173 F.3d 854
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Sixth Circuit.

Homer D. BOLES, Plaintiff-Appellant,
v.
Robert MATTHEWS, individually and in his official capacity as an employee of the Shelby County Circuit Court; K. Tauard, individually and in her official capacity as an employee of the Shelby County Circuit Court, Defendants-Appellees.

No. 97-5874. | March 15, 1999.

Before MERRITT and COLE, Circuit Judges; EDMUNDS, District Judge.*

Opinion

***1** This is an appeal from a judgment sua sponte dismissing a prisoner civil rights complaint filed under 42 U.S.C. § 1983 and the Religious Freedom Restoration Act. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

In 1997, Tennessee inmate Homer Boles filed a complaint in which he sought declaratory and injunctive relief in connection with the alleged refusal of Tennessee state court clerk to process Boles's attempt legally to change his name. The district court sua sponte ordered the complaint dismissed under the "three strikes" provision of the Prison Litigation Reform Act ("PLRA"), concluded that the complaint was also liable to be dismissed for failure to state a claim for relief and placed significant restrictions on Boles's ability to file lawsuits in the future.

The district court received Boles's civil rights complaint on June 5, 1997, and, before service of process was effected on the named defendants, entered the judgment on review on June 16, 1997. First, the court concluded that Boles's complaint was subject to dismissal under the "three strikes" provision of the PLRA. The three prior dismissals, upon which the court relied, included one district court dismissal for frivolity and two dismissals by the Sixth Circuit of Boles's appeals from adverse summary judgments. Second, the court noted that, even if Boles's complaint was not subject to dismissal pursuant to the "three strikes" provision, it was legally insufficient on its face. Third, the court imposed significant restrictions on Boles's ability to file further actions owing to what the court characterized as "the fourth dismissal as frivolous of a case" filed by Boles. Finally, the court denied Boles's in forma pauperis status on appeal and ordered Boles to pay the entire $150 filing fee within thirty days of the entry of the court's order. Boles argues the merits of the foregoing four decisions by the district court.

"THREE STRIKES"

The district court relied on three enumerated prior decisions in concluding that this, Boles's fourth prisoner civil rights complaint, was subject to dismissal under the "three strikes" provision. Two of the cases were summary judgments for the defendants in which the Sixth Circuit dismissed Boles's appeals; the remaining case was dismissed as frivolous by the district court. Boles does not challenge the district court's characterization of the latter case but contends, on appeal, that neither of the two Sixth Circuit dismissals qualify as "strikes" under the PLRA. An examination of the record and law supports this position.

The Prison Litigation Reform Act of 1995 contained a provision, codified at 28 U.S.C. § 1915(g), now popularly known as the "three strikes" provision, effective April 26, 1996.

> 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 three 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.

***2** The two Sixth Circuit dismissals relied upon by the district court are *Boles v. Bradley,* No. 95-6411 (6th Cir. Nov. 9, 1995) (order), and *Boles v. Reynolds,* No. 96-5465 (6th Cir. Nov. 18, 1996) (order). Each of these orders contains the notation that the appeal is being dismissed for want of prosecution after Boles failed to pay the filing fee required. Neither of these orders makes any reference to the nature of the underlying action or appeal as frivolous, malicious or one that fails to state a claim for relief.

Neither of the Sixth Circuit dismissals, clearly based on a failure to satisfy filing fee requirements, contains any language that would put them within the ambit of § 1915(g). The authority relied upon by the district court, *Adepegba v. Hammons,* 103 F.3d 383 (5th Cir.1996), applies appellate decisions that are plainly addressed to the merits of the appeal. *Id.* at 388. There is no Sixth Circuit, or other, authority for the proposition that a dismissal for failure to pay a filing fee is equivalent to a dismissal within the contemplation of § 1915(g) and the plain language of the statute does not so state. Therefore, the district court erred in concluding that Boles's complaint was subject to summary dismissal under the "three strikes" provision of the PLRA. This portion of the appeal will be reversed without the necessity of a remand for further action as will be explained below.

THE FRIVOLOUS NATURE OF THE PRESENT COMPLAINT

This court reviews de novo a district court's decision to dismiss a complaint pursuant to 28 U.S.C. § 1915(e)(2) (West 1997) because the case is frivolous. *McGore v. Wrigglesworth,* 114 F.3d 601, 604 (6th Cir.1997). A complaint is properly dismissed as frivolous when the plaintiff fails to present any claim with an arguable or rational basis in law or fact. *Neitzke v. Williams,* 490 U.S. 319, 325 (1989).

Upon de novo review, the district court's alternate basis for its decision is supported by the record and the law. Boles is clearly seeking an order from a federal district court declaring that state court employees erred in the fashion in which they conducted the affairs of their office when Boles attempted to change his name. Review of final determinations in state judicial proceedings can be obtained only in the United States Supreme Court. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476 (1983); 28 U.S.C. § 1257. A United States District Court lacks the authority to review final state court judgments in judicial proceedings. *Feldman,* 460 U.S. at 482. This relief is unavailable in law and the district court properly identified this as an alternate ground upon which to base a sua sponte dismissal. In addition, Boles's claim for relief under the Religious Freedom Restoration Act did not survive the Act being declared unconstitutional in *City of Boerne v. Flores,* 117 S.Ct. 2157 (1997). This portion of the decision on review will be affirmed and will therefore qualify as Boles's "third strike."

FUTURE PRE-FILING SANCTIONS

***3** The district court decided to impose pre-filing requirements on Boles in recognition of "the fourth dismissal as frivolous of a case" filed by Boles. These include yearly limits on the number of court-mandated complaint forms and Boles's verifications as to the nature of the suit and the identity of the defendants.

The Sixth Circuit has recognized that a district court may properly require prolific litigators to obtain leave of court before accepting any further complaints for filing, *see Filipas v. Lemons,* 835 F.2d 1145, 1146 (6th Cir.1987) (order), and may deny a vexatious litigant permission to proceed in forma pauperis. *See, e.g., Reneer v. Sewell,* 975 F.2d 258, 260-61 (6th Cir.1992). The imposition of these prospective orders has been upheld where a litigant has demonstrated a "history of unsubstantial and vexatious litigation [amounting to] an abuse of the permission granted to him to proceed as a pauper in good faith under 28 U.S.C. § 1915(d)." *Maxberry v. SEC,* 879 F.2d 222, 224 (6th Cir.1989). *See also In re McDonald,* 489 U.S. 180 (1989).

Two problems nevertheless exist with respect to the pre-filing restrictions imposed in the present case. The first problem is

that the district court imposed these restrictions because it concluded Boles was being handed his fourth dismissal of a case as frivolous. As noted above, this conclusion was in error. A second, larger, question exists whether these types of sanctions in general have been superceded by the PLRA's "three strikes" legislation. This need not be addressed in the present appeal, however, as this decision will constitute Boles's "third strike" and will automatically subject him to the stringent filing restrictions of 28 U.S.C. § 1915(g).

PROPRIETY OF THE FEE ORDER AND DENIAL OF IFP ON APPEAL

The district court imposed upon Boles the responsibility for the entire $150 filing fee at the outset of its decision and denied Boles's request for pauper status on appeal after concluding that the complaint was frivolous. Boles now contends that both actions were reversible error.

These assignments of error are without merit. Prisoners are no longer entitled to a waiver of the fees and costs of litigation. *See In re Tyler,* 110 F.3d 528, 529-30 (8th Cir.1997). Thus, by filing the complaint or notice of appeal, the prisoner waives any objection to the fee assessment by the district court. *McGore,* 114 F.3d at 605. Finally, Boles challenges the district court's denial of his motion to proceed with this appeal in forma pauperis, pursuant to 28 U.S.C. § 1915. This court reviews a district court's order denying a motion to proceed in forma pauperis for an abuse of discretion. *Gibson v. R.G. Smith Co.,* 915 F.2d 260, 261 (6th Cir.1990). In the case at bar, the district court noted that the decision to deny Boles pauper status on appeal was based on the same considerations found in the analysis of his complaint. As noted above, the district court properly concluded that Boles's complaint was legally frivolous. This is sufficient to affirm the decision to deny pauper status on appeal.

CONCLUSION

***4** Accordingly, that portion of the district court's decision finding that the prior Sixth Circuit dismissals qualified as "strikes" under the PLRA is reversed, as are the pre-filing sanctions imposed in mistaken reliance on the "three strikes" determination. The district court's dismissal of the complaint as legally frivolous and the decisions to impose fees and deny pauper status on appeal are affirmed. Finally, the district court is advised that the issuance of this decision constitutes Boles's "third strike" under 28 U.S.C. § 1915(g). Rule 9(b)(3), Rules of the Sixth Circuit.

Parallel Citations

1999 WL 183472 (C.A.6 (Tenn.))

Footnotes

[*] The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.