UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-7416

(Summary Calendar)

LEOPOLD LEE PEDRAZA,

Plaintiff-Appellant,

versus

DALTON G. MEYER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-V89-20)

(May 13, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Plaintiff Leopold Lee Pedraza, pro se and in forma pauperis, appeals the dismissal with prejudice of his 42 U.S.C. § 1983 prisoner civil rights complaint as frivolous under 28 U.S.C. § 1915(d). We vacate and remand.

Pedraza, a former inmate in the Texas Department of Criminal Justice ("TDCJ"), alleges that numerous officials of Victoria

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

County, Texas, in retaliation for lawsuits that he had filed against Victoria County officials, intercepted mail sent by him from the TDCJ to Laura Aleman, an inmate of the Victoria County jail. The district court denied Pedraza's motion for a *Spears* hearing,[1] and ordered Pedraza to submit a more definite statement of the facts to support his complaint, which Pedraza did.[2] In dismissing the complaint as frivolous, the district court concluded both that prison officials may, at their discretion, restrict inmate-to-inmate mail and Pedraza's claim of retaliation was "purely conclusory, unsupported by factual basis."[3]

"An *in forma pauperis* complaint may be dismissed if it lacks an arguable basis in law or fact." *Eason v. Thaler*, 14 F.3d 8, 9 (5th Cir. 1994). We review the district court's § 1915(d) dismissal of such a complaint using the abuse of discretion standard.

Pedraza's complaint alleged that Victoria County prison officials, in retaliation for lawsuits that Pedraza had brought against Victoria County officials, refused to deliver his letters, which were sent to "legally advi[s]e, console, comfort, and reas[s]ure" Aleman. In response to the district court's order for

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[1] *Spears v. McCotter*, 766 F.2d 179, 181 (5th Cir. 1985).

[2] The district court, seeking to bring into focus the factual nature of Pedraza's claim, provided Pedraza with a four-question questionnaire. *See Watson v. Ault*, 525 F.2d 886, 892 (5th Cir. 1976).

[3] The district court also found it "questionable whether Pedraza has standing to complain that another person was not allowed to receive mail."

a more definite statement, Pedraza stated that the defendants intercepted his letters "[a]s retaliation and so [he] could not communicate with prospective witnesses." Because "[t]he law is well established that prison officials may not retaliate against or harass an inmate because of the inmate's exercise of his right of access to the courts," *Gibbs v. King*, 779 F.2d 1040, 1046 (5th Cir.), *cert. denied*, 476 U.S. 1117, 106 S. Ct. 1975, 90 L. Ed. 2d 659 (1986), we conclude that Pedraza's § 1983 complaint had an arguable basis in law. *See Jackson v. Cain*, 864 F.2d 1235, 1248 (5th Cir. 1989) (prisoner's contention that prison officials retaliated against him for filing grievances raised a facially valid § 1983 claim, thereby precluding summary judgment for the officials); *Whittington v. Lynaugh*, 842 F.2d 818, 820 (5th Cir.) ("If a case were found where . . . the specific reason for the change in status or the refusal to change custodial status was an unconstitutional discriminatory reason such as . . . [a] prior suit brought against the prison system, it would have to be concluded that there could be a civil rights remedy."), *cert. denied*, 488 U.S. 840, 109 S. Ct. 108, 102 L. Ed. 2d 83 (1988).

We next address whether Pedraza's complaint had an arguable basis in fact. Pedraza's complaint alleged that TDCJ officials had screened Pedraza's letters to Aleman and found them "to be free of any threats to the security of an institution, . . . contraband, and . . . sexually explicit material." Accordingly, Pedraza concludes that the only reason the defendants would intercept his letters is to retaliate against him for the lawsuits filed against

Victoria County officials.[4] In response to the district court's questionnaire, Pedraza alleged that the defendants had admitted that the letters had been intercepted and that Aleman told him she had not received his correspondence. Although Pedraza's response to the district court's questionnaire was not as specific as it should have been, *see Watson*, 525 F.2d at 892, we cannot conclude, given the limited information before us, that the facts alleged are "fantastic or delusional scenarios."[5] *Neitzke v. Williams*, 490 U.S., 319, 327-28, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989).[6] The district court therefore abused its discretion in

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[4] Pedraza also alleged that after complaining to the defendants about the interception and retention of the letters sent to Aleman, the defendants persisted in denying him "the right to corresspond [sic] with inmate residents of the Victoria County Jail, simply to deny him of his right to contact witnesses for the purpose of obtaining their testimony and/or affidavits in support of the allegations, charges, and violations" described in the complaint.

[5] The letters at issue are not in the record. Pedraza alleges that the defendants retained the letters in spite of his requests that the letters be returned to him.

[6] *Compare Moody v. Baker*, 857 F.2d 256, 258 (5th Cir.) ("Moody claims that the job he was given represents retaliation for his prior complaints. He alleges no factual basis for that mere conclusionary allegation. Standing alone, the contention is frivolous."), *cert. denied*, 488 U.S. 985, 109 S. Ct. 540, 102 L. Ed. 2d 570 (1988); *Richardson v. McDonnell*, 841 F.2d 120, 122-23 (5th Cir. 1988) (although prisoner conducted discovery, he was not able to offer any evidence substantiating his claim of retaliation; therefore, the district court properly granted summary judgment for the prison officials).

dismissing Pedraza's complaint.[7] *See Gartrell v. Gaylor*, 981 F.2d 254, 259 (5th Cir. 1993).

For the foregoing reasons, we VACATE the judgment of the district court and REMAND for further proceedings.

[7] In considering whether the district court abused its discretion in dismissing Pedraza's complaint pursuant to § 1915(d), we note that the dismissal was with prejudice. *See Denton v. Hernandez*, ___ U.S. ___, 112 S. Ct 1728, 1734, 118 L. Ed. 2d 340 (1992) ("In reviewing a § 1915(d) dismissal for abuse of discretion, it would be appropriate for the court of appeals to consider, among other things, . . . whether the dismissal was with or without prejudice."). Dismissal with prejudice is appropriate "if the plaintiff has been given an opportunity to expound on the factual allegations by way of a *Watson* questionnaire or orally via a *Spears* hearing, but does not assert any facts which would support an arguable claim." *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993) (footnote omitted). Here, as we have held, Pedraza has asserted facts that, at this stage of the proceedings, preclude a dismissal under § 1915(d).