

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7687
Summary Calendar

RODNEY JAMES DILWORTH,

Plaintiff-Appellant,

versus

TIM WEST, Warden, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas
(93-CV-414)

(March 21, 1994)

Before GOLDBERG, JOLLY, and JONES, Circuit Judges.

PER CURIAM:*

I. Background

Rodney J. Dilworth is a prisoner at the Texas Department of Corrections facility at Brazoria, Texas. Proceeding pro se and in forma pauperis, he filed this action under 42 U.S.C. § 1983 against Tim West, the warden of the prison, and Lewis Barnette, a guard at the prison. Dilworth complains that, without provocation, Barnette

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

elbowed him in the chest and slapped him on the face with a wet towel. Dilworth also charges that he had warned West about Barnette's violent behavior and that West had failed to supervise Barnette adequately. Dilworth contends that he has suffered emotional distress, fear, anxiety, humiliation, and sleeplessness as a result of Barnette's action. The district court granted Dilworth's motion to proceed in forma pauperis under 28 U.S.C. § 1915(a), but dismissed the suit as frivolous under 28 U.S.C. § 1915(d), finding the incident described to be "an isolated incident of relatively small proportions [that] constitutes a de minimis level of imposition with which the Constitution is not concerned." (internal quotation omitted).

II. Analysis

A District Court may dismiss an in forma pauperis suit "if satisfied that the action is frivolous." 28 U.S.C. § 1915(d). A claim may be found to be frivolous under § 1915(d) only if it "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 329 (1989). We review a district court's dismissal of a suit under § 1915(d) for abuse of discretion. Id.

Dilworth has alleged that Barnette used excessive force against him while incarcerated in a Texas prison. Thus, Dilworth's § 1983 claim must be examined through the lens of the Eighth Amendment. See Whitley v. Albers, 475 U.S. 312, 327 (1986) (Eighth Amendment is primary source of protection against the official use of force on convicted prisoners); Rankin v. Klevenhagen, 7 F.3d 103, 106 (5th Cir. 1993). To state an Eighth Amendment excessive

force claim, Dilworth "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, 7 F.3d at 107 (quoting Hudson v. McMillian, 112 S. Ct. 995, 999 (1992)). In Hudson, the Supreme Court eliminated the "significant injury" requirement that we had previously engrafted onto Eighth Amendment-based § 1983 claims. Nevertheless, the Court was careful to note that not "every malevolent touch by a prison guard gives rise to a federal cause of action The Eighth Amendment's prohibition of 'cruel and unusual' punishment necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscious of mankind." Hudson, 112 S. Ct. at 1000 (internal quotation omitted). We conclude that the use of force complained of is de minimis and not of a sort repugnant to the conscious of mankind. We thus conclude that the district court properly concluded that Dilworth's allegations have no arguable basis in law.

We also find that the district court did not abuse its discretion when it dismissed Dilworth's claim with prejudice under § 1915(d). We find little merit to Dilworth's contention that the district court abused its discretion when it refused to allow him to amend his complaint before dismissal. The district court need not have allowed Dilworth an opportunity to amend his complaint because his claims clearly had no arguable basis in law, thereby

negating the possibility of rectification by amendment. See Graves v. Hampton, 1 F.3d 315, 319 (5th Cir. 1993).

Finally, since the district court properly concluded that Dilworth failed to state an Eighth Amendment claim against Barnette, Dilworth's claim against West must necessarily fail.

AFFIRMED.