NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 18-2171

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AVON C. QUIERO, JR.,
Appellant

v.

CAPTAIN MICHAEL L. OTT; WARDEN ROBERT J. KARNES

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 3-14-cv-00225)
District Judge: Honorable A. Richard Caputo

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Submitted Pursuant to Third Circuit LAR 34.1(a)
July 2, 2019
Before: GREENAWAY, JR., RESTREPO and FUENTES, Circuit Judges

(Opinion filed: January 9, 2020)

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OPINION*

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PER CURIAM

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Avon C. Quiero, Jr., appeals from an order of the United States District Court for the Middle District of Pennsylvania, which granted summary judgment to the Defendants in his civil rights action. We will affirm the District Court's judgment.

At the time of the incidents in question, Quiero was housed at Lebanon County Correctional Facility.[1] He filed a grievance to allege that he had been sexually harassed when a correctional officer gave him a bedsheet covered with sexually explicit drawings and phrases.

Captain Michael Ott spoke to Quiero twice about the incident. At their second meeting, Ott discovered that Quiero had written a grievance on a page ripped from a prisoner handbook. Ott wrote a "major misconduct" against Quiero for destroying county property, and for slamming the door of Ott's office as he left. Quiero was then placed in the Restrictive Housing Unit ("RHU") for about ten days. At the end of that time, he received a disciplinary hearing, was found guilty of the major misconduct, and was disciplined with time served.

Quiero then filed a federal complaint against certain prison officials. After some of the claims of his initial and amended complaints were dismissed with prejudice, see Dkt. #34, #47, Quiero filed a Second Amended Complaint against Captain Ott and Warden Robert Karnes. Id. After discovery, the Defendants filed a motion for summary judgment on Quiero's three remaining claims: retaliation under the First Amendment,

[1] Quiero alleged that he was a pretrial detainee at the time, but the District Court determined that he was a convicted prisoner. As explained below, we need not resolve this issue.

violation of his due process rights, and violation of his First Amendment religious rights. The Magistrate Judge recommended granting the Defendants' motion, Dkt. #60, and the District Court adopted that recommendation, Dkt. #65. Quiero timely appealed.

We have jurisdiction under 28 U.S.C. § 1291.[2] We exercise a plenary standard of review and apply the same standard as the District Court to determine whether summary judgment was appropriate. See State Auto Prop. & Cas. Ins. Co. v. Pro Design, P.C., 566 F.3d 86, 89 (3d Cir. 2009). We agree with the District Court that summary judgment was warranted on Quiero's Second Amended Complaint.

As to his First Amendment retaliation claim against Captain Ott, even if Quiero established a prima facie case of retaliation for filing a grievance, see Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001), the claim fails because Defendants averred that "they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest," id. at 334. In other words, Quiero was punished for disobeying prison rules. See Watson v. Rozum, 834 F.3d 417, 422, 426 (3d Cir. 2016) (explaining "same decision defense").

In his brief, Quiero challenges Defendants' motives, stating that "[n]o evidence was offered to demonstrate any county property was destroyed, and only the bald

[2] Quiero's notice of appeal references only the final judgment entered on May 14, 2018. See Dkt. #66. We may exercise jurisdiction to review "orders not specified in the Notice of Appeal" under certain circumstances, see Sulima v. Toyhanna Army Depot, 602 F.3d 177, 184 (2010); but Quiero does not reference any of the District Court's earlier orders in his appellate brief. We thus consider only the claims disposed of in the final judgment entered on May 14, 2018. See Kopec v. Tate, 361 F.3d 772, 775 n.5 (3d Cir. 2004) ("An issue is waived unless a party raises it in its opening brief.").

assertion of a door being slammed was made (with no evidence in the record.)" Appellant's Br. at 6. But the District Court *did* have evidence of destroyed property and a slammed door—first, Quiero was found guilty of those offenses by the disciplinary board, see Dkt. #57-1 at 23,[3] and Captain Ott declared in a sworn affidavit that Quiero slammed the door of his office and "attempted to write a grievance on a torn piece of his inmate handbook, thus damaging county property," see Dkt. #57-2 at 3. Although Quiero submitted a declaration under penalty of perjury in response to the motion for summary judgment, see Dkt. #58, he did not include averments disputing the misconduct allegations. Furthermore, to the extent that Quiero disputed the allegations in a "Statement of Disputed Facts" attached to his objections to the Magistrate Judge's Report and Recommendation, see Dkt. #62 at 39-41, the statements in that *unsworn* document are somewhat equivocal.[4] He did not expressly state that he had not destroyed county property. Instead, he noted that he was "not personally aware of using a 'county owned inmate handbook' to create an improper grievance; however, request slips were consistently unavailable . . . [and] as a general practice we were instructed to use half

[3] Superintendent v. Hill, 472 U.S. 445, 455–56 (1985) (noting that a finding of a prison disciplinary infraction must be supported by "some evidence"); Henderson v. Baird, 29 F.3d 464, 469 (8th Cir. 1994) (concluding that because the finding of guilt in the inmate's disciplinary hearing was based on "some evidence," that finding "essentially checkmates his retaliation claim").

[4] Quiero did not directly dispute the Defendants' Statement of Facts under penalty of perjury. Cf. Lupyan v. Corinthian Colleges Inc., 761 F.3d 314, 320-21 (3d Cir. 2014) ("[A] single, non-conclusory affidavit or witness's testimony, when based on personal knowledge and directed at a material issue, is sufficient to defeat summary judgment . . . even if the affidavit is 'selfserving.'" (internal quotation and citation omitted)).

sheets or scraps of paper when necessary." Dkt. #62 at 40. And although he stated in the same unsworn statement that "[n]o door was slammed or disrespect given," see id., Quiero's statement at the disciplinary hearing was also equivocal—he stated that he thought the door to Ott's office would be difficult to open, and so it swung open with more force than he intended, see Dkt. #57-1 at 23. Given the evidence, the District Court did not err in determining that Quiero was punished for breaking prison rules.

As for Quiero's Due Process claim, although it was unfortunate that he did not receive a hearing within a few days of being placed in the RHU,[5] we agree with the District Court that his ten or so days in RHU did not implicate a protected liberty interest that would afford him more rigorous Due Process rights. See Sandin v. Conner, 515 U.S. 472, 486 (1995) (holding that 30 days' "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest"); see also Smith v. Mensinger, 293 F.3d 641, 645, 654 (3d Cir. 2002) (holding that seven months in disciplinary confinement did not implicate a liberty interest).

Even if Quiero was a pretrial detainee at the time of his RHU confinement, which we need not decide, it appears that Quiero received all of the procedural protections that a

[5] Prison regulations provide that a disciplinary hearing will "usually [be] held within seventy-two (72) hours (excluding weekends and holidays) of the incident." Dkt. #57-1 at 22. That regulation does not *guarantee* a hearing within 72 hours.

pretrial detainee was due. Wolff v. McDonnell, 418 U.S. 539, 563-71 (1974); see also Stevenson v. Carroll, 495 F.3d 62, 70 (3d Cir. 2007).[6]

Finally, with regard to Quiero's First Amendment Free Exercise of Religion claim, all parties appear to agree with the District Court that the prison's regulations regarding access to religious services[7] while in RHU (requiring the inmate to submit a request slip) were reasonable under Turner v. Safely, 482 U.S. 78, 89-90 (1987). The District Court granted summary judgment after determining that Quiero failed to point to any record evidence showing that he *properly* requested a visit from a prison chaplain while he was in the RHU.[8] However, in addition to his statement under penalty of perjury that he made

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[6] Wolff requires: (1) written notice of the charges at least twenty-four hours prior to any hearing, (2) an opportunity to call witnesses and present evidence in one's defense, (3) an opportunity to receive assistance from an inmate representative, and (4) a written statement of the evidence relied on and the reasons for the disciplinary action. Wolff, 418 U.S. at 563-71. Quiero stated in his brief in opposition to summary judgment--but not in his sworn declaration--that he was not allowed to have witnesses. See Dkt. #58-1 at 7. But in context, it appears that he is saying that he was not allowed to have a hearing and witnesses *before* being placed in RHU, see id. at 7-8, and the procedural requirements do not need to be met before the inmate is transferred. See, e.g., Stevenson, 495 F.3d at 70-71.

[7] Although not entirely clear, it appears that both Quiero and the Defendants are talking about visits from male chaplains in RHU, rather than any form of church service or Bible study.

[8] Defendants noted in their summary judgment reply that Quiero had been provided with a copy of his inmate file through discovery and stated that it was "telling that Plaintiff has produced no such request slips [for religious services] in his opposition filings." Dkt. #59 at 10 n.3. In his objections to the Magistrate Judge's Report and Recommendation, Quiero stated that his requests "asking Chaplain Newman or Chaplain Dobbs to visit him in the RHU . . . were sent via the inmate request form in accordance with LCCF Policy." See Dkt. #62 at 12. Notably, Quiero stated on the first page of those objections that he "aver[red] the following in support of his objection," Dkt. #62 at 1, but in his declaration that was explicitly made under penalty of perjury he did not say that the requests were

"numerous requests" for chaplains, Quiero pointed to an email in the record, from a chaplain manager to Warden Karnes and others, explaining that Quiero "has been seeking the help of the chaplains with regard to his recent alleged 'harassment,'" and that Quiero "has been writing requests to us, including asking Chaplain Newman or Chaplain Dobbs to visit him in RHU." Dkt. #58-1 at 14. After reviewing that email, the District Court determined that Quiero's requests "were not properly submitted through a request slip," Dkt. #64 at 12, but that was not a proper inference at the summary judgment stage. See United States ex rel. Jones v. Rundle, 453 F.2d 147, 150 (3d Cir. 1971) ("Documents filed in support of a motion for summary judgment are to be used to determine whether issues of fact exist and *not* to decide the fact issues themselves."). The email does not explain how the requests reached the chaplains and it is not clear to us how the requests would have reached them, absent a proper request slip.

Nevertheless, even assuming that Quiero had properly submitted requests that were not acted upon, Quiero's First Amendment claim fails because he did not point to any genuine issue of material fact that would show that his right to free exercise of religion was "substantially burdened." See Washington v. Klem, 497 F.3d 272, 278 (3d Cir. 2007) (describing First Amendment/Free Exercise "substantial burden" jurisprudence in a case brought under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a))). In order for a practice to be a substantial burden,

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made on proper forms, see Dkt. #58. Given our disposition of the claim, we need not determine whether asserting a fact using the verb "aver" is sufficient to create a genuine issue of material fact.

it "must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion." Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813 (8th Cir. 2008); see also Wilcox v. Brown, 877 F.3d 161, 168 (4th Cir. 2017). Summary judgment was warranted here, as Quiero was only deprived of chaplain visits for ten days and he did not explain how that adversely impacted his practice of religion. Cf. Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005); Phillips v. Norris, 320 F.3d 844, 847 (8th Cir. 2003) (finding no due process violation where inmate was deprived of religious services for 37 days but could exercise his religion in his cell); Allah v. Al-Hafeez, 208 F. Supp. 2d 520, 530-31 (E.D. Pa. 2002) (concluding that prisoner's two-month exclusion from religious services did not violate his First Amendment rights).

For the foregoing reasons, we will affirm the District Court's judgment.