

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

WILLIE C. SIMPSON,

Plaintiff,

v.

JANEL NICKEL, TIMOTHY DOUMA,
PHILIP KINGSTON, WILLIAM
NOLAND, MATTHEW J. FRANK,

Defendants.

ORDER

05-C-232-C

Plaintiff is a state prisoner currently confined at the Racine Correctional Institution in Sturtevant, Wisconsin. He filed this civil action under 42 U.S.C. § 1983 seeking relief from defendants' alleged retaliation for the exercise of his free speech rights. In an order dated November 23, 2005, I dismissed plaintiff's complaint sua sponte under 28 U.S.C. § 1915A for his failure to state a claim upon which relief may be granted. In particular, I found that because plaintiff had alleged in his complaint that the speech he claimed was protected had been found in a disciplinary proceeding to have been a lie, he could not proceed on his constitutional claim unless he could show that the finding of the disciplinary committee had been overturned. Now plaintiff has filed a notice of appeal. The notice is

not accompanied by the \$255 fee for filing an appeal. Therefore, I construe the notice as including a request for leave to proceed in forma pauperis on appeal.

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, in Hains v. Washington, 131 F.3d 1248 (1997), the court of appeals suggested that when a district court dismisses an action under 28 U.S.C. § 1915A for failure to state a claim, it ordinarily should not find good faith for an appeal except in rare circumstances, which the district court is to articulate in allowing the appeal to go forward. This is such a case. There is room for debate among reasonable jurists whether a prisoner alleging retaliation for protected speech under the circumstances of this case must make a threshold showing that the finding of a disciplinary committee that he has lied has been overturned. Therefore, I do not intend to certify that plaintiff's appeal is not taken in good faith.

The only other hurdle to plaintiff's proceeding with his appeal in forma pauperis is the requirement that he make 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

has not submitted the necessary trust fund account statement. Until he does so, I cannot determine whether he is indigent and, if he is, the amount of the initial partial payment he must make.

Accordingly, IT IS ORDERED that plaintiff may have until January 10, 2006, in which to submit a certified copy of his trust fund account statement for the six-month period beginning approximately July 1, 2005 to approximately January 1, 2006. If, by January 10, 2006, 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 27th day of December, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge