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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002553-MR

ROBERT L. POLK APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 05-CI-00866

DOUG SAPP; VERTNER TAYLOR; JOHN REES; KENTUCKY DEPARTMENT OF CORRECTIONS; TOM CAMPBELL; DAVID JOHNSON; CLARK TAYLOR; RANDY ECKMAN; J. MICHAEL QUINLAN APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: Robert L. Polk ("Polk"), *pro se*, appeals from an order of the Franklin Circuit Court dismissing his claims against the Kentucky Department of Corrections ("DOC"), Doug Sapp (former commissioner), Vertner Taylor (former commissioner), Tom Campbell (former commissioner), John Rees (current commissioner), David Johnson (former DOC employee), Clark Taylor (current deputy warden of security at the

Kentucky State Reformatory), Randy Eckman (former warden of Lee Adjustment Center and employee of Corrections Corporation of America ("CCA")), and J. Michael Quinlan (chief operating officer of CCA) (collectively referred to as "Appellees"). No brief has been filed on behalf of any of the Appellees. Polk's complaint alleges violations by the Appellees of §§ 2, 25, 162, 253, and 254 of the Kentucky Constitution and the Thirteenth and Fourteenth Amendments to the United States Constitution. Specifically, Polk asserts that he was forced to do manual labor while an inmate at the Lee Adjustment Center ("LAC"), a privately owned and operated prison, for the benefit of LAC. Polk contends these actions constituted a violation of his constitutional rights when he was "leased" by the Commonwealth for labor to a private corporation for their profit. Polk asks this Court to reverse and remand his action to the trial court for a jury trial. The trial court granted Appellees' motion to dismiss. We affirm.

A motion to dismiss should only be granted if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). When ruling on the motion, the allegations in "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky.App. 1987). In making this decision, the trial court is not required to make any factual findings. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky.App. 2002). Therefore, the question is purely a matter

of law, *id.*, and the trial court's decision will be reviewed *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000).

Polk first argues that the trial court erred in failing to hold a hearing on this matter prior to entering an order granting Appellees' motion to dismiss. However, Polk filed the AOC-280 form indicating that the issue was ready for submission. Moreover, there is no indication in the record that Polk requested a hearing. Finally, Polk can show no prejudice as there are no material facts at issue in a motion to dismiss. A motion to dismiss is entirely one of law. Accordingly, we find no error.

Polk next argues that the trial court erred in finding that his claims for damages against the DOC were barred by sovereign immunity and his claims against the DOC officials were barred by official immunity. However, § 231 of the Kentucky Constitution prohibits the Commonwealth from being sued absent its consent. *Holloway Construction Co. v. Smith*, 683 S.W.2d 248 (Ky. 1984). Because the state has not consented, in the form of a waiver of sovereign immunity, the Commonwealth is immune from suit. *Wells v. Commonwealth, Department of Highways*, 384 S.W.2d 308 (Ky. 1964). Polk requests relief in the form of nominal and punitive damages. Here, governmental immunity precludes recovery of such damages against the DOC as it performs a governmental function. *Yanero v. Davis*, 65 S.W.3d 510, 518-20 (Ky. 2001).

While sovereign immunity does not apply to individuals, official immunity protects public officials sued in their official capacity when the agency that employs them is the real party in interest. *Id.* at 521-22. Polk's claims against Commissioner John Rees

and Warden Clark Taylor are clearly based on their status as officials of KOC. Thus, the claims are barred by official immunity. *Id*.

Polk's claims for declaratory relief are not barred. However, we agree with the trial court that the actions of the DOC and its officials are not constitutionally suspect. Section 254 of the Kentucky Constitution requires the Commonwealth to maintain control of the discipline and provide for all supplies and sanitary conditions of prisoners. KRS 197.500, *et seq*., permits the Commonwealth to contract with CCA. But the statutory scheme does not involve a total delegation of the responsibilities for the oversight of prisoners. While KRS 197.505(1) authorizes the Commonwealth to enter into contracts with private providers "to establish, operate, and manage adult correctional facilities," KRS 197.500 prohibits the Commonwealth from total delegation of power to private providers. The contract between the Commonwealth and CCA does not stray from the statute. In fact, under the contract between the Commonwealth and CCA, the Commonwealth retains extensive authority of the supervision, maintenance, and control of the inmates.

Polk also points to § 253 of the Kentucky Constitution, which provides that persons convicted of a felony within the Commonwealth "be confined at labor within the walls of the penitentiary." With the exception to public works and the limitations set on these jobs in § 253, the Attorney General interpreted § 253 as prohibiting prisoners from employment outside of the institution. *See* OAG 84-411. Polk suggests that inmate labor

performed at LAC actually constitutes employment outside of a legal correctional institution.

But as noted by the trial court, "[a]s inmates are required to labor, pursuant to Section 253 of the Kentucky Constitution, and the Commonwealth has the authority to enter into contract with private vendors with the operation of prisons within the Commonwealth, it is constitutionally permissible to require inmates to perform work within the walls of LAC." Here, the jobs at issue are ones performed by inmates within the institution. Therefore, the labor performed by inmates at LAC does not violate § 253 of the Kentucky Constitution.

Polk next argues that the Thirteenth Amendment to the United States Constitution forbids involuntary servitude. Polk argues his right under the provision is violated through the actions of Appellees making him labor at LAC. This argument must also fail. There is no authority that holds that requiring inmates to perform labor within privately operated institutions violates the Thirteenth Amendment. In fact, "the Thirteenth Amendment, which forbids involuntary servitude, has an express exception for persons in prison pursuant to conviction for a crime." *Pischke v. Litscher*, 178 F.3d 497, 500 (7th Cir. 1999). Although it has not directly been ruled on in Kentucky, other jurisdictions have consistently held that confining an inmate in "a prison owned by a private firm rather than by a government" did not violate the Thirteenth Amendment. *Id.* *See Lambert v. Sullivan*, 35 F. Supp. 2d 1131 (E.D. Wis. 1999) and *State v. Lankford*, 51 S.W.3d 212, 218 (Tenn. Crim. App. 2001). We find no reason or authority supporting

the position that the Kentucky Constitution would require a different result. Polk has not demonstrated that he has been unconstitutionally subjected to involuntary servitude.

Finally, Polk fails to put forth any facts that would support his argument that Appellees have violated his rights under the Fourteenth Amendment to the United States Constitution. Further, inmates do not have liberty interests that require due process protections based on their custody level in the prison or where they are housed. *Mahoney v. Carter*, 938 S.W.2d 575, 576 (Ky. 1997). Finding no violation of the United States Constitution by Appellees with regard to their contract with CCA pursuant to KRS 197.500, Polk's argument fails.

Accordingly, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert L. Polk
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No briefs filed for Appellees.