

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

BRUCE A. BENSINGER : CIVIL ACTION
 :
 v. :
 :
 :
 MICHAEL E. KUNZ :
 RONALD L. BUCKWALTER : NO. 98-6014

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, S.J.

JANUARY 19, 1999

Plaintiff Bruce A. Bensinger ("Bensinger"), an inmate at the Northampton County prison, applies to file an action under 42 U.S.C. § 1983 without prepayment of fees. His proposed complaint alleges that the Honorable Ronald L. Buckwalter and Michael E. Kunz, Clerk of Court of the United States District Court for the Eastern District of Pennsylvania, by statistically closing his action, violated his constitutional rights of court access, due process, and equal protection of the laws.

Title 28 U.S.C. § 1915(g) of the Prison Litigation Reform Act of 1996 (PLRA), provides that a prisoner who, while incarcerated, has filed an action in a federal court that was dismissed as frivolous, malicious, or failing to state a claim upon which relief may be granted, on three or more prior occasions, shall be denied in forma pauperis status unless in imminent danger of serious physical injury "at the time of the

alleged incident." Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997).

In Gibbs, a prisoner appealed an order dismissing a § 1983 action alleging he was subjected to physical threats and attacks after an inmate-law clerk was permitted to read legal papers revealing Gibbs had been a government informant. The Court of Appeals held that the "imminent danger" requirement of § 1915(g), considered as of the time the alleged incident occurred, was satisfied because it was alleged in the complaint and unchallenged. See id. at 86. The court remanded the case for a determination of the credibility of Gibbs' allegations of imminent danger. See id. at 87.

The constitutionality of § 1915(g) was not reached by the Court of Appeals in Gibbs,, see id. at 85 n.4, but the provision has been held constitutional by four other circuit courts. See White v. Colorado, 157 F.3d 1226 (10th Cir. 1998)(challenge based on due process and equal protection); Rivera v. Allin, 144 F.3d 719 (11th Cir. 1998)(challenge based on court access, due process, and equal protection); Wilson v. Yaklich, 148 F.3d 596 (6th Cir. 1998)(challenge based on equal protection and due process); Carson v. Johnson, 112 F.3d 818 (5th Cir. 1997)(challenge based on court access and due process). Cf. Lyon v. Vande Krol, 940 F. Supp. 1433 (S.D. Iowa 1996)(statute violates prisoners' equal protection rights).

In Rivera, Vincent Rivera ("Rivera") filed a § 1983 action, alleging neglect of his medical needs and molestation; Rivera moved to proceed in forma pauperis. The district court held § 1915(g) required dismissal of the action without prejudice for failure to pay the required filing fee. See Rivera, 144 F.3d at 721. On appeal, Rivera challenged § 1915(g) as violative of his constitutional rights to court access, due process, and equal protection.

The Eleventh Circuit held that the right to court access is not absolute; Congress can reasonably limit it. See id. at 723. Section 1915(g) restricts only prisoners' rights to proceed in forma pauperis, a privilege not a right. See id. at 723-24. The provision does not restrict a prisoner's right to bring a cause of action if the filing fee is paid. See id. at 723.

The court also concluded that appellant's due process rights were not violated. See id. at 727. The court, finding no difference between Rivera's due process argument and his right to court access argument, rejected Rivera's argument that § 1915(g) was nothing more than an "'extreme' application of res judicata," and reiterated that no fundamental right was denied and substantive due process was not violated. See id. at 726-27, 727 n.11.

In addressing the equal protection argument, the Rivera court found indigent prisoners are not a protected class, and the right to court access is not a fundamental right, so the appropriate test is whether the differential treatment of indigent prisoners has a rational basis. See id. at 727. Since Congress has a legitimate interest in preventing prisoner abuse of the judicial system and “[s]ection 1915(g) rationally serves these ends through its requirement that prisoner indigents with three strikes prepay the entire filing fee before the court may further review their lawsuits,” there is a rational basis for § 1915(g), and it does not violate equal protection. See id. at 727-28.

Title 28 U.S.C. § 1915(g) is constitutional for the reasons stated by the Eleventh Circuit Court of Appeals. See Rivera, 144 F.3d at 719; see also White, 157 F.3d at 1226; Wilson, 148 F.3d at 596; Carson, 112 F.3d at 818. In addition, the so-called “three strikes” provision is not cruel and unusual punishment in violation of the Eighth Amendment.

Actions filed before the enactment date of § 1915(g) are considered in determining whether the “three strikes rule” applies. See Keener v. Pennsylvania Bd. of Probation & Parole, 128 F.3d 143, 144-45 (3d Cir. 1997) (“We thus now join those circuits in holding that dismissals for frivolousness prior to the passage of the PLRA are included among the three that establish the threshold for requiring a prisoner to pay the full

docket fees unless the prisoner can show s/he is 'under imminent danger of serious physical injury'").

Bensinger has filed numerous civil rights actions dismissed as frivolous. The three most recent civil rights actions dismissed as frivolous were: 1) Civil Action No. 95-5499, dismissed September 28, 1995; 2) Civil Action No. 95-2610, dismissed May 26, 1995; and 3) Civil Action No. 94-6892, dismissed November 17, 1994.

The complaint presently before this court claims that defendants denied plaintiff court access by statistically closing Civil Action No. 98-5507 for failure to pay the filing fee of \$150.00 or to submit a petition to proceed in forma pauperis. That action alleged plaintiff was refused access to the prison law library and law books, and not permitted to make legal photocopies. Neither the complaint in Civil Action No. 98-5507 nor this complaint claims plaintiff was in imminent danger of serious physical injury "at the time of the alleged incident." See Gibbs, 116 F.3d at 86. Plaintiff was properly denied the right to file Civil Action No. 98-5507 without payment of the \$150.00 filing fee, and may not file this action without prepayment of the filing fee either.

If Plaintiff were permitted to file an action for monetary damages against Judge Buckwalter, with or without prepayment of fees, it would be dismissed as frivolous because

Judge Buckwalter has absolute immunity for decisions made in the course of judicial duties. See Stump v. Sparkman, 435 U.S. 349, 359 (1978). Clerk Kunz would probably have qualified immunity because no clear violation of constitutional rights has been established.

Plaintiff's application to proceed in forma pauperis will be denied without prejudice to his right to reinstate an action for injunctive relief upon prepayment of full docketing fees.

An appropriate Order follows.

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O R D E R

AND NOW, to wit, this day of January, 1999, in accordance with the accompanying memorandum, **IT IS ORDERED** that plaintiff's application for leave to proceed in forma pauperis is **DENIED** pursuant to 28 U.S.C. § 1915(g) without prejudice to his filing an action upon prepayment of full docketing fees. Such action would nevertheless be subject to consideration of dismissal under 28 U.S.C. § 1915(e)(2)(B).

BY THE COURT:

, S.J.