

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

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MICHAEL SCOTT,

Plaintiff,

v.

ORDER

11-cv-90-bbc

LORRAINE MCCABE, NEAL CONLEY,  
SCOTT PELOWSKI, PAUL THOMPSON,  
MARLYN TINSLEY and MICHAEL KOCH,

Defendants.

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In an order entered in this case on March 23, 2011, I assessed plaintiff Michael Scott a \$0.03 initial partial payment of the \$350 filing fee and gave him until April 13, 2011, in which to make his payment. Now plaintiff has submitted a letter in which he asks the court to waive the initial partial payment because he has no money in his regular or release accounts. In addition, plaintiff has included with his letter a canteen statement for March 22, 2011 showing that he has a zero balance in his regular account. 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 28 U.S.C. § 1915(b)(4).

Under §1915(b)(4), a prisoner 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.”

Unfortunately, plaintiff’s immediate lack of income is not sufficient by itself to allow a finding that he lacks the means to pay the initial partial payment. 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 average monthly deposits and average monthly balance from the previous six months. 28 U.S.C. § 1915(a)(2).

In this case, the trust fund account statement plaintiff submitted with his complaint shows that plaintiff had an average monthly balance of \$0.15. Twenty percent of that amount is \$0.03. 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). Thus, the fact that plaintiff owes money in other cases does not prevent him from utilizing a new deposit to make the \$0.03 payment he still owes for his initial partial payment in this case.

It may well be that plaintiff will not be able to pay the \$0.03 payment he has been assessed within the time directed below. If that turns out to be the case, I will consider that plaintiff has withdrawn this action and he will not owe a filing fee. If at some future time plaintiff is able to make an initial partial payment or enough time elapses that a six month trust fund account statement would show that he has no means to make an initial partial payment, he would be free to file a new lawsuit.

#### ORDER

IT IS ORDERED that plaintiff Michael Scott's motion to waive the initial partial payment in this case, dkt. #9, is DENIED. Plaintiff may have an enlargement of time to May 6, 2011 in which to submit a check or money order made payable to the clerk of court in the amount of \$0.03. If, by May 6, 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 April, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge