IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE SIMPSON,

Plaintiff,

OPINION AND ORDER

13-cv-776-bbc

v.

SCOTT WALKER, J.B. VAN HOLLEN,
EDWARD F. WALLS, TIMOTHY HAINES,
SARA MASON, DIANE ESSER,
SHAWN GALLINGER, C.O. GODFREY,
TRAVIS PARR, SGT. PRIMMER,
CATHY JESS and JOHN DOE GUARDS,

Defendants.

- -

Plaintiff Willie Simpson, a prisoner housed at the Wisconsin Secure Program Facility, filed a lawsuit raising several different claims against state prison officials and seeking leave to proceed in forma pauperis. Plaintiff has struck out under 28 U.S.C. § 1915(g), which 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.

In a December 9, 2013 order, I stated that plaintiff's complaint raised claims that belonged in several different lawsuits. Dkt. #3. Plaintiff responded by filing three proposed amended complaints. Dkts. ##4, 9, 13. In a January 27, 2014 order, I explained that plaintiff would have to choose which of these three lawsuits to pursue in this case. Plaintiff

has responded, choosing the complaint I numbered Lawsuit #2 (contained in dkt. #9) raising claims about being repeatedly assaulted by correctional officers. He would like the other two complaints to be dismissed, so I will grant that request, Also in the January 27, 2014 order, I stated that plaintiff would owe a $0.08 initial partial payment for this case, which he has now paid.

After considering plaintiff's allegations, I conclude that he has met the imminent danger requirement and I will allow him to proceed on his claims of excessive force and failure to protect against the prison officials who plaintiff alleges beat and continue to threaten him. Also, I will set briefing on plaintiff's motion for preliminary injunctive relief. I will deny plaintiff leave to proceed on the remainder of his claims.

I draw the following facts from plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff Willie Simpson is an inmate at the Wisconsin Secure Program Facility. Every day, defendant correctional officers Travis Parr, Shawn Gallinger and unidentified "John Does" go behind plaintiff's cell and taunt him, threaten to kill him for a previous conviction of battery against prison staff and "alter the air flow from the vents in [his] cell, decreasing [and] increasing the pressure" to cause plaintiff symptoms of heart attack and stroke.

On July 25, 2013, plaintiff "could no longer tolerate" these actions, so "under duress," he broke his television and cell window. Defendants Captain Sarah Mason, Captain

Flannery and correctional officers Godfrey, Parr and Gallinger came to remove him from the cell. Plaintiff complied with all directives. He was handcuffed behind his back and placed in leg restraints. As he left the cell, Gallinger began choking him and Parr and Godfrey helped Gallinger throw plaintiff to the floor. Gallinger, Parr and Godfrey held plaintiff down while Gallinger kneed plaintiff in the head and then ground his knee into plaintiff's head, hurting him. Flannery took out his "electronic hand gun" and shot plaintiff in the right leg. Plaintiff yelled to Mason to stop the attack, but Mason disregarded him. Flannery, Mason, Parr, Gallinger and Godfrey then escorted plaintiff to a different cell, cut his clothes off and conducted an anal search that plaintiff believed was done only to humiliate him.

On August 6, 2013, plaintiff filed a complaint (presumably about the July 25, 2013 incident) to defendant Cathy Jess, the Division of Adult Institutions administrator. I understand plaintiff to be alleging that Jess did nothing even after reviewing video evidence.

On August 12, 2013, defendants Lieutenant Diane Esser, Sergeant Primmer and John Doe officers came to plaintiff's cell to move him back to the original cell. Once plaintiff was back in his original cell, Esser ordered Primmer and the Doe officers to remove his leg restraints. They "threw [plaintiff] to the floor and held him down," while Esser shot plaintiff with an electronic hand gun for no apparent reason. Defendants cut off his clothes and Esser performed an anal search. While plaintiff was naked, Esser forced plaintiff to crawl into the cell while threatening to use the stun gun on him, solely to humiliate him.

Since these two incidents, defendants Parr, Godfrey, Gallinger and Esser have repeatedly come to plaintiff's cell door, taunting him that "it's not over" and threatening to

kill him.

Plaintiff filed several inmate complaints about these incidents, but the institution complaint examiner told plaintiff that it was not the proper venue for his complaint.

OPINION

A. Imminent Danger

Plaintiff seeks leave to proceed in forma pauperis in this case. 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. Simpson v. Maas, No. 04-cv-29-bbc (W.D. Wis. March 29, 2004); Simpson v. Douma, No. 04-cv-298-bbc (W.D. Wis. June 30, 2004); Simpson v. Haines, No. 13-2146 (7th Cir. Oct. 25, 2013). Therefore, he cannot proceed in forma pauperis 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 has been assaulted by prison staff and they threaten to continue doing so.

In the court's December 9, 2013 order, I told plaintiff that "[i]f he chooses to proceed on his excessive force claims, he will need to explain how he was in imminent danger of serious physical harm at the time he filed his complaint, since the alleged incidents happened months before that." Plaintiff supports his belief that he is in imminent danger with two allegations: (1) defendants Parr, Gallinger and John Doe officers go behind his cell and taunt him, threaten to kill him for a previous conviction of battery against prison staff and "alter the air flow from the vents in [his] cell"; and (2) defendants Parr, Godfrey, Gallinger and Esser have repeatedly come to plaintiff's cell door, taunting him that "it's not over" and threatening to kill him.

I am extremely dubious of plaintiff's claim that the air vents in his cell can be manipulated to cause an inmate harm, but in any case, his allegations that various defendants have assaulted him in the recent past and continue to threaten him suffice to meet the imminent danger standard. Jones v. Morton, 409 F. App'x 936, 937 (7th Cir. 2010) "We have cautioned against a 'chimerical' interpretation of imminent danger; the relevant time frame is not limited to the exact moment an inmate faces assault."; Lewis, 279 F.3d at 531 (7th Cir. 2002) ("If limited to situations in which, say, a beating is ongoing, no prisoner will find solace; once the beating starts, it is too late to avoid the physical injury;

and once the beating is over the prisoner is no longer in 'imminent danger' and so could not use this proviso to seek damages . . . .").

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 Eighth Amendment excessive force, failure to protect and conditions of confinement claims.

1. Excessive force

Plaintiff alleges that in two separate incidents, defendants Mason, Flannery, Godfrey, Parr, Gallinger, Esser, Primmer and John Doe officers beat plaintiff, used a stun gun on him for no reason and performed anal searches on plaintiff solely to humiliate him. Thus I understand him to be bringing excessive force claims against these defendants.

In determining whether an officer has used excessive force against a prisoner in violation of the Eighth Amendment, the question is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320 (1986). The factors relevant to making this determination include:

- the need for the application of force;
- the relationship between the need and the amount of force that was used;
- the extent of injury inflicted;
- the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them;
- any efforts made to temper the severity of a forceful response.

Assuming as I must that plaintiff's allegations are true, I conclude that he states excessive force claims for these incidents.

The matter of identifying the Doe defendants will be addressed at a preliminary pretrial conference, which will be held before Magistrate Judge Stephen Crocker after defendants have answered the complaint. After plaintiff works with defendants to identify the Doe defendants, plaintiff will amend his complaint to include their proper identities and obtain service of process upon those defendants.

In addition, I understand plaintiff to be saying that defendant Jess participated in these violations of his rights because plaintiff complained about the first assault and she did nothing. (This claim is probably better characterized as a "failure to protect" claim rather than an "excessive force" claim.) To be liable under § 1983, a defendant must have participated directly in a violation of the plaintiff's constitutional rights. Hildebrandt v. Illinois Dept. of Natural Resources, 347 F.3d 1014, 1036 (7th Cir. 2003). The Court of Appeals for the Seventh Circuit has suggested that prison officials cannot be sued for denying a grievance when the complaint relates to an event that has already occurred, as opposed to an ongoing threat to the inmate. George v. Smith, 507 F.3d 605 (7th Cir.

2007). ("A guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not.") Because plaintiff does not allege that he warned Jess about the ongoing threats, but rather complained only about the first assault, I will not allow him to proceed on a claim against defendant Jess.

2. Failure to protect

The Eighth Amendment guarantees that prison officials "'take reasonable measures to guarantee the safety of the inmates.'" Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526–527 (1984). To state an Eighth Amendment failure to protect claim, a prisoner must allege that (1) he faced a "substantial risk of serious harm" and (2) the prison officials identified acted with "deliberate indifference" to that risk. Farmer, 511 U.S. at 834; Brown v. Budz, 398 F.3d 904, 909 (7th Cir. 2005). "'[O]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" Farmer, 511 U.S. at 845 (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)).

In this case, plaintiff alleges that defendants Parr, Gallinger, Godfrey, Esser and John Does are still coming to his cell, taunting him that "it's not over" and threatening to kill him. Therefore, even beyond "failing to protect" plaintiff from threats to his safety, plaintiff is alleging that these defendants are creating a threat of future harm in line with the harm they have already caused him. I conclude that his allegations regarding the ongoing threats state

an Eighth Amendment claim for injunctive relief. "'[O]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" Farmer, 511 U.S. at 845 (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)). Further, I will add Gary Boughton, warden of the Wisconsin Secure Program Facility, as a defendant because he would be responsible for ensuring that any injunctive relief is carried out. E.g., Gonzalez v. Feinerman, 663 F.3d 311, 315 (7th Cir. 2011).

3. Conditions of confinement

Finally, I understand plaintiff to be attempting to bring Eighth Amendment conditions of confinement claims against defendants Parr, Gallinger and John Doe officers for going behind his cell to "alter the air flow from the vents in [his] cell, decreasing [and] increasing the pressure" to cause plaintiff symptoms of heart attack and stroke. Although conditions of confinement that expose a prisoner to a substantial risk of serious harm are unconstitutional, Rhodes v. Chapman, 452 U.S. 337, 347 (1981), I will not allow him to proceed on conditions of confinement claims because his allegations are fantastical in nature and similar to those that the Court of Appeals for the Seventh Circuit has already called "preposterous" and "outlandish." Simpson v. Haines, 536 F. App'x 657, 657 (7th Cir. 2013) ("Simpson's allegation that the warden allowed prison staff to pump toxic gas into his cell is preposterous. . . . This lawsuit is not the first where Simpson has made the same outlandish allegation about toxic gas. Simpson is on notice that future attempts to recycle this frivolous contention risk sanctions.") (citations omitted).

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 May 16, 2014 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 some of 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*, explaining what happened during the alleged beatings as well as the nature of defendants' ongoing threatening behavior. 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. I am particularly aware of this possibility in this case given the similarities between plaintiff's current allegations and those he has raised in previous cases in this court. If plaintiff again proves unable to support his claims with evidence, I may revoke the court's grant of leave to proceed in forma pauperis or put in place further filing bars as a sanction against plaintiff.

ORDER

IT IS ORDERED that

1. Plaintiff Willie Simpson is GRANTED leave to proceed on the following claims:

    a. Eighth Amendment excessive force claims against defendants Mason, Flannery, Godfrey, Parr, Gallinger, Esser, Primmer and John Doe officers for beating him, using a stun gun on him for no reason and performing anal searches on plaintiff solely to humiliate him.

    b. Eighth Amendment failure to protect claims against defendants Parr, Gallinger, Godfrey, Esser and John Doe officers for threatening harm to plaintiff.

2. Plaintiff is DENIED leave to proceed on the following claims:

a. An Eighth Amendment failure to protect claim against defendant Jess for failing to respond to plaintiff's complaint.

b. Eighth Amendment conditions of confinement claims against Parr, Gallinger and John Doe officers for altering the air pressure in his cell.

3. Gary Boughton, warden of the Wisconsin Secure Program Facility, is added to the caption as a defendant for purposes of plaintiff's request for injunctive relief.

4. Plaintiff may have until May 16, 2014 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.

5. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's operative pleading, dkt. #9, and this order are being sent today to the Attorney General for service on defendants. Plaintiff should not attempt to serve defendants on his own at this time. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

6. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

7. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his

documents.

8. Plaintiff is obligated to pay the unpaid balance of the filing fee for this case in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered this 25th day of April, 2014.

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