Vermont Superior Court
Filed 11/06/26
Franklin Unit

VERMONT SUPERIOR COURT
Franklin Unit
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CIVIL DIVISION
Case No. 25-CV-04101

Malachi Buswell v. Vermont Department of Corrections

DECISION ON THE MERITS AND ORDER

The Court held a bench trial on the tort claims in this docket on July 11, 2026. Mr. Buswell represented himself and Attorney Menzel appeared for Defendant, Department of Corrections ("DOC"). The Court considered the testimony, the admitted exhibits, and the parties' post-trial briefs, and grants judgment in favor of Defendant DOC.

Procedural History

Malachi Buswell originally filed this case as a Rule 75 petition in 2024. In the attachment to the petition, Mr. Buswell asked to be allowed to file a tort claim for violation of his constitutional rights under the Vermont Tort Claims Act ("VTCA") and requested damages. The Court determined it would first rule on Mr. Buswell's Rule 75 petition (docket number 24-CV-0096) but did not address any damages-related issues.

The Court allowed Mr. Buswell to file a separate request for money damages through a tort claim, which he has since done on September 23, 2025. For administrative convenience, the Court opened this docket to consider Mr. Buswell's tort claims separately from the Rule 75 claims.

Background

In this lawsuit, Mr. Buswell seeks money damages under 12 V.S.A. §§ 5601-06 (VTCA) for the same issues raised in his Rule 75 lawsuit. The complaint alleges, among other things, that DOC directed its employees to deny and interfere with Mr. Buswell's religious rights "provided by the [Defendant's] own Directive, which is authorized by State and Federal statutes and constitutional rights," denied him religious rights by taking his religious hammer, his Edda, his runes, and prevented him from wearing a headband outside of living units. Compl., at 3–4. Mr. Buswell is a practitioner of the Asatru religion.

At trial, Mr. Buswell presented evidence that DOC employees interfered with his religious rights, by taking his religious hammer, Edda, and runes, preventing him from wearing a religious headband outside of his living unit, and conducting searches in a disrespectful manner that stripped his religious objects of their sacredness. He presented additional evidence that DOC did not allow him to properly celebrate Asatru holidays, specifically at the equinoxes and solstices, by denying access to appropriate food, communal meals with only his fellow co-

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religionists, and the ability to conduct a sacrifice by taking a portion of the food and burying it in the ground.

At trial, the Court requested that the parties brief (1) whether the claims brought by Mr. Buswell are proper under VTCA and *Zullo v. State*, 2019 VT 1, 209 Vt. 298, and (2) whether the claims should have been instead brought under 42 U.S.C.A. § 1983. The parties have now briefed these issues.

DOC makes four arguments. First, citing *Zullo*, DOC argues that VTCA does not govern constitutional tort claims against the State. DOC asserts that because Mr. Buswell has pled this as a VTCA case, and that because he has taken no steps before trial to amend the complaint, he has failed to meet his burden of proof.

Second, to the extent that Mr. Buswell has alleged claims under 42 U.S.C. § 1983, DOC argues that he has failed to name and serve any "person acting under the color of state law." DOC argues that neither the State nor one of its agencies nor an official of that agency sued in his or her official capacity is a "person" under section 1983. Relatedly, DOC asserts that Mr. Buswell has not proven that he suffered a physical injury as a result of the alleged conduct – a prerequisite for an award of compensatory damages under section 1983.

Third, DOC argues that additional incidents that Mr. Buswell raised at trial but did not raise in the original complaint should be disregarded. At trial, DOC objected to many of the issues raised by Mr. Buswell as outside the scope of the pleadings. These allegations post-date the complaint, which Mr. Buswell never amended.

Lastly, DOC argues that Mr. Buswell has failed to meet his burden of proof that he is entitled to damages. DOC asserts that Mr. Buswell has not proven by a preponderance of the evidence the extent and nature of his damages with reasonable certainty.

Mr. Buswell responds by asserting generally that because he prevailed in the Rule 75 case, he is now automatically entitled to damages in the tort case. Mr. Buswell cites various cases, statutes, and constitutional provisions that he contends support his analysis.

Analysis

The Court does not need to make extensive factual findings in this case because its decision is based on legal defects that do not depend on the facts presented by Mr. Buswell.

a. Vermont Tort Claims Act

"VTCA generally makes the State liable for injuries … resulting from the negligent or wrongful acts or omissions of state employees acting within the scope of their employment 'under the same circumstances, in the same manner, and to the same extent as a private person would be liable.'" *Zullo*, 2019 VT 1, ¶ 19 (quoting 12 V.S.A. § 5601(a)). "[T]he primary purpose of the VTCA is to waive sovereign immunity for recognized causes of action, particularly for common law torts." *Kennery v. State*, 2011 VT 121, ¶ 26, 191 Vt. 44.

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The State of Vermont, however, has not waived its sovereign immunity under the VTCA for constitutional torts. See *Zullo*, 2019 VT 1, ¶ 3 ("VTCA does not apply to plaintiff's suit alleging a constitutional tort[.]"). "[T]he Act applies only to ordinary common law torts[.]" *Id.* at ¶ 18. "The statute does not explicitly address constitutional torts," and in light of that silence "and the absence of any comparable private analog, we conclude that the Act's statutory waiver of sovereign immunity against certain civil tort claims does not apply [to this constitutional tort claim]." *Id.* at ¶¶ 19, 22; c.f. *F.D.I.C. v. Meyer*, 510 U.S. 471, 477-78 (1994) (holding that constitutional tort claims are not actionable under Federal Tort Claims Act ("FTCA") and that FTCA claims must be based on state-law tort claims and cannot be based on federal constitutional or statutory claims against government); *Castro v. United States*, 34 F.3d 106, 110 (2d Cir. 1994) ("The government has not waived its sovereign immunity with respect to claims that its employees have committed constitutional torts, and claimant's exclusive remedy for nonconstitutional torts by a government employee acting within the scope of his employment is a suit against the government under the FTCA."); *Jacobs v. State Teachers' Ret. Sys. of Vermont*, 174 Vt. 404, 407 (2002) (observing that VTCA is based on FTCA); *LaShay v. Dep't of Soc. & Rehab. Servs.*, 160 Vt. 60, 67–68 (1993) (applying federal case law to determine scope of VTCA provisions that are similar to provisions of FTCA).

As noted above, the evidence presented by Mr. Buswell was that DOC employees interfered with his religious rights by confiscating certain religious items, handling them inappropriately, not allowing him to wear a religious headband outside of his unit, and not allowing him to properly celebrate Asatru holidays. Mr. Buswell therefore alleges constitutional torts for which the State has not waived its sovereign immunity. C.f. *Lloyd v. City of New York*, 43 F. Supp. 3d 254, 261 (S.D.N.Y. 2014) (observing that violation of free exercise rights and discrimination against adherents of religion are constitutional torts). He names only DOC as the defendant, and he has never moved to amend his complaint as to the cause of action or parties.

Because VTCA does not apply in this case, the Court will enter judgment on the VTCA claims in favor of DOC.

b. 42 U.S.C. § 1983

Mr. Buswell never explicitly stated that his claim was brought under 42 U.S.C. § 1983, but the Court reviews this statute as an alternative basis for his claims. "Generally, 42 U.S.C. § 1983 'creates a remedy for violations of federal rights committed by persons acting under color of state law.'" *Zullo*, 2019 VT 1, ¶ 39 (quoting *Howlett v. Rose*, 496 U.S. 356, 358 (1990)). A section "1983 action for monetary damages cannot be maintained against a state, a state agency, or state officials sued in their official capacity." *Id.* Monetary damages "are available against state officials only in their individual capacity." *Id.*; see also *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). DOC is a state agency. See, e.g., *Charbonneau v. Gorczyk*, 2003 VT 105, ¶ 8, 176 Vt. 140 (reviewing state prisoner's discrimination claim against commissioner of DOC and characterizing DOC as a state agency); *Miner v. Chater*, 137 Vt. 330, 333 (1979) ("Department of Corrections is … an administrative entity, created by act of the Legislature, and, again by legislative act, invested with certain powers and charged with certain duties.").

Even if Mr. Buswell were pursuing his tort claims under section 1983, those claims would fail because he cannot bring a section 1983 claim against DOC – DOC is not a "person"

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within the meaning of section 1983. *Brown v. State*, 2018 VT 1, ¶ 15, 206 Vt. 394; *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (concluding that neither a state nor an official acting in their official capacity are "persons" within the meaning of 42 U.S.C. § 1983); *Williams v. State*, 156 Vt. 42, 47 (1990) (referencing *Will*, 491 U.S. at 64, and concluding that a state is not a person under section 1983 jurisprudence); accord *Jordan v. Dep't of Corr.*, 2024 WL 2801705, at *6 (D. Conn. 2024) (concluding that section 1983 claim cannot proceed against Connecticut DOC because "neither a state, a state agency, nor a division of a state agency is a 'person' subject to suit under 42 U.S.C. § 1983").

The Court does not reach the remainder of DOC's arguments because it finds that Mr. Buswell did not bring a legally recognized claim against this Defendant. For the same reasons, the Court does not make findings of fact.

ORDER

Based on the foregoing, the Court concludes that Mr. Buswell has failed to state a claim for relief under VTCA. To the extent that Mr. Buswell's complaint can be understood to make claims under 42 U.S.C. § 1983, the case is filed against the wrong the defendant.

Accordingly, the Court grants judgment in favor of DOC on the claims raised by Mr. Buswell in this case.

Electronically signed on November 6, 2026, pursuant to V.R.E.F. 9(d).



Navah C. Spero
Superior Court Judge