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Robert Kenny v. USA

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1644

ROBERT KENNY,
Appellant

v.

UNITED STATES; STEVEN WALD;
MARK TRYBA; ANDRIA GREENIDGE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Civ. No. 3-08-cv-03921)
District Judge: Honorable Garrett E. Brown, Jr.

Submitted Under Third Circuit L.A.R. 34.1(a)
February 22, 2010
Before: SCIRICA, Chief Judge, CHAGARES and WEIS, Circuit Judges.

(Filed: April 2, 2010)

OPINION

WEIS, Circuit Judge.

The plaintiff's complaint requested damages and equitable relief against the United States and named employees of the Internal Revenue Service for retaliation based

on the plaintiff's allegations of misconduct on the part of the IRS. On February 5, 2009, the District Court ordered that "Defendants' motion to dismiss all counts of the Complaint is [granted] without prejudice; and . . . Plaintiff's Motion for a Preliminary Injunction is [dismissed] as moot."

This Court has held that a dismissal without prejudice generally is a non-final order and is not appealable. "Only if the plaintiff cannot amend or declares his intention to stand on his complaint does the order become final and appealable." Borelli v. City of Reading, 532 F.2d 950, 951-52 (3d Cir. 1976).

In his Reply Brief before this Court, plaintiff states, "If and when the district court again has jurisdiction of this case, [plaintiff] will move to amend the complaint to correct any deficiencies" Although not in proper form, we construe the statement as establishing the plaintiff's intention not to stand on his complaint. The Court calls plaintiff's attention to Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 251-52 (3d Cir. 2007), for the proper procedures to amend his complaint.

Because we find that this appeal is from a non-final order, the appeal will be dismissed.