

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

GLENN M. DAVIS,

Plaintiff,

v.

ORDER

05-C-374-C

JAMES E. DOYLE, Governor, State of Wisconsin;
E. MICHAEL McCANN, Milwaukee District Attorney;
ROBERT D. DONOHOO, Deputy District Attorney, Milwaukee;
MATTHEW J. FRANK, Secretary of Dept. of Corrections;
CATHERINE J. FARRY, Warden of New Lisbon Corr. Inst.;
RUDOLPH T. RANDA, Eastern District of Wisconsin Chief Judge;
TED E. WEDEMEYER, Presiding Appellate Court Judge, Milwaukee;

Defendants.

This case was transferred to this venue from the District of Colorado by order of the Hon. Zita L. Weinshienk dated June 16, 2005. Plaintiff is a prisoner confined at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. In his complaint, he alleges that his constitutional right of access to the courts is being infringed because prison officials are opening his legal mail and because the prison law library is inadequate.

Because he is a prisoner, plaintiff is subject to the 1996 Prison Litigation Reform Act. That means that he must pay the \$250 fee for filing his complaint, whether in full or in

installments beginning with an initial partial payment, depending on his financial circumstances. It means also that after the financial prerequisites are complete, the court must screen the allegations of plaintiff's complaint and dismiss it if the claims are frivolous or malicious or fail to state a claim upon which relief may be granted or if plaintiff is seeking money damages from persons who are immune from such relief. 28 U.S.C. § 1915(e)(2).

Before plaintiff's case was transferred to this district, the District Court for the District of Colorado granted plaintiff leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(b)(4), after concluding that he did not have the means to pay an initial partial payment of the filing fee. The Colorado court left for this court the task of screening plaintiff's complaint. However, before I will screen plaintiff's complaint, I must revisit the decision of the Colorado court to allow plaintiff to proceed without paying an initial partial payment of the filing fee.

In this circuit, the Court of Appeals for the Seventh Circuit has held 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), 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.) 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."

The trust fund account statement plaintiff filed in support of his in forma pauperis request shows that he has means. He has been receiving small paychecks regularly since at least January 24, 2005. His average monthly deposits is \$25.52 and his average monthly balance is \$207.72. Under the law established in Newlin, funds "exist" in his account.

Therefore, before I will screen plaintiff's complaint, he will have to pay an initial partial payment of the \$250 fee for filing this case in the amount of \$41.54. Because he filed his complaint in the District of Colorado, plaintiff will have to make his initial partial payment to the Colorado court. He will then have to submit to this court a copy of the transmittal record of the payment prepared by the New Lisbon financial office or a recent trust fund account activity statement showing that the funds were debited from his account and sent to the District of Colorado.

ORDER

IT IS ORDERED that plaintiff may have until July 26, 2005, in which to pay an initial partial payment of the \$255 fee for filing this action to the Clerk of Court for the District of Colorado in the amount of \$41.54.

Further, IT IS ORDERED that plaintiff may have until August 1, 2005, in which to submit proof to this court that he paid the initial partial payment as required above.

Finally, IT IS ORDERED that if, by August 1, 2005, plaintiff fails to submit proof that he paid the required initial partial payment, I will dismiss this case without prejudice for plaintiff's failure to prosecute it.

Entered this 5th day of July, 2005.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge