

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000605-MR

WALTER L. THOMAS

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 03-CI-00280

JOHN MOTLEY, WARDEN

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

HENRY, JUDGE: Walter L. Thomas appeals from an order of the Morgan Circuit Court entered on January 14, 2004, which dismissed his petition for declaration of rights challenging two prison disciplinary actions filed pursuant to KRS¹ 418.04, CR² 57, and 42 U.S.C. § 1983. We believe the action was properly dismissed because some of the claims were barred by the statute of limitations and the others failed to state a claim for relief; thus, we affirm.

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

In August 2002, Thomas was an inmate at the Eastern Kentucky Correctional Complex authorized to work as a legal aide for inmates at the institution. On August 2, 2002, following an investigation, Thomas was cited for violation of Corrections Policy and Procedure (CPP) 15.2, Category III (Major Violations) No. 13, charging another inmate for any services, associated with his receipt of a \$100.00 money order from an acquaintance of another inmate. In an interview of Thomas about the money order, he admitted having received the money for assisting the other inmate in a disciplinary proceeding. At Thomas's disciplinary hearing held on August 12, 2002, he effectively pled guilty to the charge. The adjustment officer found Thomas guilty based on his admissions and a copy of the money order, and imposed a penalty of 15 days in disciplinary segregation. In an extensive document appealing the disciplinary action to the prison warden, Thomas argued the evidence was insufficient because the money order was sent by a person different from that alleged by the charging officers, and the action was based racial bias and retaliation. On August 29, 2002, the prison warden rejected the appeal by concurring with the decision of the Adjustment officer. On August 12, 2002, prior to his placement into the segregation unit, Corrections officers conducted an inventory of Thomas's possessions in his cell. The officers discovered and confiscated a large number of canteen

items (148 according to Thomas). Thomas produced receipts for many of the items but several were not included in the records from the canteen. On August 26, 2002, Thomas was charged with violating CPP 15.2, Category IV No. 26, possession of unaccountable canteen items. During the hearing held on September 9, 2002, Thomas stated that he received some of the items from other inmates in return for assistance as a legal aide. The Adjustment Officer found Thomas guilty and imposed a penalty of 30 days in disciplinary segregation. On September 25, 2002, the prison warden concurred with the decision of the Adjustment Officer.

Between August 20, 2002 and September 10, 2002, Thomas filed two grievances claiming the prison officials brought the charges for violation of the prison regulation on possession of canteen items as an act of retaliation for filing the initial grievance. Both on review through informal resolution and by the Commissioner of the Department of Corrections, Thomas's claim of retaliation was rejected based on the evidence of the violation. In addition, in August and September, 2002, Thomas filed grievances alleging cruel and unusual punishment in connection with the failure of prison authorities to allow him to take a shower on several days and the presence of blood in his cell while in the segregation unit. These grievances were denied because prison physicians had recommended that Thomas

receive complete bed rest for a sprained ankle and the cell had been cleaned prior to his placement in the cell.

On September 3, 2003, Thomas filed a petition for declaration of rights pursuant to KRS 418 and 42 U.S.C. § 1983.³ Thomas alleged that the actions of the prison officials in connection with the two disciplinary proceedings violated his right to due process under the 14th Amendment of the United States Constitution because of a lack of evidence to support the findings of violations of the prison regulations, because the Adjustment officer was biased, and because the Adjustment Officer's written findings were inadequate.⁴ Thomas also claimed that the disciplinary charges for improper possession of canteen items was brought in retaliation for filing grievances and that he was subjected to cruel and unusual punishment in connection with the solitary confinement.

On January 5, 2004, the Department of Corrections on behalf of the prison officials, filed a response to the petition for declaration of rights and motion to dismiss the action. On January 14, 2004, the circuit court entered an order granting

³ Thomas filed the action in Franklin Circuit Court but in December 2003, the Franklin Circuit Court granted the appellee's motion to transfer the case to Morgan Circuit Court as the more appropriate venue given the fact that Eastern Kentucky's Correctional Complex is located in Morgan County.

⁴ Thomas also cited the Sixth Amendment but that provision addresses criminal prosecutions and the Supreme Court has recognized that the full panoply of procedural rights associated with criminal prosecutions do not apply to prison disciplinary actions. Wolff v. McDonnell, 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974).

the respondent's motion to dismiss on both procedural and substantive grounds. The court held that several of the claims were barred by a one-year statute of limitations under both KRS 413.140(1)(a) and KRS 413.140(1)(k), and that both disciplinary proceedings complied with the procedural due process requirements. The court also found that Thomas failed to present evidence of retaliation, racial discrimination, or cruel and unusual punishment. On January 28, 2004, Thomas filed a motion to alter, amend or vacate the judgment pursuant to CR 52.02 and 59.05, which the trial court denied. This appeal followed.

Thomas utilized the state declaration of rights procedural mechanism to raise constitutional challenges under the federal statute 42 U.S.C. § 1983.⁵ Thomas's primary claims concern the two prison disciplinary actions. Thomas alleges that the two disciplinary proceedings violated his constitutional right to due process in several procedural aspects including bias on the part of the Adjustment Officer and inadequate written findings of fact, as well as substantive aspects because of a lack of sufficient evidence to support the disciplinary decision.

⁵ Thomas mentions Section 14 of the Kentucky Constitution in conjunction with his federal claim to violation of his rights to access to the courts. This provision was not included in his declaration of rights petition and is raised for the first time in his brief, and therefore is untimely.

Generally, the United States Supreme Court has recognized that the 14th Amendment Due Process Clause protects an inmate's state-created liberty interest. See Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 460, 109 S.Ct. 1904, 1908, 104 L.Ed. 2d 506 (1989). In Wolff v. McDonnell, 418 U.S. 539, 563-567, 94 S.Ct. 2963, 2978-82, 41 L.Ed.2d 935 (1974), the Supreme Court held that while prison disciplinary actions are not subject to the full range of procedural safeguards, inmates are entitled to certain minimum requirements of procedural due process including advance written notice of the disciplinary charges, a written statement by the fact-finders of the evidence relied upon and the reasons for the disciplinary action; the opportunity to call witnesses and present documentary evidence consistent with institutional safety and correctional goals; and an impartial decision-making tribunal. See also Hewitt v. Helms, 459 U.S. 460, 466 n.3, 103 S.Ct. 864, 868 n.3, 41 L.Ed.2d 935 (1983). While Wolff outlines certain minimal procedures required by due process, in Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 454, 105 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985), the Supreme Court set out the substantive quantum of evidence applicable to prison disciplinary actions in holding the decision to impose sanctions for violations of prison rules must be supported by merely "some evidence in the record."

Before considering the general procedural and substantive evidentiary requirements, however, Thomas's claims fail because the two disciplinary actions did not affect a due process interest and the first disciplinary action was not challenged in a timely manner. The circuit court held that the claims concerning the first disciplinary proceeding were barred by the one year period of limitations in KRS 413.140(1)(k), which applies to actions "arising out of a detention facility disciplinary proceeding, whether based upon state or federal law." KRS 413.140(7) further provides that with respect to actions referred to in subsection (k), "the cause of action shall be deemed to accrue on the date an appeal of the disciplinary proceeding is decided by the institutional warden." The prison warden officially recorded his decision concurring with the decision of the Adjustment Committee Officer finding Thomas guilty of violating the rule prohibiting charging inmates for services in the first disciplinary proceeding on August 29, 2002. Thomas's petition for declaration of rights was initially received and filed by the Franklin Circuit Court Clerk on September 3, 2003. Thus, it fell outside the one-year statutory time period and was untimely.⁶

⁶ KRS 413.140 was amended by the 2002 General Assembly by adding subsections (1)(k) and (7) to specifically address actions arising out of prison disciplinary proceedings and became effective on July 15, 2002. See Ky. Acts Ch. 11, § 3. We note that the Kentucky Supreme Court, in Million v. Raymer, 139 S.W.3d 914 (Ky. 2004), held that declaration of rights actions involving

Thomas attempts to avoid the statutory time-bar by application of the so-called "mailbox rule". He contends that he placed his petition for declaration of rights in the prison mail system on August 28, 2002, one day before the one-year time limitation expired. The prison mailbox rule is a judicially created procedural rule which provides that for a prisoner proceeding pro se, the effective filing date is considered the day the prisoner delivers the applicable legal document into the hands of the prison officials for mailing. See Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988); Sulek v. Toney County, Mo., 316 F.3d 813 (8th Cir. 2003), Hall v. Scott, 292 F.3d 1264, 1266 n.1 (10th Cir. 2002); Noble v. Kelly, 246 F.3d 93, 97 (2d Cir. 2001); Fed. R. App. P. 4 (c) (involving notices of appeal). The prison mailbox rule is a rule developed and applied in federal courts, but because it is a procedural rather than a substantive rule of law, is not binding on state courts. Insyxiengmay v. Morgan, 403 F.3d 657, 666-67 (9th Cir. 2005), (listing state courts which have adopted or rejected

prison disciplinary actions grounded in 14th Amendment due process complaints were governed by a one-year statutory limitations period under KRS 413.140. The Court's decision was not based on subdivisions (1)(k) and (7) because Raymer's claims arose out of disciplinary proceedings that occurred in 1999 prior to the effective date of the 2002 amendments. The Court stated that due process claims analogous to federal constitutional claims made under 42 U.S.C. § 1983 were governed by the state one-year limitations period under KRS 413.140 for personal-injury actions and such claims accrued upon affirmance of the Adjustment Committee's decision by the prison Warden. Consequently, Thomas' claims alleging procedural due process violations in the first disciplinary proceeding were barred under either KRS 413.140(1)(k) or Million v. Raymer.

federal mailbox rule); see, e.g., Sykes v. State, 757 So.2d 997, 1000 (Miss. 2000) (stating whether to adopt prison mailbox rule in state proceedings is matter of state procedural law); Setala v. J. C. Penny Co., 97 Haw. 484, 40 P.3d 886 (2002); Mayer v. State, 184 Ariz. 242, 284, 908 P.2d 56, 58 (1995); Houston v. Lack, (based on interpretation of federal appellate rules of procedure rather than federal constitution so it is not binding on Arizona); Hamel v. State, 338 Ark. 769, 1 S.W.3d 434 (1999) (declining to adopt federal prison mailbox rule for state proceedings). Consequently, Taylor's reliance on federal case law, especially Higginbottom v. McManus, 840 F.Supp. 454 (W.D. Ky. 1994)(applying prison mail box rule to federal civil rights complaint), is misplaced. But see Jackson v. Nicoletti, 875 F. Supp. 1107 (E.D. Pa. 1994) (disagreeing with Higginbottom and deciding not to apply the prison mailbox rule to statute of limitations issue and filing of 42 U.S.C. § 1983 complaint). CR 3 states that a civil action is "commenced by the filing of a complaint with the court" and issuance of a summons. CR 5.05 clarifies the phrase "filing . . . with the court" by specifically stating "[t]he filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court" The prison mailbox rule deviates from these explicit provisions by providing an exception for a class of litigants, i.e., pro-se

prisoners, to allow compliance by handing legal papers to prison officials. There is no published Kentucky case law adopting the prison mailbox rule for state proceedings and the cases cited by Thomas do not require application of that rule under the circumstances in this case. The civil rules should be amended, if at all, by the Kentucky Supreme Court. As a result, we decline to apply the prison mailbox rule or to extend to Thomas the benefits of that rule.

In addition to the time bar of the first disciplinary proceeding, Thomas's claims of procedural due process violations associated with both disciplinary proceedings are subject to dismissal because they do not impact constitutionally protected rights. Recently in Marksberry v. Chandler, 126 S.W. 3d 747 (Ky.App. 2004), this court explained the factors necessary to raise a due process cause of action associated with prison disciplinary actions. Under the United States Supreme Court decision in Sandin v. Conner, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), in order to establish a "liberty" interest protected by the due process clause, an inmate must show both state statutes or prison regulations restricting the discretion of prison officials, and sanctions that impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." See Marksberry, 126 S.W.3d at 750 (quoting Sandin, 515 U.S. at 484, 115 S.Ct. at 2300). Factors

relevant to determining whether a particular disciplinary penalty constitutes atypical and significant hardship include: “(1) the effect of the segregation on the length of prison confinement under the original sentence; (2) the extent to which the conditions of the segregation differ from other routine prison conditions; and (3) the duration of the segregation imposed.” Id., citing Sandin, 515 U.S. at 486-87, 115 S.Ct. at 2301-02. In Marksberry, the court held that 15 days disciplinary segregation with no loss of good time credit did not constitute atypical and significant hardship and cited to several cases finding periods significantly longer than 15 days, including a 30 day period in Sandin, did not rise to the level of atypical and significant hardship. Id. at 750-51 and footnote 16.

In the current case, Thomas was assessed penalties of disciplinary segregation for 15 days for charging other inmates for services and 30 days for possession of unaccountable canteen items, in the first and second disciplinary proceedings, respectively. The penalties did not include a loss of good time service credit or otherwise affect the length of Thomas’s confinement under the original sentence. The conditions of disciplinary segregation are not substantially more restrictive than other routine prison conditions. Id. at 750-51. The duration of the segregation was not extraordinary. Applying the

analysis outlined in Marksberry and Sandin and weighing the conditions and duration of the segregation, we believe that Taylor has failed to show that he suffered atypical and significant hardship resulting from these two disciplinary actions sufficient to create a protected constitutional due process liberty interest.

In addition to his procedural due process claims, Thomas asserts constitutional violations based on alleged retaliation by the prison authorities. Thomas claimed that the first disciplinary charge was in retaliation for a statement that he made to the investigating corrections officers that they were merely "pulling his chain" and that if they did not have clear evidence that he was charging other inmates for services, he "would take everybody down" with him. Thomas suggests that the first disciplinary charge was false and merely an attempt to punish him for challenging the officers' authority. Similarly, Thomas alleged that the second disciplinary charge for improper possession of canteen items was in retaliation for his filing of administrative grievances complaining about the confiscation of his items as part of the investigation of the disciplinary charge.

The Sixth Circuit Court of Appeals has noted that there are two categories of prison retaliation claims --- general claims of retaliation and claims that allege retaliation

against the inmate for the exercise of specific constitutional rights. See Herron v. Harrison, 203 F.3d 410, 414 (6th Cir. 2000). General claims of retaliation are brought under the concept of substantive due process arising under the Due Process Clause of the Fourteenth Amendment. Id. To state a successful claim of general retaliation under substantive due process, a prisoner must establish an egregious abuse of governmental power “or behavior that shocks the conscience”. Id.; Leslie v. Doyle, 125 F.3d 1132, 1136-37 (7th Cir. 1997). This is a very demanding standard that prisoners have rarely been able to support. See Herron, 203 F. 3d at 414-15 (noting two rare examples where prison officials pointed gun at inmate while voicing death threats); Doyle, supra. Moreover, a general claim of retaliation under substantive due process is not available where the claim implicates more specific provisions of the Constitution. As the Supreme Court stated, “[w]here a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of substantive due process must be the guide for analyzing these claims’.” Albright v. Oliver, 510 U.S. 266, 273, 144 S.Ct. 807, 813, 127 L.Ed. 2d 114 (1994)(quoting Graham v. Conner, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989); Thaddeus-X v. Blatter, 175 F.3d 378, 387 (6th Cir.

1999) (prisoner retaliation action). The more common prisoner retaliation claims under 42 U.S.C. § 1983 allege complaints against government officials for retaliation associated with the prisoner's exercise of specific constitutional rights. See Pratt v. Rowland, 65 F.3d 802, 806 n. 4 (9th Cir. 1995) (listing numerous federal circuits recognizing retaliation actions); Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001); Farrow v. West, 320 F.3d 1235, 1248 (11th Cir. 2003). See also Crawford-El v. Briton, 523 U.S. 574, 600, 118 S. Ct. 1584, 1597-98, 140 L. Ed. 2d 759 (1998) (discussing standard of proof for summary judgment in prisoner retaliation action). Given the requirements of incarceration, prison officials are allowed to infringe on prisoners' rights as long as the infringement is rationally related to a legitimate penological concern. See Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). A prisoner suing prison officials under § 1983 for retaliation must prove that he was retaliated against for exercising his constitutional rights and that the retaliatory action does not advance legitimate penological concerns such as preserving institutional order and discipline. Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994). A prisoner retains First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. See Safley, 482 U.S. at 84-89, 107 S.

