

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4447
USDC No.9:93 MC 2

WADE BROOKS,

Plaintiff-Appellant,

versus

PINKERTON SECURITY,

Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

August 19, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

BY THE COURT:

Wade Brooks's motion for leave to appeal in forma pauperis (IFP) is hereby GRANTED. We now determine the merits of Brooks's appeal. See Clark v. Williams, 693 F.2d 381, 382 (5th Cir. 1982).

A district court may dismiss an action without prejudice for a plaintiff's failure to prosecute or failure to comply with any court order. Such a dismissal is not disturbed unless the district court abuses its discretion. Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241, 247 (5th Cir. 1980). A dismissal with prejudice, however, is warranted only upon "a clear record of delay or contumacious conduct by the plaintiff." See id. (internal quotation omitted). A district court abuses its discretion in entering a dismissal with prejudice for failure to

prosecute unless "a particular case discloses both (1) a clear record of delay or contumacious conduct by the plaintiff, and (2) that a lesser sanction would not better serve the best interests of justice." McNeal v. Papasan, 842 F.2d 787, 790 (5th Cir. 1988). Because the dismissal did not specify whether it was with or without prejudice, it was with prejudice. Fed. R. Civ. P. 41(b).

Brooks failed to appear at the hearing on his motion to proceed IFP and appointment of counsel and failed to provide the court with a copy of the requested EEOC file. Brooks alleges that he waited in front of a locked courthouse from 9:00 to 9:45 for his 10:00 hearing.

Brooks filed his complaint on January 9, 1993. The magistrate judge held the hearing on February 26 and submitted his report on March 4. The district judge dismissed Brooks's complaint on March 30. Given such a relatively brief time frame, Brooks's actions are not sufficiently obnoxious to warrant dismissal with prejudice. Moreover, the record does not reflect that Brooks received any warning that his complaint was subject to dismissal or that the court considered any lesser sanctions before deciding to dismiss Brooks's complaint. The district court therefore improperly dismissed Brooks's complaint with prejudice. Because Brooks's 90-day limitations period has expired, the district court's judgment may not be modified to a judgment of dismissal without prejudice and affirmed as such.

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Such a judgment would operate against Brooks as a judgment with prejudice. See Berry v. Cigna/RSI-Cigna, 975 F.2d 1188, 1191 (5th Cir. 1991). The district court is therefore instructed to reinstate the complaint and to conduct further proceedings in this matter not inconsistent with this opinion.

REVERSED and REMANDED.