

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4197
Conference Calendar

WILLIAM BYRON HOLLIS, JR.,

Plaintiff-Appellant,

versus

CRAIG A. RAINES ET AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 92-CV-469
- - - - -

August 20, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

William Byron Hollis, Jr., a prisoner in the Michael Unit of the Texas Department of Criminal Justice - Institutional Division, filed a civil rights complaint under 42 U.S.C. § 1983. Hollis alleged, among other things, that prison officials used excessive force against him. On October 30, 1992, the magistrate judge ordered Hollis to pursue his complaints through the prison grievance system. Hollis was given 60 days to pursue these remedies. The magistrate judge warned Hollis that failure to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

comply with the order would result in the dismissal of his lawsuit. On December 29, 1992, Hollis filed inmate grievance forms related to the alleged use of force. The magistrate judge recommended and the district court ordered that the complaint be dismissed as frivolous because Hollis had not complied with the order to exhaust his remedies through the inmate grievance procedure.

Although neither the magistrate judge nor the district court specifically cited to Fed. R. Civ. P. 41(b), the dismissal with prejudice of Hollis's complaint was the result of his failure to comply with the magistrate judge's order. Rule 41(b) dismissals are reviewed for abuse of discretion. Berry v. CIGNA/RSI-CIGNA, 975 F.2d 1188, 1191 (5th Cir. 1992). This Court will find an abuse of discretion unless "there is a clear record of delay or contumacious conduct by the plaintiff and . . . the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile." Id. (footnote omitted).

Hollis asserts that he did exhaust the prison grievance procedure. The record shows that he submitted all three steps of the inmate grievance forms within the time ordered. There is nothing in the record to demonstrate contumacious conduct. There is nothing in the record to demonstrate that any lesser sanction was considered, much less imposed with no result. Therefore, the dismissal with prejudice of Hollis's complaint is VACATED and the case REMANDED for appropriate disposition.