UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1650
Summary Calendar

BURNICE JOE BIRDO,

Plaintiff-Appellant,

VERSUS

DONALD LOGAN, TDCJ,
Clements Unit Employees, ET AL.,

Defendants.

DONALD LOGAN, TDCJ,
Clements Unit Employees, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(2:92-CV-223)

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No. 93-1649
Summary Calendar

BURNICE JOE BIRDO,

Plaintiff-Appellant,

VERSUS

LOLA M. ASHMEAD, ET AL.,

Defendants,

LOLA M. ASHMEAD, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(2:92-CV-313)

(February 23, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Burnice Joe Birdo challenges the magistrate judge's § 1915(d) dismissal of his two *pro se*, *in forma pauperis* complaints. A single ***Spears***[2] hearing was held to address both. While most of his challenges may be dismissed quickly, we lack an adequate record to decide one. Accordingly, we **AFFIRM** in **PART** and **REMAND** in **PART**.

I.

Birdo is an inmate in the custody of the Texas Department of Criminal Justice, Institutional Division (TDCJ). He voluntarily entered its Program for the Aggressive Mentally Ill Offender (PAMIO), an alternative to administrative segregation. The program operates on a system defined by levels numbered one to four. Inmates at level one have the fewest privileges; those at four, the most; and, newcomers begin at level two.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

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

A.

In the complaint for no. 93-1650, Birdo presented several claims. First, he submitted one for procedural due process, alleging that, upon his arrival in PAMIO in May, 1992, PAMIO treatment team psychologists Logan and Owens told him that if he did not receive any "assessments" prior to his promotion hearing, he would be "promoted" to level three. He alleged, and testified at the ***Spears*** hearing, that he received no "assessments"; however, Logan and others told him at the promotion hearing that they could not promote him because of his "masturbation problem", as reflected in his blue PAMIO chart book and other prison records.[3] Birdo claimed that reliance on this "ex parte false and inaccurate information" deprived him of due process, because he could not contest the veracity of the reports.

Second, Birdo claimed his right to equal protection was infringed, alleging that, although he was denied promotion because of masturbation, other similarly situated PAMIO inmates were promoted. Third, Birdo claimed that the PAMIO procedure for promotion from level two to three is facially unconstitutional, because it allegedly permits reliance on the sort of "ex parte" information contested in his first claim. Birdo's fourth claim essentially restated his first, although it involved a different treatment team, and hence different defendants. Birdo's original complaint contained another claim that was voluntarily dismissed at the ***Spears*** hearing.

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[3] He was later promoted to level three, in October 1992.

In the complaint for no. 93-1649, Birdo makes nearly identical equal protection and procedural due process claims (although the complained-of act is a demotion in levels, rather than the denial of a promotion, and involves different defendants). The one unique claim is one of retaliation for protected first amendment speech. According to Birdo, he became incensed when defendant Ashmead, a prison guard, threatened to write up the inmate in the cell next to Birdo's for masturbation. Birdo, by his own admission, then employed vulgar language against Ashmead.[4] Birdo alleged that Ashmead then wrote him (Birdo) up for masturbation, which he claims was a retaliatory act violating his right of free speech.

At the ***Spears*** hearing, Birdo consented to the magistrate judge entering final judgment as to both complaints. The magistrate judge later dismissed both as frivolous pursuant to § 1915(d), and stated his reasons for doing so in final orders.

II.

Birdo challenges the dismissal of both complaints. A district court is free to dismiss an *in forma pauperis* action as frivolous if "it lacks an arguable basis either in law or in fact." ***Neitzke v. Williams***, 490 U.S. 319, 325 (1989); *see also* ***Denton v. Hernandez***, 112 S. Ct. 1728, 1733 (1992). Such a *sua sponte* dismissal is within the discretion of the district court; this

[4] According to Birdo's complaint, he told Ashmead "I see you is acting like a sometiming bitch because last week when you worked picket you allowed us to jerk off on you all night without giving cases or saying anything". At the ***Spears*** hearing, Birdo stated that he "got kind of hot" because he "had just did it [masturbated] ... and she [Ashmead] didn't say nothing".

court will reverse the dismissal only upon concluding that such discretion has been abused. ***Denton***, 112 S. Ct. at 1734.

A.

Birdo raises three challenges to the dismissal of his complaint in case no. 93-1650: first, that the court denied him due process by not providing him with copies of records upon which the court relied in reaching its decision to dismiss; second, that it erred in failing to consider his third cause of action, relating to the application of the PAMIO regulation; and third, that it erred in holding that his substantive and procedural due process rights were not infringed by the failure of the defendants to promote him to level three.

As to the first contention, not providing copies of records, it is true that the magistrate judge told Birdo that he would "get a copy of anything that we consider in determining your case". The exhibits in the record contain "health records" for Birdo for the relevant period, reports of promotion hearings, staff members' progress notes, and a psychiatric evaluation.

Birdo never contends that he renewed his request for copies of the documents during the four months between his ***Spears*** hearing and the order of dismissal. Nor has he requested that this court forward him the record, including exhibits. Perhaps this is because Birdo, prior to the ***Spears*** hearing, examined his "blue chart", which is now available to him. Birdo was well aware that he was denied the promotion because "they kept writing in [his] chart" about masturbation incidents. Also, at the first promotion

hearing, a team member read to Birdo two reports contained in his chart of such incidents. Finally, Birdo admitted at the ***Spears*** hearing, "I was masturbating, you know, and I still am"; therefore, the fact that the magistrate judge did not provide him with the copies was not a denial of due process. *See* ***Pace v. Oliver***, 634 F.2d 302, 304 (5th Cir. 1981) (rejecting prisoner's due process claim to evidence allegedly in possession of prison authorities, because, in part, the prisoner "suffered no injury from their non-production").

Birdo contends that the district court erred by not addressing his third cause of action. In it, he alleged that he was denied due process by application of TDCJ PAMIO Policy No. 10-3E, ¶ 7, so as to deny him a promotion to level three. Specifically, he alleged that ¶ 7 requires that the treatment team review information contained in institutional records when determining whether to promote an inmate; Birdo contends that he was not given access to those records, thereby denying him due process. Because ¶ 7 does not address whether an inmate should have access to the records, his challenge does not go to the regulation itself, and his claim in this regard is no different from the third issue he raises in this appeal, *i.e.*, that his substantive and procedural due process rights were denied when the treatment teams relied on "ex parte" records in denying him his promotion.

The magistrate judge rejected this claim, and correctly noted that "[s]ince no disciplinary proceeding was involved and no loss of good time [or parol eligibility] could occur, the process rights

of an inmate facing a disciplinary proceeding are not applicable and provide no basis for [Birdo's] claim." *See generally* ***Wolff v. McDonnell***, 418 U.S. 539 (1974) (discussing procedures required for prisoners facing disciplinary proceedings). Whatever process was due Birdo (if any), it could not exceed that contemplated by the Supreme Court for prisoners contesting the imposition of administrative segregation. Under such circumstances, due process requires merely that a prisoner "receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." ***Hewitt v. Helms***, 459 U.S. 460, 476 (1983).

Birdo's own testimony established that he had adequate notice of his promotion hearings, and that he was permitted to make oral statements at those hearings. Birdo received adequate "informal, nonadversary evidentiary review"; he is entitled to nothing more. *See* ***id.*** And, in any event, the "ex parte" records merely confirmed Birdo's habitual masturbation, a behavior Birdo acknowledged at the ***Spears*** hearing. Accordingly, he did not suffer any harm from the allegedly "ex parte" medical reports.

B.

We agree with the magistrate judge's dismissal of the claims presented in the complaint for no. 93-1649; to address those issues would be to iterate needlessly both the magistrate judge's conclusions and portions of our discussion *supra*. Only one issue separate discussion.

Birdo contends that the magistrate judge erred in refusing to consider the equal protection and due process claims allegedly contained in his "supplemental complaint". At the ***Spears*** hearing, the magistrate judge told Birdo that he could file a supplemental complaint within two weeks. Almost three weeks later, Birdo filed a motion for leave to file his "attached" supplemental complaint, stating that he had not filed the supplement within two weeks because he had been transferred to another facility which had not provided him with paper, pen, etc. The record does not contain the "attached" supplement; and, some four months after the motion, the magistrate judge dismissed Birdo's complaint as frivolous, without discussing either a supplemental complaint or the motion to file it.

Barring other factors of which we are unaware, and because no responsive pleading had been served, Birdo could amend his pleading. Fed. R. Civ. P. 15(a); *see* ***Barksdale v. King***, 699 F.2d 744, 746-47 (5th Cir. 1983); *see also* ***Jackson v. City of Beaumont Police Dept.***, 958 F.2d 616, 617 (5th Cir. 1992) (complaint amended subsequent to ***Spears*** hearing, because no responsive pleading filed; second hearing then conducted). Accordingly, notwithstanding Birdo's failure to meet the two week deadline, it appears that the magistrate judge should have allowed the amendment. Unfortunately, given the state of the record, we cannot ascertain whether the magistrate judge did, or whether a supplemental complaint was, in fact, "attached" to the motion.

Accordingly, we remand this case for the magistrate judge to either: permit Birdo to file a supplemental complaint; or, if an amended complaint was filed, incorporate it into the record and state the reasons for dismissing it.

If the former course of action is selected, and Birdo files a supplemental complaint, he is warned that the magistrate judge would be justified in imposing sanctions if the claims he asserts are essentially the same as those dismissed as frivolous by the magistrate judge and affirmed by this court. Federal courts do not exist to indulge the recreational whims of litigious prisoners. *See* ***Gabel v. Lynaugh***, 835 F.2d 124, 125 n.1 (5th Cir. 1988) (per curiam) ("pro se civil rights litigation has become a recreational activity for state prisoners in our Circuit .... We give notice that future frivolous or malicious appeals will call forth like sanctions.")

III.

The judgment in no. 93-1650 is **AFFIRMED**.

The judgment in no. 93-1649 is **AFFIRMED** in part, and the case is **REMANDED** for further proceedings consistent with this opinion.