

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Raymond J. Smolsky, and All	:	
Pennsylvania Prisoners,	:	
Petitioners	:	
	:	
v.	:	No. 513 M.D. 2010
	:	
Pennsylvania General Assembly and	:	Submitted: December 23, 2010
Legislatures of the Commonwealth of	:	
Pennsylvania, et. al., and the State	:	
Department of Corrections of the	:	
Commonwealth of Pennsylvania,	:	
Respondents	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
 HONORABLE PATRICIA A. McCULLOUGH, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: May 5, 2011

Before this Court are the applications for relief filed by the Department of Corrections (Department) and the Pennsylvania General Assembly (General Assembly) seeking revocation of Raymond J. Smolsky’s (Smolsky) *in forma pauperis* status and dismissal of Smolsky’s petition for review pursuant to Section 6602 of the act known as the Prisoner Litigation Reform Act (PLRA), 42 Pa. C.S. §6602.

On June 4, 2010, Smolsky, an inmate incarcerated with the Department, filed a *pro se* petition for review in this Court’s original jurisdiction. The petition for review seeks declaratory judgment relief against the Department and the General Assembly on the basis that Section 6602(f)(1) of the PLRA,

42 Pa. C.S. §6602(f)(1), is unconstitutional as it conflicts with the Remedies Clause of Article 1, Section 11 of the Pennsylvania Constitution¹ and the Equal Protection Clause of Fourteenth Amendment to the United States Constitution. Section 6602(f)(1) of the PLRA permits a court to dismiss a complaint challenging prison conditions where the prisoner has had three prior prison conditions complaints dismissed as frivolous or malicious or for failure to state a claim upon which relief may be granted. Smolsky claims he has been “injured” by the PLRA because he has been identified by this Court as an “abusive litigator” and his cases have been dismissed on this basis by the courts. Smolsky also filed an application to proceed *in forma pauperis*, which this Court granted on June 9, 2010.

On June 23, 2010, the Department filed an application for relief in the nature of a request to revoke *in forma pauperis* status and dismiss the petition for review. On June 29, 2010, the General Assembly filed an application for relief, which joined in the application filed by the Department and asserted additional grounds for the relief requested.²

¹ This section provides:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Pa. Const. Art. 1, §11.

² The Department and General Assembly also filed applications for relief in the nature of a request to stay the time for filing a responsive pleading. This Court granted these applications and stayed the obligation to file responsive pleadings pending disposition of the applications to revoke *in forma pauperis* status and dismiss the petition for review.

The Department and the General Assembly assert that Smolsky has been adjudicated an abusive litigator and therefore his *in forma pauperis* status should be revoked and his case dismissed as it is frivolous on its face. The General Assembly adds that the case should be dismissed because (1) Smolsky fails to state a claim upon which relief can be granted, (2) the General Assembly has complied with all of its constitutional obligations as the challenged provisions have already been upheld by this Court, and (3) the General Assembly is protected against this lawsuit because it falls within the scope of legislative immunity.

An inmate's ability to proceed *in forma pauperis* is governed by Rule 240 of the Pennsylvania Rules of Civil Procedure. Jae v. Good, 946 A.2d 802 (Pa. Cmwlth.), petition for allowance of appeal denied, 598 Pa. 790, 959 A.2d 930 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 1042 (2009). Generally, any party, including a prisoner, who lacks the financial resources to pay the costs of a civil lawsuit may have those costs waived if permitted "to proceed *in forma pauperis*." PA. R.C.P. No. 240; Jae. "If, simultaneous with the commencement of an action or proceeding or the taking of an appeal, a party has filed a petition for leave to proceed *in forma pauperis*, the court prior to acting upon the petition may dismiss the action, proceeding or appeal if the allegation of poverty is untrue *or if it is satisfied that the action, proceeding or appeal is frivolous.*"³ PA. R.C.P. No. 240(j) (emphasis added).

In addition to having to satisfy the terms of Rule of Civil Procedure 240, prisoners seeking to proceed *in forma pauperis* must also satisfy the terms of

³ In Grosso v. Love, 667 A.2d 43 (Pa. Cmwlth. 1995), this Court ruled that dismissal pursuant to Pa. R.C.P. No. 240(j) can occur only before the grant of an *in forma pauperis*

(Continued....)

the PLRA, which is designed to discourage the filing of frivolous prison conditions lawsuits. Jae. It does so by authorizing a court to dismiss the *in forma pauperis* complaint of a prisoner who has a history of filing frivolous litigation. Id.; Section 6602(e) of the PLRA, 42 Pa. C.S. §6602(e). Section 6602(e) of the PLRA provides:

(e) Dismissal of litigation.--Notwithstanding any filing fee which has been paid, ***the court shall dismiss prison conditions litigation at any time***, including prior to service on the defendant, if the court determines any of the following:

(1) The allegation of indigency is untrue.

(2) **The *prison conditions litigation* is frivolous or malicious or fails to state a claim upon which relief may be granted or the defendant is entitled to assert a valid affirmative defense, including immunity, which, if asserted, would preclude the relief.**

The court may reinstate the prison conditions litigation where the dismissal is based upon an untrue allegation of indigency and the prisoner establishes to the satisfaction of the court that the untrue information was not known to the prisoner.

42 Pa. C.S. §6602(e) (emphasis added). Frivolous litigation lacks an arguable basis either in law or in fact. Section 6601 of the PLRA, 42 Pa. C.S. §6601. Section 6602(f) of the PLRA, commonly referred to as the "three strikes rule," provides:

(f) Abusive litigation. — If the prisoner has previously filed prison conditions litigation and:

petition, not after.

(1) *three or more of these prior civil actions have been dismissed pursuant to subsection (e)(2)* [prison conditions litigation that is frivolous or malicious or fails to state a claim upon which relief may be granted]; or

(2) the prisoner has previously filed prison conditions litigation against a person named as a defendant in the instant action or a person serving in the same official capacity as a named defendant and a court made a finding that the prior action was filed in bad faith or that the prisoner knowingly presented false evidence or testimony at a hearing or trial;

the court may dismiss the action. The court shall not, however, dismiss a request for preliminary injunctive relief or a temporary restraining order which makes a credible allegation that the prisoner is in imminent danger of serious bodily injury.

42 Pa. C.S. §6602(f) (emphasis added). The PLRA defines “prison conditions litigation” as:

A civil proceeding arising in whole or in part under Federal or State law with respect to the conditions of confinement or the effects of actions by a government party on the life of an individual confined in prison. The term includes an appeal. The term does not include criminal proceedings or habeas corpus proceedings challenging the fact or duration of confinement in prison.

Section 6601 of the PLRA, 42 Pa. C.S. §6601. Examples of prison conditions litigation have included, *inter alia*, an action challenging obscenity provisions of inmate mail and incoming publication policy (Payne v. Department of Corrections, 582 Pa. 375, 871 A.2d 795 (2005)); action challenging inmate mail policy (Jae); action challenging rates charged to inmates for usage of prison telephone system (Smolsky v. Governor's Office of Administration, 990 A.2d 173 (Pa. Cmwlth. 2010)); civil rights violation action (Brown v. Beard, 11 A.3d 578 (Pa. Cmwlth.

2010)); and a malpractice action (McCool v. Department of Corrections, 984 A.2d 565 (Pa. Cmwlth. 2009), petition for allowance of appeal denied, __ Pa. __, 989 A.2d 10 (2010)).

There is no dispute that Smolsky has already been adjudicated an abusive litigator by this Court. See Smolsky v. Governor's Office of Administration.⁴ The pertinent question here is whether the current petition for review constitutes "prison conditions litigation". The Department and the General Assembly assert that the petition involves a challenge to the Department's anti-pornography policy and, therefore, is "prison conditions litigation" subject to the PLRA. However, Smolsky's anti-pornography policy challenge was the subject matter of Smolsky v. Beard (Pa. Cmwlth., No. 612 MD 2007, filed March 24, 2010),⁵ which was dismissed by this Court. While the instant matter may have been motivated by the dismissal of Smolsky v. Beard,⁶ the present case is a

⁴ Therein, the Court recounted that Smolsky has filed at least three prior actions and appeals therefrom involving prison conditions, which were either frivolous or failed to state a cause of action. Specifically,

two cases, Smolsky v. Feretti [(C.P. Pa. Northumberland Co., No. 03-CV-1692, filed January 13, 2004), aff'd, 863 A.2d 1240 (Pa. Super. 2004)] and Smolsky v. Beard [(Pa. Cmwlth., No. 356 M.D. 2004, filed February 2, 2005), aff'd, 585 Pa. 545, 889 A.2d 500 (2005)], were dismissed for failure to state a cause of action and thus, constitute strikes under section 6602(f)(1) of the PLRA. In ... Smolsky v. Horn [(Pa. Cmwlth., No. 567 M.D. 1998, filed December 15, 1998), aff'd, 559 Pa. 282, 739 A.2d 1052 (1999)], this court dismissed Smolsky's petition for review for failure to prosecute ... [which] also constitutes a strike under section 6602(f)(1) of the PLRA.

Smolsky v. Governor's Office of Administration, 990 A.2d at 175.

⁵ Therein, Smolsky sought an injunction of the enforcement of a Department policy that barred his receipt of Playboy magazine and other publications depicting nudity.

⁶ In his petition for review, Smolsky cites Smolsky v. Beard as an example of prison
(Continued....)

straight-forward constitutional challenge of the PLRA and does not involve the conditions of confinement. We, therefore, conclude that the instant matter does not constitute “prison conditions litigation” and is not subject to dismissal under Section 6602 of the PLRA.

Accordingly, the applications for relief filed by the Department and General Assembly are denied.

JAMES R. KELLEY, Senior Judge

conditions litigation that has been dismissed.

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Commonwealth of Pennsylvania,	:	
Respondents	:	

ORDER

AND NOW, this 5th day of May, 2011, the Respondents' applications for relief are DENIED; Respondents are hereby directed to file responsive pleadings within thirty (30) days of this order.

JAMES R. KELLEY, Senior Judge