

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-3348
Summary Calendar

REGINALD R. ROBICHAUX,

Plaintiff-Appellant,

VERSUS

BRUCE LYNN, Secretary,
Department of Corrections
State of Louisiana, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA-91-CV-3097 "L" (5))

(April 5, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Reginald R. Robichaux, a Louisiana state prisoner incarcerated in Washington Correctional Institute (WCI), filed this pro se 42

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S.C. § 1983 action against Secretary Bruce Lynn¹ of the Louisiana Department of Corrections, and employees of WCI, Warden Ed Day, Captains Judith Phelps and G. Slade, Nurse Stephanie Owens, and Sgt. Mark Kennedy, in their official and individual capacities, for alleged deprivation of his due process in connection with a disciplinary hearing on March 4, 1991, and for alleged retaliation for using the prison grievance procedure in October 1990. The defendants moved for summary judgment, to which Robichaux responded with his own motion for summary judgment. The magistrate judge reported that the defendants' motion for summary judgment should be granted and recommended dismissing Robichaux's complaint with prejudice. Over Robichaux's objections, the district court adopted the magistrate judge's report and recommendation, granted the defendants' motion for summary judgment, and dismissed Robichaux's complaint with prejudice. Robichaux timely appealed.² We AFFIRM the decision of the trial court.

DISCUSSION

We note initially that Robichaux does not challenge on appeal the district court's dismissal of his claims regarding the composition of the March 4, 1991 disciplinary board, Secretary Lynn's failure to sign Robichaux's appeal of the March 4, 1991

¹Richard L. Stalder succeeded Bruce Lynn as Department Secretary on January 13, 1992.

²Robichaux moves this Court for in forma pauperis (IFP) status on appeal. Because the district court granted Robichaux leave to proceed IFP, and that status has not been de-certified, Robichaux's motion is denied as unnecessary. See Fed. R. App. P. 24(a) (when IFP motion is granted by district court, party may proceed without further application to the Court of Appeals).

guilty verdict, and an alleged violation by all of the defendants of his Eighth Amendment right to be protected from cruel and unusual punishment. We will not consider legal issues Robichaux has failed to raise. See Brinkmann v. Abner, 813 F.2d 744, 748 (5th Cir. 1987). The granting of summary judgment and the dismissal as to these claims is affirmed. This effectively disposes of all of the claims against Lynn.

Review of a district court's ruling on a motion for summary judgment is plenary. King v. Chide, 974 F.2d 653, 655 (5th Cir. 1992). We apply the same standards as those that govern the district court's determination. Id. We will grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Id. at 655-56 (quoting Fed. R. Civ. P. 56(c)). To determine whether there are any genuine issues of material fact, we will first consult the applicable substantive law to ascertain the material factual issues. We then review the evidence bearing on those issues, viewing the facts and inferences in the light most favorable to the nonmoving party. Id. at 656.

Robichaux generally alleges failure to supervise as the basis for his § 1983 claims against Warden Day. "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. Robichaux does not allege Day's personal involvement in any constitutional deprivation or any causal connection between Day's conduct and any violation outside of his alleged failure to supervise. Consequently, the district court's decision to grant summary judgment and dismiss the claims as to Day is affirmed.

Therefore, we address two issues in this appeal:

- (1) Whether the defendants denied Robichaux due process at his disciplinary hearing; and
- (2) Whether the defendants retaliated against Robichaux for using the prison grievance procedure.

Issue 1: Due Process

Robichaux argues that the defendants denied him due process in connection with his disciplinary hearing held on March 4, 1991. He contends that defendants Slade and Owens violated due process requirements by: 1) failing to give him advance written notice of the charge against him when they, as the sole members of the disciplinary board, amended the charged offense of "threat to security" to one of "defiance;" 2) failing to grant him a motion of continuance to allow him to prepare a defense to the new charge; and 3) failing to give him a written statement of the evidence relied upon by them in arriving at the guilty verdict.

According to the incident report dated March 4, 1991, Robichaux told a correctional officer that a kitchen worker had passed his plate to someone else and that he ought to "punch one of those

fuckers or kill them." He also allegedly stated that "[s]ecurity's just as bad. I'm gonna kill them. They won't do it again." The nature of the incident was labeled "Threat [t]o Security," but was changed to "Defiance #3." The summary of the evidence and reasons for the decision noted only "[a]mend to Rule #3" and "[c]redibility of officer and inmate[']s statements." The disciplinary board, Slade and Owens, found Robichaux guilty and sentenced him to 10 days of isolation with the notation "credit 3." Robichaux was not deprived of his constitutional rights if the state provided a procedurally adequate hearing. Stewart v. Thiigpen, 730 F.2d 1002, 1006 (5th Cir. 1984). Arguably, Robichaux's punishment of isolation and possible loss of good-time credits activated the more rigorous due process standards of Wolff v. McDonnell, 418 U.S. 539, 563-66, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) instead of the less demanding strictures of Hewitt v. Helms, 459 U.S. 460, 476-77, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). See Walker v. Navarro County Jail, 4 F.3d 410, 412 (5th Cir. 1993) (this Circuit has not yet drawn a clear boundary between the two standards). However, we have determined that even under Wolff, Robichaux received the process he was due.

Wolff held that a prisoner punished by solitary confinement and the loss of good-time credits is entitled to 1) advance written notice of the violation; 2) a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken; and 3) an opportunity to present witnesses and documentary evidence in his defense when permitting him to do so

would not be unduly hazardous to institutional safety or correctional goals. Wolff, 418 U.S. at 563-66. Within the above limits the federal courts should afford wide discretion to prison officials. Gibbs v. King, 779 F.2d 1040, 1044 (5th Cir.), cert. denied, 476 U.S. 1117 (1986).

Amended Charge and Failure to Grant 24-Hour Continuance

On appeal of the board's guilty verdict, the appeals board stated that no continuance was necessary as there was no substantial difference as to the nature of the charge. The disciplinary board did not add a charge but merely modified the original charge of "threat to security" to "defiance" to more accurately reflect the nature of the violation. The conduct on which the "new charge" was based was the same conduct described in the original incident report.

The Louisiana Department of Public Safety and Correction Disciplinary Rules and Procedures of Adult Prisoners (the Handbook) reveals that there is no rule violation labeled "threat to security." The relevant portion of the violation "defiance" states that "[n]o prisoner shall . . . threaten physically or verbally to commit bodily harm upon an employee. . . . No prisoner shall threaten an employee in any manner. . . ."

The disciplinary board merely changed the title of the offense to reflect an actual violation, without changing the nature of the offense. Such a change did not necessitate a different defense by Robichaux to the challenged conduct. Consequently, we hold that Robichaux was given adequate notice of the nature of the charge

against him, and the disciplinary board's failure to grant Robichaux a 24-hour continuance to prepare another defense did not violate his due process rights.

Failure to Give Written Statement
Regarding Evidence for Decision

As earlier stated, Robichaux contends that he was entitled to a written statement of the evidence relied upon by the board, not just a notation that he was found guilty on "the credibility of officer and inmate[']s statements." Under Wolff, Robichaux is entitled to a "written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action." Wolff, 418 U.S. at 564 (internal quotations and citation omitted). Robichaux was present at the hearing and argued his defense to the board. Robichaux's presence at the hearing indicates that he heard the case presented against him and any accusing testimony. Consequently, we hold that the board's notation that its decision was based upon the credibility of Robichaux's and the officer's statements constituted adequate "written statement[s]" under Wolff. See McShan v. Fregia, 986 F.2d 1418 (TABLE), No. 92-7312, p. 7 (5th Cir. Feb. 10, 1993) (unpublished; copy attached as Appendix 1).

Issue 2: Retaliation

Robichaux also contends that defendants Phelps and Kennedy retaliated against him for using the prison grievance procedure. Robichaux contends that in October 1990, Kennedy wrote a "trumped-up" and "falsified" disciplinary report to retaliate against Robichaux because he had a suit pending against Phelps, and he had that same day filed an administrative remedy procedure against

another correctional officer. Phelps furthered the retaliation by placing Robichaux in administrative lockdown in reliance upon Kennedy's report. The disciplinary board ultimately dismissed the disciplinary report's charges against Robichaux, and Robichaux was released from administrative lockdown.

If the prison regulations establish a liberty interest in the use of the prison grievance procedures, then an allegation showing retaliation against a prisoner for the exercise of that right states a valid § 1983 claim. Jackson v. Cain, 864 F.2d 1235, 1248-49 (5th Cir. 1989). The Handbook has established an administrative remedy procedure through which an inmate may seek formal review of any grievances or complaints. The Handbook states that "[t]hrough this procedure, inmates shall receive reasonable responses and where appropriate, meaningful remedies." Under the heading "Reprisals," it further states that "[no] action shall be taken against anyone for the good faith use of or good faith participation in the [grievance] procedure." This mandatory language arguably creates a liberty interest in the use of the prison grievance procedures. See Jackson, 864 F.2d at 1248-49.

The defendants admit that Kennedy issued a disciplinary report against Robichaux and that following a hearing, the charge was dismissed. The defendants do not deny that Phelps placed Robichaux in administrative lockdown pending the hearing in reliance upon Kennedy's report. The disputed issue is rather Kennedy's and Phelps' states of mind while filing the incident report and placing Robichaux in temporary administrative lockdown. Other than

Robichaux's allegations that Kennedy and Phelps had retaliatory motives, there are no material facts to support his claim. In addition, Robichaux administratively appealed the adverse decision on his administrative remedy procedure and raised his allegations of retaliation. A written "thirdstep" response stated that Robichaux had provided no evidence of retaliation. Consequently, we hold that Robichaux has not raised a genuine issue of material fact on his retaliation claim.

CONCLUSION

Therefore, we AFFIRM the district court's decision to grant summary judgment in favor of defendants and to dismiss Appellant Robichaux's claims with prejudice.