

RENDERED: JULY 15, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001818-MR

JOHNNY C. SHEPHERD

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 10-CI-03598

DON BOTTOM AND
LADONNA THOMPSON

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, KELLER AND VANMETER, JUDGES.

KELLER, JUDGE: The circuit court found that Johnny Shepherd's (Shepherd) petition for declaratory relief failed to state a cause of action for which relief could be granted and dismissed it. Shepherd appeals from that order of dismissal. For the reasons set forth below, we affirm.

FACTS

The record in this matter is sparse and Shepherd's recitation of the facts is somewhat disjointed. Because the Appellees have not disputed Shepherd's allegations, we base our summary of the facts on his pleadings and the exhibits attached thereto.

It appears that Shepherd was a member of the firehouse detail at the Kentucky State Reformatory. In order to perform his duties, Shepherd was required to wear boots. The boots issued by the corrections facility "bled" dye. Because of a liver condition, Shepherd cannot wear footwear or clothing that bleeds dye; therefore, he purchased dye-free boots from an outside vendor. Shepherd became ill, needed treatment, and could not perform his duties as part of the firehouse detail. Therefore, his boots "were mailed home." After receiving medical treatment, Shepherd was transferred to the Blackburn Correctional Complex (Blackburn) and was advised to have his boots mailed back to him. Shepherd arranged for a family member to mail the boots to Blackburn, and he paid the postage. When the boots arrived at Blackburn, personnel in receiving and distribution inspected them, determined that they had steel toes, and returned them to the sender. Corrections officials charged Shepherd's inmate account for the return postage. Shepherd then filed an "Inmate Grievance Form," seeking reimbursement of the \$20.00 he paid in postage to have his boots shipped to Blackburn and returned to the sender.

A grievance committee found that the boots were "steel toed;" that Shepherd was not permitted to have them; and that they were appropriately returned. Shepherd appealed this decision to the commissioner, who agreed with the committee. Shepherd then filed a petition for declaration of rights in circuit court naming as respondents the Appellees, "Warden: Don Bottoms" and "Commissioner of Dept. of Corrections LaDonna H. Thompson." In his petition, Shepherd asked the court to find that he "did everything in accordance to Dept. of Corrections Policy to obtain his boots" and for reimbursement of the \$20.00 in postage he expended.

The Appellees filed a motion to dismiss Shepherd's complaint arguing that they had immunity and that Shepherd had failed to exhaust his administrative remedies. Shepherd did not address the Appellees' immunity argument in his response, but he did attach documents indicating that he had exhausted his administrative remedies. The court entered an order dismissing Shepherd's complaint finding that the Appellees were entitled to governmental immunity and that Shepherd had failed to establish that he exhausted his administrative remedies. It is from this order that Shepherd appeals.

On appeal, Shepherd continues to argue that he exhausted his administrative remedies. For the first time, Shepherd also argues that the Appellees discriminated against him because of a disability.

STANDARD OF REVIEW

A trial court should only grant a motion to dismiss for failure to state a claim upon which relief can be granted when "the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (citation omitted). Thus, the court's decision is one of law, not one of fact. *Id.* We review questions of law *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001). With these standards in mind, we address the issue raised by Shepherd on appeal.

ANALYSIS

Initially, we note that "[t]he function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review." *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985). As noted above, Shepherd did not raise any issue regarding discrimination before the circuit court; therefore, we are foreclosed from reviewing that issue.

Furthermore, we need not address the exhaustion of remedies issue because the Appellees have immunity. "[A] state agency is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function." *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001).

Employees of a state agency sued in their official or representative capacity are entitled to the same immunity as the agency. *Autry v. Western Kentucky University*, 219 S.W.3d 713, 717 (Ky. 2007). The operation of corrections

facilities is a governmental function. *See Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997). Shepherd named the Appellees in their official capacities; therefore, they have immunity and the court properly dismissed Shepherd's petition.

CONCLUSION

Because the Appellees have immunity, we affirm the circuit court's dismissal of Shepherd's petition.

ALL CONCUR.

BRIEF FOR APPELLANT:

Johnny C. Shepherd, *pro se*
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BRIEF FOR APPELLEE:

J. Todd Henning
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