

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1760  
Summary Calendar

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BOB E. BAILES,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

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Appeal from the United States District Court  
For the Northern District of Texas  
(3:91-CV-2271-R)

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(March 11, 1993)

Before POLITZ, Chief Judge, DUHÉ and DeMOSS, Circuit Judges.

PER CURIAM:\*

The district court dismissed the Federal Tort Claims Act petition of Bob E. Bailes, a federal prisoner, for failure to exhaust administrative remedies. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Bailes brought this action to recover money damages for personal property that he alleges was lost when he was transferred between federal correctional institutions.<sup>1</sup> The government moved for summary judgment on the grounds that Bailes did not first present his claim to the Bureau of Prisons, as required by 28 U.S.C. § 2675(a).<sup>2</sup> The district court granted the motion and subsequently denied two motions for reconsideration. Bailes timely appealed. He moved this court for an extension of time to file his reply brief, which we now grant, and for leave to supplement the record with additional exhibits, which we deny because we may only consider evidence presented in the trial court.<sup>3</sup>

In support of its summary judgment motion, the government submitted the affidavits of three Bureau of Prisons employees

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<sup>1</sup> No stranger to the process, Bailes by his own admission has filed at least nine other tort claims.

<sup>2</sup> 28 U.S.C. § 2675(a) provides in pertinent part:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

<sup>3</sup> The government's motion for an extension of time to file its opposition to Bailes' motion for leave to supplement the record is mooted by our denial of Bailes' motion and therefore denied. Bailes also filed with us a motion for leave to take an interlocutory appeal from another proceeding. This motion, which previously was denied by a different panel, is dismissed.

attesting that they found no administrative claim related to the subject matter of the instant suit after a search of the pertinent files and records. This evidence shifted the burden to Bailes to proffer evidence that the claim had been "presented" within the meaning of the statute.<sup>4</sup> Bailes did not acquit himself of this burden. He submitted some evidence that the claim had been mailed. Evidence of mailing, however, does not show presentment.<sup>5</sup> A claim is not presented until received.<sup>6</sup> Bailes proffered no evidence of receipt. Summary judgment therefore was proper.

Alternatively, Bailes urges us to find that the administrative prerequisites were satisfied by his attachment of an administrative claim form to his federal court complaint which was served on the United States Attorney General. We decline to do so. 28 U.S.C. § 2875(a) by its plain language requires that a claim be presented to the agency before an action is commenced.<sup>7</sup> The statutory purpose is to facilitate settlement of tort claims without litigation.<sup>8</sup> Simultaneous filing of the administrative claim and

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<sup>4</sup> **Lavespere v. Niagara Machine & Tool Works, Inc.** 910 F.2d 167 (5th Cir. 1990).

<sup>5</sup> **Bailey v. United States**, 642 F.2d 344 (9th Cir. 1981); **Crack v. United States**, 694 F.Supp. 1244 (E.D.Va. 1988).

<sup>6</sup> **Id.**, 28 C.F.R. § 14.2(a).

<sup>7</sup> **Eure v. U.S. Postal Service**, 711 F.Supp. 1365 (S.D.Miss. 1989).

<sup>8</sup> **Gregory v. Mitchell**, 634 F.2d 199 (5th Cir. 1981).

the judicial complaint comports with neither the letter nor the spirit of the statute. Bailes' argument is without merit.

AFFIRMED.