

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-066

AUGUST TERM, 2020

Brian Butler* v. Michael Touchette	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 259-7-19 Wrcv
		Trial Judge: Robert P. Gerety, Jr.

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the superior court’s order dismissing his complaint against the Commissioner of the Vermont Department of Corrections (DOC). We remand.

Plaintiff is an inmate in the custody of the DOC. In January 2019, when plaintiff was housed at the Southern State Correctional Facility in Vermont, plaintiff filed an informal complaint requesting permission to order publications from Amazon or other distributors beyond the DOC’s approved vendor. Plaintiff relied on a DOC administrative rule pertaining to inmate access to publications. See Department of Corrections, Inmate Access to Publications, Code of Vt. Rules 13 130 007, <https://www.lexisnexis.com/hottopics/codeofvtrules>. Plaintiff argued that the rule allowed inmates to order from any vendor under the following language: “Inmates may request and have access to magazines, newspapers, softcover books, and other publications sent directly from publishers or commercial distributors.” *Id.* (General Publication Guidelines). Plaintiff did not agree with the plan suggested by correctional staff and submitted a grievance. A DOC staff member found that the Southern State Correctional Facility only allowed books to be ordered from a vendor approved by DOC. Plaintiff appealed this decision to the DOC Executive on February 1, 2019. The Executive denied the appeal, concluding that offering inmates the opportunity to order from an approved vendor complied with the requirements of the Directive. Plaintiff then appealed this decision to the Commissioner on March 1, 2019. There was no response from the Commissioner.

On July 1, 2019, plaintiff filed a complaint in the civil division. Plaintiff attached a memo from the Southern State Correctional Facility dated November 11, 2018, providing the DOC approved vendor list, which did not include Amazon. Plaintiff also attached letters he had sent to DOC’s approved vendor in April 2019 and May 2019, which indicated that plaintiff had attempted to obtain books from the approved vendor, but the books were not available. The State moved to dismiss, arguing that plaintiff’s suit was untimely filed and that there was no right to appeal the administrative decision regarding vendors. The court concluded that plaintiff’s complaint was timely filed because plaintiff had six months from the point it would have been reasonable for the Commissioner to respond. See V.R.C.P. 75(c) (providing that complaint should be filed “within 30 days after notice of any action or refusal to act” and “in the event of a failure to act, within six months after expiration of the time in which action should reasonably have occurred”). The court concluded, however, that there was no

basis for review of the DOC's decision regarding approved vendors provided by statute or any of the common-law writs and dismissed the action.

Plaintiff filed this appeal. On appeal, plaintiff argues that limiting his access to materials distributed by approved vendors is inconsistent with the rule as adopted.

As an initial matter, we address the State's argument that the appeal is moot because plaintiff is now incarcerated in Mississippi. According to the State, the contract with that facility makes the publications and packages policy and the Department's list of preapproved vendors not applicable to or binding on the contractor operating the facility in Mississippi. Plaintiff disputes that the issue is moot, asserting that an out-of-state prison meets the definition of correctional facility under 28 V.S.A. § 3 and therefore he is subject to the DOC's approved vendor list even though he is in Mississippi. He has represented that while incarcerated in Mississippi he has been subjected to the same policy restriction based on the DOC practice.

A case becomes moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome," or when "the reviewing court can no longer grant effective relief." In re Moriarty, 156 Vt. 160, 163 (1991) (quotations omitted). Even where there was a live controversy, a case may become moot when facts change. Id.

Here, plaintiff does not dispute the fact that he has been moved to an out-of-state facility. There is a dispute of fact, however, as to whether the facility in Mississippi applies the same regulations and policies regarding ordering of materials as that applied at the Southern State Correctional Facility. If the Mississippi facility applies different regulations or interprets the regulations in a different manner and plaintiff is no longer subject to the same restrictions on ordering books, the controversy would now be moot.* Because the trial court is better able to resolve this issue of disputed fact, we remand the matter to the trial court. See Brandt v. Menard, 2019 VT 32, ¶ 8 (remanding for trial court to resolve disputed fact presented on appeal).

Remanded for further proceedings consistent with this decision.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

William D. Cohen, Associate Justice

* We express no ruling on whether the DOC's regulations and policies are legally applicable in the Mississippi facility. The remand is to determine whether, as a factual matter, Mississippi is applying the DOC regulations and interpreting them in the same manner as the Southern State Correctional Facility.