UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOES 1 through 30 inclusive, and Unknown Illinois State University football Players,

Plaintiff

VS.

FRANCO PRODUCTIONS; DAN FRANCO, Individually and d/b/a Franco Productions; GEORGE JACHEM, Individually and d/b/a Rodco; R.D. COUTURE, Individually and d/b/a Rodco, RODCO; HIDVIDCO: HIDVIDCO-ATLAS VIDEO RELEASE; DEREK ROBERTS, Individually and d/b/a/ AMO Video; AMO VIDEO; LOGAN GINES ENTERTAINMENT; LOGAN GAINES, Individually and d/b/a Logan Gaines Entrainment; MARVIN JONES, Individually and d/b/a Campfire Video; CAMPFIRE VIDEO; LEO MARTIN, Individually and d/b/a Gameport; GAMEPORT: JAY HENNIGAN, Individually and d/b/a Westnet Communications; WESTNET COMMUNICATIONS; ALAN GOULD; BRAD THEISSEN, Individually and d/b/a Cal Video; CAL VIDEO; TVRP; PSI NET, Individually and d/b/a TIAC. Net; GTE, Individually and d/b/a GTE Internet Working d/b/a Genuity.Net; RICK GREENSPAN; LINDA HERMAN; and DAVID STRAND,

Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

Before the Court is the motion to reconsider of Plaintiffs John Does 1 Through 30 Inclusive and Unknown Illinois State University Football Players. Plaintiffs ask us to reconsider our ruling of April 12, 2001, granting their motion for class certification and certifying the class pursuant to Rule 23(0)(3) of the Federal Rules of Civil Procedure. In support of this motion, they raise several concerns about the conduct required of them in order to satisfy the notice requirements of Rule 23(0)(3). In light of the sensitive allegations in this case, we can understand Plaintiffs' concerns. Accordingly, we have reconsidered the class certification issue.

Plaintiffs seek injunctive relief and monetary damages. They also desire to avoid the notice and

opportunity to opt out required by Rule 23(0)(3) because of the delicate nature of this litigation. These dual desires - the pursuit of monetary damages but aversion to notice and opt-out provisions - can pose a predicament. Generally speaking, where plaintiffs seek money damages for their injuries, the Supreme Court has "stressed that proper interpretation of Rule 23, principles of sound judicial management, and constitutional considerations (due process and jury trial), all lead to the conclusion that in actions for money damages class members are entitled to personal notice and opportunity to opt out." Jefferson v. Ingersoll Int'l. Inc., 195 F.3d 894, 897 (7th Cir. 1999) (citing Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)). This general requirement may only be lifted where individual suits would confound the interest of other plaintiffs. See id.; see also Fed. R. Cir. P. 23(0)(1), 23(0)(2). Examples of such suits are where a limited fund must be distributed ratably among stakeholders (making certification appropriate under Rule 23(b)(1)), or where an injunction would affect everyone alike (making certification appropriate under Rule 23 (b)(2)). Both subsections have limited application, however, and both the Supreme Court and the Seventh Circuit have discouraged "creative use" of these two subsections in order to "override the fights of class members to notice and an opportunity to control their own litigation." Id. (citing Ortiz, 527 U.S. 815 (1999)).

Neither Rule 23 (b)(1) nor Rule 23(b)(2) furnishes an appropriate basis for class certification in the case at bar. Because no limited fund is at play, nor would individual suits confound the interest of other plaintiffs, Rule 23(b)(1) does not apply. Furthermore, Rule 2300)(2) cannot

encompass the entire litigation, since Plaintiffs seek money damages as well as injunctive relief. The Seventh Circuit has held that certification of a class under Rule 23(b)(2), without notice or opportunity to opt out, is impermissible unless the requested monetary damage is "incidental" to the requested injunctive relief. See Lemon v. International Union of Operating Engineers, 216 F.3d 577, 581 (7th Cir. 2000) (vacating certification of a c/ass under Rule 23(b)(2) where requested monetary damages were not incidental to the requested equitable relief). The term "incidental" is defined narrowly as "damages that flow directly from liability to the class as a whole on the claims forming the basis of injunctive or declaratory relief." *Id.*,. (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998)). Conversely, incidental damages do not depend on the "intangible, subjective differences of each class member's circumstances" nor require "additional hearings to resolve the disparate merits of each individual's case." Id. (quoting Allison, 151 F.3d at 415). The damages art the case at bar will be based on precisely such "intangible, subjective differences" among class members based on the nature of their exposure in the films. Assessing each individual's damages will necessarily require a hearing or some type of individual inquiry into that person's case. Accordingly, the damages in this case are not "incidental" to the desired injunctive relief, so class certification under Rule 23(b)(2) with respect to all claims is improper.

Instead, the most prudent course is to certify a class pursuant to Rule 23(b)(2) with respect to the injunctive relief sought by Plaintiffs. With respect to the portion of the case seeking monetary damages, however, we decline to certify a class action. Instead, each action will proceed

individually. This resolution comports with the relevant rules and case law and accommodates Plaintiffs' desires as set forth on page five of their motion memorandum.

Charles P. Kocoras
United States District Judge

Dated: June 20, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOES 1 through 30 inclusive,
and Unknown Illinois State University
Football Players,

Plaintiff,

Vs.

FRANCO PRODUCTIONS, DAN FRANCO,
Individually and d/b/a FRANCO
PRODUCTIONS, et al.,

Defendants.

99 C 7885

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on Defendant PSINet's and GTE's motion to dismiss Plaintiffs' third amended complaint. For the reasons set forth below, the Court grants Defendants PSINet's and GTE's motion.

BACKGROUND

The Plaintiffs in this matter were intercollegiate athletes who, without theft knowledge or consent, were videotaped in various states of undress by hidden cameras in restrooms, locker rooms, or showers. The resulting videotapes were sold by various means, including web sites hosted by Genuity.net and TIAC.Net that included still images of the Plaintiffs taken from the videotapes. At no time did any of the Plaintiffs authorize the use of their images; in fact, they did not learn of the existence of the videotapes or that they were available for purchase until a newspaper article detailed the operation. They instituted this action to obtain monetary damages and injunctive relief for intrusion into the Plaintiffs' seclusion against the defendants, the alleged producers and distributors of the videotapes, and against defendants GTE Corporation and GTE Internetworking (together "GTE") and PSINet Inc. ("PSINet"), the respective successors to Genuity.net and TIAC.Net. The Court dismissed Plaintiffs' previous complaint against GTE, finding that GTE was a service provider and therefore immune from suit under the Communications Decency Act of 1996, 47 U.S.C. §230 (the "CDA"). The Court also granted PSINet's oral motion to dismiss on April 20, 2000 for the same reason. After the Court granted leave to amend, Plaintiffs filed their third amended complaint. They re-alleged their previous claims, this time making their allegations against GTE and PSINet in their capacity as web site hosts. Plaintiffs also added a third-party beneficiaries claim, a public nuisance claim, and a claim for eavesdropping under the Electronic Communications Privacy Act, 18 U.S.C. §2511(a) (the "EDPA"). Presently, GTE and Defendant PSINet move this court to dismiss the third amended complaint against them pursuant to Federal Rule of Civil Procedure 1209)(6).

LEGAL STANDARD

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. A defendant must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may

be granted. In ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiffs complaint must be taken as true. Bontkowski v. First Nat'l Bank of Cicero, 998 F.2d 459, 461 (7th Cir. 1993), cert. denied, 510 U.S. 1012, 114 S.Ct. 602, 126 L.Ed.2d 567 (1993). The allegations of a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Nonetheless, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential dements of the cause of action. Luciela v. primer, 967 F.2d 1166, 1168 (Tth Cir. 1992), cert. denied, 506 U.S. 893, 113 S.Ct. 267, 121 L.Ed.2d 196 (1992).

In reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court is limited to the allegations contained in the pleadings themselves. Documents incorporated by reference into the pleadings and documents attached to the pleading as exhibits are considered part of the pleadings for all purposes. See Fed. R. Civ. P. 10(c). In addition, "documents that a defendant attaches to a motion to dismiss are considered a part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." Venture Associates Com. v. Zenith Data Systems Corp., 987 F.2d 429,431 (7th Cir. 1993). It is with these principles in mind that the Court evaluates the present motion.

DISCUSSION

Defendants GTE and PS1Net move to dismiss Plaintiffs' third amended complaint, alleging *that* Plaintiffs amended their previous complaint to add allegations beyond those permitted by the Court when it granted Plaintiffs leave to amend. Defendants GTE and PSINet also argue that Plaintiffs' third amended complaint exceeds the boundaries of pleading provided by Federal Rule of Civil Procedure 11. In addition, Defendants GTE and PSINet assert that the allegations in Plaintiffs' third amended complaint fail to state a claim.

I. Improper Amendment and Rule 11

The Court agrees with Defendants GTE and PSINet that Plaintiffs amended their complaint to an extent beyond which Plaintiffs represented they were seeking leave to amend. Although the Court looks disfavorably on parties who do not follow the spirit of its orders, the Court is unwilling to dismiss claims that may state viable causes of action solely on this basis.

Defendants GTE and PSINet also claim that Plaintiffs' pleadings made "on information and belief" do not conform with Rule 11. Although the Federal Rules allow liberal notice pleading, they do not "allow a plaintiff to abdicate the responsibility of alleging the basic facts demonstrating his entitlement to relief." Murphy v. White Hen Pant~ Co.. 691 F.2d 350, 353 (7th Cir. 1982). Allegations made on "information and belief" are usually sufficient to meet the requirements of Rule 8. See Chisholm v. Foothill Capital Corp.. 940 F. Supp. 1273, 1280 (N.D. Ill. 1996), citing Hall v. Carlson, 1985 WL 2412, at "1 (N.D. Ill. Aug. 28, 1985). Nevertheless, Rule 11 tempers the liberal pleading standards in federal court. See Chisholm, 940 F. Supp. at

1280. Rule 11 requires attorneys to conduct a "reasonable inquiry" into the facts and law of a complaint before filing it with the court. See id. (citations omitted); Ped.R.Civ.P. 11Co). The Advisory Committee Notes to the 1993 amendments to Rule 11 provide:

> Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Fed.R.Civ.P. 11, 1993 Advisory Committee Notes.

Plaintiffs push the boundaries of Rule 11 by making such general and nonspecific allegations with respect to GTE and PSINet, which suggest that Plaintiffs did not conduct a reasonable prelirninzry inquiry before filing its third amended complaint.

> For example, Plaintiffs allege:
>
> As web site hosts, GTE and PSI engage in varying degrees of designing or creating or maintaining the web site, ranging anywhere from completely creating, writing, organizing and originally editing content before it is posted and changing, updating, adding or deleting content thereafter, to providing the template or architecture of the web site. The exact degree of involvement by GTE and PSI in creating and designing the web sites at issue is known only to the defendants and cannot be ascertained by the Plaintiffs without the right of discovery, but after a reasonable opportunity for further investigation or discovery, there is likely to be evidentiary support that GTE and PSI were responsible at least in part for the creation or development or design of the web site or web pages, including the web pages which advertised the videos for sale.

Essentially, Plaintiffs are alleging that they have no idea what GTE and PSINet do in their capacity as web hoses and it could be just about anything, but if given the opportunity, Plaintiffs can figure out what GTE and PSINet do, and it will probably include at least partial responsibility

for the creation or development or design of the web site or web pages, based upon which Plaintiffs seek to hold GTE and PSINet liable. Plaintiffs further allege in their third amended complaint, "depending on the exact range of involvement in the creation or design of the web site, GTE and PSI may have created or designed actual content of the web site." This allegation suggests that Plaintiffs do not even possess a current belief based on any information that GTE or PSI did create or design the actual content of the web site, but rather, they hope and speculate that they may be able to demonstrate it if they end up uncovering certain information. Moreover, Plaintiffs arguments in its response to GTE's and PSINet's motion to dismiss, seem to Confirm that Plaintiffs do not have a reasonable belief that GTE and PSINet created the web site or contributed to its contents, but rather that it is probable that GTE and PSINet helped provide the framework necessary for others to create a web site. Thus, Plaintiffs argue that "the Host Server Defendants in their capacity as such more likely than not helped to create the web site, including by developing the graphics, the photo utilization, and the information and materials related to credit card transactions necessary to the sale for the illegal videotapes."

These allegations press the limits of the liberal pleading standards and come up against the provisions of Rule 11. They indicate little preliminary inquiry by Plaintiffs into their allegations before filing their third amended complaint and little known information upon which to base belief in certain factual allegations. However, the Court will not dismiss Plaintiffs' third amended complaint for its stretching of Rule 1 l's provisions. Sanctions are the appropriate remedy for

violation of Rule 11, not dismissal. See Chisholm, 940 F. Supp. at 1280-81. Because, however, the Court does not find that Plaintiffs' allegations are insufficient to place Defendants GTE and PSI-Net on notice as to the nature of Plaintiffs' claims, the Court will not dismiss Plaintiffs' third amended complaint based on pleading deficiencies under Rule 8. See Fed.R.Civ.P. 8; Veazey v. Communications & Cable of Chicano. Inc., 194 F.3d 850, 854 (7th Cir. 1999).

II. Failure to State a Claim

A. Immunity under the CDA

Plaintiffs assert that they are not seeking to hold GTE and PSINet liable as publishers or speakers of information provided by another under §230(c)(1), thus whatever immunity that section may supply is irrelevant. Rather, Plaintiffs assert that it is seeking to hold GTE and PSINet liable for their "own conduct" in “knowingly failing to restrict content" under §230(c)(2). Section 230(c)(2) provides immunity to those who restrict or enable restriction to objectionable material. See 47 U. S.C. §230(c). Thus, Plaintiffs reason because GTE and PSINet did not restrict or enable restriction of objectionable material, they are not entitled to immunity under this section. However, what Plaintiffs ignore is that by seeking to hold GTE and PSINet liable for their decision not to restrict certain content it is seeking to hold them liable in a publisher's capacity. Section 230(c)(1) provides, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.., lawsuits

seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content-are barred." See Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); see also Ben Ezra. Weinstein, and Co. v. America Online. Inc.. 206 F.3d 980, 985-86 (10th Cir. 2000) (§230 forbids imposition of liability for exercise of editorial functions). Thus, because Plaintiffs seek to hold GTE and PSINet liable for their "own conduct" as publishers, GTE and PSINet may avail themselves of the CDA's immunity in this action under §230(c)(1).

Moreover, Plaintiffs have recast the dismissed claims raised in their previous complaint by alleging that they are bringing the instant suit against GTE and PSINet in their capacity as "web site host[s]" rather than service providers. In this capacity as web hosts, Plaintiffs claim that GTE and PSINet acted as "information content provider[s]" and would, thus, not be immune from suit under the CDA. GTE and PSINet argue that Plaintiffs' amended claims still fail to state a claim because web site hosting activities are immunized under the CDA.

The Court agrees with Defendants GTE and PSINet. The CDA creates federal immunity against any state law cause of action that would hold computer service providers liable for information originating from a third party. See Franco Productions, No. 99 C 7885, at *4-5 (unpublished Apr. 20, 2000); Ben Ezra., 206 F.3d at 984-85. After the Court ruled that GTE as a service provider is immune from suit under the CDA, Plaintiffs severed out and focused on the allegedly separate role of web host played by GTE and PSINet, claiming that a suit against an entity based on its

capacity as a web host is not barred by the CDA. This is because as web hosts GTE and PSI-Net are "information content provider[s]" according to Plaintiffs. Thus, Plaintiffs essentially argue that although GTE and PSINet are acting as service providers, they are also content providers in their role as web hosts and that in its third amended complaint Plaintiffs only seek to hold GTE and PSINet liable in their separate capacity as content providers as manifested in their role as web hosts. However, not only did the Court previously fred that GTE was acting as a service provider for purposes of this action, but the Court specifically rejected the notion that GTE was acting as a content provider in this action as well. See Franco Productions, No. 99 C 7885, at *7. The Court reiterates its previous holding finding GTE, and now similarly PSINet, service providers whose immunity or status as service providers under the CDA is not vitiated because of their web hosting activities, whether viewed in combination with their roles as service providers or in isolation. Immunity under the CDA is not limited to service providers who contain their activity to editorial exercises or those who do not engage in web hosting, but rather, "Congress ... provid [ed] immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others." Blurnenthal v. Drudge, 992 F. Supp. 44, 52 (D.D. C. 1998).

Thus, Plaintiffs' new characterization of GTE's and PSINet's activities as web hosts do not alter this finding. The deficiency in Plaintiffs' allegations is the notion that involvement in web hosting activities transform as an entity into an information content provider. Plaintiffs believe that by

focusing on Defendants GTE's and PSINet's web hosting activities, GTE and PSINet can essentially be characterized as information content providers. However, Plaintiff has pointed to no authority which provides that involvement in these web hosting activities makes an entity an information content provider.

Perhaps the Court is obtuse in its consistent "misunderstanding of Plaintiffs' cause of action," but it is still "at a loss to understand how GTE's [and PSINet's] role[s] in the descriptions or presentation of the images on the Web site impact the creation or development of the images and videotapes themselves." Franco Productions, No. 99 C 7885, *8-9. Plaintiffs' explain that "the culpable conduct is not only the taking of the videotapes but also disseminating them on the Internet and offering them for sale and selling them. The Plaintiffs were harmed, not just by the posting of their illegally taken images on the web page, but also by the sale and dissemination of the videotapes because of the web page." (Emphasis in original) This makes no clearer Plaintiffs' theory that GTE and PSINet were somehow content providers. Plaintiffs do not allege that GTE or PSINet themselves sold or offered for sale the videotapes at issue. Plaintiffs simply allege that GTE and PSINet, as web hosts, provided a medium through which others could sell or offer for sale the videotapes at issue. However, by offering web hosting services which enable someone to create a web page, GTE and PSINet are not magically rendered the creators of those web pages. See 47 U.S.C. (c)(1).

As such, Plaintiffs' new characterization of GTE and PSINet as web hosts neither prevents these defendants from being deemed service providers protected by immunity under the CDA nor

makes them content providers unprotected by the CDA's immunity. Moreover, this immunity extends to Plaintiffs' newly alleged public nuisance claim.

In addition, Plaintiffs' claims for injunctive relief, although not precluded by the CDA, fail to state a claim. See Mainstream Loudoun v. Board of Trustees , 24 F. Supp. 2d 552, 561 (E.D. Va. 1998). Plaintiffs fail to elucidate what activities of GTE and PSINet they seek to enjoin. It appears that the offending images at issue are no longer available on any web site hosted by GTE or PSINet. Moreover, Plaintiffs do not suggest that there is a likelihood that GTE or PSINet will engage in any offending activity against Plaintiffs. As such, Plaintiffs have failed to make allegations that would demonstrate their entitlement to injunctive relief.

B. Third-Party Beneficiary Claim

Plaintiffs base their intended third-party beneficiaries claim on the contracts between GTE and PSINet and the other defendants in this action, which provide that the other defendants would not use the services of GTE and PSINet to violate federal or state law, or infringe the fights or others, or distribute child pornography or obscenity over the Internet. Plaintiffs reason that because the contract provides that the other defendants would not infringe the fights"of others," Plaintiffs are intended third-party beneficiaries because they qualify as "others." This is insufficient to state a claim as an intended third-party beneficiary. Plaintiffs must allege express language in the contract identifying the third-party beneficiary or imply a showing where "the implication that the contract applies to third parties [is] so strong as to be practically an express declaration." Quinn v.

