

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

NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

GARY R. McCAUGHTRY,

Defendant.

ORDER

01-C-209-C

In an order dated January 23, 2004, I granted conditionally plaintiff's request for leave to proceed in forma pauperis on appeal. I advised plaintiff that he had until March 5, 2004, in which to pay an initial partial payment of the \$255 filing fee in the amount of \$9.39, and that if he failed to pay the initial partial payment, I would advise the court of appeals of this fact so that it could take whatever action it deemed appropriate with respect to his appeal. Now plaintiff has filed a document titled "Notice and Motion, with Declaration and Memorandum in Support to have 28 U.S.C. § 1915(b)(1) Declared Violative of the Equal Protection Clause on its Face and as Applied in this Case, and Allow Lindell to Appeal." I construe plaintiff's motion as a motion for reconsideration of the order

requiring him to pay an initial partial payment.

Plaintiff argues that § 1915(b)(1) should be declared unconstitutional, but the Court of Appeals for the Seventh Circuit has ruled that § 1915(b) does not violate the constitution. See Lucien v. DeTella, 141 F.3d 773, 775 (7th Cir. 1998). In any event, plaintiff's real objection to the January 23 order is this court's application of the holding in Newlin v. Helman, 123 F.3d 429, 435 (7th Cir. 1997), that when an inmate receives periodic income, he has the "means" to pay an initial partial payment, even if he does not have assets. Plaintiff contends in his motion that he "no longer earns prison pay and is forbidden by prison officials from [engaging in] business activities." However, he does not back up his unsworn statement with a copy of his trust fund account statement showing that he no longer receives periodic income. Even if he had, I am not persuaded that it would have made a difference.

Plaintiff was required under 28 U.S.C. § 1915(a)(2) to submit to a trust fund account statement for the six month period immediately preceding the filing of his appeal. He did that. His notice of appeal was filed on November 20, 2003. The trust fund account statement he submitted correctly covers the period beginning May 20, 2003 and ending November 19, 2003. In that time period, plaintiff shows periodic income, with a deposit being made as late as November 17, 2003. If plaintiff wants to argue that his loss of periodic income at the moment he filed his appeal entitles him to obtain a pass under § 1915(b)(4) he will have to make that argument to the court of appeals.

ORDER

IT IS ORDERED that plaintiff's motion for reconsideration of this court's order of January 23, 2004 is DENIED. Plaintiff remains responsible for prepaying \$9.39 as an initial partial payment of the \$255 fee for filing his appeal. If, by March 5, 2004, plaintiff fails to pay the initial partial payment, I will advise the court of appeals of this fact so that it may take whatever action it deems appropriate with respect to plaintiff's appeal.

Entered this 9th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge