

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

HAKIM NASEER,

Plaintiff,

OPINION and ORDER

v.

13-cv-821-bbc

THOMAS BELZ, C/O GALLINGER,
C/O WIEGEL, MARY MILLER,
SGT. WALLACE, CAPTAIN MASON
and ELLEN RAY,

Defendants.

Plaintiff Hakim Naseer, an inmate at the Wisconsin Secure Program Facility, has filed this lawsuit alleging that prison staff has been retaliating against him by contaminating his food. Plaintiff has struck out under 28 U.S.C. § 1915(g) because on three different occasions he has filed lawsuits that were dismissed as dismissed as frivolous. This 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.

After considering plaintiff's allegations, I conclude that he has met the imminent danger requirement and I will allow him to proceed on Eighth Amendment deliberate indifference claims against defendants Thomas Belz, C.O. Gallinger, C.O. Wiegel, Sergeant Wallace, Captain Mason, Mary Miller and Ellen Ray as well as First Amendment retaliation

claims against Belz, Gallinger and Wiegel. Also, I will set briefing on plaintiff's motion for preliminary injunctive relief.

I draw the following facts from plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff Hakim Naseer is an inmate at the Wisconsin Secure Program Facility. Over the last couple months, defendant correctional officers Belz, Gallinger and Wiegel have tried to intimidate plaintiff into stopping the filing of "institution correspondences against them" by contaminating his food with "household products, unsanitary floor dust, hazardous human hair from an unknown body, and lint ball fabrics that smell of mild urine." Plaintiff believes he has suffered medical problems from the contaminated food, such as constant vomiting, "irregular" weight loss and yellow mucus coming out of his penis. These defendants joke about what they are doing to plaintiff and threaten him. Plaintiff has alerted defendants Sergeant Wallace, Captain Mason, Mary Miller (the health nursing manager) and Ellen Ray (an institution complaint examiner) to his problems, but they have not assisted him, either by stopping the contamination of his food or rendering medical aid.

DISCUSSION

A. Imminent Danger

Plaintiff seeks leave to proceed in forma pauperis in this case. However, as stated above, plaintiff has struck out under 28 U.S.C. § 1915(g). This provision 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, plaintiff has brought actions that were dismissed because they were frivolous, malicious or failed to state a claim upon which relief may be granted. Almond v. State of Wisconsin, 06-C-447-C, decided August 23, 2006; Naseer v. Neumaier, 10-cv-399-bbc; (W.D. Wis. Sept. 29, 2010); Naseer v. Belz, 10-cv-27-bbc; (W.D. Wis. Feb. 16, 2010); and Naseer v. Trumm, 09-cv-699-bbc (W.D. Wis. Dec. 11, 2009). Therefore, he cannot proceed in forma pauperis unless I find that he has alleged that he is in imminent danger of serious physical injury.

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 prison staff is contaminating his food and that he is suffering medical problems from it.

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 has stated claims of imminent danger. He has alleged that he is unable to keep his food down because of contaminants and he refuses to eat food he believes has been tampered with. Although plaintiff's allegation that he suffered yellow mucus discharge from his penis as a result of the contaminated food seems to border on the preposterous, his allegations that he vomited and has lost "irregular weight" as a result of the contaminated food is sufficient to meet the imminent danger standard at this point. Therefore, plaintiff may proceed on his claims without prepayment of the \$350 filing fee.

B. Initial Partial Payment

Although I conclude that plaintiff qualifies to proceed in forma pauperis under the imminent danger exception to 28 U.S.C. § 1915(g), plaintiff must still make an initial partial payment of the filing fee. In addition, plaintiff will have to pay the remainder of the fee in installments of 20% of the preceding month's income in accordance with 28 U.S.C. § 1915(b)(2).

The initial partial payment is calculated by using the method established in § 1915 by figuring 20% of the greater of the average monthly balance or the average monthly deposits to the plaintiff's trust fund account statement. From the trust fund account statement that plaintiff has submitted, I calculate his initial partial payment to be \$0.20. If plaintiff does not have the money in his regular account to make the initial partial

payment, he will have to arrange with prison authorities to pay some or all of the assessment from his release account. This does not mean that plaintiff is free to ask prison authorities to pay *all* of his filing fee from his release account. The only amount plaintiff must pay at this time is the \$0.20 initial partial payment. Plaintiff should show a copy of this order to prison officials to insure that they are aware that they should send plaintiff's initial partial payment to this court.

Usually, the court would wait for plaintiff to submit his initial partial payment before screening his complaint. However, because plaintiff alleges that he is in imminent danger of serious physical harm, I will proceed to screen his complaint immediately. Plaintiff is still required to submit the \$0.20 initial partial payment or the court will consider closing the case for plaintiff's failure to comply with 28 U.S.C. § 1915.

