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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY EDWARD HOLZ,

Plaintiff - Appellant,

v.

ROBERT E. MCFADDEN, Regional
Director; et al.,

Defendants - Appellees.

No. 08-55565

D.C. No. 5:07-cv-01410-DSF-PJW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Submitted February 16, 2010

Before: FERNANDEZ, GOULD, and M. SMITH, Circuit Judges.

Timothy Edward Holz, a California state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action without prejudice for failure to pay the partial initial filing fee. We have jurisdiction under

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

28 U.S.C. § 1291. We review for abuse of discretion, *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002), and we vacate and remand.

The district court dismissed the action without determining whether Holz had funds to pay the partial initial filing fee in its entirety at the time the payment was ordered. Because Holz demonstrated in his response to the order to show cause that he lacked the funds to pay the entire fee, the district court should not have dismissed the action. *See* 8 U.S.C. § 1915(b)(1), (4); *Taylor*, 281 F.3d at 850 (“[A] district court cannot dismiss an in forma pauperis prisoner’s case based on his failure to pay the initial fee when his failure to pay is due to lack of funds available to him when payment is ordered.”). Accordingly, we vacate and remand for further proceedings.

VACATED and REMANDED.