

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

EUGENE CHERRY,

Plaintiff,

v.

MATTHEW FRANK, GERALD BERGE,
PETER HUIBREGTSE, GARY BOUGHTON,
BRAD HOMPE, JOAN GERL,
SGT. C. HANEY, THOMAS BELZ and
HENRY BRAY,

Defendants.

ORDER

03-C-129-C

Plaintiff has filed a document titled “notice of appeal” in which he states that he wishes to appeal from a portion of the December 4, 2003 order entered in this case. In the December 4 order, I denied plaintiff’s motions for summary judgment, a temporary restraining order, appointment of counsel, and to strike an amendment to defendants’ proposed findings of fact and the affidavit on which the amendment was based. In addition, I denied defendants’ motion for summary judgment in part, granted it in part, and dismissed defendants Matthew Frank, Gerald Berge, Peter Huibregtse, Gary Boughton, Brad Hompe, Joan Gerl and Corey Haney. In his “notice,” plaintiff states expressly that he is appealing

the decision to grant defendants' motion for summary judgment in part.

Although the December 4 order includes a decision on a motion for temporary restraining order that is immediately appealable under 28 U.S.C. § 1292(a)(1), it is not otherwise an appealable order, because it does not resolve all of the issues raised in plaintiff's lawsuit. Therefore, I construe plaintiff's "notice of appeal" as a motion for modification of the December 4 order to include a finding that the order granting defendants' motion for summary judgment in part is appealable immediately under 28 U.S.C. § 1292. That 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.

Although there may be a substantial ground for a difference of opinion on the question whether defendants' motion for summary judgment should have been granted in part and denied in part, an immediate appeal will not materially advance the ultimate termination of this litigation. It would serve only to delay the litigation. Therefore, I will deny plaintiff's motion for amendment of the December 4, 2003 order to include a finding that a part of the order is appealable under 28 U.S.C. § 1292. Plaintiff should be aware that a final judgment

will be entered in this case after the jury reaches its verdict on the one claim that remains to be resolved, as set forth in the December 4 order. Once judgment is entered, plaintiff will be free to appeal from the judgment and any earlier final orders he believes were entered in error.

ORDER

IT IS ORDERED that plaintiff's motion for amendment of the December 4, 2003 order to include a finding that the decision to grant in part defendants' motion for summary judgment is appealable under 28 U.S.C. § 1292 is DENIED.

Entered this 7th day of January, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge