

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CLARENCE E.
GRISSOM,

Plaintiff,

v.

CASE NO. 10-3134-SAC

KAREN ROHLING,

Defendant.

O R D E R

This action was dismissed and all relief was denied by Order entered November 9, 2010. The matter is now before the court upon plaintiff's third Notice of Appeal (Doc. 45) filed in this case, third Motion to Appoint Counsel on Appeal (Doc. 46), and third Motion for Leave to Appeal in forma pauperis (Doc. 49). The two motions are the same as those that were previously denied by Orders entered December 15, 2010 (Doc. 37) and January 5, 2011 (Doc. 44). Mr. Grissom provides no grounds for this court to reconsider its prior denials.

The appeal of the final orders and judgment in this action is now pending before the Tenth Circuit Court of Appeals. Mr. Grissom does not show that he has sought either leave to appeal in forma pauperis or appointment of counsel from the Tenth Circuit Court.

Plaintiff's latest Notice of Appeal (Doc. 46) states that he appeals "all adverse rulings" of this court, which would be the orders in Docs. 23, 31, 37, 44, and the judgment (Doc. 32).

However, plaintiff has already filed Notices of Appeal as to all but one of those orders and the appeal is presently pending. The only order (Doc. 44) that he has not already appealed is that denying his second Motion to Appoint Counsel on Appeal and second Motion for Leave to Appeal in forma pauperis. While the denial of a motion for leave to appeal in forma pauperis and the denial of a motion for appointment of counsel may be appealable, Mr. Grissom has already filed an appeal of the order denying those motions. For these reasons, the court finds that the only order he now seeks to appeal on which an appeal is not already pending is Document 44 and that, under these circumstances, this order is not an appealable order. 28 U.S.C.A. § 1291 vests the Circuit Court appellate jurisdiction "to all final decisions of the district courts except where a direct review may be had in the Supreme Court." McKinney v. Gannett Co., Inc., 694 F.2d 1240, (10th Cir. 1982)(citing United States v. Feeney, 641 F.2d 821 (10th Cir. 1981)); see also Adelman v. Fourth Nat'l Bank & Trust Co. (In re Durability Inc.), 893 F.2d 264, 265 (10th Cir.1990)("[A]n order is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.").

The court further finds that this additional, separate appeal of orders that have already been appealed and a non-appealable order is frivolous. Thus, if the court's action on this matter is affirmed on appeal, this appeal should count as a strike against

Mr. Grissom under 28 U.S.C. § 1915(g).¹

The court additionally notes that plaintiff's Notice of Appeal (Doc. 45) again provides no grounds for appeal. Accordingly, the court finds that plaintiff states no nonfrivolous argument on the law or facts for this appeal. The court concludes that this third Notice of Appeal is frivolous and is not taken in good faith.

IT IS THEREFORE ORDERED that plaintiff's third Motion to Appoint Counsel on Appeal (Doc. 46) and third Motion to Proceed in forma pauperis on Appeal (Doc. 49) are denied.

IT IS FURTHER ORDERED that this separate appeal (Doc. 45) is not taken in good faith.

The clerk is directed to send a copy of this Order to the Tenth Circuit Court of Appeals.

IT IS SO ORDERED.

Dated this 15th day of March, 2011, at Topeka, Kansas.

¹ Section 1915(g) of 28 U.S.C. provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court that is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

s/Sam A. Crow

U. S. Senior District Judge