

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3910
(Summary Calendar)

JOHN F. CHAMBERS,

Plaintiff-Appellant,

v.

RICHARD STALDER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
CA 92 2356 M

August 4, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Louisiana prisoner John F. Chambers appeals from the district court's dismissal of his pro se civil rights complaint as frivolous pursuant to 28 U.S.C. § 1915(d). We affirm in part and reverse in part the judgment of the district court.

I.

*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Proceeding pro se and in forma pauperis, Louisiana prisoner John F. Chambers filed this § 1983 civil rights action against state prison officials (Defendants) alleging various violations of his constitutional rights. Specifically, Chambers contends that on June 24, 1992, defendant Freeman deliberately ordered him to perform work duties that were outside the scope of his duty classification. According to Chambers, the work involved prolonged walking, which caused "great pain" in his right leg.

Chambers contends that, when Freeman found out on June 25th that Chambers intended to file a grievance report regarding the incident, he threatened Chambers with "reprisals." He asserts that Freeman then "wrote him up" for an "aggravated work offense," stating that he had not been present for roll call on the morning of June 25th. Chambers contends that the disciplinary charges were false and that they were deliberately filed by Freeman as a reprisal for his use of the prison grievance procedures. Chambers complains that he ultimately was found guilty of the false disciplinary charges, resulting in a five-day isolation period, the loss of his trustee status, and a reduction in his ability to earn good-time credits.

Chambers complains further that prison officials, and defendant Wallace in particular, failed to conduct the disciplinary proceedings in accordance with Louisiana Law and Louisiana Department of Corrections rules. Specifically, Chambers complains that he was denied the opportunity to present evidence and call witnesses on his own behalf. According to

Chambers, Defendants' conduct--forcing him to work outside of his duty status, filing false disciplinary charges against him in "reprisal" for using the prison grievance system, and imposing disciplinary sanctions without following mandatory procedures--violated his rights under the Due Process Clause of the Fourteenth Amendment.

The district court referred the matter to a magistrate judge, who recommended that the action be dismissed. The magistrate judge recommended that Chambers' claim regarding his work-duty status be dismissed because Chambers had set forth substantially the same claim in another action then pending before the court.¹ With respect to Chambers' other claims, the magistrate judge recommended dismissal because the conduct of which Chambers complained constituted "random and unpredictable action in violation of established procedure." Thus, the magistrate reasoned, under Parratt v. Taylor, 451 U.S. 527 (1981), overruled in part by Daniels v. Williams, 474 U.S. 327 (1986), and Hudson v. Palmer, 468 U.S. 517 (1984), Chambers had failed to state a claim for denial of due process. Chambers objected to the magistrate's report, and, after a de novo review, the district court adopted the report and dismissed the action with prejudice. Chambers timely appealed.

II.

28 U.S.C. § 1915(d) authorizes a federal court to dismiss a claim filed in forma pauperis "if satisfied that the action is

¹ Chambers v. Stalder, Civil Action No. 92-1703 "A" (4).

frivolous or malicious." Under this statute, an action is frivolous if it "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). The statute thus accords judges the authority to dismiss a claim based on "an indisputably meritless legal theory" or "whose factual contentions are clearly baseless." Id. at 327. Because the frivolousness determination is discretionary, we review § 1915(d) dismissals for abuse of that discretion. Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1734 (1992).

A.

We first address the district court's dismissal of Chambers' work-duty status claim as duplicative. This court has held that it is "malicious" for a prisoner proceeding in forma pauperis to file a lawsuit that duplicates the allegations of another pending federal action by the same plaintiff. Pittman v. Moore, 980 F.2d 994, 995 (5th Cir. 1993). Consequently, the district court was fully justified in dismissing Chambers' claim regarding his work-duty status.

We note, however, that when a successive in forma pauperis suit is duplicative, the court should insure that the plaintiff obtains "one bite at the litigation apple--but not more." Id. Thus, because of the basis of the dismissal, the duplicative claim should be dismissed without prejudice to the plaintiff's prosecution of the claim in the other pending suit. Id. We therefore affirm this aspect of the district court's judgment, but modify the judgment so that the dismissal is without

prejudice to Chambers' prosecution of Civil Action No. 92-1703 "A" (4).

B.

We may not, however, so easily dispose of Chambers' claim that defendant Freeman initiated disciplinary proceedings against him in "reprisal" for his use of prison grievance procedures. This court has stated that prison officials may be subject to § 1983 liability where their decisions are "made in retaliation against or so as to hinder the exercise of federally protected rights." Williams v. Rhoden, 629 F.2d 1099, 1103 (5th Cir. 1980). Thus, in Jackson v. Cain, 864 F.2d 1235 (5th Cir. 1989), we held that a prisoner's allegation that prison officials had changed his job assignment in retaliation for his exercise of his First Amendment rights stated a valid constitutional claim. Id. at 1248.

In Jackson, we also recognized that prison grievance procedures may constitute the type of state-created liberty interests recognized by the Supreme Court in Hewitt v. Helms, 459 U.S. 460, 470 (1983). 864 F.2d at 1249; see also Gartrell v. Gaylor, 981 F.2d 254, 259 (5th Cir. 1993). We concluded, therefore, that an allegation of retaliation against a prisoner for use of the grievance procedures states a cognizable claim under § 1983. 864 F.2d at 1249. Chambers' assertion that Defendants took action in "reprisal" for his use of the prison grievance procedures thus makes out a facially valid constitutional claim.

We further note that the district court's reliance upon Parratt and Hudson to defeat Chambers' "reprisal" claim is misplaced. The Court in those cases set forth the rule "that a deprivation of a constitutionally protected property interest caused by a state employee's random, unauthorized conduct does not give rise to a § 1983 procedural due process claim, unless the State fails to provide an adequate postdeprivation remedy." Zinermon v. Burch, 494 U.S. 113, 115 (1990). In setting out this rule, the Court reasoned that "in a situation where the State cannot predict and guard in advance against a deprivation, a postdeprivation tort remedy is all the process the State can be expected to provide, and is constitutionally adequate." Id. In Burch, the Court extended the rule to encompass some deprivations of liberty interests. See Id. at 132.

The Burch Court emphasized, however, that the Parratt rule comes into play only in the context of procedural due process claims. See id. at 125-28; see also Thibodeaux v. Bordelon, 740 F.2d 329, 333 (5th Cir. 1984). Thus, Parratt does not affect our analysis when a plaintiff brings a § 1983 claim under the Due Process Clause of the Fourteenth Amendment, alleging violations of rights defined in the Bill of Rights or challenging the conduct of state actors under the substantive component of the Due Process Clause, which "bars certain arbitrary, wrongful government actions `regardless of the fairness of the procedures used to implement them.'" Burch, 494 U.S. at 125 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). Liberally

construed, Chambers' allegations regarding disciplinary proceedings brought in retaliation for his use of state-established prison grievance procedures falls into the second of these categories. See Jackson, 864 F.2d at 1249 & n.5 (noting that the claim asserted was that "retaliation for proper, good faith use of the state-established liberty interest (the prison grievance system) is a prima facie violation of substantive due process").

C.

That is not to say that Chambers has not raised a procedural due process claim. He has. Chambers also complains that he was deprived of state-created liberty interests without due process of law because the disciplinary proceedings, which resulted in a five-day isolation period, the loss of his trustee status, and a reduction in his ability to earn good-time credits, were not conducted in accordance with mandatory Louisiana Department of Corrections procedures. Specifically, he contends that he was denied the opportunity to present evidence and call witnesses on his behalf.

This court has held that a state's failure to follow its own procedural regulations does not necessarily establish a violation of due process because constitutional minima may nevertheless have been met. Jackson, 864 F.2d at 1251. Thus, it is not enough for Chambers to allege that Defendants failed to comply with state-established procedures, even if those procedures are mandatory in nature. Yet, while Chambers has no federal right to

insist that the state follow its own procedures, he does have a right to procedures that meet constitutional due process standards before he is deprived of a substantive liberty interest established under state regulations. Id. at 1252.

The Supreme Court has set out two different due process standards: their application depends upon the sanction imposed upon the prisoner and the consequences flowing from it. Id. When the sanctions imposed involve solitary confinement and the loss of good-time credits, a prisoner must receive (1) written notice of the charges at least twenty-four hours before the hearing, (2) a written statement of the factfinder as to the evidence relied on and the reasons for the disciplinary action taken, and (3) the opportunity to call witnesses and present documentary evidence in his defense, unless these procedures would create a security risk in a particular case. Id. (citing Wolff v. McDonnell, 418 U.S. 539, 563-66 (1974)). In the case before us, Chambers specifically has alleged that he was denied the opportunity to present evidence and call witnesses in his defense before disciplinary sanctions were imposed. Consequently, he has stated a facially valid claim for deprivation of his state-established liberty interests without due process of law. See id.

Although the Parratt rule discussed supra does come into play here, we conclude that the rule does not control. This case presents precisely the type of situation where the state can predict and guard in advance against a deprivation. See Burch,

494 U.S. at 136-37. A wrongful deprivation of the type Chambers complains will occur, if at all, when disciplinary sanctions are imposed by prison authorities without affording the prisoner the opportunity to present evidence and call witnesses. Moreover, the state cannot characterize Defendants' conduct as "unauthorized" in the sense the term is used in Parratt and Hudson, for the state delegated to them the power and authority to effect the very deprivation complained of here. See id. at 138.

III.

For the foregoing reasons, we conclude that the district court erred in finding that Chambers' "reprisal" and procedural due process claims had no arguable basis in law. Consequently, the district court abused its discretion in dismissing those claims as frivolous pursuant to 28 U.S.C. § 1915(d). We therefore REVERSE the judgment of the district court with respect to those claims and REMAND the case for further proceedings. With respect to the district court's dismissal of Chambers' work-duty status claim, we AFFIRM the judgment of the district court AS MODIFIED to provide that the judgment is without prejudice to Chambers' prosecution of Civil Action No. 92-1703 "A" (4).