

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50245
Conference Calendar

JULIAN SCOTT ESPARZA,

Plaintiff-Appellant,

versus

TIM MORGAN,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. A-93-CA-61
- - - - -

(July 19, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Julian Scott Esparza appeals the judgment of the district court dismissing his civil rights action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Esparza's brief is liberally construed as arguing that Tim Morgan, a member of the State Classification Committee for the Texas Department of Criminal Justice, deprived him of due process by failing to follow state-established procedures in determining his classification.

"A district court's ruling on a Rule 12(b)(6) motion is

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

subject to de novo review." Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 618 (5th Cir. 1992). A Rule 12(b)(6) dismissal will be affirmed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1343 (5th Cir. 1988) (internal quotation and citation omitted). In reviewing a Rule 12(b)(6) dismissal, the allegations of the complaint are taken as true; however, this Court does not assume facts not alleged. Id. at 1343.

"[A] state can create a protected liberty interest by establishing sufficiently mandatory discretion-limiting standards or criteria to guide state decision makers." Jackson v. Cain, 864 F.2d 1235, 1250 (5th Cir. 1989). To show such a liberty interest, first, "[a]n inmate must show that particularized standards or criteria guide the State's decisionmakers and that these criteria are sufficiently mandatory in nature. Second, the prison decision must substantially affect the nature or length of a prisoner's confinement. . . ." Id. at 1250-51 (internal quotation and citations omitted). The Fourteenth Amendment does not create a protected interest in being confined in the general population. Hewitt v. Helms, 459 U.S. 460, 467-68, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). However, remaining in the general prison population as opposed to administrative segregation may involve a liberty interest. Jackson, 864 F.2d at 1251.

On remand following an appeal in this Court, the district court afforded Esparza an opportunity "to offer a more detailed

set of factual claims" by way of a questionnaire. Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994); see Graves v. Hampton, 1 F.3d 315, 319 (5th Cir. 1993). Given this opportunity, Esparza has not identified a violation of a recognizable liberty interest created by the Due Process Clause itself, state laws and regulations, or "particularized standards or criteria." Mitchell v. Sheriff Dep't, Lubbock County, Tex., 995 F.2d 60, 63 (5th Cir. 1993). Nor has Esparza expanded the factual allegations concerning the deprivation of a liberty interest beyond those asserted in his original complaint. Although directed to give a "clearer statement and explanation of [his] claims," he has not provided a factual account of the events surrounding the decision not to return him to general population.

Taking the allegations in the complaint and in his reply to the questionnaire as true, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McCormack, 845 F.2d at 1343.

AFFIRMED.