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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEVEN HAIRL WILHELM, CASE NO. 1:10-cv-00001-GBC (PC)

Plaintiff,

v.

ORDER FINDING THAT PLAINTIFF IS ENTITLED TO PROCEED IN FORMA PAUPERIS ON APPEAL FILED MAY 26, 2011

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., (ECF No. 15)

Defendants.

ORDER DIRECTING CLERK'S OFFICE TO SERVE COPY OF ORDER ON NINTH / CIRCUIT

ORDER

Steven Hairl Wilhelm ("Plaintiff") is a state prisoner and proceeded pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. On May 10, 2011, the Court dismissed Plaintiff's action, with prejudice, for failure to state any cognizable claims. (ECF No. 13.) On May 26, 2011, Plaintiff filed a notice of appeal and on June 6, 2011, the Ninth Circuit remanded for the limited purpose of determining whether in forma pauperis status should continue for this appeal or whether the appeal is frivolous or taken in bad faith. (ECF Nos. 15 & 18.)

Pursuant to the Federal Rules of Appellate Procedure,

A party who was permitted to proceed in forma pauperis in the district-court action . . . 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 entitled to proceed in forma pauperis and states in writing its

1 reasons for the certification or finding;
2 or

3 (B) a statute provides otherwise.

4 Fed. R. App. P. 24(a)(3).

5 The district clerk must immediately notify the parties and the court of appeals
6 when the district court does any of the following:

7 (A) denies a motion to proceed on appeal in forma pauperis;

8 (B) certifies that the appeal is not taken in good faith; or

9 (C) finds that the party is not otherwise entitled to proceed in forma pauperis.

10 Fed. R. App. P. 24(a)(4).

11 Because Plaintiff proceeded in forma pauperis in this action, Plaintiff is entitled to
12 proceed in forma pauperis on appeal unless the Court finds her appeal is not taken in good
13 faith or finds that she is not otherwise entitled to proceed in forma pauperis. As set forth
14 below by this Order, the Court finds that Plaintiff is entitled to proceed in forma pauperis
15 on appeal.

16 “An appeal may not be taken in forma pauperis if the trial court certifies in writing
17 that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3). “In the absence of some evident
18 improper motive, the applicant’s good faith is established by the presentation of any issue
19 that is not plainly frivolous.” Ellis v. United States, 356 U.S. 674 (1958). An action is
20 frivolous “where it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490
21 U.S. 319, 325 (1989). In other words, the term “frivolous”, as used in § 1915 and when
22 applied to a complaint, “embraces not only the inarguable legal conclusion, but also the
23 fanciful factual allegation.” Id.

24 Pursuant to 28 U.S.C. § 1291, Plaintiff can appeal the Court’s May 10, 2011 Order
25 dismissing the action as a final and appealable order. Here, Plaintiff received guidance
26 from the Court and the opportunity to amend his claims to attempt to state cognizable
27 claims in its Screening Order. (ECF No. 9.) Plaintiff filed his First Amended Complaint,
28 and after screening it, the Court issued an Order dismissing the action due to Plaintiff’s
repeated failure to state any cognizable claims. (ECF Nos. 12 & 13.)

Given that Plaintiff’s action was dismissed for failure to state a claim and the

1 absence of improper motive, Plaintiff's appeal is not plainly frivolous. It does not appear
2 to lack an arguable basis either in law or in fact.

3 Based on the foregoing, it is HEREBY ORDERED that:

4 Plaintiff's appeal is taken in good faith. 28 U.S.C. § 1915(a). The Clerk's Office
5 shall serve a copy of this order on the Ninth Circuit.

6 IT IS SO ORDERED.

7 Dated: June 14, 2011

8 
UNITED STATES MAGISTRATE JUDGE