1992 WL 359633
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

Curtis AVANT, Plaintiff,
v.
Everett S. RICE and Pinellas County Jail,
Defendants.

Nos. 91–748–CIV–T–17A, 91–1011–CIV–T–17C and 91–1012–CIV–T–17A. | Nov. 19, 1992.

Attorneys and Law Firms

Curtis Avant, Pro se

Robert F. Jagger, Pinellas County Attorney's Office, Clearwater, Fla., for defendant.

Opinion

ORDER

KOVACHEVICH, District Judge.

***1** *Pro se* prisoner Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983 and an Affidavit of Indigency seeking to proceed *informa pauperis* on June 14, 1991. The Court granted Plaintiff's motion to proceed *in forma pauperis* on June 26, 1991. Plaintiff was not assessed, and did not pay, a partial filing fee.

On September 6, 1991, the Court determined that Case No. 91–1011–CIV–T–17C and Case No. 91–1012–CIV–T–10A presented common questions of fact or law. Accordingly, Case No. 92–1012–CIV–T–10A was transferred to the Honorable Elizabeth A. Kovachevich, and pursuant to Local Rule 1.04(b), M.D. Fla. Rules, the cases were consolidated for all further proceedings. On October 16, 1991, Case No. 91–1011–CIV–T–17C and Case No. 91–1012–CIV–T–17A were consolidated with this case, Case No. 91–748–CIV–T–17A.

In the style of Case No. 91–1011–Civ–T–17C, Plaintiff named Everett S. Rice and Pinellas County Jail as Defendants. In the body of the complaint, Plaintiff named only Everett S. Rice as Defendant. Likewise, in the style of Case No. 91–1012–Civ–T–17A, Plaintiff named Everett S. Rice and Pinellas County Jail as Defendants. In the body of the complaint, Plaintiff named only Everett S. Rice as Defendant.

On November 1, 1991, Plaintiff filed an amended complaint in this case. In the style of the amended complaint, Plaintiff names as Defendants Everett S. Rice, Charles Feldon [sic], John Doe, Shift Sargent [sic], John Doe, Officer Sanford, Officer Johnson. In the body of the amended complaint, Plaintiff named the same Defendants. Only Everett S. Rice has been served.

Plaintiff alleges that Defendants violated his constitutional rights because they opened his legal mail outside of his presence. Plaintiff asserts that his legal mail was opened before it was delivered to him on March 18, 1991, April 17, 1991, May 16, 1991, June 24, 1991 and June 27, 1991. Plaintiff claims that he filed grievances with the jail on four separate occasions regarding the aforementioned incidents. At the time of the alleged constitutional violations, Plaintiff was a pre-trial detainee at the Pinellas County Jail.

Also on November 1, 1991, in accordance with the Consent Degree entered into in *Davis v. Roberts,* Case No. 75–411–CIV–T–GC, on November 2, 1979, the Court forwarded the Plaintiff's complaint in this case and each of the consolidated cases to Marcellas Durham, the Court Monitor in the *Davis* case.

In *Davis v. Roberts,* inmates brought an action alleging unconstitutional conditions and practices at the Pinellas County Jail. *Davis* was certified as a class action; the class consisted of all present and future inmates of the Pinellas County Jail. The Consent Decree ultimately agreed upon and entered by the Court provided for the appointment of a Monitor. The Monitor's purpose is to insure compliance with the decree and to file periodic reports with the Court. The decree provides that:

> Any violations will be specifically designated in those reports which shall be followed by a special compliance report, within thirty (30) days after receipt of the notice of violation ...

***2** and that:

> The Court shall retain jurisdiction of this cause for the purpose of enforcing the executory provisions of this agreement. The Court shall also conduct a periodic review of the efforts made to comply with this agreement every six months until further order of the Court.

The proper procedure regarding prisoner mail was

addressed in Section VI *VISITATION AND COMMUNICATION,* paragraph D on page 11 of the Consent Decree:

> D. The following procedures shall be instituted in regard to the processing of incoming and outgoing mail:
>
> 1) There will be no opening or other interference with any outgoing mail to any Court, Attorney, or Public Official.
>
> 2) There will be no opening or other interference with any incoming mail received from any Court, Attorney or Public Official except to open and inspect it for contraband in the involved inmate's presence.
>
> 3) All other incoming and outgoing mail shall be inspected for contraband or any attempts to formulate, devise or otherwise effectuate a plan to escape or introduce contraband into the County Jail.
>
> 4) Inmate mail shall be delivered to inmates on each weekday from Monday through Friday.
>
> 5) Inmates who are indigent upon request shall be provided with writing materials, envelopes and a minimum of two stamps per week for the purpose of sending letters.

Thus, the subject matter of which Plaintiff complains is addressed by the consent decree and Plaintiff is bound by the terms of the consent decree. Accordingly, the Court directed the Monitor to investigate Plaintiff's complaint and include his findings in his quarterly report for that visit.

On March 18, 1992, Defendant Rice filed a Motion To Dismiss (Doc. No. 19). On April 24, 1992, the Court denied Defendant Rice's Motion to Dismiss without prejudice to refiling after Plaintiff responded to the Monitor's report.

On June 20, 1992, the Court Monitor filed his report. The report stated the following conclusions as to Plaintiff's complaints:

> Because of the lapse in time since these complaints were made and responded to by the correctional staff, it is doubtful if any additional credible information could be developed in this case.
>
> The present policy of recording incoming and outgoing legal mail should prevent the occurrence of mail tampering charges in the future.
>
> Corrective action was taken in inmate Avant's case and that action appears to have been adequate.

The Monitor recommended the following actions:

> That this complaint be closed for insufficient evidence.
>
> That the Count(sic) files be closed without further action based on insufficient evidence.

On April 29, 1992, Plaintiff filed his response and opposition to the Monitor's report. Plaintiff alleged that the Monitor's report did not address any investigation into Plaintiff's allegations and did not recommend any administrative action to resolve Plaintiff's complaint. Plaintiff alleged that Defendant was in contempt of Court and also stated that Plaintiff "still desires to prosecute this claim for damages."

***3** On May 7, 1992, Plaintiff filed a Motion For Sanctions against "Defendant and or Pinellas County Sheriff Department" alleging that Defendants disregarded a Court order "from the Honorable Judge Elizabeth A. Kovachevich ordering the defendant to resolve the Plaintiff's complaint by means of an Administrative Action." Plaintiff alleged that Defendant "sent Plaintiff a sham report of the Monitor's investigation" (Doc. No. 24). Accordingly, Plaintiff requested that the Court assess sanctions against Defendants.

Plaintiff included with his Motion for Sanctions an enclosure entitled "Exhibit A". Exhibit A is a two page copy of a "State of Florida Department of Corrections" interoffice memorandum. The memorandum concluded with the following statement:

> "The information which was generated during this inquiry, has been sufficient to show that jail staff did open Inmate AVANT's legal mail outside of his presence, in violation of Chapter 33–8.009(4)(b) of the Florida Administrative Code and applicable Florida Statutes.

The memorandum also stated:

> Inspectors Virgil Choate and Tim Yaw interviewed Inmate AVANT, at the Pinellas County Jail Maximum Security Unit, on September 16, 1991, and he stated that he was satisfied that the legal mail problem had been resolved, and would not happen again."

The memorandum, dated October 8, 1991, was signed by Glenn E. Sellers, Correctional Officer Inspector II. Plaintiff disputes the above-quoted statement that he "was

satisfied" and states that those were Inspector Tim Yaw's words, not his.

On June 1, 1992, Defendant Rice filed a Motion To Dismiss the Amended Complaint for failure to state a claim (Doc. No. 25). Defendant Rice asserts that pursuant to Rule 12(b), F.R.C.P. the complaint should be dismissed on the following bases:

> 1. The complaint fails to state a claim upon which relief can be granted in that the Defendant, Everett S. Rice, is entitled to qualified immunity from this action.
>
> 2. The complaint fails to state a claim, pursuant to 42 U.S.C. § 1983.

On July 27, 1992, the Court entered an Order advising Plaintiff that he had twenty days to respond to Defendant Rice's Motion To Dismiss (Doc. No. 27).

On August 13, 1992, Plaintiff filed an "Opposition to Defendants Motion To Dismiss" and requested summary judgment in his favor (Doc. No. 28). Plaintiff's "Opposition" consists of nineteen numbered statements. Plaintiff does not dispute Defendant's contention that the complaint fails to state a claim, nor does Plaintiff dispute Defendant's argument that Everett S. Rice is entitled to qualified immunity. Instead, Plaintiff complains about a variety of topics.

It appears that Plaintiff believes that the Court is prohibited from considering Defendant's Motion to Dismiss because Plaintiff filed a "Rejection to the Monitor's Report," an "Objection to Court Order," and a "Motion for Sanctions" prior to Defendant's filing his Motion To Dismiss Amended Complaint. Paragraph (6) of the Plaintiff's "Opposition" states:

> ***4** (6) reminding the Court that said documents were on record before the filing of the defendant's motion to dismiss, dated May28,(sic) 1992. "What legal right do the Court have, or any member of the court, have to threaten the Plaintiff with dismissing this case? when the Courts are in violation of its own laws.

And paragraph (11) states:

> (11) As of this date, I, plaintiff, have not received a response from either of the three notorized(sic) and certified documents. "Therefore, the defendant and the courts are in direct conspiricy(sic) against the plaintiff; or the defendant is still tampering with the plaintiff's legal mail. The last three Court Orders appear to be falcified(sic). All three Court Orders, dated March 23, 1992, April 24, 1992[1] and July 27, 1992, are all stating fraud and disceptions (sic). Novembers(sic) Court Order is dated November 1, 1991, and not November 1, 1992. It would appear that the courts are attempting to erase the date of the original November 1, 1991 Court Order off the records.

DISCUSSION

Plaintiff's amended complaint lists the dates on which he alleges that his legal mail was opened prior to his receiving it. The amended complaint also lists the dates which Plaintiff filed grievances in response to the alleged opening of his legal mail. The amended complaint then alleges:

> 15. Everett S. Rice is the Sheriff of Pinellas County and as such, he, is required to instruct and oversee all operations of the Sheriff's Department of which Pinellas County Jail is one. He is to monitor all problems connected with the operation of the jail including but not limited to inmate grievances, through his subordinate, Charles Feldon, Director Pinellas County Jail.
>
> 16. Charles Feldon, Director, Pinellas County Jail, has the responsibility, under Everett S. Rice, for the operation of the County Jail Facility, and for instructing all correctional officers in his employ in the proper methods of conducting themselves as required by law, and is to report to Sheriff Rice regarding the carrying out of these duties. He is also responsible for monitoring problems connected to the operation of this facility, including but not limited to inmate legal mail and inmate grievances.
>
> 17. Shift Commander or Commanders, John Doe between 12–2–90 and 6–26–91, responsible for the inmate mail and insuring that the officers who handle it are aware of the laws regarding these procedures. They in turn must report to the Director that these men are trained in the proper procedure. Any problems, grievances reported, must be investigated and if wrong corrected.
>
> 18. Shift Sargent or Sargents, John Doe between 12–2–90 and 6–26–91 are also responsible for inmate mail and insuring that the officers who handle it are aware of the laws regarding these procedures. They in turn must report to the Shift Commander or Commanders that these men are trained in the proper procedure. Any problems, grievances reported must be investigated and if wrong corrected.
>
> ***5** 19. Officers Johnson, MSC and Sanford, MAX, who work as the mail officers and report to the Shift Sargents respectively are or should be trianed (sic) in

> the proper procedure concerning inmate legal mail, as they are acting under the color of law of the State of Florida County of Pinellas. They have continuously violated my Constitutional Rights by opening my legal mail out of my presence and prior to delivery to me.

Paragraphs fifteen, sixteen, seventeen and eighteen allege that Everett S. Rice, Charles Felton, Pinellas County Jail Shift Commanders and Shift Sargents have various duties. Plaintiff does not allege that any of these individuals violated their alleged duties or personally committed any offense against Plaintiff.

STANDARD FOR DISMISSAL

For purposes of a Motion to Dismiss, the Complaint is construed in the light most favorable to Plaintiff and its allegations are taken as true. 5 C. Wright and Miller, Federal Practice and Procedures 1357 (1969). Additionally, *pro se* complaints are to be read with especial liberality. *Dickinson v. Chief of Police,* 499 F.2d 336 (5th Cir.1974).

Plaintiffs "[m]ay not avoid dismissal, however, simply by attaching bare legal conclusions to narrated facts which fail to outline the bases of their claims". *Study v. United States,* 782 F.Supp. 1293 (1991) (citing *Sutliff, Inc. v. Donovan Companies,* 727 F.2d 648, 654 (7th Cir.1984)).

STANDARD FOR FRIVOLITY

A prisoner complaint is frivolous under section 1915(d) "where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams,* 490 U.S. 319, 325 (1989). A complaint filed *in forma pauperis* which fails to state a claim under Fed.R.Civ.P. 12(b)(6) is not automatically frivolous. *Id.* at 328. Section 1915(d) dismissals should only be ordered when the legal theories are "indisputably meritless", *Id.* at 327, or when the claims rely on factual allegations which are "clearly baseless." *Denton v. Hernandez,* 112 S.Ct. 1728, 1733 (1992).

Plaintiff's claims against Sheriff Everett S. Rice, Charles Felton, Direction of Pinellas County Jail and "Shift Commanders–John Doe, or Shift Sargents–John Doe "

It appears that Plaintiff is attempting state a claim against Sheriff Rice and the other Defendants listed above based on the doctrine of *respondeat superior.* As noted in *Van Poych v. Dugger,* 779 F.Supp. 571 (Fla.1991), *respondeat superior* has clearly been rejected as a theory of recovery under section 1983. Defendants allege in their Memorandum of Law in Support of Defendants' Motion To Dismiss Amended Complaint [hereinafter Support Memorandum] states:

> EVERETT S. RICE is not alleged to have been directly involved in or deliberately indifferent to the conduct complained of. Liability will not be found under Section 1983 on the basis of respondeat superior from mere negligence. *Monell v. N.Y. City Dept. of Social Service,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1976); *Brown v. Hughes,* 894 F.2d 1533, 1537 (11th Cir.1990).
>
> ***6** Before a prison official can be civilly liable for an alleged constitutional violation under Section 1983, there must be allegations that he actively participated in the violation of the prisoner's rights, or had knowledge of such violation and tolerated others' misconduct or was indifferent to them to a degree sufficient to constitute deliberate indifference. *Id.* at 1537.

Defendants further allege that:

> Plaintiff fails to allege facts establishing that the conduct he complains of is so common and well settled as to represent a customary practice which fairly represents official policy. *Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir.1984) (interpreting the municipal liability standard in *Monell v. Department of Social Services,* 436 U.S. 658 [1978]); *Bennet v. City of Slidell,* 735 F.2d 861, 862 (5th Cir.1984). Therefore, the causation element required under a Section 42 U.S.C. § 1983 action against Defendant is not met.

Plaintiff should be aware that *respondeat superior,* without more, does not provide a basis for recovery under section 1983. *Polk County v. Dodson,* 454 U.S. 312, 325 (1981); *Tittle v. Jefferson County Commission,* 966 F.2d 606 (11th Cir.1992); *Harvey v. Harvey,* 949 F.2d 1127, 1129 (11th Cir.1992) (citing *Monell v. Department of Social Services,* 436 U.S. 658 (1978)); *Greason v. Kemp,* 819 F.2d 829, 836 (11th Cir.1990). *See Collins v. City of Harker Heights,* 503 U.S. 115, 112 S.Ct. 1061 (1992); *Pacific Mutual Life Insurance Company v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032 (1991); *Pembaur v. City of Cincinnati, et al.,* 475 U.S. 469 (1986).

Although personal participation is not specifically required for liability under section 1983, there must be

some causal connection between the defendant named and the injury allegedly sustained. *Rivas v. Freeman,* 940 F.2d 1491, 1495 (11th Cir.1991); *Zatler v. Wainwright,* 802 F.2d 397, 401 (11th Cir.1986) (per curiam).

Accordingly, Plaintiff has stated no cause of action against these Defendants. Defendant Rice's motion to dismiss will be granted. Plaintiff's claims against the other Defendants set out above will be dismissed as frivolous because they have no basis in law.

Plaintiff's claims against Pinellas County Jail

The Pinellas County Jail is a detention facility under the direction and operation of the Pinellas County Sheriff. The jail is not an actionable legal entity because it does not enjoy a separate legal existence independent of the County or the Sheriff's Office. *Mayes v. Elrod,* 470 F.Supp. 1188, 1192 (N.D.Ill.1979). The capacity of a governmental corporation to be sued in federal Court is governed by the law of the state in which the District court is located. *Dean v. Barber,* 951 F.2d 1210, 1214 (11th Cir.1992).

Pursuant to Chapter 30, Florida Statutes (1991), Florida Sheriffs of their respective counties are subject to suit. Further, Florida Sheriffs are subject to suit under 42 U.S.C. § 1983. *Ortega v. Schramm,* 922 F.2d 684, 694 (11th Cir.1991) (citing *Hufford v. Rodgers,* 912 F.2d 1338, 1342 (11th Cir.1990)). Accordingly, Florida law does not recognize a jail facility as a legal entity separate and apart from the Sheriff charged with its operation and control. Therefore, Plaintiff's claims against the jail will be dismissed as frivolous.

Plaintiff's claims against Officers Johnson and Sanford

***7** In paragraph nineteen, Plaintiff alleges that two employees of the Pinellas County Jail were acting "under color of law of the State" and that they violated Plaintiff's "Constitutional Rights" by opening his legal mail out of his presence prior to delivery.[2] Plaintiff has made no attempt to serve these Defendants. Therefore, Plaintiff's claim against these Defendants will be dismissed for failure to prosecute. Accordingly, the Court orders:

1. That Defendant Rice's Motion To Dismiss (Doc. No. 25) is granted. Further, Plaintiff's claims against Defendants Felton, John Does and the Pinellas County Jail are dismissed as frivolous. Plaintiff's claims against Defendants Sanford and Johnson are dismissed, *without prejudice,* for failure to prosecute. The Clerk is directed to enter a judgment in favor of the Defendants and to close this case.

2. That Plaintiff's Motion For Sanctions (Doc. No. 24) is denied. The motion is without merit.

3. That Plaintiff's request for summary judgment (Doc. No. 28) is denied as moot.

4. That Case No. 91–1011–CIV–T–17C and Case No. 91–1012–CIV–T–17A are also dismissed. The Clerk is directed to close these cases.

[1] In these orders, the Court incorrectly referred to its order of November 1, 1992, rather than November 1, 1991. The typographical error does not affect Plaintiff's substantive claims in this case.

[2] In any § 1983 action, the initial inquiry must focus on whether the two essential elements to a § 1983 action are present:

> 1. whether the conduct complained of was committed by a person acting under color of state law; and
>
> 2. whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Parratt v. Taylor, 451 U.S. 527, 535 (1981); *Tillman v. Coley,* 886 F.2d 317, 319 (11th Cir.1989); *Barfield v. Brierton,* 883 F.2d 923, 934 (11th Cir.1989); *Cornelius v. Town of Highland Lake, Alabama,* 880 F.2d 348, 352 (11th Cir.1989).