

STATE OF MICHIGAN
COURT OF APPEALS

CHESTER E. GLOVER,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
October 19, 1999

No. 212313
Washtenaw Circuit Court
LC No. 97-008297 CZ

Before: Neff, P.J., and Murphy and J. B. Sullivan*, JJ.

PER CURIAM.

Plaintiff Chester E. Glover, an inmate of the Huron Valley Men's Facility (HVMF), appeals as of right from an order of the Washtenaw Circuit Court granting summary disposition, pursuant to MCR 2.116(C)(7) and (10), of his civil rights action in favor of defendant. Plaintiff contends that the court erred when it found that he had failed to establish factual issues to support his claims of retaliation for the exercise of his constitutional right to petition for redress of his grievances. We disagree and affirm the order of the circuit court.

Plaintiff was an employee assigned to the HVMF Food Service Building. Early on the morning of September 4, 1996, plaintiff reported for work as assigned and was asked by his supervisor, Angelina Godoy, to empty food trays in the dish tank area. According to plaintiff, he attempted to comply with her directives but upon doing so noticed that the garbage can normally set out for that purpose had been removed. Upon inquiring of Godoy as to the whereabouts of the can, plaintiff was informed by her that she had taken the can for use under the food serving line counter. Plaintiff contends that as he attempted to retrieve the can Godoy cursed him and stated, "where are you going with that can." Plaintiff alleges that he did not respond to these comments and placed the can back under the counter where he had found it. Plaintiff contends that Godoy then approached him and stated that if he needed a garbage can he should find one of his own. Plaintiff claims to have responded by informing Godoy that removing the can from the dish tank area created a problem because it slowed down the performance of his duties. According to plaintiff, Godoy again cursed him, at which point he requested that she refrain from

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

referring to him in that manner and returned to the dish tank area. Several minutes later, Godoy again approached plaintiff and told him to return to his cell because he was being "laid in." Plaintiff alleges that upon returning to his cell he immediately wrote a grievance wherein he complained of the above-described incident with Godoy.

Plaintiff alleges that at approximately 11:00 a.m. that same day, he was approached by two corrections officers who served him with a copy of a misconduct report, filed by Godoy, charging him with threatening behavior regarding the incident in the dining room. Plaintiff was then removed from his cell and placed in administrative segregation. According to the report filed by Godoy, plaintiff, upon realizing that she had removed the garbage can from the dish tank area, angrily kicked the can in her direction while pointing his finger in her face and yelling, "If you want a garbage container, get it yourself and don't get it from ours." Godoy reported that plaintiff's conduct alarmed her and caused her to fear for her safety.

Plaintiff remained in administrative segregation until September 6, 1996, at which time he was given a hearing regarding the misconduct report filed by Godoy. After reviewing the hearing investigation report with plaintiff, the hearing officer found plaintiff guilty of insolence and sanctioned him with seven days' loss of privileges and two days of administrative segregation. Plaintiff received credit for the two days already served in segregation.

On September 7, 1996, plaintiff returned to his work assignment in the Food Services Building where he contends that Godoy continued to harass and humiliate him. Plaintiff further alleges that on September 11, 1996, he received a poor work evaluation report authored by Godoy for which he filed a second grievance alleging that both the evaluation and the misconduct report filed by Godoy were "false and fabricated" harassment designed to cause him to lose his work assignment. In addition to this grievance, plaintiff wrote letters to both Andrew Jackson, HVMF's warden, and Kenneth McGinnis, Director of the Michigan Department of Corrections, outlining his concerns over the problems he had allegedly been having with Godoy. Jackson referred plaintiff's letter to Tom Galardi, HVMF's business manager, for investigation.

Plaintiff alleges that on September 16, 1996, Godoy approached him and asked to speak with him regarding his grievances. The following day, plaintiff was informed that he was being removed from his food service work assignment pending Galardi's investigation. Plaintiff then filed a third grievance restating the allegations made in the previous two.

In conducting his investigation, Galardi, along with S. Ricciardi, HVMF's food services director, reviewed plaintiff's record office file and all of his work assignment evaluations, and spoke with other prisoners and food service supervisors regarding the allegations made by plaintiff. In a memorandum to Jackson, Galardi noted that plaintiff had previously been terminated from his food service work assignment for fighting, and further commented that several food service supervisors other than Godoy had noted a need for plaintiff to improve his temperament. Based upon these findings, as well as his personal knowledge of Godoy's work ethics, Galardi concluded that plaintiff's allegations were unsubstantiated. Plaintiff was terminated from his work assignment on September 18, 1996. On September 25, 1996, plaintiff authored a second letter to Jackson, criticizing the investigation conducted

by Galardi.

Several months later plaintiff filed the instant suit, under 42 USC 1983, in which he claims Godoy, Jackson, Galardi, and Ricciardi violated his constitutional rights. Essentially, plaintiff claims that Godoy issued the “false and fabricated” misconduct report and work assignment evaluations, and had him terminated from his employment, in retaliation for his filing of grievances against her. Plaintiff further asserts that Jackson, Galardi, and Ricciardi acted with deliberate indifference toward Godoy's constitutional violations.

Defendant moved for summary disposition. Pursuant to MCR 2.119(E)(3) the court dispensed with oral argument, and in a written opinion and order granted summary disposition in favor of defendant. The court found that, although plaintiff had met his burden of asserting a violation of a clearly established constitutional right, he had failed to establish factual issues regarding the alleged violation. Plaintiff appeals from this order.

Although defendant's motion for summary disposition was brought pursuant to MCR 2.116(C)(8), the lower court appears to have relied upon MCR 2.116(C)(7) and (10) in granting summary disposition, finding that plaintiff had failed to establish factual issues regarding the claimed violation of his constitutional rights and further holding that the individual defendants were entitled to qualified immunity. On appeal, plaintiff asserts no error regarding immunity, merely arguing the merits of the court's finding that no factual issues were in dispute. In the proceedings below, defendant did assert, in part, that summary disposition was appropriate based upon plaintiff's failure to establish a genuine issue of fact for trial. Because it does not appear that plaintiff was misled by the mislabeling of the motion for summary disposition, and because plaintiff did not raise the issue on appeal, we will review the lower court's decision under the standard set for the grant of a motion for summary disposition based upon no genuine issue of material fact. See *Mollet v City of Taylor*, 197 Mich App 328, 332; 494 NW2d 832 (1992).

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Miller v Farm Bureau Mutual Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996). In reviewing an order granting summary disposition under MCR 2.116(C)(10), we must examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995).

Plaintiff argues that he has successfully established issues of fact in support of his claim that, contrary to 42 USC 1983, defendant deprived him of his constitutional rights. Section 1983, provides a remedy for constitutional violations committed by state actors. Specifically, this section provides that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [42 USC 1983.]

In this case, the alleged constitutional violation is in the form of a claim that a public officer, Angelina Godoy, retaliated against plaintiff for exercising his First Amendment right to redress for his grievances.

The requirements for successfully bringing a claim of retaliation under 42 USC 1983 were most recently set forth by the Sixth Circuit Court of Appeals in *Thaddeus-X v Blatter*, 175 F3d 378 (CA 6, 1999):

A retaliation claim essentially entails three elements: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two--that is, the adverse action was motivated at least in part by the plaintiff's protected conduct. [*Id.* at 394.]

Thus, the first step in assessing plaintiff's retaliation claim is to determine whether he was engaged in protected conduct. "Absent protected conduct, plaintiff[] cannot establish a constitutional violation." *Id.* at 395.

Although it is generally more difficult for a prisoner to show that his conduct is protected, because prison regulations are allowed to infringe on prisoners' rights as long as they are rationally related to a legitimate penological concern, it is well established that "prisoners have a fundamental right of access to the courts and the right to petition for a redress of grievances." *Ward v Dyke*, 58 F3d 271, 275 (CA 6, 1995). Here, plaintiff alleges that the misconduct ticket and his discharge from employment were a direct result of his filing of grievances against Godoy. Therefore, plaintiff was engaged in protected conduct.

Similarly, the facts alleged by plaintiff support a finding that he has established the second element of his retaliation claim, an adverse action. "[A]n adverse action is one that would 'deter a person of ordinary firmness' from the exercise of the right at stake." *Thaddeus-X*, *supra* at 396. Determination as to whether the action complained of should be deemed adverse is an objective inquiry that is to be tailored to the specific circumstances in which the retaliation claim arose. Thus, "[p]risoners may be required to tolerate more . . . than average citizens, before an action taken against them is considered adverse." *Id.* at 398. As such, the question in this case is whether a prisoner of ordinary firmness would be deterred from exercising his right to petition for redress of grievances by the actions taken against plaintiff. Here, plaintiff asserts that after he filed his first grievance, Godoy authored a "false and fabricated" report that resulted in him being placed in administrative segregation for two days. As noted by the court in *Thaddeus-X*, *supra* at 396, "[i]n the prison context, an action comparable to transfer to administrative segregation would certainly be adverse." Plaintiff further asserts a loss of his privilege to work based upon the grievances filed by him. Although prison inmates do not possess a right to employment while incarcerated, the threat of losing the privilege to work could certainly "deter a person of ordinary firmness" from exercising his right to redress for grievances.

The third and final element of a retaliation claim requires that plaintiff demonstrate a causal connection between the protected conduct and the adverse action. Here, the subjective motivation of

defendant is at issue. *Id.* at 399. In establishing the causal connection, while “[c]ircumstantial evidence, like the timing of events . . . is appropriate,” *id.*, it is not necessarily dispositive of the issue. In this case, plaintiff has asserted that immediately following his writing of a grievance against Godoy, he was issued a misconduct ticket for threatening behavior based upon the “false and fabricated” report filed by Godoy. In the proceedings below, however, defendant argued that the misconduct ticket was issued before the grievance filed by plaintiff, and that the grievance was written simply to “cover” the wrongdoing of Godoy. While the report issued by Godoy indicates that it was written at 11:30 a.m. on the day of the incident, the grievance filed by plaintiff merely indicates that it was filed that same day.

There is nothing in the record to support plaintiff’s allegation that he in fact submitted the grievance before the report filed by Godoy, and thus nothing to support a finding that the report was in retaliation for his filing of the grievance. To establish a genuine issue of material fact regarding a causal connection between the adverse action and protected conduct, plaintiff may not merely rely on unsubstantiated allegations, but, rather, must come forward with admissible evidence, affidavits, or other evidentiary materials, demonstrating the existence of a factual dispute. See MCR 2.116(G)(4). Although plaintiff refers to affidavits that would support his version of the facts, no such affidavits appear in the lower court record and plaintiff has failed to otherwise provide them to this Court. Thus, there is no evidence in the record before the Court establishing the factual issues alleged by plaintiff. See *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 305; 486 NW2d 351 (1992). Accordingly, plaintiff has failed to demonstrate a genuine issue of fact regarding the causal connection between his filing of grievances and the misconduct ticket received by him.

Plaintiff also asserts that other evidence demonstrates that the loss of his work assignment is causally connected to the exercise of his constitutional right to redress. Again, this unsupported assertion must fail. Essentially, plaintiff alleges that Godoy used false work assignment evaluations as a tool to wrongfully remove him from his work assignment. First, it should be noted that the final evaluation terminating plaintiff from his assignment on September 18, 1996, was not written by Godoy, but rather by assistant food services director Bryson. In that evaluation, Bryson indicates that termination was a result of prior instances in which plaintiff displayed an “explosive temperament” while on work assignment. In response, plaintiff merely offers his unsubstantiated and unsworn allegations that these evaluations are “false and fabricated,” and merely a ploy to have him terminated for the filing of grievances. Even accepting these unsupported allegations as true, we conclude that no rational trier of fact could find the requisite causal connection between the grievances and plaintiff’s termination. The supervisor who terminated plaintiff had no involvement in the incident plaintiff grieved, but was rather a passive observer who became involved in the matter two weeks after the original grievance and after a full investigation of plaintiff’s allegations by the facility’s business manager.

Accordingly, plaintiff has failed to present sufficient evidence to establish issues of fact regarding a causal connection between the claimed adverse action and the protected conduct. The decision of the trial court granting summary disposition of the retaliation claims should be affirmed.

As a final consideration we note that plaintiff, by failing to address the issue on appeal, has abandoned the question whether Jackson, Galardi, and Ricciardi were entitled to summary disposition on his claim of deliberate indifference. *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 430; 576 NW2d 667 (1998)(when a party fails to address the merits of an issue, it is deemed abandoned).

Affirmed.

/s/ Janet T. Neff

/s/ William B. Murphy

/s/ Joseph B. Sullivan