

OCT 14 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIP A. DENNEY,

Plaintiff - Appellant,

v.

DRUG ENFORCEMENT AGENCY;
BUREAU OF ALCOHOL, TOBACCO
FIREARMS; KAREN TANDY,
Administrator; MICHAEL J. SULLIVAN
Acting Director; DENNIS HALE, Agent;
CARL A. TRUSCOTT Director; STEVEN
DECKER, Agent; OFFICE OF THE
SHASTA COUNTY DISRICT
ATTORNEY; SHASTA COUNTY
SHERIFF'S DEPARTMENT; REDDING
POLICE DEPARTMENT; GERALD
BENITO, District Attorney; JAMES
POPE; CHRISTOPHER MCQUILLAN;
LEONARD MOTY; TRACY MILLER;
ERIC WALLACE,

Defendants - Appellees.

No. 08-16291

D.C. No. 2:06-cv-01711-LKK-
GGH

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

Submitted October 8, 2009**
San Francisco, California

Before: GOODWIN and PAEZ, Circuit Judges, and CARNEY, *** District Judge.

Dr. Philip Denney appeals the district court's summary judgment in this action alleging violations of his First Amendment free speech and Fifth Amendment equal protection rights. Denney argues that defendants involved him in the investigation of Dixon Herbs, a marijuana dispensary, in retaliation for his support of medical marijuana. We review the order granting summary judgment *de novo*, *Adkins v. Mireles*, 526 F.3d 531, 538 (9th Cir. 2008), and we affirm.

There is no genuine issue of material fact whether defendants conducted a retaliatory investigation against Denney. Defendants initially tried to investigate Dixon Herbs using confidential informants (CIs) who already possessed doctors' recommendations for medical marijuana. When no additional CIs were available locally, defendants used CIs who lacked doctors' recommendations. Dixon Herbs required the buyers to obtain doctors' recommendations, and referred one CI to Denney's office. Defendants' decision to use Denney in their investigation of

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Cormac Carney, District Judge for the Central District of California, sitting by designation.

Dixon Herbs resulted from this referral, not from their alleged intent to retaliate against him for his support of medical marijuana. The circumstantial evidence Denney relies upon fails to create a genuine issue. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *cf. Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1302-03 (9th Cir. 1999).

Because there is no genuine issue of material fact regarding Denney's retaliation claim, his equal protection claim also fails. Denney relies on the same circumstantial evidence to support his equal protection claim. Just as he fails to show defendants may have investigated him in a retaliatory fashion, he cannot prove that defendants were motivated by a discriminatory purpose. *See Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007).

AFFIRMED.