

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

JAMES J. KAUFMAN,

Plaintiff,

v.

GARY R. McCAUGHTRY, SGT. McCARTHY,
JAMES MUENCHOW, RENEE RONZANI,
SANDY HAUTAMAKI, JOHN RAY,
CYNTHIA L. O'DONNELL and JAMYI WITCH,

Defendants.

ORDER

03-C-27-C

Plaintiff James J. Kaufman has filed a notice of appeal from this court's orders of March 27, 2003, April 24, 2003, May 9, 2003, May 19, 2003, and May 22, 2003, each of which includes a ruling adverse to plaintiff. Because this case is not closed, judgment has not been entered. Therefore, I construe plaintiff's notice of appeal to include a motion for modification of all the listed orders except the order of April 24, 2003, to include a finding that the orders are appealable immediately under 28 U.S.C. § 1292. This motion will be denied. Also, although the April 24 order is appealable without the finding mandated by § 1292, I must certify that plaintiff's appeal from this order is not taken in good faith. That

means that plaintiff cannot proceed in forma pauperis on appeal.

28 U.S.C. § 1292 states in relevant part,

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

As noted above, only the April 24 order is appealable under § 1292. With respect to the remaining orders, there is not a substantial ground for a difference of opinion on the questions raised and an immediate appeal will not materially advance the ultimate termination of this litigation.

In the March 27 order, I granted plaintiff leave to proceed in forma pauperis in this action on several claims, but denied him leave to proceed on three claims I deemed to be legally frivolous: 1) that he was denied free postage to mail letters to the United States Civil Rights Commission and his “power of attorney”; 2) that he was not permitted to receive a pornographic specialty catalog mailed to him; and 3) that he could not buy atheist holiday cards from the canteen during the Christmas season. In addition, I dismissed Matthew Frank, Jon E. Litscher and Darilyn J. Marthaler from this case because plaintiff failed to state a valid constitutional claim against them.

In the May 9 and May 19 orders, I denied plaintiff’s motions for reconsideration of

the March 27 and April 24 orders. These are non-appealable orders. Also unappealable is the order of May 22, in which I denied plaintiff's motion to strike defendants' answer and reconsider a second time my ruling in the April 24 order.

Because there is neither a substantial ground for a difference of opinion on the questions raised in plaintiff's appeal from the March 27, May 9, May 19 and May 22 orders, nor any showing that an appeal from these orders will advance the ultimate termination of this litigation, I decline to amend the orders to include a finding that they are appealable under 28 U.S.C. § 1292.

I turn then to plaintiff's notice of appeal from the April 24 order. In that order, I denied plaintiff's motion for a preliminary injunction and dismissed plaintiff's claim that six publications were withheld from him after having been improperly characterized as containing pornographic material prohibited under DOC § 309 and IMP 50. Also, I dismissed defendant Marc Clements, whose only alleged wrongdoing related to this claim.

The April 24 order sets out clearly the bases for denial of plaintiff's motion. In addition to failing to conform his motion to this court's procedures governing motions for preliminary injunctive relief, plaintiff failed to satisfy his burden of showing that he had more than a negligible chance of success on the merits of his claims. In particular, plaintiff sought an order requiring defendants to open in his presence "any and all incoming first class mail addressed to [him] . . . by mechanical means," to deliver to him "all incoming mail

and/or publications . . . which do not contain *explicit* images of sexual intercourse,” and to modify the screening procedure established in the settlement agreement in the class action lawsuit of Aiello v. Litscher, case no. 98-C-791-C. I explained thoroughly that plaintiff’s first request extended well beyond what plaintiff was entitled to under the Constitution and that his second request could not be granted because, pursuant to 28 U.S.C. § 1915A, I was dismissing his claim relating to the alleged mis-identification of pornographic material in light of the settlement agreement in the Aiello case. I noted that plaintiff’s request for leave to proceed in forma pauperis on this claim had been improvidently granted and explained in detail the reasons I was dismissing the claim under § 1915A. With the dismissal of the claim, plaintiff had no chance of success on the merits of the claim for preliminary injunctive relief. Therefore, the motion was denied with respect to that claim.

There is no non-frivolous reason for plaintiff to appeal my ruling that he cannot obtain preliminary injunctive relief beyond that to which he is constitutionally entitled with respect to his first request for relief and that the second request for relief was mooted by the dismissal of the claim. Thus, I will certify that the appeal is not taken in good faith.

To the extent that plaintiff is attempting to appeal the § 1915A dismissal of his claim concerning alleged pornographic materials, he is free to raise the matter after judgment has been entered disposing of all of his claims.

Despite the fact that I am denying plaintiff’s request for leave to proceed in forma

pauperis on appeal, his filing of a notice of appeal triggers his financial obligation under the 1996 Prison Litigation Reform Act to pay the \$105 filing fee for an appeal. This fee is due immediately, except under the limited circumstances described below.

ORDER

IT IS ORDERED that plaintiff is DENIED leave to amend of the orders of March 27, May 9, May 19 and May 22, 2003, to include a finding that the orders are appealable under 28 U.S.C. § 1292.

Plaintiff is DENIED leave to proceed in forma pauperis on appeal from the April 24, 2003 order denying his motion for preliminary injunction and dismissing his pornographic material claim pursuant to 28 U.S.C. § 1915A. I certify that plaintiff's appeal from the April 24 order is not taken in good faith.

Plaintiff owes the \$105 fee for filing his notice of appeal immediately. If he does not have \$105 in his prison account, then prison officials must 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 plaintiff has enough money in his regular and release accounts to pay the full \$105, he must be send it promptly to the clerk of court in one payment. Plaintiff may delay payment of the fee only if, within thirty days of the date he receives this order, he challenges in the court of appeals this court's certification that his

appeal is not taken in good faith. In that instance, the court of appeals may decide that the certification is improper, in which case the matter will be remanded to this court for collection of an initial partial payment of the fee before the court of appeals will decide whether plaintiff's appeal is legally frivolous. If the court of appeals determines that this court was correct in finding that the appeal is not taken in good faith, then the payment will once again be due in full immediately. Whatever the scenario, plaintiff is responsible for insuring that the required sum is sent to the court at the appropriate time. If he fails to pay for any reason other than total lack of money, he will be giving up his right to file future suits in forma pauperis. See Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996).

Entered this 9th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge