

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-7350  
Conference Calendar

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SAMUEL MONTGOMERY,

Plaintiff-Appellant,

versus

JERRY COLE,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Northern District of Mississippi  
USDC No. CA 92-032-B-D  
- - - - -  
(December 15, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Samuel Montgomery filed an in forma pauperis (IFP) civil rights suit against Jerry Cole, a corrections officer at the Mississippi State Penitentiary, alleging that Cole shoved him twice. The district court's dismissal of the complaint prior to service on the defendant is treated as a dismissal as frivolous under 28 U.S.C. § 1915(d). See Holloway v. Gunnell, 662 F.2d 150, 152 (5th Cir. 1982). An IFP complaint may be dismissed as frivolous if it lacks an arguable basis in law or fact. Denton

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

v. Hernandez, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1728, 1733-34, 118 L.Ed.2d 340 (1992). A dismissal under § 1915(d) is reviewed for an abuse of discretion. Id. at 1734.

"To state an Eighth Amendment excessive force claim, a prisoner . . . must show that force was applied not 'in a good faith effort to maintain or restore discipline,' but rather that the force complained of was administered 'maliciously and sadistically to cause harm.'" Rankin v. Klevenhagen, 5 F.3d 103, 107 (5th Cir. 1993)(quoting Hudson v. McMillian, 503 U.S. \_\_\_, 112 S.Ct. 995, 999, 117 L.Ed.2d 156 (1992)). Although Hudson removed the "serious" or "significant" injury requirement this Court previously held necessary to show an Eighth Amendment violation, "in cases post-Hudson, 'certainly some injury is still required.'" Id. at 108 (citation omitted).

This Court's requirement that a prisoner claiming the use of excessive force show "some" injury does not violate the Constitution. "[T]he Supreme Court specifically denied constitutional protection for 'de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.'" Knight v. Caldwell, 970 F.2d 1430, 1432 (5th Cir. 1992), cert. denied, 113 S.Ct. 1298 (quoting Hudson, 112 S.Ct. at 1000). The de minimus use of force by Cole is not the sort of physical force repugnant to the conscience of mankind.

Montgomery argues for the first time on appeal that the requirement that an excessive-force claimant show an injury violates the Equal Protection Clause of the Fourteenth Amendment

and that Cole violated his equal protection rights. This Court does not consider issues raised for the first time on appeal. United States v. Sherbak, 950 F.2d 1095, 1101 (5th Cir. 1992). Accordingly, the judgment of the district court is AFFIRMED.