

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 22, 2018

Elisabeth A. Shumaker
Clerk of Court

WADE LAY,

Plaintiff - Appellant,

v.

OKLAHOMA DEPARTMENT OF
CORRECTIONS; JOE ALLBAUGH,
ODOC Director; OKLAHOMA STATE
PENITENTIARY; TERRY ROYAL,
Warden OSP; JERRY PERRY, H-Unit,
Unit Manager,

Defendants - Appellees.

No. 18-6024
(D.C. No. 5:17-CV-01224-D)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before PHILLIPS, McKAY, and O'BRIEN, Circuit Judges.

Wade Lay, a state prisoner proceeding pro se,¹ appeals the district court's denial of his motion to proceed *in forma pauperis* (IFP). He now moves to proceed IFP on appeal.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G)*. The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with *Fed. R. App. P. 32.1* and *10th Cir. R. 32.1*.

¹ We construe a pro se appellant's complaint liberally. *Gaines v. Stenseng*, 292 F.3d 1222, 1224 (10th Cir. 2002). But this liberal treatment has limits. Though we can make allowances for "the [pro se] plaintiff's failure to cite proper legal authority,

And he moves for injunctive relief and for a protective order. We affirm the district court's denial of IFP and deny Lay's motion to proceed IFP on appeal.

BACKGROUND

On November 13, 2017, Lay sued the Oklahoma Department of Corrections, the Oklahoma State Penitentiary, the H-Unit Manager Jerry Perry, and Warden Terry Royal, under 42 U.S.C. § 1983. Lay alleges that corrections officials have violated his constitutional rights by taking from him a document essential to a state-court appeal and protective order he has filed with the Oklahoma Supreme Court. Lay doesn't specify what constitutional provision he believes corrections officials violated by taking the document from him. Lay also alleges in the present appeal that corrections officials have violated his due process rights by restricting his access to a phone to call his attorneys or sister, by restricting his access to the courts, by withholding medical services, and by keeping him from enjoying commissary items such as hygiene products and stationary. And he contends he's in imminent danger because two corrections officers have assaulted him, breaking his left ring finger and right pinky finger. For his imminent-danger claim, Lay doesn't specify what constitutional right he believes the officers violated by assaulting him.

Lay moved to proceed IFP in the district court. He also moved for injunctive relief and a protective order as part of his § 1983 suit. He asked the district court to: order the Oklahoma Department of Corrections and Oklahoma State Penitentiary to follow the

his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements," we can't serve as his advocate. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Prison Rape Elimination Act; enjoin corrections officials from physically abusing him and withholding medical services; enjoin corrections officials from steaming open his legal mail; enjoin corrections officials from sharing information among one another concerning his state-court and federal lawsuits; and enjoin corrections staff from retaliating against him for having filed his lawsuits.

The district court twice ordered Lay to cure deficiencies with his IFP motion. In response, Lay filed an “Application for Leave to Proceed in Forma Pauperis,” which cured some, but not all, of the deficiencies identified by the district court. R. vol. I at 366. So the district court issued a third and final deficiency notice. Lay finally complied, filing his IFP motion on the proper form. Later, the magistrate judge assigned to Lay’s case found that Lay had \$550.67 in his inmate-savings account, an amount sufficient to prepay the \$400 district court filing fee. So the magistrate judge recommended denying Lay’s IFP motion. Lay objected to the magistrate’s recommendation, contending that though he could pay the filing fee, he worried that corrections officials would obstruct his attempt to pay it.

On January 31, 2018, the district court adopted the magistrate’s recommendation and denied Lay’s IFP motion. To alleviate Lay’s reputed fears that corrections officials might block him from paying the \$400 filing fee, the district court directed the Court Clerk to send a copy of the court’s order to the accounting department of the Oklahoma State Penitentiary.

Lay appealed the district court’s denial of his IFP motion.

DISCUSSION

A. District Court IFP Denial

A district court's denial of IFP status is immediately appealable. *Lister v. Dep't of Treasury*, 408 F.3d 1309, 1310 (10th Cir. 2005). We review such a denial for an abuse of discretion. *Id.* at 1312. When denying an IFP motion, the district court must not act arbitrarily or base its decision on erroneous grounds. *Id.* at 1313.

Under 28 U.S.C. § 1915(a), "any court of the United States may authorize the commencement" of a civil suit without the prepayment of fees "by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor." So to succeed on an IFP motion, the movant must make two showings: (1) "a financial inability to pay the required filing fees"; and (2) "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues" he raises. *Lister*, 408 F.3d at 1312 (citing *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991)).

We conclude that the district court acted within its discretion when it denied Lay's IFP motion. At the time, Lay's inmate-savings statement reflected a \$550.67 balance. That balance sufficed to prepay the \$400 district court filing fee.

B. IFP Motion on Appeal

Lay now moves to proceed IFP on appeal. To do so, Lay must show (1) that he has a financial inability to prepay the \$505 appellate filing fee, and (2) that he has forwarded a "reasoned, nonfrivolous argument on the law and facts in support" of his appeal.

McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 812–13 (10th Cir. 1997) (quoting

DeBardeleben, 937 F.2d at 505). Lay can't afford to prepay the \$505 appeal filing fee because his funds have declined, and because a corrections official has certified that his average monthly balance for the past six months has been \$85.39. So Lay meets the first requirement for proceeding IFP on appeal. But he fails the second requirement because his appeal is frivolous. The record shows that when the district court denied IFP, Lay had sufficient funds to pay the \$400 district court filing fee. And it shows that though Lay acknowledged he could pay the district court fee, he still chose to lodge this appeal. Lay doesn't qualify for IFP on appeal, and we deny his appellate IFP motion. *Cf. Lister*, 408 F.3d at 1313 (denying motion to proceed IFP on appeal because prisoner failed to provide court of appeals with sufficient information regarding her financial status). We order immediate payment of the unpaid balance due.

CONCLUSION

We affirm the district court's denial of IFP and we deny Lay's motion to proceed IFP on appeal.²

Entered for the Court

Gregory A. Phillips
Circuit Judge

² We lack jurisdiction to consider Lay's motion for injunctive relief and a protective order because the district court hasn't yet ruled on these issues. *See* 28 U.S.C. § 1292(a)(1) ("[T]he courts of appeals shall have jurisdiction of appeals from[] . . . [i]nterlocutory orders . . . granting, . . . refusing or dissolving injunctions[.]"). And the present appeal concerns only the district court's denial of Lay's IFP motion.

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

WADE LAY,)
)
 Plaintiff,)
)
 v.) Case No. CIV-17-1224-D
)
 OKLAHOMA DEPARTMENT OF)
 CORRECTIONS, *et al.*,)
)
 Defendants.)

ORDER

This matter is before the Court for review of the Report and Recommendation [Doc. No. 18] issued by United States Magistrate Judge Bernard M. Jones pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). Upon initial screening, Judge Jones recommended that the Court: (1) deny Plaintiff's motion for leave to proceed *in forma pauperis*; (2) order the payment of the \$400.00 filing fee within 21 days; and (3) dismiss this action without prejudice if Plaintiff fails to pay the \$400.00 filing fee.

Following receipt of the Report and Recommendation, Plaintiff filed various motions with the Court [Doc. Nos. 19-24]. In essence, Plaintiff has no objection to paying the \$400.00 filing fee from his institutional savings account. However, Plaintiff indicates that “if he is dependent on the Oklahoma State Penitentiary (O.S.P.) Business Office or Trust Fund [Department]” to “achieve such a payment,” he foresees that his efforts will “be inhibited by a practice of malicious process.” [Doc. No. 22 at 2].

Liberally construed, the Court treats these filings as Plaintiff's timely written objections to Judge Jones' Report. The Court must make a *de novo* determination of any

portion of the Report to which a specific objection is made, and may accept, reject, or modify the recommended decision. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(3).

Upon *de novo* review of the issues presented, the Court fully concurs with Judge Jones. The Court concludes that Plaintiff has sufficient funds in his account to pay the \$400.00 filing fee.¹

The Court is not required to facilitate Plaintiff's payment of the \$400.00 filing fee. That is Plaintiff's responsibility. Plaintiff is capable of obtaining a disbursement of funds from his institutional savings account. *See* OKLA. STAT. tit. 57, § 549(A)(5) ("Funds from [an inmate's mandatory savings account] may be used by the inmate for fees or costs in filing a civil or criminal action"); *see also* *Pack v. Kaiser*, No. 92-6367, 1993 WL 96885, at *1 (10th Cir. Mar. 29, 1993) (unpublished)² (recognizing Oklahoma law allows inmates to utilize funds in their mandatory savings accounts to pay court-required filing fees and "prisoners may be required to utilize funds in prison accounts in order to initiate litigation").

Although Plaintiff may foresee a problem in obtaining the disbursement, he has not shown that prison officials have been uncooperative in his efforts. The fact that Plaintiff obtained proper documentation for his IFP motion [Doc. No. 15] from the prison's

¹ On December 6, 2017, Plaintiff had a balance of \$550.67 in his institutional savings account. [Doc. No. 15 at 4, 6]. On December 21, 2017, Plaintiff had a balance of \$761.46. [Doc. No. 19 at 3, 6].

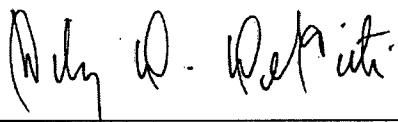
² Unpublished opinion cited pursuant to FED. R. APP. P. 32.1(a) and 10TH CIR. R. 32.1.

accounting department negates his argument that prison officials have been uncooperative.³ The Court is cognizant of the fact that the process may take some time. In addition to sending a copy of this Order to Plaintiff, the court will direct the Court Clerk to send a copy of the Order to the accounting department at OSP to help facilitate payment.

Accordingly, Judge Jones' Report and Recommendation is ADOPTED in its entirety. Plaintiff's motions for leave to proceed *in forma pauperis* [Doc. Nos. 15, 19] are DENIED. Plaintiff shall pay the \$400.00 filing fee within 21 days from the date of this Order. If Plaintiff fails to pay the filing fee or show good cause for his failure to do so within 21 days of the date of this Order, the Court, without further notice to Plaintiff, will dismiss this action without prejudice.

The Court directs the Court Clerk, in addition to sending a copy of this Order to Plaintiff, to send a copy of this Order and Judge Jones' Report and Recommendation [Doc. No. 18] to the accounting department at OSP.

IT IS SO ORDERED this 31st day of January 2018.



TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

³ It appears, in fact, that prison officials provided the information to Plaintiff at least twice. [Doc. Nos. 15, 19]. Plaintiff filed two separate IFP motions with supporting documentation of his institutional savings account – one on December 21, 2017 [Doc. No. 15], and one on January 8, 2018 [Doc. No. 19]. Ellen Clay, “accounting tech III,” at OSP provided the certifications [Doc. Nos. 15, 19].

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

WADE LAY,)
)
Plaintiff,)
)
v.) Case No. CIV-17-1224-D
)
OKLAHOMA DEPARTMENT OF)
CORRECTIONS, et al.,)
)
Defendants.)

REPORT AND RECOMMENDATION

Plaintiff, a state prisoner appearing pro se, filed a Complaint under 42 U.S.C. § 1983 [Doc. No. 1] and a handwritten motion for leave to proceed in forma pauperis, [Doc. No. 2]. United States District Judge Timothy D. DeGiusti referred the matter for initial proceedings in accordance with 28 U.S.C. §636(b)(1)(B) and (C). The Court ordered Plaintiff to cure deficiencies in his request to proceed in forma pauperis, [Doc. No. 7], and Plaintiff filed an Amended Complaint with a handwritten motion attached alleging that officials would not provide the relevant financial information, [Doc. No. 8]. The Court again ordered Plaintiff to cure the deficiencies, [Doc. No. 9], and Plaintiff thereafter filed an Application for Leave to Proceed in Forma Pauperis, [Doc. No. 10]. Finding Plaintiff had cured some, but not all, the original deficiencies and being unclear whether Plaintiff had received the Court's previous order, the Court gave Plaintiff a third and final opportunity to cure his errors. [Doc. No. 14]. Plaintiff finally complied, filing an Application for Leave to Proceed in Forma Pauperis on the proper form. [Doc. No. 15].

A review of Plaintiff's Application indicates that he had \$550.67 in his institutional savings account when he filed his Amended Complaint, [Doc. No. 15, at 4, 6], and thus has sufficient funds to prepay the \$400 filing fee. Because Plaintiff has sufficient funds available to prepay the entire filing fee, Plaintiff's Application for Leave to Proceed in Forma Pauperis [Doc. No. 15] should be

denied. *See* 28 U.S.C. § 1915(a)(1); *see also Lister v. Department of the Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005).

If Plaintiff does not pay the \$400 filing fee in full to the Clerk of the Court within twenty-one days of an order adopting this Report and Recommendation, it is recommended that this action be dismissed, without prejudice to refiling, pursuant to LCvR 3.3(e).

Plaintiff is advised of his right to object to this Report and Recommendation. *See* 28 U.S.C. § 636. Any objection must be filed with the Clerk of the District Court by January 24, 2018. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. *See Moore v. United States*, 950 F.2d 656 (10th Cir. 1991).

ENTERED this 3rd day of January, 2018.



BERNARD M. JONES
UNITED STATES MAGISTRATE JUDGE

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available in the
Clerk's Office.**