

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

WILLIE C. SIMPSON,

Plaintiff,

v.

CYNTHIA THORPE and DR. COX,

Defendants.

ORDER

09-cv-532-bbc

In an order entered on April 15, 2011, I assessed plaintiff Willie Simpson an initial partial payment of the appeal filing fee in the amount of \$3.32 and gave him until May 6, 2011, in which to submit his payment. Now plaintiff has filed a motion to proceed without prepayment of the initial partial appeal filing fee pursuant to 28 U.S.C. § 1915(b)(4).

In his motion, plaintiff says that he does not have any assets in his general prison account or in his release account. In addition, plaintiff has submitted a trust account statement for the one week period of April 12, 2011 to April 18, 2011 showing that he has a zero balance in his regular account.

Under §1915(b)(4), a prisoner may not be prohibited from bringing a civil action or appealing a civil or criminal judgment if “the prisoner has no assets and no means by which

to pay the initial partial filing fee.” Plaintiff 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. 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.”

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, I was able to calculate plaintiff’s initial partial appeal payment based on trust fund account information he provided on April 13, 2011. This statement showed that for the six-month period immediately preceding the filing of his appeal, plaintiff received deposits into his account. Under the holding of Newlin, plaintiff will not be eligible for waiver of the initial partial payment under § 1915(b)(4) unless he submits a six-month trust fund account statement revealing an absence of periodic income for the full six-month period. However, initial partial payments assessed under § 1915(b)(1) are to receive priority over plaintiff’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). It may well be that plaintiff will be able to pay the initial partial payment he has been assessed from the next deposit to his account. Therefore, I am willing to allow him an extension of 30 days in which to pay the initial partial appeal filing fee. If, however, by June 10, 2011, plaintiff is unable to pay the initial partial appeal payment, then I will advise the court of appeals of his noncompliance in paying the assessment so that it may take whatever steps it deems appropriate with respect to this appeal.

ORDER

IT IS ORDERED that plaintiff’s motion to waive the \$3.32 initial partial payment of the \$455 appeal filing fee, dkt. #131 is DENIED.

Further, IT IS ORDERED that plaintiff may have an enlargement of time to June 10, 2011, in which to submit a check or money order made payable to the clerk of court in the amount of \$3.32. If, by June 10, 2011, plaintiff fails to make the initial partial payment or explain his failure to do so, then I will advise the court of appeals of his noncompliance in paying the assessment so that it may take whatever steps it deems appropriate with respect

to this appeal.

Entered this 9th day of May, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge