

IN THE SUPREME COURT OF THE UNITED STATES

No. 21A

CONRAD HERNANDEZ, APPLICANT

v.

LENROY MCLEAN

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Pursuant to Rules 13.5 and 30.2 of this Court, the Solicitor General, on behalf of Conrad Hernandez, respectfully requests a 30-day extension of time, to and including December 22, 2021, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The opinion of the court of appeals (App., infra, 1a-4a) is not published in the Federal Reporter but is reprinted at 848 Fed. Appx. 727. The court of appeals entered its judgment on May 25, 2021, and denied a petition for rehearing on August 24, 2021. App., infra, 1a, 5a. Unless extended, the time within which to file a petition for a writ of certiorari will expire on November 22, 2021. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. The plaintiff in this lawsuit, Lenroy McLean, is a federal prisoner who at all times relevant to this case was housed at the Federal Correctional Institution I in Victorville, California (FCI Victorville). In 2014, he filed a civil complaint seeking damages under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), alleging that defendant Conrad Hernandez, a correctional officer at FCI Victorville, used excessive force and committed a sexual assault in violation of the Eighth Amendment. See 2019 WL 4777335, at *1. Specifically, he alleges that, during a pat-down search, defendant ran his hand up plaintiff's leg and into plaintiff's testicle with force. See id. at *2. He further alleges that defendant acted intentionally and was acting in retaliation against plaintiff on behalf of another prison official, who had been reprimanded for not releasing money from plaintiff's account. See id. at *2, *7. And he alleges that the incident caused him to suffer pain and have difficulty urinating for several months. See id. at *2.

Following discovery, defendant moved for summary judgment. A magistrate judge recommended granting the motion for summary judgment. As to the excessive-force claim, the judge noted that, in order "[t]o establish an Eighth Amendment claim for excessive force," a plaintiff must demonstrate (1) that "the deprivation or harm suffered by the prisoner [was] sufficiently serious so as, for example, to result in the denial of the minimal civilized

measure of life's necessities," and (2) that the force was not applied "in a good-faith effort to maintain or restore discipline, but rather maliciously and sadistically to cause harm." 2019 WL 4777335, at *5 (citation and internal quotation marks omitted). The judge determined that there was no genuine dispute of material fact as to whether defendant conducted the search maliciously and sadistically. Id. at *6-*9. The judge found that "plaintiff points to no evidence that defendant * * * was in fact motivated to attack plaintiff on behalf of the" other prison official. Id. at *7. The judge also found that the "evidence of plaintiff's injury," which included plaintiff's medical records and the fact that he did not miss any work as a result of the injury, did not indicate that "defendant applied an amount of force from which one could reasonably infer he struck plaintiff maliciously and sadistically." Id. at *8.

Turning to plaintiff's sexual-assault claim, the magistrate judge noted that "[s]exual abuse in violation of the Eighth Amendment generally requires contact for the purpose of sexual gratification." 2019 WL 4777335, at *6. The judge explained that "[t]he only purported evidence plaintiff offer[ed] to support" his sexual-assault claim was "that defendant * * * touched his testicle during a pat-down" search, which the judge found "d[id] not make the search sexual in nature, much less sexual abuse." Ibid. Because the judge found that plaintiff did not demonstrate

a genuine dispute of material fact, she did not reach the issue of qualified immunity. Id. at *9.

Plaintiff did not file timely objections to the magistrate judge's report and recommendation. See 2019 WL 4750117, at *1. The district court accepted the findings and recommendation of the magistrate judge and granted defendant's motion for summary judgment. Ibid.

2. The court of appeals reversed in an unpublished memorandum opinion. App., infra, 1a-4a.

The court of appeals found that, because plaintiff "alleged in his verified complaint that [defendant] attacked his testicle to cause pain and humiliation," when the court "[r]esolv[ed] all factual disputes and dr[ew] all reasonable inferences in [plaintiff's] favor" there was a material dispute of fact on plaintiff's sexual-assault claim. App., infra, 2a. The court also found there was a genuine dispute of material fact on plaintiff's excessive-force claim because plaintiff

submitted a declaration that provided a credible motive for [defendant's] alleged assault, namely that [defendant] acted on behalf of another prison staff member who expressed a desire to retaliate against [plaintiff] for a reprimand the staff member received due to his failure to release prison account funds to pay [plaintiff's] attorney.

Id. at 2a-3a (citing Hudson v. McMillian, 503 U.S. 1, 7 (1992)). The court therefore reversed the district court's grant of summary judgment on plaintiff's excessive-force and sexual-assault claims. Ibid.

The court of appeals also found that plaintiff "is not entitled to qualified immunity" for either claim. App., infra, 3a. The court relied on this Court's decision in Hudson, which stated that it is a "settled rule that the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment." Ibid. (quoting Hudson, 503 U.S. at 5). And the court of appeals found that "the Eighth Amendment right of prisoners to be free from sexual abuse was unquestionably clearly established prior to the time of th[e] alleged assault, and no reasonable prison guard could possibly have believed otherwise." Ibid. (citation and omitted).

3. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. Additional time is needed for further consultation with other components of the Department of Justice and with the individual defendant with respect to the legal basis and practical effect of the decision, as well as for preparing and printing a petition in the event that one is authorized to be filed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NOVEMBER 2021