UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60318
Summary Calendar

RONALD BARRY EVANS,

Plaintiff-Appellant,

VERSUS

EDWARD M. HARGETT, Superintendent,
Mississippi State Penitentiary, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
(4:92-CV-129-D-D)

(December 21, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Ronald Barry Evans appeals from the dismissal of his civil rights claims. We **AFFIRM**.

I.

Evans, a prisoner *pro se* litigant proceeding *in forma pauperis*, filed a civil rights action under 42 U.S.C. § 1983 against Norris Holly, a guard at the Parchman State Prison; Albert Showers, a classification officer at the prison; Ethel Carlize,

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Deloras Wilson, and Jereillas Watridge, members of the prison's disciplinary committee; and Edward Hargett, the Superintendent of the Mississippi Department of Corrections.

Evans alleged that, on October 18, 1991, Holly ordered all inmates in Unit 29F into the prison yard for field operations; that Holly forced him to remain handcuffed in the prison yard for one hour, lightly clothed, in 30-degree temperature, despite the fact that his medical classification required that he perform only indoor work; that he developed pneumonia as a result of the exposure; that Holly was scolded by another officer for keeping Evans in the prison yard; and that Holly retaliated by reporting Evans for a rules violation.[2] In addition, Evans alleged that the other defendants violated his constitutional rights by accepting Holly's false disciplinary report, and by conspiring to deprive Evans of 90 days of earned time as punishment.

After a hearing, pursuant to ***Spears v. McCotter***, 766 F.2d 179 (5th Cir. 1985) (clarification of *in forma pauperis* claims), the magistrate judge concluded that Evans had stated a claim only against Holly; and, therefore, required only Holly to be served with process and to answer the complaint. Following a non-jury trial on the claims against Holly, the magistrate judge recommended that judgment be entered in his favor. The district court adopted

[2] The report stated that Evans had refused to walk out to the prison yard and had to be forced out by Holly. Evans was subsequently found guilty of insubordination by the disciplinary committee.

the recommendations, and dismissed all of Evans's claims with prejudice.

I.

A.

Evans first challenges the adverse judgment on his claims against Holly. As noted, the district court entered judgment on these claims after a non-jury trial and a *de novo* review of the magistrate judge's findings and recommendations.[3] Accordingly, we review the findings only for clear error;[4] the legal conclusions, *de novo*. ***Price v. Austin Indep. School Dist.***, 945 F.2d 1307, 1312 (5th Cir. 1991) (citations omitted).

1.

To have succeeded on his Eighth Amendment claim, Evans was required to establish first that he sustained treatment depriving "the minimal civilized measure of life's necessities." ***Rhodes v. Chapman***, 452 U.S. 337, 347 (1981). It is insufficient to allege mere discomfort. ***Id***. As stated, Evans alleges he was made to remain outside for an hour, lightly clothed and handcuffed, in 30-degree weather. The district court was not persuaded that the temperature was 30 degrees, and concluded that Evans' case of

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[3] Evans bases error on the fact that the magistrate judge did not have his consent to proceed with the non-jury trial. But, 28 U.S.C. § 636(b)(1)(B) authorizes the nonconsensual reference to a magistrate judge of a prisoner petition challenging the conditions of confinement. *See* ***Archie v. Christian***, 808 F.2d 1132, 1135 (5th Cir. 1987).

[4] Clear error is absent when "the district court's findings are plausible in light of the record viewed in its entirety". ***Price***, 945 F.2d at 1312. Special deference is given to findings based on the credibility of testimony. ***Id***.

pneumonia, occurring at least two months later, did not result from Holly's alleged misconduct. The court also determined that it was not unusual for inmates to be handcuffed in the prison yard. These findings are not clearly erroneous; Evans has failed to prove conditions sufficient to support an Eighth Amendment claim.[5]

2.

Evans also claimed that Holly reported him for a rules violation in retaliation for Holly's being scolded by another officer. Although such retaliation could constitute a civil rights violation, Evans must provide factual support for his claim. *See* ***Whittington v. Lynaugh***, 842 F.2d 818, 819 (5th Cir.), *cert. denied*, 488 U.S. 840 (1988). He has not done so.

B.

Next, Evans challenges the dismissal of his claims against Hargett, Showers, Carlize, Wilson, and Watridge.[6] As noted, these claims were dismissed without causing service of the complaint; accordingly, they are construed as being dismissed pursuant to 28

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[5] Alternatively, even assuming sufficiently grievous conditions, Evans failed to clearly demonstrate that Holly acted with "deliberate indifference" as required by ***Farmer v. Brennan***, 114 S. Ct. 1970, 1983 (1994), and ***Wilson v. Seiter***, 501 U.S. 294, 111 S. Ct. 2321, 2326 (1991).

[6] Contrary to Evans' claim, the district judge, not the magistrate judge, entered the dismissal as to these defendants. Similarly, Evans' complaint that he should have been allowed to call the defendants as witnesses at the ***Spears*** hearing is without legal basis. *See* ***Wesson v. Oglesby***, 910 F.2d 278, 281 (5th Cir. 1990) (it is not the function of a ***Spears*** hearing to resolve credibility disputes).

Evans raises several other claims against the magistrate judge involving allegations of bias, false statements, failure to call witnesses, and conspiracy. These claims are without merit.

U.S.C. § 1915(d). *See* ***Holloway v Gunnell***, 685 F.2d 150, 152 (5th Cir. 1982). An *in forma pauperis* complaint may be dismissed as frivolous if it lacks an arguable basis in law or fact. ***Denton v. Hernandez***, 112 S. Ct. 1728, 1733-34, (1992). We review such dismissals only for abuse of discretion. ***Id***. at 1734.

1.

Evans claimed that Carlize, Wilson, and Watridge (members of prison's disciplinary committee) found him guilty of the rules violation based solely on Holly's uncorroborated report. The district court's review of the disciplinary committee's factual findings was limited, however, to a determination of whether the findings were supported by *any* evidence. ***Stewart v. Thigpen***, 730 F.2d 1002, 1005-06 (5th Cir. 1984). Because the committee's finding of guilt was supported by Holly's report, the district court did not abuse its discretion in dismissing the disciplinary committee defendants.[7]

2.

Evans charged Hargett with conspiring for the purpose of denying Evans' earned time allowances. The district court found no

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[7] Evans also argues that his violation was not "felonious" in nature; therefore, the committee could not forfeit his earned time as punishment for the infraction. This claim is based on an outdated statute and is without merit. *See* Miss. Code Ann. § 47-5-138(2) (1993) ("felonious" violation no longer required).

Additionally, Evans claims that Showers violated his rights by classifying his misconduct as "serious". He contends that Mississippi's system, which classifies misconduct as major, serious, or minor, was disapproved by ***Gates v. Collier***, 454 F. Supp. 579, 585 (N.D. Miss. 1978), *aff'd*, 606 F.2d 115 (5th Cir. 1979). Evans has misinterpreted ***Gates***; his claim is without merit.

merit to Evans' conclusory allegation; no factual support was offered. There was no abuse of discretion. *See* ***McAfee v. 5th Circuit Judges***, 884 F.2d 221, 222 (5th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

C.

Finally, Evans claims that he was entitled to trial by jury. Rule 38(b) of the Fed. R. Civ. P. requires that a party demand a jury trial no later than ten days after the last pleading relating to the issue for which the jury trial is requested. Evans's motion for a jury trial, made five months after Holly answered the complaint, was not timely.[8]

III.

For the foregoing reasons, the judgment is

AFFIRMED.

[8] Evans has moved for default judgment. The motion is **DENIED**.