

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-7122

YA JELANI SIMBA,

Plaintiff - Appellant,

v.

WENDY BRANCH, Unit Manager - Blue Unit; DONALD G. WOOD, Superintendent, Scotland Corr. Inst.; FREDERICK B. HUBBARD, Asst. Supt. For Security and Operations; GARY CRUTCHFIELD, Asst. Supt. Programs; MARY WYATT, Unit Manager, Red Unit; ISAAC BALDWIN, Asst. Unit Manager, Blue Unit; SERGEANT BARNHILL, Prison Guard, Blue Unit; SERGEANT PRUDE, Prison Guard, Blue Unit; LINDA GLOVER, Sergeant Prison Guard, Blue Unit; DARLENE CAPEL, Sergeant Prison Guard, Blue Unit; HENRY JOHNSON, Sergeant Prison Guard, Blue Unit; PAUL GALLOWAY, Sergeant Prison Guard, Blue Unit; THEODIS BECK, Secretary, NC DOC; BOYD BENNETT, Director of Prisons; ELLIOTT ALFORD, Prison Guard, Blue Unit; M. BELLAMY, Prison Guard, Blue Unit; P. BERGMAN, Prison Guard, Blue Unit; ANN BETHEA, Prison Guard, Blue Unit; JAMES CAUDDER, Prison Guard, Blue Unit; B. DIXON, Prison Guard, Blue Unit; MS. DUNSTON, Prison Guard, Blue Unit; JANICE FARMER, Prison Guard, Blue Unit; MS. HUDSON, Prison Guard, Blue Unit; G. HUNT, Prison Guard, Blue Unit; MS. HUNT, Prison Guard, Blue Unit; CONSTANCE LOCKLEAR, Prison Guard, Blue Unit; JOSHUA LOCKLEAR, Prison Guard, Blue Unit; KIMBERLY LOCKLEAR, Prison Guard, Blue Unit; TAWANNA LOCKLEAR, Prison Guard, Blue Unit; SHANNON MAPLES, Prison Guard, Blue Unit; THOMAS MEEKINS; SUSAN MORRISON, Prison Guard, Blue Unit; R. SMITH, Prison Guard, Blue Unit; K. SPEIGHT, Prison Guard, Blue Unit; T. TYNER, Prison Guard, Blue Unit; SPURGEON WILBORN, Prison Guard, Blue Unit,

Defendants - Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. James A. Beaty, Jr., Chief District Judge. (1:07-cv-00712-JAB-WWD)

Submitted: April 8, 2009

Decided: May 4, 2009

Before NIEMEYER and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed in part; vacated in part by unpublished per curiam opinion.

Ya Jelani Simba, Appellant Pro Se. James Philip Allen, Assistant Attorney General, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ya Jelani Simba appeals the district court's order adopting the recommendation of the magistrate judge and dismissing Simba's 42 U.S.C. § 1983 (2000) complaint as frivolous or for failure to state a claim. We affirm in part and vacate in part.

Having thoroughly reviewed the record, we conclude the district court erred when it found Simba possessed three strikes under the Prison Litigation Reform Act, 28 U.S.C. § 1915(g) (2006) ("PLRA"). Examination of the district court's order in Horne v. Martin, No. 5:89-CT-393-BR (E.D.N.C. Nov. 13, 1989), reveals that Simba, under his former name, Joseph Shaw, was denied the right to proceed in forma pauperis, and the action was ultimately dismissed because he failed to remit the required filing fee. Thus, because the action was not dismissed as frivolous, malicious, or for failure to state a claim, it should not have counted as a qualifying strike. Accordingly, we vacate the district court's finding that Simba has three strikes under the PLRA. We affirm the remainder of the district court's order, including the imposition of a limited pre-filing injunction. See Simba v. Branch, No. 1:07-cv-00712-JAB-WWD (M.D.N.C. June 17, 2008).

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials

before the court and argument would not aid the decisional process.

AFFIRMED IN PART;
VACATED IN PART