

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Robert Martin, and all similarly situated,	:	
	:	
Relators,	:	
	:	
v.	:	No. 09AP-329
	:	
Terry Collins, Director for Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	

D E C I S I O N

Rendered on September 24, 2009

Robert Martin, pro se.

Richard Cordray, Attorney General, and *Lawrence H. Babich*,
for respondent.

IN MANDAMUS

SADLER, J.

{¶1} Relator, Robert Martin ("relator"), an inmate incarcerated at the London Correctional Institution, commenced this original action requesting this court to issue a writ of mandamus ordering respondent, Terry Collins, Director of the Ohio Department of Rehabilitation and Correction ("respondent"), to permit relator and fellow inmates incarcerated prior to March 1, 2009, the right to smoke and use tobacco products while incarcerated. Respondent filed a motion for judgment on the pleadings asserting that

relator has failed to comply with mandatory filing requirements set forth in R.C. 2969.25(A) and (C) and that relator has failed to state a claim upon which relief can be granted as he has no vested or constitutional right to use tobacco products. Relator did not respond to respondent's motion.

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who considered the action on its merits and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate recommended dismissal of relator's complaint. First, the magistrate concluded that R.C. 3794.01 through 3794.04 do not grant relator a clear legal right to smoke and determined that respondent is entitled to judgment as a matter of law. Additionally, the magistrate determined relator failed to comply with the mandatory filing requirements of R.C. 2969.25 and recommended dismissal for such failure.

{¶3} No objections have been filed to the magistrate's decision.

{¶4} We observe that the magistrate's finding of fact in paragraph seven, *infra*, contains a typographical error, in that it states that respondent argued that relator had failed to comply with R.C. 2969.25(A)(c), which does not exist. Respondent's motion actually cites R.C. 2969.25(A) *and* (C). We correct this typographical error and adopt the balance of the magistrate's decision as our own, including the findings of fact and conclusions of law therein. In accordance with the magistrate's decision, respondent's motion for judgment on the pleadings is granted and this action is dismissed.

*Motion for judgment on the pleadings granted;
action dismissed.*

TYACK and CONNOR, JJ., concur.

A P P E N D I X

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and all similarly situated,	:	
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of Rehabilitation and Corrections,	:	
	:	
Respondent.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on May 21, 2009

Robert Martin, pro se.

*Richard Cordray, Attorney General, and Lawrence H. Babich,
for respondent.*

IN MANDAMUS
ON MOTION FOR JUDGMENT ON PLEADINGS

{¶5} Relator, Robert Martin, on behalf of himself and all others similarly situated, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Terry Collins, Director for Ohio Department of Rehabilitation and

Correction ("ODRC"), to permit him and fellow inmates incarcerated prior to March 1, 2009, the right to smoke.

Findings of Fact:

{¶6} 1. Relator is an inmate currently incarcerated at the London Correctional Institution. On April 1, 2009, relator filed the instant mandamus action arguing that, pursuant to R.C. 3794.01 through 3794.04, the Smoke Free Workplace Act, he has a vested right to be permitted to smoke and purchase tobacco products. Specifically, relator asserts that "[a]ll inmates are employees of respondent who is their employer" and "all outside areas encompassing state public buildings, i.e., state prisons, are exempt from secondhand tobacco smoke exposure bans." Further, relator contends that Ohio Adm.Code 5120-9-33(J), which deals with the rights of inmates to possess certain items of personal property, acts as a "grandfather clause" that permits him and other smokers to continue to use and possess tobacco products.

{¶7} 2. Respondent has filed a motion for judgment on the pleadings asserting that relator has failed to comply with the mandatory filing requirements of R.C. 2969.25(A)(c) as well as failed to state a claim upon which relief can be granted since he has no vested right or constitutional right to use tobacco products.

{¶8} 3. Relator has not filed a response; however, relator has filed a motion requesting a jury trial.

{¶9} 4. The matter is currently before the magistrate.

Conclusions of Law:

{¶10} Civ.R. 12(C) provides that, after the pleadings are closed but within such time as not to delay, any party may move for judgment on the pleadings. A Civ.R. 12(C)

motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted. *Whaley v. Franklin Cty. Bd. of Commrs.* (2001), 92 Ohio St.3d 574.

{¶11} A motion for judgment on the pleadings is to be granted when, after viewing the allegations and reasonable inferences therefrom in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *Brown v. Wood Cty. Bd. of Elections* (1992), 79 Ohio App.3d 474, citing *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161. A motion for judgment on the pleadings is specifically intended for resolving questions of law. *Friends of Ferguson v. Ohio Elections Comm.* (1997), 117 Ohio App.3d 332.

{¶12} For the following reasons, not only should respondent's motion be granted but sua sponte dismissal of relator's complaint is also appropriate.

{¶13} Relator asserts that R.C. 3794.01 through 3794.04 grants him the right to smoke while he is incarcerated at the London Correctional Institution. Relator asserts that he is an employee and that the outside areas of the prison are exempt from the requirements of the Smoke Free Workplace Act.

{¶14} "Employee" is defined in R.C. 3794.01(D) as follows: "[A] person who is employed by an employer, or who contracts with an employer or third person to perform services for an employer, or who otherwise performs services for an employer for compensation or for no compensation." Relator is not an employee of the Ohio Department of Rehabilitation and Correction. Relator is an inmate. Further, the statute does not confer employees a right to smoke.

{¶15} "Public place" is defined in R.C. 3794.01(B) as follows: "[A]n enclosed area to which the public is invited or in which the public is permitted and that is not a private residence." The outside areas of a prison are not places where the public is invited. In any case, the statute does not guarantee a right to smoke in public places.

{¶16} As respondent states in its motion, there is no clear legal right to smoke and relator has misconstrued the Smoke Free Workplace Act in an attempt to assert such a right. Further, relator's reliance on Ohio Adm.Code 5120-9-33, which deals with the right to possess certain items of personal property, is also misconstrued and has no relevance whatsoever to the use of tobacco products. After viewing the complaint and the allegations and reasonable inferences therefrom in the light most favorable to relator, the nonmoving party, it is this magistrate's conclusion that respondent is entitled to judgment as a matter of law.

{¶17} Furthermore, relator has not complied with the mandatory filing requirements of R.C. 2969.25. He has failed to file an affidavit listing each civil action or appeal of a civil action he has filed in the past five years and he has failed to attach the certified statement by the institutional cashier setting forth the balance on his account when he filed his affidavit of indigency. Compliance with the provisions of R.C. 2969.25 is mandatory and the failure to satisfy the statutory requirements is grounds for dismissal of the action. *State ex rel. Washington v. Ohio Adult Parole Auth.* (1999), 87 Ohio St.3d 258; *State ex rel. Zanders v. Ohio Parole Bd.* (1998), 82 Ohio St.3d 421; *State ex rel. Alford v. Winters* (1997), 80 Ohio St.3d 285.

{¶18} In response, relator asserts that the provisions of R.C. 2969.25 do not apply pursuant to R.C. 2969.21(B)(2). That particular section of the Ohio Revised Code provides:

"Civil action or appeal against a governmental entity or employee" does not include any civil action that an inmate commences against the state, a political subdivision, or an employee of the state or a political subdivision in the court of claims or the supreme court or an appeal of the judgment or order entered by the court of claims in a civil action of that nature, that an inmate files in a court of appeals or the supreme court.

{¶19} This action has not been filed in either the court of claims or the Supreme Court of Ohio and is not an appeal from a judgment entered by the court of claims. As such, the mandatory requirements of R.C. 2969.25 do apply.

{¶20} For the foregoing reasons, it is this magistrate's conclusion that this court should dismiss relator's complaint.

/S/ *Stephanie Bisca Brooks*
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).