

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

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ANTHONY MURRY,

Petitioner,

v.

STEVEN H. GIBBS  
and MARY G. FISCHER,

Respondents.  
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ORDER

04-C-30-C

Petitioner Anthony Murry, a prisoner at the Diamondback Correctional Institution in Watonga, Oklahoma, has filed a proposed complaint and a request for leave to proceed in forma pauperis. The request will be denied, because petitioner does not qualify for in forma pauperis status under 28 U.S.C. § 1915(g).

Section 1915(g) reads as follows:

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.

On at least three prior occasions, I denied petitioner leave to proceed in forma pauperis in lawsuits that were legally frivolous. See Murry v. Brunner, 94-C-321-C, decided May 9, 1994; Murry v. Nelson, 95-C-639, decided Oct. 4, 1995; and Murry v. Gibbs, 01-C-202-C, decided Oct. 19, 2001.

Moreover, petitioner's complaint does not allege facts from which an inference may be drawn that he is under imminent danger of serious physical injury. In his complaint, petitioner alleges that “administrative people” at the North Fork Correctional Institution failed to make a phone call to a circuit court so that petitioner could participate in a telephone conference that had been scheduled and that his case was dismissed for his failure to appear by phone.

In order to meet the imminent danger requirement of 28 U.S.C. § 1915(g), a petitioner must allege a physical injury that is imminent or occurring at the time the complaint is filed, and the threat or prison condition causing the physical injury must be real and proximate. Ciarpaglini v. Saini, 352 F.3d 328 (7th Cir. 2003) (citing Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002) and Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003)). Claims of physical injury ordinarily arise in the context of lawsuits alleging Eighth Amendment violations. I can conceive of no factual scenario under which a petitioner would be subjected to physical injury by the denial of meaningful access to the courts. Accordingly, petitioner’s complaint is not a complaint requiring application of the exception to § 1915(g).

Because petitioner is disqualified from proceeding in forma pauperis under § 1915(g), he may choose 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 \$150 and he must do so no later than February 12, 2004. 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.

If petitioner does not pay the \$150 filing fee by January 5, 2004, I will consider that he does not want to pursue this action. In that event, the clerk of court is directed to close this file. However, even if the file is closed, petitioner will still owe the \$150 filing fee and he must pay it as soon as he has the means to do so. Newlin v. Helman, 123 F.3d 429, 436-437 (7th Cir. 1997). From petitioner's trust fund account statement, it appears that he has the means to pay at least a portion of the fee from his prison account. However, unless he is successful in obtaining the full amount of the fee, I will be required to advise the warden of the Diamondback Correctional Institution of petitioner's obligation to pay the fee so that if and when funds do exist in petitioner's account, the fee can be collected and sent to the court in accordance with 28 U.S.C. § 1915(b)(2).

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis is DENIED because petitioner is ineligible for in forma pauperis status under 28 U.S.C. § 1915(g).

Further, IT IS ORDERED that petitioner may have until February 12, 2004, in which to submit a check or money order made payable to the clerk of court in the amount of \$150. If, by February 12, 2004, petitioner fails to pay the fee, the clerk of court is directed to close this file and notify the warden of petitioner's prison of the amount petitioner must pay in accordance with 28 U.S.C. § 1915(b)(2).

Entered this 26th day of January, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge