

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

GARY ALLEN BORZYCH,

Plaintiff,

v.

MATTHEW J. FRANK, STEVE
CASPERSON, ANA M. BOATWRIGHT,
GERALD BERGE, GARY BOUGHTON,
PETER HUIBREGTSE, RICHARD
RAEMISCH, SGT. JUDITH HUIBREGTSE,
CPT. LEBBEUS BROWN, ELLEN RAY and
TODD OVERBO,

Defendants.

ORDER

04-C-632-C

In an order dated February 8, 2005, I denied plaintiff's motion for a preliminary injunction. On February 14, 2005, plaintiff moved for reconsideration of the order. I denied that motion on February 18, 2005. Now plaintiff has filed a notice of appeal from the February 8 order. Because the notice is not accompanied by the \$255 fee for filing his appeal, 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 his 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 has two, but not three strikes against him. See Elkins v. Bertrand, 02-C-232-CNC (E.D. Wis. Apr. 26, 2002) and Borzych v. Litscher, 01-C-723 (E.D. Wis. Nov. 6, 2002). Moreover, I do not intend to certify that his appeal is not taken in good faith.

The only other hurdles to plaintiff's proceeding with his appeal in forma pauperis are the requirements that he be found indigent and, if he is indigent, that he pay an initial partial payment of the filing fee that has been calculated from a certified copy of his trust fund account statement for the six-month period immediately preceding the filing of his notice of appeal. 28 U.S.C. § 1915(a)(2). Plaintiff paid the fee for filing his complaint. Therefore, the file does not contain a trust fund account statement from which a determination may be made that he is indigent. Even if he had submitted such a statement when he filed his complaint in September 2004, it would be too old to satisfy the requirement of § 1915(a)(2) that the statement cover the six-month period immediately preceding the filing of his notice of appeal.

ORDER

IT IS ORDERED that a decision whether plaintiff may proceed in forma pauperis on

appeal from this court's February 8, 2005 order denying his motion for a preliminary injunction is STAYED pending plaintiff's submission of a trust fund account statement for the period beginning approximately September 14, 2004 and ending approximately February 14, 2005. If, by March 16, 2005, plaintiff fails to submit the required trust account statement or show cause for his failure to do so, I will deny his request for leave to proceed in forma pauperis on the ground that he has failed to show that he is entitled to indigent status on appeal.

Entered this 24th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge