

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

COLEEN L. POWERS,
Plaintiff,
vs.
NWA, INC., et al.,
Defendants.

X
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No. 05-2468-An/P

ORDER OF DISMISSAL
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
NOTICE OF APPELLATE FILING FEE

On February 28, 2008, United States District Judge J. Daniel Breen issued an order that, inter alia, dismissed the complaint with prejudice as to all defendants with the sole exception of a claim of discrimination under the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A, that had been filed with the Secretary of Labor on June 15, 2004. (Docket Entry ("D.E.") 76 at 8.) The Court issued an order on March 14, 2008 that modified the February 28, 2008 order by substituting the correct defendant, Pinnacle Airlines, Inc., on the remaining claim. (D.E. 81.) Plaintiff was directed to obtain a summons within thirty (30) days of entry of the February 28, 2008 order and to serve Pinnacle with "(i) the complaint, filed June 30, 2005 (D.E. 1); (ii) the June 15, 2004 SOX complaint (D.E. 24 at 11-12); and (iii) [the February 28, 2008] order." (D.E. 76 at 9.) Plaintiff timely obtained a summons from

the Clerk on March 27, 2008, but the summons incorrectly identified Plaintiff as "Qui Tam Plaintiff." (D.E. 83.) That designation is incorrect because this is not a qui tam action on behalf of the United States. The Court issued an order on April 10, 2008 quashing the summons issued on March 27, 2008 and directing Plaintiff to obtain another summons from the Clerk within thirty (30) days. (D.E. 86.) The order further stated as follows:

In the February 28, 2008 order, Plaintiff was advised that the time limit set forth in Fed. R. Civ. P. 4(m) commenced to run on February 28, 2008. This order does not extend that time limit.

(Id. at 2 (emphasis in original).)

On March 27, 2008, Plaintiff filed a notice that she was taking an interlocutory appeal of various orders issued in this action. (D.E. 91.) Plaintiff filed another notice of appeal on March 28, 2008. (D.E. 84.) Judge Breen issued an order on April 10, 2008 that, inter alia, declined to certify any order for interlocutory appeal and also stated as follows:

Finally, Plaintiff is advised that her interlocutory appeal does not stay proceedings in this matter before this Court. In the February 28, 2008 order (D.E. 76 at 9), Powers was advised that the time limit set forth in Fed. R. Civ. P. 4(m) commenced to run on February 28, 2008. This order, and the filing of that interlocutory appeal, do not extend that time limit.

(D.E. 85 at 3-4 (emphasis in original).)

The docket reflects that Plaintiff obtained a new summons on May 5, 2008. (D.E. 99.) The case was reassigned to this judge on May 21, 2008. (D.E. 100.)

The time limit set forth in Fed. R. Civ. P. 4(m) expired on June 30, 2008. As Plaintiff did not filed proof of service and Defendant did not respond to the complaint, the Court issued an order on July 11, 2008 that ordered Plaintiff to show cause, within eleven (11) days, why the case should not be dismissed pursuant to Fed. R. Civ. P. 4(m) and 41(b). (D.E. 102.) The order further provided that a "[f]ailure timely to comply with this order will result in dismissal of the remainder of the complaint on that basis." (Id. at 2.) Plaintiff was further notified that all previous restrictions on her filing privileges remain in effect and, as a result, "[t]he only documents Plaintiff may file in response to this order are (i) a written response to the show cause order; and (ii) a return of service." (Id. at 2-3.)

On July 25, 2008, Plaintiff's copy of the order to show cause was returned by the post office as undeliverable. The mailing envelope, which was properly addressed to Plaintiff's address of record, was stamped "ATTEMPTED NOT KNOWN." (D.E. 103 at 5.) Plaintiff has not notified the Clerk of any change of address.

Plaintiff has not filed proof of service, as required by Fed. R. Civ. P. 4(l) and the order issued on February 28, 2008. (D.E. 65 at 8-9.) It also appears that Plaintiff has not served Pinnacle within the time specified in Fed. R. Civ. P. 4(m), as Pinnacle has not responded to the complaint. The Court therefore DISMISSES the complaint against Pinnacle without prejudice, pursuant to Fed. R. Civ. P. 4(m) and 41(b). The Clerk is directed

to enter judgment for Defendants.¹ All pending motions are DENIED as moot.

The Court must also consider whether Powers or Blodgett should be allowed to appeal this decision in forma pauperis, should they seek to do so. Pursuant to the Federal Rules of Appellate Procedure, a non-prisoner desiring to proceed on appeal in forma pauperis must obtain pauper status under Fed. R. App. P. 24(a). See Callihan v. Schneider, 178 F.3d 800, 803-04 (6th Cir. 1999). Rule 24(a) provides that if a party seeks pauper status on appeal, he or she must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal in forma pauperis, the litigant must file his or her motion to proceed in forma pauperis in the Court of Appeals. Fed. R. App. P. 24(a)(4)-(5).

The good faith standard is an objective one. Coppedge v. United States, 369 U.S. 438, 445 (1962). The same considerations that lead the Court to dismiss the various claims asserted in this action by Plaintiff and Blodgett also compel the conclusion that an appeal would not be taken in good faith. It is therefore CERTIFIED,

¹ Specifically, the Clerk is directed to enter judgment dismissing all claims asserted by Coleen L. Powers against all defendants with prejudice, except for the SOX claim asserted by Powers against Pinnacle, which is dismissed without prejudice. The Clerk is also directed to enter judgment dismissing all claims asserted by James G. Blodgett, Jr. without prejudice, pursuant to the order issued on May 31, 2006. (D.E. 60.) The Clerk is directed to mail Blodgett a copy of this order and the judgment at 36121 Jeffrey Court, Polson, Montana 59860, and to make a notation on the docket indicating the mailing to Blodgett.

pursuant to Fed. R. App. P. 24(a), that any appeal in this matter by Plaintiff or Blodgett would not be taken in good faith. Leave to proceed on appeal in forma pauperis is, therefore, DENIED. If Plaintiff or Blodgett files a notice of appeal, he or she must also pay the full \$455 appellate filing fee or file a motion to proceed in forma pauperis and supporting affidavit in the United States Court of Appeals for the Sixth Circuit within thirty (30) days.

IT IS SO ORDERED this 25th day of August, 2008.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE