

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

JONATHAN P. COLE,
EDWARD J. YOUNGBLOOD,
MACK D. HILL,
LOUIS NIEVES,
ANDREW COLLETTE,
BARNEY A. GUARNERO,
VINCENT D. WHITAKER,
JASON TYRRELL,
KENTA FINKLEY,
RODNEY REED,
JEFF DAKE,
KARRY HILLEY,
ESAW P. HARNESS, JR.,
TERRY COMMODORE, JR.,

Plaintiffs,

v.

JON E. LITSCHER;
MICHAEL CATALANO;
PRISON HEALTH SERVICES, INC.;
PAM BARTELS;
JOHN DOES 1, 34, 35, 36, 37, 39, 82, 84, A, D and E;
and GERALD A. BERGE,

Defendants.

ORDER

04-C-116-C

JEFF DAKE,

Plaintiff,

v.

JON LITSCHER,
MICHAEL CATALANO,
PRISON HEALTH SERVICES, INC.,
PAM BARTELS,
JOHN DOES 1, 34, 35, 36, 37, 39, 82, 84, A, D and E;
and GERALD A. BERGE,

Defendant.

ORDER

04-C-168-C

In an order entered in case no. 04-C-116-C on March 15, 2004, I dismissed one of plaintiffs' claims under § 1915A and severed the remaining claims of the several plaintiffs, including those of plaintiff Jeff Dake. Plaintiff Dake's severed case was assigned case no. 04-C-168-C. On April 12, 2004, plaintiff Dake filed a notice of appeal from the March 15 order. That notice was photocopied by the clerk of court and docketed in both case nos. 04-C-116-C (Dkt. #14) and 04-C-168 (Dkt. #4).

On April 19, 2004, I addressed Dake's notice of appeal in an order docketed into case number 04-C-168-C. I stated that the May 15 decision was not appealable because it did not end plaintiff's litigation on the merits. Coopers & Lybrand v. Livesay, 473 U.S. 463,

467 (1978). Instead, it simply dismissed one of plaintiffs' claims as without legal merit and separated plaintiffs' remaining claims into individual lawsuits. I then construed Duke's notice of appeal as a motion to modify the March 15, 2004 order to include a finding that the order is appealable immediately under 28 U.S.C. § 1292 and denied that motion.

Noting the existence of an appeal that has been docketed in each of cases no. 04-C-116-C and 04-C-168-C, the Court of Appeals for the Seventh Circuit has asked this court to rule on the question whether plaintiff may proceed on appeal in forma pauperis. I trust that the court of appeals will consolidate these appeals, since it is this court and not plaintiff that duplicated the appeal and docketed it in both case no. 04-C-116-C and case no. 04-C-168-C. 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. Plaintiff does not have three strikes. I do not need to determine whether he qualifies financially for pauper status on appeal, however, because I intend to certify that his appeal is not taken in good faith.

I have advised plaintiff that the May 15, 2004 order is not a final order from which an appeal may be taken. I have ruled that the order will not be amended to include a finding that it is immediately appealable under 28 U.S.C. § 1292. Because plaintiff is appealing from an order that is not appealable, the appeal is legally frivolous and must be certified as

not taken in good faith.

Because I am certifying plaintiff's appeal as not having been taken in good faith, plaintiff owes the \$255 fee for filing his notice of appeal immediately. If he does not have \$255 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 \$255, he must be sent the money 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 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.

ORDER

IT IS ORDERED that plaintiff cannot proceed in forma pauperis on an interlocutory appeal from the May 15, 2004, order severing his claims from the claims of his former co-plaintiffs, because I am certifying that his appeal is not taken in good faith.

Entered this 6th day of July, 2004.

BY THE COURT:
BARBARA B. CRABB
District Judge