

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

HARRISON FRANKLIN,

Plaintiff,

v.

ORDER

02-C-618-C

GARY R. McCAUGHTRY, GERALD BERGE,
PAULINE BELGADO, SARGENT SIEDOSCHLAG,
PETER HUIBREGTSE, LINDA HODDY-TRIPP,
JIM WEGNER, SARGENT LIND, CAPTAIN JOHN P
GRAHL, SARGENT DAN MEEHAN, CO II MIKE
GLAMAN, NURSE HOLLY MEIER, PAM BARTELS,
TODD BAST and STEVEN SCHOELER

Defendants.

Following the denial on February 17, 2004, of plaintiff's timely motion to alter or amend the judgment under Fed. R. Civ. P. 59, plaintiff filed a notice of appeal dated March 7, 2004. Three days later, he filed another notice of appeal dated March 10, 2004. Because the March 10 notice of appeal made small cosmetic changes to the March 7 notice of appeal, I treated the March 10 document as plaintiff's "perfected" notice of appeal. In an order dated March 16, 2004, I found plaintiff eligible to proceed on appeal in forma

pauperis and assessed him an initial partial payment of the fee for his March 10 appeal. In that same order, I requested that the court of appeals accept plaintiff's March 10 notice of appeal as plaintiff's only operative appeal. Now the court of appeals has notified this court that it cannot treat plaintiff's March 7 and March 10 filings as a single notice of appeal. Instead, I have been directed to treat the March 7 notice of appeal as a separate appeal. This means that I must determine whether plaintiff may proceed in forma pauperis on two identical appeals.

Because plaintiff is a prisoner, I am required under the Prison Litigation Reform Act to make the in forma pauperis determination by considering whether plaintiff has three strikes against him under 28 U.S.C. § 1915(g), whether he qualifies financially for pauper status, and whether his appeal is taken in good faith. I have already found in the March 16 order that plaintiff qualifies financially for indigent status and that he is not barred by the three-strike provision in § 1915 from proceeding in forma pauperis on appeal. However, although I did not certify plaintiff's March 10 appeal as not having been taken in good faith, I cannot reach the same conclusion with respect to the March 7 appeal. This is because I can conceive of no legally meritorious reason to justify two appeals on the same subject matter. Unfortunately, because I must certify plaintiff's March 7 as not taken in good faith, plaintiff is inflicted with a harsh penalty. He cannot use the partial payment provisions of 28 U.S.C. § 1915 to pay his second \$255 filing fee. Instead, he owes the full fee immediately.

I suspect that plaintiff would not have attempted to reach perfection on the wording in his appeal had he realized that he would be charged a filing fee for each notice. Although I cannot predict precisely what relief the court of appeals may be willing to grant to plaintiff under the circumstances presented here, I am aware that in other instances such as this, the court of appeals has granted a prisoner appellant's request to consolidate nearly identical appeals and waive the second filing fee. Plaintiff is encouraged to write to the court of appeals to make such a request.

ORDER

IT IS ORDERED that plaintiff's request for leave to proceed in forma pauperis on appeal in connection with the March 7, 2004 notice of appeal is DENIED. I certify that the duplicate appeal is not taken in good faith. Plaintiff has 30 days from the date of this order in which to ask the court of appeals to review this court's certification of bad faith. Alternatively, plaintiff may ask the court of appeals to consolidate his two appeals and waive

the fees with respect to one of them.

Entered this 1st day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge