IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40223
Summary Calendar

JEWEL EDWARD POOLE,

Plaintiff-Appellant,

versus

UNIDENTIFIED BARRATT, Warden, ET AL.,

Defendants-Appellees.

- - - - - - - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 9:93-CV-4
- - - - - - - - - -
(August 29, 1994)

Before KING, SMITH, and STEWART, Circuit Judges.

PER CURIAM:[*]

Jewel Edward Poole moves for leave to proceed in forma pauperis (IFP) on appeal.[**] To prevail, Poole must demonstrate

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[**] The district court's "provisional" grant of IFP was procedurally incorrect. See Mitchell v. Sheriff Dep't, Lubbock County, 995 F.2d 60, 62 n.1 (5th Cir. 1993). The determination whether to grant IFP is based solely on the plaintiff's economic status. See Cay v. Estelle, 789 F.2d 318, 322 (5th Cir. 1986). If the plaintiff's financial status warrants it, IFP is granted and the case is docketed. See Watson v. Ault, 525 F.2d 886, 891 (5th Cir. 1976). The district court then evaluates the merits of the claim based on the complaint. Cay, 789 F.2d at 323. If the claim is frivolous, it may be dismissed pursuant to 28 U.S.C. § 1915(d) after filing but before service. Id.

that he is a pauper and that he will present a nonfrivolous issue on appeal. Carson v. Polley, 689 F.2d 562, 586 (5th Cir. 1982). Poole submitted an affidavit to the district court which indicates that he is a pauper.

A district court may dismiss an IFP complaint as frivolous if it lacks an arguable basis in either law or fact. Denton v. Hernandez, ___ U.S. ___, 112 S. Ct. 1728, 1733, 118 L. Ed. 2d 340 (1992). A "finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible. . . . " Id. This Court reviews a district court's § 1915(d) dismissal for abuse of discretion. Id. at 1734.

Poole's claim regarding his incoming legal mail lacks a basis in law. The mere opening of an inmate's legal mail by prison officials outside of the inmate's presence is not a violation of a prisoner's constitutional rights and, therefore, not cognizable under § 1983. Brewer v. Wilkinson, 3 F.3d 816, 825 (5th Cir. 1993), cert denied, ___ U.S. ___, 114 S. Ct. 1081 (1994). Poole must allege that his position as a litigant was prejudiced by the mail tampering. See Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.), cert. denied, 112 S. Ct. 2974 (1992).

Poole's assertion that he was subjected to cruel and unusual punishment and denied adequate medical care when Defendant Bararra spilled scalding coffee on him lacks a basis in fact. A prisoner alleging that conditions of imprisonment constitute cruel and unusual punishment must show that prison officials were deliberately indifferent to conditions. Wilson v. Seiter, 501

U.S. 294, 303, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991). Likewise, to state a medical claim cognizable under § 1983, a convicted prisoner must allege acts or omissions sufficiently harmful to evidence a deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). "The Supreme Court recently adopted `subjective recklessness as used in the criminal law' as the appropriate definition of `deliberate indifference' under the Eighth Amendment.'" Reeves v. Collins, ___ F.3d ___ (5th Cir. Aug. 1, 1994, No. 93-1902), slip p. 5480 (quoting Farmer v. Brennan, ___ U.S. ___, 114 S. Ct. 1970, 1979-80, 128 L. Ed. 2d 811 (1994)). A prison official is not deliberately indifferent "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 114 S. Ct. at 1979. "Under exceptional circumstances, a prison official's knowledge of a substantial risk of harm may be inferred by the obviousness of the substantial risk." Reeves, at slip p. 5480 (citing Farmer, 114 S. Ct. at 1981-82 and n.8).

Poole's conclusory allegation that the coffee spill was intentional is not enough to lift Poole's claim out of the realm of factual frivolousness and the district court properly dismissed it. See Whittington v. Lynaugh, 842 F.2d 818, 821 (5th Cir.), cert. denied, 488 U.S. 840 (1988) (claim of retaliation without the slightest support of any factual allegations properly

dismissed as frivolous). Poole's medical records show that he received medical treatment for a small burn the day after the coffee mishap. A one-day delay for treatment of such an injury does not rise to subjective recklessness that is more than negligence.

As to Poole's contention that he did not receive a mandatory break between terms of solitary confinement, Poole challenged the truthfulness of the records at the Spears hearing. A disputed factual allegation raised in a Spears hearing that would warrant relief, if true, and that is not "clearly baseless . . . fanciful . . . fantastic . . . and delusional" cannot be resolved by § 1915(d) dismissal. See Denton, 112 S. Ct. at 1733-34 (citation and internal quotation omitted). Thus, the issue becomes whether, if Poole was released from solitary confinement on May 28, 1992, and began another term on May 29, 1992, his claim that he was denied due process has an arguable basis in law.

The Due Process Clause does not protect inmates from being transferred to administrative segregation to await disciplinary hearings. Hewitt v. Helms, 459 U.S. 460, 468, 103 S. Ct. 865, 74 L. Ed. 2d 675 (1983). A state, however, may by statute or through prison rules or regulations, create a protected liberty interest in remaining in the general population. Id. at 469-70. When such state enactments combine explicitly mandatory language with specific substantive predicates, absent which administrative segregation will not occur, a liberty interest protected by the Due Process Clause arises. Id. at 471-72.

Under the applicable TDJC regulation, Poole was at least entitled to a 72-hour hiatus, either in pre-hearing detention or in the general population, before beginning his next term of solitary confinement. Although Poole had no protected liberty interest in being placed in administrative segregation, i.e. pre-hearing detention, see Hewitt, 459 U.S. at 468, the record is unclear whether he was a security threat precluding placement into the general population.

Given the regulation's mandatory language, Poole's claim has an arguable legal basis and the district court abused its discretion when it dismissed it. Poole should be permitted to proceed IFP on appeal this issue. See Carson, 689 F.2d at 586. Because the defendants have not been served and further briefing is not necessary, the appeal may be decided now pursuant to Clark v. Williams, 693 F.2d 381, 381-82 (5th Cir. 1982). The district court's dismissal of this claim should be vacated and the action should be remanded for further proceedings.

For Poole to prevail on his argument that he was wrongfully denied parole by the parole board, Poole would have to show that he was denied a liberty interest without due process. A Texas inmate has no liberty interest in parole and is "not entitled to reasons" for the denial of the same. Gilbertson v. Texas Bd. of Pardons and Paroles, 993 F.2d 74, 74-75 (5th Cir. 1993). Poole's claim lacks an arguable basis in law and was properly dismissed as frivolous.

Poole's assertion that he was denied investigation into his grievances is refuted by documents submitted by Poole in the district court and was properly dismissed as frivolous.

Poole's argument that Warden Barratt is liable for the violations of Poole's civil rights under the theory of respondeat superior lacks a basis in law. A defendant cannot be held liable under § 1983 on a theory of vicarious liability, including respondeat superior. Baskin v. Parker, 602 F.2d 1205, 1207-08 (5th Cir. 1979). "Personal involvement is an essential element of a civil rights cause of action." Thompson v. Steele, 709 F.2d 381, 382 (5th Cir.), cert. denied, 464 U.S. 897 (1983).

Poole's contention that the magistrate judge "attempted to discredit [his] testimony with complex questions knowing that [Poole] had a limited knowledge of the law" is also frivolous. A Spears hearing is for the purpose of "flesh[ing] out the substance of a prisoner's claims" and is "in the nature of a motion for more definite statement." Wesson v. Oglesby, 910 F.2d 278, 281 (5th Cir. 1990) (citation and internal quotation omitted). The purpose of the Spears hearing is not to address the merits of the complaint but to focus on the legal viability of the allegations. Id. (citations omitted).

Likewise, Poole's argument that the magistrate judge failed to rule on his motion for appointment of counsel and on his motion to compel discovery lacks merit. Once the district court determined that the claims should be dismissed as frivolous, such action was not required by the court.

The motion to proceed IFP is GRANTED. The judgment is AFFIRMED in part, VACATED in part, and REMANDED.