

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40362
Summary Calendar

MARK WHITE,

Plaintiff-Appellant,

versus

RONALD REED, Dr., Physician,
ET AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 9:93-CV-141
- - - - -
(August 29, 1994)

Before KING, SMITH, and STEWART, Circuit Judges.

PER CURIAM:*

Mark White moves this Court for leave to proceed on appeal in forma pauperis (IFP). See Fed. R. App. P. 24(a). "To proceed on appeal [IFP], a litigant must be economically eligible, and his appeal must not be frivolous." Jackson v. Dallas Police Dep't, 811 F.2d 260, 261 (5th Cir. 1986). The determination whether his appeal is not frivolous, does not require probable success on the merits. Id.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

White fails to mention his contentions concerning the presence of asbestos in his assigned work area. Therefore, this claim is deemed abandoned on appeal. See Eason v. Thaler, 14 F.3d 8, 9 n.1 (5th Cir. 1994). Liberally construed, White's arguments challenge the district court's dismissal, with prejudice, as frivolous** of his claims of retaliation and of work assignments which aggravate his breathing problems.

An [IFP] complaint may be dismissed as frivolous if it lacks an arguable basis in law or fact. Should it appear that insufficient factual allegations might be remedied by more specific pleading, we must consider whether the district court abused its discretion by dismissing the complaint either with prejudice or without any effort to amend.

Id. at 9 (footnotes omitted). The district court failed to utilize a Spears*** hearing or a questionnaire before dismissing White's complaint as frivolous. "Dismissal with prejudice . . . would be appropriate if the plaintiff has been given an opportunity to expound on the factual allegations by way of a . . . questionnaire or orally via a Spears hearing." Graves v. Hampton, 1 F.3d 315, 319 (5th Cir. 1993) (footnote omitted).

A review of White's claims concerning improper job assignments for malicious and retaliatory reasons do not fall under the characterization of "pure fantasy or . . . a legally inarguable proposition." Eason, 14 F.3d at 10. With further

**Mitchell v. Sheriff Dep't, Lubbock County, Tex., 995 F.2d 60, 62 n.1 (5th Cir. 1993), sets out this Court's "preferred procedure" for the district courts to use in determining a litigant's IFP status.

***Spears v. McCotter, 766 F.2d 179, 181-82 (5th Cir. 1985).

factual development, it is conceivable that White could state a claim which meets the deliberate-indifference standard, based on his current allegations that the defendants chose job assignments for White, knowing such choices would aggravate his medical condition, and that the defendants punished White for his refusal to work, although they knew his condition precluded such work. See Mendoza v. Lynaugh, 989 F.2d 191, 194 (5th Cir. 1993); see also Farmer v. Brennan, ___ U.S. ___, 114 S. Ct. 1970, 1980, 128 L. Ed. 2d 811 (1994) (using criminal law's definition of subjective recklessness to define the Eighth Amendment's deliberate indifference).

White alleged that the defendants used the improper job assignments as retaliation for White's jailhouse lawyering. With further factual development as to what, if any, unidentified litigating activity gave rise to retaliation and what specific instances, if any, justified a conclusion of retaliation by the defendants, it is possible that White may state a claim for retaliation. See Gibbs v. King, 779 F.2d 1040, 1046 (5th Cir.), cert. denied, 476 U.S. 1117 (1986).

Because these claims, with further factual development, may survive 28 U.S.C. § 1915(d) scrutiny, the district court abused its discretion in dismissing, with prejudice, these claims as frivolous. See Eason, 14 F.3d at 10. Therefore, White has stated issues of arguable legal merit. See Jackson, 811 F.2d at 261.

White's motion to proceed IFP is granted. The district court's judgment on the issues presented for appeal is vacated

and remanded for further development by the district court. Because White failed to preserve for appeal the claim concerning asbestos in the prison work environment, the district court's determination as to this claim is affirmed.

MOTION GRANTED. AFFIRMED IN PART. VACATED AND REMANDED IN PART.