COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2008AP1870 **Cir. Ct. No. 2007SC7428**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JOHNNY LACY, JR.,

PLAINTIFF-APPELLANT,

V.

PETER HUIBREGTSE, KELLY TRUMM AND STEVEN B. CASPERSON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: DIANE M. NICKS, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Johnny Lacy, Jr., an inmate at the Wisconsin Secure Program Facility (WSPF) in Boscobel, appeals the summary judgment dismissal on immunity grounds of his 42 U.S.C. § 1983 small claims

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08).

action against Peter Huibregtse, Kelly Trumm and Steven Casperson of the Wisconsin Department of Corrections (DOC). Lacy alleges that these officials infringed upon his First Amendment rights by adopting policies that deny inmates access to commercially produced photographs and that limit the number of photographs inmates may possess, and by not delivering to him certain risqué photographs that Lacy maintains are not pornography as the term is defined by the DOC policy prohibiting pornography in correctional institutions.

¶2 We conclude that Huibregtse, Trumm and Casperson are protected by qualified immunity from Lacy's claims for damages. Accordingly, we affirm.

BACKGROUND

¶3 The facts of this case are undisputed. At all relevant times, Lacy was an inmate at the WSPF. Beginning November 2002, the Division of Adult Institutions (DAI) inmate property policy limited inmates to possession of fifty photographs. *See* DAI Policy #309.20.01, Section XIII.C-10.[2] Peter Huibregtse, Deputy Warden at WSPF at the time of these events, sent a memorandum to all affected inmates informing them of the policy.

¶4 On September 9, 2005, WSPF personnel refused to deliver five photographs Lacy purchased from a mail order vendor. On April 26, 2006, WSPF personnel refused to deliver an additional ten photographs and one brochure Lacy received by mail from the vendor. On both occasions, WSPF personnel explained they refused to deliver the items because they were prohibited under DOC's

[2] DAI Policy # 309.20.01, Section XIII C-10 (October 2006) provides, in relevant part, that "[p]ersonal photographs are restricted to a combined limit of fifty (50)."

pornography ban set forth in WIS. ADMIN. CODE § DOC 309.04(4).[3] Lacy appealed both non-delivery decisions, alleging the photographs and brochures did not contain nudity. Huibregtse reviewed and denied Lacy's appeals. Lacy subsequently filed inmate complaints. Trumm, an inmate complaint examiner, reviewed the complaint related to the September 9 non-delivery, and another inmate complaint examiner reviewed the complaint related to the April 26 non-delivery. Both examiners recommended dismissal of the complaints. Huibregtse agreed and dismissed both complaints. The dismissals were affirmed by the corrections complaint examiner and the Secretary of the DOC.

¶5 In September 2006, the DAI implemented inmate property Policy #309.20.01, Section XIII.C-11, prohibiting possession of commercially produced photographs.[4] The policy contains a grandfather provision which allows inmates to keep commercial photographs already in their possession on the date the policy took effect. In July 2006, Casperson, Administrator of DAI at that time, sent a memorandum to all affected inmates informing them of the policy.

¶6 In January 2007, Lacy filed an inmate complaint alleging the DAI policy banning all commercially produced photographs violated his rights under the United States and Wisconsin Constitutions. Trumm reviewed Lacy's complaint and recommended dismissal. Huibregtse dismissed Lacy's complaint,[5]

[3] WIS. ADMIN. CODE § DOC 309.04(4)(c)8.a. provides, in relevant part, that "[t]he department may not deliver incoming or outgoing mail if it … [i]s 'injurious,' meaning material that: [i]s pornography."

[4] DAI Policy # 309.20.01, Section XIII C-11 (October 2006) provides, in relevant part, that "[c]ommercially published photos are not allowed."

[5] Lacy's inmate complaint regarding the ban on commercial photographs and the limit on the number of photographs an inmate may possess is not in the record. Eileen Pray, an inmate complaint examiner, averred in an affidavit included in the record that the complaint was filed. (continued)

and the corrections complaint examiner and the Secretary of the DOC affirmed the dismissal.

