

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

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JONATHON M. MARK,

Plaintiff,

v.

ORDER

05-C-279-C

Off. GUSTAFSON; Sgt. McARTHER; Lt. DOHMS;  
Unit Manager DOUGHERTY; Mr. BROWN (head  
of PRC); STEPHEN M. PUCKETT,

Defendants.  
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At the time judgment was entered in this case on August 31, 2006, plaintiff was a prisoner at the Oakhill Correctional Institution in Oregon, Wisconsin. That same address appears on plaintiff's Rule 59 motion, which is dated September 14, 2006. On October 19, 2006, following a denial of plaintiff's Rule 59 motion, plaintiff filed a notice of appeal directly with the Court of Appeals for the Seventh Circuit. The court of appeals forwarded the notice to this court as required under Fed. R. App. P. 4(d) on November 1, 2006. Plaintiff's address on the notice of appeal is P.O. Box 1251, Fond du Lac, Wisconsin, 54936. No notice of this change of address appears to have been taken by this court. Nothing on the court's docket suggests that a change of address was entered into the record and, more

important, I treated plaintiff's notice of appeal as an appeal subject to the 1996 Prison Litigation Reform Act. In an order dated November 6, 2006, I advised plaintiff that under the act, he would have to submit a trust fund account statement in support of his request for leave to proceed in forma pauperis on appeal.

Plaintiff clearly received the court's November 6 order. On November 16, 2006, he submitted a trust fund account statement. At the same time, he submitted a cover letter indicating that his address had changed from the Oakhill Correctional Institution to N8611 Van Dyne Rd., Van Dyne, Wisconsin, 54979. Nothing in this submission gave the court reason to doubt that plaintiff was a prisoner at the time he filed his notice of appeal. Therefore, in an order dated November 27, 2006, I calculated plaintiff's initial partial payment of the \$455 fee for filing his appeal in the amount of \$70.16 and directed plaintiff to submit it no later than December 18, 2006.

That order has crossed in the mail with two more communications from plaintiff. In one of those communications, plaintiff advises the court that his trust fund account statement did not cover the full six-month period immediately preceding the filing of his notice of appeal because he was released from the Oakhill prison on September 26, 2006.

If it is true that plaintiff was released from prison on September 26, 2006, and that he was not in a halfway house when he filed his notice of appeal, then he would not be subject to the Prison Litigation Reform Act and he would not be required to submit an initial

partial payment of the fee for filing his appeal. See, e.g., Kerr v. Puckett, 138 F.3d 321 (7th Cir. 1998)(convict out on parole is not a “person incarcerated or detained in any facility” subject to the PLRA). If the address plaintiff shows on his notice of appeal is a halfway house address, however, then plaintiff was a prisoner detained in a facility and subject to the act. Witzke v. Femal, 376 F.3d 744 (2004)(halfway house comes within definition of “any jail, prison, or other correctional facility” for purpose of applying PLRA’s exhaustion requirement). At this point, it seems sensible to vacate this court’s order of November 27, 2006 and allow plaintiff to clarify his custodial status as of October 19, 2006, when he filed his notice of appeal.

#### ORDER

IT IS ORDERED that the order entered herein on November 27, 2006 is VACATED. Plaintiff may have until December 11, 2006, in which to advise the court whether he was living in a halfway house in Fond du Lac at the time he filed his notice of appeal. If he was, then plaintiff owes an initial partial payment of the fee for filing his appeal in the amount of \$70.16, which must be paid no later than December 22, 2006. If, however, plaintiff was not living in a halfway house but was, in fact, on parole or otherwise fully released from his sentence, then he must complete the enclosed form for an affidavit of indigency and return it to the court no later than December 11, 2006, so that this court can determine whether

he qualifies for indigent status on appeal under the standard applicable to non-prisoners.

Further, IT IS ORDERED that if, by December 11, 2006, plaintiff fails to respond to this order, I will advise the court of appeals of that fact so that it can take whatever action it deems appropriate with respect to plaintiff's appeal.

Entered this 1st day of December, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge