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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOMMIE LEE MCDOWELL, Jr., Plaintiff-Appellant, v. HULSEY; WARD; K. CHOLICO-BALTIERRA; WILLIAM REUBART; TICHINA SANDOVAL; FREDERIC HAMMEL, Defendants-Appellees.	No. 22-15266 D.C. No. 3:19-cv-00230-MMD-CSD MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding

Submitted December 5, 2022[**]
San Francisco, California

Before: WALLACE, FERNANDEZ, and SILVERMAN, Circuit Judges.

Nevada prisoner Tommie McDowell appeals pro se from the district court's summary judgment in favor of Defendants Timothy Hulsey and William Reubart

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

in his 42 U.S.C. § 1983 action claiming they retaliated against him, and from the district court's dismissal with prejudice of his due process claim. *See* U.S. Const. amends. I, XIV. We review de novo,[1] and we affirm.

The district court properly granted Defendant Hulsey's motion for summary judgment on Claim 1 on the ground that evidence of a critical element of retaliation—that Hulsey himself took an adverse action against McDowell—was lacking. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Brodheim*, 584 F.3d at 1269 (elements of retaliation). While McDowell's evidence[2] placed Hulsey at the scene, it was insufficient for a rational juror to find in McDowell's favor on the question of Hulsey's personal participation in confiscating his property. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *see also Hopkins v. Bonvicino*, 573 F.3d 752, 769–70 (9th Cir. 2009); *Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002). Moreover, the district court correctly determined that the inconsistency in the record regarding the

[1] *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014); *Brodheim v. Cry*, 584 F.3d 1262, 1267 (9th Cir. 2009).

[2] The evidence includes the allegations of McDowell's verified complaint, *see Schroeder v. McDonald*, 55 F.3d 454, 460 & n.10 (9th Cir. 1995), but not assertions made in other papers without attestation. *See S.A. Empresa De Viaca Aerea Rio Grandense (Varig Airlines) v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982); *cf. Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

date of the confiscation was necessarily immaterial in light of McDowell's failure to adduce evidence of Hulsey's own actions. *See Celotex*, 477 U.S. at 322–23, 106 S. Ct. at 2552; *see also Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). By the same token, the district court properly granted Hulsey's motion for summary judgment on Claim 2 on the ground that McDowell had failed to present evidence tending to show that Hulsey was involved in the detention or return of McDowell's property. There was no evidence in this record that Hulsey possessed or withheld McDowell's property.

The district court also properly entered judgment in favor of Defendant Reubart on McDowell's Claim 4 on the ground that Reubart had presented evidence that he was not involved in the reactivation of McDowell's Florida detainer, and McDowell had provided no evidence to the contrary. Although McDowell argues that the district court should not have believed Reubart, it could not make credibility determinations at summary judgment. *See Zetwick v. County of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017). McDowell failed to adduce evidence of Reubart's involvement in the activation or deactivation of any inmate detainers,

let alone any evidence that he reactivated McDowell's detainer in retaliation for McDowell's filing a lawsuit in May 2019.[3]

The district court properly dismissed McDowell's substantive due process claim with prejudice at screening. *See* 28 U.S.C. § 1915A(b)(1). Not only did McDowell lack a due process interest in the detainer's effect on his prison classification,[4] but also his allegations do not meet the applicable shocks-the-conscience standard.[5]

AFFIRMED. McDowell's motion for appointment of counsel (9th Cir. Dkt. 21) is **DENIED**.

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[3] That the detainer was reactivated several months after the lawsuit was filed does not by itself create an inference of retaliation or responsibility on the part of Reubart. *See Wood v. Yordy*, 753 F.3d 899, 904–05 (9th Cir. 2014); *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995).

[4] *See Moody v. Daggett*, 429 U.S. 78, 87–88, 88 n.9, 97 S. Ct. 274, 279 & n.9, 50 L. Ed. 2d 236 (1976).

[5] *See County of Sacramento v. Lewis*, 523 U.S. 833, 848–49, 854, 118 S. Ct. 1708, 1717–18, 1720, 140 L. Ed. 2d 1043 (1998).