

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

MATTHEW ALLEN,

Petitioner,

ORDER

v.

08-cv-665-bbc

DEPT. OF CORRECTIONS,
RICK RAEMISCH (Secretary) and
MATT HANEMAN, Agent for
Department of Corrections,

Respondents.

In an order entered in this case on November 18, 2008, this court assessed petitioner a \$5.30 initial partial payment of the \$350 filing fee and gave him until December 9, 2008, in which to make his payment. Now petitioner has submitted a letter explaining that he cannot make the \$5.30 payment because his account has been frozen to pay filing fees to another court. He asks this court to allow him to proceed with this case at the present time and for permission to make his initial partial payment at a later date, after his other court filing fees have been paid. I construe petitioner's letter to be a motion to waive the initial partial payment.

28 U.S.C. § 1915(b)(4), provides that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee." In *Newlin v. Helman*, 123 F.3d 429, 435 (7th Cir. 1977), *rev'd on other grounds by Lee v. Clinton*, 209 F.3d 1025 (7th Cir. 2000) and *Walker v. O'Brien*, 216 F.3d 626 (7th Cir. 2000), the Court of Appeals for the Seventh Circuit held that

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.”

(Emphasis in original.) According to *Newlin*, when a prisoner receives periodic income, deciding how much the prisoner owes and how it will be collected is “determined entirely by the statute and is outside the prisoner’s and the prison’s control.” *Id.* at 436. Section 1915(b)(1) requires that an initial partial payment is to be collected “when funds exist.”

The trust fund account statement petitioner submitted in this case shows that he has means. Since at least May 2, 2008, petitioner has been receiving regular deposits to his account from his employment at the prison. Although the funds were immediately debited to pay for state court filing fees and other debts, under the law established in *Newlin*, it would appear that funds exist in his account.

The Seventh Circuit has not definitively ruled on the question whether jails and prisons may ignore a petitioner’s obligations under the Prison Litigation Reform Act in favor of making payments on debts a prisoner owes to the county, the state or even his victims under a restitution program. However, in *Newlin*, the court of appeals suggested in dicta that prison officials are required by statute to give priority to federal court filing fees. *Id.* at 435-36 (“[initial partial payment] should have been immediate, and its collection should have come off the top of the next deposit of prison wages”). Thus, the fact that petitioner owes filing fees for other cases should not prevent him from making the initial partial payment he has been assessed in this case.

Although I cannot conclude that petitioner meets the requirements for waiver of the initial partial filing fee under §1915(b)(4), this will not prejudice him. A question exists as to whether petitioner has made the business office at the prison aware of the payment he has been assessed in this case. Petitioner has not submitted proof that he sent a disbursement request to the prison business office and that his request was denied by prison officials. To be sure, petitioner should show a copy of this order to prison officials in order to insure that they are aware they should send petitioner's initial partial payment to this court.

For the reasons discussed above, I will deny petitioner's motion to waive the initial partial payment. However, because it is possible that petitioner will be able to make the payment with a modest extension of the deadline, I am willing to allow him an additional 21 days time to pay the initial partial filing fee. If, however, by January 1, 2009, petitioner is unable to make the \$5.30 payment, it may be necessary to request that the warden of the Jackson Correctional Institution look into the matter and advise this court, in writing, of the status of petitioner's request for withdrawal of the initial partial payment in this case.

ORDER

IT IS ORDERED that

1. Petitioner's motion to waive the initial partial payment in this case (dkt. #5) is
DENIED.

2. Petitioner may have an enlargement of time to January 1, 2009, in which to submit a check or money order payable to the clerk of court in the amount of \$5.30.

Entered this 10th day of December, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge