

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 22, 2023*

Decided April 3, 2023

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2129

MICHAEL S. GORBEY,
Plaintiff-Appellant,

v.

USP THOMSON,
Defendant-Appellee.

Appeal from the United States District
Court for the Northern District of Illinois,
Western Division.

No. 22 C 50160

Philip G. Reinhard,
Judge.

ORDER

Under the Prison Litigation Reform Act, if a prisoner has had a suit dismissed “on the grounds that it is frivolous, malicious, or fails to state a claim” three or more times, he cannot proceed in forma pauperis (IFP)—that is, without prepaying the filing fee—unless he “is under imminent danger of serious physical injury.” 28 U.S.C.

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

§ 1915(g). Michael Gorbey, a federal prisoner (who also uses the last name Owl Feather-Gorbey), admits he has more than three strikes. He sought to invoke the imminent-danger exception based on, among other things, his allegation that prison staff were refusing to treat his painful nerve and bone damage after they assaulted him. The district court ruled that Gorbey did not sufficiently allege that he was in imminent danger of serious physical injury. We disagree, vacate the denial of IFP status, and remand for further proceedings.

We take as true at this stage the allegations in Gorbey's complaint and in his contemporaneous filings. *Wallace v. Baldwin*, 895 F.3d 481, 483 (7th Cir. 2018). He asserts several physical perils. First, he tells us, the staff at his prison, USP Thomson, attacked him, fracturing his bones and causing severe neck pain that they refuse to treat. Second, they have threatened to attack him again, deny him care for his glaucoma, and place him in cells with violent prisoners. Gorbey's allegations about the staff's refusal to treat his injuries from the assault are sufficient to decide this appeal, so we focus on them.

Gorbey states that the assault damaged nerves in his neck and fractured bones in his right hand, left wrist, and left elbow. He places at level 9 on a 10-point scale "pain in his neck that runs to his [left] scapula and splits off to run up over his [left] shoulder & down to his [left] elbow." The staff have refused to treat his fractures, nerve damage, and pain, beyond offering ineffective anti-inflammatory drugs and, after a nine-month delay, an X-ray exam, the results of which they have refused to share with him.

When he sued prison staff for violating his rights under the Eighth Amendment, Gorbey unsuccessfully sought leave to proceed IFP. The district court ruled that he had incurred three strikes and his allegations about glaucoma and violent cellmates did not fall within the imminent-danger exception. It noted that other courts had rebuffed his claims of imminent danger from glaucoma and abusive cellmates. The court did not acknowledge or analyze his allegations about untreated fractures and nerve pain.

Gorbey sought to appeal this ruling. After he filed a notice of appeal, the district court denied his motion to appeal without prepaying the appellate fee. Again, it reasoned that his "allegations of imminent danger failed to meet the same plausibility standard required of all complaints." We independently reviewed Gorbey's motion for IFP status on appeal and came to the opposite conclusion: Gorbey has "adequately demonstrated that he is in imminent danger of serious physical injury and so may proceed in forma pauperis in this appeal."

On appeal, Gorbey argues that the district court wrongly denied his application to sue without prepaying the filing fee, because he adequately alleged that he is in imminent danger. He repeats that, after the staff assaulted him, fractured bones in his right hand, and damaged nerves in his neck, back, and left arm, they refused to treat the “unbearable pains” that they had inflicted. He feared (and fears) that, if his physical injuries and pain continue to go untreated, he could face “permanent” damage.

We briefly pause to consider appellate jurisdiction. The government suggests that we might not have jurisdiction because Gorbey appealed before the deadline that the district court gave him to pay the filing fee had passed. But denials of IFP requests are immediately appealable. *See Turley v. Gaetz*, 625 F.3d 1005, 1007 n.3 (7th Cir. 2010). Thus our jurisdiction is secure.

We review de novo a district court’s ruling that a plaintiff does not meet the imminent-danger exception for IFP status. *Wallace*, 895 F.3d at 483. To meet the standard of “imminent danger of serious physical injury” under § 1915(g), a plaintiff must allege serious physical harm that is “real and proximate,” *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002), not “conclusory or ridiculous.” *Ciarpaglini v. Saini*, 352 F.3d 328, 331 (7th Cir. 2003). But “§ 1915(g) is not a vehicle for determining the merits of a claim.” *Id.*

We conclude that Gorbey’s allegations of untreated severe pain, nerve damage, and bone fractures satisfy the imminent-danger exception. The ongoing denial of care for a serious injury can establish an imminent danger of serious physical harm. *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010). Gorbey has alleged a serious injury (bone fractures, nerve damage, and “unbearable pains” in his neck and upper extremities from the assault). And he has alleged the ongoing refusal of staff for months to treat his fractures, nerve damage, and pain with something other than ineffective pain pills and an X-ray exam whose results they kept from him. We have previously ruled that a plaintiff satisfied the imminent-danger exception by alleging that he was denied medical treatment for a mere two days after a “severe injury and pain to wrists, arms, feet, neck, shoulder, and back” caused by correctional officers’ assault. *Id.* at 1172. Thus, Gorbey’s allegations satisfy the standard.

Our ruling is limited. We simply allow Gorbey to begin his suit without prepaying the full filing fee. The first item of business for the district court, after assessing an appropriate partial fee from Gorbey, *see* 28 U.S.C. § 1915(b), is to require him to amend his complaint and name the persons he believes are responsible for his injuries. If the defendants wish to challenge Gorbey’s entitlement to IFP status, they may submit evidence disputing his allegations of imminent danger. *See Sanders v.*

Melvin, 873 F.3d 957, 962 (7th Cir. 2017). If it turns out that his allegations are untrue, he must pay the full filing fee upfront or face dismissal, *id.* at 961, and he may incur additional sanctions such as a filing bar under *Support Sys. Int'l, Inc. v. Mack*, 45 F.3d 185 (7th Cir. 1995).

We VACATE the denial of the application to proceed in forma pauperis and REMAND for further proceedings consistent with this order.