

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

CARL C. GILBERT, JR.,

Petitioner,

v.

JUDGE JOHN C. SHABAZ,

Respondent.

ORDER

05-C-534-C

Petitioner Carl C. Gilbert, Jr., a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin, has filed a proposed complaint for mandamus relief 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.

On at least three prior occasions, I denied petitioner leave to proceed in forma pauperis in

lawsuits that were legally frivolous. See Gilbert v. Shabaz, 93-C-338-C, decided May 27, 1993; Gilbert v. Shabaz, 93-C-339, also decided May 27, 1993; and Gilbert v. Shabaz, 93-C-366, decided June 3, 1993.

Moreover, petitioner's complaint does not allege facts from which an inference may be drawn that he is under imminent danger of serious physical injury. In his complaint, petitioner alleges that Judge Shabaz is requiring him to make an initial partial payment of the fees for lawsuits recently filed in his court. In order to meet the imminent danger requirement of 28 U.S.C. § 1915(g), a petitioner must allege a physical injury that is imminent or occurring at the time the complaint is filed, and the threat or prison condition causing the physical injury must be real and proximate. Ciarpaglini v. Saini, slip op. 01-2657, (7th Cir. Dec. 11, 2003) (citing Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002) and Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003)). Claims of physical injury ordinarily arise in the context of lawsuits alleging Eighth Amendment violations. I can conceive of no factual scenario under which a petitioner would be subjected to physical injury by Judge Shabaz's orders that he pay a portion of the filing fees for his cases. Accordingly, petitioner's complaint is not a complaint requiring application of the exception to § 1915(g).

Because petitioner is disqualified from proceeding in forma pauperis under § 1915(g), he may choose 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 \$250 and he must do so no later than September 30, 2005. 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.

If petitioner does not pay the \$250 filing fee by September 30, 2005, I will consider that he does not want to pursue this action. In that event, the clerk of court is directed to close this file. However, even if the file is closed, petitioner will still owe the \$250 filing fee and he must pay it as soon as he has the means to do so. Newlin v. Helman, 123 F.3d 429, 436-437 (7th Cir. 1997). The warden of the Waupun Correctional Institution will be informed of petitioner's obligation to pay the fee so that when funds exist in petitioner's account, the fee can be collected and sent to the court in accordance with 28 U.S.C. § 1915(b)(2).

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis is DENIED because petitioner is ineligible for in forma pauperis status under 28 U.S.C. § 1915(g).

Further, IT IS ORDERED that petitioner may have until September 30, 2005, in which to submit a check or money order made payable to the clerk of court in the amount of \$250. If, by September 30, 2005, petitioner fails to pay the fee, the clerk of court is directed to close this file.

Finally, the Clerk of Court is directed to insure that the court's financial records reflect that plaintiff owes the \$250 fee for filing this case whether or not plaintiff proceeds further with the action.

Entered this 9th day of September, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge