United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 28, 2023
Lyle W. Cayce
Clerk

No. 23-40213

SANTIAGO MASON GOMEZ,

Plaintiff—Appellant,

versus

ODUNAY O. KUKU; ASSISTANT WARDEN LAMORRIS MARSHALL; ASSISTANT WARDEN JUAN J. NUNEZ; LIEUTENANT A. ABDULMALIK; SERGEANT MIS ENOJOSA,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:22-CV-457

Before JONES, HIGGINSON, and HO, *Circuit Judges*.

PER CURIAM:*

Santiago Mason Gomez, Texas prisoner # 01852089, filed a 42 U.S.C. § 1983 complaint in the Eastern District of Texas alleging that various employees of the Texas Department of Criminal Justice (TDCJ) were

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

conspiring to have him killed; one of the means of effectuating that plan was to proclaim that Gomez had previously died, which would then allow the other inmates to kill him without repercussions. Claims involving some defendants located in the Southern District of Texas were severed and transferred to that court. The district court dismissed the allegations remaining in Gomez's complaint for failure to state a claim upon which relief may be granted and denied Gomez leave to proceed in forma pauperis (IFP) on appeal. *See* 28 U.S.C. § 1915A(b)(1). Gomez has now filed a motion for authorization to proceed IFP on appeal, which constitutes a challenge to the district court's certification that any appeal would not be taken in good faith because Gomez will not present a nonfrivolous appellate issue. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997).

Before this court, Gomez argues that he filed his lawsuit based on the danger to his life and that the dismissal of his action will result in his death. He also appears to assert that he had a First Amendment right to provide information about individuals responsible for contraband in the prisons, which he alleges was the impetus for the plot against him. He does not, however, address the conclusions of the district court that his vague allegations were insufficient to show that the defendants were part of a far-reaching TDCJ conspiracy or that their actions resulted in harm to him. His failure to make these arguments results in the abandonment of his claims. *See Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

Gomez does contend that the district court was biased and dismissed his lawsuit and denied him IFP status in retaliation for his assertion that he would hold the court responsible for any harm he suffers and that he should not suffer retaliation for engaging in his First Amendment rights, including his right to file the instant lawsuit. He does not present a nonfrivolous argument showing that the dismissal of his lawsuit was the result of judicial

bias. *See Liteky v. United States*, 510 U.S. 540, 555 (1994); *Baugh*, 117 F.3d at 202.

Gomez also asserts that the district court erred in denying his request for appointment of counsel. This does not constitute a nonfrivolous appellate issue, as he has not established exceptional circumstances warranting appointment of an attorney. *See Baugh*, 117 F.3d at 202; *Jackson v. Dallas Police Dep't*, 811 F.2d 260, 261 (5th Cir. 1986); *Ulmer v. Chancellor*, 691 F.2d 209, 212-13 (5th Cir. 1982).

The appeal is without arguable merit and is thus frivolous. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). Accordingly, Gomez's motion to proceed IFP on appeal is DENIED, and the appeal is DISMISSED. *See* 5TH CIR. R. 42.2. The dismissal of this appeal counts as a strike under 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996), *abrogated in part on other grounds*, *Coleman v. Tollefson*, 575 U.S. 532, 537 (2015). In addition, the district court's dismissal of the original complaint for failure to state a claim upon which relief may be granted also counts as a strike. *See* § 1915(g); *Adepegba*, 103 F.3d at 388. Gomez is WARNED that if he accumulates three strikes, he will no longer be allowed to proceed IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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August 28, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 23-40213 Gomez v. Kuku
USDC No. 6:22-CV-457

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By: _____
Christina C. Rachal, Deputy Clerk

Enclosure(s)

Mr. Santiago Mason Gomez

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

No. 6:22-cv-00457

Santiago Mason Gomez,
Plaintiff,
v.
Odunay O. Kuku et al.,
Defendants.

ORDER

Plaintiff Santiago Mason Gomez, proceeding pro se and *in forma pauperis,* filed this civil-rights lawsuit pursuant to 42 U.S.C. § 1983. The case was referred to United States Magistrate Judge K. Nicole Mitchell pursuant to 28 U.S.C. § 636(b). Doc. 3.

On January 9, 2023, the court severed and transferred several of plaintiff's claims to other courts for proper venue. Doc. 13. On January 12, 2023, the magistrate judge issued a report recommending that the claims remaining before this court be dismissed with prejudice for failure to state a claim pursuant to 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(b). Doc. 15. Plaintiff filed written objections. Docs. 18, 19.

The court reviews the objected-to portions of a magistrate judge's report and recommendation de novo. *See* Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1). The magistrate judge recommended dismissal because plaintiff's claim that Warden Marshall had falsely declared him dead as part of a conspiracy with defendant Enjosa to "feed [plaintiff] to Black inmates" to be killed is delusional and is not supported by any specific facts that would support a claim for any constitutional violation. Doc. 15 at 5–7.

Plaintiff's objections do not identify any specific error in the magistrate judge's analysis. They are vague, rambling accounts of a general perception of danger, including events alleged to have taken place in prisons within other venues and involving individuals who

are not parties before this court. Plaintiff elaborates on his allegation that Warden Marshall announced through a speaker or radio that the plaintiff had died of COVID-19 (Doc. 19 at 3–4), but he does not dispute the magistrate judge's conclusion that this allegation fails to state a claim for which relief can be granted. He also alleges now that defendant Enjosa "said [he] died in the shower" (*id.* at 5), but he does not allege any plausible facts that would raise that claim to the level of a constitutional violation.

Having reviewed the magistrate judge's report de novo and being satisfied that it contains no error, the court overrules plaintiff's objection and accepts the report's findings and recommendation. This case is dismissed with prejudice for failure to state a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(b).

So ordered by the court on March 6, 2023.

J. CAMPBELL BARKER
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

SANTIAGO MASON GOMEZ #01852089	§	
VS.	§	CIVIL ACTION NO. 6:22cv457
ODUNAY O. KUKU, et al.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Plaintiff Santiago Mason Gomez, an inmate of the Texas Department of Criminal Justice (TDCJ) proceeding *pro se*, filed this civil rights lawsuit pursuant to 42 U.S.C. § 1983 alleging violations of his constitutional rights. The case was referred to the undersigned for findings of fact, conclusions of law, and recommendations for the disposition of the case.

I. Plaintiff's Allegations and Procedural History

Plaintiff filed his original complaint and was permitted to proceed *in forma pauperis* in December 2022. (Dkt. ##1, 4.) On December 12, 2022, the Court found Plaintiff's original complaint to be deficient in several respects and ordered him to amend to "stat[e] specific facts to support his claims." (Dkt. #5 at 2.)

Plaintiff filed his amended complaint on January 5, 2022. (Dkt. #11.) Upon review, the Court determined that Plaintiff sued Defendants about separate incidents at three separate prisons without any viable connection between his claims. Accordingly, the Court severed and transferred to the courts with proper venue Plaintiff's claims that arose in the Terrell Unit and the McConnell Unit of the TDCJ. (Dkt. #13.) The only claims remaining before this Court are those arising from the Michael Unit.

Specifically, Plaintiff sues Assistant Warden LaMorris Marshall for allegedly faking Plaintiff's death of Covid-19 in the Michael Unit for the purpose of "feed[ing] [him] to Black inmates," presumably to be killed. (Dkt. #11 at 3.) He alleges that "Huntsville is part of this conspiracy" to have him killed and sues a Ms. Enjosa in Huntsville because "she used her head stg. G.I. authority to set [him] up and have [him] killed." (*Id.*; Dkt. #11-2 at 1.) He seeks "a full pardon and enough money to start [his] life over." (Dkt. #11 at 4.)

Despite having been expressly instructed to "comprehensively set forth Plaintiff's claims" in his amended complaint (Dkt. #5 at 2), Plaintiff also later filed an "Amended Complaint Statement Attachment," which, in the interest of expediency, is liberally considered as part of the amended complaint. (Dkt. #12.)

II. Legal Standards and Preliminary Screening

Because Plaintiff is a prisoner seeking redress from an officer or employee of a governmental entity, his complaint is subject to preliminary screening pursuant to the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915A. *See Martin v. Scott*, 156 F.3d 578, 579-80 (5th Cir. 1998) (per curiam). That statute provides for *sua sponte* dismissal of a complaint—or any portion thereof—if the Court finds it frivolous or malicious, if it fails to state a claim upon which relief can be granted, or if it seeks monetary relief against a defendant who is immune from such relief.

A complaint is frivolous if it lacks an arguable basis in law or fact. *Samford v. Dretke*, 562 F.3d 674, 678 (5th Cir. 2009). The Fifth Circuit has held that a complaint lacks an arguable basis in fact when "the facts alleged are fantastic or delusional scenarios or the legal theory upon which a complaint relies is indisputably meritless." *Id.* (quoting *Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir. 1999) (internal quotation marks omitted)). In other words, during the initial screening

under section 1915A, a court may determine that a prisoner's complaint is frivolous if it rests upon delusional scenarios or baseless facts—and dismiss the complaint. *See Henry v. Kerr County, Texas*, 2016 WL 2344231 *3 (W.D. Tex. May 2, 2016) ("A court may dismiss a claim as factually frivolous only if the facts alleged are clearly baseless, fanciful, fantastic, delusional, or otherwise rise to the level of the irrational or the wholly incredible, regardless of whether there are judicially noticeable facts available to contradict them.") (citing *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992)).

Moreover, a complaint fails to state a claim upon which relief may be granted where it does not allege sufficient facts which, taken as true, state a claim which is plausible on its face and thus does not raise a right to relief above the speculative level. *See Montoya v. FedEx Ground Packaging Sys. Inc.*, 614 F.3d 145, 149 (5th Cir. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A claim has factual plausibility when the pleaded factual content allows the court to draw reasonable inferences that the defendant is liable for the misconduct alleged. *See Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 245 (5th Cir. 2010); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This plausibility standard is not akin to a probability standard; rather, the plausibility standard requires *more than the mere possibility* that the defendant has acted unlawfully. *Twombly*, 550 U.S. at 556 (emphasis supplied).

All well-pleaded facts are taken as true, but the district court need not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions. *See Whatley v. Coffin*, 496 F. App'x 414 (5th Cir. 2012) (unpublished) (citing *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005)). Crucially, while the federal pleading rules do not require "detailed factual allegations," the rule does "demand more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A pleading offering "labels and conclusions" or a

"formulaic recitation of the elements of a cause of action" will not suffice, nor does a complaint which provides only naked assertions that are devoid of further factual enhancement. *Id.* Particularly with regard to any claim that defendants have conspired to harm him, a plaintiff must plead specific, non-conclusory facts that establish that there was an agreement among the defendants to violate his federal civil rights. *Priester v. Lowndes County*, 354 F.3d 414, 420 (5th Cir. 2004); *Lynch v. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir. 1987) (plaintiffs asserting conspiracy claims under Section 1983 must plead the operative facts on which their claim is based; bald allegations that a conspiracy existed are insufficient).

A federal court has an independent duty, at any level of the proceedings, to determine whether it properly has subject matter jurisdiction over a case. *Ruhgras AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level."); *McDonal v. Abbott Labs.*, 408 F.3d 177, 182 n.5 (5th Cir. 2005) ("federal court may raise subject matter jurisdiction *sua sponte*").

III. Discussion and Analysis

Plaintiff's sole allegation against Defendant Marshall is the following: "Warden said I died of Covid-19 part of this conspiracy, was gonna feed me to Black inmates." (Dkt. #11 at 3.) Couched in the context of Plaintiff's assertion that he has "died on 5 different units, they were using medical to confirm my deaths" (Dkt. #11-2 at 1), Plaintiff's allegation seems plainly delusional and thus subject to dismissal as factually frivolous. *Gary v. U.S. Gov't*, 540 F. App'x 916, 916-918 (11th Cir. 2013) (affirming dismissal of complaint as frivolous where plaintiff alleged that government officials implanted microchips in her body that caused her injury and pain); *see also United States v. Gutierrez*, No. A-09-CR-453-SS, 2011 WL 386784, at *3 (W.D.

Tex. Feb. 3, 2011), *vacated on other grounds*, 443 F. App'x 898 (5th Cir. 2011) (discussing "complexity of [party's] delusional system").

Even if it were plausible that Warden Marshall had falsely claimed that Plaintiff died of Covid-19, Plaintiff does not provide any material facts to support his assertion. He does not say when, or how Defendant Marshall carried out this ruse or how Plaintiff—who is clearly not dead—was harmed by it. Plaintiff insinuates that the false announcement of his death was related to a plan to allow inmates to kill him, but he does not coherently connect those pieces. A claim that prison officials are being deliberately indifferent to an inmate's safety triggers "an extremely high standard to meet," *Domino v. Texas Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001), requiring the plaintiff to prove both "a substantial risk of serious harm" and the defendant's knowledge of that risk and failure to take reasonable measures to alleviate it. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Plaintiff here does not satisfy either prong of that test.

First, Plaintiff's assertions of danger are too vague and incoherent to give anyone notice of the basis of his claim. He indicates that he provided some unspecified "confidential information to stg G.I. Sgt. and safe prison." (Dkt. #11 at 4.) Plaintiff's supplement alleges that he provided this information to officials at the Terrell Unit in July 2021, and that it led to his placement in Offender Protection Investigation and a transfer to another prison. (Dkt. #12 at 1–2.) His pleadings generally indicate that both TDCJ employees and inmates want him to be killed for providing that information. But he does not identify any particular inmates, either by name or group, who pose a risk to him, beyond the insinuation that all Black inmates want to kill him because the information he provided "sent a whole Black family to prison." (Dkt. #12 at 4.) He does not specifically allege that anyone has ever actually threatened him or tried to harm him or plausibly explain why Marshall or Enjosa would bear homicidal animosity against him for providing information about

other inmates. Plaintiff's intimation that Marshall wants to have him killed simply because Marshall is Black calls for a totally unwarranted factual inference, which the Court is not required to accept. (*See* Dkt. #12 at 4.)

Plaintiff repeatedly asserts that there is some department-wide conspiracy to harm him, but he does not assert any specific facts as required to support that claim. *See Priester v. Lowndes County*, 354 F.3d 414, 420 (5th Cir. 2004); *Lynch v. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir. 1987) (plaintiffs asserting conspiracy claims under Section 1983 must plead the operative facts on which their claim is based; bald allegations that a conspiracy existed are insufficient). Plaintiff's unsubstantiated belief that staff have conspired to harm or mistreat him does not satisfy that standard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("It is the conclusory nature of respondent's allegations . . . that disentitles them to the presumption of truth."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2000) (holding that conspiracy claim did not require "detailed factual allegations" but must be supported "with enough factual matter (taken as true) to suggest that an agreement was made"); *Parker v. Currie*, 359 F. App'x 488, 490 (5th Cir. 2010) (holding that prisoner's speculation that his injuries were "orchestrated by prison officials . . . without additional support, calls for dismissal). Plaintiff insists that phone recordings and other evidence will support his claim, but he does not specify the facts that evidence would support or indicate how he knows those facts, beyond his own speculation or assumptions.

Plaintiff also does not explain what role Defendant Marshall would have personally had in declaring him dead of Covid or state what specific action Enjosa has taken or failed to take that violated his rights. To the extent Plaintiff sues them simply because of their positions of authority in the TDCJ, lawsuits against supervisory personnel based on their positions of authority are claims of liability under the doctrine of *respondeat superior*, which does not generally apply in Section 1983 cases. *Williams v. Luna*, 909 F.2d 121 (5th Cir. 1990). A supervisor may be held liable under

Section 1983 only if he is personally involved in a constitutional deprivation, a causal connection exists between the supervisor's wrongful conduct and a constitutional deprivation, or if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force behind a constitutional deprivation. *Thompkins v. Belt*, 828 F.2d 298 (5th Cir. 1987). Plaintiff does not allege any facts that would support liability under any of these theories in this case.

Finally, although Plaintiff seeks a pardon and unspecified money to begin a life outside of prison, the Fifth Circuit has held that pardon and commutation decisions are not traditionally the business of courts and are subject to the ultimate discretion of the executive power. *Faulder v. Texas Board of Pardons and Paroles*, 178 F.3d 343, 344 (5th Cir. 1999). Accordingly, even if Plaintiff stated a claim for which relief could be granted, the relief he seeks is not within the Court's power to grant.

IV. Conclusion

For the reasons set forth above, Plaintiff's amended complaint is frivolous and fails to state a claim for which relief can be granted. Dismissal is appropriate where Plaintiff has already been given a chance to cure his deficiencies but still fails to state a viable claim. *See Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986) (holding that "once given adequate opportunity, even a *pro se* complaint must contain specific facts supporting its conclusions"); *Garcia v. City of Lubbock, Texas*, 487 F. Supp. 3d 555, 566 (N.D. Tex. 2020) (dismissing where inmate had "already amended his complaint once" and been afforded "an opportunity to further flesh out his claims").

RECOMMENDATION

Accordingly, the undersigned recommends that Plaintiff's lawsuit be dismissed with prejudice pursuant to 28 U.S.C. § 1915A(b).

Within fourteen (14) days after receipt of the Magistrate Judge's Report, any party may serve and file written objections to the findings and recommendations contained in the Report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

So ORDERED and SIGNED this 12th day of January, 2023.

K. Nicole Mitchell

K. NICOLE MITCHELL
UNITED STATES MAGISTRATE JUDGE