IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DWAYNE ALMOND,

Plaintiff, OPINION and ORDER

v. 12-cv-259-bbc

WARDEN MICHAEL BAENEN,
DR. RICHARD HEIDORN M.D.,
JEANANNE ZWIERS, JEAN LUTSEY R.N..
WARDEN WILLIAM POLLARD,
DR. SUMINICHT, M.D.,
SUPERVISOR R.N. SCHRUBBE,
R.N. AMY SCHRAUFNGED, R.N. S. JACKSON,
ANGLIA KROLL (ICE -PA),
SUPERVISOR ICE ("JOHN DOE"),
DR. DAVID BURNETT, B.H.S. MEDICAL. D.,
DR. SCOTT HOFTIEZER, B.H.S. A.M.D.,
MR. JIM GREER, B.H.S. DIRECTOR,
MS. MARY MUSE, B.H.S. DIRECTOR OF NURSING,
MONICA-BURKERT-BRIST, ATTORNEY GENERAL,
CRYSTAL A. BANSE, ATTORNEY GENERAL,
J.B. VAN HOLLEN, and OFFICIAL JONES,

Defendants.

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In a July 3, 2012 order, I reviewed four pending complaints filed by plaintiff Dwayne Almond, an inmate at the Waupun Correctional Institution. All of the complaints focused on the lack of treatment provided him for his back and abdominal maladies. I concluded that there was no reason to allow him to proceed in four separate cases when one would suffice, closed three of the cases and directed plaintiff to file a proposed amended complaint

in the above-captioned case combining all of his allegations regarding his back and abdominal problems. Plaintiff has now submitted his amended complaint, which I construe as including a request for preliminary injunctive relief.

Plaintiff has struck out under 28 U.S.C. § 1915(g) because on three different occasions, he has filed lawsuits that were dismissed as dismissed as frivolous. This means that he cannot obtain indigent status under § 1915 in any suit he files during the period of his incarceration unless he alleges facts in his complaint from which an inference may be drawn that he is in imminent danger of serious physical injury.

After considering plaintiff's allegations, I will allow him to proceed on deliberate indifference claims against defendants Dr. Sumnicht, Amy Schraufnged, Official Jones, Nurse S. Jackson, David Burnett, Scott Hoftiezer, Jim Greer, Mary Muse, Warden William Pollard, Angela Kroll and Charles Cole, but dismiss the rest of his claims. Also, I will set briefing on plaintiff's motion for preliminary injunctive relief.

I draw the following facts from plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff Dwayne Almond is a prisoner incarcerated at the Waupun Correctional Institution, but previously he was incarcerated at the Green Bay Correctional Institution. Plaintiff suffers from lower back and abdominal ailments, such as lower back pain, lower abdominal pain and swelling. He believes he has a "lower abdomen infection."

On February 19, 2010, defendant Richard Heidorn, a physician at the Green Bay

prison, examined plaintiff and found "questionable" lower back pain. Heidorn ordered further tests, including x-rays, around February 25, 2010. The results showed a "minimal amount of air in [plaintiff's] small bowel." Despite these results, defendants Heidorn, Jeananne Zwiers and Nurse Jean Lutsey denied plaintiff treatment at the Green Bay prison. Defendant Warden Michael Baenen knew about plaintiff's health problems but did not intervene.

Plaintiff was transferred to the Waupun Correctional Institution December 2, 2011. At the Waupun prison, plaintiff was seen by defendant Dr. Sumnicht and made aware of his health problems. Sumnicht ordered blood tests in December 2011 and an occult blood test was positive. However, Sumnicht did not give plaintiff any treatment or prescribe any pain medication.

On December 2, 2011, while using the toilet in his segregation cell, plaintiff saw blood coming out of his penis and rectum. Plaintiff showed defendant "Official" Jones the blood but did not receive treatment. Plaintiff then submitted a health service request. Defendant Nurse S. Jackson received plaintiff's health service request. (Plaintiff does not explain how Jackson responded to the complaint other than to say that he continued to be deprived of medical care.)

On December 5, 2011, defendant Nurse Amy Schraufnged performed rounds in the Waupun prison's segregation unit. Plaintiff told her about his back and abdominal ailments and how he had started bleeding. Schraufnged said that there was nothing she could do for him and that he should file a health service request.

Also on December 5, 2011, plaintiff filed an inmate grievance about the lack of treatment. Defendant Angela Kroll returned the complaint, stating that he would have to first attempt to resolve the issue by contacting defendant Health Services Manager Schrubbe.

Plaintiff appealed his inmate grievance to defendant Welcome Rose, and then to defendant Deputy Secretary Charles Cole. Cole responded by extending the deadline for his response because of a backlog of prisoner grievances. Rose recommended dismissal of the grievance and Cole accepted that recommendation on April 4, 2012.

On December 8, 2011, plaintiff wrote to defendants Dr. David Burnett, Dr. Scott Hoftiezer, Jim Greer and Mary Muse, all of whom are upper-level staff in the Department of Corrections Bureau of Health Services, explaining his medical problems and the lack of treatment he received. They did not respond. Plaintiff wrote also to defendant Warden William Pollard but Pollard did not take action to help plaintiff.

Defendants J.B. Van Hollen, Monica Burkert-Brist and Crystal Banse are aware of plaintiff's health problems from their representation of defendants and have lied to the court about plaintiff's exhaustion of administrative remedies in previous cases, which has prevented plaintiff from receiving treatment.

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 reads 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 brought actions that were dismissed because they were frivolous, malicious or failed to state a claim upon which relief may be granted. Almond v. State of Wisconsin, 06-C-447-C, decided August 23, 2006; Almond v. State of Wisconsin, 06-C-448-C, decided August 23, 2006; and Almond v. State of Wisconsin, 06-C-449-C, decided August 24, 2006. Therefore, he cannot proceed in this case unless I find that he has alleged that he is in imminent danger of serious physical injury.

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 denied treatment for back and abdominal pain and bleeding from the penis and rectum.

These allegations are sufficient as they pertain to plaintiff's current course of treatment at the Waupun Correctional Institution. However, plaintiff's claims against staff

at the Green Bay Correctional Institution are claims of past harm and cannot be brought in forma pauperis under the imminent danger exception to § 1915(g). Accordingly, I will dismiss plaintiff's claims against defendants Heidorn, Zwiers, Lutsey and Baenen without prejudice to plaintiff's bringing them in a new case as a paying litigant.

B. Initial Partial Payment

Although I conclude that plaintiff qualifies to proceed in forma pauperis under the imminent danger exception to 28 U.S.C. § 1915(g), plaintiff must still make an initial partial payment of the filing fee. In addition, plaintiff will have to pay the remainder of the fee in installments of 20% of the preceding month's income in accordance with 28 U.S.C. § 1915(b)(2).

The initial partial payment is calculated by using the method established in § 1915 by figuring 20% of the greater of the average monthly balance or the average monthly deposits to the plaintiff's trust fund account statement. From the trust fund account statement that plaintiff submitted in his previous case, I calculate his initial partial payment to be $0.65. 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 $0.65 initial partial payment. Plaintiff should show a copy of this order to prison officials to insure that they are aware that 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, because plaintiff alleges that he is imminent danger of serious physical harm, I will proceed to screen his complaint immediately. Plaintiff is still required to submit the $0.65 initial partial payment or the court will consider closing the case for plaintiff's failure to comply with 28 U.S.C. § 1915.

C. 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 treatment for his back and abdominal ailments and bleeding from the penis and rectum. 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 met with defendant Dr. Sumnicht, who was aware of plaintiff's health problems but failed to provide him with further treatment even after an occult blood test was positive. These allegations are sufficient to state a deliberate indifference claim against Sumnicht.

Plaintiff alleges that defendant Nurse Schraufnged told him that there was nothing she could do to help his ailments and that he should file a health services request. It is possible that this was all Schraufnged could have done and that the proper course of action was to refer plaintiff to the formal request system. However, giving plaintiff the benefit of all inferences to which he is entitled as a pro se plaintiff at the screening stage, I conclude that his allegations state a deliberate indifference claim; it is possible that a nurse performing rounds could have taken direct action to assist plaintiff, such as providing him with pain medication or setting up a later appointment herself. Similarly, I conclude that plaintiff may proceed on claims against defendants Official Jones and Nurse Jackson for failing to take action to help plaintiff after he made them aware of his medical problems.

Plaintiff alleges that defendants David Burnett, Scott Hoftiezer, Jim Greer and Mary Muse, all high-level Bureau of Health Services officials, ignored plaintiff's letter informing them of his problems and prison staff's inadequate treatment. He alleges also that he alerted defendant Warden William Pollard to his health problems but Pollard did not assist him. At this early stage of the proceedings I conclude that plaintiff has stated a claim against these defendants, if only barely. Going forward, plaintiff will have to show that these officials had a duty to help plaintiff, had the authority to grant his requests and did not defer decisions to medical professionals at the prison. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) ("Public officials do not have a free-floating obligation to put things to rights. . . . Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job"; high-level prison officials, including wardens, are "entitled to relegate to the prison's medical staff the provision of good medical care.")

Plaintiff names Health Services Manager Schrubbe as a defendant but does not include any allegations stating whether plaintiff brought his medical needs to her attention and how she responded. Accordingly, plaintiff has not stated a claim upon which relief can be granted against this defendant.

Plaintiff alleges that defendant Institution Complaint Examiner Angela Kroll returned an inmate grievance to him, stating that he would have to address his medical concerns with defendant Schrubbe before filing the grievance. He alleges also that defendant Deputy Secretary Charles Cole needlessly delayed ruling on plaintiff's grievance before denying it. I will allow plaintiff leave to proceed against these defendants but note that at summary

judgment or trial it will not be enough to show that these defendants merely denied a grievance or deferred to medical staff or otherwise performed their duties as outlined by administrative rules; he will have to show that they committed misconduct that amounted to deliberate indifference. Id. at 595 (noting that a complaint examiner who failed to read each grievance or who prevented the medical unit from delivering needed care might be liable under § 1983).

Plaintiff alleges that Corrections Complaint Examiner Welcome Rose "permitted" Cole's delay and cites to various attached documents, but these documents show only that Rose was to receive a copy of the correspondence, and plaintiff does not explain how Rose could "permit" conduct by her superior, Cole. I conclude that plaintiff has not set forth allegations that suggest that Rose acted with deliberate indifference and I will dismiss plaintiff's claim against her.

Plaintiff names as a defendant "John Doe," a supervisor of defendant Kroll, and states that Doe "helped" medical staff "commit[] . . . misconduct," but does not describe what this official did. This extremely vague and conclusory allegation does not support a claim against Doe.

With regard to defendants Van Hollen, Burkert-Brist and Banse, plaintiff's claims against them seem to be centered on their conduct as counsel for various prison officials in plaintiff's other cases. However, these defendants do not have a duty to insure that plaintiff receives appropriate medical care. Their responsibilities do not include such duties. Burks, 555 F.3d at 595 (government official cannot be held liable for failing to take action outside

his job duties).

D. Preliminary Injunctive Relief

Because plaintiff is alleging that he is in imminent danger of serious physical harm and asks for immediate medical treatment, 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 September 20, 2012 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.

As plaintiff should be aware from his previous litigation in this court, the bar for obtaining a preliminary injunction is significantly higher than it is for obtaining 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 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).

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.

E. Criminal Prosecution

Finally, plaintiff requests a grand jury hearing to have criminal charges brought against defendants. However, federal courts do not have the authority to order law enforcement officials to conduct investigations into potential criminal misconduct. "Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." United States v. Batchelder, 442 U.S. 114, 124

(1979). If plaintiff seeks a criminal investigation he should contact law enforcement authorities directly.

ORDER

IT IS ORDERED that

1. Plaintiff Dwayne Almond is GRANTED leave to proceed on his Eighth Amendment deliberate indifference claims against defendants Dr. Sumnicht, Amy Schraufnged, Official Jones, Nurse S. Jackson, David Burnett, Scott Hoftiezer, Jim Greer, Mary Muse, Warden William Pollard, Angela Kroll and Charles Cole.

2. Plaintiff is DENIED leave to proceed on his claims against defendants Health Services Manager Schrubbe, Welcome Rose, John Doe Supervisor, J.B. Van Hollen, Monica Burkert-Brist and Crystal Banse.

3. Plaintiff's claims against defendants Richard Heidorn, Jeananne Zwiers, Jean Lutsey and Michael Baenen are DISMISSED without prejudice to plaintiff's bringing them in a new case as a paying litigant.

4. Defendants Schrubbe, Rose, Doe, Van Hollen, Burkert-Brist, Banse, Heidorn, Zwiers, Lutsey, and Baenen are DISMISSED from this lawsuit.

5. Plaintiff's motion for a grand jury hearing, dkt. #1, is DENIED.

6. Plaintiff is assessed $0.65 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 this amount on or before September 20, 2012. If plaintiff fails to make the initial partial

payment by this deadline or show cause for his failure to do so, I will direct the clerk of court to close the case. Plaintiff is obligated to pay the remainder of the filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at plaintiff's institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

7. Plaintiff may have until September 20, 2012, 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.

8. 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.

9. 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.

10. 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 30th day of August, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge