

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

October 31, 2007

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No. 06-40465  
Summary Calendar

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Charles R. Fulbruge III  
Clerk

THOMAS WAYNE FLORENCE

Plaintiff-Appellant

v.

Captain Unknown DEEL; Sergeant Unknown ROTH; JACOB BAYER,  
Corrections Officer; Major Unidentified MONEYHAM; Warden Unidentified  
WESTFALL

Defendants-Appellees

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 6:05-CV-307

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Before JOLLY, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:\*

Thomas Wayne Florence, Texas prisoner # 654322, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint for failure to state a claim upon which relief could be granted and as frivolous. See 28 U.S.C. § 1915A. Florence's complaint alleged that the defendants conspired and retaliated

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

against him and maliciously prosecuted him in disciplinary proceeding number 20050042060.

We review the district court's dismissal of Florence's § 1983 complaint de novo. *Ruiz v. United States*, 160 F.3d 273, 275 (5th Cir. 1998). Florence's only argument on appeal is that the district court erred in determining that his reduction in line classification status did not implicate a constitutionally protected liberty interest. The district court's determination was based on our holding in *Malchi v. Thaler*, 211 F.3d 953 (5th Cir. 2000). Florence argues that *Malchi* was incorrectly decided and that we should revisit that decision. Absent an intervening Supreme Court or en banc decision, we cannot overrule the decision of a prior panel of this court. *Foster v. Quarterman*, 466 F.3d 359, 367-68 (5th Cir. 2006), cert. denied, 127 S. Ct. 2099 (2007). The district court correctly dismissed Florence's complaint, and all of his outstanding motions before this court are denied.

The appeal is without arguable merit and is dismissed as frivolous. See 5TH CIR. R. 42.2; *Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983). Florence is warned that the district court's dismissal of his complaint for failure to state a claim upon which relief could be granted and this court's dismissal of his appeal as frivolous both count as strikes for purposes of 28 U.S.C. § 1915(g) and that if he accumulates three strikes, he will not be able to 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 *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996); § 1915(g).

APPEAL DISMISSED AS FRIVOLOUS; ALL OUTSTANDING MOTIONS DENIED; SANCTION WARNING ISSUED.