

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-6439

SYLVESTER A. RICHARDSON,
Plaintiff - Appellant,

v.

WARDEN TRACY RAY; OFFICER J. BELLAMY; OFFICER INGLE,
Defendants - Appellees.

Appeal from the United States District Court for the Western
District of Virginia, at Roanoke. James C. Turk, Senior
District Judge. (7:10-cv-00078-jct-mfu)

Submitted: October 25, 2010 Decided: November 22, 2010

Before KING, GREGORY, and DUNCAN, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

Sylvester A. Richardson, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Sylvester A. Richardson appeals the district court's order dismissing his 42 U.S.C. § 1983 (2006) complaint without prejudice for failure to pay the filing fee. The district court determined that Richardson possessed three strikes under the Prison Litigation Reform Act, 28 U.S.C. § 1915(g) (2006) ("PLRA"). However, examination of the district court's order in Richardson v. Grizzard, No. 7:91-cv-00001 (W.D. Va. July 18, 1991), and the subsequent appeal, Richardson v. Grizzard, No. 91-7208 (4th Cir. Jan. 14, 1992), reveals that the action was dismissed on summary judgment and that the appeal was dismissed for being without merit. Because neither the action nor the appeal was dismissed as frivolous, malicious, or for failure to state a claim, neither should have counted as a qualifying strike. See Thompson v. Drug Enforcement Admin., 492 F.3d 428, 438 (D.C. Cir. 2007) (observing dismissal of complaint on summary judgment does not count as strike under PLRA). Accordingly, we vacate the district court's finding that the decisions in Richardson v. Grizzard constituted strikes against Richardson. We remand for further consideration of Richardson's PLRA application. 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.

VACATED AND REMANDED