IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2027
(Summary Calendar)

WESLEY LYNN PITTMAN, ET AL.,

Plaintiffs,

WESLEY LYNN PITTMAN,

Plaintiff-Appellant,

versus

LESTER BEAIRD, JAMES LYNAUGH,
and R. D. BOYD,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-89-3914)

(January 19, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant Wesley Lynn Pittman appeals the judgment of the district court dismissing as frivolous, pursuant to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

28 U.S.C. § 1915(d), his pro se civil rights action under 42 U.S.C. § 1983. On appeal Pittman also renews his motion for appointment of counsel and for a transcript of his Spears[1] hearing at government expense. Although we affirm the judgment of the district court in large part, we vacate and remand in part for further proceedings consistent with this opinion.

I

FACTS AND PROCEEDINGS

Pittman was incarcerated in the Wynne Unit of the Texas Department of Criminal Justice (TDCJ) when he filed a civil rights action against Warden Lester Beaird, Director James Lynaugh, and Captain R. D. Boyd.[2] In his superseding complaint and at a Spears hearing, Pittman raised several issues. He first alleged that he was denied his First Amendment right to practice his religion of Islam "Sunni Muslim." He maintained that even though his religion requires him to wear a beard, prison officials forced him to shave. Pittman also alleged that he was denied the right to attend religious services and to have any kind of reading material other than legal mail during the time he was in administrative segregation.

Moreover, according to Pittman, prison officials retaliated against him with repeated disciplinary actions because he wore a beard, such actions ultimately resulting in his solitary

[1] Spears v. McCotter, 766 F.2d 179, 181 (5th Cir. 1985).

[2] The district court dismissed another plaintiff, William Thomas, from the action due to his death.

confinement; and labeled him a threat to security. He asserted that the label is a form of discrimination because Caucasian inmates with beards are not labeled as security threats.

Pittman next alleged that his confinement in solitary was based on a false and malicious charge that he struck an officer when in fact officers retaliated against him. He stated that Officer Boyd used excessive force against him; and when Pittman threatened to file a grievance against Boyd he became involved in a plot to have disciplinary charges brought against Pittman for striking an officer. A disciplinary hearing was held and Pittman received notice, attended the hearing, gave his version of the incident, and received the assistance of substitute counsel. He asserted that he was denied his right to call witnesses at his disciplinary hearing in violation of due process.

Pittman also challenged the conditions of his confinement in administrative segregation. He alleged that he was deprived of daily showers, clean underwear, and socks. Moreover, he stated that he did not receive a physical examination before being placed in administrative segregation; and that as a result his skin disease, pseudofolliculitis barbe, was not treated. Pittman claimed that, unlike other prisoners, he was not permitted to wear his glasses when he went to the shower. He asserts, moreover, that he was denied outside recreation and sunlight for over three months. In yet another claim, Pittman alleged that he was assaulted by three guards: Losack, Sklar and Germany.

Pittman also alleged that the Warden conspired with prison

personnel and has not solved any of the problems. Moreover, asserts Pittman, the Director "has been placed on notice of the violation" and "concedes with his agents of the discriminations."

The district court found that Pittman's claims had only a slight, if any, realistic chance of ultimate success and no arguable basis in law and fact, and therefore dismissed the complaint as frivolous. Additionally, the court denied Pittman's motions for appointment of counsel and for a transcript of the Spears hearing at government expense.

II

ANALYSIS

Pittman challenges the district court's dismissal of his civil rights claims as frivolous. A district court may dismiss an in forma pauperis proceeding if the claim has no arguable basis in law and fact. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992). The dismissal is reviewed for abuse of discretion. Id.

A. The Beard

Pittman contends that the district court abused its discretion in dismissing his claims concerning his right to grow and maintain a beard. He argues that forcing him to shave his beard violated his right freely to practice his religion, constituted deliberate indifference to his medical needs because shaving aggravated his skin condition, and violated the Equal Protection Clause because the regulations regarding hair grooming do not apply to female prisoners.

"When a prison regulation impinges on inmates' constitutional

rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). "The TDCJ prohibition on long hair and beards is rationally related to legitimate state objectives." Powell v. Estelle, 959 F.2d 22, 26 (5th Cir.), cert. denied, 113 S.Ct. 668 (1992). Therefore, the regulation is valid; and the district court did not abuse its discretion in finding that Pittman's challenge to the regulation on First Amendment grounds was frivolous.

Pittman argues that requiring him to shave constitutes deliberate indifference to his serious medical needs because of his skin condition. He contends that he suffers from folliculitis barbe and that the district court erred in finding that his medical records do not support his contention.

To state a cognizable claim of an Eighth Amendment violation in the medical sense, a prisoner must show that prison officials were deliberately indifferent to his serious medical needs, thereby constituting unnecessary and wanton infliction of pain. Estelle v. Gamble, 429 U.S. 97, 104-06, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

An unidentified prison doctor testified under oath at the Spears hearing and presented Pittman's medical history. There was no record that Pittman suffered from the skin condition. Pittman has been incarcerated since 1986, but the available medical records contained information only as far back as November 1989. The doctor explained that, if Pittman had the skin abnormality, he would have been diagnosed when he entered the system as having a

chronic condition; and it would have been unnecessary to refer to it again in his records.

Assuming that Pittman had serious medical problems, he has not demonstrated that prison officials were deliberately indifferent to them. He contends that he is not required to be clean-shaven and has had a "clipper shave pass"[3] ever since he entered TDCJ. Pittman does not allege that he has suffered any symptoms of the disease that required treatment. Moreover, he asserts in his appeal brief that he had a full beard at the Spears hearing There is no merit to this claim.

Pittman argues that the district court failed to address the discriminatory practice of imposing hair-grooming restrictions on male prisoners but not on female prisoners. This argument was not presented to the district court and should not be addressed for the first time on appeal. See Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

B. Conditions of Confinement in Administrative Segregation

Pittman asserts that, in violation of the Eighth Amendment, he was denied daily showers, clean underwear and socks, and that he was prevented from wearing his prescription eyeglasses to the showers while in solitary confinement. He also asserts that he was not permitted to exercise outdoors for approximately 3 1/2 months.

"[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the

[3] A "clipper shave pass" allowed Pittman to wear a beard that was 1/4 inch in length.

extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). "[T]he Eighth Amendment may afford protection against conditions of confinement which constitute health threats but not against those which cause mere discomfort or inconvenience." Wilson v. Lynaugh, 878 F.2d 846, 849 (5th Cir.), cert. denied, 493 U.S. 969 (1989). Whether a deprivation of exercise constitutes cruel and unusual punishment depends on the facts of each case. Wilkerson v. Maggio, 703 F.2d 909, 912 (5th Cir. 1983). However, deprivation of the basic elements of hygiene is forbidden by the Eighth Amendment. Daigre v. Maggio, 719 F.2d 1310, 1312 (5th Cir. 1983).

Pittman also contends that he was deprived of his rights in retaliation for his having previously filed administrative grievances against prison personnel. Prison officials may not retaliate against an inmate for pursuing grievance claims. See Gibbs v. King, 779 F.2d 1040, 1046 (5th Cir.), cert. denied, 476 U.S. 1117 (1986); Jackson v. Cain, 864 F.2d 1235, 1248-49 (5th Cir. 1989).

> [A] court may dismiss a claim as factually frivolous only if the facts alleged are "clearly baseless," a category encompassing allegations that are "fanciful," "fantastic," and "delusional." As those words suggest, a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them. An in forma pauperis complaint may not be dismissed, however, simply because the court finds the plaintiff's allegations unlikely.

Denton v. Hernandez, _____ U.S. _____, 112 S.Ct. 1728, 1733-34, 118 L.Ed.2d 340 (1992) (citations omitted).

Pittman's allegations that his conditions of confinement constituted cruel and unusual punishment and that the officers acted in retaliation because he filed grievances are not clearly baseless. The district court abused its discretion in dismissing the claims as frivolous without developing the facts further.

C. Disciplinary Report and Hearing

Pittman argues that the district court abused its discretion because it did not address his due process claim. In his complaint, Pittman alleged that Unit Disciplinary Captain Boyd conspired to bring disciplinary charges against him in retaliation for filing grievances. Moreover, Pittman asserts that he was deprived of his right to call witnesses at his hearing due to Boyd's actions.

It is undisputed that Pittman received a formal disciplinary hearing as required by Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Under Wolff, a prisoner punished by solitary confinement and loss of good-time credits must receive:

> (1) written notice of the charges against him at least twenty-four hours before the hearing, (2) a written statement of the factfinders as to the evidence relied on and the reasons for the disciplinary action taken, and (3) the opportunity to call witnesses and present documentary evidence in his defense, unless these procedures would create a security risk in the particular case.

Jackson v. Cain, 864 F.2d 1235, 1252 (5th Cir. 1989) (internal quotations omitted).

At the Spears hearing Pittman stated inter alia that he was

allowed to give his version of the events at the disciplinary hearing. Further, the prison records indicate that there was witness testimony at the hearing and that no requested witnesses were excluded. Pittman does not assert facts to support an arguable claim. See Graves v. Hampton, 1 F.3d 315, 319 (5th Cir. 1993).

Similarly, although he was "given an opportunity to expound on the factual allegations," Pittman did not assert any facts in his complaint or at the Spears hearing which would support arguable claims against Boyd of conspiracy and retaliation. Graves, 1 F.3d at 319. The district court did not abuse its discretion in dismissing these claims as frivolous.

D. Use of Excessive Force

Pittman asserts that officers exerted force against him as a result of his refusal to get a haircut and shave. He contends that the district court based its decision on unauthenticated records and unsworn testimony presented at the Spears hearing.

In a claim of excessive force against prison officials, the inquiry is "whether the force used against [the plaintiff] was applied maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillian, 962 F.2d 522, 523 (5th Cir. 1992). Under the present standard, the following factors are relevant:

1. the extent of the injury suffered;
2. the need for the application of force;
3. the relationship between the need and the amount of force used;
4. the threat reasonably perceived by the responsible officials; and

5. any efforts made to temper the severity of a forceful response.

Id. (citing Hudson v. McMillian, 503 U.S. ____, 112 S.Ct. 995, 999, 117 L.Ed.2d 156 (1992)).

Contrary to Pittman's assertion, all of the witnesses at the Spears hearing did give sworn testimony. Medical records were presented at the hearing, and disciplinary and use-of-force reports were provided thereafter. The prison records were certified, and there is no indication that they fail to meet "adequate indicia of reliability" test. Wilson v. Barrientos, 926 F.2d 480, 483 (5th Cir. 1991).

Nevertheless, there is no certainty that the facts Pittman has alleged are clearly baseless or that they lack an arguable basis in law. See Denton, 112 S.Ct. at 1733. According to Pittman, when he went to the inmate barber to get a haircut, Officers Sklar and Germany ordered the inmate barber to cut off all of his hair and beard. When the barber refused, Germany called the supervisor, Sergeant Losack. The three officers then escorted Pittman back to administrative segregation in handcuffs equipped with a "leash chain." Once they reached the cell, Pittman placed his hands in the tray slot and Officer Sklar removed the handcuff from Pittman's right wrist. Pittman alleged that Germany pulled on the leash to make him turn around, and that Sergeant Losack slammed the tray slot on Pittman's arm, threatening to break his arm. Pittman also alleged that he suffered injury to his left bicep and a "skinned" left arm. A physician applied peroxide to the abrasions and advised that the swelling would go down with time. Id.

Post Hudson, these allegations if proved could constitute actionable excessive force. Pittman posed no threat to the officers; he was in a cell and handcuffed; he alleged more than a de minimis injury; and the amount of force used may have been excessive to the need.

A district court may not dismiss a complaint simply because the allegations are unlikely. Gartrell v. Gaylor, 981 F.2d 254, 259 (5th Cir. 1993). "Some improbable allegations may properly be disposed of on summary judgment," but it is an abuse of discretion to dismiss them as frivolous without any factual development. Id.

E. Discrimination

Pittman contends that he was discriminated against because Caucasian prisoners were allowed to wear beards twice as long as his and were not considered a "threat to security." He argues that, unlike Caucasian prisoners, he and other African-American prisoners were placed in solitary confinement and subjected to a loss of privileges. Pittman does not assert that the regulations were intended to apply only to African-American prisoners.

"To succeed in his equal protection claim [Pittman] must prove purposeful discrimination resulting in a discriminatory effect among persons similarly situated." Muhammad v. Lynaugh, 966 F.2d 901, 903 (5th Cir. 1992).

Pittman has not provided a factual predicate to support a claim that he has suffered injury from an inequitable application of the "no beard" regulation. The regulations concerning hair grooming are reasonably related to prison security interests. See

Powell, 959 F.2d at 25. Moreover, Pittman has not shown a nexus between the disciplinary action that resulted in solitary confinement and the enforcement of the regulation to shave his beard. He does not dispute that the disciplinary action mentioned in his complaint and at the Spears hearing was a result of striking an officer. Moreover, there was sworn testimony at the Spears hearing and documentary evidence that Pittman is classified as administrative segregation group A because he had received 30 major disciplinary reports during his incarceration. Pittman has not shown purposeful discrimination or a discriminatory effect from the officers' alleged purposeful discriminatory acts. The district court did not abuse its discretion in dismissing the claim as frivolous.

F. Respondeat Superior

Pittman argues that Warden Beaird established and administered the policy that deprived him of the constitutional rights named in this complaint: his First Amendment right to exercise freedom of religion by wearing a beard, deliberate indifference to his medical needs, the conditions of his confinement in solitary, and his equal protection right to be treated the same as white prisoners. Further, he contends that Director Lynaugh was advised of the unconstitutional acts of his subordinates and took no action to remedy the situation.

"Under section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability." Thompkins v. Belt, 828 F.2d 298, 303 (5th Cir. 1987). There can be

liability if a supervisor is either personally involved in the constitutional deprivation or there is a causal connection between the supervisor's conduct and the violation. Id. at 304.

As discussed above, Pittman's allegation that his rights under the First Amendment, Eighth Amendment (medical), and the Equal Protection Clause are frivolous. Therefore, his allegations against Beaird and Lynaugh concerning these claims are also frivolous. As to his allegation that the conditions of his solitary confinement violated the Eighth Amendment, he has alleged only that Beaird and Lynaugh are "policy makers." However, he has not alleged that they established a prison policy to deprive prisoners in solitary confinement of showers, clothing, glasses, the freedom to exercise their religion, and exercise that caused the violation. There is no merit to his claim.

III

CONCLUSION

We affirm the judgment of the district court rejecting Pittman's claims that 1) he was deprived of (a) his right to practice his religion, (b) his Eighth Amendment right to have his serious medical needs met, (c) his right to be free from retaliation, (d) his right to due process at a disciplinary hearing, and (e) his equal protection rights; and 2) the Warden and the Director set policy that deprived him of his constitutional rights. We vacate the judgment of the district court, however, and remand for further proceedings as to Pittman's Eighth Amendment claims concerning the conditions of confinement in solitary and

that those conditions were imposed in retaliation for filing grievances, and his claim that officers used excessive force in removing his handcuffs.

Pittman's motions for appointment of counsel and production of a transcript at government expense are denied. His § 1983 suit does not present "exceptional circumstances" that require the appointment of counsel. Ulmer v. Chancellor, 691 F.2d 209, 212-13 (5th Cir. 1982). Moreover, an audio tape of the Spears hearing is a part of the record, and Pittman has not demonstrated that he needs a transcript for the proper disposition of the appeal. See Harvey v. Andrist, 754 F.2d 569, 571 (5th Cir.), cert. denied, 471 U.S. 1126 (1985).

AFFIRMED in part, and VACATED and REMANDED in part.