

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

DEC 16 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ANTONIO ALEJANDRO GUTIERREZ,

Plaintiff-Appellant,

v.

STEVE SHELTON, Medical Director,
Health Services Oregon Department of
Corrections; et al.,

Defendants-Appellees.

No. 21-35158

D.C. No. 2:14-cv-02071-AA
District of Oregon,
Pendleton

ORDER

Before: WALLACE, CLIFTON, and HURWITZ, Circuit Judges.

The district court has certified that this appeal is not taken in good faith and has revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). On March 10, 2021, this court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record and the response to the court's March 10, 2021 order, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 6 and 12) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

All other pending motions are denied as moot.

Appendix B

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District of Oregon,
Pendleton

ORDER,

A review of the district court's docket reflects that the district court has certified that this appeal is not taken in good faith and has revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). This court may dismiss a case at any time, if the court determines the case is frivolous. *See* 28 U.S.C. § 1915(e)(2).

Within 35 days after the date of this order, appellant must:

- (1) file a motion to dismiss this appeal, *see* Fed. R. App. P. 42(b), or
- (2) file a statement explaining why the appeal is not frivolous and should go forward.

If appellant files a statement that the appeal should go forward, appellant also must:

- (1) file in this court a motion to proceed in forma pauperis, OR

Appendix C

(2) pay to the district court \$505.00 for the filing and docketing fees for this appeal AND file in this court proof that the \$505.00 was paid.

If appellant does not respond to this order, the Clerk will dismiss this appeal for failure to prosecute, without further notice. *See* 9th Cir. R. 42-1. If appellant files a motion to dismiss the appeal, the Clerk will dismiss this appeal, pursuant to Federal Rule of Appellate Procedure 42(b). If appellant submits any response to this order other than a motion to dismiss the appeal, the court may dismiss this appeal as frivolous, without further notice. If the court dismisses the appeal as frivolous, this appeal may be counted as a strike under 28 U.S.C. § 1915(g).

If appellant files a statement that the appeal should go forward, appellee may file a response within 10 days after service of appellant's statement.

The briefing schedule for this appeal is stayed.

The Clerk shall serve on appellant: (1) a form motion to voluntarily dismiss the appeal, (2) a form statement that the appeal should go forward, and (3) a Form 4 financial affidavit. Appellant may use the enclosed forms for any motion to dismiss the appeal, statement that the appeal should go forward, and/or motion to proceed in forma pauperis.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

ANTONIO A. GUTIERREZ,

Case No. 2:14-cv-02071-AA

Plaintiff,

ORDER

v.

STEVE SHELTON, Medical Director;
GARTH GULICK; J. TAYLOR,

Defendants.

AIKEN, District Judge:

Plaintiff moves to reopen this and several other cases for the purpose of modifying the collection of filing fees from his inmate trust account.

Pursuant to the Prison Litigation Reform Act (PLRA), a prisoner proceeding in forma pauperis (IFP) is required to pay the full filing fee of \$350 when bringing a civil action. *See* 28 U.S.C. § 1915(b)(1). When funds exist, the prisoner is statutorily obligated to make “monthly payments of 20 percent of the preceding month’s income credited” to the prisoner’s inmate trust account. *Id.* § 1915(b)(2). These payments are collected and forwarded by the agency having custody of the prisoner to the Clerk of the Court.

Plaintiff filed several civil rights cases in this District and was granted leave to proceed IFP. In each case,¹ plaintiff authorized the agency having custody of him to collect the filing fee from his prison trust account when funds exist. According to plaintiff, the Oregon Department of Corrections (ODOC) initially collected 20% of his monthly deposits as payment for his filing fees, regardless of the number of cases he had filed. Recently, however, ODOC began collecting 20% of petitioner's monthly deposits in *each* case. Plaintiff argues that the new formula will result in ODOC collecting 100% of his monthly deposits, based on the number of cases and appeals for which he owes filing fees.

The United States Supreme Court has held that § 1915(b)(2) "calls for 'monthly payments of 20 percent of the preceding month's income' *simultaneously* for each action pursued" rather than payments of 20 percent collected sequentially for each action. In *Bruce v. Samuels*, 577 U.S. 82, 90 (2016) (*emphasis added*). The Supreme Court expressly rejected plaintiff's argument and approved "a per-case approach under which a prisoner would pay 20 percent of his monthly income for each case he has filed." *Id.* at 84. Accordingly, plaintiff has no grounds for relief.

CONCLUSION

Plaintiff's Motions to Modify Fee Collection and to Reopen Case (ECF Nos. 76, 78) are DENIED.

IT IS SO ORDERED.

DATED this 12th day of February, 2021.

/s/Ann Aiken
Ann Aiken
United States District Judge

¹ Plaintiff seeks to reopen and challenge the collection of fees for Case Nos. 2:11-cv-01095-KI, 2:12-cv-0542-KI, and 3:13-cv-01219-HZ, and for appeals filed with the Court of Appeals for the Ninth Circuit. This Court did not order the collection of fees in Case No. 13-cv-01219-HZ.