UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DENNIS HUNT,

Plaintiff,

Case No: 8:07-CV-1168-T-30TBM
Dispositive Motion

vs.

DAVID L. PILVER,

Defendant.
_____/

DEFENDANT DAVID L. PILVER'S RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW AND MEMORANDUM OF LAW IN SUPPORT

COMES NOW Defendant David L. Pilver (herein, "Pilver") through his undersigned counsel and files his Motion for Judgment as a Matter of Law pursuant to Rule 50, Fed.R.Civ.P. and states that:

Rule 50(a)

Rule 50(a), Fed.R.Civ.P. requires that, if a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may resolve the issue against the party and grant a motion as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

At this point during the jury trial in this case, Plaintiff has been fully heard as he has rested after presenting his case in chief.

Plaintiff's Claims

In Count III of his Complaint, Hunt claims that Pilver is liable to him under 42 U.S.C. §1983 for violating "Plaintiff's First Amendment rights by barring him from the law library, ..." (¶ 73 of the Complaint).

Plaintiff has sued Pilver in his individual capacity. Court's Order dated July 17, 2009 (Doc. 62) at page 6.

Summary of Arguments

1. Pilver is protected by the doctrine of qualified immunity.
2. Plaintiff's claims are both "*Heck*-barred" and precluded by the *Rooker-Feldman* doctrine.

Argument 1: Qualified Immunity

Summary

Pilver is entitled to judgment as a matter of law because there is absolutely no evidence that Pilver reasonably should have been aware of any pre-existing law which compelled the conclusion "that what [Pilver was] doing violates federal law in the circumstances." *Lassiter v. Alabama A&M*, 28 F.3d 1146, 1150 (11th Cir. 1994)(en banc).

Pilver testified that, in taking the actions he took on July 5, 2003, by calling security and then by telling Plaintiff he needed to leave the premises, he received no advice from anyone—from the attorney head of the Library Board, from Pilver's supervisor, or from Officer Hathcox of the Tampa Police Dept., suggesting that Pilver's actions might violate federal law "in the cirumstances." There is no conflicting testimony that suggests that Pilver should reasonably have been aware that he might be violating the

law by taking the actions he took. Finally, Pilver's actions were clearly motivated, at least in part, by the desire to protect himself and patrons, which is a wholly legal motivation which by itself entitles Pilver to the protections of qualified immunity.

Qualified Immunity Analysis

"Qualified immunity offers complete protection for government officials sued in their individual capacities." *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). Public officials, like Pilver, are protected from "undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). 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." *Id.* at 818. "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). Qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is a 'mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson v. Callahan*, 129

S.Ct. 808, 815 (2009), citing to *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (*Kennedy, J.*, dissenting)(citing *Butz v. Economou*, 438 U.S. 478, 507 (1978).

"[T]he presence of a jury issue about a defendant's improper intent does not necessarily preclude qualified immunity." *Bogle v. McClure*, 332 F.3d 1347, 1353 (11th Cir. 2003). A "defendant is entitled to qualified immunity under the *Foy* rationale only where, among other things, the record *indisputably* establishes that the defendant in fact was motivated *at least in part*, by lawful considerations." *Bogle*, 332 F.3d at 1356 (quoting *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1296 (11th Cir. 2000) (emphasis in original). Further elaborating the law in this area, the court requires that the evidence "undisputably indicate that [defendants] were motivated, at least in part, by objectively valid reasons." *Bogle*, 332 F.3d at 1356.

Where as at bar a Plaintiff asserts a violation of his First Amendment rights (R. 9, ¶73 of the Amended Complaint), plaintiff "must plead and prove that the defendant acted with discriminatory purpose...purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences'." *Ashcroft*, 129 S.Ct. at 1948, citing to *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540-541 (1993) and *Personnel Director of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Hunt does not allege Pilver acted with a discriminatory purpose to deny Hunt his First Amendment rights, nor is there any evidence in the Record evincing a discriminatory purpose.

Discretionary Job Function

Where, as at bar, a government official is sued under 42 U.S.C. § 1983 under a theory of direct liability, the official may seek a judgment if he was engaged in a

"discretionary function." *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004). A "discretionary function" is defined as "the power to choose between two or more courses of action each of which is thought of as permissible." *Bryant v. CEO Dekalb County*, ___ F.3d ____, ____ (11th Cir. 2009), citing to 1 H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application Law* 162 (Tent.Ed. 1958). "If the official demonstrates that he was engaged in a discretionary function, the burden shifts to the plaintiff to prove that the official is not entitled to qualified immunity." *Bryant*, ___ F.3d at ____; *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003).

In determining whether Pilver had "the power to choose between two or more courses of action each of which is thought of as permissible", the analysis begins by assessing whether Pilver's questioned activities are of a type that fell within the employee's job responsibilities. This inquiry is two-fold. First, the Court asks whether the employee was performing a legitimate job-related function. Second, the Court asks whether the function was accomplished through the means that were within his authority to utilize. *Holloman*, 370 F.3d at ____.

At bar, there is no question that Pilver acted well within his discretionary authority. Sandra Kellaher, the Law Library Board Chairperson, told Pilver specifically how she wanted Pilver to handle the problems with Hunt: he had full discretion to handle the situation as he saw fit, but was reminded to protect himself and the patrons. Moreover, Pilver was the only staff person in the Library, and as the only staff person in the Library, this obligation or duty was an inherent part of his legitimate job functions. Pilver reasonably had to construe Kellaher's instructions as part of his job duties.

Kellaher gave Pilver "the power to choose between two or more courses of action each of which is thought of as permissible". On one hand, Pilver was authorized to construe Kellaher's "full discretion" mandate as an instruction to err on the side of caution by not risking any possible future confrontations with Hunt. On the other hand, Pilver could have construed Kellaher's "full discretion" mandate as permission to allow Hunt to have another chance to come into the Library. Another reasonable option would have been for Pilver to construe Kellaher's mandate as permission to have security staff standing close by while allowing Hunt to come into the Library. The options presented to Pilver in light of Kellaher's mandate, were varied and potentially numerous.

The bottom line was that Pilver was granted authority by Kellaher to make a clear judgment call between two (or more) permissible courses of action. Pilver made that judgment call. Perhaps it was the wrong call. Yet even if it was the wrong call, Pilver should be protected from suit because he made a decision that fell well within the authority granted to him. *Butz v. Economou*, 438 U.S. 478, 507 (1978)(noting that qualified immunity covers "***mere mistakes in judgment,*** whether the mistake is one of fact or one of law")(emphasis supplied)).

Pilver was placed by the Library Board Chair into a position where his clear mandate was to protect not only patrons but himself from what Pilver perceived as potentially violent or threatening behavior. Pilver's actions in response to that mandate can be second-guessed, but the actions he took were not objectively unreasonable actions and did not go beyond his mandate.

Plaintiff Has not met his Burden to Show that Qualified Immunity is Not Appropriate

Because it is established that Pilver was acting within his discretionary authority, "the burden shifts to the plaintiff to show that qualified immunity is not appropriate.[cite omitted] To do so, the plaintiff must first demonstrate that the defendant violated his constitutional rights. [cite omitted] The plaintiff then must demonstrate that the 'right was clearly established.'" *Grimes v. Yoos*, 2008 U.S. App. LEXIS 22697 (11th Cir. 2008) (unreported), citing to *Vinyard*, 311 F.3d 1340, 1346.

Finally, Plaintiff must prove that a reasonable government official would have been aware of a clearly established right. *Saucier,* 533 U.S. at 201; *Tindal v. Montgomery County Comm'n.*, 32 F.3d 1535, 1539 (11th Cir. 1994).

In *Pearson*, 555 U.S. at 818, the Court withdrew from the strict adherence to the sequence of the two-part test in *Saucier* (requiring the plaintiff *first* demonstrate a violation of rights and *then* demonstrate the right was clearly established) and held that "while the sequence set forth [in Saucier] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts...should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at Section IIIA. Thus, as in *Pearson*, this Court may elect not to decide whether a constitutional right was violated (the first prong of *Saucier*), instead deciding the case on the issue of whether Pilver was reasonably aware of a clearly established right (the second prong of *Saucier*).

In establishing the "clearly established right", Plaintiff must prove that it was clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Saucier, 533 U.S. at 202. The "clearly established" test is met if "in light of the pre-existing law the unlawfulness [is] apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). In construing this issue, the inquiry is whether a reasonable officer in Pilver's position could believe that his conduct was lawful. The "appropriate inquiry is particularized and *fact-specific*." *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1504 (11th Cir. 1990) (emphasis supplied), citing to *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993).

Hunt alleges that Pilver violated his First Amendment rights by barring him from the Library. This allegation presupposes that Hunt had an absolute right to be in the Library, regardless of Hunt's behavior. Nothing in the law confers such a right. A library is "a place dedicated to quiet, to knowledge, and to beauty." *Brown v. Louisiana*, 383 U.S. 131, 142 (1966). It is a legitimate government interest to preserve a library as a "sanctuary for reading, writing and quiet contemplation." *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 908 (9th Cir. 2007). To preserve that legitimate interest, "the right to free speech in a library is subject to curtailment." *Heffron v. Int'l. Soc'y. for Krishna Consciousness*, 452 U.S. 640, 647 (1981). "...[T]he right to receive information [in a library] is not unfettered and may give way to significant countervailing interests." *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3rd Cir. 1992) (holding that removing a homeless man from the library because he smelled bad was a reasonable restriction on his First Amendment rights). "Prohibiting

disruptive behavior is perhaps the clearest and most direct way to achieve maximum Library use." *Id.* at 1263.

Hunt certainly has a qualified right to go to a library and to receive information from that library. However, just as in a courtroom, Hunt's right is conditioned somewhat upon his behavior. The Library can certainly constitutionally remove Hunt for threatening behavior. *Id.* at 1263; *Galiano v. Institute of Governmental Studies*, 2008 U.S. Dist. LEXIS 68527 (N.D. Cal. 2008). And that is precisely what Pilver did at bar.

Pilver was Motivated *at Least in Part*, by *Objectively* Valid Reasons

Applying the holding in *Bogle*, the evidence reflects Pilver was afraid Hunt posed a threat to his safety and the safety of patrons. The "clearly established" inquiry turns on "the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken'", *Pearson*, 555 U.S. at 822, citing to *Wilson v. Layne*, 526 U.S. 603, 614 (1999). In light of the facts as presented by Pilver, it was objectively reasonable for Pilver to believe Hunt posed a threat to his safety and the safety of others. This reasonable belief factor has formed the basis for qualified immunity in use-of-force cases, wherein the essential question was whether the use of force was reasonable in light of the apparent threat. *E.g.*, *Pace v. City of Palmetto*, 489 F.Supp. 2d 1325, 1335 (M.D. Fla. 2007) (police officer's use of non-deadly K-9 force after failing to give a verbal warning was not enough to establish that use of force was objectively unreasonable); *Mongeau v. Jacksonville Sheriff's Office*, 197 Fed. Appx. 847, 849-850 (11th Cir. 2006) (no constitutional violation occurred where officers stopped a suspect by releasing a K-9 on the suspect, spraying the suspect with pepper spray,

slamming the suspect on the ground, beating his head and back, then placing a knee on the suspect's back and neck as he was handcuffed).

In a case that is close factually to the case at bar, qualified immunity protected library staff from the claims of patrons whose actions were much less egregious than Hunt's behavior at bar. In *Galiano,* (N.D. Cal. 2008), Galiano was busily reading at a library when he was disturbed by a conversation between another patron and the librarian. Galiano asked the other patron to lower her voice, after which the librarian informed Galiano that patrons were required by an unwritten rule to address concerns involving other patrons with library staff. Galiano then commenced to argue with the librarian that the rule was unreasonable, after which the librarian told Galiano that he had to leave the library. Galiano uttered an epithet and left. Id. at *3. The librarian later reported Galiano to campus police as a trespasser. Id. at *29. After Galiano filed suit against the librarian, the Court dismissed the librarian on qualified immunity grounds, finding that the librarian did not violate clearly established law. Id. at *31.

Galiano and *Kreimer* are notable not only for their holdings on facts similar to those at bar, but for what Pilver *could reasonably have believed the law required* under the circumstances Pilver faced. If a federal judge, in *Galiano*, holds that it is not illegal for a library patron to be thrown out and trespassed for simply arguing about an unwritten library rule, then there is *no way* Pilver should *reasonably* have believed his actions were illegal. Likewise, if a patron in *Kreimer* could be lawfully removed from the library for smelling bad, Pilver could reasonably have assumed his removal of Hunt from the library was perfectly legal. This being the case, Pilver acted in a manner that was reasonably

consistent with those lawful actions taken in *Kreimer* and *Galiano* and consequently, qualified immunity protects Pilver.

Other than *Galiano* and *Kreimer*, there is No "Well-Developed" Law Governing this Fact Situation

In this Circuit, in order to deny qualified immunity, "the law must be so well-developed as to make it obvious to reasonable public officials that their conduct would violate federal law." *Rowe v. City of Cocoa*, 2003 U.S. Dist. LEXIS 25578 (M.D. Fla. 2003), citing to *Braddy v. Dept. of Labor & Employment Sec.*, 133 F.3d 797, 801 (11th Cir. 1998). As in the facts of the case involving an officer who cut loose his K-9 without giving advance warning, *Pace*, 489 F.Supp. 2d 1335, this case involved a judgment call; there is no "obvious" rule at bar. Rather than a bright-line rule, this case turns on a weighing of relative interests: Hunt's interest in remaining in the Library, juxtaposed against Pilver's mandate to protect himself and patrons from a person whom he reasonably believed might be a security concern. It is difficult for even law enforcement to determine at what point reasonable suspicion exists, or at what point an arrest is appropriate.

In order to assess what Pilver should reasonably have done under the circumstances, the Court could ask any number of questions: Should Pilver have reasonably waited before calling law enforcement until Hunt acted *again* or *escalated*? Should Pilver have specified to law enforcement that Hunt should be removed *today only* but allowed back tomorrow (or *this week only* but allowed back next week)? Should Pilver have taken the issue to the entire Law Library Board before taking any action in spite of his direction from the Board Chairperson and from his management? There is no clear answer, in terms of established law, to these questions. They all turn on Pilver's

judgment as a lone employee responsible for the safety of the Library. Pilver should not be penalized for erring in that judgment call, because a mere mistake of judgment (to the extent that Pilver's actions may be construed as a mistake) are protected by qualified immunity. See *Pearson*, citing to *Groh* and *Butz*, supra. For that reason, all of these questions suggest the absence of a clear guide for what Pilver should do. Like in the use-of-force cases, this case turns on a judgment call, requiring that a "reasonableness inquiry 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Mongeau*, 197 Fed. Appx. at 850, citing to *Graham v. Connor*, 490 U.S. 386 (1989). In light of Pilver's difficult judgment call, 20/20 hindsight should not govern the case at bar. Pilver should not be subjected further to the challenges of being a Defendant in federal litigation. Qualified immunity is appropriate as a matter of law.

Argument 2: *Heck v. Humphrey* and/or the *Rooker-Feldman* Doctrine

a. *Heck v. Humphrey*

Heck v. Humphrey, 512 U.S. 477 (1994), was brought by a state prisoner under § 1983. The lawsuit challenged the conduct of state officials who, the prisoner claimed, had caused his conviction by improperly investigating his crime and destroying evidence. *Id.* at 479. The Supreme Court noted that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments", *Id.* at 486, and held that where "establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction," *Id.* at 481-482, the § 1983 action would not lie "unless...the conviction or sentence had already been invalidated." *Id.* at 487.

The applicability of *Heck* was reviewed and analyzed by Magistrate Judge McCoun in *Abusaid v. Hillsborough County*, 2007 U.S. Dist. LEXIS, 65813 (M.D. Fla. 2007). Abusaid had been convicted in state court for violations of Hillsborough County's "Rave" ordinance, and, subsequent to his conviction and after serving his sentence, filed suit against the County under § 1983. Judge McCoun held that, regardless of the timing of Plaintiff's conviction and sentence, the damages portion of Abusaid's claims were barred by *Heck* ("a declaration that the [Rave] Ordinance is unconstitutional together with an award of damages... would necessarily imply the invalidity of his convictions." *Id.* at *37).

As Hunt testified, he believes that if he prevails in the lawsuit at bar, the result at bar will imply that he should not have been convicted of trespassing in his state criminal case. Based on the foregoing, Heck specifically bars the damages claims at bar:

> "[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. [cite omitted] A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983."

Heck, 512 U.S. at 486-87.

In addition to precluding Plaintiff's damages claim, one Eleventh Circuit panel has noted that *Heck* also bars a claim for injunctive relief where a plaintiff cannot "show that the relief will not 'necessarily imply' the invalidity of his conviction..." *Koger v. State of Florida*, 130 Fed. Appx. 327, 333 (11th Cir. 2005), *citing to Edwards v. Balisok*, 520 U.S. 641, 648 (1997). As noted previously, Hunt himself believes (as he testified) a

favorable resolution at bar would imply the invalidity of his conviction, so Hunt will not be able to prove otherwise in this case. Accordingly, his claims are "*Heck*-barred."

b. *Rooker-Feldman*

The *Rooker-Feldman* doctrine applies the holdings of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). "The Rooker-Feldman doctrine provides that federal courts, other than the United States Supreme Court, have no authority to review the final judgments of state courts." *Siegel v. Lepore*, 234 F.3d 1163, 1172 (11th Cir. 2000). "The doctrine extends not only to constitutional claims presented or adjudicated by a state court, but also to claims that are 'inextricably intertwined' with the state court's judgment." *Siegel*, 234 F.3d at 1172; *Wood v. Orange County*, 715 F.2d 1543, 1546 (11th Cir. 1983). "A federal claim is inextricably intertwined with a state court judgment 'if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.'" *Siegel*, 234 F.3d at 1172, *citing to Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987)(Marshall, J., concurring).

Hunt's appeal of his criminal conviction not only addressed issues "inextricably intertwined" with those at bar, but addressed *precisely the same* legal issues that are at issue at bar. In Plaintiff's Initial Brief on appeal, Plaintiff stated one of the relevant issues on appeal, in part, as follows:

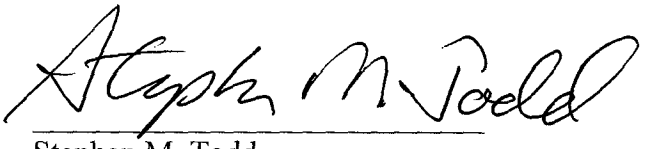
> "ISSUE ONE. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL THAT ALLEGED THE LIBRARY VIOLATED THE APPELLANT'S FIRST AMENDMENT RIGHTS WHEN THE LIBRARY TRESPASSED THE APPELLANT ON JULY 5, 2003, ...?"

On appeal in state court was the question of whether Hunt's First Amendment rights were violated by the Library. The Court, by "affirming" the decision below, resolved the issue in the negative. A contrary ruling by the Court at bar would create conflicting results and would cloud the state criminal court's resolution of the question regarding whether Plaintiff's First Amendment rights were violated.

Conclusion

Plaintiff is entitled to qualified immunity because the uncontroverted evidence requires the conclusion that Pilver did not perceive and should not reasonably have perceived that anything he did was against federal law. Alternatively, Plaintiff's claims are *Heck*-barred and/or barred by the *Rooker-Feldman* doctrine. Plaintiff is entitled to judgment as a matter of law.

Respectfully,



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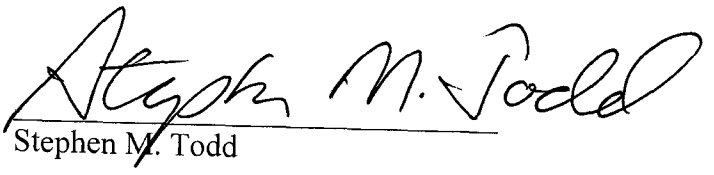
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to **Dennis Hunt, 2319 Nantucket Drive, Sun City Center, FL 33573-8005**, via **hand delivery** on this 12 day of May 2010.



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