

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GLENN DARNELL DEAN,
Appellant,
vs.
THE STATE OF NEVADA
DEPARTMENT OF CORRECTIONS;
JAMES G. COX, DIRECTOR OF
(NDOCS); DWIGHT NEVEN, WARDEN
OF HIGH DESERT STATE PRISON
(HDSP); JENNIFFER NASH (AW)
(HDSP); BRUCE STROUD, (AW)
(HDSP); AND CHRISTOPHER DAY,
LIEUTENANT (HDSP)
Respondents.

No. 71798

FILED

APR 26 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Glenn Darnell Dean appeals from a district court order granting summary judgment to the Nevada Department of Corrections (NDOC) and several NDOC officials in a civil rights action.¹ Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Dean was an inmate at the High Desert State Prison and he owned and possessed an electric musical keyboard. Cell searches at the prison revealed that some inmates were hiding contraband in the hollow

¹Dean seems to identify the district court's denial of his own motion for summary judgment in his notice of appeal. However, because Dean does not provide any arguments suggesting the district court's denial of his motion was in error, we do not consider this order on appeal. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

spaces inside these types of keyboards.² Consequently, Warden Dwight Neven issued a memorandum banning inmates' possession of those keyboards and ordered inmates, including Dean, to surrender them within 30 days.

Dean filed a series of grievances using the prison's grievance protocols, all of which were denied by prison officials. During the grievance process, respondent Christopher Day, the property room sergeant, mailed Dean's keyboard to the address provided by Dean and with the funds authorized by Dean.³ Subsequently, Dean filed a civil rights action alleging that prison officials, the NDOC, and the State of Nevada violated his First and Fourteenth Amendment rights by retaliating against him for filing grievances relating to the prison's keyboard policy change. He alleged that Day violated prison policy by shipping his keyboard before the grievance process was finished and retaliated against him by discarding Dean's unauthorized property form. Dean also alleged that Associate Warden Jennifer Nash made false statements that caused his second level grievance to be denied.

Dean moved for summary judgment arguing there were no genuine issues of material fact concerning his claim that the prison officials retaliated against him. Respondents opposed Dean's motion and filed their own motion for summary judgment wherein they argued they could not be liable as a matter of law. Dean opposed respondents' motion for summary judgment within his reply on his own motion for summary judgment.

²We do not recount the facts except as necessary to our disposition.

³The record on appeal does not contain any support or proof to establish that Dean's mother received the keyboard. During oral argument, respondents' counsel stated that he was not sure if Dean's mother was in possession of the keyboard.

The district court held a hearing on these motions. Ultimately, the district court granted respondents' motion for summary judgment because it concluded that Dean failed to demonstrate the five factors required to show that respondents had retaliated against him. It summarily denied Dean's motion for summary judgment on similar grounds.

Dean argues on appeal the district court erred by granting respondents' motion for summary judgment because, in reviewing their motion, the court did not view the evidence and any reasonable inferences drawn from it in a light most favorable to him as the non-moving party. Dean also argues the district court erred by granting respondents' motion for summary judgment because genuine issues of material fact exist concerning his retaliation claim.⁴

This court reviews a district court's order granting summary judgment de novo, without deference to the district court's findings. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all "other evidence on file demonstrate that no genuine issue" of material fact exists "and that the moving party is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted). "[W]hen reviewing a motion for summary judgment," this court views "the evidence, and any reasonable inferences drawn from it, . . . in a

⁴Dean also moved for summary judgment below. In that motion, Dean contended that the facts of his case are not in dispute. Because Dean's argument on appeal that genuine issues of material fact exist contradicts his position below, we observe that Dean waived this argument by not raising it in the district court in the first instance. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Nevertheless, we choose to address the merits of Dean's arguments.

light most favorable to the nonmoving party.” *Id.* However, “the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue.” *Id.* at 731, 121 P.3d at 1030-31 (internal quotation marks omitted).

An inmate alleging retaliation for the exercise of his First Amendment rights must show that:

- (1) the prisoner engaged in protected conduct, (2) a state actor took adverse action against the prisoner, (3) the adverse action was taken because of the prisoner’s protected conduct, (4) the adverse action had a chilling effect on the prisoner’s protected conduct, and (5) the adverse action did not reasonably advance a legitimate correctional goal.

Angel v. Cruse, 130 Nev. 220, 225, 321 P.3d 895, 898 (2014) (citing *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2004)). “To prevail on a retaliation claim, a plaintiff must show that his protected conduct was the substantial or motivating factor behind the defendant’s conduct.” *Id.* at 225, 321 P.3d at 899 (quoting *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009)). Moreover, a plaintiff must be able to support all five elements of a retaliation claim to make out that claim. *See id.* at 225, 321 P.3d at 898-99.

Dean asserts that Day retaliated against him for filing grievances by mailing his keyboard before Dean’s grievance process was completed, thereby violating his First Amendment rights. “To survive summary judgment on this element of a retaliation claim, a prisoner only has to submit evidence of a retaliatory motive sufficient to create a factual issue in this regard.” *Id.* at 226, 321 P.3d at 899. “While the timing of a punishment alone is not sufficient to establish motivation, it may be circumstantial evidence of motivation.” *Id.*

Respondents concede that Day mailed Dan's keyboard before his grievance process was completed, but contend that Day followed prison policy and acted according to the warden's memorandum. In opposition, Dean only argues that Day's mailing the keyboard *before* the grievance process was complete demonstrates that Day retaliated against him. Without more than this bare allegation based on the timing of Day's conduct, Dean's claim cannot survive summary judgment, as he has not shown any genuine issue of material fact, only speculation, concerning the third element of retaliation⁵—that Day's action was taken *because of* Dean's protected conduct.⁶

As for the remaining defendants, summary judgment was also appropriate. Dean did not allege what, if any, action Cox and Stroud took against him that constituted an adverse action in retaliation for filing his grievances. Additionally, the actions that Dean alleged that Neven and Nash took do not rise to the level of personal participation needed to succeed on a retaliation claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (“[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.”). Therefore, Dean's

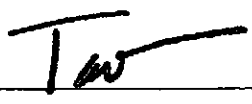
⁵Dean also offers no evidence to support the fourth or fifth elements of a retaliation claim. Specifically, he cannot show that the prison's untimely shipping of his keyboard had any chilling effect on his protected conduct (filing grievances) and he cannot show that removing his keyboard from the prison did not serve a legitimate correctional goal.


⁶The district court also found that respondents were entitled to qualified immunity. Because we conclude no genuine issue of material fact exists on Dean's retaliation claim such that summary judgment was appropriate, we need not determine whether respondents were entitled to qualified immunity.


allegations fail to demonstrate the second element required for a First Amendment retaliation claim regarding the remaining defendants.

Thus, the district court did not err in granting summary judgment as to Day and the other named defendants.⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, C.J.
Silver


_____, J.
Gibbons

cc: Hon. Joseph Hardy, Jr., District Judge
Jeannie N. Hua
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk

⁷Dean also argues that the district court abused its discretion by denying his motion to compel discovery without affording him an opportunity to appear at the hearing on that motion. Dean does not include documentation in the appellate record to show that he raised this challenge below, and regardless, it appears the motion was resolved without a hearing. *See generally* EDCR 2.23(c) (providing that a district court may choose to decide a motion without oral argument). Accordingly, we will not consider this argument on appeal. *See Cuzze v. Univ. & Comm. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (“When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court’s decision.”); *see also Old Aztec Mine, Inc.*, 97 Nev.at 52, 623 P.2d at 983 (1981). Moreover, he did not identify the order denying his motion to compel in his notice of appeal such that this court will not consider this issue. *See Collins v. Union Fed. Sav. & Loan Ass’n*, 97 Nev. 88, 89-90, 624 P.2d 496, 497 (1981).