Ct. at 2259-61; Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). Among prisoners' First Amendment rights is the rights to seek redress by filing grievances. See Bruce v. Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003); Toolasprashad v. Bureau of Prisons, 286 F.3d 576, 584 (D.C. Cir. 2002); Herron v. Harrison, 203 F.3d 410, 415 (6th Cir. 2000).

In adjudicating retaliation claims in the prison context, the federal courts have recognized that "courts must approach prisoner claims of retaliation with skepticism and particular care --- because virtually any adverse action taken against a prisoner by a prison official --- even those otherwise not rising to the level of a constitutional violation --- can be characterized as a constitutionally proscribed retaliatory act." Dawes v. Walker, 239 F.3d 489, 491 (2d Cir. 2001), partially overruled on other grounds by Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); Adams v. Rice, 40 F.3d 72, 74 (4th Cir. 1994); Sisneros v. Nix, 95 F.3d 749, 752 (8th Cir. 1996).

The federal courts vary somewhat in their analysis and requirements for establishing a prison retaliation claim. Generally the federal courts require evidence that (1) the inmate engaged in conduct protected by the Constitution; (2) prison officials took adverse action against the inmate; (3) there is a causal connection in that the adverse action was

motivated because of the protected activity for a retaliatory purpose; and usually (4) the adverse action would not have been taken in the absence of the protected conduct for reasons related to penological interest. See, e.g., McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979); Gayle v. Gonyea, 313 F.3d 677, 682 (2d Cir. 2002); Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2003); Adams v. Rice, 40 F.3d 72, 74 (4th Cir. 1994); Freeman v. Texas Department of Criminal Justice, 369 F.3d 854, 863 (5th Cir. 2004); Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999); Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996); Moore v. Plaster, 266 F.3d 928, 931 (8th Cir. 2001). Protected conduct involves actions recognized as protected by some specific provision of the Constitution within the more restrictive prison setting and deference afforded prison authorities. For instance, “if a prisoner violates a legitimate prison regulation, he is not engaged in ‘protected conduct’ and cannot proceed beyond step one.” Thaddeus-X v. Blatter, 175 F.3d at 395. In addition, while an inmate has a general First Amendment right to file grievances against prison officials, that right is protected conduct only if the grievances are not frivolous. See Herron v. Harrison, 203 F.3d 410, 415 (6th Cir. 2000).

The alleged adverse action necessary to support a retaliation claim must be sufficient to deter a person of ordinary firmness from exercising his constitutional rights or

continuing to engage in the protected conduct. See Thaddeus-X v. Blatter, 175 F.3d at 396-98; Davis v. Goord, 320 F.3d 346, 353 (2d Cir. 2003); Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001); Resnick v. Hayes, 213 F.3d 443, 449 (9th Cir. 2000); Brown v. Crowley, 312 F.3d 782, 789 (6th Cir. 2002) (placing prisoner in or subjecting him to the risk of segregation is sufficient to constitute adverse action). Factors relevant to raising an inference or establishing a causal connection include the temporal proximity between the protected activity and the adverse action, a chronology of events suggesting retaliatory animus, direct statements by the prison officials regarding their motivations, and disparate treatment of similarly situated individuals. See Colon v. Coughlin, 58 F.3d 865, 872-73 (2d Cir. 1995); Smith v. Campbell, 250 F.3d 1032, 1038 (6th Cir. 2001); Thaddeus-X, 175 F. 3d at 399. The federal circuits differ in allocating the burdens of these elements. For instance, the Second, Third, Sixth and Seventh Circuits apply a burden shifting approach whereby once the prisoner has raised an inference that the protected conduct was a substantial factor motivating the adverse action, the burden of production of evidence shifts to the prison officials to show that they would have taken the same action even in the absence of the protected conduct. See Gayle, 313 F.3d at 682 (2d Cir. 2002); Rauser, 241 F.3d at 333 (3d Cir. 2001); Thaddeus-X, 175 F. 3d at 399 (6th

Cir. 1999); Babcock, 102 F.3d at 275 (7th Cir. 1996). This burden shifting approach is an adaptation of the analysis delineated in a retaliation case in the employment context by the Supreme Court in Mt. Healthy City School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Several other circuits including the First, Fifth, Eighth, and Tenth, noting the deference accorded prison officials in the administration of prisons have declined to adopt the burden-shifting approach and place the burden on the prisoner to show that the prison officials would not have taken the adverse action "but for" the protected conduct. See, e.g., McDonald, 610 F.2d at 18 (1st Cir. 1979); Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995); Goff v. Burton, 7 F.3d 734, 738 (8th Cir. 1993); Peterson v. Shanks, 149 F.3d 1140, 1144 (10th Cir. 1998).

For instance, the Eighth Circuit has held that where the adverse action involves disciplinary punishment imposed through an administrative prison disciplinary proceeding, a prisoner has no claim for retaliation if the disciplinary action was legitimate and supported by "some evidence". See Moore v. Plaster, 266 F.3d 928, 931 (8th Cir. 2001) ("a defendant may successfully defend a retaliatory discipline claim by showing 'some evidence' that the inmate actually committed a rule violation."); Henderson v. Baird, 29 F.3d 464, 469 (8th Cir. 1994) (finding of actual violation of prison rules based on

"some evidence" defeats claim of retaliation associated with prison discipline); Orebaugh v. Caspari, 910 F.2d 526, 528 (8th Cir. 1990)("no claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform."); Goff v. Burton, 7 F.3d 734, 738 (8th Cir. 1993)("if discipline which the prisoner claims to have been retaliatory was in fact imposed for an actual violation of prisoner rules or regulations, then the prisoner's claim that the discipline was retaliatory in nature must fail."); Cowens v. Warren, 150 F.3d 910, 912 (8th Cir. 1998) (no cause of action for alleged retaliation for filing a grievance by bringing disciplinary charges related to grievance procedure when the disciplinary charges were supported by some evidence).

The Ninth and Eleventh Circuits have not expressly adopted either the burden-shifting or "but for" approach, but rather conduct a general ad hoc analysis. See, e.g., Bruce v. Ylst, 351 F.3d 1283 (9th Cir. 2003); Rhodes v. Robinson, 408 F.3d 559 (9th Cir. 2004); Farrow v. West, 320 F.3d 1235 (11th Cir. 2003). But see Pate v. Peel, 256 F.Supp.2d 1326, 1339 (N.D. Fla. 2003)(applying burden-shifting approach to prisoner retaliation claim while noting Eleventh Circuit Court of Appeals had not expressly adopted that analysis). While prisoners pursuing a retaliation claim cannot be held to a heightened standard of proof or persuasion as to prison officials' intent,

they still must present “specific, non-conclusory factual allegations that establish improper motive causing cognizable injury.” Crawford-El, 523 U.S. at 594, 118 S.Ct. at 1595, 1598 (holding prisoner raising retaliation claim could not be required to show unconstitutional motive by clear and convincing evidence). However, appropriate deference should be afforded prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory. See Pratt, 65 F. 3d at 807.

In the current case, Thomas maintains that both of the disciplinary sanctions were retaliatory actions against him. The question of which approach to apply to prisoner retaliation actions is one of first impression in Kentucky. The circuit court relied on the line of cases from the Eighth Circuit Court of Appeals that deny a cause of action for alleged retaliation based on adverse action consisting of disciplinary punishment where the claimant has been found guilty in a prison disciplinary proceeding supported by “some evidence”. This approach effectively creates an irrebuttable presumption that a valid disciplinary action was motivated for legitimate penological reasons and not improper retaliatory animus. The two disciplinary actions were supported by “some evidence”, so the circuit court’s dismissal of Thomas’s retaliation claim under this approach was justifiable. However, this approach

appears to be an extreme minority position that has not been adopted outside of the Eighth Circuit. Woods v. Smith, 60 F.3d at 1164-65 (declining to accept the Eighth Circuit approach stating that existence of legitimate prison disciplinary report is not an absolute bar to a retaliation claim but is probative potent evidence refuting such a claim); Bruce v. Ylst, 351 F.3d at 1289 (rejecting "some evidence" approach).

On the other hand, we believe that Thomas's retaliation claim lacks merit under the "but for" and burden-shifting approaches as well. While not imposing an absolute barrier, the courts employing these other approaches recognize presumptions in favor of the prison authorities especially in matters of discipline. First, the retaliation claim involving the first disciplinary action did not implicate constitutionally protected conduct. Thomas contends that the charges for charging other inmates for services were retaliation for his comments to the corrections officers warning them not to "pull his chain", and stating that he would "take everybody down with me" if they could not substantiate the charges. Thomas has no recognized constitutional right that protects his making these comments. Moreover, Thomas admitted receiving money for his legal services in violation of a valid prison regulation, so he has not shown that "but for" protected conduct he would have

received the disciplinary penalties or that the disciplinary action was substantially motivated by any protected conduct.

With respect to the second disciplinary action involving unauthorized possession of canteen items, Thomas alleges the charges were brought in retaliation for filing his grievance complaining about the confiscation of the items. The grievance was rejected because it involved the same issues raised in the disciplinary proceeding and challenges to the disciplinary decision had to be raised through the disciplinary procedures under CPP 15.6, rather than the grievance procedures under CPP 14.6. See CPP 14.6, II (C) (4) (listing Adjustment Committee decision as non-grievable issue). Thomas's attempt to use the grievance procedure for non-grievable complaints rendered the grievance frivolous removing it from the realm of "protected conduct" under the First Amendment. Additionally, even assuming the grievance was "protected conduct", Thomas has not presented sufficient specific facts to raise an inference of a causal connection between the adverse action and the protected conduct. Thomas's claim consists primarily of conclusory allegations except for the superficial temporal proximity between the filing of the grievance on August 20, 2002, and the filing of the disciplinary report on August 26, 2002, charging Thomas with the violation. See Woods v. Smith, 60 F.3d at 1166 ("Mere conclusionary allegations of retaliation will not

withstand a summary judgment challenge. The inmate must produce direct evidence of motivation or, the more probable scenario, 'allege a chronology of events from which retaliation may plausibly be inferred.'")(applying but-for standard); however, the actual inventory and confiscation of the canteen items occurred on August 12, 2002, and the filing of charges was delayed for an investigation of Thomas's canteen purchases. In other words, the genesis of the charges occurred prior to the initiation of the grievance thereby severely weakening any inference that the disciplinary action was motivated by retaliation for Thomas's having filed the grievance. Thomas has not carried his burden of presenting evidence that the disciplinary action was substantially motivated by Thomas's use of the grievance procedure.

Finally, the Commonwealth asserts that the disciplinary action would have been taken even in the absence of any protected conduct. "The conclusion that the state action would have been taken in the absence of improper motives is readily drawn in the context of prison administration where we have been cautioned to recognize that prison officials have broad administrative and discretionary authority over the institutions they manage." Hynes v. Squillace, 143 F.3d 653, 657 (2d Cir. 1998) (quoting Lowrance v. Actyl, 20 F.3d 529, 535 (2d Cir. 1994)). Under the majority burden-shifting approach,

once the inmate demonstrates that the exercise of a constitutional right was a substantial or motivating factor in the adverse action, the prison officials may still prevail by showing that they would have taken the same action absent the protected conduct for reasons reasonably related to a legitimate penological interest. Rauser v. Horn, 241 F.3d 330, 334 (3d Cir. 2001). In the current case, Thomas has stated that he had receipts for most but not all of the canteen items, and some of the items were obtained in barter for legal services. These facts support the prison officials' contention that they acted for legitimate non-retaliatory penological reasons in enforcing the disciplinary prison regulation. See Graham v. Henderson, 89 F.3d 75, 81 (2d Cir. 1996) (even assuming retaliatory motive, prison officials are entitled to summary judgment if there were proper, non-retaliatory reasons for the disciplinary punishment), McGrath v. Johnson, 155 F.Supp.2d 294, 302 (E.D.Pa. 2001). Thomas has not countered or presented evidence to rebut the proffered legitimate non-retaliatory reason. In conclusion, Thomas has not presented sufficient evidence showing that the filing of his grievance was the substantial or motivating factor for the second disciplinary action, or regardless of a possible retaliatory motivation, the prison officials had sufficient evidence to pursue the disciplinary action. Thus, Thomas's retaliation claim was properly rejected.

Thomas also has raised a claim of racial discrimination in violation of his right to equal protection under the Fourteenth Amendment in connection with the two disciplinary actions. Thomas, who is African-American, alleges that the prison officials unconstitutionally discriminated against him by penalizing him more severely than white inmates associated with violating the prison regulations. The equal protection clause of the Fourteenth Amendment protects prisoners from racial discrimination except for "'the necessities of prison security and discipline'". Cruz v. Beto, 405 U.S. 319, 321, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972) (per curiam) (quoting Lee v. Washington, 390 U.S. 333, 334, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (Per curiam)). In reviewing prisoner complaints, the Supreme Court has recognized that prisoner's constitutional rights must be balanced against deference accorded prison officials to manage and administer prison rules and regulations. See Pecunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed. 2d 224 (1974). In the prison context, actions by prison officials impinging fundamental rights such as the right to equal protection are not subjected to the strict scrutiny normally applicable, but rather are reviewed on a reasonableness standard based on the relationship to legitimate penological interests. See Walker v. Gomez, 370 F.3d 969, 974 (9th Cir. 2004) (citing Turner v. Safley, 482 U.S. 78, 107 S.Ct.

2254, 96 L.Ed.2d 64 (1987). In addition, Thomas' complaint protests differential treatment or administration of the prison regulation rather than the regulation itself. As such, this claim is similar to complaints of selective enforcement of neutral laws under the equal protection clause. As with prison administration, the courts accord government officials deference and discretion by acknowledging "a strong presumption that state actors have properly discharged their official duties "that can be overcome only by "clear evidence to the contrary." Stemler v. City of Florence, 126 F.3d 856, 873 (6th Cir. 1997). See also United States v. Armstrong, 517 U.S. 456, 464, 116 S.Ct. 1480, 1486, 134 L.Ed.2d 687 (1996)(the presumption of regularity supports prosecutorial decisions, but can be rebutted by clear evidence to the contrary). At the same time, selective enforcement claims are judged according to the ordinary equal protection standards, which require the claimant to show both a discriminatory motive or purpose and a discriminatory effect. Armstrong, 517 U.S. at 465, 116 S.Ct. at 1487; McCleskey v. Kemp, 481 U.S. 279, 292-93, 107 S.Ct. 1756, 1767, 95 L.Ed.2d 262 (1987). To establish a discriminatory effect, a claimant must show that he was treated differently than similarly situated individuals. Armstrong, *supra*; Gardenshire v. Schubert, 205 F.3d 303, 319 (6th Cir. 2000); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313

(1985); (Weiland v. Board of Trustees of Ky. Retirement Systems, 25 S.W.3d 88, 92 (Ky. 2000)). Several courts have recognized that the equal protection clause protects prisoners from racial discrimination associated with disciplinary punishment. See Propst v. Leapley, 886 F.2d 1068 (8th Cir. 1989); Giles v. Henry, 841 F.Supp. 270 (S.D. Iowa 1993); Shabazz v. Cole, 69 F.Supp.2d 177 (D. Mass. 1999) (involving lodging of false disciplinary charge). A finding of intentional discriminatory purpose may be inferred from the totality of the circumstances. Giles, 841 F.Supp. at 274; Shabazz, 69 F.Supp.2d at 209. Although a claimant need not show that the discriminatory purpose was the only reason for the decision, he has to demonstrate through direct or circumstantial evidence that intentional discrimination was "a motivating factor in the decision." Shabazz, 69 F. Supp. 2d at 209 (quoting Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 265-66, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977)). Evidence of discriminatory intent includes the historical background of the decision, substantive departures from normal procedures or considerations, verbal abuse or racial slurs, and disparate treatment. Giles, 841 F.Supp. at 275; Shabazz, 69 F. Supp.2d at 209. See also Propst, 886 F.2d at 1070 ("Evidence of disparate treatment is highly probative of discriminatory intent in civil rights cases.").

For the foregoing reasons, we affirm the order of the
Morgan Circuit Court.

ALL CONCUR.

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