

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CHARLES LAMAR MILLER,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION NO.: 7:06-CV-55 (HL)
VS.	:	
	:	
DONALD BARROW; Lt. T.	:	
FOUNTAIN,	:	
	:	
Defendants	:	
	:	<u>ORDER</u>

Pending before the Court is plaintiff's Motion for Reconsideration (R. at 6). For the reasons discussed below, this motion is **DENIED**.

Plaintiff filed his original complaint and accompanying Motion for Leave to Proceed *In Forma Pauperis* on July 10, 2006 (R. at 1, 2). A review of Court records revealed that plaintiff had three previous strikes under 28 U.S.C. § 1915(g). Therefore, the Court denied plaintiff's request to proceed *in forma pauperis* and dismissed his action without prejudice. (R. at 4). Plaintiff now requests that the Court reconsider its decision because one of his previous cases—*Miller v. Sikes*, 3:04-CV-32 (DHB) (S.D. Ga. July 21, 2004)—was not dismissed as frivolous; but was dismissed without prejudice for failure to exhaust administrative remedies.

Plaintiff is correct in his assertion that this case was dismissed for failure to exhaust administrative remedies. However, in *Rivera v. Allen*, 144 F.3d 719 (11th Cir. 1998), the United States Court of Appeals for the Eleventh Circuit explained that “[a] claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted.” *Id.* at 731. Therefore, such a dismissal without prejudice for failure to exhaust counts as a strike under 28 U.S.C. § 1915(g). *Rivera*, 144 F.3d at 731. Based on *Rivera*, the Court's

July 21, 2004 dismissal without prejudice of *Miller v. Sikes*, 3:04-CV-32 (DHB) counts as a strike.

Moreover, plaintiff then appealed this dismissal and the United States Court of Appeals for the Eleventh Circuit dismissed the appeal as frivolous on November 3, 2004. This dismissal counts as another strike under 28 U.S.C. § 1915(g). *See Al-Hakim v. Crosby*, No. 4:05-CV-230, 2006 U.S. Dist. LEXIS 44850 (N. D. Fla. April 21, 2006). In addition to these two strikes, plaintiff had a third case dismissed as frivolous: *Miller v. Daniel*, 1:04-CV-143 (CC) (N.D. Ga. July 2, 2004). Therefore, plaintiff has had three strikes under 28 U.S.C. § 1915(g), and he may not proceed *in forma pauperis* in this action.

For these reasons, the Court **DENIES** Plaintiff's Motion for Reconsideration.

SO ORDERED, this 26th day of July, 2006

s/ Hugh Lawson

HUGH LAWSON
UNITED STATES DISTRICT JUDGE

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