

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

MICHAEL LEPPERT,

Petitioner,

ORDER

v.

08-cv-367-slc

DAVID MAHONEY, LT. TWOMBLY,
SARGENT PRICE, WAYNE HONER,
Detective, DANIEL VILLAREAL,
DEBBIE MOORE and NANCY REED,
sued in their individual and official
capacities,

Respondents.

On June 30, 2008, I directed petitioner Michael Leppert to submit an initial partial payment of the \$350 filing fee in the amount of \$22.08 no later than July 21, 2008. Now petitioner has submitted a letter dated July 6, 2008, that I construe as a motion for waiver of the fee under 28 U.S.C. § 1915(b)(4). In support of his motion, petitioner has submitted a “Petition for Waiver of Prepayment of Fees/Costs – Affidavit of Indigency.” He asks the court to note that he is not currently employed and has “no money, property, savings [or] real estate.” Petitioner’s motion will 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. From the trust fund account statement petitioner submitted with his complaint in this case, it is possible to tell that for the months of December, 2007 through February, 2008, deposits totaling \$1.59, \$400, and \$40 respectively were made to petitioner's account. Thus, 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.

It may well be that petitioner will not be able to pay the initial partial payment he has been assessed from the next deposit to his account. Although petitioner has received sizeable deposits to his account in the six months preceding the filing of his complaint, the deposits are irregular and vary in amount. Because it may be difficult for petitioner to obtain the funds for his initial partial payment, I will allow him an extension of 21 days time to make his payment. If, however, by August 11, 2008, petitioner is unable to pay the initial partial payment, I will consider that he has withdrawn this action and he will not owe a filing fee.

In that event, if, at some future time, enough time elapses that a six month trust fund account statement would show that he owes a smaller payment based on his smaller income, he would be free to file a new lawsuit.

ORDER

IT IS ORDERED that

1. Petitioner's motion for waiver of the \$22.08 initial partial payment of the filing fee in this case is DENIED.
2. Petitioner may have an enlargement of time to August 11, 2008, in which to submit a check or money order made payable to the clerk of court in the amount of \$22.08. If, by August 11, 2008, petitioner fails to make the initial partial payment, the clerk is directed to close this file without prejudice to petitioner's filing his case at a later date.

Entered this 9th day of July, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge