

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

LARRY COCHRAN

Petitioner,

v.

CAROL HOLINKA,

Respondent.

ORDER

10-cv-490-wmc

In an order entered in this case on August 27, 2010, I assessed petitioner an initial partial payment of the \$5 filing fee in the amount of \$1.56 and gave him until September 17, 2010, in which to submit his payment. Now petitioner has filed a “Motion for Extension of Time to Pay Filing Fee and/or Request for Possible Waiver of Filing Fee.” In support of his motion, petitioner explains that he is completely broke, he does not receive financial assistance from anyone outside of the institution and he has carried a zero balance in his trust fund account for several months.

Under §1915(b)(4), a prisoner may not be prohibited from bringing a lawsuit if “the prisoner has no assets and no means by which to pay the initial partial filing fee.” Unfortunately, petitioner’s immediate lack of income is not enough 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.”

In measuring periodic income, § 1915 requires courts to look backward in time rather than forward. In other words, in determining whether a prisoner has the means to pay, the court cannot consider representations the prisoner makes about his future income or lack of it. Rather, the court must look at the prisoner's income from the previous six months. 28 U.S.C. § 1915(a)(2).

From the account information petitioner supplied at the time he filed his case, his average six-month balance is \$7.78, and twenty percent of that average is \$1.56. Section 1915 does not grant courts discretion to reduce or waive an initial partial payment, even if the deposits made were taken immediately to pay a past debt. Thus, petitioner has two options only: Either he must pay the \$1.56 payment previously assessed or he must submit a new trust fund account statement for the period beginning March 25, 2010 and ending September 24, 2010 showing that no deposits have been made to his prison account during that full period. To allow petitioner time to do this, I will extend to October 18, 2009, his deadline to act.

ORDER

IT IS ORDERED that petitioner is GRANTED an extension of time until October 18, 2010 in which either to pay an initial partial payment of \$1.56, or to submit a trust fund account statement beginning March 25, 2010 and ending September 24, 2010, showing that he has had no deposits to his account during that entire period. If, by October 18, 2010, petitioner fails to make the initial partial payment or submit the necessary trust fund account statement, he will be held to have withdrawn this action voluntarily. As soon as petitioner submits the required amount, the court will take under advisement his petition for a writ of habeas corpus for a

determination whether it is appropriate to issue an order directing respondent to show cause why petitioner's petition should not be granted.

Entered this 24th day of September, 2010.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge