IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHRISTOPHER McSWAIN,

OPINION AND ORDER

Plaintiff,

09-cv-219-bbc

v.

PAUL SUMNICHT, DALIA SULIENE,
RICK RAEMISCH, MARY GORSKE,
LORI ALSUM, BELINDA SCHRUBBE,
and BRIAN FRANSON,

Defendants.

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In this civil action brought under 42 U.S.C. § 1983, plaintiff Christopher McSwain, a prisoner at the Columbia Correctional Institution in Portage, Wisconsin, alleges that medical staff at the institution are failing to treat him for various ailments. 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. I dismissed plaintiff's original complaint because it failed to give fair notice to defendants as to the claims against them, thus violating Fed. R. Civ. P. 8. Now plaintiff

has filed an amended complaint against defendants Dalia Suliene, Lori Alsum and Brian Franson; he no longer brings claims against Paul Sumnicht, Rick Raemisch, Mary Gorske or Belinda Schrubbe. After screening plaintiff's claims that he is being denied adequate medical care under the Eighth Amendment, I will grant him leave to proceed in forma pauperis on his claim against defendant Suliene but deny him leave to proceed against defendants Alsum and Franson. Further, because plaintiff is alleging that he is in imminent danger of serious physical injury, I will construe his complaint as including a request for preliminary injunctive relief and give the parties an opportunity to brief the motion in accordance with this court's procedures.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Christopher McSwain is a prisoner at the Columbia Correctional Institution in Portage, Wisconsin. Defendants Dalia Suliene, Lori Alsum and Brian Franson are employed at the Columbia Correctional Institution; Suliene is a doctor, Alsum is the health service unit manager and Franson is a unit manager. Plaintiff was previously incarcerated at the Waupun Correctional Institution, where Paul Sumnicht prescribed him medications that caused great harm to his health. Plaintiff was not aware of this until he was later transferred to the Wisconsin Resource Center.

On December 18, 2007, while at the Wisconsin Resource Center, plaintiff fell out of his bed, injuring his knees and legs. He fell out of bed because he was "out of it," as if he had fainted. Plaintiff was taken to the Mercy Medical Center, where staff performed tests and discovered that plaintiff's blood pressure was extremely low. Plaintiff explained what medications he was taking and the doctor there said he would discontinue all of his "toxic medications." However, when plaintiff was transferred back to the Waupun Correctional Institution, the physician there re-prescribed these medications and never examined the medical file from the Mercy Medical Center.

On July 16, 2007, plaintiff was transferred to the Columbia Correctional Institution. Defendant Suliene "started right where physician Sumnicht had left off." Suliene put plaintiff on Gabapentin, which has stopped plaintiff's sex drive and causes pain in his penis and legs. Plaintiff also has a serious fracture in his left leg, his kidneys hurt, urination causes a burning sensation and he is in such constant pain that he cannot sleep in his bed. When plaintiff tells Suliene about these problems, she does nothing about them.

On March 6, 2009, plaintiff filed an "Interview/Information Request" with defendant Alsum, saying that he fell in his cell, hurting his left arm, left leg, and ankle. Alsum responded, stating, "[The request] is inappropriate. Your complaint was addressed through the complaint system."

Plaintiff believes that through their neglect, defendants are "trying to kill [him]

slowly," and are more generally trying to kill all black inmates at the institution.

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.

On at least three or more prior occasions, plaintiff has filed lawsuits or appeals that were dismissed as legally frivolous or because they failed to state a claim upon which relief may be granted. McSwain v. Endicott; 96-C-84-C; (W.D. Wis. Feb. 9, 1996); McSwain v. McCaughtry; 97-C-1129; (E.D. Wis. Aug. 21, 1998); McSwain v. McCaughtry, 97-C-1133; (E.D. Wis. Aug. 21, 1998). Thus, he must prepay the filing fee for this lawsuit 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 plaintiff 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 Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003); Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002)). In

his amended complaint in his case, plaintiff is alleging that (1) defendant Suliene is failing to treat him for various ailments and prescribing him with medications that cause him pain; and (2) defendant Alsum did not properly respond to his complaint.

I conclude that plaintiff's amended complaint meets the imminent danger requirement of 28 U.S.C. § 1915(g). It is well-established that pro se complaints must be liberally construed. Ciarpaglini v. Saini, 352 F.3d at 330. Moreover, I must accept as true plaintiff's claim that he is suffering severe pain as a direct result of the medications he is prescribed and the lack of treatment for other ailments. Given this framework, I am inclined to accept plaintiff's allegation that he has a serious physical injury. Under Ciarpaglini, it is improper to adopt a "complicated set of rules [to discern] what conditions are serious enough" to constitute "serious physical injury" under § 1915(g). Id. at 331. Therefore, plaintiff need not prepay the $350 fee before submitting his claims to the court for consideration. It is appropriate for him to present his claims along with a request for leave to proceed in forma pauperis under 28 U.S.C. §§ 1915, as he has done here.

From the trust fund account statement plaintiff submitted along with his original complaint and request for leave to proceed in forma pauperis, I have calculated his initial partial payment to be $2.03. He is to submit a check or money order made payable to the clerk of court in the amount of $2.03 on or before September 11, 2009. 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 $2.03 initial partial payment. Before prison officials take any portion of that amount from plaintiff's release account, they may first take from plaintiff's 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, this is not an ordinary case. It makes no sense to hold on the one hand that plaintiff's complaint alleges facts from which an inference may be drawn that he faces imminent danger of serious physical injury, but to rule on the other hand that the case cannot move forward until some later date after the initial partial payment is made. Norwood v. Strahota, 08-cv-446 (W.D. Wis. Aug. 11, 2008). When plaintiff's allegations are taken as true as they are required to be, they mandate a swifter response from the court. After all, as the court of appeals has acknowledged, § 1915(g) is just "a simple statutory provision governing when a prisoner must pay the filing fee for his claim." Ciarpaglini, 352 F.3d at 331. Therefore, although I am requiring plaintiff to pay the $2.03 initial partial payment, with the remainder due in monthly installments later, I will not wait until the initial partial payment is made before screening the merits of his case under § 1915(e)(2).

I turn now to the substance of plaintiff's claims. Under the Eighth Amendment, a

prison official may violate a prisoner's right to medical care if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). Plaintiff says that defendants were deliberately indifferent to his serious medical needs in the following ways: (1) defendant Suliene has prescribed medications for him that cause him pain and is failing to treat him for various ailments; and (2) defendant Alsum did not properly respond to his complaint.

A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997). A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes serious pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994).

"Deliberate indifference" means that prison officials know of and disregard an excessive risk to inmate health and safety. Farmer, 511 U.S. at 837. Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996). Thus, disagreement with a doctor's medical judgment, incorrect diagnosis or improper treatment resulting from

negligence is insufficient to state an Eighth Amendment claim. Gutierrez, 111 F.3d at 1374; Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). Instead, "deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole, 94 F.3d at 261-62. Under these standards, therefore, plaintiff's claims have three elements:

(1) Did plaintiff need medical treatment?

(2) Did defendants know that plaintiff needed treatment?

(3) Despite their awareness of the need, did defendants fail to take reasonable measures to provide the necessary treatment?

Plaintiff alleges first that defendant Suliene has prescribed medications that cause him pain and is failing to treat him for various ailments. Even after plaintiff amended his complaint in order to comply with Rule 8, it is somewhat difficult to understand precisely what medical problems plaintiff has and what Suliene has done to treat him. However, he does indicate that he is in severe pain both because of drugs Suliene has prescribed and because she has ignored his complaints. Construing his complaint liberally, it is possible to infer, if only barely, that Suliene was aware that plaintiff was in severe pain yet failed to modify his medications or provide treatment for his other ailments. Thus I conclude that

plaintiff has stated a deliberate indifference claim against Suliene.

As for defendants Alsum and Franson, I conclude that plaintiff fails to state deliberate indifference claims against them. His only allegation against Alsum is that he filed an "Interview/Information Request" with her saying that he fell in his cell, hurting his left arm, left leg, and ankle. Alsum's response stating that his complaint was already addressed through the inmate complaint system indicates that she believed the issue had already been resolved and does not show deliberate indifference on her part. Plaintiff does not include any allegations regarding Franson's role in his lack of medical treatment. Therefore, I will dismiss these defendants from the lawsuit.

Because plaintiff is alleging that he is in imminent danger, I construe his complaint as including a request for preliminary injunctive relief. Under this court's procedures for obtaining a preliminary injunction, a copy of which is attached to this order, plaintiff must file with the court and serve on defendant Suliene a brief supporting his claim, proposed findings of fact and any evidence he has to support his request for relief. He may have until September 11, 2009 to submit these documents. Defendant Suliene may have until the day her answer is due to file a response. If the parties' preliminary injunction submissions raise issues necessitating a hearing, a hearing date on the preliminary injunction motion will be set following receipt of defendant Suliene's response.

Despite the fact that I have allowed plaintiff to proceed on his claim against

defendant Suliene, I wish to make it clear to him that the bar is significantly higher for ultimately prevailing on his claims 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 with precision, identifying what symptoms he is suffering from, when and how he sought treatment, and how defendant Suliene responded. Plaintiff will have to show that he has some likelihood of success on the merits of his claim and that irreparable harm will result 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 defendant Suliene 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).

Finally, 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 because it is clear 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.

ORDER

IT IS ORDERED that:

1. Plaintiff Christopher McSwain's request for leave to proceed in forma pauperis is GRANTED on his claim that defendant Dalia Suliene was deliberately indifferent to plaintiff's serious medical needs.

2. Plaintiff's request for leave to proceed in forma pauperis is DENIED on his claims that defendants Lori Alsum and Brian Franson were deliberately indifferent to plaintiff's serious medical needs. Alsum, Franson, Paul Sumnicht, Rick Raemisch, Mary Gorske and Belinda Schrubbe are DISMISSED from this case. In all future documents filed with the court, the parties should amend the caption to reflect that these defendants are no longer parties to the lawsuit.

3. Plaintiff may have until September 11, 2009, in which to file a brief, proposed findings of fact and evidentiary materials in support of his motion for a preliminary injunction. Defendant Suliene may have until the date her answer is due to file a response.

4. For the remainder of this lawsuit, plaintiff must send defendant Suliene a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendant Suliene, he should serve the lawyer directly rather than Suliene. The court will disregard any documents submitted by plaintiff unless he shows on the court's copy that he has sent a copy to defendant Suliene or her attorney.

5. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. 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 $2.03 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 $2.03 on or before September 11, 2009. 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). This court will notify the warden at the Columbia Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's amended complaint and this order are being sent today to the Attorney General for service on the state defendant. Although defendants normally have 40

days under this agreement to file an answer, in light of the urgency of plaintiff's allegations, I would expect that every effort will be made to file the answer in advance of that deadline.

Entered this 19th day of August, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PROCEDURE TO BE FOLLOWED ON MOTIONS FOR INJUNCTIVE RELIEF

NOTE WELL: **It is the duty of the parties to present to the court, in the manner required by this procedure, all facts and law necessary to the just, speedy and inexpensive determination of this matter. The court is not obliged to search the record for facts or to research the law when deciding a motion for injunctive relief.**

I. NOTICE

A. It is the movant's obligation to provide **actual** and **immediate** notice to the opposing party of the filing of the motion and of the date set for a hearing, if any.

B. The movant must serve the opposing party **promptly** with copies of all materials filed.

C. Failure to comply with provisions A and B may result in denial of the motion for this reasons alone.

II. MOVANT'S OBLIGATIONS

A. It is the movant's obligation to establish the factual basis for a grant of relief.

1. In establishing the factual basis necessary for a grant of the motion, the movant must file and serve:

   (a) A stipulation of those facts to which the parties agree; or

   (b) A statement of record facts proposed by the movant; or

   (c) A statement of those facts movant intends to prove at an evidentiary hearing; or

   (d) Any combination of (a), (b) and (c).

2. Whether the movant elects a stipulation or a statement of proposed facts, it is the movant's obligation to present a precisely tailored set of factual propositions that movant considers necessary to a decision in the movant's favor.[1]

[1] These factual propositions must include all basic facts necessary to a decision on the motion, including the basis for this court's jurisdiction, the identity of the parties and the background of the

(a) The movant must set forth each factual proposition in its own separately numbered paragraph.

(b) In each numbered paragraph the movant shall set cite with precision to the source of that proposition, such as pleadings,[2] affidavits,[3] exhibits, deposition transcripts, or a detailed proffer of testimony that will be presented at an evidentiary hearing.

B. The movant must file and serve all materials specified in II. A with the movant's supporting brief.

D. If, the court concludes that the movant's submissions do not comply substantially with these procedures, then the court, at its sole discretion, may deny summarily the motion for injunctive relief, cancel any hearing on the motion, or postpone the hearing.

III. RESPONDENT'S OBLIGATIONS

A. When a motion and supporting materials and brief have been filed and served in compliance with Section II, above, the opposing respondent(s) shall file and serve the following:

1. Any affidavits or other documentary evidence that the respondent chooses to file and serve in opposition to the motion.

2. A response to the movant's statement of proposed findings of fact, with the respondent's paragraph numbers corresponding to the movant's paragraph numbers.

(a) With respect to each numbered paragraph of the movant's proposed findings of fact, each respondent shall state clearly whether the proposed finding is not disputed, disputed, or disputed in part. If disputed in part, then the response shall identify

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parties' dispute. The movant should not include facts unnecessary to deciding the motion for injunctive relief.

[2] The pleadings, however, are not evidence. Therefore, the movant may use the pleadings as a source of facts *only if* all parties to the hearing stipulate to these facts on the record.

[3] Affidavits must be made on personal knowledge setting forth facts that would be admissible in evidence, including any facts necessary to establish admissibility.

precisely which part is disputed.

(b) For each paragraph disputed in whole or in part, the response shall cite with precision to the evidentiary matter in the record or to the testimony to be presented at the hearing that respondent contends will refute this factual proposition.

B. The response, in the form required by III A., above, shall be filed and served together with a brief in opposition to the motion for injunctive relief no later than the date set by the court in a separately issued briefing schedule.

C. There shall be no reply by the movant.

IV. HEARING

If the court determines that a hearing is necessary to take evidence and hear arguments it shall notify the parties promptly. It is each party's responsibility to ensure the attendance of its witnesses at any hearing.

11/24/2008