

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8240
Summary Calendar

LAWRENCE EDWARD THOMPSON,

Plaintiff-Appellant,

VERSUS

EMMETT SOLOMON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W-92-CA-47)

June 2, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Lawrence Edward Thompson, an inmate in the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID), appeals, *pro se*, the 28 U.S.C. § 1915(d) dismissal of his 42 U.S.C. § 1983 complaint, contending that the district court improperly disposed of his complaint on the merits and without sufficient evidence. Because we find an arguable basis in law and in fact for several of Thompson's claims, we conclude that the district court abused its discretion in dismissing them as frivolous. We affirm as to the remainder.

I.

¹ Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Thompson is a member of the Lost-Found Nation of Islam, which observes Ramadan during the month of December. During Ramadan, all Muslims must fast between sunrise and sunset. In 1989, Thompson requested that prison authorities provide meals for Nation of Islam prisoners during Ramadan observance in December, as they do for orthodox Muslim inmates in the spring. According to Thompson, Chaplain Emmett Solomon, administrator of the Chaplaincy Program, responded that his department assists inmates one month a year in observing Ramadan, and that if Thompson wants to observe Ramadan at another time, he will have to make his own provisions.

Thompson brought this action against Solomon and Mansur Beyah, Islamic Chaplain, claiming violation of his First and Fourteenth Amendments of the United States Constitution and the Texas Constitution. He alleged, *inter alia*, that appellees (1) refuse to accommodate the Nation of Islam's observance of Ramadan; (2) maintain a policy of classifying members of the Nation of Islam as "disruptive"; (3) deny all Muslim inmates the right to possess a book titled **Farrakhan's Final Call** by Louis Farrakhan; (4) refuse to provide religious newspapers, "Final Call" and "Muhammad Speaks", to inmates in solitary and administrative segregation; and (5) fail to provide pork-free meals. He requested, *inter alia*, a declaratory judgment, injunctive relief, and compensatory and punitive damages. Thompson was granted leave to proceed *in forma pauperis*.

A *Spears* hearing² was held, in which the assistant warden testified that the Hughes Unit accommodates the orthodox Ramadan in March, and cannot provide for each individual sect that desires to observe it at another time. He noted that the provision of special meals requires additional work. The assistant warden did not deny that the book **Farrakhan's Final Call** has been deemed "racist", but stated that its classification is determined by the Director's review. In addition, he stated that all inmates in solitary and administrative segregation are only allowed to have the Bible or Koran.

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

Based upon the hearing, the magistrate judge recommended dismissal of Thompson's damages claims, and the transfer of his claims for equitable relief to the court handling the global **Ruiz** decree.³ Over Thompson's objections, the district court adopted the recommendation.

Because the **Ruiz** decree did not encompass claims of religious freedom, the case was transferred back to the western district of Texas. Accordingly, the magistrate judge issued another report, recommending dismissal of the remaining claims for equitable relief. The magistrate judge concluded that "[t]he allegations of [Thompson's] complaint, as well as his testimony at a **Spears** hearing ..., do not indicate that [Thompson] has been denied the opportunity to practice his professed religion, nor has he been punished for adhering to certain religious practices". In addition, the magistrate judge reiterated the factors set forth in **Turner v. Safely**, 482 U.S. 78 (1987) used to determine whether a regulation is "reasonably related to legitimate penological interests", and concluded that "[t]he foregoing analysis applies in the present case to all of [Thompson's] allegations". Over Thompson's objections, the district court adopted the recommendation, and dismissed the complaint as frivolous.

II.

A dismissal as frivolous is appropriate where the claim has no arguable basis in law or in fact. **Denton v. Hernandez**, ___ U.S. ___, 112 S. Ct. 1728, 1733 (1992); **Gartrell v. Gaylor**, 981 F.2d 254, 256 (5th Cir. 1993). Accordingly, a district court may dismiss a claim based on "an indisputably meritless legal theory", **Neitzke v. Williams**, 490 U.S. 319, 327 (1989), or whose factual contentions "rise to the level of the irrational or the wholly incredible". **Denton**, ___ U.S. ___, 112 S. Ct. at 1733. "[W]e review § 1915(d) dismissals for abuse of that discretion". **Gartrell**, 981 F.2d at 256.

The First and Fourteenth Amendments require that an inmate be given "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts". **Cruz v. Beto**, 405 U.S. 319, 322 (1972). A prison regulation

³ See **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).

that impinges on inmates' constitutional rights is valid "if it is reasonably related to legitimate penological interests". *Turner v. Safely*, 482 U.S. 78, 89 (1987). Consideration of the following factors set forth in *Turner* aids a court's determination of such reasonableness:

(1) whether the regulation has a logical connection to the legitimate government interests invoked to justify it, (2) whether there are alternative means of exercising the rights that remain open to the inmates, (3) the impact that accommodation of the asserted constitutional rights will have on other inmates, guards and prison resources, and (4) the presence or absence of ready alternatives that fully accommodate the prisoner's rights at *de minimis* costs to valid penological interests.

Kahey v. Jones, 836 F.2d 948, 950 (5th Cir. 1988) (citations omitted).

A court, however, is not required "to weigh evenly, or even consider, each of these factors". *Scott v. Mississippi Dept. of Corrections*, 961 F.2d 77, 80 (5th Cir. 1992). Upon review of Thompson's complaint and the testimony at the *Spears* hearing,⁴ we conclude that several of Thompson's claims were not properly dismissed under § 1915(d).

A.

Concerning Thompson's request for accommodation during the December observance of Ramadan, the TDCJ's refusal to accommodate that observance arguably infringes Thompson's constitutional rights. In examining the reasonableness of this policy, the district court relied on the assistant warden's cursory response that the prison accommodates the orthodox observance in June, and that a separate accommodation in December requires substantial "lead work". We conclude that the above response provides an insufficient factual basis to conclude that Thompson's reasonableness challenge under *Turner* is indisputably without merit. See *Saleem v. Evans*, 866 F.2d 1313, 1317 (11th Cir. 1989) (holding that the district court erred in dismissing prisoner's complaint for failure to state a claim without developing facts surrounding state justification for refusing to accommodate December Ramadan).

B.

⁴ We were not provided with a transcript of the hearing; accordingly, we reviewed the audiotape.

The court similarly erred in dismissing as frivolous Thompson's objection to the denial of books except the Bible and the Koran in solitary, and the classification of Farrakhan's book as "racist". In dismissing these claims, the magistrate applied the *Turner* standard and correctly noted that distinctions between publications solely on the basis of their potential implications for prison security are "neutral" under *Turner*. See *Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874 (1989); however, there is no basis in the record for concluding that the restrictions were based on concerns for prison security. That a committee labelled Farrakhan's book "racist", standing alone, does not sufficiently justify its prohibition. We cannot infer that the relevant authorities concluded that the book's "racist" content threatened prison security. See *Thornburgh v. Abbott*, 490 U.S. 399 (1989) (distinguishing prohibitions on writings that express "inflammatory political, racial, religious, or other views" from those that are found to threaten prison security).

C.

On the other hand, the magistrate properly rejected Thompson's claims based on his alleged inability to obtain a pork free meal, and discrimination resulting from the classification of members of the Nation of Islam as "disruptive". TDCJ accommodates Muslim dietary restrictions. As Thompson testified, all pork is indicated by an asterisk, and a pork free meal is provided every 72 hours. When in solitary confinement, a pork free meal is provided upon request. Concerning his discrimination claim, he failed to offer supporting facts. See *Wesson v. Oglesby*, 910 F.2d 278, 281 (5th Cir. 1990).

D.

Finally, we examine the court's dismissal of Thompson's damages claims. We agree with the district court that Thompson failed to set forth facts in support of "actual injury", or, in support of the allegation that appellees' conduct involved "reckless or callous indifference to the federally protected rights of others". *Brown v. Byer*, 870 F.2d 975, 982 (5th Cir. 1989) (standard for punitive damages in § 1983 action). Accordingly, his claims for actual damages and punitive damages were

properly dismissed. See *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986). Of course, if Thompson establishes a constitutional violation, he remains entitled to nominal damages. *Mann v. Smith*, 796 F.2d 79, 86 (5th Cir. 1986).

III.

For the foregoing reasons, the judgment of the district court is **AFFIRMED** in part and **REVERSED** in part and this case is **REMANDED** for proceedings consistent with this opinion.

AFFIRMED in Part; REVERSED in Part; and REMANDED.