COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2459 **Cir. Ct. No. 2016CV538**

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

STEVEN J. LELINSKI,

PLAINTIFF-APPELLANT,

V.

ALBERT O. DURAN, JIN T. GOH, MICHAEL J. TURNER, DUSTY P. GROSS, JENNIFER L. DELVAUX, BRIAN D. EWERT, THERESA A. MURPHY, RONALD S. BUDWIG, JOHN DOE, JUDY P. SMITH, EDWARD F. WALL AND DEPARTMENT OF CORRECTIONS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Inmate Steven J. Lelinski, pro se, appeals an order dismissing his claims against the Department of Corrections (DOC), former DOC secretary Edward F. Wall, Oshkosh Correctional Institution (OSCI) warden Judy P. Smith, and various OSCI officials (collectively, the State defendants). One claim alleging that fellow inmate Albert O. Duran harassed, intimidated, threatened, and assaulted and battered him was allowed to proceed. We affirm.

¶2 Lelinski is a former police officer incarcerated at OSCI. In 2016, he filed a twenty-two-count complaint alleging state law and state and federal constitutional violations. The first count alleged that Duran subjected Lelinski to on-going harassment, threats of physical harm, including sodomy, and ultimately battered him by shoving him in the back. Eleven state-law claims alleged that the State defendants negligently failed to follow through on his complaints to them, retaliated against him for filing them, and violated article I, section 3 of the Wisconsin Constitution. The remaining ten claims alleged that the State defendants, except for the DOC, violated his rights under the First, Seventh, Eighth, and Fourteenth Amendments to the United States Constitution by either inadequately acting on his complaints about Duran and the warden or retaliating against him for filing them.[1]

[1] Examples of the alleged retaliation include dismissing his complaints without taking corrective action; harassing him by awakening him after midnight to discuss a record request he made about a prison policy and, in that discussion, asking him about his political affiliations and views on the governor and the Milwaukee County sheriff; being moved from a less-restrictive, protective custody unit to less desirable, general-population units; and issuing a conduct report and assigning him fifteen days' in-cell confinement for having retrieved a pizza he ordered from the training kitchen that was misdelivered to a unit in which he formerly was housed.

¶3 The State defendants asked the circuit court to screen the complaint under WIS. STAT. § 802.05(4) (2015-16).[2] The court ordered the dismissal of the state-law claims on the basis of qualified immunity, finding that the manner of conducting an OSCI investigation is discretionary as it is not statutorily set forth, and, under § 802.05(4)(b)3., the State defendants are immune from liability for monetary damages. The court also found the constitutional claims to be frivolous, as Lelinski had an avenue and opportunity to air his grievances, and dislike of the process or outcome does not rise to a constitutional violation. The sole count against Duran was allowed to proceed.

¶4 On appeal, Lelinski seeks reversal of the order of dismissal. He first argues that the court erred when it applied qualified immunity and dismissed his state-law claims on the basis that no statutory method prescribes how to investigate an inmate complaint. The particular method may be undefined, he contends, but the State defendants' statutory duty to protect him is clear.[3] He also asserts that the retaliatory actions taken against him for complaining violated his right to "freely speak, write and publish his sentiments on all subjects," guaranteed him by article I, section 3 of the Wisconsin Constitution. We disagree.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

[3] Lelinski cites to WIS. STAT. §§ 301.02 (the DOC "shall maintain and govern the state correctional institutions"); 301.03(2), the DOC shall "[s]upervise the custody and discipline of all prisoners"); and 302.07 (the warden or superintendent, through officers of the institution, "shall maintain order, enforce obedience, suppress riots and prevent escapes"). He also cites to WIS. ADMIN. CODE §§ DOC 306.03 (Sept. 2017) (the DOC's primary security objectives "are to protect the public, staff, and inmates and to afford inmates the opportunity to participate in correctional activities in a safe setting,") and 306.04 (every DOC employee "is responsible for the safe custody of the inmates confined in the institutions.").

¶5 "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997). "[W]e accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. Although Wisconsin is a notice-pleading state, ***Norwest Bank Wis. Eau Claire v. Plourde***, 185 Wis. 2d 377, 388, 518 N.W.2d 265 (Ct. App. 1994), and we liberally construe prisoners' pro se complaints, ***State ex rel. Adell v. Smith***, 2001 WI App 168, ¶7, 247 Wis. 2d 260, 633 N.W.2d 231, we do not accept as true a complaint's legal conclusions, ***Data Key Partners***, 356 Wis. 2d 665, ¶19. Legal conclusions are insufficient to enable a complaint to withstand a motion to dismiss. ***Id.*** It is the sufficiency of the *facts* alleged that control if a claim for relief was properly pled. ***Strid v. Converse***, 111 Wis. 2d 418, 422-23, 331 N.W.2d 350 (1983).

¶6 "[A]dministrative rules enacted pursuant to statutory rule-making authority have the force and effect of law." ***Kranzush v. Badger State Mut. Cas. Co.***, 103 Wis. 2d 56, 77-78, 307 N.W.2d 256 (1981). The precepts governing the presence of implied rights of action thus apply equally to statutes and administrative code sections. ***Id.*** at 78-79. A statute or administrative rule cannot form the basis for a private right of action to impose civil liability absent "a clear indication of the legislature's intent to create such a right." ***Grube v. Daun***, 210 Wis. 2d 681, 689, 563 N.W.2d 523 (1997). The statutory and administrative code sections Lelinski cites evince no such intent.

¶7 Immunity from personal liability is the general rule for state employees. WIS. STAT. § 893.80(4); ***Kimps v. Hill***, 200 Wis. 2d 1, 10, 546 N.W.2d 151 (1996). Immunity exists for their negligent acts performed pursuant to a discretionary duty, but not pursuant to a ministerial duty. *See* ***id.*** at 10. A

discretionary duty involves the exercise of judgment in the application of a rule to specific facts. *See* ***Lifer v. Raymond***, 80 Wis. 2d 503, 512, 259 N.W.2d 537 (1977). A ministerial act involves a duty that "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." ***Stann v. Waukesha Cty.***, 161 Wis. 2d 808, 816, 468 N.W.2d 775 (Ct. App. 1991).

¶8 Lelinski points to no rule or statute that expressly imposes either a definitive duty or the manner of performing it in regard to determining whether, when, and where to transfer him, whether and how to discipline him, or how much and what kind of protection from Duran was warranted. Neither the allegations recited in his complaint nor the laws he claims were violated describe "absolute, certain and imperative" duties that leave "nothing … for judgment or discretion." Evaluating inmate threats and implementing procedures to reduce them requires balancing multiple objectives and limited resources dependent on the matter at hand. *See* ***Ottinger v. Pinel***, 215 Wis. 2d 266, 279-80, 572 N.W.2d 519 (Ct. App. 1997) (stating that the nature of operating a penal institution, including the management of inmates, "requires that correctional officers have discretion on how they will deal with any situation that arises.").

¶9 And even if the State defendants made errors in judgment or negligently performed their discretionary duties, immunity remains the rule as long as the actions were not malicious, willful, and intentional,[4] ***Lister v. Board of***

[4] Lelinski alleges in conclusory fashion that the actions of several of the State defendants were malicious, willful, and intentional. Because these allegations come up short on facts, they fail to state a claim for which relief could be granted.

Regents, 72 Wis. 2d 282, 301-02, 240 N.W.2d 610 (1976), or "wholly outside" the employees' discretionary authority, *see* ***K.L. v. Hinickle***, 144 Wis. 2d 102, 113, 423 N.W.2d 528 (1988). Neither of those scenarios are true here. Further, WIS. STAT. § 893.80(4) immunizes the State defendants from liability for tort-based injunctive relief,[5] or for money damages in tort. ***Willow Creek Ranch, L.L.C. v. Town of Shelby***, 2000 WI 56, ¶31, 235 Wis. 2d 409, 611 N.W.2d 693. Lelinski has not identified any exception to the general rule of qualified immunity. *See* ***Kimps v. Hill***, 187 Wis. 2d 508, 523-24, 523 N.W.2d 281 (Ct. App. 1994), *aff'd*, 200 Wis. 2d 1, 546 N.W.2d 151 (1996).

¶10 Lelinski also seeks money damages for the State defendants' alleged retaliatory acts, claiming a violation of his rights under article I, section 3 of the Wisconsin Constitution. He points to no law authorizing money damages for such a claim, and we have found none, but for a single narrow exception—the taking of property without just compensation. *See* ***W.H. Pugh Coal Co. v. State***, 157 Wis. 2d 620, 634-35, 460 N.W.2d 787 (Ct. App. 1990). Not being a takings case, this claim likewise fails.

¶11 Lelinski's final state-law claim is that DOC is liable for money damages for its failure to properly train and supervise the State defendants, allowing them to act negligently, retaliate against him, and fail to protect him. Lelinski again does not state a claim upon which he can recover because a suit

[5] Before filing suit, Lelinski sought a harassment injunction against Duran. *See* ***Lelinski v. Duran***, No. 2015AP1923, unpublished slip op. at 1. He did not seek injunctive relief in this action, however. Duran no longer is at OSCI. *See* ***id.*** at 3. The availability of injunctive relief thus is a moot issue, as it would have no practical effect on the underlying controversy. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

against DOC is barred by sovereign immunity. ***Mayhugh v. State***, 2015 WI 77, ¶3, 364 Wis. 2d 208, 867 N.W.2d 754.

¶12 As noted, Lelinski also alleged four federal constitutional violations. On appeal, however, he limits his arguments to retaliation claims in violation of his First Amendment right to free speech and failure-to-protect claims in violation of the Eighth Amendment. The circuit court properly dismissed them.

¶13 Lelinski contends in his brief that various State defendants violated his First Amendment rights by retaliating against him for filing complaints against Duran, making a record request regarding an inmate-compensation policy, and filing a complaint against the warden in connection with that policy. He failed to allege in his complaint, however, that his activities were protected by the First Amendment, that he suffered one or more retaliatory actions that likely would deter him from future protected speech, or that First Amendment activity was a motivating factor in the State defendants' decision to retaliate. *See* ***Soderlund v. Zibolski***, 2016 WI App 6, ¶40, 366 Wis. 2d 579, 874 N.W.2d 561.[6] It would "trivialize the First Amendment" to hold that harassment for exercising a First Amendment right is "always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." ***Bart v. Telford***, 677 F.2d 622, 625 (7th Cir. 1982). Lelinski has not stated a First Amendment retaliation claim.

[6] Lelinski did allege that the sergeant disciplining him for retrieving the pizza "made comments that indicated" the punishment was payback for seeking an injunction against Duran. His subjective feeling that he was the victim of retaliation is insufficient Courts apply an objective test to determine whether the alleged conduct likely would deter a person of ordinary firmness from future protected activity. ***Surita v. Hyde***, 665 F.3d 860, 878-79 (7th Cir. 2011). As Lelinski does not reveal the alleged comments, an objective determination is impossible. We note, however, that a prisoner who, without permission, leaves an assigned area or enters an unassigned area violates WIS. ADMIN. CODE §§ DOC 303.52 and 303.53.

¶14 As for Lelinski's failure-to-protect claim, "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate" violates the Eighth Amendment's prohibition against cruel and unusual punishment. ***Farmer v. Brennan***, 511 U.S. 825, 828 (1994) (citation omitted). But not every injury an inmate suffers constitutes an Eighth Amendment violation. ***Id.*** at 834. "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." ***Id.*** at 837. "[A]n official's failure to alleviate a significant risk that he [or she] should have perceived but did not … cannot … be condemned as the infliction of punishment." ***Id.*** at 838.

¶15 Lelinski complained that Duran persistently harassed and intimidated him and twice "included a statement about sodomizing" him, causing him embarrassment, humiliation, and emotional distress, and requested on several occasions to be moved away from Duran. He also asserts that officials were aware that Duran "forcibly shoved" him in the back, causing him to "almost lose control and drop [his] tray of food," resulting in a backache that lasted a day-and-a-half for which he took ibuprofen but did not require medical care.

¶16 "The [E]ighth [A]mendment does not demand that guards perform this task [of protecting inmates] flawlessly." ***Riccardo v. Rausch***, 375 F.3d 521, 525 (7th Cir. 2004). "All that can be expected is that guards act responsibly under the circumstances that confront them." ***Id.*** Feelings of embarrassment that arise from harassing and offensive comments do not constitute cruel and unusual punishment actionable under the Eighth Amendment. *See* ***DeWalt v. Carter***, 224 F.3d 607, 612 (7th Cir. 2000).

¶17 The State defendants may have discounted Lelinski's claimed emotional distress because the one-time "shove" did not even upend Lelinski's food tray or prompt him to seek medical attention. Further, he cast his cell transfers as retaliation.

> A guard may be responsible without being credulous. Some prisoners are manipulative and cry "wolf" in an effort to have a cell to themselves or choose a favored cellmate. Other prisoners perceive specters in every shadow, even though their fears are unsupported…. Guards therefore must discriminate between serious risks of harm and feigned or imagined ones, which is not an easy task given the brief time and scant information available to make each of the many decisions that fill every day's work.

Riccardo, 375 F.3d at 525. Lelinski's Eighth Amendment failure-to-protect claim was properly dismissed.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.