

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

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JAMES JENKINS,

Plaintiff,

v.

JAMES WILSON and  
TIM BENGSTON,

Defendants.

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ORDER

05-C-609-C

Following a jury trial on November 1, 2006, judgment was entered in this case in defendants' favor. On March 12, 2007, well after the time for filing a notice of appeal had expired, plaintiff filed a notice of appeal, together with a request for leave to proceed in forma pauperis. In an order dated March 14, 2007, I told plaintiff that although his appeal appeared to be untimely, only the court of appeals has the authority to dismiss an appeal on that ground. I determined that plaintiff was otherwise qualified for pauper status and, after examining his trust fund account statement, assessed him an initial partial payment of \$0.67, which plaintiff was directed to pay no later than April 3, 2007.

Now, plaintiff has submitted a letter dated March 22, 2007, in which he states that

he is “unable to pay the amount certified for me to pay on this appeal.” He asks that the court waive the initial partial payment. In addition, he asks for appointment of counsel to represent him on appeal.

Plaintiff has not indicated why believes that he is unable to pay the \$0.67 he was assessed. His trust fund account statement, which begins in September 2006, shows that over the past six months, he has received two \$10 deposits to his account, with the most recent deposit occurring on February 12, 2007. Plaintiff spent \$5.90 of the February 12 deposit at the prison canteen. His balance is now \$.34. Although it is not possible to predict whether plaintiff will receive additional funds within the next few weeks, possibly from the same person who made the earlier \$10 deposits, his immediate lack of income is not sufficient by itself to allow me to conclude that he lacks the means to pay the initial partial payment. See 28 U.S.C. § 1915(b)(4). In Newlin v. Helman, 123 F.3d 429, 435 (7th Cir. 1997), the court of appeals stated,

[I]t is not enough that the prisoner lack assets on the date he files. If that were so, then a prisoner could squander his trust account and avoid the fee. 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."

It is too soon to conclude that plaintiff lacks the means to pay the initial partial payment assessed in this case. Even if he does not receive another deposit in the immediate future, he was free to request an enlargement of time in which to pay the initial partial

payment until he receives another deposit. Although plaintiff did not ask for such an extension, I will grant him more time to pay the assessment.

Plaintiff's motion for appointment of counsel is not properly addressed to this court. If he believes he qualifies for appointed counsel, he should file his motion and supporting papers in the Court of Appeals for the Seventh Circuit.

#### ORDER

IT IS ORDERED that plaintiff James Jenkins's motion to waive the \$.67 initial partial payment assessed on March 14, 2007, is DENIED. On the court's own motion, plaintiff may have an enlargement of time to May 7, 2007, in which to submit a check or money order made payable to the clerk of court in the amount of \$.67. If, by May 7, 2007, plaintiff fails to pay the assessed amount or show cause for his failure to do so, I will notify the court of appeals of his non-compliance so that it may take whatever action it deems appropriate with respect to plaintiff's appeal.

Further, IT IS ORDERED that plaintiff's motion for appointment of counsel on

appeal is DENIED because this court is without authority to make such an appointment.

Entered this 6<sup>th</sup> day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge