

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 00-16512-BB

MARCELLUS M. MASON,

Mason/Appellant,

v.

HIGHLANDS COUNTY BOARD OF COUNTY
COMMISSIONERS,

Defendant/Appellee.

Appeal from the United States District Court
Southern District of Florida
Case No. 00-14201-CIV

DEFENDANT/APPELLEE'S ANSWER BRIEF

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Commissioners, *et al.*

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1, counsel for the Appellees hereby certifies the following list of individuals and entities are known to me to have an interest in the outcome of this particular case:

Highlands County Board of County Commissioners

Heartland Library Cooperative

Mary Myers

Ed Kilroy

Diane Hunt

Fred Carino

Carl Cool

Thomas Portz

Carolyn Hesselink

Fred Myers

Leslie Wood

J. Ross MacBeth

Maria N. Sorolis, Esq.

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Brian Koji, Esq.

Public Risk Management

Gallagher-Bassett Services, Inc.

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STATEMENT REGARDING ORAL ARGUMENT

Defendant/Appellee, Highlands County Board of County Commissioners (hereinafter "Highlands County"), does not request oral argument in this matter, as its brief fully addresses its position in this matter.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over Plaintiff/Appellant's, Marcellus M. Mason, Jr.'s (hereinafter "Mason") complaint alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, the Florida Civil Rights Act, Chapter 760, Fla. Stat., and 42 U.S.C. § 1981 pursuant to 28 U.S.C. §§ 1331 and 1367.

Title 28, § 1291 of the United States Code gives this Court jurisdiction over Mason's appeal of the District Court's denial of his motion to proceed *in forma pauperis* (hereinafter "IFP"), as an appeal from a final order. Flowers v. Turbine Support Division, 507 F.2d 1242, 1244 (5th Cir. 1975).

STATEMENT OF THE ISSUES

Whether the District Court abused its discretion in denying Mason's motion to proceed *in forma pauperis* under 28 U.S.C. § 1915. (D.E. 9, 12, 13).¹

¹ D.E. refers to "District Court Docket Entry No. ____, page ____."

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STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

Mason's appeal to this Court concerns the District Court's denial of his motion to proceed *in forma pauperis* in that court. The District Court twice denied Mason's motions to proceed *in forma pauperis*, and on November 21, 2000, dismissed Mason's case without prejudice because of Mason's failure to pay filing fees. (D.E. 9, 12, 13).

B. STATEMENT OF THE FACTS

In this employment discrimination case, Mason filed suit against Highlands County because of its allegedly discriminatory failure to hire him as a Budget Technician. (D.E. 1, 1). Mason asserts violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, the Florida Civil Rights Act, Chapter 760, Fla. Stat., and 42 U.S.C. § 1981. *Id.*

Mason's complaint in the instant case was filed in the District Court on or about July 3, 2000. *Id.* Along with his complaint, Mason applied in the District Court for permission to proceed IFP under 28 U.S.C. § 1915. (D.E. 2). Before the District Court ruled on Mason's IFP application, Mason sought and the clerk

issued a summons to Mason. (D.E. 10, p. 1). Mason had neither paid the filing fees, nor received an order granting him IFP status. (D.E. 10, p. 2). As a result, Highlands County filed a motion to quash for insufficiency of process in this matter, which the District Court granted on or about November 2, 2000. (D.E. 6, 10). On November 2, District Judge Graham denied Mason's motion to proceed IFP. (D.E. 10). The same day, the Court granted Highlands County's Motion to Quash and instructed Mason to pay the requisite filing fees. Id.

Rather than pay the filing fee as instructed by the court, Mason filed yet another motion to proceed IFP in this matter. (D.E. 11). The court again denied Mason's motion, and as a result of his disregard for the court's order and failure to pay the requisite filing fee, the court dismissed Case No. 00-14201 without prejudice. (D.E. 12, 13).

Mason subsequently filed a motion to proceed IFP on appeal with the Eleventh Circuit. However, because Mason failed to first seek permission of the District Court to proceed IFP on appeal, this Court returned the motion to the District Court for a determination.

On January 5, 2001, the District Court denied Mason's Motion to Proceed on Appeal IFP. (D.E. 20). In its order denying IFP status, the District Court determined that Mason did not qualify for IFP status, mentioning the fact that

Mason's spouse has income from her employment although Mason is not employed. Id. at 1.

C. STANDARD OF REVIEW

The standard of review is whether the District Court abused its discretion in denying Mason's Motion to Proceed *In Forma Pauperis* in this case. Flowers v. Turbine Support Division, 507 F.2d 1242, 1244 (5th Cir. 1975).

SUMMARY OF THE ARGUMENT

The District Court acted within its discretion when it denied Mason's motion to proceed *in forma pauperis* in Mason's newest case against Highlands County. The District Court apparently determined that Mason did not qualify or warrant IFP status based upon Mason's own affidavits. Furthermore, Mason should be denied IFP status because of his misconduct in obtaining a summons from the clerk prior to the District Court's granting his IFP application.²

ARGUMENT AND CITATIONS OF AUTHORITY

The privilege of proceeding *in forma pauperis* is governed by 28 U.S.C. § 1915. Section 1915(a)(1) provides that:

² Mason has much experience with the process by which one applies for IFP status.

Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. (emphasis added).

In Flowers v. Turbine Support Division, 507 F.2d 1242, 1244 (1975), the former Fifth Circuit noted that Section 1915 gives trial courts wide discretion to deny applications to proceed IFP. The court further stated that trial courts especially have discretion in civil cases for damages, “wherein the courts should grant the privilege sparingly.” Id. (citing Weller v. Dickson, 314 F.2d 598 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963)). The court cautioned only that District Courts must not act arbitrarily nor deny IFP applications on erroneous grounds. See id.

In Mason’s Application to Proceed Without Prepayment of Fees and Affidavit dated June 28, 2000, Mason declared that he owned a home and an automobile, upon which he makes payments. (D.E. 2). The Court denied his Application for IFP status on November 1, 2000. On November 8, 2000, Mason filed yet another Motion to Proceed in IFP and a Supporting Affidavit. (D.E. 11). In this Supporting Affidavit, Mason again listed his home and his auto as assets

which he owns, and also disclosed that his wife was then employed and earned approximately \$618 per month. Id. The District Court denied Mason's second Motion to Proceed in IFP status and noted its previous denial of Mason's first Motion to Proceed in IFP status, which denial was issued only 20 days earlier. (D.E. 12, 13). Accordingly, it appears that the District Court based its denial of Mason's Motions to Proceed in IFP status on its determination that Mason was not a pauper.

In the instant matter, Mason's own affidavits were the basis for the District Court's apparent determination that Mason is not a pauper. As such, the record supports the District Court's determination that Mason was not entitled to IFP status.

This Court should also deny Mason's appeal of the District Court's denial of IFP status to him in this case because of Mason's apparent misconduct in seeking and obtaining the summons from the clerk prior to the District Court's ruling on Mason's IFP application. Because Mason has a long history of litigation against Highlands County and against other government entities, all arising out of the same facts and circumstances, Mason cannot assert that he was unfamiliar with the IFP process. The background of this case highlights Mason's familiarity with the IFP process.

Highlands County formerly employed Mason, and terminated his employment. Mason brought four lawsuits (Case Nos. 99-14027, 99-14042, 99-14257 and 99-14314, United States District Court for the Southern District of Florida) against Highlands County and other government entities, arising out of his employment termination and circumstances surrounding it. In those cases, Mason sought and was granted IFP status by the District Court, which consolidated those actions.

Mason filed the instant case alleging retaliation after he applied for another position with Highlands County for which he was not qualified and for which he was not hired. Subsequent to the denial of IFP status in this case by the District Court below, Mason has filed additional lawsuits in which he has also sought IFP designation and, as of the date of this document, is abiding by proper rules for seeking IFP designation. So, clearly, his efforts to circumvent the rules were borne out of dishonesty and not out of ignorance. Such an "end run" effort should not be rewarded by the grant of IFP status.

Further, Mason has abused the IFP status he has been granted. Mason instituted numerous actions in state and federal court against Highlands County

and other governmental entities, or their employees or agents,³ and has been permitted to amend those lawsuits repeatedly. Rather than attempt to bring all claims at once, Mason has adopted a piecemeal approach out of his perception that it creates more trouble for the Defendant Highlands County and its officers. Highlands County asserts that Mason should not be allowed to abuse *pauperis* status in this manner. See e.g., Glendora v. Marshall, 1997 U.S. App. LEXIS 28751 (2d Cir. Oct. 15, 1997) (unreported opinion), reported in table format at 129 F.3d 113 (Court ordered plaintiff/appellant to show cause why her *pauperis* status should not be revoked after repeated filings of frivolous claims and appeals). Such abuse of the judicial process is not the goal of *pauperis* status and it should not be fostered.

CONCLUSION

Because of Mason's abuse of the *in forma pauperis* statute in his numerous actions, Mason's apparent wrongful attainment of subpoenas, and the District

³ These actions include Case Nos. 99-14042, 99-14257, 99-14314 (now consolidated with the present case); and Case No. 00-14116, United States District Court for the Southern District of Florida. Mason has pursued several claims in state court, as well.

Court's apparent determination that Mason is not a pauper, this Court should uphold the District Court's denial of IFP status to Mason.

WHEREFORE, Defendant/Appellee Highlands County Board of County Commissioners respectfully requests this Court uphold the District Court's denial of *in forma pauperis* status to Plaintiff/Appellant Marcellus M. Mason, Jr.

DATED: April 17, 2001

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitations set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Microsoft Word 97 calculates a word count of 2,189 in this Answer Brief.

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing has been furnished by overnight courier to Marcellus Mason, Jr., 218 Florida Drive, Sebring, FL 33870, this 17th day of April, 2001.



Attorney

CERTIFICATE OF SERVICE

I hereby certify that the original and six copies of the foregoing have been furnished by overnight courier to Clerk of the Court, United States Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, GA 30303, this 17th day of April, 2001.



Attorney