IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1620
Conference Calendar

GABRIEL AKASIKE,

Plaintiff-Appellant,

versus

MICHAEL FITZPATRICK, Warden,
FCI, Big Spring, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:93-CV-140-C
- - - - - - - - - - -
October 27, 1993

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.
PER CURIAM:*

Gabriel Akasike appeals the dismissal, pursuant to 28 U.S.C. § 1915(d), of his civil rights petition brought under 42 U.S.C. § 1983.

An in forma pauperis (IFP) petition alleging a violation of 42 U.S.C. § 1983 may be dismissed as frivolous under 28 U.S.C. § 1915(d) if it lacks an arguable basis in law or in fact. Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992). The "initial assessment of the in forma

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pauperis plaintiff's factual allegations must be weighed in favor of the plaintiff." Id. Section 1915(d) "cannot serve as a fact finding process for the resolution of disputed facts." Id. "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." Id. An IFP complaint may not be dismissed "simply because the court finds the plaintiff's allegations unlikely." Id. This Court reviews a § 1915(d) dismissal under the abuse-of-discretion standard. Id. at 1734. Some of Akasike's allegations may have an arguable basis in law and fact.

Akasike argues that his injuries were caused "solely by reason of the foregoing negligence" of defendant, Sheriff Keesee. Negligence does not support a claim under 42 U.S.C. § 1983. Thomas v. Kippermann, 846 F.2d 1009, 1011 (5th Cir. 1988). However, according Akasike's petition a liberal construction under Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), although he couches his allegation in terms of negligence, he alleges facts that may possibly support a deliberate indifference claim. See Daniels v. Williams, 474 U.S. 327, 330-31, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); Davidson v. Cannon, 474 U.S. 344, 345-48, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986).

To prevail, Akasike would have to show that Sheriff Keesee's conduct involved more than a lack of due care for Akasike's safety, and that Keesee's conduct manifested a conscious or

callous indifference to Akasike's rights. See Johnston v. Lucas, 786 F.2d 1254, 1259-60 (5th Cir. 1986). Akasike possibly has made such an allegation.

Additionally, to the extent that Akasike's district court pleadings could be construed to argue he was improperly segregated from other inmates and kept in isolation after his release from the prison hospital, that argument may raise a claim under § 1983. Prison officials have broad discretion in the classification of prisoners. McCord v. Maggio, 910 F.2d 1248, 1250 (5th Cir. 1990). However, Akasike's claim that the extended stay in isolation "was an apparent effort to cause mental distress and anxiety" could possibly indicate that his segregation was punitive in nature or retaliatory, implicating constitutional due process concerns. Tubwell v. Griffith, 742 F.2d 250, 251 (5th Cir. 1984); Whittington v. Lynaugh, 842 F.2d 818, 819 (5th Cir.), cert. denied, 488 U.S. 840 (1988). It is not clear from his pleadings whether Akasike received the process due him, or whether Jail officials were deliberately indifferent. Thus, his claims against Keesee should be developed further by way of a questionnaire or a hearing held pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). Because the district court did not conduct a Spears hearing or afford Akasike any other opportunity to amend his pleadings, the dismissal was premature because the complaint, viewed in its most favorable light with all its allegations accepted as true, states a

colorable claim. Foulds v. Corley, 833 F.2d 52, 53-55 (5th Cir. 1987).

Akasike also contends that Warden Fitzpatrick is liable "solely by reason of the foregoing negligence." Warden Fitzpatrick is a federal official. Thus, Akasike's action against him is not proper under § 1983 but is more properly construed as a Bivens action. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). However, because Akasike asserts negligence as his sole theory of recovery, and does not allege any facts that would tie Fitzpatrick to the assault or segregation, he does not have a Bivens claim, and any liability on the part of Warden Fitzpatrick would be governed by the Federal Tort Claims Act (FTCA). Id.

In order to state a claim under the FTCA for the actions of Warden Fitzpatrick, Akasike must first exhaust administrative remedies by presenting his claim for damages to the appropriate federal agency. 28 U.S.C. § 2675(a); McAfee v. 5th Circuit Judges, 884 F.2d 221, 222-23 (5th Cir. 1989), cert. denied, 493 U.S. 1083 (1990). The exhaustion requirement is jurisdictional. Id. Akasike does not assert he has exhausted administrative remedies. Because Akasike's claims against Fitzpatrick do not have an arguable basis in law, we AFFIRM the district court's dismissal as to those claims. However, because his claims against Keesee may have merit, dismissal under § 1915(d) is inappropriate. Those claims should be developed further. Thus,

the district court's dismissal as to those claims is VACATED and the case is REMANDED.