IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-41088
(Summary Calendar)

RODNEY JAMES DILWORTH,

Plaintiff-Appellant,

versus

TERRY BOX, Sheriff,

Defendant-Appellee.

Appeal from United States District Court
for the Eastern District of Texas
(4:92-CV-264)

(April 20, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Rodney James Dilworth, a Texas prisoner proceeding pro se and in forma pauperis, filed a suit alleging that Collin County Sheriff Terry Box intentionally ordered guards to beat him in retaliation for lawsuits he had filed. Dilworth also alleged that he was not receiving medical care for his severe neck and back pain and shortness of breath, which he alleges were caused by the beating.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Dilworth attached as an exhibit a copy of a letter dated November 16, 1992, addressed to Sheriff Box, in which he notified Box that guards were threatening him and harassing him because of his lawsuits.

Dilworth filed an amended complaint, alleging that on November 29, 1992, guards attacked, beat, and kicked him without provocation. He averred that, because he gave Sheriff Box notice of threatening and harassing behavior by the guards, Box negligently breached his duty to adequately supervise his employees. Dilworth alleged that Sheriff Box's behavior amounted to gross negligence.

The magistrate judge held an evidentiary hearing regarding Dilworth's claims. At the hearing, Dilworth testified that he did not know what led him to conclude that Box had directed the guards to beat him. Dilworth then stated that being in the county jail was his evidence and that negligence was "a daily thing" at the jail. Dilworth stated that he knew guards were retaliating against him for filing the lawsuit because the guards copy all of the legal documents. Dilworth stated that, other than the letter to Sheriff Box before the beating, he submitted four or five request slips[1] addressed to Box, explaining that he was being threatened and harassed and requesting a meeting with "someone." Dilworth explained that the guards harassed him by stepping on his feet, folding him up in his mattress, and putting him in the isolation cell "almost every day for nothing."

[1] These slips are not in the record.

The magistrate judge recommended treating Box's Rule 12(b)(6) motion as a motion for summary judgment and granted the motion. If the district court considers matters outside the pleadings when ruling on a Rule 12(b) motion to dismiss, the court must treat it as a motion for summary judgment and dispose of it in accordance with Rule 56. FED. R. CIV. P. 12(b); Washington v. Allstate Ins. Co., 901 F.2d 1281, 1284 (5th Cir. 1990).

The magistrate judge relied on matters outside the pleadings. If Dilworth received adequate notice, this Court may review the decision as one for summary judgment. Washington, 901 F.2d at 1284. Under Rule 56 the district court must give the parties ten days notice that it intends to treat the motion as a motion for summary judgment to permit the parties to submit additional evidence. FED. R. CIV. P. 56(c); Washington, 901 F.2d at 1284. The magistrate judge gave Dilworth notice of the motion for summary judgment on March 24, 1994. Dilworth filed a response on April 7, 1994, and the district court did not issue a ruling until September 29, 1994. Thus, because Dilworth had adequate notice, this Court can review the district court's decision as one for summary judgment.

The district court adopted the findings of the magistrate judge, granted summary judgment in favor of Box, and dismissed the suit with prejudice.

DISCUSSION

The Summary Judgment

Dilworth argues that the district court erred in granting summary judgment in favor of Box because there was a genuine issue of material fact concerning whether Box had knowledge that Dilworth was being harassed in the jail. Summary judgment is reviewed de novo under the same standards the district court applies when determining whether summary judgment is appropriate. Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991). Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Id.; FED. R. CIV. P. 56(c). "Furthermore, the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (internal quotation and citation omitted). If the movant cannot meet this initial burden, the motion must be denied irrespective of the response of the nonmoving party. However, if the movant does meet this burden, the nonmoving party "must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." Id.

This court conducts a bifurcated analysis to assess whether Box is entitled to qualified immunity. Rankin v. Klevenhagen, 5 F.3d 103, 105 (5th Cir. 1993). The first step is to determine

whether Dilworth alleged a violation of a clearly established constitutional right. Siegert v. Gilley, 500 U.S. 226, 232 (1991). Dilworth alleged a violation of his Eighth Amendment right to be free from cruel and unusual punishment. The second step is to determine "whether the defendant's conduct was objectively reasonable." Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993). The reasonableness of the conduct is assessed in light of the legal rules clearly established at the time of the incident. Rankin, 5 F.3d at 108.

As a supervisory official, Box may not be liable for the unconstitutional acts of his guards 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 offensive 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).

To succeed on his claim of failure to train or supervise, a plaintiff must show: (1) that the sheriff inadequately supervised or trained the officers; (2) that there was a causal relationship between the failure to train or supervise and a violation of the plaintiff's constitutional rights; and (3) that such failure to

train or supervise amounted to gross negligence or deliberate indifference to the possibility of a constitutional violation. Hinshaw v. Doffer, 785 F.2d 1260, 1263 (5th Cir. 1986); see also Benavides v. County of Wilson, 955 F.2d 968, 972 (5th Cir.), cert. denied, 113 S.Ct. 79 (1992). Usually, a failure to supervise gives rise to § 1983 liability only when there is a history of widespread abuse. In that case, knowledge may be imputed to the supervisory official, and the official can be found to have caused the violation by the failure to prevent it. Bowen v. Watkins, 669 F.2d 979, 988 (5th Cir. 1982).

To establish an Eighth Amendment[2] failure-to-protect claim a prisoner must show that prison officials were deliberately indifferent to his need for protection. A prison official is deliberately indifferent "if he [the defendant] knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 114 S.Ct. 1970, 1984 (1994).

In his motion for summary judgment, Box argued that Dilworth failed to allege that Box was personally involved in the alleged beating. Box also alleged that Dilworth's conclusional allegation failed to rise to the level of a claim of failure to train or supervise or deliberate indifference. Box also raised the issue of

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[2] Dilworth had been convicted prior to the alleged attack; thus, we analyze this case under the Eighth Amendment rather than the Fourteenth Amendment (applicable to pretrial detainees) or the Fourth Amendment (applicable in cases involving the use of excessive force to effectuate an arrest). *See* Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir. 1994).

his qualified immunity. Box's contentions shifted the burden to Dilworth to "designate specific facts showing that there is a genuine issue for trial." Little, 37 F.3d at 1075.

At the evidentiary hearing, Dilworth testified that he did not have any information that would indicate that Box was directing the officers to assault him. Dilworth made a general claim of negligence, but failed to demonstrate that the guards were not properly trained or that a lack of training amounted to gross negligence. Dilworth presented no evidence to suggest a history of widespread abuse. Thus, Box has shown the absence of a genuine issue of material fact concerning Dilworth's claim that Box was liable as a supervisor of the officers.

In attempting to shoulder his burden as the nonmovant, Dilworth directed the court to the letter he sent to Box regarding harassment in the jail and argued that the letter demonstrated knowledge on Box's part.

Dilworth's prior notice to Box that he was receiving threats raises an issue of failure-to-protect. However, because of the general and relatively innocuous nature of the allegations, Box's alleged failure to protect after receiving the purported notice (assuming that he did receive notice) was at most mere negligence. Contrary to Dilworth's assertion that a due process violation has occured, a merely negligent failure to protect a prisoner from assault does not implicate the Due Process Clause. Davidson v. Cannon, 474 U.S. 344, 347-48 (1986); see Johnston v. Lucas, 786 F.2d 1254, 1260 (5th Cir. 1986). Moreover, as we stated earlier,

because Dilworth was a convicted prisoner, his claims are analyzed under the Eight Amendment rather than the Fourteenth Amendment. Dilworth did not carry his summary-judgment burden. The magistrate judge did not err in granting summary judgment in favor of Box. We AFFIRM.

Appointment of counsel on appeal

Dilworth has requested the appointment of counsel on appeal. Generally, "[c]ounsel will be appointed in civil cases only in exceptional circumstances." Richardson v. Henry, 902 F.2d 414, 427 (5th Cir.), cert. denied, 498 U.S. 901 (1990). In Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982), the court held that in deciding such a motion, a district court should consider the type and complexity of the case; whether the indigent can investigate the case adequately; and whether the presentation of the evidence would require skill in cross-examination. Although not all of these specific considerations apply to cases on appeal, the duty to consider the appellant's ability to present fairly his or her case is the same. The record indicates that Dilworth has some mental problems, but the pleadings filed in the district court and on appeal show that he has sufficient skill to file coherent pleadings. This case contains no exceptional circumstances requiring appointment of counsel. Ulmer, 691 F.2d at 212. Accordingly, we DENY the motion for appointment of counsel on appeal.

Sanctions

The magistrate judge found that Dilworth "has filed no fewer than eight federal civil rights lawsuits, of which seven have been dismissed as frivolous and one, the present case, remains outstanding." We have previously affirmed the dismissal as frivolous of another of Dilworth's civil rights suits. See Dilworth v. West, No. 93-7687 (5th Cir. Mar. 21, 1994) (unpublished; copy attached). Dilworth's willingness to prosecute frivolous suits warrants our warning to him that bringing frivolous appeals may result in sanctions in which he is assessed costs, attorney's fees, etc. We suggest that Dilworth familiarize himself with Rule 11 of the Federal Rules of Civil Procedure. A federal court may implement sanctions necessary or warranted to control its docket and maintain the orderly administration of justice. If Dilworth persists in filing frivolous suits, he may be ordered to obtain judicial pre-approval of all future filings. *See, e.g.,* Goldgar v. Office of Admin., 26 F.3d 32 (5th Cir. 1994), and Vinson v. Heckmann, 940 F.2d 114, 116-17 (5th Cir. 1991) (ordering all trial and appellate courts within the Fifth Circuit's supervisory jurisdiction to decline acceptance of any filing from frivolous litigant unless he obtained specific pre-authorization by a judge of the forum court).

AFFIRMED.