

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

Plaintiff,

ORDER

02-C-21-C

v.

JON E. LITSCHER, Secretary of the  
Wisconsin Department of Corrections;  
CINDY O'DONNELL, Deputy Secretary to  
Litscher; JOHN RAY, Corrections Complaint  
Examiner ("C.C.E."); GERALD BERGE, Warden  
at Supermax Correctional Institution; PETER  
HUIBREGTSE, Deputy Warden of Supermax;  
LIEUTENANT JULIE BIGGAR, a Lt. at Supermax;  
ELLEN RAY, I.C.E.; SGT. JANZEN; C.O. WETTER;  
C.O. S. GRONDIN; C.O. MUELLER; C.O. CLARK, all  
guards at Supermax; JOHN SHARPE, Manager Foxtrot  
Unit at Supermax,

Defendants.

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Presently before the court is plaintiff's "Notice and Motion purs. to Fed. R. Civ. P. 59(e) / Notice of Appeal / Petition for Mandamus." Plaintiff's motion indicates that he (1) seeks reconsideration of this court's August 21, 2002 order denying his motion to file a second amended complaint; and (2) anticipating that his motion for reconsideration of the August 21, 2002 order will be denied, plaintiff seeks to appeal to the Court of Appeals for the Seventh Circuit the court's August 21, 2002 order and any subsequent order denying his motion to reconsider the August 21, 2002 order.

Plaintiff's motion to reconsider the court's August 21, 2002 order denying him leave to file a second amended complaint will be denied. I have reviewed plaintiff's motion to reconsider and nothing in the motion persuades me that I erred in denying him leave to amend his complaint for a second time.

Next, plaintiff's motion states that he wishes to immediately appeal the August 21, 2002 order as well as the portion of this order denying his motion to reconsider the August 21 order. Because plaintiff's notice of appeal is not accompanied by the \$105 fee for filing his appeal, I construe petitioner's notice to include a request for leave to proceed on appeal in forma pauperis.

Plaintiff's appeal of the August 21, 2002 order denying his motion to file a second amended complaint is legally frivolous because the order is not immediately appealable. Agretti v. ANR Freight System, Inc., 982 F.2d 242, 248 (7th Cir. 1992) ("An order denying a motion to amend a pleading is not immediately appealable."). Because plaintiff's appeal is legally frivolous, I must certify that it is not taken in good faith. A prisoner whose appeal is certified as not having been taken in good faith owes the \$105 fee in full immediately, and if the money does not presently exist in his prison account, then prison officials are required to calculate monthly payments according to the formula set out in 28 U.S.C. § 1915(b)(2) and forward those payments to the court until the debt is satisfied. If the prisoner has sufficient funds in his regular account to pay the full \$105, it must be remitted promptly to the clerk of court in one payment.

If he wishes, plaintiff may delay payment of the fee if, within thirty days of the date of this order, he challenges in the court of appeals the certification that his appeal is not taken in good faith. See Fed. R. App. P. 24(a)(5). However, petitioner should be aware that if he mounts such a challenge and the

court of appeals determines that this court was correct that the appeal is not taken in good faith, then the court of appeals may record a strike against plaintiff and the payment will once again be due in full immediately. Plaintiff's failure to pay the fee for any reason other than destitution will be understood as a relinquishment of his right to file future suits in forma pauperis. See Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996).

#### ORDER

IT IS ORDERED that

1. Plaintiff's motion to reconsider the court's August 21, 2002 denying his motion to file a second amended complaint is DENIED;
2. Plaintiff's request for leave to proceed in forma pauperis on appeal is DENIED.

I certify that his appeal is not taken in good faith.

Entered this 17<sup>th</sup> day of September, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge