IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFF DAKE,

ORDER

Plaintiff,

04-C-168-C

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.

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Cole v. Litscher, 04-C-116-C, is a lawsuit that was transferred to this district from the District Court for the Eastern District of Wisconsin. When it was transferred, there were 14 plaintiffs, all prisoners or former prisoners in the Wisconsin prison system. In an order dated 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. In an effort to insure that each individual pro se plaintiff was aware of the claims that had been raised on his behalf, I instructed the plaintiffs to submit, no later than April 9, 2004, individual

proposed pleadings setting forth only those claims on which they had been allowed to proceed and identifying all defendants who allegedly committed the acts about which they complained. I advised the plaintiffs that when I received their amend pleadings, I would review them to insure they were limited to the claims on which each had been granted leave to proceed. I advised the plaintiffs that if they were still unable to identify the defendants they described as Doe defendants almost two years ago when the original complaint was filed, I would dismiss the claims for which no defendant had been identified.

On April 12, 2004, plaintiff Jeff Dake filed a notice of appeal and a motion to stay proceedings pending appeal. In addition, he submitted a letter to this court noting that the court ordered "in part" that each plaintiff identify the defendants who allegedly committed the acts about which they complained. Dake then lists by number or alphabetical letters the names of 86 Doe defendants.

I turn first to plaintiff Dake's notice of appeal. Ordinarily, a decision is not appealable unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Coopers & Lybrand v. Livesay, 473 U.S. 463, 467 (1978). The March 15 decision in this case did not end the litigation on its merits. The order dismissed as without legal merit one of plaintiffs' claims and separated plaintiffs' remaining claims into individual lawsuits that may be litigated to completion. Plaintiff Dake may file a notice of appeal from the March 15 only if I modify the order to include a finding that the order is

appealable pursuant to 28 U.S.C. § 1292. For that reason, I construe plaintiff'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. The motion to modify 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.

There is not a substantial ground for a difference of opinion on the question whether it was an abuse of the court's discretion to sever plaintiffs' claims under the circumstances of this case. Moreover, an immediate appeal will not materially advance the ultimate termination of this litigation, whether plaintiff is challenging the decision to sever or the decision to dismiss one of plaintiffs' claims on its merits or both. An appeal at this time will serve only to delay resolution of the action.

Because I am denying plaintiff's motion to modify the March 15 order § 1292 to include a finding that it is appealable under § 1292, plaintiff's motion for a stay of proceedings pending an appeal will be denied as moot.

With respect to plaintiff's attempt to name the Doe defendants relating to his claims, the majority of the 86 Does listed by plaintiff are no longer a party to this lawsuit. When

the case was transferred to this district, only Does 1, 34, 35, 36, 37, 39, 82, 84, A, D and E remained. Plaintiff Dake identifies Doe #1 as "Kusmaul," Doe 34 as "Esser" and Doe 35 as "Fostburge." He indicates he does not know the name of Doe 36. He identifies Doe 37 as "Blackburn," Doe 39 as "Mailroom," Doe 82 as "Jantzon," Doe 84 as "T. Haines," and Does A, D and E as "S. Olson," "K. Melby" and "Becky Manning," respectively. However, most of these Does have nothing to do with plaintiff's claims. Doe defendants 1, 34 and 35 are alleged to have retaliated against Jonathan Cole. Does 36 and 37 are alleged to have enforced a policy that resulted in Louis Nieves's being denied a rosary. Doe 82 is alleged to have implemented a policy that suppressed Cole's First Amendment free speech rights and to have kicked on Cole's and Edward Youngblood's cell doors at night. Doe 84 is alleged to have interfered with Cole's right of access to the courts. Doe D is alleged to have disclosed Cole's medical records. Does A, D and E are alleged to have denied Nieves medical care.

Dake does not explain how any of these Does have a connection to the claims on which he has been allowed to proceed. Indeed, his submission contains no allegations of fact forming the basis for the claims on which he was granted leave to proceed. The March 15 order made it clear to plaintiff that he would need to submit no later than April 9, 2004, an amended pleading setting out his claims against the defendants. As noted above, this requirement was imposed to insure that he understood and consented to the claims that were raised on his behalf in the group complaint. Plaintiff's failure to submit such a pleading

suggests that he has not been involved in any meaningful way with litigating the group complaint and that he is not prepared to prosecute his own claims in a severed lawsuit.

ORDER

IT IS ORDERED that

1. Plaintiff's motion to modify the March 15, 2004 order to include a finding that the order is appealable under 28 U.S.C. § 1292 is DENIED.

2. Plaintiff's motion for a stay pending appeal is DENIED as moot.

3. This case is DISMISSED without prejudice to plaintiff Jeff Dake's filing a new complaint at some future time.

Entered this 19th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge