IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM CLIFTON LEWIS,

Plaintiff,

v.

MICHAEL J. SULLIVAN, Secretary,
Wisconsin Department of Corrections,

Defendant.

ORDER

98-C-789-C

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Petitioner William Clifton Lewis is a prisoner at Waupun Correctional Institution in Waupun, Wisconsin. On November 12, 1998, he submitted a proposed complaint requesting leave to proceed in forma pauperis, in which he contends that he has been diagnosed with chronic post traumatic stress disorder related to his combat experience as a member of the United States Armed Forces and that his condition is aggravated by stressors. He contends that the Wisconsin Department of Corrections has no program to treat incarcerated prisoners suffering from post traumatic stress disorder and that the department planned to transfer him to an out-of-state facility with even less capacity to treat his disorder. Petitioner seeks an injunction preventing his transfer, together with other declaratory or injunctive relief.

To commence a civil action in federal district court, parties generally must prepay the filing fee. See 28 U.S.C. § 1914(a). Before the enactment of the Prison Litigation Reform Act, federal courts could waive the filing fee prepayment requirement for any indigent person, including prisoners, by granting in forma pauperis status. Under the act, however, this option is no longer available. Instead, prisoners who are allowed to proceed in forma pauperis must make an initial partial payment and monthly payments thereafter, see 28 U.S.C. § 1915(b), unless the prisoner has "no means" by which to make the initial partial payment. See 28 U.S.C. § 1915(b)(4). However, if on three previous occasions a prisoner has had an action or appeal dismissed on the grounds that it is frivolous, malicious or fails to state a claim upon which relief can be granted, he may not proceed in forma pauperis. See 28 U.S.C. 1915(g). Instead, he must prepay the entire fee before proceeding unless he is "under imminent danger of serious physical injury." See 28 U.S.C. § 1915(g).

On at least three prior occasions, petitioner has 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. In an order entered December 11, 1998, I delayed a decision on petitioner's request to proceed in forma pauperis, to insure that he was aware of the restrictions of § 1915(g). Petitioner was given the option of

either withdrawing his complaint voluntarily without paying the filing fee or proceeding with his request, at which point he would be obligated to pay the $150.00 filing fee. Petitioner responded by stating that § 1915(g) did not apply to him because he had not filed three civil actions that had been dismissed as legally meritless after the enactment of § 1915(g).

In an order dated December 17, 1998, petitioner was denied leave to proceed in forma pauperis because he had not alleged facts in his proposed complaint indicating that he might fit into the narrow exception § 1915(g) provides for prisoners in imminent danger of serious physical injury. In the December 17 order, petitioner was advised that he had three options: he could prepay the entire filing fee and proceed; forgo proceeding (although he would still be obligated to pay the fee); or appeal the order barring him from proceeding in forma pauperis (although if he lost he would be required to pay a fee for both filing the complaint and filing the appeal).

Petitioner responded with a letter dated December 22, 1998, objecting to the denial of leave to proceed in forma pauperis. He argued that § 1915(g) is unconstitutional on several grounds, one of which is that it violates the ex post facto clause and another, that it violates his right to equal protection. On December 29, 1998, I entered an order rejecting petitioner's contention that § 1915(g) violates the ex post facto clause, citing Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996), but recognizing that the Court of Appeals for the Seventh

Circuit had not yet ruled on other challenges to the constitutionality of § 1915(g). I concluded that the appointment of counsel was warranted and on January 6, 1999, I entered an order appointing counsel for the purpose of challenging the constitutionality of § 1915(g).

Because petitioner was challenging the constitutionality of a United States statute, I notified the United States of that fact, as I must do pursuant to 28 U.S.C. § 2403. On May 18, 1999, I granted the motion of the United States to intervene, as required under § 2403(a). After full briefing by the parties, it became apparent that petitioner had not exhausted his available administrative remedies before bringing this action as required by 28 U.S.C. § 1997e(a). In an order entered August 17, 1999, 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 petitioner's request for leave to proceed in forma pauperis without prejudice to his re-opening the case after he 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.

On December 27, 1999, petitioner submitted a motion to re-open his case. In his motion, petitioner stated that the inmate complaint review system "lack[ed] subject matter jurisdiction" over his proposed complaint. Instead of using that system, petitioner sought relief by writing to the director of health services for the Wisconsin Department of Corrections. In

an order entered February 29, 2000, I found that under 42 U.S.C. § 1997e(a), petitioner was not free to refuse to exhaust available administrative remedies according to the procedures of Wis. Admin. Code § DOC 310. I interpreted petitioner's contention that the inmate complaint review system "lack[ed] subject matter jurisdiction" over his complaint as an argument that using that system would be futile because the administrative process cannot or will not provide treatment for him or money damages. I found that even if that were so, it would not matter. See Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999) (prisoner must exhaust administrative remedies even if exhaustion would be futile and prisoner cannot obtain money damages through administrative process). Accordingly, petitioner's motion to re-open his lawsuit was denied.

In a second motion to re-open his lawsuit filed April 6, 2000, petitioner contended that Wis. Admin. Code § DOC 310.08(4) allows him to exhaust his available administrative remedies by writing to the director of the bureau health services for the Wisconsin Department of Corrections. In an order entered August 8, 2000, I concluded that § 310.08(4) does not exempt health care and psychiatric complaints from the requirements of the inmate complaint review system. Rather, § 310.08(4) instructs inmates to direct their complaints through the inmate complaint review system to the director of the bureau of health services. In the August 8 order, I concluded that this court could consider petitoiner's claim only after he has

completed each step of the inmate complaint review system as described in Wis. Admin. Code § DOC 310.

On October 5, 2000, petitioner asked again that his lawsuit be re-opened and attached an administrative grievance that he had filed in August 2000. In an order dated October 26, 2000, I denied petitioner's third motion to re-open his lawsuit, after concluding that because 42 U.S.C. § 1997e(a) requires that a prisoner exhaust administrative remedies *before* he files a lawsuit and the proof of exhaustion submitted by petitioner was filed almost two years after he filed his complaint, it would be futile for petitioner to proceed on a claim that would be subject to dismissal even if petitioner succeeded in establishing the unconstitutionality of the three strikes provision. I suggested that petitioner could avoid this problem by re-filing his complaint as a new lawsuit now that he has allegedly exhausted his administrative remedies. Petitioner chose not to follow this suggestion and instead filed a letter that I construe as a motion to reconsider the denial of his request to re-open the lawsuit. Petitioner contends that his constitutional challenge to § 1915(g) is unrelated to any issues raised by his underlying claim, including exhaustion.

It is true that exhaustion is an affirmative defense that may be waived See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez 182 F.3d 532. Therefore, I will give petitioner a choice of how to proceed. I intended to return a copy of petitioner's complaint to

him with my last order so that petitioner would be able to re-file the complaint if he chose to do so. Inadvertently, the copy of the complaint was not mailed to petitioner. I will enclose a copy of the complaint with this order so that petitioner will have the option of re-filing it. This is petitioner's first option. If petitioner re-files his complaint as a new lawsuit and again raises the issue of the constitutionality of § 1915(g), he may file a supplemental brief at the same time in support of the motion to find § 1915(g) unconstitutional.

Petitioner's second option is to have the court re-open this lawsuit and address the constitutionality of § 1915(g). If petitioner selects this option, he must file a letter within two weeks indicating that such is his intent. If he chooses to file a supplemental brief in support of the motion to find § 1915(g) unconstitutional updating the law since June 1999, when his last brief was filed, that brief should be filed within two weeks after entry of this order. Upon receipt of the brief, this lawsuit will be re-opened and respondent and intervenor United States will have two weeks in which to submit any supplemental briefs. Petitioner may elect to proceed on either option one or option two but not both. Should petitioner re-file his complaint as a new lawsuit, the court will ignore any further submissions in this lawsuit. As stated in the order entered October 26, 2000, should petitioner choose to re-file his complaint as a new lawsuit, fail to pay the $150 filing fee and raise 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 had been filed in petitioner's new case.

ORDER

IT IS ORDERED that the motion of petitioner William Clifton Lewis to reconsider the order entered October 26, 2000 is DENIED. If petitioner files by November 20, 2000, a letter indicating his intent to proceed with this lawsuit, this lawsuit will be re-opened. A copy of petitioner's complaint is enclosed with this order. If petitioner files nothing in this lawsuit before November 20, 2000, but files his complaint as a new lawsuit, the briefs submitted in this case will be considered as part of the new lawsuit.

Entered this 3rd day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge