

In the United States Court of Federal Claims

No. 09-517C

(Filed: January 19, 2010)

(NOT TO BE PUBLISHED)

* * * * *)
)
BENNY R. SMITH,)
)
 Plaintiff,)
)
 v.)
)
UNITED STATES,)
)
 Defendant.)
)
 * * * * *

Benny R. Smith, *pro se*, Lansing, Kansas.

Daniel G. Kim, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him on the brief were Tony West, Assistant Attorney General, Civil Division, Jeanne E. Davidson, Director, and Kirk Manhardt, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C.

OPINION AND ORDER

LETTOW, Judge.

Benny R. Smith is an inmate at the Lansing Correctional Facility in Lansing, Kansas. Compl. at 1. In a complaint filed with the court on August 6, 2009, Mr. Smith requests that this court review decisions of the United States District Court for the District of Kansas and the United States Court of Appeals for the Tenth Circuit, each of which denied Mr. Smith relief for claims asserted pursuant to 42 U.S.C. § 1983. *See id.* at 1, 13, 15. Mr. Smith also seeks to recover \$160,000 in monetary damages. *Id.* at 15. Mr. Smith did not pay the filing fee when he submitted his complaint but rather filed a motion for leave to proceed *in forma pauperis*. The government has moved to dismiss Mr. Smith’s complaint pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims (“RCFC”), asserting that this court lacks subject matter

jurisdiction over his claims. Def.'s Mot. to Dismiss at 1. Mr. Smith has not responded to the government's motion.

BACKGROUND

Since his incarceration in Kansas prisons in 2001, Mr. Smith has filed a number of actions and appeals in the United States District Court for the District of Kansas and the United States Court of Appeals for the Tenth Circuit. *See, e.g., Smith v. Sedgwick County Dist. Court*, No. 06-3137, 2007 WL 675723, at *1 (D. Kan. Mar. 1, 2007) (order dismissing petition for habeas corpus for failure to use correct form), *certificate of appealability denied*, 244 Fed. Appx. 199 (10th Cir. 2007), *cert. denied*, 552 U.S. 1046 (2007); *Smith v. Cowman*, 208 Fed. Appx. 687 (10th Cir. 2006) (dismissal of prisoner's complaint by district court accrued as third strike under the Prison Litigation Reform Act); *Smith v. Rudicel*, 123 Fed. Appx. 906 (10th Cir. 2005) (order affirming dismissal of claim made under 42 U.S.C. § 1983 for failure to exhaust administrative remedies as required by Prison Litigation Reform Act), *cert. denied*, 546 U.S. 831 (2005), *pet. for rehearing denied*, 546 U.S. 1025 (2005); *Smith v. Peterson*, No. 04-3025 (D. Kan. Jan. 29, 2004) (order dismissing petition for mandamus or habeas corpus stemming from plaintiff's conviction because petition was premature while state court proceedings were still pending) (copy appended to Compl. at A-17); *see also* Compl at 3-8 (describing several cases filed by Mr. Smith since his incarceration).

Two of these actions, *Smith v. Bruce* and *Smith v. McKune*, both civil rights actions brought pursuant to 42 U.S.C. § 1983, form the basis of Mr. Smith's complaint in this case. *See* Compl. at 3-8. In both *Bruce* and *McKune*, Mr. Smith was denied leave to proceed *in forma pauperis* pursuant to the Prison Litigation Reform Act, 28 U.S.C. § 1915(g) (the "Act"), and each case was subsequently dismissed for his failure to pay the required filing fees.¹ Mr. Smith asserts

¹*See Smith v. Bruce*, No. 06-3332 (D. Kan. July 12, 2007) (order dismissing plaintiff's claim regarding disposition of his property following disciplinary action by the Hutchinson Correctional Facility, for failure to state a claim upon which relief may be granted) (copy appended to Compl. at A-1); *Smith v. Bruce*, No. 06-3332 (D. Kan. Sept. 10, 2008) (order denying plaintiff's motion to proceed *in forma pauperis* on appeal of dismissal of claim made pursuant to 42 U.S.C. § 1983) (copy appended to Compl. at A-3); *Smith v. Bruce*, No. 08-3240 (10th Cir. Sept. 12, 2008) (order to show cause why appeal should not be dismissed for failure to prepay entire filing fees as required by the Prison Litigation Reform Act or why that Act should not apply) (copy appended to Compl. at A-4); *Smith v. Bruce*, No. 08-3240 (10th Cir. Nov. 14, 2008) (order to pay filing fee within twenty-one days or appeal will be dismissed for lack of prosecution) (copy appended to Compl. at A-6); *Smith v. Bruce*, No. 08-3240 (10th Cir. Dec. 15, 2008) (order dismissing appeal for lack of prosecution) (copy appended to Compl. at A-6); *Smith v. McKune*, No. 08-3030 (D. Kan. Jan. 29, 2008) (order denying plaintiff's motion to proceed *in forma pauperis* pursuant to the Prison Litigation Reform Act) (copy appended to Compl. at A-8); *Smith v. McKune*, No. 08-3030 (D. Kan. Mar. 4, 2008) (order overruling plaintiff's objection to court's order of January 29, 2008 and dismissing action without prejudice for failure to pay the

that the decisions in *Bruce* and *McKune* denying his motions to proceed *in forma pauperis* and dismissing his cases for failure to pay the filing fees were erroneous and should be “corrected” by this court. Compl. at 13, 15. Specifically, Mr. Smith avers that an order issued by the Tenth Circuit denying his petition for a writ of mandamus as frivolous was improperly counted as one of his “three strikes” pursuant to the Act. See Compl. at 4-8. The Tenth Circuit’s decision in *Smith v. Bruce*, No. 08-3240, slip op. at 2 (10th Cir. Sept. 12, 2008), had cited *Green v. Nottingham*, 90 F.3d 415, 418 (10th Cir. 1996), for the proposition that a mandamus petition qualifies as a “civil action” under the Act. See also *Smith v. McKune*, No. 08-3068, slip op. at 2 (10th Cir. Mar. 27, 2008) (order to show cause also citing *Green v. Nottingham*).

APPLICABILITY OF THE PRISON LITIGATION REFORM ACT

The application to proceed *in forma pauperis* filed by Mr. Smith is subject to the provisions of the Prison Litigation Reform Act. That Act, enacted as Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1374-75 (April 26, 1996), provides “a special form of filing *in forma pauperis* for prisoners.” *Dudley v. United States*, 61 Fed. Cl. 685, 686 (2004). If a prisoner cannot pay the filing fee immediately upon submission of a complaint, the Act allows partial payment of any court fees established by law, with required subsequent installment payments made from the prisoner’s account established with his or her custodian. See 28 U.S.C. §1915(b).

The Act also establishes the requirement that once a prisoner has filed three actions that have been dismissed on the grounds of frivolousness, maliciousness, or failure to state a claim upon which relief may be granted, the prisoner must pay the entire filing fee when the prisoner initiates the action. The pertinent provision, 28 U.S.C. §1915(g), provides:

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.

required filing fee) (copy appended to Compl. at A-10); *Smith v. McKune*, No. 08-3030 (D. Kan. Mar. 13, 2008) (order to pay full appellate filing fee; plaintiff may not proceed on appeal *in forma pauperis*) (copy appended to Compl. at A-10); *Smith v. McKune*, No. 08-3068 (10th Cir. Mar. 27, 2008) (order to show cause why appeal should not be dismissed for failure to pay entire filing fee as required by the Prison Litigation Reform Act or why that Act should not apply) (copy appended to Compl. at A-11); *Smith v. McKune*, No. 08-3068 (10th Cir. May 1, 2008) (order dismissing appeal for lack of prosecution) (copy appended to Compl. at A-15).

This “three strikes” provision was adopted by Congress as a procedural mechanism to address the large numbers of suits filed in federal courts by prisoners. *See Jones v. Bock*, 549 U.S. 199, 202 (2007).

Mr. Smith has filed a number of cases in the United States District Court for the District of Kansas, at least three of which have been dismissed as frivolous or for failure to state a claim. *See Smith v. Bruce*, No. 06-3332, slip op. at 2 & n.1 (D. Kan. Sept. 10, 2009) (“Court records in the District of Kansas reflect that plaintiff has filed at least ten cases in this court, and that at least three (3) of those cases, or related appeals, were dismissed as frivolous or for failure to state a claim for relief.”). Mr. Smith, however, disputes that he is subject to the three-strikes rule of 28 U.S.C. § 1915(g), arguing that an order dismissing a mandamus petition as frivolous should not have been counted as one of his “three strikes” pursuant to the Act, and that in doing so, the court “violat[ed] . . . the principle established in *Green v. Nottingham*.” Compl. at 15. This argument lacks merit. *Green v. Nottingham* expressly permits counting a mandamus petition as a “strike” pursuant to the Act where the litigant has abused the legal system. *Green*, 90 F.3d at 418 n.2 (“To the extent that subsection (g) of amended [Section] 1915 acts to curtail prisoners from filing ‘civil actions’ *in forma pauperis* because of past abuses, treating mandamus actions and other extraordinary writs as ‘civil actions’ is particularly appropriate.”). Accordingly, Mr. Smith’s motion to proceed *in forma pauperis* is denied because of the three-strikes rule of 28 U.S.C. § 1915(g).

Parties filing actions in this court, unless granted leave to proceed *in forma pauperis*, are required to pay the filing fee. *See Brown v. United States*, 88 Fed. Cl. 795, 798 (2009) (citing U.S.C. § 1926(a) and RCFC 77.1(c)(1), which rule incorporates the fee schedule prescribed by the Judicial Conference of the United States for this court). When he filed his complaint in this action, Mr. Smith did not pay the requisite filing fee. Consequently, Mr. Smith has not satisfied the requirements for filing his complaint with the court. Accordingly, Mr. Smith’s complaint will be dismissed without prejudice for failure to pay the filing fee, subject to reinstatement if Mr. Smith submits the full amount of the filing fee within thirty days of this opinion.²

²In accord with 28 U.S.C. § 1915A, the court has undertaken a screening review of Mr. Smith’s complaint, and as a result, the court cautions Mr. Smith that even if he does pay the filing fee in full, the court appears not to have subject matter jurisdiction over his complaint. At the heart of plaintiff’s complaint is the request that this court review the decisions issued by the United States District Court for the District of Kansas and the Court of Appeals for the Tenth Circuit denying him leave to proceed *in forma pauperis*. *See* Compl. at 13, 15. This court, however, is without authority to review decisions of other federal courts. *See Vereda Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001); *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). Apart from the fact that Mr. Smith has requested that the court review the decisions of other federal courts, a task that the court cannot undertake, he does not appear to have identified any money-mandating provision of law that could entitle him to the monetary relief he has sought. The court’s jurisdiction based upon Subsection (a) of the Tucker Act, 28 U.S.C. § 1491(a), requires that such a money-mandating provision of law provide the predicate

CONCLUSION

For the reasons stated, the government's motion to dismiss is GRANTED. Mr. Smith's complaint is dismissed for failure to pay the requisite filing fee, subject to reinstatement if Mr. Smith pays the full amount of the filing fee within thirty days of the issuance of this opinion and order. Plaintiff's motion to proceed *in forma pauperis* is DENIED. The Clerk is directed to enter an appropriate judgment.³ No costs.

It is so ORDERED.

Charles F. Lettow
Judge

for a cause of action seeking monetary relief. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 216-17 (1983).

³Mr. Smith's motion to inform and motion for verification are both DENIED.