

Appendix A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

May 25, 2022

Lyle W. Cayce
Clerk

No. 21-60361
Summary Calendar

GENERAL AKECHETA MORNINGSTAR,

Plaintiff—Appellant,

versus

KROGER COMPANY,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:20-CV-424

Before SOUTHWICK, GRAVES, and COSTA, *Circuit Judges.*

PER CURIAM:*

Akecheta Morningstar, also known as Akecheta A. Morningstar, General Akecheta Morningstar, and General Akecheta A. Morningstar, Ph.D., moves for a refund of his appellate filing fee so that he can proceed in forma pauperis (IFP) in this appeal. The district court granted Kroger's

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

motion for summary judgment and dismissed Morningstar's claims of racial discrimination and violations of the Americans with Disabilities Act (ADA).

After Morningstar filed his notice of appeal, the district court certified that the appeal was not in good faith under Federal Rule of Appellate Procedure 24(a)(3)(A). Meanwhile, Morningstar filed an appeal brief in this court before briefing was suspended by the district court's IFP ruling. Morningstar moved this court for leave to appeal IFP. But he later withdrew the motion and paid the fee in hopes of speeding up the appeal. He now seeks a refund of the fee and asserts that he is a pauper.

Morningstar's financial affidavit, and especially his payment of the filing fee, indicate that he can afford to pay the fee without losing the ability "to provide himself and dependents with the necessities of life." *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339-40 (1948). Moreover, his fee was not incorrectly calculated or assessed by mistake. *Cf. Owen v. Harris Cty., Tex.*, 617 F.3d 361, 362-63 (5th Cir. 2010) (ordering the refund of an erroneously assessed fee). There is no factual or legal basis for refunding the fee in this case. Accordingly, the motions for a refund and to proceed IFP are DENIED.

Even though the fee has been paid, this court may dismiss the appeal "pursuant to 5TH CIR. R. 42.2 when it is apparent that an appeal would be meritless." *Baugh v. Taylor*, 117 F.3d 197, 202 n.24 (5th Cir. 1997). Morningstar did not brief his claim brought under the ADA and has thereby waived an appeal of the dismissal of that claim. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). His discrimination arguments are vague and conclusional, if not irrelevant. He asserts that he was fired for working too hard, and he interprets a religious poem as a racist death threat from a fellow employee. More significantly, Morningstar does not address the district court's application of the burden-shifting analysis of *McDonnell Douglas*

Corp. v. Green, 411 U.S. 792, 802-03 (1973). Pursuant to that analysis the court correctly determined that Morningstar had not alleged facts to show a hostile work environment or an adverse employment decision, such as a constructive discharge. Because Morningstar fails to identify any error in the district court's analysis, it is as if he had not appealed that issue. See *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). In addition, Morningstar's conclusional allegations are insufficient to overcome summary judgment, even when the factual allegations are viewed in the light most favorable to him. See *Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 278-79 (5th Cir. 2001). Because Morningstar presents no nonfrivolous issue for appeal, the appeal is DISMISSED. See *Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

GENERAL AKECHETA MORNINGSTAR

PLAINTIFF

VS.

CIVIL ACTION NO. 3:20CV424TSL-LGI

THE KROGER COMPANY

DEFENDANT

ORDER

Plaintiff Akecheta Morningstar, proceeding pro se and in forma pauperis (ifp), filed his complaint in this cause against The Kroger Company alleging employment discrimination. On April 22, 2021, the court granted defendant's motion for summary judgment, denied plaintiff's summary judgment motion and entered judgment in favor of defendant. Now before the court is plaintiff's motion for leave to proceed ifp.

"[A] federal court may refuse to certify an appeal for in forma pauperis status if it is not taken in good faith." Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983) (citing 28 U.S.C. § 1915(a); Fed. R. App. R. 24(a))¹. An appeal is taken in good

1 Rule 24(a)(3) of the Federal Rules of Appellate Procedure provides, in pertinent part:

A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless:

(A) the district court--before or after the notice of appeal is filed--certifies that the appeal is not taken in good faith or finds that the party is not otherwise

faith if it presents an arguable issue on the merits and therefore is not frivolous. See Coppedge v. United States, 369 U.S. 438, 445 (1962); Howard, 707 F.2d at 219. The movant must demonstrate the existence of a non-frivolous issue for appeal. See Payne v. Lynaugh, 843 F.2d 177, 178 (5th Cir. 1988).

Morningstar essentially identifies two issues for appeal: (1) the existence of genuine issues of material fact precluded summary judgment and (2) the court had a bias posture against him. For the reasons set out in the court's April 22, 2021 memorandum opinion and order, plaintiff fails to demonstrate the existence of a non-frivolous issue on the merits for appeal. Baugh v. Taylor, 117 F.3d 197, 202 n. 21 2 (5th Cir. 1997) (to comply with Rule 24 and to inform the Court of Appeals of the reasons for its certification, a district court may incorporate by reference its order dismissing an appellant's claims). As to the second issue for appeal, plaintiff has not heretofore asserted that the court was biased against him. His assertion of bias seems to be based

entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding.

Section 1915(a)(3) of Title 28 also provides: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

solely on the fact that the court ruled against him on the summary judgment motions. This is not a good faith basis for appeal. Spears v. Scales, 689 F. App'x 293, 294 (5th Cir. 2017) ("A reasoned decision dismissing a plaintiff's claims does not raise an inference of bias.") (citing United States v. Reeves, 782 F.2d 1323, 1325 (5th Cir. 1986) ("The fact that the trial judge ruled against the defendant in an earlier appearance does not render the trial judge biased.")). For these reasons, the court certifies that the appeal is not taken in good faith such that the motion to proceed ifp on appeal is denied.

Although this court has certified that the appeal is not taken in good faith under Section 1915(a)(3) and Rule 24(a)(3)(A), plaintiff may challenge this finding pursuant to Baugh v. Taylor, 117 F.3d 197 (5th Cir. 1997), by filing a separate motion to proceed in forma pauperis on appeal with the Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of this order.

SO ORDERED this 13th day of May, 2021.

/s/Tom S. Lee
UNITED STATES DISTRICT JUDGE