

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-40349

LUTHER OTIS FOSTER, III,

Plaintiff - Appellant,

versus

UNIDENTIFIED PARTY, John Doe #1, Warden;
UNIDENTIFIED PARTY, John Doe # 2,

Defendants - Appellees.

Appeal from the United States District Court
for the Eastern District of Texas, Beaumont
USDC No. 1:01-CV-44

April 1, 2002

Before POLITZ, HIGGINBOTHAM, and CLEMENT, Circuit Judges.

PER CURIAM:*

Luther Otis Foster, III, a federal prisoner who is a *pro se* litigant proceeding *in forma pauperis*, brought an action under Bivens v. Six Unknown Named Agents

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

of Federal Bureau of Narcotics,¹ alleging that defendants negligently subjected him to second-hand smoke by failing to enforce a no-smoking policy. The district court dismissed the complaint as barred under 28 U.S.C. § 1915(g). Three prior actions by Foster had been dismissed as frivolous or for failing to state a claim. Therefore, under § 1915(g), proceeding *in forma pauperis*, Foster was required to show he was “under imminent danger of serious physical injury.” The district court found that Foster did not make such a showing and dismissed the complaint.

Whether Foster’s complaint states a claim that he is “under imminent danger of serious physical injury,” is a conclusion of law which we review *de novo*.

We find neither error nor abuse of discretion in the district court’s determination that Foster failed to demonstrate in his petition that he is in “imminent danger of serious physical injury.” Therefore, dismissal under § 1915(g) was proper.

AFFIRMED.

¹403 U.S. 388 (1971).