UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20319
Summary Calendar

MICHAEL ANTHONY EVANS,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, Director, Texas Department of Criminal Justice, Institutional Division, and D. STEVENS,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-92-0859)

(November 30, 1994)

Before POLITZ, Chief Judge, KING and STEWART, Circuit Judges.

PER CURIAM:[*]

Michael Anthony Evans appeals the 28 U.S.C. § 1915(d) dismissal of his *pro se, in forma pauperis* 42 U.S.C. § 1983 complaint, alleging violations of his civil rights by unreasonable search and seizure, retaliation, harassment, and discrimination. Concluding that the dismissal of the harassment claim is error, we affirm in part, vacate in part, and remand for further proceedings.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

In March 1992, Evans, an inmate in the Texas Department of Criminal Justice, filed a 42 U.S.C. § 1983 complaint against Correctional Officer D. Stevens,[1] alleging unreasonable search and seizure, retaliation, and harassment. Evans alleged that for a two-month period beginning in October 1991, Stevens repeatedly conducted searches of his prison cell without cause. Evans claimed that no contraband was found in the course of the searches. According to Evans, during this period he frequently returned to the cell and discovered his books scattered about the cell and his legal documents in disarray or missing. On one occasion following a "shakedown" search of the cell by Stevens, Evans returned and found his thermal undergarments missing. Another time he returned to discover sunflower seeds on the inside and seat of the toilet.

Evans also alleged that he, unlike other prisoners, was handcuffed on the way to solitary confinement and was thus unable to carry his property with him. Further, upon release from solitary confinement Evans allegedly was given a prison jumpsuit to wear, unlike the other prisoners who were given pants and shirts.

The magistrate judge ordered Evans to submit a more definite statement of the facts, including a request for clarification of the retaliation claim. Evans then modified his complaint to allege harassment and violation of equal protection rather than

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[1]Although Evans also filed suit against James A. Collins, the director of the TDJC, Evans does not allege that Collins had any involvement in the incidents giving rise to the complaint. The district court properly dismissed the claim against Collins and that dismissal is affirmed.

retaliation. Evans alleged that the acts of harassment constituted cruel and unusual punishment in violation of the eighth amendment. The district court granted Evans *in forma pauperis* status under 28 U.S.C. § 1915(a) and simultaneously dismissed the complaint as frivolous under 28 U.S.C. § 1915(d), finding that all of the claims lacked an arguable basis in law. Evans timely appealed.

Analysis

Evans challenges the district court's dismissal of his harassment, discrimination, and retaliation claims.

Title 28 U.S.C. § 1915(d) allows a court to dismiss a complaint seeking *in forma pauperis* status when the claim, lacking an arguable basis in either law or fact, is frivolous.[2] Frivolousness in this context refers to a narrower set of claims than does Rule 12(b)(6): when a complaint raises an arguable question which the district court ultimately finds is correctly resolved against the plaintiff, dismissal under Rule 12(b)(6) may be appropriate; however, dismissal under section 1915(d) is not.[3] We review a section 1915(d) dismissal for abuse of discretion,[4] examining whether the court applied erroneous legal conclusions.

Evans first challenges the district court's dismissal of his harassment claim, contending that the repeated searches of his cell constituted calculated harassment in violation of the eighth

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[2]**Denton v. Hernandez**, 112 S.Ct. 1728 (1992) (citing **Nietzke v. Williams**, 490 U.S. 319 (1989)).

[3]**Nietzke**; **Moore v. Mabus**, 976 F.2d 268 (5th Cir. 1992).

[4]**Denton**; **Moore**.

amendment. In dismissing this claim, the district court determined that it had no basis apart from the non-meritorious claims of unreasonable searches and seizures. This legal conclusion was erroneous, given the Supreme Court's clear statement that even though the fourth amendment does not confer a reasonable expectation of privacy in the prison cell, the eighth amendment remains as a protection for prisoners against "calculated harassment unrelated to prison needs."[5]

Evans alleges two months of repeated unauthorized searches of his prison cell, which apparently disclosed nothing improper. The record contains no evidence indicating that the searches were related to a legitimate prison interest. An arguable legal basis thus exists for Evans' claim that the searches constituted calculated harassment in violation of the eighth amendment.[6] Because the district court abused its discretion in dismissing this claim under section 1915(d), we must vacate the dismissal of this claim.

Evans also appeals the district court's dismissal of his equal protection claim. In his complaint Evans did not allege discrimination on the basis of membership in a protected class.

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[5]**Hudson v. Palmer**, 468 U.S. 517, 530 (1984).

[6]See **Scher v. Engelke**, 943 F.2d 921 (8th Cir. 1991), cert. denied, 112 S.Ct. 1516 (1992) (finding that retaliatory searches of inmate's cell 10 times in 19 days and leaving cell in disarray after three of those searches could amount to cruel and unusual punishment under the eighth amendment, even absent physical abuse, injury, or pain); **Vigliotto v. Terry**, 873 F.2d 1201 (9th Cir. 1989) (finding one isolated search of an inmate's cell not sufficient to constitute calculated harassment for eighth amendment violation).

Because the district court was not presented with any facts supporting a claim of discrimination, dismissal was proper. Evans now raises in this court allegations in support of race-based discrimination. Issues raised for the first time on appeal are not reviewable unless they involve purely legal questions and failure to consider them would result in manifest injustice.[7] Evans' additional allegations pertaining to race-based discrimination are factual issues that may not be raised for the first time on appeal.

Finally, Evans appeals the district court's dismissal of his retaliation claim which he disavowed. Evans maintains that he did not intend to drop this claim, but was unaware of reasons for Stevens' retaliation at the time he was ordered to clarify his complaint. Nonetheless, because Evans clearly abandoned the retaliation claim in the course of pleading, the district court did not err in dismissing the claim.

The judgment dismissing the equal protection and retaliation claims is AFFIRMED; dismissal of the harassment claim is VACATED and this matter is REMANDED for further proceedings consistent herewith.

[7] **Varnado v. Lynaugh**, 920 F.2d 320 (5th Cir. 1991).