

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

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WILLIAM FAULKNER, #244067,

Plaintiff,

ORDER

v.

04-C-409-C

JON LITSCHNER, Former Sec. WI. D.O.C.;  
DANIEL BENICK, Former Warden, C.C.I.;  
MIKE MARSHALL, Social Worker, C.C.I.;  
DR. BRIDGEWATER, M.D., C.C.I.;  
FRED FIGUEROA, Former Warden, Whiteville Corr. Facility;  
MS. POLK, Social Worker, Whiteville;  
MS. RIVERS, Officer, Whiteville Corr. Facility;  
JOSEPH OROSCO, #335933, Former Inmate, Whiteville  
Corr. Facility;  
ALL UNNAMED WHITEVILLE STAFF;  
ALL UNNAMED WHITEVILLE SECURITY  
PERSONAL/DIRECTORS; and  
ALL WI D.O.C. PERSONAL WITH INTERSTATE TRANSFERS,

Defendants.

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Judgment of dismissal was entered in this action on July 27, 2004, after I screened petitioner's complaint pursuant to 28 U.S.C. § 1915A and concluded that it failed to state a claim upon which relief may be granted. In particular, I concluded that plaintiff's Eighth Amendment right to be free from cruel and unusual punishment was not implicated by

defendants' failure to offer him less restricted housing than segregated confinement in an effort to protect him from another inmate's assault. Subsequently, plaintiff filed a timely motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59, which I denied on August 25, 2004. Now plaintiff has filed a notice of appeal. However, the notice is not accompanied by the \$255 fee for filing an appeal. Therefore, I construe plaintiff's notice to include a request for leave to proceed on appeal in forma pauperis.

Plaintiff's request for leave to proceed in forma pauperis on appeal is governed by the 1996 Prison Litigation Reform Act. This means that this court must determine first whether plaintiff's request must be denied either because he has three strikes against him under 28 U.S.C. § 1915(g) or because the appeal is not taken in good faith. Plaintiff does not have three strikes against him. However, I must certify that plaintiff's appeal is not taken in good faith.

In Haines v. Washington, 131 F.3d 1248 (1997), the Court of Appeals for the Seventh Circuit held that although it is "at least theoretically possible" that an appeal from a § 1915A dismissal for failure to state a claim upon which relief may be granted could be taken in good faith, this would be an "exceptional case" in which the plaintiff appeals a close question. In such a case, the district court is to articulate explicitly the exceptional nature of the claim before allowing the appeal to go forward.

There is nothing exceptional about plaintiff's claim. No case law supports plaintiff's

argument that the Eighth Amendment requires prison officials to use “the least restrictive means” to insure an inmate’s safety in the prison setting. Indeed, the court of appeals has ruled directly to the contrary, that placing an inmate in segregation is an appropriate way to protect an inmate from harm. Case v. Ahitow, 301 F.3d 605, 607 (7th Cir. 2002). Because plaintiff’s lawsuit patently fails to state a claim upon which relief may be granted, I must certify that his appeal is not taken in good faith.

Because I am certifying plaintiff’s appeal as not having been taken in good faith, plaintiff cannot proceed with his appeal without prepaying the \$255 filing fee unless the court of appeals gives him permission to do so. Pursuant to Fed. R. App. P. 24, plaintiff has 30 days from the date of this order in which to ask the court of appeals to review this court’s denial of leave to proceed in forma pauperis on appeal. His motion must be accompanied by an affidavit as described in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order. Plaintiff should be aware that if the court of appeals agrees with this court that the appeal is not taken in good faith, it will send him an order requiring him to pay all of the filing fee by a set deadline. If plaintiff fails to pay the fee within the deadline set, the court of appeals ordinarily will dismiss the appeal and order this court to arrange for collection of the fee from plaintiff’s prison account.

ORDER

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

Entered this 28th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge