

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8228  
Conference Calendar

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ALEJANDRO MONTANA,

Plaintiff-Appellant,

versus

REBECKA BURKETT ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. W-91-CA-259  
- - - - -  
(December 15, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Alejandro Montana filed a civil rights complaint alleging that his First Amendment and Equal Protection rights were violated because prison officials refused to permit him to receive certain publications because they contained graphic depictions of women engaging in homosexual activity. The district court granted the defendants' motion to dismiss and denied Montana's motion for leave to amend his complaint.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

A dismissal under Rule 12(b)(6) is appropriate only if it appears to a certainty that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Fee v. Herndon, 900 F.2d 804, 807 (5th Cir.), cert. denied, 498 U.S. 908 (1990). In making this determination the Court may not go outside the pleadings and must accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. Id.

Montana argues that the correspondence rules that prevented him from receiving publications that contained graphic depictions of women engaged in homosexual activity are not "neutral" as required by Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). A prison regulation that impinges on an inmate's constitutional rights is valid if it is reasonably related to legitimate penological interests. Turner, 482 U.S. at 89. To determine whether a regulation is valid the Court considers:

(1) whether the regulation has a logical connection to the legitimate government interest invoked to justify it, (2) whether there are alternative means of exercising the rights that remain open to the inmates, (3) the impact that accommodation of the asserted constitutional rights will have on other inmates, guards and prison resources, and (4) the presence or absence of ready alternatives that fully accommodate the prisoner's rights at de minimis costs to valid penological interests.

Kahey v. Jones, 836 F.2d 948, 950 (5th Cir. 1988) (citations omitted). The Court is not required to consider all four factors to determine whether a regulation is rationally related to

legitimate penological interests. Scott v. Mississippi Dep't of Corrections, 961 F.2d 77, 80 (5th Cir. 1992).

The first Turner factor requires that the regulations restricting prisoners' First Amendment rights operate in a neutral fashion without regard to the content of the expression. Turner, 482 U.S. at 90. This neutrality element is satisfied if the regulation "further[s] an important or substantial governmental interest unrelated to the suppression of expression." Thornburgh v. Abbott, 490 U.S. 401, 415, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989). Where the regulation draws a distinction between publications solely on the basis of their potential implications for prison security, the regulation is neutral within the meaning of Turner. Id. at 415-16. The correspondence rules that Montana is challenging distinguish between publications only to address the legitimate penological interests of security and prisoner rehabilitation, see Thompson v. Patteson, 985 F.2d 202, 206-07 (5th Cir. 1993), and therefore satisfy the Turner neutrality requirement.

Montana also argues that his Equal Protection rights were violated because he was permitted to receive some publications, specifically Penthouse, which contained graphic depictions of women engaging in homosexual activity, but was not permitted to receive other publications because they contained similar material. Although Montana seeks to allege a violation of his rights, he is essentially arguing that prison officials are discriminating against certain publications. See Thompson, 985 F.2d at 207. However, the challenged rules are valid and in the

absence of "any allegation of an improper motive, a mere claim of inconsistent outcomes in particular, individual instances furnishes no basis for relief." Id.

Finally, Montana argues that the district court improperly denied his motion for leave to amend his complaint. This Court reviews the district court's denial of the motion for an abuse of discretion. Ashe v. Corley, 992 F.2d 540, 542 (5th Cir. 1993). Leave to amend should be freely given when justice so requires, but leave to amend is not automatic. Id.

The district court did not abuse its discretion by denying Montana's motion. To the extent that he raised the same challenges to the correspondence rules his amendment was futile, see Thompson, 985 F.2d at 206-07, and the district court may properly deny a motion to amend if the amendment would be futile. Davis v. Louisiana State Univ., 876 F.2d 412, 413-14 (5th Cir. 1989). To the extent that he raised unrelated claims and added a new plaintiff, Montana must raise these claims in a separate action.

AFFIRMED.