

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

RODOSVALDO C. POZO,

Plaintiff,

v.

PETER HUIBREGTSE, SGT. RICHARD MATTY,
ROBERT HABLE and HEALTH SERV.
ADMINISTRATOR,¹

Defendants.

OPINION and ORDER

11-cv-56-bbc

Plaintiff Rodosvaldo Pozo, a prisoner at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin, is proceeding on a claim that defendant prison officials have subjected him to severely cold conditions in his cell and taken away his warm clothing, in violation of the Eighth Amendment. Now before the court is plaintiff's motion for preliminary injunctive relief. Also, plaintiff has filed several other motions, including a motion for reconsideration of his "three strike" status, two motions for appointment of counsel and two motions to stop defendants' interference with his prosecution of the case.

¹ I have amended the complaint to include defendants' full names, as provided by counsel for defendants.

After considering the documents submitted by the parties, I will stay resolution of the motion for preliminary injunctive relief pending supplemental briefing by the parties. I will deny the rest of plaintiff's motions.

OPINION

A. Doe Defendants

As an initial matter, I note that plaintiff was granted leave to proceed against a "John Doe" health services administrator. Defendants have filed their notice of appearance, in which they state that Mary Miller is the name of the health services administrator. Plaintiff will have until June 21, 2011 to inform the court and defendants whether he agrees that Miller is the appropriate defendant to add to the caption. If Miller is not the correct defendant, plaintiff should include information about the Doe defendant, such as the dates and time he or she was on duty, to help defendants ascertain the identity of the Doe defendant.

Also, in his proposed findings of fact in support of his motion for preliminary injunctive relief, plaintiff seems to add more John or Jane Doe defendants. Because plaintiff was allowed leave to proceed only against the Doe health services administrator, he cannot add new Doe defendants without amending his complaint to include allegations about the new defendants, and then filing a motion for leave to amend his complaint in this court.

B. Motion for Reconsideration of Three-Strike Status

In the March 28, 2011 order granting plaintiff leave to proceed on his conditions of confinement claim, I discussed whether plaintiff was barred from proceeding in forma pauperis under 28 U.S.C. § 1915(g). I noted that plaintiff was previously assessed strikes in three cases, Pozo v. Huibregtse, 07-cv-597-jcs (W.D. Wis. Nov. 19, 2007); Pozo v. Sawinski, 06-cv-206-jcs (W.D. Wis. May 4, 2006); and Hashim a/k/a Tiggs v. Berge, 01-cv-314-bbc (W.D. Wis. Sept. 24, 2001), because at least one claim in each of those cases was dismissed as legally frivolous. However, I concluded that none of these cases should now count as strikes under Turley v. Gaetz, 625 F.3d 1005, 1012 (7th Cir. 2010), because at least one claim in each of those cases survived initial screening. Nevertheless, I concluded that plaintiff had struck out because he had filed three other cases that were dismissed in their entirety on the grounds listed in § 1915(g). Pozo v. La Crosse County, 95-cv-542-jcs (W.D. Wis. July 31, 1995); Pozo v. Parlaw, 92-cv-284-jcs (W.D. Wis. Apr. 17, 1992); Pozo v. Horne, 92-cv-283-jcs (W.D. Wis. Apr. 17, 1992).

Now plaintiff has filed a motion for reconsideration of that portion of the March 28 order, claiming that he did not file these three cases and, in fact, that the cases “never took place.” Unfortunately for plaintiff, this claim is not borne out by the record. Examination of court records confirms the existence of the three cases in which plaintiff received strikes. Plaintiff’s statement that he did not file the cases leads to the question whether this is a case

of mistaken identity. In the present case, plaintiff states that his name is “Rodosvaldo C. Pozo,” while the name of the plaintiff in case nos. 92-cv-283-jcs and 92-cv-284-jcs is “Rodobaldo C. Pozo” and the name of the plaintiff in case no. 95-cv-542-jcs is “Rodosbaldo C. Pozo.” However, these spelling discrepancies do not show conclusively that there are three separate Pozos. The trust fund account statement submitted by plaintiff in the present case gives plaintiff’s first name as “Rodobaldo” and it indicates that plaintiff is still in the process of paying off the filing fee in case no. 95-cv-542-jcs. Thus it seems that these discrepant spellings belong to the same person. Moreover, the handwriting in each of the complaints in the four cases at issue is so similar that it is virtually certain that they were produced by the same person. Accordingly, I conclude that plaintiff is the person who filed those three cases, and I will deny plaintiff’s motion for reconsideration.

In an effort to make sure that plaintiff is fully aware of the cases in which he received strikes, I will send him a copy of each of the complaints in those cases. I note that, at best, plaintiff is mistaken about his previous litigation and, at worst, misleading the court about it. The next time plaintiff wishes to file a lawsuit seeking leave to proceed in forma pauperis, he remains free to challenge his three-strike status. However, he is warned that should he continue to question the existence of these cases or authorship of those complaints, this court will have to conduct further inquiry. If I am satisfied that plaintiff is lying about his previous litigation, he will be subject to sanctions, which could include dismissal of his

pending lawsuits, fines and further restrictions on his ability to file cases in this court.

C. Motion for Preliminary Injunctive Relief

Plaintiff has filed a motion for preliminary injunctive relief, which the parties have now briefed. However, the materials submitted by the parties raise two issues that need to be resolved before I will rule on the motion.

First, plaintiff struggled to comply with this court's procedures on briefing motions for injunctions. His formal proposed findings of fact are generally not supported by admissible evidence. The biggest problem is that most of plaintiff's proposed findings have to do with his personal experiences, but he does not provide an affidavit in which he swears under penalty of perjury that his statements are true. Therefore, I will give plaintiff a chance to submit supplemental proposed findings of fact and supporting materials (such as an affidavit sworn to by plaintiff) that comply with this court's procedures. Plaintiff will have until June 21, 2011 to submit these materials. Defendants will have until July 1 to file a response, although they will not be required to provide new responses to proposed findings of fact that they have already responded to in their original submission.

In submitting supplemental materials, the parties should address an issue that their current submissions make somewhat puzzling. Defendants submit evidence indicating that beginning in December 13, 2010 at the latest, the unit where plaintiff is housed was

controlled by a heating system that maintains a temperature of 72 degrees. Temperature logs updated every hour seem to show that the unit fluctuated between 71 and 75 degrees from December 13, 2010 to April 6, 2011. Yet, at the same time, the parties argue at length about thermal clothes, blankets and whether inmates may wear their winter coats in their cells or common areas. This raises the obvious question why an inmate would ever have to wear cold weather clothing indoors when it is 71-75 degrees. Even recognizing that every person has a different idea of a comfortable indoor temperature, it would be useful for the parties to explain whether inmates routinely wear thermal clothing or winter coats inside, and whether that calls into question the usefulness and accuracy of the temperature data provided by defendants.

Also, defendants raise the argument that plaintiff has not properly exhausted his administrative remedies on his claim. In particular, they state that plaintiff's only grievance about being provided adequate clothes for the cold, no. WSPF-2010-26652, was not exhausted until March 8, 2011, well after plaintiff filed his complaint. If this is so, I may be required to dismiss the case. Accordingly, in providing supplemental materials on the motion for preliminary injunctive relief, plaintiff should address the questions whether he exhausted his administrative remedies before he filed the complaint, whether he was prevented from doing so or whether he simply overlooked the requirement. In responding, plaintiff should include any relevant grievance materials that have not already been submitted by defendants.

D. Motions for Appointment of Counsel

Plaintiff has filed two motions for appointment of counsel. In determining whether to appoint counsel, I must find first that plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070, 1073 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers whom he asked to represent him in this case and who turned him down. Plaintiff has submitted two letters from lawyers who turned him down, as well as several letters to lawyers that have not been answered, so I conclude that he has met this prerequisite.

Next, plaintiff must show that this case is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. Pruitt v. Mote, 503 F.3d 647, 654, 655 (7th Cir. 2007). At this point, plaintiff has not shown that this case is beyond his capabilities. Accordingly, I will deny plaintiff's motions without prejudice to his filing one again at a later date.

E. Motions to Stop Interference with Lawsuit

Plaintiff has filed two motions in which he alleges that defendants are interfering with

his ability to prosecute the case by withholding documents and delaying in making copies for him. Plaintiff has been able to file a significant number of documents already in this case, so this does not seem to be a problem at this point. Also, plaintiff should keep in mind that he will be able to conduct discovery in this case, which will enable him to request information from defendants under the court's authority. Accordingly, I will deny plaintiff's motions without prejudice. If plaintiff continues to experience problems such as significant delays in receiving copies, he is free to file a motion at a later time.

ORDER

IT IS ORDERED that

1. Plaintiff Rodosvaldo Pozo will have until June 21, 2011 to respond to defendants' identification of Mary Miller as defendant Doe health services administrator.
2. Plaintiff's motion for reconsideration of the portion of the March 28, 2011 order confirming his three-strike status, dkt. #10, is DENIED.
3. A ruling on plaintiff's motion for preliminary injunctive relief is STAYED pending supplemental briefing by the parties. Plaintiff will have until June 21, 2011 to submit supplemental proposed findings of fact and supporting materials regarding the issues raised in the opinion above, including defendants' argument that plaintiff has failed to exhaust his administrative remedies. Defendants will have until July 1, 2011 to submit their response.

4. Plaintiff's motions for appointment of counsel, dkt. ##11 & 28, are DENIED.

5. Plaintiff's motions to stop interference with his prosecution of the case, dkt. ##16 & 28, are DENIED.

Entered this 7th day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge