

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30690
Conference Calendar

GLORIA JEAN GATES,

Plaintiff-Appellant,

versus

JOHNNIE W. JONES, JR., Warden,
ET AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. CA-94-2632-A-M1
- - - - -

June 29, 1995

Before JONES, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Gloria Jean Gates's motion for leave to proceed in forma pauperis is hereby DENIED.

Gates contends that the district court erred by dismissing her complaint as frivolous. A reviewing court will disturb a district court's dismissal of a pauper's complaint as frivolous only on finding an abuse of discretion. A district court may dismiss a complaint as frivolous "where it lacks an arguable

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

basis either in law or in fact.'" *Denton v. Hernandez*, 112 S. Ct. 1728, 1733-34 (1992)(quoting *Neitzke v. Williams*, 490 U.S. 319, 325, (1989)).

The materials Gates submitted in conjunction with her complaint indicate that her contention has no basis in fact. The disciplinary report indicates that Gates violated policy number 64. The reporting employee wrote that Gates violated "posted policy #64 which states in part, `[r]esidents must report to [m]edicine call only at the time and in the group to which they are assigned[.]'" The list of posted policies Gates submitted indicates that the reporting employee accurately quoted from posted policy 64. That policy evidently was added to the prison's regulations, replacing former policy 64, which was renumbered as policy 65. Because Gates's claim has no basis in fact, the district court correctly dismissed her complaint as frivolous.

Gates raises other contentions which we address briefly.

Because Gates's own submissions indicate that her claim lacks basis in fact, her contention that the district court improperly resolved issues of material fact is unavailing. Because it is obvious that Gates's complaint lacks basis in fact, the district court need not have allowed her to amend her complaint. *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993).

Finally, because the judgment dismissing Gates's complaint did not indicate whether it was with or without prejudice, it is presumed to operate as a judgment without prejudice. *Graves*, 1 F.3d at 319. Gates's contention that the district court violated

due process by failing to indicate whether the judgment operated with or without prejudice is unavailing.

APPEAL DISMISSED.