

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10228
(Summary Calendar)

AHMARD R. EASTER,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA, ETC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(1:94-CV-3)

(July 1, 1994)

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

PER CURIAM:*

In this appeal from the district court's 28 U.S.C. § 1915(d) dismissal of a prisoner's § 1983 complaint, Plaintiff-Appellant

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Ahmard R. Easter asserts that his allegations of excessive force, denial of medical care, and false disciplinary report, were sufficient to withstand dismissal as frivolous. Agreeing with Easter to the extent that his assertions implicate allegations against prison officials, we vacate and remand for further consistent proceedings. But agreeing with the district court in its dismissal of Easter's complaints against the United States of America and Texas Governor Ann Richards, we affirm.

I

FACTS AND PROCEEDINGS

Easter, a state prisoner in the Robertson Unit of the Texas Department of Criminal Justice (TDCJ), proceeding pro se and in forma pauperis (IFP), filed this civil rights complaint in which he sued the United States of America, Texas Governor Ann Richards, and several employees of the TDCJ. Easter alleged the following.

A. Excessive Force

When Easter left his cell one day to go to the gym for a "shake down." While Easter was on the way to the dayroom, Officer Jones kicked him on the heels of his feet. Once Easter reached the dayroom, he was pulled out of line by Officer Jones and told by Jones that he would "kick [Easter's] ass" if he heard any kind of sound. When the inmates exited the dayroom, Officer Jones continued kicking Easter's heels.

The inmates then entered the "sally port," where Officer Jones pushed Easter in the back. When exiting the sally port, Officer Gustafsome rushed through the doorway "trying to get ahead and beat

[Easter] out of the sally port" so Easter stopped to let him through. Officers Jones and Gustafsome then grabbed Easter and threw him against the wall. Officer Gustafsome pushed Easter's head into the wall, and Easter was handcuffed and kicked in the back of his legs by the other officers. Easter sustained a cut above his right eyebrow. An unknown officer told his colleagues to stop because he was getting ready to "cut the camera on."

Some officers took Easter to the French Robertson Unit Infirmary for "a major use of force physical exam," and told him that if he reported them they would "kick his ass" again. Easter alleges that, as a result of the laceration above his eyebrow, he has permanently lost some of his eyesight and has suffered pain every day.

B. Denial of Medical Care

On the following day Easter submitted a sick call request for the injuries he received during the alleged beating by the officers, complaining of serious headaches, blurry vision, and facial pain. He did not, however, receive an appointment for 22 days. To date, Easter asserts that he has headaches and that his right eye "goes dead."

C. False Disciplinary Report

Easter alleges that he received a false disciplinary report from Sergeant Busby to justify Gustafsome's actions of misconduct, i.e., using excessive force, contrary to unit policy. The report stated that Easter had attempted to strike Officer Gustafsome. Easter was found guilty, as a result of which he lost various

privileges and credit for good time. Easter filed a grievance on October 15, 1993, butSOhe insistsSObecause he is being retaliated against he has received no response.

Without conducting a Spears¹ hearing or requiring Easter to fill out a questionnaire, the magistrate judge determined that Easter's claims were frivolous because they related to a disciplinary action that could be challenged only by a habeas corpus petition after exhausting state remedies. The magistrate judge further determined that Easter's claim that he was denied medical care was frivolous because there were "no factual allegations or basis to (sic) which deliberate indifference to be (sic) derived. . . ." And, the magistrate judge concluded that Easter had not met any of the elements required to show excessive force and that his complaint should be dismissed because it had "only a slight chance of ultimate success and . . . little or no arguable basis in law or fact." Over Easter's objections to the magistrate judge's report and recommendation, the district court adopted the magistrate judge's findings and ordered that Easter's complaint be dismissed as frivolous.

II

ANALYSIS

On appeal, Easter reasserts the allegations made in his complaint, i.e., that prison officials used excessive force, that

¹ Spears v. McCotter, 766 F.2d 179, 181 (5th Cir. 1985) (district court, before dismissing IFP complaints as frivolous, should "bring into focus the factual and legal basis of prisoners' claims" via a questionnaire or evidentiary hearing).

he was denied adequate medical care, and that a false disciplinary report was filed against him, arguing that his suit was not frivolous and thus was dismissed prematurely. A district court may dismiss an IFP suit as frivolous under § 1915(d) if the complaint lacks an arguable basis in law or fact. Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994). When it appears that "insufficient factual allegations might be remedied by more specific pleading," we consider "whether the district court abused its discretion by dismissing the complaint either with prejudice or without any effort to amend." Id.

A. Excessive Force

Easter submits that he was subjected to excessive force when he was beaten during the shakedown on October 10, 1993, resulting in diminution of vision in his right eye. "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, ___ U.S. ___, 112 S.Ct. 995, 999, 117 L.Ed.2d 156 (1992)). Although Hudson removed the "serious" or "significant" injury requirement we had previously held necessary to show an Eighth Amendment violation, "in cases post-Hudson, 'certainly some injury is still required.'" Id. at 108 (citation omitted).

The reason for the force applied against Easter is not known.

The magistrate judge concluded that, by his own admission, Easter was pushed against the wall to be handcuffed. The magistrate judge further noted that, as Easter was found guilty of striking an officer, prison officials did not maliciously and sadistically use force to cause harm. The district court also determined that Easter's complaint had only a "slight chance of ultimate success and [] little or no arguable basis in law or in fact."

The "slight chance of ultimate success" standard for dismissing § 1983 claims as frivolous was abandoned in Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1734, 118 L.Ed.2d 340 (1992). See Booker v. Koonce, 2 F.3d 114, 116 & n.9 (5th Cir. 1993). As noted above, a district court may dismiss an IFP complaint as frivolous under § 1915(d) only if it lacks an arguable basis in law or fact. Eason, 14 F.3d at 9. The district court did not hold that Easter's claim has no arguable basis in law or fact, but rather "little or no" arguable basis. As alleged, Easter's claim that prison officials used excessive force against him is not without an arguable basis in law or fact. We must, therefore, vacate and remand the district court's § 1915(d) dismissal of this claim as frivolous.

B. Deliberate Indifference to Medical Needs

Easter alleges that he was denied adequate medical care for the cut to his right eyebrow because he did not receive an appointment for 22 days following his request for the same. To state a medical claim cognizable under § 1983, a convicted prisoner must allege acts or omissions sufficiently harmful to evidence a

deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). A prison official is deliberately indifferent if he intentionally denies or delays access to medical care. Id. at 104. The Supreme Court recently defined "deliberate indifference" as "if he [the defendant] knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, No. 92-7247, 1994 WL 237595, at *12 (U.S. June 6, 1994). If, with further factual development, Easter were to allege that the delay was intentional, his claim would not be without an arguable basis in law or fact. See Eason, 14 F.3d at 10. We must, therefore, vacate the district court's § 1915(d) dismissal of this claim as frivolous too and remand it to allow Easter a Spears hearing or other opportunity to flesh out his deliberate indifference claim.

C. False Disciplinary Report

Easter contends that he received a false disciplinary report for which he was found guilty, as a result of which he lost various privileges and good-time credit. Here, the district court incorrectly determined that Easter's claim had to be dismissed for failure to raise it first in a state habeas petition. Federal courts may review the sufficiency of the evidence of prison disciplinary findings by determining whether they are supported by any evidence at all. See Stewart v. Thigpen, 730 F.2d 1002, 1005-06 (5th Cir. 1984). Inasmuch as we are vacating and remanding the case for a Spears hearing or other means to permit further factual

development of Easter's other claims, on remand the district court should also elicit additional details surrounding Easter's disciplinary hearing, such as the contents of the report filed against him and the facts relied on by the hearing officer to reach a finding of guilt.

D. Dismissal of United States and Governor Richards

As for the district court's dismissal of the United States and Governor Ann Richards as defendants, though, we affirm. The United States is immune from suit absent a waiver of sovereign immunity. Interfirst Bank Dallas, N.A. v. U.S., 769 F.2d 299, 303 (5th Cir. 1985), cert. denied, 475 U.S. 1081 (1986). And, to the extent Easter seeks nonprospective monetary relief from Governor Ann Richards in her official capacity, his action is barred under the Eleventh Amendment. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Easter's claims against these two defendants, therefore, lack an arguable basis in law altogether. Thus the district court did not abuse its discretion in dismissing them.

III

CONCLUSION

For the foregoing reasons the district court's dismissals of Easter's claims against the United States and Governor Ann Richards are AFFIRMED; but the dismissals of Easter's claims against the prison officials based on use of excessive force, indifference to medical needs, and filing a false disciplinary report are VACATED and this case REMANDED as to those claims against those parties for

further proceedings consistent with this opinion.

AFFIRMED in part; VACATED and REMANDED in part.