NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 20, 2024*
Decided November 20, 2024

Before

FRANK H. EASTERBOOK, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 24-1508

GREGORY PERKINS,
Plaintiff-Appellant,

v.

JAMES KOEHLER, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 22-CV-1125

William E. Duffin,
Magistrate Judge.

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2) (C).

O R D E R

Gregory Perkins, an inmate at the Green Bay Correctional Institution, sued several prison officials, alleging that they violated his rights under the Eighth and First Amendments when one harassed him about his sexual orientation, and they all retaliated against him for filing a complaint about the sexual harassment of another prisoner at another institution. *See* 42 U.S.C. § 1983. A magistrate judge, presiding by consent, *see* 28 U.S.C. § 636(c), entered summary judgment for the defendants because Perkins did not identify a genuine dispute of material fact. Because Perkins fails to present sufficient evidence to support either claim, we affirm.

We construe all facts and reasonable inferences in favor of Perkins, the non-moving party. *Douglas v. Reeves*, 964 F.3d 643, 645 (7th Cir. 2020). While incarcerated at Oshkosh Correctional Institution, Perkins called a hotline to report a violation of the Prison Rape Elimination Act, 42 U.S.C. §§ 15601–15609 (the "Act"), on behalf of another inmate, Tim Behrensprung. An investigation resulted, and Perkins was a third-party witness. Later, both inmates were transferred (a few weeks apart) to Green Bay. But the investigation of the complaint was conducted and concluded at Oshkosh.

Not long after the inmates' transfer, a member of the Green Bay security staff found emails that suggested a romantic relationship between Perkins and Behrensprung and flagged the issue for James Koehler, the Corrections Program Supervisor. (The Wisconsin Department of Correction prohibits consensual sexual activities or relationships between prisoners.) The report prompted an email discussion among Koehler, Daniel Cushing (a correctional Captain), and John Kind (the Security Director), regarding whether Perkins and Behrensprung should be separated, and how to best accomplish that. Eventually, with Cushing's and Kind's agreement, Koehler placed a special handling note in Perkins's profile in the electronic inmate population management system. The note stated that Perkins and Behrensprung should be separated by housing unit because they "had a suspected inappropriate relationship." None of the communications among the defendants about the suspected relationship and the separation requirement mentioned Perkins's complaint at Oshkosh.

A few months later, a conversation—the exact content of which is in dispute—occurred between Perkins and Captain Cushing. At summary judgment, Perkins filed multiple documents under penalty of perjury. In these he attested that Cushing yelled, amid or within earshot of other inmates, that Perkins was gay and was trying to be housed with Behrensprung, and other remarks to that effect. Perkins asserts that this

exchange caused severe psychological damage, including suicidal ideation, and put him at risk of harm from other inmates. Cushing, on the other hand, attested that Perkins initiated the interaction when he asked to be housed with Behrensprung, and Cushing informed him that there was a note in his profile requiring that he and Behrensprung be separated because of a suspected inappropriate relationship. According to Cushing, only one other inmate passed by during the interaction. Not long after, Perkins received a conduct report from Cushing and then a disciplinary conviction and sentence to segregation for forging notes to the prison social worker asking to lift the separation order for Perkins and Behrensprung. Perkins asserts that this was also part of a campaign of retaliation against him.

Perkins sued Koehler, Cushing, and Kind, alleging that, by labeling him a homosexual, restricting his housing options, and putting him in segregation, they intended to punish him for speech protected by the First Amendment: filing the complaint about a violation of the Act while at Oshkosh. He also alleged that Cushing violated his rights under the Eighth Amendment by openly harassing him about his sexual orientation and placing him in danger. The defendants eventually moved for summary judgment. The district court granted the motion, concluding that Perkins had only speculation that there was a retaliatory motive for the special handling note, given the legitimate rationale provided by the defendants. The court also determined that, even if Cushing had harassed Perkins in the manner alleged, that harassment was not enough to constitute cruel and unusual punishment under the Eighth Amendment.

On appeal, Perkins argues that the district court overlooked factual inconsistencies in the defendants' accounts and failed to properly weigh Perkins's evidence. We review the summary judgment decision de novo. *Douglas* 964 F.3d at 645. Where the evidence raises factual disputes, we accept Perkins's version of events.

As to the First Amendment claim, the district court appropriately entered judgment for the defendants based on the absence of evidence that they restricted Perkins's housing placement to punish him for protected activity. Prisons cannot attach penalties to prisoners' protected speech. *Herron v. Meyer*, 820 F.3d 860, 863 (7th Cir. 2016); *see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 742 (2011). For his claim to survive summary judgment, Perkins required evidence sufficient to allow a reasonable jury to conclude that he engaged in activity protected by the First Amendment, that he suffered a deprivation that would likely deter future First Amendment activity, and that the First Amendment activity was a motivating factor in the defendants' decision to take the retaliatory action. *Jones v. Van Lanen*, 27 F.4th 1280,

1284 (7th Cir. 2022). Even then, the defendants can prevail if they can show that the harm Perkins complains of would have occurred anyway. *Greene v. Doruff*, 660 F.3d 975, 980 (7th Cir. 2011). Like the district court, we jump to the question of whether Perkins supplied evidence that his protected activity was a motivating factor for the housing restriction that Perkins views as a reprisal.[†] He did not.

Here, the record shows that the defendants created or approved the special handling note in Perkins's file because his emails alerted security staff to a possible relationship with Behrensprung, which would violate the policies of the Department of Corrections. The defendants' attestations and records sufficiently supported this legitimate reason for their conduct. Therefore, Perkins required some evidence that places their rationale in dispute—and that his protected activity motivated the decision. *Manuel v. Nalley*, 966 F.3d 678, 680 (7th Cir. 2020); *Greene*, 660 F.3d at 980. He has no basis in personal knowledge of the reasons they acted, so he gets nowhere by swearing to their motives. *See* FED. R. CIV. P. 56(c)(4). Thus, as the district court explained, all Perkins did was speculate about their motives based on their (admitted) knowledge that Perkins was involved, at least as a witness, in an investigation at his previous institution. But the mere knowledge that a prisoner engaged in protected activity is not enough to show improper motivation in the face of legitimate reason for the action. *See Jones*, 27 F.4th at 1284. The defendants made this decision over email; their emails made no mention of Perkins's prior complaint. Moreover, the defendants were not targets of or involved in the investigation of Perkins's complaint, which did not affect or pertain to anyone at Green Bay. Thus, there is no circumstantial evidence allowing a reasonable inference of an improper motive.

The district court also properly granted summary judgment on Perkins's Eighth Amendment claim because the interaction with Cushing was too fleeting to rise to the level of cruel and unusual punishment. Verbal harassment by jail or prison guards generally does not rise to the level of cruel and unusual punishment. *See Beal v. Foster*, 803 F.3d 356, 358 (7th Cir. 2015). Although we have acknowledged that harassment so

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[†] The defendants do not dispute that the filing a complaint about a violation of the Prison Rape Elimination Act is activity presented by the First Amendment, so we need not decide. *See Zimmerman v. Bornick*, 25 F.4th 491, 493 (7th Cir. 2022) ("Our case law has not resolved where the First Amendment draws the line for prisoners between protected and unprotected speech.").

cruel as to inflict significant psychological harm can violate the Eighth Amendment, harassment that is "fleeting" or "simple" does not rise to that level. *Id*. at 457–58. Here, Perkins cites one interaction with Cushing that did not involve especially "severe" or "devasting" content. *See id*. Furthermore, the only harm Perkins alleges is the worsening of his psychological conditions and his fear that other inmates will target him. But prisoners cannot bring suit based on mental or emotional injury alone. 42 U.S.C. § 1997e(e); *Gray v. Hardy*, 826 F.3d 1000, 1007 (7th Cir. 2016). Therefore, no reasonable jury could conclude that Cushing's actions violated the Eighth Amendment.

AFFIRMED