

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

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VANCES H. SMITH,

Petitioner,

v.

RICK RAEMISCH;  
MIKE THURMER;  
DAN WESTFIELD; and  
PHIL KINGSTON,

Respondents.  
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ORDER

07-C-297-C

Petitioner Vances H. Smith, a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin, has filed a proposed complaint for injunctive relief and money damages, together with 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 more than three prior occasions, petitioner has been denied leave to proceed in forma pauperis on an appeal or at the district court level or both in lawsuits that were legally frivolous. See Smith v. Thurmer, 04-Cv-1245RTR, (E.D. Wis.) decided 4/29/05, and appeal (7th Cir.) decided 7/28/05 (2 strikes); Smith v. Corrections Corp. of America, 03-CV-1026-JDT (W.D. Tenn.) decided 2/11/03; and Smith v. Corrections Corp. of America, 00-CV-1013-JDT, (W.D. Tenn.) decided 02/14/00, and appeal (6th Cir.) decided 2/28/01 (2 strikes).

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 respondents deprived him of his constitutional rights when they denied him delivery of a newsletter jail officials had determined contained "material, that if completed, would violate the laws of the United States or Administrative Code."

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, slip op. 01-2657, (7th Cir. Dec. 11, 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 a publication. 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 \$350 and he must do so no later than June 20, 2007. 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 \$350 filing fee by June 20, 2007, 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 \$350 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 is clear that he does not presently have the means to pay the full fee from his prison account. Therefore, unless he is successful in obtaining the money from some other source, I will be required to advise the warden of the Oshkosh 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 June 20, 2007, in which to submit a check or money order made payable to the clerk of court in the amount of \$350. If, by June 20, 2007, petitioner fails to pay the fee, the clerk of court is directed to close this file. However, even in that event, the clerk of court is to insure that petitioner's obligation to pay the \$350 fee for filing this case is reflected in this court's financial records.

Entered this 6th day of June, 2007.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge