

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

TYRONE NUNN, SR.,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO. 2:10cv338-WHA
)	
MYRON H. THOMPSON, et al.,)	(WO)
)	
Defendants.)	

ORDER

This case is before the court on the Order and Recommendation of the Magistrate Judge (Doc. #7), filed on July 15, 2010, together with the Plaintiff’s Objection (Doc. #8), filed on July 29, 2010.

The Magistrate Judge denied Plaintiff Tyrone Nunn, Sr.’s motion for leave to proceed *in forma pauperis* and recommended that his case be dismissed without prejudice for Plaintiff’s failure to pay the full filing fee upon initiation of this case.

Plaintiff has filed his objections to this court’s Recommendation that this *Bivens* action be dismissed, without prejudice, based on the “three strikes” provision of 28 U.S.C. § 1915(g).

In his objections, Plaintiff argues:

(1) that the three-strike rule should not have been applied to him because it is not apparent that the three prior dismissals cited in this court’s Recommendation as bases for applying the three-strike rule were all dismissals with prejudice.

Plaintiff cites a Fourth Circuit case, *McClean v. United States*, 566 F.3d 391 (4th Cir. 2009), as support for his claim that the prior dismissals must be with prejudice to warrant

application of the three-strike rule. The Fourth Circuit is the only circuit to write the “with prejudice” requirement into the language of 28 U.S.C. § 1915(g). The other circuits that have expressly addressed this issue have all held that prior dismissals without prejudice may also count as “strikes” for purposes of § 1915(g). See *O’Neal v. Pierce* 531 F.3d 1146, 1154-55 (9th Cir.2008); *Day v. Maynard*, 200 F.3d 665, 667 (10th Cir.1999); *Cage v. Lyons*, 248 F.3d 1157, 2007 WL 1770668 *2 (7th Cir. Nov. 22, 2000) (unpublished). Moreover, the Eleventh Circuit has issued opinions indicating that dismissals without prejudice count as “strikes” under the statute. See *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998), abrogated on different grounds by *Jones v. Bock*, 549 U.S. 199 (2007); also *Allen v. Clark*, 266 Fed.Appx. 815, 816 (11th Cir. 2008) (unpublished).

In Plaintiff Nunn’s case, the three cases on which the Magistrate Judge relied in finding a violation of § 1915(g) are (1) *Nunn v. Bailey, et al.*, Case No. 3:05-CV-1059-MHT-VPM (M.D. Ala. 2005); (2) *Nunn v. Clay County Hospital, et al.*, Case No.7:05-CV-515-SLB (N.D. Ala. 2005), and (3) *Nunn v. Bank of Wedowee - Woodland Branch*, Case No. 3:03-CV-392-MEF-VPM (M.D. Ala. 2003). The two prior cited cases dismissed by this court both plainly stated that the dismissals were with prejudice. In the case from the Northern District, *Nunn v. Clay County Hospital, et al.*, the court dismissed, without prejudice, *for failing to state a claim upon which relief could be granted*. Consistent with the language of 28 U.S.C. § 1915(g) and with the decisions by the Eleventh Circuit cited above, as well as with the holdings of the Seventh, Ninth, and Tenth Circuits, the Northern District’s dismissal constituted a “strike” for purposes of § 1915(g). Therefore, Nunn’s objection in this regard is not meritorious.

(2) Plaintiff next complains that the three cases upon which this court relied in applying § 1915(g) are not sufficiently identified in the court’s Recommendation. The manner in which

those cases were cited is indicated above. That manner was sufficient to put Plaintiff on notice as to what cases the court considered when applying the three-strike rule. His objection is without merit.

Therefore, Plaintiff's objection is overruled, the court adopts the Recommendation of the Magistrate Judge, and it is hereby

ORDERED that the motion for leave to proceed *in forma pauperis* filed by the Plaintiff (Doc. #5) is DENIED, and this case is DISMISSED without prejudice for Plaintiff's failure to pay the full filing fee upon the initiation of this case.

DONE this 29th day September, 2010.

/s/ W. Harold Albritton

W. HAROLD ALBRITTON

SENIOR UNITED STATES DISTRICT JUDGE