[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11750
Non-Argument Calendar

D.C. Docket No. 4:15-cv-00618-RH-CAS

CECIL MATHEWS,

Plaintiff - Appellant,

versus

WARDEN, A. PAYNTER,
Secretary Representative,
HEATHER HAMLIN,
Colonel,
HAWKINS,
Classification Officer,
SMITH,
Lieutenant,

Defendants - Appellees,

HUDSON,
Assistant Warden, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Florida

(September 27, 2018)

Before WILLIAM PRYOR, ANDERSON, and JULIE CARNES Circuit Judges.

PER CURIAM:

Cecil Mathews ("Plaintiff"), a prisoner at Jefferson Correctional Institution, was punished with twenty days of disciplinary confinement for making disrespectful statements to prison officials in a grievance. Plaintiff, proceeding *pro se*, filed this lawsuit against the prison officials involved in those disciplinary proceedings—Warden Hodgson, V. Smith, A. Paynter, Heather Hamlin, Christopher Hawkins, and Theresa Bratcher—for allegedly violating his First Amendment rights. The district court, adopting the magistrate judge's report and recommendation, dismissed Plaintiff's complaint for failure to state a claim because his speech was not protected under the First Amendment. We agree and affirm.

I. BACKGROUND

According to the operative complaint, Plaintiff filed a grievance stating: "I am grieving the issue that no margarine was provided at dinner on Monday 8-24-15." Prison authorities responded: "Margarine is provided." Plaintiff filed a second grievance in response stating: "Liar, liar, pants on fire. When the margarine is there and done correctly there won't be any more grievances on the matter. Just ignoring it like you all do isn't fixing the problem."

Based solely on this second grievance, Hamlin issued Plaintiff a disciplinary report for being disrespectful to prison officials in violation of Florida Administrative Code Rule 33–601.314(1). At the disciplinary hearing, Smith and Hawkins concluded that Plaintiff had been disrespectful in violation of the rule. Plaintiff filed an appeal, but Bratcher and Hodgson affirmed the disciplinary panel's decision. Plaintiff also alleges that Paynter was involved in the appeal and had the opportunity to reverse the disciplinary panel's findings but failed to do so. As a result of the disciplinary panel's decision, Plaintiff received twenty days in disciplinary confinement.

Plaintiff, proceeding *pro se*, filed suit under 42 U.S.C. § 1983 against the prison officials involved in these disciplinary proceedings, alleging that they violated his First Amendment rights. Specifically, he alleged that his statements

"Liar, liar, pants on fire" and "Just ignoring it like you all do isn't fixing the problem" were protected speech under the First Amendment and that being disciplined for those statements violated his rights.

The defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The magistrate judge issued a report and recommendation concluding that the motion should be granted because Plaintiff's speech was not protected under the First Amendment. Over Plaintiff's objections, the district court adopted the magistrate judge's report and dismissed Plaintiff's complaint. After the district court denied Plaintiff's postjudgment motion for relief, Plaintiff filed a timely appeal.

II. STANDARD OF REVIEW

"We review *de novo* the district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim, accepting the complaint's allegations as true and construing them in the light most favorable to the plaintiff." *Cinotto v. Delta Air Lines Inc.*, 674 F.3d 1285, 1291 (11th Cir. 2012).

III. DISCUSSION

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." So "[t]o survive a motion to dismiss, a complaint must contain sufficient factual

matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "*Pro se* pleadings are held to a less stringent standard" and are liberally construed. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

"[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)). Indeed, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources." *Turner v. Safley*, 482 U.S. 78, 84–85 (1987). "Prison officials are therefore 'accorded latitude in the administration of prison affairs.'" *Smith v. Mosley*, 532 F.3d 1270, 1277 (11th Cir. 2008) (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)).

Although prison officials have leeway in implementing and executing administrative policies, "[t]he First Amendment forbids prison officials from retaliating against prisoners for exercising the right of free speech." *Farrow v. West*, 320 F.3d 1235, 1248 (11th Cir. 2003). To state a claim for a violation of First Amendment rights through retaliation, an inmate must establish that: "(1) his

speech was constitutionally protected; (2) the inmate suffered adverse action such that the administrator's allegedly retaliatory conduct would likely deter a person of ordinary firmness from engaging in such speech; and (3) there is a causal relationship between the retaliatory action and the protected speech." *Smith*, 532 F.3d at 1276.

This case concerns the first element—whether Plaintiff's speech is protected speech.[1] The district court, adopting the magistrate judge's report and recommendation, held that Plaintiff's complaint failed to establish that his speech was protected under the First Amendment because it was disrespectful to prison officials in violation of the prison's rules. Specifically, Florida Administrative Code Rule 33–601.314(1) states that an inmate may not engage in "[d]isrespect to officials, employees, or other persons of constituted authority expressed by means of words, gestures, and the like."

Plaintiff argues that the district court erred in two ways. First, Plaintiff contends that his use of the phrase "Liar, liar, pants on fire" is protected speech

[1] "In deciding issues on appeal we consider only evidence that was part of the record before the district court." *Selman v. Cobb Cty. Sch. Dist.*, 449 F.3d 1320, 1332 (11th Cir. 2006). So we do not consider the supplemental evidence filed by Plaintiff that was not originally presented to the district court. Even if we did, it is inapposite.

because it was said in a grievance.[2] As Plaintiff correctly points out, "[i]t is an established principle of constitutional law that an inmate is considered to be exercising his First Amendment right of freedom of speech when he complains to the prison's administrators about the conditions of his confinement." *Smith*, 532 F.3d at 1276. As a result, inmates' grievances about prison conditions "constitute[ ] protected speech." *Id.*

But "an inmate's First Amendment right to free speech is not protected if affording protection would be inconsistent with the inmate's 'status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Id.* (quoting *Pell*, 417 U.S. at 822). So "if a prisoner violates a legitimate prison regulation, he is not engaged in 'protected conduct.'" *Id.* at 1277 (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 389 (6th Cir. 1999)). Indeed, in *Smith v. Mosley*, a prisoner sent a letter to the assistant warden complaining about the

[2] To be clear, Plaintiff asserts that he was disciplined for some of the statements made in his grievance, not for merely filing a grievance.

Also, although Plaintiff alleges in his complaint that both "Liar, liar, pants on fire" and "Just ignoring it like you all do isn't fixing the problem" are protected speech, his only argument before the district court and on appeal is that "Liar, liar, pants on fire" is protected. Because we only consider issues briefed in the district court and raised on appeal, we do not consider whether the second phrase is protected speech. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) ("While we read briefs filed by *pro se* litigants liberally, issues not briefed on appeal by a *pro se* litigant are deemed abandoned." (citations omitted)); *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) ("This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." (internal quotation marks omitted)).

prison's conditions. 532 F.3d 1270, 1272–73 (11th Cir. 2008). In response, the assistant warden issued the prisoner a disciplinary report for violating the prison's rules for making false and insubordinate statements. *Id.* at 1273. We acknowledged that although the prisoner's specific grievances "constituted protected speech," other statements in the letter violated the prison's rules and, as a result, were not protected. *Id.* at 1276.

This leads to Plaintiff's second set of arguments: that Rule 33–601.314(1)—the rule prohibiting disrespectful behavior towards prison officials—is either unconstitutional or does not apply. In *Smith*, we held that a rule prohibiting insubordination—functionally identical to Rule 33–601.314(1)[3]—was "reasonably related to legitimate penological interests and therefore [a] valid limitation[ ] on inmate speech." 532 F.3d at 1277. *Smith* dictates that Rule 33–601.314(1) is also constitutional.[4]

Alternatively, Plaintiff argues that Rule 33–601.314(1) does not apply because, under Plaintiff's interpretation, Florida Administrative Code Rule 33–103.017(2) specifies the only grounds for which inmates may be punished based on

[3] The rule in *Smith* prohibited "[a]ny act, gesture, remark or statement which obviously reflects disrespect to lawful authority." 532 F.3d at 1273 n.4.

[4] The cases cited by Plaintiff to dispute this proposition are either distinguishable or from other circuits and not binding on this Court.

the contents of a grievance. But Rule 33–103.017(2) says only that prisoners "shall be subject to disciplinary action" for knowingly making "false, threatening, obscene, or profane statements" in grievances, not that they may be disciplined *only* for those sorts of statements. Rule 33–103.017(2)'s text indicates neither that it is an exhaustive list nor that it excludes the application of other rules. *See N.L.R.B. v. SW General, Inc.*, _ U.S. _, 137 S. Ct. 929, 940 (2017) ("The *expressio unius* canon applies only when 'circumstances support[ ] a sensible inference that the term left out must have been meant to be excluded.'" (alteration in original) (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002))); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012) ("[*Expressio unius*] properly applies only when . . . [the thing or things specified] can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved." (emphasis in original)). Thus, Rule 33–601.314(1) applies. *See Moton v. Cowart*, 631 F.3d 1337, 1342 (11th Cir. 2011) (evaluating whether a prisoner's grievance violated Rule 33–601.314).

Because Plaintiff's statement violated Rule 33–601.314(1), the district court correctly concluded that it was not protected speech and that Plaintiff failed to state a claim for relief.

AFFIRMED.