

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

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LARRY J DUANE SPENCER,

Plaintiff,

v.

ORDER

10-cv-288-bbc

JOSEPH L. SOMMERS, ANN SAYLES,  
STUART A. SCHWARTZ, DAVID KNOLL,  
CHRISTOPHER DUREN, PAUL NESSON JR,  
TIMOTHY DAVID EDWARDS, JENNIFER HARPER,  
GREGORY DUTCH, STAN KAUFMAN,  
JAY LAUFENBERG, MARY JONES,  
FRANK EARL RADCLIFF, ROY U. SCHENK,  
CINDY S. GEOFFREY, MELISSA HARNESS,  
JOHN RADOVAN, ROSA I AGUILU,  
BRIAN BLANCHARD, GARY H. HAMBLIN,  
JOHN PIER ROEMER, KAREN KRUGGER,  
MARIANNE SIMPSON, ANA M. BOATWRIGHT,  
TAMMY J. SIME, MS BURNS, MS RICHARDSON,  
RANDALL HEPP, NANCEY GANTHER,  
CAPT. KANNANBERG, CAPT GUARCEAU,  
MR JAEGER, MS TEGELS, C.O. KRATKY,  
SANDY K. MAGUIR-PETKE, C.O. RYBUCK, MS RICK,  
TERRY L. SHUK, C.O. CORBIN, DAWON JONES,  
JAMES ISAACSON, ROY LA BARTON GAY,  
D.O. WATSON, TODD E. MEURER,  
PEGGY L. NICHOLS, STACEY A. BIRCH,  
BRENDA L. PETERSON, SHEILA D. PATTEN,  
DOCTOR HANNULA, MR SWEENEY  
and DEPARTMENT OF CORRECTIONS

Defendants.

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On July 28, 2010, I denied plaintiff Larry Spencer's motion to waive the initial partial payment in this case and dismissed his case without prejudice. I advised him that he could move to reopen this case by submitting a six-month trust fund account statement revealing an absence of periodic income for a full six-month period. Now plaintiff has submitted a third motion to reopen this case. Dkt #34.

Plaintiff's prior motions to reopen were denied because plaintiff was unable to show that he had not had regular deposits to his trust fund account in the last six months. However, plaintiff has now attached to his motion an Interview/Information request dated September 16, 2010, in which plaintiff asks Inmate Accounts personnel to send the \$1.65 initial partial payment to the court and advises the business office that pursuant to the September 7, 2010 court order, the payment "should come off the top of the next deposit of prison wages." On September 20, 2010, a prison employee in the business office named M. Sime responded to plaintiff's request stating "wages go to past due state & federal fees." A review of the trust fund account statements that plaintiff has submitted in this case shows that he has been receiving regular income to his prison account since at least December 2009 and as recently as August 11, 2010. Plaintiff's statement shows also that any income he receives is automatically deducted to pay state and federal court filing fees and various loans and obligations. It appears also that he has no funds in his release account.

It is unclear whether plaintiff's initial payment has not been remitted because prison officials have chosen to give priority to plaintiff's other debts or whether plaintiff has not

received any income from which the initial partial payment can be made. Although the Court of Appeals for the Seventh Circuit has not determined the priority to be given to a prisoner's monthly payment obligations under § 1915(b)(2), it has ruled that initial partial payments are to "come off the top of the next deposit of prison wages . . . ." Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000)(district court erred in failing to collect initial partial payment from inmate receiving periodic income that had been directed elsewhere). Nothing in the statute authorizes prison officials to refuse to make an initial partial payment simply because a prisoner owes payments on other obligations.

Because I do not wish to decide this matter without allowing the prison an opportunity to address the issue, I am sending a copy of this order to the warden at the Stanley Correctional Institution, and asking him to take whatever steps are necessary to see to it that the initial partial payment ordered in this case is paid from the next deposit to plaintiff's account. If it is the case that plaintiff will not have a deposit to his account before October 26, 2010, then plaintiff will have until that date to obtain the funds from another source. If he has no alternate source, he may refile his case at a later date when a six-month trust fund account statement would show that he has had no income for an entire six-month period. Alternatively, if the warden determines that a state statute, a state court order or prison policy is guiding the decision to give priority to plaintiff's state court obligation to the exclusion of his federal court obligation, he is requested to advise the court of that authority.

ORDER

IT IS ORDERED that plaintiff Larry Spencer's motion to reopen, dkt. #34, is STAYED . Plaintiff may have until October 26, 2010 in which to submit a check or money order made payable to the clerk of court in the amount of \$1.65. In order to insure payment of the assessed amount, I am sending a copy of this order to the warden at Stanley Correctional Institution and requesting that he take whatever steps are necessary to see to it that the initial partial payment is paid from the next deposit made to plaintiff's account.

Entered this 5th day of October, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge