

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

JONATHAN MCCORD,

Plaintiff,

v.

RICK RAEMISCH, Secretary, Wisconsin
Department of Corrections and
JOHN DOE 1, Correctional Officer, Wisconsin
Department of Corrections,

Defendants.

ORDER

10-cv-318-bbc

In an order entered June 14, 2010, this court directed plaintiff to submit an initial partial payment in the amount of \$2.47 no later than July 2, 2010. Now plaintiff has filed a motion for waiver of the initial partial filing fee pursuant to 28 U.S.C. § 1915(b)(4). In his motion, plaintiff says that he has no money in his general or release accounts and that any income he receives is automatically deducted from his account to pay debts and other obligations. Although plaintiff asserts that his lack of income precludes him from paying the assessed amount, I cannot find that he qualifies for waiver of the initial partial filing fee under § 1915(b)(4). Plaintiff's motion will be denied.

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.”

I was able to calculate plaintiff’s initial partial payment from deposits to his account during the six months prior to filing of the complaint. In this six-month period, plaintiff received income in the amount of \$74.20. Plaintiff’s trust fund account statement shows that any income he receives is automatically debited to pay various loans and fees. However, 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 plaintiff’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 plaintiff owes filing fees for other cases or is paying other debts should not prevent him from making the initial partial payment he has been assessed in this case.

Although I cannot conclude that plaintiff meets the requirements for waiver of the initial partial filing fee under §1915(b)(4), this will not prejudice him. A question exists whether plaintiff has made the business office at the prison aware of the payment he has been assessed

in this case. Plaintiff 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, plaintiff should show a copy of this order to prison officials to insure that they are aware they should send his initial partial payment to this court.

For the reasons discussed above, I will deny plaintiff's motion to waive the initial partial payment. However, because plaintiff's deadline to pay is fast-approaching, I will allow him an additional 21 days time to make the payment. If, however, by July 23, 2010, plaintiff is unable to make the \$2.47 payment, it may be necessary to request that the warden of the Waupun Correctional Institution look into the matter and advise this court, in writing, of the status of plaintiff's request for withdrawal of the initial partial payment in this case.

ORDER

IT IS ORDERED that

1. Plaintiff Jonathan McCord's motion to waive the initial partial payment in this case (dkt. #5) is DENIED.
2. Plaintiff may have an enlargement of time to July 23, 2010, in which to submit a check or money order payable to the clerk of court in the amount of \$2.47.

Entered this 26th day of June, 2010.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge