NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued August 3, 2022
Decided August 22, 2022

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 21-2129

BRANDON LEE CHITTUM,
Plaintiff-Appellant,

v.

MICHAEL HARE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois.

No. 3:18-CV-01167-NJR

Nancy J. Rosenstengel,
Chief Judge.

O R D E R

Brandon Lee Chittum, a former pretrial detainee, sued a jail guard who, he says, sexually harassed and assaulted him, then punished him for rejecting and reporting the advances. *See* 42 U.S.C. § 1983. At screening, a district judge allowed Chittum to proceed on two counts: a Fourteenth Amendment claim for the alleged harassment and assault and a retaliation claim under the First Amendment. Eventually, another district judge entered summary judgment against Chittum on both counts.

We conclude that, regarding the Fourteenth Amendment claim, the judge erred by relying in part on summaries of video recordings prepared by jail officials and jail records and resolving a swearing contest by assessing credibility. Under oath, Chittum described multiple instances of the guard, Michael Hare, assaulting him verbally and physically. Hare testified that he did none of this. These conflicting accounts must be sorted out at trial because the record contains no video or other irrefutable evidence that blatantly contradicts Chittum's story. *See Scott v. Harris*, 550 U.S. 372, 380 (2007); *Eagan v. Dempsey*, 987 F.3d 667, 691 & n.56 (7th Cir. 2021). But Chittum introduced no evidence that Hare retaliated against him for protected speech, so we affirm the judgment on Chittum's First Amendment claim.

Background

We present the evidence in the light most favorable to Chittum, as we must at this stage. *Ziccarelli v. Dart*, 35 F.4th 1079, 1083 (7th Cir. 2022). Chittum was detained in the Madison County Jail from December 2013 through May 2019 while awaiting trial for first-degree murder and related offenses, of which he was later convicted. Sergeant Hare is a longtime jail officer with the Madison County Sheriff's Department.

One night in May 2018, Hare saw some prescription pills in Chittum's cell and reached through the bars to take them. Chittum thought that someone was trying to steal his pills and tried to grab them. But once he realized the person was Hare, just after their "fingers interlocked," he gave the pills up. Hare filed an incident report charging Chittum with assaulting him by grabbing his wrists and scraping his forearm during the brief struggle over the pills. Chittum sent Hare a letter apologizing for the incident and asked Hare to rescind the charge, but Hare did not.

A few days after Hare refused to rescind the charge, Chittum filed a grievance against Hare, alleging that Hare had targeted Chittum for years. He said that Hare made sexually explicit comments and obscene gestures to him and drew sexual images in pencil on the walls of his cell. When Hare frisked Chittum, Hare would fondle Chittum's genitals while whispering in his ear. Hare often slapped Chittum's buttocks. Twice, Hare walked into the showers and took Chittum's clothing until he agreed to show his penis. During one of these episodes, Hare "tried to put his mouth on [Chittum's mouth] and grabbed [Chittum's] genitals." Another time, while Chittum was walking to a church service, Hare approached Chittum from behind and said, "I am still going to get you one way or the other." Chittum later testified that virtually all this conduct occurred in areas without cameras.

When Chittum complained to Hare or refused his advances, Hare struck back by "locking [Chittum] down," withholding clothes, and refusing to give Chittum food at mealtimes. Chittum also says that Hare filed the assault charge against him because Chittum would not give in. Hare told Chittum that "[l]ife would be a whole lot easier … if you just let it happen."

A few weeks after the pill-grabbing incident, Chittum filed a second grievance against Hare. Chittum alleged that Hare said, "get your sexy ass in your cell." Chittum provided the names of seven witnesses to the interaction.

Hare categorically denies all Chittum's harassment and assault allegations. During the grievance process, Hare insisted that Chittum made up his story in response to the assault charge for the pill-grabbing incident. He also denied the allegations at his deposition, adding that he did not recall ever searching Chittum's groin area, but if he did it would have been to search for contraband or weapons.

Hare's supervisor, Captain Christopher Eales, investigated Chittum's grievances. Regarding Chittum's first grievance, Eales interviewed Hare and reviewed the lockdown logbooks and video footage. There was no footage of most of the events Chittum described. The only relevant recording showed the interaction between Hare and Chittum on the walk to the church service. According to Eales's written summary, the video shows Hare about three feet behind Chittum but does not show that Hare said anything. The lockdown logs showed that Hare never placed Chittum in lockdown. Eales deemed the first grievance unfounded because Hare denied it, there was a lack of evidence, and the timing—just after the scuffle that could lead to discipline—was suspicious.

Eales investigated the second grievance, too. Three witnesses confirmed that Hare made a sexually explicit comment to Chittum, and three others confirmed that there was an incident but did not hear what was said. Eales's summary of the available video footage states that an incident occurred but not what, if anything, was said. Eales decided that Chittum's grievance was unfounded and was likely motivated by Hare having filed the assault report against Chittum.

Chittum sued Hare under § 1983 and, after screening, proceeded on a Fourteenth Amendment excessive-force claim and a First Amendment retaliation claim.[1] Hare conceded that exhaustion of administrative remedies was not at issue and, after discovery, moved for summary judgment on the merits. To support the motion, Hare submitted Eales's summaries of the lockdown records and video footage, but he did not provide the records or videos themselves. (The videos Eales reviewed were apparently not preserved.) The judge granted Hare's motion, relying on the rule of *Scott v. Harris*, 550 U.S. 372, 380 (2007), in discounting Chittum's evidence. She concluded that Chittum's only evidence of harassment and assault—his testimony—was "unreliable and inconsistent." The judge noted that it was not her place to "weigh Chittum's credibility at summary judgment," but because "his statements are directly contradicted by records and recordings," she "should not take his clearly fictive version of events at face value." The judge ruled in Hare's favor on the First Amendment claim based on Eales's report that a video showed Chittum assaulting Hare and that jail records demonstrated that Hare never put Chittum on lockdown.

Analysis

Chittum now argues that the judge improperly resolved issues of credibility and wrongly relied on Eales's summaries rather than the actual videos and lockdown logs. We review the summary judgment decision de novo. *James v. Hale*, 959 F.3d 307, 314 (7th Cir. 2020). Summary judgment is appropriate if "there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). We draw all reasonable inferences supported by the record in Chittum's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The harassment claim boils down to a swearing contest between Chittum and Hare: Each testified that the other is wrong. Typically, this sort of dispute must be resolved by a jury. *Gupta v. Melloh*, 19 F.4th 990, 996 (7th Cir. 2021). But *Scott* provides a "narrow, pragmatic exception" if "irrefutable evidence" (like a video of the events in question) blatantly contradicts one side's version of events. *Gant v. Hartman*, 924 F.3d 445, 449–50, 51 (7th Cir. 2019).

[1] Chittum eventually retained counsel, who also represents him on appeal. Counsel tried several times to file an amended complaint but failed to comply with the local rules each time. Thus, Chittum's original, pro se complaint is operative.

Chittum argues, and we agree, that the judge stretched this rule too far in concluding that she could reject all his testimony because it was "blatantly contradicted by the record." *Scott*, 550 U.S. at 380. Importantly, the video in *Scott* was in the record and conclusively showed the plaintiff's reckless driving, which directly refuted his testimony that he drove cautiously. *Id.*; *see also Dockery v. Blackburn*, 911 F.3d 458, 466 (7th Cir. 2018) (ignoring plaintiff's assertion that he did not resist arrest when a video in the record disproved his story).

But here there are two problems with applying *Scott*. First, there is no irrefutable evidence in the record. In fact, there is no video evidence in the record at all. Instead, Hare submitted Eales's summary of what some videos show. That is not irrefutable evidence. *See Eagan*, 987 F.3d at 691 & n.56. Nor are the lockdown logs in the record—just Eales's summary of them. Regardless, these logs likely cannot "blatantly contradict" Chittum's entire story. *See id.*

Second, unlike the video in *Scott*, the available footage here was not of the most important alleged events (for instance, when Hare allegedly fondled Chittum). At issue in *Scott* was a single incident, which was fully captured in a video that directly contradicted the plaintiff's version of events. 550 U.S. at 380. By contrast, the claims here encompass many alleged affronts, only one of which corresponds to an available video. And Chittum testified that Hare approached him inappropriately only when they were out of view of the jail's cameras.

Because *Scott* does not apply, the judge was required to accept Chittum's deposition testimony, even if it was self-serving, uncorroborated, or seemed implausible. *Ziccarelli*, 35 F.4th at 1089–90; *Payne v. Pauley*, 337 F.3d 767, 771 (7th Cir. 2003). If a jury believes Chittum's story, it could find that Hare used excessive force against him in an objectively unreasonable manner.[2] *Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015). Chittum says that Hare repeatedly fondled and touched Chittum's private parts and engaged in voyeurism to gratify Hare's sexual desires, and possibly to humiliate Chittum; that is a constitutional violation if true. *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012). Although Hare's subjective intent must be inferred, a

[2] We have noted that the phrase "excessive force" can be a misnomer as related to sexual misconduct because, in that context, using minimal physical force (or even none at all) can violate a prisoner's constitutional rights. *See Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012).

jury could accept Chittum's tale and find that Hare acted with the requisite culpability. *See id.* at 643–44.

To be sure, Hare denies all of this. He says that he never fondled Chittum's privates, slapped Chittum's buttocks, sought to view Chittum naked, or "cat called" Chittum. He also asserts that if he searched Chittum, any incidental touching was appropriate and necessary to search for contraband. He adds that Eales investigated Chittum's grievances and determined they were unfounded.

But this simply demonstrates that there is a genuine dispute of material fact. Hare repeatedly argues that Chittum "has made no credible allegation that Hare assaulted him" and that Chittum's evidence relies on his own "discredited say-so." But the standard for deciding a jail grievance (assuming that is what Hare means by "discredited") is not the same as for resolving a summary judgment motion. In court, credibility is a jury question, and there is nothing wrong with providing Chittum's own testimony in opposition to a summary judgment motion. *Payne*, 337 F.3d at 770–73. (Providing "fictive" testimony, as the judge called Chittum's, is a separate problem and a serious allegation.) Hare also says that Chittum's apology letter contradicts his story. But that letter has nothing to do with the sexual harassment and assault claim.

Hare asserts that, regardless, he is entitled to qualified immunity. But his cursory argument on this point is based on disputed facts. If events transpired as Chittum avers, a jury could conclude that Hare violated Chittum's clearly established constitutional rights. *See, e.g.*, *Washington*, 695 F.3d at 643–44 (reversing summary judgment for guard who, for mere seconds, gratuitously fondled prisoner's testicles and penis).

As for his First Amendment claim, Chittum needed evidence that (1) he engaged in protected activity; (2) Hare took an adverse action against him; and (3) the protected activity "was at least a motivating factor for the adverse action." *Holleman v. Zatecky*, 951 F.3d 873, 878 (7th Cir. 2020). We can affirm for any reason the record supports "so long as it was adequately addressed below and the plaintiffs had an opportunity to contest the issue." *O'Brien v. Caterpillar, Inc.*, 900 F.3d 923, 928 (7th Cir. 2018).

We affirm because Chittum put forth no evidence that his protected speech motivated any adverse action by Hare. First, Chittum argues that Hare retaliated against him for refusing Hare's sexual advances (such as by locking him down and withholding meals). Chittum had the right to refuse unwanted sexual advances by a guard, but he does not explain why the First Amendment protects that right. *See,*

e.g., *Zimmerman v. Bornick*, 25 F.4th 491, 493 (7th Cir. 2022). Thus, the retaliation theory does not add anything to his Fourteenth Amendment claim.

Chittum also argues that Hare retaliated against him by filing the assault report. But the evidence shows that Hare reasonably believed that he had been assaulted, as defined by 20 ILL. ADMIN. CODE tit. 20 § 504 App. A. *See Zellner v. Herrick*, 639 F.3d 371, 379 (7th Cir. 2011). Against this evidence that Hare acted for a nonretaliatory reason, Chittum merely speculates that there was another, hidden motive; that is insufficient. *See* FED. R. CIV. P. 56(c)(4); *Widmar v. Sun Chem. Corp.*, 772 F.3d 457, 460 (7th Cir. 2014).

We VACATE the district court's judgment and REMAND on Chittum's Fourteenth Amendment claim but otherwise AFFIRM.