

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

MICHAEL B. KINGSLEY,

Plaintiff,

v.

STAN HENDRICKSON and FRITZ DEGNER,

Defendants.

ORDER

10-cv-832-bbc

In an order entered on November 29, 2012, I assessed plaintiff Michael Kingsley an initial partial payment of the appellate filing fee in the amount of \$5.83 and gave him until December 21, 2012, in which to submit his payment. Now plaintiff has filed a motion for reconsideration of this court's November 29 order.

In his motion, plaintiff says that he is unable to make the initial partial payment because he does not have \$5.83 in his prison account. Plaintiff has submitted a trust account statement for the month of November 2012, showing that as of November 30, 2012 he had \$0.24 in his regular account and \$5.48 in his release account for a total of \$5.72, \$0.11 short of the amount I have assessed him as an initial partial appeal payment in this case.

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 current or 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 November 28, 2012. This statement showed that for the six-month period immediately preceding the filing of his appeal, plaintiff received five deposits, totaling \$175, which, when divided by six months, resulted in an average monthly balance of \$29.17. Twenty percent of \$29.17 is \$5.83. 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 grant him an extension of time until January 7, 2013 in which to pay the initial partial appeal filing fee. If, however, by January 7, 2013, 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 Michael Kingsley's motion for reconsideration of the order assessing a \$5.83 initial partial payment of the \$455 appeal filing fee, dkt. #170 is DENIED.

Further, IT IS ORDERED that plaintiff may have an enlargement of time to January 7, 2013, in which to submit a check or money order made payable to the clerk of court in the amount of \$5.83. If, by January 7, 2013, 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 11th day of December, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge