IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 94-20871
Summary Calendar

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NORRIS HICKS,

Plaintiff-Appellant,

versus

JAMES A. LYNAUGH, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the
Southern District of Texas
(CA-H-94-102)

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(May 24, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

PER CURIAM:

Plaintiff-appellant Norris Hicks (Hicks), a prisoner in the Texas Department of Criminal Justice, filed *pro se* and *in forma pauperis* this suit under 42 U.S.C. § 1983 alleging irregularities in six prison disciplinary proceedings. On March 17, 1994,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

approximately two months after the suit was filed, the district court, *sua sponte*, dismissed the action without prejudice pursuant to 28 U.S.C. § 1915(d). At the time of the dismissal, there had been no activity whatever in the suit and no filings apart from the complaint and IFP papers. Hicks had no notice that the dismissal was contemplated and there was no hearing under *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), nor any questionnaire in the nature of a motion for more definite statement under *Watson v. Alt*, 525 F.2d 886, 892 (5th Cir. 1976). No leave to amend was afforded. On March 29, 1994, Hicks filed a motion for reconsideration, and on April 25, 1994, he filed a motion to amend and supplement, which was dated April 22. The district court denied both of these motions on October 13, 1994. Hicks brings timely notice of appeal.

The primary thrust of Hicks' complaint is that he was denied procedural due process in the six disciplinary proceedings in question. With respect to four of these, the district court correctly concluded that they were, as affirmatively reflected by the complaint, minor proceedings in which the process constitutionally due was only that required by *Hewitt v. Helms*, 459 U.S. 460, 476-77 (1983). *See also Dzana v. Foti*, 829 F.2d 558, 561 (5th Cir. 1987). In three of these four the only punishment was a verbal reprimand; in the fourth the only punishment was a fifteen-day commissary restriction. The district court concluded that the other two disciplinary proceedings were major proceedings, at which Hicks was entitled to the minimal process required by *Wolff v. McDonnell*, 418 U.S. 539, 563-66 (1974). In one of these (No. 94-0019617), Hicks was punished with a fifteen-day commissary

restriction and reduction in "time earning" classification from S3 to S4. In the other of these, the most serious, the punishment was reduction in classification from S4 to L2, loss of 365 days' good time, a 30-day commissary restriction, and 15-days' solitary confinement (no. 94-0027003).

The district court held that in these two major disciplinary proceedings, the complaint reflected that Hicks received all the process he was due under *Wolff*. The court held that in the other four minor proceedings, the complaint reflected that Hicks received all the process he was due under *Hewitt*. For the reasons explained in the district court's memorandum, we agree that the complaint affirmatively reflects that Hicks received all the process that he was due under the Constitution in all six proceedings. Further, contrary to Hicks' contentions, there is no requirement that there be more than one hearing officer, either under *Wolff* or *Hewitt*. We likewise reject Hicks' contention with respect to the most serious disciplinary proceeding (No. 94-0027003) that prison officials' telling him he should not have engaged in the conduct he did amounted to punishment and thus barred under double jeopardy the subsequent formal disciplinary proceeding. Further, the fact that Hicks was in detention for six days before the hearing in No. 94-0027003 did not violate his constitutional rights. *See Hewitt* at 477 & n.9 (five days), and *Johnson v. Craig*, No. 93-4635 (5th Cir. Oct. 27, 1993) (unpublished) (ten days).

That the proceedings may not have been in all respects in accordance with the procedures called for by prison regulations, or

by the decree in the *Ruiz* case (or other similar decree), does not entitle Hicks to relief, so long as he was afforded the minimum due process required in the minor hearings by *Hewitt* and in the major hearings by *Wolff*, as he was as appears from the complaint itself. *See Hernandez v. Estelle*, 788 F.2d 1154, 1158 (5th Cir. 1986); *Green v. McKaskle*, 788 F.2d 1116, 1122 (5th Cir. 1986).

Hicks complains that the district court erred in denying his motion to file an amended or supplemental complaint. This document makes allegations of events occurring both before and after the filing of the original complaint. Given that this amended complaint was tendered more than a month after the judgment, the district court did not abuse its discretion in denying the leave to file. *See Whitaker v. City of Houston*, 963 F.2d 831, 836 (5th Cir. 1992). Hicks also complains because the tendered amended complaint was not treated as a separate suit, which his motion requested in the event that the district court did not allow him to file it in the present suit. We see no abuse of discretion in this regard, as the rules do not provide for the commencement of a suit in the alternative.

The district court also correctly rejected Hicks' argument that the prison grievance system was unconstitutional because the grievances were ruled on by prison employees. *Paden v. United States*, 430 F.2d 882, 883 (5th Cir. 1970).

Hicks also complains that the most serious disciplinary proceeding (No. 94-0027003) was in retaliation for his exercise of his free speech rights, inasmuch as in that proceeding, in which he

was charged for conspiring to create a work stoppage, he was in effect punished for having told a large group of inmates, who were considering what they could do in order to gain compensation from the prison for their labor, that, as stated in Hicks' complaint, "the only sure way of getting monetary compensation for labor was a work stoppage" and that this was what "it would take to get compensation for the labor inmates supply." We see no violation of the First Amendment in the disciplinary determination that these statements, in the context reflected by Hicks' complaint, adequately reflect conspiring to create a work stoppage.

Hicks also alleged that in the other disciplinary proceedings, particularly including the other major proceeding (No. 94-0019617), the proceedings were instituted in retaliation for his being a writ writer and for assisting others with grievances and access to the courts. The district judge correctly concluded that the pleading of this retaliation claim was overly conclusory, and failed to state any factual basis for the conclusion that such retaliation was being engaged in, correctly citing *Whittington v. Lynaugh*, 842 F.2d 818 (5th Cir. 1988). The difficulty with the position taken by the district court, however, is that its dismissal did not afford Hicks an opportunity to amend, he had no advance notice of it, and there was no *Spears* hearing or *Watson*-type questionnaire in the nature of a motion for more definite statement, and nothing in the complaint suggests that Hicks could not adequately specify and establish facts which would suffice to show such retaliation. In *Whittington*, there *was* a *Spears* hearing, and the dismissal was on

that basis. *Id*. at 820. While we might well be inclined to simply disregard as *de minimis* the dismissal of the conclusory retaliation claims in respect to the four minor disciplinary proceedings, particularly those where there was only a verbal reprimand, we are reluctant to do so as to the major disciplinary proceeding, No. 94-0019617. We are also reluctant to proceed in this manner inasmuch as five disciplinary proceedings are involved (we have already concluded that the complaint itself reflects no improper retaliation in No. 94-0027003).

Accordingly, we vacate so much of the district court's order of dismissal as dismisses Hicks' claims of retaliation in regard to the five specific disciplinary proceedings other than proceeding No. 94-0027003; the district court's dismissal of all of Hicks' other claims (except those five retaliation claims) is affirmed. The referenced five retaliation claims are remanded to the district court for further proceedings not inconsistent herewith; we do not preclude their dismissal following a *Spears* hearing or the like, depending on what is thereby developed.

AFFIRMED in part; VACATED and REMANDED in part