2016 IL App (4th) 150314-U

NO. 4-15-0314

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 29, 2016
Carla Bender
4th District Appellate
Court, IL

AARON FILLMORE, Petitioner-Appellant, v. THE ILLINOIS DEPARTMENT OF CORRECTIONS, Respondent-Appellee.	)	Appeal from Circuit Court of Sangamon County No. 13MR1223 Honorable Brian T. Otwell, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held*: Because the amended petition for discovery (Ill. S. Ct. R. 224 (eff. May 30, 2008)) fails to state a cause of action for damages, the proposed discovery is unnecessary, and the dismissal of the amended petition and the striking of the case are affirmed.

¶ 2 Petitioner, Aaron Fillmore, appeals from the dismissal of an amended petition against respondent, the Illinois Department of Corrections (Department), in which he sought to discover the identity of individual correctional officers who, he believed, had wronged him and who were subject to liability for damages. See Ill. S. Ct. R. 224 (eff. May 30, 2008). We affirm the trial court's judgment because the amended petition fails to state a cause of action for damages and, hence, the proposed discovery is unnecessary.

¶ 3 I. BACKGROUND

¶ 4 A. The Amended Petition for Discovery

¶ 5 According to the amended petition for discovery, petitioner went on a hunger strike and filed "many grievances," raising the ire of the Department, and consequently officers, whose names he did not know, retaliated against him in the following ways.

¶ 6 1. *Blocking His Outgoing Telephone Calls*

¶ 7 On December 16, 2013, according to the amended petition, someone in the Department "restricted all of Petitioner's telephone numbers." He infers this someone was an "Intel Officer." Here is why.

¶ 8 The inmate telephone system at Lawrence Correctional Center is computerized, and the telephone numbers an inmate is permitted to call are entered into the system ahead of time. These telephone numbers come, apparently, from a form the inmate fills out, and this form is subject to approval by an "Intel Officer," as a policy manual calls this person.

¶ 9 Pages from the policy manual—Lawrence Correctional Center, Illinois Department of Corrections, Administrative Segregation Orientation Manual (2013)—are attached to the amended petition as exhibit No. 1. We are unable to cite specific pages of this policy manual, because it lacks page numbers (or at least the photocopy attached to the amended petition does). It does not have any section numbers, either. But the policy manual provides, in one of the portions that petitioner has underlined, that "[a]dministrative detention offenders" in "Phase III 'A' or 'B' Grade"—petitioner alleges he is in "A" Grade—are allowed a single 15-minute call each week. All the offender has to do is fill out a "Telephone Request Form," listing "[a] maximum of 20 names and telephone numbers" (once a month, the offender may make additions and deletions in this list). The policy manual continues: "All Administrative Detention Offender, DOC 0193 Telephone Request Forms are to be reviewed and approved by the assigned Intel Officer."

¶ 10 Petitioner alleges that on December 16, 2013, someone in the Department "restricted all of [his] telephone numbers." He assumes, from the policy manual, that this was the work of an "Intel Officer." He contends, in his amended petition, that the block on his outgoing telephone calls deprived him of his entitlement, under section 525.150(a) of the Department's rules (20 Ill. Adm. Code § 525.150 (2013)), to "[t]elephone privileges *** in accordance with [his] institutional status."

¶ 11 2. *"Outgoing Privileged Mail" to the Department's Attorneys*

¶ 12 The amended petition, something else happened on December 16, 2013: the Department "restricted *** Petitioner's *** outgoing privileged mail to *** Department attorneys."

¶ 13 In this connection, the amended petition references exhibit No. 2, a photocopy of what purports to be a form of Lawrence Correctional Center entitled "Inmate Mail Procedure Correction Request." On the line corresponding to "Name," petitioner's last name is written. His inmate number, B63343, is written on the line corresponding to "IDOC Number." Next to "Date," "12/16/13" is written. Then there is a column of boxes. To the right of each box is a preprinted explanation, except that the final box, labeled "Other," has blank lines for a handwritten explanation.

¶ 14 The first box is checked, next to the explanation: "Everything except Legal/Privileged mail must be UNSEALED." (Emphasis omitted.) The last box also is checked, and on the blank lines next to "Other," the following explanation is written: "IDOC Attorneys are not Legal or Privileged." All the intervening boxes are empty (unchecked), including the box corresponding to "Legal/Privileged mail must be clearly marked and sealed."

¶ 15 The amended petition argues that, under section 3-7-2(e) of the Unified Code of Corrections (730 ILCS 5/3-7-2(e) (West 2014)) and section 525.130(a) of the Department's rules (20 Ill. Adm. Code § 525.130(a) (2003)), petitioner "is allowed *** to *** receive mail, including privileged and legal mail[,] without arbitrary infringements by prison officials." The amended petition observes that, under section 525.110(g)(3) (20 Ill. Adm. Code § 525.110(g)(3) (2011)), "mail to *** Department attorneys" is, by definition, "[o]utgoing privileged mail."

¶ 16 3. *"Legal Mail" From the Attorney General of Illinois*

¶ 17 Finally, the amended petition accuses the Department of opening "legal mail" addressed to him from the Attorney General of Illinois.

¶ 18 In this regard, the amended petition references exhibit No. 3, a photocopy of the front of two legal-sized envelopes, one postmarked December 20, 2013, and the other February 5, 2014. In the upper left corner of both envelopes, the name, title, and address of "LISA MADIGAN, "ATTORNEY GENERAL" of the "STATE OF ILLINOIS," are printed. The addressee on both envelopes is petitioner, at Lawrence Correctional Center. And both envelopes bear the following message, imprinted with a rubber stamp: "This correspondence was not clearly marked as 'LEGAL' or 'PRIVILEGED' therefore it was opened in the mailroom. Please notify the sender so mail can be marked accordingly."

¶ 19 So, those three points of contention—one of them having to do with telephone calls and the other two having to do with mail—were the stated "reason[s]" why "the proposed discovery was necessary." Ill. S. Ct. R. 224(a)(1)(ii)(A) (eff. May 30, 2008).

¶ 20 Petitioner requested the following discovery (see Ill. S. Ct. R. 224(a)(1)(ii)(B) (eff. May 30, 2008)): "(1) the names of each I.D.O.C. Intel officer who restricted his telephone rights/numbers on or after December 16, 2013; (2) the names of each I.D.O.C. official who

restricted him from writing I.D.O.C. Department attorneys on December 16, 2013; [and] (3) [t]he names of each I.D.O.C. official who continuously open[ed] his incoming legal mail from the Illinois Attorney General from December 5, 2013[,] to date of this filing."

¶ 21 B. The Department's Response to the Amended Motion for Discovery and Petitioner's Objection to the Response

¶ 22 On October 28, 2014, the Department filed its response to the amended petition for discovery.

¶ 23 To item 1 of the amended petition, the Department responded: "No IDOC Intelligence officers have restricted Petitioner's telephone rights or numbers on or after December 16, 2013."

¶ 24 To item 2, the Department responded: "No IDOC officials restricted Plaintiff from writing to *** Department attorneys on December 16, 2013."

¶ 25 To item 3, the Department responded: "Incoming mail, regardless of the source, is only considered to be legal mail if the outside of the envelope is clearly marked either 'legal' or 'privileged.' No IDOC official has opened Plaintiff's incoming legal mail from the Illinois Attorney General from December 5, 2013[,] to present."

¶ 26 On November 5, 2014, petitioner filed an objection to the Department's responses. He argued: "In this case, Petitioner adequately alleged and presented substantial tangible evidence (Petition Exhibits 1, 2, and 3) showing that unknown prison officials were in fact violating his constitutional rights. Despite this clear evidence, the Respondent claims that 'No IDOC official' and 'No IDOC Intelligence officers' are responsible *without giving the identity of such officials*. This response falls short of Rule 224's mandate." (Emphasis in original.) He

requested the trial court to strike the Department's responses as noncompliant and to order the Department to "produce the identity of each requested prison official."

¶ 27 On November 18, 2014, the Department filed a response to petitioner's objections. The Department insisted it had "truly, accurately, and fully answered each of Petitioner's interrogatory requests," and the Department added it was "not the [Department's] fault *** that Petitioner worded his requests in such a way that the true and accurate answer to each question was that no IDOC employee fits the description in each request."

¶ 28 C. The Trial Court's Decision

¶ 29 On March 30, 2015, the trial court held a telephonic hearing "on all pending matters" (to quote the Department's notice). The record contains no transcript of the hearing and no bystander's report.

¶ 30 In an inadvertently belated docket entry for April 27, 2015, the trial court summed up the outcome of the telephonic hearing:

> "The Court denied the Petitioner's objections to [the Department's] response to the request for discovery herein and dismissed this matter. [The Department] provided all materials responsive to the Petitioner's Amended Request for Discovery. Petitioner failed to identify any information or documents that [the Department] may have been withholding in response to his requests. CAUSE STRICKEN."

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 Rule 224(a)(1)(i) (Ill. S. Ct. R. 224(a)(1)(i) (eff. May 30, 2008)) provides: "A person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible *in damages* may file an independent action for such discovery." (Emphasis added.) Thus, the possible availability, under the law, of declaratory or injunctive relief will not support a petition for discovery under Rule 224(a)(1)(i); the "one" whose identity the petitioner seeks to discover must be subject to liability for damages, assuming petitioner's factual allegations to be true (see *Hadley v. Doe*, 2015 IL 118000, ¶ 29).

¶ 34 In short, a petition pursuant to Rule 224 must state a cause of action for damages, just like a complaint. *Id.* ¶ 27. Unless the petition states a cause of action for damages, the proposed discovery is unnecessary. *Id.* The necessity for discovery must be factually pleaded. As the rule says, the petition must affirmatively "set forth *** the reason the proposed discovery is necessary." Ill. S. Ct. R. 224(a)(1)(ii)(A) (eff. May 30, 2008). This "reason" must consist of factual allegations which, if taken as true and construed in the light most favorable to the petitioner, would entitle the petitioner to damages under the law. *Hadley*, 2015 IL 118000, ¶ 29.

¶ 35 The first thing a court must do, then, is scrutinize the legal sufficiency of the petition as if it were a complaint and an opposing party had moved to dismiss it on the ground of failure to state a cause of action for damages (735 ILCS 5/2-615 (West 2014)), even though the unidentified individual has filed no such motion. *Guava LLC v. Comcast Cable Communications, LLC*, 2014 IL App (5th) 130091, ¶ 62. "[I]f the petitioner cannot satisfy the section 2-615 standard of pleading in its Rule 224 petition for early discovery, then the petitioner has not made an adequate statement that the discovery is 'necessary' as required by the [r]ule." *Id.*

¶ 36 It does not appear that, in the present case, the trial court found any of the three claims in the amended petition to be legally insufficient. If the record, however, reveals any reason for affirming the trial court's judgment, we should do so, without considering ourselves to be limited by the trial court's rationale. *Cessna v. City of Danville*, 296 Ill. App. 3d 156, 165 (1998). Therefore, we will consider, *de novo* (*Hadley*, 2015 IL 118000, ¶ 29), whether the amended petition alleges, with particularity, the facts necessary to state a cause of action for damages against the individuals whose identity petitioner seeks to ascertain. See *Guava*, 2014 IL App (5th) 130091, ¶ 62. Because he invokes section 1983 (42 U.S.C. § 1983 (2012)), we will consider whether the amended petition alleges a cause of action for damages under that federal statute.

¶ 37 Before taking up the three claims individually, we should address the theory of retaliation, because petitioner alleges that "[o]n or about December 16, 2013[,] [the Department] arbitrarily, unlawfully[,] and in an act of retaliation restricted all of Petitioner's telephone numbers and outgoing privileged mail to *** Department attorneys." Setting aside the conclusory nature of this allegation of retaliation, such minor irritations, occurring on a single day, would deter no person of ordinary firmness from exercising his or her constitutional rights. For that reason alone, petitioner has failed to state a cause under section 1983 for retaliation. See *Huertas v. Sobina*, 476 Fed. Appx. 981, 984 (3d Cir. 2012); *Morris v. Powell*, 449 F.3d 682, 686 (2006); *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (*en banc*); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir.1982).

¶ 38 Having found the theory of retaliation to be meritless, we now turn to petitioner's individual claims.

¶ 39 A. Telephone Privileges

¶ 40 A cause of action under section 1983 has two elements: the conduct (1) was by a person acting under color of state law; and the conduct (2) deprived the plaintiff of rights, privileges, or immunities secured by the federal constitution or by other federal laws. *Webb v. Lane*, 222 Ill. App. 3d 322, 326 (1991). If a prisoner has alternative ways of communicating with the outside world, such as by writing letters, denial of telephone privileges violates no constitutional right. *Graf v. Lanigan*, No. 14-2613 (RBK) (AMD), 2016 WL 324946, at *2 (D. N.J. Jan. 27, 2016); *Johnson v Bledsoe*, No. 12-0097, 2012 WL 258680, at *2 (M.D. Pa. Jan. 27, 2012); *Ingalls v. Florio*, 968 F. Supp. 193, 203-04 (D. N.J. 1997). Petitioner does not allege he was forbidden to mail letters to the persons he wanted to telephone. Therefore, the "Intel Officer" who allegedly "restricted all of Petitioner's telephone numbers" on December 16, 2013, has no resulting liability for damages under section 1983.

¶ 41 B. Requiring That Correspondence to the Department's Attorneys Be Unsealed

¶ 42 It appears, from exhibit No. 2 of the amended petition for discovery, that on December 16, 2013, an officer of the Department required correspondence from petitioner to respondent's attorneys to be unsealed on the stated ground that "IDOC Attorneys [were] not Legal or Privileged." Presumably, the officer opened the mail and returned it to petitioner. See 20 Ill. Adm. Code § 525.130(e) (2003) ("Sealed mail that is not privileged will be opened and returned to the sender if the sender's identity can be determined.").

¶ 43 We will assume, for the sake of argument, that, by virtue of section 525.110(g)(3) of the Department's regulations (20 Ill. Adm. Code § 525.110(g)(3) (2011)), petitioner has a reasonable expectation of privacy in his outgoing correspondence to the Department's attorneys,

since that section defines " '[o]utgoing privileged mail' " to include "mail to *** Department attorneys."

¶ 44 Even so, petitioner alleges only one instance of the Department's mishandling of his mail to its attorneys. This isolated instance, which appears to be against the Department's policy (see 20 Ill. Adm. Code § 525.110(g)(3) (2011), 20 Ill. Adm. Code § 525.130(c) (2003)), does not rise to the level of a constitutional violation. See *Buie v. Jones*, 717 F.2d 925, 926 (4th Cir. 1983) (isolated incidents of opening legal mail, apparently in violation of the jail's policy, do not warrant relief under section 1983); *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003) ("[A]n isolated incident of mail tampering is usually insufficient to establish a constitutional violation."); *Gardner v. Howard*, 109 F.3d 427, 430-31 (8th Cir. 1997) (isolated, inadvertent instances of legal mail being opened outside of an inmate's presence are not actionable); *Bryant v. Winston*, 750 F. Supp. 733, 734 (E.D. Va. 1990) (an isolated incident of mail mishandling, which is not pursuant to any pattern or practice, is not actionable under section 1983). To hold otherwise would trivialize section 1983.

¶ 45 C. Requiring That Incoming Correspondence From the Attorney General Be Marked as "Legal" or "Privileged"

¶ 46 The two letters from the Attorney General to petitioner—shown in exhibit No. 3 of the amended petition—were not marked as "privileged." A rule of the Department provides: "Incoming privileged mail must be clearly marked as 'privileged' *and* be clearly marked with the name, title, and address of the sender." (Emphasis added.) 20 Ill. Adm. Code § 525.140(a) (2003). Thus, although mail from the Attorney General is, by definition, " '[i]ncoming privileged mail' " (20 Ill. Adm. Code §§ 525.110(f)(11), (h)(3) (2011)), clearly inscribing the "name, title, and address" of the Attorney General on the mail (20 Ill. Adm. Code § 525.140(a) (2003)) will

not exempt the mail from being opened in the mailroom. If the mail is to be treated as "privileged," that is, if it is to be opened only "in the presence of the offender to whom it is addressed" (20 Ill. Adm. Code § 525.140(b) (2003)), the mail *also* "must be clearly marked as 'privileged' " (20 Ill. Adm. Code § 525.140(a) (2003)). It follows that when the unknown officer of the Department opened the two letters addressed from the Attorney General to petitioner and when the officer stamped them with the reminder that such correspondence, to avoid being opened in the mailroom, had to be clearly marked as "legal" or "privileged," the officer merely was following the Department's regulations.

¶ 47 The Department's regulations are presumed to be constitutional (see *People v. Olsen*, 388 Ill. App. 3d 704, 716-17 (2009)), and the good-faith enforcement of a governmental regulation does not subject an individual to liability under section 1983 (*Pierson v. Ray*, 386 U.S. 547, 555 (1967); *Milton v. Nelson*, 527 F.2d 1158, 1159-60 (9th Cir. 1975)). Petitioner does not explain how the unknown individual or individuals in the mailroom were on clear notice that section 525.140(a) of the Department's regulations was unconstitutional. And, for that matter, we are not on clear notice, either. Petitioner has made no effort to convince us of the unconstitutionality of section 525.140(a). Years before the promulgation of the Department's regulation, the Sixth Circuit upheld the constitutionality of a similar prison regulation. *Boswell v. Mayer*, 169 F.3d 384, 389 (6th Cir. 1999) ("[T]he *** policy treats mail from the Attorney General as legal mail. The policy adds but one condition ***: the envelope from the Attorney General must have markings showing that it contains confidential material. *** This requirement passes constitutional muster and makes sense.").

¶ 48 It would be unreasonable to require officers in the mailroom to second-guess *Boswell* and declare their employer's regulation to be unconstitutional. Therefore, the amended

petition fails to state a cause of action under section 1983 premised on the opening of mail from the Attorney General.

¶ 49 III. CONCLUSION

¶ 50 For the foregoing reasons stated, we affirm the trial court's judgment.

¶ 51 Affirmed.