

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BERNARD JONES,

Plaintiff,

v.

JAMES MILLER,

Defendant.

Case No. 07-14881

Bernard A. Friedman
United States District Judge

Michael Hluchaniuk
United States Magistrate Judge

**ORDER ON MOTION FOR CERTIFICATE
OF APPEALABILITY (DKT. 21)**

Plaintiff filed his complaint in this matter on October 24, 2007, in the Western District of Michigan, alleging that defendant, a prison guard employed by the Michigan Department of Corrections, had violated his Constitutional rights. The case was transferred to the Eastern District of Michigan by order dated November 7, 2007. Defendant filed a motion for summary judgment on May 9, 2008. (Dkt. 13). Plaintiff responded to the motion on May 27, 2008. (Dkt. 15).

On February 11, 2009, the undersigned recommended that defendant's motion for summary judgment be granted. (Dkt. 16). Plaintiff filed timely objections to the report and recommendation, which were filed on February 25, 2009. (Dkt. 17). Judge Friedman considered plaintiff's objections, but overruled

them, adopted the report and recommendation as the determination of the court, and entered summary judgment in favor of defendant on February 27, 2009. (Dkt. 18). On March 30, 2009, plaintiff filed a motion for certificate of appealability. (Dkt. 21). On April 1, 2009, Judge Friedman referred the motion for certificate of appealability to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A) for hearing and determination. (Dkt. 25).

A certificate of appealability in the context of a prisoner civil rights suit is a certification by the trial court that the appeal is taken in good faith. 28 U.S.C. § 1915(a)(3). An appeal is taken in good faith if it is demonstrated that there is a reasoned, nonfrivolous argument based on the law and facts in support of the issues raised on appeal. The standard is an objective one. *Coppedge v. United States*, 369 U.S. 438, 445 (1962); *see also DeBardleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991); *Taylor v Luttrell*, 2008 WL 4065927 (W.D. Tenn. 2008).

Plaintiff's motion for certificate of appealability suggests that the issues that he would raise on appeal relate to (1) the claim that he was engaged in protected conduct contrary to the determination of the district court, (2) that the misconduct hearings were not conducted properly, and (3) that the standards of *Saucier v Katz*, 533 U.S. 194 (2001) are not applicable to his case. For the reasons stated in the recommendation to grant defendant's motion for summary judgment, it is

determined that no reasoned, nonfrivolous arguments exist, which plaintiff intends to make on appeal, when those issues are viewed objectively. With respect to the issue regarding *Saucier* and its applicability to plaintiff's case, the report and recommendation noted *Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808 (2009) and its impact on the *Saucier* case. Plaintiff has not demonstrated that incorrect legal standards were applied to his case in the district court.

It is, therefore, certified, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by plaintiff would not be in good faith.

IT IS SO ORDERED.

The parties to this action may object to and seek review of this Order, but are required to file any objections within 10 days of service as provided for in 28 U.S.C. § 636(b)(1) and Local Rule 72.1(d)(2). A party may not thereafter assign as error any defect in this Order to which timely objection was not made.

Fed.R.Civ.P. 72(a). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Date: May 11, 2009

s/Michael Hluchaniuk
Michael Hluchaniuk
United States Magistrate Judge

CERTIFICATE OF SERVICE

I certify that on May 11, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send electronic notification to the following: Scott R. Rothermel, and I certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: Bernard Jones, # 292243, SAGINAW CORRECTIONAL FACILITY, 9625 Pierce Road, Freeland, MI 48623.

s/Tammy Hallwood _____
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