

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Allen J. Semenchuk,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-19
Ohio Department of Rehabilitation and	:	(C.P.C. No. 08CVH12-18073)
Correction,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	
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D E C I S I O N

Rendered on November 16, 2010

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*Allen J. Semenchuk, pro se.*

*Richard Cordray, Attorney General, and Mary Anne Reese,*  
*for appellee.*

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Allen J. Semenchuk ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas granting a partial dismissal of his complaint for declaratory judgment and injunctive relief and also granting summary judgment in favor of appellee, Ohio Department of Rehabilitation and Correction ("ODRC"), as to appellant's remaining claims. For the reasons that follow, we affirm those judgments.

{¶2} Appellant is an inmate in the custody of ODRC. He has been incarcerated since 1979 for various convictions, including murder. At the time of the filing of this appeal, he was residing at the Allen Correctional Institution in Lima, Ohio.

{¶3} Appellant seeks injunctive and declaratory relief to prevent ODRC from celling him with non-whites and to also prohibit ODRC from classifying and tracking appellant as a member of a security threat group. Furthermore, appellant requests a declaration that Ohio Adm.Code 5120-9-31(F), a provision of the inmate grievance procedure, is overbroad and void for vagueness.

{¶4} Specifically, in his complaint, appellant asserts it is against his religious and political beliefs to share a cell with non-white inmates. Appellant asserts he has refused to cell with non-whites throughout the course of his imprisonment and admits he has a 30-year documented history of violence with non-white inmates. He further admits he has been stabbed and hospitalized on numerous occasions and has also been found guilty by the rules infraction board of stabbing and beating non-white inmates. Appellant contends that forcing him to randomly cell with non-white prisoners creates a very real security threat and is a violation of his rights.

{¶5} In addition, appellant alleges his security status was raised from "medium" to "close" and he was found guilty of "implied threats" and received sanctions when he requested a racial separation celling order. Appellant asserts he was also placed on a security threat group list as a "white supremacist," despite the fact he has no connection to such a group and has never been charged with or found guilty of such an allegation. Appellant contends this violates his right to due process, as well as his right to hold his religious and political beliefs.

{¶6} Finally, appellant's complaint alleges Ohio Adm.Code 5120-9-31(F), which subjects an inmate to disciplinary action for disrespectful, threatening, or inappropriate comments made in an informal complaint, grievance, or grievance appeal, is "so overbroad and subject to the bias[ed] interpretation of defendant[']s agents that reasonable minds cannot understand it." (Complaint, at ¶12.) Appellant contends this provision chills his right to petition the government for the redress of grievances and punishes persons who attempt to use the grievance process.

{¶7} Accordingly, appellant seeks a declaratory judgment declaring the following: (1) that appellant has the right not to be celled with non-white prisoners, based upon his political and religious beliefs and his past history of violent interactions; ODRC shall be enjoined from celling appellant with non-whites and appellant shall receive a racial separation order or single-celling status as permitted by ODRC policy 55-SPC-01 IV and VI 5; (2) that appellant shall not be placed on the security threat group list unless ODRC can demonstrate, after affording appellant due process, that he is a member of such a group; and (3) that Ohio Adm.Code 5120-9-31(F) is void for vagueness as well as overbroad and therefore unconstitutional.

{¶8} On February 19, 2009, ODRC filed a motion to dismiss appellant's complaint for failure to state a claim, pursuant to Civ.R. 12(B)(6). Appellant filed a memorandum contra on February 26, 2009. On April 22, 2009, the trial court filed a decision and judgment entry granting in part and denying in part ODRC's motion to dismiss. The trial court dismissed appellant's claims challenging his security threat group classification, finding appellant had no constitutional right to a particular classification, but allowed appellant's other claims to remain.

{¶9} On September 25, 2009, ODRC filed a motion for summary judgment on appellant's two remaining claims. Appellant opposed the motion and filed a memorandum contra on November 4, 2009. On December 9, 2009, the trial court granted summary judgment in favor of ODRC. With respect to appellant's claim that he has a right to racially segregated celling, the trial court determined this constitutional challenge was an as-applied challenge, meaning appellant was first required to exhaust his administrative remedies. Because appellant failed to do so, the trial court granted summary judgment in favor of ODRC.

{¶10} As to appellant's claim that Ohio Adm.Code 5120-9-31(F) is unconstitutional, the trial court determined this challenge could be construed as both a facial challenge as well as an as-applied challenge. The trial court held the portion of appellant's claim alleging Ohio Adm.Code 5120-9-31(F) was overbroad, void for vagueness, and chilling to his grievance rights was a facial challenge, which did not require the exhaustion of administrative remedies prior to seeking relief. However, the trial court determined deference must be given to prison administrators in the adoption and execution of policies implemented to preserve discipline and maintain security. Because the rule was reasonably related to legitimate penological interests, the trial court determined appellant's challenge failed.

{¶11} Appellant filed a timely appeal and asserts the following assignments of error for our review:

**ASSIGNMENT OF ERROR I**

THE COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF WHEN IT GRANTED DISMISSAL OF THE STG CLASSIFICATION ASPECT OF HIS CLAIM AS SUCH CLASSIFICATION WAS IN RETALIATION FOR

PETITIONING THE GOVERNMENT FOR THE REDRESS OF GRIEVANCES.

**ASSIGNMENT OF ERROR II**

THE COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF WHEN IT GRANTED SUMMARY JUDGMENT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IN VIOLATION OF O.R.C. §2969.26(B).

**ASSIGNMENT OF ERROR III**

THE COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF WHEN IT DID NOT DECLARE HIS RIGHTS AS TO RELIGIOUS, POLITICAL BELIEFS AND AS TO THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES WITHOUT RETALIATION AND TO BE SECURE IN HIS PERSON.

**ASSIGNMENT OF ERROR IV**

THE COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT FAILED TO DECLARE THAT OHIO ADMINISTRATIVE CODE 5120-9-31 WAS SO OVER BROAD AS TO CHILL THE PLAINTIFF'S RIGHT TO PETITION THE GOVERNMENT FOR THE REDRESS OF GRIEVANCES.

{¶12} In his first assignment of error, appellant asserts the trial court erred in dismissing his challenge to his security threat group classification, arguing he should not be placed on the list and seemingly arguing said classification was in retaliation for filing an informal complaint or grievance in which he petitioned for segregated celling. Appellant argues ODRC's actions violated his First Amendment rights as well as his right to due process. He further states that retaliation against a prisoner for the prisoner's exercise of a constitutionally protected right properly states a claim.

{¶13} "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v.*

*Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *Id.*; *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus. This court reviews a trial court's disposition of a motion to dismiss for failure to state a claim under Civ.R. 12(B)(6) de novo. *Stewart v. Fifth Third Bank of Columbus, Inc.* (Jan. 25, 2001), 10th Dist. No. 00AP-258. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the non-moving party. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60.

{¶14} Appellant's complaint requests a declaration that he "has the right not to be placed on the Security threat Group list unless [ODRC] can show he is a member of such a group and that he be afforded due process in that showing." (Complaint, at ¶14; R. 5 at 4.)

{¶15} Appellant is not entitled to the relief sought here. Appellant has admitted within his complaint that he has a 30 year history of violence with non-white inmates and has been found guilty by prison disciplinary boards of stabbing and beating non-white inmates. Additionally, appellant requested a segregated cell assignment. ODRC's determination to label appellant as a member of a security threat group is a classification decision. Classification decisions are left to the discretion of prison officials. See *Moody v. Daggett* (1976), 429 U.S. 78, 88, 97 S.Ct. 274, 279 (prison officials have full discretion to control the conditions of confinement, which includes prisoner classification).

{¶16} Furthermore, appellant cannot invoke the protections of due process to challenge his classification because prisoners have no constitutional right to any particular security classification. *Bloomer v. Holland* (C.A.6, 1999), 198 F.3d 244, citing *Olim v. Wakinekona* (1983), 461 U.S. 238, 103 S.Ct. 1741. See also *Moody* at 88, 279 (prisoners have no legitimate statutory or constitutional entitlement regarding security classification sufficient to invoke due process). Additionally, appellant has no constitutional right to a segregated cell assignment. See *Williams v. Brimeyer* (C.A.8, 1997), 116 F.3d 351 ("inmates have no right to insist on segregated cells").

{¶17} Additionally, we note that appellant's complaint does not specifically allege that the filing of his request for a segregated cell assignment caused ODRC to retaliate against him by increasing his security classification. However, his assignment of error states his "classification was in retaliation for petitioning the government for the redress of grievances." To the extent that appellant may now be attempting to argue his complaint was actually inartfully pled or alleged that he suffered retaliation as a result of the filing of his informal complaint, we reject that assertion as well. In order to state a claim for retaliation, including a retaliatory increase in a prisoner's security classification as a result of the prisoner's exercise of a constitutional right, a prisoner must allege a chronology of events from which retaliation may be inferred. See generally, *Murphy v. Lane* (C.A.7, 1987), 833 F.2d 106, 108-09; *Baker v. Ohio Dept. of Rehab. & Corr.*, 144 Ohio App.3d 740, 2001-Ohio-2553; *Gumpl v. Bost* (1993), 88 Ohio App.3d 325. A simple allegation of retaliation is not sufficient. *Id.*; *Benson v. Cady* (C.A.7, 1985), 761 F.2d 335, 342. Additionally, a prisoner must also set forth operative grounds that reveal the extent of the

injury that resulted from the retaliation. See *Ustrak v. Fairman* (C.A.7, 1986), 781 F.2d 573, 578-79. Appellant has failed to do so here.

{¶18} Accordingly, we find the trial court properly dismissed appellant's cause of action regarding his security classification for failure to state a claim pursuant to Civ.R. 12(B)(6). Therefore, we overrule appellant's first assignment of error.

{¶19} Appellant's next three assignments of error allege the trial court improperly granted summary judgment for various reasons. For ease of discussion, we shall address those assignments of error out of order.

{¶20} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶21} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶22} When seeking summary judgment on the ground that the non-moving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Id.*

{¶23} In his second assignment of error, appellant asserts the trial court erred in granting summary judgment on the grounds that appellant had failed to exhaust administrative remedies. First, appellant contends he did in fact exhaust administrative remedies. Second, even if he did fail to exhaust administrative remedies, appellant argues R.C. 2969.26(B) requires a 180-day stay of the proceedings, rather than the dismissal that occurred here. Moreover, appellant argues he was not required to exhaust administrative remedies because the matters at hand involve constitutional issues.

{¶24} To clarify, we point out that the trial court found appellant was only required to exhaust administrative remedies with respect to his claim challenging his cell assignment because the trial court found that claim to be an as-applied constitutional challenge. The trial court determined that such a challenge could not be adjudicated without resorting to extrinsic facts and therefore a record is required, and it is subject to the inmate grievance procedure set forth in Ohio Adm.Code 5120-9-31(K).

{¶25} After establishing that exhaustion of administrative remedies is a prerequisite here, and after determining that appellant failed to attach evidence that he

had exhausted his administrative remedies as required by R.C. 2969.26(A), we find the trial court properly granted summary judgment in favor of ODRC on this claim.

{¶26} Pursuant to R.C. 2969.26(A), if an inmate commences a civil action or appeal against a governmental entity or employee, and if the inmate's claim is subject to the grievance procedure system, the inmate must file: (1) an affidavit stating the grievance was filed, along with the date on which the decision regarding the grievance was received; and (2) a copy of any written decision received regarding the grievance from the grievance system.

{¶27} A review of the record reveals that appellant failed to meet these filing requirements with respect to his claim involving his celling assignment. Appellant's affidavit does not state the dates upon which any grievances were filed and the only written grievance decision provided relates to his security classification label, not his celling assignment. Furthermore, the letter addressing his request for a segregated cell assignment is not a grievance decision and does not meet the requirements of R.C. 2969.26. Therefore, we find appellant failed to exhaust his administrative remedies.

{¶28} As for appellant's claim that his failure to exhaust administrative remedies should warrant a 180-day stay pursuant to R.C. 2969.26(B), rather than a dismissal on summary judgment, this argument is without merit. Compliance with R.C. 2969.26 is mandatory and the failure to satisfy this statutory requirement is grounds for dismissal. See *State ex rel. Spurlock v. Sevrey*, 10th Dist. No. 06AP-1291, 2007-Ohio-3550; and *Hamilton v. Wilkinson*, 10th Dist. No. 04AP-502, 2004-Ohio-6982. Thus, appellant's argument for a stay, rather than a dismissal, is without merit.

{¶29} Finally, we address appellant's argument that this claim involves a constitutional issue and therefore, the exhaustion of administrative remedies is not a prerequisite to filing this action in the judicial system.

{¶30} The failure to exhaust administrative remedies is not a necessary prerequisite to an action which challenges the constitutionality of a statute or administrative rule. See *Jones v. Village of Chagrin Falls*, 77 Ohio St.3d 456, 462, 1997-Ohio-253; *Fairview Gen. Hosp. v. Fletcher* (1992), 63 Ohio St.3d 146, 149; *Derakhshan v. State Med. Bd. of Ohio*, 10th Dist. No. 07AP-261, 2007-Ohio-5802. Ohio courts have distinguished between facial constitutional challenges and as-applied challenges. The Supreme Court of Ohio has held that an appellant can raise a facial constitutional challenge for the first time on appeal in the judicial system because extrinsic facts are not necessary to determine whether a statute is unconstitutional on its face. However, when the constitutionality of a statute is challenged as-applied to a specific set of facts, a record is required. Thus, an as-applied constitutional challenge must be raised during the administrative proceedings in order to develop a record. See *City of Reading v. Pub. Util. Comm. of Ohio*, 109 Ohio St.3d 193, 2006-Ohio-2181.

{¶31} We find appellant's challenge to ODRC's integrated ceiling assignments on the grounds that it violates his political and religious beliefs is an as-applied challenge. Thus, appellant was required to exhaust his administrative remedies prior to bringing his claim into the judicial system. However, appellant failed to do so. Accordingly, we overrule appellant's second assignment of error.

{¶32} In his fourth assignment of error, appellant asserts the trial court erred in failing to declare Ohio Adm.Code 5120-9-31 unconstitutional because it is overbroad and

chills appellant's right to petition the government for the redress of grievances. Appellant argues the rule is unconstitutional because it allows prisoners to be punished for filing grievances and not using politically correct language. Appellant further argues that allowing ODRC to use a subjective standard to determine what is or is not threatening or disrespectful language chills his right to petition and prevents him from having meaningful access to the grievance process.

{¶33} Ohio Adm.Code 5120-9-31(F) states, in relevant part, as follows: "An inmate may be subject to disciplinary action for disrespectful, threatening or otherwise inappropriate comments made in an informal complaint, grievance or grievance appeal."

{¶34} Here, appellant's claim alleging Ohio Adm.Code 5120-9-31(F) is overbroad, void for vagueness and chilling to his right to file a grievance is a facial challenge, which does not require exhaustion of administrative remedies. Nevertheless, we find this rule is not unconstitutional, as it is rationally related to a legitimate penological objective, based upon evidence submitted by ODRC, which was not refuted by appellant.

{¶35} In *Turner v. Safley* (1987), 482 U.S. 78, 107 S.Ct. 2254, the United States Supreme Court held that where a prison regulation infringes on the constitutional rights of a prison inmate, the regulation is valid if it is reasonably related to legitimate penological interests. *Turner* at syllabus. In order to determine reasonableness, the relevant factors to be considered are: (1) there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest set forth to justify it. If the connection is "arbitrary or irrational," then the regulation fails; (2) the existence of "alternative means of exercising the right" available to inmates; (3) the impact the accommodation of the asserted constitutional right will have upon guards and other inmates, as well as the

general allocation of limited prison resources; and (4) "the absence of ready alternatives" available to the prison for achieving its governmental objectives. *Shaw v. Murphy* (2001), 532 U.S. 223, 229-30, 121 S.Ct. 1475, 1479, quoting *Turner* at syllabus.

{¶36} In addition, courts must give substantial deference to the professional judgment of prison administrators, who carry the significant responsibility of defining the legitimate goals of a corrections system and determining the most appropriate means to accomplish them. See *Overton v. Bazzetta* (2003), 539 U.S. 126, 123 S.Ct. 2162; *Conway v. Wilkinson* (Dec. 6, 2005), S.D. Ohio No. 2:05-CV-820. Furthermore, the burden is not on ODRC to prove the validity of prison regulations. Instead, the burden is on the prisoner to disprove it. *Overton* at 132, 2168; *Shaw* at 232, 1481. Appellant has failed to do so here.

{¶37} In support of its position, ODRC attached the affidavit of Terry Tibbals, who has been employed by ODRC for nearly 25 years and served in varying capacities. At the time he submitted the affidavit, Mr. Tibbals was employed as the North Region Security Administrator. His responsibilities included overseeing the security operations of 16 prisons, writing policies and procedures, performing audits and inspections at institutions, and reviewing institutional policies. (Affidavit of Terry Tibbals, at ¶2-3; R. 28 at Defendant's exhibit No. A.)

{¶38} Mr. Tibbals averred that Ohio Adm.Code 5120-9-31(F) serves the penological objective of requiring that communications from inmates be civil, respectful, and non-threatening. In turn, this serves several penological goals including: (1) enabling prison staff to maintain security and control over inmates by supporting the legitimate authority of the staff and the overall authority structure within the prison, since

threats and disrespectfulness undermines authority and control; (2) enabling ODRC to operate a workplace system which is non-hostile and free from illegal and morale-lowering forms of harassment, as required pursuant to law and correctional management principles; and (3) rehabilitating prisoners in anticipation of their return into a society where disrespect, threats, and similar communications will likely prevent the inmate from successfully functioning in the workplace, school settings, and in family and day-to-day activities.

{¶39} We find Ohio Adm.Code 5120-9-31(F) is rationally related to several penological objectives. Additionally, in considering the *Turner* factors, we find there is a "valid, rational connection" between the regulation and ODRC's need to maintain security and control over inmates and also foster a non-hostile work environment, as well as provide a civilized means of raising complaints with prison officials. The regulation is not an exaggerated response to prison concerns and further accommodation of this asserted right would have a decidedly negative impact upon prison staff. Accordingly, we overrule appellant's fourth assignment of error.

{¶40} In his third assignment of error, appellant argues the trial court erred in failing to declare his rights as to his religious and political beliefs, his right to be secure, and his right to petition for the redress of grievances without retaliation. Here, appellant seems to assert that his First Amendment rights have been violated.

{¶41} Although this assignment of error is likely moot based upon our analysis as set forth above in addressing appellant's second assignment of error, we will assume, for the purposes of this argument, that appellant was not required to exhaust his administrative remedies with respect to his request for a segregated cell assignment.

{¶42} Even so, we still find appellant is not entitled to the requested relief regarding his claimed right to a segregated cell assignment. Appellant has produced no authority to support the position that he has a constitutional right to a segregated cell assignment. To the contrary, see *Williams* ("inmates have no right to insist on segregated cells"). Furthermore, it is unlawful for prison officials to segregate prisoners by race except under certain limited exceptions. See *Cruz v. Beto* (1972), 405 U.S. 319, 321, 92 S.Ct. 1079. See also *Johnson v. California* (2005), 543 U.S. 499, 125 S.Ct. 1141 (in the prison context, a searching judicial review of racial classifications is necessary to guard against discrimination; granting prisons an exemption from the rule that strict scrutiny applies to all racial classifications would undermine efforts to extinguish racial prejudice from the criminal justice system); and *White v. Morris* (S.D.Ohio, 1993), 832 F.Supp 1129, 1132 ("as a general matter, racial segregation in prisons is unconstitutional.").

{¶43} The *Turner* reasonableness test set forth in our discussion of appellant's fourth assignment of error is also applicable here in reviewing a specific application of a prison regulation involving alleged First Amendment rights. Under the *Turner* test, when a prison regulation infringes upon an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. *Turner* at 89. See also *Shaw* at 232, 481. Furthermore, as stated previously, the burden is on appellant to disprove the validity of the regulation. *Overton* at 132, 2168; *Shaw* at 232, 1481.

{¶44} In the instant case, ODRC has provided its policy, 64-DCM-3, by which it seeks to promote integration and limit segregation. Additionally, attached to the policy is the affidavit of Mr. Tibbals, in which he avers that the policy is rationally related to several penological objectives. These include: (1) preserving scarce resources by protecting

ODRC from the costs of litigation stemming from lawsuits brought under the equal protection clause; (2) rehabilitating prisoners, with the goal of returning them to successfully function in an integrated, free society; (3) avoiding the managerial burden and costs which would be imposed on a system with 51,000 inmates if staff had to keep track of one or more inmates who could only be celled with members of his own race; and (4) promoting sound correctional management by applying the policy fairly and equally to all inmates in an effort to reduce tension and resentment in the inmate population.

{¶45} Appellant has failed to provide specific facts demonstrating how this regulation has been improperly applied to him. Furthermore, the regulation is reasonably related to numerous legitimate penological interests. Pursuant to the *Turner* factors, there is a valid, rational connection between the regulation and the legitimate governmental interest in avoiding unconstitutional racial segregation and the corresponding evils and costs which could follow. Thus, we overrule appellant's third assignment of error.

{¶46} In conclusion, we overrule appellant's first, second, third, and fourth assignments of error and affirm the judgments of the Franklin County Court of Common Pleas.

*Judgments affirmed.*

TYACK, P.J. and McGRATH, J., concur.

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