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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001904-MR

ADRIAN BROWN — APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 15-CI-00087

THE KENTUCKY DEPARTMENT OF CORRECTIONS and LADONNA THOMPSON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Adrian Brown (Brown) brings this *pro se* appeal of an order of the Lyon Circuit Court dismissing his petition for a declaration of rights.[1] He argues that the Kentucky Department of Corrections (KDOC) violates its internal regulations and due process by assigning inmates to an "unassigned" status.

[1] Brown's notice of appeal lists the Kentucky Department of Corrections as the only appellee. However, he lists LaDonna Thompson as a "respondent" in the style of his case.

Because we hold that the KDOC has not violated its internal regulations, and because Brown has no protected liberty interest in his employment status while incarcerated, we affirm.

Analysis

On appeal, Brown argues that the KDOC violates its internal regulations and due process by 1) assigning inmates to an "unassigned" status regarding their employment, when that status is not specifically listed in the Kentucky Correctional Policies and Procedures (CPP); 2) preventing inmates from attending hearings regarding that status; and 3) failing to provide sufficient employment opportunities for inmates.[2]

A summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. "[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991).

It is true that, as Brown has argued, the "unassigned" status appears nowhere in the CPP. CPP 18.13(II)(A)(2)(b) does state that the "General

[2] Brown also argues that the circuit court erred in apply the summary judgment standard. We review the sufficiency of the evidence separately for each issue that Brown has raised.

Population may include the following subcategories . . . Voluntarily Unassigned - an institution that permits an inmate to voluntarily elect not to work shall be assigned to this status as a means of regulating his activities. Essential services shall be provided with restrictions on certain privileges." In an affidavit filed with the circuit court, Warden Randy White distinguished a "voluntary unassigned" status from an "unassigned" status:

> "[U]nassigned" status is different from the "voluntary unassigned" status mentioned in CPP 18.13. While "voluntary unassigned" allows the inmate to make the decision not to work, "unassigned" is a decision made by the KSP classification staff with no input from the inmate. An inmate may be given "unassigned" status for several reasons, including a previous history of poor job performance while incarcerated and/or repeated trips to segregation. Specifically, "unassigned" status is often used once an inmate returns to the general population from administrative or disciplinary segregation as a way to track the inmate while determining possible assignments.
>
> "Unassigned" status provides KSP staff with a way to monitor the activities of certain inmates while they do not have a regular job or activity, and is necessary for the overall security of the staff, other inmates, and the institution as a whole. Inmates given "unassigned" status do have restricted privileges, but that acts as an empowerment tool for those inmates to get things together and progress to the point of being able to hold down a job, thus allowing them to enjoy increased privileges like more yard time.

Warden White's affidavit stated the following in regards to Brown's history regarding his "unassigned" status within the institution:

> Regarding Inmate Adrian Brown (#184749), he has been incarcerated at KSP on two different occasions – August 2009 through August 2010 and November 2012 through the present. Throughout his incarceration at KSP, he has held several jobs, including working in food service, sanitation, and recycling. He has also been written up for fifteen disciplinary violations and gone to segregation several times. He has been given "unassigned" status on eight different occasions, each time following his release from segregation. But every time Inmate Brown was placed on "unassigned" status at KSP, he was subsequently reassigned within days or weeks to an open job vacancy and given the chance to show that he could hold down a job and earn additional privileges. At present, Inmate Brown is assigned to the Clean Team.

The Justice & Public Safety Cabinet argues that because CPP 18.13(II)(A)(2)(b) contains permissive language, stating that the population "may include" the two listed categories, that the list was intended to be non-exhaustive. We agree. "Not only have Kentucky courts long construed 'may' to be a permissive word, rather than a mandatory word, but our legislature has given guidance in this regard. When considering the construction of statutes, KRS 446.010(20) provides that 'may' is permissive, and 'shall' is mandatory." *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000). "The same rules of construction or interpretation that apply to statutes also apply to administrative regulations." *Marksberry v. Chandler*, 126 S.W.3d 747, 753 (Ky. App. 2003) (footnote omitted). The language used in CPP 18.13(II)(A)(2)(b) stands in direct contrast to CPP 18.13(II)(A), which provides that "[t]he population categories recognized by Corrections shall be Orientation, General Population,

Honor Status, and Special Management." Although the CPP mandates that certain population categories must be maintained throughout prisons in Kentucky, the CPP does not require prisons to maintain certain classifications within those categories. It merely imbues individual prisons with the authority to create different classes of inmates within the appropriate categories.

Brown also contends that the KDOC has violated its regulations regarding attendance in their meetings. CPP 18.1(II)(D)(4) provides that "[t]he inmate shall attend the Classification Committee meeting regarding his custody level in order to present any evidence or testimony to ensure an appropriate classification[.]" As the appellee correctly points out, however, Brown did not raise this allegation in his complaint. A party "may not escape summary judgment by raising allegations which he might have made in his complaint but did not." *Davidson v. Commonwealth, Dep't of Military Affairs*, 152 S.W.3d 247, 253 (Ky. App. 2004).[3] That is precisely what has occurred in the present case; therefore, we decline to address this issue.

Brown has also alleged that the inmates within the Kentucky penal system do not have sufficient job opportunities available to them. This allegation, however, is unsupported by the record. The only proof in the record on this point, again, was provided by Warden White, who stated that "[a]t this time, KSP has a

[3] The KDOC transformed its motion to dismiss into a motion for summary judgment by attaching an affidavit to it. "[A]lthough DAV tendered its motion to dismiss pursuant to CR 12, it supplemented its motion with affidavits and other matters outside the pleadings. The motion to dismiss effectively became one for summary judgment, therefore, and we shall fashion our review accordingly." *Kreate v. Disabled Am. Veterans*, 33 S.W.3d 176, 178 (Ky. App. 2000).

sufficient number of jobs for the inmates incarcerated at the institution. If inmates want to work, have a decent employment history, and are staying out of trouble and segregation, they will have a job." Because Brown has failed to controvert the proof in the record provided by the appellee, the trial court did not err in granting summary judgment on this issue.

We similarly find Brown has no constitutional claim. Our Supreme Court has explicitly held that "so long as the conditions or the degree of confinement to which the prisoner is subjected do not exceed the sentence which was imposed and are not otherwise in violation of the Constitution, the due process clause of the Fourteenth Amendment does not subject an inmate's treatment by prison authorities to judicial oversight." *Mahoney v. Carter*, 938 S.W.2d 575, 576 (Ky. 1997).

In *Mahoney*, our Supreme Court held that inmates did not have a protected liberty interest in being subject to a particular security classification. *Id.* at 577. The *Mahoney* Court noted that "[u]nlike persons who are free in society, persons who are lawfully incarcerated have only the narrowest range of protected liberty interests." *Id.* at 576. Our Supreme Court relied upon the United States Supreme Court's decision in *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989), which held that a

> [A] State creates a protected liberty interest by placing substantive limitations on official discretion. A State may do this in a number of ways. Neither the drafting of regulations nor their interpretation can be reduced to an exact science. Our past decisions suggest, however, that

> the most common manner in which a State creates a liberty interest is by establishing substantive predicates to govern official decision-making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

Id., 490 U.S. at 462 (citations and internal quotation marks omitted). The regulations in the present case do not provide any governance as to substantive decision-making, as the regulations do not mandate that inmates be placed in any particular category within a prison. We hold that Brown does not have a liberty interest in a particular employment status; this is consistent with dicta in a past case by this Court:

> [W]e note that even if Crum receives no compensation for his inmate employment, there is no constitutional violation. "An inmate has no constitutional right to a specific educational or vocational program in prison.... It is well settled that an inmate has no constitutional right to be rehabilitated." *Archer v. Reno,* 877 F.Supp. 372, 377 (E.D.Ky.1995) (citations omitted). Incarceration brings about "diminished liberties." *Preston v. Ford,* 378 F.Supp. 729, 730 (D.C.Ky.1974). Among the liberties diminished are the rights to "participation in a particular prison job, ... or payment for work while incarcerated." *Id.* (Internal citation omitted; emphasis supplied).

Commonwealth v. Crum, 250 S.W.3d 347, 351 (Ky. App. 2008) (emphasis removed).

Brown has also alleged that the KDOC was without authority to promulgate the regulations in this case. Brown premises this argument, however, on the assumption that the practices currently in place violate the KDOC's internal

regulations. As we hold that no violations of the CPP occurred, we decline to address this argument.

Because Brown has failed to allege any grounds for reversal under statutory law, the CPP or the Constitution, we find that the trial court did not err in dismissing Brown's petition for a declaration of rights.

Conclusion

In sum, we hold that the circuit court did not err when it dismissed Brown's claim that it was error assigning him to the "unassigned" employment status. No violation of the CPP or the Constitution occurred. The Lyon Circuit Court's order granting summary judgment is therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

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