

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10681  
Conference Calendar

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VALENTINO ADEPEGBA,

Plaintiff-Appellant,

versus

R. L. MORGAN, Officer Balch  
Spring City, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:93-CV-2514

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(September 20, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:\*

A complaint filed in forma pauperis can be dismissed sua sponte if the complaint is frivolous. 28 U.S.C. § 1915(d); Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986). A complaint is frivolous if it lacks an arguable basis in law or fact. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992). This Court reviews the district court's dismissal for an abuse of discretion. Id.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Valentino Adepegba challenges the dismissal of his claims against the City of Balch Springs. To establish municipal liability under § 1983 a plaintiff must demonstrate a policy or custom which caused the constitutional violation. Colle v. Brazos County, Tex., 981 F.2d 237, 244 (5th Cir.1993). To demonstrate municipal liability when a plaintiff is not relying on an explicit, stated policy, the plaintiff must plead "a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent policy misconduct and/or that serious incompetence or misbehavior was generally widespread throughout the [City of Balch Springs] police department." Freire v. City of Arlington, 957 F.2d 1268, 1278 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992).

Adepegba has not alleged any policy or custom of the City of Balch Springs which resulted in the violation of his constitutional rights, and the district court properly dismissed the complaint as frivolous. Although a dismissal under § 1915(d) is usually without prejudice, dismissal with prejudice is appropriate if the plaintiff has been given an opportunity to elaborate on the factual basis of the claims but does not assert any facts which would support an arguable claim. Graves v. Hampton, 1 F.3d 315, 319 (5th Cir. 1993). Adepegba was given an opportunity to expand on the factual basis of his claims in his answers to the magistrate judge's interrogatories, in his amended complaint, and in his objections to the magistrate judge's report, but has alleged no facts which would support municipal liability. Dismissal with prejudice was appropriate.

To the extent that Adepegba challenges the dismissal of the claims against R. L. Morgan, we do not have jurisdiction over the appeal. The district court issued a Fed. R. Civ. P. 54(b) judgment dismissing the claims against Morgan, and Adepegba did not file a notice of appeal within 30 days of that judgment. The propriety that dismissal is not before this Court. Smith v. Mine Safety Appliances Co., 691 F.2d 724, 725 (5th Cir. 1982) (Rule 54(b) judgment is a final judgment under Fed. R. App. 4 and the notice of appeal must be filed within 30 days of entry of the Rule 54(b) certification).

AFFIRMED.