

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

CURTIS LEON SMALL,

Plaintiff,

v.

CASE NO. 13-3011-SAC

**ADAMS HEIGHTS MANUFACTURED HOME
PARK, LLC,**

Defendants.

MEMORANDUM AND ORDER

This matter is a civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff, a prisoner in the Shawnee County Jail, proceeds pro se and seeks leave to proceed in forma pauperis.

Pursuant to 28 U.S.C. § 1915(b)(1), the court must assess as an initial partial filing fee twenty percent of the greater of the average monthly deposit or average monthly balance in the prisoner's account for the six months immediately preceding the date of filing of a civil action.

Having examined the records submitted by the plaintiff, which reflect four months, the court finds the average monthly deposit to his account is \$40.00; the average monthly balance cannot be determined from the records provided. The court therefore assesses an initial partial filing fee of \$8.00, twenty percent of the average monthly deposit, rounded to the lower half dollar.¹

Next, the court's initial review of this matter suggests a

¹ Plaintiff will be required to pay the balance of the \$350.00 filing fee in installments calculated pursuant to 28 U.S.C. § 1915(b)(2), which require payments of twenty percent of the preceding month's income each time the income exceeds \$10.00.

defect, namely, that plaintiff asserts a state law negligence claim rather than a constitutional claim cognizable under § 1983. See *Daniels v. Williams*, 474 U.S. 327, 330-32 (1986) (claims of negligence are not cognizable in an action under § 1983); *Rost v. Steamboat Springs RE-2 School District*, 511 F.3d 1114, 1126 (10th Cir. 2008) (“negligent conduct is insufficient to prove liability under §1983” (citations omitted)). Because plaintiff’s claim of negligence by the defendant presents a state law claim that should be presented to a state district court, the court is considering the dismissal of this action. The dismissal would not prevent plaintiff from presenting the claim in the state court if he chooses to do so.

IT IS, THEREFORE, BY THE COURT ORDERED that on or before March 19, 2013, plaintiff shall submit to the clerk of the court an initial partial filing fee of \$8.00. Any objection to this order must be filed on or before the date payment is due.

IT IS FURTHER ORDERED that on or before March 19, 2013, plaintiff shall show cause why this matter should not be dismissed for failure to state a claim that is cognizable under § 1983. The failure to file a timely response may result in the dismissal of this action without additional prior notice to the plaintiff.

A copy of this order shall be transmitted to the plaintiff.

IT IS SO ORDERED.

DATED: This 19th day of February, 2013, at Topeka, Kansas.

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