

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8136  
Conference Calendar

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DARRELL LYNN BOOKER,

Plaintiff-Appellant,

versus

E. N. BENOIT ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. W-91-CA-178  
- - - - -  
(October 28, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:\*

Darrell Lynn Booker's suit against prison officials alleging that they deprived him of lunch on two successive weekdays in 1991 as punishment for creating a disturbance that he did not create was dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). We take the plaintiff's factual allegations as true and will not affirm "unless it appears beyond doubt that the plaintiff can prove no set of facts in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

support of his claim which would entitle him to relief.'" McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1343 (5th Cir. 1988) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Our review is de novo. Walker v. South Cent. Bell Tel. Co., 904 F.2d 275, 276 (5th Cir. 1990). We liberally construe Booker's arguments. Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

### I.

The provision of two, rather than three, meals a day is not cruel and unusual punishment. Green v. Ferrell, 801 F.2d 765, 770, 771 & n.5 (5th Cir. 1986). Violations of state law and prison policy, without more, are not cognizable in a 42 U.S.C.

§ 1983 case. Hernandez v. Estelle, 788 F.2d 1154, 1158 (5th Cir. 1986) (prison policy); Smith v. Sullivan, 611 F.2d 1039, 1045 (5th Cir. 1980) (state law). Violations of the Ruiz decree, without more, are not cognizable in a § 1983 action, either. Green v. McKaskle, 788 F.2d 1116, 1122 (5th Cir. 1986) (referring to Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), aff'd in part and vacated in part, 679 F.2d 1115, amended in part and vacated in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983)).

### II.

In addition to the foregoing claims, Booker alleged that the officers' failure to provide him a hearing and their failure to follow the prison's own disciplinary rules and procedures deprived him of a protected liberty interest without due process.

Booker has moved in this Court to supplement the pleadings with a copy of a prison administrative directive stating, "All inmates shall be provided three (3) meals daily on all working days. . . . No food or meals shall be withheld as a disciplinary sanction for an individual inmate."

A state statute or regulation creates a protected liberty interest for a prisoner when it explicitly uses mandatory language to specifically limit official discretion, thus requiring a particular outcome when relevant criteria are met. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 462-63, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989); Olim v. Wakinekona, 461 U.S. 238, 249, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983). The district court made no determination whether the directive creates a protected liberty interest and, if so, whether the defendants acted within the scope of the directive.

When officers denied an inmate food because he refused to fully dress himself for meals, the district court was required to examine the regulation pursuant to which the denial was imposed. Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078, 1082-83 (5th Cir. 1991). A Rule 12(b)(6) dismissal was improper without a determination whether the officers acted within their regulatory authority. Id. at 1083.

Additionally, an "affirmative defense or other bar" must appear on the face of the complaint for it to be the basis of a Rule 12(b)(6) dismissal. Garrett v. Commonwealth Mortgage Corp. of America, 938 F.2d 591, 594 (5th Cir. 1991). Accordingly, the dismissal may not rest on the finding that the officers pursued a

proper prison interest or that Booker had an opportunity to eat before creating a disturbance.

**III.**

To the extent that the principles addressed in Part I above relate to the dismissal, the judgment is AFFIRMED. To the extent that the principles addressed in Part II above relate to the dismissal, the judgment is VACATED and the matter REMANDED.

Booker's motion to supplement the pleadings with the administrative directive is GRANTED because the directive is relevant to the disposition of the appeal. His motion to enter his grievance procedure documents as an exhibit is DENIED because they are not relevant to the disposition of the appeal.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.