

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LAMONT HARRIS, : CIVIL NO. 3:01-CV-2185
 :
 Plaintiff : (Judge Caputo)
 :
 v. : (Magistrate Judge Smyser)
 :
 LT. MILLER, SGT. GRAY, :
 C.O. RHODES, C.O. TORRES, :
 C.O. LOPEZ, and :
 JOHN DOES #1 THRU #9, :
 :
 Defendants :

ORDER

The plaintiff, a state prisoner proceeding *pro se* and *in forma pauperis*, commenced this 42 U.S.C. § 1983 action by filing a complaint on November 19, 2001. On March 7, 2002, the plaintiff filed an amended complaint.

The plaintiff alleges the following facts in his amended complaint.

On September 14, 2001, the plaintiff arrived at the State Correctional Institution at Camp Hill (SCI-Camp Hill) from the State Correctional Institution at Pittsburgh (SCI-Pittsburgh) for a court appearance in *Harris v. Horn*, 3:CV-01-0220. Upon his arrival, defendant Miller told the plaintiff that he would not be fed. Defendant Miller stated to the

plaintiff: "We were waiting for you. You testify you don't eat."

On September 14, 2001, while passing out dinner, defendants Gray and John Doe #1 stated to the plaintiff that they were not going to feed him per defendant Miller's instructions. On September 15, 2001 and September 16, 2001, the plaintiff was denied breakfast and lunch by defendants Miller and John Doe #1. On September 17, 2001, the plaintiff was denied breakfast by defendants Rhodes and John Doe #2 and was told that such denial was per defendant Miller's instructions. On September 17, 2001, after arriving back from court, the plaintiff's property was seized and he was strip searched. At that time, the plaintiff was also denied dinner by defendants Gray and John Doe #1 and was told that such denial was per defendant Miller's instructions. The plaintiff alleges that as a result of being denied meals he suffered stomach pain, headaches and physical weakness.

On September 18, 2001, the plaintiff sought help from defendant Steven and told defendant Steven of the retaliation he was experiencing. Defendant Steven told the plaintiff "I

don't have time to hear that shit from you" and walked away from the plaintiff's cell door.

John Doe #3 cancelled the plaintiff's prescribed medications which caused the plaintiff to suffer unnecessary pain and suffering.

On September 18, 2001, the plaintiff was assaulted by defendants Rhodes, Torres, Lopez, John Doe #4 and three other unidentified guards. As these individuals were punching and kicking the plaintiff, they stated: "We were waiting for you, this should teach you about coming down here testifying against the DOC" and "You should have stayed at SCIP." These individuals ignored the plaintiff's pleas for medical attention.

On September 18, 2001, the plaintiff received his lunch from defendant Lopez. After eating his lunch, the plaintiff became sick and experienced excruciating pain in his stomach. When plaintiff requested medical assistance, defendant Lopez told him "You're lucky I didn't get the chance to kill you outright, your not getting shit." The plaintiff was eventually taken to the infirmary and then to the Hospital.

X-rays indicated that the plaintiff had two screws in his stomach and a fracture in his left foot. The screws were surgically removed from the plaintiff's stomach.

On September 21, 2001, the plaintiff was processed for transfer back to SCI-Pittsburgh. When the plaintiff inquired about his property, defendant John Doe #9 told that plaintiff that he never had any property. After the plaintiff produced his property inventory form, the defendant stated: "I don't care, you just don't have nothing in this prison."

By an Order dated August 2, 2002, the complaint was dismissed as to defendant Steven and the plaintiff's claims against the other defendants in their official capacities were dismissed.

On January 13, 2003, the defendants filed a motion to revoke the plaintiff's *in forma pauperis* status and a brief and documents in support of that motion. The plaintiff has not filed a brief in opposition to the motion. Pursuant to Local Rule 7.6, the plaintiff is deemed not to oppose the motion.

28 U.S.C. § 1915(g) (commonly referred to as the three-strikes provision) provides:

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.

In his application to proceed *in forma pauperis*, the plaintiff indicated that had not brought three or more actions or appeals in a court of the United States that were dismissed as frivolous, malicious or for failure to state a claim upon which relief may be granted. The defendants contend, however, that after pursuing discovery they have discovered that the plaintiff has brought three or more actions in a court of the United States that were dismissed as frivolous, malicious or for failure to state a claim upon which relief may be granted. The defendants cite four cases brought by the plaintiff that were dismissed and the defendants contend that these cases count as strikes pursuant to the three-strikes provision.

The first case cited by the defendants is *Harris v. Ridge*, 1:CV-99-1409 (M.D.Pa.) (Kane, J.). By an order filed on October 25, 1999, Judge Kane dismissed that case pursuant to 28 U.S.C. § 1915A and 42 U.S.C. § 1997e for failure to state a claim upon which relief can be granted. That dismissal counts as a strike under 28 U.S.C. § 1915(g).

The second case cited by the defendants is *Harris v. Pittsburgh*, Civil Action No. 98-436 (M.D.PA.) (Ambrose, J.). By an order dated December 30, 1998, Judge Ambrose dismissed that case pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim upon which relief can be granted. That dismissal counts as a strike under 28 U.S.C. § 1915(g).

The third case cited by the defendants is *Harris v. Dept. of Corrections*, 3:CV-91-1659 (M.D.Pa.) (Rambo, J.). By an order filed July 20, 1994, Judge Rambo granted the defendants' Fed.R.Civ.P. 12(b)(6) motion to dismiss that case on the basis of the statute of limitations. The defendants assert that the dismissal was tantamount to a dismissal for frivolousness under 28 U.S.C. § 1915(e)(2). A court may dismiss an *in forma pauperis* complaint as frivolous when it is apparent on the face of the complaint that the statute of limitations has expired.

Thomas v. Meyers, 3:CV-00-1887, slip op. at 11 (M.D.Pa. Mar. 25, 2002) (Caputo, J.). However, Judge Rambo did not dismiss the case as frivolous under 28 U.S.C. § 1915. Rather, Judge Rambo granted the defendants' 12(b)(6) motion to dismiss. Although the statute of limitations is an affirmative defense, a Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted may be granted on the basis of the statute of limitations if "the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations." *Bethel v. Jendoco Construction Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978). Since Judge Rambo granted the defendants' 12(b)(6) motion to dismiss, we construe the case as having been dismissed for failure to state a claim upon which relief can be granted. That dismissal counts as a strike under 28 U.S.C. § 1915(g).

Since the plaintiff has had three¹ actions dismissed for failure to state a claim upon which relief can be granted

¹The defendants cite a fourth case - *Bronson v. White*, Civil Action No. 94-1928 (M.D.PA.) (J., Bloch) - in which Harris was a plaintiff. That case was dismissed as to Harris pursuant to Fed.R.Civ.P. 41(b) for Harris' failure to prosecute. Since we have already determined that the plaintiff has brought three cases which have been dismissed for failure to state a claim upon which relief can be granted, we need not determine whether the dismissal in that case counts as a strike.

and the plaintiff has not alleged that he was in imminent danger of serious physical injury on the date he filed his complaint, he is not entitled to proceed *in forma pauperis* in this case. We will vacate the order granting the plaintiff leave to proceed *in forma pauperis* and will order the plaintiff to pay the filing fee.

On February 5, 2003, the plaintiff filed a motion to compel discovery and a brief in support of that motion. We will not rule on this motion to compel unless, or until, the plaintiff pays the filing fee.

AND NOW, this 31st day of March, 2003, **IT IS HEREBY ORDERED** that the defendants' motion (doc. 47) to revoke the plaintiff's *in forma pauperis* status is **GRANTED**. The Order of November 28, 2001, granting the plaintiff's request to proceed *in forma pauperis* is **VACATED**. **IT IS FURTHER ORDERED** that on or before May 1, 2003, the plaintiff shall pay the entire \$150.00 filing fee. If the plaintiff fails to pay the filing fee, it will be recommended that this action be dismissed.

/s/ J. Andrew Smyser
J. Andrew Smyser
Magistrate Judge

DATED: March 31, 2003.