

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

WILLIE C. SIMPSON,

Petitioner,

v.

ORDER

05-C-232-C

JANEL NICKEL, Corrections Captain;
TIMOTHY DOUMA, Security Director;
PHILLIP KINGSTON, Warden;
WILLIAM NOLAND, Inmate Complaint
Examiner; and MATTHEW J. FRANK,
DOC Secretary,

Respondents.

In an order entered on April 18, 2005, I told petitioner Willie C. Simpson that he would have to pay \$1.40 as an initial partial payment of the fee for filing the complaint in this case. Now petitioner has moved the court to waive the initial partial payment. According to petitioner, he has no money in his regular or release accounts, no job, and is presently in segregation status where he receives no pay. Petitioner does not say how long he expects to be in segregation status or whether the move was administrative or the result of disciplinary action.

When he filed his complaint, petitioner had \$.48 in his release account and \$.96 in

his regular account. He had a one-time deposit of \$30 on November 19, 2004, and regular deposits of \$4.00 every two weeks beginning March 11, 2005 and continuing through April 7, 2005, when the trust fund account statement ends.

28 U.S.C. § 1915(b)(4) provides

In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

The requirement that petitioner pay an initial partial payment is also statutory. Section 1915(b)(1) provides that a court

shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of (A) the average monthly deposits to the prisoner's account; or (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint.

In Newlin v. Helman, 123 F.3d 429, 435 (7th Cir. 1977), rev'd on other grounds by Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000) and Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000), the Court of Appeals for the Seventh Circuit held that

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."

(Emphasis in original.) At this moment, petitioner contends that he lacks assets and means. His assets have been depleted and his means cut off by his placement in segregation. Nevertheless, according to Newlin, when a prisoner receives *periodic income*, deciding how much the prisoner owes and how it will be collected is "determined entirely by the statute

and is outside the prisoner's and the prison's control." Id. at 436. Section 1915(b)(1) requires that an initial partial payment is to be collected when funds "exist."

Petitioner's trust fund account statement shows that immediately before he was placed in segregation, he was receiving regular small paychecks. His current difficulty in making the payment he has been ordered to pay may be temporary if the placement is short-term and plaintiff resumes receiving regular income following his release from segregation status. I am not prepared to conclude that a temporary short-term interruption in petitioner's ability to earn an income is sufficient to allow him to obtain a waiver of the initial partial payment under § 1915(b)(4).

Under the circumstances of this case, I will extend to May 31, 2005, the deadline for petitioner to pay the initial partial payment he owes. If, however, no later than May 31, 2005, petitioner submits an affidavit or other documentation to show that his placement in segregation status is long-term and that during this confinement he will be ineligible to earn a wage, I will consider his request for waiver of the initial partial payment under 28 U.S.C. § 1915(b)(4).

ORDER

IT IS ORDERED that petitioner may have an enlargement of time to May 31, 2005, in which to submit a check or money order made payable to the clerk of court in the amount of \$1.40. If, by May 31, 2005, petitioner fails to make the initial partial payment or submit

proof that he cannot make the payment because he has lost long-term his capacity to earn a wage, the clerk of court is directed to close this file without prejudice to petitioner's filing his case at a later date.

Entered this 3rd day of May, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge