IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHNNY LACY,

Plaintiff,

v.

DR. SCOTT A. HOFTIEZER, JAMES GREER,
DR. DAVID BURNETT, DR. BURTON COX,
and DR. PAUL SUMNICHT

Defendants.

OPINION and ORDER

12-cv-397-slc[1]

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Plaintiff Johnny Lacy, a prisoner at the Wisconsin Secure Program Facility, has filed this civil action alleging that defendant prison officials are failing to treat his various severe medical problems. Plaintiff seeks leave to proceed with his complaint in forma pauperis. Trust fund account information submitted by plaintiff shows that he is completely indigent and would not have to pay an initial partial payment of the filing fee. However, because plaintiff has struck out under 28 U.S.C. § 1915(g), he cannot obtain indigent status under § 1915 unless his complaint alleges facts from which an inference may be drawn that he is in imminent danger of serious physical injury.

After applying 28 U.S.C. § 1915(g) to plaintiff's claims, I conclude that several of his claims meet the imminent danger requirement while others do not. I will dismiss the non-

[1] I assume jurisdiction over this case for the purpose of issuing this opinion and order.

imminent-danger claims and allow him to proceed with Eighth Amendment deliberate indifference claims against the prison staff currently responsible for his medical care. Also, I will construe plaintiff's complaint as including a motion for preliminary injunctive relief and set briefing on that motion. Plaintiff will not be allowed to proceed on claims for past harm. Finally, I will deny plaintiff's motion for appointment of counsel.

I draw the following facts from plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff Johnny Lacy is currently incarcerated at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin. Plaintiff has hepatitis C, cirrhosis of the liver, fibromyalgia, arthritis, high blood pressure and 53 "clips, pins and staples" inside his body. As a result of these maladies, plaintiff suffers severe pain. From 2003 to 2009, high-level Bureau of Prisons defendants David Burnett, Scott Hoftiezer and James Greer approved "all X-Rays, MRIs, medications, examinations, and treatment related to hepatitis C, with then stage 2 cirrhosis." (From these allegations I understand plaintiff to be alleging that these defendants no longer approve these treatments.)

On May 2008, plaintiff was transferred from the Wisconsin Secure Program Facility to the Waupun Correctional Institution. Upon arrival at Waupun, plaintiff was taken off the painkiller Vicodin by a nurse practitioner with the approval of defendant Dr. Paul Sumnicht. Sumnicht told plaintiff that his "brain should produce" the pain medication he needed. Plaintiff suffered withdrawal that caused severe pain. In October 2008, Sumnicht

prescribed plaintiff methadone for the pain.

Plaintiff was transferred back to the Wisconsin Secure Program Facility in 2009, and his pain increased "what seem like 10-fold." Defendant Dr. Burton Cox increased the dosages of methadone.

Plaintiff was transferred back to the Waupun Correctional Institution on August 25, 2010. Defendant Sumnicht accused plaintiff of selling methadone to other prisoners. On December 24, 2010, plaintiff was admitted to the Waupun Memorial Hospital. (Plaintiff states that he was admitted "on the abuse of a guard." It is unclear whether plaintiff is stating that he was assaulted by a correctional officer but in any case he does not name that officer as a defendant.) At the hospital, plaintiff was subjected to medical treatments over his objection. (Again, plaintiff does not seem to be bringing a claim against the hospital staff who performed the treatment.) Tests found that plaintiff has a "left ventricular hypotrophy with an anterior fascicular blockage, with an atrial enlargement."

Upon return to the Waupun Correctional Institution, defendant Sumnicht continued to accuse plaintiff of selling methadone. After plaintiff brought a lawsuit against Sumnicht and other prison officials, a search of plaintiff's cell uncovered 21 methadone packets. (I understand plaintiff to be alleging that Sumnicht had something to do with planting this evidence in retaliation for plaintiff's lawsuit.) Plaintiff was taken off methadone and suffered difficult withdrawals.

On January 31, 2012, plaintiff was transferred back to the Wisconsin Secure Program Facility. Since then he has received no treatment or even any painkillers for any of his

serious medical conditions and severe pain. Plaintiff's numerous requests for liver, pancreas and kidney transplants have been denied. Defendant Cox told plaintiff that he would have be "in liver failure" in order to be considered for a transplant.

OPINION

A. Imminent Danger

Plaintiff seeks leave to proceed in forma pauperis in this case under 28 U.S.C. § 1915. However, as stated above, plaintiff has struck out under 28 U.S.C. § 1915(g). This provision states 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, plaintiff has been denied leave to proceed in forma pauperis in lawsuits that were legally frivolous. Lacy v. Buchler, No. 93-C-889 (E.D. Wis. Aug. 1, 1994); Lacy v. McCaughtry, No. 93-C-657 (E.D. Wis. May 4, 1994); Lacy v. Malloy, No. 93-C-944 (E.D. Wis. June 10, 1994). Plaintiff remains struck out even following the November 2, 2010 opinion in Turley v. Gaetz, 09-3847, 2010 WL 4286368, in which 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).

