

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALTON D. BROWN, : CIVIL ACTION
: NO. 04-5729
Plaintiff, :
: v. :
: MONTGOMERY COUNTY, et al., :
: Defendants. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

July 7, 2006

Before the Court is defendants' motion to revoke plaintiff's *in forma pauperis* ("I.F.P.") status (doc. no. 35). For the reasons that follow, defendants' motion will be granted.

Whether plaintiff, a *pro se* prisoner at State Correctional Institution at Graterford, is entitled to I.F.P. status is governed by 28 U.S.C. § 1915(g). § 1915(g) states:

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 injury.

Thus, § 1915(g) "limits a prisoner's ability to proceed I.F.P. if the prisoner abuses the judicial system by filing frivolous actions [on three or more prior occasions]. Prisoners may avoid the limitation in this provision, however, if they are under

'imminent danger of imminent physical injury'" at the time the complaint was filed. Abdul-Akbar v. McKelvie, 239 F.3d 307, 312 (3d Cir. 2001) (quoting 28 U.S.C. § 1915(g)).

In this case, the Court finds that plaintiff has "three strikes." The Third Circuit has denied a prior motion by this plaintiff to proceed I.F.P. because he had at least three prior actions dismissed as frivolous. Brown v. Blaine, C.A. No. 04-4618 (3d Cir. May 26, 2005). The Court need not look further than Third Circuit precedent for evidence of "three strikes."

It is equally clear that plaintiff was not "under imminent danger of serious injury," 28 U.S.C. § 1915(g), at the time the complaint was filed, Abdul-Akbar, 239 F.3d at 312. Plaintiff alleges in his complaint that he was physically abused during his transport to and confinement at the Montgomery County Jail. Plaintiff, however, was not confined at the Montgomery County Jail at the time he filed his complaint, nor is he incarcerated there presently. There is also no evidence that he will be returning to county custody.

Under § 1915(g), "[i]n no event" may a prisoner proceed I.F.P. when the prisoner fails to meet the conditions of the statute. Defendants have now brought to the Court's attention, for the first time,¹ that plaintiff does not meet the conditions

¹ On January 12, 2005 Judge Hutton granted plaintiff's motion to proceed I.F.P. Defendants filed the instant motion to revoke plaintiff's I.F.P. status on April 3, 2006. The case was

of § 1915(g). Although defendants could have exercised greater diligence in discovering plaintiff's litigious background at some point earlier in the litigation, there is no suggestion that defendants knew about plaintiff's prior litigation history and/or that defendants deliberately manipulated the system for their own benefit. Additionally, plaintiff is not unfairly prejudiced by the presentation of these facts to the Court at this time as the facts precluding plaintiff from proceeding I.F.P. were known to him at the time the complaint was filed.

No longer able to proceed I.F.P., the Court may not consider the merits of his case until the filing fee has been paid. "While the remittance of a filing fee is not jurisdictional, see McDowell v. Del. State Police, 88 F.3d 188, 191 (3d Cir. 1996), it is an 'administrative hurdle' that the Court may require a plaintiff to clear before considering the merits of the case." Boreland v. Vaughn, Civ. A. 97-5590, 2000 WL 254313, at *3 n.5 (E.D. Pa. March 7, 2000) (Reed, J.) (citing Smith v. Dist. of Columbia, 182 F.3d 25, 28 n.2 (D.C. Cir. 1999)). Here, the "administrative hurdle" has not been cleared. Thus, plaintiff may only resume his action upon prepayment of the

then transferred to the undersigned on April 17, 2006. Because at the time Judge Hutton decided the motion to proceed I.F.P. neither Judge Hutton nor the defendants were aware of the existence of the "three strikes" against plaintiff, the Court is not bound by the decision.

entire amount of the filing fee. An appropriate order follows.²

² In order to improve the efficiencies of the system, the Clerk's Office should investigate whether a prisoner plaintiff's application to proceed I.F.P. should include a self-reporting requirement as to the prisoner plaintiff's compliance with § 1915(g), i.e., whether the prisoner (1) "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," and (2) whether the prisoner is "under imminent danger of serious injury."

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O R D E R

AND NOW, this 7th day of **July, 2006**, it is hereby **ORDERED** that defendants' motion to revoke plaintiff's *in forma pauperis* status (doc. no. 35) is hereby **GRANTED**.

IT IS FURTHER ORDERED that the rule **ISSUED** upon defendants to show cause why the motion to revoke plaintiff's *in forma pauperis* status should not be denied because of waiver (doc. no. 43) is hereby **DISSOLVED**.

IT IS FURTHER ORDERED that the portion of the Judge Hutton's January 12, 2005 granting leave to plaintiff to proceed *in forma pauperis* is **VACATED**.

IT IS FURTHER ORDERED that plaintiff shall submit the filing fee of \$350 within 30 days from the date of this Order. Failure to pay the fee within that time will result in dismissal of this case for failure to prosecute.

IT IS FURTHER ORDERED that defendants' motion for summary judgment (doc. no. 48) and defendants' motion to deem certain requests for admissions to be admitted and to compel

responses to discovery requests (doc. no. 50) are **DENIED WITHOUT PREJUDICE**.¹

AND IT IS SO ORDERED.

S/Eduardo C. Robreno
EDUARDO C. ROBRENO, J.

¹ Should plaintiff timely submit the full filing fee, defendants may seek to reinstate these motions by letter to the Court.