

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

MICHAEL OKO,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2010-A-0002
LAKE ERIE CORRECTIONAL INSTITUTION, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2007 CV 57.

Judgment: Affirmed.

Michael Oko, pro se, PID# 500-505, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (For Plaintiff-Appellant).

Timothy T. Reid and Jason M. St. George, Norchi Forbes LLC, Commerce park IV, 23240 Chagrin Boulevard, #600, Cleveland, OH 44122 (For Defendants-Appellees).

DIANE V. GRENDALL, J.

{¶1} Plaintiff-appellant, Michael Oko, appeals the Judgment Entry of the Ashtabula County Court of Common Pleas, dismissing his civil complaint filed against defendants-appellees, Lake Erie Correctional Institution, Sergeant Linda Obershaw, and

Sergeant Denise Cox, for failure to state a claim upon which relief can be granted. For the following reasons, we affirm the decision of the court below.

{¶2} Oko is currently serving a prison sentence at Lake Erie Correctional Institution, in Conneaut, Ohio, for various convictions of Drug Trafficking, Possession of Drugs, and Possession of Criminal Tools. See *State v. Oko*, 8th Dist. No. 87539, 2007-Ohio-538.

{¶3} On January 12, 2007, Oko filed a complaint in the Ashtabula County Court of Common Pleas, denominated Administrative Appeals from the Rules Infraction Board Lake Erie Correctional Institution (LaECI) Agent of ODRC. Oko alleged that his Due Process rights were violated in the course of two proceedings against him by the Rules Infraction Board. In substance, Oko's complaint seeks damages for the deprivation of his constitutional rights and, thus, constitutes an action under 42 U.S.C. 1983. *Monroe v. Pape* (1961), 365 U.S. 167, 172-183.

{¶4} The complaint alleged that, on October 3, 2006, the Rules Infraction Board found Oko had violated Rule 21 ("Disobedience of a direct order") and Rule 26 ("Disrespect to an officer, staff member, visitor or other inmate") of the Inmate Rules of Conduct, and placed him "in segregation and fourteen days bunk restriction."

{¶5} The complaint further alleged that, on October 5, 2006, the Rules Infraction Board found Oko had violated Rule 39 ("Unauthorized possession, manufacture, or consumption of drugs or any intoxicating substance"), and placed him "in segregation *** 15 days" and required him to participate in "a mandatory substance abuse program upon release from segregation."

{¶6} On April 20, 2007, the trial court granted the Defendants' Motion for Judgment on the Pleadings, and dismissed the complaint on the grounds that Oko failed to exhaust available administrative remedies, as required by the Prison Reform Litigation Act. 42 U.S.C. §1997e(a).

{¶7} Oko appealed the trial court's April 20, 2007 Judgment Entry to this court.

{¶8} On February 29, 2008, this court affirmed the trial court's Judgment with respect to claims arising out of the October 5, 2006 Rules Infraction Board's decision, and reversed with respect to claims arising out of the October 3, 2006 Rules Infraction Board's decision. *Oko v. Lake Erie Correctional Institution*, 175 Ohio App.3d 341, 2008-Ohio-835, at ¶30.

{¶9} On October 20, 2008, the defendants filed a Motion to Dismiss, pursuant to Civ.R. 12(B)(6).

{¶10} On December 8, 2009, the trial court issued a Judgment Entry, granting the Motion to Dismiss on the grounds that Oko "cannot prove any set of facts which would show a denial of due process concerning the October 3, 2006, decision of the [Rules Infraction Board]." Moreover, the court noted that Oko "failed to comply with the procedural requirements of R.C. §2969.25(A), regarding a prison inmate who commences a civil action against a government entity or employee." The court also granted Oko leave to file a First Amended Complaint.

{¶11} On January 7, 2010, Oko filed his Notice of Appeal.

{¶12} On February 23, 2010, Oko filed his First Amended Complaint.

{¶13} On appeal, Oko raises the following assignments of error:

{¶14} “[1.] The trial court abused its discretion in partially dismissing **with prejudice** the complaint without opportunity for discovery and meaningful adjudication.”

{¶15} “[2.] The trial court erred in concluding that first, second, and third defendants are public officers subject to R.C. 2969.”¹

{¶16} “In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ. R. 12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.” *O’Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, at syllabus.

{¶17} The trial court’s judgment on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Hall v. Watkins*, 11th Dist. No. 2006-T-0034, 2007-Ohio-209, at ¶18. On appeal, as in the trial court, “[t]he factual allegations of the complaint and items properly incorporated therein must be accepted as true,” and “the plaintiff must be afforded all reasonable inferences possibly derived therefrom.” *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 1995-Ohio-187, citing *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.

{¶18} Section 1983 of the United States Code “provides a remedy to persons whose federal rights have been violated by governmental officials.” *1946 St. Clair Corp. v. Cleveland* (1990), 49 Ohio St.3d 33, 34 (citation omitted). “To establish such a claim, two elements are required: (1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of

1. In a Reply Brief, filed on April 1, 2010, Oko raised three additional and/or alternative assignments of error. These are not properly before us. “Pursuant to App.R. 16(C), reply briefs are only to be used to rebut arguments raised in the appellee’s brief. An appellant may not use a reply brief to raise new issues or assignments of error.” *Durham v. Pike Cty. Joint Vocational School*, 150 Ohio App.3d 148, 2002-Ohio-6300, at ¶12, citing *Sheppard v. Mack* (1980), 68 Ohio App.2d 95, 97, fn. 1; *State v. Shaffer*, 11th Dist. No. 2002-P-0133, 2004-Ohio-336, at ¶39 (citation omitted).

rights, privileges or immunities secured by the Constitution or laws of the United States.”
Id. (citation omitted).

{¶19} The complaint filed by Oko provides as follows with respect to the October 3, 2006 Rules Infraction Board decision:

{¶20} 7. On October 1, 2006, [Oko] had went to chow hall for lunch, accompanied by a friend, who is also an incarcerated person (I.P.). [Oko] picked a tray and one piece of napkin and the service staff member asked that the piece of napkin be returned to him. The staff member, who name is Mr. Jones thought that [Oko] had taken two pieces of napkin.

{¶21} 8. [Oko] returned the one piece of napkin to Mr. Jones by placing it at the service desk to avoid physical contact with staff.

{¶22} 9. On October 2, 2006, [Oko] was read a conduct report by a unit sgt., Sergeant Cox, on claim of failure to carry [out] a direct order and disrespect. [Oko] pled not guilty. The unit sgt. bound the ticket to [the Rules Infraction Board].

{¶23} 10. On October 3, 2006, [Oko] was ordered to appear at the [Rules Infraction Board] hearing. At the Board Hearing is unit staff Sergeant Cox, hearing officer Sergeant Obershaw, second defendant and “Jane Doe.” [Oko] called witness on his behalf[;] the charging was not called. [Sic.] In less than four minutes, the board found [Oko] guilty of disobeying a direct order and disrespect and [he] was placed in segregation and fourteen days bunk restriction.

{¶24} 11. On October 4, 2006, [Oko] was released from segregation and approximately thirty minutes later, [Oko] was handcuffed and returned to the segregation without explanation. Four hours later, [Oko] was informed that he has been placed in the segregation for stealing a prescriptive medication and abusing medication.

{¶25} ***

{¶26} 26. That the conduct of the Defendants *** violates [Oko’s] ODRC policy [sic] and United States Constitutional due process.

{¶27} Accepting these allegations as true, Oko has failed to state a claim for which relief may be granted under Section 1983. Oko has failed to identify a federal right, privilege or immunity of which he was deprived by the defendants’ conduct. Alternatively, Oko has failed to identify the conduct which deprived him an alleged right.

{¶28} In *Sandin v. Conner* (1995), 515 U.S. 472, the United States Supreme Court rejected the argument that “any state action taken for a punitive reason encroaches upon a [prisoner’s] liberty interest under the Due Process Clause.” *Id.* at 484. Although “prisoners do not shed all constitutional rights at the prison gate, *** ‘lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.’” *Id.* at 485 (citation omitted). “Discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law.” *Id.*

{¶29} In *Sandin*, the Supreme Court specifically held that “discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest.” *Id.* at 486. Applying this holding to the facts as alleged in Oko’s complaint, fourteen days of segregation/bunk restriction does not deprive Oko of a federally protected right under the Due Process Clause. Cf. *David v. Lake Erie Correctional Institution*, 11th Dist. No. 2009-A-0022, 2010-Ohio-1271, at ¶28 (the prisoner’s “placement in administrative segregation for 15 days and the wearing of a uniform in a different color does not present the type of ‘atypical and significant hardship’ to constitute a deprivation of a constitutionally protected interest triggering due process protections”) (citation omitted); *State ex rel. Larkins v. Wilkinson*, 79 Ohio St.3d 477, 479, 1997-Ohio-139 (“[a]bsent evidence that the challenged institutional action would affect the inmate’s duration of confinement, an inmate has no liberty interest in being free of disciplinary or administrative segregation

because such segregation does not impose an atypical and significant hardship on the inmate”).

{¶30} The first assignment of error is without merit.

{¶31} In his second assignment of error, Oko argues the trial court erred by holding that the requirements of R.C. 2969.25(A) applied to his suit against Lake Erie Correctional Institution. Oko relies upon this court’s decision in *Anthony v. Lake Erie Correctional Institution*, 11th Dist. No. 2005-A-0009, 2006-Ohio-742, for the proposition that Lake Erie Correctional, being a privately operated facility, is not a “government entity” for the purposes of R.C. 2969.25(A). *Id.* at ¶22.

{¶32} Defendants urge this court to review and overturn its decision in *Anthony*.

{¶33} Given our disposition of the first assignment of error, the issue of whether Oko was required to comply with the requirements of R.C. 2969.25(A) is moot. App.R. 12(A)(1)(c) (a court of appeals shall decide each assignment of error “[u]nless an assignment of error is made moot by a ruling on another assignment of error”).

{¶34} The second assignment of error is without merit.

{¶35} For the foregoing reasons, the Judgment of the Ashtabula County Court of Common Pleas, dismissing Oko’s civil complaint for failure to state a claim upon which relief can be granted, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O’TOOLE, J., concurs in judgment only.