

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

GARY B. CAMPBELL,

Plaintiff,

v.

CAPTAIN NYKLEWICK and
CAPTAIN PARADISE,

Defendants.

ORDER

05-C-481-C

In an order dated April 5, 2006, I invited defendants Nyklewick and Paradise to file a motion for sanctions against plaintiff Gary Campbell after they submitted a copy of a report from a jail officer at the Milwaukee County jail which suggested that plaintiff might be having money intended for him deposited into the account of another inmate to avoid paying filing fees he owes on several lawsuits he has filed in this court. Now defendants have filed a motion for sanctions seeking dismissal of this case with prejudice and recovery of costs and attorney fees. Plaintiff has filed a response. Defendants' evidence indicates that plaintiff attempted to avoid making monthly payments required under the Prison Litigation Reform Act. Plaintiff's attempt to meet defendant's evidence is wholly unpersuasive. A

sanction of dismissal with prejudice is appropriate in light of plaintiff's conduct and necessary to deter him and other prisoner litigants from attempting to defraud the government. Therefore, I will grant defendants' motion and dismiss this case with prejudice.

A. Background

Recently, in another case filed by plaintiff, I listed all of the filing fees plaintiff owes this court. By way of review, plaintiff owes 1) \$79.56 for filing a complaint in Campbell v. Nyklewick, 05-C-481-C; 2) \$644.59 for filing a complaint and two appeals in Campbell v. Johnson, 04-C-661-C; 3) \$227.46 for filing a complaint and appeal in Campbell v. Doll, 02-C-255-C; and 4) \$181.93 for filing a complaint and appeal in Campbell v. Toney, 01-C-524-C. Now defendants allege that plaintiff has diverted money on at least one occasion from his prison account to avoid making monthly payments on these balances as required under 28 U.S.C. § 1915(b)(2).

Defendants support their allegation of diversion with an affidavit of Kyle Baus, who was working as a correctional officer in pod 5A at the Milwaukee County jail on February 13, 2006. On that day, plaintiff was housed in cell #16 in pod 5A. Baus avers that around 4:00 p.m. on February 13, plaintiff told him that he needed to use the telephone. Baus asked plaintiff why he needed to use the telephone and plaintiff responded that he was having money deposited into the account of Dion Spychala, another inmate at the jail.

Plaintiff admitted that the reason he was having money deposited in Spsychala's account was to avoid paying the filing fees he owed. With the money intended for him in Spsychala's account, plaintiff could order commissary items through Spsychala while his own account continued to show a low or negative balance. Because Spsychala had been transferred to another pod earlier on February 13, plaintiff would not be able to order commissary items through him. Therefore, he wanted to use the telephone to stop a deposit into Spsychala's account scheduled to occur that day. Baus told plaintiff that he would not be allowed to use the telephone for this purpose and completed an incident report describing the conversation he had with plaintiff. Baus attached the incident report to his affidavit.

In response to defendant's motion, plaintiff has filed a brief in opposition along with several affidavits.¹ In his affidavit, plaintiff denies that he told officer Baus that he was having money deposited in another inmate's account to avoid paying filing fees. Moreover, plaintiff denies that he asked officer Baus to use the telephone on February 13, 2006. In

¹Plaintiff submitted a letter dated April 27, 2006 in which he states that his opposition brief and affidavits were destroyed by "defendants and/or their co-conspirator(s)." According to the letter, plaintiff gave a jail officer his documents in an envelope to be mailed out on April 21, 2006. On April 25, plaintiff asked his public defender to call the clerk of court and ask whether plaintiff's papers had been received because plaintiff had learned that the jail's mail log did not indicate that his documents had been mailed. Plaintiff states that his mail had not been received by the clerk's office as of April 27, 2006. Whatever the cause for the delay, plaintiff's mail was received by the clerk and file stamped on May 1, 2006. I have considered all of the documents he filed in ruling on defendant's motion.

addition to his own affidavit, plaintiff has submitted affidavits from Sheffield Groves and Leonard McGhee, two other inmates at the jail who were detained in Pod 5A on February 13, 2006. In their affidavits, Groves and McGhee state that they did not see officer Baus stop to talk with plaintiff or any other inmate while he was making his rounds that day. McGhee states that he attempted to get Baus's attention when Baus walked past McGhee's cell but that Baus told him that he did not have time to talk.

In reply, defendants have submitted an affidavit from William Lethlean, an accountant in the Milwaukee County Sheriff's Department. Attached to the affidavit are records for the jail accounts of plaintiff and inmate Spychala. Spychala's account statement indicates that a "window deposit" in the amount of \$20.00 was made to his account on February 13, 2006. According to Lethlean, a "window deposit" is one made by someone who is not an inmate. The person who makes the deposit must sign a receipt which is kept in the jail's records. Lethlean has provided copies of receipts for the February 13, 2006 deposit to Spychala's account and a July 23, 2005 window deposit made to plaintiff's account. The same signature appears on both receipts. It appears to be that of Ashley Pittman, plaintiff's girlfriend. Plaintiff's jail account statement, which covers the period from February 16, 2005 to April 21, 2006, does not show any withdrawals made to pay plaintiff's filing fees in this court. However, the balance in plaintiff's account was near or above one thousand dollars from February 16, 2005 until April 22, 2005. For much of the

time between April 22, 2005 to November 2005, plaintiff's balance was more than \$10.00. Finally, plaintiff's account statement shows withdrawals of \$1,000.00 on March 5, 2005 and \$650.00 on April 22, 2005 to cover third party checks from plaintiff to Ashley Pittman.

B. Discussion

The Prison Litigation Reform Act relieves indigent litigants of the obligation to prepay filing fees when commencing civil actions or appeals. With respect to indigent prisoners, the statute requires them to make an initial partial payment if they possess the necessary funds and to pay the rest of the filing fee in "monthly payments of 20 percent of the preceding month's income credited to the prisoner's account." 28 U.S.C. § 1915(b)(1)-(2). However, § 1915 provides that monthly payments are to be made to the clerk of court only when a prisoner's account balance exceeds \$10.00. Prisoners, not prison officials, bear ultimate responsibility for monitoring their prison accounts so that monthly payments are made when appropriate. Lucien v. DeTella, 141 F.3d 773, 776 (7th Cir. 1998) ("If in a given month the prison fails to make the required distribution from the trust account, the prisoner should notice this and refrain from spending the funds on personal items until they can be applied properly."). "[W]hen a prisoner has sufficient income to pay a monthly partial filing fee and instead spends his money on amenities at the prison canteen, he cannot be excused for failing to make the required partial payments." Cosby v. Meadors, 351 F.3d

1324, 1327 (10th Cir. 2003).

Defendants argue that the evidence indicates that plaintiff has conspired with another inmate to maintain a low or negative balance in his prison account to avoid paying filing fees. By having money deposited in Spychala's account, plaintiff is able to purchase commissary items and avoid his financial obligations to this court. Plaintiff has represented to the court in this and other cases that he is indigent and has been allowed to proceed in forma pauperis. Defendants argue that his representations of indigency were fraudulent, that plaintiff has abused the judicial process and that dismissal of his case with prejudice is an appropriate sanction for his misconduct.

Plaintiff's arguments to the contrary are unpersuasive. First, he argues without explanation that Baus's affidavit is "self-serving." However, Baus's statement is not self-serving merely because it is favorable to defendants. As defendants note, Baus is not a defendant or a potential defendant in this case; plaintiff has not identified any motive Baus might have to fabricate evidence against him. This distinguishes the present case from two cases cited by plaintiff, Bracey v. Herring, 466 F.2d 702 (7th Cir. 1972) (error for district court to dismiss prisoner's excessive force claim on basis of conduct reports written by defendants and other guards potentially subject to liability), and Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1942), aff'd, 318 U.S. 109 (1943) (accident report prepared by train engineer inadmissible because it was "dripping with motivations to misrepresent").

Moreover, officer Baus's recollection of plaintiff's statement is corroborated by other evidence, specifically the \$20.00 window deposit to Spsychala's account made by plaintiff's girlfriend on February 13, 2006. Plaintiff has not explained why his girlfriend deposited \$20.00 into Spsychala's account on February 13.

I agree with defendants that the evidence indicates that plaintiff has arranged with Spsychala to have money intended for plaintiff deposited in Spsychala's account. As a result, plaintiff is able to use money that should be going to pay his filing fees to order items from the jail's commissary. At the same time, plaintiff's account has maintained a negative balance since November 2005, which prevents any monthly payments from being made to the court. Plaintiff has engineered his prison account to insure that no money is taken from him to pay his debts under the PLRA. He has created an illusion of destitution to avoid his obligations to this court. Finally, plaintiff's account statement shows that he did not meet his obligation under the Prison Litigation Reform Act to insure that monthly payments were made on the balances he owes this court when his account had a balance of hundreds or thousands of dollars.

The only question remaining is what is an appropriate sanction. At least two courts of appeals have held that dismissal with prejudice is an appropriate sanction when a litigant submits a false affidavit of indigency in support of a request for leave to proceed in forma pauperis. Thomas v. General Motors Acceptance Corp., 288 F.3d 305, 306-07 (7th Cir.

2002) (“Dismissal with prejudice may have been the only feasible sanction for this perjury designed to defraud the government.”); Matthews v. Gaither, 902 F.2d 877, 880 (11th Cir. 1990) (“This court has held that dismissal with prejudice is an appropriate sanction in cases involving a bad-faith misstatement of assets.”). In Cosby, 351 F.3d 1324, the Court of Appeals for the Tenth Circuit held that a district court did not abuse its discretion in dismissing a prisoner’s lawsuit after the prisoner failed repeatedly to make monthly payments, choosing instead to spend the money deposited into his account on discretionary items.

I believe that dismissal with prejudice is an appropriate sanction in this case. It will punish plaintiff for his attempts to evade his obligations to this court. Also, it will serve as a deterrent to plaintiff and other prisoners who contemplate engaging in similar behavior. As the prevailing party, defendants are entitled to recover their costs, which they may submit in the form of a bill of costs to the clerk of court. However, I decline to award them attorney fees. Defendants have not identified any authority for awarding attorney fees in this situation and I believe that dismissal of plaintiff’s case with prejudice is a severe enough sanction.

ORDER

IT IS ORDERED that:

1. Defendants' motion for sanctions is GRANTED;
2. This case is DISMISSED with prejudice for plaintiff's attempt to perpetrate a fraud upon this court;
3. Defendants' request for attorney fees is DENIED; and
4. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 9th day of May, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge