

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-6809

BERNARD MCFADDEN,

Plaintiff - Appellant,

v.

BERNARD MCKIE, Warden of Kirkland CI; MR. LATTER, Major of KCI; JACKSON, FNU Major of KCI; MRS. REEVES, FNU Sergeant of KCI; MR. THOMAS, Food Service Director of KCI; MRS. MARSHALL, Food Services Supervisor, in their individual or personal capacities,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. J. Michelle Childs, District Judge. (3:11-cv-00673-JMC)

Submitted: January 6, 2012

Decided: February 7, 2012

Before NIEMEYER and DIAZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Vacated and remanded by unpublished per curiam opinion.

Bernard McFadden, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Bernard McFadden appeals the district court's order adopting the magistrate judge's report and recommendation and denying McFadden's request to proceed with his complaint, brought pursuant to 42 U.S.C. § 1983 (2006), without prepayment of fees. Because the district court erroneously classified McFadden as a "three-striker" for purposes of the Prison Litigation Reform Act ("PLRA"), we vacate the order and remand.*

Under the PLRA, a prisoner who brings a civil action or an appeal who has had three or more actions or appeals dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted may not proceed without prepayment of fees unless he is under "imminent danger of serious physical injury." 28 U.S.C. § 1915(g) (2006). The dismissal of an action for failure to state a claim that is without prejudice, however, does not count as a strike under the PLRA. McLean v. United States, 566 F.3d 391, 395-98 (4th Cir. 2009).

Although the three cases the district court relied on to deny McFadden's motion were dismissed for failure to state a claim, each was dismissed without prejudice. See McFadden v.

* "The denial by a District Judge of a motion to proceed in forma pauperis is an appealable order." Roberts v. U.S. Dist. Court, 339 U.S. 844, 845 (1950) (per curiam).

Allen, No. 3:05-0887-RBH-JRM (D.S.C. Nov. 29, 2005), aff'd, 193 F. App'x 251 (4th Cir. 2006); McFadden v. Clarendon Cnty. Sheriff's Dep't, No. 3:00-cv-2536-MBS-JRM (D.S.C. May 22, 2001), aff'd 20 F. App'x 207 (4th Cir. 2001); McFadden v. Land, No. 3:99-cv-3221-MBS-JRM (D.S.C. Oct. 21, 1999). Accordingly, they are not proper bases on which to deny McFadden's motion to proceed without prepayment of fees.

We therefore vacate the district court's order and remand for reconsideration of McFadden's motion consistent with this court's decision in McLean. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court.

VACATED AND REMANDED