IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

LLOYD T. SCHUENKE,

Plaintiff,

ORDER

v.

10-cv-788-bbc

WISCONSIN DEPARTMENT OF CORRECTIONS,
RICK RAEMISCH, MICHAEL THURMER,
JOHN DOES and JANE DOES,

Defendants.

- -

Plaintiff Lloyd Schuenke, a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin, has submitted a proposed complaint alleging that the air quality in his cell triggers his severe asthma, forces him to use his asthma medications excessively and causes other health problems. In his complaint he includes a motion for preliminary injunctive relief. In addition, plaintiff has filed another motion for preliminary injunctive relief, stating that he is being threatened by his cellmate.

Plaintiff seeks leave to proceed with his complaint in forma pauperis and has paid his $6.35 initial partial payment as assessed by the court. However, because plaintiff has struck

out under 28 U.S.C. § 1915(g), he cannot obtain indigent status under § 1915 unless his complaint alleges facts from which an inference may be drawn that he is in imminent danger of serious physical injury. After considering plaintiff's submissions, I conclude that plaintiff may proceed with conditions of confinement claims against defendants.

I draw the following facts from plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff Lloyd Schuenke is a prisoner at the Waupun Correctional Institution. Defendant Rick Raemisch is Secretary of the Wisconsin Department of Corrections. Defendant Michael Thurmer is Warden of the Waupun prison. Plaintiff includes all male and female correctional officers and staff members at the Waupun prison as John and Jane Doe defendants.

Plaintiff, who suffers from asthma, has transferred to the Waupun Correctional Institution on July 14, 2009. Since then, plaintiff has been forced to live in "oxygen-deprived cells which have absolutely no clean fresh oxygen circulation, cooling, exchange, exhaust, heating, ventilation system attached to them" even though "the ports to attach such a system" exist in every cell. The poor air quality forces plaintiff to use his asthma inhalers excessively. He experiences bouts of chest pain, coughing, shortness of breath, lightheadedness, wheezing, dizziness, headaches and shakes. Defendants deliberately place

plaintiff in these cells.

DISCUSSION

A. Imminent Danger

Because plaintiff has not submitted payment of the $350 filing fee for this case, I construe his complaint as including a motion for leave to proceed in forma pauperis under 28 U.S.C. § 1915. However, as stated above, plaintiff has struck out under 28 U.S.C. § 1915(g). This provision states as follows:

> 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 prior occasions, plaintiff has been denied leave to proceed in forma pauperis in lawsuits that were legally frivolous. Schuenke v. Wisconsin Dept. of Corrections, 96-C-748 (W.D. Wis. Sept. 30, 1996); Schuenke v. County of Milwaukee, 97-C-46 (W.D. Wis. Jan. 30, 1997); and Schuenke v. Wisconsin Dept. of Corrections, 98-C-95 (W.D. Wis. Mar. 23, 1998). Plaintiff remains struck out even following the November 2, 2010 opinion in Turley v. Gaetz, 09-3847, 2010 WL 4286368, in which the Court of Appeals for the Seventh Circuit held that "a strike is incurred under § 1915(g) when an inmate's case is dismissed in its entirety based on the grounds listed in § 1915(g)," rather than when only

one claim out of several is dismissed under § 1915(g). Each of the cases in which plaintiff received a strike was dismissed in its entirety.

To meet the imminent danger requirement of 28 U.S.C. § 1915(g), a prisoner must allege a physical injury that is imminent or occurring at the time the complaint is filed and show that the threat or prison condition causing the physical injury is 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 complaint, plaintiff alleges that he is being forced to live in cells with such poor air quality that he suffers from chest pain, coughing, shortness of breath, lightheadedness, wheezing, dizziness, headaches, and shakes, despite having inhalers to treat his asthma.

In considering whether plaintiff's complaint meets the imminent danger requirement of § 1915(g), a court must follow the well established proposition that pro se complaints must be liberally construed. Ciarpaglini, 352 F.3d at 330. Further, 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.

Given this framework, I conclude that plaintiff's allegations qualify under the imminent danger standard, if only barely. Although plaintiff receives medication for his asthma, he alleges that it does not ward off the many maladies from which he is suffering. Therefore, plaintiff may proceed without prepayment of the $350 filing fee. I will proceed

to screen his claims.

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).

As an initial matter, plaintiff's federal claims under 42 U.S.C. § 1983 cannot be asserted against defendant Wisconsin Department of Corrections. 42 U.S.C. § 1983 authorizes actions against any "person" that violates the constitutional rights of another. Neither states nor state agencies are "persons" that can be sued under § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 64 (1989); Ryan v. Illinois Department of Children and Family Services, 185 F.3d 751, 758 (7th Cir. 1999). However, the other named defendants in this case are prison personnel and "persons" that can be sued under § 1983.

I understand plaintiff to be bringing an Eighth Amendment conditions of confinement claim regarding the air quality in his cell. The Eighth Amendment requires the government to "provide humane conditions of confinement; prison officials must ensure that inmates

receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of inmates.'" Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)). Conditions of confinement that "involve the wanton and unnecessary infliction of pain," deny a prisoner "the minimal civilized measure of life's necessities" or are "grossly disproportionate to the severity of the crime warranting imprisonment" are unconstitutional, Rhodes v. Chapman, 452 U.S. 337, 347 (1981), as are conditions that expose a prisoner to a substantial risk of serious harm, Farmer, 511 U.S. at 847.

A conditions of confinement claim under the Eighth Amendment requires that plaintiff's allegations about the conditions satisfy a test that involves both a subjective and objective component. Farmer, 511 U.S. at 834. The objective component focuses on "whether the conditions at issue were sufficiently serious so that a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities." Townsend v. Fuchs, 522 F.3d 765, 773 (7th Cir. 2008) (internal quotations omitted). The subjective component focuses on "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994).

In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." Farmer, 511 U.S. at 834. Deliberate indifference

"implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)). To meet this component, "it is not enough for the inmate to show that the official acted negligently or that he or she should have known about the risk." Townsend, 522 F.3d at 773. Rather, "the inmate must show that the official received information from which the inference could be drawn that a substantial risk existed, and that the official actually drew the inference." Id.

After considering plaintiff's allegations, I conclude that he states a claim against defendants concerning the air quality in his cells. See Vasquez v. Frank, 209 Fed. Appx. 538, 541 (7th Cir. 2006) (plaintiff stated claim regarding poor ventilation in cell, causing adverse effects from stagnant air and excessive heat). Construing his allegations liberally, I conclude that his allegations that defendants intentionally put him in cells with bad air quality shows that they were deliberately indifferent to his safety. At summary judgment or trial, plaintiff will have to show that individual defendants were aware of the health risks posed to plaintiff but housed him in those cells anyway.

C. Preliminary Injunctive Relief

Plaintiff's complaint includes 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 21, 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 and explaining how defendants were aware about the poor air quality and the symptoms he is experiencing. 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 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.

D. Request for Single Cell

In addition, plaintiff has filed another motion for preliminary injunctive relief, stating that he is being threatened by his cellmate. Plaintiff requests to be put into a single cell for his safety. I must deny this motion because it is unrelated to the allegations contained in plaintiff's complaint. If plaintiff believes that an official's failure to protect him from his cellmates violated his constitutional rights, he will have to file a new and separate lawsuit raising that claim against the individual he believes is responsible for the alleged

unconstitutional act.

ORDER

IT IS ORDERED that

1. Plaintiff Lloyd Schuenke is GRANTED leave to proceed on Eighth Amendment conditions of confinement claims against defendants Rick Raemisch, Michael Thurmer and John and Jane Doe prison staff members.

2. Plaintiff is DENIED leave to proceed on his claim against defendant Wisconsin Department of Corrections. Wisconsin Department of Corrections is dismissed from the lawsuit.

3. Plaintiff may have until February 21, 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 materials in response.

4. Plaintiff's motion for a preliminary injunction placing him in a single cell, dkt. #5, is DENIED.

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 31st day of January, 2011.

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