

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

NATE A. LINDELL,

Petitioner,

v.

MATTHEW FRANK, STEVEN CASPERSON,
RICHARD SCHNEITER, PETER HUIBREGTSE,
RICHARD RAEMISCH, TOM GOZINISKE,
LT. TODD BRUDOS, LT. ___ BOISEN, JOHN RAY,
KELLY TRUMM, ELLEN RAY, SGT. JUDITH
HUIBREGTSE, K.J. (A/K/A JANE DOE),
C.O.'S MICHAEL SHERMAN and SHANNON,

Respondents.

ORDER

07-C-484-C

Petitioner Nate A. Lindell, a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has submitted a proposed complaint. He asks for leave to proceed in forma pauperis. Because petitioner is a prisoner, he is subject to the 1996 Prisoner Litigation Reform Act. This means that before this court may decide whether he can proceed with his complaint in forma pauperis, petitioner will have to make an initial partial payment of the filing fee in the amount of \$1.50 and the remainder of the fee in monthly installments even if his request for leave to proceed is denied.

I note that in an affidavit in support of his request to proceed in forma pauperis, petitioner states that he is “completely indigent” and has no funds, no assets, and no resources to pay a filing fee. He points out that any money he receives is automatically seized and used to pay costs he has incurred in connection with other litigation in federal court. He states that he does not earn a prison wage and does not expect “any incoming funds.”

Under §1915(b)(4), a prisoner may not be prohibited from bringing a lawsuit if “the prisoner has no assets and no means by which to pay the initial partial filing fee.” Petitioner may think that he falls into the category of prisoners who have “no means” to make an initial partial payment, but controlling authority holds otherwise. Petitioner’s immediate lack of income is not sufficient by itself to allow me to conclude that he lacks the means to pay the initial partial payment pursuant to 28 U.S.C. § 1915(b)(4). In Newlin v. Helman, 123 F.3d at 435, the court of appeals stated,

[I]t 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.”

Further, in measuring periodic income, § 1915 requires courts to look backward in time rather than forward. In other words, in determining whether a prisoner has the means to pay, the court cannot consider representations the prisoner makes about his future income

or lack of it. Rather, the court must look at the prisoner's income from the previous six months. 28 U.S.C. § 1915(a)(2).

In this case, petitioner had two deposits to his account on March 6, 2007, totaling \$4.90, and he received a \$40 deposit to his account on August 20, 2007. From these deposits, I calculated petitioner's initial partial payment as \$1.50. Section 1915 does not grant courts discretion to reduce or waive an initial partial payment, even if the prisoner says he is unable to pay it. Moreover, I am fully cognizant, that each deposit petitioner has received to his account in the past six months was debited against the numerous filing fees he owes in this and other courts. However, initial partial payments assessed under § 1915(b)(1) are to receive priority over petitioner's other debts. Walker v. O'Brien, 216 F.3d 626, 628 (7th Cir. 2000)(initial partial payments are to "come off the top" of all deposits to prisoner's account). Thus, the fact that petitioner owes filing fees for other cases does not prevent him from utilizing a new deposit to make the \$1.50 payment he has been assessed in this case.

It may well be that petitioner will not be able to pay the \$1.50 payment he has been assessed within the time directed below. If that turns out to be the case, I will consider that petitioner has withdrawn this action and he will not owe a filing fee. In that event, if, at some future time, petitioner is able to make an initial partial payment or enough time elapses that a six month trust fund account statement would show that he has no means to

make an initial partial payment, he would be free to file a new lawsuit.

ORDER

IT IS ORDERED that petitioner is assessed \$1.50 as an initial partial payment of the \$350 fee for filing this case. He is to submit a check or money order made payable to the clerk of court in the amount of \$1.50 on or before September 20, 2007. If, by September 20, 2007, petitioner fails to make the initial partial payment, 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 30th day of August, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge