

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10940
(Summary Calendar)

JOEY MAURICE TATE,

Plaintiff-Appellant

versus

C. E. GILREATH, Deputy II,
Tarrant County Jail,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(4:94-CV-597-Y)

(January 17, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

In this appeal of the dismissal of the state prisoner's complaint under 42 U.S.C. § 1983, Plaintiff-Appellant Joey Maurice

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Tate, a Texas inmate proceeding pro se and in forma pauperis (IFP), contests the district court's sua sponte ruling. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Tate filed this civil rights suit against Defendant-Appellee C. E. Gilreath, Deputy II, Tarrant County Jail, alleging that in the presence of several witnesses Gilreath threw a milk carton at Tate's ribs and "right arm area" from a distance of eight feet or more "with such force that the milk carton burst." Tate further alleged that he could establish a pattern of this type of behavior by Gilreath.

Citing Elliott v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985), the district court ordered Tate to file an amended complaint alleging all facts supporting the contention that Gilreath's anticipated defense of qualified immunity could not be sustained. Tate filed an amended complaint in which he reiterated the allegations set forth in his original complaint and added that Gilreath, on other occasions, "flipped [him] off, unprovoked," interrupted his conversations with other inmates, hid the basketball, and sought to damage Tate's character by seeking non-existent rule violations. Tate also described the filing of a grievance against Gilreath and provided a detailed account of portions of the procedural history of his case.

After reviewing Tate's amended complaint and granting him leave to proceed IFP, the district court dismissed Tate's action,

holding that Tate had failed to state a constitutionally cognizable civil rights claim against Gilreath. The court also held that Tate failed to allege specific facts sufficient to show that Gilreath's expected claim of qualified immunity could not be sustained.¹

II

ANALYSIS

The district court did not express the basis for its dismissal of Tate's action, but Gilreath was not served, and the district court granted Tate IFP status before dismissing his complaint. Prior to service, an IFP complaint may be dismissed only under 28 U.S.C. § 1915(d) as frivolous. Holloway v. Gunnel, 685 F.2d 150, 152 (5th Cir. 1982). Thus, the district court's dismissal here is treated as a § 1915(d) dismissal. See Spears v. McCotter, 766 F.2d 179, 180-81 (5th Cir. 1985).

A complaint filed IFP can be dismissed by the court sua sponte if the complaint is frivolous. 28 U.S.C. § 1915(d). A complaint is "frivolous where it lacks an arguable basis either in law or in fact." Denton v. Hernandez, ____ U.S. ____, 112 S. Ct. 1728, 1733, 118 L.Ed.2d 340 (1992) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L.Ed.2d 338 (1989)). We review a § 1915(d) dismissal for abuse of discretion. Denton, 112 S. Ct. at 1734.

¹Shultea v. Wood, 27 F.3d 1112 (5th Cir. 1994), pending before this court for en banc reconsideration, raises the issue whether the heightened pleading requirement applies when a government official moves to dismiss based on qualified immunity. As Tate's complaint and amended complaint fail to allege a constitutional violation, however, resolution of the issue pending in Shultea is not required before we can decide the instant case.

To obtain relief under 42 U.S.C. § 1983, a plaintiff must prove that he was deprived of a federal constitutional or statutory right and that the persons depriving him of that right acted under color of state law. Hernandez v. Maxwell, 905 F.2d 94, 95 (5th Cir. 1990). Although Tate does not identify his as an excessive force claim, that is the kind of claim suggested by his factual allegations.

Regarding excessive force claims, the inquiry is "whether the force used against [the plaintiff] was applied maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillian, 962 F.2d 522, 523 (5th Cir. 1992). Courts consider (1) the extent of the injury suffered, (2) the need for the application of force, (3) the relationship between the need and the amount of force used, (4) the threat reasonably perceived by the responsible officials, and (5) any efforts made to temper the severity of a forceful response. Hudson v. McMillian, 503 U.S. 1, _____, 112 S. Ct. 995, 999, 117 L.Ed.2d 156 (1992).

Tate has failed to allege any physical injury in the complaint or the amended complaint; neither does he suggest on appeal that he suffered a physical injury. As Tate suffered no injuries, the use of force was de minimis and did not violate the Eighth Amendment. See Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (although prisoner need not show significant injury, he must have suffered at least some injury; single incident with no injury found to be de minimis use of physical force). Moreover, the kinds of verbal and other non-physical abuse alleged by Tate to have been

perpetuated by Gilreath do not present an actionable claim under § 1983. Bender v. Brumley, 1 F.3d 271, 274 n.4 (5th Cir. 1994). The district court properly concluded that Tate's allegations fail to state a constitutional violation; accordingly, the district court did not abuse its discretion in dismissing Tate's claims.

Tate nevertheless argues that he was unable to respond properly to the district court's orders because he was indigent, unable to employ counsel, and did not understand what he should have alleged in his amended complaint. He also argues that "[i]n the case of an incarcerated individual attempting to sue employees or representatives of the institution in which he is incarcerated, the likelihood of evidence tampering, and or mail tampering should also be considered." But we need not address issues not considered by the district court. "`Issues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice.'" Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

The district court's dismissal of Tate's civil rights complaint for failure to allege a constitutional violation is AFFIRMED.