

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

MATTHEW G. SILVA,	)	No. 66302-0-1
	)	
Appellant,	)	
	)	
v.	)	
	)	
DEBORAH HOLLY,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	FILED: January 14, 2013
	)	

Verellen, J. — A civil case may be dismissed on the pleadings if the complaint fails to state a claim upon which relief can be granted. Although the superior court in this case erroneously dismissed Matthew Silva’s civil rights action on the basis of collateral estoppel, dismissal was nevertheless proper because Silva’s complaint fails to state a viable claim for relief. We therefore affirm.

FACTS

In July 2009, while incarcerated at the Monroe Correctional Complex, Silva filed three separate inmate grievances. The grievances alleged that certain correctional personnel had engaged in retaliatory conduct against him.

On August 14, 2009, Silva filed a complaint in superior court alleging that grievance counselor Deborah Holly violated his First Amendment and civil rights by refusing to process the three grievances unless he changed their content. Silva

alleged that Holly refused to process the first grievance because it raised “multiple unrelated issues.”<sup>1</sup> He countered that the main allegation in the grievance involved a series of related actions. In refusing to process Silva’s second grievance, Holly said he “could not state what [personnel] had told him and he could not cite [the] Revised Code of Washington (RCW) in his [grievance].”<sup>2</sup> Silva’s complaint did not challenge Holly’s reasons, but alleged that she lacked authority to decide the grievance because she was named in it. Holly refused to process Silva’s third grievance on the ground that he “could only raise ‘one issue per complaint.’”<sup>3</sup> After Silva filed his complaint in this action, Holly processed the grievance.

The complaint alleged that Holly’s refusal to process the grievances violated 42 U.S.C. § 1983 and caused Silva various injuries, including mental anguish, emotional distress, loss of sleep, and a “chilling” effect on his right to free speech.<sup>4</sup> Silva sought monetary damages and declaratory and injunctive relief.

On August 19, 2009, the Attorney General filed an answer to the complaint on Holly’s behalf. The answer admitted that Holly did not process the grievances due to noncompliance with grievance procedures, including requirements that grievances be based on personal knowledge and contain only one issue. The answer alleged that Holly’s actions “furthered legitimate penological goals and are therefore constitutional even if they infringe upon a constitutional right.”<sup>5</sup>

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<sup>1</sup> Clerk’s Papers at 66.

<sup>2</sup> Clerk’s Papers at 67.

<sup>3</sup> Clerk’s Papers at 67.

<sup>4</sup> Clerk’s Papers at 68.

On July 14, 2010, Holly moved for judgment on the pleadings, arguing that Silva's action was barred by the doctrine of collateral estoppel, that the complaint failed to state a claim upon which relief could be granted, and that Holly was entitled to qualified immunity. In support of her collateral estoppel claim, Holly cited an unpublished federal district court decision, Silva v. Gregoire, No. C05-5731RJB, WL 1724957 (W.D. Wash. 2007). She argued that the court in that case had resolved the same legal issues presented in this action, and that Silva was barred from litigating those issues again.

On August 26, 2010, Silva filed a response to the motion to dismiss and an amended complaint. The amended complaint alleged that “[o]ne reason” Holly refused to process the grievances was that she knew about, and “was facilitating,” the retaliatory or conspiratorial campaigns of others alleged in the grievances.<sup>6</sup> It also alleged that her refusal to process the grievances was accompanied by an “evil motive.”<sup>7</sup> The amended complaint did not dispute Holly’s assertions in her answer to the original complaint that the grievances were not processed due to noncompliance with prison policies and that Holly’s actions regarding the grievances furthered legitimate penological interests.

The amended complaint also added a fourth cause of action alleging that Holly issued a baseless and retaliatory infraction against Silva after he served her with the

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<sup>5</sup> Clerk’s Papers at 61.

<sup>6</sup> Clerk’s Papers at 42.

<sup>7</sup> Clerk’s Papers at 45.

complaint. Silva alleged that Holly issued the infraction with knowledge that the rule he was accused of violating had not been posted in the prison. He further alleged that the infraction was ultimately dismissed for lack of notice, that the infraction furthered no penological interest, and that one reason Holly issued it was to harass, intimidate and dissuade him from pursuing the instant action.

On October 18, 2010, the superior court simultaneously granted Silva's motion to amend his complaint and dismissed his action "on the basis of collateral estoppel."<sup>8</sup>

In a motion for reconsideration, Silva argued that collateral estoppel did not apply because his amended complaint included an allegation of retaliation, and because federal courts had recognized exceptions to the rule followed in Silva v. Gregoire. The court denied the motion. Silva appeals.

#### DECISION

An action may be dismissed under CR 12(c) if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery."<sup>9</sup> In making this determination, we must presume the plaintiff's allegations are true and may consider hypothetical facts not included in the record.<sup>10</sup> Dismissal should be granted only when the plaintiff's allegations "show on the face of the complaint that there is some insuperable bar to relief."<sup>11</sup> We review a CR 12(c) dismissal de novo.<sup>12</sup>

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<sup>8</sup> Clerk's Papers at 4.

<sup>9</sup> Tenore v. AT & T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998); Parmalee v. O'Neel, 145 Wn. App. 223, 248, 186 P.3d 1094 (2008).

<sup>10</sup> Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

<sup>11</sup> Tenore, 136 Wn.2d at 330 (quoting Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

For the reasons set forth below, we conclude the superior court did not err in dismissing Silva's complaint because it failed to set forth claims upon which relief could be granted.

*Collateral Estoppel*

Silva first contends the superior court erred in ruling that his claims are barred by the doctrine of collateral estoppel. We agree.

Collateral estoppel bars "a second litigation of issues between parties, even though a different claim or cause of action is asserted."<sup>13</sup> To invoke this bar, a party must show, among other things, that the issue decided in the prior litigation was identical to the issue in the current litigation.<sup>14</sup> Here, the parties dispute whether Silva v. Gregoire, a federal court decision involving other grievances filed by Silva, has collateral estoppel effect in this case. The parties agree that count 4 in Silva's current action, a retaliatory infraction claim, is not barred by collateral estoppel. They disagree, however, as to whether the three grievance-based claims are barred.

Holly contends the grievance-based claims are identical to the claims litigated in Silva v. Gregoire. In that case, a federal court dismissed Silva's civil rights claims for theft of, and failure to process, a different set of grievances. Relying on established federal law, the court ruled that Silva's civil rights claims failed because inmates have no constitutional right to a prison grievance system.<sup>15</sup> While the present case also

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<sup>12</sup> M.H. v. Corp. of Catholic Archbishop of Seattle, 162 Wn. App. 183, 189, 252 P.3d 914, review denied, 173 Wn.2d 1006, 268 P.3d 943 (2011).

<sup>13</sup> Rains v. State, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

<sup>14</sup> Id.

involves the processing of prison grievances, it differs from Silva's federal court claims in that the complaint alleges retaliatory, content-based grievance restrictions and a retaliatory infraction. Inmates retain First Amendment protections during the grievance process,<sup>16</sup> and those protections apply to the content of grievances<sup>17</sup> and acts of retaliation occurring during the grievance process.<sup>18</sup> Thus, Silva's potential § 1983 claims in this lawsuit are distinguishable from the claims in Silva v. Gregoire, and are not barred by collateral estoppel.

Holly argues in the alternative that the dismissal of Silva's claims can be sustained on any ground supported by the record, and that Silva's complaint fails to state claims upon which relief can be granted. We agree.<sup>19</sup>

*Dismissal of Grievance-Based Claims*

Silva's grievance-based claims, counts 1 through 3, do not state a claim on which relief can be granted. The allegations in the amended complaint do not state a challenge to the constitutionality of any applicable grievance policies. In order to bring either a facial or "as-applied" challenge to a grievance policy on First Amendment

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<sup>15</sup> See Mann v. Adams, 855 F.2d 639, 640 (9th Cir.1988); Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003).

<sup>16</sup> In re Parmelee, 115 Wn. App. 273, 281, 63 P.3d 800 (2003).

<sup>17</sup> Id. at 281-88; Bradley v. Hall, 64 F.3d 1276 (9th Cir. 1995); Bradley v. Hall, 911 F. Supp. 446 (D. Or. 1994).

<sup>18</sup> Parmelee, 145 Wn. App. at 247-48; In re Parmelee, 115 Wn. App. at 284; Rhodes v. Robinson, 408 F.3d 559, 567 (9th Cir. 2005); Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995); Hines v. Gomez, 108 F.3d at 265, 267 (9th Cir. 1997); Valandingham v. Bojorquez, 866 F.2d 1135, 1138 (9th Cir. 1989).

<sup>19</sup> We may uphold a court's decision on any basis supported by the record. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

grounds, Silva would have to allege the absence of a legitimate penological basis for any such policy or its application.<sup>20</sup> Silva's amended complaint does not acknowledge, let alone challenge, any applicable grievance policy. Nor does it allege the absence of a legitimate penological basis for any applicable policies or their application. It thus fails to state a facial or "as applied" challenge to any grievance policies.

The grievance-based claims also fail to state a claim for retaliatory refusal to process Silva's grievances. In the prison context, a viable claim of First Amendment retaliation under 42 U.S.C. § 1983 entails five elements: "(1) An assertion that a state actor took some adverse action against a [prisoner] (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the [prisoner's] exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal."<sup>21</sup> Silva's amended complaint fails to allege the first, fourth, and fifth elements.

The first and fourth elements require an adverse act that is more than a de minimis inconvenience.<sup>22</sup> An action taken by prison officials is considered "adverse"

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<sup>20</sup> See Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); Bahrampour v. Lampert, 356 F.3d 969, 975 (9th Cir. 2004) (Turner analysis "applies equally to facial and 'as applied' challenges").

<sup>21</sup> Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005); accord Silva v. Di Vittorio, 658 F.3d 1090, 1104 (9th Cir. 2011).

<sup>22</sup> See generally Blair v. Bethel School District, 608 F.3d 540, 544 (9th Cir. 2010) (de minimis actions taken in retaliation for exercise of First Amendment rights do not give rise to a constitutional violation; "de minimis deprivations of benefits and privileges on account of one's speech do not give rise to a First Amendment claim. Rather, for adverse, retaliatory actions to offend the First Amendment, they must be of a nature that would stifle someone from speaking out."); Dawes v. Walker, 239 F.3d 489, 492 (2d Cir. 2001) (de minimis retaliatory act is outside the ambit of constitutional protection), overruled on other grounds, Swierkiewicz v. Sorema, N.A., 534 U.S. 506,

only if it “would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights. . . . Otherwise, the retaliatory act is simply de minimis and therefore outside the ambit of constitutional protection.”<sup>23</sup> The de minimis standard

achieves the proper balance between the need to recognize valid retaliation claims and the danger of “federal courts embroil[ing] themselves in every disciplinary act that occurs in state penal institutions.” The purpose of allowing inmate retaliation claims under § 1983 is to ensure that prisoners are not unduly discouraged from exercising constitutional rights. *Some acts, though maybe motivated by retaliatory intent, are so de minimis that they would not deter the ordinary person from further exercise of his rights. Such acts do not rise to the level of constitutional violations and cannot form the basis of a § 1983 claim.*<sup>[24]</sup>

The alleged retaliatory acts in this case—*i.e.*, refusing to process grievances including more than one issue based on a policy limiting grievances to a single issue—would not deter a person of ordinary firmness from further exercising their first amendment rights. Silva’s grievances were not denied; he was invited to resubmit them, and the corrections requested were minimal. Such “adverse acts” do not support a first amendment retaliation claim under 42 U.S.C. § 1983.<sup>25</sup>

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122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); Bell v. Johnson, 308 F.3d 594, 603 (6th Cir. 2002) (“inconsequential actions” do not satisfy the “adverse action requirement”).

<sup>23</sup> Dawes, 239 F.3d at 493 (citations omitted).

<sup>24</sup> Morris v. Powell, 449 F.3d 682, 686 (5th Cir. 2006) (emphasis added) (alteration in original) (citations omitted) (quoting Woods v. Smith, 60 F. 3d 1161, 1166 (5th Cir. 1995)).

<sup>25</sup> Compare Burgos v. Canino, 641 F. Supp. 2d 443, 455 (E.D. Pa. 2009) (“The mere denial of grievances does not rise to the level of adverse action sufficient to deter a person of ordinary firmness from exercising constitutional rights.”); Harbin-Bey v. Rutter, 420 F.3d 571, 579-80 (6th Cir. 2005) (defendant’s filing of “Notice of Intent to Conduct an Administrative Hearing” which did not result in loss of inmate privileges did not qualify as “adverse action”); Jones v. Greninger, 188 F.3d 322, 325-26 (5th Cir. 1999) (claim that inmate was restricted to five hours per week in law library in



The fifth element—*i.e.*, that the retaliatory action did not reasonably advance a legitimate correctional goal—is not pleaded. The plaintiff bears the burden of pleading and proving the absence of legitimate correctional goals for the conduct of which he complains.<sup>26</sup> Silva makes no such allegation in the grievance-based claims.<sup>27</sup> That omission is fatal to Silva’s retaliation claim and to any claims that Holly’s actions, whether retaliatory or not, restricted the content of his grievances in violation of the First Amendment (including count 2 that Holly refused to process a grievance in part because she was facilitating the conspiracy challenged in the grievance).<sup>28</sup>

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retaliation for filing grievances failed because the alleged adverse acts did not rise to level of constitutional claim) with Bibbs v. Early, 541 F.3d 267, 271-72 (5th Cir. 2008) (subjecting inmate to below-freezing temperatures for more than four hours during each of four consecutive nights was more than *de minimis* ); Thaddeus-X v. Blatter, 175 F.3d 378, 396, 398 (threat of physical harm); Smith v. Yarrow, 78 F. Appx. 529, 542 (6th Cir. 2003) (threat to change drug test results); Scott v. Churchill, 377 F.3d 565, 571-72 (6th Cir. 2004) (threatening to impose disciplinary sanctions).

<sup>26</sup> Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995).

<sup>27</sup> He includes such an allegation only as to his retaliatory infraction claim. Count 4 states in pertinent part: “Defendant Holly’s retaliatory infraction against Mr. Silva . . . did not advance any legitimate penological interest.” Clerk’s Papers at 44.

<sup>28</sup> The constitutional rights of inmates may be limited “in order to allow prison officials to achieve legitimate correctional goals,” Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990), and a prison regulation or action that infringes First Amendment rights “is valid if it is reasonably related to legitimate penological interests.” Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Accordingly, any First Amendment challenge to Holly’s actions must allege the absence of a legitimate penological interest. See Shakur v. Schriro, 514 F.3d 878, 884-85 (9th Cir. 2008) (to state a First Amendment free-exercise-of-religion claim, plaintiff must allege defendant’s acts were not reasonably related to legitimate penological interests); Gee v. Pacheco, 627 F.3d 1178, 1187-88 (10th Cir. 2010) (to state First Amendment claim for interference with nonlegal mail, inmate must show pattern and practice of interference without a legitimate penological interest); see also Bieregu v. Reno, 59 F.3d 1445, 1457 (3rd Cir. 1995) (Turner applies to actions taken by prison officials).

Even if Silva's amended complaint might be read as implicitly alleging the absence of a legitimate penological basis for Holly's decisions, the complaint fails to state viable claims for relief. In count 1, Silva admits that Holly refused to process his grievance because it contained multiple unrelated issues. In disputing her conclusion, he argues that “the *main allegation* in the grievance” involved related, retaliatory actions.<sup>29</sup> But this implicitly acknowledges that the grievance contained allegations other than “the main allegation.” Silva thus fails to allege facts demonstrating the absence of a penological basis for Holly’s rejection of this grievance.<sup>30</sup>

In count 2, Silva alleges Holly refused to process a grievance because it contained hearsay and cited the Revised Code of Washington. He does not dispute these were valid grounds for rejecting the grievance. Instead, he alleges Holly lacked authority to process the grievance because it accused her of wrongdoing. This allegation does not demonstrate a First Amendment violation or any constitutional infirmity in any policy as applied to Silva. It merely alleges a violation of grievance procedures. These allegations do not state a First Amendment claim under 42 U.S.C. § 1983.<sup>31</sup>

In count 3, Silva alleges that, contrary to Holly’s assertions, a third grievance did not contain more than one issue. He concedes, however, that shortly after receiving the complaint in this action, Holly reconsidered her decision and processed the

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<sup>29</sup> Clerk’s Papers at 41 (emphasis added).

<sup>30</sup> Cf. Citizens for Rational Shoreline Planning v. Whatcom County, 172 Wn.2d 384, 389, 258 P.3d 36 (2011) (“A CR 12(b)(6) motion is properly granted when it appears from the face of the complaint that the plaintiff would not be entitled to relief even if he proves all the alleged facts supporting the claim.”).

grievance. Thus, there was ultimately no restriction applied to this grievance. Even if Holly's initial decision is theoretically actionable to the extent Silva alleges that she deliberately misapplied a policy to facilitate a retaliatory campaign,<sup>32</sup> we have already concluded that any adverse act was de minimis and insufficient to support a first amendment claim under 42 U.S.C. § 1983.

For the reasons set forth above, the record supports the court's dismissal of Silva's grievance-based claims.

*Dismissal of Retaliatory Infraction Claim*

Silva also contends the superior court erred in dismissing count 4, which asserted a claim for a retaliatory infraction. Holly concedes that collateral estoppel does not bar that count, but contends dismissal was nevertheless proper because the count fails to state a claim on which relief can be granted. We agree.

In this context, a viable retaliation claim must allege that an infraction was issued in retaliation for an inmate's exercise of his constitutional rights, and that the retaliatory action advanced no legitimate penological interest.<sup>33</sup> Silva's amended complaint

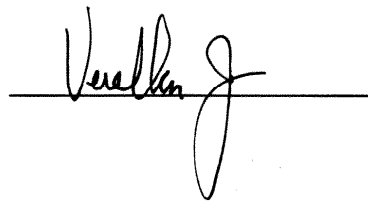
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<sup>31</sup> Green v. Herbert, 677 F. Supp. 2d 633, 639 (W.D.N.Y. 2010) (inmate's allegation that officer who was assigned to investigate his grievance conducted a biased, unfair investigation "fails because an inmate 'has no constitutional right to have his grievances processed or investigated in any particular manner'" (quoting Shell v. Brzezniak, 365 F. Supp. 2d 362, 379 (W.D.N.Y. 2005)); Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988).

<sup>32</sup> Woodward v. City of Worland, 977 F.2d 1392, 1399 (10th Cir. 1992) ("The Supreme Court has made it clear that liability under § 1983 must be predicated upon a 'deliberate' deprivation of constitutional rights by the defendant."). In the absence of retaliatory motive, however, whether prison officials have complied with grievance policies is generally not actionable because, as previously noted, inmates have no constitutional right to grievance procedures. See n.31, *supra*.

alleges each of these elements. It alleges the infraction was retaliation for Silva's use of another prisoner to serve process on Holly. It further alleges the infraction did not advance any legitimate penological interest because Holly knew when she issued it that there was no posted notice in the prison describing the rule Silva violated, and because the infraction was eventually dismissed for lack of notice. But it appears that posting is not the sole means of giving adequate notice of prison policies and rules.<sup>34</sup> Even assuming that Silva's allegation is true, it does not, without more, establish that Holly knew Silva lacked any notice from any source when she issued the infraction. Because Silva's allegations fail to state a claim for relief, and because he proffers no hypothetical facts remedying that deficiency,<sup>35</sup> the superior court did not err in dismissing count 4.

Silva's request for statutory attorney's fees and costs under RAP 14.1 is denied. The order of dismissal is affirmed.



WE CONCUR:

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<sup>33</sup> Hines, 108 F.3d at 267.

<sup>34</sup> See WAC 137-28-180.

<sup>35</sup> West v. Thurston County, 169 Wn. App. 862, 867 n.3, 282 P.3d 1150 (2012) (noting that West "failed even to assert hypothetical facts supporting his claims let alone legally sufficient ones.").

Spencer, A.C.

Appelwick, J.