¶7 Lacy subsequently filed a civil rights action under 42 U.S.C. § 1983 in small claims court. He alleged that the DAI policies banning inmates from possessing commercially produced photographs and limiting the number of personal photographs possessed by an inmate to fifty, and the non-delivery of certain risqué photographs violated his civil rights[6] and his rights under the First Amendment of the United States Constitution.[7] Respondents claimed immunity and moved for summary judgment. Lacy moved for summary judgment on his constitutional claims. The circuit court granted respondents' motion, ruling that Trumm and Huibregtse had absolute immunity, and Casperson had qualified immunity, and entered judgment in their favor. Lacy appeals.

The State cites to this affidavit in support of its factual assertion that the complaint was administratively processed and dismissed. This affidavit does not support these assertions and we find no documents in the record reflecting these assertions. However, the State acknowledges in its brief that this complaint was filed and that the administrative actions were taken. The State does not argue that Lacy failed to exhaust his administrative remedies and does not argue forfeiture. For these reasons, and because we resolve the issues related to DAI Policy #309.20.01 on qualified immunity grounds, we address Lacy's complaint on these two issues.

[6] 42 U.S.C. § 1983 provides, in relevant part:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

[7] UNITED STATES CONST. amend. I provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

STANDARD OF REVIEW

Summary Judgment

¶8 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). "[W]e draw all reasonable inferences from the evidence in the light most favorable to the non-moving party." ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781.

DISCUSSION

Absolute Immunity

¶9 In Wisconsin, we recognize two types of immunity for public officials, absolute and qualified. Absolute immunity arises out of judicial and quasi-judicial proceedings. *See* ***DiMiceli v. Klieger***, 58 Wis. 2d 359, 365, 206 N.W.2d 184 (1973). To determine whether absolute immunity is available to a government official, we look to an official's function:

> the touchstone for [finding absolute immunity] has been [the] performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights. When [absolute] immunity is extended to officials other than judges, it is because their judgments are functionally comparable to those of judges—that is, because they, too, exercise a discretionary judgment as a part of their function.

Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 435-36 (1993) (citations omitted). The official claiming absolute immunity bears the burden of

demonstrating how public policy requires protection beyond that of qualified immunity. ***Harlow v. Fitzgerald***, 457 U.S. 800, 808 (1982); ***Butz v. Economou***, 438 U.S. 478, 506-07 (1978).

¶10 Trumm and Huibregtse argue that the circuit court properly determined that they are entitled to absolute immunity, maintaining that their duties in examining and dismissing two of Lacy's three complaints (Trumm) and in affirming the dismissal of the complaints (Huibregtse) were judicial in nature. For the reasons set forth below, we conclude that Trumm and Huibregtse are not entitled to absolute immunity.

¶11 In deciding that Trumm and Huibregtse are entitled to absolute immunity, the circuit court relied on ***Koutnick v. Brown***, 351 F. Supp. 2d 871 (W.D. Wis. 2004), which held that an inmate complaint examiner and Huibregtse (a party in that case), were entitled to absolute immunity. However, following ***Koutnick***, the United States District Court for the Western District of Wisconsin issued ***Lindell v. O'Donnell***, 2005 WL 2740999 at 15 (W.D. Wis. 2005), which concluded that DOC inmate complaint examiners (Trumm among them in ***Lindell***) were not entitled to absolute immunity because they "serve as both fact-gatherers and fact-finders" and make decisions "without the benefit of an adversarial process and within an environment that is not impartial or insulated from workplace pressures."[8] The federal district court in ***Lindell*** likened DOC inmate

[8] ***Koutnick v. Brown***, 351 F. Supp. 2d 871 (W.D. Wis. 2004), and ***Lindell v. O'Donnell***, 2005 WL 2740999 at 15 (W.D. Wis. 2005), are cases from federal courts sitting in Wisconsin. Because they are from another jurisdiction, we cite them for their persuasive value only. *See* ***Miezin v. Midwest Express Airlines, Inc.***, 2005 WI App 120, ¶15 n.5, 284 Wis. 2d 428, 701 N.W.2d 626; ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶7 n.6, 246 Wis. 2d 814, 632 N.W.2d 878. Additionally, although ***Lindell*** is an unpublished decision, WIS. STAT. § 809.23(3) permits us to cite unpublished opinions from other jurisdictions for their persuasive value. ***Predick v. O'Connor***, 2003 WI App 46, ¶12 n.7, 260 Wis. 2d 323, 660 N.W.2d 1.

complaint examiners to prison officials serving on an inmate disciplinary review board whose claims of absolute immunity were rejected by the Supreme Court in ***Cleavinger v. Saxner***, 474 U.S. 193, 201-02 (1985). There, the High Court concluded that, as employees of the prison system, the members of the disciplinary review board lacked the independence of a state or federal judge, and were therefore not entitled to absolute immunity. ***Cleavinger***, 474 U.S. at 203-04. The ***Cleavinger*** court noted that the board members were direct subordinates of the prison warden who reviewed their decisions, and co-workers of the prison employee against whom the inmate complaint was filed. ***Id***. at 204. "It is the old situational problem of the relationship between the keeper and the kept," explained the court, "a relationship that hardly is conducive to a truly adjudicatory performance." ***Id***.

¶12 Like the federal district court in ***Lindell***, we are persuaded that, while inmate complaint examiners and the prison officials who review the examiners' decisions act in some sense like judges, they are not entitled to absolute immunity because they lack the independence from the parties that is essential to the judicial function. We find persuasive ***Lindell***'s thorough analysis of this issue, which we have set forth in its entirety below:

> The distinctions made by the [***Cleavinger***] Court between prison disciplinary hearing officers and judges apply with even greater force to the differences between judges and inmate complaint review officers. In Wisconsin, the inmate complaint review system is administered by prison officials operating in four distinct roles: (1) "inmate complaint examiners," who investigate facts of inmate complaints and offer preliminary recommendations for disposition to the reviewing authority; (2) "reviewing authorities," who receive the recommendations of complaint examiners and either recommend further investigation by the inmate complaint examiner or dispose of the complaints; (3) "corrections complaint examiners," who review decisions of reviewing authorities, conduct

> independent investigation of the facts underlying the complaint and offer recommendations for disposition to the Secretary; and (4) the "Secretary," who can order further investigation by the corrections complaint examiner, accept recommendations of the corrections complaint examiner (with or without modification) or reject the recommendation and issue an independent disposition. Wis. Admin. Code §§ DOC 310.11(3) & (11), 310.12(2), 310.13(5)-(6), 310.14(2). Like disciplinary hearing officers, all inmate complaint review officers are employees of the Wisconsin Department of Corrections. See, e.g., Wis. Admin. Code § DOC 310.03(2), (5), (10), (15).
>
> Typically, complaint review officers work within the Department of Corrections as the colleagues and supervisors of officials often named in suits as "offending parties." Although reviewing authorities and the Secretary are responsible for determining the disposition of complaints, which is a task traditionally carried out by judicial officers, all complaint review officials possess the authority to investigate facts or recommend that those under their supervision investigate facts relevant to the resolution of inmate complaints. Wisconsin Admin. Code §§ DOC 310.11(3) and 310.13(5) authorize inmate complaint examiners and corrections complaint examiners to use "discretion in deciding the method best suited to determine the facts [raised by a complaint], including personal interviews, telephone calls and document review." Reviewing authorities and the Secretary are given the authority to order "further investigation" of the complaints that come before them. Wis. Admin. Code §§ DOC 310.12(2)(e), 310.14(2)(d). Therefore, officers within the inmate complaint review system serve as both fact-gatherers and fact-finders. They investigate charges of wrongdoing on the part of their colleagues and recommend or issue decisions on those charges. Their decisions are made without the benefit of an adversarial process and within an environment that is not impartial or insulated from workplace pressure…. I find that these officials fail to meet the prevailing standard for absolute immunity as set forth in ***Cleavinger***.

Lindell, 2005 WL 2740999 at 15.

Qualified Immunity

¶13 In the alternative, Trumm and Huibregtse argue they are entitled to qualified immunity, and DAI Administrator Casperson joins in this argument. "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Pearson v. Callahan***, 129 S. Ct. 808, 815 (2009) (citation omitted). Prior to ***Pearson***, courts applied a rigid two-part test to determine whether a government official is entitled to qualified immunity. *See* ***Saucier v. Katz***, 533 U.S. 194, 200-03 (2001). Under that test, courts were required to first decide whether the facts alleged made out a violation of a constitutional right. ***Pearson***, 129 S. Ct. at 815-16. If this prong is met, the analysis proceeded to whether the right at issue was "clearly established" at the time of the alleged misconduct. ***Id.*** at 816. Under ***Pearson***, however, courts are no longer required to analyze these two steps in order when addressing a claim of qualified immunity. Instead, courts now have the discretion to decide the sequence of the two-prong qualified immunity analysis "in light of the circumstances" of the case at hand. ***Pearson***, 129 S. Ct. at 818. Moreover, it is no longer necessary to address both prongs if the party asserting qualified immunity makes a sufficient showing as to one prong. ***Id***.

¶14 Lacy alleges that DAI Policy #309.20.01, Section XIII.C-11, prohibiting the possession of commercially produced photographs, and DAI Policy #309.20.01, Section XIII.C-10, limiting the number of photographs an inmate may possess to fifty, violate his First Amendment rights. We observe that Lacy has not designated the nature of his constitutional challenges as facial or as-applied. Nonetheless, for purposes of this appeal, we construe both of these claims as facial challenges to the constitutionality of these policies because neither of these

policies were specifically applied against Lacy. It would appear that these claims target DAI Administrator Casperson, an official of the agency charged with creating DAI policies. For purposes of determining whether Casperson may assert qualified immunity against these claims, we consider first whether Lacy's purported First Amendment right to possess commercially produced photographs and to possess more than fifty photographs are "clearly established."

¶15 With regard to the commercial photography ban, we note that the United States Court of Appeals for the Seventh Circuit reviewed this DAI policy and upheld its constitutionality in ***Jackson v. Frank***, 509 F.3d 389, 391-92 (7th Cir. 2007). Although we are not bound by the Seventh Circuit's rulings on the constitutionality of Wisconsin laws, *see* ***Kaloti Enterprises, Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶23, 283 Wis. 2d 555, 699 N.W.2d 205, we are persuaded by the ***Jackson*** court's analysis. Applying the test set forth in ***Turner v. Safley***, 482 U.S. 78, 89-91 (1987), for determining the constitutionality of a First Amendment restriction on inmates, the Seventh Circuit in ***Jackson*** held the commercial photography ban was permissible because it was reasonably related to legitimate penological objectives. ***Jackson***, 509 F.3d at 391-92. The ***Jackson*** court concluded that the DOC's interest in conserving staff resources by limiting the property inmates may possess, and the availability of an alternate means of acquiring the same material via a magazine subscription (inmates may possess magazines under DOC rules), weighed in favor of the constitutionality of the restriction. ***Id.*** Adopting ***Jackson***'s analysis as our own, we conclude that Lacy does not have a clearly established right to possess commercially produced photographs, and, thus, Casperson is entitled to qualified immunity on this claim.

¶16 Lacy argues this case is distinguishable from ***Jackson*** because ***Jackson*** turned on the fact that photographs at issue in that case were of the

actress Jennifer Aniston, a celebrity whose image appears regularly in popular magazines. *See* ***id.*** at 390. Thus, Jackson would be able to obtain images of Aniston by subscribing to celebrity magazines, whereas, in Lacy's view, this alternate means of First Amendment expression is not available to him because the less famous models in Lacy's mail order photographs do not appear in popular magazines. We are not persuaded.

¶17 We agree with the circuit court that the fact that Lacy will not find pictures of these particular models in popular magazines does not alter the conclusion in this case. As the circuit court noted, Lacy, unlike Jackson, seeks photographs of swimwear-clad women in general, not photographs of any one swimsuit model in particular. Thus, subscribing to a popular magazine that features models in swimwear is a more than adequate alternate means of the First Amendment activity Lacy seeks to engage in.

¶18 With regard to Lacy's challenge to the fifty-photograph limit set forth in DAI Policy #309.20.01, Section XIII.C-10, we note that the constitutionality of this rule has not previously been addressed by any state or federal court. However, Lacy fails to direct our attention to any case law invalidating a comparable restriction, and therefore does not meet his burden of showing that this policy violates a "clearly established" constitutional right.

¶19 Moreover, some of the reasons advanced by the respondents for the fifty-photograph limit are identical to those reasons on which the ***Jackson*** court relied in upholding the commercial photography ban. For example, an affidavit submitted by Daniel A. Westfield, Security Chief of the DAI, stated that the photograph limit conserves limited staff resources, allowing security staff to spend less time processing incoming mail and more time with other essential tasks. As

noted, conservation of staff resources was among the reasons on which the ***Jackson*** court relied in concluding that the commercial photography ban was reasonably related to a legitimate penological objective. *See* ***Jackson***, 509 F.3d at 391-92. We therefore conclude that Casperson is entitled to qualified immunity on this claim as well.

Risqué Photographs Withheld from Lacy

¶20 Lacy contends that prison personnel improperly withheld from him fifteen photographs they confiscated on September 9, 2005 and April 26, 2006, as pornographic under the definitions of pornography and nudity as set forth in WIS. ADMIN. CODE §§ DOC 309.02(16)(b) and (14), respectively.[9] Pornography as defined in § DOC 309.02(16) includes "a publication that features nudity."[10] Section DOC 309.02(14) defines "nudity for commercially produced material" as:

[9] Lacy also argues that the circuit court erred by dismissing this claim on the ground that the policy banning inmates from possessing commercially produced photographs applied to these photos. We agree. This ban was not in effect at the time the photographs were withheld, and the regulation grandfathers in commercial photographs in the possession of an inmate prior to the enactment of the ban.

[10] WISCONSIN ADMIN. CODE § DOC 309.02(16) defines pornography as follows:

> (a) Any material, other than written material, that depicts any of the following:
>
> 1. Human sexual behavior.
>
> 2. Sadomasochistic abuse, including but not limited to flagellation, bondage, brutality to or mutilation or physical torture of a human being.
>
> 3. Unnatural preoccupation with human excretion.
>
> 4. Nudity which is not part of any published photograph or printed material, such as a personal nude photograph.

(continued)

> The showing of human male or female genitals or pubic area with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of the areola or nipple, or the depiction of covered male genitals in a discernibly turgid state.

"Opaque" is not defined in the regulation. Turning to its definition in a well-accepted dictionary, "opaque" means "impervious to the rays of visible light: not transparent or translucent." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1579 (1993).

¶21 The State contends that Trumm and Huibregtse, the officials who withheld the photographs from Lacy, are entitled to qualified immunity against Lacy's as-applied constitutional claim for damages stemming from the withholding of risqué mail order photographs under the pornography ban.[11] We

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> 5. Nudity of any person who has not attained the age of 18.
>
> (b) A publication that features nudity.
>
> (c) Written material which the average person, applying state contemporary community standards, would find, when taken as a whole does all of the following:
>
> 1. Appeals to the prurient interest.
>
> 2. Describes human sexual behavior in a patently offensive way.
>
> 3. Lacks serious literary, artistic, political, educational, or scientific value.

[11] We do not construe Lacy's complaint to state a facial challenge to the constitutionality of the pornography ban. He merely asserts that the photographs were wrongfully denied to him under the DAI policy's own definitions of nudity and pornography, which are the product of a successful challenge to the constitutionality of a prior, more stringent, ban on pornographic materials. We accept for purposes of this analysis only that the present regulation mirrors the scope of a prison inmate's First Amendment rights to published materials.

agree because Lacy has failed to establish that he had a clearly established constitutional right to these particular photographs at the time they were withheld.

¶22 Upon our review of these photographs, we conclude that a majority were properly withheld under the rule's definitions of nudity and pornography. However, four of the photographs appear to have been improperly withheld under the pornography ban, as the swimsuits in these photographs are fully opaque and cover the pubic area and areolae of each of the models. Nonetheless, these improperly withheld photographs come so close to the rule's definitions of nudity and pornography—all of the photographs feature women in provocative poses wearing skimpy swimsuits made of thin fabric—that it cannot be said that Lacy had a "clearly established" right to these photographs at the time they were excluded. In other words, while we conclude that four of these photographs do not contain nudity and are not pornography within the meaning of the rule, a prison official reviewing these photographs might reasonably come to a different conclusion. Thus, we conclude that Trumm and Huibregtse are entitled to qualified immunity on Lacy's claim for damages relating to the four photographs that were improperly withheld from him.[12]

¶23 For the foregoing reasons, we conclude that all three respondents are entitled to qualified immunity from damages on all claims.

[12] In the alternative, the State contends that Lacy was not entitled to the photographs and brochure because they are subject to the ban on commercially published photographs. We disagree. We noted in footnote 8 that DAI Policy #309.20.01, contained a grandfather provision, permitting inmates to possess commercially published photographs received before September 2006, the effective date of the new policy. The alleged pornographic and nude photographs were withheld from Lacy in September 2005 and April 2006, before the ban on commercial photographs was adopted.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.