

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

June 11, 2007

Elisabeth A. Shumaker
Clerk of Court

PETER E. WASKO,

Plaintiff-Appellant,

v.

HERBERT M. SILVERBERG

Defendant-Appellee.

No. 06-2314

(D. New Mexico)

(D.C. No. CIV-05-1073 JB/RHS)

ORDER

Before **HENRY, TYMKOVICH, and HOLMES**, Circuit Judges.

Peter Wasko filed this action pursuant to 42 U.S.C. § 1983, alleging that the defendant Herbert M. Silverberg, an attorney who had represented Mr. Wasko in a wrongful termination proceeding before the New Mexico Human Rights Commission, committed malpractice. In a thorough and well-reasoned memorandum opinion and order, the district court dismissed Mr. Wasko's complaint on two grounds. First, the court concluded that the defendant Mr. Silverberg was not a state actor and thus could not be sued in a § 1983 action. Second, the court held that Mr. Wasko's complaint was barred by the doctrine of res judicata because Mr. Wasko had raised the same claim in a prior federal lawsuit. See *Wasko v. Silverberg*, 103 Fed. Appx. 332, 334 (10th Cir. 2004).

Mr. Wasko now seeks to appeal the district court's dismissal of his action. He has moved to proceed in forma pauperis.

For substantially the same reasons set forth in the district court's order, we conclude that Mr. Wasko has failed to present a reasoned non-frivolous challenge to the district court's ruling. Mr. Silverberg was clearly not a state actor. See American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999) (liability under § 1983 requires showing that deprivation of federal right was committed under color of state law). Moreover, this action is barred by the doctrine of res judicata. Nwosun v. Gen. Mills Rests., Inc., 124 F.3d 1255, 1257 (10th Cir. 1997) (explaining that res judicata applies when: (1) the prior action has been finally adjudicated on the merits; (2) the parties are identical or in privity; (3) the suit is based on the same cause of action; and (4) the plaintiff had a full and fair opportunity to litigate the claim in the prior action).

Accordingly, we DENY Mr. Wasko's motion to proceed in forma pauperis and DISMISS this appeal.

Entered for the Court,

Robert H. Henry
United States Circuit Judge