

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

WILLIE SIMPSON,

Plaintiff,

v.

TIMOTHY HAINES,

Defendant.

ORDER

11-cv-851-bbc

Plaintiff Willie Simpson has filed a notice of interlocutory appeal in which he states that he wishes to appeal this court's January 31, 2013 order denying his motion to preserve video evidence. Because the January 31, 2013 order is not a final order, I understand plaintiff to be asking for certification that he can take an interlocutory appeal under 28 U.S.C. §1292(b).

28 U.S.C. § 1292(b) 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.

There is not a substantial ground for a difference of opinion on the question whether video recordings are necessary to plaintiff's prosecution of this case. As defendant explained in his response, all videos of cell extractions where chemical agents are used are preserved by the

institution pursuant to institution policy. Furthermore, plaintiff's request to preserve 24-hour surveillance video outside his cell is overly burdensome and unlikely to lead to discoverable evidence. Fed. R. Civ. P. 26(b)(2)(B). Moreover, an appeal of this order will only prolong this litigation, not advance its ultimate termination. Therefore, I will deny plaintiff's request for certification of an interlocutory appeal from the January 31, 2013 order.

Nevertheless, plaintiff's filing of a notice of appeal triggers a financial obligation: he owes \$455 fee for filing his notice of appeal. Plaintiff has filed a motion to proceed in forma pauperis in his interlocutory appeal, which will be denied. A district court has authority to deny a request for leave to proceed in forma pauperis under 28 U.S.C. § 1915 for one or more of the following reasons: the litigant wishing to take an appeal has not established indigence, the appeal is in bad faith or the litigant is a prisoner and has three strikes. § 1915(a)(1),(3) and (g). Sperow v. Melvin, 153 F.3d 780, 781 (7th Cir. 1998). I will deny plaintiff's request because I certify that his appeal from an unappealable non-final order is not taken in good faith.

Because I am certifying plaintiff's appeal as not having been taken in good faith, he cannot proceed with his appeal without prepaying the \$455 filing fee unless the court of appeals gives him permission to do so. Under Fed. R. App. P. 24, he 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. With his motion, he must include an affidavit as described in the first paragraph of Fed. R. App. P. 24(a), with a statement of issues he intends to argue on appeal. Also, he must send along a copy of this order. Plaintiff should

be aware that he must file these documents in addition to the notice of appeal he has filed previously. If he does not file a motion requesting review of this order, the court of appeals may choose not to address the denial of leave to proceed in forma pauperis on appeal. Instead, it may require him to pay the entire \$455 filing fee before it considers his appeal. If he does not pay the fee within the deadline set, it is possible that the court of appeals will dismiss the appeal.

ORDER

IT IS ORDERED that

1. Plaintiff Willie Simpson's motion for the court to certify that an interlocutory appeal may be taken from the January 31, 2013 order in this case, dkt. #95, is DENIED.
2. Plaintiff's request for leave to proceed in forma pauperis on appeal, dkt. #96, is DENIED. The clerk of court is directed to insure that plaintiff's obligation to pay the \$455 fee for filing his appeal is reflected in the court's financial records.

Entered this 3d day of April, 2013.

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