

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

RAYMOND K. HEDGESPETH, JR.

Petitioner,

MEMORANDUM

v.

08-cv-410-slc

STEVE WATTERS,

Respondent.

Petitioner Raymond K. Hedgespeth is a patient at the Wisconsin Resource Center. On July 16, 2008, he filed a proposed complaint under 42 U.S.C. § 1983 in this case alleging violations of his constitutional rights. In an order dated August 3, 2008, I assessed petitioner an “initial partial payment” of \$13.75 toward his \$350 filing fee and suggested in the order that petitioner was a prisoner subject to the 1996 Prison Litigation Reform Act. Petitioner promptly filed a document titled “Appeal to In Forma Pauperis Order,” which Judge Crabb construed to include a motion for reconsideration of the court’s determination that petitioner was subject to the PLRA and a request for leave to proceed *in forma pauperis* on an interlocutory appeal.

In an order dated August 20, 2008, Judge Crabb vacated that portion of my August 3 order that referred to petitioner as a prisoner. However, she explained that even though petitioner was not subject to the PLRA, it was proper to have determined that he qualified financially for indigent status only if he prepaid \$13.75 of the \$350 filing fee. Therefore, Judge Crabb gave petitioner additional time to submit a check or money order in the amount of \$13.75. In the same order, Judge Crabb denied petitioner’s request for leave to proceed *in forma*

pauperis with an interlocutory appeal, finding that his appeal was not taken in good faith because he was attempting to appeal a non-appealable order. Subsequently, the Court of Appeals for the Seventh Circuit notified petitioner that if he intended to pursue his appeal, he would have to prepay the \$455 filing fee. When he did not do so, the court of appeals dismissed petitioner's appeal on September 30, 2008 and ordered that the \$455 filing fee "be collected from his *prisoner's* trust fund account using the mechanism of Section 1915(b)." (Emphasis added.)

Now petitioner has written to ask why the Court of Appeals has dismissed his appeal for his failure to pay the \$455 filing fee and ordered that it be collected. He says that he is confused, because he thought that when Judge Crabb denied his request to proceed *in forma pauperis* on appeal, his appeal was dismissed at that time. Petitioner's confusion is understandable.

When a person tells the district court that he wants to appeal a district court decision, the document is docketed as a notice of appeal. At the time the notice of appeal is docketed in the district court, the court of appeals is sent a copy of the notice and that court opens an appeal and assigns the appeal a number. In this case, when petitioner filed his notice of appeal on August 15, 2008, the court of appeals opened a docket in its court and assigned the appeal number 08-3114.

As soon as a notice of appeal is filed, the matter of payment for the appeal arises. Because petitioner's appeal was not accompanied by the \$455 filing fee, Judge Crabb construed the notice of appeal to include a request for leave to proceed *in forma pauperis* on appeal. As noted above, she denied petitioner's request. But denial of a request for leave to proceed *in forma*

pauperis is not the same thing as dismissing an appeal. Only the court of appeals has authority to dismiss an appeal. Petitioner was still free to pursue his appeal either by asking the court of appeals to find that the district court erred in deciding that he did not qualify for pauper status on appeal or by paying the \$455 filing fee. When petitioner did neither of these things, the court of appeals dismissed his appeal.

However, it appears that the court of appeals' September 30 order may be repeating the mistake that arose earlier in this case. In its order, the court of appeals has directed this court to collect the appellate fees from "the prisoner's" trust fund account using the mechanism in 28 U.S.C. § 1915(b), a mechanism that ordinarily applies only to persons subject to the PLRA. As this court has already made clear, petitioner is not a prisoner. He is a civilly committed patient institutionalized under Chapter 980 of the Wisconsin Statutes. Because the court of appeals' directive to this court may have been issued in error, I am sending a copy of this memorandum to the court and asking for clarification whether it intends this court to direct the superintendent of the Wisconsin Resource Center to collect the \$455 appellate filing fee using a mechanism ordinarily reserved for persons subject to the PLRA.

In the meantime, I note that petitioner has prepaid \$13.75 of the \$350 fee for filing his case in this court and that his complaint is presently under advisement for a determination whether one or more claims must be dismissed as frivolous or malicious, for failure to state a claim on which relief may be granted or because petitioner is seeking money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). As soon as a decision is

reached, petitioner will be notified promptly.

Entered this 17th day of October, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge