IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

HAKIM NASEER,

Plaintiff,

v.

ICE KELLY TRUMM, TIM HAINES,
HSU Supervisor MARY MILLER, WARDEN
HUIBREGTSE, CHRISTINE BEERKIRCHER
and UNKNOWN MAINTENANCE
DEPARTMENT PERSONNEL,

Defendants.

OPINION and ORDER

11-cv-004-bbc

- -

In this civil action, plaintiff Hakim Naseer, an inmate at the Wisconsin Secure Program Facility, is proceeding on claims that prison staff retaliated against him by putting hazardous chemicals in his cell's water supply and by refusing to investigate the problem. In a May 6, 2011 order, I denied plaintiff's motion for preliminary injunctive relief because he provided no evidence of any value to support his claims. Now plaintiff has filed a renewed motion for preliminary injunctive relief, as well as a motion to stay the proceedings. Defendants have filed a motion to revoke plaintiff's in forma pauperis status. After considering the parties' submissions, I will deny each of these motions. In addition, I will set out procedures for identifying the John Doe defendants in this case.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff is proceeding on both Eighth Amendment conditions of confinement claims and First Amendment retaliation claims against (1) John Doe maintenance personnel for intentionally introducing hazardous chemicals into the water supply in his cell; (2) defendant Mary Miller for refusing to look into the problem when plaintiff complained; and (3) defendants Kelly Trumm, Tim Haines, Warden Huibregtse and Christine Beerkircher for rejecting his complaints.

"[T]he granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 389 (7th Cir. 1984). The standard for showing entitlement to preliminary injunctive relief is well established:

> A district court must consider four factors in deciding whether a preliminary injunction should be granted. These factors are: 1) whether the plaintiff has a reasonable likelihood of success on the merits; 2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; 3) whether the threatened injury to the plaintiff outweighs the threatened harm an injunction may inflict on defendant; and 4) whether the granting of a preliminary injunction will disserve the public interest.

Pelfresne v. Village of Williams Bay, 865 F.2d 877, 883 (7th Cir. 1989). At the threshold, plaintiff must show some likelihood of success on the merits and the probability that irreparable harm will result if the requested relief is denied. If plaintiff makes both showings, the court then moves on to balance the relative harms and 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). Thus, to obtain a preliminary injunction, a movant must first

prove that his claim has "at least some merit." Digrugilliers v. Consolidated City of Indianapolis, 506 F.3d 612, 618 (7th Cir. 2007) (citing Cavel International, Inc. v. Madigan, 500 F.3d 544, 547 (7th Cir. 2007)).

In denying plaintiff's first motion for preliminary injunctive relief, I concluded that plaintiff failed to show a likelihood of success on his conditions of confinement claims because he failed to provide evidence indicating what was wrong with his water beyond a conclusory statement that it was "contaminated." He did not describe any actions of maintenance personnel that might have led to contamination or identify any health problems he suffered from the supposedly contaminated water. In addition, regarding his retaliation claims, plaintiff failed to submit any evidence indicating what protected activity he engaged in that might have given defendants a reason to retaliate against him. I stated, "[A]lthough plaintiff's motion for preliminary injunctive relief will be denied, he remains free to file a renewed motion if he continues to be at risk from his drinking water. However, if he does so, he must present proposed findings of fact detailing exactly what happened to him, including the dates on which the events occurred and the parties responsible."

Unfortunately for plaintiff, his new proposed findings of fact fare no better than his original submissions. At the core of plaintiff's proposed findings are statements that the prison's video recording system "will show" maintenance staff entering plaintiff's cell or the area behind his cell several times in January and March 2011, and that at these times the staff had "the ability and opportunity to introduce hazardous chemicals into plaintiff's drinking water . . ." Pltf.'s PFOF, dkt. #30. However, plaintiff did not submit a copy of the

videotape or explain how he knows what the videotape would show. Did he witness these events? (If so, he could aver from his personal knowledge that they happened, but he fails to do so.)

It appears undisputed that prison maintenance staff did work on plaintiff's plumbing at least once in January, but plaintiff only speculates that staff introduced hazardous chemicals to his water supply. His statements that staff had "the ability and opportunity" to poison his drinking water are not a substitute for evidence. In addition, he has nopt explained what was wrong with his drinking water and whether he suffered any health problems that can be attributed to contaminated water. The only materials plaintiff submits that describe what occurred in his cell are his health service requests. However, as I explained in the May 6, 2011 order, these documents are not admissible evidence because they are not sworn. Collins v. Seeman, 462 F.3d 757, 760 n.1 (7th Cir. 2006). Finally, regarding his retaliation claims, plaintiff continues to fail to submit any evidence indicating what protected activity he engaged in that would have given defendants a reason to retaliate against him. Because plaintiff has not set out facts bolstering his claims, I must deny his renewed motion for preliminary injunctive relief. Chicago District Council of Carpenters Pension Fund v. K & I Construction, Inc., 270 F.3d 1060, 1064 (7th Cir. 2001) (preliminary injunction is "extraordinary remedy that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.")

MOTION TO REVOKE IN FORMA PAUPERIS STATUS

In their response brief, defendants again argue that plaintiff's in forma pauperis status should be revoked, quoting the court's February 10, 2011 screening order:

> 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.

In the May 6, 2011 order, I denied defendants' earlier motion to revoke plaintiff's pauper status because "No matter how far-fetched [plaintiff's claim that defendants contaminated plaintiff's water supply] may seem, I do not consider it 'impossible' given the evidence on the record." For the same reason, I will deny defendants' current motion, although the dearth of evidence presented by plaintiff would certainly lead any reasonable observer to wonder whether plaintiff is fabricating his claim. I warn plaintiff that it is almost inevitable that defendants will file a motion for summary judgment in this case, and that if he cannot produce evidence at that time to support his claims, it is highly likely that his case will be dismissed.

MOTION TO STAY PROCEEDINGS

Next, plaintiff has filed a motion stating that his legal loan has been terminated and asking for a stay of the proceedings, or in the alternative, for an "impartial" application of the legal loan rules or transfer to another prison. I will deny plaintiff's motion at this point

because it is unclear whether plaintiff's right of access to this court has been compromised. The legal loan rejection letter plaintiff attaches to his motion states that plaintiff may continue to utilize "state issued 'writing materials'" in litigating this case, but plaintiff does not explain what those materials are or what tasks he will be unable to accomplish even with those materials. Plaintiff is free to renew his motion if he finds his access to this court limited by the Department of Corrections.

JOHN DOE DEFENDANTS

Finally, I note that the caption continues to include "Unknown Maintenance Department Personnel" as defendants. Through two rounds of preliminary injunction briefing, it would appear that at the very least, prison plumber Randy Kuykendall is one of the maintenance staff whom plaintiff wishes to sue, but it is unclear if there are others. In order to identify these defendants, I will set the following schedule:

1. September 27, 2011: Plaintiff shall complete service of discovery requests aimed at identifying the "Jon Doe" defendants. He can do this by requesting the names of maintenance staff who performed work on plaintiff's plumbing on the dates that are the subject of plaintiff's claims. It is important for plaintiff to prepare clear, thorough discovery requests so that defendants' attorneys and the institution have enough information to provide useful responses. Although defendants' attorneys and the institution have no duty to conduct a proactive investigation, the court expects them to use good faith best efforts promptly to identify the Doe defendants in this case.

2. October 12, 2011: Defendants have until this date to respond to plaintiff's discovery requests. Defendants' attorneys should file with the court a copy of their responses to plaintiff's discovery requests relating to the Doe defendants. Defendants' attorneys also must report to the court whether they will accept service of the amended complaint on behalf of some or all of the Doe defendants. If the Department of Justice chooses not to accept service, then it must provide to the court, ex parte and under seal, the known addresses of the now-identified Doe defendants so that the Marshals Service may serve them with the new amended complaint.

3. October 26, 2011: Plaintiff shall file an amended complaint, with the caption of the document changed to identify the Doe defendants. Plaintiff shall replace all references to Doe defendants in the body of the current operative pleading, dkt. #13, with the names provided to him by the state. Plaintiff shall not make any other changes to dkt. #13 without first asking for and receiving permission from the court.

4. November 16, 2011: The now-identified Doe defendants shall file and serve their answers to plaintiff's new amended complaint.

ORDER

IT IS ORDERED that

1. Plaintiff Hakim Naseer's motion for preliminary injunctive relief, dkt. #29, is DENIED.

2. Defendants' motion to revoke plaintiff's in forma pauperis status, dkt. #34, is

DENIED.

3. Plaintiff's motion to stay proceedings, dkt. #38, is DENIED without prejudice to plaintiff renewing this motion later if he finds his access to this court limited by the Department of Corrections.

4. The parties shall following the court's procedure for identifying the John Doe defendants as outlined in this opinion.

Entered this 7th day of September, 2011.

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