IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2764
Conference Calendar

THOMAS H. BARANOWSKI,
MICHAEL J. HEIDT, and
ROBERT D. BANKSTON,

Plaintiffs-Appellants,

versus

STATE OF TEXAS ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA H 93 2033
- - - - - - - - - - -
(May 18, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Thomas H. Baranowski, Michael J. Heidt, and Robert D. Bankston appeal the dismissal of their complaint as frivolous.

A reviewing court will disturb the dismissal of a pauper's complaint as frivolous only on finding an abuse of discretion. A district court may dismiss such a complaint as frivolous "`where it lacks an arguable basis either in law or in fact.'" Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1733-34, 118 L.Ed.2d 340 (1992)(quoting Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

1827, 104 L.Ed.2d 338 (1989)).

Inmate status does not foreclose protection by the Fair Labor Standards Act (FLSA), but a prisoner who has been sentenced to labor as part of his sentence is not an employee covered by the FLSA regarding work assignments. See Watson v. Graves, 909 F.2d 1549, 1553 & n.7 (5th Cir. 1990); Alexander v. Sara, Inc., 721 F.2d 149, 150 (5th Cir. 1983). There is "no employer-employee relationship, because the inmate's labor belong[s] to the penitentiary[.]" Alexander, 721 F.2d at 150.

Texas explicitly required prisoners to work when Baranowski, Heidt, and Bankston began to work for Texas Correctional Industries (TCI) and had required them to work since at least 1929. Tex. Rev. Civ. Stat. Ann. art. 6166x (West 1970)(repealed 1989); see Wendt v. Lynaugh, 841 F.2d 619, 620 (5th Cir. 1988). The plaintiffs thus were sentenced to work. Nothing indicates that the repeal of section 6166x changed that aspect of the plaintiffs' sentences.

It is clear that the plaintiffs cannot present a nonfrivolous FLSA claim. The dismissal of their complaint before allowing them to flesh out the complaint or amend it was not an abuse of discretion. Cf. Eason v. Thaler, ___ F.3d ___, (5th Cir. Feb. 10, 1994, No. 93-1765, slip p. 2567). Finally, we need not consider Baranowski's Fourth and Eighth Amendment contentions, as he did not raise them in the district court. See Beck v. Lynaugh, 842 F.2d 759, 762 (5th Cir. 1988).

AFFIRMED.