IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MONTELL M. HORTON,

Plaintiff, ORDER

v. 02-C-0470-C

GERALD BERGE, PETER HUIBREGTSE,
PAMELA BARTELS and LINDA HODDY-TRIPP,

Defendants.

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Plaintiff filed this case in the Dane County Circuit Court and defendants removed it to this court. In an order dated September 23, 2002, I screened plaintiff's complaint pursuant to 28 U.S.C. § 1915A and denied him leave to proceed in forma pauperis on several claims that were legally meritless. I granted him leave to proceed on the following claims: (1) that on October 26, 2001, defendants Peter Huibregste and Linda Hoddy-Tripp denied plaintiff's advancement to level 4 in retaliation for grievances he had filed; (2) that defendant Pamela Bartels was deliberately indifferent to his serious medical needs when she refused to let him see an optometrist for over 21 days for his eye condition; (3) that defendant Berge's previous policy of 24-hour cell illumination and allowing noisy mentally

ill inmates to be confined at Supermax caused him sleep deprivation; and (4) that the combination or totality of certain conditions of confinement imposed by defendant Berge (windowless cell; no contact with other prisoners; four hours of "so-called exercise" a week; limited use of library, exercise cell and telephone; visits by video; video monitoring; and the lack of any meaningful programming) caused him social isolation and sensory deprivation in violation of his Eighth Amendment rights. With respect to the last claim, I advised plaintiff that he could seek money damages only, and only for the period he was subject to the conditions up to March 28, 2002, when I approved a settlement agreement in a class action lawsuit challenging those same conditions Jones 'El v. Berge, 00-C-421-C, a case in which plaintiff is a class member.

Subsequently, on October 18, 2002, plaintiff filed a motion for reconsideration of the September 23 order, which I denied on November 7, 2002. Now plaintiff has filed a document titled "Notice of Appeal and Appeal," which is accompanied by a statement of the issues plaintiff intends to raise on appeal. From the statement, it appears that plaintiff believes this court erred in allowing defendants to remove the case to this court against his wishes and in limiting the type of damages he can recover on his totality of conditions claim.

I construe plaintiff's notice of appeal to include a motion for modification of the September 23 or November 7 order to include a finding that the order is appealable immediately under 28 U.S.C. § 1292. The motion will be denied.

28 U.S.C. § 1292 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 plaintiff's case was removed properly to this district or whether plaintiff should be able to continue to challenge conditions that were the subject of a settlement agreement on March 28, 2002. Moreover, an immediate appeal will not materially advance the ultimate termination of this litigation. It would serve only to delay the litigation. Therefore, plaintiff's motion for amendment of the September 23 or November 7, 2002 orders to include a finding that the order is appealable under 28 U.S.C. § 1292 will be denied.

Nevertheless, plaintiff's filing of a notice of appeal triggers a financial obligation for plaintiff under the 1996 Prison Litigation Reform Act. He must pay the $105 fee for filing his notice of appeal, either in installments if this court were to find that his appeal is taken in good faith, or in a lump sum if this court certifies that the appeal is not taken in good faith. I certify that plaintiff's appeal is not taken in good faith. Because his challenges to the removal and to the limitation on his ability to recover for conditions that were covered in the settlement agreement in the Jones-El case are legally frivolous, I must certify that

plaintiff's appeal is not taken in good faith.

ORDER

IT IS ORDERED that plaintiff's motion for amendment of the September 23 or November 7, 2002 orders to include a finding that the order is appealable under 28 U.S.C. § 1292 is DENIED.

Plaintiff's request for leave to proceed in forma pauperis on appeal is denied and I certify that plaintiff's appeal is not taken in good faith.

Denial of leave to proceed in forma pauperis on appeal on the ground that the appeal has been certified not to be taken in good faith means that plaintiff owes the $105 fee for filing his appeal in full immediately. If plaintiff does not have the money 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 send those payments to the court until the debt is satisfied. Plaintiff may delay payment of the fee only if within 30 days of the date he receives this order he files an appeal in the court of appeals challenging this court's certification that his appeal is not taken in good faith. In either case, however, plaintiff is responsible for making sure that the necessary amount is sent to this court at the proper

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).

Entered this 17th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge