

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4995
Conference Calendar

FRED D. RILEY, JR.,

Plaintiff-Appellant,

versus

CARL GRIFFITH, Etc., ET AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 92-CV-438
- - - - -

(May 18, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Fred D. Riley, Jr., appeals from the dismissal of his civil rights action under Fed. R. Civ. P. 41(b) for failure to comply with the district court's order to pay a partial filing fee. He argues that the district court's order to pay a partial filing fee and the subsequent dismissal was an abuse of discretion. He contends that the district court did not inform him that he had to notify the court of his intent to prosecute the claim further or that he had the alternative of filing another application to proceed in forma pauperis (IFP).

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

A district court may dismiss an action sua sponte under Rule 41(b) for failure to prosecute or to comply with an order of the court. McCullough v. Lynaugh, 835 F.2d 1126, 1127 (5th Cir. 1988). The standard of review is whether the district court abused its discretion. Id.

Subsumed within the appeal from the Rule 41(b) dismissal is an appeal from the district court's order denying IFP. See Flowers v. Turbine Support Div., 507 F.2d 1242, 1244 (5th Cir. 1975). Based on the amended balance sheet reflecting an average monthly income of \$116.08, the district court did not abuse its discretion in ordering Riley to pay a partial filing fee of \$60. Id.

Contrary to Riley's assertion, prior to dismissal, the magistrate judge offered alternatives, ordering Riley either to submit the partial fee or submit a certified application to proceed IFP, including "the jail furnished account balance sheet for the past three months," within ten days. In a previous order, the district court had warned that non-payment of the filing fee might result in dismissal if Riley failed to comply. Because Riley did not comply, the district court did not abuse its discretion in denying IFP and dismissing the action under Rule 41(b). Riley need only refile his complaint and his application for IFP with supporting documents in the district court.

AFFIRMED.