

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

ROGER DALE GODWIN,

Plaintiff,

v.

NANCEY TIDQUIST, TAMMY MAASSEN,
DR. ADLER, RANDALL HEPP, JODI DOUGHERTY,
HOLLY A. GUNDERSON, RICK RAEMISCH,
LIBRARIAN FLIEGER,

Defendants.

ORDER

10-cv-573-bbc

Plaintiff Roger Dale Godwin, a prisoner at the Jackson Correctional Institution, has filed a proposed complaint and a request for leave to proceed in forma pauperis. In a November 30, 2010 order, I noted that plaintiff could not proceed in the same case with both his Eighth Amendment medical care claims and his access to the courts claim for two reasons: (1) Fed. R. Civ. P. 20 prohibits him from combining the claims; and (2) he has struck out under 28 U.S.C. § 1915(g), and his access to the courts claim does not qualify for the imminent danger exception to the in forma pauperis statute. I told plaintiff that he would have to explain how he wishes to proceed with the case given these problems.

Now plaintiff has responded, stating that he wishes to voluntarily dismiss his access to the courts claim against defendant Flieger and pursue his medical care claims against the remaining defendants. Because I concluded in the November 30, 2010 order that these claims qualify under the imminent danger exception to § 1915(g), I will screen the claims.

After considering plaintiff's allegations, I will grant plaintiff leave to proceed on his claims against defendants. 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.

I draw the following facts from plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff Roger Dale Godwin has a serious skin condition that causes him pain, dry skin, "burning all over [his] body" and gives him rashes. When he goes outside or gets in or out of the shower, "it feels like someone has put a million buckets of fire ants on [him]" and he breaks out in a rash. Plaintiff was transferred from the Waupun Correctional Institution to the Jackson Correctional Institution in April 2010. Upon his arrival, defendant Dr. Adler "started to take away" his medications that help him with his dry skin and burning. (It is unclear precisely what plaintiff means by this but he states that the Health Services Unit has failed to refill medications or lotions he had been receiving.) Adler continues to pursue a course of treatment for plaintiff's conditions that does not work.

Plaintiff was seen by defendant nurse practitioner Nancey Tidquist, but she did not examine his skin problems and took away medications that had been ordered by another nurse. Now plaintiff suffers from these skin problems and is getting only eight hours of sleep a week. Plaintiff has complained to defendants Health Services Unit supervisor Tammy Maasen and Warden Randall Hepp, but they did not respond. Plaintiff filed an inmate complaint that was dismissed “with bias” by defendants Holly Gunderson and Jodi Dougherty. Plaintiff appealed all the way to defendant Secretary Rick Raemisch, who dismissed his appeal.

DISCUSSION

A. Initial Partial Payment

In determining whether a prisoner litigant qualifies for indigent status, this court applies the formula set forth in 28 U.S.C. § 1915(b)(1). According to this formula, a prisoner requesting leave to proceed in forma pauperis must prepay 20% of the greater of the average monthly balance or the average monthly deposits made to his prison account in the six-month period immediately preceding the filing of the complaint.

In this case, 20% of the average monthly balance in his account is \$0.08, but 20% of the average monthly deposits is \$2.68. Because the greater of the two amounts is 20% of the average monthly deposits, or \$2.68, that is the amount that plaintiff will be assessed as an initial partial payment of the filing fee.

If plaintiff does not have the money in his regular account to make the initial partial

payment, 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 \$2.68 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 plaintiff owes. Plaintiff should show a copy of this order to prison officials to insure that they are aware they should send plaintiff's initial partial payment to this court.

Usually, the court would wait for plaintiff to submit his initial partial payment before screening his complaint. However, this is not a normal case. It makes no sense to hold on one hand that plaintiff's complaint alleges facts from which an inference may be drawn that he faces a real and proximate threat of danger, but to rule on the other hand that the case cannot move forward. Norwood v. Strahota, 08-cv-446 (W.D. Wis. Aug. 11, 2008). Plaintiff's allegations 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 submit the required initial partial payment, with the remainder due in monthly installments later, I will proceed to screen the merits of his case under § 1915(e)(2).

B. Screening Plaintiff's Claims

In screening plaintiff's claims, the court must construe the complaint liberally. Erickson v. Pardus, 551 U.S. 89, 94 (2007). However, I must dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B).

I understand plaintiff to be bringing claims that defendants violated his right to medical care under the Eighth Amendment by failing to provide him with adequate treatment for his serious skin condition. A prison official may violate this right if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). 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. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life threatening. Id. 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 significant 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 the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures to provide it. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Plaintiff alleges that he suffers from a severe skin condition causing him pain, “burning” and rashes, and that defendants have failed to provide him with adequate treatment and denied his complaints about it. These allegations are sufficient to state claims upon which relief may be granted.

C. Preliminary Injunctive Relief

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 defendants a brief supporting his claim, proposed findings of fact and any evidence he has to support his request for relief. He may have until February 1, 2011 to submit these documents. Defendants may have until the day their answer is due in which to file a response. I will review the parties’ preliminary injunction submissions before deciding whether a hearing will be necessary.

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 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 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 claims 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 defendants and whether an injunction would be in the public interest, considering all four factors under a “sliding scale” approach. 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 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.

ORDER

IT IS ORDERED that

1. Plaintiff is GRANTED leave to proceed on Eighth Amendment deliberate indifference claims against defendants Dr. Adler, Nancey Tidquist, Tammy Maasen, Randall Hepp, Holly Gunderson, Jodi Dougherty and Rick Raemisch.

2. Plaintiff's notice of voluntarily dismissal of his access to the courts claim against defendant Flieger is ACCEPTED, and that claim is DISMISSED without prejudice to plaintiff's filing it in a new case at a later date. Defendant Flieger is DISMISSED from this lawsuit.

3. Plaintiff may have until February 1, 2011, 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.

4. Plaintiff is assessed \$2.68 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 \$2.68 on or before February 1, 2011. If, by February 1, 2011, plaintiff fails to make the initial partial payment or show cause for his failure to do so, he will be held to have withdrawn this action voluntarily.

5. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The

court will disregard any documents submitted by plaintiff unless he shows on the court's copy that he has sent a copy to defendants or their attorney.

6. 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.

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 defendants. Although it is usual for defendants to 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 11th day of January, 2011.

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