

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

January 6, 2022

Lyle W. Cayce
Clerk

No. 21-40672
Summary Calendar

MARSHALL RAY PARTAIN,

Plaintiff—Appellant,

versus

DOCTOR MARY HELEN MORROW,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:20-CV-581

Before JONES, DUNCAN, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Marshall Ray Partain, Texas prisoner # 2311988, seeks leave to proceed in forma pauperis (IFP) on appeal from the dismissal of his 42 U.S.C. § 1983 civil rights complaint against Dr. Mary Helen Morrow for failure to exhaust his administrative remedies. By moving to proceed IFP, Partain is

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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challenging the certification that his appeal was not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry into Partain’s good faith “is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous).” *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citations omitted).

The undisputed summary judgment evidence demonstrates that Partain never pursued his grievances against Dr. Morrow through the two-step process prior to filing his civil rights complaint, a fact which he conceded in his complaint and does not now contest. Consequently, he cannot show that the district court erred in dismissing his claims against Dr. Morrow for failure to exhaust. *See Jones v. Bock*, 549 U.S. 199, 202 (2007); *Johnson v. Johnson*, 385 F.3d 503, 515 (5th Cir. 2004); *see also Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012).

The appeal lacks arguable merit. *See Howard*, 707 F.2d at 220. Accordingly, Partain’s IFP motion is DENIED, and the appeal is DISMISSED as frivolous. *See* 5TH CIR. R. 42.2; *Baugh*, 117 F.3d at 202 n.24. Partain’s motion for the appointment of counsel is similarly DENIED. *See Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982).

Our dismissal of this appeal counts as a strike under 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson*, 575 U.S. 532, 537 (2015). Partain is CAUTIONED that if he accumulates three strikes, he may not proceed IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).