Each of the cases in which plaintiff received a strike was dismissed in its entirety.

To meet the imminent danger requirement of 28 U.S.C. § 1915(g), a prisoner must allege a physical injury that is imminent or occurring at the time the complaint is filed and 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 his complaint, plaintiff alleges that he has several serious medical conditions that are not being treated and he suffers severe pain.

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's allegations against defendant Burton Cox and the Bureau of Health Services officials qualify under the imminent danger standard because they are the prison officials *currently* responsible for plaintiff's treatment.

However, plaintiff's claims against defendant Paul Sumnicht for his treatment (or other retaliation) at the Waupun Correctional Institution, where he is no longer incarcerated, do not meet the imminent danger standard, because Sumnicht is not responsible for plaintiff's medical care at the present time. Because these allegations do not involve imminent danger, plaintiff cannot proceed on these claims without prepaying the

$350 filing fee for this case.

It is this court's practice to move forward on imminent danger claims as quickly as possible and, if the complaint survives screening, setting expedited briefing on preliminary injunctive relief. E.g., Norwood v. Strahota, 08-cv-446 (W.D. Wis. Aug. 11, 2008). Therefore, I will dismiss the non-imminent-danger claims without prejudice to plaintiff's either reinstating the claims by submitting the $350 filing fee for this case or filing a new lawsuit later on as a paying litigant. I will proceed to screen plaintiff's remaining claims.

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). 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).

I understand plaintiff to be bringing a claim that defendants Cox, Burnett, Hoftiezer and Greer violated his right to medical care under the Eighth Amendment by failing to provide him treatment for his various severe medical problems. A prison official may violate this right if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006).

The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir.1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures to provide it. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir.1997).

At this point I conclude that plaintiff has stated Eighth Amendment deliberate indifference claims against defendants Cox, Burnett, Hoftiezer and Greer, if only barely. Although there is no question that plaintiff alleges that he has serious medical needs, he includes very few allegations explaining actual decisions made by these defendants that deprived him of medical care. However, I can infer that defendants acted with deliberate indifference to plaintiff's serious medical needs from the fact that plaintiff states that Cox has denied his requests for organ transplants and that Burnett, Hoftiezer and Greer used to approve the treatments he requested (by which I understand him to be saying that those defendants have withdrawn their approval for those treatments).

C. Preliminary Injunctive Relief

Because plaintiff is alleging that he is in imminent danger of serious physical harm and asks for immediate action to treat his maladies, I construe his complaint as including 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 September 20, 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.

Plaintiff should be aware that the bar for obtaining a preliminary injunction is significantly higher than it is for obtaining leave to proceed. In his proposed findings of fact, plaintiff will have to lay out the facts of his case in detail, identifying the problems he is suffering from, when and how he sought treatment and how defendants responded. 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).

Also, plaintiff should be aware 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.

D. Motion to Appoint Counsel

Finally, I note that in his complaint, plaintiff asks to be appointed counsel. In deciding whether to appoint counsel, I must first find that plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers who he has asked to represent him in this case and who turned him down. Plaintiff has failed to include any such information.

Moreover, even if plaintiff had submitted proof that three lawyers had declined to represent him, I would deny his motion for appointment of counsel at this point because it is too early to tell whether the complexity of the case will outstrip plaintiff's ability to litigate

it. Although plaintiff states that he lacks legal knowledge and skill, this is true for almost every pro se litigant. Shortly after defendants file their answer, the court will hold a preliminary pretrial conference at which plaintiff will be provided with information about how to use discovery techniques to gather the evidence he needs to prove his claims as well as copies of this court's procedures for filing or opposing dispositive motions and for calling witnesses. Plaintiff is free to renew his motion for appointment of counsel at a later time if he feels incapable of representing himself as the case proceeds, but he will have to provide the court the names and addresses of at least three lawyers who he has asked to represent him in this case and who turned him down.

ORDER

IT IS ORDERED that

1. Plaintiff Johnny Lacy is GRANTED leave to proceed on his Eighth Amendment deliberate indifference claims against defendants Burton Cox, David Burnett, Scott Hoftiezer and James Greer.

2. Plaintiff's claims against defendant Paul Sumnicht are DISMISSED without prejudice to plaintiff paying the full $350 filing fee in this case or bringing them in a new case as a paying litigant. Sumnicht is DISMISSED from this lawsuit.

3. Plaintiff may have until September 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.

4. Plaintiff's motion for appointment of counsel, dkt. #1, is DENIED without prejudice to him renewing his motion later in the proceedings.

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 expect that every effort will be made to file the answer in advance of that deadline.

8. Plaintiff is obligated to pay the $350 filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at plaintiff's institution of that

institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 30th day of August, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge