

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TYRIS EASLEY,

Plaintiff,

v.

CASE NO. 11-3182-SAC

R.A. BYRD,

Defendant.

O R D E R

Plaintiff, a prisoner incarcerated in the United States Penitentiary at Leavenworth, Kansas, initiated this matter by submitting a pro se form pleading seeking relief under the Federal Tort Claims Act (FTCA) on claims related to an alleged false and malicious prison disciplinary action against plaintiff while he was incarcerated in a federal facility in California. The court granted plaintiff provisional leave to proceed in forma pauperis subject to plaintiff voluntarily dismissing his action or showing cause why the action, whether construed as proceeding under FTCA or *Bivens*, should not be dismissed without prejudice because it appeared plain on the face of the complaint that plaintiff had not exhausted administrative remedies, because the relief being sought was barred by *Heck*, and because the court lacked personal jurisdiction over the sole California defendant named in the complaint.

Plaintiff submitted a pro se response which the court liberally construed as a notice of voluntary dismissal pursuant to Fed.R.Civ.P. 41. Plaintiff filed a notice of appeal from that final order and judgment without prepayment of the \$455.00 appellate

filing fee. Plaintiff also submitted a "Motion to Recharacterize" his complaint as seeking relief under 28 U.S.C. § 2241, and substituting the USPLVN Warden as the defendant.

Plaintiff's Motion for Recharacterization

Plaintiff's motion for recharacterization of the complaint, liberally construed as a motion for relief from judgment under Fed.R.Civ.P. 60(b), is denied. See *Reed v. Champion*, 46 F.3d 1152 (10th Cir.1995)(table)(district court retains jurisdiction to deny Rule 60(b) motions while appeal is pending)(citing *Summers v. State of Utah*, 927 F.2d 1165, 1168 (10th Cir.1991)). Dismissal of this action was without prejudice to plaintiff seeking appropriate relief in a new action. Plaintiff is free to seek relief under § 2241 on a court approved form petition, with payment of the \$5.00 district court filing fee in habeas corpus or submission of a court approved form motion for seeking leave to proceed in forma pauperis without prepayment of that filing fee.

Plaintiff's Appeal

Plaintiff is obligated to pay the \$455.00 filing fee for his appeal. See 28 U.S.C. § 1915(b)(1)(prisoner bringing a civil action or appeal in forma pauperis is required to pay the full filing fee). Plaintiff may satisfy this appellate fee obligation over time by submitting a motion for leave to proceed in forma pauperis on appeal, by payment of an initial partial appellate filing fee assessed by the court pursuant to 28 U.S.C. § 1915(b)(1), and by automatic payments thereafter from plaintiff's inmate trust fund account as authorized by 28 U.S.C. § 1915(b)(2). See *Boling-Bey v. U.S. Parole Com'n*, 559 F.3d 1149, 1153 (10th Cir.2009)(a prisoner seeking in forma pauperis status on appeal from judgment in a civil

action must submit a new motion in the district court with a supporting affidavit and certified copy of his trust fund account statement for six month period prior to filing notice of appeal). The court grants plaintiff additional time to either pay the \$455.00 appellate filing fee, or submit an executed form motion for filing under § 1915.

IT IS THEREFORE ORDERED that plaintiff's motion for recharacterization of his complaint (Doc. 10) is denied.

IT IS FURTHER ORDERED that plaintiff is granted thirty (30) days to either pay the \$455.00 appellate filing fee, or to submit an executed form motion seeking leave to proceed in forma pauperis in his appeal.

The clerk's office is to provide plaintiff with a form petition for filing under 28 U.S.C. § 2241, and two form motions for filing under 28 U.S.C. § 1915.

IT IS SO ORDERED.

DATED: This 8th day of May 2012 at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge