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United States District Court, S.D. New York.

Aida Vasquez NERI and Fred Neri, Plaintiffs,
v.
Thomas A. COUGHLIN, III, Commissioner, New York State Department of Correctional Services; Anthony J. Annucci, Deputy Commissioner and Counsel, N.Y.S. Department of Correctional Services; D. Morgan, Counsel's Office, N.Y.S. Department of Correctional Services; R.J. McClellan, Superintendent, Southport Correctional Facility; M.L. Hollins, First Deputy Superintendent, Southport Correctional Facility; J. Burge, Lieutenant, Southport Correctional Facility, Defendants.

No. 92 Civ. 7890 (SS). | Nov. 9, 1993.

Opinion

OPINION AND ORDER

SOTOMAYOR, District Judge.

***1** Plaintiff Aida Vasquez Neri is the wife of plaintiff Fred Neri, an inmate at the Southport Correctional Facility in Pine City, New York, a facility under the Department of Correctional Services ("DOCS"). Plaintiffs allege that Ms. Vasquez Neri's visitation privileges with her husband were improperly revoked in 1992, in violation of the Consent Decree approved in *Kozlowski v. Coughlin,* 539 F.Supp. 852 (S.D.N.Y.1982), and, alternatively under 42 U.S.C. § 1983 (1981), in that defendants' actions constituted a deprivation of their constitutional rights. Plaintiffs seek injunctive and declaratory relief, compensatory and punitive damages and attorney's fees under 42 U.S.C. § 1988 (1981).

I. *Background*

In 1992, plaintiff Vasquez Neri's visitation privileges were revoked on two different occasions. Plaintiffs in this action challenge only the second revocation. Background about the first, however, is necessary to a full understanding of plaintiffs' claims. The parties have presented a lengthy chronology of events, but only those facts relevant to this matter are set forth herein.

On January 5, 1992, plaintiff Neri was charged with a prison rule violation for possession of a controlled substance. On that same day, January 5th, plaintiff Vasquez Neri's request to visit Neri was denied when she refused to submit to a pre-visit body search. Her request to deliver a package to Neri was also denied. On January 6, 1992, defendant Mel Hollins, First Deputy Superintendent at Southport, wrote to Vasquez Neri informing her that her visiting privileges were temporarily suspended pending a DOCS investigation into the possible introduction of drugs and drug paraphernalia to Neri. On January 22, 1992, Hollins wrote to Vasquez Neri informing her that her visiting privileges were restored, effective January 18, 1992. The plaintiffs do not challenge the basis and procedure for this January 1992 revocation.

On March 22, 1992, Vasquez Neri again visited her husband; she did not undergo a strip search prior to this visit. Two days later, on March 24th, corrections officers found Neri unconscious, on the floor of his cell, suffering a drug overdose. Neri was treated by facility medical staff and immediately transferred to the Arnot Ogden Medical Center outside the prison.

Marijuana was discovered on Neri's person the day he was found unconscious. A hypodermic needle was also found near Neri's body. Laboratory results on the contents of the needle tested positive for heroin. Thereafter, three corrections officers issued Neri three separate Misbehavior Reports for violations of Rule 113.12 which prohibits an inmate from making, possessing, using, selling or exchanging any narcotic, narcotic paraphernalia or controlled substance.

On March 27, 1992, Hollins wrote to Vasquez Neri and informed her that her visiting privileges were revoked pending the results of a DOCS investigation of her March 22nd visit and Neri's March 24th incident. Neri immediately wrote to defendant Anthony Annucci, Deputy Commissioner and Counsel of DOCS, challenging the termination of his and his wife's visitation rights.

***2** On March 30, 1992, at a DOCS administrative hearing on the three Misbehavior Reports, Neri pled guilty to two of the charges of possession of drug contraband. As a penalty, Neri was placed in the Special Housing Unit for 365 days, denied package, commissary and phone privileges for 365 days and suffered a 12 month loss of good time and a 12 month loss of visiting privileges with plaintiff Vasquez Neri. Defendant Hollins notified Neri of his right to appeal.

Correspondence from defendants Hollins and Annucci to both plaintiffs concerning the revocation of visitation privileges followed. On March 30, 1992, Hollins wrote to Vasquez Neri and informed her that her visiting privileges

were permanently revoked. This letter also informed her that she could request restoration of the privileges after one year. On April 1, 1992, Hollins again wrote to Vasquez Neri revoking her privileges but indicating that the revocation was for a one year period, to March 28, 1993. Defendant Hollins informed Vasquez Neri in this letter that the basis for the revocation was that the alleged misconduct "represents a serious threat to [Neri's] personal well being and to the safety, security and good order of" Southport.

This letter also referred to two visits by Vasquez Neri predating two of Neri's separate misbehavior incidences. The first reference pointed to a December 25, 1991 visit by Vasquez Neri followed by a January 5, 1992 discovery of drug-associated contraband in Neri's cell. The second reference was to the March 22, 1992 Vasquez Neri visit and the March 24, 1992 Neri incident. The letter stated that Vasquez Neri had been Neri's only visitor during these time periods and that Neri had pled guilty to the charges arising from the incidences. The letter informed Vasquez Neri that she had 30 days to request a hearing, by notice to defendant Commissioner Thomas Coughlin III, if she wanted to appeal the revocation.

By letter dated April 15, 1992, Vasquez Neri complained of the revocation to DOCS officials. This correspondence contained a denial by Vasquez Neri of any involvement in her husband's contraband-related incidences. She offered to submit to weekly strip searches in order to have her visitation privileges reinstated. Vasquez Neri further proffered a specific reason for her refusal to submit to a body search on January 5, 1992. She stated that she was not "feeling mentally well" on that date and "was in no condition for such a search." She enclosed a letter from the Lenox Hill Hospital emergency room indicating that she had visited a psychiatrist on January 3, 1992. She claimed that she had presented the Lenox Hill letter to Hollins the day of the search. This reason provided by Vasquez Neri, however, differed from the reason provided by her husband shortly after the January incident. Neri claimed that his wife had refused to submit to the January search because she was in her menstrual cycle; this was the reason he also proffered during the second revocation challenges.

***3** On April 24, 1992, Hollins again wrote to Vasquez Neri about the revocation. Hollins reiterated the grounds for revocation mentioned previously in his April 1, 1992 letter, and additionally described admissions made by Neri to defendant Lieutenant Burge at the Arnot Ogden Medical Center in March. Hollins stated that these admissions indicated that the drugs and drug paraphernalia in Neri's possession had been brought to Southport by Vasquez Neri.

This letter informed Vasquez Neri of her right to appeal, to testify and call witnesses or, if she did not request a hearing, to present her case through written submissions. The letter also contained copies of the Misbehavior Reports issued to Neri and the results of the laboratory tests of the contraband-related materials. It did not include any written documentation of Neri's statements to Burge. Copies of this correspondence were also sent to Neri. On May 20, 1992, Vasquez Neri again appealed the revocation of her visiting privileges.

In addition to the correspondence between defendant Hollins and Vasquez Neri, plaintiff Neri received and submitted various letters related to the revocation privileges. On March 26th and 28th 1992, Neri wrote to defendant Annucci complaining, respectively, about the revocation of Vasquez Neri's visitation privileges and suspension of his visitation privileges. Following the March 30th Tier III hearing, Neri wrote to Annucci on April 3, 1992, appealing the suspension of his privileges. Neri also wrote to defendant Robert McClellan, Southport Superintendent, on June 1, 1992, requesting reinstatement of the visitation privileges based on a May 26, 1992 decision of Don Selsky, director of a DOCS program, in which Selsky reversed the Tier III decision with respect to Neri's loss of visiting privileges with his wife.

On June 16, 1992, Annucci rendered a decision upon written submissions, in compliance with New York's Rules and Regulations governing suspension and revocation of visiting privileges applicable to cases such as this where the appellant does not request a hearing. Defendant Annucci upheld the revocation based on Neri's Tier III guilty pleas and admissions by Neri to facility staff that he had received the contraband from plaintiff Vasquez Neri during her visits. He concluded that a preponderance of the evidence established that Vasquez Neri gave Neri the contraband.

On August 6, 1992, Neri again wrote to Hollins requesting reinstatement. Hollins responded on August 11, 1992, that Neri should renew his request in November, 1992. Neri renewed his request on November 11, 1992 by letter to Hollins. Approximately one week later, Hollins wrote to Vasquez Neri and informed her that her visitation privileges were restored, effective November 28, 1992, "based upon [Neri's] continued positive adjustment and a written commitment made on August 11, 1992 ... to review his Disciplinary Record toward consideration of restoration at this approximate time." Hollins also informed Neri on November 25th of the conditional restoration of his wife's privileges.

II. ***The Motions for Summary Judgment***

***4** Defendants move for summary judgment on the grounds that plaintiffs fail to state a claim cognizable under § 1983, that defendant Coughlin did not have any personal knowledge of nor participated in the incidences

alleged in the complaint, and that the Eleventh Amendment precludes any monetary damage relief against the defendants in their official capacities.

Plaintiffs cross move for summary judgment, reiterating the claims set forth in their complaint that the defendants violated their own rules regarding visitation privileges, and therefore, the mandates of the *Kozlowski* Consent Decree and § 1983. The plaintiffs do not respond to defendants' summary judgment arguments nor do they reiterate their demand for injunctive relief. This Court treats the request for injunctive relief as abandoned and moot since visitation privileges were restored in November 1992. I now turn to the specific issues raised by the parties in these motions.

III. *Summary Judgment Burdens*

This Court must be completely satisfied that there is no genuine issue of material fact and that the moving party is entitled to summary judgment before it may grant the motion pursuant to Fed.R.Civ.P. 56. The summary judgment movant bears the "initial responsibility" of establishing that there are no genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). To establish the absence of genuine issues of material fact, the movant does not have to "negat[e] the opponent's claim." *Id.* Rather, the movant must establish that the "nonmoving party has failed to make a sufficient showing on an essential element ... with respect to which she has the burden of proof." 477 U.S. at 323, 106 S.Ct. at 2552.

In cases such as this, where the non-moving party bears the burden of proof, the movant may make "a summary judgment motion ... rel[ying] solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' " 477 U.S. at 323, 106 S.Ct. at 2552. The non-moving party, however, must respond by "designating specific facts showing that there is a genuine issue for trial." *Id.* (*quoting* Fed.R.Civ.P. 56(e)); *see also* Local Rule 3(g).

In determining whether there is a genuine issue of material fact, a court must resolve all ambiguities, and draw all reasonable inferences, against the moving party. *See United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curiam); *Donahue v. Windsor Locks Bd. of Fire Comm'rs,* 834 F.2d 54, 57 (2d Cir.1987).

After careful review of the parties' respective motion papers, supporting documents and the pleadings, I find that there are no genuine issues of material fact in dispute in this case and determine that as a matter of law the defendants are entitled to summary judgment.

IV. *Discussion*

It is well established that in order to succeed on a § 1983 claim, a plaintiff must allege the defendant's direct or personal involvement in the alleged constitutional deprivation. *Al–Jundi v. Estate of Nelson Rockefeller,* 885 F.2d 1060, 1065–66 (2d Cir.1989); *Williams v. Smith,* 781 F.2d 319, 323–24 (2d Cir.1986). Otherwise, the defendant must have actual or constructive notice of the deprivation, and act in a manner which constitutes "gross negligence" or "deliberate indifference." *Al–Jundi,* 885 F.2d at 1066. A defendant in a § 1983 action cannot be held liable for damages based on *respondeat superior. Monell v. Dep't of Social Servs.,* 436 U.S. 658, 691 (1978); *Johnson v. Glick,* 481 F.2d 1028, 1034 (2d Cir.), *cert. denied,* 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).

***5** Plaintiffs' claims against defendant Coughlin fail to satisfy this threshold requirement and must be dismissed as against this defendant. Plaintiffs do not set forth any personal knowledge of or participation by defendant Coughlin in their claims of constitutional and Consent Decree violations. Rather, plaintiffs point to defendant Coughlin as the high level DOCS official who promulgates the rules on visitation and who entered into the Consent Decree. As the case law makes clear, such oversight authority is insufficient to constitute personal involvement for purposes of a § 1983 action.

Similarly, plaintiffs' claims against defendants Morgan and McClellan are claims based on their supervisory positions within DOCS and the Southport facility. The claims against these defendants are also inform for the reasons already stated.

The claims against defendants Annucci, Hollins and Burge sufficiently set forth direct and personal involvement on the part of these defendants and, therefore, survive an initial examination of the allegations. Defendants assert that any claim for damages against these defendants for actions taken in their official capacity must be dismissed under the Eleventh Amendment.

The Eleventh Amendment does indeed prohibit litigation by individuals against a state and is a bar to a § 1983 action against a public officer in the officer's official capacity. *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 64, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989); *Kaminsky v. Rosenblum,* 929 F.2d 922, 925 (2d Cir.1991). Nevertheless, a state's explicit consent to litigation vitiates the state's Eleventh Amendment immunity. *See Papasan v. Allain,* 478 U.S. 265, 276–77, 106 S.Ct. 2932, 2939–40, 92 L.Ed.2d 209 (1986); *Kaminsky v. Rosenblum,* 737 F.Supp. 1309, 1319 (S.D.N.Y.1990). Arguably, defendants, as parties to the *Kozlowski* Consent Decree, have consented to litigation against them for

violations of visitation privileges. I need not address defendants' Eleventh Amendment argument, however, because as discussed below, the plaintiffs' claims of constitutional violations by these defendants are insufficient as a matter of law.

Plaintiffs' claims are based on alleged violations of their first and fourteenth amendment rights and visitation rights specifically recognized in *Kozlowski.* However, the plaintiffs' claims, considered in the most favorable terms, and drawing all reasonable inferences against the defendants, are fundamentally claims of administrative delay and mistake. All of these defendants were well aware of the visitation rules and the requirements set forth in the Consent Decree. Defendants' conduct, as described by plaintiffs, neither rises to the level of a constitutional violation nor constitutes a cognizable § 1983 claim.

It is undisputed that plaintiffs were entitled to certain procedural safeguards of their visitation rights. Neither party disputes that *Kozlowski* recognized that New York prisoners, under state law, have a liberty interest in receiving visitors, and that due process protections attach when the state seeks to suspend, revoke or otherwise terminate prisoner visitation privileges. *Kozlowski v. Coughlin,* 539 F.Supp. 852, 856–58 (S.D.N.Y.1982); *Kozlowski v. Coughlin,* 711 F.Supp. 83, 89 (S.D.N.Y.1988), *aff'd,* 871 F.2d 241 (2d Cir.1989). The subsequent *Kozlowski* Consent Decree defined the procedures which apply to suspension or revocation of visitation privileges. Those procedures are contained in New York's Codes, Rules and Regulations, N.Y.COMP.CODES R. & REGS. tit. 7, Part 200 (1986) ("New York's Rules"). Directive 4403 of the DOCS also sets forth visitation suspension or revocation procedures.

***6** Plaintiffs claim that the defendants violated these procedural requirements in the dilatory treatment of their appeal and, specifically, for their failure to render a final decision on the appeal within the 20 day time limit set forth in New York's Rules. Plaintiffs also claim that defendant Hollins' notice to Vasquez Neri was ineffective because it did not include the underlying documents containing Neri's alleged admissions to defendant Burge. Plaintiffs also challenge the substance of the appeal decision, claiming it was based on inappropriate considerations.

New York's Rules require that a decision on an appeal of a revocation or suspension of visitation rights be rendered within 20 days of receipt of the appeal. N.Y.COMP.CODES R. & REGS. tit. 7, Part 200.5(b)(2)(ii), (c)(1)(iii). Plaintiffs complain that the June 16th decision of their appeal exceeded this 20 day time limit. Plaintiffs argue that the time for the decision should have run as of their initial challenges to the revocation contained in the Neri April 3rd and 15th correspondence. Plaintiffs further maintain that even if, for purposes of assessing timeliness, the appeal decision of June 16th is related back to Vasquez Neri's May 20th letter, the defendants failed to comply with the 20 day limitations period.

On the record, however, it appears that defendants did comply with the procedural time requirements. Defendant Hollins was in ongoing communication with both plaintiffs and, as plaintiffs themselves recognize, not until his April 24th letter were plaintiffs fully apprised of the basis for the revocation and Vasquez Neri's right to appeal that determination. Thus, the Vasquez Neri appeal letter dated May 20th, postdating the April 24th Hollins letter, is the appropriate appeal request from which to assess defendants' compliance with the appeal time requirements. Vasquez Neri's appeal letter, attached to defendants' motion papers as Exhibit 22, is marked with a DOCS receipt stamp dated June 1, 1992; the May 20, 1992 date reflects the date of the letter itself and is handwritten onto the otherwise typed document. Plaintiffs do not challenge the DOCS' receipt date as June 1st, but continue to argue the applicability of the earlier April dates for determining the timeliness of the defendants' decision of the appeal. Upon the facts and on this record, however, the defendants decided the appeal in a timely manner based on the June 1st receipt of the request for appeal.

Even if the decision had exceeded the 20 day time limit or the defendants otherwise took longer than the plaintiffs' deem appropriate under the circumstances, any administrative delays in responding to and deciding plaintiffs' challenges to the revocation do not rise to the level of a due process violation because they do not implicate constitutional due process requirements. *See Wolf v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Although initially there was some confusion in the correspondence, plaintiff Vasquez Neri received several notices of the revocation, including two from Hollins in April 1992, setting forth the basis for the defendants' decision to revoke her privileges. Her challenge to the revocation was properly reviewed and given appropriate consideration in the June 16, 1992 decision. Plaintiff's due process rights were not compromised or prejudiced as a result of any administrative delay. She had notice and the opportunity to submit her evidence, call witnesses and argue her case before a hearing officer. Any mistake or procedural error does not constitute a due process violation on these facts. The Second Circuit has held that procedural error in a disciplinary hearing which is not prejudicial cannot support a § 1983 claim. *Powell v. Coughlin,* 953 F.2d 744, 750–51 (2d Cir.1991). Rather, such error is harmless. Moreover, due process is not a concept without limits. "Due process, as guaranteed by the constitution, is not implicated by every deviation from a state's procedural rules." *Glenn v. Gonzalez,* No. 89 CIV. 2602, 1991 WL 222109, at *2 (S.D.N.Y. Oct. 18, 1991).

***7** Plaintiffs' other claim that Vasquez Neri was not properly notified of Neri's admissions to defendant Burge also is insufficient to support a claim of a constitutional violation. Defendant Hollins's April 24, 1992 letter to Vasquez Neri tells her that Neri informed defendant Burge that Vasquez Neri had given drugs and drug paraphernalia to Neri during her visits. Plaintiffs appear to assert that they were entitled to more than a description of the admission and that the defendants should have turned over documents revealing the actual conversation between Neri and Burge. I do not agree. The Hollins's letter provided sufficient notice of the admission. Moreover, it also informed plaintiffs of their right to call witnesses. Plaintiffs, thus, had ample opportunity to examine defendant Burge as part of their appeal. Accordingly, I do not find any violations of plaintiffs' due process rights or visitation rights as recognized in *Wolf v. McDonnell,* 418 U.S. 539 (1974), or within the parameters of the *Kozlowski* Consent Decree.

Plaintiffs raise a new claim in their memorandum of law in support of their cross motion for summary judgment that defendants improperly based their revocation decisions on Vasquez Neri's refusal to undergo a pre-visit body search on January 5, 1992. This is the first time plaintiffs raise this claim before this Court, however, since an issue presented for the first time in a motion for summary judgment may be considered and treated as an amendment of the complaint, and since defendants received notice of this claim and responded to it in their reply memorandum of law in support of their motion for summary judgment, I will address the issue. *See Salahuddin v. Coughlin,* 781 F.2d 24 (2d Cir.1986); *Seaboard Terminals Corp. v. Standard Oil Co.,* 104 F.2d 659 (2d Cir.1939); *In re Schwartz,* 36 B.R. 355 (E.D.N.Y.1984); *In re Zweibon,* 565 F.2d 742 (D.C.Cir.1977); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2722 at 47 (1983).

Plaintiffs claim that the use of this information was impermissible because New York's Rules, N.Y.COMP.CODES R. & REGS. tit. 7, Part 200.3(c)(3)(i), (c)(3)(ii), specifically state that a refusal to undergo a body search does not constitute guilt of any conduct and cannot be the basis for denials of future visits. Plaintiffs incorrectly read the revocation decision in this case and New York's Rules.

The decision on the revocation and appeal was not based solely or even substantially or materially on Vasquez Neri's January 5th refusal. Plaintiffs themselves recognize that other factors affected the defendants' decisions, as indicated in their complaint where they directly attack the failure to fully notify them about the Burge evidence. Rather, all of the defendants' correspondence and writings on the revocation and the appeal indicate that it was one of several factors which DOCS considered, including the decision in Neri's Tier III case, his plea in that matter, his own admissions as to his wife's involvement in bringing him drugs and the proximity of time between his wife's visits and Neri's two drug-related incidences. The defendants, therefore, did not violate any procedural requirements since the January 5th refusal to undergo a body search was not the sole, even substantial, basis for the revocation of future visits.

***8** Finally, to the extent that the plaintiffs allege that defendant Burge provided false information and testimony and, therefore, he and the other defendants, due to their reliance on this testimony, violated plaintiffs' constitutional rights, such claims are deficient as a matter of law. The Second Circuit has held that in a prison context a false accusation resulting in disciplinary action against a prisoner alone is not a due process violation actionable under § 1983. *Freeman v. Rideout,* 808 F.2d 949 (2d Cir.1986), *reh'g and reh'g en banc denied,* 826 F.2d 194 (2d Cir.1987), *cert, denied,* 485 U.S. 982, 108 S.Ct. 1273 (1988). In *Freeman* the Court concluded that the filing of unfounded charges is not a *per se* section 1983 constitutional violation. The plaintiff in *Freeman* complained that at a prison disciplinary hearing the defendant corrections officer falsely charged the plaintiff with assault of another inmate. "The prison inmate has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest." *Freeman,* 808 F.2d at 951. All the inmate is entitled to receive is due process, appropriate to the circumstances and the alleged violation. *Id.*

In the present case, plaintiffs clearly received due process pursuant to the defendants' regulations and the Consent Decree, as well as in compliance with traditional constitutional due process principles. Plaintiffs' claims against defendants, based on any alleged false testimony or other evidence submitted by defendant Burge, are therefore the proper subject for dismissal on summary judgment.

V. *Conclusion*

For the reasons stated, the defendants' motion for summary judgment is granted and plaintiffs' cross motion for summary judgment is denied. The complaint is dismissed.

SO ORDERED.