IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RODOSVALDO C. POZO,

ORDER

Plaintiff,

11-cv-56-bbc

v.

PETER HUIBREGTSE, SGT. MATTY,
ROBERT HABLE, HEALTH SERV.
ADMINISTRATOR and MS. SCHWANDT,

Defendants.

- -

Plaintiff Rodosvaldo Pozo, a prisoner at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin, has filed a proposed civil complaint and a request for leave to proceed in forma pauperis. Plaintiff alleges that defendants have subjected him to severely cold conditions in his cell and taken away his warm clothing, in violation of the Eighth Amendment.

However, plaintiff currently faces two barriers in filing lawsuits in this court. First, the United States Court of Appeals for the Seventh Circuit has sanctioned plaintiff for repeatedly filing applications for permission to file successive habeas corpus petitions. Pozo v. Schneiter, No. 07-1762, slip op. (Apr. 11, 2007). The court issued an order pursuant to

Support Systems International, Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995), directing clerks of court to return unfiled any papers that plaintiff submits, other than any collateral attacks under 28 U.S.C. 2254 on his imprisonment, until he pays a $500 fine.

Second, plaintiff has accrued three strikes under 28 U.S.C. § 1915(g), which means that he cannot obtain indigent status under § 1915 in any future suit he files during the period of his incarceration unless his complaint alleges facts from which an inference may be drawn that he is in imminent danger of serious physical injury.

After considering plaintiff's complaint, I conclude that these barriers do not restrict plaintiff from proceeding with this lawsuit because he alleges that he is in imminent danger of serious physical injury. Further, after screening plaintiff's claims, I conclude that he states an Eighth Amendment claim against defendants Sgt. Matty, Robert Heble, John Doe health services administrator and Peter Huibregtse, and I will have the parties brief plaintiff's request for preliminary injunctive relief. However, because plaintiff fails to state a claim against defendant Ms. Schwandt, I will dismiss her from the case.

Documents attached to the complaint may be considered part of the complaint itself. International Marketing, Ltd. v. Archer-Daniels-Midland Co., 192 F.3d 724, 729 (7th Cir. 1999). In his complaint and attached documents, plaintiff alleges the following facts:

ALLEGATIONS OF FACT

Plaintiff Rodosvaldo Pozo is a prisoner at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin. At some point between October and December 2010, plaintiff was subjected to extremely cold temperatures in the prison. The unit he is on is below 60 degrees. Defendants provide thermal clothing to inmates in segregation but not to inmates in general population. When plaintiff was transferred from segregation to general population, defendants Sgt. Matty and Robert Heble took away his state-issued thermal clothing and sweatshirt. Inmates can purchase thermal clothing or sweatshirts, but plaintiff cannot afford to buy these clothes. Defendant John Doe, the health services administrator, told plaintiff that they no longer provide these clothes because "people in Madison told them not to." Defendant Peter Huibregtse denied plaintiff's request to wear his winter coat. As a result of the constant cold environment, plaintiff is "very sick," constantly shivers, has lost weight and suffers headaches.

DISCUSSION

A. Imminent Danger

As stated above, plaintiff is barred in two separate ways from filing civil actions in this court. First, plaintiff is subject to a Mack order from filing any papers with this court, apart from certain exceptions, until he pays a $500 fine. However, I have previously concluded

that a Mack order does not prohibit the court from considering a plaintiff's complaint where the plaintiff alleges that he is in imminent danger of serious physical injury. Ammons v. Hannula, no. 08-cv-608-bbc (W.D. Wis. Nov. 5, 2008).

Likewise, plaintiff is barred from proceeding in forma pauperis under 28 U.S.C. § 1915(g), which states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

In his complaint, plaintiff notes that he has three strikes. I conclude that this is correct, but his case history deserves further explanation. Plaintiff was previously assessed strikes in three cases because at least one claim in each of those cases was dismissed as legally frivolous. Pozo v. Huibregtse, 07-cv-597-jcs (W.D. Wis. Nov. 19, 2007); Pozo v. Sawinski, 06-cv-206-jcs (W.D. Wis. May 4, 2006); Hashim a/k/a Tiggs v. Berge, 01-cv-314-bbc (W.D. Wis. Sept. 24, 2001). In a recent opinion, the Court of Appeals for the Seventh Circuit held that "a strike is incurred under § 1915(g) when an inmate's case is dismissed in its entirety based on the grounds listed in § 1915(g)," rather than when only one claim out of several is dismissed under § 1915(g). Turley v. Gaetz, 625 F.3d 1005, 1012 (7th Cir. 2010). Under this rule, it appears that plaintiff should not have been assessed a strike in any of these cases because

in each case, at least one claim survived initial screening.

However, examination of plaintiff's entire filing history in the court shows that there are three other cases in which plaintiff's entire case has been dismissed on the grounds listed in § 1915(g). Pozo v. La Crosse County, 95-cv-542-jcs (W.D. Wis. July 31, 1995); Pozo v. Parlaw, 92-cv-284-jcs (W.D. Wis. Apr. 17, 1992); Pozo v. Horne, 92-cv-283-jcs (W.D. Wis. Apr. 17, 1992). Therefore, plaintiff is indeed barred from proceeding in forma pauperis in this case, unless, as with the Mack restriction, he alleges that he is in imminent danger of serious physical harm.

In order to qualify for the imminent danger exception to the Mack order and 28 U.S.C. § 1915(g), a plaintiff must allege a physical injury that is imminent or occurring at the time the complaint is filed and the threat or prison condition causing the physical injury must be real and proximate. Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (citing Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003); Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002)). In his complaint in his case, plaintiff is alleging that his cell is very cold, defendants will not give him thermal clothing or a sweatshirt and as a result of the constant cold environment, he is "very sick," shivers constantly, has lost weight and suffers headaches.

I conclude that plaintiff's complaint meets the imminent danger requirement of 28 U.S.C. § 1915(g), if only barely. It is well established that pro se complaints must be liberally construed. Ciarpaglini v. Saini, 352 F.3d at 330. Moreover, I must accept as true

plaintiff's claim that he is suffering illness and pain as a direct result of his placement in cold conditions. Given this framework, I am inclined to accept plaintiff's allegations that he has a serious physical injury. Under Ciarpaglini, it is improper to adopt a "complicated set of rules [to discern] what conditions are serious enough" to constitute "serious physical injury" under § 1915(g). 352 F.3d at 331. Therefore, plaintiff need not prepay the $350 fee before submitting his claims to the court for consideration. It is appropriate for him to present his claims along with a request for leave to proceed in forma pauperis under 28 U.S.C. §§ 1915(a) and (b), as he has done here.

However, in order to proceed in forma pauperis, plaintiff must demonstrate that he is indigent by submitting a trust fund account statement for the six-month period preceding the filing of his complaint. Accordingly, a decision on plaintiff's request to proceed in forma pauperis will be delayed until plaintiff provides a copy of his trust fund account statement for the period of time between July 25, 2010 and January 25, 2011. Plaintiff will have until April 15, 2011 to submit the trust fund account statement.

Usually, the court would wait for plaintiff to submit his trust fund account information before screening his complaint. However, this is not a normal case. It makes no sense to hold on the one hand that plaintiff's complaint alleges facts from which an inference may be drawn that he faces a real and proximate threat of danger, but to rule on the other hand that the case cannot move forward. Norwood v. Strahota, 08-cv-446 (W.D.

Wis. Aug. 11, 2008). Plaintiff's allegations mandate a swifter response from the court. After all, as the court of appeals has acknowledged, § 1915(g) is just "a simple statutory provision governing when a prisoner must pay the filing fee for his claim." Ciarpaglini, 352 F.3d at 331. Therefore, although I am requiring plaintiff to submit the required trust fund account information and pay any amount he is assessed subsequently, with the remainder due in monthly installments later, I will proceed to screen the merits of his case under § 1915(e)(2) now.

B. Screening Plaintiff's Claims

The Eighth Amendment requires the government to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of inmates.'" Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)). Conditions of confinement that expose a prisoner to a substantial risk of serious harm are unconstitutional. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

A conditions of confinement claim under the Eighth Amendment requires that plaintiff's allegations about the conditions satisfy a test that involves both a subjective and objective component. Farmer, 511 U.S. at 834. The objective component focuses on "whether the conditions at issue were sufficiently serious so that a prison official's act or

omission results in the denial of the minimal civilized measure of life's necessities." Townsend v. Fuchs, 522 F.3d 765, 773 (7th Cir. 2008) (internal quotations omitted). The subjective component focuses on "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994).

In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." Farmer, 511 U.S. at 834. Deliberate indifference "implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)). To meet this component, "it is not enough for the inmate to show that the official acted negligently or that he or she should have known about the risk." Townsend, 522 F.3d at 773. Rather, "the inmate must show that the official received information from which the inference could be drawn that a substantial risk existed, and that the official actually drew the inference." Id.

Because prisoners have the right to life's necessity of adequate shelter, they also have a right to "protection from extreme cold." Dixon, 114 F.3d at 642. For Eighth Amendment claims based on low cell temperature, courts should examine several factors, such as "the severity of the cold; its duration; whether the prisoner has alternative means to protect

himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as cold." Id. at 644. "Cold temperatures need not imminently threaten inmates' health to violate the Eighth Amendment." Id. Taken in combination, the conditions of low cell temperature, lack of clothing and bedding may establish an Eighth Amendment violation because they have "a mutually enforcing effect that produces the deprivation of a single, identifiable human need" such as warmth. Wilson v. Seiter, 501 U.S. 294, 304 (1991).

Plaintiff alleges that he has been subjected to cold temperatures in his cell but that inmates in general population are required to purchase thermal clothing or sweatshirts even though inmates in segregation are given such items. Further, he alleges that defendants Matty and Heble took away his thermal clothing and sweatshirt when he was transferred to general population, that defendant John Doe health services administrator told plaintiff that they no longer provide these clothes because "people in Madison told them not to" and that defendant Huibregtse denied plaintiff's request to wear his winter coat. At this point I conclude that plaintiff has stated a claim against defendants Matty, Heble, Doe health services administrator and Huibregtse for denying him warm clothes even though his cell is cold.

I note that the matter of identifying the John Doe health services administrator will be addressed at a preliminary pretrial conference, which will be held before Magistrate Judge

Stephen Crocker after the remaining defendants have answered the complaint. At that time, the magistrate judge will ask the defendants to assist plaintiff in identifying the unknown defendant so that plaintiff can amend his complaint and obtain service of process upon that defendant.

As for defendant Ms. Schwandt, "individual liability under § 1983 requires 'personal involvement in the alleged constitutional deprivation.'" Minix v. Canarecci, 597 F.3d 824, 834 (7th Cir. 2010) (quoting Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003)). Because plaintiff does not allege anything that Schwandt did that would have violated his rights, he will not be allowed to proceed on a claim against her.

C. Preliminary Injunctive Relief

Plaintiff's complaint includes a request for preliminary injunctive relief. Under this court's procedures for obtaining a preliminary injunction, a copy of which is attached to this order, plaintiff must file with the court and serve on defendants a brief supporting his claim, proposed findings of fact and any evidence he has to support his request for relief. He may have until April 15, 2011 to submit these documents. Defendants may have until the day their answer is due in which to file a response. I will review the parties' preliminary injunction submissions before deciding whether a hearing will be necessary.

Despite the fact that I have allowed plaintiff to proceed on his claims, I wish to make

it clear to him that the bar is significantly higher for ultimately prevailing on his claims than it is on his request for leave to proceed. In his proposed findings of fact, plaintiff will have to lay out the facts of his case in detail, explaining how cold it was on his unit, how the cold has affected him, how defendants were aware of this and how they responded to plaintiff's complaints. Plaintiff will have to show that he has some likelihood of success on the merits of his claim and that irreparable harm will result if the requested relief is denied. If he makes both showings, the court will move on to consider the balance of hardships between plaintiff and defendants and whether an injunction would be in the public interest, considering all four factors under a "sliding scale" approach. In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997).

Finally, I warn plaintiff about the ramifications facing litigants who abuse the imminent danger exception to their three-strike status. The only reason that plaintiff has been allowed to proceed in forma pauperis in this case is that his allegations suggest that he was under imminent danger of serious physical injury at the time that he filed his complaint. The "imminent danger" exception under 28 U.S.C. § 1915(g) is available "for genuine emergencies," where "time is pressing" and "a threat . . . is real and proximate." Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002). In certain cases it may become clear from the preliminary injunction proceedings that a plaintiff who has already received three strikes under § 1915(g) for bringing frivolous claims has exaggerated or even fabricated the existence

of a genuine emergency in order to circumvent the three-strikes bar. In such a case, this court may revoke its grant of leave to proceed in forma pauperis once it is clear that plaintiff was never in imminent danger of serious physical harm. Plaintiff would then be forced to pay the full $350 filing fee or have his case dismissed.

ORDER

IT IS ORDERED that

1. Plaintiff Rodosvaldo Pozo is GRANTED leave to proceed on an Eighth Amendment conditions of confinement claim against defendants Sgt. Matty, Robert Heble, John Doe health services administrator and Peter Huibregtse.

2. Plaintiff is DENIED leave to proceed on any claim against defendant Ms. Schwandt; the complaint is DISMISSED as to defendant Schwandt.

