

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

DAMIEN GREEN,

Plaintiff,

v.

DAWN M. LAURENT, KARAN ANDERSON,
DR. MYIER, DR. NORGE,
DS-1 UNIT MANAGER MELBY,
SECURITY DIRECTOR WEBBER, MICHAEL MEISNER,
DR. LESER, OFFICER EXNER, OFFICER RANKER,
OFFICER BOILER, OFFICER KEARNS, DR. WOOD,
LT. MORRISON, and JOHN DOES,

Defendants.

OPINION and ORDER

14-cv-326-jdp

Pro se plaintiff Damien Green, a prisoner incarcerated at the Columbia Correctional Institution, filed this proposed civil lawsuit under 42 U.S.C. § 1983 alleging that he was allowed to stockpile medication while he was placed in observation, enabling him to attempt suicide by overdosing, and that he was forced to live in a cold and unsanitary cell. Plaintiff seeks leave to proceed *in forma pauperis*, but 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.

In a July 28, 2014 order, I stated the allegations in plaintiff's original complaint were too vague to tell whether he was in imminent danger of serious physical harm and directed him to file an amended complaint. Currently before the court are plaintiff's amended complaint, a series of motions for preliminary injunctive relief, a motion for appointment of

counsel, and a motion for my recusal. After considering plaintiff's revised allegations, I will allow him to proceed on imminent danger claims regarding the provision of medication, but deny him leave to proceed on his claims regarding cell conditions because those allegations do not meet the imminent danger standard. I will also deny plaintiff's motions for preliminary injunctive relief and for my recusal, but grant plaintiff's request for the court to locate counsel for him.

IMMINENT DANGER

In a July 28, 2014 order, I stated the following about plaintiff's allegations as they related to the § 1915(g) "imminent danger" standard:

In his complaint, plaintiff discusses the prison's practice of allowing mentally ill and suicidal inmates in DS-1 to stockpile medications even after there were numerous instances of overdoses, including two by plaintiff. He also alleges that the conditions of his cell were unsanitary and cold.

There is no question that these allegations state colorable Eighth Amendment claims against various prison officials for past harm, but claims of past harm do not meet the imminent danger standard. Plaintiff's allegations are vague as to whether he was in imminent danger of serious physical harm at the time he filed his complaint. The way plaintiff couches his allegations in the past tense, along with his statement that he was housed in DS-1 observation for 71 days, makes it seem as though plaintiff has been removed from observation and no longer faces the harm. Even to the extent that he could theoretically find himself back in observation, he does not explain whether he would be allowed to stockpile medication following his two suicide attempts, and without further explanation from plaintiff I am not inclined to say that the unsanitary and cold conditions of confinement there placed him in imminent danger of serious physical harm.

Dkt. 22, at 5-6. I directed plaintiff to submit an amended complaint explaining whether he was indeed in imminent danger at the time he filed his complaint.¹ *Id.* at 6. Plaintiff has

¹ In the July 28, 2014 order, I also noted that plaintiff had failed to show that he qualified for *in forma pauperis* from a financial standpoint and directed him to submit a copy of his prison

responded by filing an amended complaint containing a section titled “Imminent Danger” in which he clarifies that the conditions leading to the threat of overdosing on medications applies to the entire DS-1 unit rather than just observation status within the unit, and that plaintiff has remained incarcerated in the DS-1 unit. Dkt. 31. Thus I conclude that he has adequately alleged that he was in imminent danger at the time he filed his complaint. I will proceed to screen plaintiff’s claims regarding the threat of overdose.

However, plaintiff’s amended complaint does not contain any allegations leading me to believe that he was in imminent danger regarding his allegedly unsanitary and cold cell. Plaintiff may not proceed on these claims without prepaying the entire \$400 filing fee for this case, so I will give plaintiff a short time to submit that payment. If plaintiff fails to submit payment by the deadline, those claims will be dismissed. If plaintiff does submit payment, I will screen those claims.

