(Appendix- [A.])

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7626

FRANKLIN C. SMITH,

Plaintiff - Appellant,

v.

NURSE MAYFIELD, Nurse at the Virginia Beach Jail; CPL. LEVENDUSKI, Corporal at Virginia Beach Jail; DEPUTY DREW, Deputy at Virginia Beach Jail; CPL. FAY, Corporal at Virginia Beach Jail,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Mark S. Davis, Chief District Judge. (2:18-cv-00031-MSD-LRL)

Submitted: April 14, 2020 Decided: April 16, 2020

Before WILKINSON, QUATTLEBAUM, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Franklin C. Smith, Appellant Pro Se. Jeff W. Rosen, PENDER & COWARD, PC, Virginia Beach, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Franklin C. Smith appeals the district court's order denying relief on his 42 U.S.C. § 1983 (2018) complaint. On appeal, we confine our review to the issues raised in the Appellant's brief. *See* 4th Cir. R. 34(b). Because the informal brief does not challenge the basis for the district court's disposition, Smith has forfeited appellate review of the court's order. *See Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

* (Petition for Rehearing) *
(Appendix- [A])

FILED: April 16, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7626
(2:18-cv-00031-MSD-LRL)

FRANKLIN C. SMITH

Plaintiff - Appellant

v.

NURSE MAYFIELD, Nurse at the Virginia Beach Jail; CPL. LEVENDUSKI, Corporal at Virginia Beach Jail; DEPUTY DREW, Deputy at Virginia Beach Jail; CPL. FAY, Corporal at Virginia Beach Jail

Defendants - Appellees

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

* (Petition for Rehearing) * (Appendix-[A].)

FILED: May 26, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7626
(2:18-cv-00031-MSD-LRL)

FRANKLIN C. SMITH

Plaintiff - Appellant

v.

NURSE MAYFIELD, Nurse at the Virginia Beach Jail; CPL. LEVENDUSKI, Corporal at Virginia Beach Jail; DEPUTY DREW, Deputy at Virginia Beach Jail; CPL. FAY, Corporal at Virginia Beach Jail

Defendants - Appellees

MANDATE

The judgment of this court, entered April 16, 2020, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FRANKLIN C. SMITH,

Plaintiff,

v. **ACTION NO. 2:18cv31**

NURSE MAYFIELD, *et al.*,[1]

Defendants.

DISMISSAL ORDER

This matter is before the Court on Defendants' Motion for Summary Judgment. ECF No. 13. Plaintiff has filed a Response. ECF No.18. Defendants filed a Reply. ECF No. 19. This matter is fully briefed and ripe for judicial Determination.

I. Facts

The parties do not dispute the basic facts. On December 7, 2017, Plaintiff claims he filed a grievance against Defendant Fay. On December 8, 2017, Defendant Mayfield, a Medical Technician, dispensed Plaintiff's medications to him in a water cup. Plaintiff turned and walked away before showing Defendant Mayfield that he had swallowed the pills. Defendant Mayfield called Plaintiff back to ensure that he swallowed the pills. Plaintiff opened his mouth to show that he had not swallowed the pills and that they were still in his mouth. Plaintiff walked to his cell without swallowing the pills.

[1] The Clerk is **DIRECTED** to correct the spelling of Defendant Levendusky to Levenduski.

Defendant Mayfield notified Deputy Bowers that Plaintiff had not swallowed his pills. Deputy Bowers notified Defendant Leveduski. Deputy Bowers, Defendant Drew, and Defendant Levenduski had Plaintiff step out of the cell block. When questioned about the incident, Plaintiff claimed that Defendant Mayfield was always picking on him. Plaintiff was secured in the visitation panel, and Defendants Drew and Levenduski searched Plaintiff's cell, and they found the three pills that had been given to Plaintiff by Defendant Mayfield. They also found contraband items such as a sharpened paper clip and several ink pens. Plaintiff disputes that these items were found in his cell.

Defendant Levenduski notified the Classification Supervisor to request a new housing assignment for Plaintiff. The Classification Supervisor assigned Plaintiff to administrative segregation. Plaintiff remained in administrative segregation until December 29, 2017.

On January 3, 2018, Plaintiff submitted an inmate request form complaining that after his release from administrative segregation, he was missing a new deodorant, two tubes of toothpaste, and five coffees. However, in the Complaint, ECF No. 1, Plaintiff claims that Defendants Levenduski and Drew destroyed his radio, magazines, and books. Defendants established that Plaintiff never owned a radio during the relevant time period.

II. Analysis

A. Standard of Review

Summary judgment is appropriate only when a court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *Seabulk Offshore,*

Ltd. v. Am. Home Assurance Co., 377 F.3d 408, 418 (4th Cir. 2004). The moving party has the initial burden to show the absence of an essential element of the nonmoving party's case and to demonstrate that the moving party is entitled to judgment as a matter of law. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 185 (4th Cir. 2004); *McLean v. Patten Cmtys., Inc.*, 332 F.3d 714, 718 (4th Cir. 2003); *see Celotex Corp.*, 477 U.S. at 322-25. When the moving party has met its burden to show that the evidence is insufficient to support the nonmoving party's case, the burden then shifts to the nonmoving party to present specific facts demonstrating that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Honor*, 383 F.3d at 185; *McLean*, 332 F.3d at 718-19. Such facts must be presented in the form of exhibits and sworn affidavits. *Celotex Corp.*, 477 U.S. at 324; *see also M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 163 (4th Cir. 1993). Failure by a plaintiff to rebut a defendant's motion with such evidence on his behalf will result in summary judgment when appropriate. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.[2]

Although a court must draw all justifiable inferences in favor of the nonmoving party, in order to successfully defeat a motion for summary judgment, the nonmoving party must rely on more than conclusory allegations, "mere speculation," the "building of one inference upon

[2] Amendments to the Federal Rules of Civil Procedure, which became effective on December 1, 2010, moved the relevant language from section (c)(2) of Rule 56 to its present location in section (a). However, the advisory committee's note indicates that, despite these amendments, "[t]he standard for granting summary judgment remains unchanged." Fed. R. Civ. P. 56 advisory committee's note.

another," the "mere existence of a scintilla of evidence," or the appearance of "some metaphysical doubt" concerning a material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002); *Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc.*, 330 F. Supp. 2d 668, 671 (E.D. Va. 2004). Rather, the evidence must be such that the fact-finder reasonably could find for the nonmoving party. *See Anderson*, 477 U.S. at 252.

B. First Amendment Claims of Retaliation

In order to survive summary judgment, Plaintiff must demonstrate "that (1) [he] engaged in protected First Amendment activity, (2) [Defendants] took some action that adversely affected [Plaintiff's] First Amendment rights, and (3) there was a causal relationship between [Plaintiff's] protected activity and [Defendants'] conduct." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005).

The United States Court of Appeals for the Fourth Circuit has concluded that inmates engage in protected First Amendment activity when they write grievances and file lawsuits. *See Booker v. S.C. Dep't of Corr.*, 855 F.3d 544-46 (4th Cir. 2017). Furthermore, the alleged retaliatory conduct need not itself violate a constitutional right. *See Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994) ("[P]laintiffs must allege *either* that the retaliatory act was taken in response to the exercise of a constitutionally protected right *or* that the act itself violated such a right."). Plaintiff must demonstrate "that [Defendants'] conduct resulted in something more than a *de minimums* inconvenience to [his] exercise of First Amendment rights." *Constantine*, 411 F.3d at 500 (internal quotation marks omitted). This, however, is not dispositive. Instead, the Court must also consider whether Defendants' actions "would likely deter a person of ordinary firmness

from the exercise of First Amendment rights." *Id.* (internal quotation marks omitted). This inquiry considers the specific facts of the case, taking into account the actors involved and their relationships. *See Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006). Because "conduct that tends to chill the exercise of constitutional rights might not itself deprive such rights, . . . a plaintiff need not actually be deprived of [his] First Amendment rights in order to establish First Amendment retaliation." *Constantine*, 411 F.3d at 500. With respect to causation, Plaintiff must establish a causal connection between his First Amendment activity and the alleged adverse action. *See Constantine*, 411 F.3d at 501. This evidence can include direct evidence of retaliatory motive, *see Hill*, 630 F.3d at 475, or circumstantial evidence, such as evidence that the retaliation took place within some "temporal proximity" of that activity. *Constantine*, 411 F.3d at 501.

C. Discussion

Plaintiff has failed to establish that there is a material issue of fact that suggests that Defendants were retaliating against him. Plaintiff asserts that Defendants staged the incident on December 8, 2017 merely to place him in isolation because he filed a grievance against Defendant Fay. Plaintiff also claims that he was retaliated against for refusing to take his medication. Plaintiff proffers no facts other than his bald assertions that the incident was staged. In addition, Plaintiff proffers no facts to support a claim of retaliation based on his filing a grievance against Defendant Fay. Plaintiff bases his claim of retaliation solely on temporal proximity. However, Plaintiff's attempt to hoard medication by accepting it but not swallowing the medication was closer in time to Plaintiff's placement in administrative segregation. Contrary to Plaintiff's assertion, he was not forced to take medication. An inmate may decline to accept medication,

however, if the inmate accepts the medication, they must swallow it to prevent hoarding and possible selling of contraband medication. Defendants have established that there was a legitimate penological reason for placing Plaintiff in administrative segregation and Plaintiff has failed to proffer anything other than his own opinion that it was in retaliation for exercising his First Amendment right to seek redress from the government.

The most that Plaintiff has established with regard to his property is that after he was released from administrative segregation, he believed he was missing a deodorant, two tubes of toothpaste, and five coffees. Plaintiff has failed to establish that there is reason to believe that Defendants destroyed significant amounts of his property in retaliation for Plaintiff filing a grievance against Defendant Fay or in order to prevent Plaintiff from listening to legal news or law-oriented radio programming. For these reasons, Defendants' Motion for Summary Judgment, ECF No. 13, is **GRANTED**. The Clerk is **DIRECTED** to enter judgment in favor of Defendants.

III. Fraud on the Court

Plaintiff has raised an allegation of fraud on the Court, claiming that Defendants and their counsel destroyed records. Plaintiff has proffered nothing except his own unsupported assertions that any records were destroyed. Plaintiff is ADVISED that making unsupported accusations such as this can subject him to sanctions. In light of Plaintiff's *pro se* status, the Court declines to sanction Plaintiff's behavior at this time. However, Plaintiff is warned that merely because he is proceeding *pro se* does not absolve him of all responsibility for actions.

Plaintiff is advised that he may appeal from this Dismissal Order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600

Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days from the date of this Dismissal Order.

If Plaintiff wishes to proceed *in forma pauperis* on appeal, the application to proceed *in forma pauperis* is to be submitted to the Clerk, United States Court of Appeals, Fourth Circuit, 1100 E. Main Street, Richmond, Virginia 23219.

The Clerk is **DIRECTED** to send a copy of this Dismissal Order to Plaintiff and counsel for Defendants.

IT IS SO **ORDERED**.

/s/ MSD
Mark S. Davis
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
September 30, 2019

FILED: May 18, 2020

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FOR THE FOURTH CIRCUIT

No. 19-7626
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Plaintiff - Appellant

v.

NURSE MAYFIELD, Nurse at the Virginia Beach Jail; CPL. LEVENDUSKI, Corporal at Virginia Beach Jail; DEPUTY DREW, Deputy at Virginia Beach Jail; CPL. FAY, Corporal at Virginia Beach Jail

Defendants - Appellees

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk