

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-02656-BNB

BRIAN M. GROSS,

Plaintiff,

v.

TOM CLEMENTS,  
JOHN DAVIS,  
ELLEN BLACKMORE,  
MARY CARTER,  
THOMAS FISHER,  
MARY BETH KALYMER,  
KERRY BARONI,  
MARCIA MORTIN,  
ARISTEDES ZARVARES,  
SM VICALVI,  
P. LASTRELL,  
JOHN DOE,  
JANE DOE, and  
ANTHONY DeCESARO,

Defendants.

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ORDER VACATING DISMISSAL

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This matter is before the Court *sua sponte*. Plaintiff, Brian M. Gross, is in the custody of the Colorado Department of Corrections and currently is incarcerated at the Buena Vista Correctional Complex in Buena Vista, Colorado. On October 12, 2011, Mr. Gross submitted to the Court a *pro se* Prisoner Complaint pursuant to 42 U.S.C. § 1983 and a Motion and Affidavit for Leave to Proceed Under 28 U.S.C. § 1915. On October 17, 2011, Magistrate Judge Boyd N. Boland directed Plaintiff to cure certain deficiencies. Specifically, he directed Mr. Gross to submit a certified copy of his inmate

trust fund statement for the six month period immediately preceding the filing. Mr. Gross submitted a certified copy of his inmate trust fund statement on October 27, 2011. Magistrate Judge Boland granted Mr. Gross leave to proceed pursuant to 28 U.S.C. § 1915 by order dated October 31, 2011.

The October 31 Order required Mr. Gross to pay the full amount of the \$350.00 filing fee in installments and directed him to pay an initial partial filing fee of \$20.00 within thirty days or to show cause why he had no assets and no means to pay the initial fee by filing a current certified copy of his trust fund account statement. The Order warned Mr. Gross that if he failed to have the initial partial filing fee sent to the Clerk of the Court by the designated deadline or to show cause why he had no assets and no means by which to pay the initial fee the Complaint would be dismissed without further notice.

On December 8, 2011, the Court dismissed the instant action without prejudice on the basis that Mr. Gross failed to pay the initial partial filing fee or show cause why he could not within the time allowed. The Court further noted that Mr. Gross had not communicated with the Court since October 27, 2011. Judgment also entered on December 8, 2011.

However, it appears that on November 9, 2011, Mr. Gross paid a \$20.00 filing fee to the Court, and the filing fee was mistakenly applied to a previous case filed by Mr. Gross that is now closed, Case No. 11-cv-02026-LTB. It is clear that the \$20.00 filing fee should have been applied to the instant case, because no initial partial filing fee was due in Case No. 11-cv-02026-LTB. Therefore, the Court finds that this case was erroneously dismissed. The Court will direct the Clerk of the Court to apply the \$20.00

filing fee to the instant case, and the case will be reopened. Accordingly, it is

ORDERED that the Order of Dismissal and Judgment entered on December 8, 2011, are vacated because Plaintiff, Brian M. Gross, paid the initial partial filing fee on November 9, 2011. It is

FURTHER ORDERED that the Clerk of the Court shall reopen this case and return it to the *pro se* docket. It is

FURTHER ORDERED that the financial division of the Clerk of the Court shall apply the \$20.00 payment entered in Case No. 11-cv-02026-LTB on November 9, 2011, to the instant case.

DATED at Denver, Colorado, this 20<sup>th</sup> day of December, 2011.

BY THE COURT:

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