IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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Nos. 94-10180
& 94-10439
Summary Calendar

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DONNY JOEL HARVEY,

Plaintiff-Appellant,

versus

CHARLES TURNBO, ET AL.,

Defendants-Appellees.

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Appeals from the United States District Court for the
Northern District of Texas
(3:93-CV-0960-T)

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(August 24, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.*

PER CURIAM:

The above-referenced appeals by plaintiff-appellant Donny Joel Harvey (Harvey) have been consolidated for appeal, as each arises from the same suit in the district court below. Our cause number 94-10180 is Harvey's appeal of the district court's denial of his request for appointed counsel; our cause number 94-10439 is

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Harvey's appeal from the district court's judgment dismissing Harvey's suit without prejudice for improper venue.[1]

Harvey was a prisoner in the Federal Correctional Institution in Bastrop, Texas, which is in the Western District of Texas, when he filed this suit in May 1993 in the United States District Court for the Northern District of Texas against officials of the Bureau of Prisons (BOP) in their individual capacities alleging that he fell while trying to get into the upper bunk in his cell when no ladder was provided. He alleged that he was injured, that he was punished for the injury by being placed in solitary confinement, and that prison officials denied him medical and dental care. Certain items of Harvey's personal property were allegedly lost in the process. He alleged that BOP officials in Dallas and Washington, D.C., failed to provide a safe environment in Bastrop and refused to order the return of lost property. Harvey has since been released from the FCI to a halfway house and then to "home confinement," all in the Western District of Texas.

Harvey is a frequent filer. Prior to Harvey's filing the instant lawsuit, the district court in the Western District in December 1992 barred him from filing any civil action in that district for life, except with advance written permission of a judge of that district or of the Fifth Circuit (cause number MO-92-CA 71). The court further directed the clerk of the Western District to refuse to accept for filing any civil complaint or

[1] We need not determine whether number 94-10180 is independently appealable, as number 94-10439 suffices to also bring up Harvey's complaint of denial of his request for appointed counsel.

other initial pleading from Harvey, including any suit filed in another district and transferred to the Western District. The opinion in that case notes some eighteen previous lawsuits filed by Harvey in the Western District of Texas. We affirmed. *Harvey v. Smith*, No. 92-8705 (5th Cir. June 16, 1993) (unpublished).

In the instant complaint, Harvey named the following persons as defendants: Charles Turnbo (Turnbo), a resident of Dallas and regional director of BOP; Kathleen Hawk (Hawk), a resident of Washington, D.C., and director of BOP; J.L. Megathlin (Megathlin), a resident of Washington, D.C., and an official of BOP; and several officials of FCI Bastrop who reside in and near Bastrop. The defendants, represented by the U.S. Attorney for the Northern District of Texas, on January 18, 1994, moved to dismiss for improper venue. The motion was supported by documentary evidence (including a copy of the Western District's judgment in the above-referenced cause number MO-92-CA 71) and diverse sworn declarations. Harvey opposed the motion.

The district court on March 16, 1994, determined that venue did not lie in the Northern District and dismissed the action without prejudice.

Harvey argues that this suit comes within the scope of the Federal Tort Claims Act (FTCA) and *Bivens v. Six Unknown Named Agents*, 91 S.Ct. 1999 (1971). As a civil rights suit against federal officers, it does come within *Bivens*. The next question is whether it comes within the FTCA.

Harvey filed suit on May 17, 1993. The BOP denied Harvey's FTCA claims on June 24, 1993. The FTCA requires a claimant to

exhaust administrative remedies *before* bringing suit. *McNeil v. United States*, 113 S.Ct. 1980, 1984 (1993). A lawsuit filed before an agency's resolution of an FTCA claim is premature. *Id*. at 1983-84. As an FTCA action, therefore, the instant suit is premature. Accordingly, it survives exclusively as a *Bivens* action.

Harvey argues that venue is proper in the Northern District of Texas. This Court reviews a dismissal for improper venue for abuse of discretion. *Crase v. Astroworld, Inc*., 941 F.2d 265, 267 (5th Cir. 1991).

Subsection (b) of the general venue statute provides:

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought." 28 U.S.C. § 1391(b).

Subsection (b)(1) does not apply because most defendants reside in Texas but two reside in Washington, D.C. Subsection (b)(2) allows venue only in the Western District of Texas because that is where the events of which Harvey complains occurred. Subsection (b)(3) does not apply because, with judicial permission, the action may be brought in the Western District. Accordingly, the only proper venue pursuant to this subsection is the Western District.

Subsection (e) of the same statute provides:

> "A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the

> United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e).

The alleged injurious event occurred in the Western District, where Harvey resided at the time that he filed the instant suit. Accordingly, subsections (e)(2) and (e)(3) allow venue in that district.

Were Turnbo, who is the regional BOP director in Dallas, a proper defendant, subsection (e)(1) would allow venue in the Northern District of Texas. Subsection (e)(1) would be the only authority for venue in the Northern District.

However, "respondeat superior liability is not available in a *Bivens* action." *Abate v. Southern Pac. Transp. Co.*, 993 F.2d 107, 110 (5th Cir. 1993). Without culpability, a federal officer may not be liable under *Bivens*. *Id*. at 111. To flesh out this concept, the Court analogizes to cases decided under 42 U.S.C. § 1983. *Id*.

In a section 1983 suit, supervisory officials may not be liable for the acts of their subordinates on a theory of vicarious liability. *Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987). A supervisor may be liable if he is personally involved in the constitutional violation or there is "a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Id*. at 304. "Supervisory liability exists even without overt personal participation in the offensive

act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Id*. (quotations not indicated). However, "the existence of a constitutionally deficient policy cannot be inferred from a single wrongful act." *Id*.

Harvey asserts on appeal without elaboration that Turnbo may be held liable for "allowing and condoning a policy which resulted in plaintiff's injuries and deprivations." Harvey states incorrectly that Turnbo conceded that he condoned policies that resulted in Harvey's injuries.

Harvey also asserted on appeal that Turnbo may be liable for failing to properly train prison personnel. In the complaint, Harvey alleged without elaboration that Turnbo failed to adopt employment and training policies that would identify and remedy potential dangers. Turnbo's declaration under 28 U.S.C. § 1746, filed in support of the venue motion, states that "I do not have any personal involvement in the day to day operating procedures at FCI Bastrop, nor am I responsible for the implementation of policy and procedures at FCI Bastrop." In his opposition to the motion to dismiss, Harvey repeated the complaint's conclusional allegation without stating any supporting facts. Once given an opportunity to plead his best case, even a pro se plaintiff must plead specific facts to support his conclusions. *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986). Harvey has provided no specifics.

The only possible involvement of Turnbo that is indicated in the record is his name printed on a form used to deny Harvey relief

in an administrative remedy appeal. As reflected in his declaration, Turnbo did not sign the denial; an acting regional director did. Harvey does not dispute this. He argues on appeal that Turnbo is liable for an "unwritten policy," not for denial of administrative relief.

Generally, as a supervisor, Turnbo could not be liable in a *Bivens* action. He could be liable if he had implemented a policy so deficient that it repudiated the Constitution and was a motivating factor in a constitutional deprivation. Harvey has in no way indicated that any specific facts might exist to support a conclusional allegation that Turnbo was responsible for a policy that somehow caused his alleged injuries. Such a constitutionally deficient policy may not be inferred from one incident. Harvey has failed to allege any facts that could result in Turnbo's liability.

Harvey named Turnbo in an attempt to create venue in the Northern District. As an experienced litigator, Harvey surely did so to circumvent the sanction in the Western District. The dismissal was not an abuse of discretion.

Harvey argues on appeal that the court in the Northern District should have given him an opportunity to seek permission for a transfer to the Western District. Harvey knew that he needed permission to have his case heard in the Western District before he filed in the Northern District. The argument is disingenuous.

Harvey argues in his brief in number 94-10180 that the district court erred in denying his motion for appointment of counsel. Barring exceptional circumstances, Harvey has no right to appointed counsel. *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th

Cir. 1982). Appointment is within the district court's discretion. *Id*. at 213. Considerations include the type and complexity of the case and the plaintiff's ability to investigate and present his case. *Id*. The only exceptional circumstance in this case is the temerity of the plaintiff. The district court did not abuse its discretion in denying the motion for appointment of counsel.

Finally, we note that Harvey has been previously warned by this Court concerning frivolous suits, *see Harvey v. Weyenberg*, No. 89-1579 (5th Cir. Dec. 7, 1989) (unpublished), and has been sanctioned in other district court cases. *See, e.g., Harvey v. Collins*, No. 91-6375 (5th Cir. April 21, 1992) (unpublished). Harvey's instant suit presents a situation analogous to that which we considered in *Mayfield v. Klevenhagen*, 941 F.2d 346 (5th Cir. 1991). Like the plaintiff in *Mayfield*, Harvey has attempted to circumvent the bar that the district court of the Western District of Texas imposed on him in its attempt to prevent an avalanche on the mountains of chaff of pro se prisoner litigation. *See Spears v. McCotter*, 766 F.2d 179, 182 (5th Cir. 1985). Harvey has shown himself to be unwilling to abide by the restrictions imposed on him by that court. His disdain for the judicial process is palpable.

We accordingly bar Harvey from filing any civil appeal in this Court or any initial pleading in any court subject to the jurisdiction of this Court without the advance written permission of a judge of the forum court or of this Court (*see Mayfield*, 941 F.2d at 349); and we direct the clerk of this Court and the clerks of all federal district courts in this Circuit to return to Harvey, unfiled, any attempted submission inconsistent with this bar (see

*id*.).

The judgment of the district court is AFFIRMED, and sanctions are imposed as stated in the preceding sentence.