Opinion issued December 22, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00850-CV

CLIFFORD ALLEN SMITH, Appellant

V.

GEAN LEONARD, FORMER SHERIFF OF GALVESTON COUNTY, GALVESTON COUNTY SHERIFF FREDDIE POOR, MAJOR MIKE HENSON, JOHN DOE #1, AND JOHN DOE #2, IN THEIR INDIVIDUAL CAPACITIES, Appellees

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On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Case No. 10-CV-3781

MEMORANDUM OPINION

Clifford Allen Smith, pro se, appeals from an order dismissing his lawsuit against Gean Leonard, the former Sheriff of Galveston County (the County),

Freddie Poor, his successor, and three other employees of the Galveston County Sheriff's Department. We grant Smith's motion to proceed in forma pauperis and affirm.

Background

Smith, inmate in the Texas Department of Criminal Justice—Institutional Division, sued Leonard and the others solely in their individual capacities, alleging that they refused to grant his request for a bottom bunk during his incarceration in the Galveston County Jail. Smith claimed that, because he suffers from illnesses that make it painful for him to climb into an upper bunk, the failure to assign him to a lower bunk constituted common-law negligence and violated the Eighth Amendment of the United States Constitution and the Americans With Disabilities Act. U.S. CONST. amend VIII; 42 U.S.C.A. §§ 12101–12213 (West 1993). Smith notified the trial court that he was previously declared a vexatious litigant under Chapter 11 of the Texas Civil Practice and Remedies Code and, pursuant to section 11.102, asked the local administrative judge for permission to file the suit.[1] After a hearing, the local administrative judge concluded that Smith's suit had no merit and denied his request.

[1] *See Smith v. Livingston*, No. 10-09-00003-CV, 2009 WL 5155621 (Tex. App.—Waco Dec. 30, 2009, pet. denied) (affirming order declaring Smith a vexatious litigant).

Discussion

I. Jurisdiction

Before we address Smith's issue on the merits, we consider the County's contention that we must dismiss Smith's appeal for lack of jurisdiction. For several more days, Chapter 11 is silent on whether the litigant could seek appellate review of an order denying permission to file suit. In its past session, the Legislature amended the statute to provide that "the litigant may apply for a writ of mandamus with the court of appeals not later than the 30th day after the date of the decision . . . ." TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.102(c), 11.103(d) (eff. Jan. 1, 2012). Nevertheless, because the statute as it applies to this case does not answer the jurisdictional question, we consider it here.

Appellate courts have jurisdiction to review final judgments and certain interlocutory orders identified by statute. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). According to the County, the order denying Smith's request for permission to file suit is neither a final judgment nor an appealable interlocutory order.

We have held that an order dismissing as frivolous an indigent inmate's lawsuit under Chapter 14 of the Civil Practice and Remedies Code is appealable. *See Lentworth v. Trahan*, 981 S.W.2d 720, 722 (Tex. App.—Houston [1st Dist.] 1998, no pet.). The determination required under Chapter 11 is similar to that

required under Chapter 14. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 11.102 (West 2011) (local administrative judge may grant permission to file if it appears that litigation has merit and has not been filed for purposes of harassment or delay) *with id.*§ 14.003(a) West 2002) (court may dismiss claim if it finds that claim is frivolous or malicious, and may do so before service of process). The procedure set forth under Chapter 11, however, differs in that the determination of whether the litigation has merit and has not been filed for the purposes of harassment or delay should occur before the suit is filed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 11.102; *see also id.* § 11.103 (explaining procedure for procuring stay and dismissal of lawsuit if clerk mistakenly files it without order permitting its filing). If the vexatious litigant complies with section 11.102 and the local administrative judge concludes that the proposed suit lacks merit, then an adverse decision results not in the dismissal of the suit, but the denial of permission to file the suit. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 11.102.

Here, Smith complied with section 11.102, and the local administrative judge denied him permission to proceed. If we were to accept the County's position that the order is nonappealable, it would have the perverse result of allowing the vexatious litigant whose suit is dismissed because he did not comply with section 11.102 to appeal while barring the litigant who complies with that provision. Further, the denial of permission to proceed is the functional equivalent

of a dismissal. We decline to elevate form over substance when doing so would prevent a litigant from obtaining appellate review. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997). We therefore hold that we have jurisdiction over Smith's appeal.

II. Standard of review

We apply the abuse-of-discretion standard to review the dismissal of a lawsuit as lacking merit or filed for the purpose of harassment and delay. *See Thompson v. TDCJ-ID*, 33 S.W.3d 412, 414 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (dismissal of inmate suit as frivolous and malicious under Chapter 14); *see also Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007) (applying abuse-of-discretion standard to review sanctions under Chapter 10); *In re Douglas*, 333 S.W.3d 273 (Tex. App.—Houston [1st Dist.] 2010) (applying standard to vexatious litigant determination). The test for an abuse of discretion is whether the court acted arbitrarily or unreasonably and without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)

III. Dismissal

In his sole issue, Smith complains that the trial court abused its discretion in denying him permission to proceed with his lawsuit. A local administrative judge may grant a vexatious litigant permission to file suit only if it appears to the judge

that the litigation has merit and has not been filed for the purposes of harassment or delay. TEX. CIV. PRAC. & REM. CODE ANN. § 11.102(a).

Smith's common-law negligence claims against the government employees in their individual capacities are barred on their face. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (suit against government employee based on conduct within general scope of that employee's employment is considered to be against employee in official capacity only and is subject to dismissal on motion); *Franka v. Velasquez*, 332 S.W3d 367, 370 (Tex. 2011). His state constitutional claims fail for the same reason. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009).

Smith's petition, also fails to state a cognizable claim under the federal Americans with Disabilities Act. Title II of the ADA does not provide for suit against a public official acting in his individual capacity. *D.A. v. Hous. Indep. Sch. Dist.*, 716 F. Supp. 2d 603, 611 (S.D. Tex. 2009); *see, e.g., Garcia v. SUNY Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 107 (2d Cir.2001); *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 808 n.1 (6th Cir. 1999); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n.8 (8th Cir.1999); *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 404–05 n.6 (6th Cir. 1997).

Finally, Smith has not alleged that the officers acted with deliberate indifference as required to show a violation of the Eighth Amendment; contrary to

his assertion, allegations of negligence are insufficient. *See Adames v. Perez*, 331 F.3d 508, 514 (5th Cir. 2003); *Felix-Torres v. Graham*, 687 F. Supp. 2d 38, 53 (N.D.N.Y. 2009); *Goodson v. Willard Drug Treatment Campus*, 615 F. Supp. 2d 100, 102 (W.D.N.Y. 2009) ("[E]ven if there were sufficient evidence upon which a factfinder could reasonably conclude that defendants were negligent in assigning plaintiff to a top bunk (and I do not believe that there is), that too would be insufficient."); *Connors v. Heywright*, 02-CV-9988, 2003 WL 21087886, at *3 (S.D.N.Y. May 12, 2003) (dismissing prisoner's claim that defendants were "negligent to [his] medical needs" in that they, among other things, placed him in top bunk despite fact that he had "mandatory lower bunk slip"). Further, Smith's allegations relate to two separate incidents, both of which were temporary in nature. Allegations about temporary inconveniences, such as being deprived of a lower bunk, subjected to a flooded cell, or deprived of a working toilet, do not demonstrate that the conditions violate the Eighth Amendment. *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508, 511 (6th Cir. 2001). We hold that the trial court did not abuse its discretion in finding that Smith's proposed litigation does not have merit.

Conclusion

We affirm the order of the trial court denying Smith permission to file the lawsuit. All other pending motions are dismissed as moot.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.