

NOTICE

Decision filed 02/25/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-10-0045

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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JON COX,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Perry County.
	)	
v.	)	No. 09-LM-29
	)	
TERESA KISRO, GREGORY SCHWARTZ,	)	
and ROGER WALKER,	)	Honorable
	)	Richard A. Brown,
Defendants-Appellees.	)	Judge, presiding.

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JUSTICE DONOVAN delivered the judgment of the court.  
Justices Welch and Spomer concurred in the judgment.

**RULE 23 ORDER**

*Held:* Where the inmate plaintiff failed to exhaust administrative remedies and failed to state a cause of action for which relief could be granted, the circuit court committed no error in dismissing his complaint against prison officials.

Plaintiff, Jon Cox, an inmate in the Department of Corrections (Department), appeals from the circuit court's January 12, 2010, order granting defendants' motion to dismiss his civil rights complaint. For the following reasons, we affirm the judgment of the circuit court.

I. BACKGROUND

On November 17, 2008, plaintiff, who is incarcerated at Pinckneyville Correctional Center (Pinckneyville prison), submitted an offender visiting list composed of eight proposed visitors for which plaintiff sought approval, as required by Department policy (20 Ill. Adm. Code §525.60(b), 27 Ill. Reg. 8039, 8050-52, eff. July 1, 2003). Plaintiff included on the form the name, sex, age, and telephone number of each of his proposed visitors, but he failed to complete the section of the form that asked for the race of each visitor. On November 21

the list was returned to plaintiff after being signed by a Pinckneyville prison staff member indicating that the visitors list had been approved.

On April 14, 2009, plaintiff submitted a new visiting list for approval. Plaintiff again left blank the sections of the form that requested the race of his proposed visitors, and he also failed to include the telephone numbers of three of the seven people on his list. Department grievance counselor Teresa Kisro returned the list to plaintiff, along with a memorandum informing him that the list would not be processed until it was completed in full.

On June 12, 2009, plaintiff filed a multiple-count civil rights complaint in the circuit court, naming as defendants counselor Teresa Kisro, warden Greg Schwartz, and Department Director Roger Walker (misidentified in the complaint as "Larry Walker"). Plaintiff alleged in his complaint that the Department's visitors list policy violated various constitutional and statutory rights and that several Department rules were unconstitutional.

On August 28 plaintiff submitted to his grievance counselor an institutional grievance about a subsequent visitors list that he purportedly submitted on July 27. Plaintiff contended that the processing of visitors lists should take no more than five working days, and he requested that Pinckneyville prison institute a policy requiring visiting lists to be processed in five days or less. Plaintiff received a response to his grievance on September 5, wherein the grievance counselor stated that no visitors list had been received and suggested that plaintiff resubmit it.

On September 30, 2009, plaintiff had his most recent visitors list returned to him unprocessed, along with a memorandum from the grievance counselor informing him that all the blanks on the form must be filled in and that the statements "no phone" and "unknown" are not acceptable as phone numbers. The same day, plaintiff filed a grievance arguing "that there is no penological interest in asking for a phone number of a potential visitor." Plaintiff received a response to his grievance on October 1, 2009, which stated that

effective immediately, inmates may list a visitor's phone number as "none" or "unknown."

On October 1, defendants filed a motion to dismiss plaintiff's complaint, arguing that plaintiff had failed to exhaust his administrative remedies prior to filing the civil complaint, as required by the Prison Litigation Reform Act (42 U.S.C. §1997e(a) (2006)). Attached to the motion to dismiss was an affidavit from Sarah Johnson, a chairperson in the Office of Inmate Issues for the Department. In her affidavit, Johnson outlined the administrative remedies available to inmates and the procedure that inmates are to follow when pursuing institutional grievances. Briefly stated, the Department's grievance procedure requires that an inmate first attempt to resolve grievances informally through his counselor. If the grievance is still unresolved, the inmate may then submit a written grievance on a grievance form to the facility's grievance officer. The grievance officer then forwards his recommendations to the chief administrative officer, who then rules on the grievance and forwards the results to the inmate. If, after receiving the chief administrative officer's decision, the inmate feels that the issue remains unresolved, he may then appeal in writing to the director of the Department by submitting the grievance officer's report and the chief administrative officer's decision. The administrative review board, as the director's designee, then reviews the appeal and determines whether a hearing is necessary. The administrative review board then submits a written report of its findings and recommendations to the director, who reviews the report and makes a final determination of the grievance. Johnson concluded her affidavit by averring that she had searched plaintiff's records and had determined that he had not submitted any grievances related to the visitors list policy to the director or to the administrative review board.

Defendants also argued in their motion to dismiss that plaintiff had failed to allege a cognizable claim of the deprivation of any constitutional rights and that defendants were entitled to qualified immunity. Plaintiff filed a response to defendants' motion to dismiss,

arguing, *inter alia*, that pursuing administrative remedies would have been futile because the Department itself determines whether grievances have merit, thus giving rise to a conflict of interest.

On October 6, plaintiff filed a grievance contending that he had been retaliated against by prison officials because he had submitted grievances and had filed a civil suit. The alleged retaliation concerned plaintiff's loss of his employment in Pinckneyville prison's law library. Kisro responded to plaintiff's grievance two days later, stating that according to the placement office plaintiff had been removed from the position because he no longer met the "revised criteria for that assignment."

On October 14, plaintiff filed in the circuit court a motion for leave to amend his complaint. The motion was granted, and on November 5 plaintiff filed an amended complaint, which named as defendants Kisro and Schwartz, but not Walker. In addition to the claims related to the visitors list policy that were contained in his original complaint, plaintiff alleged in his amended complaint that he was improperly retaliated against by Department staff due to the filing of his complaint and institutional grievances.

On December 15, defendants filed a motion to dismiss plaintiff's amended complaint. In their motion to dismiss, defendants again argued that plaintiff had failed to exhaust his administrative remedies and had failed to state a valid claim of constitutional deprivation. Defendants also contended that they were entitled to qualified immunity. The circuit court granted defendants' motion to dismiss, finding that plaintiff had failed to state a cause of action upon which relief could be granted. Plaintiff then filed a timely notice of appeal.

## II. STANDARD OF REVIEW

In their motion to dismiss plaintiff's complaint, defendants (1) argued that the complaint failed to state a cause of action and (2) asserted the affirmative defense of plaintiff's failure to exhaust administrative remedies. The motion to dismiss was thus in

effect a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2008)). The grant of a combined motion to dismiss pursuant to section 2-619.1 of the Code is subject to *de novo* review. *McGee v. Snyder*, 326 Ill. App. 3d 343, 346, 760 N.E.2d 982, 987 (2001). When considering a motion to dismiss, courts must accept all well-pleaded facts as true and view them in the light most favorable to the nonmoving party. *Id.* A dismissal is proper where plaintiff has failed to allege sufficient facts to bring his claim within the scope of a recognized cause of action. *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 434, 876 N.E.2d 659, 664 (2007).

### III. DISCUSSION

As a preliminary matter, we note that Director Walker is no longer a party to this cause. Plaintiff named Walker as a defendant in his original complaint, but the amended complaint makes no reference to Walker. Furthermore, plaintiff acknowledged in his January 11, 2010, response to defendants' motion to dismiss that "the named defendants at this time are proper." Plaintiff contends in his appellant's brief, though, that Walker is actually a "defendant in discovery" and that he should still be considered a party.

An amended complaint that does not refer to or adopt the original complaint supercedes the original. *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 154, 449 N.E.2d 125, 126 (1983). The original complaint is deemed abandoned, and it is no longer a part of the record. *Id.* Because plaintiff's amended complaint makes no reference to his original complaint and because Walker is not named as a defendant in plaintiff's amended complaint, he is not properly a party to plaintiff's suit.

In the counts that remain against Kisro and Schwartz, plaintiff alleged deprivations of various constitutional and statutory rights. In count I, plaintiff alleged that the visitors list policy violated his due process and equal protection rights and section 1983 of the Civil

Rights Act of 1871 (42 U.S.C. §1983 (2006)). In count II, plaintiff alleged that he was retaliated against for filing institutional grievances and his civil suit, resulting in a violation of his due process rights and entitling him to relief under section 1983. In count III, plaintiff alleged that the visitors list policy violated section 3-7-2(f) of the Unified Code of Corrections (730 ILCS 5/3-7-2(f) (West 2008)). In count IV, he alleged that the policy violated section 5(a)(2) of the Illinois Civil Rights Act of 2003 (740 ILCS 23/5(a)(2) (West 2008)). In count V, he contended that the alleged retaliation violated section 3-8-8 of the Unified Code of Corrections (730 ILCS 5/3-8-8 (West 2008)). Finally, in count VI, plaintiff alleged that the Department's policy on visitors lists violated his rights under article I, section 20, of the Illinois Constitution (Ill. Const. 1970, art. I, §20). We will discuss each of these claims in turn.

#### A. Visitors List Policy

In count I, plaintiff alleged that the Department's policies related to visitors lists violate his rights to equal protection and due process and give rise to a claim under section 1983 of the Civil Rights Act of 1871 (42 U.S.C. §1983 (2006)). Plaintiff alleged, "[These violations] occurred at the direction of the defendant, Gregory Schwartz, or with the knowledge and consent of the defendant, Gregory Schwartz, or occurred as the result of a failure by the defendant, Gregory Schwartz, to properly train and/or supervise the defendant, Teresa Kisro, from compelling racial identifiers."

Section 1983 is not itself a source of substantive rights but merely provides a method of vindicating rights conferred elsewhere. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Thus, the first step in pursuing a claim pursuant to section 1983 is to identify the specific right allegedly infringed upon. *Id.* Here, plaintiff has alleged that by requiring that he include the race of each of his proposed visitors, defendants have violated his fourteenth amendment rights to due process and equal protection.

When confronted with an allegation that a prison regulation violates an inmate's right to due process, the court must determine whether the policy at issue bears a rational relationship to a legitimate penological interest. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). The burden is on plaintiff to establish that there exists no rational relationship between the policy in question and a legitimate goal of the Department in enacting the policy. *Id.* Courts generally defer to prison officials in matters concerning the day-to-day operations of correctional facilities, and officials have a legitimate penological interest in maintaining order and security within the prison system. *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002).

Here, plaintiff has failed to allege any facts related to the relationship between the visitors list policy and the Department's interest in maintaining order in the prison setting, let alone facts sufficient to establish that there is no rational relationship between the Department's policy and the Department's interest in maintaining order. Because plaintiff has not alleged facts that would support a due process claim, he has failed to state a cause of action upon which relief could be granted.

Plaintiff further alleged in count I of his complaint that defendants deprived him of the equal protection of the laws under the fourteenth amendment, which he contends also gives rise to a valid claim pursuant to section 1983. The equal protection clause can be violated in one of three ways. First, an equal protection claim may arise when members of a vulnerable group—racial or otherwise—are singled out for unequal treatment. *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). Second, the equal protection clause may be violated when laws or policies make irrational distinctions. *Id.* Finally, an equal protection claim may arise when the government singles out an individual for discriminatory treatment. *Id.* The common thread among the three types of equal protection claims is an allegation of unequal treatment. Thus, in order to maintain an equal protection claim, plaintiff must allege that he was subjected to unequal or discriminatory treatment.

Plaintiff here has failed to do so. He has not alleged that he or his visitors were treated differently on account of their race. In fact, he has not alleged that the Department took the race of proposed visitors into account at all, but only that the Department required him to list the race of each of his visitors on his visitors list. Because he has not alleged any unequal treatment based upon the race of himself or his visitors, plaintiff has failed to state a valid claim that his equal protection rights were violated.

Furthermore, even if plaintiff had alleged sufficient facts to support a claim that his due process rights had been violated, he has forfeited this argument by abandoning it on appeal. Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006). Points not argued on appeal are forfeited, and once forfeited they cannot be raised in a reply brief. *Owens v. Snyder*, 349 Ill. App. 3d 35, 45, 811 N.E.2d 738, 746 (2004). Here, plaintiff has put forth no argument in his appellant's brief that the policy violates his due process rights, so even if his claim was otherwise meritorious, it has been forfeited on appeal.

Count III of plaintiff's complaint alleged that by "compelling racial identifiers" on the visitors list, defendants had violated section 3-7-2(f) of the Unified Code of Corrections (730 ILCS 5/3-7-2(f) (West 2008)). Section 3-7-2(f) provides that the Department must permit every inmate to receive visitors, except where the privilege has been abused or where the chief administrative officer determines that such visiting would be harmful or dangerous to the security, safety, or morale of the institution or facility. *Id.* As defendants correctly note, though, inmates do not have standing to enforce provisions of the Unified Code of Corrections, and the Unified Code of Corrections does not create more rights for inmates than those which are constitutionally required. *Ashley v. Snyder*, 316 Ill. App. 3d 1252, 1258, 739 N.E.2d 897, 902 (2000). As provided in section 3-7-2(f), inmates do not have an absolute constitutional right to visitation, and reasonable restrictions on visitation may be imposed in order to promote legitimate institutional interests. 730 ILCS 5/3-7-2(f) (West

2008). Plaintiff has therefore failed to state a cause of action in count III.

In count IV, plaintiff alleged that the Department's visitors list policy violated section 5(a)(2) of the Illinois Civil Rights Act of 2003 (Illinois Civil Rights Act) (740 ILCS 23/5(a)(2) (West 2008)) by requiring that inmates describe the race of proposed visitors. The Illinois Civil Rights Act creates a private right of action for disparate-impact-discrimination claims. See *Illinois Native American Bar Ass'n v. University of Illinois*, 368 Ill. App. 3d 321, 327, 856 N.E.2d 460, 467 (2006). Section 5(a)(2) of the Illinois Civil Rights Act prohibits units of government from using criteria that "have the effect of subjecting individuals to discrimination because of their race, color, national origin, or gender." 740 ILCS 23/5(a)(2) (West 2008). Any party who is a victim of a violation of the Illinois Civil Rights Act may bring a civil action against the unit of government that allegedly violated the Act. *Id.*

In order to prevail on a claim brought pursuant to the Illinois Civil Rights Act, though, the plaintiff must establish that the policy did in fact have the effect of discriminating against him due to his race, color, national origin, or gender. *Id.* Here, plaintiff has failed to allege that he was personally subjected to discrimination on account of his race. Nor has he alleged that the policy acted in any way to deny an inmate access to visitors. He therefore failed to state a cause of action pursuant to the Illinois Civil Rights Act, and the circuit court committed no error in dismissing his claims in count IV.

In count VI, plaintiff alleged that defendants had violated his rights under article I, section 20, of the Illinois Constitution (Ill. Const. 1970, art. I, §20) by requiring him to describe the race of each of his visitors on the visitors lists. He maintained that this requirement constitutes a violation of the individual-dignity clause of the Illinois Constitution and that he was therefore entitled to relief. Article I, section 20, known as the individual-dignity clause, condemns "communications that portray criminality, depravity or lack or virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of

persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation." Ill. Const. 1970, art. I, §20.

Contrary to plaintiff's argument, though, the individual-dignity clause is purely "hortatory and does not create a cause of action." *AIDA v. Time Warner Entertainment Co., L.P.*, 332 Ill. App. 3d 154, 162, 772 N.E.2d 953, 961 (2002). The constitution condemns the communications referred to, but it does not make them unlawful and it does not create a private right of action in them. *Id.* Plaintiff has thus failed to state a claim based on a violation of the individual dignity clause.

#### B. Retaliation Claims

Counts II and V of plaintiff's amended complaint alleged acts of retaliation by Department staff allegedly brought about by plaintiff's pursuit of claims through the Department's grievance procedure and the courts. Plaintiff bases this allegation of retaliation on the loss of his prison work assignment soon after filing his civil claim against defendants. In count II of his complaint, plaintiff alleged a violation of his due process rights and sought relief under section 1983 of the Civil Rights Act of 1871. In count V he alleged a violation of section 3-8-8 of the Unified Code of Corrections (730 ILCS 5/3-8-8 (West 2008)), which provides that inmates may not be retaliated against for pursuing the redress of wrongs allegedly committed by Department staff.

A plaintiff may only prevail on a due process claim where the State has deprived him of a constitutionally protected interest. *Lekas v. Briley*, 405 F.3d 602, 607 (7th Cir. 2005). Contrary to plaintiff's contention, an inmate has neither a property interest nor a liberty interest in his prison employment. *Wallace v. Robinson*, 940 F.2d 243, 246 (7th Cir. 1991). Plaintiff thus had no protectable interest in his prison employment, so his due process claim based upon the alleged retaliation must fail.

Furthermore, to properly state a retaliation claim, a plaintiff must allege that an

official, operating under the color of state law, personally caused or participated in the alleged constitutional deprivation. *Murillo v. Page*, 294 Ill. App. 3d 860, 864, 690 N.E.2d 1033, 1038 (1998). Suspicious timing alone is not sufficient to establish that an action undertaken by a prison official was in fact retaliatory. *Smith v. Dunn*, 368 F.3d 705, 708 (7th Cir. 2004). Here, plaintiff has failed to allege that defendants had any personal involvement in his reassignment away from the library, and the circuit court committed no error in dismissing his claim in this regard.

#### C. Plaintiff's Failure to Exhaust Administrative Remedies

Even if we were to find that plaintiff had properly stated a cause of action upon which relief may be granted, his claims would still necessarily fail.

Pursuant to the Prison Litigation Reform Act, prior to instituting a civil claim related to prison conditions, an inmate plaintiff must first exhaust all the administrative remedies that are available to him. 42 U.S.C. §1997e(a) (2006). An inmate's failure to do so subjects his claim to a dismissal. *Id.* The exhaustion of the available administrative remedies is required for any suit challenging prison conditions, and not just for those brought under section 1983. *Woodford v. Ngo*, 548 U.S. 81 (2006). The exhaustion requirement applies to claims of retaliation by prison officials, and the alleged futility of pursuing administrative remedies does not excuse an inmate's failure to do so prior to filing a civil suit. *Jackson v. District of Columbia*, 254 F.3d 262 (D.C. Cir. 2001).

Here, because plaintiff did not request that the director of the Department or the administrative review board review his grievances related to the visitors list policy, he has failed to exhaust his administrative remedies and the circuit court committed no error in dismissing his complaint.

#### IV. CONCLUSION

For the foregoing reasons, the circuit court's dismissal of plaintiff's complaint is affirmed.

Affirmed.