STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2050

Robert Bonczek,
Appellant,

vs.

City of Minneapolis,
Respondent,

Minneapolis Park and Recreation Board,
Respondent.

Filed January 27, 2009
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-06-19676

Robert L. Bonczek, P.O. Box 18782, Minneapolis, MN 55418 (pro se appellant)

Susan L. Segal, Minneapolis City Attorney, C. Lynne Fundingsland, Assistant City Attorney, Office of the City Attorney, 333 South Seventh Street, Suite 300, Minneapolis, MN 55402 (for respondent City of Minneapolis)

Ann E. Walther, Karin E. Peterson, Rice, Michels & Walther, LLP, 10 Second Street Northeast, Suite 206, Minneapolis, MN 55413 (for respondent Minneapolis Park and Recreation Board)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Pro se appellant Robert Bonczek challenges the district court's grant of summary judgment to respondents City of Minneapolis (the city) and Minneapolis Park and Recreation Board (the park board) on appellant's discrimination, retaliation, and excessive-force claims. Specifically, appellant contends that (1) legal counsel for respondent park board acted without authority; (2) the district court improperly denied his motion to extend the discovery period; (3) the district court erred in dismissing his age-discrimination and retaliation claims as time-barred; and (4) the district court erred in dismissing his 42 U.S.C. § 1983 excessive-force claims. We affirm.

D E C I S I O N

I.

Appellant asserts that counsel for respondent park board acted "without authority" in representing the park board because the city attorney is the sole legal representative of the city, and the park board is a department of the city. Therefore, appellant claims that the park board could only be represented by the city's attorney. Respondents argue that because appellant did not raise this issue before the district court it is not properly before this court. We agree.

We will generally not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Appellant never specifically argued or submitted briefs to the district court on the issue of whether the park board's counsel acted without authority. And since this issue is not plainly decisive of the entire

controversy, this court need not address this issue. *Cf. Watson v. United Servs. Auto Ass'n*, 566 N.W.2d 683, 688 (Minn. 1997) (deciding new issue on appeal because it was a novel statutory issue based on undisputed facts).

Nevertheless, we conclude that appellant's claim fails on the merits because by Minneapolis City Charter, the park board has the authority to hire its own legal counsel. "The Park and Recreation Board shall be authorized to employ and dismiss, subject to the provisions of the Civil Service Chapter of this Charter, *such attorneys*, surveyors, agents and employees as may be necessary . . . ." Minneapolis, Minn., City Charter ch. 16, § 1 (2008) (emphasis added). Pursuant to the charter, the park board did not act without authority when it retained private counsel to represent it in this proceeding.

II.

Appellant claims that the district court erred in denying his motion to extend discovery. We disagree.

The district court has broad discretion in granting or denying discovery requests. *Dunham v. Roer*, 708 N.W.2d 552, 572 (Minn. App. 2006) (citing *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987)). "In particular, whether to grant or deny a continuance is within the sound discretion of the district court, and its decision will not be reversed unless it has abused its discretion." *Id.*

There is a "presumption in favor of granting continuances to allow sufficient time for discovery." *Dunham*, 708 N.W.2d at 573 (quoting *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982)). "Accordingly, the district court considers two factors when determining whether to grant a continuance." *Id.* "First, the court considers whether the moving party

has been diligent in obtaining or seeking discovery." *Id.* (quotation omitted). "Second, the court considers whether the moving party seeks further discovery with the good faith belief that material facts will be uncovered, or is merely engaging in a fishing expedition." *Id.* (quotation omitted).

Here, the district court found that appellant did not attempt to obtain discovery before the April 6, 2007 deadline. Also, the district court concluded that the fact that appellant did not bring his motion until July 10, 2007, "well after the discovery deadline had passed," evidenced appellant's lack of diligence. And since appellant never submitted any formal discovery requests to either respondent, appellant failed to show he had a good faith belief that material facts would be uncovered. On this record, we conclude that the district court did not abuse its discretion in denying appellant's motion to extend the discovery deadline.

III.

Appellant challenges the district court's grant of summary judgment on his age-discrimination and retaliation claims against the park board. The district court concluded that appellant's claims were time-barred because the date of appellant's filing exceeded the statutory limitations periods and the application of equitable tolling was inappropriate. Appellant argues that Minn. Stat. § 541.05 (2004) provides a six-year statute of limitations period and therefore, his discrimination and retaliation claims are not time-barred. We disagree.

On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

Appellant is incorrect in his assertion that the general statute of limitations provision of section 541.05 applies to permit his claims. That section states in relevant part: "Actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues, except where a different limitation is prescribed by the Uniform Commercial Code or, *in special cases, by other statute*." Minn. Stat. § 541.01 (2008) (emphasis added). Here, two other statutes provide different limitations periods.

The Minnesota Human Rights Act (MHRA) provides that after a complainant receives notice that the Commissioner of the Minnesota Department of Human Rights (MDHR) has dismissed a charge, the complainant has a 45-day period to bring a private civil action. Minn. Stat. § 363A.33, subd. 1(1) (2008). Similarly, a claim alleging violation of the Age Discrimination in Employment Act (ADEA) must be commenced within 90 days of receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC). 29 U.S.C. § 626(e) (2004). The failure to file suit within 90 days after receiving a right-to-sue letter from the EEOC renders the lawsuit untimely. *Littell v. Aid Ass'n for Lutherans*, 62 F.3d 257, 259 (8th Cir. 1995).

Here, appellant filed his charge with the EEOC and MDRH on June 15, 2005, alleging age discrimination and retaliation by the park board. The EEOC closed its file on appellant's charge on November 7, 2005, and mailed the dismissal notice to appellant on that date. This notice informed appellant in bold print that he had 90 days to file a

lawsuit, and appellant acknowledged receiving this notice. Thus, the deadline to file suit on his ADEA claim was on or about February 5, 2006. And on December 13, 2005, the MDHR notified appellant by letter of the dismissal of appellant's MHRA charge and also alerted him to the 45-day period in which he had the "right to bring a private civil action in state district court." Appellant acknowledged receiving this letter. The deadline to file suit on his MHRA claim was on or about January 27, 2006. But appellant did not file his claim until November 9, 2006 – nearly one year after receiving notification of the EEOC and MDHR's decisions.

The failure to follow the filing requirements of the MHRA renders a lawsuit alleging an MHRA violation untimely unless the plaintiff can demonstrate entitlement to equitable tolling of the limitations period. *Ochs v. Streater, Inc.*, 568 N.W.2d 858, 860 (Minn. App. 1997). And like MHRA age-discrimination claims, the equitable tolling remedy for ADEA claims should be reserved for circumstances that are truly beyond the plaintiff's control. *Coons v. Mineta*, 410 F.3d 1036, 1040 (8th Cir. 2005) (quotation omitted). The pertinent question in applying equitable tolling is whether the employee had knowledge of his "right not to be discriminated against or the means of obtaining such knowledge." *Briley v. Carlin*, 172 F.3d 567, 570 (8th Cir. 1999) (citation omitted).

The district court concluded that appellant's excuse for not timely filing suit did not meet the requirements for equitable tolling. Appellant testified at his deposition that he did not timely file suit because he did not have the time or documentation to do so, and because his documents and property were seized. Appellant acknowledged receiving the letters from the EEOC and the MDHR, but provided no specific support for his

assertion that he lacked the time or documentation required to file suit within the required time frame. And appellant has not alleged that he was unaware of his right not to be discriminated against. Thus, the district court properly concluded that no equitable tolling principles applied.

We conclude that the district court properly granted summary judgment because appellant failed to file suit within the requisite statute of limitations, and because appellant failed to demonstrate entitlement to equitable tolling of the limitations period.

IV.

Appellant claims that the district court erred in summarily dismissing his three 42 U.S.C. § 1983 claims against the park board based on incidents that occurred in November of 2002, on May 11, 2006, and on September 29, 2006. We disagree.

"Section 1983 does not confer substantive rights but merely provides a means to vindicate rights conferred by the Constitution or the laws of the United States." *Wilson v. Spain*, 209 F.3d 713, 715 (8th Cir. 2000). Section 1983 requires a plaintiff to identify the particular right that has been violated, and to show that the conduct complained of was committed by a person acting under color of state law. *DuBose v. Kelly*, 187 F.3d 999, 1002, 1004 (8th Cir. 1999). Appellant claims that, during all three incidents, park police officers violated his Fourth Amendment rights.

November 2002 Incident

The district court declined to address appellant's Fourth Amendment claims with respect to the November 2002 incident because appellant could not identify the park police officer who allegedly pointed a gun at him and told him he could not sleep in his

truck on a city street and because the park board could not find any evidence of this encounter. Unless a plaintiff is bringing a *Monell* claim,[1] a plaintiff asserting a § 1983 violation must name an individual officer. *See* 42 U.S.C. § 1983 (2006) ("Any *person* who, under color of any statute, . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .") (emphasis added); *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694-95, 98 S. Ct. 2018, 2037-38 (1978).

Because neither appellant nor respondent park board has been able to identify the officer involved in the alleged November 2002 encounter, appellant has failed to meet the threshold requirement of identifying a particular defendant in his section 1983 claim. Thus, the district court properly granted summary judgment with respect to this incident.

May 11, 2006 Incident

Appellant claims that he was not engaged in conduct that would have justified the park police officer pointing his firearm at appellant on May 11, 2006, and therefore, the district court erred in granting summary judgment to respondent park board and the park police officer. We disagree.

To establish standing to bring an excessive force claim under section 1983 and the Fourth Amendment, a plaintiff must allege that he suffered an actual injury that is more than de minimus. *Hanig v. Lee*, 415 F.3d 822, 824 (8th Cir. 2005). Appellant has not

[1] A *Monell* claim is a federal constitutional claim asserted against a public entity arising out of actions that violate the constitution and require a showing that an entity's policy or custom violated the plaintiff's rights. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694-95, 98 S. Ct. 2018, 2037-38 (1978).

established any injury resulting from the alleged excessive force by the park police officer. Appellant asserts that he was ordered to put his hands up at gunpoint, was handcuffed for approximately ten minutes, and briefly detained in a squad car for about five minutes. Appellant does not allege any physical pain associated with being handcuffed or detained. Therefore, the district court properly concluded that appellant's Fourth Amendment claim against the park police officer fails as a matter of law.

September 29, 2006 Incident

Appellant alleges that on September 29, 2006, an unidentified officer stopped him near Boom Park in northeast Minneapolis, patted him down, and placed him in the officer's vehicle for five minutes while the officer called dispatch to verify appellant's identity. The officer told appellant that he was stopped because a person wearing clothing that matched appellant's clothing was panhandling and prowling in the area. The park board determined from its records that it was one of its park agents that encountered appellant. Appellant claims the district court erred in granting summary judgment to respondents with respect to this incident. We disagree.

A park agent is not a licensed law enforcement officer and does not carry a firearm. Because of this, appellant claims that the park police have no legal status or authority and are not state officials entitled to immunity. But in fact, the city's charter specifically provides that, "The Mayor of the City of Minneapolis shall, upon request of the Park and Recreation Board, and subject to the provisions of the Civil Service Chapter of this Charter, appoint as police officers such persons as such Board may request." Minneapolis, Minn., City Charter ch. 16, § 14 (2008). We conclude that, contrary to

appellant's assertion, the park police have legal authority to stop and investigate potential suspects.

"In addressing an officer's claimed entitlement to qualified immunity, the court must first determine whether the allegations amount to a constitutional violation, and then, whether that right was clearly established." *Sanders v. City of Minneapolis*, 474 F.3d 523, 526 (8th Cir. 2007). Because we conclude that no constitutional violation occurred, we need not decide the immunity issue. *See id.* (affirming summary judgment against complainant in a section 1983 claim against a park officer and not addressing immunity because no constitutional violation occurred).

Under *Terry v. Ohio*, the police may conduct a limited stop of a person to investigate when the police have a reasonable belief that a crime has been or is about to be committed. 392 U.S. 1, 30, 88 S. Ct., 1884-85 (1967). Here, appellant testified that when the park agent stopped him, patted him down, and detained him for five minutes to verify his identity, the park agent informed appellant that he matched the description of a person reported to be panhandling and prowling in the area. And the record indicates that shortly thereafter, when the park agent was satisfied with appellant's identity, he released him.

The district court properly concluded that the facts alleged by appellant describe a valid *Terry* stop. The park agent's stop and brief detention of appellant were based on reasonable suspicion justified by particularized, objective facts regarding the reported prowler. There are no material issues of fact in dispute, and the district court did not err

in its application of law. Thus, we conclude that the district court's grant of summary judgment to respondents was appropriate.

V.

Appellant brought a section 1983 claim against the city, alleging that an unidentified police officer, on an unknown date, pointed a gun at him. The district court granted summary judgment to the city on this claim. Appellant argues that the district court erred in granting summary judgment to the city on this section 1983 claim because appellant could "easily I.D. the officers," thereby implying that the city should conduct an investigation into this claim. We disagree.

Appellant has failed to identify any particular officer who pointed a gun at him, or even the date on which the encounter occurred; both of which are required facts to be pleaded under section 1983. And appellant has failed to meet the standing requirement because he did not allege an injury as a result of the incident. Accordingly, we conclude that the district court did not err in its application of law to the bare facts alleged by appellant and that the grant of summary judgment to the city was proper.

VI.

Appellant argues that the district court erred in granting summary judgment to the city on his claims regarding the impoundment and auctioning of his vehicle. We disagree.

Appellant claims that his impounded and auctioned vehicle was improperly sold and as a result thereof, he lost property that was in his vehicle. Appellant admits that his vehicle was parked on a public street when it was towed and that he was cited and

notified of the impoundment of his inoperable pickup truck. Moreover, the record indicates that appellant accessed the impound lot multiple times to move some of his property out of his truck and had been given a claims form to file with the city for the property that he alleged had been stolen. Appellant also stated that he knew of the auction date of his vehicle and had requested that the auction date be moved from November 10, 2007 to November 17, 2007. And the record indicates that appellant's vehicle was not auctioned until the requested date of November 17, 2007.

We conclude that appellant failed to present facts supporting any viable cause of action against the city and thus, the district court's grant of summary judgment to the city was proper.

Affirmed.