

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

HARRIS L. WINNS,  
Plaintiff,

v.

MERIT SYSTEMS PROTECTION  
BOARD, et al.,  
Defendants.

Case No. 15-cv-02313-HRL

**ORDER CERTIFYING APPEAL IS NOT  
TAKEN IN GOOD FAITH AND  
DENYING MOTION FOR LEAVE TO  
APPEAL IN FORMA PAUPERIS**

Re: Dkt. Nos. 54, 55

The court previously denied Plaintiff’s motion for leave to file a second amended complaint as futile, transferred this case to the Federal Circuit to cure a lack of subject-matter jurisdiction, and denied Plaintiff’s motion for an intra-district venue change as moot. Dkt. No. 50.

Plaintiff filed a notice of appeal to the Ninth Circuit and moved this court for leave to proceed on the appeal in forma pauperis. Plaintiff appeals five issues: (1) whether the district court abused its discretion by transferring his case to the Federal Circuit under 28 U.S.C. § 1631; (2) whether the district court abused its discretion to deny his motion for leave to amend the complaint; (3) whether the district court abused its discretion to deny his motion for an intra-district venue change; (4) whether the Merit Systems Protection Board (“MSPB”) erred to conclude that it lacked jurisdiction over his claims; and (5) whether it is “possible for the District Court to have it both ways” by lacking jurisdiction while “proceed[ing] to strip and dispose of the Plaintiff’s non-frivolous discrimination claims[.]” Dkt. No. 54.

The court previously granted in forma pauperis status to Plaintiff. Dkt. No. 8. Ordinarily a party may proceed in forma pauperis on appeal if the district court granted in forma pauperis status in the underlying action, but a party may not do so if the district court certifies the appeal has not been taken in good faith. 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3)(A); *Ellis v. United States*, 356 U.S. 674 (1958). A party makes a prima facie showing of good faith by appealing an

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issue that is not plainly frivolous. *Ellis, supra* at 674-75.

It appears that Plaintiff has solely raised non-appealable issues. An appealable final decision, in general, is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988) (internal quotation marks omitted) (applying 28 U.S.C. § 1291). A transfer order under § 1631 is not an appealable final decision because the litigation on the merits continues in a different court. *Middlebrooks v. Smith*, 735 F.2d 431, 433 (11th Cir. 1984). Four of Plaintiff’s issues challenge the propriety of decisions by this court that did not conclude the litigation on the merits of Plaintiff’s claims—that litigation continues in the Federal Circuit. As to the request for substantive review by the Ninth Circuit of the MSPB’s final decision, this court has already ruled the Federal Circuit has exclusive jurisdiction to review the merits of that issue in Plaintiff’s case. Dkt. No. 50 at 3-5. It therefore appears to the court that Plaintiff has raised only frivolous, non-appealable issues.

The court certifies Plaintiff’s appeal is not taken in good faith. The motion for leave to appeal in forma pauperis is denied. This order denying in forma pauperis status for purposes of appeal does not, however, disturb the court’s prior ruling that in forma pauperis status is proper in the context of Plaintiff’s underlying litigation.

**IT IS SO ORDERED.**

Dated: 11/19/15



HOWARD R. LLOYD  
United States Magistrate Judge