IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 2, 2019
Lyle W. Cayce
Clerk

No. 19-30125
Summary Calendar

DERRICK DEWAYNE DAVIS,

Plaintiff-Appellant

v.

RAYMOND LABORDE CORRECTIONAL CENTER; SANDRA SIBLEY; DR. MCVEA; W. S. SANDY MCCAIN; JAMES LONGINO,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 1:18-CV-1271

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Derrick Dewayne Davis, Louisiana prisoner # 126965, appeals the district court's denial and dismissal of his 42 U.S.C. § 1983 complaint against prison officials pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A. He also moves for the appointment of counsel; that motion is denied.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Davis asserts that he has degenerative disc disease that prison officials have treated with pain medication. He argues that his condition is worsening and that the proper and preferred method for treating his condition is to provide him with corrective spinal surgery. He argues that prison officials have shown deliberate indifference to his serious medical need by refusing to provide him with corrective surgery. Davis's disagreement with the treatment being provided to him is insufficient to establish a claim of deliberate indifference. *See Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006).

In this court, Davis argues that while in prison, he suffered a stroke that went untreated, that the Americans with Disabilities Act applies to his back condition, and that prison officials have retaliated against him for filing this lawsuit by discontinuing his pain medication. Because each of these arguments is made for the first time on appeal, we do not consider them. *See Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316-17 (5th Cir. 2000); *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999).

Finding no error in the district court's denial and dismissal of Davis's complaint, we affirm. Our affirmance of the district court's dismissal means that Davis has acquired one strike for purposes of § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson*, 135 S. Ct. 1759, 1762-63 (2015). Davis is cautioned that, once he accumulates three strikes, he may no longer proceed in forma pauperis in any civil action or appeal while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

AFFIRMED; MOTION FOR APPOINTMENT OF COUNSEL DENIED; SANCTION WARNING ISSUED.

APPENDIX "C"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

DERRICK DEWAYNE DAVIS, Plaintiff	CIVIL ACTION NO. 1:18-CV-1271-P
VERSUS	JUDGE DEE D. DRELL
RAYMOND LABORDE CORRECTIONAL CENTER, ET AL., Defendants	MAGISTRATE JUDGE PEREZ-MONTES

JUDGMENT

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein, and after a de novo review of the record including the objections filed by Plaintiff, and having determined that the findings and recommendation are correct under the applicable law;

IT IS ORDERED that Plaintiff's complaint is **DENIED** and **DISMISSED WITH PREJUDICE** under §§ 1915(e)(2)(b) and 1915A.

The Clerk of Court is instructed to send a copy of this Judgment to the keeper of the three strikes list in Tyler, Texas.

THUS DONE AND SIGNED at Alexandria, Louisiana, this 7th day of February, 2018.

DEE D. DRELL
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

U.S. District Court

Western District of Louisiana

Notice of Electronic Filing
The following transaction was entered on 10/30/2018 at 10:20 AM CDT and filed on 10/30/2018

Case Name:	Davis v. Raymond Laborde Correctional Center et al
Case Number:	1:18-cv-01271-DDD-JPM
Filer:	
Document Number:	9

Docket Text:
REPORT AND RECOMMENDATIONS. IT IS RECOMMENDED that [1] Complaint filed by Derrick Dewayne Davis be DENIED AND DISMISSED WITH PREJUDICE. Objections to R&R due by 11/13/2018. Signed by Magistrate Judge Joseph H L Perez-Montes on 10/30/2018. (crt,Tice, Y)(a)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

DERRICK DEWAYNE DAVIS, Plaintiff	CIVIL ACTION NO. 1:18-CV-1271-P
VERSUS	JUDGE DEE D. DRELL
RAYMOND LABORDE CORRECTIONAL CENTER, ET AL., Defendants	MAGISTRATE JUDGE PEREZ-MONTES

REPORT AND RECOMMENDATION

Before the Court is the civil rights complaint (42 U.S.C. § 1983) of pro se Plaintiff Derrick Dewayne Davis ("Davis") (#126965). Davis is an inmate in the custody of the Louisiana Department of Corrections, incarcerated at the Raymond Laborde Correctional Center ("RLCC") in Cottonport, Louisiana. Davis complains he was denied adequate medical care at RLCC.

Because Davis cannot show Defendants acted with deliberate indifference to his serious medical needs, his complaint should be dismissed.

I. Background

Davis suffers from degenerative disc disease, and he previously filed suit against the medical doctor at Winn Correctional Center ("WCC") when Davis was incarcerated at that facility. As summarized by the United States Fifth Circuit Court of Appeals in that case:

> [J]ust before arriving at WCC, a full set of lumbar spine x-rays showed that Davis had degenerative disc disease with narrowing of the disc space in the lumbosacral area and that he was instructed to perform

> light range-of-motion exercises. Upon arriving at WCC, Davis was given compound duty, allowed the use of a crutch and/or a cane, given a bottom bunk, and restricted from sports activities due to his back pain. He was seen frequently for his complaints of lower back pain, the orders regarding the crutch and cane were changed frequently, and he was prescribed medication to help manage the pain. Davis requested that more x-rays be done but was told that further radiologic examination was not indicated.
>
> He also contends that an MRI of his lower back that was ordered in 2005 still has not been done. The document to which he refers, however, simply states that an MRI is "the study of choice" if further information regarding the lumbar spine discs was desired.

(Docket No. 14-31087, 5th Cir.).

Subsequent to his suit against WCC, Davis was transferred to RLCC. Since his arrival at RLCC, Davis has been examined by Dr. George and Dr. McVea, who prescribed Parafon Forte and Cymbalta for pain. (Doc. 1, p. 4; Doc. 1-2, p. 4). According to Davis, Dr. McVea said the DOC will not pay for back surgery because it is too expensive. (Doc. 1, p. 4). Contrarily, Davis also alleges that two other inmates have received corrective back surgery. (Doc. 1, p. 4).

II. Law and Analysis

A. Davis's complaint is subject to screening under §§ 1915(e)(2) and 1915A.

Davis is a prisoner who has been permitted to proceed *in forma pauperis*. (Doc. 8). As a prisoner seeking redress from an officer or employee of a governmental entity, Davis's complaint is subject to preliminary screening pursuant to 28 U.S.C. § 1915A. See Martin v. Scott, 156 F.3d 578, 579-80 (5th Cir. 1998) (per curiam). Because he is proceeding *in forma pauperis*, Davis's complaint is also subject to screening under § 1915(e)(2). Both § 1915(e)(2)(B) and § 1915A(b) provide for *sua*

sponte dismissal of the complaint, or any portion thereof, if the Court finds it is frivolous or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary relief against a defendant who is immune from such relief.

A complaint is frivolous when it "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). A claim lacks an arguable basis in law when it is "based on an indisputably meritless legal theory." Id. at 327. A complaint fails to state a claim upon which relief may be granted when it fails to plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

B. Davis cannot show deliberate indifference to serious medical needs.

Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when they act with "deliberate indifference" to the serious medical needs of prisoners. See Farmer v. Brennan, 511 U.S. 825, 834, (1994); Estelle v. Gamble, 429 U.S. 97, 105 (1976). Deliberate indifference "is an extremely high standard to meet." Gobert v. Caldwell, 463 F.3d 339, 346 (5th Cir. 2006) (citation omitted). An inmate must show that prison personnel "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evidence a wanton disregard for any serious medical needs." Domino v. Tex. Dep't Crim. J., 239 F.3d 752, 756 (5th Cir. 2001) (quoting Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985)).

Davis has not presented factual allegations indicating that Defendants ignored his complaints, refused to treat him, or intentionally treated him incorrectly. Davis

disagrees with the treatment he received. However, a prisoner's disagreement with prison officials regarding medical treatment is insufficient to establish an unconstitutional denial of medical care. See Norton v. Dimanzana, 122 F.3d 286, 292 (5th Cir. 1997); Banuelos v. McFarland, 41 F.3d 232, 235 (5th Cir. 1995); Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

Although Davis argues he is not receiving surgery because of the cost, his argument is belied by the allegation that two other inmates at RLCC have received corrective back surgery in the two years Davis has been housed at that facility. (Doc. 1, p. 4).

III. Conclusion

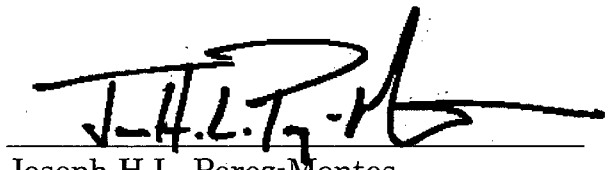
For the foregoing reasons, **IT IS RECOMMENDED** that Davis's complaint be **DENIED** and **DISMISSED** with prejudice under § 1915(e)(2)(b) and § 1915A.

Under the provisions of 28 U.S.C. § 636(b)(1)(c) and Fed.R.Civ.P. 72(b), parties aggrieved by this Report and Recommendation have fourteen (14) calendar days from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. No other briefs (such as supplemental objections, reply briefs, etc.) may be filed. Providing a courtesy copy of the objection to the undersigned is neither required nor encouraged. Timely objections will be considered by the District Judge before a final ruling.

Failure to file written objections to the proposed findings, conclusions, and recommendations contained in this Report and Recommendation within fourteen (14)

days from the date of its service, or within the time frame authorized by Fed.R.Civ.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Judge, except upon grounds of plain error.

THUS DONE AND SIGNED in chambers in Alexandria, Louisiana, this 29th day of October, 2018.



Joseph H.L. Perez-Montes
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.