

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 94-10963  
Summary Calendar

---

LOY GENE BEARD,

Plaintiff-Appellant,

VERSUS

PAROLE COMMISSION, et al.,

Defendants-Appellees.

---

Appeal from the United States District Court  
for the Northern District of Texas  
(1:94 CV 123 C)

---

February 13, 1995

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:\*

Loy Beard appeals the dismissal, for failure to state a claim, of his 42 U.S.C. § 1983 civil rights suit. Concluding that further development of this matter is needed, we vacate and remand.

I.

Beard sued the U.S. Parole Commission, the Federal Bureau of

---

\* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Prisons, and the U.S. Attorney General, seeking over \$25 million in damages for the alleged wrongful revocation of his federal parole and refusal to give him sentence credit for the time spent in state custody.

The district court initially denied Beard's motion to proceed in forma pauperis ("IFP") on the ground that he was not indigent, but this court granted Beard leave to appeal IFP and reversed and remanded. We instructed the district court to consider whether Beard should be required to pay a partial filing fee.

On remand, the district court ordered Beard to pay a partial filing fee of \$60. Beard paid the fee, and the district court clerk accepted the suit for filing. The district court entered an order granting Beard "leave to proceed in forma pauperis hereafter . . ." and directed that service of process should be withheld "pending review pursuant to 28 U.S.C. § 1915(d)." Without any intervening proceedings, the district court dismissed for failure to state a cause of action under § 1983 on the ground that none of the defendants was a state actor. See Resident Council of Allen Parkway Village v. U.S. Dep't of Housing and Urban Dev., 980 F.2d 1043, 1050 (5th Cir.), cert. denied, 114 S. Ct. 75 (1993).

## II.

Because Beard had paid a partial filing fee, the district court erred by dismissing the suit without service of process on the defendants. Grissom v. Scott, 934 F.2d 656, 657 (5th Cir. 1991). If the court determined that the suit was frivolous, it

should have dismissed without requiring Beard to pay a partial fee.  
Id.

Additionally, the order of dismissal indicates that the district court dismissed for failure to state a claim under FED. R. Civ. P. 12(b)(6). It is not certain that a district court has the authority to dismiss a suit sua sponte under rule 12(b)(6) prior to service of the complaint on the defendants. See Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 618-19 (5th Cir. 1992) (noting that under rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss); Holloway v. Gunnell, 685 F.2d 150, 152 (5th Cir. 1982) (holding that a pauper's complaint may not be dismissed prior to service of process unless it is frivolous or malicious within the meaning of § 1915(d)).

Liberally construed, the suit sounds as a Bivens<sup>1</sup> action, which provides "a remedy against federal officers, acting under color of federal law, that [is] analogous to [a] section 1983 action against state officials." Dean v. Gladney, 621 F.2d 1331, 1336 (5th Cir. 1980), cert. denied, 450 U.S. 983 (1981). Although the suit does not name any individual federal officers as defendants,<sup>2</sup> it is not certain that Beard could prove no set of facts that would entitle him to relief if he had an opportunity to amend his complaint. Jackson, 958 F.2d at 619.

---

<sup>1</sup> Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

<sup>2</sup> See Enplanar, Inc. v. Marsh, 11 F.3d 1284, 1294 n.12 (5th Cir.) (holding that Bivens claim must be brought against federal officers in their individual capacities), cert. denied, 115 S. Ct. 312 (1994).

The Attorney General, acting through the Bureau of Prisons, is required by statute to determine whether federal prisoners are entitled to sentence credit for time spent in jail under certain circumstances. United States v. Wilson, 112 S. Ct. 1351, 1353-56 (1992). Further, a prisoner may be entitled to monetary damages for due process violations in connection with the revocation of parole. Walter v. Torres, 917 F.2d 1379, 1382-83 (5th Cir. 1990); see also McCarthy v. Madigan, 112 S. Ct. 1081, 1088-92 (1992) (A federal prisoner need not exhaust administrative remedies before bringing a Bivens action that seeks only monetary relief.).

For the foregoing reasons, the order of dismissal is VACATED and REMANDED. We express no view on the ultimate merits of this case, nor upon whether, on remand, the matter may properly be disposed of on summary judgment or by means of other non-plenary proceedings.