IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10604
(Summary Calendar)

JOSEPH C. SUN,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
ET AL.,

Defendants,

FEDERAL BUREAU OF PRISONS,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

(4:92-CV-871-A)

(March 1, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In this multi-faceted appeal by Plaintiff-Appellant Joseph C. Sun, a federal prisoner, we patientlySQbut for the last timesQ review this "Medallion Level" Frequent Flyer's numerous complaints of alleged error by the district court. Finding all of his allegations to be unmeritorious, we affirm in all respects and add in closing our curtailment of Sun's future access to the federal courts of this circuit and our warning of the certainty of sanctions should he persist in his abuse of the judicial system.

I

FACTS AND PROCEEDINGS

Sun sued the United States and the Bureau of Prisons (BOP) under the Federal Tort Claims Act (FTCA) and 26 BOP employees pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971) (collectively, the Defendants). He alleged that, while he was incarcerated in FCI Fort Worth, the Defendants conspired to deprive him of constitutional rights in retaliation for filing lawsuits. Sun alleged a conspiracy reaching into myriad facets of his life as a prisoner, constituting physical, mental, and emotional torture, by using lies and fabricated incident reports, and in some cases being motivated by racial animus.

October 8 Order. On October 8, 1993, the district court granted in part and denied in part the Defendants' motion to dismiss. The court dismissed (1) the FTCA claims against the United States for lack of jurisdiction due to Sun's failure to exhaust his administrative remedies before filing the FTCA claims; (2) monetary claims against BOP, due to Sun's waiver of those

claims; (3) claims against individual defendants James and Marshall due to Sun's failure to effect service of process; and (4) claims against individual defendants Quinlan, Megathlin, R. Hood, and Suter due to lack of personal jurisdiction. On the other hand, the court denied pleas of qualified immunity "at this stage," delaying until later a determination whether any of Sun's remaining claims had merit.

May 18 Order. On May 18, 1994, the district court granted Sun's motion voluntarily to dismiss claims against two individual defendants, Davis and Lowe. This dismissal was with prejudice, even though Sun had moved to dismiss without prejudice.

May 31 Order. On May 31, 1994, the district court granted the remaining Defendants' motions for summary judgment, dismissing all remaining claims against those Defendants. The court found that the individual defendants had presented summary judgment evidence showing that they acted out of legitimate penological interests and that Sun had presented no competent evidence in rebuttal. The court also found the individual defendants qualifiedly immune.

June 2 Order. On June 2, 1994, the district court entered a final, take-nothing judgment against Sun. This appeal followed.

II

ANALYSIS

A. Waiver

The Defendants assert that Sun's original brief does not challenge the district court's determination, in the October 8 Order, that it lacked personal jurisdiction over defendants

Quinlan, Megathlin, R. Hood and Suter. The Defendants argue that Sun thereby waived any issue regarding their dismissal. Sun made no attempt in his reply brief to counter this argument.

Issues not raised on appeal are abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985). As the dismissal for lack of personal jurisdiction went unchallenged, claims against those four defendants were abandoned, and we affirm their dismissal.

B. Failure to Consider Earlier Declaration

Sun argues that the district court should have considered his "declaration" of August 25, 1993, in deciding the motion for summary judgment. The following year, on April 28, 1994, Sun filed a response to the Defendants' motion for summary judgment. Therein, he complained of not having enough time to respond adequately. He asked that "in the event that he cannot complete his new declaration and response by the deadline set by the court," the court consider the subject declaration as part of his response.

Just over a week later, on May 6, 1994, Sun filed a 35-page declaration and a statement of material facts, both of which detail the wrongs allegedly done to him, to which filing Sun appended more than one hundred pages of exhibits. He then filed another response.

The court rejected Sun's request to consider the August 25 declaration, stating that he had filed it in response to an earlier motion to dismiss. "Clearly," the district court found, "plaintiff intended to rely on such declaration only in the event that he was

unable to complete a new declaration." Sun filed a plethora of responses to the motion for summary judgment, including a new declaration, yet he has made no argument as to how the district court's reliance on his extensive responses, without consideration of the earlier declaration, could have prejudiced him. Sun's complaint regarding the subject declaration lacks merit.

C. Additional Discovery

Sun insists that the district court should have granted his request for additional time to conduct discovery and to respond to the Defendants' motions for summary judgment. We review a district court's decision to preclude further discovery for abuse of discretion. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 28 F.3d 1388, 1395-96 (5th Cir. 1994). If a party cannot adequately defend against a motion for summary judgment without additional discovery, the district court may (but is not required to) order additional discovery. Fed. R. Civ. P. 56(f). The nonmovant, however, may not merely assert that discovery is incomplete, he must show the court how additional time will allow him to rebut the movant's summary judgment evidence. Leatherman, 28 F.3d at 1396.

The district court granted Sun two continuances. After Sun responded to the motion for summary judgment, the court denied Sun's last motion for continuance. Sun has made no specific argument to show that additional discovery or additional time in which to respond would have allowed him to rebut the Defendants' summary judgment evidence.

D. FTCA: Exhaustion of Administrative Remedies

Sun argues that the district court should have allowed him to amend his complaint to allege that, after he filed it, his FTCA claim was denied administratively. The FTCA requires a claimant to exhaust administrative remedies before "invocation of the judicial process." McNeil v. United States, 113 S. Ct. 1980, 1984 (1993). Thus, a lawsuit filed before an agency's resolution of an FTCA claim is premature. Id. at 1983-84.

Sun also insists that he did exhaust administrative remedies. There are three administrative claims at issue, one of which was denied on March 23, 1993. That denial occurred after the commencement of the instant lawsuit; it identifies torts that Sun allegedly suffered at FCI Forth Worth and about which he complained in the instant lawsuit. McNeil precludes Sun's FTCA action on those allegations.

The other two administrative FTCA claims, both of which were indeed denied before the commencement of the instant lawsuit, allege torts suffered at FCI Big Spring. The instant lawsuit makes allegations about incidents at Fort Worth, not Big Spring. As these latter two FTCA claims do not relate to the instant suit, this issue is frivolous.

E. Summary Judgment; Qualified Immunity

Sun insists that he presented genuine issues of material fact to the district court, making summary judgment against him erroneous. He also argues that the Defendants did not show that they were entitled to qualified immunity.

1. Standards of Review

We review a grant of summary judgment de novo, using the same standard applicable in the district court. Matagorda County v. Law, 19 F.3d 215, 217 (5th Cir. 1994). "Summary judgment is appropriate if the record discloses `that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Id. (quoting Fed. R. Civ. P. 56(c)). "The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains." Id. Inferences from the facts are drawn most favorably to the nonmovant. If the record as a whole could not lead a rational trier of fact to find for the nonmovant, then there is no genuine issue for trial. Id.

In reviewing a district court's determination that a defendant is qualifiedly immune, we first determine whether the plaintiff has alleged a constitutional violation. If the plaintiff has not stated a constitutional claim, affirmance will be on that basis. Duckett v. City of Cedar Park, Texas, 950 F.2d 272, 277 (5th Cir. 1992); Quives v. Campbell, 934 F.2d 668, 669-70 (5th Cir. 1991). "The threshold inquiry in determining whether a government official has violated a clearly established right sufficiently to deprive that official of qualified immunity is whether the plaintiff has asserted any constitutional violation at all." Garcia v. Reeves County, Texas, 32 F.3d 200, 202 (5th Cir. 1994). Conclusional allegations will not defeat a motion for summary judgment. Booker v. Koonce, 2 F.3d 114, 117 (5th Cir. 1993).

On appeal, Sun refers to some, but not all, of the allegations that he made in the district court. Pro se briefs must be liberally construed. Haines v. Kerner, 404 U. S. 519, 520 (1972); Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988). Holding a pro se litigant to "less stringent standards" than that to which lawyers are held allows pro se claims, "however inartfully pleaded," to be considered. Haines, 404 U.S. at 520. Nevertheless, arguments must be briefed to be preserved. Price, 846 F.2d at 1028; see Fed. R. App. P. 28(a)(5). Accordingly, we shall assume that the allegations about which Sun argues in his brief are the only ones that he now believes constitute error by the district court.

2. Sun's Claims

a. Sun posits that defendant Turnbo is liable because, as a regional prison administrator, he implemented a policy that allowed and condoned the unconstitutional conduct of others. Supervisory officials may not be liable for the unconstitutional acts of their subordinates on a theory of vicarious liability. Thompkins v. Belt, 828 F.2d 298, 303 (5th Cir. 1987). A supervisor may be liable if he is personally involved in the constitutional violation or there is "a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." Id. at 304. "Supervisory liability exists even without overt personal participation in the offense act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the

constitutional violation." Id. (quotations not indicated). Sun has alleged no personal involvement of Turnbo. Sun's unsupported allegations of the existence of a policy are merely conclusional.

b. Sun claims that Warden Burkhart is liable because he allowed Sun to file only one administrative complaint at a time, with no deadline for a response; and that, along with Turnbo, Burkhart implemented a policy condoning the constitutional violations. A civil rights action requires the deprivation of a "right, privilege, or immunity guaranteed by either the Constitution or laws of the United States." Fyfe v. Curlee, 902 F.2d 401, 403 (5th Cir.), cert. denied, 498 U.S. 940 (1990). It also requires an injury. Memphis Community School Dist. v. Stachura, 477 U.S. 299, 308 (1986). Sun has stated no constitutional right to file more than one administrative complaint at a time; neither has he stated any injury that he incurred as a result of such practice. Those unsupported allegations of a policy condoning constitutional violations are conclusional.

c. Sun claims that BOP regional counsel Michael Hood is liable for denying Sun's FTCA claims by merely stating that BOP officers had committed no wrongs. Sun has not indicated how this violates any right guaranteed by the Constitution.

d. Sun argues that disciplinary hearing officer Poindexter is liable for refusing to correct an incident report that others had fabricated, for screaming at and threatening him, for imposing a punishment exceeding the allowable maximum, and for "numerous false statements in his reports to cover-up his malicious

acts." As discussed below, these alleged fabrications are not constitutional violations, so a refusal to alter the reports would not be a constitutional violation. Alone, a custodial officer's verbal threats do not amount to constitutional violations. Lynch v. Cannatella, 810 F.2d 1363, 1376 (5th Cir. 1987). Sun asserts no facts that would support the conclusion that his punishment exceeded the maximum allowable. For example, he does not identify the offense for which he was disciplined, the punishment that he received, or the allowable maximum punishment.

e. Sun indicates that FCI Fort Worth unit manager Childress is liable because he confiscated Sun's legal locker given to him by a former unit manager, even though Childress allowed other prisoners to keep extra lockers for legal materials. Sun implies that this confiscation deprived him of access to judicial remedies. A prisoner's right of judicial access is denied when he is deprived of the opportunity to file a legally sufficient claim. Mann v. Smith, 796 F.2d 79, 84 (5th Cir. 1986). Delay of access also implicates this right. Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994). To state a constitutional violation, though, a prisoner must show that his access to the courts has been prejudiced. Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.), cert. denied, 112 S. Ct. 2974 (1992); Richardson v. McDonnell, 841 F.2d 120, 122 (5th Cir. 1988). Sun has asserted no such prejudice.

f. Sun also asserts that Childress did not remedy constitutional violations committed by others and that he condoned

such conduct. Sun further argues that Childress limited his administrative complaints, as did Burkhart. But, as discussed above with respect to Turnbo and Burkhart, Sun has stated no constitutional violation.

g. Sun argues that correctional counselor Sotomayor is liable for submitting a fabricated disciplinary report against Sun. He argues that this and another allegedly fabricated incident report resulted in the delay of his parole. Prison disciplinary proceedings are reviewed to determine only if they were arbitrary and capricious. See Stewart v. Thigpen, 730 F.2d 1002, 1005-06 (5th Cir. 1984). When a disciplinary board's factual findings are challenged, judicial review is limited to determining whether the findings are supported by any evidence at all. Id. The mere fact that Sun disputes the accuracy of Sotomayor's report does not render the disciplinary proceedings arbitrary and capricious.

h. Sun suggests that he was maliciously segregated without access to legal materials and that his parole date was delayed. He cites Hewitt v. Helms, 459 U.S. 460 (1983), for the proposition that when officials transfer a prisoner from the general prison population to administrative segregation, certain process is due. As Sun alleges that his parole was delayed, however, Hewitt does not apply. Walker v. Navarro County Jail, 4 F.3d 410, 412 (5th Cir. 1993). The applicable standard was stated in Wolff v. McDonnell, 418 U.S. 539, 563-66 (1974). Id. Wolff requires that, unless a security risk would be created, the prisoner must have 24-hour written notice of a hearing, a written

statement of the fact finder, and an opportunity to present evidence. Id. Sun does not argue that he was deprived of any of these entitlements.

i. Sun argues that FCI Fort Worth special investigative supervisor Coufal is liable for preventing him from eating in the dining room on two occasions. The Constitution requires no more than well-balanced meals; it does not even require three meals a day. Green v. Ferrell, 801 F.2d 765, 770-71 (5th Cir. 1986). Even if Sun had been denied a meal on two non-consecutive, isolated occasions, the Constitution would not be offended.

j. Sun claims that correctional officer Roberts is liable because he "manipulated an incident report" to show that Sun was absent from work when in fact Sun had only gone to the restroom for five minutes, as other prisoners are allowed to do. Sun also indicates that he was repeatedly threatened with bodily harm by Roberts, and that Roberts refused Sun supplies and use of legal materials. Sun also alleges that Roberts fabricated an incident report. As discussed above, disagreement with an incident report does not render disciplinary proceedings arbitrary and capricious. Threats do not violate the Constitution, and neither does the deprivation of legal materials that results in no legal prejudice. Sun does not explain how the deprivation of unspecified supplies violates the Constitution.

k. Sun urges that correctional officer Showalter and others are liable because they "repeatedly used lies to deny Sun use of typing room, smashed his fruits, disallowed showers, and

dest[r]oyed all legal papers in Sun's cells by tearing up and throwing away numerous papers and mixing up all of them." Sun has shown no prejudice from denial of access to the typing room or from putting his legal papers in disorder. Neither is the occasional denial of a shower unconstitutional. Holloway v. Gunnell, 685 F.2d 150, 156 & n.6 (5th Cir. 1982). Intentional deprivation of property does not offend due process if a meaningful post-deprivation remedy is available. Hudson v. Palmer, 468 U.S. 517, 533 (1984). Texas recognizes such a remedy. Myers v. Adams 728 S.W.2d 771, 772 (Tex. 1987).

l. Sun argues that correctional officer Horton was one of those who acted in the same manner as Showalter. The same analysis applies to claims against both of these defendants. Sun also argues that Horton, along with Roberts, fabricated an incident report. And, again, the same analysis applies to claims against both defendants. Additionally, Sun argues that Horton, along with others, lost or destroyed items of personal and legal property. As noted above, the deprivation of non-legal property is not unconstitutional, and Sun has shown no prejudice arising from the alleged deprivation of legal materials.

m. Sun claims that recreation specialist and correctional officer Reid acted in the same manner as Showalter. Again, the same analysis applies to the claims against both defendants.

n. Sun argues that correctional officer Lovings, like Coufal, kept him from eating in the dining room. The same analysis

applies to the claims against both defendants.

o. Sun argues that correctional officer Miller acted the same way as Roberts in manipulating and fabricating incident reports. He also claims that Miller fabricated another incident report. Yet again, the same analysis applies to the claims against both defendants.

p. Sun alleges that correctional officers Manley and DeVere manipulated an incident report like Roberts allegedly did. The same analysis applies to the claims against all three defendants.

q. Sun states that he was forced by DeVere to do unsanitary hard labor in violation of BOP rules and Sun's medical restrictions. Sun does not identify his medical restrictions, the labor that he was required to do, or the rules at issue. His mere conclusion that the labor was unsanitary and inappropriate for him is woefully inadequate.

r. Sun complains that correctional officer Stubblefield is liable because he lost and delayed delivery of numerous pieces of mail. Sun states no constitutional violation related to his mail. See Brewer v. Wilkinson, 3 F.3d 816, 825 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994).

s. Sun alleges that defendants Quinlan and Megathlin also violated his constitutional rights. Sun, however, has abandoned claims against these defendants by failing to challenge their dismissal for lack of personal jurisdiction.

t. Sun urges that defendant Lowe violated Sun's

constitutional rights. Yet Sun fails to challenge the dismissal of Lowe, on Sun's own motion, in the May 18 Order, even though the district court entered a dismissal with prejudice instead of without prejudice as Sun had requested.

u. Sun states that defendant Gates acted in the same way as defendants Showalter, Horton and Reid. But Gates was not included in the list of those moving for summary judgment, and the district court did not address claims against him. Neither does the final judgment include Gates even though he was not dismissed earlier and is not included among the Defendants filing a brief. A judgment that dismisses all served Defendants but does not mention an unserved defendant is an appealable order. Sider v. Valley Line, 857 F.2d 1043, 1045 (5th Cir. 1988).

Nevertheless, Sun does not argue that Gates was or should have been served. Additionally, the claims against Showalter, Horton and Reid are clearly frivolous. It follows, then, that if there were a claim against someone named Gates, who allegedly acted in the same manner as these other three defendants, that claim too would be frivolous.

Sun makes no argument about any other defendant. Therefore, claims against all defendants not discussed above are waived. Hobbs, 752 F.2d at 1083.

In light of the foregoing we conclude that this entire appeal is frivolous and without merit, and must be dismissed as such. Coghlan v. Starkey, 852 F.2d 806, 811 (5th Cir. 1988); 5th Cir. R. 42.2.

CONCLUSION

Sun has filed over thirty lawsuits in various courts in recent years. See Sun v. United States, No. 93-1399, slip op. at 2 n.2 (5th Cir. Apr. 5, 1994) (unpublished; copy attached). The Eleventh Circuit dismissed as frivolous a mandamus action in which Sun sought to compel a public retraction of allegedly derogatory remarks that a federal judge made at his sentencing. Sun v. Forrester, 939 F.2d 924 (11th Cir. 1991), cert. denied, 112 S. Ct. 1299 (1992). A state court in Georgia likened Sun's effect on the state and federal judiciary to small pox's effect on American Indians and the boll weevil's effect on the Southern cotton crop. In sum, the flood of meritless and contumacious legal actions that Sun has unleashed must be abated. He has, like the boy who shouted "Wolf, Wolf!," lost not just any presumption of good faith but the right to use-or more accurately, to abusesQthe judicial system. Henceforth, no attempted filings by or on behalf of Sun will be accepted by the clerk of this court or any other federal court situated within this circuit without express written authorization of a judge of this court. Additionally, Sun is hereby warned that any further attempts to submit for filing any item that is determined by this court to be frivolous will result in more severe sanctions. See, e.g., Mayfield v. Klevenhagen, 941 F.2d 346, 349 (5th Cir. 1991).

DISMISSED.