

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

WILLIE C. SIMPSON

Petitioner,

ORDER

v.

07-C-493-C

WARDEN GREGORY GRAMS,
JANEL NICKEL, etc.,

Respondents.

On September 11, 2007, I directed petitioner Willie C. Simpson to submit an initial partial payment in this case in the amount of \$.41 no later than September 28, 2007. Now petitioner has filed a motion for waiver of the fee under 28 U.S.C. § 1915(b)(4). In support of his motion, petitioner has submitted a copy of his trust fund account statement covering the period beginning August 8, 2007 and ending August 23, 2007. He asks the court to note that at this moment, he has a zero balance in his regular account and \$.36 in his release account. From his trust fund account statement, however, it is clear that petitioner's motion must be denied.

28 U.S.C. § 1915(b)(4), the waiver provision, states,

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.

However, in Newlin v. Helman, 123 F.3d 429, 435 (7th Cir. 1997), 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 ruled that a prisoner has "means" any time his trust fund account statement reveals periodic income.

[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."

Here, petitioner has periodic income. Even the abbreviated trust fund account statement he submitted in support of his motion shows that as recently as August 10 and August 23, he received two \$4.00 deposits to his account, respectively. Despite the fact that the entire sum of each deposit was debited promptly to pay fees petitioner owes in other cases, under the holding of Newlin, he will not be eligible for waiver of the initial partial payment under § 1915(b)(4) until his six-month trust fund account statement reveals the absence of periodic income. Thus, if petitioner does not presently have \$.41 in his account, he is free to request an enlargement of time in which to pay the amount. If, even with a modest extension, he cannot pay the assessment, I will dismiss the case without prejudice to his refiling his complaint at such time as his statement reveals that he has not enjoyed periodic income for six months and thus qualifies for waiver of the payment under § 1915(b)(4).

One other matter requires comment. In Walker v. O'Brien, 216 F.3d at 628, the

court of appeals held that initial partial payments are to “come off the top” of all deposits to a prisoner’s account. That means that the initial partial payment assessed in this court’s September 11, 2007 order is to be given priority over debts petitioner owes to this and other courts under the Prison Litigation Reform Act. In other words, if petitioner were to receive a deposit of \$4 to his account next week, for example, \$.41 of that deposit must be sent to this court to pay petitioner’s initial partial payment. 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.

ORDER

IT IS ORDERED that petitioner’s motion for waiver of the \$.41 initial partial payment of the \$350 filing fee he has been assessed in this case is DENIED.

Entered this 17th day of September, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge