

Opinion issued April 28, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00505-CV

TIMOTHY PAUL MARTIN, Appellant¹

**On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 2004-51912**

MEMORANDUM OPINION

Timothy Paul Martin, an inmate,² filed suit alleging various causes against

¹ There are no “appellees” in this case. The suit was dismissed prior to service of citation.

² Texas Department of Criminal Justice, Institutional Division (“TDCJ-ID”).

David Turrubiarte (an Assistant Warden)³, Juan Torres and Joe Potts (fellow inmates), Douglas Geist, Thomas R. Brennan, Debbie Monroe, and Oscar Torres (prison employees), and the Brazoria County District Attorney. Because he filed *in forma pauperis*, the lawsuit is subject to Civil Practice and Remedies Code Chapter 14, which addresses inmate litigation.⁴ The trial court dismissed Martin’s claims against all defendants with prejudice. We affirm.

BACKGROUND

Martin filed his suit in the trial court on April 2, 2009.⁵ According to his pro se appellate brief, in July 2008, Martin was transferred to the Ramsey 1 Unit in Rosharon, Texas and assigned to the Gang Renunciation and Disassociation (“GRAD”) program. According to Martin, participation in the GRAD program is a privilege and benefit in that prisoners who successfully complete the program earn release into the general prison population and generally have a better chance of

³ TDCJ-ID’s Ramsey 1 Unit.

⁴ *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.002 (Vernon 2002).

⁵ We note that several of the documents filed by Martin have various, earlier dates listed within the body of the documents, indicating that they may have been written prior to April 2, 2009. However, Martin does not argue that the April 2, 2009 file stamp is incorrect, nor does he provide any information regarding how the documents came to be filed with the trial court. The record does not contain any documentation or other indication that Martin’s petition should have been deemed filed on a different date. *See, e.g., Ramos v. Richardson*, 228 S.W.3d 671, 673 (Tex. 2007) (holding that petitioner had burden of “providing some measure of proof” regarding date of filing of notice of appeal and holding that “filing letter” accompanying notice of appeal that stated date notice was placed in prison’s outgoing mail constituted such proof).

being paroled.

Among the many factual allegations set forth in Martin's petition are several arguments with his cellmate and fellow GRAD member, Juan Torres, who, Martin alleges, challenged him to a fight. According to his petition, Martin was concerned by the prospect of violence and made a written request to Officers Brennan and Geist for a new cell assignment. When neither officer acted on his request, Martin filed a grievance against them for "neglecting to act on the complaint."

Three days later, Officer Geist called Martin and Torres from their cell for questioning. Martin alleges that the prisoner in the next cell, Joe Potts, then told Torres to tell Geist that Martin had threatened Torres. Martin told Potts "to get out of [Martin's] business." Martin was then guided out into the hall where Geist was waiting.

Martin alleges that Geist asked, "So you filed a grievance, huh? Well, what if I just say you created a disturbance then write you a case?" Martin replied that he would send a letter to the Brazoria County District Attorney, file a complaint, and file a lawsuit. According to Martin's petition, Geist responded, "Then I'm putting you in ad[ministrative] Seg[regation] and kicking you out of GRAD." Martin contends Geist then turned to the other inmate, Torres, and told him, "He wrote a grievance [J]ust say he threatened you." Martin was then handcuffed and escorted to a solitary confinement cell.

According to Martin, Geist wrote up a disciplinary complaint against Martin for “creating a disturbance by telling Potts to find himself some business.” After a hearing before Major of Correctional Officers Armstrong, Martin was found guilty of this disciplinary charge. His classification was reduced; he was removed from the GRAD program and returned to Administrative Segregation for fifteen days, where he was “confined to a cell practically 24 hours a day, as he had been prior to GRAD for about 8 continuous [years]”; and he was subjected to restrictions on his access to the commissary. Martin contends that the disciplinary case was adjudicated in violation of Due Process “to [the] extent that, the evidence presented contradicted itself and showed Geist’s testimony lacked trustworthiness and the evidence constituted circumstantial evidence that Geist had issued the case to retaliate against [Martin]” and had pre-determined Martin’s guilt.

Martin makes numerous additional allegations, including accusing Captain O. Torres and other officers of neglecting their “duties to prevent the disciplinary case.” He also references an additional “step one” grievance he subsequently filed when prisoners “yelled at him . . . and threatened to get [him] when they could” and the “step two” grievance he filed when his step one grievance was denied by Assistant Warden Turrubiarte. In addition, he alleges that the Ramsey prison unit is bug-infested and unsanitary and that it violates due process of law and constitutes cruel and unusual punishment. He also complains about the

temperature in the prison and alleges further constitutional violations against the prison officials. In addition, he alleges that Potts and Torres violated their fiduciary duty to him, apparently arising from their status as fellow inmates, and accuses them of negligence. Martin further contends that the defendants are responsible for “Criminal Solicitation, in violation of the [Texas] Penal Code § 39.02” and “Official Oppression in violation of the Penal Code § 39.03.” Finally, he claims “the Criminal District Attorney for Brazoria County neglected his duty to investigate Martin’s retaliation claims against [defendant] Monroe and so is liable under [Civil Practice and Remedies] Code § 7.001(a) for neglecting his duties.” Martin seeks damages on his claims, injunctive relief restoring his rights and privileges, release to the prison population at the Cleveland unit so that he may enroll in its business program, and transfer to another state to serve the remainder of his time.

With his petition, Martin filed a declaration describing his numerous previous lawsuits and several declarations of exhausted administrative remedies. His first declaration of exhausted remedies related the grievance process he followed regarding his complaints that Geist and Brennan failed to change his cell assignment. The declaration and accompanying grievance records show that Martin received the final denial of this grievance on December 23, 2008. Another declaration of exhausted administrative remedies detailed the grievance process he

followed regarding his complaint that “prisoners at the Ramsey unit [were subjected] to extreme heat in the summer by neglecting to install air chillers or conditioners.” This declaration and the accompanying written grievance decisions indicate that Martin received the final response to his grievance on February 20, 2009. The third declaration detailed the grievance process he followed regarding his retaliation claim. This declaration and accompanying grievance decisions indicate that he received the final response to his retaliation grievance on December 19, 2008. Finally, Martin also filed a declaration and copies of the written grievance decision regarding his complaints about prison conditions, including a roach infestation. This declaration and accompanying grievance decision indicate that Martin received the written decision on January 22, 2009.

The trial court, without conducting an evidentiary hearing and prior to service of process, dismissed Martin’s claims for failure “to state a cause of action as a matter of law.”

MARTIN’S APPEAL TO THIS COURT

In one issue, Martin contends that the trial court abused its discretion when it dismissed his petition prior to service of process and without a hearing and that the dismissal “involved incorrect conclusions of law.”

Chapter 14 of the Texas Civil Practice and Remedies Code applies to an inmate’s *in propria persona* claim in a suit in which an affidavit or unsworn

declaration of inability to pay costs is filed by the inmate. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.002 (Vernon 2002). When an inmate files an unsworn declaration of inability to pay, the trial court has broad discretion to dismiss the suit as frivolous or malicious. *Id.* § 14.003(a)(2); *Thomas v. Knight*, 52 S.W.3d 292, 294 (Tex. App.—Corpus Christi 2001, pet. denied); *Lentworth v. Trahan*, 981 S.W.2d 720, 722 (Tex. App.—Houston [1st Dist.] 1998, no pet.). To establish an abuse of discretion, the inmate must show that the trial court’s action was arbitrary or unreasonable in light of all the circumstances in the case. *Thomas*, 52 S.W.3d at 294. However, while dismissals of inmate litigation under Chapter 14 are generally reviewed for an abuse of discretion, the question of whether there was an arguable basis in law for an inmate’s claims is reviewed de novo. *Scott v. Gallagher*, 209 S.W.3d 262, 266 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Minix v. Gonzales*, 162 S.W.3d 635, 637 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Gill v. Boyd Distrib. Ctr.*, 64 S.W.3d 601, 603 (Tex. App.—Texarkana 2001, pet. denied); *Sawyer v. Tex. Dep’t of Criminal Justice*, 983 S.W.2d 310, 311 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

Failure of a prison inmate who files suit in a Texas state court pro se and who seeks to proceed *in forma pauperis* to comply with the procedural requirements of Chapter 14 will result in dismissal of the inmate’s suit. *Brewer v. Simental*, 268 S.W.3d 763, 767 (Tex. App.—Waco 2008, no pet.) (citing TEX. CIV.

PRAC. & REM. CODE ANN. §§ 14.002(a), 14.004, 14.005 (Vernon 2002) and *Bell v. Tex. Dep't of Criminal Justice—Inst. Div.*, 962 S.W.2d 156, 158 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)).

Furthermore, a court may dismiss the suit if it finds that the suit is frivolous or malicious, i.e., the claims raised in the suit have no arguable basis in law or fact. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(2), (b)(2) (Vernon 2002). However, when, as here, a trial court dismisses a claim without conducting an evidentiary hearing, the dismissal can be affirmed only if the claim has no arguable basis in law. *Retzlaff v. Tex. Dep't of Criminal Justice*, 94 S.W.3d 650, 653 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (citing *Sawyer*, 983 S.W.2d at 311). A claim has no arguable basis in law if a prisoner has failed to exhaust his administrative remedies. *Id.* (citing *Pedraza v. Tibbs*, 826 S.W.2d 695, 699–700 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.)). Dismissal with prejudice is appropriate when the case has no arguable basis in law. *See Cain v. Tex. Bd. of Pardons & Paroles*, 104 S.W.3d 215, 219 (Tex. App.—Austin 2003, no pet.).

Government Code section 501.008 provides that an inmate may not file a claim in state court regarding operative facts for which the grievance system provides the exclusive remedy until he has exhausted his remedies through the grievance system. TEX. GOV'T CODE ANN. § 501.008(d)(1) (Vernon 2004); *Smith*

v. Tex. Dep't of Criminal Justice—Inst. Div., 33 S.W.3d 338, 341 (Tex. App.—Texarkana 2000, pet. denied). “The two-step ‘Offender Grievance Program’ is the sole source of administrative remedy for TDCJ inmates.” *Crain v. Prasifka*, 97 S.W.3d 867, 868 & n.3 (Tex. App.—Corpus Christi 2003, pet. denied). An inmate must first present his complaint in a step one grievance within fifteen days of the incident, and he may appeal the ruling on the step one grievance by filing a step two grievance within fifteen days of receiving the response to his step one grievance. *See id.* at 868–69. An inmate has exhausted his administrative remedies once he receives a written response to a step two grievance. *See* TEX. GOV'T CODE ANN. § 501.008.

Regarding exhaustion of administrative remedies, section 14.005 of the Civil Practice and Remedies Code provides:

- (a) An inmate who files a claim that is subject to the grievance system established under Section 501.008, Government Code, shall file with the court:
 - (1) an affidavit or unsworn declaration stating the date that the grievance was filed and the date the written decision described by Section 501.008(d), Government Code, was received by the inmate; and
 - (2) a copy of the written decision from the grievance system.
- (b) A court shall dismiss a claim if the inmate fails to file the claim before the 31st day after the date the inmate receives the written decision from the grievance system.

TEX. CIV. PRAC. & REM. CODE ANN. § 14.005(a)–(b) (Vernon 2002).

The record demonstrates that Martin followed the two-step grievance procedure for his complaints regarding the alleged retaliation, Geist and Brennan's failure to change his cell assignment, the infestation of roaches, and extreme heat in the prison. The record further reflects that he received the final written decisions on his grievances on December 19, 2008, December 23, 2008, January 22, 2009, and February 20, 2009, respectively. Consequently, the deadlines to file his claims in the trial court were January 19, 2009, January 23, 2009, February 22, 2009, and March 23, 2009, respectively. Martin did not file his suit until April 2, 2009.

Substantially all of Martin's claims arise out of the facts associated with his allegations of retaliation, his complaints about prison disciplinary procedures, or his complaints about prison conditions.⁶ To the extent his petition presents specific

⁶ Martin also attempted to state a cause of action against two fellow inmates for breach of fiduciary duty. However, Texas law does not support such a claim. Likewise, there is no arguable basis in law for Martin's allegations against various officials for violations of the Penal Code. *See A.H. Belo Corp. v. Corcoran*, 52 S.W.3d 375, 379 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (stating that Penal Code does not create private cause of action); *see also Brown v. De La Cruz*, 156 S.W.3d 560, 567 (Tex. 2004) (“[T]oo permissive an implication of private civil actions to enforce penal acts would sometimes supplant not just the criminal law but the criminal courts as well.”). Finally, Martin's allegations against the Brazoria County District Attorney under section 7.001 of the Civil Practice and Remedies Code for neglect of the duty to investigate are not supported by any arguable basis in law because Martin did not allege that “a clerk, sheriff, or other officer . . . neglect[ed] or refus[ed] to perform a duty required under the Texas Rules of Civil Procedure or under a provision of [the Civil Practice and Remedies Code] derived from those rules. . . .” *See* TEX. CIV. PRAC. & REM. CODE ANN. § 7.001 (Vernon Supp. 2010).

complaints and incidents not addressed in the grievances he provided to the trial court, dismissal was proper because he failed to exhaust his administrative remedies. *See Brewer*, 268 S.W.3d at 767; *Retzlaff*, 94 S.W.3d at 653; *see also Leachman v. Dretke*, 261 S.W.3d 297, 308 (Tex. App.—Fort Worth 2008, no pet.) (holding that TDCJ disciplinary decisions and “[a]llegations of reprisals by TDCJ employees against inmates for filing grievances or lawsuits, or other inmate complaints about TDCJ employee actions” are subject to grievance procedure).

Dismissal of his remaining claims was proper because he did not file his claim in the trial court “before the 31st day after the date [he received] the written decision from the grievance system.” *See TEX. CIV. PRAC. & REM. CODE ANN.* § 14.005(b); *Brewer*, 268 S.W.3d at 767; *see also Loyd v. Seidel*, 281 S.W.3d 55, 56 (Tex. App.—El Paso 2008, no pet.) (holding that lawsuit not timely filed at conclusion of grievance procedure is barred); *Scott v. Menchaca*, 185 S.W.3d 543, 546 (Tex. App.—Corpus Christi 2006, no pet.) (affirming trial court’s dismissal of inmate’s claims with prejudice for failure to exhaust administrative remedies and comply with section 14.005).

Because we affirm the trial court’s dismissal for failure to exhaust administrative remedies and failure to comply with section 14.005(b), we do not address Martin’s remaining complaints.

In addition, we are mindful that Martin has been declared a vexatious litigant

and is subject to a prefiling order. *See* TEX. CIV. PRAC. & REM. CODE § 11.101 (Vernon 2002); OFFICE OF COURT ADMINISTRATION, *List of Vexatious Litigants Subject to Prefiling Orders under Section 11.101, Civil Practice and Remedies Code*, available at www.courts.state.tx.us/oca/VexatiousLitigants.asp (last updated Apr. 1, 2011). The record reflects that he has brought numerous suits on virtually identical grounds, most of which have been expressly declared frivolous, and that he failed to receive and include in the record permission for the filing of this suit. To permit him to bring his claims again would frustrate both the purpose of the vexatious litigant statute, TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.001–11.104 (Vernon 2002), and the purpose of Civil Practice and Remedies Code section 14.004, requiring a declaration describing the inmate’s previous suits “to curb the constant, often duplicative, inmate litigation.”⁷ *See Clark v. J.W. Estelle Unit*, 23 S.W.3d 420, 422 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

⁷ We note that the district clerk has a duty not to file a litigation presented by a vexatious litigant subject to a prefiling order under Civil Practice and Remedies Code section 11.101 unless the litigant first obtains an order from the local administrative judge permitting the filing. *See Pease v. First Nat’l Bank of Giddings*, No. 03-09-00551-CV, 2011 WL 182877, at *1 (Tex. App.—Austin Jan. 20, 2011, no pet. h.) (mem. op.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 11.103(a) (Vernon 2002)). “If the clerk mistakenly files a litigation without an order from the local administrative judge, any party may file with the clerk and serve on the plaintiff and the other parties to the suit a notice stating that the plaintiff is a vexatious litigant subject to the prefiling order. . . .” *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 11.103(b)). After the notice is filed, the trial court “shall dismiss the litigation unless the plaintiff, not later than the 10th day after the date the notice is filed, obtains an order from the local administrative judge . . . permitting the filing of the litigation.” *Id.* There is no evidence that Martin followed these procedures.

CONCLUSION

We affirm the trial court's dismissal of this case with prejudice.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.
Justice Sharp, concurring.