

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

DERRICK L. SMITH,

Plaintiff,

v.

ROBERT (BOB) DICKMAN, MELEE THAO, P.A. and
MARATHON COUNTY JAIL MEDICAL STAFF,
DEB GLEASON, MEDICAL STAFF 2 JOHN DOE,
MALE NURSES and MEDICAL STAFF JANE DOE, NURSE,

Defendants.

ORDER

12-cv-741-wmc

DERRICK L. SMITH,

Plaintiff,

v.

ROBERT DICKMAN, WILLIAM W. BEAUDRY,
DENNY C. WOODWARD, GUARD TULLY,
R.J. AND OTHER GUARDS, DANIELLE,
SUPERVISORS PELLOWSKI, SCHAFFER and
OTHER SUPERVISORS,

Defendants.

ORDER

12-cv-742-wmc

DERRICK L. SMITH,

Plaintiff,

v.

ROBERT (BOB) DICKMAN, EDMUND J. JELINSKI,
EDMUND J. JELINSKI LAW OFFICE and
EDMUND J. JELINSKI INSURANCE COMPANY,

Defendants.

ORDER

12-cv-743-wmc

In an order entered in each of these three cases on October 22, 2012, I assessed plaintiff Derrick Smith a \$20.18 initial partial payment of each of the \$350 filing fees and gave him until November 13, 2012, in which to make his payments. Now plaintiff has submitted a letter in which he asks the court to waive the initial partial payments because he is indigent and the \$100 legal loan he has obtained does not cover initial partial filing fees. Although plaintiff asserts that

his lack of income precludes him from paying the assessed amounts, I cannot find that he qualifies for waiver of the initial partial filing fee under 28 U.S.C. § 1915(b)(4).

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.” Plaintiff’s immediate lack of income is not sufficient by itself to allow a finding that he lacks the means to pay the initial partial payment. 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 present or future income or lack of it. Rather, the court must look at the prisoner’s average monthly deposits and average monthly balance from the previous six months. 28 U.S.C. § 1915(a)(2). In this case, the account statement from the Marathon County Jail that plaintiff submitted with his complaints shows that from June 5, 2012 to September 5, 2012, plaintiff had six deposits to his account with average monthly deposits of \$100.90. Twenty percent of that amount is \$20.18.

It may well be that plaintiff will not be able to pay the \$20.18 payments he has been assessed in these three cases within the time directed below. If that turns out to be the case, I will consider that plaintiff has withdrawn these actions and he will not owe a filing fee. If at some future time plaintiff is able to make an initial partial payment or enough time elapses that

a six month trust fund account statement would show that he has no means to make an initial partial payment, he would be free to file a new lawsuit.

ORDER

IT IS ORDERED that plaintiff Derrick Smith's motion to waive the initial partial payment in cases 12-cv-741-wmc, 12-cv-742-wmc and 12-cv-743-wmc is DENIED. Plaintiff may have an enlargement of time to November 30, 2012 in which to submit a check or money order made payable to the clerk of court in the amount of \$20.18 for each case he wishes to prosecute. In the event that plaintiff is able to pay only one or two of the initial partial payments, he should clearly indicate which of the three cases the payment(s) should be applied. If, by November 30, 2012, plaintiff fails to make any of initial partial payments, the clerk is directed to close the file without prejudice to plaintiff's filing his case at a later date.

Entered this 1st day of November, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge