

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

WILLIAM STAPLES,

Petitioner,

OPINION AND ORDER
00-C-506-C

v.

STEVEN B. CASPERSON,
MICHAEL BECK, JON E.
LITSCHER, SGT. L. DAVIS, PHILLIP
KINGSTON, CAPT. TEGEL AND
BARB CHANDLER,

Respondents.

Judgment was entered in this case on September 25, 2000, dismissing petitioner William Staples's complaint pursuant to 28 U.S.C. § 1915A for failure to state a claim and recording a strike against petitioner in accordance with 28 U.S.C. § 1915(g). Subsequently, petitioner moved to alter or amend the judgment. In an order dated October 11, 2000, I denied the motion because nothing in it convinced me that I had made legal errors in dismissing his case. Now before the court is petitioner's notice of appeal.

Petitioner's notice of appeal is not accompanied by the \$105 fee for filing his appeal.

Therefore, I construe his notice as including a request for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915. An appeal may not be taken in forma pauperis if the district court concludes that the person wishing to appeal is not indigent or if the court certifies that the appeal is not taken in good faith. Although petitioner has not submitted a certified trust fund account statement for the six-month period immediately preceding the filing of his notice of appeal as required by 28 U.S.C. § 1915(a), the absence of this item is not critical because I must certify that petitioner's appeal is not taken in good faith.

In a recent opinion, the Court of Appeals for the Seventh Circuit overruled Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997), insofar as that decision had required district courts to make good faith determinations based upon a subjective inquiry into the appellant's motives in filing the appeal rather than an objective inquiry into the merits of the claims to be raised on appeal. See Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000). Noting that Congress's intent in enacting the Prison Litigation Reform Act was to reduce, not increase, the number of frivolous lawsuits and appeals filed by prisoners, the court observed,

the PLRA did not change a word in the standard for denial of in forma pauperis status on appeal, but merely shifted it to a different subsection of 28 U.S.C. § 1915. The law was clear that “good faith” as it appeared in the identical provision of the pre-amended statute was an objective concept, a synonym for frivolous.

Id. at 1026.

In an order entered September 25, 2000, I dismissed petitioner's federal claims of inadequate conditions of confinement and medical care, denial of access to the courts, denial of due process, denial of access to policy statements and conspiracy because they failed to state a claim upon which relief may be granted. In his notice of appeal, petitioner challenges the dismissal of his federal due process claim but does not challenge the decision that he did not allege viable federal claims of inadequate conditions of confinement and medical care, denial of access to the courts, denial of access to policy statements and conspiracy. In his notice of appeal, petitioner contends for the first time that various sections of the Wisconsin Administrative Code gave him liberty interests in such things as access to the courts, access to policy statements and a certain amount of exercise and that, therefore, violations of these code provisions violated his constitutional right to due process.

If petitioner intends to raise on appeal his due process claim that he raised in his complaint, his appeal will be legally frivolous. As I pointed out in the order denying petitioner leave to proceed in forma pauperis, the Supreme Court defined liberty interests in the prison setting in Sandin v. Connor, 515 U.S. 472, 483-84 (1995), as “atypical, significant deprivations.” Petitioner's allegations that he had to spend 30 days in program segregation or may have had to spend time in a more restrictive status do not amount to “atypical, significant deprivations” under Sandin, and, as a result, do not constitute a protectible liberty interest.

Petitioner suggests no reason why this clear precedent should not be applicable to his case. His appeal from the denial of leave to proceed in forma pauperis on this legally frivolous claim is not taken in good faith.

If petitioner intends to raise on appeal claims that respondents violated his liberty interests created by the Wisconsin Administrative Code, his appeal will be legally frivolous because he did not allege make these allegations in his original complaint. Although petitioner alleged that respondents had violated the Wisconsin Administrative Code, he did not allege that the code created liberty interests that were violated. Instead, he alleged that respondents violated the substantive provisions of various sections of the code. Even if petitioner had alleged violations of his state-created liberty interests in his original complaint, his complaint would have been dismissed because, as explained above, he failed to allege any “atypical, significant deprivations.” Sandin, 515 U.S. at 483-84. Without a protectible liberty interest, petitioner could not have raised a viable due process claim.

A prisoner whose appeal is certified as not having been taken in good faith cannot take advantage of the initial partial payment provision of § 1915. Instead, he owes the \$105 fee in full immediately, and if the money does not presently exist in his prison account, then prison officials are required to 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 the

prisoner has sufficient funds in his regular and release accounts to pay the full \$105, they must be remitted promptly to the clerk of court in one payment. One exception exists. Petitioner may delay payment of the fee, whether in payments because of insufficient funds or in full, if, within thirty days of the date he receives the district court's order denying his request for leave to proceed in forma pauperis on appeal, he challenges in the court of appeals the district court's certification that the 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 the district court for collection of an initial partial payment of the fee before the court of appeals will decide whether petitioner's appeal is legally frivolous. If the court of appeals determines that the district court was correct that the appeal is not taken in good faith, then the payment will be due in full immediately. Whatever the scenario, petitioner is responsible for insuring that the required sum is remitted to the court at the appropriate time. If he fails to pay the fee for any reason other than destitution, it will be understood that he is giving up his right to file future suits in forma pauperis. See Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996). Petitioner is reminded that if he challenges this court's finding of bad faith in the court of appeals and loses, he might be assessed a second strike by the court of appeals.

There is one final issue. In reviewing petitioner's original complaint, I am now convinced that although it was proper to dismiss petitioner's federal law claims, it was an error to issue him

a strike because I did not exercise supplemental jurisdiction over his state law claims. Therefore, I ask that the court of appeals relinquish jurisdiction over this appeal to allow me to amend the judgment to remove the strike that was entered pursuant to 28 U.S.C. § 1915(g).

ORDER

IT IS ORDERED that petitioner William Staples's request for leave to proceed in forma pauperis on appeal is DENIED. I certify that petitioner's appeal from the September 25, 2000 judgment denying him leave to proceed in forma pauperis and issuing him a strike is not taken in good faith.

If petitioner 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 a copy of the affidavit prescribed in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order.

Entered this 27th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge