

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

October 4, 2011

No. 11-50205
Summary Calendar

Lyle W. Cayce
Clerk

RALPH B. SMITH,

Plaintiff-Appellant

v.

NEITA HULLUM; JULIE THALER; DIRECTORS REVIEW COMMITTEE;
STEPHANIE HIDRAGO; KAY SHEELEY,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:09-CV-3

Before GARZA, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:*

Ralph B. Smith, Texas prisoner # 855314, seeks leave to proceed in forma pauperis (IFP) on appeal of the district court's dismissal in part and grant of summary judgment to the defendants in part of his 42 U.S.C. § 1983 action. By moving for leave to proceed IFP, Smith is challenging the district court's certification that his appeal is not taken in good faith because it is frivolous. *See*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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Baugh v. Taylor, 117 F.3d 197, 202 (5th Cir. 1997); 28 U.S.C. § 1915(a)(3); FED. R. APP. P. 24(a)(5).

Smith argues that the district court erred by not granting him a default judgment because the defendants did not file a timely answer. However, a district judge has discretion to determine that a default judgment “should not be granted on the claim, without more, that the defendant had failed to meet a procedural time requirement.” *Lacy v. Sitel Corp.*, 227 F.3d 290, 292 (5th Cir. 2000) (internal quotation marks and citation omitted). Since Smith has failed to make the necessary showing, the district court did not abuse its discretion. Because Smith’s appeal is frivolous, the IFP motion is denied, and the appeal is dismissed. *See Baugh*, 117 F.3d at 202; 5TH CIR. R. 42.2. Smith’s motion for appointment of counsel is also denied. *See Cooper v. Sheriff, Lubbock County, Tex.*, 929 F.2d 1078, 1084 (5th Cir. 1991).

The dismissal of this appeal as frivolous counts as a strike under § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387–88 (5th Cir. 1996). As Smith has now accumulated three strikes, he is barred from proceeding in forma pauperis pursuant to § 1915 while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g); *Smith v. Sheeley*, No. 6:09-CV-002, slip op. at 1 (W.D. Tex. Aug. 20, 2009) (unpublished); *Smith v. Owens*, No. 5:09-CV-181, slip op. at 1 (E.D. Tex. Mar. 8, 2010) (unpublished).

IFP MOTION DENIED; MOTION FOR APPOINTMENT OF COUNSEL DENIED; APPEAL DISMISSED; 28 U.S.C. § 1915(g) BAR IMPOSED.