IN THE SUPREME COURT OF THE STATE OF NEVADA

HOWARD LEE WHITE,
Appellant,
vs.
THE STATE OF NEVADA EX REL. ITS DEPARTMENT OF CORRECTIONS, D/B/A SILVER STATE INDUSTRIES; AND DON GENTINE,
Respondents.

No. 41961

FILED

FEB 02 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order granting summary judgment in an age discrimination case. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Appellant Howard Lee White filed the present action under 42 U.S.C. § 1983 against the State of Nevada, the Nevada Department of Corrections (NDOC), and Don Gentine, alleging violations of the Eighth and Fourteenth Amendments. Specifically, White contends that respondents violated his constitutional rights when they denied him a job in the prison mattress factory because of his age.

After respondents moved for judgment on the pleadings under NRCP 12(c), the district court converted the motion into one for summary judgment. The court then granted summary judgment in favor of respondents, findings that (1) the defense of qualified immunity shields them from liability, and (2) White does not have a constitutional right to employment. This appeal followed.

07-02691

This court reviews the order granting summary judgment in favor of NDOC and Gentine de novo.[1] Summary judgment is appropriate if the pleadings and other evidence on file, viewed in a light most favorable to White, demonstrate that no genuine issue of material fact remains in dispute and that NDOC and Gentine are entitled to judgment as a matter of law.[2]

Having considered the record in light of this standard, we conclude that the district court reached the correct result when it granted summary judgment in favor of NDOC and Gentine, albeit (to the extent that the court relied upon the defense of qualified immunity and White's lack of a constitutional right to employment) for the wrong reasons.[3] For the following reasons, we affirm.

The NDOC is not a "person" within the meaning of 42 U.S.C. § 1983.

As explained by the Supreme Court of Montana, "[s]tates and other governmental entities . . . are considered 'arms of the state' and, as a result, they are not 'persons' within the meaning of § 1983."[4] Thus, with respect to respondent NDOC, White's action fails because NDOC cannot

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[1]See Wood v. Safeway, Inc., 121 Nev. 724, ___, 121 P.3d 1026, 1029 (2005).

[2]Id.

[3]See Milender v. Marcum, 110 Nev. 972, 977, 879 P.2d 748, 751 (1994) (stating that this court may affirm rulings of the district court on grounds different from those relied on below).

[4]Orozco v. Day, 934 P.2d 1009, 1012 (Mont. 1997).

be sued under 42 U.S.C. § 1983.[5] Accordingly, district court did not err in granting summary judgment in favor of NDOC. However, with respect to respondent Gentine, we conclude that, because White sued Gentine in his individual capacity, Gentine is a "person" within the meaning of § 1983.[6]

Gentine is entitled to qualified immunity with respect to White's Eighth Amendment claim, but not his Fourteenth Amendment claim.

Gentine argues that he is entitled to qualified immunity. The defense of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their

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[5]See Will v. Mich. Dept. of State Police, 491 U.S. 58, 71 (1989) (holding "that neither a State nor its officials acting in their official capacities are 'persons' under § 1983").

[6]State officials are "persons" under § 1983 "if sued for money damages in their individual capacities for actions taken under color of state law." Orozco, 934 P.2d at 1013 (citing Hafer v. Melo, 502 U.S. 21 (1991)) (emphasis added). When "state officials are named in a complaint which seeks damages under 42 U.S.C. § 1983, it is presumed that the officials are being sued in their individual capacities." Shoshone-Bannock Tribes v. Fish & Game Com'n, Idaho, 42 F.3d 1278, 1284 (9th Cir. 1994). Moreover, "[i]n cases where the complaint does not clearly specify whether state officials are sued in their individual or official capacities, the course of the proceedings will indicate the type of liability sought to be imposed." Orozco, 934 P.2d at 1013 (citing Larez v. City of Los Angeles, 946 F.2d 630, 640 (9th Cir. 1991)).

In this case, White failed to set forth the capacity in which he is suing Gentine. However, respondents requested and received dismissal by the district court based in part on qualified immunity, which is only a defense in individual capacity suits. See Larez, 946 F.2d at 640. Thus, respondents must have understood that White intended to sue Gentine in his individual, rather than his official, capacity. As a result, we conclude that the course of the proceedings indicate that White properly sued Gentine in his individual capacity, as required by § 1983.

conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[7] In Saucier v. Katz, the United States Supreme Court developed a two-pronged inquiry to determine when summary judgment based on qualified immunity is appropriate.[8] Under this test, a court must first determine whether the facts alleged, taken in the light most favorable to the party asserting the injury, demonstrate that the officer violated a constitutional right.[9] If a constitutional violation did not occur under this standard, the inquiry ends, and a finding of qualified immunity is appropriate.[10] However, if the parties' submissions indicate a possible constitutional violation, the reviewing court must then ask whether the constitutional right was clearly established.[11] A right is clearly established only if it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted.[12] If the law does not put an officer on notice that his conduct is clearly unlawful, summary judgment based on qualified immunity is still appropriate.[13]

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[7]Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[8]533 U.S. 194, 200 (2001).

[9]Id. at 201.

[10]Id.

[11]Id.

[12]Id. at 202.

[13]Id.

Applying the Saucier v. Katz test to White's Eighth Amendment and Fourteenth Amendment claims, we conclude that the defense of qualified immunity shields Gentine from liability with respect to the Eighth Amendment but not the Fourteenth Amendment.

Eighth Amendment Cruel and Unusual Punishment Clause

The standard applicable under the Cruel and Unusual Punishment Clause of the Eighth Amendment "is flexible and dynamic, based on the 'evolving standards of decency that mark the progress of a maturing society.'"[14] Accordingly, the Ninth Circuit has held that, "[p]rison conditions must not be 'grossly disproportionate to the severity of the crime' nor involve the 'wanton and unnecessary infliction of pain.'"[15]

White cites Brown v. Sumner[16] in support of his argument that Gentine violated the Eighth Amendment by refusing to grant White a job because of White's age. In Brown, a Nevada federal district court found that "the eighth amendment's cruel and unusual punishments clause prohibits state authorities from administering prison programs in a racially discriminatory manner" because "[r]acial discrimination clearly is repugnant to our society's current standards of decency . . . [and] inflicts the type of unnecessary and wanton pain that is forbidden by the eighth amendment."[17] Thus, "while a prison inmate does not have an eighth

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[14]Baumann v. Ariz. Dept. of Corr's, 754 F.2d 841, 846 (9th Cir. 1985) (quoting Rhodes v. Chapman, 452 U.S. 337, 344-45 (1981)).

[15]Id. (quoting Rhodes, 452 U.S. at 347).

[16]701 F. Supp. 762 (D. Nev. 1988).

[17]Brown, 701 F. Supp. at 766 (emphasis added).

amendment right to participate in a work program, he does have an eighth amendment right to be considered for those programs that do exist without regard to his race, creed, color, or national origin."[18]

Brown deals solely with the issue of racial discrimination, and this court has been unable to find any case that extends Brown, or applies reasoning similar to that in Brown, to age discrimination. In fact, the U.S. Supreme Court has recognized that "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'"[19] We thus conclude that even if denying an inmate the opportunity to participate in a particular work program because of his age constitutes a violation of the Eighth Amendment, that violation is not "clearly established" under Saucier v. Katz. Accordingly, we further conclude that the defense of qualified immunity shields Gentine from liability with respect to White's Eighth Amendment claim.

Fourteenth Amendment Equal Protection Clause

Because "age is not a suspect classification under the Equal Protection Clause . . . States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[20] In the context of the Fifth Amendment, the Tenth Circuit has held that while a prisoner "has

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[18]Id. (emphasis added).

[19]Kimel v. Florida Bd. of Regents, 528 U.S. 62, 83 (2000).

[20]Id.

no right to a job in the prison or to any particular job assignment . . . prison officials cannot discriminate against him on the basis of his age . . . in choosing whether to assign him a job or in choosing what job to assign him."[21]

In light of the Tenth Circuit's holding, and the U.S. Supreme Court's recognition of the possibility of an unconstitutional classification based on age (as unlikely as it may be), we conclude that White may have a "clearly established" constitutional right to be free from age discrimination under the Fourteenth Amendment despite his prisoner status. Thus, to the extent the district court granted summary judgment in favor of Gentine based on the defense of qualified immunity under the Fourteenth Amendment, the district court erred. However, as explained below, summary judgment in favor of Gentine was still proper.

Summary judgment was appropriate because White failed to present evidence establishing a prima facie case of age discrimination under the Fourteenth Amendment.

To present a prima facie case of age discrimination, White was required to produce evidence that Gentine acted in a discriminatory manner and that the discrimination was intentional.[22] With respect to age discrimination under the Fourteenth Amendment, the United States Supreme Court has recognized that "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such

[21]Williams v. Meese, 926 F.2d 994, 998 (1991).

[22]See Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 473 (9th Cir. 1991).

generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant."[23] Moreover, "because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the 'facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'"[24]

In this case, the record reveals certain evidence suggesting that Gentine instructed another inmate, Michael Doyle, to tell White that White was not selected for a job because White was "too old." The evidence of this exchange is limited to an affidavit and witness statement from Dyarell Hunt in which Hunt claims to have overheard Doyle relate Gentine's statement to White. Hunt's affidavit and witness statement, however, present two layers of hearsay: first, Gentine's statement to Doyle; second, Doyle's statement to White.[25] Even assuming Gentine's statement to Doyle qualifies as an admission, there is no evidence (such as an affidavit from Doyle) or exception to the hearsay rule permitting the admission of Doyle's statement to White.[26]

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[23]Kimel, 528 U.S. at 84.

[24]Id. (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)).

[25]See NRS 51.067.

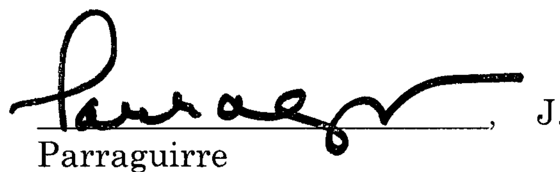
[26]See NRS 51.035; NRS 51.065. This is true even if both White and Hunt testify to the exchange with Doyle.

Because evidence submitted to avoid summary judgment must be admissible evidence,[27] and because White failed to create a genuine issue of material fact as to whether the alleged classification in this case violated the Fourteenth Amendment under the circumstances presented, judgment as a matter of law was appropriate. For these reasons, we conclude the district court did not err in granting summary judgment in favor of Gentine.

Conclusion

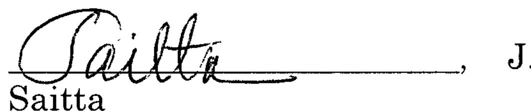
While we do not entirely agree with the district court's reasoning in granting summary judgment in favor of respondents, we conclude, for the reasons stated above, that summary judgment was appropriate. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_______________, J.
Parraguirre

_______________, J.
Hardesty



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[27]See NRCP 56(e); Schneider v. Continental Assur. Co., 110 Nev. 1270, 1273, 885 P.2d 572, 575 (1994) ("Evidence introduced in support of or opposition to a motion for summary judgment must be admissible evidence").

cc: First Judicial District Court Dept. 1, District Judge
Howard Lee White
Attorney General Catherine Cortez Masto/Carson City
Carson City Clerk