3. Plaintiff may have until April 15, 2011, in which to file a brief, proposed findings of fact and evidentiary materials in support of his motion for a preliminary injunction. Defendants may have until the date their answer is due to file materials in response.

4. No later than April 15, 2010, plaintiff is to submit a trust fund account statement covering the periods between July 25, 2010 and January 25, 2011.

5. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be

representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless he shows on the court's copy that he has sent a copy to defendants or their attorney.

6. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's amended complaint and this order are being sent today to the Attorney General for service on the state defendants. Although it is usual for defendants to have 40 days under this agreement to file an answer, in light of the urgency of plaintiff's allegations, I would expect that every effort will be made to file the answer in advance of that deadline.

Entered this 28th day of March, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PROCEDURE TO BE FOLLOWED ON MOTIONS FOR INJUNCTIVE RELIEF

I. NOTICE

A. It is the obligation of the movant to give actual and immediate notice to the opposing party of the filing of the motion and of the date set for a hearing, if any.

B. The movant must provide the opposing party promptly with copies of all materials filed.

C. Failure to comply with provisions A and B may result in denial of the motion on that ground alone.

II. MOVANT'S OBLIGATIONS

A. It is the movant's obligation to establish the factual basis for a grant of relief.

1. In establishing the factual basis necessary for a grant of the motion, the movant may elect to serve and file:

a. A stipulation of those facts to which the parties agree;

b. A statement of record facts proposed by the movant;

c. A statement of those facts movant intends to prove at an evidentiary hearing; or

d. Any combination of a, b and c.

2. Whether a movant elects a stipulation or a statement of proposed facts, it is movant's obligation to present no more and no less than the set of factual propositions that movant considers necessary to a decision in

movant's favor.[1]

a. The factual propositions are to be set forth in numbered paragraphs, the contents of each of which shall be limited as far as practicable to the statement of a single factual proposition.

b. At the close of each numbered paragraph shall be set forth one or more references to the source of the proposition (whether pleadings,[2] deposition transcripts, affidavits,[3] exhibits or testimony to be adduced at the evidentiary hearing).

B. The movant is directed to serve and file a statement of the conclusions of law proposed by the movant, in numbered paragraphs.

C. The materials in support of the motion for injunctive relief as specified in II A and II B, shall be served and filed with the supporting brief.

D. If, when the movant's submission is filed, the court finds that it does not comply substantially with the requirements set forth above, in its discretion, the court may deny summarily the motion for injunctive relief, may cancel the hearing on the motion or continue the hearing on the motion, if any.

III. Defendant'S OBLIGATIONS

A. When a motion and supporting materials and brief have been served and filed in compliance with II, above, the opposing party shall serve and file the following:

1. Such affidavits and other documentary evidence which the party may

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[1] The factual propositions should include all of the "basic" facts necessary to a decision on the motion, including those going to jurisdiction, to the identity of the parties and to the background of the dispute.

[2] The pleadings are not evidence. Therefore, facts may not be proposed from the pleadings unless the factual assertion made in a pleading has been stipulated to by the opposing party in a responsive pleading.

[3] Affidavits must be made on personal knowledge setting forth such facts as would be admissible in evidence, and showing affirmatively that the affiant is competent to testify to the matters stated therein.

elect to serve and file in opposition to the motion.

2. A response to the movant's statement of proposed findings of fact.

   a. With respect to each numbered paragraph of the movant's proposed findings of fact, the opposing party shall state clearly whether there is a dispute as to the whole or a part of the factual proposition; if the dispute only goes to a part of the proposition, the response shall identify precisely that part which the party disputes.

   b. With respect to any paragraph as to which it is contended that there is a dispute, the response shall refer to the evidentiary matter of record or testamentary evidence to be adduced at the hearing that, in the opposing party's opinion, will refute the proposition contained in that paragraph.

3. A response to the movant's proposed conclusions of law.

   a. With respect to each such numbered proposed conclusion, the said response shall state clearly whether the said conclusion is agreed to or disputed in whole or in part; if the dispute is partial, the response shall state precisely which portion of the proposed conclusion is disputed.

   b. If an opposing party believes that the motion for injunctive relief must fail because of conclusions of law not stated by movant, that party may state such other conclusions of law.

B. The response in the form required by III, above, shall be served and filed together with a brief in opposition to the motion for injunctive relief no later than ONE WEEK after service of the motion and supporting papers on the opposing party.

C. <u>The court does not consider that it is under any obligation to search the record for factual matters that might support either the granting or denial of the motion</u>. It is the duty of the parties to bring to the court's attention all factual and legal matters material to the resolution of the issues in dispute.