

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13047-F

Appx. A

ROBERT L. DAVIS,

Plaintiff - Appellant,

versus

UNITED STATES GOVERNMENT,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Florida

ORDER: Pursuant to the 11th Cir. R. 42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Robert L. Davis has failed to pay the filing and docketing fees to the district court within the time fixed by the rules.

Effective October 24, 2022.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

FOR THE COURT - BY DIRECTION

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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October 05, 2022

Robert L. Davis
Santa Rosa CI - Inmate Legal Mail
5850 E MILTON RD
MILTON, FL 32583

APPX. B

Appeal Number: 22-13047-F
Case Style: Robert Davis v. United States Government
District Court Docket No: 3:22-cv-08458-LC-ZCB

Notice to party(s):

No action will be taken on Motion to proceed in forma pauperis [9776314-2]. The referenced filing from Appellant Robert L. Davis is not applicable. All 3 strike parties must pay the filing fee.

Any filing submitted out of time must be accompanied by a motion to file out of time (or a motion to reinstate if the case has been clerically dismissed).

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Chris Blair

Phone #: (404) 335-6182

Notice No Action Taken

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

ROBERT L. DAVIS,
FDOC Inmate No. 652400,
Plaintiff,

APPX. C

vs.

Case No.: 3:22cv8458/LAC/ZCB

UNITED STATES GOVERNMENT,
Defendant.

ORDER AND REPORT AND RECOMMENDATION

Plaintiff is incarcerated in the Florida Department of Corrections. He filed this *pro se* lawsuit against the “United States Government” on June 10, 2022. (Doc. 1). Plaintiff contemporaneously filed a motion to proceed *in forma pauperis* (IFP), which was initially granted. (Doc. 2, Doc. 4). The Court has since discovered that Plaintiff is barred from proceeding IFP under the three strikes provision of 28 U.S.C. § 1915(g). The Court, therefore, vacates the prior order granting IFP status (Doc. 4) and orders that Plaintiff’s IFP motion (Doc. 2) be denied. Additionally, the Court recommends dismissing Plaintiff’s complaint without prejudice for failing to pay the full filing fee.

I. Discussion

Under the three strikes provision, a prisoner cannot proceed IFP in a civil action if he has “on 3 or more prior occasions, while incarcerated..., 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.” 28 U.S.C. § 1915(g). The statute provides a narrow exception for instances where the prisoner is “under imminent danger of serious physical injury.” *Id.*; see also *Daker v. Bryson*, 784 F. App’x 690, 692 (11th Cir. 2019) (explaining that the “sole exception to the three strikes bar is where the prisoner is under imminent danger of serious physical injury”).

A prisoner who is barred from proceeding IFP by § 1915(g) must pay the full filing fee when the lawsuit is filed. *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002). The Eleventh Circuit has explained that the “proper procedure is for the district court to dismiss the complaint without prejudice when it denies the prisoner leave to proceed *in forma pauperis* pursuant to the three strikes provision of § 1915(g).” *Id.* According to *Dupree*, a prisoner cannot avoid dismissal by “simply pay[ing] the filing fee after being denied *in forma pauperis* status” because the fee was due “at the time he *initiate[d]* the suit.” *Id.*; see also *Vanderberg v. Donaldson*,

259 F.3d 1321, 1324 (11th Cir. 2001) (stating that after three meritless suits, a prisoner must pay the full filing fee at the time he initiates suit).

Here, the Court has reviewed Plaintiff's litigation history on the Public Access To Court Electronic Records (PACER) database.¹ That search has revealed that Plaintiff (while a prisoner) has previously filed at least three actions or appeals in federal courts that were dismissed as frivolous or for failure to state a claim on which relief can be granted. More specifically:

- *Davis v. Delcos*, No. 8:20cv322-CEH-TGW (M.D. Fla. July 6, 2021) (dismissed for failure to state a claim on which relief can be granted);
- *Davis v. Holt*, No. 8:21cv1628-MSS-SPF (M.D. Fla. Nov. 18, 2021) (dismissed for failure to state a claim on which relief can be granted);
- and
- *Davis v. Delcos*, No. 21-13101-C (11th Cir. Mar. 7, 2022) (dismissed as frivolous).²

¹ Federal Rule of Evidence 201 permits a court to “judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2).

² The plaintiff in the three previously filed cases is identified as Inmate #652400. Plaintiff here identifies himself with that same inmate number. (Doc. 1 at 14).

In fact, this Court and the U.S. District Court for the Middle District of Florida have previously recognized Plaintiff as a three striker who is barred from proceeding IFP:

- *Davis v. Moody*, No. 5:21cv228-TKW-MJF (N.D. Fla. Jan 13, 2022)
- *Davis v. Inch*, No. 4:21cv348-MW-MJF (N.D. Fla. Nov. 29, 2021)
- *Davis v. Moody*, No. 8:21cv1898-CEH-JSS (M.D. Fla. Aug. 12, 2021)
- *Davis v. Inch*, No. 4:13cv191-MW-CAS (N.D. Fla. Apr. 30, 2013)
- *Davis v. McNeil*, No. 4:10cv150-MP-WCS (N.D. Fla. Aug. 25, 2010)

Plaintiff acknowledges as much. (Doc. 1 at 2). But he claims that the three-strikes provision is unconstitutional. (*Id.* at 3). The Eleventh Circuit has held otherwise. *See Daker v. Bryson*, 784 F. App'x 690, 693 (11th Cir. 2019) (rejecting argument challenging the constitutionality of 28 U.S.C. § 1915(g)); *Medberry v. Butler*, 185 F.3d 1189, 1192 (11th Cir. 1999) (stating “this Court has recently held that the three strikes *in forma pauperis* provision of 28 U.S.C. § 1915(g) passes constitutional muster”).

Because Plaintiff had three strikes when he commenced this case, he cannot proceed IFP. Thus, he should have paid the filing fee at the time of filing. He failed to do so. And he makes no allegations that establish that he is “under imminent danger of serious physical injury” as required for the exception in § 1915(g) to apply.

Dismissal without prejudice is, therefore, appropriate. *See Dupree*, 284 F.3d at 1236-37.

II. Conclusion

For the reasons above, this case should be dismissed without prejudice.

Accordingly, it is **ORDERED**:

1. The Court's previous order granting Plaintiff's motion to proceed *in forma pauperis* (Doc. 4) is **VACATED**. Plaintiff's motion to proceed *in forma pauperis* (Doc. 2) is now **DENIED**.

2. The Clerk of Court is directed to send a copy of this order to the Florida Department of Corrections, 501 South Calhoun St., Tallahassee, FL 32399-2500, Attention: Agency Clerk.

3. Plaintiff's "Motion to Terminate The PLRA Filing Fee Lien" (Doc. 5) is **GRANTED**.

And it is respectfully **RECOMMENDED**:

1. This action be **DISMISSED without prejudice**, under 28 U.S.C. § 1915(g), based on Plaintiff's failure to pay the filing fee at the time he commenced this case.

2. Plaintiff's "Motion to Have Constitutional Challenge Served on Respondent" (Doc. 6) be **DENIED as moot**.

3. The Clerk of Court be directed to close this case.

At Pensacola, Florida this 27th day of July 2022.

/s/ Zachary C. Bolitho

Zachary C. Bolitho

United States Magistrate Judge

NOTICE TO THE PARTIES

This case was referred to the undersigned for the issuance of all preliminary orders and any recommendations regarding dispositive matters. *See* N.D. Fla. Loc. R. 72.2(C); *see also* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

Objections to these proposed findings and recommendations must be filed within fourteen days of the date of the Report and Recommendation. Any different deadline that may appear on the electronic docket is for the Court's internal use only and does not control. An objecting party must serve a copy of the objections on all other parties. A party who fails to object to the magistrate judge's findings or recommendations contained in a report and recommendation waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

APPX. D

ROBERT L. DAVIS,
Plaintiff,

vs.

Case No.: 3:22cv8458/LAC/ZCB

UNITED STATES GOVERNMENT,
Defendant.

_____ /

ORDER

The magistrate judge issued a Report and Recommendation on July 27, 2022. (Doc. 8). The Court furnished the plaintiff a copy of the Report and Recommendation and afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1). I have made a *de novo* determination of the timely filed objections.

Having considered the Report and Recommendation and the objections thereto, I have determined the Report and Recommendation should be adopted.

Accordingly, it is **ORDERED**:

1. The magistrate judge's Report and Recommendation (Doc. 8) is adopted and incorporated by reference in this order.

2. This action be **DISMISSED without prejudice**, under 28 U.S.C. § 1915(g), based on Plaintiff's failure to pay the filing fee at the time he commenced this case.

3. Plaintiff's "Motion to Have Constitutional Challenge Served on Respondent" (Doc. 6) be **DENIED as moot**.

4. The Clerk of Court is directed to enter judgment in accordance with this order and close the case.

DONE AND ORDERED this 11th day of August, 2022.

s/L. A. Collier
LACEY A. COLLIER
SENIOR UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

ROBERT L DAVIS

VS

CASE NO. 3:22-cv-08458-LC-ZCB

UNITED STATES GOVERNMENT

JUDGMENT

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the Plaintiff take nothing and that this action
be DISMISSED without prejudice, under 28 U.S.C. Section 1915(g).

JESSICA J. LYUBLANOVITS
CLERK OF COURT

August 11, 2022
DATE

/s/ Monica Broussard
Deputy Clerk: Monica Broussard