SCREENING PLAINTIFF’S CLAIMS

In screening plaintiff’s claims, the court must construe the complaint liberally. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). 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).

A. Allegations of fact

The following facts are drawn from the amended complaint. Plaintiff Damien Green is a prisoner incarcerated at the Columbia Correctional Institution. Plaintiff suffers from major trust fund account statement. Plaintiff has done so and paid the initial partial payment of the filing fee calculated from his account statement.

depressive disorder and general anxiety disorder. Plaintiff also “experiences adjustment problems” that led him to be placed in solitary confinement. Prior to the events discussed in this opinion, plaintiff attempted suicide by consuming a large number of pills while he was in solitary confinement for observation.

The DS-1 unit at the Columbia Correctional Institution is a maximum security segregation unit. Prisoners can be placed in this unit regardless whether they are mentally ill. Prisoners in the unit are allowed to possess “non-controlled” medications such as Tylenol, aspirin, allergy medications, and blood pressure medications. Upon arrival at DS-1, a prisoner was allowed to possess all of his non-controlled medication without staff reviewing his medical health history or history of self-harm. Neither DS-1 staff nor Health Services Unit staff checks to see whether prisoners are taking their medications as directed or stockpiling them. It was prison staff’s practice to not pre-emptively place “no medication” restrictions on prisoners on observation, which would have forced staff to dispense non-controlled medication in individual monitored doses. Instead, staff would wait until a prisoner overdosed to place the restriction on him. As a result, there have been many instances of prisoners in the DS-1 unit overdosing on medications they had stocked in their cells.

Defendants Dawn Laurent (a psychologist at CCI acting in a supervisory role), Karen Anderson (nurse and supervisor of the CCI Health Services Unit), Michael Meisner (CCI warden), Webber (CCI security director), Melby (DS-1 unit manager), Lieutenant Morrison (“segregation manager”), Woods (supervisor of the CCI Psychological Services Unit), John Doe Deputy Warden, and Jane Doe Health Services Unit manager were aware of the high incidence of prisoner overdoses yet failed to require non-controlled medications dispensed by

staff, even for prisoners who had a history of overdoses, mental illness, or were otherwise “at risk.”

Plaintiff was placed in observation in the DS-1 unit on December 26, 2013. Plaintiff was “stressed out, depressed and wanted to kill himself.” In particular, plaintiff was depressed by the DOC’s failure to provide him treatment and decision to place him in a cell with another prisoner even though he was used to being in a cell alone. Plaintiff “quickly decompensated,” and on January 21, 2014, he overdosed on medication by consuming over 90 pills, consisting of both controlled and uncontrolled medications. Plaintiff took the medications in front of defendant Dr. Norge, who stayed at the cell talking to plaintiff for 30 minutes before getting help. Plaintiff was taken to a hospital in Portage and then transported by helicopter to the UW Hospital in Madison, where he remained in intensive care for about a week.

Upon returning to CCI, plaintiff was placed back into observation status. Plaintiff told Norge that he wanted to die and would attempt suicide again when he got the chance. Plaintiff was not given a medication restriction. Plaintiff again “decompensated” and on January 31, 2014 overdosed by taking 60 pills of both controlled and uncontrolled medication. Plaintiff took the pills in front of Norge, who waited 20 minutes to go for help. Plaintiff was taken to a hospital in Portage where he remained for treatment. Upon plaintiff’s return to CCI, he was again placed in observation status. Plaintiff told Norge he was going to attempt suicide again when given the chance.

Plaintiff is currently housed in DS-1, but staff continues to allow him to stockpile medication.

B. Analysis

Plaintiff brings Eighth Amendment claims against defendant prison officials for failing to protect him from acts of self-harm by overdosing on medication. The Eighth Amendment guarantees that prison officials “take reasonable measures to guarantee the safety of the inmates.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–527 (1984)). 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. *Farmer*, 511 U.S. at 834; *Brown v. Budz*, 398 F.3d 904, 909 (7th Cir. 2005).

Plaintiff alleges that he suffers from severe mental illness and suffers from suicidal thoughts that have repeatedly compelled him to commit acts of self-harm. These allegations suffice to show a substantial risk of serious harm.

The more difficult question is which defendants are adequately alleged to have acted with deliberate indifference to the risk of harm. Plaintiff alleges that various supervisory officials (Laurent, Anderson, Meisner, Webber, Melby, Morrison, Woods, John Doe Deputy Warden, and Jane Doe Health Services Unit manager) are aware of the major problem DS-1 has with inmates, including plaintiff, committing acts of self-harm though overdosing on medication, yet persist in allowing medication to be administered in ways making it easy for prisoners to stockpile pills. At least at this early stage in the proceedings, plaintiff’s allegations are sufficient to state Eighth Amendment claims about these officials, who had knowledge about the problem but failed to take action to fix it. Plaintiff also states an Eighth Amendment claim against defendant Norge for failing to respond quickly enough to plaintiff’s overdoses.

At the preliminary pretrial conference that will be held later in this case, Magistrate Judge Stephen Crocker will explain the process for plaintiff to identify the names of the Doe defendants and to amend the complaint to include the proper identities of these defendants.

With regard to the other defendants in the case, plaintiff does not explain what they did to violate his rights. Plaintiff does not suggest that they were supervisory officials having authority over the DS-1 unit process of administering medication, so he does not state a claim for their failure to change that process. *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009) (“Public officials do not have a free-floating obligation to put things to rights Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another’s job.”). Given their job titles (medical staffers and correctional officers), I suspect that at least some of these individuals were involved in prescribing or distributing medication to plaintiff and other inmates in the DS-1 unit. However, plaintiff does not explain which of these officials were personally involved in the provision of his medication and which acts they took that showed their deliberate indifference to his safety. Because claims under § 1983 must be based on a defendant’s personal involvement in constitutional violation, *see Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995), each individual defendant that plaintiff wishes to sue in these actions must be able to understand what he or she is alleged to have done to violate plaintiff’s rights.

At this point I will dismiss these defendants because plaintiff’s allegations against them does not satisfy *Gentry* and Federal Rule of Civil Procedure 8(a)(2), which requires a complaint to include “a short and plain statement of the claim showing that the pleader is entitled to relief.” Plaintiff remains free to attempt to amend his complaint with more

detailed allegations about how each of those defendants violated his rights, but for now the case will proceed with the claims against supervisory officials discussed above.

PRELIMINARY INJUNCTIVE RELIEF/RECRUITMENT OF COUNSEL

Plaintiff has filed a series of motions for preliminary injunctive relief, Dkt. 39, 40, and 47, none of which comply with the court's procedures to be followed in briefing motions for injunctive relief. Therefore, I will deny those motions.

Plaintiff has also filed a renewed motion for appointment of counsel, Dkt. 41. As I stated in the July 28, 2014 order, the term "appoint" is a misnomer, as I do not have the authority to appoint counsel to represent a pro se plaintiff in this type of a case; I can only recruit counsel who may be willing to serve in that capacity. To show that it is appropriate for the court to recruit counsel, plaintiff must first show that he has made reasonable efforts to locate an attorney on his own. *See Jackson v. Cnty. of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992) ("the district judge must first determine if the indigent has made reasonable efforts to retain counsel and was unsuccessful or that the indigent was effectively precluded from making such efforts"). Plaintiff has included three rejection letters from counsel, which is sufficient to meet this standard.

Even so, this court will seek to recruit counsel for a pro se litigant only when the litigant demonstrates that his case is one of those relatively few in which it appears from the record that the legal and factual difficulty of the case exceeds his ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). Although plaintiff is familiar with litigating cases in this court (he has filed seven cases since 2010) and his filings thus far are relatively easy to understand, he has been unable to file a proper motion for preliminary injunctive

relief, the alleged threat to his safety is ongoing, and I am concerned that litigating the issues concerning the provision of medication to inmates who have a history of self-harm may be too complex for him. I am persuaded that this case may outstrip plaintiff's abilities and that it is appropriate to grant his motion. The court will therefore attempt to locate counsel for plaintiff. Further proceedings in this case will be stayed until counsel is found, at which point Magistrate Judge Crocker will hold a preliminary pretrial conference with the parties.

