FILED
United States Court of Appeals
Tenth Circuit

August 20, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHAUN COWLEY,

Plaintiff - Appellant,

v.

WEST VALLEY CITY; WAYNE PYLE; DAVID GRECO,

Defendants - Appellees,

and

BUZZ NIELSEN; MICHAEL POWELL; ANITA SCHWIMMER; WEST VALLEY CITY POLICE DEPARTMENT; LEE RUSSO; PHILIP QUINLAN; JOHN COYLE,

Defendants.

No. 18-4061
(D.C. No. 2:16-CV-00143-BSJ)
(D. Utah)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **KELLY**, and **CARSON**, Circuit Judges.

Former West Valley City ("WVC") detective Shaun Cowley fatally shot Danielle Willard while working undercover in the police department's Neighborhood Narcotics Unit ("NNU"). Following that tragic incident, Cowley alleged systematic

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

misconduct within the NNU—namely, that officers in the unit violated policy when working with confidential informants, supervisors were absent, and the unit routinely mishandled property. Cowley contends that after he blew the whistle on his unit, WVC and City Manager Wayne Pyle terminated him without affording him due process of law. He further claims that WVC and WVC Detective David Greco advocated for criminal charges against him (Cowley) for the Willard shooting. Based on these allegations, Cowley brings a retaliatory prosecution claim against WVC and Greco. The district court entered summary judgment in favor of WVC, Pyle, and Greco ("WVC Defendants") on both counts. The district court also denied Cowley's request for attorneys' fees from a discovery dispute with the WVC Defendants. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

In November 2012, Cowley and Officer Kevin Salmon conducted an undercover narcotics investigation. During the investigation, Cowley shot Danielle Willard, which resulted in her death. The shooting triggered a joint investigation between WVC and the Salt Lake County District Attorney's Office. Investigators examined Cowley's police vehicle and discovered unbooked evidence, including narcotics and currency, in violation of department policy. Thereafter, WVC opened an Internal Affairs investigation into the mishandled evidence.

Several months after the shooting in March 2013, WVC interviewed Cowley as part of the Internal Affairs investigation. During that interview, Cowley alleged systemic and pervasive misconduct within the NNU. Specifically, he alleged that

officers handling illegal immigrants as confidential informants would refrain from taking the informants to Immigration and Customs Enforcement and would instead "work them on the side." He also alleged that NNU officers routinely mishandled property by improperly retaining cell phones and placing trackers on vehicles without following the appropriate procedures. Finally, he alleged that NNU supervisors were generally absent, knew about the misconduct in the unit, and failed to take corrective action.

In early April 2013, WVC Deputy Police Chief Phillip Quinlan met with Cowley and his counsel to discuss the Internal Affairs investigation. The discussion concerned WVC's evidence against Cowley for policy violations, including mishandling evidence, dereliction of duty, and conduct unbecoming of an officer, among other things. At the meeting Cowley had an opportunity to respond to the allegations. For example, police records show Cowley checked out certain items from the evidence locker, including $1,313.00 in cash, 60.9 grams of a white powdery substance, and drug paraphernalia. But Cowley did not properly return the evidence; evidence locker records showed the items as missing. In response, Cowley claimed he "told them it was either left in my car or in an evidence locker."

Several months later in August 2013, the prosecution team at the DA's Office concluded that the circumstances of the Willard shooting did not justify the use of deadly force. It then provided its conclusions to the WVC police department.

Cowley, meanwhile, received notice of a second meeting to discuss the Internal Affairs investigation with Deputy Police Chief Larry Marx.[1] The notice again set out WVC's evidence and Cowley's potential policy violations. Cowley and his counsel met with Marx, and Cowley again responded to the alleged policy violations. Notably, prior to Cowley receiving notice of this second meeting, Pyle commented at a WVC Command Group meeting that "[a]nything less than [Cowley's] termination sends the wrong message to the department and the citizens."[2]

Following his interview with Cowley, Marx provided Pyle with drafts of two disciplinary letters. Both letters sustained the charges against Cowley, but each letter imposed different disciplines: one suggested that Cowley take 240 hours of administrative leave, and the other suggested that Cowley's employment be terminated.[3] Soon thereafter, Cowley received a letter from Marx terminating his employment with the WVC police department. The letter chronicled Cowley's policy

[1] Marx assumed the duty of implementing discipline in this case because Acting Police Chief Anita Schwemmer had previously supervised the NNU. Because of Schwemmer's connection to the NNU, she and Pyle jointly decided that she would recuse from the investigation.

[2] The record does not provide details about the purpose of WVC's Command Group. It does, however, indicate that Pyle attended that meeting.

[3] The charges included the following policy violations: mishandling property, failing to follow property booking procedures, failing to package narcotics, failing to perform at required standards, mishandling of prisoner property, and insubordination.

violations (the same as those in the draft letters) and informed Cowley of his right to appeal the termination decision.

Meanwhile, the DA's Office decided to pursue criminal charges against Cowley for Felony II Manslaughter. The DA's Office drafted a criminal Information with a statement of probable cause. Blake Nakamura, the lead prosecutor on Cowley's criminal case, emailed WVC police department Sergeant Mike Christenson in June 2014 to have either WVC police officer Chris Dowland or officer David Greco sign the Information. Greco subsequently signed the Information containing the probable cause statement. The DA's Office, however, did not seek any input from WVC when drafting the probable cause statement. Nakamura also signed the Information, indicating that he had authorized it for presentment and filing.

In October 2014, Utah State District Court Judge L. A. Dever held a three-day preliminary hearing to determine whether probable cause supported the manslaughter charge. At the preliminary hearing, Greco testified that Cowley was in a "pinch point" when he discharged his weapon, meaning that the circumstances justified Cowley's use of force. Further, WVC police department detective Chris Kotrodimos testified that Cowley "could assume that [Willard] was trying to kill him" and "deadly force [was] an appropriate response." Judge Dever concluded that this testimony "establishe[d] a reasonable belief that the circumstances provided a legal justification for [Cowley's] conduct" and therefore dismissed the case for lack of probable cause.

Cowley then exercised his right to appeal his termination to WVC's Civil Service Commission. WVC Administrative Law Judge and Employee Discipline Hearing Officer Melinda Hibbert replaced the Civil Service Commission, per the parties' stipulation. In June 2015, Hibbert reinstated Cowley as a police officer with WVC and dismissed his termination appeal.[4] WVC and Cowley stipulated to a final judgment under Utah Code Ann. § 10-3-1106(5)(b) whereby Cowley received $88,190.54 in lost salary and a contribution of $32,832.82 to his retirement account.[5] The stipulation also required Cowley to voluntarily resign his employment with WVC.

Cowley subsequently filed his federal complaint in this case alleging violations of his constitutional rights under 42 U.S.C. § 1983. Relevant to this appeal, Cowley alleged violations of his Fourteenth Amendment procedural due process rights and retaliatory prosecution for his protected First Amendment speech.

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[4] Hibbert did not dismiss Cowley's termination appeal on the merits; rather, WVC did not oppose the appeal.

[5] Utah Code Ann. § 10-3-1106(5)(b) provides:

> If the appeal board or hearing officer finds in favor of the employee, the appeal board or hearing officer shall provide that the employee shall receive:
>
> (i) the employee's salary for the period of time during which the employee is discharged or suspended without pay less any amounts the employee earned from other employment during this period of time; or
>
> (ii) any deficiency in salary for the period during which the employee was transferred to a position of less remuneration.

Utah Code Ann. § 10-3-1106(5)(b).

Over a year-and-a-half later, Cowley filed a discovery motion with the district court. Cowley's motion asked the district court to do two things: (1) to rule that the WVC Defendants had waived privilege to 1,841 documents unintentionally disclosed and identified as privileged by the WVC Defendants, and (2) to require the WVC Defendants to identify every duplicate document in the production. The district court determined that the WVC Defendants had waived privilege as to seventy-eight of the documents. The district court also ordered the WVC Defendants "to present Plaintiff with a nice letter identifying documents duplicative of the documents produced."

Following receipt of that order, Cowley filed a "Motion for Reasonable Costs Pursuant to FRCP 37" ("Motion for Costs"). After briefing, the district court denied the motion on three independent grounds. First, the district court concluded that Cowley's "Discovery Motion was not a Rule 37(a) motion for a court order compelling disclosure or discovery." Second, because the district court "only granted Plaintiff's Discovery Motion in part," the district court had the discretion to deny an award of fees. Finally, the district court concluded that because Cowley's discovery requests contributed to the duplication of documents, "other circumstances [made] an award of expenses unjust."

WVC moved for partial summary judgment on Cowley's due process and retaliatory prosecution claims. After briefing and oral argument, the district court agreed with WVC and granted the motion. Cowley filed a timely notice of appeal.

II.

We review the district court's grant of summary judgment de novo and view the facts in the light most favorable to the nonmoving party. PJ ex rel. Jensen v. Wagner, 603 F.3d 1182, 1192 (10th Cir. 2010). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is material if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented." Dewitt v. Sw. Bell Tel. Co., 845 F.3d 1299, 1306 (10th Cir. 2017) (quoting Smothers v. Solvay Chemicals, Inc., 740 F.3d 530, 538 (10th Cir. 2014)).

We review the district court's decision not to award attorneys' fees for an abuse of discretion. Lancaster v. Indep. Sch. Dist. No. 5, 149 F.3d 1228, 1237 (10th Cir. 1998).

III.

A.

Cowley first argues that the district court erred when it concluded his Fourteenth Amendment procedural due process claim did not survive his settlement with WVC. In the alternative, he argues that the district court erred when it concluded he received all the pretermination process required under the Due Process Clause. In making these arguments, Cowley maintains his settlement for back-pay does not preclude him from pursuing his due process claim because he is entitled to

damages for the purported due process violation beyond the backpay he received in his settlement.[6] Further, assuming he can bring the due process claim, Cowley contends that Pyle determined that he (Cowley) would be terminated before his pretermination hearing. This, Cowley asserts, presents a prima facie case of a due process violation.

"To assess whether an individual was denied procedural due process, courts must engage in a two-step inquiry: (1) did the individual possess a protected interest such that the due process protections were applicable; and, if so, then (2) was the individual afforded an appropriate level of process[?]" Montgomery v. City of Ardmore, 365 F.3d 926, 935 (10th Cir. 2004) (quoting Watson v. Univ. of Utah Med. Ctr., 75 F.3d 569, 577 (10th Cir. 1996)). Here, neither party disputes that Cowley possessed a property interest in his public employment. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539–41 (1985) (observing that certain government employees possess a protected property interest in their public employment). We therefore address only whether Cowley received adequate process to protect that property interest.

Generally, the Fourteenth Amendment's Due Process Clause "requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." Id. at 542 (quoting Bd. of Regents of

[6] Because we conclude that Cowley received all the process that the Due Process Clause requires, we do not address whether Cowley's due process claim survived his settlement with WVC.

State Colls. v. Roth, 408 U.S. 564, 570 (1972)). But "the pretermination 'hearing,' though necessary, need not be elaborate." Id. at 545. The only requirements are "(1) 'oral or written notice [to the employee] of the charges against him;' (2) 'an explanation of the employer's evidence[;] and [3] an opportunity [for the employee] to present his side of the story.'" Montgomery, 365 F.3d at 936 (alternations in original) (quoting Loudermill, 470 U.S. at 546). Cowley concedes that he received two pretermination hearings and does not challenge the adequacy of those hearings.[7]

But another firmly established principle of procedural due process is that the decision-making tribunal be impartial. Riggins v. Goodman, 572 F.3d 1101, 1112 (10th Cir. 2009). "Due process is violated only when 'the risk of unfairness is intolerably high'"; thus, "there must be some substantial countervailing reason to conclude that a decisionmaker is actually biased with respect to factual issues being adjudicated." Id. (quoting Hicks v. City of Watonga, 942 F.2d 737, 746–47 (10th Cir. 1991)). This is a high burden—we require "a substantial showing of personal bias . . . to disqualify a hearing officer or tribunal." Id. (quoting Corstvet v. Boger, 757 F.2d 223, 229 (10th Cir. 1985)).

Cowley asserts—and the WVC Defendants do not contest—that Marx was the "tribunal" for the purpose of disciplining Cowley. Appellant's Opening Br. at 33

[7] Cowley's first hearing occurred with Quinlan. There, Quinlan described Cowley's alleged policy violations, laid out WVC's evidence against Cowley, and gave Cowley an opportunity to respond. The same is true for Cowley's hearing with Marx. Cowley received written notice from Marx detailing WVC's evidence and a description of his alleged policy violations. And at their meeting, Cowley described his version of events. Our cases do not require a more elaborate process.

("The tribunal, appointed by Pyle and pursuant to WVC policy, was Chief Larry Marx."). Yet Cowley also argues that *Pyle* predetermined Cowley's termination and ordered Marx to terminate Cowley despite Marx's purported belief that termination was unwarranted. These actions, Cowley claims, deprived him of a fair and impartial tribunal.

Marx adjudicated the facts in Cowley's Internal Affairs investigation, determined that Cowley committed serious policy violations, and concluded that those violations warranted discipline. Marx then prepared two letters that sustained the charges against Cowley and recommended disciplinary action against him. In both letters, Marx wrote, "I find your conduct completely unacceptable. You have brought dishonor to the Police Department and the City which has undermined the public's trust in the Police Department." App. 655, 1465. One of the draft letters also stated, "With the Concurrence of City Manager, Wayne Pyle, ***I am suspending you from duty without pay for 240 hours***." Id. at 1465 (emphasis in original). Similarly, the other draft letter stated, "***I am terminating your employment effective immediately***." Id. at 655 (emphasis in original). The preparation of these letters undermines Cowley's assertion that Marx believed his case did not warrant termination.

Cowley concedes that "[h]ad Chief Marx deemed termination appropriate, Pyle's intervention would not have been actionable." Appellant's Opening Br. at 40. The "intervention" Cowley describes stems from Pyle's alleged bias against Cowley. Specifically, Cowley points to Pyle's statement at the WVC Command Group

meeting, held prior to Cowley's hearing with Marx, that "[a]nything less than [Cowley's] termination sends the wrong message to the department and the citizens." App. 983. But clearly following the pretermination hearing between Cowley and Marx, Marx believed that termination was one of multiple appropriate disciplinary options. That belief is apparent from the two letters Marx wrote that sustained the charges against Cowley. Further, neither party disputes that Marx was the decisionmaker for Cowley's discipline. And Marx, as decisionmaker, is entitled to the presumption of honesty and integrity in the discharge of his duties. See Withrow v. Larkin, 421 U.S. 35, 47 (1975) (explaining that a person claiming a biased tribunal "must overcome a presumption of honesty and integrity in those serving as adjudicators"). Besides, nothing in our case law prohibits a decisionmaker from consulting with another person prior to making a termination decision. After all was said and done, Marx made a judgment call between two disciplinary options that he independently deemed were appropriate. Thus, Pyle could not have influenced Marx beyond what Marx was already prepared to do—terminate Cowley. Cowley received all the process that the Due Process Clause requires.

B.

Cowley brings another claim under 42 U.S.C. § 1983 against WVC and Greco based on his belief that they influenced the DA's Office to prosecute him for the Willard shooting in retaliation for engaging in his protected First Amendment right of free speech—namely, whistleblowing on the NNU.

As a preliminary matter, Cowley claims that the district court made a factual error regarding the events surrounding the prosecution. Although the district court found that Greco was part of a panel of police officers who met with the DA's Office in October 2013, it determined that he was *not* part of the panel that ultimately recommended criminal charges against Cowley. Cowley, however, maintains that the facts, when viewed in the light most favorable to him, show that Greco *did* participate in the panel that recommended charges against Cowley. But the record does not raise a genuine issue of material fact.

Cowley relies on Nakamura's deposition, which purports to show Greco's involvement in the charging decision. Specifically, when asked about a panel that recommended criminal charges before a press conference on June 19, 2014, Nakamura replied that he *thought* Greco participated. App. 1366. Nakamura's uncertain statement, however, is contradicted by his own testimony. Indeed, during the same deposition Nakamura testified that Greco only took part in the October 2013 panel with the DA's Office and that as late as April 2014, no charging decision had been made. Thus, as the following exchange makes clear, the October 2013 panel on which Greco participated was *not* involved in the charging decision.

> QUESTION: Do you know of any other meetings besides the October 2013 meeting where Detectives Greco and Dowland—or Dowland participated in the panel you've described?
>
> [NAKAMURA'S] ANSWER: Participate in the panel. I guess—see, I have—I have a recollection of that first meeting where Salt Lake City doesn't show up. *We then proceeded without them*.

> I—I don't have—you know, I can't tell you, as we sit here now, whether I have a firm recollection of another meeting or—or no other meeting. I have to rely upon what's—what's stated in here, which seems to suggest *there was not another meeting other than that first one where they were at*.
>
> QUESTION: *At the time of this April 2014 meeting, had the DA's office made a decision as to whether to file charges?*
>
> [NAKAMURA'S] ANSWER: At this—*that very moment, no, had not made that decision*.

Id. at 846 (emphasis added). Accordingly, Nakamura's testimony supports the district court's finding that Greco participated in a panel approximately six months before a separate panel convened in April 2014 and approximately eight months before the DA's office filed charges against Cowley.

Further, Mark Knighton, as investigator with the DA's Office testified regarding the panel that recommended criminal charges. Indeed, when asked who the members of the panel were, Knighton definitively responded: "Jason Jones . . . Chris Kotromidos, Mike Hardin, Blake [Nakamura], and me." Id. at 11408, 1238. Even Greco testified that he was not part of the panel that recommended criminal charges against Cowley. Id. at 1234. When asked that question, Greco definitively answered, "No." Id. Cowley also ignores facts in the record that indicate that WVC consciously refused to participate in, and in fact removed Greco and Dowland from, the DA's charging decision. For example, on April 10, 2014, Nakamura emailed the DA's Office and certain WVC employees, including Greco and Dowland, and invited them to provide "thoughts and comments" on "what and who [sic] to charge." Id. at 1199. Four days later, however, Lee Russo, WVC's police chief, emailed Quinlan that Greco and

Dowland "should not participate in this final phase of the charging review." Id. at 1196. He also stated that

> [o]ur personnel have done an absolutely thorough and complete job in conducting this investigation. The results of the investigation [have] been presented to prosecutors for their charging decision. *As part of the "checks and balances," the final review and charging decision appropriately rests with the DA's Office.* I see no need at this point to expose our staff to any potential criticism that we have in any way influenced the final outcome.

Id. (emphasis added).

While we are aware that we must view the facts in the light most favorable to Cowley, the record does not support Cowley's assertion that Greco participated in the charging decision. Indeed, we do not believe a rational jury would credit Cowley's assertion. As recounted above, Knighton, Nakamura, and Greco testified that Greco was not part of the panel that ultimately recommended criminal charges against Cowley. And Russo specifically removed Greco from participating in the charging decision to shield the police department from "any potential criticism" that they "influenced the final outcome." Id. Thus, the district court correctly found that Greco did not participate on the panel that recommended criminal charges against Cowley.

We now turn to the substance of Cowley's retaliatory prosecution claim. The district court concluded that claim failed on three independent grounds. First, the district court observed that the DA's Office determined charges were warranted. Second, the district court noted that the alleged retaliation was not substantially motivated as a response to Cowley's exercise of his first amendment rights (i.e.,

alleging systematic misconduct within the NNU). Third, the district court determined that the DA's Office would have filed criminal charges regardless of any urging by the WVC Defendants.

> To establish a retaliatory prosecution claim, Cowley must plead and prove:
>
> (1) that [he] was engaged in a constitutionally protected activity[8]; (2) that a defendant's action caused [him] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that a defendant's action was substantially motivated as a response to [his] exercise of [his] First Amendment speech rights.

Becker v. Kroll, 494 F.3d 904, 925 (10th Cir. 2007). Additionally, under Hartman v. Moore, 547 U.S. 250 (2006), Cowley must prove an additional factor: "a retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause." Id. at 265; Becker, 494 F.3d at 925 (noting that the appellant "also must plead and prove the absence of probable cause for the prosecution."). The WVC Defendants conceded in the district court that there is a fact issue as to whether probable cause existed. App. 33. Thus, "[t]o survive summary judgment on the retaliation claim, [Cowley] must present a genuine issue of material fact as to

[8] The Supreme Court has held that a defendant's *belief* that the plaintiff engaged in a constitutionally protected activity is enough to satisfy this first element in certain circumstances. Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016) ("When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior."). This case, however, does not present an opportunity to expound on this requirement, as neither party disputes Cowley was engaged in protected activity.

whether a non-immune defendant influenced the decision to prosecute in retaliation for protected speech." Becker, 494 F.3d at 926.

On appeal, Cowley argues that sufficient evidence of WVC and Greco's retaliatory motive exists because he (Cowley) "ratted out" the NNU and WVC purportedly engaged in a campaign to discredit and terminate him.[9] Cowley asserts that his whistleblowing motivated WVC to induce the DA's Office into prosecuting him. Specifically, he points to the "suspicious timing of WVC's participation and inducement of prosecution." Appellant's Opening Br. at 47.

Additional background is necessary to explain WVC's purported "suspicious timing." When Cowley blew the whistle on the NNU, he alleged that John Coyle, former NNU supervisor, knew of and ignored the improper handling of property within the NNU and was an absentee supervisor. Consequently, an Internal Affairs team began investigating Coyle. The investigation resulted in Coyle's demotion, which the Civil Service Commission later overturned. The record does not explain why the Commission reversed Coyle's demotion.

Cowley argues that following the reversal of Coyle's demotion, WVC became fearful that his termination would also be overturned. Cowley claims that fear drove WVC to reverse its policy prohibiting police officers from participating in the charging decision, thus allowing Greco to become part of a panel that recommended

[9] Cowley also claims he satisfied the prima facie case of inducement and that WVC failed to rebut the prima facie case of inducement. Because we conclude that Cowley did not present sufficient evidence of retaliatory motive, we do not address Cowley's remaining arguments with respect to this claim.

criminal charges against him. Cowley also asserts that "[n]either WVC nor Greco believed the shooting was criminal," yet he also claims that "they advocate[d] for and participate[d] in Cowley's prosecution."

Suspicious timing can evince retaliatory motive, Smith v. Maschner, 899 F.2d 940, 948–49 (10th Cir. 1990), but in this case no evidence suggests WVC or Greco's "participation and inducement of prosecution."[10] Appellant's Opening Br. at 47. As recounted above, the record does not support Cowley's contention that Greco participated in the panel that recommended criminal charges. Greco participated in a panel with the DA's Office in October 2013, yet charges were not recommended until after April 2014. Further, the record makes clear that WVC took care to avoid weighing in on the DA's decision to bring charges. Again, Russo determined that Greco "should not participate in [the] final phase of the charging review" in order to avoid "any potential criticism" of the police department. Smith at 1196. Of course, Greco did sign the probable cause statement in the Information. Greco, however, testified that he signed that statement as an acknowledgment that the facts contained

[10] In Smith v. Maschner, we held that a plaintiff could show retaliatory motive when prison officials initiated disciplinary action against the plaintiff immediately when he returned from court. Id. at 948. Smith, however, relied on more circumstantial evidence than the mere timing. For example, Smith presented evidence that the prison officials had never previously questioned him about the subject of his disciplinary proceeding. Id. Smith also presented an affidavit by a fellow inmate that asserted prison officials "intentionally segregated and then transferred" the inmate to prevent him from "being a witness in a pending lawsuit by Smith." Id. Finally, Smith submitted an affidavit by a prison law clerk that asserted that prison officials removed the law clerk "from library employment in retaliation for assisting Smith while he was in segregation." Id.

in the statement were true. Id. at 1234. Indeed, Greco testified that he did not participate in the decision to bring charges and in fact believed that the shooting was justified. Id. Again, Cowley fails to point to evidence that Greco acted with retaliatory motive.[11]

Because Cowley failed to produce any evidence that WVC or Greco acted with retaliatory motive, he has not satisfied the prima facie elements for retaliatory prosecution. His purely speculative assertions are not enough to escape summary judgment. Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988) (explaining that a party cannot avoid summary judgment based on ignorance of the facts, speculation, or suspicion).

IV.

Finally, Cowley appeals the district court's denial of attorneys' fees relating to his discovery dispute with the WVC Defendants.

[11] Cowley argues that Greco's participation in his prosecution (i.e., the signing of the probable cause statement) is enough to establish retaliatory prosecution. He contends that Pierce v. Gilchrist, 359 F.3d 1279 (10th Cir. 2004), allows for a claim of retaliatory prosecution if a prosecution is "initiated by a third person, and the defendant, knowing that there is no probable cause for them, thereafter takes an active part in procuring their continuation." Id. at 1292 (quoting Restatement (Second) Torts § 655, cmt. b.). Not so. Pierce involved a *malicious prosecution* claim, not a retaliatory prosecution claim. Id. While malicious prosecution and retaliatory prosecution may be "close cousin[s]", Hartman, 547 U.S. at 258, they are nonetheless two separate legal theories of liability. Compare Wilkins v. DeReyes, 528 F.3d 790, 799 (10th Cir. 2008) (discussing the elements of a malicious prosecution claim), with Becker, 494 F.3d at 925 (describing the prima facie case of retaliatory prosecution). Thus, even assuming the language from Pierce could apply to the facts of this case, we decline to extend its reasoning to retaliatory prosecution claims.

Rule 37 provides that a "court *must not* order [fees] if . . . other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A)(iii) (emphasis added). Cowley served all nine defendants involved in the initial litigation with the same discovery requests. Thus, all nine parties were obliged to respond, which caused duplicative production. See Fed. R. Civ. P. 34(b)(2). The district court recognized as much and stated:

> Plaintiff's counsel did not use good judgment when they made similar document requests as to each Defendant. Similarly, Defendants' counsel did not use good judgment when they took literally the document requests as to each Defendant. All parties contributed to the duplication, and all parties should bear their own costs. As such, an award of fees under Rule 37(a)(5) is unwarranted.

App. 44.

Cowley contends that the document requests were not identical and, therefore, that he did not contribute to the unnecessary duplication of documents. Yet a thorough review of the record shows that the document requests were all the same. For example, Cowley requested "all documents identified, referenced, or otherwise relied upon in your Answers to Plaintiff's First Set of Interrogatories" from Quinlan, Michael Powell, Coyle, Greco, Schwimmer, Pyle, Russo, and Buzz Nielsen.[12] App. 278–330. In fact, all his requests to each of the aforementioned defendants were

[12] The district court dismissed Nielsen, Russo, Quinlan, Powell, and Schwemmer from this case. App. 22.

identical.[13] Id. The only exception relates to Defendant WVC, for whom Cowley included a more robust request. See App. 332–39.

Cowley argues in the alternative that "[t]o the extent [his] discovery requests contributed to the dispute, the contribution pales in comparison to the mess created by WVC." Appellant's Opening Br. at 61. This argument is not a reasoned justification for us to conclude that the district court abused its discretion. "A district court abuses its discretion when it renders an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 968 (10th Cir. 2001) (internal quotation marks omitted). Given the nature of Cowley's requests, we agree with the district court that all parties contributed to the duplication and that all parties should bear their own costs.

Accordingly, the district court did not abuse its discretion in denying Cowley's motion for attorneys' fees.

V.

For the reasons described above, we AFFIRM.

Entered for the Court

Joel M. Carson III
Circuit Judge

[13] Like the document requests, the interrogatories submitted to each individual defendant were identical. App. 278–330.