COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1470 **Cir. Ct. No. 2004CV881**

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

STATE OF WISCONSIN EX REL. WILLIAM F. WEST,

PLAINTIFF-APPELLANT,

V.

MATTHEW J. FRANK, GERALD A. BERGE AND VIKKI SEBASTIAN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. William West appeals from an order dismissing his complaint. The issue is whether West's complaint stated a claim. We conclude that it did. We therefore reverse and remand for further proceedings.

¶2 West's complaint alleged that he is a prisoner at the Wisconsin Secure Program Facility (WSPF). After the complaint was filed, the circuit court conducted the review of prisoner complaints as required by WIS. STAT. § 802.05(3) (2003-04).[1] It concluded that the complaint failed to state a claim, and the court dismissed it without the filing of a responsive pleading by the defendants, who were alleged to be the secretary and employees of the Department of Corrections.

> In Wisconsin, a civil pleading need not define issues or state detailed facts; only "fair notice" is required. Thus, a complaint should be dismissed as legally insufficient "only if it is quite clear that under no condition can a plaintiff recover."… The facts pleaded must be taken as true, but legal conclusions need not be accepted. Whether a claim for relief exists is a question of law that we determine independently.

State ex rel. Luedtke v. Bertrand, 220 Wis. 2d 574, 578-79, 583 N.W.2d 858 (Ct. App. 1998), *aff'd by divided court*, 226 Wis. 2d 271, 594 N.W.2d 370 (1999) (citations omitted).

¶3 West's complaint alleged that the defendants violated his First Amendment and other rights by preventing him from receiving a newspaper. Specifically, it alleged the following facts. The defendants have implemented a five-step "level program" that regulates inmate receipt of publications, as well as other facets of inmate life. The defendants have a "standing policy" at the WSPF that compels staff to disallow publications received by prisoners who are assigned to the two highest levels of security. In September 2002, shortly after West's arrival at WSPF, he was not permitted to receive his copies of USA Today that

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

arrived at the institution. A prison staff member told him it was because of the above policy. Later copies of the publication were also disallowed. In late October 2002, West learned that the undelivered copies were being discarded, that is, not retained for future delivery.

¶4 The circuit court concluded that the complaint failed to state a claim because the alleged policy is reasonably related to a legitimate penological interest. On appeal, West argues that the court should have applied a four-part test found in ***Turner v. Safley***, 482 U.S. 78, 89, 107 S. Ct. 2254 (1987). He argues that the court erred by concluding at the complaint stage, before the defendants had offered any justification for the alleged policy, that there was a legitimate penological interest. In the defendants' brief, the only legal test discussed is whether the policy is reasonably related to a legitimate penological interest. The defendants argue that the restriction on publications is part of an "incentive program" that serves a legitimate penological interest, although they do not specifically identify that interest.

¶5 It is clear from ***Turner*** and later cases that the four-part test West argues for is the method by which we determine whether there is a legitimate penological interest. The defendants' brief does not acknowledge or apply the ***Turner*** test. The only authority the defendants cite is an unpublished federal district court opinion that appears to address the same policy West complains of. That opinion concluded that because the publication restriction is part of an "incentive program" it is constitutional. However, the opinion's analysis of the issue is cursory. It does not apply the ***Turner*** test, nor cite any authority holding that First Amendment rights can lawfully be restricted for the purpose of creating an "incentive." We decline to follow that opinion.

¶6 We have not attempted exhaustive independent legal research for authority, but our efforts did bring us quickly to a recent case that provides substantial support for West's arguments, ***Lindell v. Frank***, 377 F.3d 655 (7th Cir. 2004). That opinion addresses two issues, both of which are significant here. The first was the inmate's complaint that the prison violated his First Amendment right by taking down several picture postcards he displayed in his cell. ***Id.*** at 657-58. As in our case, the district court had dismissed this claim at the initial screening stage. ***Id.*** The Seventh Circuit noted that there was a potential dispute of fact over what the prison policy actually is. ***Id.*** Similarly, in our case West appears to allege that the WSPF no-publications policy is not authorized by the administrative code. West has alleged the broad outlines of the policy as it applies to him, but the actual policy is not before us. But, perhaps more importantly, the ***Lindell*** court said that while it is possible to envision a security justification that would support the prison's actions, "the district court acted prematurely in presuming such a justification." ***Id.*** The court noted that because the complaint was dismissed in the initial review, the defendants were never required to explain the basis for their action. ***Id.*** The court vacated the dismissal.

¶7 In the second issue in ***Lindell***, the Seventh Circuit reviewed the district court's grant of an injunction to Lindell against the prison's "no-clippings" policy that prohibited inmate possession of newspaper or magazine clippings, or copies of clippings. ***Id.*** at 658-60. The court applied the ***Turner*** test and concluded that the prison had not demonstrated a legitimate penological interest. ***Id.*** It may be that the defendants in ***Lindell*** did not make the same argument as in the present case, that their action is permitted as part of some kind of "incentive program." However, the outcome of the analysis in ***Lindell*** suggests that if a no-

clippings policy is at risk of being found unconstitutional, then a policy barring *all* publications may also be at risk.

¶8 Based on the above, we conclude that it cannot be determined at this point in the proceedings, from only the face of the complaint, what the defendants' precise policy is and whether it is reasonably related to a legitimate penological interest. Therefore, we reverse the dismissal and we remand for further proceedings that will develop the record for a proper application of the ***Turner*** test or other applicable law.

¶9 West also argues that the court erred by dismissing the rest of his complaint. West alleged that the defendants were acting improperly by restricting the channels offered on in-cell televisions and by including Christian programming in the channels. West's arguments on appeal on these issues are somewhat difficult to understand. His argument is partly a discussion of a settlement of a class action in federal court on behalf of inmates of WSPF. It is not clear how that settlement relates to these allegations in his complaint. The complaint did not refer to the settlement, and any attempt by West to enforce the settlement would have to be made in federal court, not state court.

¶10 West argues, apparently regarding the Christian programming, that the court failed to analyze his claim using Establishment Clause principles such as the test under ***Lemon v. Kurtzman***, 403 U.S. 602, 91 S. Ct. 2105 (1971). However, the argument is cursory. West cites no authority holding that it is an establishment of religion for the state to include Christian programming among the choices. The defendants have cited authorities that suggest it is not. West has not persuaded us that the circuit court erred by dismissing these claims.

¶11 Finally, West argues that the court erred by not allowing him to amend his complaint. This argument appears to be moot in light of our reversal and remand.

By the Court.—Order reversed and cause remanded.

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