

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

DENNIS EARL BARNES,

Plaintiff,

v.

WILLIAM J. BLACK and
METROPOLITAN PROPERTY AND
CASUALTY INSURANCE,

Defendants.

MEMORANDUM

03-C-703-C

When plaintiff failed to submit a trust fund account statement for the six month period immediately preceding the filing of his notice of appeal, I entered an order on July 27, 2004, denying his request for leave to proceed on appeal in forma pauperis on the ground that he had failed to show that he is entitled to indigent status on appeal. Now plaintiff has submitted the trust fund account statement required by 28 U.S.C. § 1915(a)(2). In addition, plaintiff has written an explanation for the statement's late delivery and asked for reconsideration of the July 27 order.

Plaintiff is presently confined at the Dodge Correctional Institution in Waupun, Wisconsin. However, for the six-month period immediately preceding June 17, 2004, the

day he filed his appeal, plaintiff was confined at the Sauk County jail. According to plaintiff, immediately after the court asked him to submit his trust fund account statement, he wrote to the Sauk County jail to request a print out. On June 25, 2004, the Sauk County Sheriff's Office sent plaintiff a copy of a letter addressed to this court, noting that plaintiff's inmate trust fund account statement was enclosed. For obvious reasons, plaintiff assumed that this court had received the original of the letter and the attached statement directly from the Sauk County Sheriff's Office. In support of his motion for reconsideration, plaintiff has attached his copy of the Sauk County Sheriff's Office letter and trust fund account statement.

I have confirmed that the original copy of the Sauk County Sheriff's Office letter is nowhere to be found in the court's record of this case. Plaintiff appears to have a meritorious argument for reconsidering the denial of his request for leave to proceed in forma pauperis on appeal. However, it is unclear whether this court has jurisdiction to grant plaintiff's motion for reconsideration.

Ordinarily, once a district court denies a plaintiff leave to proceed in forma pauperis on appeal, the plaintiff has 30 days from the date of service of the district court's order in which to file a motion to proceed on appeal in forma pauperis directly in the court of appeals. Fed. R. App. P. 24(a)(5). The motion is to be accompanied by the district court's statement of reasons for its action (the July 27 order) and the affidavit prescribed by Fed.

R. App. P. 24(a)(1). I believe instead of moving for reconsideration plaintiff should file a motion for leave to proceed on appeal in forma pauperis in the court of appeals.

If plaintiff files his motion with the court of appeals, that court may determine that this court erred in concluding that plaintiff's failure to submit a trust fund account statement constitutes a failure to show that he is financially eligible to proceed in forma pauperis on appeal. Cf. Sperow v. Melvin, 153 F.3d 780 (1998) (district court lacks authority to deny in forma pauperis status on appeal for prisoner's failure to pay partial filing fee for appeal). Even if the court of appeals were to agree that this court has authority under 28 U.S.C. § 1915 to deny a request for leave to proceed in forma pauperis on appeal when a plaintiff fails to file the trust fund account statement required by § 1915(a)(2), it may well be that the court of appeals would be receptive to plaintiff's explanation of his failure to file the statement and would grant his request for leave to proceed in forma pauperis on appeal. In this regard, I note that there would be no need for the court of appeals to refer the case back to this court for assessment of an initial partial payment of the fee for filing the appeal. Plaintiff's statement reveals that between January 16 and June 16, 2004, he had only one \$10 deposit made to his account and that deposit occurred on February 28, 2004. He has had no other income since that date. Thus, this court would have to find that he has no

means within the meaning of 28 U.S.C. § 1915(b)(4) with which to pay an initial partial payment of the fee for filing his appeal.

Entered this 30th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge