

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30596
Summary Calendar

CURTIS BROUSSARD,

Plaintiff-Appellee,

versus

MICHAEL HEBERT, ET AL.,

Defendants,

MICHAEL HEBERT, Captain,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-93-836-A-1)

(May 22, 1995)

Before JOHNSON, HIGGINBOTHAM, and SMITH, Circuit Judges.¹

JOHNSON, Circuit Judge:

Captain Michael Hebert ("Captain Hebert"), the Security Captain at the Hunt Correctional Center, appeals the district court's denial of his motion for summary judgment on qualified immunity grounds. Because we believe that Captain Hebert is

¹Local 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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

correct in claiming that there has been no violation of a clearly established constitutional right, we reverse the denial of qualified immunity and remand this case to the district court.

I. Facts and Procedural History

Curtis Broussard ("Broussard") is a Louisiana state prisoner who filed this section 1983 civil rights suit against Captain Hebert, Major Tim Maxwell ("Major Maxwell"), and three John Doe defendants. In his complaint, Broussard alleges that Captain Hebert violated his civil rights by retaliating against him because he provided legal assistance to other inmates. Broussard claimed that Captain Hebert retaliated against him by: 1) forcing him to "goose pick grass" before an attorney call-out; 2) harassing him by searching his locker; and 3) threatening to further retaliate if Broussard assisted other inmates in seeking legal redress to the courts. Hebert responded to the section 1983 complaint by filing a motion for summary judgment on qualified immunity grounds. Following a recommendation by a magistrate judge, the district court granted the summary judgment as to all grounds and all parties except for the ground that Hebert retaliated against Broussard for accessing the courts. Hebert now appeals the denial.²

II. Discussion

This Court reviews the denial of a summary judgment de novo, using the same criteria used by the district court. *Fraine v. City*

²Major Maxwell also appealed the district court's summary judgment decision. However, this Court subsequently dismissed that appeal upon Major Maxwell's own motion.

of *Arlington*, 957 F.2d 1268, 1273 (5th Cir.), *cert. denied*, 113 S. Ct. 462 (1992). The Court reviews the "evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." *Id.* Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). When a proper motion for summary judgment is made, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The mere allegation of a factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Freire*, 957 F.2d at 1273. A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. See *Anderson*, 477 U.S. at 248. Material facts are facts that might affect the outcome of the suit under the governing law. *Id.*

Qualified immunity shields government officials performing discretionary functions from liability unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person should have known. *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994). The protection afforded by the defense is an "immunity from suit, not simply immunity from liability." *Id.* (quoting *Geter v. Fortenberry*, 849 F.2d 1550, 1552

(5th Cir. 1988)). Consequently, the immunity issue must be resolved at the earliest possible stage of the litigation since it entails an entitlement to immunity from suit and not merely a defense to liability. See *Hunter v. Bryant*, 502 U.S. 224, 226 (1991).

This Court conducts a bifurcated analysis to assess whether a defendant is entitled to qualified immunity. *Harper v. Harris County*, 21 F.3d 597, 600 (5th Cir. 1994). The first step is to determine whether the plaintiff has alleged a violation of a clearly established constitutional right. *Id.* This Court uses "currently applicable constitutional standards to make this assessment." *Rankin v. Klevenhagen*, 5 F.3d 103, 106 (5th Cir. 1993). If the Court finds no constitutional injury, it need not even address the issue of qualified immunity. *Quives v. Campbell*, 934 F.2d 668, 671 (5th Cir. 1991). The plaintiff bears the burden of pleading such a violation of clearly established law. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Foster v. City of Lake Jackson*, 28 F.3d 425, 428 (5th Cir. 1994).

If the plaintiff meets the burden of alleging that there has been a violation of a clearly established right, then this Court must determine whether the defendant's conduct was objectively reasonable under the circumstances. *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993). The reasonableness of the conduct must be assessed in light of the law as it existed at the time of the conduct in question. *Harper*, 21 F.3d at 601.

A prisoner clearly has a constitutional right to exercise his

or her own right of access to the court without retaliation. *Gibbs v. King*, 779 F.2d 1040, 1046 (5th Cir.), *cert. denied*, 476 U.S. 1117 (1986). However, this Court has not determined whether an inmate has a constitutional right to be free from retaliation for his or her legal activities on behalf of a fellow inmate. See *Chambers v. Wackenhut*, No. 92-4817, slip op. at 3 (5th Cir. August 30, 1993) (unpublished opinion). The Supreme Court has never spoken to the issue and the circuits which have so spoken have come to inconsistent conclusions. See *Newsom v. Norris*, 888 F.2d 371, 375-77 (6th Cir. 1989) (assuming that jailhouse lawyers have a First Amendment right to be free from retaliation); *Gassler v. Rayl*, 862 F.2d 706, 707-08 (8th Cir. 1988) (holding that inmates do not have a constitutional right to hold the position of jailhouse lawyer).

Broussard has not alleged that he has been deprived of a clearly established constitutional right. In his brief in opposition to the defendants' motion for summary judgment, Broussard argues that he has a constitutional right to provide legal assistance to other inmates. Additionally, his original pleadings complain of his being retaliated against for his position as a writ writer in the prison. Broussard, therefore, is alleging that he was retaliated against for assisting other inmates in asserting their right to legal redress in the courts.³ Given the

³The district court incorrectly construed Broussard's claim to be that he was denied access to the courts. Broussard's pleadings demonstrate, however, that he has not alleged that he was denied access to the court, but that he was retaliated against for assisting others in gaining access.

split in the circuit law as to this issue and the fact that neither the Supreme Court nor this Court has ever spoken one way or the other, Broussard did not have a clearly established right to act as a jailhouse lawyer. Accordingly, Captain Hebert's motion for summary judgment on qualified immunity grounds should have been granted.

III. Conclusion

Because Broussard has not alleged the violation of a clearly established constitutional right, Captain Hebert is entitled to summary judgment on qualified immunity grounds. Therefore, the district court's denial of the summary judgment motion as to Captain Hebert on the retaliation ground is reversed and this case is remanded to the district court.

REVERSED AND REMANDED.