

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3651  
Conference Calendar

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CHARLES K. WALLACE,  
NEWTON LOMAX, and  
JOSEPH P. PHILLIPS, JR.,

Plaintiffs-Appellants,

versus

EDWIN W. EDWARDS,  
Governor, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Middle District of Louisiana  
USDC No. CA-93-720-B-M1  
- - - - -  
(July 21, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:\*

Charles K. Wallace and Joseph P. Phillips, Jr., appeal the dismissal of their complaint under 42 U.S.C. § 1983 as frivolous.

Sovereign immunity protects states and state officials from damages actions in their official capacities. Edelman v. Jordan, 415 U.S. 651, 662-67, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Louisiana has not explicitly waived its immunity against suits in federal courts. Delahoussaye v. City of New Iberia, 937 F.2d 144, 147 (5th Cir. 1991); La. Rev. Stat. Ann. 13:5106 (West 1991). Louisiana and its governor, Edwin W. Edwards, in his official capacity, are immune from that portion of the prisoners' suit that seeks damages. Additionally, a private utility company is not a state actor for purposes of § 1983 even if it is heavily regulated by the state. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358-59, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

Wallace and Phillips do not indicate in any of their pleadings or in their appellate brief whether they seek relief from Edwards in his individual capacity. Assuming, arguendo, that they do so, they cannot prevail. Nor can they obtain injunctive relief against Louisiana or Edwards in his official capacity.

Wallace and Phillips's contention regarding Angola's location near nuclear power plants is a claim of an unacceptable condition of imprisonment. A prisoner alleging that conditions of imprisonment constitute cruel and unusual punishment must show that prison officials were deliberately indifferent to conditions. Wilson v. Seiter, 501 U.S. 204, 111 S.Ct. 2321, 2327, 115 L.Ed.2d 271 (1991). The prisoner must show that "the risk that the prisoner complains of [is] so grave that it violates contemporary standards of decency to expose anyone to such a risk." Helling v. McKinney, \_\_\_ U.S. \_\_\_, 113 S.Ct. 2475, 2482, 125 L.Ed.2d 22 (1993). Wallace and Phillips cannot show that the infinitesimally small risk of exposure to radiation that

may exist at Angola is sufficiently grave to violate contemporary standards of decency.

This Court will not consider § 1983 issues raised for the first time on appeal. Beck v. Lynaugh, 842 F.2d 759, 762 (5th Cir. 1988). Wallace and Phillips raised their contention regarding the United Nations Charter for the first time in their appellate brief. Wallace first raised the allegedly punitive sanctions imposed by Angola officials in his district court motion for leave to proceed IFP on appeal. He did not raise for the district court's consideration any new issues raised in that motion.

Finally, the prisoners seek appointment of counsel to represent them in the district court after remand. No remand is necessary. Their motion therefore is moot.

Wallace and Phillips have pursued a ridiculous lawsuit. We warn them that future frivolous appeals could result in sanctions against them. Wallace and Phillips should review any pending appeals and should withdraw any pending appeals that are frivolous.

APPEAL DISMISSED. See 5th Cir. R. 42.2.