

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Jones,

Appellant

v.

Tom Peterman, Jeffery Smith,
Jay Stidd, R. Norris, Terry Whitman,
Robert Meyers, and Gregory Gaertner

No. 133 C.D. 2001
Submitted: May 4, 2001

BEFORE: HONORABLE JOSEPH T. DOYLE, President Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH

FILED: August 16, 2001

George Jones (Appellant) appeals from the order of the Court of Common Pleas of Centre County which sustained preliminary objections in the nature of a demurrer filed by Department of Corrections Employees (Appellees) and dismissed Appellant's civil complaint. The trial court held that Appellant failed to state causes of action against Appellees for violation of his due process rights, retaliation and denial of access to the courts. Appellant contends that the trial court erred in dismissing his complaint and that it asserted facts sufficient to establish justiciable causes of action. Appellees contend that Appellant has waived his arguments regarding civil conspiracy and libel claims because they were not raised in the complaint, were not briefed to the trial court and were not considered by the trial court. Appellees also contend that Appellant has waived his due process and retaliation claims.

The trial court found that Appellant filed his complaint as a 42 U.S.C. §1983 action¹ on July 22, 1998, alleging that Appellees violated his rights to due process during the conduct of disciplinary proceedings against Appellant, retaliated against him for asserting his rights and denied him access to the courts in 1996. At all relevant times, Appellees were employed at the State Correctional Institute at Rockview (SCI-Rockview) where Appellant was confined as an inmate. Appellant averred in his complaint that he was drafted by the J.C. Organization to participate in its crime prevention activities and that he assisted in preparations for the organization's banquet, presumably to be held at the prison. Disciplinary charges were filed against Appellant allegedly because he mailed invitations to the banquet without official permission and in violation of the direction that no outside guests be invited to the banquet. Appellant was afforded a disciplinary hearing and an appeal while confined at SCI-Rockview. He was found guilty of the charges and was transferred to the State Correctional Institute at Frackville.

Appellant averred that Appellees conspired to violate his rights by removing him from the J.C. Organization and that Appellees used their official capacities to file false charges against him, confiscated his personal property and

¹42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress.... For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

created a hostile environment against him at the institution. Appellees ultimately filed their preliminary objections, and brief in support thereof, asserting that the complaint failed to state claims upon which relief may be granted. Appellant failed to file a responsive brief, and on July 26, 2000 the trial court granted Appellees' preliminary objections and dismissed Appellant's complaint. That order is the subject of this appeal.

Appellant contends that Appellees initiated false misconduct charges against him and that his due process rights were violated when he was denied a meaningful opportunity to defend against the charges at the hearing. Generally, when an inmate charged with misconduct has been afforded the procedural due process protections required by *Wolff v. McDonnell*, 418 U.S. 539 (1974), an allegation that an inmate was falsely accused does not support a claim for violation of his constitutional rights. *Hanrahan v. Lane*, 747 F.2d 1137 (7th Cir. 1984). The decision of the disciplinary hearing panel, among others, to deny Appellant an opportunity to call certain disinterested witness, to allow hearsay testimony or to refuse submission of a prior written misconduct report prepared by one of the Appellees does not support Appellant's due process claim. Although an inmate may call witnesses in a disciplinary hearing, the prison officials have the discretion to restrict the number of witnesses called and to prescribe reasonable limitations on the presentation of the evidence. *Wolff*.

Appellant also asserted a claim against Appellees for retaliation because of their conduct against Appellant stemming from his J.C. activities and attempts to seek legal redress. In order to show retaliation, an inmate must aver an underlying constitutional right that was violated, intent by the defendant to retaliate against the inmate for exercising that right, a retaliatory adverse act and causation.

Johnson v. Rodriguez, 110 F.3d 299 (5th Cir. 1997). In essence, an inmate must demonstrate that "but for" the retaliatory motive, the conduct complained of would not have occurred. *Id.* Appellant does not indicate which of his underlying constitutional rights were violated and does not offer any evidence of Appellees' intent to retaliate against him. In addition, Appellant has not demonstrated that but for Appellees' retaliatory motive, the complained of disciplinary action against him would not have occurred. As for his claim of denial of access to the courts, Appellant failed to aver any actual injury that he suffered due to Appellees' infringement of his rights to pursue valid legal action in the courts to challenge his sentence and/or the conditions of his confinement. See *Lewis v. Casey*, 518 U.S. 343 (1996). Instead, Appellant averred that Appellees confiscated his legal pleadings and property on two occasions for over 60 days. The Court, therefore, rejects Appellant's contention that he has been denied access to the courts.²

A demurrer may be granted when the law says with certainty that no recovery is possible on the facts averred. *Fewell v. Besner*, 664 A.2d 577 (Pa. Super. 1995). A complaint that fails to set forth a cause of action may be dismissed by a demurrer. *Doe v. Dyer-Goode*, 566 A.2d 889 (Pa. Super. 1989). In reviewing preliminary objections in the nature of a demurrer, the court must consider that all material facts set forth in the complaint, along with inferences

²Pa. R.A.P. 302(a) provides that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Appellant has argued in this appeal that he was libeled by Appellees and that they are liable for civil conspiracy. These claims were only generally referenced in the complaint and were not briefed before the trial court, and they arguably may be deemed waived. In any event, the complaint does not set forth sufficient facts to establish a cause of action for libel or for civil conspiracy. See Section 8343(a) of the Judicial Code, 42 Pa. C.S. §8343(a) (stating the plaintiff's burden of proof in a civil defamation action); *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466 (1979) (discussing the elements of a civil conspiracy claim).

reasonably deducible therefrom, are admitted as true. *Wiernik v. PHH US Mortgage Corp.*, 736 A.2d 616 (Pa. Super. 1999), *appeal denied*, 561 Pa. 700, 751 A.2d 193 (2000). Appellant failed to aver facts sufficient to establish causes of action against Appellees for due process violations, retaliation or lack of access to the courts. Because the trial court did not err in concluding that the facts as averred did not sufficiently state causes of action, the trial court's order granting Appellees' preliminary objections and dismissing the complaint must be affirmed.

DORIS A. SMITH, Judge

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v.

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Tom Peterman, Jeffery Smith,
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ORDER

AND NOW, this 16th day of August, 2001, the order of the Court of Common Pleas of Centre County is hereby affirmed.

DORIS A. SMITH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

GEORGE JONES : Certified from the Record
Appellant : JAN 26 2001
: and Order Exit
v. :
TOM PETERMAN et al. : No. 133 C.D. 2001

PER CURIAM

ORDER

NOW, January 25, 2001, the individual identified above having filed an action or appeal falling within the purview of the Prison Litigation Reform Act, the filing fee for this action is \$50.00.

Pursuant to Section 6602 of the Pennsylvania Prison Litigation Reform Act, 42 Pa. C.S. §6602, and Standing Order No. 98-1 of this court, the Superintendent/Warden of the institution where this inmate is incarcerated is directed to furnish the court and the inmate with a certified copy of the statement for the past six months of the prisoner's trust fund account (or institutional equivalent). The Superintendent/Warden is also directed to set aside from the prisoner's account, in monthly installments, the full filing fee.

As soon as funds are available in the inmate's prison account, the Superintendent/Warden shall submit an initial partial payment of 20% of the greater of:

(1) the average monthly deposits to the inmate's prison account for the six-month period immediately preceding the filing of this action, or

(2) the average highest monthly balance in the inmate's prison account for the six-month period immediately preceding the filing of this action.

The remittance must be accompanied by a statement of the calculations used to arrive at the amount, a copy of which the Superintendent/Warden shall furnish to the inmate. The fee shall be clearly identified by the name of the prisoner and the number assigned to this action.

After the initial payment, if there remains any unpaid fee due and owing the court, the Superintendent/Warden in any institution where the inmate is incarcerated is required by law, when the prisoner's account balance exceeds \$10.00, to set aside 20% of the preceding month's deposits credited to the prisoner's account until the full filing fee has been collected, and thereafter, to remit the remaining fee to the court within 30 days. Each time a deposit is made to the inmate's account, the Superintendent/Warden shall set aside the deposit immediately before any disbursement is made by the inmate, until an amount equal to 20% of the previous month's deposits

is obtained. The fee shall be clearly identified by the name of the prisoner and the number assigned to this action.

Payments must be made payable to Commonwealth Court of Pa. and transmitted to:

C. R. Hostutler, Chief Clerk
Commonwealth Court of Pennsylvania
P.O. Box 11730
Harrisburg, PA 17108

In the event the appellant is transferred to a different correctional facility before the full filing fee is paid, the Superintendent/Warden of the transferring facility must forward this Administrative Order to the Superintendent/Warden of the receiving institution. This order will be binding on the Superintendent/Warden of any correctional facility where the prisoner is incarcerated until the filing fee is paid in full.