

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LUIS LEDESMA,  
Appellant,  
vs.  
THE STATE OF NEVADA; LCC; CCS  
WARD; C/O TERANCE; AND AW  
DWAYNE DEAL,  
Respondents.

No. 66435

**FILED**

SEP 16 2015

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

This is an appeal from a district court summary judgment in a civil rights action. Eleventh Judicial District Court, Pershing County; Richard Wagner, Judge.

Appellant Luis Ledesma, an inmate, filed a complaint in district court alleging that, when attempting to file a grievance regarding respondent Terance, a corrections officer, he was verbally berated, placed in handcuffs, charged with violating prison rules,<sup>1</sup> and prevented from filing his grievance.<sup>2</sup> Ledesma asserts these actions were all taken in retaliation for his attempts to file a grievance, in violation of his First Amendment rights. Respondents moved for summary judgment, arguing that their actions were not retaliatory, but were in response to Ledesma's belligerent behavior when attempting to file the grievance, and filed their responses to Ledesma's requests for admissions as supporting evidence for

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<sup>1</sup>These charges were ultimately dismissed.

<sup>2</sup>Ledesma did eventually file his grievance against respondent Terance.

that motion. Ledesma opposed the motion, stating that genuine issues of material fact remained regarding whether respondents' actions were retaliatory and included an affidavit stating that he was neither combative nor aggressive at the time respondents handcuffed him. The district court ultimately granted summary judgment in favor of respondents and this appeal followed.

This court reviews a grant of summary judgment de novo, with no deference to the district court's findings. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate where the pleadings and other evidence presented, when viewed in the light most favorable to the nonmoving party, demonstrates that the moving party is entitled to judgment as a matter of law and that no genuine issue of material fact exists. *Id.*

*First Amendment retaliation claim*

We first discuss the district court's grant of summary judgment as to Ledesma's First Amendment retaliation claim.<sup>3</sup> On appeal, Ledesma argues, as he did below, that genuine issues of material fact remain, thereby precluding summary judgment. Respondents, on the other hand, assert it is undisputed that their actions in placing Ledesma in handcuffs, charging him with prison rule violations, and preventing him from filing a grievance were taken in response to Ledesma's aggressive posturing and verbal abuse of correctional officers, not in retaliation for

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<sup>3</sup>Although the parties have separated Ledesma's allegations into separate retaliation claims, because they all stem from the same protected conduct of filing a grievance, we will treat the allegations as one claim for retaliation. See *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) ("Prisoners have a First Amendment right to file grievances against prison officials and to be free from retaliation for doing so.").

Ledesma's attempt to file a grievance against respondent Terance. Respondents further contend that their actions did not chill Ledesma's exercise of his First Amendment rights and were taken to advance the legitimate penological goal of safety and security.

In order for an inmate to establish a claim alleging retaliation for exercising his First Amendment rights he must demonstrate 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. \_\_\_, \_\_\_, 321 P.3d 895, 898 (2014). Respondents concede, in their response on appeal, that Ledesma engaged in protected conduct and that they took adverse action<sup>4</sup> against him. But they nonetheless maintain that any adverse action was not taken due to Ledesma's protected conduct, that his exercise of his First Amendment rights was not chilled, and that their actions furthered a legitimate correctional goal. In circumstances similar to those presented here, the Nevada Supreme Court stated that whether the actions were taken because of the inmate's exercise of protected conduct and whether that

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<sup>4</sup>While respondents concede that they took adverse action against Ledesma, they argue that verbal abuse is not actionable under 42 U.S.C. §1983. We agree, see *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (holding that verbal abuse "is not sufficient to state a constitutional deprivation" in a § 1983 action (internal quotation marks omitted)), and therefore we will not address verbal abuse in our discussion of appellant's civil rights claim. We will still address, however, the adverse actions that respondents concede to taking against Ledesma.

action furthered legitimate correctional goals are related, and thus, we will consider those factors first before discussing the possible chilling effect of the adverse action. *See id.* at \_\_\_, 321 P.3d at 899.

To survive summary judgment, Ledesma was required to “submit evidence of a retaliatory motive sufficient to create a factual issue” regarding whether respondents took adverse action against him in response to his attempting to file the grievance as opposed to taking that action in response to his allegedly aggressive behavior. *See id.* And here, Ledesma filed an affidavit, sworn under the penalty of perjury, attesting that he attempted to file a grievance, that he was verbally berated by respondents for attempting to file the grievance, that he continued to assert his right to file a grievance despite the verbal abuse until he was placed in restraints, and that he was not combative or aggressive.

But rather than construing these facts in favor of Ledesma in resolving the summary judgment motion as required by *Wood*, 121 Nev. at 732, 121 P.3d at 1031, the district court instead concluded that Ledesma had not contradicted respondents’ version of events and granted summary judgment against him on that basis. Viewing the pleadings and evidence presented in the light most favorable to Ledesma, a reasonable person could conclude that respondents’ actions were in response to Ledesma’s wish to file a grievance and not because of any allegedly aggressive posturing, *see Angel*, 130 Nev. at \_\_\_, 321 P.3d at 899 (holding that an inmate had presented enough evidence to avoid summary judgment on a First Amendment retaliation claim because a reasonable person could find in the inmate’s favor when viewing the evidence in the light most favorable to the inmate), such that a genuine issue of material fact remains with regard to this issue. The fact that respondents’ adverse

actions were taken while Ledesma was attempting to file a grievance further supports Ledesma's assertion that respondents' actions were taken because he was engaged in the protected conduct of filing a grievance.<sup>5</sup> *See id.* (recognizing that the timing of a punishment may be circumstantial evidence of a retaliatory motive). Construing these facts in Ledesma's favor, we conclude that a genuine issue of material fact exists as to whether the adverse action was taken in retaliation for Ledesma's exercise of protected conduct.

Turning to whether respondents' actions of placing Ledesma in restraints, charging him with rule violations, and preventing him from filing his grievance advanced a legitimate correctional goal, we agree with respondents that prison safety is a legitimate correctional goal. *See Turner v. Safley*, 482 U.S. 78, 91 (1987) (recognizing prison security as a legitimate concern for a correctional institution). If, however, it is determined that Ledesma was not verbally abusive and did not take an aggressive stance, and respondents were only reacting to Ledesma's protected conduct of filing a grievance, then respondents' actions were not taken out of any concern for safety or security. *See Angel*, 130 Nev. at \_\_\_\_, 321 P.3d at 900. Thus, a genuine issue of material fact also remains as to whether respondents' adverse actions were taken to further a legitimate correctional goal.

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<sup>5</sup>Respondents appear to assert that because respondent Terance was not present until after Ledesma requested a grievance form, the timing of the punishment is not relevant. We disagree, as Ledesma stated in his affidavit that he was still attempting to file the grievance when Terance was present, and we must construe that fact in Ledesma's favor. *See Wood*, 121 Nev. at 732, 121 P.3d at 1031.

Turning to the chilling effect issue, the Nevada Supreme Court has held that, when analyzing whether an adverse action had a chilling effect on the inmate, “the proper question [is] whether the adverse action ‘would chill or silence *a person of ordinary firmness* from future First Amendment activities.’” *Id.* (quoting *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2004)). On appeal, respondents summarily assert that, because inmates are regularly restrained, “the threat or actual use of handcuffs on an inmate would not chill the ordinary inmate from exercising his or her First Amendment rights.”<sup>6</sup> This argument fails, however, to take into account the notice of charges filed against Ledesma and the fact that placing him in handcuffs prevented him from filing his grievance at that time, actions that he also claims were retaliatory. Indeed, respondents do not even attempt to argue that these actions would not chill the exercise of future First Amendment activities. *See Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (concluding that respondent confessed error by failing to respond to appellant’s argument). Under these circumstances, we necessarily conclude that, when the evidence is considered in the light most favorable to Ledesma, a reasonable jury could find that the objective chilling standard was met. *Id.* at \_\_\_, 321 P.3d at 899. Thus, a genuine issue of fact remains as to

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<sup>6</sup>While respondents’ answering brief includes a heading entitled “The Disciplinary Charges Were Not ‘Chilling’ in Nature,” their brief does not develop this argument beyond the summary statement quoted above.

this element as well.<sup>7</sup>

*State law claims and denial of motion to amend complaint*

Ledesma's remaining arguments on appeal are that the district court erred in denying his motion to amend his complaint and in failing to consider his claims under state tort law.<sup>8</sup> In their answering brief, respondents fail to address or acknowledge these arguments. And in his reply, Ledesma asserts respondents' failure to address these issues should be treated as concession that the district court erred in making these determinations. Under these circumstances, we direct the district court to grant Ledesma leave to amend his complaint, and, to the extent summary judgment was granted on his claims under state law, we reverse

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<sup>7</sup>The district court also found that respondents were entitled to qualified immunity based on its conclusion that no genuine issue of material fact precluded summary judgment on Ledesma's retaliation claims and because respondents' actions did not violate clearly established constitutional rights. See *Pearson v. Callahan*, 555 U.S. 223, 232, 236 (2009). Because we have already determined that the district court erred in granting summary judgment on Ledesma's retaliation claim, and because retaliation is clearly prohibited under the United States Constitution, *Angel* 130 Nev. at \_\_\_, 321 P.3d at 901 (quoting *Rhodes*, 408 F.3d at 569), we conclude that the district court erred in finding respondents were entitled to qualified immunity.


<sup>8</sup>In his complaint, Ledesma also alleged a claim of supervisor liability. Although the legal basis for this claim was unclear below, on appeal Ledesma only argues that this claim should have been considered under state tort law and appears to have abandoned any effort to advance a constitution-based supervisor liability claim. Therefore, we need not discuss whether the district court erred in granting summary judgment as to that claim under § 1983.

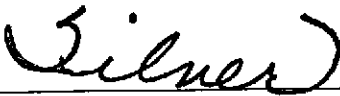
that decision as well.<sup>9</sup> See NRAP 31(d); *Bates*, 100 Nev. at 681-82, 691 P.2d at 870.

As discussed above, there were genuine issues of material fact remaining as to each disputed element of the retaliation claim and as to respondents' entitlement to qualified immunity. Accordingly, and because respondents concede to Ledesma's remaining arguments, we reverse the district court's order granting summary judgment and its denial of his motion for leave to amend his complaint and remand this matter for further proceedings consistent with this order.

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Richard Wagner, Senior District Judge  
Luis Ledesma  
Attorney General/Carson City  
Pershing County Clerk

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<sup>9</sup>By this order, we do not comment on the merits of Ledesma's claims under state law; we simply determine that, to the extent respondents failed to respond to Ledesma's arguments on appeal, the grant of summary judgment as to those claims must be reversed.