

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8485
Conference Calendar

DAVID KIKTA,

Plaintiff-Appellant,

versus

MARIAM A. MARUASTI, M.D.,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-93-CV-241
- - - - -
(December 15, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

David Kikta, proceeding pro se, filed this § 1983 action against Dr. Mariam A. Maruasti for refusal to treat him for stress. The district court dismissed his action as frivolous under 28 U.S.C. § 1915(d), holding that Kikta's complaint had failed to state a claim because it did not allege that Dr. Maruasti acted under color of state law.

A § 1915(d) dismissal is reviewed for abuse of discretion. Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1733-34, 118 L.Ed.2d 340 (1992). A district court may dismiss an in forma

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pauperis complaint if it is frivolous, that is, if it lacks an arguable basis either in law or in fact. Id.

In Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992), this Court established a framework for determining when a district court has abused its discretion in dismissing a case under § 1915(d). An appellate court should consider whether "(1) the plaintiff is proceeding pro se, 2) the court inappropriately resolved genuine issues of disputed fact, (3) the court applied erroneous legal conclusions, (4) the court has provided a statement of reasons which facilitates 'intelligent appellate review,' and (5) any factual frivolousness could have been remedied through a more specific pleading." Id.

Kikta did allege that Dr. Maruasti acted under "color of law." Although he did not allege facts to show why the defendant was acting under color of state law, this could have been remedied through allowing Kikta to amend his complaint. Kikta alleges in his brief that Dr. Maruasti acted under color of state law because she was under contract with the El Paso County Detention Facility to provide psychiatric treatment to inmates of the facility. A physician who provides medical services to inmates pursuant to a contract with the governmental authority is deemed to be a state actor. West v. Atkins, 487 U.S. 42, 54-57, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

The district court abused its discretion in dismissing Kikta's action as frivolous on this basis. The district court's judgment is VACATED and this case is REMANDED for further proceedings.