RECUSAL

Plaintiff has submitted a letter seeking reassignment of the case that I construe as a motion for my recusal. Two statutes exist for disqualifying a federal judge in a particular case. *See* 28 U.S.C. §§ 144 and 455. Section 144 requires a federal judge to recuse himself for "personal bias or prejudice." Section 455(a) requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and section 455(b)(1) provides that a judge shall disqualify himself if he "has a personal bias or prejudice concerning a party." Because the phrase "personal bias or prejudice" found in § 144 mirrors the language of § 455(b), they may be considered together. *Brokaw v. Mercer County*, 235 F.3d 1000, 1025 (7th Cir. 2000).

Section 144 provides that when a party makes and files a timely and sufficient affidavit alleging that the judge has a personal bias or prejudice either against him or in favor of the adverse party, the judge should proceed no further and another judge should be assigned to the proceeding. Recusal "is required only if actual bias or prejudice is proved by compelling evidence." *Id.* "A trial judge has as much obligation not to recuse himself when there is not occasion for him to do so [under § 144] as there is for him to do so when the

converse prevails.” *Hoffman v. Caterpillar, Inc.*, 368 F.3d 709, 717 (7th Cir. 2004) (quoting *United States v. Ming*, 466 F.2d 1000, 1004 (7th Cir. 1972)).

Plaintiff has not filed a formal affidavit, but in any case, his sole argument for reassignment is the delay in allowing him to proceed with his claims. Part of that delay is attributable to plaintiff himself for filing an original complaint that failed to adequately allege that he was in imminent danger of serious physical harm and for filing motions for preliminary injunctive relief that do not include evidence supporting his claims. Plaintiff does not show that the remaining delay in this case is attributable to reasons other than this court’s workload. Accordingly, I will deny his motion. Plaintiff should be aware that, although I am allowing him to proceed with his imminent danger claims, it may take several weeks to locate counsel for him. At that point the case will proceed with a preliminary pretrial conference.

ORDER

IT IS ORDERED that

1. Plaintiff Damien Green is GRANTED leave to proceed on Eighth Amendment claims against defendants Dawn Laurent, Karen Anderson, Michael Meisner, Melby, Lieutenant Morrison, Woods, John Doe Deputy Warden, Jane Doe Health Services Unit manager, and Dr. Norge.
2. Plaintiff is DENIED leave to proceed on all other claims. Defendants Dr. Myier, Dr. Leser, Officer Exner, Officer Rancker, Officer Bailor, Officer Kearns, and Officer John Doe are DISMISSED from the action.
3. Plaintiff may have until April 2, 2015, to submit the full \$400 filing fee for this case in order to have the court screen his non-imminent-danger claims regarding his allegedly unsanitary and cold cell. If plaintiff fails to submit payment by the deadline, those claims will be dismissed.
4. Plaintiff’s motions for preliminary injunctive relief, Dkt. 39, 40, and 47, are DENIED.

5. Plaintiff's motion for appointment of counsel, Dkt. 41, is GRANTED. If I find counsel willing to represent plaintiff, I will advise the parties of that fact. Soon thereafter, a preliminary pretrial conference will be held to set a schedule for the remainder of the case.
6. Plaintiff's motion for my recusal, Dkt. 50, is DENIED.
7. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service on behalf of defendants.
8. 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 defendants' lawyer directly rather than defendants themselves. 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 to defendants' attorney.
9. 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.
10. Plaintiff is obligated to pay the unpaid balance of the filing fee for this case in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under *Lucien v. DeTella*, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered March 12, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON

District Judge