COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1718 **Cir. Ct. No. 02CV002935**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN EX REL. ELIUD VELEZ,

PLAINTIFF-APPELLANT,

V.

JON LITSCHER, GERALD BERGE, SARGEANT JANTZEN AND RICK MICKELSON,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: ROBERT DeCHAMBEAU, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Eliud Velez appeals from an order dismissing his action brought under 42 U.S.C. § 1983. The issues relate to whether an inmate's First Amendment rights were violated by an alleged policy against the speaking of

languages other than English, and whether any of the defendants retaliated against Velez. We affirm.

¶2 Velez filed his complaint in September 2002. It alleges that Velez is an inmate at what is now called the Wisconsin Secure Program Facility, and the defendants are the secretary of corrections, the prison warden, and other prison employees. In general, its allegations concern efforts to stop Velez from speaking Spanish under certain circumstances, and it seeks declaratory, injunctive, and monetary relief. The circuit court granted the defendants' motion for summary judgment as to all claims. Summary judgment methodology is well established, and need not be repeated here. *See, e.g.,* ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). On review, we apply the same standard the circuit court is to apply. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

I. USE OF NON-ENGLISH BETWEEN INMATES

¶3 Because some of the claims must be analyzed separately, we will not attempt to describe all of the complaint's allegations at this point. The first issue relates to efforts to prohibit Velez from speaking Spanish to other inmates. The complaint alleges that on March 26, 2002, Velez was in his cell, conversing in Spanish with inmates housed in the cells around him; that defendant Sergeant Jantzen passed through the hall and stated "This is America, speak English;" that Velez replied that Jantzen cannot force him to speak any particular language; and that Jantzen then went to each of the inmates' cells and stated: "I'm giving you a verbal warning to communicate in English only," and that if he caught them speaking Spanish he would punish them.

¶4 The complaint further alleged that Velez filed a "formal inmate grievance" complaining that Jantzen was harassing the Spanish-speaking inmates and violating their First Amendment right to free speech, but the grievance was rejected, and Velez has exhausted his administrative remedies. The complaint alleged the defendants have thereby violated his First Amendment and other constitutional rights, and he requested a judgment declaring the prohibition unconstitutional; an injunction prohibiting defendants from imposing punishment for speaking Spanish between prisoners; and compensatory and punitive damages.

¶5 The defendants submitted several affidavits with their motion for summary judgment. Gary Boughton averred that he is the security director at the prison, and that the prison does not have a written policy prohibiting inmates from speaking a language other than English, but that due to security concerns, "if inmates are conversing in a language other than English, staff may instruct the inmates to cease the communication." These concerns include the potential for escape, assault, hostage-taking, riot, and gang activity. He further averred that prison records show Velez was transferred to the prison due to poor institutional adjustment, including numerous conduct reports and "significant gang involvement," and it is Boughton's opinion that allowing Velez to communicate with persons in a language other than English would pose a security concern.

¶6 Sergeant Keith Jantzen averred that his employment duties include general supervision of all correctional officers assigned to his unit, and security responsibilities. He averred that on March 26, 2002, he overheard Velez and other inmates speaking Spanish, and he directed them to speak in English, and warned the inmates that if they spoke Spanish, they would be disciplined. He averred: "Because of the security risks associated with inmates speaking in a language that correctional officers do not understand, I require inmates to speak in English."

¶7 Velez submitted an affidavit averring substantially the same material as the complaint. There are no disputes of material fact that preclude summary judgment on this issue.

¶8 On appeal, Velez argues that the "policy" against speaking Spanish in the presence of staff is a violation of his constitutional rights because it is not reasonably related to a legitimate penological interest. Velez puts the word "policy" in quotation marks, and refers to it as a "de facto policy." His point in doing so is well taken. The defendants' affidavits do not show the existence of a clearly authorized, official policy restricting foreign languages. Furthermore, their affidavits are ambiguous as to whether such a blanket policy, authorized or not, may have been stated to Velez. In other words, the affidavits fail to squarely admit or deny Velez's allegation that he has been told never to speak Spanish in the presence of staff.

¶9 Specifically, the affidavits are ambiguous in the following ways. Security Director Boughton averred that there is no written policy, but that "if inmates are conversing in a language other than English, staff may instruct the inmates to cease the communication." That averment appears to describe authority for a case-by-case response by staff, and does not describe authority for staff to issue blanket prohibitions on speaking other languages at all times in the future. In Sergeant Jantzen's affidavit, he averred that he advised the inmates that "if they spoke Spanish, they would be disciplined." This averment is ambiguous as to whether Jantzen's warning applied only to that moment, or was worded in a way that banned *future* speaking of Spanish. Jantzen then averred that "I require inmates to speak in English." Again, that averment could mean that he does so on a case-by-case basis, or it could mean that he has imposed his own policy that forbids foreign languages at all times.

¶10 The above ambiguities potentially raise a number of issues, but many of those are not before us, and we do not address them in this opinion. We do not address whether Jantzen is legally authorized to impose a blanket policy on his own authority, whether inmates can legally be subject to prison discipline for violating any such Jantzen-prohibition, or when and to whom such a prohibition might apply. The only issue before us is whether the defendants have established on summary judgment that Velez is not entitled, on constitutional grounds, to some form of relief that would allow him to speak Spanish in the presence of staff.

¶11 The defendants' brief on appeal focuses primarily on the rule against the use of non-English in *telephone* conversations. Velez clarifies in his reply brief that he is not pursuing that issue in this appeal. As to the speaking of non-English between inmates in the presence of staff, both sides agree that the applicable case law is found in ***Turner v. Safley***, 482 U.S. 78 (1987). There, the court wrote that several factors should be considered in testing the constitutionality of a prison regulation, including whether (1) there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) there are alternative means of exercising the right that remain open to prison inmates; (3) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and (4) the absence of ready alternatives to the regulation. ***Id***. at 89-90.

¶12 We conclude that a prohibition on speaking non-English in the presence of staff would be permitted under this test. The defendants' argument is based on potential security hazards or threats to institution order that may result from inmates speaking in languages that staff do not understand. The existence of these hazards is obvious, avoiding them is clearly a legitimate governmental

interest, and prohibiting non-English speaking in the presence of staff is a rational means of avoiding them. Velez's right to speak can still be exercised by an alternative means, because it is undisputed that he also speaks English. Finally, it is difficult to imagine a reasonable alternative to this regulation that would still serve the intended purposes. Although we have concluded that such a prohibition would be constitutionally permitted, we emphasize again that we have not determined whether any such blanket prohibition has, in fact, been imposed on Velez in a manner enforceable through the prison discipline system.

II. RETALIATION

¶13 The next issue is whether the defendants were entitled to summary judgment dismissing Velez's claim that they retaliated against him for filing grievances. The complaint alleged that on May 11, 2002, the secretary of corrections dismissed the inmate complaint by Velez that we referred to in our earlier description of the complaint; that on May 25, 2002, Velez was speaking with a family member by telephone and "greeted him, as normal, in Spanish." It further alleged that on May 28, 2002, Velez was given a conduct report for violating an institution policy forbidding foreign languages on the telephone, but was found not guilty because the policy states that inmates shall be warned for the first violation. It alleged that Velez filed a "formal inmate grievance" to challenge that policy, which was dismissed by the secretary of corrections in August 2002. It also alleged that Velez filed another grievance to protest what he alleged was harassment by a staff member who threatened to "yank the phone cord off the phone jack" if Velez attempted to speak Spanish, but the secretary also dismissed that complaint. It alleged that on July 16, 2002, Velez was served with another conduct report for speaking Spanish to a family member on the phone, and was found guilty. Velez alleged that the issuance of the conduct report was in

retaliation for the grievances he filed, because Velez has been confined at the prison for over two years and has previously spoken to family members over the telephone in Spanish every week, without incident.

¶14 As we stated above, Velez challenged the validity of the telephone rule earlier in this litigation, but he is no longer doing so. However, he continues to pursue his retaliation claim.

¶15 The defendants submitted affidavits that relate to the retaliation claim. Correctional Officer Dennis McClimans averred that on May 25, 2002, he monitored a telephone call placed by Velez, who "sometimes spoke in what to me heard like Spanish." McClimans averred that he issued a conduct report, but stated he did not do so as a means of retaliating against plaintiff for any exercise of his rights, and his sole purpose was to maintain institution order and security. Sergeant Thomas Schmidt averred that in July 2002 he was listening to previously recorded telephone calls between inmates and outside parties, and in one conversation he heard Velez speak Spanish "on many occasions," and that he issued a conduct report for that violation. He further averred that he did not issue the conduct report as a means of retaliating against plaintiff for any exercise of his rights, and that his sole purpose was to maintain institution order and security. These averments establish a *prima facie* defense to a claim of retaliation.

¶16 We turn next to the material opposing the motion for summary judgment. Velez submitted an affidavit of his own. He provided essentially the same chronology as described in the complaint. He stated that since his arrival at the prison more than two years earlier he had conversed in Spanish over the telephone "without no incident," until the May 25, 2002, conduct report. He averred that up to that time he and other prisoners "always spoke in Spanish …

when using the telephone." He further averred that since his arrival at the prison he had not heard of any other inmate being warned or disciplined for a violation of the policy. Thus, the essence of Velez's affidavit is that he believes the conduct reports were issued in retaliation because he and other inmates had previously been committing the same violation, without punishment or warning, until shortly after his first grievance was filed.

¶17 The defendants argue that the close relation in time between the events is not sufficient to support an inference of retaliation. They rely on a retaliation case brought under Title VII and the Americans With Disabilities Act, in which the court held that "absent other evidence of retaliation, a temporal relation is insufficient evidence to survive summary judgment." ***Contreras v. Suncast Corp.***, 237 F.3d 756, 765 (7th Cir. 2001). Velez responds with an opinion reversing a preliminary injunction that was granted in an inmate's First Amendment retaliation claim, in which the court acknowledged that "timing can properly be considered as circumstantial evidence of retaliatory intent." ***Pratt v. Rowland***, 65 F.3d 802, 808 (9th Cir. 1995). We conclude that a temporal relation in this case is not sufficient to support an inference of retaliation.

¶18 To the extent Velez also argues that his evidence shows not just a temporal sequence, but also that he was singled out for enforcement, that is not supported by his affidavit. His affidavit does not contain any assertion that, after enforcement against Velez, other inmates continued to violate the policy without being warned or punished. In other words, while his affidavit may show that enforcement of the policy began for the first time shortly after his grievance, it does not show that such enforcement was directed against only Velez. Therefore, we conclude that summary judgment was properly granted to the defendants on this issue.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.