

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

EARNEST LEE WALKER, SR.

Plaintiff,

vs.

CARTER DAVENPORT, *et al.*,

Defendant.

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CIVIL ACTION NO. 16-00175-KD-B

ORDER

This matter is before the Court on Plaintiff's complaint filed pursuant to 42 U.S.C. § 1983. (Doc. 1). Plaintiff was permitted to proceed *in forma pauperis* but was required to pay the partial filing fee of \$8.77. (Doc. 5). When he did not do so by the required deadline, the Magistrate Judge recommended that this matter be dismissed. (Doc. 7). This Court permitted Plaintiff an additional 30 days in which to pay the partial filing fee and he has failed to do so. (Doc. 9).

Thus, after due and proper consideration of all portions of this file deemed relevant to the issues raised, and a *de novo* determination of those portions of the Report and Recommendation to which objection is made, the Report and Recommendation of the Magistrate Judge, dated July 25, 2016, made under 28 U.S.C. § 636(b)(1)(B) is **ADOPTED** as the opinion of this Court. It is **ORDERED** that this action be dismissed without prejudice for failure to comply with the Court's order and to prosecute this action.

Further, Defendant's motion to stay (Doc. 10), which appears to request that he be permitted to proceed on credit via his prisoner account rather than pay the partial filing fee of

\$8.77 by the required deadline, is **DENIED**.¹ The applicable statute, 28 U.S.C. § 1915(b)(1) explains that “if a prisoner brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of-- (A) the average monthly deposits to the prisoner’s account; or (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.” This statute is not discretionary (“the court *shall* assess...” (emphasis added)).² Thus, Defendant’s payment of the partial filing fee is required and the relief he seeks is not available.

DONE and ORDERED this **15th** day of **September 2016**.

/s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE

¹ Plaintiff requests an “order allowing the partial filin[g] fee to of \$8.77 to be deducted from [his prisoner account] onces funds become available and [20%] thereafter.” (Doc. 10 at 1).

² The partial filing fee of \$8.77 is 20% of the average monthly deposits to the Defendant’s account. (Doc. 2 at 5).