

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-40344  
Summary Calendar

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DAVID GENE MORRIS,

Plaintiff-Appellant,

versus

CHRISTY POWELL, Telford Unit Employee; CHARLES POWELL, Major at  
Telford Unit; A. MASSINGILL, Assistant Warden at Telford Unit;  
WAYNE SCOTT, Director, Texas Department of Criminal Justice,  
Institutional Division,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 5:99-CV-16  
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December 5, 2000

Before EMILIO M. GARZA, STEWART and PARKER, Circuit Judges.

PER CURIAM:\*

David Gene Morris, TDCJ #285845, has filed a motion to proceed IFP on appeal, a pleading which this court construes as a motion challenging the district court's certification under 28 U.S.C. § 1915(a)(3) and Fed. R. App. P. 24(a) that his appeal is not taken in good faith. See Baugh v. Taylor, 117 F.3d 197, 202 (5th Cir. 1997)(addressing the effect of a district court's order

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

stating that an appeal by a prisoner was not taken in good faith). Morris argues that the district court erred in dismissing his 42 U.S.C. § 1983 complaint with prejudice for failure to exhaust because his complaint should have been dismissed without prejudice. Morris does not challenge the district court's finding that he failed to comply with 42 U.S.C. § 1997e's exhaustion requirement.

In recommending dismissal, the magistrate judge found that a dismissal with prejudice to proceeding IFP under Underwood v. Wilson, 151 F.3d 292, 293-94 (5th Cir. 1998), was not applicable because Morris was not proceeding IFP, but, nevertheless, she recommended dismissal with prejudice under Underwood. However, Underwood should not apply to the instant matter because Morris pre-paid to file his complaint and Underwood was IFP. See Underwood, 151 F.3d at 296. Morris argued such in his objections, and he contended that his dismissal should be without prejudice. However, the district court construed Morris' objection as arguing that dismissal should be with prejudice for purposes of proceeding IFP. The district court then adopted the findings of the magistrate judge and dismissed Morris' complaint with prejudice. On remand to provide reasons for certifying that Morris' appeal was not taken in good faith, the district court found that Morris' appeal was not taken in good faith based upon Morris' failure to contest his dismissal for failure to exhaust, citing Underwood.

In considering the amended § 1997e, Underwood suggests that, at a minimum, a prisoner who has had his claim dismissed for failure to exhaust should be able to pay in advance to refile his claim after exhaustion. Underwood, 151 F.3d at 296. The district court, therefore, erred in dismissing Morris' § 1983 claim with prejudice based upon Underwood. Morris has demonstrated that his appeal is taken in good faith. Accordingly, Morris' motion for IFP is GRANTED. See Baugh, 117 F.3d at 202. The district court's dismissal of Morris' § 1983 suit is MODIFIED from "with prejudice" to "without prejudice," and the district court's judgment is AFFIRMED AS MODIFIED.

IFP GRANTED; DISMISSAL MODIFIED FROM WITH PREJUDICE TO WITHOUT PREJUDICE; AFFIRMED AS MODIFIED.