

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40816
Summary Calendar

ROBERT WAYNE MITCHELL,

Plaintiff-Appellant,

versus

RICHARD C. ROY, Field Captain, TDCJ-ID, ET AL.,

Defendants,

BILLIE C. BELYEU, Field Officer, TDCJ-ID
and JESSY C. BOYKIN, Field High Rider, TDCJ-ID,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:93-CV-547)

(October 13, 1995)

Before REYNALDO G. GARZA, JONES, and BARKSDALE, Circuit Judges.

PER CURIAM*

Appellant Robert Wayne Mitchell appeals the District Court's dismissal of his 42 U.S.C. § 1983 action against Appellees. We affirm.

I.

FACTS

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Robert Wayne Mitchell is a prisoner in the Michael Unit of the Texas Department of Criminal Justice. In this action, he alleged that his Eighth Amendment rights were violated by Appellees Richard C. Roy (Roy), Billie C. Belyeu (Belyeu) and Jesse C. Boykin (Boykin), prison officials who oversaw Mitchell. The allegations that are relevant to this appeal were that Appellees ignored his requests for medical care, used excessive force and retaliated against him for filing complaints against them.

Mitchell's first allegation arises out of insect bites. Mitchell, as a prisoner, was required to perform certain work duties, such as cutting grass. On August 12, 1993, while performing such duties, he was bitten by insects. Mitchell requested to be sent to the infirmary. Roy, being of the opinion that the bites were not serious enough to warrant emergency medical care, denied the request and told Mitchell to use a bleach and water solution on the bites. He also told Mitchell that he could submit a sick call request. The next day, Mitchell again complained about the bites to Officer Belyeu, who also turned down Mitchell's request to go to the infirmary on the ground that the bites were not serious. Mitchell then filed grievances with the prison complaining of Roy and Belyeu's refusal to send him to the infirmary.

Mitchell's second allegation arises out of events that allegedly occurred on September 9, 1993. On that day, Mitchell was again assigned to the work squad. Belyeu pulled him from the work squad for not performing a reasonable amount of work. Roy had

Mitchell handcuffed and told him, along with another inmate, to sit down. Allegedly, Boykin then rushed toward Mitchell and the other inmate with a horse, and called them a variety of names, including "nigger."¹ Apparently, Mitchell alleged that Boykin did this to retaliate against him for filing grievances.

Finally, Mitchell alleged that Belyeu and Boykin attempted to have him beaten to retaliate against him for filing grievances. He alleges that Boykin and Belyeu told him that he was wanted in the One Building. He was not allowed in the One Building without a pass, and he did not have such a pass. He claims beatings occurred in the One Building, implying that Boykin and Belyeu were trying to have him beaten in retaliation for his filing grievances.

Mitchell filed a civil rights action against Appellees *in forma pauperis*. The magistrate judge conducted a *Spears*² hearing, and recommended that Mitchell be allowed to proceed with the above-described claims against Belyeu and Boykin, and that the remaining claims—including his claims against Roy—be dismissed pursuant to 42 U.S.C. § 1915(d). The District Court adopted the magistrate judge's recommendation.

The magistrate judge then conducted a *Flowers*³ hearing. In

¹Although the magistrate judge found that Boykin indeed engaged in such behavior, the district court did not adopt the Magistrate's finding on this issue. Because the claim could have been dismissed even if Boykin did engage in such behavior, the district court dismissed the action without conducting another evidentiary hearing on the matter.

²See *Spears v. McCotter*, 766 F.2d 179, 182 (5th Cir. 1985).

³See *Flowers v. Phelps*, 956 F.2d 488, 488 (5th Cir. 1992), *modified on other grounds*, 964 F.2d 400.

preparation for this hearing, Mitchell submitted a witness list requesting the production of eleven of his fellow inmates as witnesses. The magistrate judge ordered four of the inmate-witnesses produced for the *Flowers* hearing, but denied Mitchell's request for production of the other seven because their proposed testimony was irrelevant or cumulative. Mitchell also requested that the magistrate judge appoint him counsel. The magistrate judge denied this request.

After conducting the *Flowers* hearing, the magistrate judge made findings of fact. First, he found that Mitchell did sustain insect bites on August 12, 1993, but that they were not serious enough to warrant emergency care. Second, he found that Boykin charged Mitchell with his horse and called him a variety of names. Finally, although he found that Boykin and Belyeu told Mitchell to go to the One Building, they did so because Belyeu was told that Mitchell was wanted there, not because of some plot to harm Mitchell. The magistrate judge then found that Mitchell had not established a right to relief against any of the defendants, and recommended that the case be dismissed with prejudice.

The district court then adopted the magistrate judge's report, except for the portion chastising Boykin for charging Mitchell and calling him names. The district court held that, because Boykin was not able to testify at the *Flowers* hearing, it was premature to find that he did such things. The district court then ordered the case dismissed with prejudice.

II.

ISSUES ON APPEAL

Mitchell's brief raises four issues on appeal. First, he claimed that the trial court erred in finding that the appellees' actions did not violate his Eighth Amendment rights. Second, he claimed that the trial court erred in not allowing him to amend his petition. Third, he claimed that the trial court erred in refusing to appoint counsel for him. Finally, he claims that the trial court erred by denying his motion for judgment on partial findings without entering findings of fact and conclusions of law. All of Mitchell's arguments are without merit.

A.

ALLEGED EIGHTH AMENDMENT VIOLATIONS

Mitchell alleged that Appellees violated his Eighth Amendment rights in three ways. First, he alleged that Appellees were deliberately indifferent to his health and safety in refusing to send him to the infirmary when he complained of insect bites. Deliberate indifference to a prisoner's serious medical needs does constitute a violation of the Eighth Amendment and thus states a cause of action under 42 U.S.C. § 1983. *Estelle v. Gamble*, 429 U.S. 97, 105-07 (1976); *Jackson v. Cain*, 864 F.2d 1235, 1244 (5th Cir. 1989). However, to prove an Eighth Amendment violation, a plaintiff must prove that prison officials unnecessarily and wantonly inflicted pain upon him by deliberate indifference to his medical needs. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Mitchell failed to make such a showing. He merely suffered from insect bites, a condition that the magistrate court found did not

amount to a serious medical condition. Further, the magistrate court found that Belyeu was not indifferent to his medical needs. Since Mitchell failed to show that the magistrate judge's findings of fact were clearly erroneous, we are bound by them. See Fed. R. Civ. P. 52(a). Thus, the trial court properly dismissed Mitchell's claim based on indifference to medical needs.

Mitchell's allegation that Boykin charged him while riding a horse and called him names, including racial epithets, is more troubling. If Boykin indeed engaged in such behavior,⁴ his actions were certainly reprehensible. However, they did not violate the Eighth Amendment. For such actions to violate the Eighth Amendment, they must harm the plaintiff in some way. *Hudson v. McMillian*, 501 U.S. 1, 8-9 (1992); *Knight v. Caldwell*, 970 F.2d 1430, 1432-33 (5th Cir. 1992), *cert. denied* --- U.S. ---, 113 S. Ct. 1298 (1993). The magistrate judge found that Mitchell was not injured by Boykin's alleged actions; in fact, Mitchell presented no evidence of his being injured. Thus, the trial court did not err in dismissing Mitchell's claim based on Boykin's alleged actions.

Finally, Mitchell alleged that Appellees attempted to have him beat up in retaliation for his filing grievances. This allegation is based on Appellees' attempt to send Mitchell to One Building without a pass. The law is well established that prison officials may not retaliate against an inmate for filing grievances. *Ruiz v.*

⁴It is unclear whether Boykin engaged in such behavior because Boykin was unable to testify at the *Flowers* hearing, and because the District Court did not adopt the magistrate judge's finding that Boykin engaged in such behavior.

Estelle, 679 F.2d 1115, 1153 (5th Cir. 1982), *opinion amended in part and vacated in part*, 688 F.2d 266, *cert. denied* 460 U.S. 1042 (1983). However, to make out a 42 U.S.C. § 1983 cause of action for retaliation, a plaintiff must prove that the prison officials acted with a retaliatory motive. See *Whittington v. Lynaugh*, 842 F.2d 818, 820 (5th Cir. 1988), *cert. denied* 488 U.S. 840. The magistrate judge found that Belyeu and Boykin told Mitchell he was wanted in One Building because they had been advised that he was, in fact wanted there, not because of some retaliatory motive. Because Mitchell failed to show that Appellees acted with a retaliatory motive, the trial court did not err in dismissing his cause of action for retaliation.

B.

DISALLOWANCE OF AMENDMENT OF COMPLAINT

Mitchell complains that the trial court erred in not allowing him to amend his complaint. It is unclear from Mitchell's brief and the record when he attempted to amend his complaint or what issues he sought to raise in the amended complaint. Although Mitchell did have a right to amend his complaint once as a matter of course, Fed. R. Civ. P. 15(a), the trial court's error was harmless because Mitchell has not shown that he was prejudiced by the trial court's denial. The trial district court directed the magistrate judge to hold a *Spears* hearing to develop the facts of Mitchell's complaint, and the magistrate judge assisted Mitchell in framing the issues before proceeding to the *Flowers* hearing. Mitchell does not assert, and the record does not indicate, that he

was precluded from raising any specific issues or introducing any evidence because he was not allowed to amend his complaint. Thus, the error was harmless.

C.

DENIAL OF MOTION FOR APPOINTMENT OF COUNSEL

Mitchell asserts that the magistrate judge erred in denying his motion for the appointment of counsel. He argues that, because of his incarceration, he needed counsel to avoid confusion over the witness list, to obtain subpoenas for his witnesses at government expense, and to conduct discovery.

The magistrate did not err in denying Mitchell's motion for the appointment of counsel. There is no automatic right to the appointment of counsel in a 42 U.S.C. § 1983 case. A district court is only required to appoint counsel in "exceptional circumstances," and the district court's denial of appointed counsel is reviewed only for a clear abuse of discretion. *Cupit v. Jones*, 835 F.2d 82, 86 (5th Cir. 1987). Here, Mitchell did not show a clear abuse of discretion. Indeed, he demonstrated at the *Spears* and *Flowers* hearings that he was capable of presenting his case and examining witnesses. Therefore, we hold that the magistrate judge did not abuse her discretion in denying Mitchell's motion for the appointment of counsel.

D.

DENIAL OF MOTION FOR JUDGMENT ON PARTIAL FINDINGS

Mitchell contends that the district court erred in denying his

motion for judgment on partial findings without providing findings of fact or conclusions of law. Fed. R. Civ. P. 52(c) provides:

If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

After the magistrate judge issued her report and recommendation on the proposed findings of fact and conclusions of law adduced at the *Flowers* hearing and the district court amended the report, Mitchell filed a motion for judgment on partial findings. That motion was inappropriate in view of the posture of the case. The case was effectively over, and all that remained to be entered were the district court's order of dismissal and the final judgment. The district court adopted the findings and conclusions of the magistrate judge and denied all outstanding motions. There was no error.

Finding no reversible error, we affirm.

AFFIRMED.