

April 11, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 05-30358  
Conference Calendar

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DEREK BERNSTINE,

Plaintiff-Appellant,

versus

MICHAEL RHODES, NIKKI MCCOY; HERMAN WILLIAMS,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Louisiana  
USDC No. 5:04-CV-1743  
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Before JONES, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:\*

Derek Bernstine, Louisiana prisoner # 416283, appeals the dismissal of his civil rights suit filed pursuant to 42 U.S.C. § 1983 as frivolous and for failure to state a claim under 28 U.S.C. § 1915(e). Bernstine argues that his due process rights were violated when he was found guilty by a disciplinary board but later exonerated. These allegations, however, fail to state a claim for a due process violation and are frivolous because the punishment he received was not atypical and did not

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

affect the length of his confinement. See Sandin v. Conner, 515 U.S. 472, 484 (1995); Orellana v. Kyle, 65 F.3d 29, 31-32 (5th Cir. 1995). Nor do his complaints about his placement in administrative segregation and the loss of recreation state a claim for cruel and unusual punishment in violation of the Eighth Amendment. See Herman v. Holiday, 238 F.3d 660, 664 (5th Cir. 2001).

Bernstine's appeal is without arguable merit and is frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is dismissed. See 5TH CIR. R. 42.2. The dismissal of this appeal as frivolous counts as a strike under 28 U.S.C. § 1915(g), as does the district court's dismissal of his complaint. See Adepegba v. Hammons, 103 F.3d 383, 387-88 (5th Cir. 1996). Bernstine is warned that, if he accumulates three strikes under § 1915(g), he will not be permitted 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).

APPEAL DISMISSED; SANCTION WARNING ISSUED.