

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002212-MR

LARRY E. WATKINS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 09-CI-03802

DUSTIN MITCHELL; TODD CORNERS;
VICKIE BUSH; BRIDGET GILLILAND;
ERICA GREEN; JOEL HELENBURG; AND
ROB HOWERTON, WARDEN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND THOMPSON, JUDGES; SHAKE,¹ SENIOR JUDGE.

KELLER, JUDGE: Larry E. Watkins (Watkins) appeals from the circuit court's summary dismissal of his civil action against a number of personnel at the

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Blackburn Correctional Complex. On appeal, Watkins argues that the court prematurely and/or in error dismissed his claim of retaliation. Dustin Mitchell, *et al.* (the Appellees) argue that the court properly dismissed Watkins's complaint because he did not allege sufficient facts to support a claim of retaliation. For the following reasons, we affirm.

FACTS

On August 3, 2009, Watkins filed a complaint in Fayette Circuit Court alleging that appellee Vickie Bush (Bush) filed a false disciplinary report against him. Watkins further alleged that, when he filed a grievance against Bush, prison officials took retaliatory actions against him resulting in his transfer to another facility and loss of good time credit.

In his complaint, Watkins states that the following events took place in late May and early June 2009:

1. As Watkins was leaving the dining room, Bush stopped him and took his hat and identification card. Watkins asked Bush for her name and, as he walked away from her, Bush referred to Watkins as "you niggers;"
2. Watkins filed a grievance with the warden and internal affairs regarding Bush's actions and statement;
3. Appellee Bridget Gilliland (Gilliland), who investigated Watkins's grievance, issued a false disciplinary report indicating that Watkins admitted that he lied about what Bush said;

4. Gilliland ordered appellees Cornors and Mitchell “to go get [Watkins] and shake him down and not to come back without disciplinary reports;”
5. Within four hours, three additional false disciplinary reports were filed against Watkins;
6. Watkins was “coerced into a guilty plea” and transferred from the minimum security facility;
7. Appellee Green, the grievance coordinator, refused to process Watkins’s grievance against Bush; and
8. That the above actions amounted to unlawful retaliation and that the Appellees deprived him of his constitutionally guaranteed right to due process and equal protection of the law.

Watkins attached to his complaint his affidavit indicating that he did not tell Gilliland that he lied when he filed his grievance against Bush. Watkins also attached an affidavit from another inmate indicating that he heard Bush use the term “niggas” as she walked away from Watkins.

The disciplinary documentation attached to Watkins’s complaint includes, in pertinent part, the following:

1. “A Disciplinary Report Form Part 1 – Write Up and Investigation” dated June 2, 2009. That report, from Gilliland, states that Watkins lied in his grievance against Bush.
2. A “Disciplinary Report Form Part II – Hearing/Appeal” dated June 4, 2009. That report indicates that Watkins pled guilty to the charge of lying to an

employee and that he waived his right to an appeal. The adjustment officer imposed a loss of 30 days good time as a penalty. The warden, appellee Rob Howerton, then suspended the good time loss for a period of ninety days.

3. A “Disciplinary Report Form Part I – Write-up and Investigation” dated June 3, 2009. That report indicates that appellees Mitchell and Corners searched Watkins’s cell and found two razor blades, one concealed in an envelope and one in the spine of a legal pad. They also found a “small baggie containing four small orange pills pushed into the back of a sams card.”

4. A “Disciplinary Report Form Part II – Hearing/Appeal” dated June 4, 2009. That report indicates that Watkins again pled guilty and waived his right to appeal. The adjustment officer recommended that Watkins forfeit ninety days of good time credit. Howerton agreed with this disposition.

5. A “Detention Order” dated June 3, 2009, confining Watkins in administrative segregation pending investigation by the adjustment committee. The order notes that Watkins was claiming that the administrative segregation was retaliation for his grievance against Bush.

6. A “Reclassification Custody Form” dated June 4, 2009, indicating that Watkins could no longer be housed in a minimum security facility.

Following the disciplinary proceedings and the issuance of the reclassification custody form, Watkins was transferred to Northpoint Training Facility. From Northpoint, Watkins wrote a number of letters asking about the

status of his grievance against Bush and requesting that any record of the proceedings against him at Blackburn be stricken from his record.

Following receipt of Watkins's complaint, the Appellees filed a response and motion to dismiss under Kentucky Rule of Civil Procedure (CR) 12.02(f). In that document, the Appellees argued, as they do before us, that their actions against Watkins were not retaliatory because any investigation was justified, and he was guilty of the offenses charged.

The court, in a summary order, dismissed Watkins's complaint. Watkins then filed a "Request to Respond to Defendants' Response and Motion to Dismiss," which was, in fact, a response, followed by a motion to proceed *in forma pauperis* on appeal.

The court, treating Watkins's request to respond as a motion to reconsider, first noted that it had issued the order dismissing Watkins's complaint prematurely. Therefore, it rescinded that order and issued a second order dismissing Watkins's appeal. In that order, the court noted the history of Watkins's grievance and disciplinary proceedings and found that Watkins had not met his burden of establishing a claim of retaliation nor had he met his burden of proving that he had been deprived of equal protection of the law.

STANDARD OF REVIEW

A court should not grant a motion to dismiss for "failure to state a claim upon which relief can be granted" under CR 12.02(f)

unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determinations; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (internal citation omitted). Because the circuit court made its determination as a matter of law, we review it *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

ANALYSIS

With the preceding standard in mind, we review the issue raised by Watkins on appeal – whether the trial court erred in dismissing his claim of retaliation.²

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.

Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999).

Watkins alleges that the Appellees searched his cell and planted evidence and filed additional disciplinary charges in retaliation for his filing of a grievance against Bush. Prisoners have a right “to file nonfrivolous legal claims challenging their convictions or conditions of confinement.” *Id.* at 395 (citing *Lewis v. Casey*, 518 U.S. 343, 356, 116 S.Ct. 2174, 135 L. Ed. 2d 606 (1996)). Therefore, Watkins had a right to file a grievance against Bush. However, he did not have a right to file a falsified grievance.

After Watkins filed his grievance, prison officials conducted an investigation. As part of that investigation, Gilliland asked Watkins why he had lied when he put in his grievance that Bush had used the term “you niggers.”

² We note that the Appellees' brief contains an argument regarding Watkins's claim that he was not provided equal protection under the law. While Watkins made that claim before the circuit court, he did not make an equal protection argument in his brief before us; therefore, we will not address that issue.

According to Gilliland, Watkins admitted that he had lied in his grievance.

Therefore, Gilliland began disciplinary proceedings against Watkins based on that alleged admission. At the hearing regarding the charge that he had lied to an employee, Watkins pled guilty, thus admitting that he had lied regarding Bush's alleged comment.

Watkins argues before us, as he did before the circuit court, that he did not lie about Bush's comment and that he did not admit to Gilliland that he lied about that comment. However, because Watkins did not contest his guilt during the disciplinary hearing, he cannot contest it now. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (An appellant is not "permitted to feed one can of worms to the trial judge and another to the appellate court.") Therefore, Watkins's grievance against Bush, which was admittedly based on a lie, was frivolous and was not protected conduct. Because Watkins's conduct was not protected, he cannot meet the first prong of the *Blatter* test and the circuit court properly dismissed his complaint. Furthermore, since Watkins cannot meet the first prong of the *Blatter* test, we need not address the remaining two prongs.

CONCLUSION

Watkins cannot show that he was engaged in protected conduct when the Appellees took disciplinary action against him. Therefore, we affirm the circuit court's dismissal of his retaliation claim.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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