IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

CHARLES NORWOOD,

ORDER

Petitioner,

07-C-446-C

v.

CAPT. RADTKE, C.O. GROAK and
OTHERS,

Respondents.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Petitioner Charles Norwood is a prisoner at the Columbia Correctional Institution in Portage, Wisconsin. He has struck out under 28 U.S.C. § 1915(g), which means that he cannot obtain indigent status under § 1915 in any future suit he files during the period of his incarceration unless his complaint alleges facts from which an inference may be drawn that he is in imminent danger of serious physical injury. In this case, petitioner argues that the court should permit him to proceed with his claims under the in forma pauperis statute, because his complaint qualifies for the exception to the three strikes bar.

I conclude that petitioner's complaint does allege facts suggesting that he may be in imminent danger of serious physical injury. Therefore, I will allow petitioner to utilize the partial payment provisions of 28 U.S.C. § 1915 to pay the fee for filing this action, rather

than requiring him to pay the $350 filing fee at the outset. However, this is a victory of short duration and small worth, because the attachments to petitioner's complaint reveal that the action must be dismissed immediately on the court's own motion for petitioner's failure to exhaust available administrative remedies as required by 28 U.S.C. § 1997e(a).

In his complaint, petitioner alleges the following facts.

## ALLEGATIONS OF FACT

Petitioner Charles Norwood is an inmate currently confined at the Columbia Correctional Institution in Portage, Wisconsin. He is a "homosexual gay person." Respondent Radtke is a unit manager at the institution. Respondent Graak is a correctional officer.

In March of 2007, petitioner was confined in the segregation building in a cell with an inmate who did not care for homosexuals. At approximately 11:30 a.m., petitioner notified respondent John Doe and three other officers, Officers Morrison, Fabry and Gray, that he believed himself to be in a threatening and hostile situation. Petitioner advised these officials that the "bunk-up double arrangement wasn't working out" because of his cell mate's aversion to petitioner's sexual orientation. The cell mate made a verbal threat to Officer Morrison, saying, "Get him out of here now! Move him or else." Officer Morrison assured petitioner that something would be done. However, at the end of the day, Morrison

and the other officers left for home without having addressed the issue.

By the time second shift personnel arrived, petitioner was so tense he could neither sit down nor relax. His cell mate was insisting that petitioner find another cell. Petitioner informed an Officer Herbrand and another officer of the situation. Around 2:00 p.m., Herbrand advised petitioner that he would have to wait until after shower period to be moved, despite petitioner's protests that he believed his cell mate's threats to constitute an emergency. He told petitioner, "We're doing showers now, so you just have to wait until I see a supervisor." He then walked away. At this point, petitioner broke a rule to make the officers move him back to the segregation building in a level DS-1, "just to remove [himself] out of danger."

Recently, on August 3, 2007, petitioner earned a level increase to DS-2. At that time, he was put in a cell with another inmate who does not like homosexuals. Petitioner told several officers, including respondent Graak and Officer Morrison, that he feared for his safety. Officer Morrison responded, "So what? I'm not moving you. The person you request to double with is already doubled." He then walked away. Respondent Graak told petitioner, "We don't cell gays together; they may hanky-panky." Petitioner responded, "This arrangement of a gay and a straight person ain't working either." Graak then told petitioner, "Well, we're saving that room next door for the weekend, you'll just have to deal with it." He then walked away, leaving petitioner feeling fearful.

Officer Herbrand "was immediately aware." He told petitioner, "You had this last time. I will inform Capt. Radtke of it." Later, Herbrand returned and told petitioner that respondent Radtke denied petitioner's request to be moved or double celled with "someone more suitable."

On August 5, 2007 petitioner wrote a memorandum to respondent Radtke, in which he reminded Radtke of the hostility he faced with his cell mate in March 2007, and explained his fear of having been put in a cell on August 3 with another person who disapproved of homosexuals. Petitioner told Radtke that

> I've been placed in danger twice and now I anticipate a 3rd because I'm being denied double with people that are cool or family members. And a total stranger is about to take my floor space eventually once again possibly subjecting me to further emotional stress, fear, or jeopardizing my safety because of failure to "pair me with care." This is to inform you that I've been done wrong and I'm tired of having to give up my progress out of seg because you and other staff members are subjecting me to these unnecessary situations. You are further being placed on notice of my intent to file a civil suit against you and others.

In a memorandum dated August 6, 2007, respondent Radtke responded to petitioner's letter as follows:

> I am in receipt of your request asking to be placed on a pair with care doubling status, and claiming you are being harassed by DS-2 staff. Doubling status is reviewed by both the Psychological Services and Security departments. I have discussed your doubling status with Psychological Services, and at this time you are eligible to be doubled. If you are having difficulties adjusting to your living arrangements please work with Psychological Services or other members of your unit team who may be able to help you with coping skills. I want to

> remind you that you are responsible for your own actions. The letter that you have submitted to me will not in any way relinquish you from your responsibilities to maintain appropriate behaviors when dealing with others.
>
> I have spoken with Officer Graack as well as DS-2 staff who inform me he gave you direction on your interactions with other inmates, which in no way constitutes harassment. Your behaviors will be expected to remain consistent with policies.

In the meantime, on August 5, 2007, petitioner filed an offender complaint challenging respondents' failure to move him from the cell to which he had been assigned in March, 2007, as well as the failure of prison officials to take immediate action to move him to another cell following his August 3 double-cell assignment. On August 6, 2007, petitioner's complaint was returned to him with a memorandum from Mary Leiser, an institution complaint examiner, who advised petitioner that his complaint was being rejected because it contained more than one issue, in violation of Wis. Stat. § DOC 310.09(1)(e).

## DISCUSSION

28 U.S.C. § 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.

Petitioner Norwood has, on three or more prior occasions, filed lawsuits in this court that were dismissed as legally frivolous or for failure to state a claim upon which relief may be

granted. See Norwood v. Hamblin, 04-C-813-C, decided Nov. 24, 2004, Norwood v. Hamblin, 04-C-846-C, also decided Nov. 24, 2004; and Norwood v. Hamblin, 04-C-854-C, decided Dec. 2, 2004. Thus, he must prepay the filing fee for this and any other lawsuit or appeal he files while he is incarcerated unless his complaint alleges that he is in imminent danger of serious physical injury.

In order to meet the imminent danger requirement of 28 U.S.C. § 1915(g), a petitioner must allege a physical injury that is imminent or occurring at the time the complaint is filed and the threat or prison condition causing the physical injury must be real and proximate. Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (citing Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002) and Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003)). Ordinarily, claims of physical injury arise in the context of lawsuits alleging Eighth Amendment violations. This is such a case. Petitioner is alleging that respondents are being deliberately indifferent to his safety by failing to heed warning signs that he will be assaulted if he is forced to be celled with homophobic inmates. Nevertheless, petitioner's allegations that respondents were deliberately indifferent to his safety in March 2007 do not qualify for the exception to § 1915(g). He faces no present danger arising out of that incident. It is over and done with.

Petitioner's complaint alleges also that respondents are ignoring a present threat to his safety arising out of his cell placement on August 3, 2007, with an inmate who does not like homosexuals. Although he does not allege that his new room mate has threatened to

harm him physically, it is possible to infer from petitioner's allegations concerning his repeated attempts to be moved out of his current cell placement that he fears for his safety. Certainly it is a close question whether a petitioner's subjective fear of danger, without more, is sufficient to make out a claim that he is in imminent danger of serious physical injury. For the purpose of this opinion, however, I will accept petitioner's characterization of his present circumstances as constituting a real and not an imagined threat to his safety. Under these circumstances, I conclude that petitioner qualifies for the exception to § 1915(g) and thus is eligible to utilize the partial payment mechanism set out in § 1915 to pay the $350 fee for filing this action.

An examination of petitioner's trust fund account statement reveals that petitioner earns no income and has a zero balance in his prison account. That means he will not owe an initial partial payment before I can screen the merits of his complaint. A prisoner who has no assets and no means to pay the initial partial filing fee may proceed under the in forma pauperis statute under 28 U.S.C. § 1915(b)(4), which provides, "In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."

The next step is to screen petitioner's complaint. Under 28 U.S.C. § 1915(e), a district court is authorized to dismiss an action if it is frivolous or malicious, fails to state a claim on which relief may be granted or seeks monetary relief against a defendant who is

immune from such relief. The merits of petitioner's complaint cannot be described as legally frivolous or malicious and his allegations do not fail to state a claim upon which relief may be granted. He has not sued a respondent who is immune from suit. Nevertheless, petitioner's suit must be dismissed at the outset because it has been brought before he has exhausted his administrative remedies as required under 28 U.S.C. § 1997e.

The Prison Litigation Reform Act provides that "[n]o action [under federal law] shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). A prisoner does not satisfy § 1997e(a) unless he has exhausted "properly," which includes "using all steps that the agency holds out," Woodford v. Ngo, 126 S. Ct. 2378, 2385 (2006) (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002)), and doing so "in the place, and at the time, the prison's administrative rules require." Pozo, 286 F.3d at 1025.

The documentation of petitioner's use of Wisconsin's prison grievance procedures that petitioner submitted with his complaint shows that on August 5, 2007, he filed an offender complaint challenging respondents' failure to move him from the cell to which he had been assigned in March, 2007, as well as the failure of prison officials to take immediate action to move him to another cell following his August 3 double-cell assignment. On August 6, 2007, petitioner's complaint was returned to him with a memorandum from Mary Leiser, an institution complaint examiner, who advised petitioner that his complaint was being rejected because it contained more than one issue, in violation of Wis. Stat. § DOC

310.09(1)(e). The complaint petitioner seeks to pursue in this court is dated two days later, on August 8, 2007. It is impossible for petitioner to have taken his offender complaint through the entire administrative process available to him under Wis. Admin. Code Chapter DOC 310 in only two days.

I recognize that generally, courts may not raise an affirmative defense on their own, Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002), and that failure to exhaust is an affirmative defense. Id. However, the Court of Appeals for the Seventh Circuit has held that a district court may raise an affirmative defense on its own motion if the application of the defense "is so plain from the language of the complaint and other documents in the district court's files that it renders the suit frivolous." Gleash v. Yuswak, 308 F.3d 758, 760 (7th Cir. 2002). It is beyond doubt that respondents will be entitled to dismissal of petitioner's complaint for his failure to exhaust his administrative remedies; there is no set of facts that petitioner can prove that would enable him to overcome such a defense. Because a motion to dismiss for failure to exhaust is inevitable, it is "sensible to stop the [claim] immediately, saving time and money for everyone concerned." Id. at 761. Therefore, I will dismiss petitioner's lawsuit without prejudice to his refiling his action after he has exhausted his administrative remedies.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis is

1) GRANTED with respect to his claim that respondents are deliberately indifferent to his safety by refusing to move him from his August 3, 2007 cell assignment. because this claim allows an inference to be drawn that petitioner is eligible to utilize the imminent danger exception to 28 U.S.C. § 1915(g);

2) DENIED with respect to his claim that respondents were deliberately indifferent to his safety when they refused to move him from his double-cell assignment in March, 2007.

Further, IT IS ORDERED that this action is DISMISSED on the court's own motion for petitioner's failure to exhaust his administrative remedies on his claim concerning his August 3, 2007 cell assignment. This dismissal is without prejudice to petitioner's refiling the claim after he has exhausted his administrative remedies.

Finally, IT IS ORDERED that petitioner owes the $350 fee for filing this complaint, even though the action has been dismissed for petitioner's failure to exhaust his administrative remedies. In a separate letter, I am notifying the warden of the Columbia Correctional Institution that as soon as funds exist in petitioner's account, he must begin paying the fee in monthly installments as required under 28 U.S.C. § 1915(b)(2). Furthermore, the clerk of court is requested to insure that the court's financial records reflect

petitioner's obligation to pay the filing fee in this case.

Entered this 22nd day of August, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge