Opinion issued April 19, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00466-CV

PRIYE T. MUKORO, CERSANDRA D. TEAGUE, AND DANNY R. MEYERS, Appellants

V.

DONALD C. JACKSON, Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Case No. 37704

MEMORANDUM OPINION

Donald C. Jackson, an inmate, brought a §1983[1] action against several employees[2] of the Texas Department of Criminal Justice ["TDCJ"], alleging that the employees either retaliated or conspired to retaliate against him for filing a grievance after they allegedly damaged and subsequently seized his typewriter and box fan. In this interlocutory appeal,[3] we consider whether the trial court erred in denying the governmental employees' motions for summary judgment, which were based on assertions of immunity. We reverse and render.

BACKGROUND

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1 *See* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]").

2 According to Jackson's petition, Cersandra D. Teague and Danny R. Meyers are former correctional officers at the Stringfellow Unit of TDCJ and Priye T. Mukoro is the Unit Grievance Investigator at the Stringfellow Unit.

3 *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5) (West Supp. 2017) ("A person may appeal from an interlocutory order . . . that . . . denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or political subdivision of the state[.]").

Jackson has also appealed based on the trial court's *granting* of the defendants' motions for summary judgment on his due process claims. However, we have no jurisdiction over an interlocutory judgment that *grants* a motion for summary judgment based on an assertion of immunity by an individual who is an employee of the state. *See Iverson v. Putnam*, No. 14-16-00416-CV, 2017 WL 17191000 at *2, *4 (Tex. App.—Houston [14th Dist. May 2, 2017, pet. denied) (mem. op.) (holding that §51.014(a)(5) did not give jurisdiction over granting of governmental employee's motion for summary judgment.) Therefore, we dismiss Jackson's interlocutory appeal.

This case has a long and tortuous history, and has been in this Court on multiple occasions. According to Jackson's petition, appellants Cersandra D. Teague and Danny R. Meyers are former correctional officers at the Stringfellow Unit of TDCJ and Priye T. Mukoro is the Unit Grievance Investigator at the Stringfellow Unit. The facts giving rise to this case are set forth in one of this Court's previous opinions, which granted TDCJ's plea to the jurisdiction.

> Jackson's claims derive from damage to a typewriter and box fan that had been in his possession. These and other items had been inventoried and placed in a prison storage facility while Jackson was away from his unit on medical leave. Jackson's pleadings allege that these items were damaged when they were returned to him after his medical leave, and that he requested repair or replacement of the items by pursuing a Step 1 grievance through the prison grievance system.
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> Jackson claims that prison officials "conspired" at that point to deprive him of the damaged typewriter and fan "in retaliation" for (1) previously filing a lawsuit in state court relating to "confiscation of [his] radio and headphone set" and (2) initiating the Step 1 grievance relating to the typewriter and box fan. Shortly thereafter, the typewriter and box fan were confiscated from Jackson's living area. The reason stated for the seizure on the prison's form was "ownership questioned." Jackson disputed that assertion in the Step 2 grievance he filed at that point, in which he claimed (1) "that his property was confiscated in retaliation for the exercise of his right of access to the courts and for use of the prison grievance [system]," and (2) that he was in "possession of documentation" showing his authority to possess the typewriter and fan.
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> Jackson's pleadings allege that while the Step 2 grievance was pending, prison officials conspired to delete the documents establishing his rightful possession from prison records, with the result that his grievance was resolved in a report stating that, "after further investigation[, Jackson] never owned the property . . . in question, and

> therefore it will be disposed of in accordance with Administrative Directive 03.72."

Tex. Dep't of (Tex. Crim. App. Justice v. Jackson, No. 01-07-00477-CV, 2008 WL 2209350, at *1 (Tex. App.—Houston [1st Dist.] May 29, 2008, pet. denied) (mem. op., not designated for publication).

On May 15, 2015, the appellants filed their Amended Motion for Summary Judgment, asserting that they were entitled to qualified immunity on Jackson's retaliation, due process, and conspiracy claims. The trial court denied their summary judgment as to Jackson's retaliation and conspiracy claims, but granted their summary judgment as to Jackson's due process claim.[4] This interlocutory appeal followed.

QUALIFIED IMMUNITY

In three related issues on appeal, the appellants contend the trial court erred in denying their summary judgment, which was based on their assertion of qualified immunity.

Law Applicable to Qualified Immunity in § 1983 Cases

Under the doctrine of qualified immunity, government officials performing discretionary functions generally are shielded from civil liability insofar as their conduct does not violate clearly established federal statutory or constitutional rights

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[4] This Court had already determined that Jackson's pleadings did not state a due process violation. *See Jackson*, 2008 WL 2209350 at * 6.

of which a reasonable person would have known. *McClendon v. City of Columbia*, 305 F.3d 314, 322 (5th Cir. 2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

A good-faith assertion of qualified immunity alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not available. *Cass v. City of Abilene*, 814 F.3d 721, 728 (5th Cir. 2016); *Escobar v. Harris Cty.*, 442 S.W.3d 621, 630 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Leo v. Trevino*, 285 S.W.3d 470, 480 (Tex. App—Corpus Christi 2006, no pet.). "The plaintiff therefore bears the burden of showing a genuine and material dispute as to whether the official is entitled to qualified immunity." *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015); *see Leo*, 285 S.W.3d at 480; *Scott v. Godwin*, 147 S.W.3d 609, 616 (Tex. App.—Corpus Christi 2004, no pet.).

Here, appellants asserted that they were entitled to qualified immunity against Jackson's retaliation and conspiracy to commit retaliation claims under section 1983, and moved for summary judgment on this ground. *See Scott*, 147 S.W.3d at 616 (showing applicability of qualified immunity to a prisoner's First Amendment retaliation claim); *Umar v. Scott*, 991 S.W.2d 512, 517 (Tex. App.—Fort Worth 1999, no pet.) (same as to a prisoner's First Amendment free exercise of religion claim); *Neimes v. Ta*, 985 S.W.2d 132, 141 (Tex. App.—San Antonio 1998, pet. dism'd by agr.) (same as to a detainee's Eighth Amendment cruel and unusual

punishment claim); *see also* 42 U.S.C.A. § 1983. Thus, Jackson had the burden to introduce evidence sufficient to overcome the defendants' presumptive qualified immunity in order to survive summary judgment. *See Cass*, 814 F.3d at 728; *Leo*, 285 S.W.3d at 480.

To overcome a defendant's entitlement to qualified immunity at the summary judgment stage, we ask whether the evidence is sufficient to create a fact issue as to whether: (1) the official's conduct violated a federal right; and (2) under the circumstances, that right was sufficiently clear that every reasonable official would have understood that what he is doing violates that right. *See Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *Tolan v. Cotton*, 134 S. Ct. 1861, 1865–66 (2014); *Allen v. Cisneros*, 815 F.3d 239, 244 (5th Cir. 2016); *Trent*, 776 F.3d at 376. We review the evidence in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

Retaliation

Jackson argues that the trial court erred in granting summary judgment on his retaliation claim. Specifically, Jackson contends that "there was a genuine issue of fact as to whether the Defendants conspired to confiscate and not return Plaintiff's

typewriter and box fan in retaliation against him for exercising his First Amendment right of access to the courts."

"Prisoners have a First Amendment right to be free from retaliation for complaining about a prison official's misconduct, and a violation of this right is actionable under 42 U.S.C. § 1983." *Inst'l Div. of Tex. Dep't of Criminal Justice v. Powell*, 318 S.W.3d 889, 892 (Tex. 2010). To establish a violation of the First Amendment right against retaliation, a prisoner must establish "(1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation." *Id.* (quoting *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006)). An inmate's personal belief that he is the victim of retaliation is insufficient. *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir. 1997). Rather, the inmate must present direct evidence of a motivation or "allege a chronology of events from which retaliation may plausibly be inferred." *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995) (quoting *Cain v. Lane*, 857 F.2d 1139, 1143 n. 6 (7th Cir. 1988)). In order to establish causation, the inmate must demonstrate that, but for the retaliatory motive, the incident complained of would not have occurred. *Id.* Finally, the alleged retaliatory act(s) must be more than *de minimis* in order to support a constitutional claim. *Morris*, 449 F.3d at 684–86. "Some acts, though maybe motivated by retaliatory intent, are so *de minimis* that they would not deter the ordinary person from further exercise of his rights." *Id.* at

686. In other words, "[r]etaliation against a prisoner is actionable only if it is capable of deterring a person of ordinary firmness from further exercising his constitutional rights." *Id.* at 686.

In reviewing claims of retaliation arising from the context of prison disciplinary charges, the Fifth Circuit has recognized that "[c]laims of retaliation must . . . be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions." *Woods*, 60 F.3d at 1166 (citing *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994)).

Here, Jackson fails to raise a fact issue on the third element of retaliation, i.e., a retaliatory adverse act. The Texas Supreme Court has discussed the type of retaliatory act necessary to survive summary judgment as follows:

> Under the third prong of [the test set forth in *Morris v. Powell*], acts of retaliation that are *de minimis* do not satisfy the "retaliatory adverse act" requirement. *Id.* at 684–85. "To establish a constitutional violation, an inmate must show that he suffered a qualifying adverse retaliatory act," and "[i]f the retaliation alleged . . . does not pass this bar, he has suffered no constitutional injury." *Id.* at 684.
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> In making this determination, the Fifth Circuit has adopted the standard first set forth in *Crawford–El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996): an inmate's retaliation claim must allege adverse acts "that 'would chill or silence a person of ordinary firmness from future First Amendment activities.'" *See Morris*, 449 F.3d at 685–86 (quoting *Britton*, 93 F.3d at 826); *see also Thaddeus-X v. Blatter*, 175 F.3d 378, 397 (6th Cir. 1999) (adopting the same standard). Thus, an inmate's job transfer from the commissary to the kitchen was *de minimis*, while his transfer to a more dangerous prison was not. *Morris*, 449 F.3d at 687; *see also Bibbs v. Early*, 541 F.3d 267, 271–72 (5th Cir. 2008) (subjecting inmate to below-freezing temperatures for more than four

> hours during each of four consecutive nights was more than *de minimis*); *Leggett v. Comer*, 280 Fed. Appx. 333, 336 (5th Cir. 2008) (purported confiscation of more than $11,000 of inmate's personal property was not *de minimis*).

Powell, 318 S.W.3d at 892–93.

Here, Jackson alleges that a "Smith Corona XL-1000 typewriter" and an "$11.50 Holmes 10" White Box Fan" were seized from him in retaliation for his previously-filed Step 1 grievance alleging damage to those items while he was away from the unit on medical leave. The issue this Court must decide is whether Jackson raised an issue of fact regarding whether that alleged adverse act would chill or silence a person of ordinary firmness from future First Amendment activities. *Id.* We hold that he has not.

In *Conely v. Tex. Bd. of Crim. Justice*, No. 03-10-00422-CV, 2011 WL 3890404 (Tex. App.—Austin Aug. 31, 2011, no pet.) (mem. op.), the Austin Court of Appeals affirmed a summary judgment in favor of a prison employee on an inmate's claim that the employee retaliated against him by "trashing" various grievances he had filed. *Id.* at *1. The court "conclud[ed] that the alleged retaliatory act [was] inconsequential and did not deter [the inmate] from further exercising his constitutional rights to file grievances and lawsuits." *Id.* at *3. In *Brewer v. Simental*, No. 07. 10-00155-CV, 2010 WL 4053789 (Tex. App.—Amarillo Oct. 15, 2010, pet. denied) (mem. op.), the Amarillo Court of Appeals held that restricting an inmate's access to the law library to 90 hours in two months was a *de minimis* act of retaliation

and that the governmental employee was entitled to claim qualified immunity. Id. at *5.

In *Jones v. Copeland*, No. 07-11-00437-CV, 2012 WL 3536764 (Tex. App.—Amarillo, Aug. 16, 2012, no pet.) (mem. op.) the Amarillo Court of Appeals, affirmed the dismissal of an inmate's suit alleging that a prison official denied him his constitutional right to access to the court by damaging his legal papers and wrongfully confiscating five pens, two and one-half bags of coffee, and a padlock. *Id.* at *1. The court concluded that the inmate's retaliation claim had no arguable basis in law because the retaliatory action taken was *de minimis*. *Id.* at *5. In so holding, the court noted:

> As an additional basis for concluding that Jones's claims have no arguable basis in law, we add that this Court, among several others, has employed the doctrine of de minimis non curat lex—that is, "[t]he law does not concern itself with trifles"—to affirm the dismissal as frivolous of suits brought by inmates over the claimed confiscation by prison employees of property having insignificant value. Black's Law Dictionary 496 (9th ed.2009); *see Brown v. Cockrell*, No. 07–03–00139–CV, 2005 Tex. App. LEXIS 2131, at *5–6, 2005 WL 645944 (Tex. App.—Amarillo Mar. 21, 2005, no pet.) (mem.op.) (finding doctrine applicable when inmate sought recovery for confiscation of postage stamps); *Hammonds*, 2004 Tex. App. LEXIS 3293, at *5, 2004 WL 769373 (applying doctrine when inmate sued to recover for loss of two shower shoes, two chess sets, and a sweatshirt); *Pennington v. Peterson*, No. 13–96–00344–CV, 1998 Tex. App. LEXIS 573, at *5–6, 1998 WL 35277005 (Tex. App.—Corpus Christi Jan. 29, 1998, pet. denied) (concluding the law did not concern itself with inmate's claim seeking recovery of $3.15 for property confiscated upon arrival at new prison unit); *Smith v. Stevens*, 822 S.W.2d 152, 152 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (concluding that the law was not concerned with claims involving the confiscation of a coffee bag and

> two packs of cigarettes); *Thompson*, 814 S.W.2d at 812 (finding trial court could have invoked doctrine when inmate sought recovery for the conversion of five highlighters, an extension cord, four small wooden picture frames, a stainless steel pen and pencil set, a mirror, three hospital bracelets, and a fan). Any error associated with the dismissal would be harmless because the amount of damages sought is insignificant. *See Hammonds*, 2004 Tex. App. LEXIS 3293, at *5–6, 2004 WL 769373; *Smith*, 822 S.W.2d at 152.
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> The trial court could have concluded that, based on the same doctrine, Jones's claims seeking compensation for or the return of two and one-half bags of coffee, five pens, and a padlock were *de minimus* and therefore lacked an arguable basis in the law when the law does not concern itself with such a trifling matter.

Id. at *5–6.

The authorities cited in *Jones* support our conclusions that, even accepting the alleged acts of retaliation as true, taking Jackson's typewriter and fan "would not deter the ordinary person from further exercise of his rights." *Morris*, 449 F.3d at 686. S*ee also Hurd v. Barnette*, No. 6:15cv734, 2017 WL 892118 (E.D. Tex. Mar. 6, 2017 (holding seizure of radio and papers and temporary detention of other property was *de minimis* for purposes of retaliation claim); *Adams v. Martin*, No. A-14-CA-821-SS, 2015 WL 4637612 (W.D. Tex. July 31, 2015) (holding seizure of underwear and alleged excessive force were *de minimis* for purposes of retaliation claim); *Ali v. Jones*, No. H-07-0337, 2007 WL 2141381 (S.D. Tex., July 19, 2007) (holding destruction of personal property by corrections officer, including four books, ten magazines, vitamins, pencil sharpeners, ink pens, and drawing pencils was *de minimis* for purposes of retaliation claim). Indeed, Jackson has not been

deterred from exercising his First Amendment right to complaining about a prison official's misconduct, as evidenced by his continued litigation in this case since 2006. *See Conely*, 2011 WL 3890404 at *3 ("And as evidenced by this proceeding, defendants' actions plainly have not deterred [the defendant] from continuing to exercise his constitutional rights.").

Because the retaliatory act alleged by Jackson is *de minimis* and would not deter a person of ordinary firmness from further exercising his constitutional rights, Jackson has failed to raise a fact issue on his retaliation claim, and appellants are entitled to qualified immunity on his retaliation claim.

Conspiracy to Retaliate

Appellants also contend that the trial court erred in denying their claim of qualified immunity as to Jackson's conspiracy claim. We agree.

We have already held that Jackson cannot show an actionable retaliation claim under § 1983 because the adverse action alleged was de minimis. A § 1983 conspiracy claim is not actionable without an actual violation of § 1983. *Leachman v. Dretke*, 261 S.W.3d 297, 313 (Tex. App.—Fort Worth 2008, no pet.); *Denson v. T.D.C.J.-I.D.*, 63 S.W.3d 454, 463 (Tex. App.—Tyler 1999, pet. denied). Because Jackson cannot show actionable retaliation under §1983, he similarly cannot show a conspiracy to retaliate.

CONCLUSION

We sustain issues one through three. We reverse the judgment of the trial court and render judgment granting the appellants' motion for summary judgment based on qualified immunity and dismissing the claims against them.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.

01-17-00466-CV

IN THE SUPREME COURT OF TEXAS

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NO. 18-0516

DONALD C. JACKSON
v.
PRIYE T. MUKURO, CERSANDRA D. TEAGUE AND DANNY MYERS

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Brazoria County,

1st District.

November 16, 2018

Petitioner's petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

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I, BLAKE A. HAWTHORNE, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under the date shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 28th day of December, 2018.

Blake A. Hawthorne

Blake A. Hawthorne, Clerk

By Monica Zamarripa, Deputy Clerk

CAUSE NO. 37704

DONALD C. JACKSON, TDCJ # 2200044, Plaintiff,	§	IN THE DISTRICT COURT
v.	§	412th JUDICIAL DISTRICT
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL., Defendants.	§	BRAZORIA COUNTY, TEXAS

Interlocutory
~~FINAL~~ JUDGMENT

Be it remembered that on ~~this day~~ June 5, 2015 came to be considered **Defendants' Amended Motion for Summary Judgment with Brief in Support** and the Court after considering the pleadings of the parties filed herein, is of the opinion that the motion should be **GRANTED in part and DENIED in part.**

It is hereby **ORDERED** that Defendants' Amended Motion for Summary Judgment is **Denied** as to Teague, Myers, and Mickoro and **Granted** as to Kukua and Guyton on the issue of retaliation; **Granted** as to all due process claims; **Denied** as to Teague, Myers, and Mickoro and **Granted** as to Kukua and Guyton on the issue of conspiracy.

SIGNED on this the 23rd day of May, 2017.

W. Edward Ormsby

JUDGMENT

Court of Appeals

First District of Texas

NO. 01-17-00466-CV

PRIYE T. MUKORO, CERSANDRA D. TEAGUE, AND DANNY R. MEYERS,
Appellants

V.

DONALD C. JACKSON, Appellee

Appeal from the 412th District Court of Brazoria County. (Tr. Ct. No. 37704).

This case is an appeal from the appealable interlocutory judgment signed by the trial court on May 23, 2017. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that the trial court's judgment contains no reversible error. Accordingly, the Court **affirms** the trial court's judgment.

The Court **orders** that this decision be certified below for observance.

Judgment rendered April 19, 2018.

Panel consists of Chief Justice Radack and Justices Massengale and Brown. Opinion delivered by Chief Justice Radack.