

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

PETER COOK,

Plaintiff

v.

JOHN HORNER; JOHN KELLY;  
NATHAN BEASTON; OFFICER  
CARBERRY; OFFICER KLAUS;  
OFFICER PRAVE; PAUL LEGGORE;  
OFFICER ANSTEAD; C.O. RHOADES;  
OFFICER PORTERFIELD; KENNETH  
KYLER; WILLIAM WARD;  
C.O. STENDER; C.O. WYLAM;  
C.O. BARRETT; C.O. DEMANICOR; and  
NURSE VOLCIAK,

Defendants

CIVIL NO. 1:CV-97-1814

(Judge Rambo)

FILED  
HARRISBURG, PA

OCT 11 2000

MARY E. D'ANDREA, CLERK  
Per MA  
Deputy Clerk

ORDER

Before the court is Defendants' motion to revoke Plaintiff's in forma pauperis status pursuant to 28 U.S.C. § 1915(g), which 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 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.

It appears from the records that Plaintiff has at least "three strikes" against him within the meaning of 28 U.S.C. § 1915(g). These cases are Cook v. Rosenburger, Civil No. 1:CV-95-0369 (M.D. Pa.), dismissed on September 13, 1995 for failing to state a claim upon

which relief can be granted; Cook v. Kyler, Civil No. 1:CV-95-1332 (M.D. Pa.), dismissed on March 20, 1996 for failing to state a claim upon which relief can be granted; and Cook v. Ross, Civil No. 1:CV-95-1759 (M.D. Pa.), wherein Plaintiff took an appeal to the Third Circuit Court of Appeals from an interlocutory order denying his motion for a jury trial and the appeal was summarily dismissed as clearly lacking a final appealable order.

Plaintiff has also had the following cases dismissed for failure to exhaust : Cook v. Ward, Civil No. 1:CV-97-0954 (M.D. Pa.); Cook v. Kelly, Civil No. 1:CV-97-1602 (M.D. Pa.); and Cook v. Kyler, Civil No. 3:CV-99-0234 (M.D. Pa.). Some courts have found that failure to exhaust counts as a strike. See Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998), cert. dismissed, 524 U.S. 978 (1998); and Patton v. Jefferson Correctional Center, 136 F.3d 458, 463-64 (5th Cir. 1998). Other courts, however, have not treated a failure to exhaust as meeting the three strike provision. See Snider v. Melindez, 199 F.3d 108 (2d Cir. 1999). Defendants cite Booth v. Churner, C.O., 206 F.3d 289 (3d Cir. 2000), in support of the proposition that the Third Circuit treats, in some instances, an inmate's failure to exhaust as a dismissal. Since this court is not aware of the facts of each of Plaintiff's failure to exhaust cases, the court is not inclined, without further information, to treat his past failure to exhaust claims as dismissals.

The next question to which the court turns is whether Plaintiff can avoid the "three strikes" provision because he is under imminent danger of serious physical injury. At the time the complaint was filed, no such allegation was made. A motion for a temporary restraining order was denied on December 22, 1997 and March 17, 1998, and no current allegation is supported.

Of concern to this court is Defendants' lateness in raising this issue. Defendants point out that the initial grant of in forma pauperis status was made to Plaintiff

because of his failure to reveal his various case dismissals on his application for in forma pauperis status. Plaintiff's deception regarding these facts should not entitle him to in forma pauperis status.

**IT IS THEREFORE ORDERED THAT:**

- 1) Plaintiff's in forma pauperis status is revoked.
- 2) Plaintiff shall pay the full filing fee of \$150 within 90 days of the date of this order.
- 3) Failure to pay as directed above will result in the dismissal with prejudice of the captioned action.
- 4) This case is removed from the November 2000 trial list and all motions and deadlines in the captioned action are stayed until further order of court.

  
SYLVIA H. RAMBO  
United States District Judge

Dated: October // , 2000.

