

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

MARC DAVID,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2009-A-0022
LAKE ERIE CORRECTIONAL INST.,	:	
et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 754.

Judgment: Affirmed.

Marc David, pro se, PID: A490-395, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Plaintiff-Appellant).

Lawrence A. Sutter and *Stuart D. Baker*, Sutter, O'Connell & Farchione, 3600 Erieview Tower, 1301 East Ninth Street, Cleveland, OH 44114 (For Defendants-Appellees).

MARY JANE TRAPP, P.J.

{¶1} Marc David, pro se, appeals from a judgment of the Ashtabula County Court of Common Pleas which denied his motion for summary judgment and granted summary judgment in favor of Lake Erie Correctional Institution ("LECI") and its employees regarding a civil rights action in which Mr. David alleged LECI violated his various rights and sought money damages. For the following reasons, we affirm.

{¶2} **Substantive and Procedural History**

{¶3} Mr. David is currently incarcerated at LECI, a privately operated prison. This appeal stemmed from a conduct report issued to him on February 1, 2008, by Mike Belaney, a Unit Management Supervisor at LECI. The report cited Mr. David for “unauthorized consumption of drugs or intoxicating substance,” a Rule 39 violation pursuant to Ohio Adm.Code 5120-9-06(C)(39), which prohibits “unauthorized possession, manufacture, or consumption of drugs or any intoxicating substance.” Mr. Belaney stated in the conduct report that Mr. David provided a urine sample for drug testing on January 30, 2008, and the lab report showed a positive result for Benzodiazepines. He stated, furthermore, that upon an inquiry of the facility’s medical department, he learned that Mr. David had not been prescribed any medication which would cause a false positive for the substance.

{¶4} A “Rule Violation-Inmate Right” form signed by Mr. David on February 2, 2008, indicates he was advised of his rights regarding the conduct report. The document reflects that he checked a box to indicate he waived his right to request witnesses to testify at the Rules Infraction Board hearing.

{¶5} The matter was then reviewed by a hearing officer, who found a rule violation had occurred and referred the matter to the Rules Infraction Board. Linda Obeshaw, an officer at the board, reviewed the matter and affirmed the hearing officer’s decision to have the matter heard by the board.

{¶6} The board heard the case on February 6, 2008. It considered Mr. David’s denial that he took the drug and his claim that the medications he was taking caused him to test positive, as well as the conduct report in which Mr. Belaney stated he checked with the medical department and learned Mr. David was not prescribed any

kind of medication which would cause a false positive result. After the hearing, the board found Mr. David guilty of the rule violation. It placed him in administrative segregation for 15 days, and required him to wear a yellow uniform and to attend a substance abuse program. Mr. David appealed the decision to the warden, who affirmed it.

{¶7} Mr. David then appealed to the Director of Ohio Department of Rehabilitation and Correction pursuant to Ohio Adm.Code 5120-9-08(P). The director found insufficient evidence was presented to support a guilty finding for the rule violation. Apparently, there was a confirmation test performed by the Corrections Medical Center Laboratory in Columbus subsequent to the Rules Infraction Board's decision, and that test showed a negative result. Therefore, the director reversed the board's decision "with bar to further proceedings," which expunged the finding of guilt from all relevant documentation.

{¶8} Mr. David then filed an action, pro se, pursuant to §1983, Title 42, U.S. Code alleging civil rights violations, and naming LECI and two of its employees, Sgt. Obeshaw and Mr. Belaney as defendants. Although he presented three claims in the complaint, his Claim I and Claim II alleged similar due process violations. Claim III alleged retaliation and failure to train and/or supervise by LECI. He sought damages of \$100,000 on each claim against each defendant.

{¶9} Mr. David filed a motion for summary judgment claiming he was entitled to judgment as a matter of law as his constitutional rights were violated when he was placed in administrative segregation, ordered to wear a yellow uniform and attend a substance abuse program, and lost his prison job when LECI retaliated against him for

appealing to the director. He claimed a deprivation of due process at the rules infraction hearing because he was not allowed to call a witness. LECI also filed a motion for summary judgment. It asserted the defendant's failure to exhaust administrative remedy among other grounds.

{¶10} The trial court granted LECI summary judgment and denied Mr. David summary judgment. It found none of the deprivations of rights alleged by Mr. David, i.e., placement in administrative segregation and a substance abuse program, a change in his uniform color, and loss of institutional employment, involved a constitutionally protected liberty interest or property interest. Regarding his retaliation claim, the court determined he had not alleged any facts in support of the claim. Regarding the issue of failure to exhaust administrative remedies, the court noted that there was a prior conduct report issued on December 8, 2007, and Mr. David never appealed from the Board's decision; it determined Mr. David was barred from bringing any claims regarding that incident but he had a right to file claims arising from the February 2, 2008 conduct report because he *did* exhaust his administrative remedies regarding this incident.

{¶11} Mr. David now appeals, presenting us with six assignments of error.

{¶12} “[1.] The lower court improperly granted summary judgment in favor of the appellees without applying the standard of review in granting motion for summary judgment.

{¶13} “[2] The trial court erred in dismissing plaintiff[’s] civil claims based on failure to exhaust administrative remedies. *Pasty v. Board of Regent of Florida*, 40 Ohio St.3d. 152 [sic].

{¶14} “[3.] The trial court committed a reversible error in not considering appellant’s due process and equal protection claim under both the United States and Ohio Constitution.

{¶15} “[4.] Plaintiff is entitled to summary judgment as a matter of law in Claim two (2) of Plaintiff’s action where the RIB was reckless in its determination of [the] matter before the Board.

{¶16} “[5.] Plaintiff is entitled to summary judgment as a matter of law in Claim three (3) of plaintiff’s action, where plaintiff was retaliated against for exercising his constitutional right to redress of his grievances. *Thaddeus-X [v. Blatter]*, 175 F.3d 378 (6th Cir. 1999).

{¶17} “[6.] Plaintiff[’s] cause of action against L.A.E.C.I. on the basis of failure to train/inadequate training, failure to properly supervise and creating/allowing unconstitutional practices amounted to ‘deliberate indifference to the rights’ of this appellant, who is under the supervision [of] first appellee, (L.A.E.C.I.) See *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989), citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694(1978).”

{¶18} **Section 1983 Claims**

{¶19} In his complaint, Mr. David alleged violations of his civil rights and sought damages pursuant to Section 1983, Title 42, U.S. Code. “Section 1983 provides a remedy to persons whose federal rights have been violated by governmental officials. However, ‘Section 1983 does not itself create any constitutional rights; it creates a right of action for the vindication of constitutional guarantees found elsewhere.’ Moreover, Section 1983 does not cover official conduct that violates only state law. Rather, the

statute is limited to deprivations of federal statutory and constitutional rights.” *Shirokey v. Marth* (1992), 63 Ohio St.3d 113, 116 (citations and footnote omitted).

{¶20} To establish a section 1983 claim, a plaintiff must show “(1) the deprivation of a right secured by the Constitution or laws of the United States and (2) the deprivation was caused by a person acting under color of state law.” *Simescu v. Emmet Cty. Dept. of Social Servs.* (C.A. 6, 1991), 942 F.2d 372, 374, citing *Flagg Bros., Inc. v. Brooks* (1978), 436 U.S. 149, 155.

{¶21} Turning now to the assignments of error presented by Mr. David, we summarily overrule the first assignment of error, because our review of the trial court’s decision indicates the court correctly cited and applied the proper standard for summary judgment. Likewise we overrule the second assignment of error, in which Mr. David claims the court erred in dismissing his claim on the ground of a failure to exhaust administrative remedies. This claim is curious because the trial court determined that, although he did not exhaust the administrative remedies regarding the December 8, 2007 conduct report, he *did* exhaust the administrative remedies regarding the February 2, 2008 conduct report, the *only* subject matter of the instant action.

{¶22} Regarding the remaining assignments of error, we have difficulties understanding the errors Mr. David alleges, not only because of the disconnect between the assignments of error and the arguments under them, but also because of the incoherent and incongruous claims made within the arguments. However, as we typically afford considerable leeway to pro se litigants, *Robb v. Smallwood*, 165 Ohio App.3d 385, 2005-Ohio-5863, ¶5, we will address Mr. David’s arguments to the best of

our ability. We discern three separate claims in assignments of error three through six: due process, retaliation, and failure to train.

{¶23} Due Process Claim

{¶24} Mr. David alleges due process violations in the Rules Infraction Board's proceedings on the ground that he was not permitted to call witnesses to challenge the result of the drug test.

{¶25} First, the record reflects Mr. David expressly *waived* his right to call witnesses at the Rules Infraction Board's hearing. He checked a box in a form titled "Rule Violation – Inmate Rights" indicating he waived his right to call witnesses to testify at the hearing.

{¶26} Second, even if he had not waived the right to call witnesses and was not permitted to call witnesses, his due process claim still cannot stand. This is because before an individual is afforded due process rights, he must first establish that a right or protected interest exists. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex* (1979), 442 U.S. 1. The United States Supreme Court has made it clear that there is no constitutionally protected liberty interest in remaining free from administrative segregation. *Sandin v. Conner* (1995), 515 U.S. 472, 480. The United States Supreme Court recognized that "prisoners do not shed all constitutional rights at the prison gate," but "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.* at 485. The court noted specifically that with respect to confinement in administrative segregation, there is no right to remain in general population, because the due process clause "standing alone confers no liberty interest in freedom from state

action taken ‘within the sentence imposed.’” Id. at 480 (citations omitted). The court went on to hold that a prisoner’s discipline in segregated confinement “does not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest.” Id. at 486.

{¶27} See, also, *State ex rel. Larkins v. Wilkinson* (1997), 79 Ohio St.3d 477, 479 (“[a]bsent evidence that the challenged institutional action would affect the inmate’s duration of confinement, an inmate has no liberty interest in being free of disciplinary or administrative segregation because such segregation does not impose an atypical and significant hardship on the inmate”); *Collmar v. Wilkinson* (C.A.6, 1999), 1999 U.S. App. LEXIS 22803, *8 (“there is no due process right to be housed in any particular facility, or not to be transferred to a more restrictive institution”).

{¶28} Here, Mr. David’s term of imprisonment was not altered because of the conduct report. His placement in administrative segregation for 15 days and the wearing of a uniform in a different color does not present the type of “atypical and significant hardship” to constitute a deprivation of a constitutionally protected interest triggering due process protections.

{¶29} As to the loss of his institutional employment, inmates do not possess a property right in such employment. See *Phillips v. Barnes*, 10th Dist. No. 91AP-1202, 1992 Ohio App. LEXIS 2171, *4, citing *Newsom v. Norris* (C.A. 6th, 1989), 888 F.2d 371.

{¶30} Given the well-established case law, Mr. David failed to allege the deprivation of a constitutionally protected liberty or property interest and, therefore, his due process claim fails. As he cannot establish “the deprivation of a right secured by

the Constitution or laws of the United States,” the first prong of the Section 1983 analysis, we do not reach the question of whether “the deprivation was caused by a person acting under color of state law.” *Simescu*, supra. The trial court properly granted summary judgment in favor of LECI regarding the due process claim.

{¶31} Retaliation Claim

{¶32} “[R]etaliation against a prisoner by prison officials for the prisoner’s exercise of a constitutionally protected right states a Section 1983 cause of action.” *Gumpl v. Bost* (1993), 88 Ohio App.3d 325, 328, citing *Newsom*. “Prison officials may not retaliate against an inmate for exercising a constitutionally protected right.” *Id.*, citing *Adams v. James* (C.A.11, 1986), 784 F.2d 1077, 1082. “In order to state a claim for retaliatory transfer to another security facility for the exercise of a constitutional right, a prisoner must allege a chronology of events from which retaliation may be inferred. A simple allegation of retaliation is not sufficient. Additionally, a prisoner must also set forth operative grounds that reveal the extent of the injury that resulted from the retaliation.” *Id.* at 328 (internal citations omitted).

{¶33} “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* (C.A. 6, 1999), 175 F.3d 378, 394.

{¶34} Here, Mr. David made a cursory allegation he was retaliated against following the director’s reversal of the decision of the Rules Infraction Board. However,

he offered no facts in support of this claim. Therefore, he failed to demonstrate even a prima facie retaliation claim. The trial court properly granted summary judgment regarding this claim.

{¶35} Failure to Train/Supervise

{¶36} In his sixth assignment of error, Mr. David claims LECI failed to train or supervise its employees in making conduct reports and conducting Rules Infraction Board proceedings, which caused a violation of his rights.

{¶37} “Before a supervisory official may be held individually liable in a Section 1983 action for failure to supervise, control or train an employee who engages in misconduct, the plaintiff must show that the official either encouraged, participated in, or at least implicitly authorized, approved, or knowingly acquiesced in the misconduct. Inadequate training may serve as a basis for Section 1983 liability when that failure reflects deliberate indifference to constitutional rights of those with whom the employee will come into contact. Section 1983 liability of supervisors for failure to properly supervise or control their employees may be based upon a showing that the supervisor was deliberately indifferent to a pattern of unconstitutional acts committed by the employee.” *Lewis v. Westra* (August 8, 1994), 4th Dist. No. 94CA1999, 1994 Ohio App. LEXIS 3555, *7-8.

{¶38} Mr. David alleged LECI’s management was deficient in inadequately training and/or supervising its staff in handling disciplinary proceedings. However, he did not present facts to demonstrate particular unconstitutional acts committed by the employees or to show that the alleged inadequate training rises to the level of “deliberate indifference” to his constitutional rights. Therefore, he failed to establish a

failure-to-train claim, and the trial court did not err in granting summary judgment in favor of LECI regarding this claim.

{¶39} For the foregoing reasons, we overrule all six assignments of error raised in this appeal. The judgment of the Ashtabula County Court of Commons Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.