UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PRISON LEGAL NEWS, Plaintiff, v. FULTON COUNTY, GEORGIA and MYRON FREEMAN, individually and in his official capacity as Fulton County Sheriff, Defendants.	CIVIL ACTION NO. 1:07-CV-2618-CAP

O R D E R

This matter is before the court on defendants Fulton County and Fulton County Sheriff Myron Freeman's motion for summary judgment [Doc. No. 52] and plaintiff Prison Legal News's ("PLN") cross-motion for partial summary judgment [Doc. No. 50].

I. Statement of Facts

PLN is an independent, monthly magazine that has subscribers who are incarcerated in the Fulton County Jail ("Jail"). In 2007, PLN filed this lawsuit challenging the Jail's old mail policy. According to PLN, the old mail policy, which this court declared unconstitutional in 2002,[1] prevented inmates from receiving PLN's publication.

Freeman's predecessor, Jacquelyn Barrett, promulgated the old mail policy, and Freeman retained the policy in a general order on

[1] See Daker v. Barrett, No. 1:00-CV-1065-RWS (N.D. Ga. July 22, 2002).

January 3, 2005. Freeman's general order adopted all of the existing policies of the Fulton County Sheriff's Department that were in place prior to his taking office. Freeman was not aware that the old mail policy was unconstitutional when he signed the general order. The defendants claim that Freeman issued this order because he wanted to maintain a sense of continuity for his employees and pre serve the Fulton County Sheriff's Office's accreditation with the Commission on Accreditation for Law Enforcement Agencies ("CALEA"). Moreover, he believed that this accreditation signified that the Sheriff's Office complied with all applicable laws and standards. However, sometime prior to May 2007, Freeman's legal counsel told him that the Jail's old mail policy was unconstitutional.[2]

On December 18, 2007, PLN moved for a preliminary injunction to enjoin the defendants from continuing to enforce the old mail policy. On December 20, 2007, Freeman modified the Jail's mail policy ("new mail policy"). On February, 4 2008, this court granted PLN's motion for a preliminary injunction enjoining Freeman

[2] The plaintiff's Statement of Material Facts [Doc. No. 50-3] appears to indicate that defendant Freeman learned in 2005 that the old mail policy was unconstitutional, but page nineteen of defendant Freeman's deposition, from which the plaintiff gets this date, indicates that the year was actually 2007, as does the remainder of the plaintiff's document. Therefore, the court will regard the "2005" date as a typo and follow the 2007 date.

from using the old mail policy and requiring Freeman to enforce the new mail policy.

On September 2, 2008, the defendants moved for summary judgment to dismiss all of PLN's claims. PLN has conceded its claims for injunctive and declaratory relief as well as its claims against Fulton County and Freeman in his official capacity [Doc. No. 55 n.1 at 1-2]; therefore the defendants are entitled to judgment on those claims. As to PLN's remaining claims for compensatory, nominal, and punitive damages against Freeman in his individual capacity as Fulton County Sheriff, the defendants argue that Freeman is entitled to qualified immunity. The defendants also argue that during the period before Freeman implemented the new mail policy, the old mail policy was still the official rule but the actual custom in the mail room was to disregard the old mail policy and to allow mail sent directly from publishers.[3] The defendants argue that PLN fell into the category of authorized mail.

Also on September 2, 2008, PLN filed a cross-motion for partial summary judgment on its individual liability claims for

[3] According to defendants the custom in the mail room was to allow mail if it came directly from the publisher. The mail room workers tried to determine the origin of the sender's address by doing internet, phone, and other types of research

nominal damages against Freeman.[4] PLN claims that Freeman is not entitled to qualified immunity in his individual capacity as Fulton County Sheriff because he failed to follow clearly established law relating to PLN's First and Fourteenth Amendment rights. Furthermore, PLN disputes both the existence and the constitutionality of the alleged custom in the mail room.

II. Legal Analysis

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure authorizes a court to enter summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The party seeking summary judgment bears the burden of demonstrating that no dispute exists as to any material fact. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). This burden is discharged by "'showing'--that is, pointing out to the district court--that there is an absence of evidence to support [an essential element of] the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In determining whether the moving party has met its burden, a district court must view the

[4] PLN is not moving for summary judgment on its claims for compensatory and punitive damages.

evidence and all factual inferences in the light most favorable to the party opposing the motion. Johnson v. Clifton, 74 F.3d 1087, 1090 (11th Cir. 1996). Once the moving party has adequately supported its motion, the nonmovant has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In deciding a summary judgment motion, the court's function is not to resolve issues of material fact, but rather to determine whether there are any such issues to be tried. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). The applicable substantive law will identify those facts that are material. Id. at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id.

Genuine disputes are those in which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. In order for factual issues to be "genuine" they must have a real basis in the record. Matsushita, 475 U.S. at 586. When the record as a whole could not lead a rational trier of fact to find for the nonmovant, there is no "genuine issue for trial." Id. (citations omitted).

B. Qualified Immunity Standard

Qualified immunity gives government officials immunity from civil suit for damages so long as their conduct does not violate clearly established statutory or constitutional rights. Amnesty International v. Battle, 559 F.3d 1170, 1181 (11th Cir. 2009). A right is clearly established if "previous case law [has] . . . developed it in a concrete factual context so as to make it obvious to a reasonable government actor that his [or her] actions violate federal law." GJR Investments v. County of Escambia, Florida, 132 F.3d 1359, 1366 (11th Cir. 1998). In the Eleventh Circuit, a right is clearly established, and therefore obvious to the reasonable official, if it can be found in the case law of the Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court in the state where the event occurred. Amnesty International, 559 F.3d at 1184. Abrogating immunity only when an official has violated clearly established law balances the need for government officials to be able to reasonably perform their discretionary duties free from harassment and the need for citizens to be able to seek redress if officials violate their statutory or constitutional rights. See GJR Investments, 132 F.3d at 1366.

In 2001, the Supreme Court developed a rigid two-step analysis for deciding if a government official is entitled to qualified immunity. Pearson v. Callahan, ____ U.S. ____, 129 S.Ct. 808, 815

(2009). First, a court considering a qualified immunity claim had to determine whether the plaintiff was exercising a statutory or constitutional right and whether the government official infringed that right. Amnesty International, 559 F.3d at 1181. Second, the court had to determine if the statutory or constitutional right was clearly established at the time the event occurred. Id.

This rigid analysis proved impractical, so the Supreme Court has recently ruled that a court considering a qualified immunity claim is no longer required to follow this sequence. SeePearson, 129 S.Ct. at 818. Instead, the court should now use its discretion, considering the facts and circumstances of the case at hand, to determine the best method for using the two steps in deciding whether a gover nment official has violated a clearly established statutory or constitutional right. See id.

C. The Defendants Motion for Summary Judgment as to PLN's Remaining Claims Against Freeman in His Individual Capacity

The issue before the court is whether Freeman is entitled to qualified immunity as to claims brought against him in his individual capacity. The defendants argue that while PLN may have a First Amendment right to distribute literature to prison inmates, Freeman did not violate that right. Furthermore, the defendants argue that a reasonable person in Freeman's position would not have understood that Freeman's actions violated clearly established law.

Therefore, according to the defendants, Freeman is entitled to qualified immunity.

1. *Was PLN exercising a clearly established constitutional right by sending its newsletter to inmates at the Fulton County Jail?*

PLN alleges that the Jail's old mail policy, which completely banned inmates from receiving nonreligious subscriptions, was an unconstitutional violation of its First Amendment right to communicate with inmates. The Supreme Court has recognized that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution, nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.'" Thornburgh v. Abbott, 490 U.S. 401, 406 (1989). The Supreme Court has also recognized that the constitutional right to "reach out" to prison inmates extends to publishers. Id. at 408. Therefore, PLN has a clearly established constitutional right to send inmates its subscription newsletter. The court notes that this is not an unlimited right, and a mail policy that prevented PLN from sending items that could prove to be a security risk such as pornography or violent materials would not be unconstitutional. See id. at 413 ("Such regulations are 'valid if [they are] reasonably related to legitimate penological interests.'" (quoting Turner v. Safley, 482 U.S. 78, 89 (1987))).

2. *Did Freeman's actions violate PLN's clearly established right?*

The defendants argue that a reasonable official in Freeman's position would not have understood that his actions violated PLN's constitutional rights. The defendants base this argument on Freeman's belief that the Jail's CALEA accreditation implied that the Jail conformed to all applicable laws and standards.

The defendant's argument fundamentally misinterprets the qualified immunity standard. Government officials have a duty to not violate clearly established statutory or constitutional rights; a duty that includes being aware of all previous case law that established such statutory and constitutional rights. See GJR Investments, 132 F.3d at 1366. Freeman's reliance on the Jail's CALEA accreditation as proof of statutory and constitutional compliance was a subjective belief that did not satisfy this standard. PLN's right was clearly established in Thornburgh, therefore an objectively reasonable official in Freeman's position would have been aware of the right. See Amnesty International, 559 F.3d at 1184. Furthermore, this court had already determined that the Jail's old mail policy was unconstitutional in 2002, 3 years before Freeman took office. See Daker v. Barrett, NO. 1:00-CV-1065-RWS (July 22, 2002). The fact that Freeman signed a blanket order adopting all of the Jail's policies and was not specifically

aware of the unconstitutional mail policy is irrelevant. As sheriff, Freeman was responsible for the constitutionality of all of the Jail's policies; thus, because the mail policy was unconstitutional when Freeman retained it in his 2005 general order, he is responsible for any constitutional violations that resulted from the policy after he took office.

A factual dispute remains, however, as to whether Freeman's actions actually violated PLN's right. The defendants argue that Freeman did not violate PLN's right because the mail room staff ignored the unconstitutional old mail policy and instead followed a custom of delivering mail that came directly from publishers, which included PLN's newsletter. Therefore, if the mail room staff was ignoring the unconstitutional old mail policy and delivering PLN's newsletters, then PLN did not suffer any actual constitutional infringement. PLN, on the other hand, argues that there was no such custom in the mail room and that several of its subscribers did not receive their PLN newsletter.

The record neither sufficiently supports the existence of this alleged alternative custom nor sufficiently establishes that inmates were receiving their newsletters. To support the argument that a constitutional custom existed, the defendants cite the depositions of four officers who worked in the mail room or had some knowledge of the mail room's activities during the period in

question. These depositions do not clearly support a general custom, and actually suggest a disorganized system based on the officers' observations and verbal directions from superiors about how to handle incoming mail. Furthermore, three different inmates testified that they had subscriptions to PLN during the period in question but rarely if ever received their copies of PLN's newsletters.

The factual discrepancies between the parties' arguments create a genuine issue of material fact concerning whether Freeman's actions violated PLN's constitutional right. Viewing the evidence in the light most favorable to PLN (the nonmovant on the qualified immunity issue), a reasonable jury could find that a constitutionally adequate custom did not exist in the mail room and that PLN's newsletters were not reaching inmates in the Jail. This would constitute a violation of PLN's clearly established right. Therefore, the defendants have not satisfied the burden of showing that the record as a whole could not lead a rational trier of fact to find for PLN. See Matsushita Electric Industrial Co., 475 U.S. at 586. As such, the defendants are not entitled to summary judgment based on Freeman's qualified immunity claim.

D. PLN's Motion for Partial Summary Judgment on its Claims for First and Fourteenth Amendment Violations

PLN claims that Freeman violated its First and Fourteenth Amendment rights by retaining the unconstitutional old mail policy. PLN claims that this action infringed its First Amendment right because it prevented PLN from exercising its right to "reach out" to prison inmates. Additionally, PLN claims that Freeman violated its Fourteenth Amendment right to due process by not notifying PLN that the old mail policy was curtailing its First Amendment right.

PLN has not overcome its burden of production for summary judgment because of the same genuine issue of material fact at issue in the defendants' motion. If there was a constitutional custom in the mail room that essentially overrode the unconstitutional old mail policy, then Freeman's actions did not infringe PLN's First Amendment right. If PLN's First Amendment right was not violated, then it was not deprived of its due process right in violation of the Fourteenth Amendment. Therefore, PLN's claims would be barred by qualified immunity. Alternatively, if no such custom existed or if it was only rarely followed, then Freeman's actions did infringe PLN's constitutional rights and Freeman would not be entitled to qualified immunity.

Thus, PLN has not satisfied the burden of showing that the record as a whole could not lead a rational trier of fact to find

for the defendants. See Matsushita Electric Industrial Co., 475 U.S. at 586. As such, PLN is not entitled to partial summary judgment on its claim for nominal damages.

III. Conclusion

For the reasons set forth above, the court hereby GRANTS in part and DENIES in part defend ants' motion for summary judgment [Doc. No. 52]. As to PLN's claims for injunctive and declaratory relief and claims against Fulton County and Freeman in his official capacity the defendants' motion for summary judgment is GRANTED. As to PLN's remaining claims for compensatory, nominal, and punitive damages against Freeman in his individual capacity as Fulton County Sheriff the defendants' motion for summary judgment is DENIED. Additionally, PLN's cross-motion for partial summary judgment on its individual liability claims for nominal damages against Freeman [Doc. No. 50] is DENIED.

This action will be scheduled for trial after the court receives the parties' proposed pretrial orders. The parties are ORDERED to submit their proposed pretrial orders within 20 days of the date of this order.

SO ORDERED, this 13th day of July, 2009.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge