IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5028

Summary Calendar

BILLY WAYNE HORTON,

Plaintiff-Appellant,

v.

HENRY E. KINKER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:92 CV 40)

September 23, 1993

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Billy Wayne Horton, a prison inmate, filed a *pro se*, *in forma pauperis* complaint under 42 U.S.C. § 1983 against Warden Henry E. Kinker and various prison officials, alleging that he was denied his rights of access to the courts, due process, and equal protection. He appeals the district court's dismissal of his complaint as frivolous, pursuant to 28 U.S.C. § 1915(d). After a careful review of the record, we affirm in part and reverse in part the judgment of the district court.

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Billy Wayne Horton, presently confined in the Texas Department of Criminal Justice, filed a § 1983 complaint against Wardens Henry E. Kinker and Nash Moxon, and prison officials Scott, Warren, Bullock, Little, and Williams in which he alleged that he had been denied his right of access to the courts. He also alleged that various prison officials violated his Fourteenth Amendment due process rights by not following prison regulations and that Mrs. Bagley, a corrections officer under whom Horton was assigned to work in the law library, retaliated against him and acted in a racially discriminatory manner against him in violation of his Fourteenth Amendment right to equal protection.

Following a Spears[1] hearing, a magistrate issued a report and recommendation in which he determined that Horton had not been denied access to the courts and that Horton's allegations of denial of access to the courts, retaliation, and racial discrimination were insufficient to support constitutional violations. The magistrate recommended dismissal of the claims as legally "frivolous," pursuant to § 1915(d), using Wilson v. Lynaugh, 878 F.2d 846, 849 (5th Cir.), cert. denied, 493 U.S. 969 (1989), as the standard for determining "frivolous." The district court, after conducting a *de novo* review of the magistrate's recommendations and using the standard for determining "frivolous" as that set forth in Neitzke v. Williams, 490 U.S. 319 (1989), and Denton v. Hernandez, 112 S. Ct. 1728 (1992), adopted the report to the extent that it held that Horton's claims lacked any arguable legal merit and dismissed Horton's complaint pursuant to § 1915(d). Horton filed a timely notice of appeal.

II.

An *in forma pauperis* complaint is "frivolous" within the meaning of § 1915(d) if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325. The Supreme Court has determined that pursuant to § 1915(d), a federal court has "not only the authority to dismiss a

[1] Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Id. at 327.

The Court has emphasized that "legal frivolousness" within the framework of § 1915(d) "refers to a more limited set of claims than does Rule 12(b)(6)" of the Federal Rules of Civil Procedure, which governs the dismissal of a complaint for failure to state a claim. Id. at 329. A complaint is not automatically frivolous in the context of § 1915(d) because it fails to state a claim, id. at 331, and thus should be dismissed only in limited circumstances. However, the Court has explained that a complaint would be legally frivolous if the plaintiff alleges "claims of infringement of a legal interest which clearly does not exit" or "claims against which it is clear that the defendants are immune from suit." Id. at 327.

The Court has also made it clear that a complaint should be dismissed as "factually frivolous" under § 1915(d) if the facts alleged are "fanciful," "fantastic," "delusional," or "clearly baseless." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992). As those terms suggest, the Court explained, "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible," but not simply because the alleged facts are deemed unlikely. Id.

We review § 1915(d) dismissals for an abuse of discretion because a determination of frivolousness--whether legal or factual--is a discretionary one. Id. at 1734; Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992).

III.

Horton first contends that the district court abused its discretion in dismissing his access-to-the-courts claim as frivolous under § 1915(d).

Horton's complaint is generally based on his allegations that actions taken by various prison officials denied him his right of access to the courts.[2] Specifically, however, he complains that he

> (1) was denied library privileges on several occasions by Ledford, the library supervisor, in violation of prison rules;[3]
>
> (2) had his library time cut from three hours per day to an hour and a half per day during an approximate ten-day time period when his unit's evening meals were served late;
>
> (3) was unable to work effectively in the library because of loud noise and disruptive conduct when correctional officer Bullock was in charge;
>
> (4) was hampered from both assisting other prisoners and being assisted by other prisoners with legal matters because of the library's "no talking" rule;
>
> (5) had a disciplinary complaint filed against him, for which he had to serve "15 days cell restriction and 15 days commissary restriction," for talking in the library; and
>
> (5) had a pending civil case dismissed because he had failed to timely file answers to interrogatories and objections to the magistrate's ruling, allegedly as a result of his having been denied access to the library on "a couple of occasions" during the period in which he was to answer and because the noise in the library made it "impossible to concentrate" when he did have access.

Thus, Horton alleges that these incidents--viewed collectively or individually, for which various prison officials were responsible, effectively denied him his right of access to the courts.

It is clearly established that prisoners have a constitutionally protected right of access to the courts. See Bounds v. Smith, 430 U.S. 817, 821 (1977); see also Wolff v. McDonnell, 418 U.S. 539 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); Younger v. Gilmore, 404 U.S. 15

---

[2] At his Spears hearing, Horton testified that he sued wardens Kinker and Moxon and the other named prison administrators in their supervisory capacities either because they denied his grievances or ignored his complaints about his loss of library time.

[3] For example, Horton maintains that Ledford denied him extra time in the library on one occasion because a large number of inmates were scheduled for that session. He contends that Ledford's reason was insufficient and did not establish "good cause" in accord with prison rules. Horton also alleges that Ledford seemed to have indiscriminate reasons for denying him access to the law library. For example, Horton asserts that Ledford did not allow him to use the library one day or have extra time in it the next day because Horton had submitted two request slips to use the library on the same day. Horton also asserts that he requested a "legal visit" with another inmate and extra time for "letter study" on the same slip and that Ledford denied him the time for "letter study" because he had not separately requested such time.

(1971); Johnson v. Avery, 393 U.S. 483 (1969); Ex parte Hull, 312 U.S. 546 (1941). While the precise contours of a prisoner's right of access to the courts remain somewhat obscure,[4] the Supreme Court has not extended this right to apply further than the ability of an inmate to prepare and transmit a necessary legal document to a court. See Wolff, 418 U.S. at 576; see also Bounds, 430 U.S. at 828 (describing the right of access to the courts as requiring prison officials to provide prisoners with adequate law libraries or assistance from trained legal personnel); Procunier, 416 U.S. at 419-22 (determining that the right of access to the courts prohibits prison officials from unreasonably limiting an inmate's access to legal personnel who can provide essential legal advice); cf. Houston v. Lack, 108 S. Ct. 2379, 2381-84 (1988) (noting that prison authorities cannot take actions which delay the mailing of an inmate's legal papers when such a delay effectively denies the inmate's access to the courts). Furthermore, this court has determined that "a denial-of-access-to-the-courts claim is not valid if a litigant's position is not prejudiced by the alleged violation." Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.), cert. denied, 112 S. Ct. 2974 (1992).

The record indicates that Horton has conceded that he spends between ten and fifteen hours per week in the law library. Thus, he clearly is not being denied access to legal materials or a law library.[5] The record also shows that Horton has failed to allege even remotely that he was prejudiced as a result of his alleged deprivation. Although he did assert that one of his pending civil cases was dismissed because he did not timely file answers to interrogatories and objections to the magistrate's ruling, the record indicates that he has admitted that those interrogatories raised matters of fact rather than law and that he has failed to maintain in any way why access to

---

[4] See Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985) ("Perhaps because their textual footing in the Constitution is not clear, these principles suffer for lack of internal definition and prove far easier to state than to apply.").

[5] Although Horton specifically alleges that he lost time to which he was otherwise entitled to spend in the law library--because of his unit's serving dinner late or because he was "wrongfully" denied access for a day or two, the fact that he admitted that he was allowed to spend between ten and fifteen hours per week in the law library renders these specific allegations virtually meaningless.

the law library was needed to answer the interrogatories. The record further indicates that Horton has conceded that the dismissal of his pending case was reversed on appeal.[6] Horton's claim that he was denied access to the courts thus lacks an "arguable basis in law."

Furthermore, because Horton's access-to-the-courts claim lack an arguable legal basis, he cannot recover on a theory of *respondeat superior*. See Williams v. Luna, 909 F.2d 121, 123 (5th Cir. 1991); Gibbs v. King, 779 F.2d 1039, 1046 n.6 (5th Cir.), cert. denied, 476 U.S. 1117 (1986). Horton's claims against Kinker, Moxon, Warren, Bullock, Scott, Little, and Williams on such a theory are thus without merit.

Accordingly, the district court did not abuse its discretion in dismissing Horton's access-to-the-courts claim as frivolous under § 1915(d).

IV.

Horton further contends that the district court abused its discretion in dismissing his due process claim, allegedly arising from the failure of prison officials to follow the prison's own regulations in denying Horton access to the law library. Specifically, he also alleges that Ledford failed to show "good cause" for such a denial as required in the prison handbook.

We must emphasize that a state's failure to follow the state's own procedural regulations does not in and of itself establish a constitutional violation. See Jackson v. Cain, 864 F.2d 1235, 1251-52 (5th Cir. 1989). Thus, the fact that prison officials do not follow the prison's own rules, without more, is insufficient to establish a federal constitutional violation. See Hernandez v. Estelle, 788 F.2d 1154, 1158 (5th Cir. 1986); Green v. McKaskle, 788 F.2d 1116, 1123 (5th Cir. 1986). The only point at which the violation of a state procedural regulation can rise to the level of a constitutional claim occurs if the state, in promulgating the regulation, created a protected liberty interest because it established "sufficiently mandatory discretion-limiting standards or

[6] This court's opinion in that case reflects that the district court did ultimately consider Horton's untimely objections. See Horton v. Hedgepeth, No. 91-1542 (5th Cir. October 30, 1992).

criteria to guide state decision makers." Jackson, 864 F.2d at 1250; see Olim v. Wakinekona, 461 U.S. 238, 249 (1983).

Because Horton neither provided the district court with even recitation of the rules in question nor alleged any facts to support the contention that these regulations imposed such mandatory requirements of prison officials, Horton's due process claim has no arguable basis in law. Thus, the district court did not abuse its discretion for dismissing Horton's due process claim pursuant to § 1915(d).

V.

Horton next asserts that the district court abused its discretion in dismissing his racial discrimination claim. Horton, who is white, alleged that Mrs. Bagley, a black corrections officer with whom Horton was assigned to work in the law library, violated his right to equal protection by allowing another inmate--who is also black and works in the law library and with whom Bagley allegedly flirted--to do less work than Horton. Horton also alleges that Bagley would not allow Horton to do any personal work while on duty at the law library.

"To demonstrate that a challenged official act violates the racial component of the Equal Protection clause of the Fourteenth Amendment, a party must prove the racially discriminatory purpose of the act." Larry v. White, 929 F.2d 206, 209 (5th Cir. 1991), cert. denied, 113 S. Ct. 1946 (1993); see Washington v. Davis, 426 U.S. 229, 239 (1986). An official acts with discriminatory purpose only if he "single[s] out a particular group for disparate treatment and select[s] his course of action at least in part for the purpose of causing its adverse effect on an identifiable group." Lavernia v. Lynaugh, 845 F.2d 493, 496 (5th Cir. 1988) (citation and footnote omitted).

Although Horton's allegations indicate that Bagley may have favored the other inmate in the delegation of library work, they do not remotely reflect that Horton was treated in a different manner because of his race. Thus, Horton's claim of racial discrimination has no arguable basis in

law, and the district court did not abuse its discretion in dismissing the claim pursuant to § 1915(d).

VI.

Finally, Horton contends that the district court abused its discretion in dismissing his retaliation claim. Horton argues that he has alleged sufficient facts to show that Bagley retaliated against him for filing grievances by denying him access to the law library.

Horton maintains that after filing a grievance against Bagley, which was denied on the basis of insufficient evidence, Bagley requested that Ledford order Horton not to read law books on the job, although Ledford had previously allowed Horton to do so. Horton furthermore asserts that subsequent to his filing a grievance against Bagley, he was not allowed access to the law library on two of five days he requested--two days that Ledford was absent and thus not in charge of granting such access.[7] Additionally, Horton contends that Bagley retaliated against him again by denying him extra time in the law library after he had not used all of the time allotted to him on his previous visit.

This court has previously recognized that "a prisoner *may* have a protected liberty interest in prison grievance procedures." Gartrell v. Gaylor, 981 F.2d 254, 259 (5th Cir. 1993) (emphasis added); see Jackson, 864 F.2d at 1248-49. Thus, we cannot say that Horton's claim that Bagley retaliated against him for filing grievances against her has "no arguable basis in law." Such a label has been reserved for a claim based upon "an indisputably meritless legal theory." Neitzke, 490 U.S. at 327.

[7] Horton alleges that it was Bagley's duty to grant access to the law library when Ledford was absent.

Moreover, we cannot say that Horton's facts which he alleged to support his claim of retaliation are "clearly baseless." The Supreme Court has made it clear that such a conclusion is permitted only "when the facts alleged rise to the level of the irrational or the wholly incredible" and are thus deemed "fanciful," "fantastic," or "delusional." See Denton, 112 S. Ct. at 1733. Although a district court may properly dismiss improbable allegations on summary judgment, the court may not dismiss a complaint pursuant to § 1915(d) because the court finds the factual allegations unlikely. See id. at 1733-34. We conclude, therefore, that the district court abused its discretion in dismissing Horton's retaliation claim pursuant to § 1915(d).

VII.

For the foregoing reasons, we AFFIRM in part and REVERSE in part the judgment of the district court and REMAND for further proceedings.