

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

CORNELIUS R. MADDOX #233092 and
STANLEY FELTON #283330

Petitioners,

ORDER

08-cv-227-slc

v.

WILLIAM POLLARD, PETER ERICKSEN,
HEYLEY HERMANN, LT. SWIEKATOWSKI,
CAPT. MARK LESATZ, CAPT. BRANT,
LIZ LEMERY, KATHLEEN BIERKE, LT.
LAMBRECHT, MICHAEL MOHR, MATTHEW
FRANK, SANDRA HAUTAMAKI, MICHAEL
BAENEN, RICK RAEMISCH and approximately
three (3) JOHN DOES,

Respondents.

This is a joint action brought by petitioners Cornelius Maddox and Stanley Felton, inmates at the Wisconsin Secure Program Facility, alleging violations of their constitutional rights. Each asks for leave to proceed in forma pauperis.

Before I consider petitioners' requests for leave to proceed in this action under the in forma pauperis statute, it is necessary to caution petitioners about the consequences of proceeding in a group complaint and allow them an opportunity to opt out. In Boriboune v. Berge, 391 F.3d 852 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit observed that there are a number of reasons a prisoner might not want to join in a group complaint filed in federal court.

First, although petitioners have joined their claims in one complaint, each is bringing an action subject to the 1996 Prison Litigation Reform Act and each must pay the full \$350 fee for filing the action. Boriboune v. Berge, 381 F.3d at 856. In other words, before this court will screen the complaint, each petitioner will have to pay either a full filing fee if he does not qualify to proceed in forma pauperis, or an initial partial payment of the fee calculated pursuant to the method described in 28 U.S.C. § 1915(b). If an inmate qualifies for payment of an initial partial payment, he will thereafter be responsible for paying the remainder of the full fee in installments pursuant to 28 U.S.C. § 1915(b)(2).

Second, if I conclude when I screen petitioners' complaint that any one claim in the action is frivolous, malicious or fails to state a claim upon which relief may be granted, I will record a strike under 28 U.S.C. § 1915(g) against each petitioner named in the caption of the action. According to the court of appeals, when a prisoner in a group complaint signs the pleading, he attests to the validity of all of the individual claims in the complaint, whether or not they concern him personally. Therefore, he assumes the risk of incurring a strike if any one claim relating to any other petitioner warrants a strike under § 1915(g).

Petitioner Maddox should proceed cautiously with regard to his potential to earn three-strike status. He currently has two strikes in this court and if even one claim in this lawsuit were to be dismissed, he will earn a third strike. Petitioner Maddox has known for some time that he earned his first strike in Hashim v. Berge, 01-cv-314-bbc (decided September 24,

2001).¹ In addition, in light of the decision of the Court of Appeals for the Seventh Circuit in George v. Smith, 507 F.3d 605 (7th Cir. 2007), a second strike must be counted against him. In George, the court ruled that a strike under § 1915(g) is to be recorded against any prisoner who files a complaint in which “*any claim*” in the complaint is determined to be frivolous, malicious or to fail to state a claim upon which relief may be granted. (Emphasis in original.) Thus when this court ruled in Maddox v. Berge, 06-cv-761-bbc (decided February 8, 2007) that petitioner failed to state a claim upon which relief may be granted regarding his claims that respondents violated his Eighth Amendment rights when they denied him education or rehabilitative programs and violated his First Amendment rights when they inspected his outgoing non-legal mail, petitioner earned his second strike. If petitioner Maddox receives a third strike in connection with this lawsuit, he may not ask for leave to proceed in forma pauperis in a new lawsuit unless his complaint alleges facts from which a determination may be made that he is in “imminent danger of serious physical harm.” 28 U.S.C. § 1915(g).

Third, each petitioner will be held legally responsible for knowing precisely what is being filed in the case on his behalf. He will be subject to sanctions under Fed. R. Civ. P. 11 for any pleading, motion or other paper filed over his name if such sanctions are found warranted in any aspect of the case.

Finally, in screening the complaint, the court will consider whether the action of one petitioner should be severed from the action of the other petitioner and, if it decides severance

¹Petitioner Felton was also a plaintiff in this case and incurred a strike. He does not appear to have incurred additional strikes since that time.

is appropriate, the petitioner bringing the severed action will be required to prosecute his claims in a separate lawsuit.

Because petitioners may not have been aware of the consequences of joining their claims in one lawsuit, I will give each an opportunity to withdraw from the suit. If, after considering whether to continue with this lawsuit jointly, petitioners agree so to proceed, I have calculated their initial partial payments as set forth below.

From the trust fund account statement petitioner Felton submitted, I conclude that he must pay \$12.17 as an initial partial payment of the \$350 fee for filing his complaint. If petitioner Felton does not have the money to make the initial partial payment in his regular account, he will have to arrange with prison authorities to pay some or all of the assessment from his release account. This does not mean that petitioner Felton is free to ask prison authorities to pay *all* of his filing fee from his release account. The only amount petitioner Felton must pay at this time is the \$12.17 initial partial payment. Before prison officials take any portion of that amount from petitioner Felton's release account, they may first take from his regular account whatever amount up to the full amount he owes.

Petitioner Maddox's initial partial payment cannot be calculated at this time because the trust fund account statement he submitted with his complaint does not cover the full six-month period immediately preceding the filing of the complaint. Petitioners' complaint was submitted on April 15, 2008. Petitioner Maddox's trust fund account statement should cover the period beginning approximately October 15, 2008 and ending approximately April 15, 2008. Instead, petitioner Maddox has submitted two separate statements; one covering a

six-month period from May 19, 2007 to November 19, 2007 and another statement covering the six-month period from July 23, 2007 to January 23, 2008. Neither of these statements is sufficient because the six-month period immediately preceding the filing of this complaint is only partially covered by the statements petitioner has submitted. If petitioner Maddox submits a trust fund account statement covering the period between January 23, 2008 and April 15, 2008, he will have provided statements covering the full six-month period preceding the filing of the complaint in this case.

ORDER

IT IS ORDERED that

1. Each petitioner may have until May 14, 2008, in which to advise the court whether he wishes to prosecute this action jointly.
2. If petitioners decide to proceed with the action,
 - a. Petitioner Felton may have until May 14, 2008 in which to pay \$12.17 as an initial partial payment of the \$350 fee for filing his complaint. He is to submit his payment by check or money order made payable to the clerk of court.
 - b. Petitioner Maddox may have until May 14, 2008 in which to submit a trust fund account statement that covers the period beginning approximately January 23, 2008 and ending approximately April 15, 2008 so that his initial partial payment can be assessed.

3. Any petitioner who fails to respond to this order by May 14, 2008 or who advises the court that he does not want to remain a party to the complaint, will be considered to have opted out of the joint lawsuit. He will be dismissed from the lawsuit and will not be charged a filing fee.

Entered this 23rd day of April, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge