IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-851

No. COA22-193

Filed 20 December 2022

Robeson County, No. 19CVS1150

KEITH BYRD, Plaintiff,

v.

BRUCE HODGES, DWAYNE McCORMICK, and NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendants.

Appeal by plaintiff from order entered 1 July 2021 by Judge James Gregory Bell in Superior Court, Robeson County. Heard in the Court of Appeals 23 August 2022.

Keith Byrd, pro se plaintiff-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alex R. Williams, for defendants-appellees.

STROUD, Chief Judge.

¶ 1 Plaintiff-appellant Keith Byrd ("Plaintiff") appeals from an Order Granting Defendants' Motion for Summary Judgment ("Order"). At the summary judgment hearing, Defendants presented evidence showing Plaintiff was issued a written warning based on his violation of at least three applicable rules requiring offenders to be handcuffed behind the back, not in front; Plaintiff did not present any forecast

of evidence to refute Defendants' evidence and admitted he handcuffed an offender in front. The trial court did not err by concluding there was no genuine issue of material fact and Plaintiff's claims should be dismissed, so we affirm the trial court's Order.

I. Background

¶ 2 On or about 23 April 2019, Plaintiff filed a complaint against his employer, the North Carolina Department of Public Safety, and two of Plaintiff's prior supervisors. Plaintiff alleged Defendants wrongfully gave him written disciplinary warnings and he brought claims for breach of contract, defamation, and retaliation in violation of the North Carolina Whistleblower Act, seeking a declaratory judgment addressing the "constitutionality of Defendant's policy and practice of issuing written warnings while not providing an opportunity for redress of the written warnings . . . ." Plaintiff's breach of contract claim alleged Defendants "issued Plaintiff a written warning which lacked just cause, and thus Defendants materially breached and violated the contract of employment between Plaintiff and" the North Carolina Department of Public Safety. Plaintiff's allegations focused on an allegedly modified "standing [sic] operating procedure[ ]" ("SOP") at Robeson County's Confinement in Response to Violation ("CRV") Center but no other policy. Plaintiff alleges the SOP was revised after his written warning to include a requirement to handcuff offenders behind the back but the SOP did not contain this requirement prior to his written warning. Plaintiff contends the written disciplinary warning made him "'ineligible'

to take the State promotion examination for sergeant[,]" made him ineligible for internal promotions, made him ineligible for transfers, and irreparably harmed his professional reputation.

¶ 3 On or about 28 May 2022, Defendants answered Plaintiff's complaint denying most of the material allegations and alleging seven defenses. These defenses include: (1) Plaintiff failed to state a claim pursuant to Rule 12(b)(6); (2) Plaintiff failed to allege facts sufficient to support an award of punitive damages; (3) Defendants are protected by sovereign immunity under the Eleventh Amendment to the United States Constitution; (4) the individual Defendants are protected by qualified immunity; (5) Defendants are entitled to all other immunities, including "governmental immunity, sovereign immunity, good-faith immunity, and/or public officer's immunity[;]" (6) Defendants were at all times compliant with all constitutional, statutory, and regulatory authority; and (7) Defendants reserved the right to plead other defenses as necessary as discovery and trial progressed.

¶ 4 Transcripts in this case indicate that some time prior to 3 September 2020 Defendants filed a "Motion for Summary Judgment" and a "Motion for Protective Order." Neither of these motions were included in the Record on Appeal. Our record does include a Notice of Filing, filed by Defendants on or about 3 September 2020, giving Plaintiff notice of Defendants' intent to use Plaintiff's deposition and affidavits by the two individual Defendants to support Defendants' Motion for Summary

Judgment. Plaintiff did not submit any affidavits, depositions, or other evidence for purposes of the summary judgment hearing.

¶ 5 The trial court heard Defendants' Motion for Summary Judgment on 14 September 2020.[1] At this hearing, defense counsel summarized Plaintiff's complaint, then began reciting a factual history of this case. The transcript indicates defense counsel presented to the trial court a "PowerPoint presentation . . . [with] citations to deposition, quotes, and things like that[,]" but our Record does not contain this presentation. Defendants' exhibits from the hearing and exhibits from Plaintiff's deposition were included in the Record Supplement.[2]

¶ 6 Plaintiff stated in his deposition he began working at the Robeson Confinement in Response to Violation Center in Lumberton, North Carolina ("Robeson CRV Center") in 2017. Plaintiff worked as a correctional officer, and his duties included "[c]ustody and control" of offenders[3] at Robeson CRV Center. To perform these duties Plaintiff was required to take "basic correctional officer training[,]" including review of a training manual and a test on the materials in the manual. North Carolina

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[1] There are three transcripts in our Record on Appeal. The first is from February 2020 and involves a motion to continue, which was allowed. The second is from the hearing on the Motion for Summary Judgment. The third transcript is from the hearing on Plaintiff's Motion to Compel Production from 2 November 2020.

[2] We note that the page numbering in the Supplement index does not align with the documents included in the Supplement.

[3] Department of Public Safety documentation has been updated to refer to inmates as "offenders." We use the same terminology to remain consistent with Defendants' exhibits.

Department of Public Safety ("DPS") also publishes "Policies and Procedures" correctional facility staff are required to follow. Additionally, Robeson CRV Center had local SOP in place that Plaintiff was required "to go by."

¶ 7 On 23 July 2018, Plaintiff was issued a written warning for "Unacceptable Personal Conduct" from an incident at Robeson CRV Center on 25 April 2018. This written warning was later reissued on 21 September 2018 to correct two typographical errors and to add language with more detail as to why Plaintiff received the warning. This written warning states Defendant McCormick "reported that on 4/25/2018 offender [Tefft] told [Defendant] that [Tefft] would not let [Plaintiff] remove handcuffs off of him and [Tefft] alleges that [Plaintiff] used physical force and roughed him up." The warning also stated "[t]he incident was not reported appropriately thru [sic] the proper chain-of-command. An investigation was initiated." As part of this investigation, Plaintiff apparently submitted a written statement on 11 June 2018, but the Record and Record Supplement do not contain this statement.

¶ 8 The written warning and Plaintiff's deposition indicate that on 25 April 2018 Plaintiff was supposed to escort an offender at Robeson CRV Center outside to the recreational area. Plaintiff handcuffed the offender through an opening in his cell door, with the handcuffs in front of his body, and the offender then became "verbally abusive" and "boisterous[,] [a]gitated" when Plaintiff attempted to remove him from

his cell. Plaintiff decided not to take the offender outside, and the offender attempted to push past Plaintiff and another correctional officer when Plaintiff and the other officer attempted to remove the offender's handcuffs. Plaintiff and the other officer used force to remove the offender's handcuffs, then Plaintiff "left the cell, secured the door and proceeded" to report the "Use of Force" incident. Plaintiff stated in his deposition he reported the incident to three supervisors, including Defendant McCormick, after leaving offender Tefft's cell.

¶ 9 The written warning issued to Plaintiff stated Plaintiff's conduct on 25 April 2018:

> was a violation of [1] the *NCDPS Division: Administration; Chapter: Human Resources Disciplinary Policy Issue Date: 01/01/2015;* [2] *State of North Carolina Department of Public Safety .1500 Use of Force .1504 and* [3] *the Robeson CRV Standard Operating Procedure; II. Custody and Security A. Operations Subject: Restrictive Housing .3700 B. Security Procedures (3).*

(Original italics.) The warning alleged Plaintiff "did not exercise good judgment when [Plaintiff] made a willful decision to handcuff the offender in the front which created a safety and security risk for both staff and the offender; contributed to a situation requiring force to remove the cuffs and resulted in a delay in medical attention for the offender." The Record Supplement contains these policies, used as exhibits by Defendants at the hearing on Defendants' motion or at Plaintiff's deposition. The Supplement contains a "Correctional Officer Basic Training Program" which required

officers to handcuff offenders behind their back; a document designated "Robeson CRV Standard Operating Procedure; II. Custody and Security A. Operations Subject: Restrictive Housing Section: .3700," which contains a subsection "B. Security Procedures" with subsubsection "(3)," issued on 13 February 2017, which stated "[e]ach offender is placed in handcuffs behind the back before the cell door is opened[;]" and a DPS "Policy & Procedures" document identified as "Chapter F Section .1500 Title: Use of Force," issued 26 March 2018, which stated "[a]ll offenders will have their hands restrained behind their back before being removed from their cell."

¶ 10 Plaintiff made arguments in defense of Defendants' Motion for Summary Judgment. Plaintiff's arguments centered around whether his conduct violated the Robeson CRV Center SOP in place on 25 April 2018. Plaintiff did not argue about the validity or enforceability of the DPS policies or the correctional officer training. The transcript indicates Plaintiff provided multiple documents to Defendants, but Plaintiff did not provide any documents or other evidence to the trial court for consideration at the hearing on Defendants' Motion for Summary Judgment. The trial court took the Motion for Summary Judgment "under advisement," and both parties agreed the trial court could "enter the ruling outside of term, outside of session."

¶ 11 After the hearing on Defendants' summary judgment motion, Plaintiff filed a

"Motion to Compel Production" on 30 September 2020, which is included in the Record Supplement. The trial court heard Plaintiff's Motion to Compel on 2 November 2020. This motion requested security audit results from Robeson CRV Center, findings from an investigation into a personal relationship of Defendant Hodges, "Unlawful Workplace Harassment Forms" signed by Defendant Hodges and another Robeson CRV Center employee, and all investigative findings from any investigation in which Defendant Hodges was the subject of the investigation. Plaintiff also attached several exhibits to his Motion to Compel Production. Plaintiff asserted these materials were "very pertinent to [the trial court's] decision to . . . dismiss the case and probably summary judgment . . . ." The trial court denied Plaintiff's Motion to Compel Production; Plaintiff was not present because Plaintiff was late to the hearing. After Plaintiff arrived late, proceedings resumed, and the trial court explained:

> Let me just say on the Motion for Summary Judgment that I have taken under advisement the Court's not given privilege to either side to present any additional information to support the Motion for Summary Judgment or to oppose the Motion for Summary Judgment.
>
> So the Court is going to rule on the Motion for Summary Judgment based on the evidence that was presented during the motion hearing.
>
> If you want to present other evidence you need to apply to leave of the Court or get consent from the other side to do such.

The Record does not indicate Plaintiff attempted to submit his evidence again after

the trial court denied Plaintiff's Motion to Compel Production. On 1 July 2021, the trial court entered a written order granting Defendants' Motion for Summary Judgment and dismissed Plaintiff's complaint with prejudice. Plaintiff appealed 28 July 2021.

II. Standard of Review

> Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

Aesthetic Facial & Ocular Plastic Surgery Center, P.A. v. Zaldivar, 264 N.C. App. 260, 263, 826 S.E.2d 723, 726 (2019) (quoting *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)).

¶ 12 Rule 56(e) of the Rules of Civil Procedure provides that

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2020). Here, Defendants moved for summary judgment and presented evidence for the trial court's consideration; Plaintiff did not present any affidavits or other evidence to counter Defendants' evidence.

> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974). Generally this means that on "undisputed aspects of the opposing evidential forecast," where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. 2 McIntosh, *North Carolina Practice and Procedure* § 1660.5, at 73 (2d ed. Supp. 1970). If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so. *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E.2d 54 (1980); *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. at 470, 251 S.E.2d at 421–22; *Zimmerman v. Hogg & Allen*, 286 N.C. at 29, 209 S.E.2d at 798. If the moving party fails to meet his burden, summary judgment is improper regardless of whether the opponent responds. 2 McIntosh, *supra*. The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).
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> If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to "set forth *specific facts* showing that there is a genuine issue for trial." Rule 56(e), Rules of Civil Procedure (emphasis added). The non-moving party "may not rest upon the mere allegations of his pleadings." *Id.*

> Subsection (e) of Rule 56 does not shift the burden of proof at the hearing on motion for summary judgment. The moving party still has the burden of proving that no genuine issue of material fact exists in the case. However, when the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleading, he does so at the risk of having judgment entered against him. The opposing party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists. *See* Shuford, *N.C. Civil Practice and Procedure*, § 56–9 (2d ed. 1981). *However, subsection (e) of Rule 56 precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts*. *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 152, 229 S.E.2d 278, 283 (1976). And, subsection (e) clearly states that the unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion by allowable evidentiary matter showing the facts to be contrary to that alleged in the pleadings.

Lowe v. Bradford, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982) (emphasis in original).

III. Analysis

¶ 13 We first find it necessary to define the scope of Plaintiff's appeal; Plaintiff only presents an issue relevant to one of his claims before the trial court and Defendants assert several of Plaintiff's arguments are insufficiently preserved for appellate review.

A. Issue Presented

¶ 14 On appeal, Plaintiff presents an argument as to just one of the claims alleged in his complaint, breach of contract. *See* N.C. R. App. P. 28(a) ("The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned."). Plaintiff's sole issue on appeal is whether "[t]he trial court erred in dismissing plaintiff's breach of contract claim on summary judgment in light of plaintiff showing that a genuine dispute exists as to one or more material facts." Therefore, we do not address whether the trial court erred by dismissing Plaintiff's other claims.

B. Preservation

¶ 15 Plaintiff makes numerous arguments on appeal as to why "the trial court erred in dismissing Plaintiff's breach of contract claim on summary judgment in light of Plaintiff showing that a genuine dispute exists as to one or more material facts." Plaintiff argues (1) because North Carolina General Statute § 126-25 only establishes a mechanism for the removal of inaccurate or misleading information from an employee's personnel file, but does not permit an appeal from written disciplinary action, Plaintiff's lawsuit must survive summary judgment "in order to protect

Plaintiff's rights as a career employee of the State of North Carolina against formal discipline without just cause[,]" and the trial court had jurisdiction to hear his claims; (2) Plaintiff was a career state employee at 12 months of employment instead of 24 months of employment "because correctional officers are not law enforcement officers as outlined in N.C.G.S. §126-1.1[,]" and he was entitled to protection under the North Carolina Human Resources Act; (3) individual Defendants are not entitled to public official immunity because Plaintiff alleged they were acting outside the scope of their duties with malice when they falsified documents and DPS is not entitled to public official immunity as a public entity; and (4) Plaintiff did not violate correctional facility SOPs because the SOPs did not require offenders to be handcuffed behind the back, these procedures were replaced with falsified and edited procedures after issuance of Plaintiff's written warning, "[r]estraining offenders in a manner inconsistent with DPS policy was a standard practice known by the Defendants," and restraint noncompliant with State-wide requirements was common at other correctional facilities.

¶ 16 Defendants argue several of Plaintiff's arguments cannot be considered on appeal because Plaintiff failed to preserve them before the trial court. Defendants note, "In this case, Plaintiff has included in the Record on Appeal and Supplemental Record documents, which were not considered by the trial court. Specifically, the Motion to Compel and its related exhibits were not presented to the trial court before

or during the trial court's hearing on Defendants' Motion for Summary Judgment." Defendants also note Plaintiff did not appeal from the trial court's denial of his Motion to Compel. Because these documents were not presented to the trial court and because Plaintiff failed to appeal the denial of his Motion to Compel, Defendants assert this Court "should not consider any arguments based on those documents[,]" including any of Plaintiff's arguments that rely on documents submitted after the trial court's 14 September 2020 hearing on Defendants' Motion for Summary Judgment. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.").

¶ 17 Reconciling Plaintiff and Defendants' arguments, we are left with a single dispositive inquiry on appeal. Plaintiff's breach of contract claim relies upon the issuance of a written warning, allegedly without just cause. If the evidence at the hearing on Defendants' Motion for Summary Judgment shows Plaintiff's written warning was issued for just cause, without any genuine issues of material fact, then Plaintiff's arguments must necessarily fail and summary judgment was appropriate. *See Zaldivar*, 264 N.C. App. at 263, 826 S.E.2d at 726. Plaintiff did not counter

Defendants' evidence at the summary judgment hearing, and the trial court properly declined to consider the evidence Plaintiff attempted to admit after the summary judgment hearing and based its decision upon the evidence presented at the hearing. For purposes of deciding Defendants' Motion for Summary Judgment, the trial court had before it (1) Plaintiff's deposition; (2) Defendants' exhibits used during Plaintiff's deposition; (3) Defendants' exhibits presented at the hearing on Defendants' Motion for Summary Judgment; and (4) the affidavits of Defendant Hodges, Defendant McCormick, and Mr. Stephen Jacobs, the previous warden at Robeson CRV Center. The trial court did not have before it and properly did not consider Plaintiff's Motion to Compel Production and the associated exhibits, since those were not submitted to the trial court at the summary judgment hearing. We therefore limit our consideration of the Record and Record Supplement to the documents before the trial court when it decided Defendants' Motion for Summary Judgment; Plaintiff's evidence was not admitted at the hearing on Defendants' motion. The question on appeal is whether Defendants were justified in issuing a written warning for Plaintiff's conduct, because if Defendants had just cause to issue the warning to Plaintiff, based upon the evidence available at the hearing on Defendants' motion, without any genuine issue of material fact, then the trial court did not err in granting Defendants' Motion for Summary Judgment as to Plaintiff's breach of contract claim.

C. Just Cause for Written Warning

¶ 18 This Court recently established a three-pronged inquiry for analyzing whether a State agency had just cause to take disciplinary action against a career state employee for unacceptable personal conduct:

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case."

Poarch v. N.C. Dept. of Crime Control & Public Safety, 223 N.C. App. 125, 130, 741 S.E.2d 315, 319 (2012) (quoting *Warren v. N.C. Dept. of Crime Control & Public Safety*, 221 N.C. App. 376, 383, 726 S.E.2d 920, 925 (2012)). Just cause "is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *North Carolina Dept. of Environment and Natural Resources v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004) (quotation marks omitted). This inquiry necessarily requires us to determine whether there is a genuine issue as to any material fact. *See id.* If the Defendants' uncontroverted evidence determines Defendants had just cause

to issue the written warning, then summary judgment was appropriate.

¶ 19 The first step of the analytical framework is, in part, admitted by Plaintiff. The written complaint alleged three different factual bases for why just cause existed for issuance of the warning; Defendants argued the same three bases at the hearing. Defendants argued Plaintiff violated his training, the Robeson CRV Center SOP, and statewide DPS policy all requiring a correctional officer to handcuff offenders behind their back; Plaintiff failed to notify his supervisor before and immediately after a use of force; and Plaintiff violated the Robeson CRV Center SOP when he removed the handcuffs from offender Tefft prior to closing the cell door. As to the first and third allegation, Plaintiff openly admitted he engaged in the conduct. When asked at his deposition "was [Tefft] cuffed in the front or cuffed in the back?" Plaintiff answered "[i]n the front." When questioned on his written statement referred to in the written warning, Plaintiff confirmed he "left the cell, [then] secured the door, [then] proceeded" to report the use of force incident. We do not need to address the precise timing of when and whether Plaintiff reported the use of force incident. Because two of the factual bases for a written warning were admitted by the Plaintiff, and, as discussed below, either of these bases would be sufficient to support the written warning, the first step in this analysis is complete.

¶ 20 The second step in this analysis requires a determination of whether Plaintiff's conduct "falls within one of the categories of unacceptable personal conduct provided

by the Administrative Code." *Poarch*, 223 N.C. App. at 130, 741 S.E.2d at 319 (quoting *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925). Plaintiff's written warning defined unacceptable personal conduct "as an act that is conduct for which no reasonable person should expect to receive prior warning; conduct unbecoming a State employee that is detrimental to State service; and the willful violation of known or written work rules."[4] These definitions are provided by the North Carolina Administrative Code:

> (8) Unacceptable Personal Conduct means:
>
> > (a) conduct for which no reasonable person should expect to receive prior warning;
> >
> > . . .
> >
> > (d) the willful violation of known or written work rules;
> >
> > (e) conduct unbecoming a state employee that is detrimental to state service;

25 N.C. Admin. Code 1J.0614(8)(a), (d)-(e) (2021). As established above, there was no dispute that Plaintiff handcuffed the offender in the front or that Plaintiff removed the handcuffs prior to closing the offender's cell door. Plaintiff himself acknowledged

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[4] We note Defendant filed numerous objections to Plaintiff's proposed Record on Appeal prior to filing with this Court. Defendant objected to the inclusion of a number of exhibits that were ultimately included in the Record Supplement, but we note that the Record does not indicate Defendant ever sought judicial settlement of the Record. We refer to materials in the Rule 11(c) Supplement in our *de novo* review of the trial court's Order. *See* N.C. R. App. P. 11(c).

he handcuffed the offender in the front and removed these handcuffs prior to closing the offender's cell door. Both actions violated written work rules and would constitute unacceptable personal conduct under 25 N.C. Admin. Code 1J.0614(8)(d).

¶ 21 The Record contains: a Correctional Officer Basic Training Program, which required officers to handcuff offenders behind their back; a Robeson CRV Center Chapter A Section .3700 Standard Operating Procedure, issued 13 February 2017, which required offenders to be handcuffed behind their back before a cell door is opened; and a DPS "Policy & Procedures" document identified as Chapter F Section .1500 Use of Force, issued 26 March 2018, which required "[a]ll offenders will have their hands restrained behind their back before being removed from their cell[,]" and "[o]ffenders will be escorted with their hands restrained behind their back." Plaintiff does not dispute these are written work rules. Plaintiff disputed the validity of the Robeson CRV Center SOP in his brief and in argument before the trial court, but never attacked the legitimacy of the training program or the DPS policies requiring offenders to be handcuffed behind their back. Additionally, the only indication of revision of any SOP is Plaintiff's statements during his deposition. At the hearing, Plaintiff presented no evidence any applicable rule or procedure was revised after his warning. Defendants, in turn, provided multiple affidavits in support of their motion. Defendant Hodges's affidavit established "NCDPS Policy and Procedures (statewide policies applicable to all correctional officers) required that offenders be handcuffed

behind their back" and "[d]uring [Defendant Hodges] time working at Robeson CRV Center, the Standard Operating Procedures . . . always required that offenders be handcuffed behind their back." Defendant Hodges's affidavit also states he "never altered the SOPs at Robeson CRV Center, nor did [he] ever instruct anyone to alter the SOPs. The SOPs were never amended to allow offenders to be handcuffed in the front." Defendant McCormick's affidavit and Mr. Jacobs's affidavit contained similar statements; all evidence available to the trial court indicates offenders were always required to be handcuffed behind their back, and the SOPs were not revised to require this method of handcuffing offenders before or after Plaintiff's written warning. Plaintiff did not refute Defendants' evidence, as required by Rule of Civil Procedure 56(e), and the evidence available to the trial court does not show any genuine issue of material fact. *See Lowe*, 305 N.C. at 369-70, 289 S.E.2d at 366; *Zaldivar*, 264 N.C. App. at 263, 826 S.E.2d at 726.

¶ 22 Plaintiff's conduct also violated Administrative Code § 1J.0614(8)(a), "conduct for which no reasonable person should expect to receive prior warning[.]" 25 N.C. Admin. Code 1J.0614(8)(a). There were at least three different written policies stating that an offender should be handcuffed behind the back. These policies clearly stated how an offender should be handcuffed, and a reasonable person should not expect a warning when these policies are clear on the proper procedure for handcuffing offenders.

¶ 23 The third inquiry is "whether [Plaintiff's] misconduct amounted to just cause for the disciplinary action taken[,]" in this case a written warning. *See Poarch*, 223 N.C. App. at 132, 741 S.E.2d at 320 (quoting *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925). Plaintiff argues his employer did not have just cause to issue the warning. We disagree.

¶ 24 A review of the Record and Record Supplement indicates Plaintiff violated numerous written rules, policies, and procedures he was subject to as a DPS and Robeson CRV Center employee. Plaintiff only challenged whether he violated Robeson CRV Center's SOP, alleging they were revised after he was first issued his written complaint, but he did not refute Defendants' claim that his actions were also contrary to his training and to DPS policy. During his deposition, Plaintiff openly admitted he would have reviewed the DPS policy during his training. It is undisputed Plaintiff violated a written work rule and that he was aware of the rule. As a result of his conduct, Plaintiff received a written warning, and as noted by Defendants, this is "one of the least punitive measures possible to correct Plaintiff's actions." Plaintiff was not terminated, demoted, suspended, or docked pay. Plaintiff does not argue any other disciplinary action would have been appropriate. Plaintiff simply received a warning that his conduct fell short of established professional standards, and no other adverse employment action was taken.

¶ 25 Plaintiff also argued, similar to the case in *Poarch*, that Robeson CRV Center's

noncompliance with DPS rules "constitutes a lack of just cause and governmental arbitrariness such that [Plaintiff's warning] cannot stand." *Poarch*, 223 N.C. App. at 133, 741 S.E.2d at 320; *see also id.* (citing *U.S. v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its actions cannot stand and courts will strike it down.")). However, the only evidence presented at the hearing on Defendants' Motion for Summary Judgment regarding inconsistent application of state-wide DPS rules were Plaintiff's bald assertions that written rules were not being uniformly applied. There is no evidence in the record that similar conduct went unpunished, or that any other conduct was disproportionately punished or omitted from adverse employment actions. *See id.* ("[Plaintiff] has failed to identify the rules that were not followed. Instead, [Plaintiff], without providing evidence, makes seven general assertions that [his employer's] personnel rules were not followed."). This argument is overruled.

¶ 26 For the reasons above, Defendants established they had just cause to issue a written warning to Plaintiff. Plaintiff did not present evidence demonstrating a genuine issue of material fact, and Defendants are entitled to judgment as a matter of law.

IV. Conclusion

¶ 27 Because just cause existed to issue the written warning to Plaintiff, based on

uncontroverted evidence introduced at the hearing on Defendants' Motion for Summary Judgment, the order of the trial court granting Defendants' motion is affirmed.

AFFIRMED.

Judges DIETZ and ZACHARY concur.

Report per Rule 30(e).