

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20640
Conference Calendar

LINZY LINCOLN,

Plaintiff-Appellant,

versus

BROWN & WILLIAMS TOBACCO COMPANY,
PHILIP MORRIS TOBACCO COMPANY,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-98-CV-1811
- - - - -

April 15, 1999

Before JONES, SMITH, and DUHÉ, Circuit Judges.

PER CURIAM:*

Linzy Lincoln, Texas prisoner # 265570, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint against two tobacco companies for failure to state a claim. He argues that the two tobacco companies acted under the color of state law because there are Texas laws which regulate the tobacco companies.

Lincoln's complaint fails to allege the deprivation of a statutory or constitutional right by a state actor or by a party

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

who conspired with a state actor. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150-52 (1970). The district court's dismissal of the complaint for failure to state a claim was not error. See Fed. R. Civ. P. 12(b)(6); Guthrie v. Tifco Industries, 941 F.2d 374, 379 (5th Cir. 1991).

Lincoln's appeal lacks arguable merit and is thus frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983).

Because the appeal is frivolous,, it is DISMISSED. 5TH CIR. R. 42.2. The dismissal of this appeal as frivolous counts as a strike for purposes of 28 U.S.C. § 1915(g). We caution Lincoln that once he accumulates three strikes, he may not proceed in forma pauperis in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. See 28 U.S.C. § 1915(g).

APPEAL DISMISSED; SANCTIONS WARNING ISSUED.