IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

ORDER

Plaintiff,

06-cv-608-bbc

v.

CAPTAIN MONICA HORNER and
THOMAS CRAVENS,

Defendants.

- -

This is a civil action for monetary relief brought under 42 U.S.C. § 1983. Plaintiff Nathaniel Lindell, a Wisconsin state inmate housed at the Wisconsin Secure Program Facility, alleged that defendants violated his Eighth Amendment rights by depriving him of sunlight and requiring him to wear unsanitary clothing, violated his First Amendment rights by placing him in Long Term Administrative Confinement in retaliation for filing grievances and lawsuits and violated his First and Fourteenth Amendment rights by placing and retaining him in Long Term Administrative Confinement for improper reasons and without proper procedure.

In screening orders dated November 13, 2006 and January 29, 2007, I denied

plaintiff leave to proceed on his claim that defendants violated his First and Fourteenth Amendment rights by placing and retaining him in Long Term Administrative Confinement without proper procedure, but allowed him to proceed on his other claims. Later, in an opinion and order dated January 7, 2008, I granted defendants' motion for summary judgment in part and dismissed plaintiff's claim under the Eighth Amendment but allowed his claim under the First Amendment retaliation claim to proceed to trial. A jury found in defendants' favor.

Plaintiff has filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59 and a notice of appeal. I consider these in turn. In plaintiff's Rule 59 motion, he objects to several decisions I have made over the life of this case, spanning from the screening orders to rulings made during trial. Because it is too late for plaintiff to object to earlier rulings, and because in any event I am not convinced that any of the rulings were erroneous, Plaintiff's Rule 59 motion will be denied. Next, in plaintiff's notice of appeal, he requests leave to proceed in forma pauperis. That request will be denied because plaintiff has struck out under 28 U.S.C. § 1915(g) and has not shown that he is in imminent danger of serious physical injury. Therefore, plaintiff will owe the full $ 455.00 filing fee immediately.

A. Objections to Rulings Made at Trial

Plaintiff contends that I erred in ruling on four issues at trial: (1) not allowing him

to question defendants about other "similarly situated" prisoners treated more favorably; (2) not allowing him to "impeach" Shannon-Sharpe; (3) allowing defendants' counsel to make prejudicial statements in closing arguments that plaintiff was a gang member and a bad person; and (4) allowing defendants' counsel to cross-examine plaintiff on the race of an inmate plaintiff stabbed.

First, although plaintiff contends that I would not allow him to cross-examine defendants about Chaskay White, Ronald Dennis, Charles Estep and "others similarly situated," he never tried to question defendants about Charles Estep or "others." As for Chaskay White, it was only on the day of trial that plaintiff produced a Risk Assessment Information Guide for White that he planned to use. Defendants did not have fair notice that plaintiff was planing to use this exhibit or that he was asserting that White was "similarly situated." As for plaintiff's attempts to ask questions about Ronald Dennis, plaintiff never attempted to establish that defendants were even involved in placing Dennis in the High Risk Offender Program. Related to these concerns is plaintiff's objection that I did not allow him to question defendant Cravens about exhibit 12. Exhibit 12 was an unsigned draft of a Risk Assessment Information Guide for Jason Tyrrell, another prisoner plaintiff contended was "similarly situated." However, plaintiff made no showing that defendant Cravens was involved in preparing exhibit 12 and the exhibit itself had questionable probative value (plaintiff was allowed to have defendant Cravens read in full

paragraphs of Jason Tyrrell's past conduct from another exhibit). Under the circumstances, it was proper to preclude plaintiff from asking defendants questions about Chaskay White, Ronald Dennis and Exhibit 12 by granting defendants' motion in limine as it related to White and sustaining defendants' objections to plaintiffs' attempts to ask questions about Ronald Dennis and Exhibit 12.

Second, plaintiff takes issue with my decision to deny his motion to offer his own testimony to impeach Shannon-Sharpe after she testified that she did not recall telling plaintiff at a phase hearing that staff had a problem with his litigation and that was the reason they put him on long term administrative confinement. However, plaintiff's proposed "impeachment" was his own testimony about what she said at the phase hearing. Shannon-Sharpe is not a party, and plaintiff's testimony about what she said would be inadmissible hearsay. It was proper to deny plaintiff's request to "impeach" Shannon-Sharpe.

Third, plaintiff contends that it was error to allow defendants' counsel to "rant" and "rave" about plaintiffs' affiliation with the Aryan Circle during his closing argument, and that he "objected to a lot of this" to no avail. Plaintiff's contentions are groundless. Plaintiff objected only once to defendants' counsel's comments about plaintiff's relationship with the Aryan Circle, and his objection was only to point out that he never called it a "club." That objection was sustained.

Fourth, plaintiff takes issue with a question defendants' counsel posed during cross

examination of plaintiff. In particular, defendants' counsel asked plaintiff to identify the race of an inmate he had stabbed after plaintiff admitted on the stand to his "white separatist" philosophy but asserted that his motive for stabbing the inmate was "fear." Although defendants' counsel's question may have been objectionable, plaintiff failed to object to the question at the time it was asked. It is too late for him to cry foul now.

B. Objections to Decisions Made Well Before Trial

Plaintiff objects to rulings from two screening orders signed on November 13, 2006 and January 29, 2007 and the summary judgment order, signed on January 7, 2008. With the exception of one issue, plaintiff did not move for reconsideration on any of the issues he now raises, instead allowing the case to proceed to trial on narrower issues without objection. Now that he has lost the jury trial, he returns seeking relief. His chance to have this court reconsider earlier dispositive orders has come and gone; therefore, his motion to amend or alter the judgment with respect to issues decided in the screening orders and the summary judgment order will be denied.

Even if it were appropriate to reopen these early decisions at this late stage, plaintiff's motion to alter or amend the judgment related to the screening orders and summary judgment would be denied on the merits, as explained below.

1. Summary judgment order

Plaintiff contends that I made two errors related to my decision to grant defendants' motion for summary judgment on his claims that defendants violated his Eighth Amendment rights. Both relate to plaintiff's failure to adduce sufficient evidence to show that he faced substantial risk of serious harm by being deprived of sunlight and forced to wear potentially contaminated recreational clothing.

a. Judicial notice

Plaintiff contends that it was error for this court to refuse to take judicial notice of facts related to sunlight deprivation and infectious diseases in the prison setting. In both instances, plaintiff had to show that *he* was at a "substantial risk of serious harm," that is, that he was "highly likely" to be seriously harmed. Brown v. Budz, 398 F.3d 904, 911 (7th Cir. 2005). Although plaintiff asked for the court to take judicial notice of general facts about sunlight deprivation and infectious diseases in the prison setting, none of these facts could establish that *he* faced a serious risk. Because there was no admissible evidence of plaintiff's own risk, there was no reason to determine whether these background facts were proper for judicial notice. Plaintiff offered no admissible evidence that his situation made it highly likely that he would suffer serious harm either because of sunlight deprivation or because of infectious disease. Therefore, it was not error to refuse to take judicial notice of

these additional general facts.

b. Appointment of counsel and lack of expert testimony

Next, plaintiff contends that it was improper (and "contrary to due process") to grant summary judgment against him on his Eighth Amendment claims simply because he did not have the needed expert testimony, given that the court had denied his repeated motions for appointment of counsel. This contention suffers from two defects. First, plaintiff has no constitutional or statutory right to counsel and in any event is a serial litigant with ample litigation and trial experience. Pruitt v. Mote, 503 F.3d 647, 656 (7th Cir. 2007) (citations omitted). Second, even if I had agreed to ask a lawyer to represent plaintiff, there was no guarantee that one would take his case and advance the cost of experts to prove a claim on which plaintiff had little chance to succeed. I explained as much in an order dated March 15, 2007 (dkt. #14), at 6-7, in which I denied plaintiff's first motion for appointment of counsel: "[t]his case would be costly to litigate and is unlikely to succeed . . . I have no reason to believe a lawyer would accept his case, much less be able to prosecute it with the resources plaintiff envisions."

Because plaintiff was not entitled to court-appointed counsel, it was not error for this court to rule against him at summary judgment when he failed to provide the expert testimony that he knew was required to prove his case.

2. Screening orders

Plaintiff objects to decisions made in the first screening order, dated November 13, 2006 (dkt. #2) and the second screening order, dated January 29, 2007 (dkt. #10). I address each of these issues in turn.

a. November 13, 2006 order

First, plaintiff contends that it was error to deny him leave to proceed on his claim that he was denied due process when he was placed in administrative confinement instead of in the high risk offender program without a hearing because it had the effect of prolonging his confinement at the Wisconsin Secure Program Facility. As I explained in the screening order, it is "far from clear" that plaintiff enjoys a liberty interest in avoiding ongoing retention in a super-maximum security facility where he has already been placed, as opposed to being transferred to such a facility. Order, dkt. #2, at 24. Even if he does, he received any process that he might be due because he was given a written recommendation of the decision to retain him and an opportunity to appeal. Westefer v. Snyder, 422 F.3d 570, 588 (7th Cir. 2005) (suggesting due process in transfer setting requires only that "prisoner is given sufficient notice of the reasons for his transfer to afford meaningful opportunity to challenge his placement").

b. January 29, 2007 order

Next, plaintiff contends that it was error to deny him leave to proceed on a due process claim that he was placed in administrative confinement because of his "political and philosophical views (or defendants' perception of them)," a reason plaintiff contends is arbitrary. In the second screening order, I explained that prison officials' belief that he is affiliated with the Aryan Circle was "more than a minimally adequate reason" to confine him at the Wisconsin Secure Program Facility, and therefore not arbitrary.

In an attempt to dispute that decision, plaintiff first points to the evidence at trial and to exhibits he wanted to submit at trial, arguing that he was treated unfairly because other prisoners who were in "gangs" were not placed in administrative confinement. In his amended complaint, plaintiff alleged that defendants' decision to retain him in administrative confinement was in part because they "deemed" plaintiff a member or affiliate of the Aryan Circle but failed to verify that or show how he was a danger, and that defendants' decisions to place and retain him in administrative confinement were "based on [their] animosity towards [plaintiff's] non-violent and non-dangerous White Seperatist [sic] beliefs." As I explained in the screening order, plaintiff's beliefs regarding what he calls "racial separatism" "implicate obvious security concerns." In other words, they are not "non-dangerous" and it was not "arbitrary" for defendants to consider what they believed to be his gang affiliation in retaining him, regardless whether all other gang members were

retained. Therefore, it was not error to conclude that plaintiff had failed to state a due process claim.

As a last attempt, plaintiff contends that he also stated a First Amendment claim because he was retained for his "unpopular" views and affiliation. In an order dated December 14, 2006, dkt. #6, I denied a motion for reconsideration on this very issue. Nothing about plaintiffs arguments now convinces me that my decision was made in error.

C. Leave to Proceed In Forma Pauperis on Appeal

Having decided plaintiff's Rule 59 motion, I turn to consider his notice of appeal, Fed. R. App. P. 4(a)(4)(B)(i) (notice of appeal effective upon disposal of last post-judgment motion), which I construe as a request for leave to proceed in forma pauperis on appeal.

Unfortunately for plaintiff, he has incurred more than three strikes under 28 U.S.C. § 1915(g). See Lindell v. Schneiter, 06- C-608-C (decided Nov. 13, 2006); Lindell v. Frank, 05-C-03-

C (decided Mar. 8, 2005); Lindell v. Goviere, 02-C-473-C (decided May 26, 2004); Lindell v. Litcher, 02-C-21-C (decided May 28, 2002); Lindell v. Daley, 02-C-459-C (decided Dec. 3, 2002); Lindell v. Doe, 01-C-209-C (decided Lindell v. Litscher, 02-C-79-C (decided May 3, 2001). Therefore, he is not eligible to seek pauper status on appeal unless he can show that he is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

Plaintiff contends that he should be entitled to appeal in forma pauperis because he

is in imminent danger of serious physical injury as shown by his allegations that he is deprived of sunlight and exposed to other prisoners' body fluids on shared outdoor recreational clothing. It is settled law that when a prisoner who has struck out under § 1915(g) tenders a *new complaint* to the district court for filing and asks for pauper status, the court must accept the allegations of fact in the complaint as true, including those allegations supporting the prisoner's contention that he is in imminent danger of serious physical harm. Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003). So long as it appears from a liberal construction of the complaint that the prisoner has alleged an unconstitutional condition causing physical injury that is "real and proximate," that is, it is occurring at the time the complaint is filed, a district court is to apply the "imminent danger" exception to § 1915(g) and allow the prisoner to use the installment method in § 1915 to pay his filing fee. Id. (citing Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002), and Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003)).

The question that arises in this case is whether it is appropriate to apply the standard for finding imminent danger announced in Ciarpaglini to a prisoner's request for leave to *appeal* in forma pauperis. I conclude that it is not. In this case, plaintiff proceeded past screening, all the way to trial. Plaintiff failed to survive a motion for summary judgment on his allegations of sunlight deprivation and infectious disease for the simple fact that he failed to supply any evidence that *he* was exposed to any risk of injury or infection from his lack

of sunlight and exposure to shared outdoor clothing. When the record developed during the pendency of a case in the district court undermines a prisoner's allegations of imminent danger, the district court, as gatekeeper under § 1915(g), cannot disregard that record and reward the frequent filer with a free pass to present his failed claim on appeal. Therefore, I cannot allow plaintiff to take advantage of the initial partial payment provision of § 1915. He must pay the $455 fee for filing an appeal in full immediately.

However, even if I looked to plaintiff's allegations alone, he has not established "imminent danger." Unlike in Ciarpaglini, 352 F.3d 328, 330-31 (7th Cir. 2003), in which the prisoner alleged that he was being denied medication that alleviated heart palpitations, chest pains, labored breathing, choking sensations and leg and back paralysis, plaintiff alleges no "real and proximate" physical injury, pointing only to (1) his belief that a relationship exists between lack of sunlight and mental illness and behavioral problems and (2) his belief that unwashed outdoor clothing "exposed" him to deadly diseases. The first allegations fail to identify a "physical" injury and the second allegations fail to identify a physical injury that is "proximate" to the alleged violation. These allegations fall far short of suggesting imminent danger to serious physical harm. There is no reason to infer that continued sunlight deprivation has an immediate physical effect or that continued exposure to clothing has any more than some "possibility" of some kind of infection that may lead to physical injury. Plaintiff's allegations are closer to those made in Polanco v. Hopkins, 510 F.3d 152,

155 (2d Cir. 2007), in which the prisoner alleged that exposure to mold aggravated his medical condition. The court found such allegations to be insufficient to establish imminent danger. Id.; see also Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003) (prisoner's exposure on two occasions to inclement weather that could be harmful to his medical condition insufficient to establish imminent danger). Therefore, I cannot conclude that plaintiff is in imminent danger of serious physical injury and he will not be able to take advantage of the initial partial payment provision of § 1915. He owes the $ 455.00 fee for filing an appeal in full immediately.

Plaintiff may challenge my decision to deny his request for leave to proceed in forma pauperis on appeal because of his § 1915(g) status in the court of appeals within thirty days of the date he receives this order. Fed. R. App. P. 24(a)(5). If the court of appeals decides that it was improper to deny plaintiff's request for leave to proceed in forma pauperis because of his three-strike status, then the matter will be remanded to this court for a determination whether plaintiff's appeal is taken in good faith. If the court of appeals determines that this court was correct in concluding that § 1915(g) bars plaintiff from taking his appeal in forma pauperis, the $ 455.00 filing fee payment will be due in full immediately. Whatever the scenario, plaintiff is responsible for insuring that the required sum is remitted to the court at the appropriate time. Also, whether the court of appeals allows plaintiff to pay the fee in installments or agrees with this court that he owes it immediately, plaintiff's

obligation to pay the fee for filing his appeal will be entered into this court's financial records so that it may be collected as required by the Prison Litigation Reform Act.

ORDER

IT IS ORDERED that:

1. Plaintiff Nathaniel Allen Lindell's motion pursuant to Fed. R. Civ. P. 59 to alter or amend the judgment (dkt. #130) is DENIED.

2. Plaintiff's request for leave to proceed in forma pauperis on appeal (dkt. #131) is DENIED because three strikes have been recorded against him under 28 U.S.C. § 1915(g) and the issues he intends to raise on appeal do not qualify for the imminent danger exception to § 1915(g).

3. The clerk of court is directed to insure that plaintiff's obligation to pay the $ filing fee is reflected in this court's financial records.

Entered this 5th day of May, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge