IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Johnson,	:	
Appellant	:	
	:	
v.	:	
	:	No. 714 C.D. 2010
David A. Varano and John Doe	:	Submitted: January 28, 2011

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: March 9, 2011

Thomas Johnson (Johnson) appeals pro se from the March 17, 2010 order of the Court of Common Pleas of Northumberland County (trial court) dismissing his complaint on the basis that it presents a frivolous action. The issues before this Court are: (1) whether the trial court erred by dismissing Johnson's complaint for reasons not raised in his initial order; (2) whether the trial court erred by dismissing Johnson's complaint as frivolous; (3) whether Johnson's complaint states a cause of action upon which relief may be granted; and, (4) whether the complaint should be dismissed as to Superintendent, David A. Varano. For the reasons that follow, we affirm the trial court's order relative to Varano and John Doe a.k.a. kitchen supervisory staff, but vacate and remand this case to the trial court for a specific determination as to whether Johnson's complaint failed to state a cause of action in tort against food services provider GoodSource Solutions, Inc. (GoodSource).

Johnson was an inmate at the State Correctional Institution at Coal Township (SCI-Coal Township). Johnson avers that he is a Muslim who believes

that the consumption of pork is a violation of Muslim law. On May 1, 2009, SCI-Coal Township's menu reflected that beef cheese steak hot pockets would be served for the evening meal. After Johnson began eating that meal, he felt ill and, upon closer inspection, discovered that he was eating a ham and cheese hot pocket. He immediately informed the kitchen supervisor that the hot pockets served were made of pork rather than beef. Johnson was given another tray, which again contained another pork hot pocket. Johnson and other Muslim inmates questioned the kitchen staff about why there was no sign on the serving window that pork products were being served, which was the institution's normal procedure.

On January 11, 2010, Johnson filed a complaint with the trial court against Varano, John Doe a.k.a. the kitchen supervisory staff, and GoodSource in tort and pursuant to Section 1983 of the United States Code, 42 U.S.C. § 1983, for violating his civil right to freedom of religion. On that same date, Johnson filed an application to proceed *in forma pauperis*. By order issued January 29, 2010, the trial court stated "it appears that Plaintiff is attempting to proceed under federal law, making this Court an inappropriate forum for this action. Accordingly, Plaintiff is directed to file his Application and Complaint with the appropriate federal court." Certified Record Scanned Document (C.R.) at 2.

On March 17, 2010, Johnson filed a motion for reconsideration of the trial court's January 29, 2010 order. By order issued that same day, the trial court granted Johnson's motion for reconsideration, acknowledging that a Section 1983 claim may be brought in state court. The order went on, however, to dismiss Johnson's complaint under Pa.R.C.P. No. 240(j) on the basis that the action was frivolous in that "even if Plaintiff has set forth the requisite elements to state a claim under 42 U.S.C.[] § 1983, an isolated incident whereby Plaintiff was exposed inadvertently to and consumed pork at one meal does not raise a question of

constitutional proportion or paramount rights." C.R. at 5. On April 20, 2010, Johnson filed a notice of appeal.[1]

On May 5, 2010, as ordered by the trial court, Johnson timely filed his statement of matters complained of on appeal, in which he stated that the trial court erred by dismissing his complaint as frivolous. In a motion filed May 12, 2010, Johnson amended his statement of matters complained of to also state that the trial court erred by denying his motion for reconsideration and by failing to allow him to amend his complaint to state a cause of action upon which relief could be granted. In its 1925(a) opinion filed June 24, 2010, the trial court added that Johnson's complaint failed to indicate that he had exhausted his administrative remedies as required by Section 1997e(a) of the United States Code, 42 U.S.C. § 1997e(a).

On appeal, Johnson argues that the trial court erred by dismissing his complaint on grounds not originally raised in its January 29, 2010 order. We do not find error in the trial court's March 17, 2010 order, acknowledging its error in dismissing Johnson's complaint on the basis that it should have been brought in federal court, since the trial court again reviewed the case and thereafter dismissed it as being frivolous, which it was authorized to do pursuant to Pa.R.C.P. No. 240(j). We do, however, find error in the fact that it was not until after Johnson filed his statement of matters complained of on appeal that the trial court stated the complaint was also dismissed because Johnson failed to state that he used and exhausted his administrative remedies. At that point, the trial court left Johnson without the opportunity to raise that issue in his appeal to this Court.

[1] Johnson's appeal presents a question of law: specifically, whether the trial court appropriately dismissed Johnson's claim as frivolous on the basis that inadvertent exposure to (and consumption of) pork as an isolated incident raises a question of constitutional proportion. "When reviewing a question of law, our scope of review is plenary, and our standard of review is de novo." *Soppick v. Borough of W. Conshohocken*, 6 A.3d 22, 24 n.5 (Pa. Cmwlth. 2010).

Pa.R.A.P. 1925(a)(1) states, in pertinent part, that

> upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.

"[I]n any case where the trial court fails to prepare an opinion that addresses the issues upon which it passed . . . . the parties may be left without a meaningful context within which to make their arguments on appeal, particularly as to discretionary matters." *Commonwealth v. DeJesus*, 581 Pa. 632, 639, 868 A.2d 379, 383 (2005). Moreover, Pa.R.A.P. 1925(b)(4)(ii) specifies that an appellant is required in his statement of matters complained of on appeal to "concisely identify each ruling or error that [he] intends to challenge with sufficient detail to identify all pertinent issues for the [trial court]." According to Pa.R.A.P. 1925(b)(4)(vii), any issues "not included in the Statement and/or not raised in accordance with the provisions of [sub]paragraph (b)(4) are waived."

Here, Johnson's original statement of matters complained of raises as error only the trial court's finding that his action was frivolous, since that was the sole basis upon which the trial court's March 17, 2010 order dismissed his complaint.[2] Because the additional error raised by the trial court was not known by Johnson until the trial court filed its Pa.R.A.P. 1925(a) opinion on June 24, 2010, he did not raise it

[2] After his May 10, 2010 amendment to the statement, Johnson also designated as error the trial court's denial of his motion for reconsideration and the trial court's failure to give him an opportunity to amend his complaint. The first of these additional errors is moot, since the trial court in fact granted the motion for reconsideration. We will likewise not address the second additional error, since the decision to permit an amendment to a pleading is within a trial court's discretion, and there is no indication in this record that the trial court abused its discretion in that regard. *Mistick, Inc. v. City of Pittsburgh*, 646 A.2d 642 (Pa. Cmwlth. 1994).

in his statement of matters complained of on appeal, and has waived it pursuant to Pa.R.A.P. 1925(b)(4)(vii). We hold, therefore, that the trial court erred by not including in its March 17, 2010 order that its dismissal of Johnson's complaint was also due to failure to exhaust administrative remedies. Accordingly, we will not address the issue of whether Johnson failed to exhaust his administrative remedies[3], or whether he properly averred that he did in his complaint.[4]

---

[3] We note that the exhaustion requirement at issue is not a jurisdictional requirement, so any failure to comply therewith did not deprive the court of its subject matter jurisdiction. *See Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000).

[4] Even if this Court were to address the issue of whether Johnson's complaint indicated that he properly utilized and exhausted his administrative remedies, we would hold that the trial court erred in that regard. First, Johnson's complaint raised a tort action and not exclusively a Section 1983 action. Second, the averments in the complaint make it clear that Johnson made the staff aware of its improper serving of pork. In addition, Section 1997e(a) merely states: "No action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner confined in any . . . correctional facility until such administrative remedies as are available are exhausted." It does not state that the mere failure to state in the complaint that administrative remedies were exhausted is fatal to an action. Finally, there was evidence that Johnson could have produced (as he did with his brief to this Court), had he known to do so, showing that he properly followed the Department of Corrections' grievance procedure. On May 8, 2009, Johnson filed an official inmate grievance relative to the May 1, 2009 incident. By response issued May 21, 2009, the grievance officer advised Johnson that:

> The Food Service Department did not purposely or intentionally serve you a hot pocket with pork. The hot pockets we were serving were cheese steak hot pockets. When packaged by the company, there were a few ham and cheese hot pockets in the case of cheese steak hot pockets. My staff had no way of knowing that this had occurred. As soon as we were told by an inmate th[a]t he had received a pork item, we pulled the hot pockets and replaced them. There was no way for us to know that this mistake had happened unless we had broken open every hot pocket that was being served. We did not run out of cheese steak hot pockets and we would not purposely replace a beef product with a pork product. This grievance is without merit and therefore denied.

Johnson Br. Attachment 6. On June 1, 2009, in response to Johnson's appeal to the initial grievance review, David A. Varano, Superintendent of SCI-Coal Township, stated, in pertinent part:

Johnson also argues on appeal that the trial court erred by dismissing his complaint pursuant to Pa.R.C.P. No. 240(j) on the basis that his action is frivolous. Pa.R.C.P. No. 240(j) provides:

> If, simultaneous with the commencement of an action or proceeding or the taking of an appeal, a party has filed a petition for leave to proceed in forma pauperis, the court prior to acting upon the petition may dismiss the action, proceeding or appeal if the allegation of poverty is untrue or if it is satisfied that the action, proceeding or appeal is frivolous.

The Note to Pa.R.C.P. No. 240 provides that, "[a] frivolous action or proceeding has been defined as one that 'lacks an arguable basis either in law or in fact.'" *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also Robinson v. Pennsylvania Bd. of Probation and Parole*, 525 Pa. 505, 512, 582 A.2d 857, 860 (1990) (wherein the Pennsylvania Supreme Court likewise defined the term "frivolous" in the context of Pa.R.A.P. 2744 as "an appeal which lacks any basis in law or fact"). Thus, in order to properly dismiss a claim as frivolous, a trial court must determine that it lacks any basis either in law or in fact.

Johnson's complaint contained a tort claim, although it is styled as an action for violation of his civil rights. As for whether Johnson stated a claim in tort

---

> [i]t is unfortunate that the item being served to you . . . was of pork content. . . . [I]t is a manufacturing error and occurred at time of packaging. . . . [W]e should certainly be aware of the consequences of this issue. . . . [W]e apologize for this error and will follow-up with addressing this issue with our vendor. I consider this grievance resolved at such time.

Johnson Br. Attachment 7. In a final appeal decision issued July 14, 2009, the Department of Corrections' Chief Grievance Officer upheld that superintendent's response, acknowledged the error and stated that "[w]hile it is unfortunate that you were served a food product that contained pork, there is certainly no evidence that it was done intentionally." Johnson Br. Attachment 8.

for which relief may be granted, his complaint appears to seek damages for negligent and/or intentional conduct on the part of Varano and the others.[5]

A properly pleaded tort action founded on negligence "requires allegations that establish the breach of a legally recognized duty or obligation that is causally connected to the damages suffered by the complainant." *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 581 Pa. 454, 470-71, 866 A.2d 270, 280 (2005) (quotation marks omitted). Johnson's complaint avers that Varano, in his individual and official capacity, was responsible for regulating, training and supervising SCI-Coal Township's kitchen staff, and he failed to do so in this instance. It also alleges that the kitchen staff, in its individual and official capacity, and GoodSource, who was responsible for the content of the food it served at SCI-Coal Township, knew or should have known they were serving pork hot pockets on May 1, 2009, and intentionally acted in spite of that knowledge. The complaint also avers that Johnson ate one of the pork hot pockets, which caused him to violate Muslim law and to become ill. Although it may seem that Johnson's complaint contains the elements necessary to state valid tort claims against Varano and the kitchen staff, to the extent it avers they were acting in their official capacity and were intentional, his claims fail due to the principle of sovereign immunity.

Article I, Section 11 of the Pennsylvania Constitution provides, in part, that "[s]uits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." Pa. Const. art. 1, § 11.

[5] The fact that Johnson's complaint does not state which tort he is claiming is not fatal. "Where the elements to a cause of action are adequately set forth, a *pro se* complaint will not be dismissed just because it is not artfully drafted." *Williams v. Syed*, 782 A.2d 1090, 1095 n.6 (Pa. Cmwlth. 2001). Moreover, "it is not necessary that a plaintiff identify the specific legal theory underlying the complaint. It is the duty of the court to discover from the facts alleged in a complaint the cause of action, if any, stated therein." *Burnside v. Abbott Labs.*, 505 A.2d 973, 980 (Pa. Super. 1985) (citation omitted).

Pursuant to Section 11, the Pennsylvania General Assembly has directed that "the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity." 1 Pa.C.S. § 2310. Section 8522(a) of the Judicial Code, 42 Pa.C.S. § 8522(a), states in pertinent part:

> The General Assembly . . . does hereby waive, in the instances set forth in subsection (b) only . . . sovereign immunity as a bar to an action against Commonwealth parties, for damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity.

Thus, in order to prevail on a negligence claim, Johnson must prove that the defendants were negligent in their duties and that his claim falls within one of the enumerated exceptions to sovereign immunity which, according to Section 8522(b) of the Judicial Code, 42 Pa.C.S. § 8522(b), are: (1) vehicle liability; (2) medical-professional liability; (3) care, custody or control of personal property; (4) commonwealth real estate, highways and sidewalks; (5) potholes and other dangerous conditions; (6) care, custody or control of animals; (7) liquor store sales; (8) National Guard activities; and, (9) toxoids or vaccines. Moreover, "[t]his court has held that, 'when an employee of a Commonwealth agency was acting within the scope of his or her duties, the Commonwealth employee is protected by sovereign immunity from the imposition of liability for intentional tort claims.'" *Williams v. Stickman*, 917 A.2d 915, 917 (Pa. Cmwlth. 2007) (quoting *La Frankie v. Miklich*, 618 A.2d 1145, 1149 (Pa. Cmwlth. 1992)).

Johnson's complaint references facts in support of only negligence or intentional tort claims against Varano or the kitchen staff in their official capacities.[6] It does not reflect that their official actions fall within any of the exceptions to sovereign immunity. Since Varano and the kitchen staff are immune from such claims, Johnson's claims in tort against them lack any basis either in law or in fact.

Johnson's civil rights claim, on the other hand, is specifically based upon Section 1983 of the United States Code, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

In order to set forth a viable Section 1983 civil rights claim, a plaintiff must: "1) allege a violation of rights secured by the United States Constitution and the laws of the United States, and 2) show that the alleged deprivation was committed by a person acting under the color of state law." *Owens v. Shannon*, 808 A.2d 607, 609 n.6 (Pa. Cmwlth. 2002). Where an inmate alleges that prison officials deprived him of his constitutional rights, a prima facie case under Section 1983 is made. *Owens*.

The first inquiry in this Section 1983 case, therefore, is whether Johnson was deprived of a right secured by the Constitution. Johnson's complaint specifically avers that the defendants, particularly Varano and the kitchen staff under his direction, served him pork without notice, which violated his right to freedom of religion expressly granted in the First Amendment of the United States Constitution.

[6] The complaint does not set forth any allegations to support claims against them in their individual capacities.

The First Amendment to the United States Constitution states, in pertinent part, that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. This Court has stated:

> Because of the crimes that prisoners committed resulting in their incarceration, prison officials are given a wide range of discretion in the promulgation and enforcement of rules to govern the prison community in order to maintain security, order and discipline. While prison officials are given wide discretion to maintain prison security, prison walls are not a barrier separating prisoners from the protection of the Constitution, including the right to the freedom of religion.

Maute v. Frank, 670 A.2d 737, 739 (Pa. Cmwlth. 1996) (citations omitted). Inmates in Pennsylvania correctional facilities have a constitutional right to special diets for religious reasons, to the extent they impose a relatively small burden on the institution. *See DeHart v. Horn*, 390 F.3d 262 (3d Cir. 2004); *see also Miles v. Beard*, 847 A.2d 161 (Pa. Cmwlth. 2004). In particular, in a case involving a Muslim inmate who refused to handle pork while preparing food, the Third Circuit of the United States Court of Appeals specifically concluded that Commonwealth "prison officials must respect and accommodate, when practicable, Muslim inmates' religious beliefs regarding prohibitions on handling pork." *Williams v. Bitner*, 455 F.3d 186, 194 (3d Cir. 2006). The trial court in this case stated, however, that the single incidence of a *de minimus* nature, such as was the case here, does not result in a violation of Johnson's constitutional rights.

In order to accommodate an inmate's constitutional right to a special diet for religious reasons, Section 95.237(5) of the Department's regulations, 37 Pa. Code § 95.237(5), requires that the Department have in place a "[w]ritten local policy [to] provide for the accommodation of special foods, diets and fasts as part of an inmate's religious practices consistent with the security needs and orderly administration of the

prison. . . ." In accordance with the aforementioned regulation, the Department has issued policies that recognize inmates' special religious diets. Although we found no specific reference to the Department's general accommodation of Muslim inmates' pork-free diet, it appears that the Department normally makes such accommodations for Muslim inmates. Johnson states in his brief, and the Department does not dispute, that "when ever the [Department] is serving pork in the chow hall, at the wi[n]dow they have a big sign . . . saying pork, as well as a menu[] . . . to prevent [M]uslims from being served pork by mistake . . . ." Johnson Br. at 11. It is clear, therefore, that SCI-Coal Township generally recognized and accommodated its Muslim inmates' pork-free diets. On May 1, 2009, however, the Department's system broke down.[7]

As for whether a single and apparently isolated incident of serving pork to Johnson constitutes a violation of his First Amendment right to free exercise of his religion, we hold that a single incident of being inadvertently served pork does not deprive a Muslim of the right to the free exercise of his faith. In *Johnson-Bey v. Indiana Department of Corrections*, 668 F.Supp.2d 1122 (N.D. Ind. 2009), the United States District Court for the Northern District of Indiana dismissed Muslim prisoners' claims brought under Section 1983 because it found,

> no authority holding that a single instance of being fed pork violated [Muslim] inmates' First Amendment right to freedom of religion . . . particularly where inclusion of pork was inadvertent. While being provided with diet trays containing pork for one meal . . . may have annoyed and inconvenienced the Plaintiffs, this isolated negligent act of Aramark employees cannot support a claim that the

[7] Because it does not appear that Johnson's grievance documents were made part of the record before the trial court, they cannot form the basis for our decision here; however, we see that the Department's responses thereto acknowledge and apologize that Johnson was unintentionally served pork in error, and that steps were taken to correct the situation.

> Plaintiffs were denied their First Amendment right to freedom of religion . . . .

Johnson-Bey , 668 F.Supp.2d at 1129. In *Gallagher v. Shelton*, 587 F.3d 1063 (10th Cir. 2009), the United States Court of Appeals for the 10th Circuit affirmed the lower court's dismissal of a Kansas inmate's Section 1983 claim on the basis that a single, isolated violation of an inmate's kosher diet restrictions did not support his claim that he was denied his First Amendment right to free exercise of religion. We likewise hold that a single incident of Johnson being served pork did not deprive him of the right to the free exercise of his Muslim faith. Since Johnson was not deprived of a right secured by the Constitution, the first requirement for a viable Section 1983 action was not met. Johnson's complaint, therefore, fails to state a cause of action upon which relief may be granted under Section 1983.

Based upon the foregoing, we affirm the trial court's conclusion that Johnson has not established a factual or legal foundation that would support his claims against either Varano and/or the kitchen staff. Because we have determined that Johnson has either failed to state valid claims against either Varano and/or the kitchen staff upon which relief may be granted, or such claims are barred by sovereign immunity, we must agree with the trial court that his complaint as against those parties is frivolous, and we affirm the order of the trial court dismissing Johnson's complaint pursuant to Pa.R.C.P No. 240(j).[8] However, to the extent that GoodSource is independent of Varano and/or the kitchen staff and is not a Commonwealth official, it does not have similar immunity, and an action in tort may lie against it. Because the trial court did not make a separate determination as to GoodSource, we vacate the trial court's order relative to defendant GoodSource and

[8] In light of our holding in this case, we need not address the Department's claim on appeal that the complaint must be dismissed as to Varano.

remand this case to the trial court for a specific determination as to whether Johnson's complaint failed to state a cause of action in tort against GoodSource.

_____

JOHNNY J. BUTLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Johnson,	:	
Appellant	:	
	:	
v.	:	
	:	No. 714 C.D. 2010
David A. Varano and John Doe	:	

O R D E R

AND NOW, this 9th day of March, 2011, the March 17, 2010 order of the Court of Common Pleas of Northumberland County relative to David A. Varano and John Doe a.k.a. kitchen supervisory staff is affirmed. The trial court's order relative to GoodSource is vacated, and the matter is remanded to the Court of Common Pleas of Northumberland County for proceedings consistent with this Court's opinion.

Jurisdiction relinquished.

_____

JOHNNY J. BUTLER, Judge