IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DWAYNE ALMOND, #238829-A,

Plaintiff,

v.

JAMES E. DOYLE, RICK RAEMISCH, WILLIAM POLLARD, PETE ERICKSEN, LT. SWIEKATOWSKI, CAPT. LESATZ, RICHARD HEIDORN, JEANANNA ZWIERS, OFFICIAL KEILER, OFFICIAL THOMPSON, and OFFICIAL FLUMER.

Defendants.

OPINION and ORDER

09-cv-335-bbc

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Plaintiff Dwayne Almond, a prisoner at the Green Bay Correctional Institution, has filed a proposed amended complaint under 42 U.S.C. § 1983, raising several claims against defendants. Also, plaintiff seeks leave to proceed in forma pauperis. In a November 5, 2009 order, I informed plaintiff that because he has struck out under 28 U.S.C. § 1915(g), he could not obtain indigent status under § 1915 unless his complaint alleged facts from which an inference may be drawn that he is in imminent danger of serious physical injury. I concluded that several of his claims met the imminent danger requirement while others did not. I gave plaintiff a chance to choose whether (1) to proceed with his imminent danger

claims, at which point those claims would be screened but his other claims would be dismissed without prejudice; or (2) pay the $350 filing fee and have the court screen all of his claims. Plaintiff did not respond by the deadline set in the November 5 order but has now filed four documents: (1) a motion for preliminary injunctive relief; (2) a motion for a ruling on the motion for preliminary injunctive relief; (3) a motion for a state "John Doe" criminal hearing; and (4) a motion that I construe as one asking the court to allow him to bring all of his claims under the imminent danger exception of § 1915(g).

Because I have already concluded that some of plaintiff's claims do not meet the imminent danger exception, I will deny plaintiff's motion to bring all of his claims under this exception. Also, because plaintiff has not paid the full $350 filing fee needed to pursue non-imminent danger claims, I will dismiss those claims. After screening plaintiff's remaining claims, I will grant him leave to proceed in forma pauperis on his Eighth Amendment claims against defendants Richard Heidorn, Jeananna Zwiers, William Swiekatowski, Pete Ericksen and William Pollard, but will deny him leave to proceed against defendants James Doyle, Rick Raemisch, Official Keiler, Official Thompson, Official Flumer and Captain Lesatz. Further, I cannot consider plaintiff's motion for preliminary injunctive relief at this time because his submissions do not comply with this court's procedures for such motions, but I will give him another chance to submit materials in support of his motion. Accordingly, I will deny plaintiff's motion for a ruling on his motion for preliminary injunctive relief as unnecessary. Finally, I will deny plaintiff's motion for a state "John Doe" criminal hearing.

In plaintiff's amended complaint, he alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Dwayne Almond is a prisoner at the Green Bay Correctional Institution. He suffers from back injuries and a groin infection, leaving him in constant pain. He has submitted health service requests regarding these ailments but defendants Doctor Richard Heidorn and Jeananna Zwiers are denying him treatment. Defendants William Swiekatowski, a lieutenant, and Pete Ericksen, the security director, are aware of plaintiff's back injuries but chose to take away plaintiff's clothing, mattress and shoes. Defendant Warden William Pollard is aware of plaintiff's conditions but has allowed staff members to take away plaintiff's clothes, mattress and shoes, and has failed to help him or order staff members to take him to the hospital. Also, Pollard has threatened plaintiff by telling him if he keeps "challenging" prison staff, Pollard "doesn't care what happen[s]" to plaintiff. Plaintiff has written to defendants James Doyle and Rick Raemisch but they have not helped him get treatment.

In June and July 2009, defendants "Official Keiler," "Official Thompson" and "Official Flumer" used excessive force by making plaintiff kneel in the shower of his cell despite their awareness that he had medical conditions making kneeling very painful. Also, at some point in the past, defendant Captain Mark Lesatz saw that plaintiff was on the floor of his cell after sustaining a back injury and left him there for three to four days without helping him or alerting medical personnel.

DISCUSSION

In the November 5, 2009 order, I construed plaintiff's amended complaint as containing the following claims: (1) defendants Heidorn and Zwiers are denying him treatment for his back and groin ailments; (2) defendants Doyle and Raemisch have ignored his requests for treatment; (3) defendants Swiekatowski and Ericksen took away his clothing, mattress and shoes; (4) defendant Pollard allowed staff members to take away plaintiff's clothes, mattress and shoes, failed to help him or order staff members to take him to the hospital, and threatened him; (5) defendants Keiler, Thompson and Flumer used excessive force by making plaintiff kneel in the shower of his cell; and (6) defendant Lesatz failed to assist plaintiff when he discovered him on the floor on his cell after he had sustained a back injury. I concluded that the first four claims met the imminent danger requirement of § 1915(g) but the latter two claims did not. Plaintiff has filed a motion that I construe as one asking the court to allow him to bring all of his claims under the imminent danger exception of § 1915(g). However, I have already concluded that his claims against defendants Keiler, Thompson, Flumer and Lesatz do not qualify under the imminent danger exception. Therefore I will deny this motion. Moreover, because plaintiff has not paid the full $350 filing fee in order to pursue these non-imminent danger claims, I will dismiss those claims without prejudice.

From the trust fund account statement plaintiff submitted along with his request for leave to proceed in forma pauperis, I have calculated his initial partial payment to be $1.91. He is to submit a check or money order made payable to the clerk of court in the amount

of $1.91 on or before February 11, 2010. If plaintiff does not have the money to make the initial partial payment in his regular account, he will have to arrange with prison authorities to pay some or all of the assessment from his release account. This does not mean that plaintiff is free to ask prison authorities to pay *all* of his filing fee from his release account. The only amount plaintiff must pay at this time is the $1.91 initial partial payment. Before prison officials take any portion of that amount from plaintiff's release account, they may first take from his regular account whatever amount up to the full amount he owes.

In an ordinary case, I would not screen plaintiff's complaint until I received his initial partial payment. However, because plaintiff's remaining claims contain allegations that he is in imminent danger of serious physical harm, I will not wait until the initial partial payment is made before screening the merits of his case. In doing so under 28 U.S.C. § 1915(e)(2)(B), I must dismiss any claim if it is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Prison officials have a duty under the Eighth Amendment to provide medical care to those being punished by incarceration. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to this need.

Estelle, 429 U.S. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Gutierrez, 111 F.3d at 1371-73, "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer, 511 U.S. 825, 847 (1994).

"Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

(1) Did plaintiff need medical treatment?

(2) Did defendant know that plaintiff needed treatment?

(3) Despite defendant's awareness of the need, did defendant fail to take reasonable measures to provide the necessary treatment?

Plaintiff's first claim is against defendants Heidorn and Zwiers. He alleges that he suffers from back injuries and a groin infection, leaving him in constant pain. He has submitted health service requests regarding these ailments but defendants Heidorn and Zwiers are denying him treatment. Plaintiff has pleaded enough facts to make it possible to infer that his ailments qualify as serious medical needs, that defendants Heidorn and Zwiers are aware that plaintiff needs treatment and that they have failed to provide treatment. Therefore, plaintiff has stated a claim that defendants Heidorn and Zwiers

violated his rights under the Eighth Amendment.

However, plaintiff fails to state a claim against defendants Doyle and Raemisch. Plaintiff alleges that he has written to defendants Doyle, the Wisconsin governor, and Rick Raemisch, the secretary of the state Department of Corrections, but they have not helped him get treatment. These high-level officials are "entitled to relegate to the prison's medical staff the provision of good medical care." Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009). Therefore, I will dismiss defendants Doyle and Raemisch from the case.

Next, plaintiff alleges that defendants Swiekatowski and Ericksen took away his clothing, mattress and shoes even though they were aware of his back problems. Plaintiff provides no explanation for how he was harmed by the loss of his clothing and shoes, but I can reasonably infer from the complaint that Swiekatowski and Ericksen knew about his back injuries and yet chose to remove the mattress even though they knew that doing so would exacerbate plaintiff's back pain. I conclude that plaintiff has stated an Eighth Amendment claim against Swiekatowski and Ericksen.

Finally, defendant Pollard allowed staff members to take away plaintiff's clothes, mattress and shoes, failed to help him or order staff members to take him to the hospital, and threatened him by saying if he keeps "challenging" prison staff, Pollard "doesn't care what happen[s]" to plaintiff. Usually, as with defendants Governor Doyle and Secretary Raemisch, a defendant in Pollard's position as warden is entitled to delegate the medical treatment of prisoners to medical staff, Burks, 555 F.3d at 595, which means a failure to personally intervene does not violate the Eighth Amendment. However, in the present case,

plaintiff seems to be alleging that defendant Pollard has intervened in plaintiff's care, if only to reject his complaints out of personal animosity rather than a desire to delegate these tasks to others. These allegations suggest that defendant Pollard acted with deliberate indifference toward plaintiff, so I conclude that plaintiff states an Eighth Amendment claim against Pollard.

Turning to plaintiff's motion for preliminary injunctive relief, plaintiff has submitted a combined brief and proposed findings of fact, as well as a supplement to this document. I cannot consider plaintiff's motion at this time because plaintiff's submissions do not comply with this court's procedures for obtaining a preliminary injunction. In particular, plaintiff fails to provide enough detail regarding what each defendants did to him to show their deliberate indifference to his medical needs. In his proposed findings of fact, plaintiff should describe what happened to him as if he were telling a story to someone who does not know anything about the case, explaining what each defendant did and when they did it. Also, plaintiff must provide evidence supporting each of his proposed findings of fact; plaintiff has provided some exhibits as supporting evidence, but leaves out other evidence and cites evidence in other cases in this court and the Eastern District of Wisconsin. Plaintiff should attach all the evidence he cites in his proposed findings of fact rather than directing the court to locate it in another case file. I will give plaintiff another chance to submit a brief, proposed findings of fact and evidence in support of his findings of fact. Plaintiff will have until February 11, 2010 to file these materials. Defendants may have until the day their answer is due in which to file a response. I will attach another copy of the

court's procedures for obtaining a preliminary injunction to this order. Plaintiff's motion for a ruling on his motion for preliminary injunctive relief will be denied as unnecessary.

Despite the fact that I have allowed plaintiff to proceed on his claims, I wish to make it clear to him that the bar is significantly higher for prevailing on his motion for a preliminary injunction than it is on his request for leave to proceed. In his proposed findings of fact, plaintiff will have to lay out the facts of his case in detail, identifying the problems he is suffering from, when and how he sought treatment and how defendants responded. Plaintiff will have to show that he has some likelihood of success on the merits of his claim and that he will suffer irreparable harm if the requested relief is denied. If he makes both showings, the court will move on to consider the balance of hardships between plaintiff and defendants and whether an injunction would be in the public interest, considering all four factors under a "sliding scale" approach. See In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997).

Also, I warn plaintiff about the ramifications facing litigants who abuse the imminent danger exception to their three-strike status. The only reason that plaintiff has been allowed to proceed in forma pauperis in this case is that his allegations suggest that he was under imminent danger of serious physical injury at the time that he filed his complaint. The "imminent danger" exception under 28 U.S.C. § 1915(g) is available "for genuine emergencies," where "time is pressing" and "a threat . . . is real and proximate." Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002). In certain cases it may become clear from the preliminary injunction proceedings that a plaintiff who has already received three strikes

under § 1915(g) for bringing frivolous claims has exaggerated or even fabricated the existence of a genuine emergency in order to circumvent the three-strikes bar. In such a case, this court may revoke its grant of leave to proceed in forma pauperis once it is clear that plaintiff was never in imminent danger of serious physical harm. Plaintiff would then be forced to pay the full $350 filing fee or have his case dismissed.

Next, I turn to plaintiff's motion for a state "John Doe" criminal hearing regarding defendants. Plaintiff refers to Wisconsin Statutes § 968.26, under which a judge may initiate a hearing to ascertain whether a crime has been committed based on a private citizen's complaint. However, this state law does not apply to federal courts. Under federal law, "'a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.'" Diamond v. Charles, 476 U.S. 54, 64-65 (1986) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)). Therefore, I will deny plaintiff's motion for a John Doe hearing. If plaintiff wishes to pursue such a hearing, he must petition the state courts.

Finally, I note that plaintiff argues that this court incorrectly denied his earlier motion for appointment of counsel because he had not submitted proof that he contacted three different lawyers who declined to take his case. Plaintiff provided correspondence from lawyers declining to take earlier cases of his, but not this case. If plaintiff wishes to renew his motion for appointment of counsel, he should submit proof showing that three lawyers declined to take this particular case.

ORDER

IT IS ORDERED that

1. Plaintiff Dwayne Almond's motion to allow him to bring all of his claims under the imminent danger exception of § 1915(g), dkt. #25, is DENIED.

2. Plaintiff is GRANTED leave to proceed on his Eighth Amendment claims against defendants Richard Heidorn, Jeananna Zwiers, William Swiekatowski, Pete Ericksen and William Pollard.

3. Plaintiff is DENIED leave to proceed on his claims against defendants James Doyle, Rick Raemisch, Official Keiler, Official Thompson, Official Flumer and Captain Lesatz and those defendants are DISMISSED from the case.

4. Plaintiff may have until February 11, 2010, in which to file a brief, proposed findings of fact and evidentiary materials in support of his motion for a preliminary injunction. Defendants may have until the date their answer is due to file a response.

5. Plaintiff's motion for a ruling on his motion for a preliminary injunction, dkt. #26, is DENIED as unnecessary.

6. Plaintiff's motion for a state "John Doe hearing," dkt. #24, is DENIED.

7. The clerk of court is requested to insure that the court's financial records reflect plaintiff's obligation to pay the filing fee in this case. Plaintiff is assessed $1.91 as an initial partial payment of the $350 fee for filing this case. He is to submit a check or money order made payable to the clerk of court in the amount of $1.91 on or before February 11, 2010. Plaintiff is then obligated to pay the unpaid balance of his filing fee 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 fees have been paid in full.

8. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show 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 he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of their documents.

10. Pursuant to 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 the defendant. 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 for defendant.

Entered this 26th day of January, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge