

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

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EUGENE L. CHERRY,

Plaintiff,

v.

GERALD BERGE, CINDY SAWINSKI,  
JOLENE MILLER and JOLINDA WATERMAN,

Defendants.  
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ORDER

02-C-544-C

Plaintiff Eugene Cherry has filed a notice of appeal from an order of this court denying his motion for a preliminary injunction. Because plaintiff's notice of appeal is not accompanied by the \$105 fee for filing an appeal, I construe the notice to include a request for leave to proceed in forma pauperis on appeal.

Plaintiff is a prisoner. Therefore, he is subject to the 1996 Prison Litigation Reform Act. This means that I must determine whether his appeal is barred because he has three strikes against him under 28 U.S.C. § 1915(g) or whether it must be certified as not having been taken in good faith. Plaintiff has only one strike. See Hashim a/k/a Tiggs v. Berge, 01-C-314-C (W.D. Wis. Sept. 24, 2001). Therefore, he is not barred from proceeding in forma

pauperis under § 1915(g). However, I conclude that plaintiff's appeal is not taken in good faith because he is appealing a legally frivolous motion for preliminary injunction. See Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000) (appeal of frivolous lawsuit cannot be in good faith).

In his motion for a preliminary injunction, plaintiff requested immediate transfer to another correctional facility, allegedly because he is not receiving adequate medical care. However, plaintiff submitted no evidentiary materials to show that he was in any immediate danger (he contends that the same medical condition has existed for three years) or that transfer to another facility was necessary to remedy the alleged harm. In addition, plaintiff knew that he had made the same motion several months earlier in another of his cases, Cherry v. Litscher, 02-C-394-C; the motion had been denied in September 2002, for his failure to make the necessary showings of irreparable harm; when he appealed the denial, I found that the appeal was not taken in good faith; and the court of appeals affirmed the bad faith finding on October 30, 2002, when it denied plaintiff's request for leave to proceed in forma pauperis on appeal made pursuant to Fed. R. App. P. 24(a)(5). In continuing to file motions and appeals on matters that already have been considered and denied, petitioner shows evidence of bad faith.

Because I am certifying that this appeal is not taken in good faith, plaintiff must pay the \$105 fee for filing the appeal immediately. He cannot take advantage of the partial

payment provision of 28 U.S.C. § 1915.

ORDER

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

If plaintiff intends to challenge this court's certification that his appeal is not taken in good faith, he has 30 days from the date he receives this order in which to file with the court of appeals a motion for leave to proceed in forma pauperis on appeal. His motion must be accompanied by 1) a copy of the affidavit prescribed in the first paragraph of Fed. R. App. P. 24(a) and 2) a copy of this order.

Entered this 6th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge