

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

DAVID LIVINGSTON COLE, III,            )  
  )  
  Plaintiff,            )  
  )  
  v.                    ) Civil Action No. 03-720-KAJ  
  )  
D. GREGGORY, and MR. CALHOON,        )  
  )  
  Defendants.            )

**MEMORANDUM ORDER**

Plaintiff, David Livingston Cole ("Cole"), is a pro se litigant who is presently incarcerated at the Delaware Correctional Center ("DCC") located in Smyrna, Delaware. He filed this action pursuant to 42 U.S.C. § 1983 and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

**I. STANDARD OF REVIEW**

Reviewing complaints filed pursuant to 28 U.S.C. § 1915 is a two step process. First, the Court must determine whether Cole is eligible for pauper status. The Court granted Cole leave to proceed in forma pauperis on August 11, 2003. On November 12, 2003, the Court determined that Cole had no assets with which to pay an initial partial filing fee, and ordered Cole to file an authorization form within thirty days. On November 17, 2003, Cole filed the authorization form.

Once the pauper determination is made, the Court must then determine whether the action is frivolous, malicious, fails to state a claim upon which relief may be granted

or seeks monetary relief from a defendant immune from such relief pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).<sup>1</sup> If the Court finds Cole's complaint falls under any one of the exclusions listed in the statutes, then the Court must dismiss the complaint.

When reviewing complaints pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1), the Court must apply the standard of review set forth in Federal Rule of Civil Procedure 12(b)(6). See Neal v. Pennsylvania Bd. of Prob. & Parole, No. 96-7923, 1997 WL 338838 (E.D. Pa. June 19, 1997)(applying Rule 12(b)(6) standard as the appropriate standard for dismissing claims under § 1915A). Accordingly, the Court must "accept as true factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996)(citing Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993)). Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim when "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Haines v. Kerner, 404 U.S. 519, 520-521 (1972)(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

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<sup>1</sup> These two statutes work in conjunction. Section 1915(e)(2)(B) authorizes the Court to dismiss an in forma pauperis complaint at any time, if the Court finds the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief. Section 1915A(a) requires the Court to screen prisoner in forma pauperis complaints seeking redress from governmental entities, officers or employees before docketing, if feasible and to dismiss those complaints falling under the categories listed in § 1915A (b)(1).

The United States Supreme Court has held that, as used in § 1915(e)(2)(B), the term "frivolous" when applied to a complaint, "embraces not only the inarguable legal conclusion but also the fanciful factual allegation." Neitzke v. Williams, 490 U.S. 319, 325 (1989).<sup>2</sup> Consequently, a claim is frivolous within the meaning of § 1915(e)(2)(B) if it "lacks an arguable basis either in law or in fact." Id. As discussed below, Cole's claims have no arguable basis in law or in fact, and shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

## II. DISCUSSION

### A. The Complaint and the Amendment

Cole initially filed his complaint alleging as follows, "on 5-6-03 my feet were severely burned by sulfuric acid in the shower area at Gander Hill Prison. I have facts to prove that Gander Hill Prison is at fault for my injuries." (D.I. 2 at 3) On March 16, 2004, Cole filed a letter motion requesting leave to amend the complaint. (D.I. 13) Under Federal Rule of Civil Procedure 15(a) a plaintiff may amend a complaint once, as a matter of course, at any time before a responsive pleading is served. As this case has not been served, the Court construes the letter motion simply as Cole's amended complaint. The Court shall, therefore, consider the allegations contained in the Amended Complaint.

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<sup>2</sup> Neitzke applied § 1915(d) prior to the enactment of the Prisoner Litigation Reform Act of 1995 (PLRA). Section 1915 (e)(2)(B) is the re-designation of the former § 1915(d) under the PLRA. Therefore, cases addressing the meaning of frivolous under the prior section remain applicable. See § 804 of the PLRA, Pub. L. No. 14-134, 110 Stat. 1321 (April 26, 1996).

In the amended complaint, Cole more specifically sets out his allegations. For instance, Cole alleges that the Defendants, D. Gregory ("Greggory") and M. Calhoun ("Calhoun") violated his constitutional rights because they did not flush a drain after using sulfuric acid. (Id. at 2) Cole further alleges that Greggory and Calhoun both wore masks and gloves the day that they worked in the shower area, but that the inmates on the tier were not provided any protection from the fumes. (Id.)

Cole also appears to be alleging that his constitutional rights under the Eighth Amendment have been violated because Nurse Monica Scott, who has not been named as a Defendant, told him that he could not see the doctor, because the doctor had been in a car accident. (Id.) Cole requests that the Court award him compensatory damages in the amount of \$100,000. (Id. at 3)

## **B. Analysis**

Cole's claim against Greggory and Calhoun regarding his injury sounds in tort. The Supreme Court has held that prison authorities' mere negligence in and of itself does not violate prisoners' constitutional rights. See Daniels v. Williams, 474 U.S. 327, 330-30 (1986)); see also Walker v. Reed, 104 F.3d 156, 158 (8<sup>th</sup> Cir. 1997)(holding that prison officials' simple negligence does not amount to violation of the Eighth Amendment prohibition against cruel and unusual punishment for inhuman conditions of confinement). Consequently, Cole's § 1983 claim against Greggory and Calhoun has no arguable basis in law or in fact and must be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

Cole has also attempted to raise a claim regarding denial of medical treatment. (D.I. 13) Cole does not name a Defendant regarding this claim. Cole simply alleges

that Nurse Monica Scott told him he could not see the doctor because the doctor had been in a car accident. (D.I. 13 at 3) Cole does not provide the date of this alleged incident. Nor, does he indicate whether he was denied access to a doctor on a continuing basis. The Third Circuit has determined that pro se plaintiffs are no longer held to a heightened pleading requirement when filing civil rights complaints. Alston v. Parker, 363 F.3d 229, 233 (3d Cir. 2004)(citing Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)). In this instance, however, Cole's claim regarding denial of medical treatment lacks sufficient detail to serve its function as a guide to discovery. Alston v. Parker, 363 F.3d at 253. As currently presented, Cole's claim regarding the denial of medical treatment has no arguable basis in law or in fact. Neitzke v. Williams, 490 U.S. at 325. Therefore, Cole's claim regarding the denial of medical treatment is frivolous and shall be dismissed without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B) -1915A(b)(1).

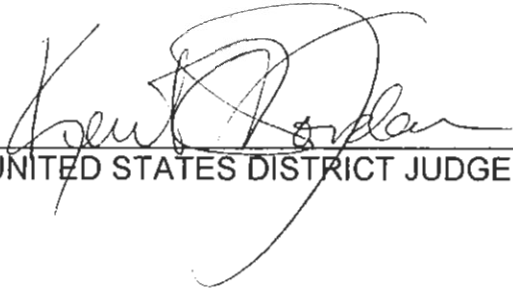
### **C. Conclusion**

For the foregoing reasons IT IS HEREBY ORDERED that:

1. Cole's letter motion to amend the complaint (D.I. 13) is denied as moot.
2. Cole's claim against Gregory and Calhoun is dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).
3. Cole's Eighth Amendment claim regarding the denial of medical treatment is dismissed without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1). Cole is granted leave to further amend the complaint regarding this claim

within thirty (30) days from the date this order is mailed. See Alston v. Parker, 363 F.3d at 253.

IT IS SO ORDERED.

  
UNITED STATES DISTRICT JUDGE

March 10, 2005  
Wilmington, Delaware