

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

CHRISTOPHER McSWAIN,

Petitioner,

v.

SUSEN J. WALLINTIN,
GARY R. McCAUGHTRY,

Respondents.

ORDER

03-C-150-C

Petitioner Christopher McSwain, a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin, has filed a proposed complaint and a request for leave to proceed in forma pauperis. The request will be denied, because petitioner does not qualify for in forma pauperis status under 28 U.S.C. § 1915(g).

Section 1915(g) reads as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Petitioner has been denied leave to proceed in forma pauperis on at least three prior occasions because his complaints were deemed to be legally meritless. On February 9, 1996, he was denied leave to proceed in forma pauperis in this district in McSwain v. Endicott, 96-C-84-C, because there was no arguable basis in fact or law for his claims. Subsequently, he received strikes in at least two cases filed in the Eastern District of Wisconsin, McSwain v. McCaughtry, 97-C-1133 (E.D. Wis. Aug. 21, 1998) and McSwain v. McCaughtry, 97-C-1129 (E.D. Wis. Aug. 21, 1998).

Petitioner's newest complaint does not allege any facts from which an inference may be drawn that he is under imminent danger of serious physical injury. The subject of petitioner's complaint is that money is being taken from his inmate account to pay a small portion of his medical care. Petitioner's assertions are inadequate to permit him to proceed under the exception in § 1915(g).

Because petitioner is disqualified from proceeding in forma pauperis under § 1915(g), he may choose one of three courses of action to follow.

First, he may decide that he wishes to pursue this case as a paying litigant. If so, he must submit a check or money order made payable to the clerk of court in the amount of \$150 and advise the court that he is proceeding as a paying litigant. If he does this, however, petitioner should be aware that the court then will be required to screen his complaint under 28 U.S.C. § 1915A, and dismiss his case if the complaint is frivolous,

malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief.

Second, petitioner may decide he does not wish to pursue this matter further. If this is the case, then no further review will be given petitioner's complaint. However, petitioner will still owe the \$150 filing fee, and he must pay it immediately. Newlin v. Helman, 123 F.3d 429, 436-437 (7th Cir. 1997). If petitioner fails to pay the fee promptly for any reason other than because he has no means to do so, an order will be entered under Support Systems International, Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995), requiring the clerks of the courts within the circuit to return unfiled any civil complaints petitioner might submit until petitioner's debt to the judicial system has been paid. Newlin, 123 F.3d at 437.

Third, petitioner may decide to take an appeal from this order barring him from proceeding in forma pauperis because of his three-strike status. If, within 30 days of the date of this order, petitioner were to file a notice of appeal, I would be required to allow him to take the appeal without prepaying the \$105 filing fee, Newlin, 123 F.3d at 436. However, petitioner is cautioned that if he takes an appeal and loses, he will then owe two fees, one for filing the complaint and another for filing the appeal, and both fees will have to be paid in full or an order under Mack will be issued and remain in force until the fees are paid.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis is DENIED because petitioner is not eligible for in forma pauperis status under 28 U.S.C. § 1915(g).

Petitioner has thirty (30) days from the date of this order in which to:

- 1) pay the \$150 fee and request that the court process the complaint;
- 2) pay the \$150 fee and advise the court that he does not intend to pursue the lawsuit; or
- 3) file a notice of appeal.

If, within thirty (30) days of the date of this order, petitioner does none of these things, then an order under Support Systems International, Inc. v. Mack will be entered.

Entered this 4th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge