

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

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NATE A. LINDELL,

Petitioner,

v.

ORDER

07-C-009-C

MATTHEW J. FRANK, RICHARD  
SCHNEITER, GARY BOUGHTON, PETER  
HUIBREGTSE, CAPTAIN LEBBEUS BROWN,  
LT. JAMES GRONDIN, RICHARD RAEMISCH,  
SANDRA HAUTAMAKI, TISHA LANSING,  
ELLEN RAY, KELLY TRUMM and  
CATHY BEERKIRCHER,

Respondents.

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Petitioner Nate A. Lindell, a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has submitted a proposed complaint. He asks for leave to proceed in forma pauperis. Because petitioner is a prisoner, he is subject to the 1996 Prisoner Litigation Reform Act. This means that before this court may decide whether he can proceed with his complaint in forma pauperis, petitioner will have to make an initial partial payment of the filing fee in the amount of \$1.51 and the remainder of the fee in monthly installments even if his request for leave to proceed is denied.

I recognize that 100% of petitioner's income is being collected to pay filing fees he

owes for earlier litigation. However, this should not prevent petitioner from paying the initial partial payment assessed in this case. The Court of Appeals for the Seventh Circuit held in Walker v. O'Brien, 216 F.3d 626, 628 (7th Cir. 2000), and Newlin v. Helman, 123 F.3d 429, 435 (7th Cir. 1977), that initial partial payments are to “come off the top” of all deposits to prisoners’ accounts. That means that the initial partial payment assessed in this case is to be given priority over the debts petitioner owes for his past litigation. If petitioner finds that prison staff members misunderstand their responsibilities in this regard, he may make a copy of this order available for their review.

One other matter calls for comment. Petitioner’s trust fund account statement, which begins on July 6, 2006, shows that the Department of Corrections has been crediting his account with regular bimonthly deposits since at least July 10, 2006 up to November 27, 2006, when the deposits appear to have ceased. It is not clear why the bimonthly deposits stopped or how long the dry spell will continue. However, petitioner’s 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 pursuant to 28 U.S.C. § 1915(b)(4). In Newlin v. Helman, 123 F.3d at 435, 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 petitioner lacks the means to pay the initial partial payment

assessed in this case. Even if the Department of Corrections has cut off his bimonthly deposits temporarily, he is free to request an enlargement of time in which to pay the initial partial payment until the deposits resume or he explains in an affidavit why the payments have ceased and how long it will be before he can expect them to resume. Alternatively, petitioner may be able to have a friend or family member pay the initial partial payment. One of the deposits reflected on petitioner's trust fund account statement is a \$10 gift deposited in mid-September. Moreover, in a letter accompanying petitioner's proposed complaint, petitioner asks, "Can I have \$ sent to your office for copies of internet items cited in your judge's orders? Or cases she cites? RSVP." It is sensible to conclude from petitioner's suggestion that he can find money to purchase photocopies from the court that he can find money to pay his initial partial payment.

#### ORDER

IT IS ORDERED that petitioner is assessed \$1.51 as an initial partial payment of the \$350 fee for filing this case. He is to submit a check or money order made payable to the clerk of court in the amount of \$1.51 on or before February 1, 2007. If, by February 1, 2007, petitioner fails to make the initial partial payment or show cause for his failure to do

so, he will be held to have withdrawn this action voluntarily. In that event, the clerk of court is directed to close this file without prejudice to petitioner's filing his case at a later date.

Entered this 11th day of January, 2006.

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