

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-40324
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

June 13, 2017

Lyle W. Cayce
Clerk

STACY L. CONNER,

Plaintiff-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; MICHAEL A. ROESLER, Head Warden Stiles Unit; DARREN B. WALLACE, Assistant Warden Stiles Unit; GENE A. KROLL, Assistant Warden Stiles Unit; DAVID G. PILLE, Correctional Officer; LATASHA JOSEPH, Correctional Officer; ANGELIQUE N. DENNIS, Correctional Officer,

Defendants-Appellees

Appeals from the United States District Court
for the Eastern District of Texas
USDC No. 1:14-CV-498

Before DAVIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Stacy L. Conner, Texas prisoner # 1428940, proceeding pro se and in forma pauperis, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint. Conner alleged in his complaint that prison officials violated his

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

due process rights by unlawfully seizing his personal and legal property. He also alleged that the prison officials' actions denied him access to the courts and were done in retaliation for his filing a grievance. Conner further alleged that certain prison officials were liable for the unconstitutional actions of their subordinates.

We start with the due process claim regarding the seizure of property. Conner fails to challenge the district court's determination that he failed to state a cognizable claim because Texas state law provided an adequate remedy for conversion claims. Therefore, the claim is deemed abandoned. *See Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993). Similarly, Conner's claims against the supervisory defendants are deemed abandoned since Conner fails to raise the claims before this court. *See id.*

Conner's claims alleging denial of access to the courts and retaliation are conclusory and insufficient to state valid constitutional claims. *See Christopher v. Harbury*, 536 U.S. 403, 414–22 (2002); *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995). Thus, he has failed to show that the district court erred in dismissing his action as frivolous and for failure to state a claim upon which relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Geiger v. Jowers*, 404 F.3d 371, 373 (5th Cir. 2005).

Accordingly, the judgment of the district court is AFFIRMED. The district court's dismissal of Conner's complaint counts as a strike under 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387–88 (5th Cir. 1996). Conner is WARNED that if he accumulates three strikes, he will not be allowed to proceed in forma pauperis in any civil action or appeal unless he is under imminent danger of serious physical injury. *See* § 1915(g).

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Plaintiff - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; MICHAEL A.
ROESLER, Head Warden Stiles Unit; DARREN B. WALLACE, Assistant
Warden Stiles Unit; GENE A. KROLL, Assistant Warden Stiles Unit; DAVID
G. PILLE, Correctional Officer; LATASHA JOSEPH, Correctional Officer;
ANGELIQUE N. DENNIS, Correctional Officer,

Defendants - Appellees

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., _____, _____ F.3d _____)

Before DAVIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

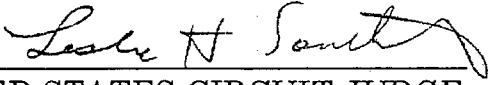
PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel
Rehearing, the Petition for Panel Rehearing is DENIED. No member of
the panel nor judge in regular active service of the court having

requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

STACY L. CONNER	§	
VS.	§	CIVIL ACTION NO. 1:14-CV-498
WILLIAM STEPHEN, ET AL.	§	

**MEMORANDUM ORDER OVERRULING PLAINTIFF’S OBJECTIONS AND ADOPTING
THE MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION**

Plaintiff Stacy L. Conner, a prisoner confined at the Stiles Unit of the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ-CID), proceeding *pro se*, filed this civil rights action pursuant to 42 U.S.C. § 1983.

The Court ordered that this matter be referred to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this Court. The magistrate judge recommends dismissing the complaint as frivolous and for failure to state a claim upon which relief may be granted.

The Court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record and the pleadings. Plaintiff filed objections to the magistrate judge's Report and Recommendation.

The Court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the Court concludes the objections are without merit.

ORDER

Accordingly, plaintiff's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge (document no. 20)

is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation.

SIGNED this the 25 day of January, 2016.

A handwritten signature in black ink, appearing to read "Thad Heartfield", written over a horizontal line.

Thad Heartfield
United States District Judge

legal material and personal possessions to retaliate against plaintiff for filing the grievance. Plaintiff alleges he contacted defendant Dennis on several occasions to arrange for the return of his property or to have it sent to his home, but she ignored his requests. Plaintiff alleges defendants Roesler, Wallace, and Kroll were made aware of the actions of their subordinates, but did not intervene on plaintiff's behalf.

Standard of Review

An *in forma pauperis* proceeding may be dismissed pursuant to 28 U.S.C. § 1915(e) if it: (1) is frivolous or malicious, (2) fails to state a claim upon which relief may be granted, or (3) seeks monetary relief from a defendant who is immune from such relief.

A complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997). A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory. *See Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). A complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless. *Denton v. Hernandez*, 504 U.S. 25, 32 (1992).

A complaint does not need detailed factual allegations, but the plaintiff must allege sufficient facts to show more than a speculative right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Dismissal for failure to state a claim is appropriate if the complaint does not include enough facts to state a claim that is plausible on its face. *Id.* at 570. Conclusory allegations and a formulaic recitation of the elements of a cause of action will not suffice to prevent dismissal for failure to state a claim. *Id.* at 555.

Analysis

Title 42 U.S.C. § 1983 creates a cause of action against any person who, acting under color of state law, causes a person to be deprived of a federally-protected constitutional right. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Phillips v. Monroe County*, 311 F.3d 369, 373 (5th Cir. 2002).

Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured

42 U.S.C. § 1983.

Property Claim

Plaintiff contends his personal and legal property was improperly confiscated by defendants Pille and Joseph. Plaintiff further contends that defendants Roseler, Wallace, and Kroll were aware of the property deprivation, but did not intervene on plaintiff's behalf.

A claim of deprivation of property by persons acting under color of state law may be cognizable in § 1983 litigation under the Due Process Clause of the Fourteenth Amendment. However, where the deprivation was random and unauthorized, and the state has an adequate post-deprivation tort remedy, due process is satisfied. *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that the due process clause is not violated when a state employee intentionally deprives an individual of property where the state has a meaningful post-deprivation remedy); *Parratt v. Taylor*, 451 U.S. 527 (1981) (finding no due process violation when a state employee negligently deprives an individual of property if the state provides a post-deprivation remedy), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986); *see also Geiger v. Jowers*, 404 F.3d 371, 374

(5th Cir. 2005) (concluding that plaintiff failed to state a claim regardless of whether the deprivation of property was the result of negligence or intentional misconduct); *Murphy v. Collins*, 26 F.3d 541, 543-44 (5th Cir. 1994) (noting that deprivations of property caused by the misconduct of state officials do not violate constitutional due process, provided adequate state post-deprivation remedies exist).

In this case, plaintiff alleges the deprivation of his property was random and unauthorized. The Texas tort of conversion provides an adequate post-deprivation remedy. *Brewster v. Dretke*, 587 F.3d 764, 768 (5th Cir. 2009). As a result, plaintiff has failed to state a constitutional claim for the deprivation of his property.

Access to Courts

Prisoners have a right to access to the courts protected by the First Amendment right to petition for redress of grievances, and the Fourteenth Amendment guarantees of procedural and substantive due process. *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Jackson v. Procunier*, 789 F.2d 307, 310 (5th Cir. 1986). This right can be satisfied through appointed counsel, access to a law library, or access to legally trained paraprofessionals. *Bounds*, 430 U.S. at 830-31. However, *Bounds* “does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims.” *Lewis v. Casey*, 518 U.S. 343, 355 (1996). Rather, the right of access to the courts requires that inmates be allowed a reasonably adequate opportunity to file non-frivolous cases challenging their convictions and the conditions of their confinement. *Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999). “Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.” *Lewis*, 518 U.S. at 355. In order to

recover for a denial of access to the courts, an inmate must show that “an actionable claim [involving a challenge to a sentence or conditions of confinement] which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented” *Id.* at 356; *see also Woodard v. Andrus*, 419 F.3d 348, 354 (5th Cir. 2005) (affirming dismissal of access to courts claim because plaintiff did not show that the defendant’s actions delayed her ability, or deprived her of her right, to avail herself of the legal process).

Plaintiff has not demonstrated that the loss of his legal materials prevented him from pursuing a non-frivolous claim concerning his criminal prosecution or the conditions of confinement. Therefore, he has failed to state a claim that he was denied access to the courts.

Retaliation

Plaintiff contends defendant Pille retaliated against him for filing a grievance against defendant Joseph. “An action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate.” *Woods v. Smith*, 60 F.3d 1161, 1165 (5th Cir. 1995). Retaliation, though it is not expressly referred to in the Constitution, is nonetheless actionable because retaliatory actions may tend to chill an individual’s exercise of constitutional rights. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). However, retaliation is actionable only if the retaliatory act “is capable of deterring a person of ordinary firmness from further exercising his constitutional rights.” *Bibbs v. Early*, 541 F.3d 267, 270 (5th Cir. 2008).

To establish a retaliation claim, an inmate must prove: (1) he was exercising a specific constitutional right, (2) the defendant intended to retaliate against the inmate for exercising that right, (3) a retaliatory adverse act, and (4) causation. *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006).

Conclusory allegations are insufficient to establish a retaliation claim. *Woods*, 60 F.3d at 1166. The inmate must either produce direct evidence of motivation or allege a chronology of events from which retaliation may be plausibly inferred. *Allen v. Thomas*, 388 F.3d 147, 149 (5th Cir. 2004).

Plaintiff meets the first prong of the test because he alleges he was exercising his constitutional rights to file a grievance. However, plaintiff has failed to allege that the defendant intended to retaliate against him. There are no direct allegations of motivation, and plaintiff failed to allege a chronology of events from which retaliation may be inferred.

Personal Involvement

Plaintiff must enunciate a set of facts that illustrate the defendant's participation in the alleged wrong. *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986). Plaintiff's pleadings do not allege that defendant Stephens, the Director of the Texas Department of Criminal Justice, was personally involved in the incidents that form the basis of the complaint. Plaintiff acknowledges that he sued defendant Stephens based on his position as a supervisor. Under § 1983, supervisory officials are not liable for subordinates' actions on any vicarious liability theory. *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002). A supervisor may be held liable only for implementing a policy that repudiates constitutional rights and the policy is the moving force of the constitutional violation. *Id.*

In this case, plaintiff did not allege any factual basis to hold defendant Stephens liable in his capacity as a supervisor. Therefore, the claims against defendant Stephens should be dismissed as frivolous and for failure to state a claim upon which relief may be granted.

Recommendation

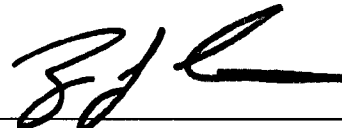
This civil rights action should be dismissed with prejudice pursuant to 28 U.S.C. § 1915(e) as frivolous and for failure to state a claim upon which relief may be granted.

Objections

Within fourteen days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 2nd day of October, 2015.

A handwritten signature in black ink, appearing to read 'Zack Hawthorn', written over a horizontal line.

Zack Hawthorn
United States Magistrate Judge

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