

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 94-50196
Summary Calendar
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MUKHTAR AHMAD,

Plaintiff-Appellant,

versus

CARLOS C. ORTIZ, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the
Western District of Texas
(A-92-CV-616)
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(December 27, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant Mukhtar Ahmad (Ahmad), a prisoner proceeding *pro se*, brought this *Bivens*¹ suit against numerous officers of a Texas federal correctional unit (Defendants) for allegedly violating his constitutional rights. Ahmad appeals the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

¹ *Bivens v. Six Unknown Federal Narcotics Agents*, 91 S.Ct. 1999 (1971).

district court's grant of summary judgment for Defendants. We affirm in part and vacate and remand in part.

Facts and Proceedings Below

On November 2, 1992, Ahmad filed a *Bivens* suit against seven named and three unnamed officers of the Federal Correctional Institution (FCI) in Bastrop, Texas.² Ahmad claimed that these officials, individually or in conspiracy, were deliberately indifferent to his serious medical needs, violated his due process rights at a prison disciplinary hearing, denied him access to the courts, inflicted cruel and unusual punishment upon him, placed him in administrative segregation without due process, and retaliated against him for the exercise of his constitutional rights. For these alleged violations, Ahmad sought over two million dollars in damages.

On February 4, 1993, Defendants filed a motion to dismiss or, in the alternative, for summary judgment. The magistrate judge recommended that the suit be dismissed, concluding that Ahmad had failed to show that Defendants had violated his clearly established constitutional rights. After a *de novo* review, the district court adopted, over Ahmad's objections, the report and recommendation of the magistrate judge. Ahmad filed a timely appeal.

Discussion

Although terming its order a dismissal under Rule 12(b)(6),

² Defendants are Warden Carlos C. Ortiz; Unit Manager Joe Warren; Unit Counselor Isaias Sarmiento; Unit Case Manager Gregory Lowe; Unit Counselor Thomas Parker; Virginia Cortes, M.D.; Disciplinary Hearing Officer Harold Killyon; Officer Jeanice Taylor; and three John Doe officers.

the district court, by considering matters outside the pleadings, in fact treated the motion as one for summary judgment under Rule 56. See FED.R.CIV.P. 12(b). We therefore deem the district court's final order a grant of summary judgment, which we review *de novo*. *Weyant v. Acceptance Ins. Co.*, 917 F.2d 209, 212 (5th Cir. 1990). Rule 56 provides for summary judgment when, considering all the evidence in the light most favorable to the nonmoving party, there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Newell v. Oxford Management, Inc.*, 912 F.2d 793, 795 (5th Cir. 1990). Summary judgment against a party is proper if the summary judgment evidence before the court is not sufficient to sustain a finding in favor of that party on a necessary element of his case as to which he carries the burden of proof at trial. *Celotex Corporation v. Catrett*, 106 S.Ct. 2548, 2552-53 (1986).

Ahmad raises six issues on appeal: (1) whether Defendants were deliberately indifferent to his serious medical need; (2) whether Defendants assigned him work in retaliation for an attempt to file a grievance; (3) whether Defendants denied him visitation privileges without due process; (4) whether Defendants denied him access to the courts; (5) whether Defendants transferred him to another prison in retaliation for the filing of grievances; and (6) whether Defendants placed him in administrative segregation without due process.

Ahmad argues first that Defendants' deliberate indifference to a serious medical need violated the Eighth Amendment's prohibition

on cruel and unusual punishment. To prevail, Ahmad must show not only that his medical need was serious, but also that Defendants acted with subjective recklessness⁵⁰ that is, with "wanton disregard" of the prisoner's rights. *Johnson v. Treen*, 759 F.2d 1236, 1237 (5th Cir. 1985); see also *Farmer v. Brennan*, 114 S.Ct. 1970 (1994). Ahmad claims to suffer from an acute and chronic sinus condition. By his own admission, Ahmad has, since incarceration, undergone two surgeries at the government's expense to remedy this condition. Following the second surgery, a polypectomy performed in 1989 by Dr. Paul Burns (Burns), a private specialist, Ahmad claimed that the treatment had cut, but not cured, the pain. Several postoperative exams uncovered nothing remarkable.

After the operation, Ahmad complained of sinus pain brought about by his cell's air conditioner. Because of these complaints, Ahmad again met with Burns in 1991. At this visit, Burns found no evidence of sinus symptoms and characterized Ahmad's condition as "completely normal," but recommended a CT scan "to be sure." Burns also noted that "[i]t might also be helpful to turn off the air-conditioning duct to his room as this seems to aggravate the problem." FCI officials ordered a CT scan, which confirmed Burns's diagnosis that Ahmad suffered from no "specific sinus disease." The officials, furthermore, found unfeasible Burns's suggestion to turn off the air conditioner because of the layout of the cells and the critical need for cooling during the summer months. Officials instead provided Ahmad with antibiotics, pain killers, and sinus

pills.

Despite this extensive treatment, Ahmad claims Defendants have shown a wanton disregard for his medical condition by refusing to provide him with a single room without air conditioning. Even assuming the seriousness of Ahmad's medical condition, an assumption unsupported and even contraindicated by the postoperative medical findings, Ahmad has still failed to set forth facts sufficient to establish Defendants' deliberate indifference. Indeed, rather than demonstrating wanton disregard for Ahmad's sinus problem, Defendants persistently sought to remedy his condition. See *Johnson*, 759 F.2d at 1238. They have also adequately explained why a room transfer was unfeasible.³ Defendants thus acted reasonably under the circumstances. See *Farmer*, 114 S.Ct. at 1983 ("[P]rison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."). Consequently, we agree that Defendants were entitled to summary judgment on this issue.

Second, Ahmad claims he was assigned to kitchen work in retaliation for his attempt to file an administrative grievance. Defendants concede that Ahmad was assigned kitchen duty, but deny that this assignment resulted from a retaliatory motive. Instead, Defendants claim that Ahmad was assigned because, although

³ In any event, Defendants were unable to reassign Ahmad to a single room without the issuance of a medical requirement from the Health Services Department. In this case, no requirement was issued.

medically cleared for work, he had not yet been given a job.⁴ Beyond his conclusory allegations, Ahmad has completely failed "to make a showing sufficient to establish the existence," directly or inferentially, of a retaliatory motivation. See *Celotex*, 106 S.Ct. at 2552; see also *Richardson v. McDonnell*, 841 F.2d 120, 122-23 (5th Cir. 1988). Defendants were therefore entitled to summary judgment on this issue.

Third, Ahmad contends that Defendants Parker and Warren deprived him of visitation privileges. Ahmad has failed to show how the denial of visitation privileges amounts to a due process violation. The relevant prison regulations extend visiting privileges only to those people with whom the inmate has "an established relationship prior to confinement."⁵ 28 C.F.R. § 540.44 (1991). Exceptions to this prior-relationship rule are committed to the complete discretion of prison officials, who are not bound in the regulation by any mandatory language or specified substantive predicates. *Id.* Because Ahmad wished to add to his visitation list a person with whom he had no prior relationship, he had no right under the regulation to have this visitor approved. Consequently, Ahmad has failed to allege any protectible liberty interest and therefore cannot maintain a due process claim. See *Kentucky Department of Corrections v. Thompson*, 109 S.Ct. 1904,

⁴ The record contains an Inmate History confirming that Ahmad had no medical restrictions and could therefore be assigned regular work duty.

⁵ Despite Ahmad's objections, the record is clear that this regulation was in effect when the visitation request was denied.

1910 (1989).⁶ Accordingly, summary judgment was proper.

Fourth, Ahmad claims he was denied access to the courts because of restricted access to the law library while in administrative segregation. To allege a constitutional violation, a prisoner must show that the purported denial of access somehow prejudiced his position as a litigant. *See Henthorn v. Swinson*, 955 F.2d 351, 354 (5th Cir.), *cert. denied*, 112 S.Ct. 2974 (1992). Because Ahmad failed to make this showing, Defendants were entitled to summary judgment on this issue.

Fifth, Ahmad claims that Defendants transferred him to another prison in retaliation for filing administrative grievances. Initially, we observe that Ahmad has failed to link the transfer to Defendants, none of whom had the power to transfer Ahmad. In fact, only the Regional Designations Administrator, a nonparty, has such authority. The record indicates, moreover, that Ahmad was transferred for a disciplinary violation and for improper conduct toward a female staff member. Once again, Ahmad has made only conclusory allegations to support his theory that the motivation behind the transfer was retaliatory. *See Richardson*, 841 F.2d at 122-23. For this reason, summary judgment was proper.

Finally, Ahmad claims he was placed in administrative segregation for almost a month without a hearing or notice of the charges against him. Although Ahmad raised this issue in his

⁶ By merely pointing to other prisoners for whom an exception has been made, Ahmad likewise does not state an equal protection violation. He has merely identified the obvious effects of a discretionary rule.

complaint and reasserted it in his objections to the magistrate judge's report, Defendants concede that neither they in their motion to dismiss or for summary judgment nor the magistrate judge nor the district court addressed it below. Administrative segregation imposed for punitive reasons generally requires minimal due process protections of notice to the prisoner and an opportunity to present his views. See *Mitchell v. Sheriff Department, Lubbock County*, 995 F.2d 60 (5th Cir. 1993). Because this claim was not addressed in the motion to dismiss or for summary judgment, nor by the magistrate judge or the district court, Ahmad was not obliged to bring forth any summary judgment evidence in support of the claim. See *FDIC v. Laguarda*, 939 F.2d 1231, 1240 (5th Cir. 1991). The record does not exclude the possibility that he could properly plead and prove such a claim. Accordingly, we vacate and remand the implicit grant of summary judgment on this claim. We intimate no views as to its merits, including whether any such segregation was imposed for punitive, as opposed to simply for administrative, reasons, or whether the complaint as now drafted would be good as against a proper motion to dismiss or could withstand a proper motion for summary judgment.

Conclusion

We affirm the district court's judgment in all respects except as to the claim that Ahmad was placed in administrative segregation for about a month in violation of his due process rights; the judgment of dismissal of that claim is vacated and it is remanded to the district court.

AFFIRMED in part; VACATED and REMANDED in part