

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-41143

(Summary Calendar)

GLENN STEWART STITT,

Plaintiff-Appellant,

versus

J. COCKRELL, Warden,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas
(6:93-CV-743)

(January 5, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Glen Stewart Stitt, an inmate of the Texas Department of Criminal Justice (TDCJ), appeals the district court's dismissal with prejudice of his civil rights suit against Warden Janie Cockrell. We affirm.

After being attacked by inmate Wilson during a job assignment, Stitt reported the attack to various officers of the TDCJ, but not to Warden Cockrell. Stitt then refused to report to work,

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

allegedly because he feared another attack by Wilson. Stitt was reassigned to a cell with inmate Jefferies, a friend of Wilson's, and Jefferies allegedly threatened Stitt as well. After prison officials searched the cell and found a knife belonging to Jefferies, they moved Stitt to a holding area to await transfer to another unit. Jefferies was also in the holding area, and he attacked Stitt.

Stitt filed a *pro se in forma pauperis* complaint under 42 U.S.C. § 1983 (1988) against Warden Cockrell alleging that Cockrell's failure to protect him violated the Eighth Amendment.¹ A magistrate judge conducted a hearing pursuant to *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), and recommended dismissal of the complaint. The district court adopted the magistrate judge's recommendation and dismissed Stitt's claim as frivolous.

A district court may dismiss an *in forma pauperis* complaint "if the action is frivolous or malicious." 28 U.S.C. § 1915(d) (1988). A suit is frivolous under § 1915(d) if it lacks an arguable basis in law or fact. *Denton v. Hernandez*, ___ U.S. ___, ___, 112 S. Ct. 1728, 1733, 118 L. Ed. 2d 340 (1992). We review § 1915(d) dismissals for abuse of discretion. *Ancar v. Sara Plasma, Inc.*, 964 F.2d 465, 468 (5th Cir. 1992).

¹ "The Eighth Amendment affords prisoners protection against injury at the hands of other inmates." *Johnston v. Lucas*, 786 F.2d 1254, 1259 (5th Cir. 1986). However, "[t]o be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S. Ct. 1078, 1084, 89 L. Ed. 2d 251 (1986); see also *Wilson v. Seiter*, 501 U.S. 294, 303, 111 S. Ct. 2321, 2326-27, 115 L. Ed. 2d 271 (1991) (applying "deliberate indifference" standard as articulated in *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), to prison conditions cases).

Stitt sued Warden Cockrell claiming that she should have known both that her subordinates had placed him in the holding area with Jefferies and that this action placed him in danger of bodily harm. "Under section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability. . . . However, a supervisor may be held liable if there exists either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Thompkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir. 1987) (citations omitted). A supervisor's conduct does not qualify as wrongful unless she institutes "unconstitutional policies that causally result in plaintiff's injury." *Mouille v. City of Live Oak*, 977 F.2d 924, 929 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2443, 124 L. Ed. 2d 660 (1993). Stitt admitted that Cockrell had not participated in the challenged actions, and he did not allege any potentially wrongful conduct other than that she should have known of the risk of harm. Consequently, because Stitt failed to allege facts under which Warden Cockrell could be held liable under § 1983, the district court properly dismissed Stitt's action as frivolous.

The district court dismissed Stitt's complaint with prejudice.² Although § 1915(d) dismissals are generally without

² The district court also did not offer Stitt leave to amend his complaint to substitute more appropriate defendants. Section 1915(d) does not require a district court to grant leave to amend before dismissing a claim, especially if the district court has conducted a *Spears* hearing. See *Graves v. Hampton*, 1 F.3d 315, 318 & n.12 (5th Cir. 1993) (holding that § 1915 does not

prejudice, "[d]ismissal with prejudice . . . would be appropriate if the plaintiff has been given an opportunity to expound on the factual allegations . . . orally via a *Spears* hearing, but does not assert any facts which would support an arguable claim." *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993) (footnotes omitted). The magistrate judge gave Stitt ample opportunity to allege facts that would support a § 1983 cause of action against Warden Cockrell, but Stitt failed to do so. Consequently, the district court properly dismissed Stitt's complaint with prejudice.

For the foregoing reasons, we AFFIRM the district court's dismissal of Stitt's § 1983 complaint with prejudice.³

require giving plaintiff opportunity to amend or supplement complaint, and *Spears* hearing provides sufficient "opportunity to expound on the factual allegations"); *Wilson v. Barrientos*, 926 F.2d 480, 482 (5th Cir. 1991) (*Spears* hearing allows prisoner to "elaborate on often less than artfully-drafted pleadings"); *Spears*, 766 F.2d at 181-82 (*Spears* hearing serves same purpose as motion for more definite statement). The district court conducted a *Spears* hearing, and gave Stitt several opportunities to articulate fully the factual basis of his claims. See *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986) (allowing dismissal without leave to amend if, after considering all the circumstances surrounding the pleadings, court is convinced that plaintiff has pleaded his best case).

³ We do not comment on whether Stitt may file a new complaint naming proper defendants.