

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2389
Conference Calendar

MARK A. HUGHES,

Plaintiff-Appellant,

versus

JOHN ADAMS, ET AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-H-92-1214
- - - - -
August 17, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

An IFP complaint alleging a violation of 42 U.S.C. § 1983 may be dismissed as frivolous if it lacks an arguable basis in law or fact. Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992). The "initial assessment of the in forma pauperis plaintiff's factual allegations must be weighed in favor of the plaintiff." Id. "[A] finding of factual frivolousness is appropriate when the facts alleged arise to the level of the irrational or the wholly incredible, whether or not

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

there are judicially noticeable facts available to contradict them." Id. This Court reviews a § 1915(d) dismissal under the abuse-of-discretion standard. Denton, 112 S.Ct. at 1734.

In his complaint, Hughes admitted a sexual gesture towards a female guard. Prison officials came to remove him from his cell, and he stepped halfway out. He alleged that: 1) prison officials then grabbed him and snatched him out of his cell; 2) jumped him knocking him partially unconscious; 3) one official was on his back handcuffing him while other officers kicked him in the head and hit him in the ribs with their fists; and, 4) one officer kicked him in the mouth, chipping his top front tooth and busting his lower lip.

In deciding whether unnecessary and wanton infliction of pain was used in violation of a prisoner's Eighth Amendment rights, this Court considers: 1) the extent of the injury suffered; 2) the need for the application of force; 3) the relationship between the need and the amount of force used; 4) the threat reasonably perceived by the responsible officials; and, 5) any efforts made to temper the severity of a forceful response. Hudson v. McMillan, 962 F.2d 522, 523 (5th Cir. 1992), on remand from and citing Hudson v. McMillan, ___ U.S. ___, 112 S.Ct. 995, 999, 117 L.Ed.2d 156 (1992). The core judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." 112 S.Ct. at 999.

Hughes alleged that prison officials kicked and beat him while he was being hand-cuffed and offering no resistance. While

he did not use the words malicious or sadistic, he does contend that the officers retaliated against him for his sexual misconduct, and that they used excessive force amounting to an Eighth Amendment violation. Hughes' allegations are sufficient to survive dismissal as frivolous under the standards set forth in Hudson. The district court's judgment is VACATED and the case REMANDED so that the district court may consider Hughes' claim in the light of Hudson.

Hughes' motion for appointment of counsel is DENIED.