IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5522
Summary Calendar

KIRK WAYNE McBRIDE,

Plaintiff-Appellant,

versus

JACK BREMER, Sheriff, Comal County,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas
(SA 90 CA 299 c/w/ SA 90 CA 936 & SA 90 CA 937)

April 16, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Kirk Wayne McBride filed three civil rights complaints against Jack Bremer, the sheriff of Comal County; Brian John, the jail administrator; and Walt Sumner, the assistant jail administrator. McBride challenges the conditions at the Comal County jail between January 16, and August 10, 1990. McBride sued the defendants in their official and individual capacities, and sought monetary and

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

injunctive relief. Because the complaints alleged similar violations, the district court consolidated the complaints.

McBride argues that the district court improperly considered the defendants' motion for summary judgment because it was filed untimely. He contends that all summary judgment motions had to be submitted by September 27, 1991, and the defendants did not file their motion for summary judgment until October 1, 1991. The district court treated the objection as a motion to strike the pleading and denied it.

The pretrial order required all summary judgment motions to be submitted by September 27, 1991, but did not indicate whether they had to be filed or served by that date. Therefore, the defendants' motion for summary judgment may not have been untimely. Service by mail is considered complete on the day the motion is placed in the mail. See Fed. R. Civ. P. 5(b); In re Todd Corp., 662 F.2d 339, 340 (5th Cir. 1981). The defendants placed their summary judgment motion in the mail on September 27, 1991, and therefore it was timely served.

Even if the motion was untimely, we will not disturb the district court's judgment. We review the denial of McBride's motion to strike for an abuse of discretion. See Clark v. Tarrant County, 798 F.2d 736, 747 (5th Cir. 1986) (motion to strike deposition); Dukes v. South Carolina Ins. Co., 770 F.2d 545, 548-49 (5th Cir. 1985) (motion to strike discovery). McBride was given notice that the magistrate judge intended to rule on the motion for

summary judgment and was given an opportunity to respond to the motion, which he did. He filed a response to the motion but did not object to the timeliness of the motion until after the magistrate judge had recommended granting the defendants' motion for summary judgment. McBride has not shown that he was unfairly prejudiced by the denial of his motion to strike; consequently, the district court did not abuse its discretion by denying the motion.

This court reviews the district court's grant of summary judgment de novo. Weyant v. Acceptance Ins. Co., 917 F.2d 209, 212 (5th Cir. 1990). Summary judgment is appropriate when, considering all of the facts in the pleadings, depositions, admissions, answers to interrogatories, and affidavits and drawing all inferences in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Newel v. Oxford Management, Inc., 912 F.2d 793, 795 (5th Cir. 1990). There is no genuine issue of material fact if taking the record as a whole a rational trier of fact could not find for the nonmoving party. Id. The court may also affirm the district court's judgment on alternative grounds. See Hanchey v. Enegras Co., 925 F.2d 96, 96 (5th Cir. 1990).

McBride argues that he was denied equal protection because convicted prisoners in state prisons received better amenities than pretrial detainees in the Comal County jail. To establish an equal protection violation, McBride must demonstrate, inter alia, that similarly situated individuals were treated differently. Muhammad

v. Lynaugh, 966 F.2d 901, 903 (5th Cir. 1992). All of the inmates similarly situated, the inmates in the Comal County jail, were subject to the same rules and regulations. Nothing indicates that the inmates at the county jail were, for purposes of an equal protection analysis, similarly situated to inmates in the state prison. See id. (a prisoner in one prison unit was not "similarly situated" to a prisoner housed in another unit). Therefore, McBride cannot establish an equal protection violation. Id. The district court properly dismissed this claim.

McBride next argues that he was denied access to the courts because the law library was insufficient, and he was not given sufficient access to the law library. A plaintiff cannot state a cognizable denial-of-access-to-the-courts claim if the plaintiff's position is not prejudiced by the alleged deprivation. Richardson v. McDonnell, 841 F.2d 120, 122 (5th Cir. 1988). McBride has not alleged that he was actually denied access to the court or that any pending litigation was prejudiced by the alleged deficiencies at the law library, and therefore has not stated a § 1983 cognizable claim. See Mann v. Smith, 796 F.2d 79, 84 n.5 (5th Cir. 1986). The district court properly dismissed this claim.

McBride further argues that his civil rights were violated because the jail adopted a no-smoking policy; the jail did not deliver mail on Saturdays; he was permitted outdoor recreation only three days per week and the jail did not have windows; and the food handlers did not have state-mandated food-handler cards. To obtain

relief under § 1983, a plaintiff must prove that he was deprived of a constitutional right or a federal statutory right and that the person depriving him of that right acted under color of state law. Resident Council of Allen Parkway Village v. U.S. Dep't of Housing & Urban Dev., 980 F.2d 1043, 1050 (5th Cir. 1993).

McBride does not have a federal constitutional or statutory right to smoke or to receive mail on Saturdays and therefore these claims do not state cognizable § 1983 claims. Additionally, although jail officials must provide inmates with some outdoor recreation and access to outdoor light, competent summary judgment material indicates that the Comal County jail has a policy of providing one hour of outdoor exercise three days a week and permits inmates to move to the dayroom or stay in the cell for the majority of the day. This policy is constitutionally sufficient. See Green v. Ferrell, 801 F.2d 765, 771-72 (5th Cir. 1986). Finally, even assuming that the food servers do not have the state-mandated food-handler card, an alleged violation of state law without more does not give rise to a constitutional violation. See Hernandez v. Estelle, 788 F.2d 1154, 1158 (5th Cir. 1986) (prison regulations). The district court properly granted summary judgment on these claims.

Finally, McBride argues that the district court improperly determined that the only claims before it were the claims for monetary relief against the defendants in their individual capacities. McBride was transferred to the state prison system and

therefore his claims for injunctive relief were rendered moot. See Hooten v. Jenne, 786 F.2d 692, 697 n.6 (5th Cir. 1986).

A lawsuit for monetary damages filed against a county official in his official capacity is actually a lawsuit against the county, and therefore the suit for monetary damages against the defendants in their official capacity was actually a suit against the county. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Section 1983 provides relief if a "person" has engaged in proscribed conduct. Id., 491 U.S. at 58 n.1, 62. A county is not a person within the meaning of § 1983, id., 491 U.S. at 71, and the district court properly dismissed these claims.

A F F I R M E D.