

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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**United States Court of Appeals
for the Fifth Circuit**

No. 21-20623
Summary Calendar

FILED
June 17, 2022

PERCY UTLEY,

Plaintiff—Appellant,

versus

City of Houston; Art Acevedo; John Doe
Officers.

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-1907

Before SOUTHWICK, OLDHAM, and WILSON, *Circuit Judges*. PER CURIAM:*

Percy Utley filed suit under 42 U.S.C. § 1983 against the City of Houston, Houston Police Chief Art Acevedo, and John Doe Officers, for alleged violations of his First, Fourth, and Fourteenth Amendment rights that occurred when he was

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

arrested during a protest following the death of George Floyd. The district court granted the defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), concluding that Utley's first amended complaint was insufficient to state a claim and his proposed second amended complaint failed to cure the deficiencies. Utley appeals, contending that the district court erred by dismissing his complaint and by denying his motion to amend his complaint. We affirm.

We review the grant of a Rule 12(b)(6) motion to dismiss de novo. *Cousin v. Small*, 325 F.3d 627, 631 (5th Cir. 2003) (per curiam). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Because Utley's first amended complaint contains nothing other than conclusory allegations in support of his claims, the district court did not err in granting the defendants' motion to dismiss. See *Iqbal*, 556 U.S. at 678.

Utley's Fourth Amendment claim fails because there was probable cause to support his arrest. *See Deville v. Marcantel*, 567 F.3d 156, 164–65 (5th Cir. 2009). And Utley was not engaged in constitutionally protected activity when he was arrested—he was obstructing a roadway in

violation of TEX. PENAL CODE § 42.03—so his First Amendment retaliation claim fails. *See Singleton v. Darby*, 609 F. App'x 190, 193 (5th Cir. 2015). Third, Utley did not support his Fourteenth Amendment claim with anything more than conclusory allegations insufficient to state a claim under Rule 12(b)(6). *See Iqbal*, 556 U.S. at 678; *Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 441–42 (5th Cir. 2015). Finally, Utley’s claim against the City of Houston fails because he does not identify any official municipal policy that caused the alleged constitutional violations. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978); *see Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001).

We review Utley’s contention that the district court erred by denying his motion for leave to amend his complaint for an abuse of discretion. *See Pervasive Software Inc. v. Lexware GmbH*, 688 F.3d 214, 232 (5th Cir. 2012). A district court “should freely give leave [to amend] when justice so requires.” FED. R. CIV. P. 15(a)(2). However, “[d]enying a motion to amend is not an abuse of discretion if allowing an amendment would be futile.” *Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 378 (5th Cir. 2014)(citing *Briggs v. Mississippi*, 331 F.3d 499, 508 (5th Cir. 2004)). An amendment is futile if it would not survive a Rule 12(b)(6) motion. *Id.*

We agree with the district court that Utley’s proposed second amended complaint failed to cure the deficiencies in his first amended complaint and that allowing him further to amend his complaint

would be futile. Accordingly, we discern no abuse of discretion in the denial of Utley's motion to amend. *See Marucci Sports, L.L.C.*, 751 F.3d at 378.

AFFIRMED.

**United States Court of Appeals
for the Fifth Circuit**

No. 21-20623 FILED
Summary Calendar June 17, 2022

PERCY UTLEY,

Plaintiff—Appellant

versus

City of Houston; Art Acevedo; John Doe
Officers.

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-1907

Before SOUTHWICK, OLDHAM, and WILSON, *Circuit Judges.*

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

**United States Court of Appeals
for the Fifth Circuit**

No. 21-20623

[Filed: July 18, 2022]

PERCY UTLEY,

Plaintiff—Appellant,

versus

City of Houston; Art Acevedo; John Doe
Officers,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-1907

ON PETITION FOR REHEARING EN BANC

Before SOUTHWICK, OLDHAM, and WILSON, *Circuit
Judges.* PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PERCY UTLEY, § CIVIL ACTION NO.
Plaintiff, § 4:20-cv-01907
§
vs. § JUDGE CHARLES
§ ESKRIDGE
§
CITY OF § ENTERED
HOUSTON, *et al.*, § June 08, 2021
Defendants. §

ORDER ON DISMISSAL WITHOUT PREJUDICE

This case involves claims brought by Plaintiff Percy Utley under 42 USC § 1983 for alleged violations of his constitutional rights by Defendants the City of Houston, Art Acevedo, and several John Doe Officers of the Houston Police Department. The City and Acevedo filed motions to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dkts 14, 15. Dismissal is warranted for the reasons stated in the motions.

As to the City of Houston. Utley fails to specify facts supporting allegation that his constitutional rights were violated. He also fails to specify facts supporting his allegation of an official City policy that caused those constitutional violations. Utley also fails to respond to arguments by the City that his state-law tort claims (and claims against

Mayor Sylvester Turner, to the extent asserted) should be dismissed, thus waiving opposition.

As to Acevedo. Utley fails to specify facts supporting his allegation that his constitutional rights were violated and allegation that Acevedo was personally involved in the allegedly unconstitutional acts.

As to both. Defendants on reply point out that Utley's response introduces as facts matters that are outside of the four corners of the complaint. Dkt 21 at 1–2. They also argue that Utley at best asserts *respondeat superior* theory as to the alleged misconduct of individual HPD officers. Id at 3–4. They are correct that neither approach is proper.

As to repleading. A district court “should freely give leave [to amend] when justice so requires.” FRCP 15(a)(2). The Fifth Circuit has long held that this evinces a bias in favor of granting leave to amend. See *Carroll v Fort James Corp*, 470 F3d 1171, 1175 (5th Cir 2006); *Dussouy v Gulf Coast Investment Corp*, 660 F2d 594, 597(5th Cir 1981). Utley to this point has filed his original complaint and amended it once as a matter of right, without facing any prior motion to dismiss. See Dkts 1, 11. Dismissal will be without prejudice. Utley may seek leave by motion to replead his claims, if he can do so in good faith. Any amended complaint that is allowed will be Utley's final attempt to plead his claims.

The motions to dismiss by Defendants the City of Houston and Art Acevedo are GRANTED. Dkts 14, 15.

The complaint against them by Plaintiff Percy Utley is DISMISSED WITHOUT PREJUDICE.

Utley may seek leave to amend by no later than June 25, 2021. The parties must observe Section 17(b) of this Court's procedures. Prior to seeking leave, Utley must share a specific draft of an amended complaint with Defendants, who must in turn identify all issues that they would assert on motion under Rule 12(b)(6) or Rule 12(c).

SO ORDERED.

Signed on June 8, 2021, at Houston, Texas.

/s/Charles Eskridge

Hon. Charles Eskridge

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PERCY UTLEY,	§	CIVIL ACTION NO.
Plaintiff,	§	4:20-cv-01907
	§	
vs.	§	JUDGE CHARLES
	§	ESKRIDGE
	§	
CITY OF	§	ENTERED
HOUSTON, <i>et al.</i>	§	November 23, 2021
Defendants.	§	

ORDER

The complaint in this action by Plaintiff Percy Utley was previously dismissed without prejudice. Dkt 29. Now pending is his motion for leave to file an amended complaint. Dkt 33.

The City of Houston responded, arguing that Utley in bad faith and with a dilatory motive “seeks leave to amend his complaint to allege facts known to him since at least as early as November 20, 2020.” Dkt 34 at 3. It further asserts that “Utley offers no explanation for the unreasonable delay,” and that he “should therefore be estopped from reversing positions now, after substantial delay, waste of judicial resources, and prejudice to the Defendants.” Id at 4–5. The City also argues that leave should be denied as futile, asserting that the proposed amendment doesn’t cure the prior deficiencies. Id at 5–8.

Utley didn't reply. His failure to address in reply the pertinent arguments raised in the City's response is treated as waiver of opposition. For example, see *Clayton v ConocoPhillips Co*, 722 F3d 279, 299 (5th Cir 2013) (argument not briefed in reply waived). Review of the proposed amendment also discloses that it fails to cure prior deficiencies. In particular, see Dkt 34 at 6–7.

The motion for leave to amend by Plaintiff Percy Utley is DENIED. Dkt 33.

SO ORDERED.

Signed on November 23, 2021, at Houston,
Texas.

/s/Charles Eskridge

Hon. Charles Eskridge
United States District Judge

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

PERCY UTLEY,	§	CIVIL ACTION NO.
Plaintiff,	§	4:20-cv-01907
	§	
vs.	§	JUDGE CHARLES
	§	ESKRIDGE
	§	
CITY OF	§	ENTERED
HOUSTON, <i>et al.</i>	§	November 24, 2021
Defendants.	§	

FINAL JUDGMENT

This case was dismissed without prejudice on June 8, 2021. Dkt 29. Plaintiff Percy Utley sought leave to replead. Dkt 33. That motion was denied. Dkt 36.

This action is now DISMISSED WITH PREJUDICE for the reasons previously stated.

This is a FINAL JUDGMENT.
SO ORDERED.

Signed on November 24, 2021, at Houston,
Texas.

/s/Charles Eskridge
Hon. Charles Eskridge
United States District Judge