IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ROBERT HARRY KUNFERMAN,

Plaintiff,

OPINION and ORDER

09-cv-662-bbc

v.

ERNESTO R. MONGE,

Defendant.

- -

In this civil action brought under 42 U.S.C. § 1983, plaintiff Robert Harry Kunferman is proceeding pro se on a claim that defendant Ernesto R. Monge retaliated against him in violation of the First Amendment by filing or contributing to a disorderly conduct charge against him. Now before the court is defendant's motion for summary judgment. Dkt. #64.

After reviewing the parties' proposed findings of facts and arguments, I conclude that defendant is entitled to summary judgment because he was not acting under color of law when he filed a statement with the police and even if he was, plaintiff has adduced no evidence that defendant filed the statement to retaliate against plaintiff for engaging in protected speech.

From the parties' proposed findings of fact and the record, I find the following to be material and undisputed. I note that although plaintiff proposed facts and disputed several of defendant's proposed facts, many of plaintiff's proposed facts and disputes are based on speculation, are not supported by evidence or are simply legal conclusions that are insufficient to create a genuine factual dispute. Additionally, several of plaintiff's proposed facts and the statements in his affidavit relate to defendants and claims that were dismissed previously from this case. I have not considered those facts nor plaintiff's arguments regarding previously dismissed defendants and claims. Where there are genuine factual disputes, I note them below.

UNDISPUTED FACTS

A. June 11, 2008 Incident

In 2008, defendant Ernesto Monge worked as a senior student services coordinator in the Office of Student Financial Services at the University of Wisconsin–Madison, where plaintiff Robert Kunferman was a student. In this position, defendant was assigned to assist with specific student applications and also to assist student workers in the office. Susan Fischer was the director of the office and defendant's direct supervisor. She had instructed defendant and other staff at the office to answer phone calls, listen to the callers' questions and complaints, but to end such calls if the caller's language became abusive or obscene or

did not raise the subject of financial aid.

Defendant had never reviewed a financial aid application of plaintiff's. However, defendant was aware of plaintiff because sometime before June 11, 2008, another employee in the financial services office showed defendant some internet postings about political and social issues that plaintiff had written between 2007 and 2008.

On June 11, 2008, plaintiff called the Student Financial Services office and asked various student workers questions about the financial aid process. He thought that the students were unable to answer his questions adequately and asked to speak to a supervisor. Eventually, plaintiff's call was transferred to defendant, who was assigned on that day to assist student workers with telephone calls. Plaintiff asked defendant his name and title, the director's name and title and the name of the director's supervisor. Defendant gave him that information and told plaintiff that he was a supervisor. (Defendant says that plaintiff did not ask any questions about financial aid, but instead made derogatory comments about each person and position, saying that "it was all a waste of taxpayer's money." Plaintiff denies making any derogatory remarks and says that he asked defendant questions about applying for financial aid but that defendant refused to answer any financial aid questions.) Plaintiff asked how to file a complaint and defendant explained that plaintiff needed to write a letter to the director of the financial services office. (Defendant says that plaintiff did not say who or what would be the subject of his complaint, but plaintiff says that he asked defendant who

he should talk to in order to file a complaint about defendant.) Eventually, defendant told plaintiff that he had read some of his writings on the internet, that he did not have to listen to plaintiff any longer and that the call was over. Defendant hung up the phone. Defendant reported the incident to the director, Susan Fischer. He did not contact the UW-Madison police or any other police department to file a complaint against plaintiff.

Also on June 11, 2008, the UW-Madison Police Department received a complaint regarding a harassing phone call that Joanne Berg, the vice provost responsible for overseeing the financial services office, had received that day. Detective Cheryl Radzinski of the UW-Madison police department determined that Berg's phone call was from plaintiff. On June 12, 2008, Radzinski called Director Fischer regarding Berg's complaint, and Fischer contacted defendant and another staff member in the financial services office to participate in a conference call regarding the incident. During the conference call, defendant told the detective about his June 11 phone conversation with plaintiff, including that plaintiff had wanted to know who was in charge, how to file a complaint and that he thought the system was a waste of taxpayer money. Defendant did not tell the detective about plaintiff's internet postings and he did not tell the detective that plaintiff was a racist or disruptive.

On July 18, 2008, detective Radzinksi issued a disorderly conduct citation to plaintiff for the phone call he made to Joanne Berg on June 11. Dkt. #89-15. This charge was later dismissed by the Dane County District Attorney's office for lack of prosecutorial merit.

OPINION

In his second amended complaint, plaintiff alleged that defendant refused to help him with financial aid because he disapproved of plaintiff's political writings. Plaintiff alleged that after he threatened to file a complaint against defendant, defendant submitted false statements to the police that supported a disorderly conduct charge. Plaintiff was granted leave to proceed on a claim that defendant Monge retaliated against him in violation of the First Amendment by filing or contributing to a false disorderly conduct citation against him. Plaintiff's allegations permitted an inference that defendant's false statements were motivated by plaintiff's political writings and threatened complaint and that the disorderly conduct citation would likely cause a person of ordinary firmness to limit future speech.

Defendant contends that he is entitled to summary judgment because (1) he was not acting under color of law when he participated in the police investigation of plaintiff; (2) assuming that plaintiff was engaged in activities protected by the First Amendment, plaintiff's activities did not cause defendant to file a statement with the police; (3) defendant's actions would not deter a person from exercising his First Amendment rights in the future; and (4) defendant is entitled to qualified immunity.

A. Color of Law

A plaintiff pursuing a claim under 42 U.S.C. § 1983 must show that an individual,

acting under color of state law, deprived him of a right secured by the Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988); Estate of Sims ex. rel. Sims v. County of Bureau, 506 F.3d 509, 514 (7th Cir. 2007). "Not every action by a state official or employee is to be deemed as occurring 'under color' of state law." Wilson v. Price, 624 F.3d 389, 392 (7th Cir. 2010) (citation omitted). An "[a]ction is taken under color of state law when it is made possible only because the wrongdoer is clothed with the authority of state law." Hughes v. Meyer, 880 F.2d 967, 971 (7th Cir. 1989) (citation and internal quotation marks omitted). Additionally, "[a] state officer's conduct does not constitute acting under color of state law unless it is 'related in some way to the performance of the duties of the state office.'" Wilson, 624 F.3d at 392 (citation omitted).

Plaintiff contends that defendant was acting under color of state law when he made statements to the UW-Madison police about the June 11, 2008 phone conversation with plaintiff because defendant was at work, as a state employee, when he spoke with a UW-Madison police officer. However, plaintiff does not explain how plaintiff's statements to the police related to his position as a senior student services coordinator with the UW-Madison.

In Hughes, 880 F.2d at 969, a game warden employed by the Wisconsin Department of Natural Resources provided local sheriffs information regarding the plaintiffs' alleged attempt to falsely imprison him while he was investigating reports of illegal hunting, thereby causing the plaintiffs' arrest. The plaintiffs brought a § 1983 action against the warden and

the sheriffs, alleging that the defendants had violated their rights under the Fourth Amendment by arresting them without probable cause. The court of appeals found that the game warden's provision of information about the alleged criminal act was not an act taken under color of state law. Id. at 972. Although the warden had the authority to enforce Wisconsin's gaming laws, "his authority presumably does not extend to the general enforcement of state law; he is a game warden, charged only with enforcing the state's game laws, not the full panoply of criminal laws such as those against false imprisonment." Id.

Like the game warden in Hughes, defendant took actions that cannot be classified as taken by virtue of the authority granted to him by his employment. Defendant's position as a senior student services coordinator did not provide him with greater authority than an ordinary citizen to speak to the police regarding an ongoing investigation. Defendant did not even file the complaint against plaintiff that initiated the police investigation, he merely responded to questions from the police that arose during an investigation prompted by someone else. His conversation with the police did not relate to the performance of his duties as a financial aid officer; thus, his statements to the police were not made possible "only because [he was] clothed with the authority of state law." West, 487 U.S. at 49. See also Wilson, 624 F.3d at 394 (holding that alderman's actions during altercation were not under color of state law because plaintiffs "failed to allege facts demonstrating that [defendant's] conduct was related to the performance of his duties as an alderman");

Honaker v. Smith, 256 F.3d 477, 485-86 (7th Cir. 2001) (holding that any action taken by mayor to cause fire to house was not done under color of state law).

B. Evidence of Retaliation

Even if defendant was acting under the color of state law when he made statements to the police, defendant would be entitled to summary judgment on plaintiff's retaliation claim because plaintiff has not shown that his speech caused or motivated defendant to give a statement to the police.

To make a prima facie case for First Amendment retaliation, plaintiff must show that he engaged in activity protected by the First Amendment and that he suffered a deprivation that would likely deter First Amendment activity in the future. Bridges v. Gilbert, 557 F.3d 541, 553 (7th Cir. 2009). Also, plaintiff must show that his protected conduct caused defendant's adverse treatment of him. The law is not clear whether plaintiff must show that his protected conduct was a "but for" cause of defendant's retaliatory action, or whether it is sufficient to show that it was "at least a motivating factor." In several recent cases, the court of appeals has stated that a "but for" causation standard applies to retaliation cases brought under the First Amendment, relying on Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343, 2351 (2009), in which the Supreme Court applied that standard to claims under the Age Discrimination in Employment Act. E.g., Gunville v. Walker, 583 F.3d 979,

983-84 (7th Cir. 2009) (speech must be "but for" cause of retaliation); Fairley v. Andrews, 578 F.3d 518, 525-26 (7th Cir. 2009) ("Some decisions . . . say that a plaintiff just needs to show that his speech was a motivating factor in defendant's decision. These decisions do not survive Gross, which holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law."). However, in other cases, the court continues to apply the "substantial or motivating factor" standard, without acknowledging cases that apply Gross. E.g., Swearnigen-El v. Cook County Sheriff's Dept., 602 F.3d 852, 861 (7th Cir. 2010); Bivens v. Trent, 591 F.3d 555, 559 (7th Cir. 2010).

It is unnecessary to resolve the conflict in this opinion because plaintiff has not adduced evidence sufficient to satisfy either standard. Plaintiff contends that his internet postings and statements to defendant that he was going to file a complaint were protected speech that caused defendant to file a statement with the UW-Madison police, leading ultimately to a disorderly conduct charge against plaintiff. However, plaintiff has adduced no evidence implying that his internet postings and intent to file a complaint were the "but for" cause of plaintiff's conversation with the police and there is no reason to believe that defendant was "motivated" to respond to the police's questions because he had read plaintiff's internet postings or because plaintiff told defendant that he was going to file a complaint about him. Rather, the evidence in the record establishes that defendant did not

talk to the police until he was contacted regarding the investigation of plaintiff's phone call to Joanne Berg. Defendant did not do anything to initiate the police investigation of plaintiff and did nothing more than respond to questions by the investigating officer. Plaintiff has not adduced any evidence of a connection between plaintiff's political writings or his desire to file a complaint against defendant and defendant's statement to the UW-Madison police.

Plaintiff contends that even if defendant did not contact the police on his own, a jury could infer that defendant falsified his statements to the police and made plaintiff's phone conversation sound worse than it actually was. However, the only specific part of defendant's statement to the police that plaintiff has identified as being false is defendant's statement that plaintiff make derogatory comments about the university administration and said "all this was a waste of taxpayer money." Even if a jury concluded that these statements were false and that defendant made them in response to plaintiff's protected speech, no reasonable jury could infer these specific statements caused "an adverse action that would likely deter First Amendment activity in the future." Bridges, 557 F.3d at 553. The connection between defendant's statements to the police and the disorderly conduct charge is simply too attenuated. Defendant did not contact the police himself, and Joanne Berg, not defendant, is listed as the victim to plaintiff's disorderly conduct offense. In sum, there is no evidence that defendant's allegedly false statements to the police caused the police to

issue a disorderly conduct charge against plaintiff. Therefore, there is no evidence that defendant retaliated against plaintiff in violation of plaintiff's First Amendment rights.

Because I conclude that defendant is entitled to summary judgment both because he was not acting under the color of state law when he gave a statement to the police and because plaintiff has not made a prima facie case of retaliation, it is not necessary to consider defendant's qualified immunity defense.

ORDER

IT IS ORDERED that defendant Ernesto Monge's motion for summary judgment, dkt. #64, is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 11th day of October, 2011.

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