

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

LEE SIMMONS,
No. 00192235,

Petitioner,

v.

SECRETARY MATTHEW FRANK;
JON LITSCHER; DICK VERHAGEN;
SHARON ZUNKER; PATRICK J. KNOWLES;
DR. ROYLE EENIGENBURG, JR., M.D.;
DR. V. STONE; DR. DONALD HANDS;
KENNETH MORGAN; LINDA MORGAN;
CHRIS ELLARD; DR. WITTE; SHARIDEN ASH;
PHIL KINGSTON; GREG GRAM; DR. JANET
WALSH; DR. TRACY JOHNSON; DR. TRINIDAD;
TIM DOUMA; AMY MILLARD; JIM SUTTEN;
DR. GARY BRIDGEWATER; PAT SIEDSCHLAG;
KRISTI DIETZ; RADALL R. HEPP; JEFF
WYDEVEN; BILL NOLAN; JOHN RAY;
SGT. ALLEN; SGT. WINSLOW; KEVIN
POTTER; MS. HACKBART; LENARD WELL;
and DR. JOHN ROBERTS,

Respondents.

ORDER

03-C-365-C

This is a civil action in which petitioner seeks relief for alleged violations of his constitutional rights under 42 U.S.C. § 1983. On July 16, 2003, I denied petitioner leave

to proceed in forma pauperis on his claims because he has struck out under 28 U.S.C. § 1915(g) and because he has the means to make regular payments on amounts he owes for previous lawsuits but is not doing so. On July 21, 2003, petitioner filed a motion to reconsider the denial of his request for leave to proceed. I denied that motion in an order dated July 28, 2003. Now petitioner has filed a document titled “Notice of Appeal and Petition for Application of Appealability Pursuant to § 2253.” Because this is a § 1983 action, petitioner does not need a certificate of appealability. Instead, I construe his notice of appeal to include a request for leave to proceed in forma pauperis on appeal. In addition, petitioner has filed a motion for appointment of counsel on appeal.

Because petitioner has accumulated three strikes, so long as he is incarcerated he cannot file any new lawsuit or an appeal without prepaying the filing fee unless he can show that he is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g). Petitioner has not made the required showing of imminent danger of a serious physical injury in this case. Therefore, he cannot take advantage of the initial partial payment provision of § 1915. He owes the \$105 fee in full immediately.

Petitioner has been receiving regular income into his prison account. However, if he does not have enough money to pay the \$105 fee in full immediately, prison officials will be required to monitor petitioner’s account and collect monthly payments according to the formula set out in 28 U.S.C. § 1915(b)(2) until the fee is paid.

Petitioner may delay payment of the \$105 fee under one circumstance; that is, if he challenges in the court of appeals within thirty days of the date he receives this order the decision to deny his request for leave to proceed in forma pauperis on appeal because of his § 1915(g) status. Fed. R. App. P. 24(a)(5). If the court of appeals decides that it was improper to deny petitioner leave to proceed on appeal because of his three-strike status, then the matter will be remanded to this court for a determination whether petitioner's appeal is taken in good faith. If the court of appeals determines that this court was correct in finding that § 1915(g) bars petitioner from taking his appeal in forma pauperis, the \$105 filing fee 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.

Because petitioner has not been allowed to proceed in this court, his request for appointment of counsel will be denied as moot. If petitioner wishes to request appointment of counsel to represent him on appeal, he will have to make his request directly to the Court of Appeals for the Seventh Circuit.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on

appeal is DENIED because three strikes have been recorded against petitioner under 28 U.S.C. § 1915(g).

Further, IT IS ORDERED that petitioner's motion for appointment of counsel is DENIED as moot.

Entered this 18th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge