

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

JUSTIN KINDRED,

Plaintiff,

vs.

WARDEN JOHN FAYRAM, CAPTAIN  
MAYO, SERGEANT CASPER,

Defendants.

No. C10-0042-LRR

ORDER

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This matter is before the court on the plaintiff's application to proceed in forma pauperis (docket no. 1). The plaintiff filed such application on March 16, 2010. Along with his application to proceed in forma pauperis, the plaintiff submitted a complaint pursuant to 42 U.S.C. § 1983, a motion for preliminary injunction (docket no. 2) and a motion for appointment of counsel (docket no. 3). The plaintiff supplemented his motion for appointment of counsel (docket no. 4) on March 30, 2010.

***I. IN FORMA PAUPERIS UNDER 28 U.S.C. § 1915***

Based on the plaintiff's application and certificate of inmate account, it is clear that the plaintiff does not have sufficient funds to pay the required filing fee. 28 U.S.C. § 1914(a) (requiring \$350.00 filing fee). Thus, in forma pauperis status shall be granted to the plaintiff. *See generally* 28 U.S.C. § 1915. The clerk of court shall file the complaint without the prepayment of the filing fee. Although the court deemed it appropriate to grant the plaintiff in forma pauperis status, the plaintiff is required to pay the full \$350.00 filing fee by making payments on an installment basis. 28 U.S.C. § 1915(b)(1); *see also In re Tyler*, 110 F.3d 528, 529-30 (8th Cir. 1997) (“[T]he [Prisoner Litigation Reform Act] makes prisoners responsible for their filing fees the moment the prisoner brings a civil action or files an appeal.”). The full filing fee will be collected even if the court dismisses

the case because it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks money damages against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

Here, the plaintiff must pay an initial partial filing fee in the amount of 20 percent of the greater of his average monthly account balance or average monthly deposits for the six months preceding the filing of the complaint. 28 U.S.C. § 1915(b)(1). Based on an average monthly deposit of \$41.12, the court finds that the initial partial filing fee is \$8.22. *Id.* The plaintiff shall submit \$8.22 by no later than June 25, 2010. *Id.* If the court does not receive payment by this deadline, the instant action shall be dismissed. *See Fed. R. Civ. P. 41(b)* (permitting dismissal where a plaintiff either fails to prosecute or fails to respond to an order of the court); *Edgington v. Missouri Dept. of Corrections*, 52 F.3d 777, 779-80 (8th Cir. 1995) (same). If necessary, the plaintiff may request in a written motion an extension of time to pay the initial partial filing fee.

In addition to the initial partial filing fee, the plaintiff must “make monthly payments of 20 percent of the preceding month’s income credited to the prisoner’s account.” 28 U.S.C. § 1915(b)(2). The statute places the burden on the prisoner’s institution to collect the additional monthly payments and forward them to the court. Specifically,

[a]fter payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month’s income credited to the prisoner’s account. The agency having custody of the prisoner shall forward payments from the prisoner’s account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.

28 U.S.C. § 1915(b)(2). Therefore, after the plaintiff pays in full the initial partial filing fee, the remaining installments shall be collected by the institution having custody of the plaintiff. *Id.* The clerk of court shall send a copy of this order and the notice of collection of filing fee to the appropriate official at the place where the plaintiff is an inmate. The

court shall reserve ruling on the plaintiff's claims for purposes of 28 U.S.C. § 1915(e)(2)(B) and/or 28 U.S.C. § 1915A.

## ***II. APPLICATION FOR APPOINTMENT OF COUNSEL***

Appointment of counsel is based on multiple factors, including the complexity of the case, and, although the court does appoint attorneys in actions that arise under 42 U.S.C. § 1983, it is not required to appoint an attorney. *See Davis v. Scott*, 94 F.3d 444, 447 (8th Cir. 1996) (setting forth factors to be considered for appointment of counsel in civil case); *Abdullah v. Gunter*, 949 F.2d 1032, 1035 (8th Cir. 1991) (same); *Wiggins v. Sargent*, 753 F.2d 663, 668 (8th Cir. 1985) (stating an indigent litigant enjoys neither a statutory nor a constitutional right to have counsel appointed in a civil case). Given the record in this action under 42 U.S.C. § 1983, the court does not believe that the assistance of counsel is warranted at this time. Accordingly, the plaintiff's application for appointment of counsel shall be denied.

## ***III. MOTION FOR PRELIMINARY INJUNCTION***

With respect to the merits of the plaintiff's motion for preliminary injunction, the standard set forth in *Dataphase Sys., Inc. v. C. L. Sys., Inc.*, 640 F.2d 109, 112-14 (8th Cir. 1981), applies to a request for preliminary injunctive relief. The factors to consider when determining whether to grant preliminary relief in a federal setting are:

- (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

*Id.* at 114. The burden of establishing the necessity of a preliminary injunction is on the movant. *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) (citing *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 737 (8th Cir. 1989)). “No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction.”

*Baker*, 28 F.3d at 1472 (quoting *Calvin Klein Cosmetics Corp. v. Lenox Laboratories, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987), in turn citing *Dataphase*, 640 F.2d at 113)). However, “a failure to demonstrate irreparable harm, standing alone, may be a sufficient basis to deny preliminary injunctive relief.” *Caballo Coal Co. v. Ind. Mich. Power Co.*, 305 F.3d 796, 800 (8th Cir. 2002) (citing *Dataphase*, 640 F.2d at 114 n.9). The court reviewed the plaintiff’s complaint and motion for preliminary injunction. Based on its review of the plaintiff’s pleadings and relevant legal authority, the court does not believe that it is appropriate to grant a preliminary injunction. Nothing indicates that the defendants will intentionally dispose of evidence that relates to the instant proceeding. Accordingly, a preliminary injunction will not issue.

**IT IS THEREFORE ORDERED:**

- 1) The plaintiff’s application to proceed in forma pauperis status (docket no. 1) is granted.
- 2) The clerk of the court is directed to file the complaint without the prepayment of the filing fee.
- 3) The plaintiff is directed to submit an initial partial filing fee of \$8.22 by no later than June 25, 2010. The instant action will be dismissed unless either the initial partial filing fee of \$8.22 is received by June 25, 2010 or the court grants an enlargement of time to pay the initial partial filing fee in response to a written motion.
- 4) After the plaintiff pays the initial partial filing fee, the institution having custody of the plaintiff is directed to collect and remit monthly payments in the manner set forth in 28 U.S.C. § 1915(b)(2). Until the \$350.00 filing fee is paid in full, the plaintiff is obligated to pay and the institution having custody of him is obligated to forward 20 percent of the preceding month’s income credited to his account each time the amount in the account exceeds \$10.00.


5) The clerk of the court is directed to send a copy of this order and the notice of collection of filing fee to the appropriate official at the place where the plaintiff is an inmate.

6) The plaintiff's motion for appointment of counsel (docket no. 3) is denied.

7) The plaintiff's motion for preliminary injunction (docket no. 2) is denied.

8) The court reserves ruling on the plaintiff's claims for purposes of 28 U.S.C. § 1915(e)(2)(B) and/or 28 U.S.C. § 1915A.

**DATED** this 2nd day of June, 2010.



LINDA R. READE  
CHIEF JUDGE, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA

**TO: WARDEN/ADMINISTRATOR**  
**Anamosa State Penitentiary, Anamosa, Iowa**

**NOTICE OF COLLECTION OF FILING FEE**

You are hereby given notice that Justin Kindred, #1058198, an inmate at your facility, filed the following lawsuit in the United States District Court for the Northern District of Iowa: *Kindred v. Fayram, et al.*, Case No. C10-0042-LRR. The inmate was granted in forma pauperis status pursuant to 28 U.S.C. § 1915(b), which requires partial payments of the \$350.00 filing fee. Based on the inmate's account information, the court has assessed an initial partial filing fee of \$8.22, which the inmate must pay now to the clerk of court. 28 U.S.C. § 1915(b)(1).

After payment of the initial partial filing fee, the [inmate] shall be required to make monthly payments of 20 percent of the preceding month's income credited to [his] account. The agency having custody of the [inmate] shall forward payments from [his] account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.

28 U.S.C. § 1915(b)(2). Therefore, you must monitor the account and send payments to the clerk of court according to the system provided in 28 U.S.C. § 1915(b)(2), that is, you should begin making monthly payments of 20 percent of the preceding month's income credited to the inmate's account.

Please make the appropriate arrangements to have these fees deducted and sent to the court as instructed.

s/Karen S Yorgensen, Deputy  
Robert L. Phelps  
U.S. District Court Clerk  
Northern District of Iowa