

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

Vonnie Darin Darby and)
All Those Similarly Situated,)
)
Plaintiffs,)
)
vs.)
)
Robyn Schmalenberger, Warden, et al.,)
)
Defendants.)

**ORDER ADOPTING REPORT
AND RECOMMENDATION**

Case No. 1:12-cv-033

Before the Court is Magistrate Judge Charles S. Miller Jr.'s "Order to Show Cause and Report and Recommendation" filed on May 7, 2012. See Docket No. 10. The Order to Show Cause and Report and Recommendation provides in relevant part as follows:

Based on the foregoing, it is hereby **ORDERED** that Darby shall have fourteen (14) days to show cause in writing why this court's prior order granting him leave to proceed *in forma pauperis* should not be vacated as improvidently granted and why leave to proceed *in forma pauperis* should not be denied based on his having accumulated three or more strikes pursuant to the "three strikes" provisions in 28 U.S.C. § 1915(g). Defendant is advised that failure to show good cause may result in the court taking the recommended action set forth below.

In addition, it is hereby **RECOMMENDED** as follows:

1. If Darby fails to show good cause for why the court's prior order granting leave to proceed *in forma pauperis* should not be granted, the court orders as follows:
 - a. The court's order dated April 2, 2012, granting Darby leave to proceed *in forma pauperis* (Doc. No. 4) be vacated and leave to proceed *in forma pauperis* be denied.
 - b. Darby be given an additional thirty days to file a paid complaint or the complaint be dismissed without prejudice.
2. In the alternative, this case be dismissed without prejudice for failure to state a claim.

See Docket No. 10, p. 18. Darby filed a “Response to Order to Show Cause and Report & Recommendation” on May 21, 2012. See Docket No. 12.

The Court has carefully reviewed Judge Miller’s Order to Show Cause and Report and Recommendation, the relevant case law, and the entire record, and finds the Report and Recommendation to be persuasive. Accordingly, the Court **ADOPTS** the Report and Recommendation (Docket No. 10) in part and **ORDERS** as follows:

- 1) The court’s order dated April 2, 2012, granting Darby leave to proceed *in forma pauperis* (Docket No. 4) be **VACATED** and leave to proceed *in forma pauperis* be **DENIED**; and
- 2) That this case is **DISMISSED** without prejudice for failure to state a claim.

IT IS SO ORDERED.

Dated this 9th day of November, 2012.

/s/ Daniel L. Hovland _____
Daniel L. Hovland, District Judge
United States District Court