IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHARLES E. HENNINGS,

OPINION
AND ORDER

Plaintiff,

06-C-353-C

v.

DAVE DITTER,

Defendant.

- -

Defendant David Ditter was plaintiff Charles Hennings's unit supervisor while plaintiff was incarcerated at the Columbia Correctional Institution. Defendant has moved for summary judgment on plaintiff's claim that defendant retaliated against plaintiff for exercising his constitutional right to appeal a disciplinary decision.

The motion requires resolution of three questions: (1) whether plaintiff has adduced sufficient evidence to allow a reasonable jury to find that defendant is lying about the reason plaintiff was not rehired at his former prison job when his disciplinary conviction was overturned; (2) whether defendant may be held liable for the decision not to rehire plaintiff, even though defendant did not make the final decision; and (3) whether plaintiff is barred from pursuing his claim because he cannot show that defendants' actions deterred him from

exercising his rights. I conclude that there is a genuine dispute regarding why plaintiff was not rehired. In addition, I find as a matter of law that defendant's actions sufficiently influenced the decision not to rehire plaintiff to justify the imposition of liability on defendant for that decision and that plaintiff's perseverance in pursuing his rights does not prevent him from prevailing in this lawsuit. Accordingly, defendant's motion for summary judgment will be denied.

From the parties' proposed findings of fact and the record, I find the following facts to be undisputed.

UNDISPUTED FACTS

From March 3, 2004 until November 7, 2006, plaintiff Charles Hennings was incarcerated at the Columbia Correctional Institution, which is a maximum security prison in Portage, Wisconsin. Defendant Dave Ditter is an employee of the Wisconsin Department of Corrections and the "Print Shop Industries Supervisor" at the prison; before October 1, 2005, defendant was a corrections unit supervisor.

Plaintiff began working at the prison print shop on January 2, 2005. On May 15, 2005, defendant completed an incident report, in which he stated: "During the course of an investigation, it became apparent that the above named inmates [including plaintiff] had been using [office] equipment to either copy legal briefs or envelopes (stamped) illegally. No

items were paid for." As a result of the incident report, plaintiff was placed in temporary lock up. On June 2, defendant issued a conduct report to plaintiff, repeating the allegations in the incident report and adding that plaintiff had mailed out approximately 17 pounds of legal materials over an unspecified period of time, but had paid for only 64 copies and had received "a few copies" his mother made for him.

Defendant charged plaintiff with violating Wis. Admin. Code §§ DOC 303.34 (theft), 303.36 (misuse of state property) and 303.27 (lying). After plaintiff was found guilty of these three offenses, the print shop supervisor at the time, Brian Franson, terminated plaintiff from his prison job for "cop[ying] legal material without permission."

On appeal, the warden overturned the conviction and ordered that the conduct report be expunged. As it turns out, plaintiff had not mailed 17 *pounds* of paper, but only 17 *ounces,* which would be consistent with the papers for which plaintiff had paid or received from his mother. (The reason for this mistake is not addressed in the parties' proposed findings of fact.)

Defendant met with Franson to discuss whether plaintiff should be rehired because the disciplinary decision had been overturned. Defendant told Franson that he had overheard plaintiff telling another prisoner that he "beat [defendant] on a conduct report," that defendant was "not smart enough to write a conduct report," and that he "could beat the system." (Plaintiff denies making any of those statements.) Defendant said that he did not

know whether he wanted plaintiff working for the print shop anymore because plaintiff's comments could "lead to a breakdown of authority or a serious disturbance." Franson had the final say in deciding whether to rehire plaintiff. After agreeing with defendant that plaintiff's behavior was a problem, Franson decided not to rehire him. Franson "probably" would have rehired plaintiff if it had not been for defendant's accusation.

In August 2005, plaintiff asked Franson in writing whether he was getting his job back. Franson's response was that "security was reviewing his placement." Janel Nickel, the security director, informed plaintiff in August that he had "been removed" from his prison job; she encouraged him to look for another prison job.

Plaintiff wrote a number of letters to various prison officials complaining about the decision not to rehire him. The only explanation he received, from defendant or anyone else, was that he had behaved "inappropriately" when he was released from segregation.

OPINION

The primary question in this case is the same as in so many civil rights cases: why did the defendant take a particular action against the plaintiff? This is often a central issue because of the nature of civil rights cases; usually, the defendant's reason for doing what he did determines whether his actions were illegal. Most reasons are well within the law, even if they are mistaken, foolish or mean-spirited. For example, as a general matter, nothing

prohibits an employer from firing an employee for no other reason than the employer has a personal vendetta against the employee.

There are very limited exceptions to the general rule. Through its laws, society has decided that certain reasons cut too strongly against public morality to provide a legitimate basis for firing an employee or taking other adverse actions. Thus, employers in Wisconsin may not discriminate on the basis of a person's race, sex or religion (under federal law, 42 U.S.C. §2000e) or sexual orientation, marital status or conviction record (under state law, Wis. Stat. §111.31).

When the government is the decision maker, another important limitation comes into play: a public official may not take adverse action against a citizen if the official's reason for doing so is to retaliate against the citizen for exercising a constitutional right, even if that citizen is a prisoner. Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006). That is the limitation at issue in this case. Plaintiff says that defendant refused to rehire him because he filed an appeal of his disciplinary decision. In the screening order, I did not identify which constitutional right protected plaintiff's filing of a disciplinary appeal. Defendant appears to assume that the appeal was protected by plaintiff's right of access to the courts, which extends not only to the filing of lawsuits but also to pursuing "administrative remedies that must be exhausted before a prisoner can seek relief in court." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). Another possibility is the more general First Amendment

right to petition the government for redress of grievances, which applies to prison authorities and would not be limited to issues that must be administratively exhausted before filing a lawsuit. Powers v. Snyder, 484 F.3d 929, 932 (7th Cir. 2007); Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir 1995). In any event, because the parties agree that plaintiff's filing of the appeal was constitutionally protected, I need not decide for the purpose of the motion for summary judgment which particular constitutional right was implicated.

This leaves the question whether plaintiff's appeal was the reason he was not rehired. Of course, it is impossible for the court, a jury or plaintiff to look inside defendant's mind to learn his motivations; only the defendant himself knows these for sure. This is why many civil rights cases are so difficult to prove. In the absence of an outright admission from the defendant that his motivation was illegal (an extremely rare occurrence), the plaintiff must establish illegal intent indirectly, through other pieces of evidence that would permit a reasonable finder of fact to infer that the defendant relied on an illegal factor.

How does a plaintiff accomplish this seemingly impossible task? To begin with, a plaintiff's burden is somewhat lightened by the evidentiary framework the Supreme Court has established in cases involving alleged retaliation for exercising a constitutional right. Under that framework, the plaintiff need not show that the protected conduct was the only reason for acting; it is enough to show that the exercise was a "substantial or motivating factor" in the decision. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287

(1977). In Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153-54 (W.D. Wis. 2003), in the context of a prisoner civil rights case, I interpreted the Mt. Healthy standard to mean that a plaintiff must show that the exercise of a constitutional right was "one of the reasons" for the action taken against him. If he can make this showing, the burden shifts to defendant to show that he would have made the same decision even if the plaintiff had not exercised his constitutional rights. Id.

Defendant suggests in his brief that the burden does not shift to defendants once plaintiff makes an initial showing. As explained by the court of appeals in Spiegla v. Hull, 371 F.3d 928, 941 (7th Cir. 2004), the case defendant cites for this proposition, Buttons v. Harden, 814 F.2d 382 (7th Cir. 1987), is inconsistent with Mt. Healthy and has been overruled to that extent. Also, I disagree with defendant that a court should treat prisoner retaliation claims with greater "skepticism," at least to the extent that means that courts should apply a different evidentiary standard to prisoner claims. Courts must give all claims the same scrutiny, unless otherwise directed by Congress. Crawford-El v. Britton, 523 U.S. 574, 597 (1998); Hasan v. United States Dept. of Labor, 400 F.3d 1001, 1006 (7th Cir. 2005).

Of course, this does not answer the question posed regarding a plaintiff's burden, but only shifts it: how must a plaintiff show that his protected conducted was one of the reasons for the adverse treatment? I am not aware of any case in which the court of appeals has

discussed this issue in detail in the context of a prisoner suit, but generally the court has identified two paths of proof for a case involving alleged retaliation. He may present evidence that he was qualified for the job and that other similarly situated employees who did not engage in protected conduct received better treatment. Scaife v. Cook County, 446 F.3d 735, 739 (7th Cir 2006). Or he may point to circumstantial evidence of a retaliatory motive, such as suspicious timing or statements by the defendant suggesting that he was bothered by the protected conduct. E.g., Mullin v. Gettinger, 450 F.3d 280, 285 (7th Cir. 2006); Culver v. Gorman & Co., 416 F.3d 540, 545-50 (7th Cir. 2005). Evidence of pretext (meaning that the defendant's stated reason is not the true one) is relevant for either path, though not necessarily sufficient by itself to prove a case. E.g., Massey v. Johnson, 457 F.3d 711, 716-17 (7th Cir. 2006); Hasan, 400 F.3d at 1004. (Although some of these cases were decided under Title VII rather than the Constitution, the court of appeals has held that the evidentiary standards are the same for both. Spiegla, 371 F.3d at 943.)

For the purpose of defendant's motion for summary judgment, I need not decide whether plaintiff satisfies all the requirements of one of these methods of proof because in his brief, defendant proceeds directly to the issue of pretext. Accordingly, I focus solely on that question. Sublett v. John Wiley & Sons, Inc., 463 F.3d 731, 736 (7th Cir. 2006) ("As a general matter, if the moving party does not raise an issue in support of its motion for summary judgment, the nonmoving party is not required to present evidence on that point,

and the district court should not rely on that ground in its decision.").

Unfortunately for defendant, the issue he chose to emphasize is the one least amenable to resolution on summary judgment. Defendant advances only one reason for concluding that plaintiff should not have been rehired: he made a number of "inappropriate" statements after he returned from segregation. (Defendant proposes facts relating to other alleged short comings that plaintiff had as an employee, but I have disregarded these because defendant does not suggest that any of those alleged deficiencies had any effect on the decision whether to rehire plaintiff.) Plaintiff denies making any of those statements. Thus, there is a genuine dispute whether plaintiff was not rehired because he made inappropriate statements.

Defendant goes to great lengths to explain why plaintiff's alleged statements were a legitimate basis for refusing to rehire him. But this line of argument would be important only if plaintiff were taking the position that the statements defendant attributes to him were constitutionally protected. Plaintiff not only denies making the derogatory statements, he expressly disavows any argument in the alternative that, even if he did make them, defendant would not have been justified in refusing to rehire him. Thus, it is unnecessary to decide whether the First Amendment would protect a prisoner's statements that call a correctional officer's wisdom into question.

Both parties devote significant space in their briefs to defending their position

regarding whether plaintiff made derogatory statements about defendant. But these are arguments that should be reserved for the jury. At this stage, it does not matter which party has the most "convincing" story, Waldridge v. American Hoechst Corp., 24 F.3d 918, 921 (7th Cir. 1994), because the question of which party is telling the truth is not one that I may resolve in the context of a motion for summary judgment. Washington v. Haupert, 481 F.3d 543, 550 (7th Cir. 2007). Rather, in deciding defendant's motion, I must accept plaintiff's version of the facts so long as they are supported by admissible evidence. Hemsworth v. Quotesmith.Com, Inc., 476 F.3d 487, 489 (7th Cir. 2007).

Defendant raises the argument in his reply brief that plaintiff's evidence is not admissible because it consists of a "self-serving" affidavit. I agree with defendant that plaintiff's affidavit is self-serving, but what else could it be? Did defendant expect plaintiff to testify against his own interests? If I were to adopt defendant's argument, it would require me to strike the affidavit of any party that testified on his own behalf. This would include defendant's affidavit, which, not surprisingly, is equally self-serving. Although the court of appeals has made stray remarks about the inadmissibility of "self-serving" affidavits, the court has explained repeatedly in recent years that it not the self-serving nature of an affidavit that makes it inadmissible, e.g., Wilson v. McRae's, Inc., 413 F.3d 692, 694 (7th Cir. 2005); Dalton v. Battaglia, 402 F.3d 729, 735 (7th Cir. 2005), it is the party's failure to aver specific facts or show that the affidavit is made on the basis of personal knowledge.

Payne v. Pauley, 337 F.3d 767, 773 (7th Cir. 2003).

In this case, there can be no question that plaintiff has personal knowledge of his own statements (or the lack of them) and plaintiff does not have to be more specific than to deny that he made any of the statements defendant attributes to him. Thus, defendant is not entitled to summary judgment on the ground that plaintiff failed to raise a genuine dispute whether the stated reason for refusing to rehire plaintiff is a pretext.

Defendant makes two other points in support of his motion. First, he says that even if defendant *did* intend to retaliate against plaintiff for filing an appeal, defendant cannot be held liable because Franson had the final say in making the rehiring decision. Tellingly, defendant does not cite any authority for this argument. Of course, the language of 42 U.S.C. § 1983 (the statute that authorizes civil lawsuits for constitutional violations) does not limit individual liability to "final decision makers." Rather, it imposes liability on anyone acting under color of law who "subjects or causes to be subjected" a person to a constitutional violation. The court of appeals has interpreted this language as requiring that a defendant be "personally involved" in the constitutional deprivation at issue, Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003), which defendant undoubtedly was.

It is undisputed that defendant's report to Franson played a large part in the decision not to rehire him. In fact, neither defendant nor Franson identify any other reason for the

decision. (Again, defendant proposes facts about other alleged shortcomings of plaintiff, but he proposes no fact suggesting that any of those perceived deficiencies had an effect on Franson's decision.) Thus, regardless whether defendant made the final decision, he brought it about through his accusation. That is enough. A defendant may not escape liability for unconstitutional conduct that he caused by professing that he is only one cog in the machine. Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 187 (1961); see also Jones v. City of Chicago, 856 F.2d 985, 993-94 (7th Cir 1988) (police officers who gave knowingly false reports to prosecutor could be held liable for charging decision that relied on those reports). A subordinate who urges a higher ranking official to follow a particular course of conduct cannot later protest that he had no involvement in the decision that followed or that he could not have foreseen it. Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004) (rejecting view that defendants could not be held liable because they only made recommendations to a higher authority).

Also, following defendant's logic would mean that many victims of unconstitutional conduct would have no recourse. For example, in this case, I dismissed Franson in the screening order because plaintiff did not allege that Franson acted with a retaliatory motive but apparently relied in good faith on defendant's accusation. Under defendant's view, §1983 provides no remedy any time a constitutional violation is approved by an innocent

party, even if the subordinate's unconstitutional motive is the cause of the violation. Such a result would only encourage public officials to diffuse responsibility to prevent accountability for unlawful conduct. That cannot be and is not the law.

Finally, defendant suggests (argues would be too strong a word) in two sentences that plaintiff cannot prevail on his claim because nothing defendant did actually deterred plaintiff from exercising his constitutional rights; he continued to file grievances and later this lawsuit. Defendant cites Power v. Summers, 226 F.3d 815, 820-21 (7th Cir. 2000), in which the court held that a plaintiff may not sustain a claim for retaliation under the Constitution unless "the action of which the [plaintiff] is complaining [is] sufficiently 'adverse' to deter the exercise of those rights."

It should be obvious that the standard in Power does not bar relief to a plaintiff, simply because he refused to be deterred. Otherwise, a claim involving retaliation for exercising the right of access to the courts would be impossible to win. A person who brought a lawsuit would by definition show that he could not prevail on his claim because the lawsuit itself would be conclusive evidence that he was not deterred. At the same time, however, a victim of retaliation who did not file a lawsuit would be without a legal remedy as well. Thus, the question is not whether the *plaintiff* was actually deterred, but whether "the harassment is so trivial that a *person of ordinary firmness* would not be deterred from" exercising his constitutional rights. Pieczynski v. Duffy, 875 F.2d 1331, 1333 (7th Cir.

1989) (emphasis added). The court of appeals has consistently recognized the loss of a job as meeting this standard. E.g., Massey, 457 F.3d at 716 (citing cases).

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Dave Ditter is DENIED.

Entered this 7th day of June, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge