

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8206
(Summary Calendar)

JAMES X. BANKEHEAD, a/k/a,
Henry Bankehead,

Plaintiff-Appellant

versus

JAMES R. MANNIX, Sgt. AND
MARIE J. FAUBION, CO, III

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas
(W-91-CA-166)

(January 11, 1993)

BEFORE KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant James X. Bankehead, a prisoner in the Hughes Unit of the Texas Department of Criminal Justice, Institutional Division near Gatesville, Texas, appeals the district court's dismissal of his First Amendment claim, in which he asserts that he was denied an opportunity to practice his religion. The district court dismissed his allegations as either moot or

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

frivolous. As we find that Bankehead states a claim on all but one of his allegations, we reverse and remand for further proceedings consistent with this opinion.

I

FACTS AND PROCEEDINGS

Bankehead, proceeding pro se and in forma pauperis, filed a complaint for violation of his rights under 28 U.S.C. § 1983, alleging that he was denied his First Amendment right to freedom of religion. His claim included allegations that he was prohibited from attending prayer services; that his religious medallion, holy Qur'an (prayer book), and pork-free diet card were improperly confiscated; that he was denied access to Islamic religious materials; and that he was retaliated against because he was Muslim. Bankehead requested unspecified monetary damages for "mental anguish," punitive damages, and injunctive relief. He later amended his complaint to specify the actual damages requested.

The United States Magistrate Judge considered Bankehead's claims and recommended that those regarding his lost Qur'an and his denial of access to prayer services be dismissed as moot. His decision regarding the Qur'an was based on the fact that the book had been returned to Bankehead, albeit in a damaged condition. In response to Bankehead's allegation concerning his access to prayer services, the prison chaplin explained that previously he had announced Christian services in advance but had failed to do so for Muslim services. He explained further, however, that he has

corrected this situation and now announces Muslim services as well. The magistrate noted that although the failure to announce the Muslim services was unfair, it did not rise to the level of a constitutional violation; and that, in any event, even if there had ever been a violation it has been remedied so the claim is moot.

In addition, the magistrate judge recommended that Bankehead's claims regarding the losses of his diet card and his medallion be dismissed as frivolous because they did not rise to the level of constitutional violations either. Finally, the magistrate judge concluded that Bankehead's claims for declaratory and injunctive relief should be transferred to the court retaining jurisdiction over all such cases (the "Ruiz Court").

The district court adopted the magistrate's recommendations regarding the loss of the Qur'an and the holy medallion, and the failure to announce religious services, dismissing these claims. But the court disregarded the recommendation for referral to the Ruiz court and instead dismissed Bankehead's claim for injunctive relief as meritless. Bankehead timely appealed.

II

ANALYSIS

A. STANDARD OF REVIEW

A complaint filed in forma pauperis may be dismissed by the court sua sponte if the complaint is found to be frivolous.¹ A complaint is frivolous if it lacks an arguable basis in law or

¹ 28 U.S.C. § 1915(d); Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986).

fact.² We review the district court's dismissal on this basis for abuse of discretion.³

B. RELIGIOUS CLAIMS

We first address those claims for which the magistrate judge recommended dismissal⁴ whether on the basis of mootness, frivolity, or availability of post-deprivation remedies. Although a prisoner cannot state a cognizable due process claim if a meaningful post-deprivation remedy is available to address a property loss,⁴ this rule does not apply to violations of substantive constitutional rights.⁵ Bankehead is not complaining of the loss of his religious properties per se, but of the prison officials' interference, by depriving him of his religious items, with his First Amendment right freely to exercise his religion. Thus, when he alleges that he has been deprived of his Qur'an and his medallion, he is alleging a violation of his substantive constitutional right. The deprivation of the Qur'an and the medallion is therefore neither moot nor frivolous. The district court did not consider this aspect of Bankehead's claims, and we remand for it to do so.

Bankehead's claim that he was denied the opportunity to attend religious services is also a First Amendment right that must be addressed on remand. In addition, the magistrate judge and

² Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992).

³ Id.

⁴ Hudson v. Palmer 468 U.S. 517, 533 (1984).

⁵ Martin v. Dallas County, Tex., 822 F.2d 553, 555 (5th Cir. 1987).

district court failed to address Bankehead's claims that prison officials retaliated for his attendance at Muslim prayer services by filing false disciplinary actions, and that prison officials were biased in favor of Christian inmates. These are substantive constitutional issues that also must be addressed on remand.

We agree with the district court, however, that Bankehead's claim regarding the deprivation of his pork-free diet card is not a meritorious allegation. Prison officials confiscated the card because the diet card system was not used at its facility. Moreover, Bankehead was never forced to eat pork, but was always provided a non-meat alternative. On this determination, we affirm the district court's dismissal of Bankehead's claim relating to the diet card.

Next we consider Bankehead's claim for declaratory and injunctive relief to require prison officials to permit him to receive solicited and unsolicited religious publications. Bankehead insists that these claims should be referred to the Ruiz court, as recommended by the magistrate judge.⁶ Despite this recommendation, the district court dismissed the claims, stating only the bald conclusion that they were meritless. Nevertheless, this dispute has now been resolved by the recent settlement in the Ruiz case, in which the court's Final Judgment terminates that class action. As Bankehead's claim was not then pending before the

⁶ Previously, prisoners in the Texas system had to pursue their claims for equitable relief from allegedly unconstitutional prison conditions through the class representative in the Ruiz court, or intervene in that litigation. Gillespie v. Crawford, 858 F.2d 1101, 1103 (5th Cir. 1988).

Ruiz court, transfer to that court now is not a viable option.

The question remains, however, as to what is the proper way to handle Bankehead's claims for injunctive relief. A review of the record reveals that neither the magistrate judge nor the district court addressed the substance of Bankehead's claims for injunctive relief. The magistrate judge concluded simply that as these claims were for injunctive relief they should be transferred to the Ruiz court. The district court, in disregarding this recommendation, made only the conclusionary statement that the claims were without merit. Although upon closer examination the claims may well prove to be meritless, we cannot affirm the district court's conclusion when it fails to express either the legal or factual reasoning behind it. Thus, we remand Bankehead's injunctive claims for a more thorough consideration and explanation by the district court.

Finally, Bankehead alleges, for the first time on appeal, that he was denied access to the courts when prison officials ignored his complaints filed in compliance with the unit grievance procedure. Issues raised for the first time on appeal are reviewable only if they involve purely legal questions and failure to consider them would result in manifest injustice.⁷ We find no manifest injustice in the instant case, inasmuch as Bankehead's claims were reviewed by the magistrate judge and the district court. We therefore decline to address this issue.

III

⁷ United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990).

CONCLUSION

We affirm the district court's determination that Bankehead's claim regarding the deprivation of his pork-free diet card is frivolous and thus properly dismissed. On all other issues, however, we reverse and remand for proceedings consistent with this opinion. Specifically, on remand the district court is to consider Bankehead's claims of denial of his right freely to exercise his religion, the deprivation of his holy medallion and Qur'an, and his allegations that he was prevented from attending religious services, as allegations of a First Amendment violations. As such, the mere fact that one or more of these violations have since been remedied does not moot Bankehead's claims. Moreover, the district court is to consider Bankehead's claims that prison officials retaliated against him for attending Muslim religious services by filing false disciplinary reports as well as his general claim of prison bias against Muslims. Finally, the district court is to consider Bankehead's claims for declaratory and injunctive relief more than a cursory manner and enter findings sufficient to enable this court to review that court's conclusions and its reasons therefor.

AFFIRMED in part and REVERSED and REMANDED in part.