LEXSEE 55 FED. APPX. 33

JOSEPH FIDTLER, Appellant v. PA DEPARTMENT OF CORRECTIONS; CHARLES STROUP; KAREN RODGERS; CHARLES MCCLOSKEY; RAY P. SMITH

No: 01-3994

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

55 Fed. Appx. 33*; *2002 U.S. App. LEXIS 25117

September 9, 2002, Submitted Under Third Circuit LAR 34.1(a)
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NOTICE: RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Middle District of Pennsylvania. (D.C. Civil Action No. 01-cv-00955). District Judge: Honorable Yvette Kane.

DISPOSITION: Affirmed.

COUNSEL: Joseph Fidtler, Appellant, Pro se, Coal Township, PA.

For Pa Dept Corr, Charles Stroup, Karen Rodgers, Charles McCloskey, Ray P. Smith, Appellees: Raymond W. Dorian, Department of Corrections, Camp Hill, PA.

JUDGES: Before: NYGAARD, ROTH and WEIS, Circuit Judges.

OPINION BY: Jane R. Roth

OPINION

[*34] ROTH, Circuit Judge:

Appellant Joseph Fidtler brought a civil rights action in the Court of Common Pleas of Northumberland County, Pennsylvania, against the Department of Corrections and several of its employees. In his suit, he challenged a new prison policy on inmate compensation. The defendants removed the case to the United States District Court for the Middle District of Pennsylvania. The District Court dismissed his suit and Fidtler appealed.

Pursuant to Department of Corrections Amendment 816, "any inmate refusing an education program should not be compensated in any manner." Because Fidtler refused to participate in an adult education program, he was refused "idle pay." "Idle pay" is given to inmates who, through no fault [**2] of their own, do not have a prison work assignment. DC ADM 816-5. Fidtler claims on appeal that (1) the claims brought against the Department of Corrections for Pennsylvania are not barred by the *Eleventh Amendment*, (2) the refusal of an allowance without notice or a hearing violates the *Fourteenth Amendment's* conception of due process, and (3) the policy change constitutes an illegal *ex post facto* law.

We have jurisdiction pursuant to *28 U.S.C. § 1291* from the final order dismissing the case under Rule 12(b)(6). We exercise plenary review to determine whether Fidtler is entitled to any relief under any reasonable reading of the pleadings. *Langford v. City of*

Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000) (citing *Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996))*.

The District Court concluded that Fidtler's claim was barred by the *Eleventh Amendment* on the basis that a state agency is not a person within the meaning of *42 U.S.C. § 1983*. [*35] See *Will v. Michigan Dept. of State Police, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1991)*. Under Will, a suit in federal court against [**3] the state or one of its agencies is barred by the *Eleventh Amendment*. However, since the time that the District Court dismissed Fidtler's claim against the department and the individual defendants in their official capacities as barred by the *Eleventh Amendment*, the Supreme Court has ruled in *Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613, 152 L. Ed. 2d 806, 122 S. Ct. 1640 (2002)*, that a state's removal of a suit to federal court constitutes waiver of its *Eleventh Amendment* immunity. Under Lapides, therefore, the dismissal of the claims on *Eleventh Amendment* grounds cannot stand.

The District Court did, however, go on to consider the merits of Fidtler's claim. First, the District Court held that Fidtler had failed to show an interest in receiving idle pay which was protected by the *Due Process Clause of the Fourteenth Amendment*. See *Aultman v. Dept. of Corrections, 686 A.2d 40, 42-42 (Pa. Commw. Ct. 1996)*, aff'd *549 Pa. 577, 701 A.2d 1359 (Pa. 1997)*; *McCoy v. Chesney, 1996 U.S. Dist. LEXIS 3172, 1996 WL 119990*, **2-3 (E.D.Pa. Mar. 18, 1996). Additionally, we have held that a state inmate does not have a liberty or property interest in prison employment. [**4] *Bryan v. Werner, 516 F.2d 233, 240 (3d Cir. 1975)*. Therefore, Fidtler has failed to show an interest protected by the *Fourteenth Amendment*.

Moreover, we agree with the District Court that the new policy does not constitute an illegal *ex post facto* law. The Supreme Court has described an illegal *ex post facto* law as one "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham, 450 U.S. 24, 28, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981)* (quoting *Cummings v. Missouri, 71 U.S. 277, 18 L. Ed. 356 (1867))*. Further, the *ex post facto* clause only applies to laws that are penal in nature. *Collins v. Youngblood, 497 U.S. 37, 41, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990)*.

The enactment of the new policy is not punitive. It is meant only to encourage inmates to participate in educational programs. Courts give broad deference to prison administrators' policies that are "reasonably related to legitimate penological interests." *Turner v. Safley, 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)*. [**5] Moreover, the policy does not affect Fidtler's term of incarceration in any way. Hence, the policy does not fall within the ambit of an illegal *ex post facto* law.

Because we agree with the District Court that there is no due process violation and that the new policy is not an illegal *ex post facto* law, we will affirm the dismissal of Fidtler's action by the District Court.

By the Court,

/s/ Jane R. Roth

Circuit Judge