

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1349

Gary Leon Webster

Plaintiff - Appellant

v.

Doe, Sheriff, Department Head, Craighead County

Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Northern
(3:22-cv-00245-DPM)

JUDGMENT

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed for lack of jurisdiction.

Appellant's motion for leave to proceed on appeal in forma pauperis is denied as moot.

The full \$505 appellate and docketing fees are assessed against the appellant. The court remands the collection of those fees to the district court.

April 03, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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Doe, Sheriff, Department Head, Craighead County

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Appeal from U.S. District Court for the Eastern District of Arkansas - Northern
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ORDER

The petition for rehearing by the panel is denied.

May 08, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION**

GARY LEON WEBSTER,
ADC # 114018

PLAINTIFF

v.

3:22CV00245-DPM-JTK

DOE

DEFENDANT

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following recommended disposition has been sent to Chief United States District Judge D.P. Marshall Jr. Any party may file written objections to all or part of this Recommendation. If you do so, those objections must: (1) specifically explain the factual and/or legal basis for your objections; and (2) be received by the Clerk of this Court within fourteen (14) days of this Recommendation. By not objecting, you may waive the right to appeal questions of fact.

DISPOSITION

I. INTRODUCTION

Gary Leon Webster ("Plaintiff") is in custody at the Tucker Unit of the Arkansas Division of Correction. He filed this pro se civil rights action pursuant to 42 U.S.C. § 1983. (Doc. No. 2). Although Plaintiff submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a), Plaintiff's IFP Motion (Doc. No. 1) should be denied because Plaintiff is a "three striker" under the Prison Litigation Reform Act ("PLRA") and, as set out below, has not established imminent danger.

II. SCREENING

The Court is required to screen prisoner complaints seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. §1915A(a).¹ Additionally, the PLRA, 28 U.S.C. § 1915(g), provides that:

[i]n 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 (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.

Plaintiff has had at least three complaints dismissed for failure to state a claim.² The Court finds that Plaintiff is a “three-striker” within the meaning of the PLRA. Gonzalez v. United States, 23 F. 4th 788, 789-91 (8th Cir. 2022).

¹ The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that: (a) are legally frivolous or malicious; (b) fail to state a claim upon which relief may be granted; or (c) seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b). An action is frivolous if “it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989). Whether a plaintiff is represented by counsel or is appearing *pro se*, his complaint must allege specific facts sufficient to state a claim. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir.1985). An action fails to state a claim upon which relief can be granted if it does not plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). In reviewing a *pro se* complaint under § 1915(e)(2)(B), the Court must give the complaint the benefit of a liberal construction. Haines v. Kerner, 404 U.S. 519, 520 (1972). The Court must also weigh all factual allegations in favor of the plaintiff, unless the facts alleged are clearly baseless. Denton v. Hernandez, 504 U.S. 25, 32 (1992).

Additionally, to survive a court’s screening, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), citing Twombly, 550 U.S. at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Twombly, 550 U.S. at 556-7. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of entitlement to relief.” Id.

² Webster v. Does, 3:19cv00059-DPM (E.D. Ark.) (aff’d on appeal October 1, 2019);

Plaintiff may, however, be permitted to proceed in forma pauperis if he falls under the “imminent danger” exception to the three strikes rule set forth above. 28 U.S.C. §1915(g). This exception does not apply to allegations of past danger, and the alleged harm must be “real and proximate” and occurring at the time the complaint is filed. Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002). In the Eighth Circuit, the exception does not apply unless the plaintiff alleges “specific fact allegations of ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent serious physical injury.” Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003).

Plaintiff complains about the way prison authorities handle Plaintiff’s money from outside sources. (Doc. No. 2). He seeks “restitution in law and/or equity.” (Id. at 6). Even liberally construing Plaintiff’s Complaint, the Court finds Plaintiff’s allegations do not support a finding of “ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent serious physical injury.” Martin, 319 F.3d at 1050. As such, Plaintiff’s Complaint should be dismissed without prejudice pending payment of the \$402.00 filing and administrative fee.

III. CONCLUSION

IT IS, THEREFORE, RECOMMENDED that:

1. Plaintiff’s IFP Motion (Doc. No. 1) be DENIED.
2. Plaintiff’s Complaint be DISMISSED without prejudice.
3. If Plaintiff wishes to continue this case, he be required to submit the statutory filing and administrative fee of \$402.00 to the Clerk, noting the above case style and number, within

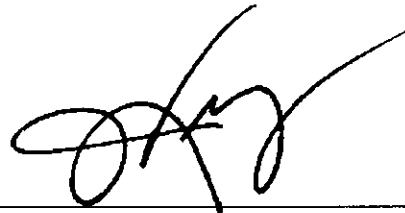
Webster v. Pigg, 3:19cv00060-DPM (E.D. Ark.) (aff’d on appeal October 1, 2019); and Webster v. Days Inn Motels, Inc., 3:19cv00078-DPM (E.D. Ark.) (aff’d on appeal October 1, 2019).

fifteen (15) days of the date of this Order, together with a motion to reopen the case. Upon receipt of the motion and full payment, the case will be reopened.

4. Plaintiff's Motion for Return of Seized Property (Doc. No. 3) be DENIED as moot.

5. The Court certify, pursuant to 28 U.S.C. § 1915(a)(3), that an in forma pauperis appeal from any Order adopting these recommendations and the accompanying Judgment would not be taken in good faith.

Dated this 29th day of September, 2022.

A handwritten signature in black ink, appearing to read 'J. Kearney', is written over a horizontal line.

JEROME T. KEARNEY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

GARY LEON WEBSTER
ADC #114018

PLAINTIFF

v.

No. 3:22-cv-245-DPM

DOE, Sheriff, Department
Head, Craighead County

DEFENDANT

ORDER

Magistrate Judge Kearney screened Webster's complaint, recommending dismissal because Webster is a three-striker and his claims don't indicate any imminent danger of serious physical injury. *Doc. 4.* Webster objected and filed a notice of appeal. *Doc. 5, 6 & 7.* Webster mailed an application to appeal *in forma pauperis* to the Eighth Circuit, which in turn sent it to this Court. *Doc. 11.* This Court doesn't have jurisdiction to rule on the recommendation while Webster's appeal is pending. *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1106-07 (8th Cir. 1999). But the Court retains jurisdiction over collateral matters. *FutureFuel Chemical Co. v. Lonza, Inc.*, 756 F.3d 641, 648-49 (8th Cir. 2014).

Webster's motion for leave to appeal *in forma pauperis*, *Doc. 11*, is denied. He is a three-striker and isn't under imminent danger of

serious physical injury. 28 U.S.C. § 1915(g). And the Court certifies that the appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3).

So Ordered.

D.P. Marshall Jr.
D.P. Marshall Jr.
United States District Judge

22 February 2023

**Additional material
from this filing is
available in the
Clerk's Office.**