IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 29, 2020

Lyle W. Cayce
Clerk

No. 18-50844
Summary Calendar

SCOTT LYNN GIBSON, also known as Vanessa Lynn,

Plaintiff - Appellant

v.

FRANCOIS JEAN-BAPTISTE,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:17-CV-42

Before JOLLY, JONES, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Pro se appellant Scott Lynn Gibson appeals the district court's grant of summary judgment in favor of appellee Francois Jean-Baptiste on Gibson's First Amendment retaliation claim. We affirm.

Gibson is a transgender inmate in the custody of the Texas Department of Criminal Justice (the "TDCJ"). Jean-Baptiste is a correctional officer in Gibson's unit. This case arises, if only tangentially, from a previous lawsuit

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Gibson filed against the TDCJ, seeking an order compelling the TDCJ to evaluate him for sex reassignment surgery. *See Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019) (*Gibson I*).[1] The facts are simple and undisputed. In reference to Gibson's earlier lawsuit, Jean-Baptiste posted two comments on a colleague's private Facebook page. First, Jean-Baptiste stated, "Really, he's still going to fight it[?]" Second, after his colleague responded, "Let the f[. . .] suffer," Jean-Baptiste replied, "One to the back of the head." Based solely on those comments, Gibson sued Jean-Baptiste pursuant to 42 U.S.C. § 1983, alleging Jean-Baptiste violated Gibson's First Amendment rights by threatening to kill Gibson in retaliation for pursuing his previous lawsuit. The district court found Jean-Baptiste was entitled to qualified immunity. We agree.

We review a grant of summary judgment *de novo*, applying the same standard as the district court. *Brewer v. Hayne*, 860 F.3d 819, 822 (5th Cir. 2017).

Government officials are entitled to qualified immunity unless "they violated a federal statutory or constitutional right, and . . . the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted). To prevail on a retaliation claim, a prisoner must show (1) the exercise of a specific constitutional right, (2) a state official's intent to retaliate against the prisoner for the exercise of that right, (3) a retaliatory adverse act, and (4) causation. *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006). Only the second and third elements are in dispute.

[1] Consistent with *Gibson I* and TDCJ policy, we use male pronouns. *See id.* at 217 n.2.

As to those elements, Gibson argues that Jean-Baptiste's Facebook comments should be interpreted as a death threat and that the comments provide a "chronology of events" from which Jean-Baptiste's intent to harm Gibson in retaliation for filing his previous lawsuit may be inferred. While we question whether the comments demonstrate an intent to retaliate, at a minimum, Gibson fails to show a retaliatory adverse act.

To begin with, it is not at all clear that the Facebook comments were actually a threat. As the district court found, the comments were not addressed to Gibson; Gibson learned of them after the fact and indirectly.[2] And even construing the comments as an implicit threat, this court has long held that "mere threatening language and gestures of a custodial office[r] do not, even if true" establish Section 1983 liability. *McFadden v. Lucas*, 713 F.2d 143, 146 (5th Cir. 1983); *Bender v. Brumley*, 1 F.3d 271, 274 n.4 (5th Cir. 1993) ("Mere allegations of verbal abuse do not present actionable claims under § 1983."). Accordingly, we have consistently rejected threat-based retaliation claims. *See Smith v. Hebert*, 533 F. App'x 479, 483 (5th Cir.2013); *Hudson v. Univ. of Tex. Med. Branch*, 441 F. App'x 291, 292–93 (5th Cir. 2011); *Bell v. Woods*, 382 F. App'x 391, 393 (5th Cir. 2010); *Brown v. Craven*, 106 F. App'x 257, 259 (5th Cir. 2004).[3] Gibson nevertheless argues that this case is different because of the severity of Jean-Baptiste's purported threat. But we have found similarly severe threats insufficient. *See Hudson*, 441 F. App'x at 292–93 (prison official's threat "to dilute [the prisoner's] insulin with water after [the prisoner] filed a grievance against [the official]"

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[2] The comments were made in response to an article published in the Texas Observer discussing Gibson's previous lawsuit. Apparently, a reporter that had worked on the piece subsequently contacted Gibson and brought the comments to his attention.

[3] Although *Smith*, *Hudson*, *Bell,* and *Brown* are unpublished opinions and are not therefore binding on this court, they are useful evidence of this court's treatment of the issue.

was not a retaliatory adverse act). Gibson cannot therefore show that Jean-Baptiste violated his First Amendment rights. Jean Baptiste is entitled to qualified immunity.

Accordingly, the district court's judgment is **AFFIRMED**.