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United States District Court,
W.D. Wisconsin.

Dennis E. JONES'EL, Micha'El Johnson,
De'Ondre Conquest, Luis Nieves, Scott Seal, Alex
Figueroa, Robert Sallie, Chad Goetsch, Edward
Piscitello, Quintin L'Mingio, Lorenzo Balli,
Donald Brown, Christopher Scarver, Benjamin
Biese, Lashawn Logan, Jason Pagliarini, and
Andrew Collette, and all others similarly situated,
Plaintiffs,

v.

Gerald BERGE and Jon Litscher, Defendants.

No. 00-C-421-C. | Oct. 9, 2002.

Attorneys and Law Firms

Stephen P. Hurley, Edward R. Garvey, for Plaintiffs.

James E. McCambridge, Assistant Attorney General,
Madison, WI, for Defendants.

Opinion

ORDER

CRABB, J.

*1 In an order entered in this case on September 18, 2002, I denied the requests of plaintiffs Dennis Jones'el and Micha'el Johnson for leave to proceed *in forma pauperis* on appeal on the ground that these plaintiffs do not qualify financially for indigent status under 28 U.S.C. § 1915. I denied inmate Donald Lee's request for leave to proceed *in forma pauperis* on appeal because Lee is barred by the three-strike provision of 28 U.S.C. § 1915 from proceeding as a pauper in any future action or appeal so long as he is a prisoner. I stayed a decision whether inmates Christopher Scarver, Norman Green, Glenn Turner and Rayfus Dukes could proceed *in forma pauperis* on appeal until October 7, 2002, so that these appellants could submit a statement of the issues they intend to raise on appeal and a trust fund account statement so that they could be assessed an initial partial payment of the filing fee in the event that their appeal was found to be taken in good faith. In response to the September 18 order, Dennis Jones'el and Micha'el Johnson have filed documents that I construe as motions for reconsideration of that portion of the September 18 order holding that they are not indigent under § 1915, and

inmates Rayfus Dukes, Norman Green, Christopher Scarver and Glenn Turner have responded to the court's request for supplemental information.

I will begin with Dennis Jones'el's and Micha'el Johnson's motions for reconsideration of this court's determination that they do not qualify financially for indigent status under § 1915. In the September 18 order, I reasoned that even if Jones'el's and Johnson's only income in the past six months was the \$3500 settlement payment they received in this case, their average monthly income would amount to \$583.33, and 20% of that amount would be \$116.66, which is more than the \$105 they owe for filing their notice of appeal. In support of his request for reconsideration, Jones'el has submitted a trust fund account statement that does not reveal the \$3500 settlement payment as having been deposited in his prison account. Jones-el explains in his motion that the settlement money went "a small amount to [his] children and the rest to outstanding attorney fees owed ... for [his] criminal cases..." Plaintiff Johnson has not submitted a trust fund account statement because, he explains, he is in the process of being transferred to another prison and has not had the opportunity to arrange for the statement. However, he contends that once the court receives his trust fund account statement, it will show that he qualifies for pauper status.

As plaintiffs Jones'el and Johnson already are aware, when a prisoner seeks to utilize the initial partial payment provision in 28 U.S.C. § 1915, the court must calculate 20% of the prisoner's average monthly income or average monthly balance in his prison account for the six month period immediately preceding the filing of the notice of appeal, and require the prisoner to pay the greater of the two amounts at the outset of his appeal. This method of calculating a prisoner's eligibility for pauper status is statutory. Although Jones-el's and Johnson's trust fund account statements may not show the settlement award they received, neither plaintiff denies having been given the money. That plaintiffs Jones'el and Johnson chose to disburse the money immediately in the way that they did does not mean that their income cannot be considered in determining their pauper status. Nothing in § 1915 allows this court to ignore settlement awards or any other income in figuring a prisoner's initial partial payment simply because the prisoner spends the money as quickly as he receives it. Therefore, I will deny the motions of plaintiffs Jones'el and Johnson for reconsideration of that part of the September 18 order finding that they are not financially eligible for pauper status on appeal.

*2 In his response to the September 18 order, inmate Rayfus Dukes has submitted a letter in which he complains that prison officials are retaliating against him for taking an appeal in this case, apparently by denying

him postage to mail letters to the monitor appointed to oversee implementation of the settlement agreement in this case and by refusing him medical attention for his allergies. Separately, he submitted "exhibits" covering a variety of subjects. He asks that the court make copies of these papers for its records and return the originals to him.

Dukes's claim of retaliation and "exhibits" are not properly considered in the context of this case. Dukes concedes that he is free to communicate with the monitor by using a locked box at the institution designated for such communications, so he is not being physically prevented from exercising his right to communicate with the monitor. If he believes that prison officials are retaliating against him in other ways for exercising his right of access to the court in this case, he will have to file a lawsuit separate from this one raising the claim. With respect to Dukes's "exhibits," it is not this court's practice to make copies of inmate submissions free of charge and then return the originals to the inmate. Dukes is responsible for bearing his own copying costs. Moreover, the usual rule is that original documents submitted to the court cannot be returned to the party submitting them because they become part of the court's record upon their submission. In this instance, however, the exhibits Dukes sent to the court appear to relate entirely to his claims of retaliation. Because they cannot be considered at all in this case, I will return them to Dukes with a copy of this order.

Rayfus Dukes, Glenn Turner, Norman Green and Christopher Scarver have submitted trust fund account statements, as well as statements of the issues they intend to raise on appeal. Also, Dukes, Turner and Green have submitted copies of their objections to the proposed settlement agreement, which Scarver was not required to submit because he is a named representative of the class in this action. From these submissions, I find that each intends to raise at least one non-frivolous issue on appeal and that Dukes, Turner and Green intend to argue on appeal the same objections they made in their objections to the proposed settlement. Pursuant to *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), an inmate who is not a named representative of the class may appeal from a settlement agreement on the ground that the court disregarded his objections. Therefore, I will not certify that the appeals of Dukes, Turner, Green and Scarver are not taken in good faith.

In the September 18 order, I noted that Scarver may be barred from proceeding *in forma pauperis* on appeal if his trust fund account statement showed that he was receiving regular deposits to his prison account but was failing to make payments on his other financial obligations in this court. Scarver's trust fund account statement confirms that he is receiving regular deposits to his account, but

that 100% of those deposits are being intercepted to pay his financial obligations in this and other courts. Accordingly, I will grant Scarver's request for leave to proceed *in forma pauperis* on appeal and will not require him to make an initial partial payment of the fee for filing the appeal because I conclude that he does not have the means to make such a payment.

*3 Rayfus Dukes, Norman Green and Glenn Turner each may proceed *in forma pauperis* on appeal, but must make initial partial payments in the following amounts: Norman Green is assessed an initial partial payment in the amount of \$12.68; Glenn Turner is assessed an initial partial payment in the amount of \$5.00; and Rayfus Dukes is assessed an initial partial payment in the amount of \$2.55.

ORDER

IT IS ORDERED that

- 1) The motions of plaintiffs Dennis Jones'el and Micha'el Johnson for reconsideration of that portion of this court's order of September 18, 2002, finding that they are not financially eligible to proceed as paupers under 28 U.S.C. § 1915 are DENIED;
- 2) I do not intend to certify that the appeals of inmates Christopher Scarver, Norman Green, Glenn Turner and Rayfus Dukes are not taken in good faith;
- 3) Christopher Scarver's request for leave to proceed *in forma pauperis* on appeal is GRANTED. Scarver need not submit an initial partial payment of the fee for filing his appeal because he does not presently have the money to make such a payment. However, Scarver remains jointly and severally liable for paying the fee should he obtain the means to do so at some time in the future.
- 4) The motion of Rayfus Dukes, Glenn Turner and Norman Green to proceed *in forma pauperis* on appeal is GRANTED. Glenn Turner is assessed an initial partial payment of the fee for filing his appeal in the amount of \$5. Norman Green is assessed an initial partial payment of the fee in the amount of \$12.68. Rayfus Dukes is assessed an initial partial payment of the fee in the amount of \$2.55. Dukes, Turner and Green may have until October 28, 2002, in which to submit these initial partial payments. If, by October 28, Dukes, Turner or Green fail to make the required payments, I will notify the Court of Appeals for the Seventh Circuit of that fact so that it may take appropriate action with respect to their appeals.

