UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-5054
Summary Calendar

GEORGE BURT, THERESA BURT,

Plaintiffs-Appellants,

versus

MICHAEL W. COUNTZ, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas
(TY 89 CV 565)

(July 1, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.[*]

GARWOOD, Circuit Judge:

George and Theresa Burt appeal the summary judgment dismissing their section 1983 claims against Warden Michael W. Countz, Warden Tommy Womack, Mail Room Supervisor Kathy Driver, and Officer Forrest Curry. The Burts contend that the district court erred in implicitly adopting the magistrate's ruling withdrawing defendants'

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

deemed admissions, erred in finding that defendants were entitled to qualified immunity on the First Amendment claims, erred in ignoring the Burts' sexual harassment and retaliation claims, and erred in making a *sua sponte* ruling on George's excessive force claim. We sustain the district court's implicit affirmance of the withdrawal of the deemed admissions and its holding that qualified immunity shields defendants from the Burts' First Amendment claims. However, the district court erred in ignoring the Burts' sexual harassment and retaliation claims and in making a *sua sponte* ruling on George's excessive force claim.

Facts and Proceedings Below

George Burt is an inmate at the Beto II unit of the Texas Department of Corrections' Institutional Division (TDC). He and his wife filed this lawsuit after numerous incidents between himself, his wife, and several TDC officials. The Burts claim that the defendants conspired to harass, intimidate, and violate their constitutional rights, in part because of prison grievances George made to other prison officials about the defendants' behavior.

The Burts contend that defendants improperly placed Theresa on George's negative mailing list, meaning that all letters sent from Theresa to George would be seized by prison mail room officials and not delivered to George. Defendants state that Theresa was placed on the negative mailing list because she attempted to send George contraband (a $100 bill). Theresa wrote two letters to George saying that she intended to send him a $100 bill. Then in early March 1989, an envelope addressed to George containing a $100 bill, but containing no letter explaining who the sender was, arrived at

the prison. The envelope had been passed through a postage meter and had George's former attorney's return address on it. Money is classified as contraband by prison officials. Mail room officials, under the supervision of Kathy Driver, discovered the money and began an investigation. They called the lawyer whose name was on the envelope and he denied having sent George the money. He also said that he did not have a postage meter at the time the letter was mailed. Driver discussed these letters with Countz. The Burts state that Womack was also consulted. Subsequently, on July 2, 1989, all correspondence from Theresa to George was seized by mail room officials. Mail sent to George by two other people, who were on George's approved visitors list, was also confiscated because mail room officials thought the letters were sent by Theresa, under a different name. Mail room officials read these letters carefully and telephoned people referenced therein in an attempt to confirm their belief that Theresa authored the letters. Driver also said that Theresa had a history of sending letters under an assumed name. Theresa remained on the negative mailing list for over a year and may still remain there. Both George and Theresa contend that Theresa did not attempt to send George money and George filed numerous prison grievances to that effect.

Next, Theresa claims that she was physically harassed, threatened, and blasted with obscenities by prison guards when she came to visit George. More particularly, she alleges that on June 24, 1989, a few days before she was placed on the negative mailing list, defendant Womack grabbed her breasts and said "I can make it easy on you or I can make it hard on you, but I can make it really

hard on your husband." Allegedly as a result of this conduct by Womack and other prison officials and the difficulty she had communicating with her husband, Theresa filed for a divorce from her husband George. Seven months later, she dismissed the divorce proceedings.

George claims that on August 24, 1989, he was returning from work when Curry, without any provocation, turned around and struck him in the chest in the shower area. The blow knocked him into the side framing of a door, injuring his elbow. George then sought to be treated in the infirmary. The nurse refused to treat him, ordering him to send in a sick call request. On August 28, 1989, George was seen by a doctor. His left elbow was bruised, but his range of motion was normal. He was diagnosed with a contusion to the left condyle and given heat packs and Ibuprofen. On August 31, George saw the doctor again. The swelling had decreased and George said that he felt better. Curry does not deny inflicting the blow, but claims that George did not incur a significant injury.

George claims that this blow, the harassment of his wife, her placement on the negative mailing list, and several other events were part of a conspiracy of retaliation intended to dissuade him from filing more grievances against defendants.

After this action was filed, the district court issued an order directing the magistrate to conduct a *Spears* hearing, issue findings of fact and recommendations of law, and suggest a method of dealing with the complaint. After the *Spears* hearing, the Burts propounded requests for admission. Defendants failed to timely respond to the requests for admission and the requests were deemed

admitted. Both parties moved for summary judgment and in December 1990 defendants moved to withdraw the deemed admissions. Defendants claimed that a change of counsel and the excessive number of discovery requests were sufficient excuses to permit the withdrawal of their deemed admissions. In January 1991, the Burts responded to this motion. On August 27, 1991, the magistrate issued an order withdrawing the deemed admissions. The next day, the magistrate issued his findings of fact and recommended that all of the Burts' claims be dismissed.

The Burts filed objections to the magistrate's report. After a *de novo* review, the district court in November 1991 adopted the magistrate's report and granted summary judgment in favor of defendants on all of the Burts' claims. The Burts appeal.

Discussion

Preliminarily, we review the magistrate's decision to permit the withdrawal of the defendants' deemed admissions. The Burts contend that the magistrate did not have the authority to make this discovery ruling. The magistrate's authority in this case derived from 28 U.S.C. § 636(b). Section 636(b)(1)(A) provides that a district court may "designate a magistrate to hear and determine any pretrial matter pending before the court . . . . A Judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law." Section 636(b)(1)(B) provides that "a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and

recommendations for the disposition . . . of any motion, . . . and of prisoner petitions challenging conditions of confinement." The district court must review the recommendations of the magistrate before the recommendations become binding. *Id*. Here, the district court charged the magistrate, "pursuant to . . . 636(b)(1)(A)(B) and (3) . . . (1) to conduct an evidentiary hearing . . . , (2) to submit . . . proposed findings of fact and conclusions of law; and (3) to make his recommendations for the disposition of such complaint." This order implies that the district court gave the magistrate the power to make this evidentiary ruling. Therefore, the Burts' contention is without merit.[1]

The Burts also claim that the magistrate erred in making this ruling. The decision to permit the withdrawal of deemed admissions is reviewed under the abuse of discretion standard. *American Auto Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1119 (5th Cir. 1991). Admissions should not be withdrawn where their withdrawal inflicts substantial prejudice on the party relying on them. *Id.* at 1120; FED. R. CIV. P. 36(b) (West 1992). The Burts claim that they were prejudiced by the fact that the magistrate gave them no new time to obtain evidence since summary judgment was recommended the day after the admissions were withdrawn. However, the Burts were on notice eight months before the magistrate's recommendation that defendants had requested withdrawal of the admissions. The Burts have failed to indicate (here or in their objections to the

[1] Implicit in the district court's summary judgment order was its affirmance of the magistrate's decision on this issue as it was raised in the Burts' objections to the magistrate's report.

magistrate's report) what information or what types of information they might have obtained through additional discovery and therefore they have not shown prejudice. Accordingly, the magistrate did not abuse his discretion in permitting the withdrawal of the deemed admissions.

The four other issues involve the district court's summary dismissal of the Burt's claims. We grant *de novo* review of issues of fact and law in summary judgment cases. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 82 (1992). A party moving for summary judgment is entitled to a judgment where no genuine issues of material fact are in dispute and where they are entitled to a judgment as a matter of law. FED. R. CIV. P. 56. Under *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986), when the party opposing a motion for summary judgment bears the burden of proof at trial on an essential element of the case and does not, after discovery, make a sufficient showing of the existence of that element with summary judgment evidence, summary judgment may be entered against that party. Since the Burts bear the burden of proof as plaintiffs, to survive summary judgment they must establish facts supporting the elements of their causes of action both in pleadings and in timely filed summary judgment evidence.

First, the Burt's contend that the district court improperly dismissed their First Amendment claims arising from Theresa's placement on the negative mailing list.[2] The district court, adopting the magistrate's holding, found that defendants were

[2] George claims that his right to receive mail was violated and Theresa claims that her right to send mail was violated.

protected from this claim by the defense of qualified immunity. Government officials are immune from suit and liability unless they violate clearly established constitutional rights through conduct that is not objectively reasonable. *Spann v. Rainey*, 987 F.2d 1140 (5th Cir. 1993).

Since the right to receive mail is established, the issue is whether under the circumstances defendants acted in an objectively reasonable manner in reference thereto.[3] Although the Burts' argue that Theresa did not attempt to send the money to her husband and that Theresa was placed on the list in retaliation for grievances filed by George, prison officials had substantial evidence indicating that Theresa mailed the letter. Theresa mailed two letters saying that she was going to send contraband to her husband. Theresa had used her attorney's envelopes to send mail to her husband in the past. The money arrived in George's attorney's envelope, but the attorney denied sending the envelope and denied having a postage meter at the time the envelope was mailed. Even if the defendants were wrong and Theresa did not mail the contraband, based on the large amount of evidence before the defendants suggesting that Theresa had sent the money, defendants

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[3] A prisoner's right to send and receive mail, subject to limitations based on the need for prison security, is protected by the First Amendment. *Guajardo v. Estelle*, 580 F.2d 748, 757 (5th Cir. 1978). A prisoner's right to send and receive mail may be restricted as long as the restriction is "`reasonably related to legitimate penological interests." *Thornburgh v. Abbott*, 109 S.Ct. 1874, 1879 (1989) (quoting *Turner v. Safley*, 107 S.Ct. 2254, 2261 (1987)). Censorship and negative mailing lists are legitimate restrictions reasonably related to promoting prison security when a party attempts to send contraband into a prison through the mail. *See Guajardo*, 580 F.2d at 757.

acted in an objectively reasonable manner.[4] No material facts about the objective reasonableness of defendants' conduct are disputed. The district court did not err in concluding that the defendants are shielded from liability on this claim by the doctrine of qualified immunity.

Second, Theresa claims that her Fourth Amendment rights were violated when defendant Womack grabbed her breasts and said "I can make it easy for you or I can make it hard on you, but I can make it really hard on your husband."

A district court cannot render summary judgment on a party's claims "without the defendant raising them, the court mentioning them, nor without adequate notice." *Evans v. United Airlines*, 986 F.2d 942, 944-45 (5th Cir. 1993) (footnotes omitted). This claim was properly pleaded in the Burts' original complaint, in their objections to the magistrate's report and recommendation, and in their briefs to this Court. However, it was not raised in defendants' motion for summary judgment, addressed by the magistrate or by the district court in entering summary judgment and dismissing the case with prejudice. Since Theresa's claim was not considered below, we reverse the dismissal of this claim and remand it for consideration by the district court.[5]

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[4] That the penalty lasted longer than one year may be harsh, but it is not clearly proscribed by the First Amendment.

[5] There was no summary judgment establishment of qualified immunity here, since the unprovoked grabbing of a woman's breast is not objectively reasonable conduct. This action by the prison official would appear to raise a Fourth Amendment unreasonable search claim because it was undertaken as Mrs. Burt submitted to a security search on her visit. Because the claim is not, in any event, an excessive force claim, the *Johnson v. Morel* significant

Third, George's claim that defendants engaged in a continual conspiracy to harass him in retaliation for his filing of prison complaints against them was also not mentioned in defendants' motion for summary judgment or addressed by the court below. Retaliation for filing prison grievances violates a prisoner's due process rights. *Gibbs v. King*, 779 F.2d 1040, 1046 (5th Cir.), *cert. denied*, 106 U.S. 1975 (1986) ("prison officials may not retaliate against or harass an inmate because of the inmate's exercise of his right of access to the courts. [citations omitted]. In *Ruiz* [679 F.2d 1115, 1153-54 (5th Cir. 1982)] we also held that prison officials were prohibited from `retaliation against inmates who complain of prison conditions or official misconduct.' 679 F.2d at 1154. A guard thus may not harass an inmate in retaliation for the inmate complaining to supervisors about the guard's conduct.").

The allegations in George's complaint, supplemented by his affidavits and testimony at the *Spears* hearing, suggest that this claim is not frivolous or conclusional.[6] George pleaded this claim

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injury test is inapplicable and we do not have to address the effect of *Hudson v. McMillian*, 112 S.Ct. 995 (1992), on the *Johnson* test. *See Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993). *See also Hudson*, 112 S.Ct. at 1000 ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated."). We express no opinion on the merits of the claim except to say that it is sufficiently pleaded and supported by summary judgment evidence (Theresa's affidavit) that it should have been considered by the court below.

[6] At the *Spears* hearing, the magistrate limited George's ability to allege facts supporting his retaliation claim to those in his complaint saying that a formal amended complaint or a new lawsuit had to be filed for such other claims to be considered. Because George was a *pro se* litigant, the district court should have construed the complaint more liberally. *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983); *Cooper v. Sheriff, Lubbock County,*

in paragraph thirteen of the first cause of action and paragraph two of the second cause of action of his original complaint. George alleged that he filed numerous prison grievances, that the defendants retaliated by placing his wife on the negative mailing list, by using excessive force against him in the shower, by denying him prompt access to medical care and his medications, and by engaging in other harassment activities. George said that defendant Curry "communicated" to him that the blow in the shower was intended as a warning that worse things would happen unless he stopped filing grievance against Countz, Womack, Driver, and Curry. George also claims that Womack told him that "I stopped your correspondence with your wife as punishment for her attitude. She has a piss-poor attitude and needs to get her heart right."

Since this claim was properly alleged and preserved on appeal and since it was not addressed by the court below nor by defendants in their motion for summary judgment, it should not have been dismissed by the district court. We reverse the dismissal of this claim and remand it for appropriate consideration by the district court.

Fourth, George's Eighth Amendment excessive force claim about the unprovoked injury he suffered in the shower was not properly considered by the district court. A district court cannot grant summary judgment *sua sponte* without giving notice to the parties

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Texas, 929 F.2d 1078, 1081 (5th Cir. 1991). "Most importantly, however, the court was required to look beyond the inmates' formal complaint and to consider . . . those materials subsequently filed," *Howard*, 707 F.2d at 220, and George's testimony at the *Spears* hearing.

about the particular issues that the court is addressing so that the parties have the opportunity to present summary judgment evidence. *Young v. Biggers*, 938 F.2d 565, 568 (5th Cir. 1991). Although addressed in the magistrate's opinion, the defendants' motion for summary judgment expressly excluded this claim and the magistrate did not give the parties notice that the claim was under scrutiny. We reverse the dismissal of this claim. We note that the magistrate and the district court applied the pre-*Hudson* "significant injury" test, which has since been overruled. *Hudson v. McMillian*, 112 S.Ct. 995 (1992). On remand, the district court should reconsider its judgment in light of *Hudson* and the post-*Hudson* jurisprudence in this Circuit.

Conclusion

Since the evidence showed that defendants acted in an objectively reasonable manner in placing Theresa on the negative mailing list, they are protected by the qualified immunity defense, and we affirm the dismissal of the Burts' First Amendment claims. However, since the defendants did not move for summary judgment on Theresa's sexual harassment claim or on George's retaliation claim, and since the district court did not discuss these claims or give notice that the claims were under consideration, the judgment dismissing these claims is reversed and remanded. Since the district court failed to give notice to the parties that George's excessive force claim was being considered for summary judgment, the dismissal of this claim is remanded for consideration by the district court in light of *Hudson v. McMillian*.

AFFIRMED IN PART, REVERSED IN PART; CAUSE REMANDED