IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-1540
Summary Calendar

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RICHARD A. KUYKENDALL,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, In his individual and official capacity, ET AL.,

Defendants,

JAMES A. COLLINS, In his individual and official capacity, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the Northern District of Texas
(5:92-CV-135-W)

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(August 15, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

PER CURIAM:

Plaintiff-appellant Richard A. Kuykendall (Kuykendall), a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

white inmate at the Price Daniel Unit of the Texas Department of Criminal Justice, Institutional Division, (TDCJ-ID) filed this 42 U.S.C. § 1983 suit alleging that prison authorities engaged in racial discrimination by refusing to declare him "racially ineligible" to be celled with black or Hispanic inmates and by not housing him in a cell with a white inmate. Named as the original defendants were James A. Collins, TDCJ-ID Director; L.W Woods, Warden at the Price Daniel Unit; and M. Nichols, Chief Correctional Counselor of Classifications at the Price Daniel Unit.

After the defendants filed their answers, the magistrate judge granted Kuykendall permission to file an amended complaint containing more specific and detailed allegations, but denied his attempt to add additional defendants to the suit. In his amended complaint, Kuykendall alleged "a history of hostile confrontations with blacks," "tatoos which can be interpreted as expressing beliefs and attitudes hostile towards other races," and "inability to get along with blacks and his strong desire to remain apart from black inmates," as evidenced in his statements, and a fear of black homosexuals due to a "near rape" *prior* to coming to prison. Kuykendall also alleged that his case manager had told him that he "would have little difficulty in being exempted from in-cell integration with black inmates." Kuykendall sued the defendants, in both their official and individual capacities, and sought monetary damages, as well as declaratory and injunctive relief. The defendants filed an amended answer asserting various immunity defenses and requesting dismissal under Fed. R. App. P. 12(b)(6) for failure to state a claim.

Finding that Kuykendall had made only conclusional allegations concerning his troubles with black inmates, and that "Collins, Woods and Nichols, individually, are protected by their entitlement to qualified immunity, the State of Texas is protected from a claim for monetary damages by the Eleventh Amendment to the U.S. Constitution, and the Plaintiff's prayer for declaratory and injunctive relief is not sustainable pursuant to Rule 12(b)(6)," the magistrate judge recommended dismissal. The district court considered Kuykendall's objections, conducted *de novo* review, adopted the magistrate judge's findings and recommendations, and dismissed Kuykendall's suit. As to the claims against the defendants in their individual capacities and the damages claims, the dismissal was with prejudice; as to the claims for injunctive and declaratory relief against defendants in their official capacities, the dismissal was without prejudice.

Kuykendall contends that the district court erred in holding that the defendants, in their individual capacities, were qualifiedly immune from section 1983 damage claims.

Kuykendall does not have a constitutionally protected interest in a racially segregated cell. *See Lee v. Washington*, 88 S.Ct. 994 (1968); *Sockwell v. Phelps*, 20 F.3d 187, 191-92 (5th Cir. 1994); *Jones v. Diamond*, 636 F.2d 1364, 1373 (5th Cir.) (en banc), *cert. dismissed*, 453 U.S. 950 (1981), *overruled on other grounds, International Woodworkers of America v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986) (en banc).

Nor does Kuykendall's challenge to his classification status implicate a constitutionally protected right. "Classification of

prisoners is a matter left to the discretion of prison officials" because "[i]t is well settled that prison officials must have broad discretion, free from judicial intervention, in classifying prisoners in terms of their custodial status." *McCord v. Maggio*, 910 F.2d 1248, 1250 (5th Cir. 1990) (internal quotations and citation omitted). Kuykendall's pleadings affirmatively reflect that he received ample process. As the magistrate judge correctly noted, Kuykendall "has pointed to no lack of due process procedure. His entire argument against the prison authorities is the lack of the *result* he requests." Finally, even assuming, *arguendo*, that Kuykendall's classification was in violation of TDCJ-ID rules, a violation of prison regulations, without more, does not give rise to a federal constitutional violation. *Hernandez v. Estelle*, 788 F.2d 1154, 1158 (5th Cir. 1986).

Kuykendall's assertion that his current classification jeopardizes his safety and welfare in violation of his Eighth Amendment right to be free from cruel and unusual punishment is also unavailing. The Eighth Amendment does provide prisoners protection against injury at the hands of other inmates. *Johnston v. Lucas*, 786 F.2d 1254, 1259 (5th Cir. 1986). To make such a claim, Kuykendall must demonstrate deliberate indifference on the part of prison officials. *Id*. at 1260. Kuykendall's conclusional allegations of "a history of hostile confrontation with the black race"SQpersisted in after he was allowed to amend to state specificsSQdo not meet this burden. *See Stokes v. Delcambre*, 710 F.2d 1120, 1125 (5th Cir. 1983) (rejecting section 1983 claim because the plaintiff had not alleged facts sufficient to

demonstrate a "pervasive risk of harm," or a "failure to take reasonable steps to prevent the known risk.").

Thus, as Kuykendall has failed to allege any facts showing that he was deprived of his constitutional rights, he cannot defeat the defendants' qualified immunity defense.

To the extent Kuykendall seeks nonprospective monetary relief from the defendants, in their official capacities, his action is barred under the Eleventh Amendment. *See Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989).

Kuykendall also complains that the district court dismissed his claims for injunctive and declaratory relief under section 12(b)(6).

On motion to dismiss for failure to state a claim, the plaintiff's factual allegations, though not his conclusional allegations or legal conclusions, are accepted as true. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

Kuykendall, despite being afforded ample opportunity and direction and having filed an amended complaint, has failed to state a claim under section 1983 which would be cognizable under any set of facts. He has suffered no actual, or realistic present threat of, constitutional injury traceable to the defendants' conduct, and thus he lacks standing to obtain prospective relief. *See Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir.) (en banc), *cert. denied*, 113 S.Ct. 191 (1992). *Cf. Sockwell* at 191.

The judgment of the district court is

AFFIRMED.