

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Dwayne Harris,

Plaintiff

Civil Action 2:12-cv-405

v.

Judge Watson

Gary Croft, *et al.*,

Defendants

Magistrate Judge Abel

**ORDER**

Plaintiff Dwayne Harris, a state prisoner, brings this action alleging that defendants retaliated against him for exercising his constitutionally protected right to file inmate grievances. This matter is before the Court on Plaintiff's July 26, 2012 objections to Magistrate Judge Abel's July 13, 2012 Report and Recommendation that Plaintiff's *in forma pauperis* status be revoked and that he be compelled to make immediate payment of the full filing fee.

*Plaintiff's Objections.* Plaintiff argues that the Magistrate Judge erred by counting his appeal in *Harris v. Moore* as a second strike. Plaintiff maintains that the language of 28 U.S.C. § 1915(g) uses the term "action" in the same manner as it is used by the Federal Rules of Civil Procedure. He maintains that a case is not counted as a strike until the entire case is final and a prisoner has exhausted or waived his opportunity to appeal. He further argues that if an appellate court affirms a dismissal by the lower court, then it still only counts as a single strike. Plaintiff also argues that *Harris v. Hageman* should not be counted as a strike

because this case is still pending in the Sixth Circuit Court of Appeals, and a district court's dismissal does not count as a strike until the after the litigant has exhausted his appeal.

Plaintiff also seeks reconsideration of the Magistrate Judge's denial of his motion for a protection order. Plaintiff maintains that defendants have threatened and harassed him for filing this lawsuit. Plaintiff says he fears for his life. He states that defendants said they would kill him and make it look as if he killed himself.

*Discussion.* Under the provisions of 28 U.S.C. § 1915(g) a prisoner who “has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted,” cannot proceed *in forma pauperis* “unless the prisoner is under imminent danger of serious physical injury.”

Plaintiff concedes that *Dwayne Harris v. Ernie Moore, et al.*, Case No. 1:04-cv-796 and *Dwayne Harris v. Olivia Karl, et al.*, Case No. 2:05-cv-1133 were dismissed for failure to state a claim and count as two strikes, but he argues that *Dwayne Harris v. Harry Hageman, et al.*, Case No. 2:11-cv-728 should not count as a strike because, although it was dismissed for failure to state a claim, his appeal of that decision is still pending. The Magistrate Judge properly rejected this argument because the statute does not exempt complaints dismissed on

initial screening because an appeal is pending. Moreover, § 1915(g) provides that a prisoner who “has, on 3 or more prior occasions . . . brought an . . . appeal in a court of the United States that was dismissed on the grounds that it . . . fails to state a claim upon which relief may be granted” cannot proceed *in forma pauperis* .” The Magistrate Judge also correctly concluded that even if 2:11–cv–728 were not counted as a strike, Plaintiff Harris's appeal of 1:04–cv–796 counts as a strike because the Court of Appeals affirmed the district court’s ruling that the complaint failed to state a claim for relief. Plaintiff’s argument that a dismissal by the trial court that is affirmed on appeal only counts as one strike is without merit. A frivolous appeal of a lower court's dismissal results in two strikes against the inmate under the plain language of § 1915(g).

The Magistrate Judge also properly denied Plaintiff's July 11, 2012 motion for a protection order (ECF No. 17). The facts supporting the motion arose after this lawsuit was filed, and Plaintiff's allegations concern individuals who are not parties to this case. Plaintiff's allegations are therefore not properly before this Court.

Upon *de novo* review in accordance with the provisions of 28 U.S.C. §636(b)(1)(B), the Court **ADOPTS** the Report and Recommendation and **GRANTS** Defendants’ May 24, 2012 motion to revoke plaintiff's *in forma pauperis* status. ECF No. 7. In addition, Plaintiff's motions for leave to file addenda, ECF Nos. 21 and 24, are, as Defendants suggest, both untimely, seek to raise

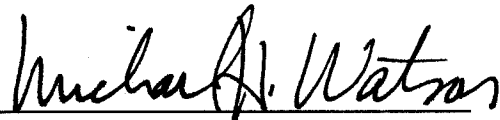
arguments not previously presented to the Magistrate Judge, and lack merit.

They are therefore **DENIED**.

Plaintiff Dwayne Harris is **ORDERED** to pay the Court's \$350 filing fee, less the \$11.44 he has already paid, Docket Notation June 25, 2012, **within thirty (30) days of the date of this Order**. See, *In re Jacta Est Alea*, 286 F.3d 378, 381 (6th Cir. 2002).

The Clerk shall remove ECF Nos. 18, 19, 21, and 24 from the Civil Justice Reform Act motions report.

**IT IS SO ORDERED.**

  
**MICHAEL H. WATSON, JUDGE**  
**United States District Court**