

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10980
Summary Calendar

GEORGE VERNON CHILES,

Plaintiff-Appellant,

VERSUS

MELVIN MORGAN and TARRANT COUNTY, TEXAS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CV-502)

(April 26, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Plaintiff George Vernon Chiles, proceeding pro se, appeals the district court's grant of summary judgment in favor of Defendants Melvin Morgan and Tarrant County, Texas. As a former County employee, Chiles seeks compensatory damages under 42 U.S.C. § 1983 for lack of procedural due process in his discharge from employment. The district court dismissed the suit because it found that Chiles had an adequate postdeprivation remedy. Because Chiles

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

was entitled to some predeprivation process before being discharged, we reverse and remand.

BACKGROUND

Morgan served as executive director of the Fort Worth/Tarrant County Convention Center. The County employed Chiles as an events services worker at the Convention Center. Chiles was a non-probationary employee, which meant that he was a permanent employee with civil service status under Texas law. See Tex. Local Gov't Code Ann. § 158.010(b)-(c) (West Supp. 1995).

During the second week of March 1993, Chiles missed several scheduled work shifts. His employers asked him to return to work. On March 18, Chiles met with two of Morgan's managers at the Convention Center. Chiles agreed to return to work and to accept a one day suspension without pay. Chiles then returned to work that day.

On March 27, Morgan interrupted Chiles while he was working to tell him to tuck in his shirttail. Chiles complied. The next day Chiles sent by certified mail a letter and a request for production of public information to Morgan. The letter alleged that Morgan's attire the day before did not comply with the facility dress code, that Chiles would record future violations, and that Chiles would no longer perform work that was not required of him. On March 31, Morgan discharged Chiles because of his unexcused absences and his insubordination.

After Morgan denied a grievance filed by Chiles, Chiles appealed his discharge to the Tarrant County Civil Service

Commission. The Commission reinstated Chiles by modifying his discharge to sixty days suspension without pay. Three months after the County reinstated him, Chiles resigned from County employment and brought this suit.²

DISCUSSION

We review a district court's grant of summary judgment de novo. Weyant v. Acceptance Ins. Co., 917 F.2d 209, 212 (5th Cir. 1990). We consider all the facts contained in the record and the inferences to be drawn therefrom in the light most favorable to the non-moving party. Id.

The district court relied on Hudson v. Palmer, 468 U.S. 517 (1984), to enter summary judgment on Chiles's procedural due process claim. In Hudson, the court held that the existence of an adequate postdeprivation remedy precludes a procedural due process claim when the deprivation occurs through the random and unauthorized conduct of a state employee. Id. at 530-33. The district court applied Hudson and dismissed Chiles's claim because it determined that Texas provides an adequate postdeprivation procedure. Although the district court found that Morgan acted under color of state law, it did not determine whether Morgan's conduct was random and unauthorized. See Caine v. Hardy, 943 F.2d 1406, 1413 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1474 (1992).

² Texas law allows a county employee to seek de novo review of a county commission's ruling in state district court. **Tex. Local Gov't Code Ann.** § 158.012 (West 1988). Chiles did not seek such review.

We need not consider whether Morgan's act was random and unauthorized because a tenured public employee is entitled to some predeprivation process before being discharged. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-43 (1985). Because a tenured public employee is entitled to some predeprivation process, the existence of an adequate postdeprivation remedy cannot by itself defeat that employee's procedural due process claim. See Wheeler v. Mental Health & Mental Retardation Auth., 752 F.2d 1063, 1070 (5th Cir.) (noting that a court may award damages when a proper postdeprivation procedure cures a constitutionally infirm predeprivation procedure), cert. denied, 474 U.S. (1985); see also Carey v. Piphus, 435 U.S. 247, 266 (1978) (describing the right to procedural due process as "absolute"). Consequently, Hudson does not apply to the discharge of a tenured public employee. The district court erred in dismissing Chiles's procedural due process claim on the basis of Hudson.

The district court also noted that Chiles did not exhaust his state remedies. Chiles's failure to exhaust his postdeprivation state remedies does not foreclose his claim of lack of predeprivation process. A dismissed employee cannot dispute the adequacy of postdeprivation remedies if he fails to utilize them. Rathjen v. Litchfield, 878 F.2d 836, 839-40 (5th Cir. 1989); Myrick v. City of Dallas, 810 F.2d 1382, 1388 (5th Cir. 1987). Chiles's procedural due process claim, however, is based on lack of predeprivation process. His failure to exhaust his postdeprivation remedies does not affect his entitlement to predeprivation process.

The district court improperly considered Chiles's failure to exhaust his postdeprivation remedies in dismissing his predeprivation claim.

Defendants contend that their March 18 meeting with Chiles served as proper predeprivation process. Before discharging a tenured public employee, a public employer must give to the employee notice of the charges raised against him, explain to him the nature of the supporting evidence, and afford him an opportunity to respond. Browning v. City of Odessa, Tex., 990 F.2d 842, 844 (5th Cir. 1993). Because representatives of Defendants discussed with Chiles his unexcused absences at the March 18 meeting and because Morgan cited Chiles's unexcused absences as a reason for his dismissal, Defendants contend that Chiles had notice and an opportunity to respond. In response, Chiles contends that he did not receive predeprivation notice of the insubordination charge and that he already received his sanction for the unexcused absences in the form of a one day suspension. Because it is unclear in this case whether the predeprivation process was sufficient, we determine that a fact issue exists making summary judgment inappropriate.

Defendants next contend that Chiles waived his procedural due process claim by resigning his position after the Commission reinstated him. When an employee knowingly and voluntarily resigns to avoid dismissal, he waives his right to whatever procedural safeguards his dismissal would have triggered. Van Arsdell v. Texas A&M Univ., 628 F.2d 344, 345 (5th Cir. 1980). In this case,

however, Chiles did not resign in lieu of dismissal. He was dismissed. Chiles only resigned after he had been reinstated. Consequently, Chiles did not waive his procedural due process claim.

Defendants' remaining arguments are without merit. First, they contend that Chiles suffered no damages because he was reinstated to his position. Defendants ignore the fact that the discharge cost Chiles a sixty day suspension without pay. Further, even if Defendants can show that the suspension was justified, the denial of procedural due process is actionable without proof of actual injury. Carey, 435 U.S. at 266. Second, Defendants suggest that a federal court should decline review of state administrative decisions. We have no such abstention doctrine. Chiles states a constitutional claim for lack of procedural due process that a federal court must adjudicate.

CONCLUSION

For the foregoing reasons, we reverse the district court's grant of summary judgment and remand for trial.

REVERSED AND REMANDED.