UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4290

OSCAR ORDAZ,

Plaintiff-Appellant,

VERSUS

JAMES A. LYNAUGH, Director, Texas Department of Criminal Justice, Institutional Division, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(9:92-CV-161)

(April 15, 1994)

Before WISDOM and BARKSDALE, Circuit Judges, and HARMON,[1] District Judge.

BARKSDALE, Circuit Judge:[2]

Oscar Ordaz, *in forma pauperis* and *pro se*, appeals the dismissal, under 28 U.S.C. § 1915(d), of his civil rights complaint. His multiple claims are wholly lacking in merit or frivolous, or both; and we therefore **AFFIRM**.[3]

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[1] District Judge for the Southern District of Texas, sitting by designation.

[2] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

[3] All other issues are deemed abandoned on appeal for failure to raise them. *See* ***Beasley v. McCotter***, 798 F.2d 116, 118 (5th

I.

Ordaz filed a civil rights action under 42 U.S.C. § 1983, alleging violation of various constitutional rights. After a ***Spears*** hearing, the magistrate judge recommended that the action be dismissed as frivolous pursuant to § 1915(d). Ordaz objected; but, based on a *de novo* determination, the district court adopted the recommendation and dismissed the action as frivolous.

II.

A district court may dismiss an IFP complaint as frivolous if it lacks an arguable basis in fact or in law. ***Denton v. Hernandez***, ___ U.S. ___, 112 S. Ct. 1728, 1733 (1992). Such a dismissal is reviewed only for abuse of discretion. ***Id***., 112 S. Ct. at 1734.

A.

Ordaz contends first that defendants Ramsey, Cooper, Martin, Tribble, Lynaugh and Scott retaliated against him for filing grievances, by limiting him to filing no more than three per week.[4] According to Ordaz, this limitation violated prison rules which provided that an "Inmate Shall Not Be Subject to Retaliation, Reprisals, Harassment, or Disciplined for the Good Faith Use of or Good Faith Participating in the Grievance Procedure."

A "state can create a protected liberty interest by establishing sufficiently mandatory discretion-limiting standards

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Cir. 1986), *cert. denied*, 479 U.S. 1039 (1987).

[4] The restriction, a copy of which is included in the record, actually limited the prison's obligations to respond to no more than three grievances each week; Ordaz could continue to file as many grievances as he wanted and the prison would review them, but only respond to three.

or criteria to guide state decision makers." ***Jackson v. Cain***, 864 F.2d 1235, 1250 (5th Cir. 1989). Therefore, even if Ordaz had a liberty interest in his use of the prison grievance procedures (which we do not decide), prison officials were still allowed to exercise discretion to limit the non-good faith use of the grievance system without impermissible intrusion on that liberty interest.

In light of the nature of the restrictions placed on him, Ordaz's bare allegations do not give rise to an inference of a retaliatory motivation by the defendants, but rather reflects the implementation of a legitimate prison policy aimed at holding frivolous and vexatious grievance filings by inmates to a manageable, realistic number. The district court therefore did not abuse its discretion in dismissing this claim.

B.

Ordaz next argues that defendants Ramsey, Scott, Cooper, and Martin gave arbitrary responses to his grievances without properly investigating the complaints. Ordaz essentially asserts that he lost the grievances in the first instance, and then lost again on appeal because of these defendants' failure to conduct an adequate investigation.[5] Significantly, Ordaz does not identify any particular grievances or any particular proof that he offered, except to assert that he presented some witnesses.

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[5] Ordaz apparently believes there was inadequate investigation of the grievances because he received the same response to ten of them.

"In reviewing prison administrative actions in section 1983 actions, the court must uphold the administrative decision unless it was arbitrary and capricious." ***Stewart v. Thigpen***, 730 F.2d 1002, 1005 (5th Cir. 1984) (citation omitted). We consider "only whether the decision is supported by some facts or any evidence at all." ***Id.*** at 1006 (internal quotations omitted).

Ordaz, however, alleged neither the nature of his grievances nor the evidence that he presented in either the ***Spears*** hearing or his complaint. Without such information, there is no basis for finding that the administrative decision was arbitrary or capricious. Ordaz's claim, therefore, does not have an arguable basis in fact or in law; and the district court did not abuse its discretion in dismissing this claim.

C.

Ordaz contends also that, under ***Wolff v. McDonnell***, 418 U.S. 539 (1974), his due process rights were violated when he was not given sufficient notice of a disciplinary hearing. Following this hearing, he was found guilty of two complaints; and his use of the commissary was restricted for two 30-day periods. ***Wolff***, however, does not determine the procedural requirements for disciplinary action such as restriction of commissary privileges. *See* ***Cooper v. Sheriff, Lubbock County, Texas***, 929 F.2d 1078, 1083 (5th Cir. 1991) (less procedural safeguards are required where sanctions are not severe). Instead, under ***Hewitt v. Helms***, 459 U.S. 460 (1983), Ordaz was only entitled to (1) some notice of the charges against

him, and (2) an opportunity to present his views to the prison official determining the disciplinary action.

Ordaz was clearly given notice that charges had been filed against him, and was given the opportunity to attend the hearing to present his views, as required by ***Hewitt***.[6] He cannot create a constitutional violation by refusing to take advantage of these opportunities. Therefore, even if we were to assume arguendo that Ordaz possessed a liberty interest created by prison rules and regulations, we would conclude that he was afforded the procedural due process to which he was entitled under the circumstances. Accordingly, the district court did not abuse its discretion in dismissing this claim.

D.

Ordaz maintains that he was denied access to the courts when, on two occasions, Norsworth refused his request for law books for two days, and thereafter allegedly retaliated against Ordaz for filing a grievance for failing to deliver the law books.[7]

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[6] Ordaz acknowledged at the ***Spears*** hearing that he received 18 hours' notice that the two hearings would be held on the following afternoon, and that he refused to sign the notice because it was not timely given in accordance with prison regulations, which required 24 hours notice. These allegations do not in any way indicate that Ordaz was precluded from attending the hearing, or that the alleged notice deficiency prejudiced him in any way.

[7] On appeal, Ordaz seems to attempt to contend that Norsworth retaliated against him because he filed a grievance. This was not raised before the district court, and we will not address issues raised for the first time on appeal. ***Beck v. Lynaugh***, 842 F.2d 759, 762 (5th Cir. 1988).

"A denial-of-access-to-the-courts claim is not valid if a litigant's position is not prejudiced by the alleged violation." ***Henthorn v. Swenson***, 955 F.2d 351, 354 (5th Cir. 1992). Ordaz did not allege specifically either in his complaint or at the ***Spears*** hearing that his legal position in any of his cases was prejudiced as a result of the two-day delay. Therefore, there is no arguable basis in law or fact for a denial-of-access-to-the-courts claim.[8]

E.

Ordaz asserts further that he was wrongfully denied recreation on one occasion by English, in violation of prison rules which allow recreation at least once in every seven days to prisoners placed on cell restrictions.

In ***Ruiz v. Estelle***, 679 F.2d 1115, 1152 (5th Cir. 1982), *opinion amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), we held that although "deprivation of exercise is not per se cruel and unusual punishment, in particular circumstances a deprivation may constitute an impairment of health forbidden under the eighth amendment." (Internal quotations omitted.) Ordaz does not allege that he was denied the right to exercise for any extended period of time thereby endangering his health, but merely that he missed one recreation period. At the ***Spears*** hearing, he

[8] Ordaz also asserts that he was denied access to the courts by the library supervisor, Flasowski, because he is responsible for having his subordinates comply with the inmates' requests for books. Supervisors cannot be held liable under § 1983 under a theory of *respondeat superior*. ***Williams v. Luna***, 909 F.2d 121, 123 (5th Cir. 1990). In the absence of any allegations against the library supervisor, this claim is frivolous; and the district court did not abuse its discretion in dismissing it.

testified that the only injury he suffered as a result of the inability to recreate was emotional distress and humiliation, which certainly does not rise to the level of health impairment. These allegations, therefore, do not state a constitutional violation resulting from the denial of recreation.[9]

F.

Ordaz continues, asserting that another defendant, Stewart, refused to allow Ordaz recreation without justification, in violation of the Eighth Amendment, and also in retaliation for Ordaz's threat to file a grievance against Stewart. Ordaz alleges that he complained to Stewart about not being released for recreation until a half hour after the other inmates were released, and that Stewart told him that "[l]ife[']s a Bitch in the Penetentiary [sic]". Ordaz alleged that after he told Stewart that he (Ordaz) was filing a grievance against him, Stewart responded that Ordaz was not going to recreation at all, so that he would have something else to report to the warden. Ordaz alleges that Stewart cursed at him when he indicated that he would use the incident in his grievance.[10]

In ***Gibbs v. King***, 779 F.2d 1040 (5th Cir. 1986), a prisoner alleged that a prison guard had retaliated against him for

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[9] Ordaz also argued in his objections to the magistrate judge's findings that English violated the requirements of the ***Ruiz*** plan and prison rules governing administrative segregation. A ***Ruiz*** violation standing alone, however, does not constitute a constitutional violation. ***Beck***, 842 F.2d at 762.

[10] Because Ordaz does not assert that this isolated denial of recreation endangered his health, he has not presented an Eighth Amendment violation. ***Ruiz***, 679 F.2d 1152.

complaining about the guard's conduct. We rejected that claim and held that "a single incident, involving a minor sanction" is not sufficient to prove harassment. ***Id.*** at 1046. A review of Ordaz's allegations demonstrates conclusively that he has alleged only a single incident, and, further, that the consequences of that single incident were *de minimis* -- the loss of recreation for one day. Significantly, he alleges only that he was not allowed to recreate at one particular time; he does *not* allege that he was prohibited from recreating at any other time, or that he suffered any other effects of the alleged retaliation. Under these circumstances, his allegations do not constitute a constitutional violation; and the district court did not abuse its discretion in dismissing this claim.[11]

G.

Ordaz contends that prison rules were violated when his radio and headphones were confiscated, and that he was not given a receipt for them by the property officer. He also asserts that he was not given the option of having the property sent home, destroyed, or donated, all in a denial of due process and prison rules.

Whether intentional or negligent, an unauthorized deprivation of property by a state official "does not constitute a violation of

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[11] In ***ACLU of Maryland v. Wicomico County***, 999 F.2d 780 (4th Cir. 1993), the court reached a similar conclusion, holding that "these § 1983 plaintiffs suffered no more than a *de minimis* inconvenience and that, on the facts of this case, such inconvenience does not constitute cognizable retaliation under the First Amendment." 999 F.2d at 786 n.6.

the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." ***Hudson v. Palmer***, 468 U.S. 517, 533 (1984). Because the state courts provide Ordaz with a post-deprivation remedy, he has failed to present a constitutional violation. ***Lewis v. Woods***, 848 F.2d 649, 652 (5th Cir. 1988). There being no legal or factual basis for the claim, it was not dismissed erroneously.

H.

Finally, Ordaz maintains that the wardens, Martin and Cooper, are liable because they denied his grievances, and thereby failed to correct the wrongs of their subordinates, in violation of prison rules and Ordaz's constitutional rights. In like manner, he argues that James Lynaugh, then the director of the Texas Correctional system, is liable because he was responsible for enforcing all prison policies and regulations.

Significantly, these claims are based solely on these defendants' supervisory responsibility, not on any act that they took personally. As set forth above, however, Ordaz has not alleged any claims of constitutional violations that have any basis in fact or in law. In the absence of such claims, there can be no supervisory liability.

III.

For the foregoing reasons, the judgment is

AFFIRMED.