

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**November 14, 2024**

**FOR THE TENTH CIRCUIT**

**Christopher M. Wolpert**  
**Clerk of Court**

JAMAR DAVIS,

Plaintiff - Appellant,

v.

FEDERAL BUREAU OF PRISONS;  
WARDEN USP FLORENCE HIGH,

Defendants - Appellees.

No. 24-1342  
(D.C. No. 1:24-CV-01530-LTB)  
(D. Colo.)

**ORDER AND JUDGMENT\***

Before **MATHESON**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Pro se prisoner Jamar Davis appeals from the district court's dismissal of his action without prejudice under Fed. R. Civ. P. 41(b) for failure to prosecute. Exercising

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\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

jurisdiction under 28 U.S.C. § 1291, we affirm the dismissal, deny Mr. Davis’s request to proceed *in forma pauperis* (“*ifp*”), and impose a “strike” under 28 U.S.C. § 1915(g).<sup>1</sup>

## I. BACKGROUND

Mr. Davis, a prisoner at the United States Penitentiary in Florence, Colorado, filed a 94-page document complaining about the conditions of his confinement.

The magistrate judge ordered Mr. Davis to (1) cure filing deficiencies by submitting a court-approved prisoner complaint form and (2) either pay the filing fee or submit a motion and affidavit requesting leave to proceed *ifp* under 28 U.S.C. § 1915. The order warned that failure to comply within 30 days would result in dismissal of the action without prejudice.

Mr. Davis did not comply. Instead, he filed letters with the district court that identified the defendants and discussed a possible retaliation claim. The district court dismissed the case. It explained that Mr. Davis had failed to cure his filing deficiencies within 30 days and had not requested an extension of time. The court dismissed the complaint without prejudice under Fed. R. Civ. P. 41(b). The court also certified that any appeal of the dismissal would not be in good faith and denied *ifp* status for appeal.

Mr. Davis filed a letter requesting the district court to reconsider the dismissal, which the court construed as a Rule 59(e) motion and denied. It also construed the letter

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<sup>1</sup> Because Mr. Davis is proceeding pro se, we construe his filings liberally, but we do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

as a timely notice of appeal of the dismissal. Mr. Davis has moved to proceed *ifp* on appeal.<sup>2</sup>

## II. DISCUSSION

### A. *Failure to Prosecute*

We review a district court’s dismissal for lack of prosecution for abuse of discretion, *DeBardleben v. Quinlan*, 937 F.2d 502, 504 (10th Cir. 1991)—when its actions are “arbitrary, capricious, or whimsical,” *United States v. Pacheco*, 884 F.3d 1031, 1047 (10th Cir. 2018).

A district court has sua sponte authority to dismiss a claim when a plaintiff has failed to prosecute his case. *Link v. Wabash R. Co.*, 370 U.S. 626, 629-30 (1962). Here, the magistrate’s order identified the problems with Mr. Davis’s filing and instructed him on how to cure them. Mr. Davis filed letters that failed to cure these deficiencies.<sup>3</sup> In his brief to this court, Mr. Davis has done nothing to demonstrate an abuse of discretion. The district court thus did not abuse its discretion in dismissing Mr. Davis’s case without prejudice.

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<sup>2</sup> Mr. Davis’s notice of intent to appeal pertained only to the dismissal order and judgment. Because he has not filed a new or amended notice of appeal that encompasses the denial of his Rule 59(e) motion, we will not address it on appeal.

<sup>3</sup> Mr. Davis argues that he was delayed in curing the filing deficiencies because he was denied appointed counsel and had difficulty getting the necessary documents from his case manager. *See* Aplt. Br. at 9-10. But Mr. Davis did not request an extension of time on these bases until after the dismissal.

### B. IFP Motion

To succeed on a motion to proceed *ifp*, “an appellant must show a financial inability to pay the required filing fees and the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal.” *DeBardeleben*, 937 F.2d at 505 (citing *Coppedge v. United States*, 369 U.S. 438 (1962)); *see also* 28 U.S.C. § 1915(e)(2)(B). An appeal is frivolous if it “lacks an arguable basis in either law or fact.” *Thompson v. Gibson*, 289 F.3d 1218, 1222 (10th Cir. 2002); *accord Coppedge*, 369 U.S. at 448 (stating all that is needed is “a rational argument on the law or facts.”). Although Mr. Davis lacks the funds to prepay the filing fee, his appeal does not contain a “reasoned, nonfrivolous argument on the law and the facts.” *DeBardeleben*, 937 F.2d at 505. We deny his *ifp* motion.

### C. Strike for Frivolousness

We may assess a “strike” against Mr. Davis under the Prison Litigation Reform Act (“PLRA”), 28 U.S.C. § 1915(g) for bringing a frivolous appeal.<sup>4</sup> Ordinarily, a district court’s dismissal for failure to prosecute does not count as a strike under § 1915(g). *Hafed v. Federal Bureau of Prisons*, 635 F.3d 1172, 1179 (10th Cir. 2011).

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<sup>4</sup> Prisoners who accumulate three strikes must “prepay the entire filing fee before federal courts may consider their civil actions and appeals,” *Jennings v. Natrona Cnty. Det. Ctr. Med. Facility*, 175 F.3d 775, 778 (10th Cir. 1999) (quotations omitted), *overruled in part on other grounds by Coleman v. Tollefson*, 575 U.S. 532 (2015), unless they are in “imminent danger of serious physical injury,” 28 U.S.C. § 1915(g).!

But although Mr. Davis does not receive a strike for the district court's dismissal, we assess a strike for bringing a frivolous appeal of the district court's order.

### III. CONCLUSION

We affirm the district court's judgment, deny Mr. Davis's motion to proceed *ifp*, and assess Mr. Davis one strike under the PLRA. We note that the dismissal of Mr. Davis's appeal does not relieve him of the responsibility to pay the appellate filing fee in full.

Entered for the Court

Scott M. Matheson, Jr.  
Circuit Judge