

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8582
Summary Calendar

FRED GARCIA SANDOVAL,

Plaintiff-Appellant,

versus

WACKENHUT CORRECTIONAL
CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CA-93)

(April 28, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Fred Garcia Sandoval, *pro se* and *in forma pauperis*, appeals from the summary judgment dismissing his civil rights complaint against Wackenhut Correctional Corporation and Tommicine Stevens.

We **AFFIRM**.

I.

Sandoval, who was serving a federal prison sentence for possession with the intent to distribute cocaine, was temporarily

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 Pursuant to that rule, the court has determined that this opinion should not be published.

housed in the Central Texas Parole Violators Facility in San Antonio, which is operated by Wackenhut, on the date of the incident upon which his lawsuit is based. Stevens was employed by Wackenhut as a correctional officer.

On June 4, 1990, at about 7:00 a.m., while Sandoval was watching television in his cell block, Stevens repeatedly turned up the volume of the television set. Inmate Bobby Salazar, who was confined in his cell out of view of the television set, began shouting and cursing for Sandoval to turn down the volume. Stevens left the television area and unlocked Salazar's cell. Salazar, apparently unaware that Stevens, rather than Sandoval, was responsible for turning up the volume, attacked Sandoval, allegedly causing Sandoval to suffer serious injuries.

In February 1992, Salazar filed a civil rights action against Wackenhut and Stevens, alleging negligence, and careless and reckless disregard for his safety, in violation of the Eighth Amendment.² The district court granted the appellees' motion for summary judgment.

II.

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.

² Based on these same facts, Sandoval has sued the United States under the Federal Tort Claims Act. See **Sandoval v. United States**, 980 F.2d 1057 (5th Cir. 1993).

56(c). Our review of summary judgment is plenary, and we view all facts, as well as the inferences to be drawn from those 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 material fact issue for trial. **Id.**

A.

Sandoval contends that Stevens violated his Eighth Amendment rights by deliberately inciting Salazar; and that she either knew, or should have known, that there was a strong likelihood that Salazar would assault Sandoval.

"The Eighth Amendment affords prisoners protection against injury at the hands of other inmates". **Johnston v. Lucas**, 786 F.2d 1254, 1259 (5th Cir. 1986). To establish such a claim, however, a prisoner must prove "at least a conscious or callous indifference to the prisoner's rights". **Id.** at 1260.

The appellees attached to their summary judgment motion excerpts from Sandoval's deposition, in which he testified that: there was no animosity or enmity between him and Stevens; his relationship with Stevens was "real good"; he met Salazar in November 1989, but had no problems with him until the incident on June 4, 1990; except for a few shouting incidents, he never saw Salazar display any violence toward any other inmates, and was not aware of any other violent acts by Salazar; except for the incident on June 4, 1990, there were no other problems with the television

in his cell block; Stevens was playing a "practical joke" or "horseplaying" with Salazar; he did not believe it was Stevens' intention for him and Salazar to get into a fight and hurt each other; he did not believe that Stevens had any intent to harm either him or Salazar; and there was no reason to believe that Stevens thought that any harm would result from her practical joke.

After the appellees moved for summary judgment, the magistrate judge entered an order, explaining the summary judgment procedure, and granting Sandoval additional time, until November 27, 1992, in which to respond to the motion. On November 12, Sandoval moved for sanctions against the appellees, because they did not attach his entire deposition to their motion. In that motion, he asserted that the excerpts submitted by the appellees did not include portions of his deposition in which he allegedly testified that Stevens deliberately and intentionally turned up the volume of the television to infuriate Salazar.

On November 30, Sandoval filed a sworn "Ground for Dismissal of Defendants['] Motion for Summary Judgment", asserting that the appellees had failed to attach relevant portions of his deposition to their summary judgment motion, and that the omitted portions contained testimony that Stevens knew, or should have known, that a fight would occur as the result of her "negligence of [*sic*] horseplay".

On December 7, the magistrate judge denied Sandoval's motion for sanctions, holding that the appellees' failure to file a complete transcript of Sandoval's deposition did not violate the

Federal Rules of Civil Procedure. The magistrate judge stated that Sandoval's "remedy if he believed the deposition excerpts inaccurately reflect his actual testimony during his deposition is to file an affidavit or other proper summary judgment evidence pointing out the alleged errors in the deposition excerpts filed by defendants". Two days later, the magistrate judge filed a report recommending summary judgment in favor of the appellees.³

On December 21, Sandoval filed an affidavit in which he stated that he believed that the deposition excerpts attached to the summary judgment motion did not accurately reflect his deposition testimony. On January 15, 1993, Sandoval filed objections to the magistrate judge's recommendation, in which he asserted that Stevens turned the volume of the television up in "negligence and reckless [sic] horse play"; that Stevens intentionally infuriated Salazar to anger and should have known that a fight would result; and that "whether by ignorance or by intent, guard Steven[]s was not to have angered Salazar by horseplay or practical joke on an inmate". In an affidavit attached to his objections, Sandoval stated that he presumed that Stevens' motive for turning up the volume of the television was "practical joke or horseplaying".

³ The magistrate judge treated Sandoval's action as one under 42 U.S.C. 1983, which is applicable to acts done under color of state law. Because Sandoval was a federal prisoner in the facility, which Wackenhut was under contract with the federal government to operate, his claims cannot be based on § 1983, because no state action was involved. See *West v. Atkins*, 487 U.S. 42, 48 (1988). Instead, his action is one under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 390-97 (1971).

"[A] nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony". **Albertson v. T. J. Stevenson & Co.**, 749 F.2d 223, 228 (5th Cir. 1984); see also **Thurman v. Sears, Roebuck & Co.**, 952 F.2d 128, 137 (5th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 136 (1992). Although Sandoval asserted that the deposition excerpts attached to the appellees' summary judgment motion did not accurately reflect his deposition testimony, he neither disavowed the testimony contained in those excerpts, nor made an attempt to explain which portions of the excerpts, if any, were inaccurate. He could have followed the procedure outlined by the magistrate judge, or taken other steps to place sufficient evidence in the record to create a material fact issue. Therefore, his attempt to raise a factual issue as to whether Stevens was consciously or callously indifferent to his safety, by asserting that the unattached portions of his deposition allegedly contained contradictory testimony, is unavailing.

B.

Sandoval contends that summary judgment for Wackenhut was improper because Wackenhut was negligent "through the [action] of [its] employee, ... Stevens". The magistrate judge correctly noted that Sandoval's claims against Wackenhut are based solely upon the fact that it employed Stevens. Summary judgment for Wackenhut was proper because the doctrine of *respondeat superior* does not apply in a **Bivens** action. *E.g.*, **Abate v. Southern Pacific Transp. Co.**, 993 F.2d 107, 110 (5th Cir. 1993).

C.

Sandoval contends that the district court erred by granting summary judgment on his claim that Wackenhut failed to provide adequate medical treatment for two "medical skin problem[s]", pemphigus and stasis ulcers. He asserts that he raised this claim in his response to the court's questionnaire, his motion to dismiss the summary judgment motion, and in his objections to the magistrate judge's recommendation.

Although Sandoval mentioned his skin problems in various papers filed after the appellees had filed an answer, he did not allege improper medical treatment in his complaint or amended complaint, and neither sought, nor obtained leave, to amend his complaint to assert such a claim. Moreover, he did not contend, in his objections to the recommendation, that the magistrate judge failed to address his medical treatment allegations as a discrete claim. Therefore, this claim is not properly before us on appeal. See **United States v. Armstrong**, 951 F.2d 626, 630 (5th Cir. 1992) (issues raised for the first time in objections to magistrate judge's report); **Oliver v. Collins**, 914 F.2d 56, 60 (5th Cir. 1990) (claim raised for first time on appeal).⁴

⁴ Sandoval seems to assert that his medical problems are a factor to be considered in determining whether an Eighth Amendment violation occurred; that, although the incident might not have injured a healthy person, he suffered injury because of his fragility or increased sensitivity. This seeming contention is rebutted by the above described evidence.

III.

For the foregoing reasons, the summary judgment is

AFFIRMED.