

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
SOUTHEASTERN DIVISION**

VICTOR RAY BURTON, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 1:10-CV-0165-SNLJ  
 )  
 STEPHANIE KASTINGS, et al., )  
 )  
 Defendant. )

**MEMORANDUM AND ORDER**

This matter is before the Court on Victor Ray Burton's Notice of Appeal [Doc. #96].

**Background**

On March 18, 2014, this Court granted defendants Amanda Gibson, Dr. Michael Hakala, Stephanie Kasting, and Terry Mitchell summary judgment and dismissed them from this action, leaving only plaintiff's claims against defendant Terri Martinez. On April 23, 2014, plaintiff filed the instant Notice of Appeal seeking to appeal the judgment in favor of Gibson, Hakala, Kasting, and Mitchell [Docs. #90 and #91].

**28 U.S.C. § 1915 (a)**

Title 28 U.S.C. § 1915(a)(1), (2) requires a prisoner seeking leave to appeal in forma pauperis to submit an affidavit of indigence and a certified copy of his prison account statement for the six month period immediately preceding the filing of the notice of appeal. Furthermore, § 1915(b)(1) requires a prisoner seeking leave to proceed on appeal in forma pauperis to pay the full amount of the filing fee. If the prisoner has insufficient funds in his prison account to pay the entire fee, the Court must assess and, when funds exist, collect an initial partial filing fee of 20 percent of the greater of (1) the average monthly deposits in the prisoner's account; or (2) the average monthly

balance in the prisoner's account for the prior six month period. See 28 U.S.C. § 1915 (b)(1). After payment of the initial partial filing fee, the prisoner is required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. *See* 28 U.S.C. § 1915 (b)(2). The agency having custody of the prisoner will forward these monthly payments to the Clerk of Court each time the amount in the prisoner's account exceeds \$10, until the filing fee is fully paid.

### **Discussion**

Plaintiff has not submitted a motion for leave to proceed in forma pauperis on appeal or a certified copy of his inmate trust fund account statement; however, the Court notes that its Order of March 18, 2014, is not a final appealable order. See *Bullock v. Baptist Memorial Hospital*, 817 F.2d 58 (8<sup>th</sup> Cir. 1987).

Because it is unclear to the Court whether plaintiff understands that there has not been a final appealable order issued in his case, the Court will give plaintiff the opportunity either to withdraw his appeal or to continue with his appeal by submitting a motion for leave to proceed in forma pauperis and a certified copy of his inmate trust fund account statement for the correct period. If, in fact, plaintiff wishes to proceed with his appeal, despite the fact that the Court has not issued a final appealable order, he will be liable for the full \$505 appellate filing fee.<sup>1</sup>

Therefore, the Court will order plaintiff to either file a motion to withdraw his appeal or, if he wishes to proceed with the appeal, to submit an affidavit and a certified copy of his inmate trust fund account statement for the six-month period immediately preceding the filing of his notice of appeal, pursuant to 28 U.S.C. § 1915 (a)(1)(2).

In accordance with the foregoing,

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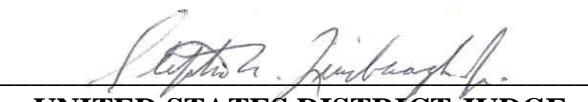
<sup>1</sup>The Court notes that after it issues a final order in this case, if plaintiff appeals, he will again be liable for the \$505 appellate filing fee.

**IT IS HEREBY ORDERED** that, within thirty (30) days from the date of this order, plaintiff shall either file a motion to withdraw his appeal, or he shall file a certified copy of his prison account statement for **the six-month period immediately preceding the filing of his notice of appeal on April 23, 2014**, and a "Motion to Proceed on Appeal in Forma Pauperis and Affidavit in Support - - Prisoner Cases."<sup>2</sup>

**IT IS FURTHER ORDERED** that if plaintiff fails to comply with this order, the Court will order him to pay the full \$505 filing and docketing fees for filing an appeal.

**IT IS FURTHER ORDERED** that the Clerk shall forward to plaintiff, together with a copy of this order, a form "Motion to Proceed on Appeal in Forma Pauperis and Affidavit in Support - - Prisoner Cases" to complete and return with his certified copy of his inmate trust fund account statement, if he elects not to withdraw his appeal.

Dated this 28th day of April, 2014.



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**UNITED STATES DISTRICT JUDGE**

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<sup>2</sup>If plaintiff chooses to go forward with his appeal at this time, when requesting a certified copy of his prison account statement, plaintiff is instructed to inform the Department of Corrections that the account statement must include all activity on his account during the six-month period preceding the filing of his notice of appeal on April 23, 2014.