

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

VINCENT D. WHITAKER,

Plaintiff,

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-165-C

Plaintiff's lawsuit was at one time a lawsuit brought by a group of prisoners in the Eastern District of Wisconsin. When the case was transferred to this district, it was identified as Cole v. Litscher and assigned case no. 04-C-116-C. On March 15, 2004, I screened the group complaint, dismissed one of plaintiffs' claims under § 1915A and severed the remaining claims of the several plaintiffs, including those of plaintiff Vincent Whitaker. Plaintiff Whitaker's severed case was assigned case no. 04-C-165-C.

On March 25, 2004, plaintiff Jonathan Cole filed in case no. 04-C-116-C a notice of

appeal from the March 15 order. Subsequently, on April 12, 2004, another former co-plaintiff, Jeff Dake, filed a notice of appeal from the March 15 order. In response, I noted that the March 15 order was not appealable, because it was not a final order. I then construed both notices as motions to modify the March 15, 2004 severance order to include a finding that the order is appealable pursuant to 28 U.S.C. § 1292, and I denied each motion.

On March 29, 2004, plaintiff Whitaker filed a motion to stay the proceedings in this case pending a decision from the Court of Appeals for the Seventh Circuit on Cole's appeal. I denied that motion, explaining that I had construed Cole's notice of appeal as a motion to modify the March 15 order and had denied it. On April 5, 2004, plaintiff Whitaker filed a second motion for a stay, which was denied summarily on April 6, 2004. Plaintiff Whitaker's case was dismissed without prejudice on April 19, 2004, when he failed to file an amended pleading identifying his claims against the defendants.

Now, plaintiff Whitaker has filed a document titled "Motion to Consolidate on Appeal," in which he appears to be asking for permission to join plaintiffs Cole and Dake in their appeals. Alternatively, plaintiff Whitaker appears to be saying that this court should have construed one or both of his motions for a stay as a notice of appeal from the March 15 order.

It is too late for plaintiff Whitaker to obtain permission to join the appeals of Cole

or Dake. Those “appeals” have already been acted upon by this court. If plaintiff Whitaker wanted his earlier filed motions for a stay to be construed as notices of appeal, he should have so identified his submissions. Nothing in either document suggests that plaintiff Whitaker wanted to take an independent appeal from the March 15 order.

I will note that if plaintiff Whitaker files a notice of appeal from the March 15 order without paying the \$255 filing fee, I will be required under the Prison Litigation Reform Act to make an in forma pauperis determination, part of which requires the court to consider whether plaintiff’s appeal is taken in good faith. Given that I have already ruled that the May 15, 2004 order is not a final order from which an appeal may be taken and that the order will not be amended to include a finding that it is immediately appealable under 28 U.S.C. § 1292, I would have to certify plaintiff’s appeal as not taken in good faith. At that point, plaintiff would owe the \$255 fee for filing his notice of appeal immediately. If he did not have \$255 in his prison account, I would direct prison officials 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 was satisfied.

ORDER

IT IS ORDERED that plaintiff Vincent Whitaker’s “Motion to Consolidate on

Appeal” is DENIED.

Entered this 19th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge