

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-3594
Summary Calendar

MICHAEL W. BURGE,

Plaintiff-Appellant,

VERSUS

RICHARD DAVIS,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-92-807-A-M1)

(September 1, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:¹

Michael Burge appeals summary dismissal of his § 1983 action and requests appointment of counsel. We deny the request for appointment of counsel and reverse and remand in part and affirm in part.

I.

Inmate Michael W. Burge filed this 42 U.S.C. § 1983 lawsuit against Angola prison officers Richard Davis, Wallace Scott, and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Joe Menzina, Warden John Whitley, and Secretary of the Louisiana Department of Public Safety and Corrections Richard Stalder. Burge alleged that Davis, Scott, and Menzina had filed "bogus" disciplinary and incident reports to keep Burge from being assigned to a more favorable prison classification in violation of his rights of equal protection and due process, and that the incident report filed by Menzina violated principles of double jeopardy. Burge made no specific allegations against defendants Whitley and Stalder.

On cross-motions for summary judgment, the magistrate judge ruled in favor of Davis, Scott, and Menzina, because the filing of the reports had not violated Burge's constitutional rights; and in favor of Warden Whitley and Secretary Stalder, because Burge's complaint did not allege that they had violated § 1983. In objections to the recommendation, Burge argued, inter alia, that the district court should not enter summary judgment without giving him an opportunity to complete discovery. After determining that de novo findings were unnecessary (because Burge's objections merely restated legal argument), the district court adopted the report and recommendation of the magistrate judge, granted summary judgment in favor of the defendants, and dismissed the suit.

II.

Burge first complains that the district court should not have entered summary judgment before the defendants produced requested documents. We agree. Burge requested numerous documents from defendant Stalder in the district court on December 7, 1992. R.

185-86. Having received no response by February 15, 1993, Burge moved to compel production of the documents as well as answers to interrogatories which he had propounded to Defendants Scott, Menzina, and Davis. R. 85 (motion filed February 17). The district court denied Plaintiff's motion on February 19, because Defendants Scott, Menzina, and Davis had "filed their discovery responses February 12." R. 77. This was accurate insofar as those defendants' answers to interrogatories, but overlooked the failure of Stalder to respond to the outstanding request for documents.

On February 18, Plaintiff filed a "Second Request for Production of Documents" and requested the clerk to supplement the motion to compel with this request for production. R. 73-75. Plaintiff explained in a letter filed with the clerk that he had received a notice of compliance of discovery from the defendants which included only answers to interrogatories but not production of documents. R. 75. Plaintiff further explained that he had no complaint about the defendants' answers but still needed the documents. Id. Plaintiff finally stated that he had moved to compel both the answers and documents, had since received the answers, "felt it best to explain to the court this fact," and wished to advise the court that the discovery motion should be considered a motion to compel only documents, not answers. Id.

On March 1, Plaintiff filed a motion for extension of time within which he noted that the requested documents were still unavailable to him. R. 71. The court granted the request for extension of time without requiring production of the documents.

R. 70. Another letter to the clerk filed in the record on March 18 noted that Plaintiff still had not received all the requested documents through discovery but that he was trying to meet the deadline given by the court. R. 65. Copies of the letters to the clerk were sent to the court. Plaintiff eventually filed his opposition to Defendants' motion and his own motion for summary judgment without having received responses to his request for production of documents.

Although Burge could have made more plain his request that the court reconsider his motion to compel as it pertained to his yet unanswered document request, we will not hold him, a pro se prisoner, to the same standard we would hold a litigant with counsel. Burge's numerous filings explained that he had not yet received his requested documents and attempted to clarify that the motion to compel which the court denied should be read as pertaining only to requested documents.

In response to Burge's interrogatories, Menzina stated that he prepared a written investigation report. Burge maintains that Menzina was never asked to investigate, never made an investigation report, and fabricated this only to substantiate a bogus incident report. Plaintiff has requested this investigation report. Accordingly, he has sufficiently shown how additional discovery would create a genuine dispute as to a material fact. See International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1267 (5th Cir. 1991), cert. denied, 112 S. Ct. 936 (1992).

III.

Although he sued Warden Whitley and Secretary Stalder, Burge made no allegations against them. Accordingly, we affirm the district court's dismissal of Burge's suit against them.

AFFIRMED in part and REVERSED and REMANDED in part.