

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-01613-BNB

LEO SIMMONS,

Plaintiff,

v.

TOM CLEMENTS, Executive Director,
KEVIN MILYARD, Warden,
TIMOTHY USRY, Major,
SCOTT, Captain,
LT. SHIFT COMMANDER,
BANUELOS, C/O in Charge Unit 24, and
MEDICAL COORDINATOR,

Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiff, Leo Simmons, is a prisoner in the custody of the Colorado Department of Corrections. He currently is incarcerated at the correctional facility in Sterling, Colorado. Mr. Simmons filed a "Motion for Reconsideration and Review of Minute Order, Recusation Administrative Review for Improper and Inconsistent Action" on November 2, 2011. In the Motion, Mr. Simmons appears to request that the Court vacate the Order Denying Leave to Proceed In Forma Pauperis dated October 19, 2011. The Court must construe the Motion liberally because Mr. Simmons is a *pro se* litigant. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

The three major grounds that justify reconsideration are: (1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Upon consideration of the Motion for Reconsideration and the entire file, the Court concludes that the Motion should be denied.

Mr. Simmons, acting *pro se*, initiated this action by filing a “Commencement of Action, Notice of Intent” on June 20, 2011. Magistrate Judge Boyd N. Boland instructed Mr. Simmons to file his claims on a Court-approved form used in filing prisoner complaints and either to pay the \$350.00 filing fee in full or to file a Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915. Finally, by September 7, 2011, Mr. Simmons filed his claims on a proper Court-approved form and submitted a § 1915 motion requesting leave to proceed *in forma pauperis*.

Magistrate Judge Craig B. Shaffer reviewed the § 1915 Motion and the Complaint and entered an order directing Mr. Simmons to amend his Complaint and to show cause why he should not be denied leave to proceed pursuant to 28 U.S.C. § 1915(g) because (1) he has on three or more prior occasions, while incarcerated or detained in any facility, brought an action in a court of the United States that was dismissed on the grounds that it was frivolous or failed to state a claim; and (2) he fails to assert that he is under imminent danger of serious physical injury. Specifically, Magistrate Judge Shaffer instructed Mr. Simmons to amend his Complaint and assert only claims of imminent danger of serious physical injury. Mr. Simmons filed an Amended Complaint on October 14, 2011.

The Court carefully reviewed the Amended Complaint and found Mr. Simmons' claims, for the most part, are conclusory and vague. The specific claims he asserted against three of the named defendants did not state allegations of ongoing serious physical injury. The Court also has carefully reviewed Mr. Simmons' Motion for Reconsideration. In a conclusory fashion, Mr. Simmons claims that (1) he has served his sentence in full but is denied release from incarceration; (2) his current classification is unauthorized; (3) the medication he receives is different than what is prescribed; and (4) prison staff has threatened him so he just does what they tell him to do. Nothing he asserts in the Motion sets forth specific allegations of ongoing serious physical injury.

Mr. Simmons fails to assert any of the major grounds that would justify reconsideration in his case. The Motion for Reconsideration, therefore, will be denied. Mr. Simmons must pay the full \$350.00 filing fee pursuant to 28 U.S.C. § 1914(a) if he wishes to pursue his claims in this action. The Court will provide Mr. Simmons additional time to submit the \$350.00 filing fee, but he is warned that his failure to pay the fee within the time provided will result in the dismissal of this action without further notice. Accordingly, it is

ORDERED that the Motion for Reconsideration, Doc. No. 21, is DENIED. It is

FURTHER ORDERED that Mr. Simmons shall have **twenty-one days from the date of this Order** to pay the entire \$350.00 filing fee if he wishes to pursue his claims in this action. It is

FURTHER ORDERED that if Mr. Simmons fails to pay the entire \$350.00 filing fee within the time allowed, the Complaint and the action will be dismissed without

further notice. It is

FURTHER ORDERED that the Motion to Amend Prisoner Complaint, Doc. No. 16, is denied as unnecessary. It is

FURTHER ORDERED that the only proper filing at this time is the payment of the \$350.00 filing fee.

DATED at Denver, Colorado, this 8th day of November, 2011.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Judge
United States District Court