

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10618
Conference Calendar

RICKY ABEYTA,

Plaintiff-Appellant,

versus

CARLOS CORREA,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:94-CV-41
- - - - -
(September 20, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Ricky Abeyta appeals the dismissal of his civil rights action as frivolous pursuant to 28 U.S.C. § 1915(d). In his complaint, Abeyta names as defendant, Carlos Correa, the lawyer who represented Abeyta in the state criminal action for which he is presently incarcerated. An in forma pauperis ("IFP") complaint may be dismissed by the district court if it determines that the action is frivolous or malicious. 28 U.S.C. § 1915(d). A complaint is "frivolous" if it "lacks an arguable basis either

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

in law or in fact." Denton v. Hernandez, ___ U.S. ___, 112 S. Ct. 1728, 1733, 118 L. Ed. 2d 340 (1992) (internal quotations omitted). Section 1915(d) dismissals are reviewed for abuse of discretion. Id. at 1734.

To recover under 42 U.S.C. § 1983, Abeyta must show the deprivation of a constitutional right by a person acting under color of state law. See Briscoe v. LaHue, 460 U.S. 325, 329-30, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). A nongovernmental private defendant can be held liable under § 1983 if the defendant's conduct involved a "state action." Daniel v. Ferguson, 839 F.2d 1124, 1129 (5th Cir. 1988). As Abeyta's retained counsel, Correa was not acting under color of state law and the complaint was properly dismissed as frivolous. Polk County v. Dodson, 454 U.S. 312, 325, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981); Russell v. Millsap, 781 F.2d 381, 383 (5th Cir. 1985), cert. denied, 479 U.S. 826 (1986).

AFFIRMED.