UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8383

LARRY MOORE,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice Institutional Division, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W-91-CV-303)

(January 26, 1995)

Before GARWOOD and EMILIO M. GARZA, Circuit Judges and NOWLIN[*], District Judge.[**]

GARWOOD, Circuit Judge:

Proceeding *pro se* and *in forma pauperis*, plaintiff-appellant Larry Moore (Moore), a prisoner of the Texas Department of Criminal Justice (TDCJ), brought suit under 42 U.S.C. § 1983 against six

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[*] District Judge of the Western District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

officers (Defendants) of TDCJ for allegedly violating his constitutional rights. Moore appeals from the judgment of the district court, which revoked his *in forma pauperis* status and dismissed his suit as frivolous pursuant to 28 U.S.C. § 1915(d). We affirm.

Facts and Proceedings Below

Moore is an inmate at TDCJ's Alfred Hughes Unit in Gatesville, Texas. On March 15, 1991, a TDCJ correctional officer, Defendant Tommy Collier (Collier), confiscated numerous items from Moore's cell, citing Moore for the possession of contraband that posed a fire hazard. According to the disciplinary report, the contraband included "31 empty Bugler and Kite tobacco cans and approximately 43 empty top tobacco boxes." Under prison regulations, the possession of such contraband was classified as a minor offense, which is punishable only by a temporary loss or restriction of privileges.

In accordance with TDCJ policy on minor offenses, Moore was given notice of a disciplinary hearing, at which he was allowed to make a written or oral statement, but not to call or examine witnesses. Moore chose to submit a written statement, in which he disputed the quantity, but not the existence, of contraband items in his cell. On March 24, 1991, Defendant Edmund Benoit (Benoit) conducted a disciplinary hearing. Following the hearing, Benoit found Moore guilty of possessing contraband and assessed his punishment at seven days of cell restriction and fifteen days of commissary restriction.

Following two unsuccessful internal TDCJ administrative

appeals, Moore filed this suit under 42 U.S.C. § 1983, alleging a violation of his rights to due process and equal protection under the Fourteenth Amendment. In his complaint, Moore claimed variously that Defendants[1] provided constitutionally inadequate procedures at his disciplinary hearing which amounted to harassment, retaliation, and a conspiracy to deny prisoner rights; and, moreover, that Defendants obstructed justice, engaged in organized criminal activity, committed forgery and burglary, tampered with United States mail and government documents, and interfered with his right of access to the courts. Moore sought $40,000 in compensatory and punitive damages from each defendant and an injunction to effect the arrest and prosecution of Defendants for their allegedly criminal acts.

The case was assigned to a magistrate judge for a report and recommendation. Following a *Spears*[2] hearing, the magistrate judge granted Moore leave to proceed *in forma pauperis* under 28 U.S.C. § 1915(a) and ordered Defendants to respond to the allegations in

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[1] Besides Collier (for perjury, retaliation, and harassment) and Benoit (for harassment, retaliation, and conspiracies to harass, to retaliate, and to deny prisoners' rights), the defendants named in this action are Warden Jack M. Garner (for tampering with government documents, conspiracy to deny prisoners' rights, and obstruction of justice), Regional Director Marshall Herklotz (for conspiracy to retaliate and to obstruct justice and for obstruction of justice), Director James A. Collins (for conspiracies to deny prisoners' rights and to obstruct justice and for obstruction of justice), and Deputy Director Wayne Scott (same). Moore's allegations of forgery and mail-tampering are made against unnamed officials of TDCJ, whom he also accuses of "affirming TDC's operational policy of conspiring, violation of equal protection, obstructing justice, and official oppression/misconduct."

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

Moore's complaint. Defendants answered, asserting the defense of qualified immunity, and filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). The magistrate judge issued a report, addressing at length the particulars of Moore's allegations. Relying on this Circuit's requirement of heightened pleading in civil rights suits against individual officers, *see Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), the magistrate judge found that Moore's allegations "lack the specificity [required] to support a § 1983 claim." In part on this basis, the magistrate judge concluded that Moore's chances for success on his claims were "nil" and, accordingly, recommended revoking Moore's *in forma pauperis* status and dismissing the action as frivolous under 28 U.S.C. § 1915(d). Over Moore's objections, the district court adopted the report and recommendations of the magistrate judge and signed a final judgment dismissing the suit.

Moore filed a timely notice of appeal. We reinstated Moore's *in forma pauperis* status and appointed counsel to represent him. We specifically requested that the parties address an issue that this Court has since decided: whether the heightened pleading standard adopted in *Elliot v. Perez*, 751 F.2d 1472 (5th Cir. 1985), for qualified immunity cases survived, for such cases, the Supreme Court's recent decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160 (1993). For the reasons that follow, we affirm.

Discussion

The federal *in forma pauperis* statute, codified at 28 U.S.C. § 1915, provides an opportunity for indigent litigants to sue in

federal court without having to pay the administrative costs required for the suit's prosecution. Because litigants who proceed *in forma pauperis* lack the disincentive of paying litigants to pursue meritless claims, the statute allows a district court broad discretion to dismiss the cause "if satisfied that the action is frivolous." 28 U.S.C. § 1915(d); *see Green v. McKaskle*, 788 F.2d 1116, 1119 (5th Cir. 1986). An action is frivolous "where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 109 S.Ct. 1827, 1831-32 (1989). When the indigent litigant's claims are so lacking, we review the decision to dismiss under section 1915(d) for an abuse of discretion. *Denton v. Hernandez*, 112 S.Ct. 1728, 1734 (1992).

In this case, the district court followed the recommendation of the magistrate judge to dismiss the action as frivolous. That decision was, in part, based on Moore's failure to plead facts with a specificity sufficient to withstand scrutiny under this Circuit's heightened pleading standard. To succeed in a section 1983 action against individual defendants, the plaintiff must plead facts with a particularity adequate to overcome the officials' qualified immunity.[3] As we observed in *Elliot v. Perez*, 751 F.2d 1472 (5th Cir. 1985),

> "In cases against governmental officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff's complaints state

[3] Moore bears the burden of overcoming Defendants' defense of qualified immunity. *Salandra v. Garza*, 684 F.2d 1159, 1163 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1253 (1983). To do so, he must show that Defendants' conduct was not objectively reasonable and, further, that Defendants violated clearly established federal law. *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982).

> with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." *Id.* at 1473.

In other words, Moore cannot prevail merely on the basis of "conclusory allegations and bold assertions." *Streetman v. Jordan*, 918 F.2d 555, 557 (5th Cir. 1990).

The legitimacy of this heightened pleading requirement was recently called into question by the Supreme Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160 (1993). In *Leatherman*, a unanimous Court invalidated this Circuit's requirement of heightened pleading for section 1983 suits against municipalities. *Id.* at 1163. The Court, however, expressly did not decide "whether . . . qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* at 1162. Because the Court did not decide this issue, we recently held that we are bound by *Elliott* and subsequent cases that require heightened pleading in civil rights suits against individual defendants covered by qualified immunity. *Babb v. Dorman*, 33 F.3d 472 at 477 (5th Cir. 1994). We therefore find no error in the district court's reliance on the heightened pleading standard.

We also agree that Moore has failed to state with adequate specificity how Defendants' actions amount to a violation of section 1983 and how, even if they do, such actions overcome Defendants' qualified immunity. All of Moore's claims against Defendants individually or in conspiracy for perjury, harassment, retaliation, burglary, obstruction of justice, interference with

the right of access to the courts, involvement in organized crime, and tampering with documents and mail are grounded on nothing more than wholly general allegations, which alone cannot sustain a suit under section 1983. *See, e.g., Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir. 1982) (in the context of a conspiracy allegation, ruling that "more than a blanket of accusation is necessary to support a § 1983 claim"). Therefore, to the extent the district court dismissed Moore's suit for failure to satisfy heightened pleading, we find no abuse of discretion.[4]

Moreover, insofar as Moore's claims rely on allegedly inadequate procedures at his disciplinary hearing, we can find no error in the district court's finding that the suit was frivolous. Most of Moore's complaints derive from perceived failings in TDCJ's informal disciplinary process. Specifically, Moore claims that he was denied due process because he was not allowed to confront the evidence against him, because he was not able to call or examine witnesses, because the hearing was not recorded, because he was convicted on what he claims amounted to perjured hearsay, and because the confiscated materials were, allegedly, not contraband. These assertions have no arguable basis in law.

In light of prisoners' restricted liberty interests and prison officials' broad discretion over prison management, an inmate facing a minor disciplinary hearing is not due the full range of rights available at criminal trials, *Wolf v. McDonnell*, 94 S.Ct.

[4] Although qualified immunity does not apply in the case of equitable relief, Moore's request for an injunction to effect the arrest and prosecution of Defendants is facially frivolous.

2963, 2974 (1974), or even those available at major disciplinary hearings, where the liberty interests at stake are considerably higher. *Id.* at 2982 n.19 (noting that the due process procedures necessary for serious deprivations are not "required for the imposition of lesser penalties such as the loss of privileges"). A minor disciplinary hearing[5] involving merely the loss of privileges need conform only to the notice-and-hearing protections of *Hewitt v. Helms*, 103 S.Ct. 864 (1983). *See Cooper v. Sheriff, Lubbock County, Texas*, 929 F.2d 1078 (5th Cir. 1981). In such proceedings, the prisoner is due "some notice of the charges against him and an opportunity to present his views to the prison official . . . ." *Hewitt*, 103 S.Ct. at 874. In accordance with TDCJ procedures, Moore was notified of the fact and nature of a disciplinary hearing against him and of his opportunity to submit a statement, which he did. Moore thus received the process he was due and was entitled to no more. In the context of this minor disciplinary hearing, Moore had no right to have the proceedings recorded,[6] no right to call or examine witnesses, and no right to

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[5] According to TDCJ disciplinary rules, "A minor disciplinary hearing is a less formal proceeding intended for the handling of charges which cannot result in the loss of good time, reduction in time earning status, or punitive segregation. . . . Should an inmate be found guilty pursuant to a minor hearing, that finding of guilty will not preclude the inmate from being reviewed or considered for promotion in class or restoration of good time credits."

Because this hearing concerned a minor offense, Moore's reliance on *Wolff v. McDonnell*, 94 S.Ct. 2963, 2981 (1974), is misplaced. The procedures announced in that case apply only to non-minor disciplinary proceedings, in that case the loss of good-time credits.

[6] Moore relies on *Ruiz v. Estelle*, 679 F.2d 1115, 1155 (5th Cir.), *amended in part and vacated in part*, 688 F.2d 266 (5th

more meaningful confrontation of the evidence against him. Because such procedures exceed the minimal requirements of due process, their absence cannot be said to state a deprivation of constitutional rights under section 1983.

Moore's other claims with respect to the hearing fail as well. In his statement, Moore outlined his objections to Collier's report, namely his assertions of perjury with regard to the quantity of contraband. Because in fact Moore never denied possessing some of the items he was accused of possessing, the hearing officer obviously had "some evidence" upon which to base his convictionsQeven assuming aspects of the report were erroneous or perjured. *Gibbs v. King*, 779 F.2d 1040, 1044 (5th Cir.) (holding that "[f]ederal courts will not review the sufficiency of the evidence at a disciplinary hearing; a finding of guilt requires only the support of 'some facts' or 'any evidence at all'"), *cert. denied*, 106 S.Ct. 1975 (1986).

Finally, Moore's assertion that confiscated items were not actually contraband is inconsistent with prison regulations.

Cir. 1982), *cert. denied*, 103 S.Ct. 1438 (1983), for the proposition that *all* TDCJ disciplinary hearings must be recorded. The cited portions of *Ruiz* deal with the particulars of a prophylactic consent decree, not with the requirements of the United States Constitution. Noting that the recording of proceedings was a measure "that the Constitution does not of its own force initially require," we nevertheless agreed the measure was necessary to remedy the TDCJ's failure to provide adequate written records of major disciplinary hearings as required by *Wolff v. McDonnell*. *Id.* Because the *Wolff* procedures are not required in the case of a minor infraction hearing, such as here, Moore cannot rely on the *Ruiz* decree. Violations of the *Ruiz* decree are not of themselves a sufficient basis for a section 1983 action. *Green v. McKaskle*, 788 F.2d 1116, 1123-1124 (5th Cir. 1986).

According to regulations, contraband is "[a]ny item which, in the judgment of TDCJ-ID personnel, unreasonably hinders the safe and effective operation of the unit." Because in Collier's judgment the empty boxes posed a fire hazard, they qualify as contraband under this broad definition. Such a regulation is valid if "reasonably related to legitimate penological interests." *Turner v. Safley*, 107 S.Ct. 2254, 2261 (1987). We cannot say the magistrate judge and district court erred in the determination that restricting prisoners' access to items that might pose a risk of fire serves a valid penological interest.[7] Given that determination, the regulation is not unconstitutional as applied here.

Conclusion

For the foregoing reasons, the district court was within its discretion to dismiss Moore's suit as frivolous under 28 U.S.C. § 1915(d).

AFFIRMED

[7] Fire is not the only risk posed by the confiscated items. According to the district court and magistrate judge, the boxes may have also been used to store weapons or other contraband.