

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60503
Conference Calendar

JAMES WESTENDORF,

Plaintiff-Appellant,

versus

INTERNAL REVENUE SERVICE,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. CA-3:92-CV-761

- - - - -
(November 17, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

This case is here on a motion to proceed in forma pauperis (IFP) on appeal. This Court may authorize James Westendorf to proceed IFP on appeal if he is unable to pay the costs of the appeal and the appeal is taken in good faith, i.e., the appeal presents nonfrivolous issues. 28 U.S.C. § 1915(a); Holmes v. Hardy, 852 F.2d 151, 153 (5th Cir.), cert. denied, 488 U.S. 931 (1988).

James Westendorf filed this action under the Privacy Act, 5 U.S.C. § 552a, against the Internal Revenue Service, seeking

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

production of an agency record related to himself which was identified by a document locator number on an IRS computer transcript. The notation on the computer transcript was entered in error, and the requested document never existed.

In his motion for IFP, Westendorf asserts that he has lost his job due to injury and does not have sufficient means to pay the filing fee. It appears from his affidavit that he would meet the financial requirements. However, Westendorf has totally failed to state the nonfrivolous issues he intends to raise on appeal.

This Court reviews a district court's grant of summary judgment de novo. Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 113 S. Ct. 82 (1992). Summary judgment under Fed. R. Civ. P. 56(c) is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The facts in this case are not in dispute. The document which Westendorf requested does not exist. The only issue remaining in the case was an issue of law, whether Westendorf was entitled to attorney's fees and costs under the Privacy Act. The district court's holding that Westendorf, as a pro se non-attorney litigant, was not entitled to attorney's fees as a matter of law is correct under Barrett v. Bureau of Customs, 651

F.2d 1087, 1090 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1982).

Costs may be awarded under § 552a(g)(3)(B) if the complainant has "substantially prevailed." Id. at 1088. Even assuming that Westendorf could be said to have substantially prevailed, an award of costs is not presumed but is within the discretion of the district court. Cazalas v. United States Dep't of Justice, 660 F.2d 612, 623 (5th Cir. 1981). The exercise of this discretion is guided by four factors: 1) the benefit to the public deriving from the case; 2) the commercial benefit to the complainant; 3) the nature of the complainant's interest in the federal records sought; and 4) whether the government's withholding of the records sought had a reasonable basis in law. Cazalas, 660 F.2d at 619; Barrett, 651 F.2d at 1088.

The district court applied these factors and determined that this lawsuit was motivated primarily by Westendorf's private interests, that the public would not benefit from the release of the document had it existed, and that the government did not unreasonably withhold any document or information because there was nothing to be disclosed. The district court did not abuse its discretion in denying Westendorf's request for costs.

Westendorf's appeal does not raise any nonfrivolous issues, his motion for IFP is DENIED, and his appeal is DISMISSED AS FRIVOLOUS. See Fifth Cir. R. 42.2.