

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 94-60042  
Summary Calendar

---

DAVID DARRELL MOORE,

Plaintiff-Appellant,

VERSUS

RANDY MELVIN, U.S. Secret Service Agent, ET AL.,

Defendants-Appellees.

---

Appeal from the United States District Court  
for the Southern District of Mississippi  
(91-CV-758)

---

(December 7, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:<sup>1</sup>

David Darrell Moore, *pro se*, appeals from the district court's dismissal of his Federal Torts Claims Act (FTCA) and ***Bivens*** actions, and the denial of his motion for leave to amend his complaint. We **AFFIRM**.

I.

Moore, a prisoner *pro se* litigant proceeding *in forma pauperis*, filed claims under the FTCA, as well as ***Bivens*** claims premised on the Fifth, Sixth, Eighth and Fourteenth Amendments of

---

<sup>1</sup> 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 Pursuant to that rule, the court has determined that this opinion should not be published.

the United States Constitution. He named as defendants three agents of the United States Secret Service: Randy Melvin, Jeff Stover and Gleen McElravy.

Moore bases his claims on an investigation by the Secret Service concerning his suspected involvement in a credit card fraud scheme. Moore claimed to have been interrogated against his will, and without counsel, in a "hostile environment" on at least two occasions during March 1989.<sup>2</sup> During this time he also claims to have been incarcerated under "cruel and unusuall [sic] conditions" at the Yazoo County Jail. As a result of the investigation, Moore claims, among other things, to have lost his job and weekend pass privileges because he was demoted from a Class A to Class B inmate.

Moore also moved for leave to amend his complaint, naming as defendants several Yazoo County and City officials and departments, Guy Caputo (chief counsel for the Secret Service) and the United States Department of the Treasury. The amended complaint also alleged additional wrongful interrogations and cruel and unusual confinement, as well as a conspiracy between the federal agents and the Yazoo City and County officials to violate Moore's constitutional rights.

On motion by the defendants, the district court dismissed Moore's claims for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The court also denied his motion for leave to amend his complaint.

---

<sup>2</sup> The defendants claim, and Moore does not expressly deny, that Moore was given his **Miranda** rights.

II.

A.

We review *de novo* the district court's Rule 12(b)(6) dismissals. ***Cinel v. Connick***, 15 F.3d 1338, 1341 (5th Cir.), *cert. denied*, (U.S. Oct. 3, 1994). On a motion to dismiss for failure to state a claim, the plaintiff's factual allegations are accepted as true. ***Fernandez-Montes v. Allied Pilots Ass'n***, 987 F.2d 278, 284 (5th Cir. 1993). The facts are taken from the plaintiff's complaint and attachments to it. Fed. R. Civ. P. 10(c); ***Neville v. American Republic Ins. Co.***, 912 F.2d 813, 814 n.1 (5th Cir. 1990).

1.

The FTCA permits claims to be made against the United States which arise out of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" if the acts which are the basis of the claims were those of investigative or law enforcement officers of the United States. 28 U.S.C. § 2680(h). The FTCA provides, however, that an FTCA claim

shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

***Id.*** at § 2401(b). This court has construed this statute to mean that "the administrative claim must be filed with the agency within two years after it accrues and the federal court complaint must be filed within six months after the agency's final denial; otherwise, the claim is barred." ***McCallister v. U.S. By U.S. Dep't of Agric.***,

**Farmers Home Admin.**, 925 F.2d 841, 843 (5th Cir. 1991). This limitation period begins to run "from the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." **Rodriguez v. Holmes**, 963 F.2d 799, 803 (5th Cir. 1992).

Moore's alleged tortious interrogations occurred, at the latest, sometime in April 1989.<sup>3</sup> Thus, he was required to submit a claim to the Department of the Treasury no later than April 1991. Moore brought his tort claim to the Secret Service in a letter dated January 21, 1992. Therefore, Moore's claims under the FTCA were time-barred and properly dismissed.

2.

Pursuant to **Bivens v. Six Unknown Fed. Narcotics Agents**, 403 U.S. 388 (1971), "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." **Carlson v. Green**, 446 U.S. 14, 18 (1980). Because Moore sought monetary damages for alleged constitutional violations by government officials, his allegations against Melvin, Stover, and McElravy fall within the purview of **Bivens**.

a.

Moore alleged that he unwillingly answered questions after being repeatedly interrogated by the agents. This implicates the Fifth Amendment protection against self-incrimination. A violation

---

<sup>3</sup> Moore's proposed amended complaint alleged a wrongful interrogation in April 1989.

of this right, however, can only occur at trial. **United States v. Verdugo-Urquidez**, 494 U.S. 259, 264 (1990); **Kastigar v. United States**, 406 U.S. 441, 453 (1972). Inasmuch as Moore was not charged with a crime as a result of the defendants' interrogation, Moore's allegations do not state a Fifth Amendment self-incrimination claim.

b.

Moore also alleged that the denial of an attorney during questioning by the defendants violated his Sixth Amendment right to counsel. That right to counsel "attaches only at or after ... adversarial judicial proceedings have been initiated" against an individual. **United States v. Gouveia**, 467 U.S. 180, 188 (1984). We agree with the district court that, because Moore does not allege that adversarial proceedings had begun, he has not stated a Sixth Amendment claim.<sup>4</sup>

c.

Moore alleged that the defendants' repeated interrogation in a hostile environment violated his Eighth Amendment right to be free from cruel and unusual punishment. A prisoner alleging that conditions of imprisonment constitute cruel and unusual punishment must show that prison officials were deliberately indifferent to these conditions. **Wilson v. Seiter**, 501 U.S. 294, 303 (1991). The

---

<sup>4</sup> In addition, giving the *pro se* complaint the requisite liberal construction, the right to counsel under the Fifth Amendment serves to protect the Fifth Amendment right against self-incrimination. For the same reason there has been no violation of the latter, there can be no violation of the former. See **Withrow v. Williams**, 113 S. Ct. 1745, 1753 (1993).

prisoner must show that "the risk that the prisoner complains of [is] so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." **Helling v. McKinney**, 113 S. Ct. 2475, 2482, (1993).

Moore's allegation falls short of this. Moreover, these allegations do not suggest that the defendants acted with deliberate indifference. Thus, Moore has failed to state an Eighth Amendment claim.

d.

Moore also appears to allege a deprivation of his liberty interests without due process of law.<sup>5</sup> Moore complains of the loss of his job and weekend passes allegedly resulting from the defendants' investigation. We agree with the district court that a lawfully incarcerated state prisoner does not state a claim for a constitutional violation on these allegations. **Hewitt v. Helms**, 459 U.S. 460, 467-68 (1983).

B.

Moore contends that the district court erred when it denied him leave to amend his complaint to name various state defendants, Guy Caputo, and the U.S. Department of the Treasury, and to add, among others, claims under 42 U.S.C. §§ 1985(3) and 1986.

We review the denial of leave to amend a complaint only for abuse of discretion. **Ashe v. Corley**, 992 F.2d 540, 542 (5th Cir. 1993). Under Fed. R. Civ. P. 15(a), leave to amend should be

---

<sup>5</sup> Moore alleges a violation of the Fourteenth Amendment, but we construe this as a Fifth Amendment claim against these federal defendants.

freely granted when justice so requires. This court, however, will affirm the denial of a motion to amend when amendment would be futile. **Avatar Exploration, Inc. v. Chevron, U.S.A.**, 933 F.2d 314, 321 (5th Cir. 1991). "Clearly, if a complaint as amended is subject to dismissal, leave to amend need not be given." **Pan-Islamic Trade Corp. v. Exxon Corp.**, 632 F.2d 539, 546 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981). The district court considered Moore's amended complaint under 28 U.S.C. § 1915(d) and concluded that Moore's claims were frivolous because they lacked an arguable basis in law and fact. **Pugh v. Parish of St. Tammany**, 875 F.2d 436, 438 (5th Cir. 1989).

1.

To maintain an action for conspiracy under 42 U.S.C. § 1985(3), Moore must allege facts that suggest:

(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

**United Brotherhood of Carpenters, Local 610 v. Scott**, 463 U.S. 825, 828-29 (1983). Moore alleged that defendants Blaine and King, members of the Yazoo County Welfare Department, conspired with the Yazoo City Police Department and the Secret Service by handing over telephone bills showing long distance phone calls that Moore supposedly made in order to falsely charge Moore with a crime.

We agree with the district court that providing such records does not amount to an allegation of conspiracy. Moore has offered

no allegations to support an agreement between any of the defendants to violate his constitutional rights.<sup>6</sup> Accordingly, the district court did not abuse its discretion when it denied Moore leave to amend his complaint as to these claims.<sup>7</sup>

2.

Moore's amended complaint claims Eighth Amendment violations by the state defendants. The amended complaint alleges confinement in "deplorable conditions" at the Yazoo County Jail. Such a conclusory allegation does not present an Eighth Amendment claim.<sup>8</sup> Moore also alleged that after an interrogation in April 1989, he was forced to spend the weekend at the Yazoo City Jail with several "hostile" and "drunken" individuals in a cell with defective plumbing, where he had to sleep on the floor.

The Eighth Amendment affords prisoners protection against exposure to egregious physical conditions that deprive them of basic human needs. **Rhodes v. Chapman**, 452 U.S. 337, 347 (1981).

---

<sup>6</sup> The district court evaluated a conspiracy claim against the three Secret Service agents under Rule 12(b)(6), treating this claim as if it were properly before the court from Moore's original or first amended complaint. Because this claim was found only in Moore's proposed second amended complaint, we have chosen to evaluate it in this part of the opinion.

<sup>7</sup> To maintain the 42 U.S.C. § 1986 action, Moore must first properly allege a violation of § 1985. **Mississippi Women's Medical Clinic v. McMillan**, 866 F.2d 788, 795 (5th Cir. 1989).

<sup>8</sup> In his original complaint, naming only federal defendants, Moore alleged confinement in an isolation cell with no running water, bad plumbing, and "vermin of every kind." Moore did not reallege these facts in his amended complaint. Although we review prisoner complaints liberally, Moore's amended complaint replaces the original. We, therefore, do not consider these prior allegations.



Moore's allegations do not rise to the level of an Eighth Amendment violation. Consequently, the district court did not abuse its discretion in denying leave to amend the complaint on these claims.

3.

Finally, the district court construed Moore's amended complaint as claiming § 1983 violations against the Yazoo City Police department. We agree with the district court that Moore's allegations are insufficient to support this claim. To state a § 1983 claim against a municipality, the plaintiff must allege that a "custom or policy" of the department caused the violation. *Monell v. Department of Social Services*, 436 U.S. 658, 692 (1978). Moore has failed to do so.<sup>9</sup>

III.

For the foregoing reasons, the judgment of the district court is

**AFFIRMED.**

---

<sup>9</sup> Moore has also failed to state a claim against Guy Caputo or the United States Treasury Department. Therefore, leave to amend as to those defendants was properly denied.