

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

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NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

GARY R. McCAUGHTRY,

Defendant.  
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ORDER

01-C-209-C

Plaintiff has filed a notice of appeal from the judgment entered in this case on October 8, 2003 and the subsequent order denying his Rule 59 motion. He has requested leave to proceed on appeal in forma pauperis.

In an order dated November 24, 2003, I concluded that plaintiff did not have three strikes against him under 28 U.S.C. § 1915(g) and that I would not certify plaintiff's appeal as having been taken in bad faith. Now plaintiff has submitted a trust fund account statement for the six-month period immediately preceding the filing of his notice of appeal. From the statement, I have calculated an initial partial payment of the \$255 filing fee according to the formula set out in § 1915(b)(1). The amount of the initial partial payment

is \$9.39. I realize that this assessment is higher than it would have been had plaintiff not had a one-time deposit of \$237.32 on June 26, 2003, and that it is more than double the average monthly income of \$4.39 that plaintiff has earned since June 26. Nevertheless, I have no authority to reduce or waive the initial partial payment or alter the statutory requirement that it be calculated according to the formula set out in § 1915(b)(1).

It may be that plaintiff believes that because prison officials took all of the \$237.32 deposit and are presently taking 100% of his monthly income to pay off the filing fees he owes for this and four other cases, he should be allowed to proceed in forma pauperis on his appeal without paying an initial partial payment. 28 U.S.C. § 1915(b)(4) provides that

In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

In Newlin v. Helman, 123 F.3d 429, 435 (7th Cir. 1997), overruled in part on other grounds by Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000), Judge Easterbrook criticized a district court for failing to collect an initial partial payment from a prisoner who had no assets or funds on hand at the time he filed his complaint, but who received a monthly income from prison employment. According to Newlin,

It is not enough that the prisoner lack assets on the date he files. If that were so, then a prisoner could squander his trust account and avoid the fee. Section 1915(b)(4) comes into play only when "the prisoner has no assets and no means by which to pay the initial partial filing fee." A prisoner with periodic income has "means" even when he lacks "assets."

Id. I can discern no difference between plaintiff, who has chosen to spend 100% of his income on lawsuits, and an inmate who chooses to dispose of 100% of his income on

canteen items shortly before filing a new lawsuit or appeal. He may be without assets from which to draw a new partial payment, but he does not lack “means” with which to pay it. Therefore, I conclude that I have no authority under § 1915(b)(4) to waive plaintiff’s payment of an initial partial payment of the fee for filing his appeal.

ORDER

IT IS ORDERED that plaintiff’s request for leave to proceed in forma pauperis on appeal is GRANTED conditionally. Plaintiff may proceed in forma pauperis on appeal on payment of an initial partial payment of the \$255 filing fee in the amount of \$9.39. If, by March 5, 2004, plaintiff fails to pay the initial partial payment, I will advise the court of appeals of this fact so that it may take whatever action it deems appropriate with respect to plaintiff’s appeal.

Entered this 23rd day of January, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge