

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

EARL RICHARDSON,

Plaintiff,

:

Case No. 3:10-cv-028

- vs -

Magistrate Judge Michael R. Merz

DAYTON PUBLIC SCHOOLS, et al.,

Defendant.

:

**DECISION AND ORDER; CERTIFICATE TO THE COURT OF
APPEALS**

This case is before the Court on Plaintiff's Motion for Pauper Status (Doc. No. 57). Upon unanimous consent of the parties, this case was previously referred to the Magistrate Judge under 28 U.S.C. § 636(c)(Doc. No. 18).

Plaintiff filed a Notice of Appeal in this case on September 26, 2013, purporting to appeal from "the final judgment entered in this action on July 15, 2013." (Notice, Doc. No. 54, PageID 398). Because the Notice was not accompanied by the required filing fee of \$455.00, this Court entered a Deficiency Order requiring Plaintiff to pay the fee or file a motion to proceed *in forma pauperis* in the Sixth Circuit by October 15, 2013 (Order, Doc. No. 55). Instead of doing that, Plaintiff filed a Motion to Withdraw Notice of Appeal (Doc. No. 56). Interpreting this Motion as evincing an intent not to appeal, the Court granted it (Notation Order docketed October 9, 2013).

Now Plaintiff has filed the instant Motion for Pauper Status which clearly evinces an intention to proceed with the appeal. Although the document is captioned as if it were being filed in the Sixth Circuit, it was actually filed in this Court. Since the Plaintiff plainly intends to proceed with an appeal, the Notation Order (docketed October 9, 2013) granting his Motion to Withdraw Notice of Appeal is VACATED. It appears to the Court that Plaintiff, who is proceeding *pro se*, was confused about when to file the Notice of Appeal relative to the consideration of *in forma pauperis* status.

Final judgment in this case was entered May 11, 2010 (Doc. Nos. 23, 24). Plaintiff appealed and this Court certified to the Sixth Circuit that the appeal was objectively frivolous (Doc. No. 31). The Sixth Circuit affirmed dismissal on December 13, 2011 (copy at Doc. No. 41). The United States Supreme Court denied a petition for writ of certiorari on May 21, 2012 (See letter at Doc. No. 48). On July 12, 2013, Plaintiff moved to reopen the case (Doc. No. 49) on the basis of newly-discovered evidence which was really evidence that came into existence after judgment, to wit, a certificate from Plaintiff's cardiologist regarding his illnesses and their relationship to his work. The Court denied the Motion (Doc. No. 50) and also denied Plaintiff's Motion for Reconsideration (Doc. No. 52).

Plaintiff's Notice of Appeal (Doc. No. 54) was filed on September 26, 2013, and purports to be an appeal from the July 15, 2013, decision denying reopening. Even assuming the appeal time was tolled by the Motion for Reconsideration (i.e., that it is deemed to be a motion to amend the judgment under Fed. R. Civ. P. 59(e)), the Notice of Appeals is still untimely, since the thirtieth day after the decision on the Motion for Reconsideration was September 15, 2013.

The Sixth Circuit Court of Appeals requires that all district courts in the Circuit determine, in all cases where the appellant seeks to proceed *in forma pauperis*, whether the

appeal is frivolous. *Floyd v. United States Postal Service*, 105 F.3d 274 (6th Cir. 1997). 28

U.S.C. § 1915(a)(3) provides that “[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.”

Plaintiff was granted leave to proceed *in forma pauperis* in this Court, but that determination is not conclusive, since the appeal involves a separate proceeding. *Slack v. McDaniel*, 529 U.S. 473 (2000); *Spruill v. Temple Baptist Church*, 141 F.2d 137, 138 (D.C. Cir. 1944). If the party was permitted to proceed *in forma pauperis* in the district court, the party may proceed on appeal *in forma pauperis* without further authorization unless the district court certifies in writing that an appeal would not be taken in good faith, or the party is not otherwise entitled to proceed as a pauper. See Fed. R.App. P. 24(a)(3). If the district court denies the individual leave to proceed *in forma pauperis* on appeal, the party may file, within thirty days after service of the district court's decision as prescribed for by Fed. R.App. P. 24(a)(4), a motion with the Court of Appeals for leave to proceed as a pauper on appeal. The party's motion must include a copy of the affidavit filed in the district court and the district court's statement as to its reasons for denying pauper status on appeal. See Fed. R.App. P. 24(a)(5). *Callihan v. Schneider*, 178 F.3d 800, 803 (6th Cir. 1999), holding *Floyd v. United States Postal Service*, 105 F.3d 274 (6th Cir. 1997), superseded in part by 1998 amendments to Fed. R.App. P. 24.

The test under § 1915(a) for whether an appeal is taken in good faith is whether the litigant seeks appellate review of any issue not frivolous. *Coppedge v. United States*, 369 U.S. 438 (1962). Thus an appellant's good faith subjective motivation for appealing is not relevant, but rather whether, objectively speaking, there is any non-frivolous issue to be litigated on appeal. This test will often be difficult to apply in any conclusive manner at the district court level because only a bare notice of appeal is before the District Court; it will often be unable to

evaluate the issues appellant intends to raise on appeal because the appellant has no occasion to reveal those issues in a notice of appeal.

In certifying that Plaintiff's prior appeal was not taken in objective good faith, the Magistrate Judge noted that the dismissal at that point in time was based on "straightforward applications on well-established law: failure to exhaust administrative remedies and obtain a right to sue letter, failure to file within the statute of limitations, and suit against individuals who are not employers within the meaning of federal law for the purpose for which they were sued." (Certificate of Frivolousness and Deficiency Order, Doc. No. 31, PageID 147.) None of those considerations have changed. In addition, Plaintiff has not given any reasons why the Court's decision on his Motion for Relief from Judgment is erroneous.

The Court has no doubt of Mr. Richardson's sincerity or his poverty status. Furthermore, his described illnesses are serious and his cardiologist is a doctor of excellent reputation in the Dayton, Ohio, area. However, as a matter of law he has no objective good faith basis for the current appeal.

Mr. Richardson is urged to file his application for *in forma pauperis* status with the Sixth Circuit Court of Appeals in Cincinnati as promptly as possible. Filing with the Clerk of this Court is not a substitute for filing with the Clerk of that Court. The address is Potter Stewart United States Courthouse, Fifth and Walnut Streets, Cincinnati, Ohio 45401.

November 4, 2013.

s/ *Michael R. Merz*
United States Magistrate Judge