



No. 2.) Plaintiff filed a Motion for Leave to Proceed *in forma pauperis* on December 19, 2017.

(ECF No. 3.) The undersigned recommends that the Court deny Plaintiff's Motion in accordance with 28 U.S.C. 1915(g) because he has accumulated three or more "strikes" and may not proceed *in forma pauperis* absent a showing of imminent danger.

The "three strikes rule"<sup>2</sup> is codified at 28 U.S.C. § 1915(g) and provides 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 was 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.

28 U.S.C. § 1915(g). In sum, under the three strikes rule, a prisoner who, on three or more prior occasions while incarcerated, has filed an action in a federal court that was dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted, must be denied *in forma pauperis* status unless he is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g).<sup>3</sup>

The Court takes judicial notice of court records and dockets of the Federal Courts located in Pennsylvania as well as those of the Court of Appeals for the Third Circuit. *See DiNicola v. DiPaolo*, 945 F. Supp. 848, 854 n.2 (W.D. Pa. 1996) (court is entitled to take judicial notice of public records). The computerized dockets of those courts reveal that Plaintiff has accumulated at least "three strikes" within the contemplation of 28 U.S.C. § 1915(g).

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<sup>2</sup> *See Abdul-Akbar v. McKelvie*, 239 F.3d 307, 310 (3d Cir. 2001) (noting that 28 U.S.C. § 1915(g) is "popularly known as the 'three strikes' rule"), *cert. denied*, 533 U.S. 953 (2001).

<sup>3</sup> The Third Circuit Court of Appeals has held that dismissals based on "frivolousness" that occurred prior to the passage of the PLRA are to be included in the amount of strikes under section § 1915(g). *See Keener v. Pennsylvania Bd. of Probation and Parole*, 128 F.3d 143, 144-45 (3d Cir. 1997).

The three strikes that Plaintiff has accumulated are the following: Bailey v. Price, Civil Action No. 99-470 (W.D. Pa.), which was dismissed under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim upon which relief may be granted by Order December 22, 1999. The second strike is Bailey v. Crisanti, Civil Action No. 00-1310 (W.D. Pa.), which was dismissed under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim upon which relief may be granted by Order dated November 22, 2000. The third strike is Bailey v. Rozum, Civil Action No. 13-78 (W.D. Pa.), which was dismissed for failure to state a claim on upon which relief may be granted by Order dated June 8, 2015.

To satisfy the imminent danger exception to the three strikes rule, a plaintiff must allege facts showing that he was in imminent danger at the time the complaint was filed; allegations that the prisoner has faced imminent danger in the past are insufficient to trigger the exception to section 1915(g). See Abdul-Akbar v. McKelvie, 239 F.3d 307 (3d Cir. 2001) (overruling Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997)). In making this determination, the court should construe all allegations in a complaint in favor of the plaintiff. Gibbs v. Cross, 160 F.3d 962, 965 (3d Cir. 1998); Gibbs v. Roman, 116 F.3d at 86. Viewing the allegations in the Complaint most generous to Plaintiff, the undersigned finds that there has been no showing of imminent danger.

### **III. CONCLUSION**

For the foregoing reasons, it is respectfully recommended that Plaintiff's Motion to Proceed *in forma pauperis* (ECF No. 3) be denied in accordance with 28 U.S.C. § 1915(g) and that this case be closed until such time he pays the full \$400.00 filing fee

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and rule 72.D.2 of the Local Rules of Court, the parties are allowed fourteen (14) days from the date of

service of a copy of this Report and Recommendation to file objections. Any party opposing the objections shall have fourteen (14) days from the date of service of objections to respond thereto.

Failure to file timely objections will constitute a waiver of any appellate rights.

Dated: January 9, 2018.

Lisa Pupo Lenihan

Lisa Pupo Lenihan

United States Magistrate Judge

cc: Demetrius Bailey  
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