COURT OF APPEALS
DECISION
DATED AND FILED

January 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2457 **Cir. Ct. No. 2010CV2683**

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

CHARLES C. DOWNING,

PLAINTIFF-APPELLANT,

V.

RICHARD RAEMISCH, DANIEL WESTFIELD, MICHAEL THURMER, MICHAEL MEISNER, THERESA MURPHY, JOHN DAHLKE, DAWN BRONKHORST, COII (FNU) SCHLIEVE, COII (FNU) OVERLIEN, LINDA ALSUM-O'DONOVAN AND COII (FNU) YUNTO,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dane County: JOHN MARKSON, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Charles Downing, an inmate at the Green Bay Correctional Institution, appeals an order that dismissed his civil rights action for

alleged violations of the United States Constitution, the Wisconsin Administrative Code, and the terms of a class action settlement agreement reached in ***Aiello v. Litscher***, 104 F. Supp. 2d 1068 (W.D. Wis. 2000), as well as another order denying reconsideration. The basis for the lawsuit was a series of decisions by prison officials that denied Downing access to materials the prison officials deemed pornographic. We affirm for the reasons discussed below.

BACKGROUND

*The **Aiello** Settlement Agreement*

¶2 ***Aiello*** was a federal class action lawsuit challenging the constitutionality of an administrative code provision on pornography that broadly prohibited prisoners in the Wisconsin prison system from having access to sexually explicit materials. ***Aiello***, 104 F. Supp. 2d at 1070. After the district court issued a decision denying summary judgment, the parties entered into a settlement agreement under which Department of Corrections (DOC) officials agreed to promulgate a revised rule on pornography that was narrower in its definitions of nudity and obscenity, to train its officials on the application of the new rule, to maintain and make available to prisoners a current prohibited publications list, and to reimburse prisoners for certain costs associated with materials later found by a court to have been improperly disallowed by the prison reviewing authority.

¶3 A paragraph describing the scope of the settlement agreement stated:

> The litigation is not about, and this Settlement Agreement may not be enforced based solely upon, isolated misinterpretations of the rule or its successor regulations by line staff, so long as adequate procedures are in place to review and address those misinterpretations. In addition, because this Settlement Agreement is intended only to

> resolve plaintiffs' effort to secure injunctive relief against the rule, nothing in this Agreement should be interpreted to preclude any action challenging any DOC regulation or policy that is adopted subsequent to the rule, including [the revised rule set forth in the Agreement], nor does this agreement preclude any action for damages arising out of the rule or any other regulation, practice or policy of DOC.

The agreement went on to describe procedures for making and challenging any future modifications to the rule, and for allowing oversight by the class attorneys.

¶4 The revised administrative rule defining pornography that was promulgated as a result of the ***Aiello*** settlement remains in effect. *See* WIS. ADMIN. CODE § DOC 309.02(16). The federal district court that approved the ***Aiello*** settlement provided further guidance to its enforcement in a memorandum decision directed to be posted in prisons for Wisconsin prisoners. The district court explained that the settlement bound all Wisconsin prisoners to an agreement that the revised rule would protect their First Amendment rights, and thus barred any future federal lawsuits raising facial challenges to the rule's constitutionality. The district court then observed that the settlement would not prevent prisoners from filing "lawsuits for monetary or injunctive relief for alleged violations of the DOC regulation or policy put into place to codify the terms of the agreement," and that any such lawsuit alleging a violation of § DOC 309 or internal management policy IMP 50 would raise a claim "arising under state law that must be brought in state court." Finally, the district court noted that a prisoner who believes prison officials are violating the settlement agreement also has the option of bringing the matter to the attention of the class attorney for evaluation of whether a contempt motion might be warranted. The district court has made similar comments about the availability of state lawsuits and assistance from the class attorney in a number of subsequent lawsuits in which a class member sought to litigate whether prison officials had wrongly denied access to material that was permissible under the

settlement agreement. *See, e.g.*, ***George v. Smith***, 467 F. Supp. 2d 906, 916 (W.D. Wis. 2006).

The Present Lawsuit

¶5 Downing filed an inmate complaint alleging that prison officials wrongly disapproved his request to order copies of PENTHOUSE UNCENSORED II and PENTHOUSE UNCENSORED V (publications Downing described as "strictly written material"); confiscated his copy of WOMEN AND ART: CONTESTED TERRITORY (a book that was found not to contain depictions of female nudity) on the grounds that it showed violence, despite having previously approved his receipt of it through the inmate complaint process; confiscated his copies of THE ENCYCLOPEDIA OF UNUSUAL SEX PRACTICES and MY SECRET GARDEN under the mistaken belief that they were on the institution's list of reviewed and prohibited publications; and placed another eight titles that Downing wished to obtain on the prohibited publications list. Downing protested both the seizure of materials already in his possession and the prohibition on his obtaining other materials in the future.

¶6 After failing to obtain relief through the inmate complaint system, Downing filed the present lawsuit claiming that the categorization of the cited materials as pornography and contraband violated: (1) his constitutional rights under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments; (2) the terms of the settlement agreement in ***Aiello***; (3) the Department of Corrections' internal management policy IMP 50; and (4) WIS. ADMIN. CODE §§ DOC 309.02, 309.04, 309.05, and 309.20. The lawsuit sought declaratory and injunctive relief, and further claimed damages pursuant to both 42 U.S.C. § 1983 and a private right to action under state law. The circuit court dismissed Downing's federal claims on a

motion to dismiss, and decided the remaining state law claims against him on summary judgment.

STANDARD OF REVIEW

¶7 This court reviews summary judgment decisions *de novo*, applying the same methodology and legal standard employed by the circuit court. ***Frost v. Whitbeck***, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted). We first examine the pleadings to determine whether the complaint states a claim and whether the answer joins an issue of fact or law. ***Id.*** If issue has been joined, we examine the parties' affidavits and other submissions to determine whether the movant has made a prima facie case for judgment and, if so, whether there are any material facts in dispute that would entitle the opposing party to trial. ***Id.***; *see also* WIS. STAT. § 802.08(2).

DISCUSSION

¶8 Downing raises the following issues on appeal: (1) the ***Aiello*** settlement agreement created a private right of action for Wisconsin prisoners to sue for damages under state law; (2) prison officials violated his due process rights by the manner in which they determined that his materials were contraband; (3) the defense of immunity for discretionary acts was not available to a number of the prison officials because many of them failed to present affidavits explaining the scope of their duties and the challenged decisions were outside their training or authority, and one official acted maliciously; (4) Downing is authorized to seek injunctive relief under WIS. STAT. § 813.40(1)(b); and (5) Downing is entitled to relief in the interest of justice. We address each issue in turn.

Private Right of Action for Alleged Violations of Administrative Rule

¶9 Several of Downing's claims in this action sought monetary damages for alleged violations of WIS. ADMIN. CODE § DOC 309.02, the revised administrative rule on pornography promulgated pursuant to the ***Aiello*** settlement agreement, and related provisions in § DOC 309.04 and 309.05. The general rule, however, is that a statute or administrative rule cannot form the basis for a private right of action to impose civil liability on anyone who violates it unless there is "a clear indication of the [drafter's] intent to create such a right." ***Grube v. Daun***, 210 Wis. 2d 681, 689, 563 N.W.2d 523 (1997) (discussing the formation of a private right of action in the context of a statute).

¶10 Downing argues that the ***Aiello*** settlement agreement was intended to, and had the effect of, creating a private cause of action allowing prisoners to sue prison officials for monetary damages. He points to the language in the agreement that it would not "preclude any action for damages arising out of the rule," as well as to the district court's multiple references to the availability of state law monetary and injunctive remedies to handle subsequent alleged instances of misinterpretations of the rule. We disagree with Downing's interpretation of the statements in the agreement and subsequent district court cases.

¶11 The fact that the settlement agreement did not *preclude* state law actions for damages or injunctive relief arising from violations of the revised rule does not mean that the agreement *created* a new private right of action for civil liability. The language cited by Downing simply means that the settlement agreement would permit prisoners to pursue any state law remedies that would otherwise be available to them. Nothing in the administrative rules provides a private right of action allowing prisoners to seek monetary damages for alleged

violations or misapplications of WIS. ADMIN. CODE § DOC 309.02, 309.04 or 309.05. To the contrary, the rules provide a separate process for obtaining review of decisions that disallow publications that does not include any liability provisions. WIS. ADMIN. CODE § DOC 309.05(3). Therefore, the circuit court properly dismissed all of Downing's state law monetary claims.

Federal Due Process Claim

¶12 Downing's complaint also sought relief for an alleged violation of his federal due process rights stemming from the manner in which prison officials handled several of his complaints. Specifically, Downing argued that the security director lacked authority to place a book on the prohibited list *after* it had already been approved by the final decision of a reviewing authority pursuant to the inmate complaint review system (ICRS) set forth in WIS. ADMIN. CODE § DOC 310, and also should not have been allowed to overrule decisions made by the line staff in the property room.

¶13 Downing appears to concede that his status as a member of the ***Aiello*** class binds him to the district court's ruling that the substance of the revised rule set forth in WIS. ADMIN. CODE § 309.02 satisfies federal constitutional standards. However, he argues that the ***Aiello*** decision did not address—and therefore does not preclude—any challenge to whether WIS. ADMIN. CODE § DOC 310 provided constitutionally adequate procedures.

¶14 While we agree with the proposition that ***Aiello*** did not address the constitutionality of the procedures set forth in WIS. ADMIN. CODE § DOC 310, it does not follow that Downing's summary judgment materials were sufficient to state a federal due process claim arising out of any alleged violation of those procedures. As the State correctly points out, the Wisconsin Supreme Court has

previously held that DOC's grievance procedure does not give rise to any liberty interest that is protected by the Due Process Clause of the United States Constitution. ***Staples v. Young***, 149 Wis. 2d 80, 88, 438 N.W.2d 567 (1989). In other words, it does not matter, from a federal constitutional perspective, which prison official made the ultimate determination to classify any of the specific materials at issue in this case as contraband. Downing was provided sufficient due process to protect his First Amendment rights by the availability of judicial review for any timely appealed ICRS decisions. We therefore conclude that the circuit court properly dismissed Downing's federal due process claim.

Immunity Issues

¶15 Since we have already determined that Downing had neither a private right of action to sue the prison officials for monetary damages under state law, nor a viable federal cause of action, we need not address the additional question whether the prison officials were also immune from civil liability.

Claims for Injunctive Relief

¶16 The circuit court asserted, without citation to authority, that any right to injunctive relief "would necessarily be premised on the existence of a private right of action," and the State relies on the circuit court's assertion without further discussion of that point.

¶17 However, in addition to claiming a private right to action under ***Aiello***, Downing also argues that he was entitled to seek injunctive relief pursuant to a statute that authorizes courts to provide injunctive relief "with respect to prison or jail conditions." WIS. STAT. § 813.40(1)(b). Prison or jail conditions are defined broadly to encompass "any matter related to the conditions of confinement

or to the effects of actions by government officers, employees or agents on the lives of prisoners." WIS. STAT. § 801.02(7)(a)3. (emphasis added). The decision by prison officials to confiscate some of Downing's books could be said to have an effect on his life. We are therefore not persuaded that the mere fact that Downing is barred from seeking monetary damages for the alleged violation of an administrative rule means that he is also barred from seeking injunctive relief to obtain compliance with that rule.

¶18 There is, however, a separate requirement that a prisoner exhaust all administrative remedies before commencing a civil action, including one related to conditions of confinement. WIS. STAT. § 801.02(7)(b); WIS. ADMIN. CODE § DOC 310.05; ***State ex rel. Hensley v. Endicott***, 2001 WI 105, ¶¶1, 9, 22, 245 Wis. 2d 607, 629 N.W.2d 686. Downing conceded in the circuit court that he did not seek timely certiorari review of any of the ICRS complaints dealing with the prohibited books. Therefore, the circuit court properly dismissed Downing's claims for injunctive relief as well, even if it relied upon the wrong rationale in doing so.

Equitable Relief

¶19 Finally, Downing asks this court to grant him relief in the interest of justice because his time to file notices of claim against two additional state officers had expired before he learned during discovery of their involvement in some of the challenged decisions. We cannot excuse non-compliance with the notice of claim statute, however, or grant any sort of relief against individuals who are not parties to the suit.

By the Court.—Orders affirmed.

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