IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROGER LEE WARREN,

ORDER

Plaintiff,

v.

02-C-0093-C

GERALD BERGE,

Defendant.

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On December 4, 2002, I dismissed defendants Jon Litscher, Janet Walsh, Twila Hagan and Collette Cullen from this case, granting all of defendants' motion to dismiss except defendant Gerald Berge's motion to dismiss plaintiff's claim that he was subjected to extreme cell temperatures in violation of the Eighth Amendment to the United States Constitution. Now plaintiff has filed a notice of appeal from the portion of the December 4 order holding that defendant Gerald Berge was entitled to qualified immunity on plaintiff's claim that the constant lighting in his cell violated his Eighth Amendment rights.

Plaintiff has not paid the $105 fee for filing his notice of appeal. He states, incorrectly, that because he was granted leave to proceed in forma pauperis in the district court, he is permitted to proceed in forma pauperis on appeal without further authorization

under Fed. R. App. P. 24 and without submitting additional "paperwork." Plaintiff is correct that under Fed. R. App. P. 24, a person who has been found eligible for pauper status at the start of his case does not need to prove his financial eligibility to gain pauper status on appeal. However, this does not mean that the district court can overlook other provisions in the pauper statute applicable to a prisoner who has filed a notice of appeal.

Specifically, under 28 U.S.C. § 1915(a)(3) and Fed. R. Civ. P. 24(a), the district court can strip a party of pauper status by certifying that the appeal is not taken in good faith. In addition, under the 1996 Prison Litigation Reform Act, a prisoner plaintiff is required to pay the fee for filing an appeal whether or not he keeps his pauper status on appeal. If he keeps his status, (because the court does not certify bad faith), a prisoner can pay the fee in installments, starting with an initial partial payment. Otherwise, he must pay the fee in full immediately.

In this case, I must certify that plaintiff's appeal is not taken in good faith. First, plaintiff did not request and receive permission to take an interlocutory appeal. 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.

I purposely did not include in the December 4 order a finding that an interlocutory appeal would be proper. The order does not involve a controlling question of law as to which there is substantial ground for difference of opinion and a prompt appeal from the order will not materially advance the ultimate termination of this litigation but will serve only to delay it.

Second, plaintiff states that he intends to argue on appeal that it was error to conclude that defendant Berge is entitled to qualified immunity on the lighting claim because Berge had notice of the allegedly unconstitutional condition in the class action lawsuit of Jones-El v. Berge, 00-C-421-C, which was settled on March 8, 2002. This argument is legally frivolous. There was no finding of liability in the Jones-El case on any of the claims raised in that lawsuit. Nothing about the case or the settlement agreement would have been sufficient under the law governing qualified immunity defenses to put defendant on notice that the cell lighting violated the Eighth Amendment's prohibition against cruel and unusual punishment. Because the argument plaintiff wishes to make on appeal is legally frivolous, I must certify that his appeal is not taken in good faith.

The parties should turn their attention to the deadline for filing dispositive motions in this case, which was extended in Magistrate Judge Stephen Crocker's order of November 7, 2002, to 30 days from the day following entry of the December 4, 2002 order, or January 3, 2003.

ORDER

IT IS ORDERED that plaintiff cannot proceed in forma pauperis on an interlocutory appeal from that portion of the December 4, 2002 order dismissing his 24-hour illumination claim against defendant Berge on the ground that Berge is entitled to qualified immunity, because I am certifying that his appeal is not taken in good faith.

Because plaintiff's appeal is certified as not having been 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 determines that this court was correct in finding that the appeal is not taken in good faith, then the payment will once again be due in full immediately. Whatever the scenario,

plaintiff is responsible for insuring that the required sum is sent to the court at the appropriate time.

Entered this 26th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge