

UNITED STATES SUPREME COURT

JONATHAN JOSEPH GOOD

Petitioner,

-v-

WENDI WALWORTH, JEREMY BUGBEE, JULIUS
MAYFIELD, BARBARA FINCH, DUJUNA
VANDECASTEELE, STEVE RIVARD

Respondents.

PETITIONER GOOD'S EXHIBIT LIST

Exhibit	Description	Page of Reference
A	Opinion and Order Court of Appeals	7
B	Order Granting Extension for En Banc	8
C	Denial of En Banc	8
D	Objection to Notice of Intent	12
E	Respondent's Summary Judgment Motion (ECF 43)	Passium
F	Motion to Compel (ECF No. 67)	Passium
G	Appellant's Brief On Appeal	Passium

EXHIBIT A

Court of Appeals Opinion and Order

No. 21-1429

FILED

Aug 22, 2023
DEBORAH S. HUNT, Clerk

Plaintiff-Appellant,

V.

Defendants-Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
MICHIGAN

ORDER

Before: NORRIS, SILER, and MURPHY, Circuit Judges.

Jonathan Joseph Good, a pro se Michigan prisoner, appeals the district court's grant of summary judgment to the defendants on his First Amendment retaliation claims filed under 42 U.S.C. § 1983. Good also moves the court to supplement the record with additional exhibits under Federal Rule of Appellate Procedure 10(e). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the reasons set forth below, we affirm.

Good is serving a life sentence in the Michigan Department of Corrections (MDOC) for a number of offenses. In 2017, he filed this action, alleging First Amendment retaliation claims against numerous prison officials and employees at St. Louis Correctional Facility (SLF), including Assistant Resident Unit Supervisor (ARUS) Wendi Walworth, Librarian Jeremy Bugbee, Classification Director Julius Mayfield, ARUS Barbara Finch, Assistant Librarian Dujuna Vandecasteele, Warden Steve Rivard, and Assistant Deputy Warden Kelly Barnett.

In August 2013, Good filed a grievance alleging that prison officials had improperly ransacked his cell, throwing his belongings everywhere and cracking his headphones. Grievance,

R.1, PageID 33. ARUS Walworth heard this grievance. The officer who conducted this search stated that “any damage or mess left in the cell did not occur during his shake down” and that he had not damaged Good’s headphones. Mem., R.1, PageID 34. Walworth concluded that Good could not seek reimbursement for the damaged headphones and that prison staff had not caused the damage. *Id.*

Good did not agree with this decision. Between September and November 2013, he filed several grievances against Walworth, including a grievance about her handling of his complaint of property damage. The officers who heard these grievances found that none of them had merit. Grievance, R.56-13, PageID 1249.

Nevertheless, Good alleges that prison staff took several adverse actions against him as a result of his grievances. To begin with, Good held a job at SLF as part of its “Legal Writer Program.” Policy Directive, R.56-2, PageID 1185. Under this program, SLF allowed some prisoners to serve as “legal writers” if they “successfully completed the legal writer training program[.]” *Id.* These legal writers could help other prisoners with their cases if these prisoners qualified for assistance because, for example, they did not “speak, read, or write English” or had a learning disability. *Id.* An SLF staff member supervised their work. *Id.* “To avoid exploitation” of the prisoners who needed to use the Legal Writer Program, however, legal writers were “prohibited from directly or indirectly charging or receiving compensation in any form, including money, goods, or services, for providing or receiving legal services from another prisoner.” *Id.* The legal writers also could not possess any legal materials of other prisoners in their cells. Bugbee Aff., R.56-5, PageID 1193; Notice of Intent, R.56-7, PageID 1231.

In October 2013, Walworth learned that Good had been performing legal work for nonqualifying prisoners (including prisoners who had left SLF). Walworth discovered Good’s communications with the relatives of these prisoners about their cases. Email, R.56-3, PageID 1188, 1190. The messages (and other evidence) suggested that these other prisoners were paying Good for his services. Notice, R.56-7, PageID 1231. One prisoner, for example, told his sister that he had paid Good \$150 for his appeal. *Id.* Walworth also learned from a librarian (defendant

Bugbee) that Good had kept the prisoners' legal materials in his cell. Bugbee Aff., R.56-5, PageID 1193. Worried that Good might improperly have more legal materials in his cell and be improperly charging for his services, Assistant Deputy Warden Kelly Barnett ordered a search of his cell. Walworth Aff., R.56-6, PageID 1202. Prison staff found legal materials in his possession. *Id.* Bugbee thus gave Good a "poor work evaluation" as a result of this misconduct, and Good was suspended ("laid-in") from his legal-writing job during an investigation. Bugbee Aff., R.56-5, PageID 1193; Walworth Aff., R.56-6, PageID 1202; Evaluation, R.56-5, PageID 1196; Resp., R.56-9, PageID 1235.

The next month, Walworth "prepared a Security Classification Screen for Good[.]" Walworth Aff., R.56-6, PageID 1202. Good says that he graded out at Security Level II on the Security Classification Screen worksheet, which allegedly would have allowed him to transfer to a lower security institution. But Walworth determined that he should be classified at a higher "Level IV" security category because "he was serving a life sentence and escaped from the County jail on November 26, 2008." *Id.*, PageID 1203. Given that he had repeatedly violated the rules of the Legal Writer Program, the prison also classified him as a high risk for property violations. *Id.*; see Transfer Order, R.56-10, PageID 1241. In December 2013, Good was transferred to another prison to make "bed space for [an] incoming VPP prisoner." Transfer Order, R.56-10, PageID 1241. The Michigan Department of Corrections sent him to Alger Correctional Facility (LMF), a remote Level IV prison in the Upper Peninsula.

In this suit, Good alleged that SLF staff removed him from his legal-writer job, increased his security clearance, and shipped him out of SLF because of his grievances. Compl., R.1, Compl., PageID 3–4. These retaliatory actions, he claimed, violated the First Amendment. *Id.*

The defendants moved for summary judgment on Good's retaliation claims, arguing that Good had not suffered an adverse action and could not show a causal connection between his protected activities and the alleged adverse actions. The defendants also argued that they were entitled to qualified immunity. Good moved the district court to stay briefing on the motion for

summary judgment so that he could file a motion to compel additional discovery. A magistrate judge granted Good's motion to stay.

Soon afterward, however, Good's case was reassigned to a second magistrate judge. The district court referred the defendants' motion for summary judgment to the second magistrate judge for a report and recommendation.

Without lifting the stay or giving Good an opportunity to respond, the second magistrate judge issued a report that recommended granting summary judgment to the defendants. To state a retaliation claim, the magistrate judge recognized, Good needed to show he engaged in expressive activity, that the defendants took an adverse action against him, and that there was a causal connection between the two. Rep., R.74, PageID 1660–61. The magistrate judge initially found it debatable whether Good's grievances were protected speech because the "great weight of evidence" established that they were "frivolous." *Id.*, PageID 1661. But the judge opted to decide the case on causation grounds alone. The judge recognized a "temporal proximity" between Good's grievances in September through November 2013 and the allegedly adverse actions in November and December 2013. *Id.*, PageID 1667. But he added that the defendants could "avoid liability" by establishing that they "would have taken the same action in the absence of the protected activity." *Id.* (citation omitted). And he identified nonretaliatory reasons for all of the defendants' actions. Among other things, Good was removed from his job as a legal writer because of his repeated violations of the rules not to possess prisoner legal files in his cell and not to accept payments from prisoners. *Id.*, PageID 1668–70. Good was also classified at a higher security level because he had just started serving a life sentence and posed a "high" risk of property violations. *Id.*, PageID 1673. The magistrate judge concluded: "Given the repeated and blatant violations of the Policy Directives, Plaintiff cannot rebut the Defendants' showing that they would [have] taken the same action in the absence of the protected activity." *Id.*, PageID 1674.

The district court initially issued an order adopting the magistrate judge's recommendations, noting that Good had failed to file any objections. Order, R.76, PageID 1680. But it subsequently granted Good an extension of time to file those objections. Order, R.79,

PageID 1692. Good raised mainly procedural objections, including an objection to the magistrate judge's recommendation to grant summary judgment on a ground not raised by the defendants.

The district court overruled Good's objections. Substantively, the court held that the magistrate judge had applied the correct law when holding that Good had established a prima facie case of retaliation, but that the defendants had come forward with "legitimate, non-retaliatory reasons for their adverse actions" that Good failed to rebut. Order, R.84, PageID 1862. The evidence showed that the adverse actions "would have occurred" even if Good had not filed any grievances. *Id.*, PageID 1862–63. Procedurally, the court rejected Good's argument that the magistrate judge had wrongly issued a recommendation without giving him an opportunity to respond. *Id.*, PageID 1866. The court reasoned that Good's ability to file objections gave him the "opportunity to respond" to the defendants' arguments. *Id.* The court also found that Good had requested discovery on matters that were "irrelevant" to the issues presented. *Id.*

On appeal, Good argues that the district court erred by lifting the stay entered by the first magistrate judge without giving him notice or an opportunity for discovery and granting summary judgment to the defendants. We review de novo a district court's order granting summary judgment. *Smith v. City of Troy*, 874 F.3d 938, 943 (6th Cir. 2017) (per curiam). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A court reviewing a summary-judgment motion must draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

We discourage district courts from granting summary judgment on a ground not advanced by the movant without giving the opponent notice and an opportunity to respond. *Smith v. Perkins Bd. of Educ.*, 708 F.3d 821, 829 (6th Cir. 2013). Nevertheless, we will affirm unless the losing party demonstrates prejudice. *Id.* To establish prejudice, the losing party must "demonstrate[] that it could have produced new favorable evidence or arguments had more notice been given." *Id.* at 831 (quoting *Turcar, LLC v. IRS*, 451 F. App'x 509, 515 (6th Cir. 2011)). As the district court recognized, Good cannot meet this burden.

A First Amendment retaliation claim has three elements: (1) the plaintiff engaged in protected conduct; (2) the plaintiff suffered an adverse action sufficient to deter a person of ordinary firmness from continuing to engage in that conduct; and (3) a causal connection existed between the protected activity and the adverse action. See *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc) (per curiam). This appeal concerns the third causation element. We recently clarified the nature of this causation element in *Lemaster v. Lawrence County*, 65 F.4th 302 (6th Cir. 2023). A plaintiff has the initial burden to establish that there is a genuine issue of material fact over whether the plaintiff's protected expression was a "motivating" factor in the defendants' adverse action. See *id.* at 309. If the plaintiff does so, the defendants can still rebut the plaintiff's claim by proving "that they would have taken the same action even if the plaintiff had not spoken"—namely, that there is an "*absence of but-for causation.*" *Id.* To carry this burden, the defendants "must affirmatively introduce evidence of such weight that no rational jury could disagree with it." *Id.* at 310.

In this respect, the burden-shifting approach for First Amendment retaliation claims differs from the burden-shifting approach for employment claims under the *McDonnell Douglas* framework, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the *McDonnell Douglas* context, a defendant only needs to identify a legitimate reason for the action; the burden then shifts back to the plaintiff to prove that the reason was pretextual and that discrimination motivated the adverse action. See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142–43 (2000). Unlike in an employment case governed by the *McDonnell Douglas* burden-shifting framework, the burden does not shift back to a plaintiff to establish pretext in a First Amendment retaliation case once the plaintiff has established that the protected activity was a motivating factor for the adverse action. See, e.g., *Wenk v. O'Reilly*, 783 F.3d 585, 594 (6th Cir. 2015). Rather, the defendants must prove they would have taken the same action anyway.

The defendants here have proved that "no rational jury" could find that they suspended Good from his legal-writer job, increased his security clearance, or transferred him because of his grievances. *Lemaster*, 65 F.4th at 310. The evidence is undisputed that Good wrongly accepted

money from other prisoners' families and possessed their legal materials. He continued to break the rules even after several warnings. As the district court explained, therefore, Good repeatedly violated prison regulations that were put "in place to protect other prisoners from exploitation and harm" caused by legal writers like himself. Order, R.84, PageID 1865. This evidence led the defendants to suspend Good from the Legal Writing Program. And when combined with his prior escape attempts and life sentence, it led the defendants to classify him as a Level IV prisoner. So the defendants have carried their burden of proving that they "would have taken the same harmful action even if" Good had not filed his grievances. *Lemaster*, 65 F.4th at 310.

In addition, Good has not shown that he was prejudiced by the district court's grant of summary judgment without affording him an opportunity to respond to the initial summary-judgment motion. Good was able to respond by filing objections to the magistrate judge's report. And he identifies nothing that he "could have produced" that would have changed the outcome. *Perkins*, 708 F.3d at 831 (citation omitted). Thus, a remand to give Good a chance to respond would qualify as an "empty formality" that wastes the district court's time. *Id.* at 829 (citation omitted).

Good also correctly points out that the district court faulted him for not presenting evidence of *pretext*. In this respect, the court erred by mistaking the burden-shifting approach in this First Amendment context with the burden-shifting approach in the *McDonnell Douglas* context. But we review the district court's order de novo. *City of Troy*, 874 F.3d at 943. So while the district court legally erred, its error was harmless because the defendants have introduced evidence that proves the absence of but-for causation. *Cf. Geiger v. Prison Realty Tr., Inc.*, 13 F. App'x 313, 315 (6th Cir. 2001) (order). Indeed, the district court elsewhere recited the correct standard, noting that the magistrate judge had properly held that the allegedly adverse actions "would have occurred even if [Good] had not filed his grievances." Order, R.84, PageID 1862.

Good finally argues that the district court prejudiced him by refusing him discovery. "The district court does not abuse its discretion in denying discovery when the discovery requested would be irrelevant to the underlying issue to be decided." *Green v. Nevers*, 196 F.3d 627, 632

(6th Cir. 1999). And here, Good sought documents that either did not exist, were privileged, or were irrelevant because they would not help Good prove retaliation. So the district court did not abuse its discretion.

One issue remains—Good moved to supplement the record to include three exhibits. We may supplement the record on appeal if “anything material to either party is omitted from or misstated in the record by error or accident.” Fed. R. App. P. 10(e)(2). Good does not explain how his proffered exhibits satisfy this standard. If anything, his exhibits bolster the defendants’ case, as they corroborate that Good “got in trouble [the] last time” he kept legal work in his cell and that he received a poor job performance score because he accepted payment for his legal work.

We **AFFIRM** the district court’s judgment and **DENY** Good’s motion to supplement the record.

SILER, Circuit Judge, dissenting. I respectfully dissent from the majority’s opinion. Plaintiff Jonathan Good was prejudiced both when the district court applied the wrong legal standard and when it denied him relevant discovery. However, the primary issue is that genuine issues of material fact exist regarding the causal connection between Good’s protected activity and the adverse actions taken against him.

The majority holds that summary judgment is appropriate because it is “undisputed that Good wrongly accepted money from other prisoners’ families and possessed their legal materials.” I disagree. First, even if it was undisputed that Good committed the alleged misconduct, this does not “preclude[] him from being able to establish retaliation.” *Maben v. Thelen*, 887 F.3d 252, 262–63 (6th Cir. 2018) (citation omitted). And here, the evidence is disputed. There is no evidence that Good’s alleged misdeeds were substantiated by a hearing as required by Department of Corrections procedure. See Mich. Admin. Code R 791.5501(2) (“A prisoner charged with minor misconduct shall be provided a fact-finding hearing conducted in accordance with R 791.3310.”).

Furthermore, although the majority points to Good’s Rule 56(C)(2) Objections to Defendants’ Motion for Summary Judgment to support the proposition that he engaged in prohibited conduct, Good only states that the misdeeds “alleged[ly] occurred,” not that they did

occur. And Good affirmatively argues, with support from the record, that he did not possess violative materials according to policies as they existed at the time or accept any money from family members.

Taking the evidence in the light most favorable to Good, as we must, Defendants have not proven that they “would have taken the same action even if” Good had not filed his grievances. *Lemaster v. Lawrence County*, 65 F.4th 302, 309 (6th Cir. 2023). Because “[t]he conflicting proof and inferences that can be drawn therefrom raise genuine issues of material fact that preclude the grant of summary judgment,” *Wexler v. White’s Furniture, Inc.*, 317 F.3d 564, 578 (6th Cir. 2003) (en banc), I respectfully dissent.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 22, 2023
DEBORAH S. HUNT, Clerk

No. 21-1429

JONATHAN JOSEPH GOOD,

Plaintiff-Appellant,

v.

WENDI WALWORTH, et al.,

Defendants-Appellees.

Before: NORRIS, SILER, and MURPHY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Exhibit B

Order Granting Extension for En Banc

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: September 25, 2023

Jonathan Joseph Good
Muskegon Correctional Facility
2400 S. Sheridan Drive
Muskegon, MI 49442

Re: Case No. 21-1429, *Jonathan Good v. Wendi Walworth, et al*
Originating Case No.: 2:17-cv-10140

Dear Mr. Good,

This is to advise that the court has granted your motion for an extension of time to file a petition for rehearing en banc.

Your petition was filed today. You will be notified when the court issues a decision on the petition.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Joshua Douglas Marcum

EXHIBIT C

Order Denying En Banc

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Oct 18, 2023
DEBORAH S. HUNT, Clerk

ORDER

* Judge Davis recused herself from participation in this ruling.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHAN GOOD,

Plaintiff,

Case No. 17-10140
HON. GERSHWIN A. DRAIN

vs.

WENDI WALWORTH, *et al.*,

Defendants.

_____/

**ORDER ACCEPTING AND ADOPTING REPORT AND
RECOMMENDATION [#74], GRANTING DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT [#56] AND DISMISSING ACTION**

I. BACKGROUND

Before the Court is the Plaintiff Jonathan Good's 42 U.S.C. § 1983 action alleging First Amendment retaliation against Defendants Wendi Walworth, Barbara Finch, Dujuna VanDecasteele, Kelly Barnett,¹ Julius Mayfield and Jeremy Bugbee, who are all employed by the Michigan Department of Corrections ("MDOC") in some capacity. The Court referred the instant matter to Executive Magistrate Judge R. Steven Whalen for all pretrial proceedings. *See* Dkt. No. 72.

¹ The Court dismissed Defendant Barnett in a prior decision.

On March 30, 2020, Executive Magistrate Judge Whalen issued a Report and Recommendation recommending that this Court grant the Defendants' Motion for Summary Judgment because Plaintiff cannot establish that Defendants were motivated by retaliatory animus. The Court agrees that Plaintiff has not rebutted the Defendants' evidence that they would have taken the same actions without Plaintiff's protected activity. Moreover, Plaintiff failed to file any objections to the Report and Recommendation and the time for doing so has expired. *See* 28 U.S.C. § 636(b)(1) and E.D. Mich. L.R. 72.1(d)(2).

II. CONCLUSION

Accordingly, consistent with the analysis set forth in Executive Magistrate Judge R. Steven Whalen's March 30, 2020 Report and Recommendation, the Court hereby ACCEPTS and ADOPTS his March 30, 2020 Report and Recommendation [#74], and GRANTS Defendants' Motion for Summary Judgment [#56].

This cause of action is dismissed.

SO ORDERED.

Dated: April 28, 2020

/s/ Gershwin A. Drain
GERSHWIN A. DRAIN
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record and on Jonathan Good,
#197972, Kinross Correctional Facility, 4533 W. Industrial Park Drive, Kincheloe,

MI 49786 on

April 28, 2020, by electronic and/or ordinary mail.

/s/ Teresa McGovern

Case Manager

**Additional material
from this filing is
available in the
Clerk's Office.**