

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

OSCAR L. FINLEY,

Plaintiff,

v.

Civil Action No. 2:11-395

JIM RUBENSTEIN,
Comm. of Corrections, and
DAVID BALLARD, Warden,
Mt. Olive Correctional Complex,
being sued in their individual
and official capacity

Defendants.

MEMORANDUM OPINION AND ORDER

This action was previously referred to Mary E. Stanley, United States Magistrate Judge, who has submitted her Proposed Findings and Recommendation ("PF&R") pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B).

The court has reviewed the PF&R entered by the magistrate judge on August 17, 2011. The magistrate judge recommends dismissal of plaintiff's complaint pursuant to 28 U.S.C. § 1915(g), which provides as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner 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, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

On June 23, 2011, the magistrate judge advised plaintiff of his obligation to pay the filing fee associated with this action. She noted the following predicate actions for purposes of section 1915(g):

1. Finley v. Painter, Case No. 5:99-cv-00765. Dismissed with prejudice on June 26, 2000, for failure to state a claim upon which relief can be granted and for being malicious (Faber, J.). This is his "first strike."

2. Finley v. Painter, Case No. 5:00-cv-00209. Dismissed with prejudice on January 31, 2001, for failure to state a claim upon which relief can be granted, frivolous or malicious (Faber, J.). This is his "second strike."

3. Finley v. Rubenstein, Case No. 5:03-cv-00066. Dismissed with prejudice on March 11, 2008, for failure to state a claim upon which relief can be granted (Haden, J.). This is his "third strike."

4. Finley v. Doe, Case No. 5:07-cv-00807. Dismissed without prejudice on June 30, 2008, for failure to pay the filing fee in full (Johnston, J.). In a Memorandum Opinion, Judge Johnston reviewed the plaintiff's prior three filings and concluded that he is subject to the three strikes provision of 28 U.S.C. § 1915(g).

(Mag. Judge. Ord. at 2-3 (stating also "that the plaintiff must pay the filing fee of \$350 in full by July 29, 2011. If he fails to pay the filing fee, the undersigned will recommend that the presiding District Judge dismiss this case.")).


In her August 17, 2011, PF&R, the magistrate recommends that the court adopt the foregoing findings, further find that plaintiff has failed to pay the required filing fee, and dismiss the case without prejudice. On August 29, 2011, plaintiff objected. The objections are difficult to decipher in places, but it does not appear that plaintiff is in imminent danger of serious physical injury. The objections are thus not meritorious.

Having reviewed the entirety of the record herein, it is accordingly ORDERED:

1. That the PF&R be, and it hereby is, adopted by the court; and
2. That this action be, and it hereby is, dismissed without prejudice.

The Clerk is directed to forward copies of this written opinion and order to the pro se plaintiff, all counsel of record, and the United States Magistrate Judge.

DATED: September 26, 2011



John T. Copenhaver, Jr.
United States District Judge