

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

MARVIN A. JOHNSON,

Petitioner,

v.

JIM GENTILE, T. WALSH,
C/O ZIEMANN, sued in their
individual capacities, and
DAREN SWENSON, sued in his
individual and official capacity,

Respondents.

ORDER

04-C-257-C

In an order dated April 30, 2004, I assessed petitioner Marvin A. Johnson an initial partial payment of the \$150 fee for filing this action in the amount of \$52.73. Petitioner was to pay this assessment no later than May 21, 2004. Now petitioner has written to request that “all fees” be waived because he is an “out-of-state inmate at an out-of-state facility with no substantial income, property or assets.” He suggests that waiver of the fees is authorized by case law, State v. Gudmanson, 610 N.W. 2d 136 (Wis. App. 2000) and Wis. Stat. § 801.02(7)(a)(2).

Because petitioner filed his complaint in federal court, it is federal law, not state law,

that governs his request for leave to proceed in forma pauperis. The federal law, 28 U.S.C. § 1915, requires that unless a petitioner is without any assets or “means” to pay the initial partial payment, he must make an initial partial payment that is the greater of two amounts, 20% of his monthly income or 20% of the monthly balance in his prison account. That petitioner does not at this moment have \$52.73 in his prison account does not automatically relieve him of the obligation to pay the assessed amount. Although he may lack assets, he has the “means” to pay so long as he is receiving periodic income. Newlin v. Helman, 123 F.3d 429, 435 (7th Cir. 1997), rev'd on other grounds, Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000) and Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000).

Petitioner asserts in his motion that he is without “substantial” income. He does not suggest that he receives *no* income. If he were to make such an assertion, he would have to do so in a sworn statement that is backed up by a certified copy of his trust fund account statement showing that he no longer receives periodic deposits to his account.

Because I understand from petitioner’s motion that he does not presently have \$52.73 in his inmate account, I will extend the time within which petitioner is required to submit the initial partial payment, which will allow him time to accumulate the required sum. Petitioner is reminded that once he has paid the initial partial payment, he will have to pay the remainder of the \$150 filing fee in monthly installments as § 1915(b)(2) provides. Because the payment provisions are statutory, this court has no authority to “waive” the fee

as petitioner asks.

ORDER

IT IS ORDERED that petitioner's motion for waiver of all fees in this action is DENIED.

Further, IT IS ORDERED that petitioner may have until June 20, 2004, in which to submit a check or money order made payable to the clerk of court in the amount of \$52.73. If, by June 20, 2004, petitioner fails to pay the initial partial payment or show cause for his failure to do so, he will be held to have withdrawn this action voluntarily. In that event, the clerk of court is directed to close this file without prejudice to petitioner's filing his case at a later date.

Entered this 12th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge