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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001579-MR

JEFFREY C. PETERSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
ACTION NO. 97-CI-00205

ARAMARK UNIFORM SERVICES;
RILEY WALSH; AND TED WIXOM — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BARBER AND KNOPF, JUDGES.

KNOPF, JUDGE: The appellant, Jeffrey C. Peterson, appeals from summary judgment orders by the Fayette Circuit Court which dismissed his racial discrimination and retaliation claims which he brought against his former employer, Aramark Uniform Services (Aramark) and individually against his supervisors. We agree with the trial court that Peterson failed to establish a *prima facie* claim for a hostile work environment. Furthermore, we find that Peterson failed to present sufficient evidence to rebut Aramark's legitimate non-discriminatory reasons for its

employment decisions with regard to his disparate treatment and retaliation claims. Hence, we affirm.

On August 14, 1994, Peterson became employed as a wash floor supervisor by Aramark at its services facility in Lexington, Kentucky. Previously, Peterson was employed at Aramark's Cincinnati, Ohio facility as a non-management (union) employee. In Lexington, he worked under the supervision of the plant manager, Riley Walsh, and the general manager, Ted Wixom. In November 1995, Peterson filed a complaint with Aramark's corporate office, alleging that he was being harassed and treated differently than other supervisors because of his race. Thereafter, Peterson concluded that Aramark's response was inadequate, and he filed a formal complaint with the Lexington and Fayette County Human Rights Commission. On August 15, 1996, Aramark terminated Peterson's employment allegedly based upon a series of verbal confrontations between Peterson and other supervisors.

On January 16, 1997, Peterson filed this action against Aramark, Walsh, and Wixom, alleging violations of the Kentucky Civil Rights Act[1] and retaliatory discharge.[2] Specifically, Peterson alleges that he was subjected to disparate treatment and harassment because he is African-American. He asserts that: (1) he was required to work full shifts of "union" work when the facility was short-handed, although white supervisors were not so required; (2) he was given other additional work assignments

[1] KRS 344.040.

[2] KRS 344.280.

which were not given to white supervisors; (3) complaints about him were sent to the corporate office, while complaints about other supervisors remained at the Lexington office; (3) Walsh and Wixom accepted the word of other supervisors who complained about Peterson, and refused to ask Peterson for his side; (4) Walsh and Wixom yelled and cursed at him, whereas white supervisors were not treated that way; (5) Wixom once referred to Peterson as "our own little Farrakhan";[3] (6) Walsh often took Peterson's paperwork before he completed it; and (6) Aramark, Walsh, and Wixom retaliated against him for filing a complaint with the Human Rights Commission.

Walsh and Wixom filed a motion for summary judgment, arguing that individual employees cannot be held liable for discrimination or retaliation under the Kentucky Civil Rights Act. The trial court agreed and dismissed Peterson's claims against Walsh and Wixom. Following a period of discovery, Aramark filed its own motion for summary judgment. Aramark pointed to documents showing that Peterson had been warned about his altercations with supervisors at both the Lexington and the Cincinnati facilities. Aramark also pointed to deposition testimony by Peterson, Walsh, Wixom and other supervisors which disputed Peterson's claims of disparate treatment and harassment.

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[3] In October, 1995, Peterson attended the "Million Man March", a gathering of African-American men held in Washington, D.C. The event was organized by Nation of Islam leader Louis Farrakhan, whose public statements sometimes generate controversy. During the event, Peterson was interviewed and appeared on a local television station. In the interview, Peterson discussed his thoughts about the event, Farrakhan, and race relations. When Peterson returned to work, several of his co-workers mentioned to him that they had seen him on television. During a discussion with Wixom and other employees, Wixom commented that Peterson was "our own little Farrakhan."

The trial court granted Aramark's motion for summary judgment, finding that Peterson had failed to present specific evidence supporting his claims of a racially hostile work environment, disparate treatment or retaliatory discharge. In the absence of specific evidence, the trial court concluded that Aramark was entitled to judgment as a matter of law because Peterson failed to rebut the evidence of non-discriminatory reasons for its employment decisions. This appeal followed.

Among other reasons, the Kentucky Civil Rights Act was enacted to provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000e.[4] Accordingly, KRS 344.040 provides, in pertinent part:

> It is an unlawful practice for an employer to:
> (1) To . . . discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, . . .
> (2) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee because of the individual's race, . . .

Furthermore, KRS 344.200 *et seq.* sets out an administrative procedure for filing complaints alleging unlawful discrimination. Since an employee who has filed a complaint alleging discrimination may continue to work for the same employer, KRS 344.280 provides that:

> It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:

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[4] KRS 344.020.

> (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter; . . .

An employment discrimination action unfolds in a different manner than most civil actions. In Harker v. Federal Land Bank of Louisville,[5] the Kentucky Supreme Court adopted a three-stage test set out by the United States Supreme Court. First, the plaintiff must make a *prima facie* case of discrimination by offering proof that, 1) he is a member of a protected class, 2) he is qualified for and applied for an available position, 3) he did not receive the job, and 4) the position remained open and the employer sought other applicants.[6] Second, the employer must then articulate a "legitimate nondiscriminatory" reason for its action.[7] Third, once such a reason is given, it is incumbent on the employee to demonstrate that the stated reason is merely a pretext to cover the actual discrimination.[8]

The establishment of a *prima facie* case is a threshold, but, if left unrefuted, judgment must be entered in

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[5] Ky., 679 S.W.2d 226 (1984).

[6] McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973).

[7] Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981).

[8] Id. at 256, 67 L.Ed.2d at 217.

the plaintiff's favor.[9] However, the burden of refuting the *prima facie* case need not be met by persuasion; the employer need only articulate with clarity and reasonable specificity a reason unrelated to a discriminatory motive; the employer is not required to persuade the trier of fact that the action was lawful.[10]

It is the third stage of the McDonnell-Douglas scheme which has proven most troublesome. In Harker, the Kentucky Supreme Court stated that "the special rule for age discrimination summary judgments is whether the plaintiff has proof of 'cold hard facts creating an inference showing age discrimination was a determining factor' in the discharge."[11] However, this variation on the McDonnell-Douglas test is specifically limited to age discrimination summary judgments.[12] Therefore, we agree with Peterson that the trial court erred by directly applying the "cold hard facts" standard set out in Harker.

Nevertheless, it is not precisely clear how the "cold hard facts" test of Harker differs from the general rule that an employee alleging discrimination must present specific evidence establishing pretext. In all discrimination cases which follow the McDonnell-Douglas model, the burden returns to the plaintiff

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[9] Id. at 254, 67 L.Ed.2d at 216.

[10] Id. at 258, 67 L.Ed.2d at 218.

[11] Harker, 679 S.W.2d at 229.

[12] *See also* Hardaway Management Co. v. Southerland, Ky., 977 S.W.2d 910, 916 (1998).

to produce specific evidence showing that the employer's articulated reason for the employment decision was a pretext for discrimination. This burden merges with the ultimate burden of persuading the fact-finder that the plaintiff has been the victim of intentional discrimination. The plaintiff may succeed in this either by directly persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence.[13]

Courts should take care not to apply the McDonnell-Douglas test mechanically. The plaintiff at all times bears the ultimate burden of proof.[14] The *prima facie* case creates an inference of discrimination only because these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Establishment of the *prima facie* case creates a presumption that the employer unlawfully discriminated against the employee.[15]

The burden that shifts to the employer is to rebut the presumption of discrimination by producing evidence that the employment decision was based on a legitimate, non-discriminatory reason.[16] However, once the employer presents evidence of a legitimate non-discriminatory reason for the employment decision,

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[13] Burdine, 450 U.S. at 256, 67 L.Ed.2d at 217.

[14] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 512, 125 L.Ed.2d 407, 419, 113 S.Ct. 2742 (1993).

[15] Burdine, 450 U.S. at 253-54, 67 L.Ed.2d at 215-16 (1981).

[16] Id.

the employee cannot simply repeat the evidence of satisfactory job performance previously offered to prove that the employer's given reasons for discharge are pretextual. Furthermore, a showing that the employer's proffered reason was false does not compel a judgment for the plaintiff unless the fact-finder also believes from the evidence that discrimination was the real reason for the employment decision.[17] This is not to say that in all cases circumstantial evidence is insufficient to establish a factual issue on pretext.[18] Nevertheless, the plaintiff must still produce some evidence warranting a reasonable inference of pretext.[19] Where the employer has advanced specific reasons for the employment decision, the employee's rebuttal evidence should be focused on them.[20] "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."[21]

As a preliminary matter, Peterson argues that summary judgment was inappropriate because the depositions, interrogatories, admissions and documents produced pursuant to

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[17] St Mary's Honor Center v. Hicks, 509 U.S. at 515-16, 125 L.Ed.2d at 421-22. *See also* Reeves v. Sanderson Plumbing Products, 530 U.S. ---, 147 L. Ed. 2d 105 119, 120 S. Ct. 2097 (2000), holding that a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification was false, may permit fact finder to conclude that the employer unlawfully discriminated.

[18] Handley, 827 S.W.2d at 700-701.

[19] Harker, 679 S.W.2d at 231.

[20] LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405, 1414 (7th Cir., 1984).

[21] Reeves, 147 L. Ed. 2d at 123.

discovery in this case were not part of the trial court's record. Under the local rules of procedure for the Fayette Circuit Court then in effect, answers to interrogatories, responses to requests for production of documents and depositions are not filed in the record.[22] Peterson notes that CR 56.03 permits summary judgment to be granted only "if the pleadings, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." As of the date on which the trial court granted Aramark's motion for summary judgment, none of the evidence produced during the discovery phase was part of the record. Rather, these materials were added to the court's record by agreed order after Peterson filed his notice of appeal.

Peterson maintains that the trial court could not have considered all of the evidence of record because the record was incomplete at the time summary judgment was entered. Aramark responds that Peterson did not raise this issue previously, nor did he contradict any of the evidence which Aramark presented to rebut Peterson's *prima facie* case. As a result, Aramark asserts that this action was ripe for summary judgment.

We emphasize that local rules of procedure cannot modify the standards for granting summary judgment pursuant to CR 56. On a motion for summary judgment, the trial court must draw all reasonable inferences in favor of the non-moving party, as

[22] Rules of Fayette Circuit Court 19 & 20.

they may be gleaned from the pretrial record.[23] Clearly, the trial court cannot do this if the record is not complete.

However, we find no prejudice to Peterson as a result of the application of the local rules. First, it is conceded that Peterson did not complain about the status of the record while he was before the trial court. Thus, any objection which he may have was waived. Furthermore, a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.[24] Once Aramark presented evidence to establish legitimate non-discriminatory reasons for its employment decisions, the burden shifted to Peterson to present evidence to establish that Aramark's stated reasons were pretexts for unlawful discrimination. Even though the discovery was not formally part of the record, Peterson still had the opportunity to present evidence to attempt to meet this burden of going forward. The trial court was not obligated to find the evidence which supported Peterson's claims.

Lastly, because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court. As did the trial court, we ask whether material facts are in dispute and whether the party moving for judgment is clearly entitled thereto

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[23] Perkins v. Hausladen, Ky., 828 S.W.2d 652, 654 (1992).

[24] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

as a matter of law.[25] Since all discovery is now part of the record, we may proceed to the merits of the appeal.

Basically, Peterson's Civil Rights Act claim rests on three separate, albeit related, grounds. First, he alleges that he was subjected to a racially hostile work environment. Second, he alleges that he was treated differently than similarly situated supervisors on account of his race. And third, he asserts that he was subjected to retaliatory treatment because he filed a complaint alleging racial discrimination. The McDonnell-Douglas framework applies to each of these grounds, although the analysis must be modified accordingly.

Hostile Work Environment

For Peterson to make a *prima facie* case of hostile work environment, he must show: (1) he belonged to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based upon race; (4) the harassment affected a term, condition, or privilege of his employment; and (5) the employer knew or should have known of the harassment and failed to take proper remedial action.[26] The United States Supreme Court instructs that hostile work environment harassment occurs when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and

[25] Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

[26] Hafford v. Seidner, 167 F.3d 1074, 1080 (6th Cir., 1999).

create an abusive working environment.'"[27] Factors to consider when determining whether harassment is sufficiently severe or pervasive include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[28] The conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile, and the victim must subjectively regard that environment as hostile.[29]

With the exception of the "Farrakhan" comment, Peterson does not allege that he was subjected to severe or pervasive harassment which was racial in tone or content.[30] Rather, he contends that he was subject to a racially hostile work environment primarily because he was treated differently than similarly situated white supervisors. Although this conduct may be sufficient to establish a *prima facie* case on the disparate treatment claim, the allegations are not sufficient to establish a pervasively and severely hostile work environment.[31]

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[27] Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 126 L. Ed. 2d 295, 301, 114 S. Ct. 367 (1993), (*quoting* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S.Ct. 2399 (1986)).

[28] Harris, 510 U.S. at 23, 126 L. Ed. 2d at 302-03.

[29] Jackson v. Quanex Corp, 191 F.3d 647, 658 (6th Cir., 1999) (*citing* Harris, 510 U.S. at 21-22, 126 L.Ed.2d at 302).

[30] Wixom stated that his comment referring to Peterson as a "Farrakhan" was intended as a compliment. However, for purposes of this appeal, we shall assume that it was intended as a pejorative.

[31] *See* Allen v. Michigan Department of Corrections, 165 F.3d 405 (6th Cir., 1999).

Furthermore, the Civil Rights Act does not impose a general civility code in the workplace.[32] Thus, the fact that Walsh and Wixom may have screamed and cursed at Peterson does not, by itself, rise to the level of a hostile work environment.

Disparate Treatment

We agree with the trial court that Peterson has stated a *prima facie* case for race-based disparate treatment. Aramark responds by denying that Peterson was treated differently from similarly situated white supervisors. Specifically, Aramark states that all supervisors were occasionally required to do "union" work, and Peterson was not singled out in this regard. Based upon Peterson's allegations and the evidence in the record, it appears that there was a perennial problem with staffing in Peterson's area of supervision, the soil and wash room.[33] Consequently, Peterson was often required to perform full shifts of "union" work in addition to his supervisory duties. However, Aramark presented evidence, and Peterson admitted, that white supervisors were required to fill in on "union" work when the other areas of the facility was short-staffed.

While Peterson complains that no other supervisors were required to put in full shifts of "union" work, he points to no documentary evidence or testimony (other than his own assertions) which support this claim. In the absence of such evidence,

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[32] Faragher v. City of Boca Raton, 524 U.S. 775, 788, 141 L.Ed.2d 662, 677, 118 S.Ct. 2275 (1998).

[33] In addition, the soil and wash rooms had significant problems with equipment breakdowns and maintaining sufficient hot water. As supervisor of the area, Peterson was responsible for dealing with these issues even though he could not always control their causes.

Peterson cannot establish that he was required to perform more work than similarly situated white supervisors. Furthermore, the Civil Rights Act was not intended as a vehicle for judicial review of the wisdom or efficiency of general business practices.[34] There is no evidence that Aramark's staffing difficulties and equipment problems were manipulated to affect Peterson's area of supervision in any greater degree than other areas of the facility.

Aramark does not directly address several of Peterson's allegations, including his assertions that Walsh often took Peterson's paperwork before Peterson was able to complete it, and that Walsh required Peterson to get supplies for an older, white supervisor, although other supervisors were not required to do so. However, these are very general allegations, and Peterson presented no direct or circumstantial evidence which would justify an inference that Walsh or Wixom's conduct toward him was motivated by a discriminatory intent.

Peterson next alleges that complaints about other supervisors were kept within the Lexington facility, but complaints about him were sent to Aramark's corporate office. Aramark asserts that its handling of complaints about Peterson was not based upon his race, but was due to Peterson's repeated verbal confrontations with employees and supervisors. Aramark also points to its documentary evidence showing that Peterson was warned about his confrontational attitude toward supervisors. Peterson did not point to any specific evidence showing that

[34] Harker, 679 S.W.2d at 231.

Aramark treated a similarly situated employee or supervisor differently than he was treated. Accordingly, Peterson failed to establish that Aramark's stated reasons for these actions were pretexts for unlawful discrimination.

By far, Peterson's strongest claim rests on his allegation that Walsh and Wixom "yelled and cursed" at him over problems which were occurring in Peterson's area of supervision. However, Aramark presented significant documentary evidence that Peterson was involved in verbal confrontations with other supervisors and employees. Peterson was warned about his confrontational attitude while he was still working at the Cincinnati facility, and he received several warnings about his conduct toward other supervisors at the Lexington facility. On July 2, 1996, Peterson received a "Final Warning" regarding a verbal confrontation with Walsh.[35] The warning advised him that any further conduct of that nature could result in his termination. Nevertheless, on August 8, 1996, Peterson engaged in another verbal confrontation with a supervisor, Mike Bentley, which resulted in Peterson's termination.

When viewed as a whole, all of Peterson's allegations raise a reasonable inference that he had conflicts with his immediate supervisors. These conflicts, together with other problems in the workplace, led to friction between Peterson and Walsh, Wixom, and other supervisors. Yet apart from Peterson's general speculation, he presented no evidence, direct or

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[35] Incidentally, the record also shows that on June 20, 1996, Walsh received a written warning about his verbal confrontation with Peterson on June 17. Record on Appeal [ROA] at p. 290.

circumstantial, that he was treated differently than similarly situated non-minority employees.[36] Moreover, Peterson has presented no specific evidence, either direct or circumstantial, to establish that Aramark's proffered reasons are unworthy of credence, or that Aramark was more likely motivated by discriminatory reasons in taking their actions.[37] As a result, the trial court properly granted summary judgment on his claim.

Retaliatory discharge

The McDonnell-Douglas scheme is, in a modified version, applicable to retaliation claims. In order to support a claim of retaliation, Peterson must show: (1) he filed a charge of harassment; (2) subsequent adverse action by the employer; and (3) the adverse action was causally linked to the protected activity.[38] We agree with the trial court that, arguably, Peterson stated a *prima facie* case establishing a claim that he was discharged because he filed a complaint alleging racial discrimination. However, Aramark put forth a specific, non-discriminatory basis for its decision to discharge Peterson. Peterson had the burden of showing specific evidence which would justify an inference that Aramark's stated reason for the discharge is false or unworthy of credence, and that the actual reason for his discharge was because he filed the complaint.

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[36] Holifield v. Reno, 115 F.3d 1555, 1563 (11th Cir., 1997). *See also* Kirkwood v. Courier Journal, Ky. App., 858 S.W.2d 194 (1993).

[37] Id. at 1567.

[38] Allen v. Michigan Dep't of Corrections, 165 F.3d at 412.

Peterson points to statements made by Walsh and Wixom after he filed a discrimination complaint with Aramark's corporate office.[39] Taken on their own, these statements might raise a stronger implication that Walsh and Wixom were attempting to create a pretext for retaliation. Yet as previously noted, Aramark presented significant documentary evidence that Peterson was involved in verbal confrontations with other supervisors and employees.

In determining pretext, the question is not whether the employer can, after the fact, find a legitimate non-discriminatory justification for its employment decision. There are few employees who have a work-history so spotless as to survive a microscopic examination. Yet while *post hoc* explanations made after the initiation of a lawsuit may be suspect, they do not automatically prove pretext. The plaintiff still has the burden of proof that there is reason to disbelieve the explanation.[40] Even viewing the record in the light most favorable to Peterson, he has failed to present evidence which would justify an inference that Aramark's stated reasons for firing him were false, or that these reasons were merely a

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[39] In an answer to Aramark's Interrogatory No. 2(e), (ROA at p. 413), Peterson alleges
> Wixom said I should not have told corporate what I did because they go back to California and we stay here in Kentucky. Walsh told me I better watch what I say about him or he would "get my ass." This happened the day after corporate went home.

[40] Billet v. Cigna Corp., 940 F.2d 812, 828 (3d Cir., 1991).

pretext for retaliation.[41] Therefore, summary judgment was appropriate on this claim as well.

Lastly, Peterson argues that the trial court erred in dismissing his discrimination claims against Walsh and Wixom in their individual capacities. He points out that KRS 344.280 prohibits a "person" from retaliating against an employee for filing a discrimination complaint. In contrast, 42 U.S.C. § 2000e-3(a) merely prohibits retaliation by an "employer." Nevertheless, because we have already found that Peterson failed to present sufficient evidence which would justify an inference that Aramark's stated reasons for discharging him were a pretext for retaliation, we conclude that this issue is now moot.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William C. Jacobs
Lexington, Kentucky

BRIEF FOR APPELLEES:

Douglas L. Hoots
Shannon M. Naish
Landrum & Shouse
Lexington, Kentucky

[41] Allen v. Michigan Dep't of Corrections, 165 F.3d at 413.