IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE SIMPSON,

OPINION and ORDER

Plaintiff,

11-cv-851-bbc

v.

COUNTY OF GRANT, a municipal corporation,
GRANT COUNTY DISTRICT ATTORNEY OFFICE,
GRANT COUNTY SHERIFF DEPARTMENT,
GRANT COUNTY COURTHOUSE, WSPF Warden
TIMOTHY HAINES, THOMAS BELZ, KEITH WEIGAL,
TIMOTHY JONES, CO JONES, MICHAEL COCKCROFT,
TODD BRUDOS, DAN ESSER, SUSAN GALLINGER,
CO SCULLION, CO BROWN, SGT. BRINKMAN,
SGT. WALLACE, JOLENDA WATERMAN
and STACY HOEM,

Defendants.

- -

Plaintiff Willie Simpson, a prisoner at the Wisconsin Secure Program Facility, has filed a proposed complaint and a request for leave to proceed in forma pauperis. He alleges that defendants have violated his constitutional rights in several ways. He has struck out under 28 U.S.C. § 1915(g), which means that he cannot obtain indigent status under § 1915 in any suit he files during the period of his incarceration unless he alleges facts in his complaint from which an inference may be drawn that he is in imminent danger of serious physical injury. I have found that plaintiff is completely indigent and that he does not have to pay an initial partial payment of the $350 filing fee for this action. Dkt. #4. After considering plaintiff's

submissions, I conclude that he may proceed with Eighth Amendment conditions of confinement, excessive force, failure to protect and medical care claims against various defendant prison officials. Also, I will set briefing on plaintiff's request for preliminary injunctive relief regarding these claims. Plaintiff will not be allowed to proceed on the remainder of his claims, either because they do not qualify for the imminent danger exception or they fail to state a claim upon which relief may be granted.

I draw the following facts from plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff Willie Simpson is a prisoner at the Wisconsin Secure Program Facility. In June 2011, defendant prison guards Thomas Belz, Keith Weigal, Timothy Jones, C.O. Jones, Michael Cockcroft, C.O. Scullion, C.O. Brown and other unidentified prison guards introduced "toxic chemical agents" through the back of plaintiff's cell. These chemicals gave plaintiff severe chest pain and caused him to choke, experience rapid heart rate and have difficulty breathing. Also, these defendants banged on plaintiff's cell wall, depriving plaintiff of sleep. Plaintiff wrote a letter to the Wisconsin governor informing him of these problems. The letter was forwarded to defendant Warden Timothy Haines, but Haines "dismissed [his] claims and refused to act."

As a result of the duress plaintiff was under, he got into physical altercations with defendants Belz, Todd Brudos, nurse Jolenda Waterman and others. After these altercations, defendants Belz, Brudos, Waterman, Weigal, Timothy Jones, C.O. Jones, Cockcroft, Scullion, Brown, as well as defendant prison guards Dan Esser, Susan Gallinger, Sgt. Brinkman and Sgt.

Wallace, all "swore revenge" against plaintiff.

Defendant Grant County Sheriff's Department investigated the altercations and ultimately filed a complaint against plaintiff with Grant County District Attorney Lisa Riniker. Riniker filed battery charges against plaintiff.

On July 13, 2011, plaintiff filed an inmate complaint to defendant Haines, stating that he felt unsafe at the Wisconsin Secure Program Facility because prison officials had sworn revenge against him. Haines disregarded the complaint. On August 19, 2011, Haines told the Bureau of Classification and Movement that plaintiff was unsafe at the prison, but he was not moved.

On July 30, 2011, defendant Brudos "unnecessarily us[ed] toxic deadly chemical agents excessively on plaintiff repeatedly" in plaintiff's cell. Plaintiff almost lost consciousness and suffered and increased heart rate and chest pains. On August 14, 2011, defendant Esser used toxic chemical agents on plaintiff even though he was unauthorized to do so.

Plaintiff is HIV positive and receives treatment from a specialist at a University of Wisconsin health clinic. On July 19, 2011, defendant Waterman discontinued plaintiff's "high-protein calorie bag meal" used to treat HIV wasting. On December 20, 2011, Waterman told plaintiff that he had an appointment at the UW clinic regarding his HIV medication, but she would not allow plaintiff to be transported to the appointment. Instead, she tried to get plaintiff to sign a refusal form and threatened to falsify plaintiff's refusal to go to the appointment.

On July 30, 2011, defendant psychologist Stacy Hoem falsified a medical report, stating

that plaintiff threatened staff, placed him on clinical observation for three days and made him sleep on a concrete floor, causing him severe pain.

From July 10, 2011 to the present, defendants Belz, Weigal, Timothy Jones, C.O. Jones, Brown, Scullion, Cockcroft, Gallinger, Brinkman and Wallace have "pump[ed] a toxic chemical agent into [plaintiff's] cell from the back of [his] cell," causing him to choke and suffer chest pain and increased heart rate. They continue to bang on plaintiff's cell wall, depriving him of sleep. Also, they place plaintiff's food and medication on the floor of his cell, exposing him to unsanitary conditions.

On August 9, 2011, plaintiff filed a state John Doe complaint and a petition for a restraining order against prison officials in the Circuit Court for Grant County, Wisconsin. The judge denied his request for injunctive relief. On August 15, 2011, plaintiff appeared before the same judge on his battery charges and again requested a "no contact" order. The judge denied this request, citing defendant Belz's "right to work at WSPF [over] plaintiff's right to safety." Grant County has a custom of denying prisoners' requests for restraining orders against Wisconsin Secure Program Facility officials because the district attorney is married to a security sergeant and the sheriff has two siblings who are prison guards. Prisoners' requests are denied without regard to the danger they face.

DISCUSSION

A. Imminent Danger

28 U.S.C. § 1915(g) reads as follows:

> 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.

On at least three prior occasions, this court has denied plaintiff leave to proceed in forma pauperis in lawsuits that were legally frivolous, malicious or failed to state a claim upon which relief may be granted. Simpson v. Walker, 11-cv-838-bbc (W.D. Wis. Mar. 5, 2012); Simpson v. Douma, 04-cv-298-bbc (W.D. Wis. Jun. 30, 2004); Simpson v. Maas, 04-cv-29-bbc (Mar. 29, 2004). Therefore, plaintiff cannot proceed in this case unless I find that he has alleged that he is in imminent danger of serious physical injury.

To meet the imminent danger requirement of § 1915(g), a prisoner must allege a physical injury that is imminent or occurring at the time the complaint is filed and must show that the threat or prison condition causing the physical injury is 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 considering whether plaintiff's complaint meets the imminent danger requirement of § 1915(g), a court must follow the well established proposition that pro se complaints must be liberally construed. Ciarpaglini, 352 F.3d at 330. Further, 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). Id. at 331. Given this framework, I conclude that plaintiff meets the imminent danger standard on his claims that he is being subjected to toxic chemicals, denied sleep and denied treatment for HIV. He does not meet the imminent danger requirement with

regard to his claims that he is being forced to eat food and take medication off the floor of his cell, Cf. Franklin v. Beth, 2007 WL 1962429 (E.D. Wis. Apr. 3, 2007) (allegation that inmates forced to eat food off dirty floor does not raise constitutional claim); that defendant Hoem issued a false report resulting in plaintiff's having to sleep on the floor for three days and that the Grant County Sheriff's Department and the district attorney's office wrongfully charged him with a crime. In addition, although it is possible that the imminent danger standard could apply to plaintiff's claim that Grant County judges will not grant him a restraining order against defendant prison guards, plaintiff cannot hope to proceed with these claims because the doctrine of judicial immunity establishes absolute immunity for judges sued for their judicial acts. Mireles v. Waco, 502 U.S. 9 (1991).

B. Screening Plaintiff's Claims

In screening plaintiff's claims, the court must construe the complaint liberally. Erickson v. Pardus, 551 U.S. 89, 94 (2007). (Plaintiff has filed a "Motion for Liberal Construction," dkt. #7, that I will deny as unnecessary.) However, I must dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B).

Usually, when a plaintiff presents claims that qualify under the imminent danger standard and other claims that do not, I would stay screening of plaintiff's claims until he explained whether he would like to pay the full $350 filing fee and proceed with all of his claims

rather than just his claims that qualify under the imminent danger standard. However, in the present case, plaintiff's non-imminent danger claims are either clearly futile or are tangential to the major issues contained in plaintiff's complaint, and it is clear that plaintiff does not currently have $350 to submit to the court. Therefore, I will dismiss plaintiff's non-imminent danger claims and proceed directly to screening his imminent danger claims. Plaintiff remains free to ask the court to add the non-imminent danger claims back into the lawsuit if he is able to secure $350 to submit to the court, or to file a new lawsuit with these claims if he can pay the filing fee.

1. Conditions of confinement

I understand plaintiff to be bringing the following Eighth Amendment conditions of confinement claims: (1) defendants Belz, Weigal, Timothy Jones, C.O. Jones, Cockcroft, Scullion, Brown, Brudos, Esser, Gallinger, Brinkman and Wallace are subjecting plaintiff to "toxic chemical agents" in his cell; (2) these defendants bang on plaintiff's cell walls, depriving him of sleep; and (3) plaintiff told defendant Warden Haines about being subjected to chemical agents but he did nothing to stop it.

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).

To state a conditions of confinement claim under the Eighth Amendment, a plaintiff must 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.

After considering plaintiff's allegations, I conclude that he states a claim against defendants concerning the "toxic chemicals" to which is being subjected. I conclude that his

allegations that prison staff intentionally introduced hazardous chemicals into his cell shows that they were deliberately indifferent to his safety. E.g., Thomas v. Bryant, 614 F.3d 1288 (11th Cir. 2010) (inmate sprayed repeatedly with chemical agents); Carroll v. DeTella, 255 F.3d 470 (7th Cir. 2001) (poisoning water supply is form of cruel and unusual punishment). In addition, I will allow plaintiff to proceed against defendant Haines for doing nothing when plaintiff complained about the problem.

In addition, he has stated a claim against all of the above defendants (not including Haines) for depriving him of sleep by banging on his cell walls. E.g., King v. Frank, 328 F. Supp. 2d 940, 946 (W.D. Wis. 2004) (severe and prolonged noise causing sleep deprivation may state Eighth Amendment claim).

2. Excessive force

Plaintiff refers to at least some of the uses of chemical agents as "unauthorized," leading me to believe that it is possible that the agents plaintiff is referring to are chemical agents, such as pepper spray, usually used by prison officials to maintain discipline. Thus, I conclude that plaintiff's allegations raise excessive force claims against defendants Belz, Weigal, Timothy Jones, C.O. Jones, Cockcroft, Scullion, Brown, Brudos, Esser, Gallinger, Brinkman and Wallace.

In determining whether an officer has used excessive force against a prisoner in violation of the Eighth Amendment, the question is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320 (1986). The factors relevant to making this

determination include:

- the need for the application of force
- the relationship between the need and the amount of force that was used
- the extent of injury inflicted
- the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them
- any efforts made to temper the severity of a forceful response

Id. at 321. In Hudson v. McMillan, 503 U.S. 1, 9-10 (1992), the Court refined this standard, explaining that the extent of injury inflicted was one factor to be considered, but the absence of a significant injury did not bar a claim for excessive force so long as the officers used more than a minimal amount of force. With regard to the use of chemical agents, "it is a violation of the Eighth Amendment for prison officials to use mace or other chemical agents in quantities greater than necessary or for the sole purpose of punishment or the infliction of pain." Soto v. Dickey, 744 F.2d 1260, 1270 (7th Cir. 1984).

At this stage, it is reasonable to infer that the allegations against defendants satisfy these standards. Accordingly, I will allow plaintiff to proceed on an excessive force claim against these defendants.

3. Failure to protect

I understand plaintiff to be alleging that he complained to defendant Warden Haines about prison guards' repeated use of excessive force but that Haines failed to protect him from

further harm. To state an Eighth Amendment failure to protect claim, a prisoner must allege that (1) he faced a "substantial risk of serious harm" and (2) the prison officials identified acted with deliberate indifference to that risk. Brown v. Budz, 398 F.3d 904, 909 (7th Cir. 2005). At this stage, I can infer that plaintiff states a claim against Haines for failing to take action after plaintiff complained.

