IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10351

VIRGIL DWAIN WHITE,

Plaintiff-Appellant,

v.

D.D. SANDERS,
Texas Department of Criminal Justice Employee, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(2:90-CV-226)

(March 2, 1995)

Before KING, GARWOOD and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Virgil Dwain White, proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983, alleging that Texas prison officials violated his First and Fourteenth Amendment rights by imposing upon him a thirty day commissary restriction for sending a letter to his girlfriend which contained vulgar remarks about an unnamed prison mailroom employee. The magistrate judge, before whom the parties

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

consented to have their case tried, entered judgment for the defendants on grounds of qualified immunity. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On or about August 27, 1990, White, a Texas prisoner, mailed a letter to his girlfriend in which he complained about prior censorship by the prison mailroom. Specifically, White told his girlfriend that he had previously mailed to her several nude photographs of himself, which she did not receive. White's letter speculated that "[t]he horny bitch in the mailroom probably kept them to look at while she diddled herself." The mailroom employee who censored White's letter, Debra Frawner, permitted the letter to be mailed,[1] but filed a disciplinary report against White for "knowingly making false statements for the purpose of harming another person," an offense under the prison's internal disciplinary rules.

On September 9, 1990, White received a hearing before the prison disciplinary board, which found him guilty and sentenced him to thirty days' commissary restriction. White filed an appeal from this decision, which was denied by the warden on October 3, 1990. Notice of that denial was received by White on October 10, 1990. As the time period for appealing the warden's decision had already expired upon White's receipt of the warden's

[1] White contends that his girlfriend never received the letter. The magistrate judge, however, found that the letter was not suppressed. White has offered no evidence that this factual finding is clearly erroneous, and we therefore accept it as true.

decision,[2] White instituted this civil rights action pursuant to 42 U.S.C. § 1983,[3] alleging that the imposition of discipline which flowed from his letter deprived him of his freedom of speech and right to due process.[4]

The parties agreed, pursuant to 28 U.S.C. § 636(c), to have their case tried before a magistrate judge, who entered judgment in favor of the defendants on grounds of qualified immunity. White appeals, asserting that the magistrate judge erred in determining that the defendants' acts did not violate his clearly established constitutional rights.

II. STANDARD OF REVIEW

Briefs and papers of pro se litigants are to be construed more liberally than those filed by counsel. Securities and Exch.

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[2] The parties do not contest the magistrate judge's determination that White has properly exhausted his available state remedies.

[3] The amended complaint named three defendants: Darwin D. Sanders, Assistant Warden of the Clements Unit; Robert E. Morin, the disciplinary hearing officer who heard White's appeal; and Debra L. Frawner, the assistant mailroom supervisor who issued the disciplinary report against White.

[4] The First Amendment freedom of speech has been incorporated to apply to the states via the Due Process Clause of the Fourteenth Amendment. See Gitlow v. New York, 268 U.S. 652, 666 (1925). Apparently, White contends that, as a result of his letter, he was punished for acts which were not legally proscribable-- i.e., he was deprived of his liberty interest to be free from punishment for engaging in speech protected by the First Amendment. Thus, we construe White's complaint and amended complaint to allege that, as a result of the alleged deprivation of his freedom of speech, he was deprived of his Fourteenth Amendment right to due process as well. Hence, we find that White's due process claim is included within his freedom of speech claim and proceed to address those claims as one claim.

Comm'n v. AMX Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993). We review a judgment rendered by a magistrate pursuant to 28 U.S.C. § 636(c) as we would a judgment rendered by a district judge, providing de novo review for issues of law and applying the clearly erroneous standard to findings of fact. Laker v. Vallette (In re Toyota of Jefferson, Inc.), 14 F.3d 1088, 1090 (5th Cir. 1994).

III. ANALYSIS

To determine whether a governmental official is entitled to qualified immunity, a court must first ascertain whether the plaintiff has asserted the violation of a clearly established constitutional right. Siegart v. Gilley, 500 U.S. 226, 232 (1991); Correa v. Fischer, 982 F.2d 931, 933 (5th Cir. 1993). This court uses "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993). Second, we must determine whether a reasonable official in the defendant's shoes would have understood that his conduct violated the plaintiff's constitutional rights. Anderson v. Creighton, 483 U.S. 635, 640 (1987); Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994). Thus, even if the official's conduct violates a constitutional right, she is entitled to qualified immunity if her conduct was objectively reasonable. Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). The reasonableness of the official's actions is assessed in light

of the legal rules clearly established at the time of the incident. Johnson v. City of Houston, 14 F.3d 1056, 1060 (5th Cir. 1994); Spann, 987 F.2d at 1114.

White claims that the defendants' act of disciplining him because of the contents of his letter violated his right to free speech in violation of the First Amendment. The magistrate judge, however, concluded that the defendants were entitled to qualified immunity because "a reasonably competent prison official would not have known that giving an inmate a minor disciplinary case for such a written statement as was made by plaintiff, violated a clearly established law." Thus, the magistrate judge's grant of qualified immunity seems to rest upon the second prong of the qualified immunity analysis-- namely, whether reasonable officials in the shoes of the defendants would have had reason in 1990 to know that their actions were unconstitutional.

Because the magistrate judge rested his decision upon the objective reasonableness prong of the qualified immunity analysis, we will assume, for purposes of argument, that the plaintiff has satisfied the first prong-- i.e., that his clearly established constitutional rights, as their contours exist today, were violated.[5] We therefore proceed to focus upon the second

[5] We recognize that since the incident at issue in this case, the Eighth Circuit, faced with analogous facts, has concluded that such facts present a violation of clearly established First Amendment rights. See Loggins v. Delo, 999 F.2d 364 (8th Cir. 1993). We are also aware that, prior to the incident at issue in this case, the Third Circuit, also faced with analogous facts, determined that a First Amendment violation

prong of the qualified immunity analysis and to determine whether prison officials in 1990 would have known that punishing White for the statements in his letter violated the First Amendment.

The standard by which all prisoner correspondence claims are scrutinized was articulated in Turner v. Safley, 482 U.S. 78 (1987). In that case, the Supreme Court concluded that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Id. at 89. Thus, if a prisoner complains that a prison regulation, on its face or as applied, has impinged upon his freedom of speech, our first task is to ascertain whether the regulation is reasonably related to legitimate penological interests. Legitimate penological interests include security, order, and rehabilitation.[6] Procunier v. Martinez, 416 U.S. 396, 413 (1974); Adams v. Gunnell, 729 F.2d 362, 367 (5th Cir. 1984).

In this case, the penological interest proffered as the basis for imposing discipline upon White is prison security.

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had occurred. Brooks v. Andolina, 826 F.2d 1266 (3d Cir. 1987). While the Third Circuit decision in Brooks predates the action taken by the defendants in this case, the decision is not binding in this circuit; thus, we proceed to analyze the objective reasonableness of the defendants actions without regard to such non-binding precedent.

[6] Our reluctance to decide whether the prison regulation at issue here, as applied to White, is reasonably related to legitimate penological interests stems in part from the fact that there is no development in the record about how the prison's penological interests are implicated by White's letter.

In McNamara v. Moody, 606 F.2d 621 (5th Cir. 1979), cert. denied, 447 U.S. 929 (1980), we held that a prisoner's First Amendment freedom of speech had been violated when prison officials refused to mail a letter to his girlfriend in which the prisoner stated that an unnamed mailroom employee masturbated and had sex with a cat.[7] Id. at 623, n.2. We stated that

> [n]o one wants to be the target of insulting remarks like those in McNamara's letter. But coarse and offensive remarks are not inherently breaches of discipline and security, nor is there any showing that they will necessarily lead to the breaking down of security or discipline. As we have recognized, "Martinez . . . emphatically states that mere complaints and disrespectful comments cannot be grounds for refusing to send or deliver a letter."

Id. at 624 (quoting Guajardo v. Estelle, 580 F.2d 748, 757 (5th Cir. 1978)).

However, six years after McNamara, this court held that no First Amendment violation occurred when prison officials disciplined a prisoner for verbally assaulting a guard. Gibbs v. King, 779 F.2d 1040 (5th Cir. 1986). We held that the prisoner's

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[7] Specifically, McNamara's letter stated:

> I wish I could write w/o some perverted dung-hole reading my words, but such is not the case. It is really a shame that there are those who have such a blah! life that they must masturbate themselves while they read other people's mail. I don't think the guy is married; however, one of the freeman told me the other day that he has a cat and that he is suspected of having relations of some sort with his cat. If the shoe fits him, watch him blush the next time we see him. I'll point him out to you and you can laugh at him. "Look, honey. There goes that pervert who has sex with a cat and masturbates while reading other people's mail." This is what I think of him. These are my thoughts, and I am entitled to them.

McNamara, 606 F.2d at 623 n.2.

remarks were not protected by the First Amendment because they "interfered with [the guard's] duty to maintain order[,]" and "bordered on a threat." Id. at 1046.

On the one hand, in McNamara we found that certain indirect, offensive remarks contained in a letter from a prisoner to his girl friend could not be censored, but we were not called upon to decide whether such remarks could form the basis for disciplining the prisoner for violating a prison regulation of the sort at issue here. On the other hand, more direct invectives, such as those in Gibbs, could be proscribed because such remarks did threaten the legitimate penological interests of security and order. The remarks contained in White's letter appear to fall within a constitutional "no man's land" between McNamara and Gibbs. Specifically, the magistrate judge determined that

> it is without question that plaintiff was aware the mailroom staff would be exposed to the letter in question and the target of plaintiff's vulgar comments would be exposed to plaintiff's comments either by reading such comments directly or by having members of the mailroom staff read the comments and bring such to the attention of the victim. Therefore, while the letter was addressed to a third person, plaintiff was aware that it, in all probability, would come to the attention of the mailroom official about whom plaintiff referred.

White does not challenge the validity of this underlying factual determination. Thus, we accept as true the magistrate judge's conclusion that, while White's letter did not specifically name his intended victim, the letter was directed toward a specific mailroom employee who would become aware of White's statement.

Thus, at the time White's letter was sent in 1990, it is unclear whether his remarks were more akin to the indirect (and hence, constitutionally protected) remarks at issue in McNamara, or to the direct (and hence, constitutionally unprotected) remarks at issue in Gibbs. A fortiori, it was by no means clear that, by punishing White for his remarks, reasonable officials in the defendants' shoes would have known that they violated White's First Amendment rights. Thus, even if the defendants' actions violated the Constitution by today's standards, a matter which we do not decide, those actions were not objectively unreasonable in 1990. Accordingly, the magistrate judge did not err in determining that the defendants were entitled to qualified immunity.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the magistrate judge.