IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2927

ANTHONY ATKINS,

Plaintiff-Appellant,

versus

RICHARD D. KASPER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(CA H 93 2587)

(September 6, 1994)

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

PER CURIAM:*

In this prisoner pro se civil rights suit filed under 42 U.S.C. § 1983, Plaintiff-Appellant Anthony Atkins complains to us that the district court erred in dismissing his action as frivolous pursuant to 28 U.S.C. § 1915(d). Atkins continues to insist here,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

as he did in the district court, that the defendant prison officials violated his Eighth Amendment right to be free of cruel and unusual punishment and that his procedural due process rights were violated as well. As we disagree with Atkins' arguments, we affirm the district court's dismissal.

I

FACTS AND PROCEEDINGS

As a prisoner incarcerated by the State of Texas and proceeding IFP, Atkins sued state prison officials, claiming that his constitutional rights were violated when he was denied food. Three non-consecutive incidents are mentioned. The first incident occurred when Atkins complained about the size of his portion of French-fried potatoes. According to Atkins, the prison guard refused Atkins' request for a larger portion, denying that Atkins was entitled to more; whereupon Atkins responded that he had the right to receive extra portions of everything except meat and dessert. Atkins was eventually escorted from the dining hall for creating a disturbance. As a result of his ejection, Atkins missed that meal. The second and third denials of food, which occurred on different, non-consecutive days, resulted from Atkins' violation of the prison's mealtime dress code. Like any number of eating establishments on the "outside," the prison apparently goes by the rule, "No Shoes, No Shirt, No Service." It seems that Atkins was refused a breakfast meal that he sought to obtain while shirtless, and was refused another breakfast that he sought to obtain while shoeless.

Atkins filed a grievance with prison authorities, complaining only of the first denial (hereafter, the French-fries incident). In this grievance, he claimed that such denial violated the prison's own regulation which he quotes as providing that "no food shall be withheld as a disciplinary sanction for an individual inmate in the general population." In rejecting that grievance, the authorities concluded that Atkins had forfeited his entitlement to that particular meal by being disruptive.

Atkins then filed the instant action, claiming that prison officials violated his constitutional rights to be free from cruel and unusual punishment and to receive due process. In dismissing Atkins' suit as frivolous within the meaning of § 1915(d), the court concluded that his complaint lacked "an arguable basis in law" because the allegations did not establish an Eighth Amendment violation and because the prison officials had not abused the wide discretion they are afforded in maintaining order. The district court voiced an alternative ground for dismissing the complaint as frivolous, i.e., that it had "no chance" of success.[1] Atkins timely filed a notice of appeal.

II

ANALYSIS

As a preliminary matter we summarily dispose of Atkins' Eighth

[1] In Booker v. Koonce, 2 F.3d 114, 115-16 (5th Cir. 1993), we determined that dismissal of an IFP petition is inappropriate if the claim asserted has even a slight chance of success. In this case we need not address whether "no chance" of success is distinguishable from a "slight chance" of success because the district court here principally dismissed Atkins' action as having no arguable basis in law.

Amendment "cruel and unusual punishment" claim. He does not have even a colorable claim that denial of a single mealsQor, for that matter, three single meals on three different, non-consecutive dayssQrises to the level of cruel and unusual punishment, if indeed it constitutes punishment at all.[2] As Atkins cannot and does not allege that denial of the single meal involved in the French-fries incident deprived him of sufficient nutritional value to preserve his health, the district court was eminently correct in dismissing as frivolous his cruel and unusual punishment claim. We shall, therefore, address that claim no further.

The remaining issue presented by this appeal involves the prison regulation which Atkins quoted as providing that "no food shall be withheld as a disciplinary sanction for an individual inmate in the general population." We have held that state prison regulations couched in mandatory language that explicitly limit a prison official's discretion may create liberty interests.[3] Atkins would have us decide his due process claim in the "liberty interest" rubric, and to conclude thatsQabsent notice and a predeprivation hearingsQdepriving him of the meal involved in the French-fries incident violated the prison's own regulation

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[2] See Green v. Ferrell, 801 F.2d 765, 770-71 & n.5 (5th Cir. 1986) (concluding that serving of two meals instead of three meals a day did not constitute punishment when two meals provide sufficient nutritional value to preserve health); Cooper v. Sheriff, Lubbock County, 929 F.2d 1078, 1083 (5th Cir. 1991) (concluding that denial of adequate food is a form of punishmentsQcontinual denial for twelve days states a claim of "cruel and unusual" punishment).

[3] E.g., Dzana v. Foti, 829 F.2d 558, 560 (5th Cir. 1987).

proscribing denial of food as a disciplinary sanction. But that is a classic red herring, for Atkins' loss of the single meal during the French-fries incident cannot properly be characterized as a disciplinary sanction at all.

To the contrary, Atkins lost the right to eat the single meal, the deprivation of which he complains of here, as a natural and predictable consequence of the meal-time disturbance that he created. He missed that meal only as the incidental result of a prison official's effort to maintain order in the dining hall, not as a disciplinary sanction for that disturbance or for some unrelated rule infraction by Atkins. A simple "parenting" analogy should suffice to explain the distinction we make: If, as a result of a child's failure to maintain his room in an orderly fashion or of his use of profanity at school or of his show of disrespect for a parent or teacher, that child is sent to bed "without supper," he will have been denied food as a disciplinary sanction, albeit for one meal only. But if because the child is unruly or disobedient or disruptive at the dinner table the parent dismisses the child from the table before he can eat that particular meal, the denial of food will not have been a disciplinary sanction but merely the incidental result of typical efforts of a parent to maintain order and decorum at the dinner table.

Even when viewed in the light most favorable to Atkins, that is precisely what happened in connection with the French-fries incident. Like an incorrigible or tired or unruly child, Atkins caused a ruckus ostensibly because he was dissatisfied with the

size of his portion of French-fried potatoes or with the guard's response to the request for "seconds," or both. When Atkins continued (or escalated) this disruption he was escorted from the dining hall because such behavior can never be countenanced in any institutional situation, particularly in prison. Only incidentally did he miss that particular meal, and then only for the obvious reason that prison officials could not be expected to abide unruliness and disruption at any gatherings of prisoners such as those that of necessity occur in dining halls at mealtimes.

Irrespective of whether Atkins was properly or improperly denied more French-fries or a second helping, he clearly was not denied that meal as a disciplinary sanction; ergo the prison regulation prohibiting denial of food as a disciplinary sanctionSQand any liberty interest possibly created by the adoption of that regulationSQwas never implicated; ergo the Due Process Clause was never implicated. The regulation in question cannot reasonably be read to create a "liberty interest" in a prisoner's being served a particular meal, no matter how disruptive or uncooperative the prisoner may become during that meal. That the prison officials' action happens to have a side effect of denying meal service cannot be fairly characterized as anything more than an expected and acceptable result of a legitimate act of maintaining order. For the subject regulation to be read as broadly as suggested by Atkins would mean that to maintain order in the dining room prison officials could never eject a prisoner who causes a disturbance if coincidentally that prisoner would miss

that particular meal. To approbate such a nonsensical interpretation would indeed be to interfere in day-to-day prison administration that is best left to the professionals in that field.

We cannot help but agree with the district court that, like the Eighth Amendment "cruel and unusual punishment" claim proffered by Atkins, his due process claim has no arguable basis in law and, in the alternative, no realistic chance of success. Therefore, the ruling of the district court dismissing Atkins' action as frivolous under § 1915(d) is

AFFIRMED.