

**THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

MICHAEL ANTHONY DAVIS,)
)
Plaintiff,)
vs.)
)
WARDEN UPTON, ET AL.,)
)
Defendants.)

NO. CIV-12-0149-HE

ORDER

Plaintiff Michael Davis, a federal prisoner appearing *pro se*, brought this action claiming violations of the Privacy Act and the denial of due process. Before the court is plaintiff’s motion to proceed in forma pauperis. Consistent with 28 U.S.C. § 636(b)(1)(B), this case was referred to Magistrate Judge Bana Roberts for initial proceedings. Judge Roberts has recommended the motion be denied on the basis that plaintiff is barred from proceeding in forma pauperis by the three-strikes rule found in 28 U.S.C. § 1915(g). She further recommended the court dismiss the complaint if plaintiff fails to prepay the full \$350 filing fee within twenty days. Plaintiff has filed a timely objection; therefore, the court makes a de novo review of the issues to which plaintiff objects. *See* 28 U.S.C. § 636(b)(1). Liberally construing Mr. Davis’s objection, he challenges the magistrate judge’s conclusion that his prior dismissals count as “strikes” and argues that he is in imminent danger. The court concludes plaintiff’s motion should be denied.

The Prison Litigation Reform Act of 1995 (“PLRA”) requires all prisoners bringing a civil action to pay the full amount of the filing fee. *See* 28 U.S.C. § 1915(b)(1). Indigent prisoners are ordinarily allowed to proceed with their lawsuit in forma pauperis by making

an initial partial payment and paying the balance of the filing fee in monthly installments. *See id.* § 1915(b)(2). A prisoner may not, however, proceed in forma pauperis if the prisoner has accumulated three or more “strikes” unless he is “under imminent danger of serious physical injury.” *See id.* § 1915(g). A prisoner accumulates a “strike” when he files a civil case or appeal which is dismissed as frivolous, malicious, or for failure to state a claim, and such dismissal becomes final. *See id.*; Jennings v. Natrona County Detention Ctr. Med. Facility, 175 F.3d 775, 780 (10th Cir. 1999).

In Davis v. United States, No. CIV-10-1136-HE, 2011 WL 693639 (W.D. Okla. Feb. 18, 2011), this court dismissed Mr. Davis’s claims with prejudice for failure to state a claim. Strike one. On appeal from that decision, the Tenth Circuit denied Mr. Davis leave to proceed in forma pauperis and dismissed his appeal because he failed to “present a reasoned, non-frivolous argument.” Davis v. United States, 426 Fed. Appx. 648 (10th Cir. 2011) (unpublished opinion). Strike two. *See* Hafed v. Fed. Bureau of Prisons, 635 F.3d 1172, 1179 (10th Cir. 2011) (holding the denial of pauper status on appeal on the basis of frivolousness and consequent dismissal count as a strike under PLRA). Finally, plaintiff’s identical suit in the Northern District of Texas was dismissed for failure to state a claim or as frivolous or malicious. Davis v. United States, No. 11-CV-064-Y, 2011 WL 2650210 (N.D. Tex. July 6, 2011). Strike three. Therefore, plaintiff may not proceed in forma pauperis unless he is in imminent danger of serious physical injury.


In an attempt to invoke the imminent-danger exception plaintiff argues: “Mr. Davis is in danger because if he breaks his leg that is danger, if he gets cut or has a fight that is

danger, if the staff has to restrain him that is danger. Mr. [D]avis's point is that he is actually innocent of the judgment." Plaintiff also argues that he has been in danger "for over 6-years" because he has been unlawfully imprisoned. These are not "specific, credible allegations of imminent danger of serious physical harm." See Hafed, 635 F.3d at 1179-80.

The Report and Recommendation [Doc. #6] is therefore **ADOPTED** and plaintiff's motion to proceed in forma pauperis [Doc. #2] is **DENIED**. Plaintiff is directed to prepay the full \$350 filing fee **on or before April 27, 2012**, or his case will be dismissed.

IT IS SO ORDERED.

Dated this 10th day of April, 2012.



JOE HEATON
UNITED STATES DISTRICT JUDGE

