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United States District Court, D. Kansas.
 Nathaniel W. ELLIBEE, Plaintiff,

v.

Charles E. SIMMONS, Defendant.
No. 03-3194-JWL.

Aug. 4, 2005.

Nathaniel W. Ellibee, El Dorado, KS, pro se.
 Brian D. Sheern, Kansas Attorney General, Topeka,
 KS, for Defendant.

MEMORANDUM & ORDER

LUNGSTRUM, J.

*1 Plaintiff, a prisoner in the custody of the State of Kansas, has filed this lawsuit against defendant, the former Secretary of Corrections for the Kansas Department of Corrections, ^{FN1} alleging that the deduction of 5 percent of plaintiff's wages earned from his private prison employment for crime victim compensation violates plaintiff's constitutional rights. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983. This matter is presently before the court on the parties' cross-motions for summary judgment. ^{FN2} As explained in more detail below, plaintiff's motion is denied, defendant's motion is granted and plaintiff's complaint is dismissed in its entirety.

FN1. Plaintiff has sued Mr. Simmons in both his official and individual capacities. Plaintiff's claims for monetary damages and a declaratory judgment against defendant in his official capacity are barred by the Eleventh Amendment. See *Meiners v. University of Kansas*, 359 F.3d 1222, 1232 (10th Cir.2004); *White v. State of Colorado*, 82 F.3d 364, 366 (10th

Cir.1996). His claims for injunctive relief against defendant in his official capacity, however, are not barred by the Eleventh Amendment. *Meiners*, 359 F.3d at 1232.

FN2. Two additional motions are also pending before the court—plaintiff's motion to toll the time period for plaintiff to file a response to defendant's motion for summary judgment and plaintiff's motion for oral argument on the motions for summary judgment. Plaintiff's motion to toll the time period for him to respond to defendant's motion for summary judgment is moot. In his motion, plaintiff requested that he not be required to file a response to defendant's motion until the magistrate judge ruled on his pending motion to compel discovery. At the time he filed his motion, however, Judge O'Hara had already issued an order denying the motion to compel. In any event, it appears that plaintiff waited to file his response until he received the order and, thus, the motion is moot. Plaintiff's motion for oral argument on the motions for summary judgment is denied as the court believes argument is unnecessary given the parties' detailed and intelligible briefing on all issues. See D. Kan. Rule 7.2 (requests for oral argument are granted only at the court's discretion).

Facts

The facts relevant to plaintiff's claims are uncontroverted. Kansas law requires that "any inmate employed in a private industry program ... shall ... have deduction [sic] of 5% of monthly gross wages paid to the crime victim compensation fund or a local property crime fund for the purpose of victim compensation." See K.S.A. § 75-5211(b). To implement this deduction and other deductions required by statute, the Secretary of the Kansas Department of Corrections adopted Internal

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Management Policy and Procedure (IMPP) 04-109. In relevant part, IMPP 04-109 states that "a minimum five (5) percent of the gross wages earned by inmates employed in private non-prison based or prison based work release programs shall be paid to the Crime Victims Compensation Board for the purposes of victim compensation."

Plaintiff is employed by a private prison-based employer at the facility in which he is incarcerated. From August 1996 through May 2001, the KDOC deducted \$3223.09 from plaintiff's inmate trust fund account for crime victim compensation. In his complaint, plaintiff asserts that this deduction constitutes an unlawful government taking in violation of the Fifth Amendment and cruel and unusual punishment in violation of the Eighth Amendment. He further asserts that IMPP 04-109 violates the reexamination clause of the Seventh Amendment and violates the due process and equal protection clauses of the Fourteenth Amendment. FN3

FN3. In his motion for summary judgment, plaintiff asserts for the first time that the deduction also constitutes an unreasonable seizure in violation of the Fourth Amendment. The court construes these allegations as a request to amend the complaint, *see Martinez v. Potter*, 347 F.3d 1208, 1211 (10th Cir.2003) (inclusion of new allegations in a response to a motion for summary judgment should be considered a request to amend the complaint pursuant to Federal Rule of Civil Procedure 15), and denies the request. Significantly, plaintiff moved to amend his complaint to add a Fourth Amendment claim when discovery was still ongoing and within the time period set forth in the scheduling order. Defendant did not oppose the motion and, on March 22, 2005, Judge O'Hara granted plaintiff's motion and directed plaintiff to file his amended complaint within 11 days of the date of his order. Despite having the opportunity to do so, plaintiff never filed an amended complaint. *See id.* at 1212 ("If

an amendment is permitted, we think the federal rules contemplate a formal amended complaint."). To permit an amendment at this time would be unduly prejudicial to defendant as discovery has been closed for more than two months. *See id.* (district court did not abuse discretion in refusing to permit plaintiff to amend complaint at summary judgment stage where discovery had closed).

Protected Property Interest

To state claims under the Fifth Amendment and under the due process clause of the Fourteenth Amendment, plaintiff must first establish that he possesses a constitutionally protected property interest. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (Fifth Amendment takings clause); *Boutwell v. Keating*, 399 F.3d 1203, 1211 (10th Cir.2005) (due process claim) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). Property interests are not created by the Constitution, but rather by independent sources such as state law. *Brown v. New Mexico State Personnel Office*, 399 F.3d 1248, 1254 (10th Cir.2005) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (to have a protected interest, there must be a legitimate claim of entitlement grounded in state law).

*2 Plaintiff does not have a protected interest in the full amount of his wages. Kansas state law permits the Department of Corrections to promulgate rules and regulations providing for various deductions and specifically requires a 5 percent deduction for victim compensation from the wages of those inmates, like plaintiff, who are employed in a private industry program. *See* K.S.A. § 75-5211(b). Nothing in the statutory scheme provides an entitlement to the full amount of wages earned. As the Kansas Court of Appeals has explained, It is well established that a state may legitimately restrict an inmate's privilege to earn a wage while incarcerated. The benefits of employment during

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incarceration are granted by the state as a privilege and not as a right.... [W]hatever right Appellants have to compensation is solely by the grace of the state and governed by rules and regulations promulgated by legislative direction.

Ellibee v. Simmons, 32 Kan.App.2d 519, 522, 85 P.3d 216 (2004) (quoting *Cumbey v. State*, 699 P.2d 1094, 1097-98 (Okla.1985) (viewing inmates' trust accounts as "conditional credits of potentially accessible funds, rather than vested property interests"). Neither do prison policies or regulations provide plaintiff a constitutionally protected property interest in the full amount of his wages. In fact, IMPP 04-109 expressly states that "all monies received by inmates" from employment "shall be secured and disbursed in a manner and in the amount required by State statute and administrative regulations." To the extent plaintiff has a protected interest in his wages, that interest would extend only to those wages remaining in his account after all mandated deductions are made. See IMPP 04-109 § V.B.11 ("Any monies [received from employment] remaining may be expended by the inmate at their discretion, subject to the approval for withdrawal by the warden or designee."); *Gillihan v. Shillinger*, 872 F.2d 935, 939 (10th Cir.1989) (Wyoming statutory scheme created legitimate expectation that money remaining in inmate trust account after deductions, including deductions for victims compensation, would be returned to the inmate at the end of his incarceration).

Accordingly, because neither Kansas law nor any other "independent source" provide plaintiff a constitutionally protected property interest in the full amount of his wages, his claims under the Fifth Amendment and the due process clause of the Fourteenth Amendment must fail. See *Ziegler v. Whitney*, 2004 WL 2326382, at *2 (10th Cir. Oct.15, 2004) (no due process claim based on the payment of less than the prevailing wage for work performed as an inmate; inmates do not have a protected property interest in the wages earned from employment); *McIntyre v. Bayer*, 2003 WL 21949154, at *1 (9th Cir. Aug.13, 2003) (no due process claim based on deductions from inmate's trust account for victim compensation; inmate had

no right to a prison job, no right to earn wages from such a job and, thus, no protected interest in the wages from that job); *Washlefske v. Winston*, 234 F.3d 179, 186 (4th Cir.2000) (no takings claim under Fifth Amendment where prison expended interest earned on inmate's trust account for the general benefit of all inmates; no protected property interest where state statutory scheme gave inmate only limited rights to funds in his account); *Christiansen v. Clarke*, 147 F.3d 655, 657 (8th Cir.1998) (no due process claim where prison deducted amounts from wages for room and board expenses; no protected property interest in full amount of his salary where statutory scheme authorized the deduction); *Petrick v. Fields*, 1996 WL 699706, at *1-2 (10th Cir. Dec.6, 1996) (no due process claim based on interest earned on funds in inmate trust account; no constitutionally protected property interest existed); *Brady v. Tansy*, 1993 WL 525680, at *(10th Cir. Dec.21, 1993) (inmate had no protected interest in full amount of wages where state statutory scheme permitted the deductions at issue).

Equal Protection

*3 According to plaintiff, defendant's IMPP 04-109 violates the Equal Protection clause of the Fourteenth Amendment because that portion of the policy requiring payment of 5 percent of an inmate's gross wages for victim compensation applies only to those inmates employed in private non-prison based work release programs and prison-based work release programs. In contrast, those employees employed in traditional work release programs are only required to pay 5 percent of their gross wages for victim compensation pursuant to an order of restitution. Plaintiff also highlights that only minimum security inmates are eligible for traditional work release programs and, as a maximum security inmate serving a life sentence, plaintiff will never be eligible for the traditional work release program.

To state an equal protection claim, plaintiff must allege that the government treated him differently than others who were similarly situated. See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432,

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105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Plaintiff has failed to identify any similarly situated inmates who were given preferential treatment under the policy. In fact, plaintiff concedes that the policy applies with the same force to those inmates who are similarly situated to plaintiff-inmates who are employed in private non-prison based work release programs or prison-based work release programs. Summary judgment in favor of defendant is appropriate on this claim. See *Sanders v. Saffle*, 2000 WL 293826, at *2 (10th Cir. Mar.21, 2000) (in order to show equal protection violation based on policy that differentiated among inmates based in part on security classification, inmate had to show that other inmates in his security classification were treated differently). FN4

FN4. According to plaintiff, he attempted to secure from defendant documentation concerning defendant's rationale for the "disparity of treatment" between those inmates employed in traditional work release programs and inmates employed in other programs. Plaintiff asserts that defendant advised him that all documents concerning the drafting of IMPP 04-109 had been destroyed. Regardless of whether the documents were destroyed, the evidence that plaintiff seeks would not save his equal protection claim for the reasons explained in the text.

Seventh Amendment

Plaintiff next asserts that defendant violated the reexamination clause of the Seventh Amendment by essentially "resentencing" him to restitution in the amount of \$3223.09 when the sentencing court imposed a sentence that did not include an order of restitution. The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. Amend. VII. The Seventh Amendment protects a party's right to a jury trial by ensuring that factual determinations made by a jury are not thereafter set aside by the court, except as permitted under the common law. *Skinner v. Total Petroleum,*

Inc., 859 F.2d 1439, 1442-43 (10th Cir.1988). On its face, then, the reexamination clause is inapplicable to this case and plaintiff's claim under the Seventh Amendment is frivolous. Simply put, plaintiff points to no "fact tried by a jury" that was thereafter reexamined by any court. Summary judgment in favor of defendant is appropriate on this claim.

Eighth Amendment

Finally, plaintiff asserts that defendant subjected him to cruel and unusual punishment within the meaning of the Eighth Amendment by deducting from his wages an amount to be paid for victim compensation. According to plaintiff, the deduction is "above and beyond the lawful sentence imposed by the court" and, thus, constitutes a "punative [sic] sanction." Only those deprivations "denying the minimal civilized measure of life's necessities ... are sufficiently grave to form the basis of an Eighth Amendment violation." *Ledbetter v. City of Topeka, Kansas*, 318 F.3d 1183, 1188 (10th Cir.2003). Plaintiff has not asserted that the deduction has deprived him of any necessities. Summary judgment, then, is warranted in favor of defendant on this claim. See *Sellers v. Worholtz*, 2004 WL 119882 (10th Cir. Jan.27, 2004) (withdrawal of funds from prison account to pay various fees did not violate Eighth Amendment rights where prisoner did not show that he was unable to obtain necessities).

*4 IT IS THEREFORE ORDERED BY THE COURT THAT plaintiff's motion for summary judgment (doc. 44) is denied; defendant's motion for summary judgment (doc. 49) is granted; plaintiff's motion to toll the time period for plaintiff to file a response to defendant's motion for summary judgment (doc. 55) is moot; and plaintiff's motion for oral argument on the parties' motions for summary judgment (doc. 59) is denied. Plaintiff's complaint is dismissed in its entirety with prejudice.

IT IS SO ORDERED.

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Ellibee v. Simmons

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Only the Westlaw citation is currently available.
 United States District Court, D. Kansas.
 Ronald L. RHODES, Plaintiff,
 v.
 Greg SCHAEFER, et al., Defendants.
Civil Action No. 98-3323-GTV.

March 20, 2002.

MEMORANDUM AND ORDER

G.T. VANBEBBER, Senior District Judge.

*1 This matter comes before the court on a civil action filed pro se by a prisoner in the custody of the Secretary of the Kansas Department of Corrections. Plaintiff commenced this action against three employees of Impact Design, Inc., a private employer operating a business on the grounds of the Lansing Correctional Facility, two employees of the Kansas Department of Corrections, and members of the Kansas Civil Rights Commission.

By an earlier order, the court granted the motion to dismiss filed on behalf of the defendants employed by the Kansas Civil Rights Commission. This matter is presently before the court on the motion to dismiss filed by the employees of the Kansas Department of Corrections (Doc. 50) and on the motion for summary judgment filed by the employees of Impact Design (Doc. 53).

Factual Background

Plaintiff is an inmate incarcerated under a life sentence and housed at the Lansing Correctional Facility, Lansing, Kansas (LCF).

Impact Design, Inc. (Impact) has a contractual relationship with the State of Kansas under which Impact leases building space at LCF to operate its business. The Kansas Department of Corrections

provides Impact Design with a labor pool comprised of inmates. Defendant Mike Neve, classification administrator at LCF, is responsible for review and recommendation of inmate participation in programs. In June 1997, defendant Neve issued an interdepartmental memorandum establishing the employment criteria for Impact. (Doc. 30, Ex. A.).

Defendant Colette Winkelbauer, a Unit Team Manager at LCF, conducted a preliminary screening of plaintiff's eligibility under these criteria and determined he was ineligible. By correspondence dated September 15, 1997, plaintiff sought review of this decision. Defendant Winkelbauer reconsidered plaintiff's eligibility and determined there was an error. As a result, she sent plaintiff's application to Impact on September 23, 1997. (*Id.*, Ex. C.) Plaintiff was interviewed by representatives of Impact in or about 1998 but was not accepted for assignment. (*Id.*, Ex. E.)

In June 1998, plaintiff wrote to defendant Winkelbauer advising her that the KHRC had filed a complaint on his behalf alleging racial discrimination. He sought a copy of his earlier correspondence to her. (*Id.*, Ex. F.) After review, the KHRC administratively closed the charge for lack of jurisdiction, and plaintiff did not seek reconsideration or appeal under state law provisions for judicial review of agency action.

Under the agreement between Impact and the Kansas Department of Corrections, the State of Kansas has exclusive authority to decide which inmates may be interviewed by Impact, and all inmates assigned must pass a security clearance. The Department of Corrections provides corrections officers to supervise inmates assigned to Impact. Payment for inmate work is made to the Department of Corrections, which deducts payments for such costs room and board, training, and victim restitution; inmate workers receive a credit of \$35.00 for purchases at the prison canteen. The

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Department of Corrections may direct the removal of any inmate from assignment to Impact, may halt production at Impact, and issues guidelines for discharge from assignment to Impact. Inmates assigned to Impact are considered wards of the state and are not eligible for unemployment compensation.

*2 Plaintiff brings the present action alleging violations of the Kansas Act Against Discrimination (KAAD) and Title VII (Doc. 1, p. 2.)

Discussion

Department of Corrections defendants

Defendants Winkelbauer and Neve move for dismissal and allege plaintiff's claim under Title VII should be dismissed because he lacks standing to pursue a charge of discrimination under Title VII. They contend plaintiff's relationship with the Department of Corrections arises from his status as a prisoner.

These defendants also allege plaintiff's claim of conspiracy fails because he has no employment relationship with them and because, even assuming standing under Title VII, he has failed to adequately plead a conspiracy and an actual deprivation of protected rights.

The court may grant a motion to dismiss pursuant to Rule 12(b)(6) where it appears beyond a doubt the plaintiff is unable to prove any set of facts entitling him to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), or where an issue of law is dispositive, *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). "All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir.1984) (citation omitted). The court views all reasonable inferences in favor of the plaintiff and liberally construes the pleadings. *Id.* (citation omitted). However, the court should not assume the plaintiff "can prove facts that it has not alleged or that the defendants have violated the ... laws in ways that have not been alleged." *Associated*

General Contractors v. California State Council of Carpenters, 459 U.S. 519, 526 (1983) (footnote omitted).

The resolution of plaintiff's claims against defendants Neve and Winkelbauer under Title VII turns upon whether there is an employment relationship between these parties.

The most instructive precedent in the Tenth Circuit addressed a Title VII claim by a federal prisoner against prison officials. In *Williams v. Meese*, 926 F.2d 994 (10th Cir.1994), the Tenth Circuit concluded the plaintiff enjoyed no substantive rights under Title VII because the relationship between him and the defendant correctional officers arose from plaintiff's status as an inmate, rather than as an employee. The court explained its reasoning as follows:

We conclude that plaintiff is not an "employee" under ... Title VII ... because his relationship with the Bureau of Prisons, and therefore, with the defendants, arises out of his status as an inmate, not an employee. Although his relationship with defendants may contain some elements commonly present in an employment relationship, it arises "from [plaintiff's] having been convicted and sentenced to imprisonment in the [defendants'] correctional institution. The primary purpose of their association [is] incarceration, not employment." Prisoner Not Protected From Racial Job Bias, 2 Empl.Prac.Guide (CCH) 6865, at 7099 (April 18, 1986)(EEOC Decision No. 86-7). Since plaintiff has no employment relationship with defendants, he cannot pursue a claim for discrimination against them under ... Title VII.... *Id.* at 997.

*3 The court has studied the present record in light of this analysis and concludes there was no employment relationship between defendants Neve and Winkelbauer and plaintiff. Defendant Winkelbauer screened plaintiff's application for compliance in the course of her employment as a corrections officer, and defendant Neve issued the guidelines in his capacity as the Classification Administrator. All contact between plaintiff and defendant Winkelbauer arose from his status as an inmate assigned to her in her capacity as a Unit Team Manager. Thus, as in *Williams*, the primary

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function of their association was the management of plaintiff's activity as a prisoner.

The court therefore concludes plaintiff cannot pursue claims against these defendants under Title VII and that their motion to dismiss must be granted.

Impact defendants

Defendants Greg Schaefer ^{FN1}, Dave Menghini, and Joseph Menghini move for summary judgment. Defendant Schaefer was a supervisor at Impact from August 1996 to June 1999. Defendants Joseph and David Menghini are employed by Impact as Vice Presidents. These defendants seek summary judgment on the grounds that plaintiff is not an employee as defined by Title VII or the KAAD, that they are not proper parties under either provision, and that because plaintiff failed to exhaust administrative remedies, he may not proceed under the KAAD.

FN1. Defendant Schaefer's name has been spelled "Schaffer" in some pleadings. Schaefer's attorney has provided the correct spelling, and this order uses that spelling.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, 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 judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of showing there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1552 (10th Cir.1997).

If the moving party meets its initial burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by ... affidavits, or by the "

depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324 (quoting Fed.R.Civ.P. 56(e)). The non-moving party may not rest on bare allegations but instead must advance specific facts establishing a genuine issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

The court first considers defendants' claim that they are not proper parties under Title VII or the Kansas Act Against Discrimination. It is settled in the Tenth Circuit that liability under Title VII liability is borne by employers and not by individual supervisors. "Under Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate." *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir.1996). See also *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir.1993)(" 'The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act.' ")(quoting *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir.1991)). The same reasoning applies with equal force to claims brought under the KAAD. *Davidson v. MAC Equipment*, 878 F.Supp. at 187-88.

*4 Plaintiff's complaint does not name Impact Design as a defendant. The complaint describes defendant Schaefer as "perform[ing] his duties as an individual in a private capacity as personnel supervisor of a private industry business operating on the grounds of a Kansas Correctional Facility." (Doc. 1, p. 1.) Each of the Menghini defendants is described as "acting in his private capacity as private employer and owner for and of Impact Design, Inc., (private close corporation) business for profit, operating on the grounds of a correctional facility." (Doc. 1, p. 2, pars.4-5.)

Thus, to the extent plaintiff proceeds against these individual defendants, he has failed to identify proper parties under Title VII.

Defendants next assert that plaintiff is not an employee as that term is defined by either Title VII or the KAAD.

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It is settled in this Circuit that a prisoner employed in prison industries is not an "employee" under Title VII. *Williams v. Meese*, 926 F.2d at 997. The Tenth Circuit has also stated, in examining whether state prisoners were "employees" under the Fair Labor Standards Act, that "the economic reality test was not intended to apply to work performed in the prison by a prison inmate ." *Franks v. Oklahoma State Industries*, 7 F.3d 971, 973 (10th Cir.1993). Here, however, the court must consider whether this case law extends to the plaintiff, a prisoner who sought work in a private industry operated on prison premises.

It is uncontroverted that the Kansas Department of Corrections exerts considerable control over the assignment of inmates to Impact at LCF. The Department establishes the criteria for eligibility for assignment, screens applications for assignment to Impact, provides corrections officers who supervise inmates as needed, and is the direct recipient of Impact's payroll. The Department retains some funds from Impact's payroll for certain identified purposes, including victim restitution and reimbursement for public assistance provided to inmates' families; inmates receive only a \$35.00 credit at the prison canteen. The Department may terminate a prisoner's assignment to Impact and may discipline a prisoner who terminates his assignment with Impact before completing one year. If a facility lockdown is necessary, the Department determines whether inmate workers may report to Impact during that time. These circumstances militate in favor of a finding that the plaintiff's assignment to Impact should be viewed no differently than the more traditional prison work assignments considered in *Williams v. Meese* and *Franks v. Oklahoma State Industries*.

The court also finds persuasive the case law developed by the courts which have considered, and rejected, the argument that prisoners assigned to private industry operating on prison premises may be viewed as employees under the Fair Labor Standards Act. See *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1325-26 (9th Cir.1991) (inmates working in private plasma center inside prison were not covered by FLSA); *Alexander v. Sara, Inc.*, 721 F.2d 149, 150 (5th Cir.1983)

(inmates working in private, for-profit laboratory inside prison were not covered by FLSA); and *Sims v. Parke Davis & Co.*, 334 F.Supp. 774, 782 (E.D.Mich.) (inmates working at private drug clinic inside prison were not covered), *aff'd*, 453 F.2d 1259 (6th Cir.1971), *cert. denied*, 405 U.S. 978 (1972). Compare *Watson v. Graves*, 909 F.2d 1549 (5th Cir.1990) (prisoners in work release programs working for private employers were employees entitled to minimum wage coverage under FLSA).

*5 Having considered the arguments made by the parties and the relevant case law, the court is persuaded that the degree of control exercised by the Department of Corrections in all aspects of the assignment of inmates to Impact at LCF outweighs those aspects of plaintiff's assignment to Impact which might suggest the existence of an employment relationship protected by Title VII. The court concludes plaintiff does not have standing to proceed as an "employee" as defined by Title VII.

Finally, this court need not reach the issue of whether plaintiff is an "employee" under KAAD, as it finds plaintiff has failed to properly exhaust administrative remedies. "Before a plaintiff may litigate any KAAD claims in court, plaintiff must first receive an unfavorable determination from the KHRC, file for reconsideration of that unfavorable determination and then receive a denial of the reconsideration application." *Davidson v. MAC Equipment Co.*, 878 F.Supp. 186, 189 (D.Kan.1995) (citation omitted); K.S.A. 44-1010("No cause of action arising out of any order or decision of the commission shall accrue in any court to any party unless such party shall petition for reconsideration as herein provided.") The record demonstrates the KHRC administratively closed plaintiff's case and that plaintiff failed to seek reconsideration of that decision.

Conclusion

For the reasons set forth, the court concludes the plaintiff is not entitled to proceed on his claims under Title VII and the KAAD. The court grants the pending motions to dismiss and for summary judgment and orders that this matter be dismissed

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and all relief denied.

IT IS, THEREFORE, BY THE COURT ORDERED the motion to dismiss of defendants Neve and Winkelbauer (Doc. 50) is granted.

IT IS FURTHER ORDERED the motion for summary judgment of defendants Schaefer, Menghini, and Menghini (Doc. 53) is granted.

Copies of this order shall be transmitted to the parties.

IT IS SO ORDERED.

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NOTICE: THIS IS AN UNPUBLISHED OPINION. (The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA10 Rule 36.3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Tenth Circuit.
 Calvin PHILLIP, Plaintiff-Appellant,

v.

Eloy MONDRAGON, Secretary of Corrections,
 and Canteen Corporation, Defendants-Appellees.

No. 94-2141.

Nov. 30, 1994.

Before SEYMOUR, Chief Judge, McKAY and BALDOCK, Circuit Judges.

ORDER AND JUDGMENT 1

*1 After examining Appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Mr. Phillip appeals the dismissal of his 42 U.S.C.1983 civil rights claim as frivolous under 28 U.S.C.1915(d). Mr. Phillip is an inmate in a New Mexico correctional facility. He has claimed that he has been and continues to be denied minimum wages for working for a private entity, Canteen Corporation, Inc., on prison grounds. The district court correctly stated that the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, does not normally apply to prisoners, citing *Franks v. Oklahoma State Indus.*, 7 F.3d 971 (10th Cir.1993). If Mr. Phillip were relying solely on the FLSA, we would agree that his claim should have been dismissed. However, Mr. Phillip has pleaded, albeit not

artfully, other grounds for relief. Accordingly, we find his claim not to be frivolous, and we remand for further proceedings.

"[W]henver a plaintiff states an *arguable* claim for relief, dismissal for frivolousness under 1915(d) is improper, even if the legal basis underlying the claim ultimately proves incorrect." *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir.1991). Construing the pro se pleadings liberally, Mr. Phillip has made a colorable claim of an equal protection violation.

Although he failed to specify the state statute in his initial complaint, it is now clear that Mr. Phillip is basing his complaint on N.M. Stat. Ann. 33-8-13. Under this provision, the Corrections Department may allow "private enterprises" to operate on correctional facility grounds, provided that "the enterprise shall be deemed a private enterprise and subject to all laws governing the operation of similar private business enterprises." The only exception stated in the law is that the "provisions of the Unemployment Compensation Law shall not apply to inmate employees." Mr. Phillip argues that the Canteen Corporation is a "private enterprise" operating at the prison under the authority of 33-8-13. Accordingly, it should be subject to all laws governing the operation of private businesses, including minimum wage laws. Mr. Phillip has also alleged that there are at least five other private industries operating within the confines of New Mexico correctional facilities, all of which pay at least minimum wages for inmate labor. Assuming, arguendo, these facts to be true, Mr. Phillip has stated that he is being deprived of a property right (the right to earned and future minimum wages) by the state while other similarly situated inmates are not. We construe this as a claim of deprivation of equal protection of the laws. Even though the claim as pled would be judged under the rational basis test, it is sufficient to survive a frivolousness dismissal.

Mr. Phillip states that he requested and was denied

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back wages. He did not elaborate on what procedure was used, but we note that he is not required to exhaust his state or administrative remedies before filing a 1983 claim. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 500-01 (1982).

*2 This case seems to be ideal for a *Martinez* report pursuant to *Martinez v. Aaron*, 570 F.2d 317, 319 (10th Cir.1978). Such a report should seek to clarify if the Canteen Corporation is operating under the authority of 33-8-13 or some other provision of state law. The report should also attempt to determine if Mr. Phillip's allegations regarding other private enterprises operating on prison grounds are true, and, if they are, what justification the Department of Corrections has for exempting the Canteen Corporation from the minimum wage laws.

We reverse the dismissal of the petition, and remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

FN1. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

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Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter. This case was not selected for publication in the Federal Reporter. Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals, Tenth Circuit.
 Timothy Gordon BERRY, Plaintiff-Appellant,

v.

State of OKLAHOMA; Oklahoma Department of Corrections Director; James L. Saffle; Patrick Crawley; Norma Bullock; Anita Wooten; Wackenhut Corrections Corporation; Dayton J. Poppell, Defendants-Appellees, and Scott Bighorse and Mary Wooten, Defendants.
No. 01-6281.

April 9, 2003.

State inmate brought § 1983 action against state, director of state corrections department, and other defendants, asserting, inter alia, claims for alleged violations of his constitutional rights. The United States District Court for the Western District of Oklahoma dismissed 15 of inmate's claims, pursuant to in forma pauperis statute, and transferred remaining claim to another district court. Inmate appealed. The Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that: (1) district court entered final, appealable judgment, and (2) appeal, which was frivolous, counted as "prior occasion" or "strike" for purposes of in forma pauperis statute's three strikes provision.

Appeal dismissed.

West Headnotes

[1] Federal Courts 170B ⇌ 589

170B Federal Courts

170BVIII Courts of Appeals
 170BVIII(C) Decisions Reviewable
 170BVIII(C)2 Finality of Determination
 170Bk585 Particular Judgments,
 Decrees or Orders, Finality

170Bk589 k. Dismissal and Nonsuit in General. Most Cited Cases
 District court entered final, appealable judgment in inmate's § 1983 action, even though district court did not certify its judgment, when, in same order dismissing 15 of inmate's 16 claims, court transferred remaining claim to different district court and its intention to sever transferred claim was indicated by language transferring only "the claim raised in Count Three"; severance rendered certification of judgment dismissing other claims unnecessary. 28 U.S.C.A. § 1406(a); 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rules 21, 54(b), 28 U.S.C.A.

[2] Federal Civil Procedure 170A ⇌ 2734

170A Federal Civil Procedure
 170AXIX Fees and Costs
 170Ak2732 Deposit or Security
 170Ak2734 k. Forma Pauperis
 Proceedings. Most Cited Cases

Federal Courts 170B ⇌ 663

170B Federal Courts
 170BVIII Courts of Appeals
 170BVIII(E) Proceedings for Transfer of Case
 170Bk662 Proceedings in Forma Pauperis
 170Bk663 k. Grounds for Permitting or Refusing. Most Cited Cases
 Dismissal, as frivolous, of inmate's appeal from dismissal of his § 1983 claims under in forma pauperis statute counted as "prior occasion" or "strike" for purposes of in forma pauperis statute's three strikes provision, which imposed restrictions on civil actions or appeals brought by prisoners proceeding in forma pauperis. 28 U.S.C.A. §

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1915(e)(2)(B)(i, ii), (g); 42 U.S.C.A. § 1983.

[3] **Federal Civil Procedure 170A** ← 2734

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2732 Deposit or Security

170Ak2734 k. Forma Pauperis

Proceedings. Most Cited Cases

Dismissal of inmate's § 1983 claims under provisions of in forma pauperis statute allowing for dismissal of frivolous, malicious, and insufficient claims counted as separate strike against inmate under three strikes provision of statute, which imposed restrictions on civil actions or appeals brought by prisoners proceeding in forma pauperis. 28 U.S.C.A. § 1915(e)(2)(B)(i, ii), (g); 42 U.S.C.A. § 1983.

*120 Timothy Gordon Berry, Holdenville, OK, for Plaintiff-Appellant.

Before SEYMOUR, KELLY and LUCERO, Circuit Judges.

ORDER AND JUDGMENT*

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

PAUL KELLY, JR., Circuit Judge.

**1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[1] Plaintiff Timothy Gordon Berry, a state prisoner appearing pro se, appeals the district court's order and the supporting judgment

dismissing fifteen of the sixteen claims he asserted in his 42 U.S.C. § 1983 civil rights complaint. Our jurisdiction arises under 28 U.S.C. § 1291, and we conclude that the district court entered a final judgment that is appealable to this court even though the district court did not certify its judgment under Fed.R.Civ.P. 54(b).^{FN1} Nonetheless, because Mr. Berry's appeal to this court is frivolous, we dismiss the appeal under 28 U.S.C. § 1915(e)(2)(B)(i).

FN1. With respect to Count Three in Mr. Berry's Complaint, the magistrate judge concluded that Mr. Berry had stated a claim against defendants Scott Bighorse and Mary Wooten based on his allegation that he was transferred to a private prison in retaliation for exercising his constitutional rights. The magistrate judge also concluded that venue over Count Three was not proper in the Western District of Oklahoma, and the magistrate judge recommended that the claim be transferred under 28 U.S.C. § 1406(a) to the Northern District of Oklahoma. The district judge adopted the magistrate judge's recommendation, and, in the same order dismissing the fifteen additional claims asserted by Mr. Berry, the district judge "transfer[red] the claim raised in Count Three ... to the ... Northern District of Oklahoma." R., Doc. 9 at 2. Although the district judge did not expressly sever Count Three under Fed.R.Civ.P. 21, we conclude that the district judge intended to sever Count Three as indicated by her language transferring only "the claim raised in Count Three." As a result of the severance, it was not necessary for the district judge to certify her judgment dismissing Mr. Berry's other claims under Rule 54(b), and this court has jurisdiction to hear this appeal without a Rule 54(b) certification.

In his complaint, Mr. Berry claimed that: (1) he was wrongfully terminated from his prison work assignment as a legal research assistant; (2) he was

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not paid the federally mandated minimum hourly wage for work he performed in prison and was denied the opportunity to work for a wage; (3) he was punished and denied certain privileges for refusing to work for no compensation; (4) he was subjected to involuntary servitude in violation of the Thirteenth Amendment; (5) he was denied certain statutory earned credits and has therefore been subjected to a lengthier term of imprisonment; (6) the conditions of his confinement were unconstitutional; (7) certain rules and regulations and related administrative procedures of the Oklahoma Department of Corrections were unlawful; (8) an assistant attorney general of the State of Oklahoma misrepresented the controlling law and committed malpractice during a state-court habeas proceeding; and (9) he has been denied access to the courts.

After thoroughly analyzing each of Mr. Berry's claims in light of the governing legal authorities, the magistrate judge concluded that Mr. Berry had failed to state a claim on which relief may be granted and/or that his claims were frivolous. The magistrate judge therefore recommended *122 to the district judge that Mr. Berry's claims be dismissed under § 1915(e)(2)(B)(i) and (ii),^{FN2} and the district judge adopted the magistrate judge's recommendation and dismissed Mr. Berry's claims. The district judge also determined that the dismissal counts as a "prior occasion" or "strike" for purposes of the "three strikes" provision in § 1915(g). In addition, the district judge denied Mr. Berry's motion for leave to proceed on appeal in forma pauperis, concluding, under § 1915(a)(3), that this appeal was not taken in good faith.

FN2. As noted by the magistrate judge, filing restrictions have been imposed on Mr. Berry due to his extensive history of filing frivolous lawsuits in the Western District of Oklahoma. See *Berry v. Fields*, No. 94-6281, 1994 WL 697314 at *1 (10th Cir. Dec. 13, 1994) (unpublished). The magistrate judge concluded that Mr. Berry substantially complied with the filing restrictions, and she therefore examined the merits of his claims.

We review the district court's dismissal for failure to state a claim de novo. See *Gaines v. Stenseng*, 292 F.3d 1222, 1224 (10th Cir.2002). We review the district court's § 1915(e) frivolousness dismissal for an abuse of discretion. See *McWilliams v. Colorado*, 121 F.3d 573, 574-75 (10th Cir.1997). The standard of review is not determinative of this appeal, however, because we reach the same conclusions under either the de novo or the abuse-of-discretion standard of review.

**2 [2] [3] For substantially the same reasons set forth in the magistrate judge's report and recommendation dated May 10, 2001, see R., Doc. 6 at 7-24, we agree that Mr. Berry's claims are frivolous and/or fail to state a claim. We also agree with the district judge that this appeal was not taken in good faith. Accordingly, we deny Mr. Berry's motion under § 1915(a)(1) for leave to proceed on appeal in forma pauperis; we order Mr. Berry to render immediate payment of the unpaid balance due on the filing fee; and we dismiss this appeal as frivolous. Further, the dismissal of this appeal counts as a "prior occasion" or "strike" for purposes of the "three strikes" provision in § 1915(g).^{FN3}

FN3. We note that Mr. Berry has two prior strikes in the Western District of Oklahoma based on the dismissals of his § 1983 complaints in Case Nos. 92-CV-174 and 94-CV-790. The district court's dismissal in this case also counts as a separate strike, giving Mr. Berry a present total of four strikes for purposes of § 1915(g) and any future civil actions he files in federal court.

This appeal is DISMISSED. We also DENY Mr. Berry's "Motion and Brief to Expand/Supplement the Record and for Leave to Amend/Supplement Pro Se Civil Rights Complaint," which he filed in this court on March 24, 2003.

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