

**United States Court of Appeals
for the Fifth Circuit**

United States Court of Appeals
Fifth Circuit

FILED

May 23, 2022

Lyle W. Cayce
Clerk

No. 21-30610
Summary Calendar

EDWARD SIMMONS,

Plaintiff—Appellant,

versus

JAMES LEBLANC, *Secretary, in his individual and official capacity*; TODD BARRERE, *Warden, in his individual and official capacity*; THOMAS, *Colonel, in his individual and official capacity*; LIEUTENANT COLONEL JOHNSON, *in his individual and official capacity*; UNKNOWN VERRETT, *Major, in his individual and official capacity*; LANCE, *Major, in his individual and official capacity*; COBB, *Captain, in his individual and official capacity*; WHITAKER, *Captain, in his individual and official capacity*; HARRIS, *Lieutenant, in his individual and official capacity*; FISHER, *Lieutenant, in his individual and official capacity*; JASMAIN FLUGENE, *Sergeant, in his individual and official capacity*; BUTLER, *Sergeant, in his individual and official capacity*,

Defendants—Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:21-CV-378

Before JONES, ELROD, and WILSON, *Circuit Judges*.

PER CURIAM:*

Edward Simmons, Louisiana prisoner # 103371, seeks leave to proceed in forma pauperis (IFP) on appeal from the district court's dismissal without prejudice of his 42 U.S.C. § 1983 action. The district court found that Simmons did not properly exhaust his administrative remedies before commencing his suit as required by 42 U.S.C. § 1997e.

By seeking leave to proceed IFP in this court, Simmons is contesting the district court's denial of leave to proceed IFP and its certification that his appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry into an appellant's good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted).

Simmons has not raised a nonfrivolous issue as to whether he properly exhausted his administrative remedies. His grievances, which were rejected as procedurally improper, did not exhaust his administrative remedies. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006); *Cowart v. Erwin*, 837 F.3d 444, 451 (5th Cir. 2016). Likewise, there is no indication that his disciplinary appeal, which is subject to a specialized administrative remedy procedure, resulted in the exhaustion of his failure-to-protect claim in these circumstances.

Thus, the IFP motion is DENIED, and the appeal is DISMISSED as frivolous. *See Howard*, 707 F.2d at 220; 5TH CIR. R. 42.2. This dismissal counts as one strike under 28 U.S.C. § 1915(g). *See Coleman v. Tollefson*, 575 U.S. 532, 537–38 (2015). Simmons has two previous strikes. *See Simmons v. La. Dep't of Pub. Safety & Corr.*, 697 F. App'x 345, 347 (5th Cir. 2017). He

* 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.

now has three strikes. *See Coleman*, 575 U.S. at 537. Thus, he is now BARRED from proceeding IFP in any civil action or appeal filed while he is incarcerated or detained unless he is under imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g); *McGarrah v. Alford*, 783 F.3d 584, 585 (5th Cir. 2015) (per curiam).

21-306

Mr. Edward Simmons
#103371
Elayn Hunt Correctional Center
6925 Highway 74, P.O. Box 174
Saint Gabriel, LA 70776-0000

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 23, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 21-30610 Simmons v. LeBlanc
USDC No. 3:21-CV-378

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in dark ink, appearing to read "W M Jett", with a long horizontal flourish extending to the right.

By: _____
Whitney M. Jett, Deputy Clerk

Enclosure(s)

Mr. Edward Simmons

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

EDWARD SIMMONS (#103371)

CIVIL ACTION

VERSUS

21-378-SDD-SDJ

JAMES LEBLANC, ET AL.

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the United States District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have fourteen (14) days after being served with the attached Report to file written objections to the proposed findings of fact, conclusions of law, and recommendations therein. Failure to file written objections to the proposed findings, conclusions, and recommendations within 14 days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions of the Magistrate Judge which have been accepted by the District Court.

**ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE
WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.**

Signed in Baton Rouge, Louisiana, on August 6, 2021.



**SCOTT D. JOHNSON
UNITED STATES MAGISTRATE JUDGE**

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

EDWARD SIMMONS (#103371)

CIVIL ACTION

VERSUS

21-378-SDD-SDJ

JAMES LEBLANC, ET AL.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The ~~pro se~~ Plaintiff, a person confined at the Elayn Hunt Correctional Center ("EHCC"), St. Gabriel, Louisiana, filed this proceeding pursuant to 42 U.S.C. § 1983 against numerous Defendants, complaining that his constitutional rights were violated due to Defendants' failure to protect him from harm at the hands of another inmate. He seeks monetary and injunctive relief.

Pursuant to 28 U.S.C. §§ 1915(e) and 1915A, this Court is authorized to dismiss an action or claim brought by a prisoner who is proceeding *in forma pauperis* or is asserting a claim against a governmental entity or an officer or employee of a governmental entity if satisfied that the action or claim is frivolous, malicious, or fails to state a claim upon which relief may be granted. An action or claim is properly dismissed as frivolous if the claim lacks an arguable basis either in fact or in law. *Denton v. Hernandez*, 504 U.S. 25, 31 (1992), citing *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Hicks v. Garner*, 69 F.3d 22, 24-25 (5th Cir. 1995). A claim is factually frivolous if the alleged facts are "clearly baseless, a category encompassing allegations that are 'fanciful,' 'fantastic,' and 'delusional.'" *Id.* at 32-33. A claim has no arguable basis in law if it is based upon an indisputably meritless legal theory, "such as if the complaint alleges the violation of a legal interest which clearly does not exist." *Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir. 1998). The law accords judges not only the authority to dismiss a claim which is based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the

factual allegations. *Denton v. Hernandez*, *supra*, 504 U.S. at 32. Pleadings which are merely improbable or strange, however, are not frivolous for purposes of § 1915. *Id.* at 33; *Ancar v. Sara Plasma, Inc.*, 964 F.2d 465, 468 (5th Cir. 1992). A § 1915 dismissal may be made any time, before or after service or process and before or after an answer is filed, if the court determines that the allegation of poverty is untrue; or the action is frivolous or malicious; fails to state a claim on which relief may be granted; or seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2) and *Green v. McKaskle*, 788 F.2d 1116, 1119 (5th Cir. 1986).

In the instant matter, Plaintiff's claims are subject to dismissal because Plaintiff has failed to exhaust available administrative remedies relative thereto as mandated by 42 U.S.C. § 1997e. Pursuant to this statute, Plaintiff was required to exhaust administrative remedies available to him at the prison prior to commencing a civil action in this Court with respect to prison conditions. This provision is mandatory and applies broadly to "all inmate suits about prison life." *Porter v. Nussle*, 534 U.S. 516, 532 (2002). Further, a prisoner must exhaust administrative remedies by complying with applicable prison grievance procedures before filing a suit relative to prison conditions. *Johnson v. Johnson*, 385 F.3d 503, 517 (5th Cir. 2004). Not only must the prisoner exhaust all available remedies, but such exhaustion must be proper, including compliance with an agency's deadlines and other critical procedural rules. *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). One of the principal purposes of the administrative exhaustion requirement is to provide fair notice to prison officials of an inmate's specific complaints so as to provide "time and opportunity to address complaints internally." *Johnson v. Johnson*, *supra*, 385 F.3d at 516, quoting *Porter v. Nussle*, *supra*, 534 U.S. at 525. Further, the degree of

specificity necessary in a prisoner's grievance should be evaluated in light of this intended purpose. *Id.*

In his Complaint, Plaintiff asserts that his grievance was rejected by the screening officer, and that his disciplinary appeal has not been resolved. Furthermore, Plaintiff alleges that the second attack by a fellow inmate occurred on May 22, 2021, but Plaintiff signed his Complaint only days later, on May 26, 2021¹. As such, the Complaint makes clear that Plaintiff failed to exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e.

RECOMMENDATION

It is recommended that this action be dismissed without prejudice, pursuant to 28 U.S.C. §§ 1915(e) and 1915A, for failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e.²

Signed in Baton Rouge, Louisiana, on August 6, 2021.



SCOTT D. JOHNSON
UNITED STATES MAGISTRATE JUDGE

¹ If Plaintiff's grievance had been accepted, the prison would have had 40 days to submit a First Step response. See 22 La. Admin. Code, Part I, § 325(J)(1)(a).

² Plaintiff is advised that 28 U.S.C. § 1915(g) provides that, "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [Proceedings in forma pauperis] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

SIMMONS

VERSUS

LEBLANC, ET AL.

CIVIL ACTION

21-378-SDD-SDJ

RULING

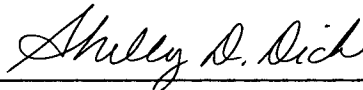
The Court has carefully considered the Complaint,¹ the record, the law applicable to this action, and the Report and Recommendations² of United States Magistrate Judge Scott D. Johnson, dated August 9, 2021, to which Objections³ were filed and also reviewed;

The Court hereby approves the Report and Recommendations of the Magistrate Judge and adopts it as the Court's opinion herein.

ACCORDINGLY,

IT IS HEREBY ORDERED that this action is dismissed without prejudice, pursuant to 28 U.S.C. §§ 1915(e) and 1915A, for failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e.

Signed in Baton Rouge, Louisiana on September 14, 2021.



**CHIEF JUDGE SHELLY D. DICK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

¹ Rec. Doc. 1.

² Rec. Doc. 4.

³ Rec. Docs. 5 and 6.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

SIMMONS

VERSUS

LEBLANC, ET AL.

CIVIL ACTION

21-378-SDD-SDJ

JUDGMENT

For the reasons outlined in this Court's Ruling adopting the Report and Recommendations of the Magistrate Judge in the captioned matter;

Judgment is hereby rendered in favor of the Defendants and against the Plaintiff and this matter is dismissed without prejudice.

Signed in Baton Rouge, Louisiana, on September 14, 2021.



**CHIEF JUDGE SHELLY D. DICK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

**Additional material
from this filing is
available in the
Clerk's Office.**