

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5119

Summary Calendar

BENARD M. CLARK,

Plaintiff-Appellant,

v.

ANN W. RICHARDS,
Governor, ET AL.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(6:92-CV-502)

(June 14, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Benard M. Clark appeals the district court's dismissal of his complaint, brought pursuant to 42 U.S.C. § 1983. We affirm in part and reverse in part.

I. FACTS AND PROCEDURAL HISTORY

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Benard Clark, currently a Texas state prisoner, filed a § 1983 pro se complaint against Governor Ann Richards, Warden Jimmy Alford, Sergeant Kevin Hukill, Selden Hale, and Doctor Rasberry alleging various violations of his constitutional rights. Specifically, Clark alleged that Sergeant Kevin Hukill punched him in the stomach while he was on his way to Islamic services, that black inmates were racially segregated and discriminated against, that black inmates were being denied good time, that Islamic inmates were forced to sign in before attending religious services while other religious groups were not so required, and that he was denied medical treatment. Clark requested a jury trial, and he sought injunctive relief and \$40,000 in damages.

Pursuant to 28 U.S.C. § 636(b)(1), the district court designated a magistrate judge to file proposed findings and recommendations concerning whether Clark should be allowed to proceed in forma pauperis and whether Clark's complaint should be dismissed as frivolous. The district court further ordered the magistrate judge to hear and determine many pretrial matters and to conduct evidentiary hearings and submit proposed findings. The magistrate judge then conducted a Spears hearing. After the Spears hearing, the magistrate judge determined that Clark had stated "factual allegations [against Hukill] which, if true, state a cause of action under 42 U.S.C. § 1983," and ordered Hukill to file an answer in the action.

The magistrate judge then set the case for an expanded evidentiary hearing, which she termed a Flowers¹ hearing, for the purpose of making recommended findings of fact and conclusions of law. Clark and the defendants were permitted to call and cross-examine witnesses at the hearing.

Following the expanded evidentiary hearing, the magistrate judge entered a proposed report and recommendation. Based on testimony taken at the expanded evidentiary hearing, the magistrate judge determined that "the preponderance of the credible evidence . . . shows that no force was used by Sergeant Hukill against the Plaintiff Benard Clark." The magistrate judge recommended that this claim be dismissed with prejudice. The magistrate judge determined that Clark's other claims were frivolous under § 1915(d), and the magistrate judge recommended that they be dismissed without prejudice. The district court then adopted the magistrate's findings and conclusions.

II. STANDARD OF REVIEW

An in forma pauperis complaint is "frivolous" within the meaning of § 1915(d) if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). The Supreme Court has determined that pursuant to § 1915(d), a federal court has "not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual

¹ Flowers v. Phelps, 956 F.2d 488 (5th Cir.), modified in part on other grounds, 964 F.2d 400 (5th Cir. 1992).

allegations and dismiss those claims whose factual contentions are clearly baseless." Id. at 327.

The Court has emphasized that "legal frivolousness" within the framework of § 1915(d) "refers to a more limited set of claims than does Rule 12(b)(6)" of the Federal Rules of Civil Procedure, which governs the dismissal of a complaint for failure to state a claim. Id. at 329. A complaint is not automatically frivolous in the context of § 1915(d) because it fails to state a claim, id. at 331, and thus should be dismissed only in limited circumstances. However, the Court has explained that a complaint would be legally frivolous if the plaintiff alleges "claims of infringement of a legal interest which clearly does not exist" or "claims against which it is clear that the defendants are immune from suit." Id. at 327.

The Court has also made it clear that a complaint should be dismissed as "factually frivolous" under § 1915(d) if the facts alleged are "fanciful," "fantastic," "delusional," or "clearly baseless." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992). As those terms suggest, the Court explained, "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible," but not simply because the alleged facts are deemed unlikely. Id.

We review § 1915(d) dismissals for an abuse of discretion because a determination of frivolousness—whether legal or factual—is a discretionary one. Id. at 1734; Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992). Factors we consider on

review, among others, are whether (1) the plaintiff is proceeding pro se, (2) the court inappropriately resolved genuine issues of disputed fact, (3) the court applied erroneous legal conclusions, (4) the court has provided an adequate statement of reasons for dismissal which facilitates intelligent appellate review, and (5) the dismissal was with or without prejudice. Denton, 112 S. Ct. at 1734; Moore, 976 F.2d at 270.

III. ANALYSIS

A. DEFENDANTS GOVERNOR ANN RICHARDS, WARDEN JIMMY ALFORD, AND SELDEN HALE.

Clark argues that Governor Ann Richards, Warden Jimmy Alford, and Selden Hale, former Chairman of the Board of Corrections (collectively referred to as "supervisory defendants"), should be held accountable for the wrongful acts of their subordinates. "Under section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability." Thompkins v. Belt, 828 F.2d 298, 303 (5th Cir. 1987). Liability exists only if the supervisor is personally involved in the constitutional deprivation or there is a causal connection between the supervisor's conduct and the violation. Clark has not alleged any facts from which it can be concluded that any supervisory defendants were personally involved in a constitutional deprivation or that their actions were causally connected with a constitutional violation committed by a subordinate. Thus, the district court did not err in dismissing these claims.

B. DEFENDANT CAPTAIN GREEN AND CLARK'S CLAIM FOR RACIAL DISCRIMINATION IN "EIGHT BUILDING"

Clark alleged that Captain Green, a disciplinary hearing officer, conducts the disciplinary procedure in such a way as to deny black inmates good time. During the Spears hearing, the only allegation which Clark referred to in support of this claim was a disciplinary hearing held in connection with an incident which took place on July 27, 1992. In relation to this incident, Clark stated that his ulcers were hurting him and that he went to the infirmary. He asked to see a doctor, but his request was denied, and he was sent to work in the fields. He alleged that his rectum bled all day and that he received a disciplinary case for not working.

He alleged that he was found guilty of a major disciplinary violation because of his race; he stated that Green should have conducted a preliminary investigation before the hearing to determine why Clark had not worked that day. However, he conceded that he was given a hearing and an opportunity to offer testimony before he was found guilty for not working.

The magistrate recommended that Clark's claim against Green be dismissed without prejudice as frivolous because Clark did not allege that he was denied due process. The magistrate judge further stated that Clark's allegations that he was disciplined because of his race were wholly lacking in factual specificity. The magistrate judge stated that "[h]e simply alleged, in a

conclusory fashion, that Captain Green imposes harsher discipline upon black inmates because of their race."

Because Clark alleges generally and vaguely, even after given an opportunity to clarify his allegations at a Spears hearing, that Green is running the disciplinary procedure in a discriminatory manner, we uphold the district court's dismissal without prejudice of this unsubstantiated claim as frivolous. See Pedraza v. Meyer, 919 F.2d 317, 318 (5th Cir. 1990) (upholding district court's dismissal, as frivolous, of the plaintiff's unsubstantiated claim that "non-drug-addicts received better medical treatment").

Likewise, Clark's allegations concerning racial discrimination in eight building are conclusory and unsubstantiated. In his original complaint, Clark alleges that "Galloway is clearly establish a racial discrimination stand in allowing all these black in 8 building and which has cost a many chance to go home and that some who will be gone if there time was restore, and Mr. Galloway know this too."² At the Spears hearing, Clark was unable to expand on these allegations. Thus, we uphold the district court's dismissal of Clark's complaint that black inmates were being discriminated against by being kept in eight building as frivolous.

² Clark never made "Galloway" a defendant in this lawsuit. Therefore, it is unclear who Clark is asserting should be held responsible for the discrimination in eight building. However, we need not address this issue as Clark's claim is frivolous.

C. RELIGIOUS DISCRIMINATION

Clark further alleged in his complaint that Muslim inmates are discriminated against because they have to sign their names in order to attend religious services, and that inmates attending the religious services of other faiths are not required to do so. All prisoners are guaranteed a reasonable opportunity to attend religious services. Pedraza v. Meyer, 919 F.2d 317, 320 (5th Cir. 1990). Clark did not allege that he was being denied a reasonable opportunity to practice his religion. Therefore, because we agree that Clark has not alleged a violation of his right to exercise his religious freedom as guaranteed by the First and Fourteenth Amendments, we uphold the district court's dismissal of this claim as frivolous.

D. DENIAL OF MEDICAL TREATMENT BY DR. RASBERRY

For a prisoner to set forth a claim for relief under § 1983 for denial of medical treatment, he must show that care was denied or delayed and that this denial or delay constituted deliberate indifference to his serious medical needs. See Whitley v. Albers, 475 U.S. 312, 319-20 (1986); Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). Deliberate indifference is a legal conclusion which must rest on facts evincing wanton action on the part of the defendant. Walker v. Butler, 967 F.2d 176, 178 (5th Cir. 1992). Negligent medical care does not constitute a valid § 1983 claim. Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993).

Clark alleged that he had been denied medical treatment based on his race. Specifically Clark alleged that he had gone to John Sealy Hospital because of a problem with his shoulder. At the hospital, he was given a prescription for Feldene which Clark alleges Dr. Rasberry refused to give to him because he is black. To support his assertion that the denial of medical treatment was based on his race, Clark asserted

[w]ell, he have been real racial towards me every time I go in his office, you know. He don't never really examine me, you know what I am saying. And the only thing he do, he ordered me some medication and told me I'm finished. I'm through. Get out of here. You know what I am saying. How is that helping me? Like right now I'm sitting here suffering. Do you know what I am saying?

Based on the magistrate judge's recommendation, the district court dismissed Clark's claim for denial of medical treatment without prejudice as frivolous. The magistrate judge stated that Clark's testimony at the Spears hearing and at the expanded evidentiary hearing demonstrated that he had not been denied medical treatment. He conceded that he had been sent to John Sealy Hospital for treatment of his ulcers and bad shoulder. Clark also conceded (1) that Dr. Rasberry ordered him medication and (2) that Dr. Rasberry had cancelled his Feldene prescriptionSOwhich was apparently prescribed for him at John Sealy Hospital for his shoulderSOwhen one of his ulcers began "acting up," because Dr. Rasberry believed that the Feldene would harm him. It is clear that Clark does not agree with Dr. Rasberry's conclusion concerning the harmful effects of Feldene on his ulcer; however, it is equally clear that Clark's

complaints do not reveal any condition which evinces an intentional indifference to a serious medical need. Therefore, we uphold the district court's dismissal of this claim as frivolous.

E. EXCESSIVE USE OF FORCE CLAIM AGAINST SERGEANT KEVIN HUKILL

As demonstrated by his complaint and from the facts fleshed out during the Spears hearing, Clark's claim for excessive use of force against Sergeant Hukill was not frivolous. See Hudson v. McMillian, 112 S. Ct. 995, 999 (1992) (determining that the standard for a claim for excessive use of force under the Eighth Amendment is whether "force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm"). Clark alleged that while he was on his way to Islamic services, Hukill stopped him and another inmate. Hukill then called Clark into his office to tell him that he and the other inmate would not be allowed to attend services because they were late. The record indicates that Clark apparently challenged Hukill's conclusion that the inmates were late and asserted that he and the other inmate had a right to attend services. Clark alleges that Hukill became irritated when Clark asserted that he had the right to attend services and began making derogatory racial statements to Clark. Clark then alleges that Hukill, unprovoked, punched him in the stomach.

After the Spears hearing, because the magistrate judge determined that Clark had stated a claim for excessive use of force against Kevin Hukill, she ordered Hukill to file an answer.

The magistrate judge then set the case for an expanded evidentiary hearing. After the expanded evidentiary hearing, the magistrate judge determined that

the preponderance of the credible evidence . . . shows that no force was used by Sergeant Hukill against the Plaintiff Benard Clark. There was a verbal confrontation in the hallway, but no recourse to violence. Consequently the Plaintiff has failed to show by a preponderance of the evidence that he was the victim of an unconstitutionally excessive use of force. Clark has failed to meet his burden of proof.

(citations omitted). On appeal, Clark asserts that the district court erred by referring the case to the magistrate judge without obtaining his consent to a trial before the magistrate judge. We agree.

Pursuant to § 636(b)(1)(B), "a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition . . . of prisoner petitions challenging conditions of confinement." However, in Archie v. Christian, 808 F.2d 1132, 1135 (5th Cir. 1987), this court, en banc, concluded that § 636(b)(1) does not permit a district court to refer civil jury cases to a magistrate for trial. Likewise, in McCarthy v. Bronson, the Supreme Court noted that "in cases in which the jury right exists and is not waived, the lower courts, guided by the principle of constitutional avoidance, have consistently held that the statute does not authorize reference to a magistrate." 111 S. Ct. 1737, 1743 (1991) (citing Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987)).

Because Clark requested a jury trial in his original complaint, he made a proper demand for a jury trial. FED. R. CIV. P. 38(b) ("Such demand [a jury demand] may be indorsed upon a pleading of the party."). Further, at the Spears hearing Clark reiterated his request for a jury trial.³ There is nothing in the record which would indicate that Clark waived his right to a jury trial or that he consented to a trial before a magistrate judge. See FED. R. CIV. P. 73 ("If, within the period specified by local rule, the parties agree to a magistrate judge's exercise of such authority [civil trial jurisdiction], they shall execute and file a joint form of consent or separate forms of consent setting forth such election."). Further, Hukill, in his brief before this court, does not allege that Clark waived his right to a jury trial, and in fact alleges that the proceeding before the magistrate was merely an expanded evidentiary hearing. We note that the local rules for the Eastern District of Texas provide that "[j]ury demands should be made on a separate paper and not endorsed upon the complaint." E.D. TEX. LOCAL RULE 4(c). However, Federal Rule of Civil Procedure 83 provides that local rules may not conflict with the Federal Rules of Civil Procedure. Even

³ During the Spears hearing, the following exchange took place between Clark and the magistrate judge.

Q. Well, I need both sides to agree that they want me to be the Judge, and then I would be the Judge. So that's my question to you [Clark] and Mr. Bennett. Would you like to consent to having me be your judge in this case?

· · ·
A. Let's see what I said here. Okay. It says here I wanted to be trial by jury.

Q. Okay. That has nothing to do with who your judge is. I can give you a jury trial.

assuming that local rule 4(c) mandates that a jury demand be made on a separate paper and not endorsed on the complaint, Clark's compliance with Federal Rule of Civil Procedure 38(b) was sufficient to make an effective jury demand.

Even though the magistrate judge referred to the hearing as merely an evidentiary hearing, we believe that the hearing amounted to a bench trial as to Clark's claim for excessive use of force. In fact, testimony from Clark, Kevin Hukill, Richard Wayne Taylor, and Dr. Ken Kuykendall was heard at the hearing. The expanded evidentiary hearing was a bench trial complete with credibility determinations and findings of fact. When a jury trial is demanded, factual determinations such as credibility determinations are for a jury and not a judge. Brown v. Lynaugh, No. 93-4070, slip op. at 5 (5th Cir. April 8, 1994) (unpublished); see also Wesson v. Oglesby, 910 F.2d 278, 282 (5th Cir. 1990) (stating that "if a prisoner's version of the facts underpinning a civil rights action is contained in his complaint and elaborated upon, if necessary, in a Spears hearing is inherently plausible and internally consistent, a court may not for purposes of a § 1915(d) dismissal simply choose to believe conflicting material facts alleged by the defendants"). Therefore, we believe that court erred in dismissing Clark's excessive use of force claim against Hukill.

Because the magistrate judge termed the expanded evidentiary hearing a Flowers hearing, we also feel compelled to address whether Flowers v. Phelps, 956 F.2d 488 (5th Cir.), modified on

other grounds, 964 F.2d 400 (5th Cir. 1992), grants the magistrate the authority to conduct the type of evidentiary hearing undertaken in this case. In Flowers v. Phelps, Flowers had brought suit under § 1983 against various officials of the Louisiana Department of Public Safety and Corrections and the Louisiana State Penitentiary. Id. at 489. Flowers' claims for excessive use of force were "tried" to a magistrate judge who then issued a report and recommendation. Id. at 490. Because the magistrate judge made recommended findings, the hearing was conducted pursuant to § 636(b)(1)(B). The opinion does not specifically state whether a jury demand had been made. We must conclude, in light of our en banc holding in Archie, that no such request was made. Therefore, Flowers does not stand for the proposition that a district court may refer a prisoner's petition which challenges the conditions of confinement to a magistrate for an expanded evidentiary hearing when the claimant has properly demanded a jury trial.

Therefore, the district court's dismissal of Clark's claim for excessive use of force is reversed and the proceedings remanded with directions that the case be listed for a trial by jury in the district court or, if a reference is made in accordance with the provisions of 28 U.S.C. § 636 and consented to by the parties, a trial by jury before a magistrate judge.

IV.

For the foregoing reasons, the judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with this opinion.