

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

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BRENTFORD TAYLOR,

Petitioner,

ORDER

v.

02-C-0548-C

PHYILLIS J. DUBE, in her official and individual capacity; JON E. LITSCHER, in his official and individual capacity; BYRON BARTOW, in his official and individual capacity; MARIO CANZIANI, in his official and individual capacity; KELLY ZAREMBR, in her official and individual capacity; MICHELLE COOPER, in her official and individual capacity; DAM SMITHBACK, in his official and individual capacity; and SARAH CORCORAN in her official and individual capacity,

Respondents.

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On October 29, 2002, I dismissed this case for lack of subject matter jurisdiction over petitioner's claim that his civil rights had been violated when he slipped and fell and was injured at what he described as an unsafe private facility. Judgment was entered on October 31, 2002. On November 14, 2002, petitioner filed a motion for reconsideration that I

construed as a timely filed motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59. In that motion, petitioner argued that the court should have recognized that his facts supported a claim that his working conditions constituted cruel and unusual punishment under the Eighth Amendment, a claim over which this court has jurisdiction. On November 21, 2002, I vacated the judgment of dismissal for lack of jurisdiction and screened petitioner's constitutional claim under 28 U.S.C. § 1915. I then denied petitioner's request for leave to proceed in forma pauperis on his constitutional claim on the ground that it is legally frivolous and entered an amended judgment dismissing the case. Now petitioner has filed a notice of appeal. Because the notice is not accompanied by the \$105 fee for filing a notice of appeal, I construe petitioner's notice as including a request for leave to proceed in forma pauperis on appeal.

In determining whether petitioner 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. Petitioner does not have three strikes under § 1915(g) and I have already found from the trust fund account statement he submitted when he filed his lawsuit that he is indigent under 28 U.S.C. § 1915. However, petitioner cannot proceed in forma pauperis on appeal 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 petitioner is appealing the same claims the court found to be without legal merit in denying petitioner leave to proceed on his complaint. See Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000). Because petitioner is attempting to raise on appeal the same legally frivolous claims he raised in his complaint in this court, I must certify his appeal as not being taken in good faith. Therefore, his request for leave to proceed in forma pauperis on appeal will be denied.

A prisoner whose appeal is certified as not having been taken in good faith owes the \$105 fee in full immediately, and if the money does not presently exist in his prison account, then prison officials are required to 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 the prisoner has sufficient funds in his regular account to pay the full \$105, it must be remitted promptly to the clerk of court in one payment.

If he wishes, petitioner may delay payment of the fee if, within thirty days of the date of this order, he challenges in the court of appeals the certification that his appeal is not taken in good faith. See Fed. R. App. P. 24(a)(5). However, petitioner should be aware that if he mounts such a challenge and the court of appeals determines that this court was correct that the appeal is not taken in good faith, then the court of appeals may record a second strike against petitioner and the payment will once again be due in full immediately. Petitioner's failure to pay the fee for any reason other than destitution will be understood

as a relinquishment of his right to file future suits in forma pauperis. See Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996).

ORDER

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

Entered this 27th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge