

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

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WILLIE C. SIMPSON,

Plaintiff,

v.

M.S. OLSON and GARY H. HAMBLIN,

Defendants.  
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ORDER

11-cv-606-bbc

On September 20, 2011, I entered an order in this case directing plaintiff Willie Simpson to submit by October 10, 2011, an initial partial payment of the filing fee in the amount of \$0.82. Now before the court is plaintiff's motion to waive the \$0.82 initial partial filing fee in this case. In his motion, plaintiff states that he has had no deposits within the past six months and he asks the court to waive his initial partial filing fee in this case. His motion will be denied.

Under §1915(b)(4), an inmate may not be prohibited from bringing a lawsuit 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 inmate who have "no means" to make an initial partial payment, but controlling authority holds otherwise. Plaintiff's immediate shortage

of income is not sufficient by itself to allow me to conclude that he lacks the means to pay the initial partial payment pursuant to 28 U.S.C. § 1915(b)(4). 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.”

Further, 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 payment based on information he provided from his prisoner trust fund account statement. Although plaintiff had no deposits to his trust fund account statement within the six-month period immediately preceding the filing of the complaint, his trust fund account had an average monthly balance of \$4.92. As I explained in the September 20, 2011 assessing his initial partial payment, under §1915(b)(4), the court must use the greater of either the average monthly balance or the average monthly deposits. In plaintiff’s case, the greater of the two amounts is the

average monthly balance.

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 filing fee. If, however, by November 14, 2011, plaintiff is unable to pay the initial partial payment, I will consider that he has withdrawn this action and he will not owe the filing fee. In that event, if, at some future time, enough time elapses that a six-month trust fund account statement would show that plaintiff owes a smaller payment based on a smaller income, he would be free to file a new lawsuit. Plaintiff should show a copy of this order to jail officials to insure that they are aware that they should send plaintiff's initial partial payment to this court.

#### ORDER

IT IS ORDERED that

1. Plaintiff Willie C. Simpson's motion to waive the initial partial filing fee is DENIED.
2. Plaintiff may have an enlargement of time to November 14, 2011, in which to submit a check or money order payable to the clerk of court in the amount of \$0.82. If, by November 14, 2011, plaintiff fails to make the initial partial payment, the clerk is directed to close this file

without prejudice to plaintiff's filing his case at a later date.

Entered this 14th day of October, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge