2013 IL App (5th) 120273-U

NO. 5-12-0273

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

KENNETH CEBERTOWICZ, Plaintiff-Appellant, v. TIMOTHY LOVE, CRAIG HENSLEY, GINA FEAZEL, BART TOENNIES, WADE TIPPIT, MARK BURTON, T. BATES, ROBERT HILLIARD, BRADLEY ROBERT, JACKIE MILLER, SARAH JOHNSON, TERRI ANDERSON, MICHAEL RANDLE, and JEFF STEWART, Defendants-Appellees.	)	Appeal from the Circuit Court of Clinton County. No. 10-MR-40 Honorable William J. Becker, Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Stewart and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The plaintiff's complaint was substantially insufficient in law and had certain other defects, and therefore the circuit court did not err in dismissing it. There was no error in refusing to appoint an attorney for the plaintiff in this civil case.

¶ 2 The plaintiff, Kenneth Cebertowicz, inmate No. B-63570 in the Illinois Department of Corrections (IDOC), appeals *pro se* from the circuit court's order dismissing his *pro se* second amended complaint for damages and for declaratory and injunctive relief. The second amended complaint was dismissed on motion of the defendants, all of whom are current or former IDOC officials or employees. Cebertowicz now appeals from that dismissal order. We affirm.

¶ 3 BACKGROUND

¶ 4 Cebertowicz is serving a 50-year sentence for first-degree murder and a concurrent 4-year sentence for aggravated discharge of a firearm. He is housed at Lawrence Correctional Center, but at the times relevant to this suit he was housed at Centralia Correctional Center (the prison).

¶ 5 In June 2010, Cebertowicz filed in the circuit court of Clinton County his original *pro se* complaint. The court approved his application to sue as an indigent person. See 735 ILCS 5/5-105(c), (d) (West 2010). He subsequently filed *pro se* an amended complaint and a second amended complaint, the latter being the subject of this appeal.

¶ 6 In the second amended complaint (complaint), Cebertowicz named as defendants 14 known persons plus "John/Jane Does 1 through 10." The 14 known defendants, all current or former IDOC officials or employees, were as follows: Timothy Love (prison chaplain); Craig Hensley (prison acting chaplain); Gina Feazel (prison counselor and grievance officer); Bart Toennies, whose first name was given as "Bert" in the complaint (prison counselor and grievance officer); Wade Tippit (chair, prison's adjustment committee[1]); Mark Burton (member, prison's adjustment committee); T. Bates (prison's assistant warden of programs); Robert Hilliard (Bates's successor as prison's assistant warden of programs); Bradley Robert (warden); Jackie Miller (member, IDOC administrative review board); Sarah Johnson, whose first name was misspelled "Sara" in the complaint (member, IDOC administrative review board); Terri Anderson (IDOC employee with authority to sign for the IDOC director); Michael Randle (IDOC director)[2]; and Jeff Stewart, who was identified as

[1]An "adjustment committee" is a prison committee that determines whether an inmate committed a charged disciplinary offense and, if the inmate is found to have committed it, recommends disciplinary action. See 20 Ill. Adm. Code 504.80(j), (k) (2010).

[2]Mr. Randle has since resigned as director.

"C/O Stewart" in the complaint (officer, IDOC internal affairs). Cebertowicz implied that the 10 unknown defendants also were current or former IDOC officials or employees. Significantly, all defendants were sued in both their official and individual capacities in all counts of the complaint.

¶ 7 The complaint contained five counts. Count I is not a subject of this appeal, for Cebertowicz has not argued that the dismissal of count I should be reversed. Therefore, we merely note that count I was brought pursuant to the federal Religious Land Use and Institutionalized Persons Act (42 U.S.C. § 2000cc *et seq.* (2000)) and the Illinois Religious Freedom Restoration Act (775 ILCS 35/1 *et seq.* (West 2012)), and was similar in substance to count II, which we discuss in ¶ 8 of this decision. We will have no need to mention count I again.

¶ 8 Count II was brought pursuant to section 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983 (2000)) and asserted a violation of Cebertowicz's first amendment right to the free exercise of religion. The defendants named in this count were Love, Hensley, Feazel, Toennies, Bates, Robert, Miller, Johnson, Anderson, and Randle. Cebertowicz alleged that "Love and Hensley refused to provide a religious diet to [him], thus making [him] choose between his religious practice and adequate nutrition." He further alleged that Feazel, Toennies, Bates, Robert, Miller, Johnson, Anderson, and Randle "had the authority and duty to override Defendants Love and Hensley's refusal, but did not." Cebertowicz prayed for "compensatory, punitive, and nominal damages" in excess of $50,000 from the defendants jointly and severally, and unspecified declaratory and injunctive relief.

¶ 9 Count III, like count I, is not a subject of this appeal. It was brought pursuant to section 1983 and asserted that 11 of the known defendants violated Cebertowicz's first amendment right to the free exercise of religion when they refused to add cable-televison channel EWTN to the prison's television system. We will have no need to mention count

III again.

¶ 10 Count IV was brought pursuant to § 1983 and asserted a violation of Cebertowicz's first amendment right to submit administrative grievances regarding prison conditions. The defendants named in this count were Hensley, Stewart, Bates, Robert, Tippit, Burton, Feazel, Toennies, Miller, Johnson, Anderson, Randle, and John or Jane Does 1-10. Cebertowicz alleged that Hensley "issued him a false [disciplinary report]" in retaliation for his previously filing a grievance about Hensley. Cebertowicz further alleged that Hensley subsequently collaborated with Robert, Bates, Tippit, Burton, Stewart, and John or Jane Does 1-10 and rewrote the disciplinary report so as to include "two false charges that would ensure [Cebertowicz] would be placed in segreation [*sic*] and transferred." Shortly thereafter, the disciplinary report "was again revised to include another false charge." Tippit and Burton found Cebertowicz guilty of the false disciplinary charges and recommended segregation and a disciplinary transfer, and Robert "signed off" on the recommendation. When Cebertowicz wrote a grievance concerning this retaliation, Toennies denied the grievance and Robert "concurred." Subsequently, the IDOC's administrative review board "expunged" the disciplinary report due to "failure to follow DR 504."[3] (Although Feazel was named as a defendant in this count, the complaint does not contain any factual allegation connecting her to the alleged retaliation.) Cebertowicz prayed for "compendatory [*sic*], punitive, and nominal damages" in excess of $50,000 from the defendants jointly and severally, and unspecified declaratory and injunctive relief.

¶ 11 Count V asserted a claim for common law civil conspiracy, and was substantively similar to count IV. The defendants named in this count were Hensley, Toennies, Tippit,

[3]"DR 504" surely refers to part 504 of the Illinois Administrative Code (20 Ill. Adm. Code 504 (2010)), which governs "discipline and grievances" in the IDOC, including the preparation of disciplinary reports and adjustment committee hearing procedures.

Burton, Bates, Robert, and John or Jane Does 1-10. Cebertowicz alleged that Hensley and Stewart, in an effort to "get rid of" him, agreed to write a "false" disciplinary report charging him with offenses that would ensure punishments including a disciplinary transfer. He further alleged that Hensley and Stewart asked Bates and Robert "to go along with the conspiracy by signing off on the [disciplinary report]," and asked Tippit and Burton "to find [Cebertowicz] guilty on the false charges." Tippit and Burton found Cebertowicz guilty and recommended punishments including a disciplinary transfer. The disciplinary report "was later expunged due to its false charges." Cebertowicz prayed for "compendatory [*sic*], punitive, and nominal damages" in excess of $50,000 against the defendants jointly and severally, and unspecified declaratory relief.

¶ 12 The outcome of this appeal turns largely on the content of the complaint, particularly the factual allegations undergirding the claims. Therefore, we canvass the 19-page complaint.

¶ 13 In the complaint, Cebertowicz alleged that on May 31, 2009, he filed an administrative grievance that stated (1) his Catholic faith required him to abstain from eating meat on all Fridays and Ash Wednesday, and the prison already provided Jewish, Muslim, and African Hebrew Israelite inmates with "religious diets", and (2) Catholic inmates were denied cable-television channel EWTN even though the prison television system carried six Protestant channels.

¶ 14 On July 17, 2009, grievance counselor Feazel denied Cebertowicz's grievance on the grounds that (1) acting chaplain Hensley informed her that Catholics do not have any religious dietary requirements except during Lent, and the prison already provided meat alternatives during Lent, and (2) EWTN cost too much for the prison to provide. Warden Robert concurred in Feazel's recommendations.

¶ 15 On July 20, 2009, Cebertowicz wrote a letter to Feazel stating that Hensley was lying

when he told her that the prison served nonmeat alternatives during Lent. Cebertowicz also stated that canon 1251 of Catholic Church law required all Catholics to abstain from eating meat on all Fridays and Ash Wednesday. The next day, Feazel responded to that letter with a note informing Cebertowicz that she could not do anything additional and advising him to appeal to the administrative review board if he disagreed with her disposition of his grievance.

¶ 16 The complaint further alleged that on July 22, 2009, "Father George" asked Cebertowicz to bring his administrative grievance to the next Mass, in order to discuss it with Hensley. On August 5, 2009, Cebertowicz took the grievance to Mass and gave it to Deacon Rich Bagby for him to review and discuss with Hensley. On August 6, 2009, Deacon Bagby left a message on Hensley's voice mail system, stating that he had mistakenly left Cebertowicz's grievance on the prison chapel's pulpit and asking Hensley to retrieve it. From the pulpit, Hensley retrieved Cebertowicz's grievance, along with Cebertowicz's July 20, 2009, letter to Feazel (wherein he accused Hensley of lying) and Feazel's response. These documents angered Hensley, and he immediately attempted to have Cebertowicz placed in segregation. Failing in that attempt, Hensley then wrote an offender disciplinary report charging Cebertowicz with the offense of "trading or trafficking."

¶ 17 On August 7, 2009, Cebertowicz wrote a grievance "claiming retaliation, staff misconduct, and religious discrimination." He claimed that Hensley's sole motivation for writing the disciplinary report was to retaliate against him. He claimed that Hensley could not truly believe that Cebertowicz violated a prison rule by giving his grievance to Deacon Bagby, for Hensley himself had given Cebertowicz "his personal outside information" and also "associated with a friend of [Cebertowicz] in free society" and apparently did not believe that his own actions violated any rules.

¶ 18 On August 9, 2009, internal affairs officer Stewart asked Hensley to rewrite his

disciplinary report against Cebertowicz, but Hensley refused. On August 11, 2009, Hensley was questioned by assistant warden of programs Bates, warden Robert, and John or Jane Does 1-10 regarding the allegations in Cebertowicz's August 7, 2009, grievance, and Hensley "confessed" to providing Cebertowicz with personal contact information and to being in contact with a friend of Cebertowicz. On August 12, 2009, Hensley, in "collaboration" with Robert, Bates, Tippit, Burton, Stewart, and John or Jane Does 1-10, "rewrote" his August 6, 2009, disciplinary report so as to add "two (2) false disciplinary charges (Insolence and Threats & Intimidation)."

¶ 19 On August 14, 2009, Cebertowicz sent to the prison's adjustment committee "a second witness request slip" with the names of nine witnesses and questions to ask them.

¶ 20 On August 16, 2009, Tippit and Burton heard the disciplinary charges against Cebertowicz. They found him not guilty of trading or trafficking, but guilty of insolence and of threats and intimidation. They recommended four disciplinary actions: a reduction in grade from A to C for three months, placement in segregation for three months, revocation of three months' good-time credits, and a disciplinary transfer. The final summary report stated, "No witnesses requested." Warden Robert subsequently approved the disposition.

¶ 21 On August 17, 2009, Cebertowicz "wrote another grievance for the false [disciplinary report], retaliation, and religious discrimination."

¶ 22 On August 21, 2009, grievance officer Toennies denied Cebertowicz's grievances of August 7 and 17, 2009. Warden Robert subsequently concurred with Toennies's findings and recommendation.

¶ 23 On September 15, 2009, the administrative review board "expunged" the disciplinary report against Cebertowicz but "denied [his] religious discrimination issues." On September 22, 2009, Tippit and Burton informed Cebertowicz of the expungement but nevertheless refused to release him from segregation. On September 23, 2009, the day an Illinois State

Police captain and lieutenant inspected the segregation unit, Cebertowicz was released from segregation.

¶ 24 On December 29, 2009, administrative review board member Johnson and DOC director Randle "denied [Cebertowicz's] religious diet and Catholic TV channel grievance."

¶ 25 On February 16, 2010, Cebertowicz and "Deacon Pete Cerneka" discussed Catholic dietary requirements with chaplain Love, and Love stated "several reasons" that Catholics could not have a "religious diet" at the prison. On February 19, 2010, Cebertowicz wrote a grievance claiming "religious discrimination" based on Love's denial of a "Catholic diet." He attached to the grievance the prison menus for February 14 to April 3, 2010. On March 4, 2010, Feazel denied the grievance.

¶ 26 On March 25, 2010, Cebertowicz wrote administrative review board member Johnson a letter detailing religious discrimination, retaliation, and staff misconduct. He mailed the letter along with a copy of his February 19, 2010, grievance and a copy of Feazel's denial of the grievance. On March 30, 2010, Johnson "summarily denied" Cebertowicz's February 19, 2010, grievance.

¶ 27 Incorporated into the complaint were 52 pages of exhibits pertaining to Cebertowicz's claims. All of these exhibits were referenced in the complaint. However, not all of the documents referenced in the complaint were included among the exhibits. For example, Cebertowicz alleged in the complaint that on August 14, 2009, he sent to the prison's adjustment committee "a second witness request slip" with the names of nine witnesses and questions to ask them, but a copy of this request slip is not included among the exhibits. Here follows a summary of the most significant exhibits that accompanied the complaint.

¶ 28 In the administrative grievance dated May 31, 2009, Cebertowicz wrote that (1) a correctional officer told him that prison rules forbade him from wearing a scapular, and the scapular was confiscated, (2) prison officials refused to add EWTN to the prison's television

system even though the system included three Protestant channels, (3) prison officials, despite being informed that Lent was coming, refused to serve Catholic inmates fish on Fridays, and (4) inmates of other faiths, including Jews, Muslims, and African Hebrew Israelites, were served "religious diets." As relief, Cebertowicz requested that he be allowed to wear his scapular, that EWTN be added to the prison television system, and that he receive "a religious diet of fish on all Fridays."

¶ 29 In a "response to offender's grievance" dated July 17, 2009, grievance officer Feazel wrote that (1) the administrative review board previously addressed the EWTN issue and on March 24, 2009, found the issue moot, and therefore the issue would not be addressed further, (2) prison rules permit the wearing of scapulars, and Cebertowicz's scapular was not confiscated, and (3) the acting chaplain was interviewed and stated that Catholics do not have a special diet, meat alternatives were provided on Ash Wednesday and on Fridays during Lent, and there is no requirement that the meat substitute be fish. Feazel added that the prison menus had been reviewed, and it was found that meat alternatives such as grilled cheese had been provided during Lent.

¶ 30 In a handwritten, five-page letter to grievance officer Feazel, dated July 20, 2009, Cebertowicz stated that acting chaplain Hensley lied when he told Feazel that meat alternatives had been provided during Lent. Cebertowicz also accused Hensley of lying on two previous occasions in regard to other matters. Cebertowicz indicated that a fervent desire to practice his faith was his sole motivation for seeking a meatless diet on Fridays, and he expressed a desire to resolve the matter amicably and without resort to a lawsuit. Near the end of the letter, Cebertowicz wrote, "So don't label me as a 'troublemaker' at least not yet", and drew something resembling a smiley face.

¶ 31 In an "offender disciplinary report" dated August 6, 2009, Hensley charged

Cebertowicz with the offenses of (1) violation of rules[4] and (2) trading or trafficking[5]. Hensley wrote that on August 6, 2009, "Catholic volunteer R. Bagby" left him a telephone message stating that Bagby accidentally left a packet of papers on the pulpit. Hensley retrieved the packet of papers and found them to be "personal papers" that Cebertowicz had given to Bagby during chapel time on August 5, 2009.

¶ 32 In the administrative grievance dated August 7, 2009, Cebertowicz acknowledged that on August 5, 2009, he gave "the grievance" to "Deacon Rick." However, Cebertowicz insisted that the grievance contained "no personal information" and "only what was sent to the [administrative review board]." Cebertowicz argued that his conduct did not constitute an offense. He suggested that Hensley wrote the disciplinary report due to his anger over Cebertowicz's accusing him of lying about the availability of meat alternatives during Lent. As relief, Cebertowicz requested expungement of the disciplinary report.

¶ 33 In the "offender disciplinary report" dated August 12, 2009, Hensley charged Cebertowicz, as before, with (1) violation of rules and (2) trading or trafficking, plus (3) insolence[6] and (4) intimidation or threats[7]. Hensley repeated the allegations contained in his August 6 disciplinary report and added that the "pack of papers" included a five-page letter written by Cebertowicz to Feazel, wherein Cebertowicz "stated 'Don't label me as a troublemaker *** at least not yet' ".

¶ 34 In a "final summary report," the prison's adjustment committee (composed of Tippit and Burton) reported that Cebertowicz had been found not guilty of trading or trafficking but guilty of the three other offenses, *viz.*: intimidation or threats, insolence, and violation

---

[4]See 20 Ill. Adm. Code 504, Appendix A, 404 (2010).

[5]See 20 Ill. Adm. Code 504, Appendix A, 406 (2010).

[6]See 20 Ill. Adm. Code 504, Appendix A, 304 (2010).

[7]See 20 Ill. Adm. Code 504, Appendix A, 206 (2010).

of rules. The stated basis for all three findings of guilt was Cebertowicz's five-page letter to Feazel, which the adjustment committee found to contain a "veiled threat" against Feazel. The final summary report quoted that portion of the letter where Cebertowicz urged Feazel not to label him a troublemaker. The adjustment committee recommended a three-month reduction in grade from A to C, a three-month placement in segregation, revocation of three months' good-conduct credit, and a disciplinary transfer. At the end of the final summary report, warden Robert indicated his concurrence in the adjustment committee's findings and recommendations.

¶ 35 In an administrative grievance dated August 17, 2009, which runs approximately 1,400 words, Cebertowicz claimed that Hensley wrote the initial disciplinary report because he was angry about Cebertowicz's July 20, 2009, letter to Feazel, in which Cebertowicz accused Hensley of lying about the availability of meat alternatives during Lent. Cebertowicz further claimed that Hensley revised the disciplinary report due to pressure by internal-affairs officers, who had questioned Hensley about providing Cebertowicz with his personal contact information and about being in contact with a nonincarcerated friend of Cebertowicz. Cebertowicz insisted that nothing in his July 20, 2009, letter to Feazel could reasonably be construed as intimidating or threatening. According to Cebertowicz, "someone" tried to persuade Feazel to write a disciplinary report against Cebertowicz in connection with the letter, but Feazel refused. Cebertowicz argued that the disciplinary charges and the adjustment committee's decision were in retaliation for his filing grievances concerning prison conditions. In addition, Cebertowicz claimed that he properly submitted the names of witnesses he wanted to testify at the adjustment committee's hearing, but none of his witnesses were called to testify. The requested witnesses included Father George, Deacon Rick, Feazel, and inmate Brian Ellis, who "witnessed [Cebertowicz] giving [his] meat away during Lent." Cebertowicz requested expungement of the disciplinary report, an

internal-affairs investigation of the retaliation against him, and other relief.

¶ 36 In a "grievance officer's report" dated August 21, 2009, grievance officer Toennies recommended denial of Cebertowicz's grievances of August 7 and 17, 2009. Toennies reported that he interviewed Hensley and Feazel, and could not substantiate Cebertowicz's allegations of staff misconduct. At the bottom of the grievance officer's report, warden Robert indicated his concurrence.

¶ 37 In a letter dated December 29, 2009, administrative review board member Johnson informed Cebertowicz that the board was recommending denial of two grievances that the board received on August 14 and September 8, 2009, wherein Cebertowicz alleged that the prison discriminated against Catholics by not providing EWTN, not providing fish on Fridays, and not allowing inmates to wear scapulars. Johnson wrote: the EWTN issue was previously addressed on March 24, 2009; the chaplain reported that Catholic inmates are given "meat substitutions" during Lent; and no prison rule prevented the wearing of scapulars, and Cebertowicz had not received a disciplinary report for wearing his scapular. At the bottom of the letter, the signature of DOC director Randle, written by "TA," indicated the director's concurrence in the board's recommendation.

¶ 38 In a letter dated January 14, 2010, administrative review board member Johnson informed Cebertowicz that on September 8, 2009, the board received his grievance concerning a disciplinary report dated August 6, 2009, scapulars, and EWTN. Johnson wrote that the disciplinary report had been expunged on September 15, 2009, "due to non-compliance with DR 504."[8] Regarding the scapular and EWTN issues, Johnson wrote that the board addressed them on December 29, 2009, and would not address them again. At the bottom of the letter, the signature of DOC director Randle, written by "TA", indicated the director's concurrence in the board's decision.

---

[8]See footnote 3 *supra*.

¶ 39 In a grievance dated February 19, 2010, Cebertowicz referred to Johnson's December 29, 2009, letter informing him of the denial of two previous grievances, and stated that the prison menu "does not reflect" that meat substitutes were provided during Lent. Cebertowicz requested a transfer to Logan Correctional Center. The grievance was accompanied by seven pages of prison menus for Sunday, February 14, 2010, through Saturday, February 20, 2010, and for Sunday, February 28, 2010, through Saturday, April 3, 2010.

¶ 40 The menu for Wednesday, February 17, 2010 (Ash Wednesday, the first day of Lent), showed a breakfast of fruit juice, fried eggs, turkey sausage patty, wheat bread, jelly, and skim milk; a lunch of rope sausage, potato rounds, braised cabbage, banana pudding, catsup, and a hot dog bun; and a dinner of chicken pot pie, corn, lettuce, thousand island dressing, wheat bread, and sherbet. The menu for Friday, February 19, 2010, showed a breakfast of fruit juice, turkey sausage patty, pancakes, syrup, and skim milk; a lunch of chicken patty, macaroni and tomatoes, green beans, coleslaw, Jell-O, wheat bread, and mayonnaise; and a dinner of spaghetti with meat sauce, broccoli, lettuce, French dressing, cookies, and garlic bread. Most of the Friday breakfasts included pancakes and/or cereal but no meat. Most of the Friday lunches and dinners included chicken or beef, though a few featured fish.

¶ 41 A "memorandum" from Feazel, dated March 4, 2010, indicated that the issue raised in Cebertowicz's February 19, 2010, grievance had been addressed previously and would not be considered further.

¶ 42 The 14 known defendants, by and through their attorney, the Illinois Attorney General, jointly filed a combined motion to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-619.1 (West 2012)). The defendants asserted that (1) sovereign immunity barred the damages claims against the defendants in their official capacities, (2) the claims for injunctive relief were moot, and (3)

the facts pleaded were insufficient to state any of the claims asserted. The defendants in their motion to dismiss addressed all five counts of the complaint. In our discussion of their motion, we will address only counts II, IV, and V, since counts I and III are not at issue in this appeal, as explained in ¶¶ 7, 9 of this decision.

¶ 43 The defendants' motion to dismiss was accompanied by a memorandum in support thereof. In regard to counts II and IV, the defendants argued that sovereign immunity barred the damages claims against them in their official capacities. Citing section 1 of the State Lawsuit Immunity Act (745 ILCS 5/1 (West 2012)) and the decision in *Schlicher v. Board of Fire & Police Commissioners of the Village of Westmont*, 363 Ill. App. 3d 869, 883 (2006), respectively, the defendants noted that the State of Illinois generally cannot be made a defendant in a lawsuit, and a lawsuit against a state employee in his official capacity is to be treated as a lawsuit against the state. On that basis, the defendants argued that the circuit court lacked subject matter jurisdiction over the official-capacity damages claims in counts II and IV and therefore should dismiss those claims pursuant to section 2-619(a)(1) of the Procedure Code (735 ILCS 5/2-619(a)(1) (West 2012)).

¶ 44 In regard to count II in particular, the defendants argued that the complaint's factual allegations failed to support a claim that they had violated Cebertowicz's first amendment right to the free exercise of religion. The defendants acknowledged that a prisoner has such a right, but noted that prison personnel may restrict a prisoner's religious practices in the interests of security and economy. Citing the decision in *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009), the defendants argued that prison personnel's actions violate a prisoner's free-exercise right only if they "substantially burden" that right. The defendants argued that Cebertowicz did not plead any facts indicating that his free-exercise right was substantially burdened by the denial of a meatless diet on all Fridays and Ash Wednesday. On that basis, the defendants urged the dismissal of count II pursuant to section 2-615 of the Code of Civil

Procedure (735 ILCS 5/2-615 (West 2010)).

¶ 45 Similarly, in regard to count IV, the defendants argued that the complaint's factual allegations failed to support a claim that they violated Cebertowicz's first amendment right to file administrative grievances concerning prison conditions. The defendants acknowledged that a prisoner has such a right, and seemed to acknowledge that prison personnel cannot retaliate against a prisoner for exercising that right. The defendants also noted that prison personnel may proscribe language that is threatening or otherwise inappropriate, in the pursuit of legitimate penological interests such as the prevention of abuse or harassment of prison personnel. The defendants' principal argument in regard to count IV may be stated as follows: Cebertowiz cannot claim that prison personnel retaliated against him through the filing of a "false" disciplinary report given that he has admitted the truth of the factual allegations in that report. On that basis, the defendants urged the dismissal of count IV pursuant to section 2-615 of the Procedure Code.

¶ 46 In regard to count V of the complaint, the defendants made an argument similar to their argument regarding count IV. They argued that Cebertowicz failed to state a claim for civil conspiracy where he, on the one hand, alleged that the defendants conspired to write a "false" disciplinary report against him but, on the other hand, admitted the truth of the report's factual allegations. On that basis, the defendants urged the dismissal of count V pursuant to section 2-615.

¶ 47 On March 14, 2012, in a written order, the circuit court dismissed with prejudice Cebertowicz's complaint. The court expressed agreement with the defendants' arguments for dismissal. Cebertowicz filed a motion for reconsideration of the dismissal order. On May 30, 2012, the court denied that motion. Cebertowicz filed a timely notice of appeal, thus perfecting this appeal.

¶ 48 ANALYSIS

¶ 49 Cebertowicz argues to this court that he pleaded facts sufficient to state the claims asserted in counts II, IV, and V. He urges reversal of the dismissal order as to those three counts and a remand to the circuit court. Meanwhile, the defendants argue that Cebertowicz failed to plead facts sufficient to state the claims asserted in counts II or IV. In regard to count V, the defendants argue (very briefly) that this court "may choose to dispense with any analysis of whether Cebertowicz has satisfied the elements of a charge of common-law conspiracy because proof of conspiracy is not an independent basis for recovery of damages."

¶ 50 This appeal is from an order dismissing a complaint pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2010)). The defendants' section 2-619.1 motion to dismiss combined (i) a section 2-615 motion to dismiss counts II, IV, and V based on a substantially insufficient complaint (see 735 ILCS 5/2-615 (West 2010)), and (ii) a section 2-619 motion to dismiss the official-capacity claims for damages in counts II and IV based on a lack of subject matter jurisdiction (see 735 ILCS 5/2-619(a)(1) (West 2012)). See also *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003) (a motion under section 2-619.1 allows a party to combine a section 2-615 motion to dismiss based upon a plaintiff's substantially insufficient pleadings with a section 2-619 motion to dismiss based upon certain defects or defenses). On appeal, the circuit court's dismissal of a complaint pursuant to section 2-619.1 is reviewed *de novo*. *Carr v. Koch*, 2011 IL App (4th) 110117, *aff'd*, 2012 IL 113414. A reviewing court may affirm on any basis warranted by the record. See *Reyes v. Walker*, 358 Ill. App. 3d 1122, 1124 (2005).

¶ 51 Contrary to Cebertowicz's arguments, his complaint was substantially insufficient in law, as we discuss *infra*. The complaint has other problems, as well, and we now discuss two of them.

¶ 52 As previously noted, counts II and IV of the complaint were brought pursuant to section 1983. Count II included a claim that the defendants, in their official capacities, violated Cebertowicz's first amendment right to the free exercise of religion. Count IV included a claim that the defendants, in their official capacities, violated his first amendment right to file grievances concerning prison conditions. Each count included a prayer for damages and for declaratory and injunctive relief. These two section 1983 official-capacity claims, insofar as they were claims for damages, could not properly be brought in any court, for they are not authorized by section 1983.

¶ 53 Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State *** 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 ***." 42 U.S.C. § 1983 (2000).

Neither states nor state officials acting in their official capacities are "persons" within the meaning of section 1983, and therefore they cannot be sued under section 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). The one caveat to this general rule is that "a state official in his or her official capacity, when sued for *injunctive* relief, would be a person under § 1983 because official-capacity actions for *prospective* relief are not treated as actions against the State. [Citations.]" (Internal quotation marks omitted and emphasis added.) *Id.* at 71 n.10. Without doubt, the IDOC is a state entity; it is a creation of the Unified Code of Corrections. See 730 ILCS 5/3-2-1 *et seq.* (West 2012). Therefore the IDOC is not a person for section 1983 purposes and cannot be sued under section 1983. Likewise, the defendants *qua* officials or employees of the IDOC, when sued

for any relief other than injunctive or prospective relief, are not persons for section 1983 purposes and cannot be sued under section 1983. By the terms of section 1983, as construed by the Supreme Court, Cebertowicz's official-capacity claims for damages in counts II and IV were quite obviously barred.

¶ 54 Count V of the complaint was brought pursuant to Illinois common law and included a claim that the defendants, in their official capacities as IDOC officials or employees, entered into a civil conspiracy to achieve the goal of "get[ting] rid of" him. The circuit court could not properly entertain this claim, for it lacked subject matter jurisdiction.

¶ 55 Suing a state employee in his or her official capacity does not differ in any significant way from suing the state itself. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). In effect, an official-capacity claim against a state employee is a claim against the state. See *Healy v. Vaupel*, 133 Ill. 2d 295, 308 (1990). Every state is sovereign, and immunity from private suits is central to sovereign dignity. *Sossamon v. Texas*, 131 S. Ct. 1651, 1657 (2011). " 'The principle is elementary that a State cannot be sued in its own courts without its consent.' " *Will*, 491 U.S. at 67 (quoting *Memphis & C. R. Co. v. Tennessee*, 101 U.S. 337, 339 (1879)). The Illinois Constitution abolishes sovereign immunity in this state but specifically grants the General Assembly the authority to revive sovereign immunity as it sees fit. See Ill. Const. 1970, art. XIII, § 4. The General Assembly has exercised this constitutional authority. In 1972, it enacted the State Lawsuit Immunity Act, the first section of which states in pertinent part: "Except as provided in *** the Court of Claims Act, *** the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1 (West 2010). The Court of Claims Act, section 8(a), grants to the court of claims "exclusive jurisdiction" over all claims against the state that are "founded upon any law of the State of Illinois." 705 ILCS 505/8(a) (West 2010). Section 8(a) makes only a few exceptions to this grant of exclusive jurisdiction, none of which is applicable here. See *id.* The IDOC

certainly is a state instrumentality for purposes of section 8(a) of the Court of Claims Act, and therefore an official-capacity claim against IDOC officials and employees is an action against the state, and sovereign immunity becomes applicable. Because the official-capacity claim in count V was essentially a claim against the state and was founded upon state law, the court of claims had exclusive jurisdiction over that claim, and the circuit court lacked jurisdiction over it. Without subject matter jurisdiction over the claim, the circuit court certainly could not adjudicate it. See, *e.g.*, *In re M.W.*, 232 Ill. 2d 408, 414 (2009) (if a court lacks subject matter jurisdiction, any order entered in the matter is void *ab initio*).

¶ 56 Turning to the issue of whether Cebertowicz's complaint was sufficient to state a claim for relief, we first emphasize that Illinois is a fact-pleading jurisdiction. See *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 26. Under our state's fact-pleading standard, a plaintiff is required to allege facts sufficient to bring his claim within a legally recognized cause of action. *Id.* See also *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997) ("plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted"). In this way, among others, pleading in Illinois circuit courts differs from pleading in, *e.g.*, the United States district courts, which have a notice-pleading regime. See Fed. R. Civ. P. 8(a)(2) (pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief"). A plaintiff may not rely on conclusions of law or fact that are unsupported by specific factual allegations. *Simpkins*, 2012 IL 110662, ¶ 26. See also *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996) (a complaint cannot be merely conclusory). Evidence, though, need not be included in a complaint. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348 (2003). We keep these principles in mind when reviewing the sufficiency of Cebertowicz's complaint.

¶ 57 Section 2-615 allows a defendant to move to dismiss a complaint on the ground that the complaint is "substantially insufficient in law." 735 ILCS 5/2-615 (West 2012). "A

section 2-615 motion to dismiss [citation] challenges the legal sufficiency of a complaint based on defects apparent on its face." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "[A] cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Id.* When reviewing an order granting a section 2-615 motion, a reviewing court must determine whether the challenged complaint's well-pleaded facts, taken as true and viewed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 16. A dismissal for failure to state a cause of action pursuant to section 2-615 is reviewed *de novo*. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

¶ 58 The well-pleaded facts in Cebertowicz's complaint, taken as true and viewed in the light most favorable to Cebertowicz, are insufficient to establish any cause of action upon which relief may be granted. We discuss *seriatim* the three counts at issue in this appeal.

¶ 59 Count II asserted a violation of the first amendment right to the free exercise of religion. Its gravamen was that "Love and Hensley refused to provide a religious diet to [Cebertowicz], thus making [him] choose between his religious practice and adequate nutrition." While prisoners do have a right to the free exercise of religion, Cebertowicz failed to state a claim for violation of that right.

¶ 60 The first amendment to the United States Constitution guarantees the right to the free exercise of religion. U.S. Const., amend. I. The free-exercise clause "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). The free-exercise clause has been applied to the states through the fourteenth amendment (U.S. Const., amend. XIV). See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The exercise of religion involves more

than believing and professing religious doctrines. It also involves, for example, "the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). A person does not forfeit this right when he becomes a state prison inmate. See, *e.g.*, *Turner v. Safley*, 482 U.S. 78, 84 (1987).

¶ 61 In general, when a person claims that government has infringed his free-exercise right, courts look to see whether the government has placed a "substantial burden" on the person's religious belief or practice. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 384-85 (1990). In accordance with this general rule, courts apply the "substantial burden" test when a prisoner asserts a section 1983 claim that prison personnel violated his free-exercise right. See, *e.g.*, *Nelson v. Miller*, 570 F.3d 868, 877 (7th Cir. 2009). When the claimed free-exercise violation consists of prison personnel's refusing to provide the prisoner with a special diet he has requested for religious reasons, the substantial burden test is met if the prison's refusal forced the prisoner to choose between his religious practice and adequate nutrition. See *id.* at 880.

¶ 62 In his complaint, Cebertowicz stated that Love and Hensley's refusal to provide him with meatless meals on Ash Wednesday and every Friday forced him to "choose between his religious practice and adequate nutrition." This bald statement is a conclusion, not a fact that could bring Cebertowicz's claim within the scope of the cause of action asserted. Cebertowicz did not allege any facts that might support a conclusion that he was forced to choose between spiritual fidelity and corporeal sustenance. In our fact-pleading jurisdiction, a conclusion cannot substitute for facts.

¶ 63 The *Nelson* opinion provides one example of a set of facts that could support a

conclusion that prison personnel substantially burdened a prisoner's free-exercise right.

¶ 64 In *Nelson*, a prisoner of the Catholic faith came to believe that he was morally obligated to abstain from eating meat on all Fridays of the year and on every day of Lent, a season of approximately 40 days. On that basis, he asked the chaplain to approve a vegan diet for him on those days. The chaplain approved the inmate for vegan meals on Fridays during Lent, but otherwise refused the request, on the ground that Catholicism required nothing more than abstaining from meat on Fridays during Lent. *Nelson*, 570 F.3d at 871-74. The prisoner sued the chaplain, claiming *inter alia* a violation of his first amendment right to the free exercise of religion. *Id.* at 871.

¶ 65 Most of the prisoner's claims proceeded to bench trial in federal district court. The evidence showed that prisoners were served (a) the "regular" diet, which might or might not contain meat at any given meal, (b) the "vegan" diet, which never included meat or animal by-products, or (c) "some medical diets." *Id.* at 871-72. The prison's dietician testified that a prisoner who was served the regular diet but abstained from eating any of the meat "probably" would not receive sufficient nutrition. *Id.* at 874, 880. The prisoner testified that he lost 42 pounds during the time period he was denied a vegan diet, a period when he abstained from eating any meat. (The length of this time period is not altogether clear from the Seventh Circuit's opinion.) The prisoner further testified that he was hospitalized three times due to weight loss, his bones started to protrude, and he felt hungry, cold, depressed, and anxious. *Id.* at 874. This testimony was undisputed. *Id.* at 880.

¶ 66 The Seventh Circuit concluded that the testimonies of the prisoner and the dietician showed, "at the very least, that [the prisoner] would be required to forego adequate nutrition on Fridays and for the forty days of Lent in order to comply with his sincerely held religious beliefs." *Id.* On that basis, the Seventh Circuit held that "[the chaplain's] refusal to grant [the prisoner] a nonmeat diet for those periods imposed a substantial burden on his religious

exercise." *Id.*

¶ 67 In the instant case, Cebertowicz did not allege any facts suggesting that the denial of a meatless diet on all Fridays and Ash Wednesday substantially burdened his right to the free exercise of religion. He did not allege, for example, that he had abstained from eating all the meat in his regular prison diet and subsequently suffered some particular adverse health consequence. Nothing along these lines appears anywhere in the complaint. Meanwhile, the prison menus attached to the complaint as an exhibit show that Friday lunches and dinners not infrequently feature fish, which Cebertowicz has no objection to eating on Fridays. Friday breakfasts rarely include meat anyway, and usually feature cereal and pancakes. The menus give the impression that Cebertowicz can simply refrain from eating the meat portion of his Friday meals without sacrificing adequate nutrition. He appears not to face a coercive choice between religious practice and adequate nutrition.

¶ 68 We conclude that in count II of his complaint, Cebertowicz failed to state a section 1983 claim that prison officials violated his free-exercise right by refusing to provide meatless meals on Ash Wednesday and every Friday. That is, he failed to allege facts sufficient to show that the defendants' refusal imposed a substantial burden on his religious practice by forcing him to choose between abandoning his religious practice and obtaining adequate nutrition. Count II of the complaint was rightly dismissed for failure to state a cause of action under the free-exercise clause.

¶ 69 Count IV of Cebertowicz's complaint asserted a violation of the first amendment right to submit grievances regarding prison conditions. The gravamen of this count was that Hensley and other defendants filed two "false" disciplinary reports against Cebertowicz in retaliation for his previous filing of grievances. Both reports are attached to the complaint as exhibits. In the first report, Hensley wrote that on August 6, 2009, he received a telephone message from "Catholic volunteer R. Bagby" stating that he had accidentally left

a packet of papers on the pulpit; Hensley retrieved the packet of papers and found them to be "personal papers" that Cebertowicz had given to Bagby during Catholic chapel time on August 5, 2009. In the second report, Hensley (in "collaboration" with several other defendants, according to the complaint) repeated the factual allegations contained in his first report and added that the "pack of papers" included a five-page letter written by Cebertowicz to Feazel, wherein Cebertowicz "stated 'Don't label me as a troublemaker *** at least not yet' ". While prisoners do have a right to submit grievances regarding prison conditions, Cebertowicz failed to state a claim for violation of that right.

¶ 70 The first amendment guarantees the people's right to "petition the Government for a redress of grievances." U.S. Const., amend. I. The petition clause applies to the states through the fourteenth amendment (U.S. Const., amend. XIV). *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). Under this clause, state prisoners have a right to submit grievances regarding the conditions of their confinement. See, *e.g.*, *Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005). When a prisoner exercises that right and files a grievance, prison personnel cannot lawfully retaliate against him for doing so. *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000). Penalizing a prisoner's exercise of the right to file grievances is a constitutional tort. *Hoskins*, 395 F.3d at 375. The deliberate filing of a false disciplinary charge against a prisoner, if done in retaliation for his previous filing of a grievance, violates the prisoner's right to seek redress of grievances, and is actionable under section 1983. *Sprouse v. Babcock*, 870 F.2d 450, 452 (1989). A prisoner may state a claim of retaliatory treatment by alleging a chronology of events from which retaliation can be inferred. *Johnson v. Stovall*, 233 F.3d 486, 489 (7th Cir. 2000).

¶ 71 Cebertowicz's retaliation claim has an obvious and fatal flaw. He asserted that Hensley and other defendants retaliated against him by filing "false" disciplinary reports, but he nowhere disputes the truth of the allegations in those reports. Indeed, in his complaint

and in his grievance dated August 7, 2009 (see ¶ 32 of this decision), he seemed to acknowledge their truth. He disputed only the interpretation or implications of his five-page letter to Feazel. Given the hollowness of the retaliation claim, we must conclude that count IV was rightly dismissed for failure to state a cause of action under the petition clause.

¶ 72 Count V of the complaint asserted a claim for common law civil conspiracy. The gravamen of this count was that Hensley and some other defendants conspired to write two "false" disciplinary reports against him. As discussed in ¶ 71 of this decision, Cebertowicz seemed to acknowledge the truth of the factual allegations contained in those two reports. Accordingly, count V failed to state a claim in the same way that count IV failed to state a claim. It was rightly dismissed.

¶ 73 The facts pleaded in Cebertowicz's complaint were legally insufficient to state any of the causes of action asserted. The circuit court did not err in dismissing the complaint.

¶ 74 In addition to his arguments concerning the dismissal of his complaint, Cebertowicz argues to this court that the circuit court erred in denying him, an indigent, a free copy of the record, and that the circuit court and this court both erred in refusing to appoint an attorney to represent him in this case. He does not suggest any particular relief in connection with these alleged errors. We reject these arguments.

¶ 75 On June 21, 2012, a few weeks after the circuit court denied his motion to reconsider the dismissal of his complaint, Cebertowicz filed in that court a "motion for trial transcripts and common law records," requesting an order allowing him to obtain copies of those documents without cost to him. The court's notation at the bottom of the motion indicates that the court granted the motion; it does not indicate a denial of the motion. We certainly would not have faulted the circuit court for denying the order. In this civil case, Cebertowicz had no right to a copy of the record at no cost to him, and the record is in excess of 650 pages, much of it consisting of Cebertowicz's own writings and exhibits.

Regardless, Cebertowicz clearly had access to the record when he wrote his appellant's brief, for it is replete with appropriate citations to the record. We find no error and no harm relating to Cebertowicz's access to the record on appeal.

¶ 76 In the midst of filing his complaints, Cebertowicz filed on December 28, 2010, a motion for the appointment of counsel under section 5-105(g) of the Procedure Code (735 ILCS 5/5-105(g) (West 2010)). Cebertowicz expressed a belief that counsel was necessary "because of the complexity of the issues and discovery will require IDOC employee work files, and several witnesses are no longer at Centralia Correctional Center." He also stated that he had "sent several letters requesting representation to attorneys with only one answering in the negative," though he did not name any of the attorneys. On January 11, 2011, the court entered a written order denying the motion for appointment of counsel. The court stated that it was "not aware of any authority to appoint counsel for plaintiff." Cebertowicz filed a motion for reconsideration of the order denying appointment of counsel, directing the court's attention to section 5-105(g) as authority to appoint counsel. The record on appeal does not indicate that the court ever ruled on that motion for reconsideration.

¶ 77 A state prisoner has a fundamental, due-process right to meaningful access to the courts for civil rights actions. *Bounds v. Smith*, 430 U.S. 817, 827-28 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). However, this right does not encompass a right to appointed counsel. See *Doherty v. Caisley*, 104 Ill. 2d 72, 77 (1984) ("the Supreme Court has never required a State to appoint counsel to represent indigent inmates in civil actions"); *Tedder v. Fairman*, 92 Ill. 2d 216, 225 (1982) ("We cannot find sufficient support in any of the United States Supreme Court holdings to say that an indigent prisoner has a constitutional right to appointed counsel in a civil suit either at trial or on appeal.") Cebertowicz had no constitutional right to an attorney in this case.

¶ 78 Section 5-105(g) of the Code of Civil Procedure allows the circuit court, in its

discretion, to appoint an attorney to represent an indigent party. 725 ILCS 5/5-105(g) (West 2012). In his December 28, 2010, motion for the appointment of counsel under section 5-105(g), Cebertowicz expressed a belief that counsel was necessary "because of the complexity of the issues and discovery will require IDOC employee work files, and several witnesses are no longer at Centralia Correctional Center." We are not convinced that the issues in this case are all that complex. Certainly Cebertowicz has had a firm grasp of the issues, judging by the brief he filed in this court, the complaint he filed in the circuit court, and the grievances and letters he wrote to IDOC personnel. For him, the big stumbling block has been the facts, not the law. He simply failed to plead facts sufficient to state the causes of action he asserted, despite having plenty of opportunity to do so. We find no error in not appointing an attorney for Cebertowicz.

¶ 79 Cebertowicz notes that the circuit court, in its order denying his motion for appointment of counsel, stated that it was "not aware of any authority to appoint counsel for plaintiff." He faults the court for failing to exercise its discretion under section 5-105(g). In general, the circuit court errs when it refuses to exercise its discretion in the erroneous belief that it does not have discretion as to the question presented. *People ex rel. Chesapeake & Ohio Ry. Co. v. Donovan*, 30 Ill. 2d 178, 180 (1964). Like most errors, though, this type of error may be harmless. See, *e.g.*, *In re Mark P.*, 402 Ill. App. 3d 173, 177 (2010) (circuit court's failure to exercise discretion in regard to whether respondent should remain handcuffed at hearing was harmless error). Any error here was harmless. The proceedings were at a very early stage, the pleading stage. At that stage, no evidence needed to be presented, and no witnesses needed to be located or interviewed, let alone examined or cross-examined. The record does not give any indication that Cebertowicz was harmed by the lack of an attorney at the pleading stage or in this appeal.

¶ 80 For all of the reasons stated in this decision, we affirm the judgment of the circuit

court.

¶ 81 Affirmed.