NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-1725

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 22, 2019
DEBORAH S. HUNT, Clerk

L.T. TUCKER, JR.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
CORIZON CORRECTIONAL HEALTH CARE, et al.,	)	THE EASTERN DISTRICT OF
	)	MICHIGAN
	)	
Defendants-Appellees.	)	
	)	

ORDER

Before: SILER, COOK, and NALBANDIAN, Circuit Judges.

L.T. Tucker, Jr., a Michigan prisoner proceeding pro se, appeals a district court judgment dismissing without prejudice his civil rights complaint filed pursuant to 42 U.S.C. § 1983. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Tucker filed an application to proceed in forma pauperis, and a complaint against Corizon Correctional Health Care and two of its employees, Kristine Nyquist and Chung Oh. Tucker asserted that the defendants were deliberately indifferent to his serious medical conditions of insulin-dependent diabetes and hepatitis C, and denied him proper medical treatment for those conditions in retaliation for filing grievances against Nyquist and Oh. Tucker asserted that: his health care requests were ignored; Nyquist and Oh discontinued the noon dose of his diabetic medication, Glucophage, without consulting him, in violation of prison policy; he suffered

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complications from his diabetes requiring his transportation to a hospital and, after he returned from the hospital, Nyquist and Oh refused to provide him with "the specialty insulin medication" prescribed by the hospital physician; Nyquist and Oh discontinued his "diabetic medication (Glucotrol)"; and Oh denied him medical treatment for his hepatitis C in retaliation for filing a grievance against Oh. Tucker asserted claims for retaliation, deliberate indifference to his serious medical needs, and breach of "legal duties owed to [him]." He sought declaratory, injunctive, and monetary relief.

The district court denied Tucker leave to proceed in forma pauperis under the "three strikes" provision of 28 U.S.C. § 1915(g), summarily dismissed his complaint without prejudice, and denied him leave to proceed in forma pauperis on appeal. Tucker filed a timely notice of appeal. The district court subsequently denied Tucker's Federal Rule of Civil Procedure 60(b)(6) motion for relief from judgment.

Tucker challenges the district court's determination that the allegations in his complaint did not satisfy the imminent-danger exception to the "three strikes" provision of § 1915(g). He contends that the district court relied on "inadmissible hearsay statements" in exhibits attached to his complaint rather than the statements in his complaint, and failed to consider his complaint "as a whole" when determining that it was subject to dismissal under § 1915(g). Tucker has filed a motion to proceed in forma pauperis, which was carried with the case, and he requests appointment of counsel.

We review "a district court's denial of pauper status for abuse of discretion." *Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 584 (6th Cir. 2013) (quoting *Pointer v. Wilkinson*, 502 F.3d 369, 372 (6th Cir. 2007)). Questions of law are reviewed de novo. *Id.*

The "three strikes" provision prohibits a prisoner from proceeding in forma pauperis when he has had three or more previous lawsuits or appeals dismissed as frivolous, malicious, or for failure to state a claim for relief, unless he "is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). "In order to allege sufficiently imminent danger, we have held that 'the threat or prison condition must be real and proximate and the danger of serious physical injury must exist at the time the complaint is filed.'" *Vandiver*, 727 F.3d at 585 (quoting *Rittner v. Kinder*, 290 F.

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App'x 796, 797 (6th Cir. 2008)). The imminent-danger exception can be satisfied where a prisoner "alleges a danger of serious harm due to a failure to treat a chronic illness or condition." *Id.* at 587.

Tucker has forfeited appellate review of the district court's determination that he had "three strikes" for purposes of § 1915(g) because he does not challenge the district court's determination in that regard in his appellate brief. *See Franklin v. Jenkins*, 839 F.3d 465, 471 (6th Cir. 2016).

As to the imminent-danger exception, Tucker asserted in his complaint that he is in "imminent danger of serious physical injury due to [the] denial of adequate medical treatment for [his] chronic illness[es] of diabetes and hepatitis C: cardiovascular complication and liver and kidney dysfunction." He further asserted that the denial of medical care for his chronic ailments "is ongoing." Tucker included numerous exhibits with his complaint, consisting of his grievances and responses to his grievances. He did not submit any of his medical records.

The district court did not abuse its discretion by dismissing Tucker's complaint without prejudice under the "three strikes" provision of § 1915(g). Tucker's imminent-danger allegations are conclusory, unsupported, and contradicted by the exhibits attached to his complaint. *See Taylor v. First Med. Mgmt.*, 508 F. App'x 488, 492 (6th Cir. 2012). As discussed by the district court, the exhibits attached to Tucker's complaint reveal that he "is being treated for his diabetes and monitored for his hepatitis." *See Arauz v. Bell*, 307 F. App'x 923, 925 n.1 (6th Cir. 2009) (noting that a court may consider materials attached to a complaint when considering sua sponte dismissal). The exhibits reveal that Tucker's medical provider: discontinued his noon dose and continued his morning and evening doses of Glucotrol; continued his Glucophage medication, although the dosage was reduced, and discontinued the noon dose while continuing the morning and evening doses of that medication; scheduled a three-month review "to assess [his] medication adjustment"; renewed his insulin medication at the three-month review mark; reviewed the insulin medication recommended by the hospital physician and changed the recommended medication, but did not refuse to provide insulin medication; and noted, at an "Infectious Disease chronic care visit" on July 27, 2017, that his "liver enzymes (as measured via blood test) were within normal limits" and that, as of February 24, 2015, he did "not have advanced liver fibrosis" requiring

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immediate hepatitis treatment but would be routinely "monitored to ensure that further intervention is initiated, if and when it becomes necessary in [the] future."

"[T]he imminent danger exception is essentially a pleading requirement subject to the ordinary principles of notice pleading." *Vandiver*, 727 F.3d at 585 (quoting *Vandiver v. Vasbinder*, 416 F. App'x 560, 562 (6th Cir. 2011)). While a pro se complaint will be liberally construed, the plaintiff must still allege "facts from which a court, informed by its judicial experience and common sense, could draw the reasonable inference that [he] was under an existing danger at the time he filed his complaint." *Id.* (quoting *Taylor*, 508 F. App'x at 492). Taken together, Tucker's complaint and exhibits do not support his assertion that he has been denied adequate medical treatment for his diabetes and hepatitis C. On the contrary, he asserted nothing more than a disagreement with the medical treatment he has received. The allegations in Tucker's complaint did not satisfy the imminent-danger exception to the "three strikes" provision in § 1915(g).

Appointment of counsel in a civil case "is a privilege that is justified only by exceptional circumstances." *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993). Such exceptional circumstances are not present here—this case is barred by the "three strikes" provision of § 1915(g), it presents non-complex issues, and Tucker has demonstrated his ability to present his claims both in the district court and on appeal. *See id.*

Accordingly, we **DENY** the request for appointment of counsel and motion to proceed in forma pauperis and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

L. T. TUCKER, JR., #132271,
a/k/a KITWANA OMARI MBWANA,

Plaintiff,

v.

CASE NO. 18-11608
HON. NANCY G. EDMUNDS

CORIZON CORRECTIONAL HEALTH CARE,
KRISTINE NYQUIST, and CHUNG OH,

Defendants.
_____/

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT [11]

I. Introduction

Plaintiff L.T. Tucker, Jr., a state prisoner at the Marquette Branch Prison in Marquette, Michigan, filed a *pro se* civil rights complaint and an application to proceed without prepaying the fees for this action on May 22, 2018. *See* ECF Nos. 1 and 2. The complaint alleged that the defendants were deliberately indifferent to Plaintiff's diabetes and hepatitis and that they retaliated against him for filing administrative grievances about his medical problems. On June 7, 2018, the Court denied Plaintiff's application to proceed without prepaying the filing fee and summarily dismissed the complaint under 28 U.S.C. § 1915(g).[1] The Court stated that, at least three of Plaintiff's prior cases were dismissed

[1] Under the "three strikes" provision of 28 U.S.C. § 1915(g), a prisoner may not bring a civil action under § 1915 "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

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as frivolous or for failure to state a claim and that Plaintiff had not shown he was in imminent danger of serious physical injury. *See* ECF No. 5.

Plaintiff appealed the Court's decision, ECF No. 7, and then filed a motion for relief from judgment in this Court, ECF No. 11. He wants the Court to vacate its order and judgment of dismissal, allow him to proceed without prepaying the entire filing fee, and serve the complaint on the defendants.

II. Discussion

This District's Local Rules state that the Court generally

> will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the Court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the Court and the parties and other persons entitled to be heard on the motion have been misled but also show that correcting the defect will result in a different disposition of the case.

LR 7.1(h)(3) (E.D. Mich. July 1, 2013). "A 'palpable' defect is a defect that is obvious, clear, unmistakable, manifest or plain." *Witzke v. Hiller*, 972 F. Supp. 426, 427 (E.D. Mich. 1997) (citing Webster's New World Dictionary 974 (3rd Ed. 1988)).

Plaintiff does not dispute that three or more of his prior complaints were dismissed as frivolous or for failure to state a claim. Instead, he argues that the Court imposed a heightened standard of pleading when it reviewed his complaint and failed to treat the complaint less stringently than complaints filed by attorneys.

Pursuant to Rule 8 of the Federal Rules of Civil Procedure, "[a] pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the

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relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. §1915(g).

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court's jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought . . . ." Fed. R. Civ. P. 8(a). Additionally, the Federal Court of Appeals for the Sixth Circuit previously stated in a *pro se* case that "[t]he imminent danger exception [of § 1915(g)] is essentially a pleading requirement subject to the ordinary principles of notice pleading." *Vandiver v. Vasbinder*, 416 F. App'x 560, 562 (6th Cir. 2011). In light of this statement from *Vandiver* and Rule 8, the Court does not believe it imposed a heightened standard of pleading when it reviewed Plaintiff's complaint and concluded that he had failed to show he was in imminent danger of serious physical injury.

The Court acknowledges that "a pro se complaint, 'however inartfully pleaded,' must be held to "less stringent standards than formal pleadings drafted by lawyers. . . ." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (quoting *Haines v. Kerner*, 404 U.S. 519 (1972)). Nevertheless, "the lenient treatment generally accorded to pro se litigants has limits. *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996) (citing *Jourdan v. Jabe*, 951 F/2d 108, 110 (6th Cir. 1991)). When a *pro se* litigant fails to comply with easily understood rules, a federal court is not required to treat the litigant any more leniently than someone represented by counsel. *See id.* ("Where, for example, a pro se litigant fails to comply with an easily understood court-imposed deadline, there is no basis for treating that party more generously than a represented litigant.").

Plaintiff, nevertheless, contends that the Court used an overly restrictive reading of the imminent-danger exception to § 1915(g) and relied on hearsay when it made the determination that he was not in imminent danger. The Court, however, merely relied on exhibits to the complaint, which indicated that Plaintiff is being treated for his diabetes

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and monitored for his hepatitis. The Court may rely on a medical professional's "declaration in deciding whether or not a claim of imminent danger of serious physical injury is credible," and "there is no basis to strike the declaration because it is hearsay." *Bronson v. Kerestes*, No. 3:09-cv-0269, 2010 WL 411720, at *6 (M.D. Pa. Jan. 25, 2010) (unpublished).

Plaintiff has failed to show that the Court made an obvious, clear, unmistakable, manifest, or plain error when it denied Plaintiff's financial application and summarily dismissed his complaint. Accordingly, the Court denies Plaintiff's motion for relief from judgment. (ECF No. 11).

s/ Nancy G. Edmunds
NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

Dated: February 8, 2019

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No. 18-1725

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

L.T. TUCKER, JR.,

Plaintiff-Appellant,

v.

CORIZON CORRECTIONAL HEALTH CARE, et al.,

Defendants-Appellees.

ORDER

L.T. Tucker, Jr., a Michigan prisoner proceeding pro se, appeals a district court judgment dismissing without prejudice his civil-rights complaint filed pursuant to 42 U.S.C. § 1983. The district court denied Tucker permission to proceed in forma pauperis on appeal. Tucker now requests permission from this court to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

In the proceedings below, Tucker filed an application to proceed in forma pauperis and a complaint against Corizon Correctional Health Care (Corizon) and Corizon employees Kristine Nyquist and Chung Oh. Because more than three of Tucker's past complaints in federal court have been dismissed as frivolous, the district court denied Tucker leave to proceed in forma pauperis under the three-strikes provision of 28 U.S.C. § 1915(g), summarily dismissed his complaint without prejudice, and denied him leave to proceed in forma pauperis on appeal. In the present appeal, Tucker argues that the district court should have found him to be exempt from the three-strikes rule because, under § 1915(g), an indigent defendant subject to that rule may nevertheless qualify for pauper status if he can show that he is "under imminent danger of serious physical injury."

Tucker's complaint alleges, among other things, that he has severe and ongoing medical conditions, one of which led to a recent emergency room visit, and that Nyquist, Oh, and Corizon

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have denied him the medication and care he needs to treat those conditions. Tucker attaches exhibits to his complaint. The exhibits show pursuit of his administrative remedies and discuss his medical treatment but do not include his medical records. The exhibits include only the prison system's own characterization of Tucker's medical care in response to the grievances he filed against Nyquist, Oh, and Corizon.

On appeal, Tucker also asks the court for permission to proceed in forma pauperis. To determine whether Tucker is entitled to pauper status on appeal, this court must conduct the same inquiry that the district court performed below—namely, it must determine whether the facts in Tucker's complaint sufficiently alleged that he was "under imminent danger of serious physical injury" at the time he filed the complaint. 28 U.S.C. § 1915(g). And because Tucker's underlying appeal challenges the district court's conclusion that Tucker failed to make this showing, the merits panel in this case must also examine the same question.

Given that Tucker's motion to proceed in forma pauperis on appeal presents the same issue that the merits panel must ultimately resolve, Tucker's motion is hereby referred to the merits panel for resolution in conjunction with Tucker's underlying appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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Additional material from this filing is available in the Clerk's Office.