

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LARRY DALE JOHNSON,)
Plaintiff,)

v.)

C.A. No. 13-12194-JGD

CARRIE ANN HUNTON, et al.,)
Defendants.)

-----)

LARRY DALE JOHNSON,)
Plaintiff,)

v.)

C.A. No. 13-12271-JGD

CARRIE ANN HUNTON, et al.,)
Defendants.)

MEMORANDUM AND ORDER

DEIN, M.J.

For the reasons set forth below, Plaintiff’s motions to proceed *in forma pauperis* are denied because Johnson is a three-strikes litigant subject to 28 U.S.C. § 1915(g) and the two complaints fail to set forth allegations sufficient to demonstrate that he is in imminent danger of physical harm. If Plaintiff wishes to proceed with either of these actions, he shall pay the \$400.00 administrative and filing fees for each action that he wishes to pursue.

BACKGROUND

Now before the Court are two separate actions filed by Larry Dale Johnson, an inmate now incarcerated at FMC Devens in Ayer, Massachusetts. The first action was filed on August 30, 2013 and is accompanied by an Application to Proceed Without Prepayment of Fees and Affidavit. See C.A. No. 13-12194-JGD. As best can be gleaned from the first

complaint, Johnson contends that he was subjected to a disciplinary hearing in July 2013 for refusing an institutional work assignment in June 2013 despite his representation that he is disabled and unable to work. Id. Plaintiff contends that his “current medical restrictions at Devens FMC have been changed often from no lifting, no duty to sedentary work only and medically idle to food services clearance for a work assignment as of July 1, 2013 through constant interference in a doctor/patient relationship by defendants/respondents unit team members in retaliation for [plaintiff’s] legal activities in [the] District of New Jersey.” Id. at p. 9. The complaint names as defendants a unit manager, a work supervisor, a case manager and “unidentified correction officers and medical providers.” Id. at p. 1-2. Plaintiff requests “a Declaratory Ruling” and “all the relief available under 28 U.S.C. § 1915(g) based upon the above material facts that [plaintiff is] under imminent danger of serious physical injury.” Id. at p. 13.

The second action was filed on September 12, 2013, and is accompanied by a self-prepared Motion and Declaration to Proceed *in forma pauperis* . See C.A. No. 13-12271-JGD. In the second complaint, plaintiff alleges that he is “in a state of constant pain caused by movement from sciatic nerve pain of [plaintiff’s] lower spine.” Complaint, p. 2. He contends that correctional officers and medical providers have failed to adequately address his needs. Id. He alleges that while incarcerated in Pennsylvania, he was subjected to several unconstitutional conditions including a sexual assault by an inmate. Id. at page 13. Plaintiff complains that his medical treatment by the Federal Bureau of Prisons “is fraught with delays, stalls, interference with an indifferent approach to the standard practice of medical (sic) that

threatens [plaintiff's] healthy life causing [him] irreparable harm placing [plaintiff] in imminent danger and risk." Id. at p. 17. The second complaint names as defendants the Warden at FMC Devens as well as the same unit manager, work supervisor, and case manager that were named in the first complaint. Id. at p. 1. In the second complaint, plaintiff seeks equitable and monetary relief. Id. at p. 19.

DISCUSSION

In order to bring a civil action in this Court, plaintiff must either (1) pay the \$350.00 filing fee and the \$50.00 administrative fee,¹ see 28 U.S.C. § 1914(a); or (2) seek leave to proceed without prepayment of the \$50.00 administrative fee, see 28 U.S.C. § 1915 (proceedings *in forma pauperis*).²

As Johnson knows, a prisoner may be denied *in forma pauperis* status if he has had, on three or more prior occasions, an action or appeal dismissed on the ground that it was frivolous, malicious, or failed to state a claim upon which relief may be granted. 28 U.S.C. § 1915(g)(the "three-strikes" rule). Where a prisoner has "three-strikes," he may only proceed *in forma pauperis* if he is "under imminent danger of serious physical injury." Id.

A search of the federal Judiciary's Public Access to Court Electronic Records (PACER) service reveals that while incarcerated at FCI Fort Dix in New Jersey, plaintiff filed

¹The \$50.00 administrative fee became effective May 1, 2013. See Judicial Conference Fee Schedule.

²Where the plaintiff is a prisoner, a motion for waiver of prepayment of the filing fee and/or administrative fee must be accompanied by "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint . . . obtained from the appropriate official of each prison at which the prisoner is or was confined." 28 U.S.C. § 1915(a)(2).

a complaint against his ex-wife. See Johnson v. Johnson, No. 12-4112-RMB-AMD (D. N.J. July 5, 2012) . By Memorandum dated January 23, 2013, plaintiff's request to proceed *in forma pauperis* was denied because he had filed at least 23 cases in one year's time in the District of Oregon, most of which were dismissed by the federal court as frivolous, because they were duplicative of another action, or for failure to state a claim. Id.

I recognize that Plaintiff Johnson is a three-strikes litigant subject to 28 U.S.C. § 1915(g) because he has had, on three or more occasions, civil actions dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. See Johnson v. Federal Bureau of Prison, et al., C.A. No. 11-1002 (ST) (D. Oregon, Oct. 6, 2011) (citing prior cases dismissed as frivolous, malicious or for failure to state a claim). I am satisfied after independently reviewing the records that Johnson is indeed a three-strikes litigant under 28 U.S.C. § 1915(g). See Johnson v. Thomas, C.A. No. 11-CV-368-ST (D. Or. Apr. 4, 2011) (dismissed on the grounds that it was duplicative of another action; Johnson v. Rudebaugh, C.A. No. 11-CV-596-ST (D. Or. July 13, 2011) (dismissed on the grounds that it was duplicative of another action and therefore frivolous); Johnson v. Friedman, C.A. No. 11-CV-603-ST (D. Or. July 13, 2011) (dismissed for failure to state a claim); Johnson v. Price, C.A. No. 11-CV-604-ST (D. Or. July 13, 2011) (dismissed duplicative of two other actions and therefore frivolous). Other cases filed by Johnson may constitute strikes as well, but I need not delve into this question further.

I find that the exception outlined in § 1915(g) permitting a prisoner to proceed *in forma pauperis* if he is under threat of imminent danger, does not apply to Johnson's two

cases. In order to invoke the exception of the three-strikes rule based on the allegation of imminent danger of serious bodily harm, two elements must be met: the harm must be imminent and the claim for relief asserted must be for the alleviation of that threat of harm. See, e.g., Judd v. Federal Election Com'n, 311 Fed. Appx 730 (5th Cir.2009) (rejecting prisoner's *in forma pauperis* application noting that the alleged threats were not related to his complaint); Polanco v. Hopkins, 510 F.3d 152, 155 (2d Cir.2007) (finding no error by the district court in determining prisoner's allegations [relating to health risks associated with his exposure to mold or as to his claim of unjust discipline] did not support a determination that he was in imminent danger under 1915(g)); Martin v. Crosby, 219 Fed. Appx. 599 (8th Cir.2007) (unpublished disposition; allegation by prisoner of risk of sexual assaults and unwarranted strip searches were baseless, and district court was alerted by the appellate court to require prisoner to demonstrate that he “is truly in imminent danger” before being allowed to proceed *in forma pauperis*); Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir.2002) (the “imminent danger” exception to § 1915(g)'s “three strikes” rule is available “for genuine emergencies,” where “time is pressing” and “a threat ... is real and proximate.”); Abdul-Akbar v. McKelvie, 239 F.3d 307, 313–315 (3d Cir.2001) (holding prisoner may invoke the imminent danger exception to 1915(g) only to seek relief from a danger which is imminent at the time the complaint is filed; stating “Congress indicated that it wanted to include a safety valve for the ‘three strikes’ rule to prevent impending harms”); Watley v. Collins, 2006 WL 3422996, *5 (S.D.Ohio 2006) (danger claims concerning past events cannot support a claim of imminent physical danger; the imminent danger must relate to the

claims in order to meet the exception of § 1915(g), citing Abdul–Akbar v. McKelvie, 239 F.3d 307, 312 (3d Cir.2001) (statutory interpretation of § 1915(g) requires that imminent danger is assessed at time the complaint is filed)).

Johnson’s two complaints fail to set forth allegations sufficient to demonstrate that he is in imminent danger of physical harm. Although he alleges deliberate indifference to serious medical need, most of his claims concern deprivations in the past, including deprivations that allegedly occurred while he was incarcerated in other institutions. The allegations of pain and suffering while imprisoned are insufficient to demonstrate imminent danger. Moreover, the factual allegations in both complaints fail to sufficiently plead civil rights claims against any of the named defendants.³ Thus, without more, this Court cannot find that Johnson has satisfied this Court that he is exempted under the three-strikes rule of § 1915(g) based on the imminent danger exception.

ORDER

Based upon the foregoing, it is hereby ORDERED that Plaintiff’s two motions for leave to proceed *in forma pauperis* are DENIED. Within forty-two (42) days of the date of this Memorandum and Order, plaintiff shall pay the \$400.00 administrative and filing fees for each action that he wishes to pursue. Failure to comply with the directives contained in this

³To state a claim for relief, a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." See Fed. R. Civ. P. 8(a)(2). The complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Calvi v. Knox County, 470 F.3d 422, 430 (1st Cir. 2006) (quoting Educadores Puertorriqueños en Acción v. Hernández, 367 F.3d 61, 66 (1st Cir. 2004)). This means that the statement of the claim must "at least set forth minimal facts as to who did what to whom, when, where, and why." Id. (quoting Educadores, 367 F.3d at 68).

Memorandum and Order may result in a dismissal of this action.⁴

SO ORDERED.

November 18, 2013
DATE

/s/ Judith G. Dein
JUDITH G. DEIN
UNITED STATES MAGISTRATE JUDGE

⁴This action was assigned pursuant to the Court's Program for Random Assignment of Civil Cases to Magistrate Judges. Upon receipt of Plaintiff's response to this Memorandum and Order, the undersigned will either direct the Clerk to issue summons or direct the reassignment of the case to a District Judge for further review.