

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

GLUE WILKINS,)	
)	
Plaintiff,)	
)	
v)	Civil Action No. 06-203J
)	Judge Kim R. Gibson/
GERALD ROZUM, Superintendent,)	Magistrate Judge Amy Reynolds Hay
JEFFREY A. BEARD, Secretary of)	
Corrections, REBECCA GAUNTNER,)	
Library Assistant, DANIEL J.)	
GEHLMAN, Major, SILVIA GIBSON)	
Deputy Superintendent, TERRY)	
DEWITT, Office of Professional)	
Responsibility, and THE)	
DEPARTMENT OF CORRECTIONS)	
)	
Defendants)	
)	

REPORT AND RECOMMENDATION

RECOMMENDATION

It is respectfully recommended that the order granting plaintiff's application for leave to proceed in forma pauperis be vacated and that the case be dismissed if Plaintiff does not pay the entire filing fee within thirty days of the District Court's order adopting this report and recommendation.

REPORT

Glue Wilkins, also known as Allen Lee Wilkins, ("Plaintiff"), is currently incarcerated in the State Correctional Institution at Cresson, serving a 24 year sentence. His inmate number is FP-1629. He has sought leave to proceed in forma pauperis (IFP) in order to file a civil rights complaint in

this court, suing six individual defendants, all of whom are employed by the Pennsylvania Department of Corrections ("DOC"). In addition, Plaintiff has also named DOC as a defendant. In the complaint, Plaintiff complains about actions or inactions committed by Defendant Rebecca Gauntner who is the librarian at SCI-Somerset, where Plaintiff was formerly incarcerated. He complains that she denied him access to the law library on May 20, 2006, when she lied to corrections officers telling them that there was no space available for Plaintiff on that day. Doc. 1 at 3, ¶¶ 3-5. Attachments to the complaint show that Plaintiff had been in the library for 17 out of 19 sessions from May 13, to May 19, 2006 and that he was in the library 14 times during the two weeks following May 19, 2006. Doc. 1 at 7. He apparently filed a grievance against Ms. Gauntner on May 22, 2006. Plaintiff alleges that Defendant Gehlman, a Corrections Officer at SCI-Somerset, who holds the rank of major, told Plaintiff that the staff were going to make sure that Plaintiff never got as much time at the library as he had before. Doc. 1 at 9, ¶ 4. Plaintiff alleges that Defendant Rozum refused to address the issue concerning Ms. Gauntner but warned Plaintiff that staff were taking measures to assure Plaintiff would not get the time he needed in the law library.

Plaintiff further alleges that he received a misconduct from Ms. Gauntner on July 1, 2006, which Plaintiff is implying was

retaliation for his filing a grievance against Ms. Gauntner. Plaintiff claims that he had no access to the library, although he also notes that he had a newly appointed lawyer for an appeal, apparently in state court concerning his conviction(s).¹ Plaintiff complains that he was routinely harassed by SCI-Somerset staff. Plaintiff alleges that at various times he was denied food, yard and access to the library. Doc. 1 at 10, ¶ 17. Plaintiff alleges that he informed Defendant DeWitt of the harassment. Plaintiff does not explicitly allege that Defendant DeWitt did nothing about the harassment but in naming him as a Defendant in this suit, a liberal reading of the complaint

¹ One of Plaintiff's constitutional claims is that he was denied access to the courts. In light of his concession in the complaint that he had court appointed counsel for an appeal, at least with respect to that case, he cannot state a claim for denial of access to courts as a matter of law. The rule is that where an inmate is represented by counsel, his right of access to the courts is satisfied as a matter of law. Lamp v. Iowa, 122 F.3d 1100, 1106 (8th Cir. 1997) ("For, once the State has provided a petitioner with an attorney in postconviction proceedings, it has provided him with the 'capability of bringing contemplated challenges to sentences or conditions of confinement before the courts.'" (quoting Lewis v. Casey, 518 U.S. 343, 356 (1996)); Schrier v. Halford, 60 F.3d 1309, 1313-1314 (8th Cir. 1995) (having appointed counsel is one way in which state can shoulder its burden of assuring access to the courts); Sanders v. Rockland County Correctional Facility, No. 94 Civ. 3691, 1995 WL 479445 at *2 (S.D.N.Y. Aug. 14, 1995) ("By the appointment of counsel, plaintiff was afforded meaningful access to the courts in his trial."); Rogers v. Thomas, No. 94-4692, 1995 WL 70548 at *2 (E.D. Pa. Feb. 17, 1995), *aff'd*, 65 F.3d 165 (3d Cir. 1995) (Table). This rule of law makes eminent sense in light of Bounds v. Smith, 430 U.S. 817 (1977), one of the landmark cases in right of access jurisprudence, which declared that inmates' right of access to the courts may be satisfied by "providing prisoners with adequate law libraries **or** adequate assistance from persons trained in the law." Id., 430 U.S. at 828 (emphasis added). Accordingly, because Plaintiff had counsel for the appeal, Plaintiff cannot state a claim for denial of access to the courts with respect to that case.

permits such an inference. Plaintiff also alleges that he repeatedly informed Defendant Gibson, the Deputy Superintendent of SCI-Somerset, about the problems Plaintiff was experiencing but she did nothing.

Plaintiff does note in the complaint that he was transferred out of SCI-Somerset on August 25, 2006. Doc. 1 at 11, ¶ 25.

In addition to his claim that he was denied access to court, Plaintiff claims that he was placed in administrative custody, harassed and transferred, all in retaliation for his filing civil rights claims against a prison official, apparently meaning thereby Defendant Gauntner. Doc. 1 at 9.

Discussion

It is a plaintiff's burden to prove entitlement to IFP status. See White v. Gregory, 87 F.3d 429, 430 (10th Cir. 1996); New Assessment Program v. PNC Corp., 1995 WL 592588, at *1 (E.D. Pa. Oct. 3, 1995); In re Lassina, 261 B.R. 614, 618 (E.D. Pa. 2001) ("The applicant bears the burden of proving her entitlement to IFP relief by a preponderance of the evidence.").

The court takes judicial notice of court records and dockets of the Federal Courts located in the Commonwealth of Pennsylvania. DiNicola v. DiPaolo, 945 F. Supp. 848, 854 n.2 (W.D. Pa. 1996) (court is entitled to take judicial notice of public records). Those dockets reveal that Mr. Wilkins has accumulated at least "three strikes" within the contemplation of

28 U.S.C. § 1915(g)² which provides in relevant part that

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.

Plaintiff Wilkins is a "prisoner" within the meaning of 28 U.S.C. § 1915(g).³ The three strikes that Mr. Glue Wilkins has accumulated are as follows. The first strike is Glue Wilkins v. Klein, No. 04-CV-2380 (M.D. Pa. order dismissing complaint as legally frivolous filed 11/8/2004 at Doc. # 6). The second strike is Glue Wilkins v. Dauphin County, Pa., No. 05-CV-901 (M.D. Pa. order dismissing complaint as legally frivolous filed 5/9/2005 at Doc. # 6). The third strike is Glue Wilkins v. The Honorable Joseph H. Kleinfelter, No. 06-CV-14 (M.D. Pa. order dismissing complaint as frivolous filed on 1/26/20 06 at Doc. # 8). In fact, Plaintiff also has at least one more strike: Glue Wilkins v. Thomas Corbett, No. 06-CV-171 (M.D. Pa. Order dismissing complaint as frivolous filed 1/31/2006 at Doc. # 6).

² 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, 121 S.Ct. 2600 (2001).

³ The term prisoner as used in Section 1915 means "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 28 U.S.C. § 1915(h)

Accordingly, because Mr. Wilkins has at least three strikes he may not proceed IFP, unless "the prisoner is under imminent danger of serious physical injury" as revealed by the complaint because imminent danger of physical injury must be assessed as of the time of filing the application for leave to proceed IFP and/or the complaint. See Abdul-Abkar v. McKelvie, 239 F.3d 307 (3d Cir. 2001); Banos v. O'Guin, 144 F.3d 883, 884 (5th Cir. 1998) ("The plain language of the statute [i.e., Section 1915(g)] leads us to conclude that a prisoner with three strikes is entitled to proceed with his action or appeal only if he is in imminent danger at the time that he seeks to file his suit in district court or seeks to proceed with his appeal or files a motion to proceed IFP.").

Viewing plaintiff's allegations contained in the proposed complaint most generously, the court has no hesitancy in concluding that Plaintiff has not met the threshold of showing "an imminent danger of serious physical injury." See, e.g., Luedtke v. Bertrand, 32 F.Supp.2d 1074 (E.D. Wis. 1999). In Luedtke, the prisoner plaintiff had three strikes against him. Nonetheless, he sought to proceed in forma pauperis without pre-paying the filing fee. The complaint alleged a conspiracy among the defendants to beat, assault, injure, harass and retaliate against him. The court found these allegations to be "insufficient and lack the specificity necessary to show an

imminent threat of *serious* physical injury.” Id. at 1077. The court reasoned that these threats of assaults and injuries at some unspecified time in the future failed to come within the exception permitted by Section 1915(g). Likewise here, the court concludes that Plaintiff’s allegations fail to show an imminent threat of serious physical injury. All of the complained of actions occurred prior to August 25, 2006 and at SCI-Somerset, prior to him being transferred to his current prison, SCI-Cresson. The instant application for leave to proceed IFP was not filed until September 21, 2006. None of plaintiff’s allegations indicate a threat of serious physical injury, yet alone imminent risk, given that all of the defendants who were alleged to be actively harassing Plaintiff, worked at SCI-Somerset, a prison in which Plaintiff is no longer housed. Hence, even assuming, without deciding, that any of plaintiff’s allegations could sufficiently allege serious physical injury, the fact that Plaintiff has been transferred out of SCI-Somerset and that at the time he filed his IFP application he was already housed in SCI-Cresson, indicates a lack of any imminent injury at the time of filing the IFP application. Abdul-Akbar v. McKelvie, 239 F.3d at 313 (“Someone whose danger has passed cannot reasonably be described as someone who ‘is’ in danger, nor can that past danger reasonably be described as ‘imminent.’”). Because plaintiff herein has failed to sufficiently allege any

facts that would permit him to proceed IFP, he should have been denied leave to so proceed. Given that he was erroneously granted leave to proceed IFP, the order granting him IFP status should be vacated⁴ and the complaint should be dismissed if Plaintiff does not pay the entire filing fee within thirty days after the District Court adopts the report and recommendation.

CONCLUSION

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) & (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of the objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

Respectfully submitted,

/s/ Amy Reynolds Hay
AMY REYNOLDS HAY
United States Magistrate Judge

Dated: 19 December, 2006

cc: The Honorable Kim R. Gibson
United States District Judge

Glue Wilkins
FP-1629
SCI Cresson
P.O. Box A
Cresson, PA 16699-0001

⁴ See, e.g., Boreland v. Vaughn, No. CIV. A. 97-5590, 2000 WL 254313 (E.D. Pa. March 7, 2000) (revoking erroneous grant of IFP status after discovering prisoner plaintiff had three strikes).