IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20761
Conference Calendar

TIMOTHY P. MARTIN,

Plaintiff-Appellant,

versus

DAVID A. HINOJOSA,
ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-H-93-1732
- - - - - - - - - - -
(March 22, 1995)

Before GARWOOD, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:[*]

Timothy P. Martin argues that the district court erred by granting the defendants' motion to dismiss his 42 U.S.C. § 1983 complaint. He contends that he was injured by the defendants' excessive use of force.

A complaint filed in forma pauperis (IFP) may be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d) if it has no arguable basis in law or in fact. Booker v. Koonce, 2 F.3d 114,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

115 (5th Cir. 1993). This court reviews a § 1915(d) dismissal for an abuse of discretion. Id.

To obtain relief under § 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). When a prisoner alleges that a prison official has used excessive force in violation of the Eighth Amendment, the core judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 999 (1992). Nevertheless, every malevolent touch by a prison guard does not give rise to a federal cause of action. Id. at 1000. "The Eighth Amendment's prohibition of `cruel and unusual' punishment necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." Id. (internal quotation and citations omitted). Factors relevant to the inquiry include (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 forceful response. See Hudson v. McMillian, 962 F.2d 522, 523 (5th Cir. 1992) (on remand).

The extent of Martin's alleged injury is not severe. He states in his brief that he suffered swelling and abrasions after

the incident and that he now has two scars on his leg and ankle. Further, Martin admits that he refused to allow officers to unhandcuff him when he was returned to his cell from the shower. He also admits that Sergeant Hinojosa informed him several times that five officers in riot gear would enter his cell and remove the handcuffs forcibly if he did not comply, and that he still refused. The officers then entered his cell, placed him face down on his bunk, and forcibly removed the handcuffs, rubbing his ankle against the corner of a desk in the process. The district court determined that this limited use of force was an objectively reasonable response to the confrontation created by Martin and that it was necessary to restore discipline. The claim thus lacks an arguable basis in law, and the district court did not abuse its discretion by dismissing Martin's complaint as frivolous pursuant to § 1915(d).

AFFIRMED.