

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

February 18, 2009

Charles R. Fulbruge III
Clerk

No. 08-30106

Conference Calendar

MILES ORLANDO LEE

Plaintiff-Appellant

v.

COUNSELOR BURKE; ASSOCIATE DEPUTY WARDEN ENDFIELD;
LIEUTENANT BOWERS; SUPERVISORY GUILLORY; MS HUGHES;
CAPTAIN MARQUES

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 1:07-CV-1718

Before HIGGINBOTHAM, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Miles Orlando Lee, federal prisoner # 11199-040, appeals the dismissal of his *Bivens*¹ complaint as frivolous and for failure to state a claim upon which relief could be granted. Lee's appellate brief fails to assign error to or address

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

the district court's reasons for dismissal and is devoid of legal argument and citation to authority. The clerk of this court afforded Lee an additional 10 days in which to file a brief in compliance with the Federal Rules of Appellate Procedure or risk waiver of his appellate issues. Lee made no further filings. Lee has therefore waived review of the district court's dismissal. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). Lee has not shown an abuse of discretion on the part of the district court in denying him leave to amend his complaint, *see Aguilar v. Texas Dep't of Criminal Justice*, 160 F.3d 1052, 1053 (5th Cir. 1998), and his fraud claim does not raise a constitutional issue and is therefore not cognizable in a *Bivens* complaint, *see Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005).

Lee's appeal is without arguable merit and is frivolous. *See Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983). It is therefore dismissed. 5TH CIR. R. 42.2. The district court's dismissal and the dismissal of Lee's appeal count as two strikes for purposes of 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996). Lee is cautioned that if he accumulates three strikes, he will no longer be allowed to proceed in forma pauperis in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is in imminent danger of serious physical injury. *See* § 1915(g)

APPEAL DISMISSED; SANCTION WARNING ISSUED.