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DISTRICT IV

July 26, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2014AP697 Harlan Richards v. Mark Heise (L.C. # 2012CV128)

Before Lundsten, Higginbotham and Sherman, JJ.

Harlan Richards appeals an order dismissing his complaint filed under 42 U.S.C. § 1983. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm.

This is the second appeal in this case. We described Richards' equal protection claim in the first opinion, and do not repeat that here. *See* ***Richards v. Heise***, No. 2012AP536,

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

unpublished slip op. (WI App Jan. 24, 2013). We concluded in that appeal that Richards' complaint stated a "class of one" equal protection claim, based on his allegation that he was given a higher security classification than other similarly situated prisoners. After that appeal, in further proceedings in the circuit court, that court dismissed the complaint on summary judgment.

The first step in summary judgment methodology is whether the complaint states a claim. ***Broome v. DOC***, 2010 WI App 176, ¶9, 330 Wis. 2d 792, 794 N.W.2d 505. As respondent on appeal, defendant Heise argues that the complaint fails to state a claim because class of one claims cannot be maintained in situations that involve discretionary, multi-factor decision-making by government officials. In support Heise relies on ***Engquist v. Oregon Dep't of Agric.***, 553 U.S. 591 (2008). There, the Court held that a class-of-one claim cannot be maintained by a government employee in connection with treatment by the employer. ***Id.*** at 594. In the course of doing so, the Court wrote:

> There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Id. at 603.

Heise argues that this language, and later federal cases applying it in contexts that include prison decisions, make class of one claims inappropriate for security classification decisions. Richards concedes, based on this case law, that discretionary decisions based on multiple factors

cannot be the basis for a class of one claim. However, he argues that his situation is different because in his case only one factor changed, namely, his parole deferral period was increased.

We reject this argument because it is logically flawed. Even if only one factor changed, the decision maker must still consider the interaction of that changed factor with the other factors that are legally appropriate to consider. That is to say, even if only one factor changes, a security classification decision is still a discretionary decision based on multiple factors.

Richards also argues that Heise is barred from making this argument based on ***Engquist*** because, in the first appeal, Heise did not attempt to make that argument until his motion for reconsideration, and we then denied that motion stating that reconsideration was not a proper time to raise new issues. Richards argues that the ***Engquist*** argument is now precluded by the law of the case doctrine.

Richards does not cite any law that prohibits us from considering this argument now. While it may be true that we have the discretion to reject the ***Engquist*** argument as forfeited, on further consideration we have determined that we will consider the argument in the context of this appeal.

Richards also alleges a due process claim. Richards appears to argue that, for substantive due process reasons, his low security classification could not be taken away from him for any reason. Heise responds that although Richards describes his claim as one based on *substantive* due process, the case law he relies on is concerned with *procedural* due process. Heise argues that Richards fails to state a due process claim because, on the facts Richards alleges, there is no additional process he was due.

Heise appears to be correct that Richards is commingling the two theories. Richards has not presented any case law holding that a low security classification can become irrevocable based on a substantive due process theory. And, it is evident that the cases Richards relies on most heavily are actually based on procedural due process theories. *See, e.g.*, ***Young v. Harper***, 520 U.S. 143 (1997); ***Wilkinson v. Austin***, 545 U.S. 209 (2005). The fact that a particular status, such as low security classification, may be considered to create a liberty interest does not mean that the prisoner is entitled to more than procedural due process. And, as Heise points out, here it does not appear that Richards is claiming that he was entitled to any additional process.

IT IS ORDERED that the order appealed is summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals