

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-30614

Summary Calendar

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HENDERSON FORD,

Plaintiff-Appellant,

v.

CHARLES C. FOTI, Sheriff, Orleans Parish  
and UNIDENTIFIED PARTIES,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CA 94 1575 F)

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April 14, 1995

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Henderson Ford appeals the dismissal of his claims against Charles C. Foti, Sheriff of the Orleans Parish Prison, and unidentified parties as frivolous under 28 U.S.C. § 1915(d). We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

While incarcerated at the Orleans Parish Prison (OPP), Henderson Ford, proceeding pro se and in forma pauperis (IFP), filed a complaint pursuant to 42 U.S.C. § 1983. Ford sued Sheriff Foti because he has been denied law books and § 1983 forms. Specifically, Ford alleged the following.

Ford requested Southern Reporters using an inmate library loan application on March 10, 1994. About three weeks later, he met with a paralegal and asked about the books. The paralegal told him that it was up to the legal staff to provide him the books. The next day he received a letter from the legal staff informing him that it could not assist him with his criminal case and to contact the attorney who was handling his case.

On April 4, 1994, Ford requested another book, § 1983 forms, and an envelope with a stamp to mail the form. About two weeks later he met with a paralegal and again requested the forms and the book, but said he no longer needed the stamp. On April 29, 1994, he received a letter telling him that he would not be provided § 1983 packets and that the federal court requires the legal staff to interview inmates before giving them packets to help prevent frivolous suits. A week later he met with a paralegal and again requested the forms and books. To date, he has not received the § 1983 forms and had to write to the clerk of the federal district court to file the instant suit. Ford sought compensatory and punitive damages.

A magistrate judge determined that Ford's claims were frivolous, noting that OPP's requirement that a prisoner be

interviewed by legal personnel prior to the issuance of § 1983 forms is not unreasonable. The magistrate judge further observed that, as evidenced by the instant § 1983 form, Ford had access to the same and that he could readily attain such forms on written request to the clerk of federal district court. As to Ford's claim that he was denied access to law books, the magistrate judge cited to Clinton v. Howard, Jr. et al v. Charles Foti, Jr., 1989 WL 152715 (E.D. La. Dec. 14, 1989), which set forth that OPP officials must provide Southern Reporters to prisoners. According to the magistrate judge, that opinion applied only to pro se prisoners and that prisoners such as Ford, who are represented by counsel, are not being denied access to the court.

After being granted a continuance, Ford filed an objection to the magistrate judge's recommendation, arguing, inter alia, that he was denied access to the courts when the defendants denied his request for law books containing the cases cited in the magistrate judge's report. After reviewing Ford's objection, the magistrate judge ordered that Ford's objection be "set for hearing on August 24, 1994." On July 2, 1994, Ford filed a motion for leave to file a supplemental complaint. The district court did not rule on the motion, but dismissed Ford's initial complaint. Judgment was entered on August 22, 1994.

Ford filed a motion to vacate the judgment on September 1, 1994. Because it was filed within ten days of the entry of final judgment (see Fed. R. Civ. P. 6(a)), it was a motion filed pursuant to Fed. R. Civ. P. 59(e). See Harcon Barge Co., Inc. v.

D & G Boat Rentals Inc., 784 F.2d 665, 667 (5th Cir.) (en banc), cert. denied, 479 U.S. 930 (1986); see also Craig v. Lynaugh, 846 F.2d 11, 13 (5th Cir. 1988) (when the defendants have not been served, the date of filing, not the date of service, governs to determine whether a motion is one pursuant to Rule 59(e) or Rule 60(b)).

Ford alleged in his motion to vacate that he received three of the cases cited by the magistrate judge the same day he mailed his objection to the report and recommendation and that the district court should have considered this before dismissing his complaint. The district court denied the Rule 59(e) motion on September 14, 1994.

Ford filed a request for an extension of time to file a notice of appeal and a request for copies of his district court filings, which the court granted. See Fed. R. App. 4(a)(5). Ford had an extension of thirty days from October 4, 1994, or until November 3, 1994. He filed a notice of appeal on November 3, 1994.

Ford argues that the district court erred when it dismissed his claims as frivolous because it should have given him an opportunity to further develop his allegations to state an arguable basis in law or fact. He asserts that all litigants, including those who are pro se, are to be accorded equal consideration.

A district court may dismiss an IFP complaint as frivolous under § 1915(d) if it lacks an arguable basis in law or fact.

Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994). If it appears that "insufficient factual allegations might be remedied by more specific pleading," this court considers "whether the district court abused its discretion by dismissing the complaint either with prejudice or without any effort to amend." Id.

Ford contends that he was denied access to the courts when OPP officials failed to give him § 1983 forms. He asserts that he should not have been required to tell the paralegal the basis of his § 1983 complaint to obtain § 1983 forms. He argues that when he filed the instant complaint he did not know that he could have obtained the § 1983 form from the district court, and obtained the instant form only after he received help from another inmate.

Ford argues that inmates such as himself, who are indigent and unable to obtain a stamp and an envelope, are unable to get the forms from the clerk of court. He adds that he wanted the forms to file a civil matter not related to this complaint and should have been given the form without having to explain allegations that he would allege. Once he received the § 1983 form from the clerk's office, he decided to file the instant complaint first.

Prisoners have a constitutionally protected right of access to the courts. Bounds v. Smith, 430 U.S. 817, 821 (1977).

"While the precise contours of a prisoner's right of access to the courts remain somewhat obscure, the Supreme Court has not extended this right to apply further than the ability of an

inmate to prepare and transmit a necessary legal document to a court." Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993) (footnote omitted), cert. denied, 114 S. Ct. 1081 (1994); see also Bounds, 430 U.S. at 828 (describing the right of access to the courts as requiring prison officials to provide prisoners with adequate law libraries or adequate assistance from trained legal personnel). To prevail on a denial-of-access-to-the-courts claim, the claimant must show he was prejudiced by the alleged violation. Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.), cert. denied, 112 S. Ct. 2974 (1992).

Ford obviously had access to the § 1983 form used to file the instant suit. He has not alleged that any delay in having to obtain the form for the instant complaint from the federal court prejudiced his position as a litigant or even prevented him from filing a pleading. See Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993) (inmates must be able to prepare and transmit necessary legal documents). Nor would such an allegation have a basis in law or fact inasmuch as the purported constitutional violations occurred no earlier than March 25, 1994, and he filed his complaint on May 20, 1994. See Ali v. Higgs, 892 F.2d 438, 439 (5th Cir. 1990) (personal injury limitations period of the forum state governs limitations period for filing § 1983 complaint); Elzy v. Roberson, 868 F.2d 793, 794 (5th Cir. 1989) (a personal injury plaintiff has a one year to file suit in Louisiana). Further, Ford could have filed any unrelated suit as soon as he found out about obtaining the forms from the district

court. Nothing indicates that he would have been prevented from filing the same at that time or that he was otherwise prejudiced. Accordingly, the district court did not abuse its discretion when it dismissed this claim as frivolous.<sup>1</sup>

Ford also argues that the district court erred when it dismissed as frivolous his claim that the failure of OPP officials to provide him Southern Reporter books denied him access to the courts. According to Ford, if the magistrate judge was correct in stating that the order in Clinton Howard v. Charles Foti, Jr., required that only pro se prisoners be supplied Southern Reporters, then Ford is suffering prejudice. He adds that he did not explain in his complaint how he was prejudiced by the denial of the law books because he thought that was something that he had to prove at trial.

Ford's filings indicate that he wanted the law books to research matters to assist his court-appointed counsel for his criminal trial. A criminal defendant who is represented by counsel has meaningful access to the courts vis-a-vis the criminal action pending against him. See Tarter v. Hury, 646 F.2d 1010, 1014 (5th Cir. 1981). Thus, the district court did not abuse its discretion when it dismissed the claim as frivolous.

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<sup>1</sup> In so ruling, we hold only that Ford has not shown that he was prejudiced by the violations he has alleged of his right of access to the courts, as required by Henthorn, 955 F.2d at 354. We express no view on whether a requirement, if indeed one exists, that legal staff interview inmates before giving them § 1983 forms would present constitutional problems.

Finally, Ford argues that the district court should have permitted him to amend his complaint before dismissing it, to "clarify his factual allegations and legal theory to conform with the requirements of a valid legal cause of action." A party may amend a pleading at anytime before a responsive pleading is filed. Fed. R. Civ. P. 15(a); Willis v. Collins, 989 F.2d 187, 189 (5th Cir. 1993). The defendants were never served and did not file a responsive pleading. Therefore, technically, Ford could amend his complaint once as a matter of right.

Ford's motion for leave to amend, however, did not state a new claim or add specific allegations of prejudice, but merely stated that "[e]vents have occurred since [he] filed his complaint which are similar in nature to the violation alleged in the complaint." As discussed above, Ford's claim that he was denied access to the courts lacks an arguable basis in law and fact. Ford, however, alleged in his objections to the magistrate judge's report that he was denied his request for law books containing the authority the magistrate judge used in his report and recommendation. Presumably, it was the denial of these books that constituted the "[e]vents [that had] occurred since [he] filed his complaint which [were] similar in nature to the violation alleged in the complaint."

On appeal, Ford argues that the district court should have taken into consideration that he was denied the requested legal materials before dismissing his complaint. According to Ford, had he had the requested authority, he could have made a "more



meaningful" response on legal grounds to the magistrate judge's report.

Given that Ford had the three cases he requested before filing his appellate brief, he could have made his "more meaningful" response to the magistrate judge's report on appeal, but did not so do. Moreover, as discussed above, the district court, which adopted the magistrate judge's report, did not abuse its discretion when it dismissed Ford's claims as frivolous. Accordingly, Ford fails to show that he was prejudiced as a litigant by the purported denial of the requested law books.

Inasmuch as Ford's amendment lacked an arguable basis in law or fact, any error committed by the district court in not permitting Ford leave to amend was harmless. See Eubanks v. Mullen, No. 94-10103, p. 12-13 (5th Cir. Dec. 14, 1994) (unpublished; copy attached) (district court's technical error in disallowing § 1983 plaintiff to amend when defendant had not yet filed an answer was harmless because amended claim lacked an arguable basis).

The judgment of the district court dismissing Ford's complaint without prejudice is AFFIRMED.