

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT A. HEIMERMANN,

Petitioner,

v.

MINNCOR INDUSTRIES, PAUL ANDERSON,
DENNIS BENSON, DANIEL A. FERRISE,
FLOAT-RITE-PARK, JOHN GALZKI, LARRY
LINDSTROM, JOHN MONTPETIT, ERIK
SKON, JAMES SUTHERLAND and DOES 1-100,

Respondents.

ORDER

02-C-426-C

This is a proposed civil action for injunctive and monetary relief. Petitioner, who is presently confined at the Waupun Correctional Institution in Waupun, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. However, because petitioner is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny him leave to proceed if he has on three or more previous occasions had a suit dismissed for lack of legal merit. Because I conclude that petitioner has accrued three strikes within the meaning of 28 U.S.C. § 1915(g), I will deny his request for leave to proceed in forma pauperis.

OPINION

Petitioner is a Wisconsin state prisoner serving a sentence for his role in a double homicide. In his proposed complaint, petitioner seeks monetary and injunctive relief for respondents' alleged violations of various federal and state statutes, including the Racketeer Influenced and Corrupt Organizations Act and the Hobbs Act. Since he has been incarcerated, petitioner has occupied himself by filing frivolous lawsuits in federal court. Because petitioner is seeking leave to proceed in forma pauperis, the provisions of 28 U.S.C. § 1915 govern this proceeding. According to 28 U.S.C. § 1915(g),

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.

A review of just a small portion of petitioner's history of frivolous litigation leads me to conclude that he has struck out pursuant to 28 U.S.C. § 1915(g).

In Heimermann v. California Federal Bank, No. 95-1818, 1995 WL 649926 (7th Cir. Nov. 2, 1995) (unpublished opinion), petitioner sued California Federal Bank and Cantor Fitzgerald Brokerage for the illegal rejection of a \$240 million cash bid on certain loans they were selling. The rejected bid was allegedly made by a company that petitioner was "advising." Noting petitioner's "fantastical allegations," the district court dismissed his complaint for failure to state a claim. That was strike one. The Court of Appeals for the Seventh Circuit summarily affirmed the dismissal, which gave petitioner his second strike. In Heimermann v. Global Securities Trust Co., No. 96-2963, 1997 WL 764389 (7th Cir. Nov. 25, 1997) (unpublished opinion), petitioner alleged that Global Securities had contracted to buy \$87 million in treasury bonds from him and had reneged on the agreement. The district court

dismissed the case as frivolous, finding petitioner's factual allegations "wholly incredible," "fanciful," and "wholly unbelievable." Id. at *2. Concluding that "[t]o say the least, an allegation that anyone would use an incarcerated double murderer to broker a T-Bond transaction is puzzling at best," the Court of Appeals for the Seventh Circuit found that petitioner's allegations were frivolous and affirmed the district court. These were strikes three and four, more than enough to disqualify petitioner from proceeding in forma pauperis in the future absent an allegation that he is in imminent danger of serious physical injury. A review of petitioner's factual allegations in this suit make clear that the "imminent danger" exception to § 1915(g) does not apply.

For good measure, I note also that in Heimermann v. Ramp, No. Civ. 01-437 ADM/AJB, 2001 WL 1628739 (D. Minn. Sept. 6, 2001), petitioner alleged that the respondent had engaged in an abuse of process by seeking to place a lien against petitioner's prison trust account in an effort to enforce previously imposed court sanctions. Petitioner alleged that he was the victim of slander and a conspiracy to block him from litigating another case. The court found petitioner's claims frivolous and vexatious and sanctioned him \$750 pursuant to Fed. R. Civ. P. 11(b). In addition, the district court judge stated that

In the future, when Plaintiff wishes to file a complaint in court, he first must submit a complete listing of every state and federal action commenced by him, and the disposition of each case, since the date of his conviction on the offenses for which he is currently incarcerated. This prerequisite shall be filed along with the complaint, petition, or other initial pleadings Plaintiff may file in any state or federal court action.

Id. at *2. Petitioner has submitted the required list, which runs to 11 pages. In many of the cases listed, petitioner has been sanctioned. In short, petitioner struck out long ago for the purpose of proceeding

under 28 U.S.C. § 1915.

Although petitioner was assessed and has submitted an initial partial payment of the \$150 filing fee for this case, I conclude that he is not entitled to proceed in forma pauperis or take advantage of the initial partial payment provision of § 1915. Because petitioner is disqualified from proceeding in forma pauperis under § 1915(g), he may choose one of three courses of action to follow.

First, he may decide that he wishes to pursue this case as a paying litigant. If so, he must submit a check or money order made payable to the clerk of court in the amount of \$130.68, representing the balance owed toward the filing fee in this case, and advise the court that he is proceeding as a paying litigant. If he does this, however, petitioner should be aware that the court then will be required to screen his complaint under 28 U.S.C. § 1915A, and dismiss his case if the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief.

Second, petitioner may decide he does not wish to pursue this matter further. If this is the case, then no further review will be given petitioner's complaint. However, petitioner will still owe the \$130.68 balance of the filing fee, and he must pay it immediately. Newlin v. Helman, 123 F.3d 429, 436-437 (7th Cir. 1997), overruled in part on other grounds by Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000). If petitioner fails to pay the fee promptly, an order will be entered under Support Systems International, Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995), requiring the clerks of the courts within the circuit to return unfiled any civil complaints petitioner might submit until petitioner's debt to the judicial system has been paid. Newlin, 123 F.3d at 437.

Third, petitioner may decide to take an appeal from this order barring him from proceeding in forma pauperis because of his three-strike status. If, within 30 days of the date of this order, petitioner were to file a notice of appeal, I would be required to allow him to take the appeal without prepaying the \$105 filing fee. Id. at 436. However, petitioner is cautioned that if he takes an appeal and loses, he will then owe two fees, one for filing the complaint and another for filing the appeal, and both fees will have to be paid in full immediately or an order under Mack will be issued and remain in force until the fees are paid.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis is DENIED because petitioner is not eligible for in forma pauperis status under 28 U.S.C. § 1915(g). Petitioner has thirty (30) days from the date of this order in which to:

- 1) pay the \$130.68 balance of the fee and request that the court process the complaint;
- 2) pay the \$130.68 balance of the fee and advise the court that he does not intend to pursue the lawsuit; or
- 3) file a notice of appeal.

If, within thirty (30) days of the date of this order, petitioner does none of these things, then an order under Support Systems International, Inc. v. Mack will be entered.

Entered this 30th day of August, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge