

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50349
USDC No. W-93-CV-115

LESLIE RAY FOSTER,

Plaintiff-Appellant,

versus

JACK GARNER ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Western District of Texas

- - - - -
(November 29, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

IT IS ORDERED that appellant Leslie Ray Foster's motion for leave to appeal in forma pauperis (IFP) is GRANTED because Foster has presented a nonfrivolous issue on appeal. See Carson v. Polley, 689 F.2d 562, 586 (5th Cir. 1982). We now determine the merits of Foster's appeal. See Clark v. Williams, 693 F.2d 381, 381-82 (5th Cir. 1982).

An IFP suit may be dismissed as frivolous if it lacks an arguable basis in law or fact. Denton v. Hernandez, ____ U.S.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

_____, 112 S. Ct. 1728, 1733, 118 L. Ed. 2d 340 (1992); 28 U.S.C. § 1915(d). A § 1915(d) dismissal is reviewed for an abuse of discretion. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992).

"To state an Eighth Amendment excessive force claim, a prisoner . . . must show that force was applied not 'in a good faith effort to maintain or restore discipline,' but rather that the force complained of was administered 'maliciously and sadistically to cause harm.'" Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993)(quoting Hudson v. McMillian, 503 U.S. _____, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156 (1992)). In evaluating the detention official's subjective intent, the trier of fact must examine objective factors, including: (1) the need for the application of force; (2) the threat reasonably perceived by the detention facility official; (3) any efforts to temper the severity of a forceful response; (4) the need to act quickly and decisively; and (5) the extent of the injury suffered. Hudson, 112 S. Ct. at 1446-47.

The district court dismissed Foster's civil rights complaint as factually frivolous. "A finding of factual frivolousness is only appropriate in the limited class of cases wherein the allegations rise to the level of the irrational or the wholly incredible, and does not include cases in which the court simply finds that plaintiff's allegations unlikely." Booker v. Koonce, 2 F.3d 114, 115-16 (5th Cir. 1993)(internal quotations and citation omitted). 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).

Foster's allegations, accepted as true, establish that he suffered pain and a hearing loss as a result of the use of force. These allegations are not delusional. Further, even assuming that Foster's injury was not serious, his allegations may rise to the level of an Eighth Amendment violation. See Hudson, 112 S. Ct. at 999. Thus, the district court abused its discretion in dismissing Foster's claim against Defendants Smith and Bretey.

Similarly, the district court abused its discretion in dismissing Foster's claim against Defendant Easley. Foster alleged that Easley, who was present during the assault by Smith and Bretey, bore an affirmative duty to intercede. A prison guard may be held liable if he observes an unconstitutional assault and fails to intervene to stop it. See, e.g., Hale v. Townley, 19 F.3d 1068, 1075 (5th Cir. 1994). Foster's claim against Easley does not lack an arguable basis in law. Denton, 112 S. Ct. at 1733. Accordingly, the district court's dismissal of Foster's complaint is VACATED and the case is REMANDED for further proceedings.