Westlaw.

392 Fed.Appx. 82, 2010 WL 3370765 (C.A.3 (Pa.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 392 Fed.Appx. 82, 2010 WL 3370765 (C.A.3 (Pa.)))

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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)

United States Court of Appeals,
Third Circuit.
John CARTER, Appellant
v.
Jeffrey BEARD, Secretary of Corrections, Department of Corrections; William Carnuche; Lance Couturier; William Harrison; Dr. Fred Maue; John McCullough; William Stickman.

No. 09-3807.
Submitted Pursuant to Third Circuit LAR 34.1(a)
Aug. 6, 2010.
Opinion filed Aug. 26, 2010.

Background: State prisoner commenced a civil rights action against various employees of the Pennsylvania Department of Corrections, alleging a violation of his due process rights. The United States District Court for the Middle District of Pennsylvania, William W. Caldwell, J., entered judgment against him, and prisoner appealed.

Holding: The Court of Appeals held that prisoner was deprived of an opportunity to develop a factual record on the issue of whether prisoner received adequate process during his confinement in administrative segregation.

Vacated and remanded.

West Headnotes

Federal Courts 170B ⇐947

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk943 Ordering New Trial or Other Proceeding
170Bk947 k. Further evidence, findings or conclusions. Most Cited Cases

Remand was warranted in prisoner's civil rights action; since prison defendants did not raise issue of whether prisoner received adequate process during his confinement in administrative segregation in their summary judgment motion, prisoner was deprived of an opportunity to develop a factual record on the issue, and thus no notice that the district court intended to consider dismissing his Section 1983 complaint on that basis. 42 U.S.C.A. § 1983.

***82** On Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Civil Action No. 05-cv-1949), District Judge: Honorable William W. Caldwell.John Carter, Rockview SCI, Bellefonte, PA, pro se.

Maryanne M. Lewis, Esq., Gwendolyn T. Mosley, Esq., Office of Attorney General of Pennsylvania, Harrisburg, PA, for Defendant-Appellee.

Before: FUENTES, GREENAWAY, JR. and VAN ANTWERPEN, Circuit Judges.

OPINION

PER CURIAM.

****1** John Carter appeals pro se from the United States District Court for the Middle***83** District of Pennsylvania's August 31, 2009 entry of judgment against him.[FN1] For the reasons that follow, we will vacate the District Court's order and remand for further proceedings consistent with this opinion.

FN1. Because Carter does not advance any argument concerning the District Court's May 19, 2006 order dismissing Secretary Jeffrey Beard as a defendant, we will not

review that order.

Carter is a Pennsylvania state prisoner. In 2005, he commenced an action under 42 U.S.C. § 1983 against various employees of the Pennsylvania Department of Corrections ("the defendants"). Carter alleged that his due process rights were violated because he was transferred into the prison's Special Management Unit ("SMU") without a hearing or the opportunity to challenge his indefinite placement in the SMU.

Carter was first placed in the SMU at the State Correctional Institution ("SCI")-Greene in October 2000 after accumulating more than 1,800 days of disciplinary time while housed in the general population and in the Restricted Housing Unit ("RHU"). In December 2001, Carter was transferred to SCI-Pittsburgh's RHU in administrative custody status, where he stayed until October 1, 2003. At that time, because he had exhibited disruptive behavior in the RHU, he was transferred back to the SCI-Greene SMU. Carter asserts, and the defendants do not argue otherwise, that his October 2003 transfer occurred without written notice or a hearing. From October 1, 2003 through March 2, 2007, Carter was moved between numerous prisons but always remained in the SMU. Then, in March 2007, he was transferred to the RHU at SCI-Smithfield because "he was considered to be an SMU failure."

The defendants moved for summary judgment, asserting that Carter's transfer to and confinement in the SMU did not trigger a protected liberty interest, and thus that his due process rights had not been implicated.[FN2] The defendants described the SMU program as an "opportunity" for the inmates to teach themselves discipline and pro-social skills so as to co-exist peacefully with people from other backgrounds. The SMU consists of five phases-phase five being the most restrictive and reserved for those in disciplinary custody. As the inmate progresses through the phases, he obtains access to privileges and services. According to the Inmate Handbook, an inmate in the SMU is reviewed by his Unit Team every thirty days. The Unit Team determines, by a "vote sheet," whether it is appropriate to move the inmate into the next phase of the SMU program. The Handbook indicates that because the SMU is a "behavioral driven program," the longer the inmate is "unsuccessful," "the longer [he or she] will remain in the program." It noted, however, that it is expected that inmates will complete all phases of the program within two years, and that if no progress is seen in the initial 12-to-18 months, then the Unit Team may transfer the inmate to a Long Term Segregation Unit or RHU.

> FN2. The defendants also argued that any claim based on events that occurred prior to September 21, 2003 was time-barred under Pennsylvania's two-year statute of limitation. *See* 42 PA. CONS.STAT. ANN. § 5524. Carter agreed that only his 2003 placement and subsequent stay in the SMU were at issue.

In response to the summary judgment motion, Carter filed a brief and submitted declarations from himself and one other inmate asserting that the Inmate Handbook does not accurately represent the SMU's actual conditions or review process. In addition to restrictions on telephone usage, visitation, and various prison services,***84** Carter described being confined to his cell (where the lights are allegedly never turned off) for 23 hours per day and alleged, among other things, that meals were withheld as a method of punishment.

****2** The District Court granted the defendants' summary judgment motion based on its conclusion that, even assuming that Carter's SMU confinement triggered a liberty interest, the monthly reviews satisfied the prison's due process obligations. This appeal followed.

II.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and review de novo the District Court's entry of summary judgment. *Pennsylvania Coal Ass'n v. Babbitt,* 63 F.3d 231, 236 (3d Cir.1995).

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A prisoner's procedural due process rights are violated when he is deprived of a legally cognizable liberty interest, which occurs when the prison "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). When considering whether segregated housing triggers a legally cognizable liberty interest, courts must consider: (1) the duration of the confinement, and (2) the conditions of that confinement in relation to other prison conditions. *Id.* at 486-87, 115 S.Ct. 2293. If there is a liberty interest that has been adversely affected by administrative segregation, we have held that the prison meets its due process obligations if it provides meaningful, periodic reviews of the prisoner's placement in segregation. *See Shoats v. Horn,* 213 F.3d 140, 145-47 (3d Cir.2000) (applying *Hewitt v. Helms,* 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), *overruled in part by, Sandin v. Conner,* 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995)).

Here, the District Court "assum[ed], without deciding, that the extended duration of Carter's SMU confinement ... did spark a due process interest." *See Shoats,* 213 F.3d at 144.[FN3] We will proceed on the same assumption and express no opinion as to whether a liberty interest was triggered.

> FN3. The District Court also determined that Carter's claim that he was entitled to a pre-transfer hearing was meritless. Carter does not challenge this decision, and we note that, under *Hewitt,* the prison was "obligated to engage only in an informal, nonadversary review of the information supporting respondent's administrative confinement, including whatever statement respondent wished to submit, within a reasonable time *after* confining him to administrative segregation." 459 U.S. at 472, 103 S.Ct. 864 (emphasis added).

The District Court then determined that the SMU's monthly reviews were sufficient to protect Carter's due process rights and that his declaration was inadequate to defeat summary judgment. *See id.* at 145-46 (discussing administrative segregation monthly reviews). Carter, however, had no opportunity to develop a factual record on the issue of whether he received adequate process (*i.e.,* meaningful periodic reviews during his confinement in administrative segregation) because he had no notice that the District Court intended to consider dismissing his complaint on this basis. *See* Fed.R.Civ.P. 56(c); *Bradley v. Pittsburgh Bd. of Educ.,* 913 F.2d 1064, 1069 (3d Cir.1990) (holding that a district court may sua sponte grant summary judgment only if it gives parties notice, so that the parties may "marshall [their] evidence to show that there is a genuine issue of material fact"). The defendants did not raise this issue in their summary judgment motion, and "[a] party has no obligation to respond to grounds that the moving party does not raise in a summary judgment motion." ***85** *Sealey v. Giltner,* 116 F.3d 47, 52 (2d Cir.1997); *see also Edwards v. Honeywell, Inc.,* 960 F.2d 673, 674 (7th Cir.1992). The defendants' current argument that Carter had notice of the issue by the mere fact that the Handbook (which stated that reviews occurred) was in the record is unavailing, and Carter must be given an opportunity to develop additional facts relevant to this analysis.[FN4]

> FN4. The failure to raise this ground below does not preclude the defendants from raising it on remand. If the record is fully developed on this issue, it may well be that summary judgment is appropriate.

****3** Based on the foregoing, we will vacate the District Court's judgment and remand for proceedings consistent with this opinion.

C.A.3 (Pa.),2010.
Carter v. Beard
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-2584

HENRY WASHINGTON

v.

EDWARD KLEM; JOSEPH PIAZZA;
JOHN MACK, Programs Coordinator;
DOUGHERTY, Property Room Supervisor

Henry Unseld Washington,

Appellant

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 01-CV-02432)
District Judge: Honorable John E. Jones, III

Submitted Under Third Circuit LAR 34.1(a)
March 25, 2004

Before: ALITO, McKEE and COWEN, Circuit Judges

(Filed: April 29, 2004)

OPINION

PER CURIAM

Henry Washington appeals from an order of the United States District Court for the Middle District of Pennsylvania, granting defendants' summary judgment motion concerning his claims that defendants violated his right of access to the courts, his right to the free exercise of religion, and his statutory rights under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). We will vacate the order to the extent that it granted summary judgment as to the RLUIPA claims, but will affirm as to all other claims.

Washington instituted the action in the District Court by filing a "Memorandum of Law in Support of a Motion for a TRO and a Preliminary Injunction," claiming that his right to free exercise of religion and rights under RLUIPA had been violated when prison officials confiscated his religious materials and threatened to destroy them if he did not arrange to have them mailed out of the institution. Washington alleged that he should have been allowed to keep all of his books in his cell, as he could fit them all in his locker. The Court denied preliminary relief, finding that in the meantime, Washington's books had been mailed to his mother, and were thus not in danger of being destroyed.

Thereafter, Washington filed a motion for default judgment. The Court denied his motion, noting that no complaint had been served on defendants, but allowed him 20 days to file an amended complaint "which amended complaint shall set forth any federal claims, other than Plaintiff's previously dismissed request for a temporary restraining

order and preliminary injunction, which Plaintiff desires to assert against the named Defendants." Supp. App. at 28A. Washington filed an amended complaint, raising primarily a claim that defendants violated his right of access to the courts by confiscating or destroying his legal materials. The complaint does, however, refer in passing to defendants confiscating or destroying his religious materials.

The defendants filed a motion to dismiss, or in the alternative, for summary judgment, addressing only the access to the courts claims. Washington responded with an opposition to the motion. As both parties submitted materials outside the pleadings, the District Court construed the defendants' motion as one for summary judgment.[1]

The District Court found that Washington had a sincerely held religious belief that books are necessary to enable him to fulfill his religious missionary work. Thus, he had a constitutionally protected interest in access to his religious materials. However, the Court held that the prison's regulation refusing Washington permission to keep more than ten books in his cell was "reasonably related to legitimate penological interests," and was thus constitutional under the familiar four-part test of Turner v. Safley, 482 U.S. 78, 89 (1986). We agree, for the reasons stated by the District Court. We further agree that

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[1] Appellees argue that the District Court should not have ruled on the religious claims, as they were not part of any "complaint." However, Washington did mention the religious claims briefly in his amended complaint, and those claims were fleshed out in his initial motion for a TRO. Thus, the appellees were on notice of those claims, and were not prejudiced when the Court chose to address the claims. Given Washington's pro se status, we find that the District Court did not abuse its discretion in addressing the religious claims.

Washington's access to the courts claim fails because he did not show the requisite actual injury.

However, we cannot agree that the District Court properly dismissed Washington's RLUIPA claim. The District Court dismissed Washington's RLUIPA claim because he had not shown "that SCI-Retreat is an institution receiving federal funds." While receipt of federal funds is a prerequisite for application of RLUIPA, Washington had no notice that the issue of federal funding would be disputed. Washington argues that pursuant to Fed. R. Civ. P. 8(a)(2), his complaint only needed to contain "a short and plain statement of the claim," and that he did not need to prove federal funding at that stage. We agree; but a party claiming violation of RLUIPA would normally need to prove federal funding by the summary judgment stage. Here, however, the defendants did not address the religious claims in their summary judgment motion. Thus, Washington had no reason to believe that defendants would dispute that SCI-Retreat receives federal funding. Given the unique procedural history of this case, we believe it was error for the District Court to dismiss the RLUIPA claim for that reason, particularly because it appears that Washington will be able to establish the fact easily. See, e.g., Williams v. Bitner, 285 F. Supp. 2d 593, 603 (M.D. Pa. 2003) ("The Pennsylvania DOC receives approximately $202.6 million per year in federal aid."); see also Lindell v. McCallum, No. 03-1550, 2003 WL 22937729, *2-*3 (7th Cir. 2003) ("The Wisconsin prison system receives federal funding, [citing Charles v. Verhagen, 348 F.3d 601, 605 (7th Cir.2003)], so to state

a claim under RLUIPA a Wisconsin prisoner need allege only that the prison has substantially burdened a religious belief, which [the plaintiff] has done.").

Assuming Washington can show federal funding, defendants will need to show that the ten-book limit regulation "(1) is in furtherance of a compelling state interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000cc-1(b). We cannot say that the regulation is valid under RLUIPA simply because it passes muster under the Turner test. As the District Court noted, the Turner test "is not a least restrictive test." Dist. Ct. Op. at 14-15. Thus, we remand so that the District Court can analyze the claim in the first instance. We express no opinion as to the merit of the RLUIPA claim.[2]

[2] Washington's motion for appointment of counsel is denied. Washington adequately presented the issues on appeal. However, Washington may wish to file a motion for appointment of counsel in the District Court on remand.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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FREQUENTLY ASKED QUESTIONS

Supporting Documents

Q: What type of advice can the Clerk's Office personnel give?

Clerk's Office staff cannot give "legal advice" and therefore cannot:

- Explain the meaning of a specific rule

- Make an interpretation of a case law

- Explain the result of taking or not taking an action in a case

- Answer whether jurisdiction is proper in a case

- Answer whether a complaint properly presents a claim

Clerk's Office staff can provide procedural information such as:

- Instruction on how to execute a task (number of copies, use of forms)

- Provide information as to compliance with Court policy

Clerk's Office staff cannot recommend a lawyer to you.

Q: What forms of payment are acceptable?

The Clerk's Office accepts payments by cash, money order, check and Visa, MasterCard, Discover, and American Express credit cards are accepted. We do not accept credit card payments for posting bail. Checks should be made payable to: Clerk, US District Court.

Q: Should discovery material be filed with the Clerk's Office?

No. Pursuant to Local Rule 5(b), discovery material, including initial disclosures made under Fed. R. Civ. P. 26(a) (1)-(3), shall not be filed except when needed in a particular pretrial or trial proceedings or upon order of the Court.

Q: How do I register a judgment from another district?

Complete a Certificate of Judgment, form AO451, and have it certified by the district court where the case originated. File the Certificate of Judgment, together with a certified copy of the judgment and a $ 39.00 filing fee. It will be assigned a new miscellaneous case number.

Q: How do I issue out-of-state deposition subpoenas?

A subpoena shall be issued out of the district court where it will be served – the top portion of the subpoena should reflect the name of the district where the deposition or production of documents will be made. The name and civil number of the case should be the same as the name and number where the case is actually pending. Counsel should sign and issue the subpoena as a officer of the Court.

Fed. R. Civ. P. 45 does not require that completed subpoenas be issued by the Clerk's Office nor used under the seal of the Court. Attorneys are authorized to issue subpoenas in the name of any court in which they are authorized to practice, and in the case of a deposition or production subpoena taking place in another district, in the name of the court where the deposition or production is to take place. It is not required that an attorney be a member of the bar in the district where the subpoena is issued as long as the attorney is authorized to practice in the district where the primary action is pending.

Q: How do I retrieve a file from the Federal Records Center?

Closed files are archived and shipped to the National Archives and Records Administration located at 380 Trapelo Road, in Waltham, Massachusetts. Files are stored in specific locations identified with an accession number and a box number.

A request for an archived file can be made with the Clerk's Office in writing, together with a retrieval fee of $45.00. NARA will generally send a closed file to the Clerk's Office within five to seven days of receipt of the retrieval request. You will be contacted when the file has been received, which will be kept in the Clerk's Office for one week.

Alternatively, records may be reviewed on site at the Waltham facility or copies of case documents may be mailed or faxed from NARA directly to the requestor. (Prior to calling NARA (781-663-0130), the requestor must obtain from the Clerk's Office the case file name and number, the accession number and the box location number).

Q: How does an attorney obtain a Certificate of Good Standing?

A request for a Certificate of Good Standing can be made to any member of the Clerk's Office staff. The fee is $15.00.

Q: What is the procedure for gaining admission pro hac vice?

Visiting counsel should not file a motion to appear pro hac vice in order to practice in this court. Local Rule 83.1 (c)(1)provides that visiting counsel need only to certify that he/she is admitted to practice in another federal court or the highest court of any State and that he/she is not currently under any order of disbarment, suspension or and other discipline. Any such visiting counsel must have at all time associated with him/her a member of the bar of this Court.

Q: What is the procedure for a Bill of Costs?

The prevailing party can seek reimbursement for those costs that are taxable under Title 28 U.S.C. Section 1920 by filing a completed bill of cost form (which is available on the court's web page), together with supporting memorandum and documentation, within 30 days of the expiration of the time for filing a timely appeal if no notice of appeal has been filed or within 30 days of the filing of the appellate mandate providing for the final disposition of any appeal to the Court of Appeals. Any response or objection shall be filed within 21 days after the filing of the Bill of Costs. The Clerk will review the filings and issue an Order on Bill of Costs. See Local Rule 54.3.

Q: What is the procedure for scheduling a disclosure proceeding?

Pursuant toFed. R. Civ. P. 69(a), the process to enforce a money judgment must be in accordance with the procedures set forth in Title 14 Maine Revised Statutes Annotated sections 3120-3163. A disclosure hearing, usually held before a magistrate judge, is conducted to determine if there are any assets of the judgment debtor that can be taken to satisfy the judgment.Counsel for the judgment creditor must contact the Clerk's Office and obtain a date for the disclosure hearing and must then prepare a disclosure subpoena for service. Service of the disclosure subpoena on the judgment debtor must be made at least 10 days prior to the disclosure hearing.