

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4375
Summary Calendar

ARTHUR W. CARSON,

Plaintiff-Appellant,

versus

OLGA PERRY, TDC INMATE
TRUST FUND,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(92-CV-506)

(October 22, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Arthur W. Carson, *pro se* and *in forma pauperis*, appeals from the dismissal of his civil rights action. We **AFFIRM** in part, and **VACATE** and **REMAND** in part.

I.

Carson is incarcerated in a facility of the Texas Department of Criminal Justice, Institutional Division (TDCJ). He filed a complaint pursuant to 42 U.S.C. § 1983, against Olga Perry

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

(supervisor of the mail room at TDCJ's Michael Unit) and the director of the inmate trust fund. Carson alleged that funds were wrongfully withdrawn from his trust fund account on several occasions; that he was denied equal protection of the law by being denied indigent status (so classified if account falls for certain time below \$5.00) and therefore unable to get free postage and supplies; and that prison officials retaliated against him by withdrawing increasing amounts of money each time he complained about withdrawals from his account.

The magistrate judge conducted a *Spears*² hearing on September 23, 1992, during which Carson presented testimony regarding his claims. The next day, the magistrate judge entered an order stating that Carson had stated "factual allegations which, if true, state a cause of action under 42 U.S.C. 1983", and requiring Perry to answer.³ In so doing, Perry also moved for dismissal for failure to state a claim upon which relief could be granted.

The magistrate judge conducted an expanded evidentiary hearing on December 7. At the conclusion of that hearing, the magistrate judge gave Carson ten days to produce any additional evidence for the court to consider, and gave the defendants ten days in which to respond to any new evidence so produced. After the parties submitted further evidence, the magistrate judge recommended dismissal for failure to state a claim upon which relief could be

² *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

³ The other defendant, the director of the inmate trust fund, was not ordered to file an answer and did not do so.

granted. The district court adopted the recommendation and dismissed the complaint with prejudice.

II.

Because the magistrate judge's recommendation was based on testimony given at the evidentiary hearing and on documentary evidence, we treat the dismissal as a grant of summary judgment. See Fed. R. Civ. P. 12(b); **Washington v. Allstate Ins. Co.**, 901 F.2d 1281, 1283-84 (5th Cir. 1990) ("Where matters outside the pleadings are considered by the district court on a motion to dismiss, Rule 12(b) requires the court to treat the motion as one for summary judgment and to dispose of it as required by [Fed. R. Civ. P.] 56".) "[A]fter the parties receive notice that the court could properly treat such a motion as one for summary judgment because it has accepted for consideration on the motion matters outside the pleadings, the parties must have at least ten days before judgment is rendered in which to submit additional evidence." **Clark v. Tarrant County, Texas**, 798 F.2d 736, 746 (5th Cir. 1986). District courts need not give *pro se* litigants any more particularized warnings or instructions regarding summary judgment motions than they give litigants who are represented by counsel. **Martin v. Harrison County Jail**, 975 F.2d 192, 193 (5th Cir. 1992).

In the order setting the **Spears** hearing, a copy of which was furnished to Carson, the magistrate judge placed both parties on notice that one of the issues to be considered was whether Carson's claims were subject to summary judgment pursuant to Rule 56. As

noted, after the expanded evidentiary hearing, she gave Carson ten days in which to submit additional evidence, and gave the state defendants ten days in which to respond to such evidence. The parties, therefore, had sufficient notice that the magistrate judge could consider summary judgment.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. P. 56(c). Our review of summary judgment is plenary, and we view all facts and the inferences to be drawn from the facts in the light most favorable to the non-movant. *E.g., LeJeune v. Shell Oil Co.*, 950 F.2d 267, 268 (5th Cir. 1992). If the summary judgment evidence could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Carson's due process claims regarding alleged overcharges of \$.90 in January 1991 and \$.34 in April 1991, and the automatic withdrawal of \$16.16 from his account in May 1991 were exhaustively considered by the magistrate judge. We have reviewed the evidence regarding those claims, and conclude that there is no genuine issue as to any material fact with respect to them. Accordingly, summary judgment on those claims was appropriate.

For the reasons stated in the magistrate judge's exhaustive recommendation, we also conclude that there is no genuine issue of material fact with respect to Carson's equal protection claim. Carson produced no evidence that he was denied access to postage or supplies, or that he is a member of a group against whom prison officials discriminated. The fact that Carson was charged for postage and supplies did not interfere with his right of access to the courts.

Likewise, summary judgment was properly granted on Carson's retaliation claim, because he produced no evidence to support his conclusory allegation that he believed that the increasing amounts of money withdrawn from his account constituted retaliation. See *Whittington v. Lynaugh*, 842 F.2d 818, 819-20 (5th Cir.), cert. denied, 488 U.S. 840 (1988).

However, summary judgment was inappropriate with respect to Carson's claim that automatic withdrawals of \$122.35 from his account in June 1992 violated his right to due process. At the expanded evidentiary hearing, the magistrate judge, over Carson's objection, ruled that evidence regarding that claim should not be introduced, because Carson was assigned to another unit outside the Eastern District of Texas at the time of such withdrawals. In her report and recommendation, the magistrate judge discussed this claim, in part, as an issue of improper venue,⁴ did make certain

⁴ The magistrate judge stated:

The sum of \$122.00, taken from Carson's account in June of 1992, appeared to have arisen in the Southern District of Texas, inasmuch as Carson

findings, however, but did not make a specific recommendation with respect to it.

The basis for the magistrate judge's recommendation of dismissal of Carson's claim regarding the June 1992 withdrawal is unclear, and the district court did not address it specifically. An inmate trust fund official testified that the withdrawals were related to an accounting error, which he attempted to explain at the hearing. One of the exhibits relied on by the official indicates that Carson's net account balance was zero at the close of both June and July 1992. The overall transaction history record, however, indicates that Carson began June 1992 with a forwarding balance of zero and ended the months of June and July with a net balance of -\$200.52. Because a material factual dispute exists with respect to the \$122.35 automatic withdrawal claim, we vacate that portion of the judgment dismissing that claim, and remand the case to the district court for further proceedings with respect to that claim.⁵

was on the Ellis Unit at that time. However, Carson pointed out that because of the delays which Turner [supervisor of the department which oversees inmate trust accounts] talked about, there was no way to tell whether he had been on the Michael Unit or the Ellis Unit when these charges were imposed.

⁵ Carson contends that the magistrate judge improperly accepted as evidence a copy of a TDCJ administrative directive regarding indigent supplies that was not in effect during the first part of 1991. The policies set forth in the administrative directive are consistent with the testimony at the evidentiary hearing; accordingly, any error in admission of the directive did not affect Carson's substantial rights and is, therefore, harmless.

III.

The judgment of the district court is **VACATED** insofar as it dismisses Carson's claim regarding the alleged withdrawal of \$122.35 from his account in June 1992, and the case is **REMANDED** to the district court for further proceedings on that claim. In all other respects, the judgment is **AFFIRMED**.

AFFIRMED in Part; VACATED in Part; and REMANDED