C. 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).

1. Eighth Amendment claims

I understand plaintiff to be bringing the following Eighth Amendment claims: (1)

defendants Belz, Gallinger and Wiegel are contaminating his food; (2) defendants Wallace, Mason, Miller and Ray failed to help him after he alerted them to the problem.

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.

After considering plaintiff's allegations that defendants Belz, Gallinger and Wiegel are intentionally contaminating his food to the point that he vomits and is losing "irregular" weight," I conclude that he states an Eighth Amendment claim because he shows that they were deliberately indifferent to his safety.

In addition, construing plaintiff's allegations liberally, I will allow plaintiff to proceed against defendants Wallace, Mason and Ray for failing to help him after he complained about the contamination of his food and against defendant Miller for failing to provide him treatment after he complained about the medical problems he suffered as a result of eating the contaminated food.

2. First Amendment retaliation claims

I understand plaintiff to be bringing First Amendment retaliation claims against defendants Belz, Gallinger and Wiegel because he alleges that they contaminated his food in an attempt to "intimidate" him into stopping the filing of "institution correspondences"

against them.

To state a claim for First Amendment retaliation, plaintiff must (1) allege that he engaged in an activity protected by the First Amendment; (2) identify one or more retaliatory actions taken by defendants that would likely deter a person from engaging in the protected activity in the future; and (3) allege sufficient facts that would make it plausible to infer that plaintiff's protected activity was a motivating factor in defendant's decision to take retaliatory action. Bridges v. Gilbert, 557 F.3d 541, 555-56 (7th Cir. 2009) (citing Woodruff v. Mason, 542 F.3d 545, 551 (7th Cir. 2008)).

Plaintiff has identified a protected activity: he has constitutional rights under the First Amendment to free speech and to petition the government for redress of grievances, which include the right to file grievances about misconduct by prison officials. Powers v. Snyder, 484 F.3d 929, 932 (7th Cir. 2007). Moreover, the alleged retaliatory action, contaminating plaintiff's food, is sufficiently adverse to "deter a person of ordinary firmness," a relatively low standard. Bridges, 557 F.3d at 552, 554-55. Finally, plaintiff alleges that defendants contaminated his food because of the "institution correspondences" he had filed or was planning to file against them. That is sufficient to state a claim upon which relief may be granted. Thomson v. Washington, 362 F.3d 969, 970-71 (7th Cir. 2004) (plaintiff may state claim for retaliation by identifying the protected conduct and the alleged acts of retaliation). Accordingly, I will allow plaintiff to proceed on retaliation claims against defendants Belz, Gallinger and Wiegel.

D. 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 February 10, 2014 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 what contaminants defendants placed in his food, how he knew that defendants contaminated his food and that they did so for retaliatory purposes, when he ate (or refused to eat) the food and what physical symptoms he suffered as a result. 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. I am particularly aware of this possibility in this case given the similarities between plaintiff’s current allegations and those he previously raised regarding hazardous chemicals in his water supply in case no. 11-cv-004-bbc. I dismissed the previous case at summary judgment because plaintiff provided nothing more than speculation that he was being poisoned. If plaintiff again proves unable to support his claims with evidence, I may revoke the court’s grant of leave to proceed in forma pauperis or put in place further filing bars as a sanction against plaintiff.

E. Criminal Prosecution

Finally, plaintiff states that he seeks criminal penalties against defendants. However, federal courts do not have the authority to impose such penalties or even to order law enforcement officials to conduct investigations into potential criminal misconduct. "Whether to prosecute and what charge to file or bring before a grand jury are decisions that

generally rest in the prosecutor's discretion." United States v. Batchelder, 442 U.S. 114, 124 (1979). If plaintiff seeks a criminal investigation he should contact law enforcement authorities directly.

ORDER

IT IS ORDERED that

1. Plaintiff Hakim Naseer is GRANTED leave to proceed on the following claims:
 - a. his Eighth Amendment deliberate indifference claims against defendants Thomas Belz, C.O. Gallinger, C.O. Wiegel, Sergeant Wallace, Captain Mason, Mary Miller and Ellen Ray; and
 - b. his First Amendment retaliation claims against defendants Belz, Gallinger and Wiegel.
2. Plaintiff is assessed \$0.20 as an initial partial payment of the \$350 fee for filing this case. He is to submit a check or money order made payable to the clerk of court in this amount on or before February 10, 2014. If plaintiff fails to make the initial partial payment by this deadline or show cause for his failure to do so, I will direct the clerk of court to close the case. Plaintiff is obligated to pay the remainder of the 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.
3. Plaintiff may have until February 10, 2014, 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. 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.

5. 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.

6. 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 24th day of January, 2014.

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