

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

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|---------------------------|---|-------------------------------|
| KEITH BARTELLI, | : | CIVIL ACTION NO. 3:CV-05-1285 |
| | : | |
| Plaintiff | : | (Judge Kosik) |
| | : | |
| v. | : | (Magistrate Judge Blewitt) |
| | : | |
| | : | |
| JEFFERY A. BEARD, et al., | : | |
| | : | |
| Defendants | : | |

REPORT AND RECOMMENDATION

The Plaintiff, Keith Bartelli, an inmate at the State Correctional Institution at Dallas ("SCI-Dallas") filed this civil rights action on June 20, 2005, pursuant to 42 U.S.C. § 1983. (Doc. 1). The Plaintiff also filed an *in forma pauperis* Motion. (Doc. 2).¹ We must preliminarily screen the Complaint.

I. Discussion.

The Prison Litigation Reform Act of 1995,² (the "PLRA"), obligates the Court to engage in a screening process when a prisoner wishes to proceed *in forma pauperis* (I.F.P.) pursuant to 28 U.S.C. § 1915.³ Specifically, § 1915(e)(2), which was created by § 805(a)(5) of the Act, provides:

¹Plaintiff has several civil rights cases pending before this Court, as he indicates. (Doc. 1, p. 1, ¶ I A.).

²Pub. L. No. 104-134, 110 Stat. 1321 (April 26, 1996).

³The Plaintiff completed an Application to Proceed *in forma pauperis* (Doc. 2) and authorization to have funds deducted from his prison account. (Doc. 3).

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that (A) the allegation of poverty is untrue; or (B) the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.

We have reviewed the allegations of the Complaint and have determined that Plaintiff's case should be dismissed pursuant to 28 U.S.C. § 1915(g), also known as the "three strikes" rule of the Prisoner Litigation Reform Act (PLRA). Plaintiff has filed three prior civil actions in District Court which warranted dismissal for failure to state a claim, namely, *Bartelli v. Burnett*, M.D. Pa. Civil Action 3:CV-04-0901; *Bartelli v. McGrady*, M.D. Pa. Civil Action No. 3:CV-04-0902; and *Bartelli v. Stachelek*, M.D. Pa. Civil Action No. 3:CV-04-0903.⁴ See 28 U.S.C. § 1915(e)(2)(b)(ii). Furthermore, Plaintiff has not alleged that he is any "imminent danger of serious physical injury," and therefore he does not qualify for Section 1915(g)'s exception.

Specifically, the statute states:

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 three 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.

28 U.S.C. § 1915(g).

⁴Plaintiff's cases *Bartelli v. Jastremski, et al.*, M.D. Pa. Civil No. 3:CV-04-0904 and *Bartelli v. Clark, et al.*, M.D. Pa. Civil No. 3:CV-04-0905, were also dismissed for failure to state a claim.

The Third Circuit elaborated upon Congress's intention and reasoning for enacting "three strikes" legislation in *Abdul-Akbar v. McKelvie*, 239 F.3d 307 (3d Cir. 2001). The Court stated:

Congress enacted the PLRA in order to limit the filing of frivolous and vexatious prisoner lawsuits. To accomplish this, Congress curtailed the ability of prisoners to take advantage of the privilege of filing I.F.P. The "three strikes" rule added by the PLRA supplied a powerful economic incentive not to file frivolous lawsuits or appeals. In stark terms, it declared that the I.F.P. privilege will not be available to prisoners who have, on three prior occasions, abused the system by filing frivolous or malicious lawsuit or appeals, no matter how meritorious subsequent claims may be.

Id. at 314-15.

While this legislation is important in decreasing the administrative and financial burden on federal courts it does block a prisoner's access. *Id.* Section 1915(g) "only denies the prisoner the privilege of filing before he has acquired the necessary filing fee." *Id.* Furthermore, it does not preclude a prisoner from filing in state court, where limitations on filing I.F.P. may not be as strict.

Id.

Presently, Plaintiff has filed three previous actions in the Middle District of Pennsylvania, which the Court denied due to a failure to state a claim. On May 28, 2004, the District Court dismissed M.D. Pa. Civil Action 3:CV-04-0901 for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(b)(ii). On June 23, 2004, the District Court dismissed M.D. Pa. Civil Action No. 3:CV-04-0902 for failure to state a claim. Finally, on October 29, 2004, the District Court dismissed M.D. Pa. Civil Actions 3:CV-04-0904 and 3:CV-04-0903 for failure to state a claim. It is apparent that Plaintiff has exhausted his three chances at pursuing legal remedies in federal court, and

therefore, his current Complaint should be dismissed. Furthermore, Plaintiff's filings are examples of the type of litigation that Congress wishes to curb, as he has filed approximately fourteen (14) cases in the past two years. As noted above, Plaintiff is not banned from federal court, but in order to proceed in the future, he must procure the appropriate funds or meet the exception of "imminent serious physical injury."⁵

II. Recommendation.

Based on the foregoing, it is respectfully recommended that Plaintiff's Complaint be dismissed pursuant to 28 U.S.C. §1915(g).

s/ Thomas M. Blewitt

THOMAS M. BLEWITT

United States Magistrate Judge

Dated: June 28, 2005

⁵We note that the Third Circuit, like many of its sister courts, held that "imminent danger" refers to danger at the time of filing the civil action, not at the time of an alleged incident. *McKelvie* 239 F.3d at 314.

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NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing **Report and Recommendation** dated **June 28, 2005**.

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection

is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

s/ **Thomas M. Blewitt**

THOMAS M. BLEWITT

United States Magistrate Judge

Dated: June 28, 2005