

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JACK HARRIS,

Plaintiff,

v.

DOUG DILTZ,

Defendant.

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4:06CV3017

DEFENDANT’S TRIAL BRIEF

INTRODUCTION

The plaintiff (“Harris”), an inmate at the Nebraska State Penitentiary (“NSP”), alleges Darcy Oliver (“Oliver”), who was at that time a NSP correctional officer, forced him to engage in sexual activities with her. Harris claims the defendant, Doug Diltz (“Diltz”), who at the time was a captain at NSP, violated Harris’ First Amendment rights by filing and pursuing a misconduct report to retaliate against Harris for filing a grievance concerning Oliver’s alleged sexual misconduct. Harris further claims Diltz’ filing of a misconduct report violated his right to equal protection because other inmates had engaged in sexual relationships with Oliver and others, but were not subject to discipline.

At trial, the evidence will show that Diltz issued Harris a misconduct report based on neutral, non-retaliatory reasons, and that at all times Diltz acted in good faith and is immune from suit and an award of damages against him in his individual capacity.

STATEMENT OF FACTS

The evidence at trial will show that from June 5, 2004, through January 19, 2005, several reports from inmates and staff were submitted to the administration at NSP concerning Caseworker Darcy Oliver and her relationship with inmates. The reports

indicated a possible sexual relationship between Oliver and plaintiff, Inmate Jack Harris.

At the time, Defendant Doug Diltz was the Investigative Captain in charge of the Intelligence ("Intel") Unit at NSP. As Captain of the Intel Unit, Diltz's job duties included monitoring suspicious inmate movement and activities at NSP. Once the Intel Unit at NSP became aware of the reports concerning the possible relationship between Harris and Oliver, Diltz, and other members of the Intel Unit, began to investigate the matter. The investigation consisted of monitoring Harris' communications including his mail and phone calls. The evidence will show that several of Harris' phone calls indicated that he was involved in some kind of a relationship with a female staff person at NSP. Harris' mail also suggested that he was involved in an intimate relationship with a female by the name of Peyton Rae, a suspected alias for Oliver.

With the above mentioned information, the decision was made by the Intel Unit to confront Oliver about her suspected relationship with Harris. With the aide of DCS Investigator Geoff Britton, Diltz and Britton met with Oliver where she admitted to speaking with Harris on the telephone, corresponding with him via mail, and sending Harris money under the alias of Peyton Rae. Oliver will testify that her relationship with Harris began as a friendship and then escalated into Harris threatening to harm her family if she did not send him money and perform sexual favors for him.

On January 19, 2005, Diltz conducted an interview with Harris concerning his relationship with Oliver. Diltz will testify that Harris told him Oliver gave Harris oral sex on several occasions. Diltz will also testify that Harris stated to Diltz that Oliver and Harris did have intercourse on two or three occasions and that Harris did have feelings for Oliver.

Engaging in sexual activities is listed as an offense under the Code of Offenses contained in the Nebraska Department of Correctional Services (“NDCS”) Rules and Regulations. All inmates who are housed within a facility under the supervision of NDCS are subject to the provisions of the Code. NDCS Rules and Regulations require that if an employee witnesses or has a reasonable belief that an infraction of the Code of Offenses has been committed by an inmate, that the employee shall prepare a written Misconduct Report to be filed with the Chief Executive Officer of the facility.

On January 20, 2005, Diltz issued Harris a Misconduct Report based on his findings during his investigation. Harris was cited for the rule infraction of engaging in sexual activities, bribery, use of threatening language, swearing and cursing, and disruption. On the same day, Diltz removed Harris from General Population and placed him in Immediate Segregation. Immediate segregation is a form of administrative segregation entailing separation of an inmate from the general population of a corrections facility. Pursuant to NDCS Rules and Regulations, inmates charged with a rule violation are to be detained in immediate segregation status pending their disciplinary hearing.

On January 31, 2005, Harris appeared before the NSP Institutional Disciplinary Committee’s Chairperson, Michael Edison, for a hearing on his charges. Chairperson Edison found Harris guilty of engaging in sexual activities and was imposed the sanction of thirty days in disciplinary segregation. The remaining charges were dismissed.

On February 17, 2005, prison officials, none of whom included Diltz, determined that Harris should be placed in Administrative Confinement after he was released from Disciplinary Segregation due to the seriousness of the incident which led to Harris’ original

placement in Disciplinary Segregation. Placement in Administrative Confinement is a classification action based on the finding that the inmate poses a threat to the safety and security of other inmates, staff, visitors and/or the institution or that the inmate needs to be removed from general population because his/her safety is threatened.

Harris later appealed his sanction to the NDCS Appeals Board. On March 17, 2005, the Appeals Board dismissed the charges finding that there was insufficient evidence to find that Harris voluntarily engaged in sexual activities.

The Unit Classification Team determined that regardless of the fact the Appeals Board reversed the NSP Institutional Disciplinary Committee's decision, Harris' actions still posed a serious threat to the security, management, control, and good order of the Nebraska State Penitentiary. Harris was found to be an imminent threat to staff and/or inmates. Further, it was determined that Harris' documented behavior and interactions with staff and other inmates justified his placement in Administrative Confinement.

On June 1, 2005, it was recommended that Harris was ready to be removed from Administrative Confinement. On July 6, 2005, Harris was removed from Administrative Confinement and placed in General Population at the Tecumseh State Correctional Institute in Tecumseh, Nebraska.

ARGUMENT AT TRIAL

I. HARRIS CANNOT PROVE A CLAIM OF RETALIATION.

Harris's first cause of action claims Diltz violated Harris' First Amendment rights by filing and pursuing a misconduct report to retaliate against Harris for filing a grievance concerning Oliver's alleged sexual misconduct.

The Eighth Circuit has “long recognized an inmate's cause of action for retaliatory discipline under 42 U.S.C. § 1983 where a prison official files disciplinary charges in retaliation for the inmate's exercise of his constitutional rights.” *Moore v. Plaster*, 266 F.3d 928, 931 (8th Cir.2001) (citing *Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir.1989)). At trial, Harris will not be able to establish that he exercised a constitutionally protected right and that his exercise of that right motivated Diltz to issue Harris a misconduct report.

[C]laims of retaliation fail if the alleged retaliatory conduct violations were issued for the actual violation of a prison rule. *Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir.1994), cert. denied, 515 U.S. 1145, 115 S.Ct. 2584 (1995). Thus, a defendant may successfully defend a retaliatory-discipline claim by showing “some evidence” that the inmate actually committed a rule violation. *Goff v. Burton*, 7 F.3d 734, 738 (8th Cir.1993), cert. denied, 512 U.S. 1209, 114 S.Ct. 2684 (1994); see also *Superintendent v. Hill*, 472 U.S. 445, 455, 105 S.Ct. 2768 (1985).

At trial, Harris cannot establish that he exercised a constitutionally protected right prior to being issued the Misconduct Report by Diltz. The evidence will be void of any grievances or complaints ever submitted by Harris prior to Diltz issuing the Misconduct Report. The only grievances Harris will be able to offer into evidence are those which were submitted by Harris after the Misconduct Report had been issued to him.

Further, Harris will not be able to prove that his alleged exercise of any rights under the Constitution motivated Diltz to discipline him. In the instant case, the evidence will show that Diltz had a reasonable belief that Harris was engaging in sexual activities and thus prepared a written Misconduct Report in accordance with the NDCS Rules and

Regulations.

II. HARRIS CANNOT PROVE DILTZ VIOLATED HIS EQUAL PROTECTION RIGHTS.

The equal protection clause protects against discriminatory treatment of similarly situated persons. “The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.” *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047 (1976). The United States Supreme Court has held that in order to prevail on an equal protection claim, a plaintiff must show that a particular defendant acted with discriminatory purpose. *McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767 (1987); see *Tyler v. Hot Springs School Dist. No. 6*, 827 F.2d 1227, 1230 (8th Cir.1987).

A finding of intentional discrimination must be based on a totality of the circumstances. See *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272 (1982). The mere showing that there is a discriminatory effect to a particular action or policy is not sufficient to establish an equal protection violation. *Washington*, 426 U.S. at 242, 96 S.Ct. at 2049.

Harris will allege that he was treated dissimilarly than other inmates. Specifically, Harris will claim that there were other inmates that engaged in sexual activities with staff, including Oliver, who did not receive the same punishment as Harris. However, Harris will be unable to prove that he was similarly situated to these other alleged inmates. Further, Harris will be unable to prove that Diltz acted with a discriminatory purpose when he issued Harris a misconduct report.

III. DILTZ IS SHIELDED FROM LIABILITY BECAUSE HIS CONDUCT DID NOT VIOLATE A CLEARLY ESTABLISHED RIGHT OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN.

Under § 1983, public officials sued in their individual capacity “are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 3017 (1984) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982)). Whether an official may prevail in his or her qualified immunity defense depends upon the “objective reasonableness of [his or her] conduct as measured by reference to clearly established law.” *Id.*

A prison official is entitled to qualified immunity from suit unless (1) the official’s conduct violates a clearly-established statutory or constitutional right; (2) the official knew or should have known the right was clearly established; and, (3) the official knew or should have known his or her conduct violated that right. *Brown v. Frey*, 889 F.2d 159, 165 (8th Cir. 1989), *cert denied*, 110 S.Ct. 1156 (1990). See also *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738 (governmental officials performing discretionary functions are generally shielded from liability insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person should have known); *Arnold v. Jones*, 891 F.2d 1370, 1372 (8th Cir. 1989)(prison officials are generally immune from suit on basis of qualified immunity unless their conduct violated clearly established constitutional rights of which a reasonable person should have known).

"For a constitutional right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right.' . . . 'This is not to say an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of the pre-existing law the unlawfulness must be apparent.'" *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 535, 105 S.Ct. 2806, 2820 (1985)).

The evidence will show that at all times Diltz acted in good faith and his conduct did not violate any established constitutional rights of which a reasonable person would have known. Diltz, a prison official, is therefore immune from this suit based on qualified immunity.

CONCLUSION

The evidence at trial will show that Diltz issued Harris a misconduct report based on neutral, non-retaliatory reasons, and that at all times Diltz acted in good faith and is immune from suit and an award of damages against him in his individual capacity. Consequently, the defendant is entitled to judgment.

Dated this 8th day of October, 2008.

DOUG DILTZ, Defendant.

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CERTIFICATE OF SERVICE

It is hereby certified that on October 8, 2008, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification to Plaintiff's counsel of record Jessica Milburn.

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