4. Medical care

Plaintiff brings a claim against defendant Waterman for discontinuing plaintiff's "high-protein calorie bag meal" used to treat HIV wasting and prohibiting plaintiff from going to an appointment at the UW clinic regarding HIV medication. Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by incarceration. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to it. Estelle, 429 U.S. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Gutierrez, 111 F.3d at 1371-73, "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996) or otherwise subjects the prisoner to a substantial risk of serious harm.

Farmer v. Brennan, 511 U.S. 825, 847 (1994).

"Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

(1) Did plaintiff need medical treatment?

(2) Did defendants know that plaintiff needed treatment?

(3) Despite defendants' awareness of the need, did defendants fail to take reasonable measures to provide the necessary treatment?

Plaintiff alleges that he has HIV and that defendant Waterman knew this yet kept him from getting treatment. I conclude that plaintiff's allegations state an Eighth Amendment medical care claim against Waterman.

5. Retaliation

I understand plaintiff to be bringing First Amendment retaliation claims against defendants Belz, Brudos, Weigal, Timothy Jones, C.O. Jones, Cockcroft, Scullion, Brown, Esser, Gallinger, Brinkman and Wallace for pumping toxic chemicals into his cell after "swearing revenge" against plaintiff for engaging in physical altercations with prison staff. He brings another claim against defendant Waterman for withholding HIV treatment after swearing revenge against him for the altercations.

Plaintiff must plead three elements in order to state a claim for retaliation. He must

identify (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by each defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts that would make it plausible to infer that plaintiff's protected activity was one of the reasons defendants took the action they did against him. Bridges v. Gilbert, 557 F.3d 541, 556 (7th Cir. 2009). I conclude that plaintiff fails to state a claim for retaliation because he fails to identify a constitutionally protected activity in which he was engaged. He alleges only that defendants retaliated against him for fighting prison staff, which is not a protected activity.

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 claims, proposed findings of fact and any evidence he has to support his request for relief. He may have until April 20, 2012 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, including explaining which plaintiffs were personally

responsible for violating his rights. Plaintiff will have to show that he has some likelihood of success on the merits of his claims 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 Willie Simpson is GRANTED leave to proceed on the following claims:

a. Defendant prison guards Thomas Belz, Keith Weigal, Timothy Jones, C.O. Jones, Michael Cockcroft, C.O. Scullion, C.O. Brown, Todd Brudos, Dan Esser, Susan Gallinger, Sgt. Brinkman and Sgt. Wallace violated plaintiff's Eighth Amendment right to humane conditions of confinement by introducing toxic chemicals into his cell and banging on his cell walls; and defendant Warden Timothy Haines failed to take action after plaintiff complained about the conditions.

b. Defendants Belz, Weigal, Timothy Jones, C.O. Jones, Cockcroft, Scullion, Brown, Brudos, Esser, Gallinger, Brinkman and Wallace violated plaintiff's Eighth Amendment right against excessive use of force by introducing toxic chemicals into his cell; and defendant Haines failed to protect plaintiff from harm after plaintiff complained.

c. Defendant Jolenda Waterman violated plaintiff's Eighth Amendment right to adequate medical care by withholding treatment for plaintiff's HIV.

2. Plaintiff is DENIED leave to proceed on his claim that defendants retaliated against him for getting into altercations with prison staff.

3. The remainder of plaintiff's claims are DISMISSED without prejudice because they do not qualify under the imminent danger exception to 28 U.S.C. § 1915(g).

4. Defendants County of Grant, Grant County District Attorney's Office, Grant County Sheriff's Department, Grant County Courthouse and Stacy Hoem are DISMISSED from this

action.

5. Plaintiff may have until April 20, 2012, 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.

6. Plaintiff's "Motion for Liberal Construction," dkt. #7, is DENIED as unnecessary.

7. 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.

8. 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.

9. 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 2d day of April, 2012.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge