UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-20171

(Summary Calendar)

OWEN JAMES YARBOROUGH,

Plaintiff-Appellant,

versus

OFFICER MAUNALLANES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-91-1370)

(November 23, 1994)

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

PER CURIAM:[*]

Owen James Yarborough sued Officer Felix Magallanes[1] and Sergeant Michael Barnett of the Texas Department of Criminal Justice under 42 U.S.C. § 1983 (1988) for excessive use of force and retaliation. Yarborough appeals the district court's dismissal of his *in forma pauperis* proceeding as frivolous under 28 U.S.C.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] Magallanes' name was misspelled in the caption.

§ 1915(d).[2] We affirm in part, reverse in part, and remand.

I

At the time of the events at issue, Yarborough was an inmate of the Texas Department of Criminal Justice, Ellis I Unit. Yarborough was returning to his cell after his work assignment with a bag of coffee under his shirt.[3] Officer Magallanes ordered him to remove the bag of coffee, and Yarborough opened the bag and dumped it into a trash can. Yarborough alleged that this action angered Magallanes, and that Magallanes then pushed Yarborough against a wall and stabbed him several times with a door key. Magallanes called Sergeant Barnett for assistance, asserting that Yarborough was uncooperative and had struck Magallanes.[4] The officers handcuffed Yarborough and escorted him to the infirmary for a physical.[5] Yarborough did not tell the nurse of any injuries when she asked him if he had any medical problems. Moreover, the officers who strip-searched Yarborough prior to placing him in prehearing detention lockup saw no injuries.

The following day, Yarborough showed various scratches and abrasions to another officer, who escorted him to the infirmary.

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[2] Magallanes and Barnett argue that Yarborough's appeal is not properly before this Court because Yarborough has not provided a sufficient record. The record is before us, and we find it sufficient to evaluate Yarborough's contentions.

[3] Yarborough's work supervisors had rewarded him with the coffee for completing special tasks.

[4] Yarborough alleged that Barnett refused to allow him to complain of Magallanes' conduct. At his disciplinary hearing, Yarborough testified that he did not remember if he had struck Magallanes.

[5] Under prison rules, a prisoner must have a physical examination prior to being placed in a prehearing detention cell.

The nurse cleaned and treated the injuries, and the officer photographed them. The nurse determined that Yarborough required no stitches.

Prison officials conducted an investigation of Yarborough's claims against Magallanes and Barnett, and of the disciplinary charge against Yarborough for striking Magallanes. Yarborough attended the disciplinary hearing, was represented by counsel, and testified. The prison authorities concluded that neither the internal investigation report nor the medical records supported Yarborough's allegations. Yarborough was found guilty on the charge of striking an officer.

Yarborough also alleged that, after filing this suit, he incurred additional disciplinary charges in retaliation for the filing of the suit. For example, he claimed that Barnett planted a weapon in his cell, for which he was disciplined.[6] Due to the repeated disciplinary charges, Yarborough is now housed in administrative segregation and classified as having a tendency to assault others.

Yarborough brought a civil rights action against Magallanes and Barnett under 42 U.S.C. § 1983, alleging excessive use of force and retaliation. He petitioned the district court for leave to proceed *in forma pauperis*. Pursuant to 28 U.S.C. § 1915(d), a magistrate conducted a hearing, and the district court dismissed Yarborough's claims as frivolous. Yarborough appeals the

[6] For each charge, Yarborough received notice and an opportunity to be heard, and he testified at the disciplinary hearings.

dismissal, contending that the district court erred in 1) dismissing his excessive use of force claim as frivolous, 2) dismissing his retaliation claim as frivolous, 3) dismissing his claims without granting leave to amend his complaint, 4) finding that he was in administrative segregation during the entire period of his incarceration, and 5) depriving him of his right to a jury trial.

II

Section 1915 of Title 28 allows a plaintiff to petition the district court for leave to proceed *in forma pauperis*. 28 U.S.C. § 1915 (1988). This provision, however, is not without restrictions. Specifically, "[t]he court . . . may dismiss the case . . . if satisfied that the action is frivolous or malicious." *Id.* § 1915(d).

In making this determination, the court usually conducts a hearing before a magistrate judge to evaluate the plaintiff's claims. *Spears v. McCotter*, 766 F.2d 179, 181-82 (5th Cir. 1985).[7] Under § 1915(d), "a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations." *Denton v. Hernandez*, ___ U.S. ___, ___, 112 S. Ct. 1728, 1733, 118 L. Ed. 2d 340 (1992). Nonetheless, the court may not dismiss merely because it finds those allegations unlikely. *Denton*, ___ U.S. at

[7] A hearing before a magistrate to evaluate a § 1915 request is commonly known as a *Spears* hearing.

___, 112 S. Ct. at 1733.

Instead, "the most important consideration in a § 1915(d) credibility assessment is the inherent plausibility of a prisoner's allegations based on objective factors." *Cay v. Estelle*, 789 F.2d 318, 326 (5th Cir. 1986). Therefore, a district court may dismiss under § 1915(d) only if the plaintiff has no realistic chance of success on the merits, or the claims have no arguable basis in law and fact. *Booker v. Koonce*, 2 F.3d 114, 116 (5th Cir. 1993).

We review a § 1915(d) dismissal for abuse of discretion. *Denton*, ___ U.S. at ___, 112 S. Ct. at 1734; *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir. 1993); *Ancar v. Sara Plasma, Inc.*, 964 F.2d 465, 468 (5th Cir. 1992). In conducting our appellate review, we

> consider whether (1) the plaintiff is proceeding *pro se*, (2) the court inappropriately resolved genuine issues of disputed fact, (3) the court applied erroneous legal conclusions, (4) the court has provided a statement of reasons which facilitates `intelligent appellate review,' and (5) any factual frivolousness could have been remedied through a more specific pleading.

Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992) (quoting *Denton*, ___ U.S. at ___, 112 S. Ct. at 1734)).

A

Yarborough first argues that the district court should not have dismissed his excessive force claim as frivolous. The question of whether a prison official's use of force was excessive and violated a prisoner's right under the eighth amendment to be free of cruel and unusual punishment turns on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v.*

McMillian, ___ U.S. ___, 112 S. Ct. 995, 999, 117 L.Ed. 2d 156 (1992); *Whitley v. Albers*, 475 U.S. 312, 320-21, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251 (1986). "Several factors are relevant in the inquiry whether unnecessary and wanton infliction of pain was used in violation of a prisoner's eighth amendment right to be free from cruel and unusual punishment." *Hudson v. McMillian*, 962 F.2d 522, 523 (5th Cir. 1992). These include:

1. the extent of the injury suffered;[8]
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 the response.

Id.

Yarborough alleged that Magallanes inflicted several stab wounds on him. The prison officials maintain that Yarborough exhibited no injuries immediately after the incident,[9] but showed some minor abrasions and scratches the next day.[10] Yarborough argues that no force was needed, but he does not dispute that he struck Magallanes, and that the disciplinary proceedings were properly conducted. Based on the objective evidence, the district

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[8] Although the injury need not be serious, *Hudson*, 962 F.2d at 523, the prisoner must show some injury at least. *Jackson v. Culbertson*, 984 F.2d 699,700 (5th Cir. 1993).

[9] On the day of the incident, the nurse did not examine Yarborough for injuries to his back because Yarborough did not complain of any injuries. Yarborough alleged that he was not permitted to speak. Moreover, the officers who strip-searched Yarborough prior to placing him in a prehearing detention cell saw no injuries.

[10] In the nurse's opinion, the injuries had occurred that same day and were inconsistent with puncture wounds from a door key.

court found that the injury, if any, was minor, and that the officers had acted in good faith in response to Yarborough's disruptive behavior. Therefore, Yarborough's claim did not constitute an eighth amendment violation, and consequently had no basis in law and fact. We cannot say that the district court abused its discretion in reaching this conclusion.[11]

B

Yarborough also argues that the district court should not have dismissed his retaliation claim. "[P]rison officials may not retaliate against or harass an inmate because of the inmate's exercise of his right of access to the courts." *Gibbs v. King*, 779 F.2d 1040, 1046 (5th Cir.), *cert. denied*, 476 U.S. 1117, 106 S. Ct. 1975, 90 L. Ed. 2d 659 (1986); *see also Whittington v. Lynaugh*, 842 F.2d 818, 819 (5th Cir.) ("[D]iscrimination in retaliation for a prisoner exercising his right to go to court would violate a prisoner's civil rights."), *cert. denied*, 488 U.S. 840, 109 S. Ct. 108, 102 L. Ed. 2d 83 (1988). The district court may, however, dismiss a claim of retaliation as frivolous where the plaintiff fails adequately to support the claim with factual allegations. *See Moody v. Baker*, 857 F.2d 256, 258 (5th Cir.) (dismissing retaliation claim as frivolous, because "no factual basis for that

[11] Yarborough also argues that the district court improperly found that he had been in administrative segregation during the entire period of his incarceration, and that the district court improperly based the § 1915(d) dismissal of his excessive force claim on that finding. In its order of dismissal, the district court based its decision not on Yarborough's classification, but on "his admitted history of assaultive behavior." Accordingly, the district court's error, if in fact one occurred, does not amount to an abuse of discretion.

mere conclusory allegation" existed), *cert. denied*, 488 U.S. 985, 109 S. Ct. 540, 102 L. Ed. 2d 570 (1988); *Whittington*, 842 F.2d at 819 (dismissing retaliation claim as frivolous because "the appellant has advanced nothing but the claim itself without the slightest support of any factual allegations"). Dismissal is inappropriate, however, if the plaintiff has "alleged . . . facts to support his claim," and "the facts he has alleged are not `clearly baseless.'" *Gartrell v. Gaylor*, 981 F.2d 254, 259 (5th Cir. 1993) (quoting *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989)). The district court dismissed Yarborough's retaliation claim, finding that he had failed sufficiently to support it. We disagree.

Yarborough made several allegations in support of his claim. He alleged that Barnett planted a weapon in his cell. Further, Yarborough stated that Barnett had told him that he, Barnett, had planted the weapon so that additional disciplinary proceedings could be brought against Yarborough. While these allegations may not ultimately succeed, we cannot say that they have "*no* chance of success". *Booker v. Koonce*, 2 F.3d 114, 116 (5th Cir. 1993).[12] In dismissing under § 1915(d), the district court inappropriately decided disputed factual issues more properly evaluated on a fully developed record. *See Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir.

[12] Magallanes and Barnett assert that the claims may be dismissed if Yarborough's chance of success is only slight, and cite *Pugh v. Parish of St. Tammany*, 875 F.2d 436, 438 (5th Cir. 1989). In *Booker*, however, we explained that *Denton v. Hernandez*, ___ U.S. ___, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992), rejected *Pugh*'s "slight chance of success" standard and replaced it with a "no chance of success" test. 2 F.3d at 116.

1992) (reversing a § 1915(d) dismissal for, among other reasons, lack of an adequately developed record necessary to review factual disputes). Consequently, the district court abused its discretion when it dismissed Yarborough's retaliation claim as frivolous under § 1915(d).

C

Yarborough further contends that the district court should not have dismissed his claims without leave to amend or supplement his complaint. Section 1915(d), however, does not require a district court to grant leave to amend before dismissing a claim, especially if the district court has conducted a *Spears* hearing. *See Graves v. Hampton*, 1 F.3d 315, 318 & n.12 (5th Cir. 1993) (holding that § 1915 does not require giving plaintiff opportunity to amend or supplement complaint, and *Spears* hearing provides sufficient "opportunity to expound on the factual allegations"); *Wilson v. Barrientos*, 926 F.2d 480, 482 (5th Cir. 1991) (*Spears* hearing allows prisoner to "elaborate on often less than artfully-drafted pleadings"); *Spears*, 766 F.2d at 181-82 (hearing is equivalent to motion for more definite statement).[13] The district court conducted a *Spears* hearing, and Yarborough had sufficient opportunity to articulate fully the factual basis of his claims. Accordingly, Yarborough's contention lacks merit.

[13] In *Parker v. Fort Worth Police Department*, 980 F.2d 1023, 1026 (5th Cir. 1993), we reversed a § 1915(d) dismissal without leave to amend, but only because no *Spears* hearing had been conducted.

D

Lastly, Yarborough contends that the district court's dismissal of his claims infringed on his right to a jury trial. Section 1915(d) clearly confers power on the district court to dismiss a frivolous claim. Consequently, Yarborough had no right to a jury determination of a § 1915(d) dismissal.

III

For the foregoing reasons, we AFFIRM the district court's dismissal of Yarborough's excessive use of force claim, but REVERSE the dismissal of his retaliation claim, and REMAND for further proceedings consistent with this opinion.