Affirmed in part; Reversed and Remanded in part; and Majority and Concurring Opinions filed December 14, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00563-CV

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OWEN T. GORDY, Appellant

V.

GARY JOHNSON and BETTY NIXON, Appellees

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 20,429-C

M A J O R I T Y O P I N I O N

Appellant Owen T. Gordy, an inmate, appeals the trial court's decision to dismiss his complaint against Gary Johnson, director of the Texas Department of Criminal Justice – Institutional Division ("TDCJ-ID"), and Betty Nixon, a prison guard, as frivolous. We affirm, in part, and reverse and remand, in part.

Background and Procedural History

Gordy is an inmate at TDCJ-ID's Estelle Unit, and Nixon is a guard at that facility. Gordy filed suit against Johnson and Nixon alleging that his civil rights had been violated under 28 U.S.C. § 1983 and the Texas Tort Claims Act. Gordy complained that the Estelle Unit employs a practice of "strip searching" inmates which promotes "acts of misconduct by female officers ranging from unprofessional comments" to "open stares" by the female guards. Gordy claimed, in particular, that Nixon persistently asked him to "strip for her," despite the fact that male guards were present, in violation of a TDCJ-ID policy which "forbids female officers to strip search male inmates" in non-emergency situations. Gordy argued that the strip searches violated his constitutional right to be free from unreasonable searches under the Fourth Amendment, and that they constituted cruel and unusual punishment in violation of the Eighth Amendment as well.

The trial court ordered an evidentiary hearing under the Section 14.008 of the Texas Civil Practice and Remedies Code to determine whether there was an arguable basis in fact and in law for Gordy's asserted claims. Following that hearing, the trial court dismissed Gordy's claims with prejudice on the grounds that his complaint was "frivolous" and had "no arguable basis in law or in fact." Gordy appeals and maintains that the trial court erred in dismissing his case. The appellees have not filed a brief in response to Gordy's claims.

Standard of Review

As an inmate, Gordy's suit is governed by Chapter 14 of the Texas Civil Practice and Remedies Code. *See* Act of June 8, 1995, 74th Leg., ch. 378, § 2, 1995 Tex. Gen. Laws 2921-27; *see also Thompson v. Henderson*, 927 S.W.2d 323, 324 (Tex. App.—Houston [1st Dist.] 1996, no writ) (noting that, effective June 8, 1995, the dismissal of inmate lawsuits is governed by Sections 14.001–.014 of the Texas Civil Practice and Remedies Code). Under this Chapter, a trial court has "broad discretion" to dismiss an inmate's suit if it finds that the claim is frivolous or malicious. *See Martinez v. Thaler*, 931 S.W.2d 45, 46 (Tex.

App.—Houston [14th Dist.] 1996, writ denied); *see also Lentworth v. Trahan*, 981 S.W.2d 720, 722 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing TEX. CIV. PRAC. & REM. CODE § 14.003(a)(2)). A trial court's dismissal of an action as frivolous or malicious is subject to review under an abuse of discretion standard. *See Martinez*, 931 S.W.2d at 46. In that regard, a trial court abuses its discretion if it acts arbitrarily, capriciously, and without reference to any guiding rules or principles. *See id.* In this context, dismissal of such a suit is proper if the claims lodged therein have no basis in law or fact. *See id.*

In reviewing the trail court's determination, we review and evaluate *pro se* pleadings by standards less stringent than those applied to formal pleadings drafted by lawyers. *See Lentworth*, 981 S.W.2d at 722. Further, we take all of the allegations in the inmate's petition as true. *See Harrison v. Texas Dept. of Criminal Justice - Institutional Div.*, 915 S.W.2d 882, 888 (Tex. App.—Houston [1st Dist.] 1995, no writ).

Prison Strip Searches

Gordy argues that the trial court erred in dismissing his petition because the manner in which Nixon was allowed to strip search him violated TDCJ-ID administrative policies and his Fourth Amendment rights. Gordy points out that TDCJ-ID Administrative Directive No. 03.22 prohibits strip searches of inmates by staff of the opposite gender, unless "extraordinary circumstances" are present or are otherwise approved by the unit warden. Notwithstanding this policy, Gordy alleges that Nixon, a female guard, routinely conducted strip searches of male inmates in the absence of extraordinary circumstances and despite the fact that male officers were available during those times.

The state courts have been silent on the precise issue raised by Gordy. By contrast, the United States Court of Appeals for the Fifth Circuit has held that, in the absence of an emergency or extraordinary circumstances, strip searches of male inmates conducted by female guards may form the basis for a Fourth Amendment violation. *See Moore v. Carwell*, 168 F.3d 234, 237 (5th Cir. 1999). Assuming that Gordy's allegations are true, his claim is therefore not frivolous or without an arguable basis in law or fact, and so the trial court erred

in dismissing his claim under the Fourth Amendment. Gordy's first, second, and third points of error are therefore sustained to that extent.

The Fifth Circuit has also recognized, however, that, while complaints such as those made by Gordy may be actionable under the Fourth Amendment, those allegations do not form a claim under the Eighth Amendment as a matter of law. *See Moore*, 168 F.3d at 237. Accordingly, the trial court correctly dismissed Gordy's Eighth Amendment claim. Gordy's contentions to the contrary are therefore overruled.

Moreover, to the extent that Gordy has alleged a claim against two state employees in their individual capacity under the Texas Tort Claims Act, that claim also fails as a matter of law. The Texas Tort Claims Act does not provide for recovery against individuals employed by the state. *See Aguilar v. Chastain*, 923 S.W.2d 740, 744 (Tex. App.—Tyler 1996, writ denied); *Perales v. S.O. Kinney*, 891 S.W.2d 731, 733 (Tex. App.—Houston [1st Dist.] 1994, no writ). Therefore, Johnson and Nixon, as state employees, were not proper parties to this suit to the extent that they were being sued under the Act, and the trial court did not err when it dismissed those claims.

Based on the foregoing, the trial court's decision to dismiss Gordy's petition is affirmed in part, as to Gordy's claims under the Eighth Amendment and the Texas Tort Claims Act, and reversed and remanded in part, as to Gordy's claim under the Fourth Amendment.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed December 14, 2000.
Panel consists of Justices Anderson, Fowler and Edelman. (Justice Edelman concurring).
Do Not Publish — TEX. R. APP. P. 47.3(b).

Affirmed in Part, Reversed and Remanded in Part, and Majority and Concurring Opinions filed December 14, 2000.

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C O N C U R R I N G O P I N I O N

With regard to Gordy's claim under the Texas Tort Claims Act (the "Act"), the majority opinion correctly cites cases which have held that state employees are not proper parties to suits for recovery under the Act. However, if those cases are correct that governmental employees are not even proper parties to such suits, then it is not apparent to me why, for example: (1) official immunity exists as an affirmative defense to protect governmental employees from personal liability and only where its conditions are proved;[1] (2) the Act states

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[1] *See, e.g.*, *University of Houston v. Clark*, 22 S.W.3d 915, 918 (Tex. 2000) ("Official immunity is an affirmative defense that protects governmental employees from personal liability. . . . A

that to the extent an employee has individual immunity from a tort claim for damages, that immunity is not affected by the Act;[2] (3) the Act states that a judgment or settlement in an action under the Act bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim.[3] If a governmental employee is not a proper party to a suit under the Act, this body of law pertaining to such an employee's liability and immunity would seem unnecessary. Conversely, to the extent that the defect in this case is the nonjoinder of a governmental unit as a defendant,[4] dismissal could have been an appropriate remedy, if at all, only if such an entity could not be joined, which has not been demonstrated in this case. *See Cooper v. Texas Gulf Industries, Inc.*, 513 S.W.2d 200, 204 (Tex. 1974). Therefore, although I agree that there is authority to support the holding of the majority opinion, its underlying legal rationale seems to be at odds with other aspects of the law concerning the Act.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed December 14, 2000.

Panel consists of Justices Anderson, Fowler, and Edelman.

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governmental employee is entitled to official immunity: (1) for the performance of discretionary duties; (2) within the scope of the employee's authority; (3) provided the employee acts in good faith.").

2 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.026 (Vernon 1997).

3 *See* id. § 101.106.

4 *See id.* § 101.102(b) ("The pleadings of the suit must name as defendant the governmental unit against which liability is to be established.").