

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SANG TRAN)
)
 Plaintiff)
)
 v.) 2:10-cv-00531-GZS
)
 UNITED STATES OF AMERICA,)
)
 Defendant)

ORDER GRANTING LEAVE TO PROCEED
IN FORMA PAUPERIS

Plaintiff, an inmate at Allenwood Low Federal Correctional Institution, in White Deer, Pennsylvania, seeks leave to proceed *in forma pauperis*. The Application to proceed *in forma pauperis* has been completed and is accompanied by a Certificate signed by an authorized individual from the Institution. The Certificate evidences that the applicant has \$475.50 in his account as of January 6, 2011; that over the last six months the average deposits have been \$271.70 and the average monthly balance has been \$309.69.

The application is GRANTED, however, pursuant to 28 U.S.C. section 1915(b)(1), Plaintiff is required to pay the entire filing fee in this matter as funds become available. An initial partial filing fee is hereby ASSESSED in the amount of \$95.10. In the event Plaintiff elects to proceed with this matter and so notifies the Court, the initial partial filing fee shall be forwarded by the institution in accordance with this Order. Subsequent payments **of twenty percent (20%) of Plaintiff's prior monthly income** shall be forwarded directly **by the institution** each time the amount in the inmate's account exceeds \$10.00 until such time as the entire filing fee of \$350.00 has been paid. Plaintiff is advised that, in the event he is released

from incarceration prior to the filing fee of \$350.00 being paid in full, he is still required to pay the entire filing fee, absent further order of the court relieving him of the obligation.

In addition, Plaintiff is hereby on notice that the Court may dismiss this action if it:

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A(b). If the Court does dismiss the action under this section, Plaintiff will still be required to pay the filing fee in full.

Further, Plaintiff is hereby on notice that a prisoner with three in forma pauperis actions dismissed under section 1915(e) may not thereafter, absent “imminent danger of serious physical injury,” file a new action without prepayment of the entire filing fee. 28 U.S.C. § 1915(g).

Plaintiff is cautioned that this complaint is particularly susceptible to dismissal. In his cover letter accompanying the complaint Tran makes it very clear that he hopes to originate an “original proceeding” under specific federal statutory provisions. He specifically requests that his petition not be treated as a prisoner petition pursuant to 28 U.S.C. § 2255, although Tran’s complaint most decidedly is a challenge to the constitutionality and/or legality of his criminal sentence imposed in this court on June 23, 2005, as modified on May 30, 2008. (See United States v. Tran, 2:04-cr-00092-GZS-1 (D. Me.), Doc. Nos. 85, 101.) I now caution Tran that he would be well advised to consider the opinion of Circuit Judge Easterbook of the Seventh Circuit who addressed a somewhat similar effort by a prisoner to avoid the hurdles to challenging a criminal judgment created by the gate-keeping provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) by trying to invoke the ancient writ of audita querela. The lesson of the opinion is that prisoners cannot avoid the AEDPA’s rules by inventive captioning.

See Melton v. United States, 359 F.3d 855, 856-57 (7th Cir. 2004). I caution Tran that should he elect to proceed with this civil lawsuit and incur the cost of the filing fee, I will most probably recommend that his “Complaint for Declaratory and Injunctive Relief and for Personal Replevin” be subject to summary dismissal.

Now therefore, Plaintiff shall notify the Court no later than February 9, 2011, whether he intends to incur the cost of the filing fee and proceed with this action, or whether he intends to forego this litigation at this time. If Plaintiff elects to proceed, he shall clearly indicate in writing that he understands his obligation to pay the full \$350 filing fee as funds are available, and he shall forward the initial partial filing fee of \$95.10 to the Court together with that written notification to indicate that he nevertheless wishes to proceed with the action. Failure to fully comply with this Order will result in the issuance of a recommendation to dismiss the Complaint.

A copy of this Order shall be forwarded to the Business Office of the Allenwood Low Federal Correctional Institution in White Deer, Pennsylvania, *following* Plaintiff's **indication to the Court that he intends to go forward with this matter and incur the \$350.00 cost of suit.**

SO ORDERED.

January 19, 2011

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge