IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM CLIFTON LEWIS,

Plaintiff,

v.

MICHAEL SULLIVAN, Secretary,
Wisconsin Department of Corrections,

Defendant.

ORDER

98-C-0789-C

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Petitioner was denied leave to proceed in forma pauperis on December 17, 1998. I held that petitioner was barred from proceeding under 28 U.S.C. § 1915(g), colloquially known as the "three strikes" provision of the Prison Litigation Reform Act. Section 1915(g) states:

> 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, petitioner had been denied leave to proceed in forma pauperis in this district in lawsuits deemed to be legally frivolous. See Lewis v. Goodrich, 88-C-

1101, decided December 28, 1988; Lewis v. Eisenga, 91-C-1048-C, decided December 20, 1991; and Lewis v. Coleman, 93-C-491-C, decided August 3, 1993. Moreover, petitioner's proposed complaint did not allege facts from which an inference could be drawn that he was under imminent danger of serious physical injury. The gravamen of the proposed complaint was that petitioner was being denied treatment for post-traumatic stress disorder, in violation of his Eighth Amendment constitutional rights and his rights under the Americans with Disabilities Act. Therefore, I held that petitioner had to prepay the entire $150.00 filing fee if he wished to proceed with his complaint.

Petitioner then submitted a motion for reconsideration challenging the constitutionality of § 1915(g). Because I found that there was no evidence that petitioner had exhausted his available administrative remedies as required under 42 U.S.C. § 1997e(a), I concluded that it was premature to decide whether § 1915(g) infringed impermissibly upon petitioner's right of reasonable access to the courts. I denied his petition without prejudice to its being re-opened after petitioner submitted documentation establishing that he had exhausted available administrative remedies according to the procedures of the Wisconsin inmate complaint review system detailed in Wis. Admin. Code § DOC 310.

Petitioner has submitted a third motion to re-open his lawsuit. Petitioner has attached an inmate complaint he filed on August 18, 2000 and contends that he has exhausted his

administrative remedies. Since petitioner first filed his complaint, the Court of Appeals for the Seventh Circuit has made it clear that the Prison Litigation Reform Act "requires prisoners to exhaust 'such administrative remedies as are available' *before* bringing a lawsuit complaining of prison conditions." Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999) (emphasis added). See also Perez v. Wisconsin Department of Corrections, 182 F.3d 532, 535 (7th Cir. 1999) ("a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits, even if the prisoner exhausts intraprison remedies before judgment"); 42 U.S.C. 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

Petitioner contends that he exhausted his administrative remedies by filing an inmate complaint on August 18, 2000. However, petitioner filed his proposed complaint on November 12, 1998, almost two years before he allegedly exhausted his administrative remedies. Therefore, he did not exhaust his administrative remedies *before* filing this lawsuit and his motion to reopen the case will be denied. To meet the requirements of the Prison Litigation Reform Act, petitioner must have exhausted his administrative remedies before he files a lawsuit. If indeed petitioner has exhausted his administrative remedies, a lawsuit filed now

would not be barred by 42 U.S.C. § 1997e(a). I am returning a copy of petitioner's complaint to him with this order in case petitioner would like to file it anew at this time. Petitioner is advised that he continues to owe the filing fee of $150 in this case and will be required to pay another $150 filing fee should he choose to re-file his complaint as a new lawsuit. However, should petitioner fail to pay the $150 filing fee and raise instead the same constitutional challenge to the three strikes provision of the Prison Litigation Reform Act that he raised in this case, I will consider the briefs that were submitted on the issue in this case as though they were filed in petitioner's new case. If petitioner re-files his complaint and re-raises the issue of the constitutionality of § 1915(g), he may file at the same time a supplemental brief in support of the motion to find § 1915(g) unconstitutional. (Petitioner should note that some courts have decided the issue in the two years that have passed since petitioner filed his original lawsuit. See, e.g., Rodriguez v. Cook, 169 F.3d 1176 (9th Cir. 1999) (upholding constitutionality); Ayers v. Norris, 43 F. Supp.2d 1039 (E.D. Ark. 1999) (striking down statute).)

ORDER

IT IS ORDERED that the motion of petitioner William Clifton Lewis to re-open this lawsuit is DENIED.

Entered this 26th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge