

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50590
(Summary Calendar)

JOHNNY R. ROBINSON,

Plaintiff-Appellant,

versus

CHARLES R. LUMPKINS, Co 3,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(USDC No. W-93-CA-276)

(December 23, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

"To proceed on appeal in forma pauperis (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)

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(citations omitted). The sole determination in this instance is whether Robinson's appeal presents a non-frivolous issue.

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review de novo the district court's summary judgment determination. See Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 912 (5th Cir.), cert. denied, 113 S. Ct. 98 (1992).

In this instance the only competent summary judgment evidence before the district court was Robinson's unsworn written statement made under penalty of perjury. Such statements are competent to raise fact issues precluding summary judgment. See 28 U.S.C. § 1746; Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300, 1306 (5th Cir. 1988). Lumpkins submitted no summary judgment evidence in support of his motion. Although the court refers to TDCJ-ID documents in its determination that summary judgment for Lumpkins is appropriate, those documents are attachments to Robinson's complaint. And Robinson complains in his statements that Lumpkins falsified the documents to cover his unconstitutional actions.

"[T]o 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,

107 (quoting Hudson v. McMillian, 112 S. Ct. 995, 999 (1992)). Robinson's allegations initially state a claim under this standard. The next step, however, is to determine, under the above standard, whether Lumpkins' conduct was objectively reasonable, thus entitling him to immunity from suit. See Rankin, 5 F.3d 103, 105.

The documents attached to Robinson's complaint include the grievance Robinson filed in protest of Lumpkins' allegedly unprovoked attack. The documents indicate that Robinson's grievance was denied because Lumpkins used force against Robinson after Robinson jerked away from Lumpkins and ran towards his (Robinson's) cell. The amount of force appeared to have been considered appropriate, as the grievance denial stated that no injuries were noted after an examination of Robinson. But Robinson's penalty-of-perjury statement asserts that Lumpkins falsified the disciplinary report to cover his unjustified use of force. Robinson has thus presented summary judgment evidence of a genuine issue of material fact, sufficient to overcome initially Lumpkins' qualified immunity defense.

On appeal, Robinson does not discuss whether the district court correctly determined that Lumpkins was entitled to absolute immunity if Robinson was suing Lumpkins in his official capacity. Issues that are not addressed on appeal are considered abandoned. See Weaver v. Puckett, 896 F.2d 126, 128 (5th Cir.), cert. denied, 498 U.S. 966 (1990). Robinson has abandoned this issue, so the negation of his claim against Lumpkins in his official capacity stands.

IT IS ORDERED that Robinson's motion for IFP is GRANTED. The district court's ruling is VACATED, and the case is REMANDED to the district court for further proceedings consistent herewith. See Clark v. Williams, 693 F.2d 381, 382 (5th Cir. 1982).