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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-00969-MR

MARK CROSSLAND

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 17-CI-00420

KENTUCKY DEPARTMENT
OF CORRECTIONS;
RODNEY BALLARD, KDOC;
SCOTT JORDAN, LLCC; AND
CATHY BUCK, LLCC

APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND
REMANDING

** ** * ** * **

BEFORE: COMBS, D. LAMBERT, AND SMALLWOOD,¹ JUDGES.

¹ Judge Gene Smallwood concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

COMBS, JUDGE: Mark Crossland appeals from the order of the Oldham Circuit Court dismissing his declaratory judgment action and tort claims. After our review, we affirm in part, vacate in part, and remand.

Crossland is a state prisoner currently housed at the Kentucky State Penitentiary, a “supermax” facility near Eddyville. The events underlying Crossland’s petition and complaint occurred while he was housed at the Luther Luckett Correctional Complex (Luther Luckett), a minimum- and medium-security facility near La Grange.

In his petition, Crossland alleges that on February 8, 2017, Luther Luckett’s Grievance Coordinator, Cathy Buck, verbally abused him and threatened to have him placed in segregation and transferred to another facility for filing “such a grievance.” We are unable to determine which of Crossland’s multiple grievances allegedly prompted the conflict between Buck and Crossland. Nevertheless, the record reflects that Scott Jordan, Luther Luckett’s Warden, placed Crossland on a grievance restriction as of February 8, 2017. This action was taken pursuant to Department of Corrections policies and procedures following a finding that Crossland had abused the grievance process by filing numerous frivolous or harassing grievances.

On February 8, 2017, Crossland filed an internal grievance against Buck. In the grievance, Crossland alleged that Buck retaliated against him by

charging him with abuse of the grievance mechanism in violation of the First Amendment to the U.S. Constitution. Jordan considered Crossland's grievance concerning his (Crossland's) interaction with Buck and denied Crossland any relief. Crossland appealed this decision.

In his grievance appeal, Crossland again alleged that Buck had violated his rights under the First Amendment by retaliating against him for filing grievances. In March 2017, Rodney Ballard, Kentucky Department of Corrections Commissioner, reviewed the warden's decision. Ballard decided that the facility had properly addressed the grievance filed by Crossland concerning the February 8 dispute with Buck. On May 8, 2017, Crossland was transferred from Luther Luckett to the Kentucky State Penitentiary.

On June 16, 2017, Crossland, *pro se*, filed a Petition for declaratory judgment pursuant to KRS² 418.040 and joined with it a tort action against Ballard, Jordan, and Buck -- each in an individual and representative capacity. CR³ 8.06 requires as follows: "all pleadings shall be so construed as to do substantial justice." In accordance with that rule, we have attempted to construe the *pro se* petition so as to do substantial justice.

² Kentucky Revised Statutes (KRS).

³ Kentucky Rules of Civil Procedure (CR).

Crossland alleged that his constitutional rights were violated during the verbal contest that he had with Buck. He contended that Buck berated and verbally abused him for several minutes in violation of the protections afforded to him by the provisions of the Eighth and Fourteenth Amendments to the U.S. Constitution. Crossland also alleged that Ballard and Jordan violated his constitutional rights by failing to respond properly to the grievance he had filed concerning that interaction. Next, Crossland alleged that he did not receive constitutional due process with respect to his transfer from Luther Luckett to the more restrictive Kentucky State Penitentiary because he had incurred no disciplinary reports while housed at Luther Luckett. Finally, Crossland contended that the transfer was made in retaliation for the grievances that he had filed in the exercise of his rights under the First Amendment. He sought to recover money damages.

In lieu of an answer, the defendants responded with a motion to dismiss pursuant to the provisions of CR 12.02(f). In an order entered on May 25, 2018, the Oldham Circuit Court dismissed the petition and complaint for Crossland's failure to state a claim upon which relief could be granted. This appeal followed.

A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the factual allegations included in the complaint. *Fox v.*

Grayson, 317 S.W.3d 1 (Ky. 2010). Since the motion presents a pure question of law, we need not defer to the trial court's determinations but rather must review *de novo*. *Id.* (citing *Morgan v. Bird*, 289 S.W.3d 222 (Ky. App. 2009)).

Crossland argues that the circuit court erred by dismissing his complaint and petition for declaration of rights. He contends that the court ignored his right to be free from the "unjust actions" of prison staff and the warden and by failing to conclude that his constitutional rights were violated when he was transferred to the Kentucky State Penitentiary. We agree – but only in part.

"Not every unpleasant experience a prisoner might endure while incarcerated constitutes cruel and unusual punishment within the meaning of the Eighth Amendment." *Ivey v. Wilson*, 832 F.2d 950, 954 (6th Cir. 1987).

Verbal abuse of inmates by prison staff -- without more -- does not amount to violation of constitutional rights. *Id.* While Buck may have used language that was unpleasant and unprofessional during her encounter with Crossland, the remarks were insufficient to rise to the level of a constitutional violation.

Consequently, the trial court did not err by concluding that Crossland's complaint against prison officials for verbal abuse failed to state a claim for which relief could be granted.

Nor did the trial court err by concluding that the complaint failed to state a claim for which relief could be granted with respect to the allegation that

Crossland was denied due process of law. Despite his assertions, neither the Due Process Clause nor Kentucky prison regulations afford Crossland a protected liberty interest that would entitle him to the procedural protections to which he contends he is entitled. *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

However, a different result obtains with respect to Crossland's contention that prison officials retaliated against him for having filed a grievance. An allegation that officials retaliated against an inmate for the exercise of a constitutionally protected right states a cognizable claim. *See Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001).

Crossland alleges that Buck threatened to have him transferred as a consequence of his decision to file a grievance and that he had, in fact, been transferred to a super maximum-security facility with adverse consequences for him. In light of the current procedural posture of the litigation, we are compelled to take those allegations of fact as true.

Crossland does not have a federal due process interest in accessing the grievance procedures voluntarily established by the Commonwealth. *See Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994)(concluding that "the Constitution creates no entitlement to grievance procedures or access to any such procedure voluntarily established by a state"); *Geiger v. Jowers*, 404 F.3d 371 (5th Cir. 2005) (holding

no liberty interest in grievance procedure); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988) (concluding that inmates have “no legitimate claim of entitlement to a grievance procedure”); *Bingham v. Thomas*, 654 F.3d 1171, 1177 (11th Cir. 2011) (holding that inmates have “no constitutionally-protected liberty interest in access to [grievance] procedure”). Nevertheless, we are persuaded that he does have a First Amendment right to be free from retaliation once he has filed a grievance in accordance with established prison policies and procedures. *See Booker v. South Carolina Dep’t of Corrections*, 855 F.3d 533 (4th Cir. 2017).

“[P]risons are not beyond the reach of the Constitution.” *Hudson v. Palmer*, 468 U.S. 517, 523, 104 S. Ct. 3194, 3198, 82 L. Ed. 2d 393 (1984).

Inmates are accorded those rights “not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.” *Id.*

“Like others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.” *Id.* (citing *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969)). We believe that there exists a sufficiently close or analogous relationship between an inmate’s filing a grievance and his filing a legal action. Thus, we agree that similar treatment is warranted. *See Booker, supra*. Consequently, while Crossland has no constitutional right to be housed in any particular institution, prison officials cannot transfer him as *punishment or as a deterrent* merely for

exercising his right to petition the government for redress as guaranteed by the First Amendment.

Since Crossland's claims of retaliation implicate a constitutional right, we are compelled to vacate the trial court's dismissal of this portion of his petition. Without commenting on Crossland's ability to succeed on his retaliation claim, we conclude that he has stated a cognizable claim for relief.

Therefore, we affirm in part and vacate in part the trial court's order dismissing. We remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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