

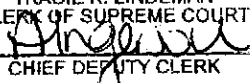
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID ABARRA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70023

FILED

SEP 20 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a civil rights action. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant David Abarra, an inmate, was placed in disciplinary segregation after being found guilty of charging fees for legal services, a violation of the prison's regulations. Abarra then filed a civil rights complaint against the State alleging, as is pertinent here,¹ that his due process rights were violated by improperly filing the disciplinary charge against him, refusing to correct the improper disciplinary charge at the hearing on the matter, and improperly convicting him on the disciplinary charge. Abarra also claimed that the State retaliated against him for

¹A fifth claim was dismissed by the district court, and that decision was affirmed on appeal by the Nevada Supreme Court; thus, we need not address it in this order. *See Abarra v. State*, 131 Nev. ___, ___, 342 P.3d 994, 997 (2015).

exercising his First Amendment rights.² The district court initially dismissed Abarra's claims because he failed to exhaust his administrative remedies, but the Nevada Supreme Court reversed and remanded that decision. *Abarra v. State*, 131 Nev. ___, 342 P.3d 994 (2015).

On remand, the State filed a motion for summary judgment, which Abarra opposed with a request for limited discovery. Although the State filed a non-opposition to Abarra's request, it did not immediately provide Abarra with the documentation he requested. Concerned that he would miss the deadline to oppose summary judgment, Abarra filed his opposition without any documentation from the State. After the State filed a reply in support of its motion, Abarra received the documentation he had requested. Abarra then moved to supplement his opposition by a specific date, and also filed a motion to compel the production of additional documentation that he believed the State was willfully withholding. The State did not oppose Abarra's request to supplement his opposition, but opposed the motion to compel stating both that discovery had not commenced and that it had produced all documentation pertaining to Abarra's limited request. The court denied the motion to compel, but granted Abarra's request to supplement his opposition. Abarra did not, however, supplement his opposition by the date he had selected, and more than a week after that date passed, the State resubmitted its reply in

²Abarra presents an argument on appeal that his claims must be reviewed as they were stated in the supreme court's previous opinion on the case, *Abarra*, 131 Nev. at ___, 342 P.3d at 995, and not as the State characterized them in the district court. Based on this argument, our description of Abarra's claims tracks the description in the supreme court's opinion. *See id.*

support of summary judgment. The district court then granted summary judgment, finding that Abarra failed to identify any liberty interest to which due process would attach and that the State furthered a legitimate penological goal when it removed him from his prison job, causing Abarra's First Amendment retaliation claim to fail. This appeal followed.

On appeal, Abarra asserts that the district court erred in granting summary judgment because it did not construe the evidence in his favor and because genuine issues of material fact remained. We disagree. Abarra's first three claims all assert that he was deprived of due process in relation to the disciplinary charge proceedings that resulted in him being assigned to disciplinary segregation. To invoke due process protections, an inmate must establish that a life, liberty, or property interest is at stake.³ *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). And, while states can create liberty interests for inmates that are protected by due process in certain instances, "these interests will generally be limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 222-23 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

In this case, the State demonstrated, by admissible evidence, that its placement of Abarra in disciplinary segregation did not create an atypical and significant hardship on Abarra's prison life, *see Sandin*, 515 U.S. at 485 (concluding that the inmate had no liberty interest in being free from disciplinary segregation because it did not "present a dramatic departure from the basic conditions" of the inmate's prison life); *Chappell*

³Abarra does not assert that a life or property interest was at stake, and thus, we consider only whether he identified a liberty interest.

v. Mandeville, 706 F.3d 1052, 1064 (9th Cir. 2013) (requiring a case-by-case consideration of whether inmate housing conditions cause an atypical hardship), and Abarra failed to present evidence that contradicted the State's position on this issue. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (providing that a party opposing summary judgment must put forth specific facts, by affidavit or otherwise, showing the existence of a genuine issue of material fact, and cannot rely on mere speculation or conjecture). Without an atypical and significant hardship on his prison life, there is no liberty interest at stake, and, thus, the State was not required to afford Abarra any due process rights. *See Wilkinson*, 545 U.S. at 221, 222-23. And because the State did not owe Abarra any due process rights as to this issue, his due process claims fail as a matter of law and the district court did not err in granting summary judgment on those claims.⁴ *See Wood*, 121 Nev. at 729, 732, 121 P.3d at 1029, 1031

⁴To the extent Abarra's due process claims could be read to assert that he was falsely charged in the disciplinary proceedings, the Nevada Supreme Court already determined that any due process rights attaching to Abarra's conviction were satisfied, and we cannot revisit that decision. *See Abarra*, 131 Nev. at ___, 342 P.3d at 997; *see also Hsu v. Cty. of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007) (providing that a higher court's decision in a case must be followed as that case progresses in the district court or in a later appeal). Abarra also asserts that the district court abused its discretion in denying his motion to compel the production of additional evidence relating to his disciplinary proceedings. But, because the supreme court determined he was afforded all process that was due at those proceedings, *see Abarra*, 131 Nev. at ___, 342 P.3d at 997, the issue was already decided and no further evidence was needed. Accordingly, the district court did not abuse its discretion in denying the motion. *See Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012) (providing that discovery matters are within the district court's discretion).

(reviewing an order granting summary judgment de novo and stating that summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law).


In regard to his retaliation claim, Abarra asserts that the State retaliated against him for filing lawsuits by removing him from his prison job, thereby violating his First Amendment rights. To prove a First Amendment retaliation claim, Abarra must demonstrate, among other things, that the State's removal of him from his job "did not reasonably advance a legitimate correctional goal." *Angel v. Cruse*, 130 Nev. ___, ___, 321 P.3d 895, 898 (2014) (setting forth the elements for a First Amendment retaliation claim). Here, the State presented evidence that it removed Abarra from his job as a legal clerk because it found him guilty of charging for legal services, which advanced the legitimate penological goal of safety and security by preventing illicit bartering between inmates. See *id.* at ___, 321 P.3d at 900 (stating that safety and security are legitimate penological goals). In opposition, Abarra merely argued that he was not accepting fees for legal services, so the State's stated goal was not advanced by removing Abarra from his job.

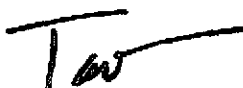
Because the Nevada Supreme Court already upheld Abarra's conviction for charging for legal services, see *Abarra*, 131 Nev. at ___, 342 P.3d at 997, Abarra's argument that he is not guilty fails. See *Hsu v. Cty. of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007) (providing that a higher court's decision in a case must be followed as that case progresses in the district court or in a later appeal). And without any further argument from Abarra that the State's removal of him from his job did not advance a legitimate penological goal, summary judgment in favor of the

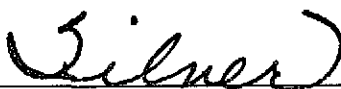
State on the retaliation claim was appropriate because Abarra's retaliation claim failed as a matter of law. *See Cuzze v. Univ. & Comm. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) (providing that when the nonmoving party bears the burden of persuasion at trial, the party moving for summary judgment can win its motion by negating one essential element of the nonmoving party's claim); *Wood*, 121 Nev. at 729, 732, 121 P.3d at 1029, 1031.

Accordingly, because the district court properly granted summary judgment to the State on all of Abarra's claims, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. James Todd Russell, District Judge
David Abarra
Attorney General/Carson City
Carson City Clerk