

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SCOTT STAGGS,

Plaintiff,

vs.

CIVIL ACTION
No. 10-3121-SAC

JAMES E. RUMSEY,

Defendant.

MEMORANDUM AND ORDER

This matter is a civil action filed pursuant to 42 U.S.C. § 1983 by a prison in state custody. By an earlier order, the court directed plaintiff to submit an initial partial filing fee and to show cause why this matter should not be dismissed for failure to state a claim for relief, as the sole defendant in this action is not a "state actor" for purposes of § 1983.

Plaintiff filed a timely response, but he has failed to submit the partial filing fee as directed.

The court has examined the response and finds plaintiff has not established this matter should be allowed to proceed. The sole defendant in this matter is a private attorney who represented plaintiff during a portion of the criminal proceedings against him. As set forth in the court's earlier order, an

attorney engaged in the private practice of law does not act under color of state law for purposes of § 1983. *Ellibee v. Hazlett*, 122 Fed. Appx. 932, 934 (10th Cir. Dec. 13, 2004)(unpublished op.)(“Neither public defenders performing their ‘traditional functions as counsel to a defendant in a criminal proceeding’ nor private attorneys act under color of state law.”)(quoting *Polk County v. Dodson*, 454 U.S. 312, 325 (1981)). Because plaintiff’s complaints about the defendant’s performance do not present a claim that is actionable under §1983, this matter must be dismissed for failure to state a claim upon which relief may be granted. This matter will be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and will count as a “prior occasion” or “strike” under § 1915(g).

IT IS, THEREFORE, BY THE COURT ORDERED plaintiff’s motion for leave to proceed in forma pauperis (Doc. 2) is granted. Collection action shall commence pursuant to 28 U.S.C. §1915(b)(2) until plaintiff satisfies the \$350.00 filing fee.

IT IS FURTHER ORDERED this matter is dismissed pursuant to 28 U.S.C. §1915(e)(2)(B)(ii).

Copies of this order shall be transmitted to the plaintiff and to the Finance Office of the facility where he is incarcerated.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 18th day of January, 2011.

S/ Sam A. Crow
SAM A. CROW
United States Senior District Judge