

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8447
Conference Calendar

JULIAN SCOTT ESPARZA,

Plaintiff-Appellant,

versus

TIM MORGAN,

Defendant-Appellee.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. A-93-CV-61
- - - - -

August 17, 1993

Before JOLLY, JONES and DUHÉ, Circuit Judges.

PER CURIAM:*

Julian Scott Esparza filed a civil rights action against Tim Morgan, a member of the State Classification Committee for the Texas Department of Criminal Justice. He alleged that Morgan deprived him of a liberty interest by transferring him from administrative segregation to an unnamed unit and denying him a transfer to general population. Esparza challenges the district court's dismissal of his claim as frivolous under 28 U.S.C. § 1915(d).

To prevail on appeal, Esparza would have to show that the district court abused its discretion in dismissing the claim as

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

frivolous under § 1915(d) because his claim has an arguable basis in law and fact. See Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992); Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992).

"[A] state can create a protected liberty interest by establishing sufficiently mandatory discretion-limiting standards or criteria to guide state decision makers." Jackson v. Cain, 864 F.2d 1235, 1250 (5th Cir. 1989). The Fourteenth Amendment does not create a protected interest in being confined in general population. Hewitt v. Helms, 459 U.S. 460, 467-68, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). However, remaining in the general prison population as opposed to administrative segregation may involve a liberty interest. Jackson, 864 F.2d at 1251.

From the limited information in Esparza's complaint, it is impossible to determine whether his allegations support a due process violation. However, accepting his sparse allegations as true, it is not certain that the claim is "clearly baseless." See Denton, 112 S.Ct. at 1733-34; see Gartrell v. Gaylor, 981 F.2d 254, 259 (5th Cir. 1993). The district court abused its discretion in dismissing the claim as having "no arguable basis in law or fact." Id. The district court may wish to use a questionnaire or to refer the case to the magistrate judge to conduct an evidentiary hearing to determine the factual and legal bases for Esparza's claim. Spears v. McCotter, 766 F.2d 179, 181 (1985).

We VACATE the judgment of the district court and REMAND the action for further proceedings.

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