IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40757
Summary Calendar

ALBERT C. MATHIS,

Plaintiff-Appellant,

v.

DR. CHARLES E. ALEXANDER, ET AL.
Defendant-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(94-CV-32)

(March 3, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Proceeding pro se and in forma pauperis, Albert C. Mathis, an inmate in the Texas Department of Corrections, filed a suit pursuant to 42 U.S.C. § 1983, claiming denial of adequate medical care. At the Spears hearing for this suit, the magistrate recommended that Mathis's complaint be dismissed with prejudice as to the filing of another informa pauperis lawsuit raising the

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

same issues as were therein presented. The district court judge adopted this recommendation. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 7, 1993, Mathis was involved in a fight with another inmate in the prison kitchen. Approximately one and a half hours later, he was transported by ambulance to Palestine Memorial Hospital, where he was diagnosed with a partially collapsed lung. He remained in the hospital for four days.

Upon returning to the Michael Unit of the TDCJID, Mathis was placed in prehearing lockup and then in solitary. While thus confined Mathis complains that "medical treatment was nearly non-exist[e]nt." Although he alleges that his medical requests and grievances were ignored, Mathis acknowledged at the Spears hearing that nurses checked on him daily. After being released from solitary, he was sent to work in the field where he reports that he "nearly passed out from weakness and dizziness."

On October 26, 1993, Mathis was struck in the head by another inmate with a combination lock tied to an extension cord. He reports that he had to walk to the searcher's desk to get help for the bleeding wound on his head. Medical records indicate that Mathis sustained a Y-shaped laceration on his head. The cut was cleaned and a collodion solution (airplane glue) was applied, but the cut was not stitched and no X-rays were taken.

Mathis further complained that no appointments were made to check the healing process, and that Tylenol, which he was told to

take for pain, was ineffective. Mathis also reported that although his wound was still draining, he was put to work in the fields.

Mathis brought suit under 42 U.S.C. § 1983, alleging lack of adequate medical care. In his original complaint, Mathis named Dr. Charles E. Alexander, Deputy Director for Health Services, Institutional Division; Mark W. Woodruff, Staff Service Officer; David M. Fortner, a physician assistant; and J.E. Alford, head warden at the Michael Unit of the TDCJID as defendants. Mathis subsequently substituted Dr. Glenn Johnson for Dr. Alexander. Later still, Mathis filed an amended complaint adding two defendants, Dr. Kerry Rasberry and Dr. Robert Brock. According to Mr. Mathis, Dr. Rasberry was liable because he was one of the doctors "who is list [sic] in the medical records as proporting [sic] to have treated me during the August 7, 1993 chest injury." Mathis alleged that Dr. Brock also treated him for that injury. Mathis also filed a supplemental complaint adding James Collins as a defendant because he was still the director of the TDCJ when the incidents made the basis of the suit occurred. Mathis named James Riley as a defendant because he is currently the acting director of the TDCJ. Mathis alleged that Collins was liable because Mathis had sent him a medical request pertaining to the August 7 injury which was reportedly returned to him without explanation and which instructed him to put in a sick call. He also sent Collins a grievance regarding the "denial of treatment" and other medical problems relating to the Oct. 26 injury which

was returned without a decision rendered. J. Alford was named as a defendant because he is the head warden and he allegedly ignored Mathis's problems with the medical staff.

At the Spears[1] hearing, Mathis acknowledged that Dr. Johnson had no personal involvement other than receiving Mathis's complaints. He named Mark Woodruff, head administrator of the medical staff, as a defendant because he failed to direct the medical staff to respond to his requests. He named physician assistant David Fortner because he was the one most involved in his treatment and refused to give Mathis a "lay-in" after his October 26 injury. Dr. Kuykendall, who testified at the Spears hearing as to Mathis's medical records, stated that the records did not indicate that Fortner was involved in treating Mr. Mathis for the August 7 incident. Mathis denied this and argued that the prison records were falsified.

The magistrate judge recommended that the suit be dismissed with prejudice as frivolous pursuant to 28 U.S.C. § 1915(d). After reviewing Mathis's objections, the district court adopted the recommendation of the magistrate and dismissed the suit with

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[1] An evidentiary hearing was held on May 18, 1994 pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). This proceeding allows a litigant to offer sworn testimony in support of his allegations. We have stated that the purpose of a Spears hearing is to determine whether in forma pauperis status should be granted or whether the lawsuit should be dismissed as frivolous. This serves to implement the congressional intent of meaningful access to the courts for indigent litigants, and also allows the district court to winnow out the wheat from the unusual amount of chaff necessarily presented to a system which contains a high volume of pro se litigation. Wilson v. Barrientos, 926 F.2d 480,482 (5th Cir. 1991). (citing Watson v. Ault, 525 F.2d 886, 890 (5th Cir. 1976)).

prejudice. Mathis reargues on appeal that he was denied adequate medical care after his injuries.

II. STANDARD OF REVIEW

A § 1983 plaintiff who proceeds in forma pauperis is subject to dismissal if his complaint is "frivolous" within the meaning of § 1915(d). Under § 1915(d), a complaint is frivolous if "it lacks an arguable basis in either law or fact." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992); Neitzke v. Williams, 490 U.S. 319, 325 (1989). A complaint is legally frivolous if it is premised on an "indisputably meritless legal theory." Neitzke, 490 U.S. at 327. Thus, a complaint that raises an arguable question of law may not be dismissed under § 1915(d), although it may be subject to dismissal under Rule 12(b)(6) if the court ultimately resolves the legal question against the plaintiff. See Id. at 328. A complaint is factually frivolous if "the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." Denton, 112 S. Ct. at 1733. The complaint may not be dismissed as factually frivolous simply because the court finds the plaintiff's allegations unlikely. Id.

We review § 1915(d) dismissals for an abuse of discretion because a determination of frivolousness-whether legal or factual-is a discretionary one. See Denton, 112 S. Ct. at 1734; Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992). In reviewing for abuse of discretion, we consider whether (1) the plaintiff is

proceeding pro se, (2) the court inappropriately resolved genuine issues of disputed fact, (3) the court applied erroneous legal conclusions, (4) the court has provided an adequate statement of reasons for dismissal which facilitates intelligent appellate review, and (5) the dismissal was with or without prejudice. Denton, 112 S. Ct. at 1734. We have directed the district courts to distinguish between findings of factual, legal, or mixed factual and legal frivolousness and to reflect the considerations identified in Denton in entering § 1915(d) dismissals. Moore, 976 F.2d at 270.

III. DISCUSSION

Mr. Mathis argues that the defendants have demonstrated "deliberate indifference" to his medical needs, thereby violating his constitutional rights under the Eighth Amendment. The Supreme Court, in Estelle v. Gamble, 429 U.S. 97, 105 (1976), stated that deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983. The Court went on to state that "[t]his does not mean, however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. The Supreme Court recently elaborated upon the meaning of this requirement:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health

> or safety. The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer v. Brennan, 114 S. Ct. 1970, 1979 (1994). The Court went on to adopt the subjective recklessness standard, as used in criminal law, as the test for "deliberate indifference" under the Eighth Amendment. Id. at 1980. This test permits a finding of recklessness only when a person has disregarded a risk of harm of which he was aware. Therefore, a prison official may be held liable under the Eighth Amendment for acting with "deliberate indifference" to inmate health and safety only if he knows that inmates face a substantial risk of serious harm and if he disregards that risk by failing to take reasonable measures to abate it.

As to the August 7 incident in which Mathis sustained a partially collapsed lung, his allegations pertain to the treatment he received while in solitary upon his return from the hospital. Specifically, Mathis alleges that he received no cleaning supplies for his wound and that his medical requests were ignored. At the Spears hearing, however, he acknowledged that nurses checked on him daily. He did not allege facts pointing to an "excessive risk to inmate health" resulting from not having cleaning supplies for his wound or from lack of medical attention. Accordingly, his claim of inadequate medical care pertaining to the August 7 injury lacks an adequate basis in law, and the district court did not abuse its discretion in dismissing this claim as frivolous.

Regarding the injury of October 26, Mathis complained that no X-rays were taken, that he received no follow-up examination, that he had no cleaning supplies for the wound, and that he received only Tylenol for pain, which he reports was ineffective. These allegations likewise do not rise to the level of deliberate indifference to a prisoner's serious medical needs or to an excessive risk to inmate health. A mere disagreement with one's medical treatment is not sufficient to state a cause of action under § 1983. See Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Further, mere negligence will not suffice to support a claim of deliberate indifference. See Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993); Jackson v. Cain, 864 F.2d 1235, 1246 (5th Cir. 1989) (citing Fielder v. Bosshard, 590 F.2d 105, 107 (5th Cir. 1979)). Mathis's claims that he received inadequate medical care after these incidents lack an arguable basis in law, and the district court did not abuse its discretion in dismissing these claims as frivolous pursuant to § 1915(d).

Mathis alleged that after both injuries, he was forced to work in the field even though he felt weak and dizzy. "[P]rison work requirements which compel inmates to perform physical labor which is beyond their strength, endangers their lives, or causes undue pain constitutes cruel and unusual punishment." Howard v. King, 707 F.2d 215, 219 (5th Cir. 1983) (citing Ray v. Mabry, 556 F.2d 881, 882 (8th Cir. 1977)). Work which is not cruel and unusual per se may also violate the Eighth Amendment if prison officials are aware that it will "significantly aggravate" a

prisoner's serious medical ailment. Jackson v. Cain, 864 F.2d 1235, 1246 (5th Cir. 1989). A negligent assignment to work that is beyond the prisoner's physical abilities, however, is not unconstitutional. See Id. Mr. Mathis does not allege that he was unable to perform the work on either occasion or that working aggravated a serious medical condition. Therefore, this claim also lacks an adequate basis in law, and the district court did not abuse its discretion when it dismissed the claim as frivolous.

Mr. Mathis additionally alleges that the prison and medical records were falsified and that Dr. Kuykendall gave perjured testimony at the Spears hearing. However, he offers no facts to support these allegations; therefore, they are lacking in merit.[2]

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's decision to dismiss Mathis's claim as frivolous pursuant to 28 U.S.C. § 1915(d).

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[2] The testimony of Dr. Kuykendall regarding prison medical records was apparently used at the hearing to counter Mathis's testimony. However, the issue which was contradicted (whether defendant Fortner was present and whether he treated Mr. Mathis on Saturday, August 7), was not a controlling factor regarding the legal or factual merit of Mathis's claims. Therefore, we need not address whether the use of the prison medical records for this purpose constituted an abuse of discretion. See Williams v. Luna, 909 F.2d 121, 124 (5th Cir. 1990).