

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

-----  
MICHAEL T. WINIUS,

Plaintiff,

v.

STATE OF WISCONSIN and  
JON E. LITSCHER, Secretary of  
the Department of Corrections,

Defendants.  
-----

ORDER

03-C-36-C

Plaintiff has filed a notice of appeal from the judgment entered in this action on January 27, 2003, dismissing his complaint under the screening provisions of 28 U.S.C. § 1915A. In the order of dismissal, I concluded that plaintiff's complaint does not present a controversy that is ripe for adjudication because plaintiff is challenging a procedure that is implemented by the State of Wisconsin that will not apply to him for at least three years. Because plaintiff's notice is not accompanied by the \$105 fee for filing his appeal, I construe plaintiff's notice to include a request for leave to proceed on appeal in forma pauperis.

In determining whether plaintiff may appeal in forma pauperis, I first must consider whether he has three strikes under 28 U.S.C. § 1915(g) and, if not, whether he is indigent and whether his appeal is taken in good faith. Plaintiff does not have three strikes under § 1915(g).

Plaintiff has not submitted a trust fund account statement as 28 U.S.C. § 1915(a) requires, so I cannot make out his financial status. (He paid the fee for filing his complaint, so the record does not include an earlier filed statement.) However, even if plaintiff were to meet the requirements for pauper status, he cannot proceed on appeal in forma pauperis because I must certify that his appeal is not taken in good faith.

In Lucien v. Roegner, 682 F.2d 625, 626 (7th Cir. 1982), the court of appeals instructed district courts to find bad faith where a plaintiff is appealing the same legally frivolous claims the court found to be without legal merit in denying plaintiff leave to proceed on his complaint. See Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000).

Plaintiff's underlying claim is not legally frivolous, but plaintiff is not appealing an adverse decision of that claim because there has been no adjudication of it. Instead, plaintiff is appealing this court's determination that his case is not ripe for review. Plaintiff's statement of reasons for taking his appeal is set out in a letter to the court accompanying the notice dated February 20, 2003. In this document, plaintiff concedes that he has no argument with this court's application of the law supporting the dismissal of his case or with

the accuracy of the facts this court found in his complaint. Instead, he is concerned with the loss of the \$150 he paid to file this action. He argues that he would not have to pay another fee if this court would have stayed the proceedings for three years to allow it to become ripe or found that because the challenged procedure has not changed for the last five years, it is not likely to change by the time plaintiff is subjected to it. Because plaintiff is not challenging the substance of this court's decision but rather, the fact that he paid for a lawsuit that could not be considered on its merits, his appeal is legally frivolous. Therefore, I must certify that the appeal is not taken in good faith.

Unfortunately for plaintiff, because I am certifying that his appeal is not taken in good faith, he 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, it must be sent promptly to the clerk of court in one payment. Plaintiff may delay payment of the fee, whether in payments because of insufficient funds or in full 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). Plaintiff is reminded that if he challenges this court's finding of bad faith in the court of appeals and loses, he may be assessed a strike by the court of appeals if his appeal is found to be legally frivolous.

#### ORDER

IT IS ORDERED that plaintiff's request for leave to proceed in forma pauperis on appeal is DENIED. I certify that plaintiffs' appeal is not taken in good faith.

If plaintiff intends to challenge this court's certification that his appeal is not taken in good faith, he has 30 days from the date he receives this order in which to file with the court of appeals a motion for leave to proceed in forma pauperis on appeal. His motion

must be accompanied by a copy of the affidavit prescribed in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order.

Entered this 28th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge