

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

United States Court of Appeals
Fifth Circuit

FILED

December 30, 2009

Charles R. Fulbruge III
Clerk

No. 09-40319

Summary Calendar

OLEGARIO PUGA-OLMOS,

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA; BUREAU OF PRISONS,

Defendants - Appellees

Appeal from the United States District Court
for the Eastern District of Texas
No. 1:08-CV-362

Before DeMOSS, PRADO, and HAYNES, Circuit Judges.

PER CURIAM:*

Olegario Puga-Olmos (Puga), federal prisoner # 39505-037, filed suit for damages and injunctive relief, pursuant *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Federal Tort Claims Act (FTCA), asserting that the United States of America and the Bureau of Prisons had acted with deliberate indifference to his serious medical needs and negligently with regard to the treatment of his injured shoulder. Puga has not

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

shown that the district court erred in concluding that Puga could not assert a claim for damages against the defendants under *Bivens*, as those parties were not individuals. *See Bivens*, 403 U.S. at 395-97; *Affiliated Prof'l Home Health Care Agency v. Schalala*, 164 F.3d 282, 286 (5th Cir. 1999). Nor has he shown that the district court erred in determining that the FTCA claim was premature because Puga had not exhausted his administrative remedies prior to the institution of the action. *See McNeil v. United States*, 508 U.S. 106, 111-12 (1993); 28 U.S.C. § 2675(a) (2006).

Because the appeal is frivolous, it is DISMISSED. *See Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2. The dismissal of this appeal as frivolous counts as a strike under 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996). We CAUTION Puga that if he accumulates three strikes under § 1915(g), he will not be able to proceed in forma pauperis 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).