

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

TONY WALKER,

Plaintiff,

v.

PATRICK BRANT, FRANCIS LARDINOIS,
and RICHARD JAUQUET,

Defendants.

ORDER

02-C-135-C

This order addresses three unrelated matters.

First, it has come to my attention that on October 30, 2002, when I granted defendants' motion to dismiss plaintiff's Eighth Amendment claims as unopposed, I did not state expressly in the order that defendants Jon E. Litscher, Daniel Bertrand, Duwayne Natzke, Glen Ripley, and Wendy Bruns are no longer parties to the case. I should have done so. The only claims on which plaintiff was granted leave to proceed against these defendants were his Eighth Amendment claims. Because the dismissal of defendants Litscher, Bertrand, Natzke, Ripley and Bruns was not made explicit in the October 30 order, the parties and the court have continued to list these defendants in the captions of their filings and orders. In

all future filings their names should be removed from the caption.

Second, former defendant Bertrand and defendant Lardinois filed an answer to plaintiff's complaint on November 12, 2002. The answer reveals that defendants are confused about what claims and which defendants are still a part of this lawsuit.

With the dismissal of plaintiff's Eighth Amendment claim, the only claim remaining in this case is plaintiff's First Amendment claim that defendants Patrick Brant, Francis Lardinois and Richard Jauquet denied him a variety of publications by improperly labeling the publications contraband. Defendants moved to dismiss the First Amendment claim on July 18, 2002, at the same time they moved to dismiss plaintiff's Eighth Amendment claims. As the motion related to the First Amendment claim, it was divided into two parts: 1) a request to dismiss the claim as to a majority of the rejected publications listed in plaintiff's complaint on the ground that plaintiff had failed to exhaust his administrative remedies; and 2) a request to dismiss one of plaintiff's claims of improper rejection of a publication on the ground that the item contained pornographic material. Both parts of the motion were supported by matters outside the pleadings.

On August 27, 2002, I converted defendants' motion to dismiss to a motion for summary judgment. In the order, I noted that with respect to the outside matter relating to the exhaustion issue, the materials were matters of public record that could be considered without converting the motion to a motion for summary judgment. However, the

evidentiary matter defendants submitted to support their argument that one publication was rejected properly because it contained pornographic material could be considered only if the motion were converted to a motion for summary judgment. In an effort to simplify the matter, I stated in the first full paragraph on page 3 of the August 27 order, “For the ease of the parties in briefing the motion [for summary judgment], *the entire motion will be converted, including the portion in which defendants seek dismissal for plaintiff’s failure to exhaust his administrative remedies.*” Emphasis added.

On October 31, 2002, defendants withdrew their motion for summary judgment. On November 7, 2002, this court held a telephone status conference on an unrelated matter. At that time, I set a deadline for defendants to answer plaintiff’s complaint and for the parties to file dispositive motions. On November 12, 2002, defendants Lardinois and former defendant Bertrand filed an answer. In the answer, defendants observe erroneously, “By orders dated June 19, 2002 and August 27, 2002, the Court dismissed all claims except plaintiff’s claim against Lardinois and Bertrand that his Paperwings catalog was improperly rejected on January 1, 2002, and therefore, no response from all other defendants is required.” (The Paperwings catalog is the publication defendants contend contains pornographic material.) Because defendants Brant and Jauquet have not answered plaintiff’s complaint, I will give defendants an opportunity to file an amended answer. For their guidance, I reiterate: defendant Bertrand is no longer a party to this suit; defendants Patrick

Brant, Francis Lardinois and Richard Jauquet remain defendants, as does all of plaintiff's First Amendment claim that he was denied publications on a number of occasions that were improperly labeled as contraband.

Third, plaintiff Walker has filed but not served a notice of appeal from the court's order of November 12, 2002, denying his motion for a preliminary injunction. His notice is accompanied by a separate motion asking for an injunction pending appeal and an affidavit supporting the motion.

Ordinarily, this court will not consider any papers one party files that are not served on the opposing party. However, under the procedural rules governing the filing of notices of appeals, the clerk of court was required to docket plaintiff's notice and advise the court of appeals of its filing. Therefore, on this one occasion, I am sending a copy of the notice and accompanying papers to opposing counsel so that the matter of the appeal can be resolved without delay in this court and in the court of appeals.

Plaintiff 's filing of a notice of appeal triggers his duty under the 1996 Prison Litigation Reform Act to pay the fee for filing the notice of appeal. If I do not certify that the appeal is not taken in good faith, then plaintiff can pay the fee in monthly installments under 28 U.S.C. § 1915. However, if I certify that plaintiff's appeal is not taken in good faith, then the partial payment provision of the in forma pauperis statute does not apply. Instead, the fee has to be paid promptly in full. In this case, I must certify that plaintiff's

appeal is not taken in good faith.

In his earlier motion for a preliminary injunction, plaintiff asked the court to direct defendants to give him legal supplies at state expense for as long as he is proceeding in this action. I denied the motion because plaintiff failed to produce evidence to show that he had followed the correct procedure for requesting a legal loan extension, or that if he were to follow proper procedure, defendants would deny a request for legal supplies made in response to a court order.

In supporting his appeal, plaintiff does not explain why he believes the November 12 decision denying his motion for preliminary injunction is wrong. He does not say that any of the factual findings were flawed or that I misapplied the law. Instead, he presses his view that defendants should have been, and should now be, ordered to advance him unlimited legal loan funds to pay for all the paper, envelopes, photocopies, and postage stamps he wants for filing papers in this case.

Under the Constitution, defendants are required to give plaintiff a reasonable opportunity to present claimed violations of fundamental rights to the court, see Bounds v. Smith, 430 U.S. 817, 825 (1977), but the law is settled that plaintiff does not have an unlimited right to court access. See Lewis v. Casey, 518 U.S. 343 (1996) (holding no abstract constitutional right to law libraries or legal assistance); see also Bounds, 430 U.S. at 825 (recognizing that prison officials may consider economic factors “in choosing the

methods used to provide meaningful access”); Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002) (“A right to petition for redress of grievances does not imply a right to free writing paper and stamps.”) The state has advanced plaintiff annual legal loans of at least \$200. This amount is more than adequate to allow plaintiff meaningful access to the courts so long as he chooses his claims carefully and litigates them responsibly. Because the issue plaintiff wishes to raise on appeal is settled against him in both the United States Supreme Court and the Court of Appeals for the Seventh Circuit, his appeal is legally frivolous. Therefore, I must certify that the appeal is not taken in good faith.

With the certification that plaintiff’s appeal is not taken in good faith, plaintiff owes the \$105 fee for filing his notice of appeal immediately. If he does not have \$105 in his prison account, then prison officials must 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 plaintiff has enough money in his regular and release accounts to pay the full \$105, it must be sent promptly to the clerk of court in one payment. Plaintiff may delay payment of the fee, whether in payments because of insufficient funds or in full only if, within thirty days of the date he receives this order, he challenges in the court of appeals this court’s certification that his appeal is not taken in good faith. In that instance, the court of appeals may decide that the certification is improper, in which case the matter will be remanded to this court for collection of an initial partial payment of the fee before the court

of appeals will decide whether plaintiff's appeal is legally frivolous. If the court of appeals finds that this court was correct in certifying that the appeal is not taken in good faith, then the payment will once again be due in full immediately. Whatever the case, plaintiff is responsible for making sure that the required payment is sent to the court at the appropriate time. If he fails to pay for any reason other than total lack of money, he will be giving up his right to file future suits in forma pauperis. See Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996). Plaintiff is reminded that if he challenges this court's finding of bad faith in the court of appeals and loses, he may be assessed a strike by the court of appeals if the court finds his appeal to be legally frivolous.

ORDER

IT IS ORDERED that

1. The parties are to remove the names of defendants Jon E. Litscher, Daniel Bertrand, Duwayne Natzke, Glen Ripley, and Wendy Bruns from the caption of future filings in this case, because the claims against these defendants were dismissed on October 30, 2002, when I granted defendants' motion to dismiss plaintiff's Eighth Amendment claim as unopposed.

2. Defendants Patrick Brant, Francis Lardinois and Richard Jauquet may have until January 10, 2003, in which to serve and file an answer to plaintiff's complaint.

3. I certify that plaintiff's appeal from this court's order of November 12, 2002, denying his motion for a preliminary injunction is not taken in good faith and plaintiff's request for leave to proceed in forma pauperis on appeal is DENIED.

Entered this 27th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge