

STATE OF MICHIGAN
COURT OF APPEALS

JOHN H. KOSER,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF
CORRECTIONS, TODD DUNN, and ROBERT
MULVANEY,

Defendants-Appellees,

UNPUBLISHED

June 3, 2003

No. 241238

Marquette Circuit Court

LC No. 01-038815-CZ

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(4), (7), and (8). We affirm.

Michigan's Department of Corrections has discretionary authority to classify prisoners. MCL 791.264. Plaintiff was designated a Security Threat Group (STG) member after he was involved in a fight which was deemed racially motivated and a search of his cell uncovered materials promoting white supremacy. Plaintiff filed four separate renunciations of STG affiliation and requests for removal of his STG designation. Each was denied. Plaintiff filed grievances against defendants for allegedly failing to consider his renunciations of STG affiliation and requests for removal of his STG designation, but all were denied as well.

Plaintiff brought his complaint under 42 USC 1983, which creates liability for individuals who violate a person's constitutional rights under color of law. *Davis v Wayne Co Sheriff*, 201 Mich App 572, 576; 507 NW2d 751 (1993). "The statute creates no substantive rights, but instead merely supplies a remedy for deprivation of rights created by other laws." *Id.* In order to state a cause of action under the statute, the plaintiff must demonstrate that the defendant (1) acted under color of state law; and (2) deprived the plaintiff of a federal right. *Id.* at 576-577. A cause of action brought in state court under 42 USC 1983 requires review of federal law interpreting the statute. *Markis v Grosse Pointe Park*, 180 Mich App 545, 553; 448 NW2d 352 (1989).

Plaintiff first argues that the trial court erred by deciding an issue not raised by plaintiff; specifically, whether plaintiff had a liberty interest in his security classification. Plaintiff, however, misunderstands the implication of the trial court's holding. Plaintiff alleged in his

second amended complaint that his due process and equal protection rights were violated because of his STG classification and defendants failure to reclassify him. Due process claims require that a person prove that a state deprived him of a protected life, liberty, or property interest. *In re Wentworth*, 251 Mich App 560, 563; 651 NW2d 773 (2002). Similarly, to establish an equal protection claim, a plaintiff must also first establish a property or liberty interest. *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 740; 605 NW2d 18 (1999). Therefore, the trial court's ruling that plaintiff's claim failed because he had no liberty interest, directly addressed plaintiff's cause of action alleged in his complaint.

The real issue on appeal is whether the trial court was correct in its determination that plaintiff failed to state a claim. We review de novo a trial court's grant or denial of summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Id.* All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Plaintiff's complaint was based on his allegation that defendants did not follow, nor apply equally, the procedures for re-evaluating a prisoner's security classification. As noted above, to establish a due process or equal protection claim, plaintiff has to prove that the STG policy and its review procedure affected a liberty interest. *In re Wentworth, supra; Rudolph, supra.* As the Sixth Circuit recognized, "State law, not federal constitutional law, is the only possible source of a liberty interest in a particular security classification or in assignment to a particular type of state penal institution." *Newell v Brown*, 981 F2d 880, 883 (CA 6 1992); see *Moody v Daggett*, 429 US 78, 88 n 9; 97 S Ct 274; 50 L Ed 2d 236 (1976); *Meacham v Fano*, 427 US 215, 226; 96 S Ct 2532; 49 L Ed 2d 451 (1976). This is because the federal constitution itself vests no liberty interest in inmates in retaining or receiving any particular security or custody status as long as the conditions or degree of confinement is within the sentence imposed and not otherwise violative of the United States Constitution.¹ *Montayne v Haymes*, 427 US 236, 242; 96 S Ct 2543; 49 L Ed 2d 466 (1976).

¹ Restrictions on prisoners' rights are constitutional, under both the federal and our state's constitution, if they are reasonably related to legitimate penological interests. *Turner v Safley*, 482 US 78, 89; 107 S Ct 2254; 96 L Ed 2d 64 (1987); *Bazzatta v Dep't of Corrections Director*, 231 Mich App 83, 88; 585 NW2d 758 (1998). This is true even regarding the right to free speech, *Bell v Wolfish*, 441 US 520, 547; 99 S Ct 1861; 60 L Ed 2d 447 (1979), and equal protection, *Bazzatta, supra* at 88. Prison administrators are accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Bell, supra* at 547; *Bazzatta, supra* at 87.

With the high incidents of gang-related and racist violence in prisons and the necessity of maintaining the prisoners' safety, we conclude that the STG designation does not offend either the federal or state constitution as it is reasonably related to a legitimate penological interest.

(continued...)

States can create liberty interests afforded federal due process protection. *Sandin v Conner*, 515 US 472, 483-484; 115 S Ct 2293; 132 L Ed 2d 418 (1995). The due process clause will only provide protection for a stated-created liberty interest in freedom from restraint that imposes “atypical, significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Id.* at 484. Stated another way, “the appropriate inquiry examines whether the state action involved the type of atypical, significant deprivation in which a state might conceivably create a liberty interest.” *Thomas v Deputy Warden*, 249 Mich App 718, 725; 644 NW2d 59 (2002).

In *Sandin*, *supra* at 496, the Supreme Court found that the defendant’s disciplinary segregation was not an atypical, significant deprivation in which the state created a liberty interest. Likewise, in *Hewitt v Helms*, 459 US 460, 468; 103 S Ct 864; 74 L Ed 2d 675 (1983), the Court found that there was no federal constitutionally-protected liberty interest in administrative segregation. Two Michigan cases have also held that certain security designations did not create a liberty interest. See *Thomas v Deputy Warden*, 249 Mich App 718, 721, 727; 644 NW2d 59 (2002) (temporary placement in “top lock six” without a hearing where plaintiffs were maintained in their cells and served meals there was not an atypical, significant deprivation); *Martin v Stine*, 214 Mich App 403, 419-420; 542 NW2d 884 (1995) (five-day loss of privileges was not an atypical, significant deprivation).

In this case, the state regulation at issue is the prison’s policy of classifying prisoners as an STG member. Plaintiff asserts that his due process rights were violated when defendants designated him as an STG member and his equal protection rights were violated when they refused to approve, allegedly not even reviewing, his applications for renunciation of his STG affiliation and request for reclassification. An STG designation prohibits work assignments without special approval, restricts visitation rights, prohibits attendance at most prisoner meetings, and limits participation in leisure activities to those in the yard. We find that the STG designation does not impose an atypical, significant deprivation.² Because a prisoner has no liberty interest in his security classification, no action pertaining to that classification can be maintained under 42 USC 1983. Therefore, his due process and equal protection claims under 42 USC 1983 cannot be sustained.

Lastly, plaintiff asserts that, as a result of his filing grievances against defendants regarding their denials of his requests for reclassification, defendant Dunn took retaliatory action by (1) refusing to reclassify plaintiff until he had kept his STG status for five years; (2) failing to respond to plaintiff’s requests for reclassification; and (3) failing to review plaintiff’s status every three months. Retaliatory conduct is actionable under the First Amendment when it would dissuade a person of ordinary firmness from continuing to engage in the protected conduct, and the adverse action was motivated at least in part by the plaintiff’s protected conduct. *Thaddeus-X v Blatter*, 175 F3d 378, 394 (CA 6 1999).

(...continued)

The significant limitation on prisoners’ rights is justified by both the lawful incarceration and the need for order and security in prison. *Bell*, *supra* at 547.

² Moreover, plaintiff’s allegation that defendants did not review his classification is not supported by the record.

Here, plaintiff's protected conduct was the filing of grievances. *Shehee v Luttrell*, 199 F3d 295, 301 (CA 6 1999). However, we find that a reasonable jury could not conclude that the retaliatory action alleged is of the type which would dissuade a person of ordinary firmness from ceasing to file grievances. Plaintiff was already in administrative segregation, and was not subjected to more severe sanctions or different housing conditions as a result of Dunn's alleged action. See *Thaddeus-X, supra* at 396, 398; *Brown v Crowley*, 312 F3d 782, 789 (CA 6 2002). Therefore, plaintiff has not established an adverse action. Furthermore, plaintiff fails to establish a causal relation between the filing of his grievances and the alleged retaliatory action. Plaintiff provided no evidence as to when he submitted requests for reclassification, nor has he provided any evidence establishing that any of the alleged adverse action occurred after he filed grievances.

Plaintiff argues also that the trial court granted summary disposition prematurely, before discovery was complete. Summary disposition is generally premature if granted before the completion of discovery on a disputed issue. *Kelly-Nevils v Detroit Receiving Hosp*, 207 Mich App 410, 421; 526 NW2d 15 (1994). However, summary disposition is appropriate if there is "no fair chance" that further discovery will result in support for the plaintiff's claim. *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 329-330; 539 NW2d 774 (1995). In the present case, because the issues raised were ones of law, there was no fair chance that further discovery would allow plaintiff to uncover factual support for his position. *Bazzatta, supra* at 89. Therefore, the trial court's summary disposition ruling was not premature.

Because we conclude that plaintiff's claims fail as a matter of law, we need not address plaintiff's remaining assertions of error.³ We hold that the trial court properly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(8), albeit, in part, for a different reason.⁴ Therefore, because the trial court reached the correct result, we affirm its ruling. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001).

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell

³ Plaintiff also argues on appeal that the trial court erred in finding that he failed to exhaust his administrative remedies, granting summary disposition pursuant to MCR 2.116(C)(4), and erred in basing its finding that defendants Dunn and Mulvaney were immune from liability on MCL 691.1407(2), granting summary disposition pursuant to MCR 2.116(C)(7).

⁴ We note that the trial court failed to address plaintiff's First Amendment claim in its analysis; however, because we concluded that this claim also fails as a matter of law, there is no need for remand.