McGraw-Hill Companies. Inc, 168 F.3d 331,334 (7th Cir. 1999). Plaintiffs' allegations fail to accomplish this. Accordingly, Plaintiffs fail to state a claim as third-party beneficiaries.

C. Eavesdropping Claim

Plaintiffs seek to hold Defendants GTE and PSINet liable for eavesdropping under the ECPA. Although the CDA does not preclude an action under the ECPA, see 47 U.S.C. §230(e)(4), Plaintiffs' allegations fail to state a claim. Plaintiffs allege that GTE and PSINet "endeavored to disclose, or knowingly aided and abetted, the intentional disclosure or endeavor to disclose [sic] the oral communications of the Plaintiffs." However, Plaintiffs factual allegations with respect to GTE and PSINet belie the notion that GTE or PSINet themselves endeavored to disclose any intercepted communication. See Arazie v. Mullane. 2 F.3d 1456, 1465 (7th Cir. 1993) (court is not required to ignore facts alleged in complaint that undermine plaintiffs claim). Plaintiffs do not allege that GTE or PSINet themselves posted any of the communications at issue on the web sites or that they in any way endeavored to disclose any such images. Rather, Plaintiffs allegations suggest that GTE and PSINet as service providers were merely acting as conduits. See United States v. Jackson, 208 F.3d 633,637 (7th Cir. 2000) (Interact service providers are merely conduits). Thus, Plaintiffs are left to resort to creating a new cause of action-"aid[ing] and abett [ing] the intentional disclosure" or endeavoring to disclose oral communications. See 18 U.S.C. §2511. The ECPA does not recognize such a cause of action. Accordingly, Plaintiffs have failed to state a claim under the ECPA.

CONCLUSION

For the reasons set forth above, the Court grants Defendants GTE's and PSINet's motion to dismiss.

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Charles P. Kocoras
United States District Judge

Dated: June 21, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOES 1 through 30 inclusive, and
and Unknown Illinois State University
Football Players,

Plaintiffs,

vs.

FRANCO PRODUCTIONS, et al.,

Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

Before this Court is the Motion of Defendants Rick Greenspan, Linda Herman, mad David Strand

("Defendants") to Dismiss Count X of the Third Amended Complaint filed by Plaintiffs John Does 1 through 30, et al. ("Plaintiffs"). Defendants are, respectively, Athletic Director, Assistant Athletic Director and President of Illinois State University ("ISU"). For the reasons set forth below, we grant the Defendants' motion.

BACKGROUND

The following facts have been taken from Plaintiff's complaint, the allegations of which must be assumed as true for purposes of this motion. See Bontkowski v. First National Bank of Cicero, 998 F.2d 459, 461 (7th Cir. 1993). Plaintiffs were intercollegiate athletes who, without their knowledge or consent, were videotaped in various states of undress by hidden cameras and microphones in the restrooms, locker rooms, and showers. The resulting product was sold on various videotapes and advertised and distributed via the Internet. At no time did any of the plaintiffs authorize the use of their images; in fact, they did not learn of the existence of the videotapes or that they were available for purchase until April 1999 when the athletes discovered a newspaper article detailing the operation. Plaintiffs in Count X of their complaint allege that Defendants became aware of the existence of said media in 1996 but did not inform the athletes. Plaintiffs further allege that Defendants did not disclose the existence of the videotapes, at least partially, because at least one Plaintiff had previously participated in a lawsuit against ISU. Plaintiffs claim as a result of the failure of Defendants to notify Plaintiffs, Plaintiffs' constitutional rights were violated. As are salt of these alleged transgressions, Plaintiffs claim they, "suffered injury in the form of emotional distress, fear and anxiety which affected their abilities to attend to their daily functions, and which assumed physical manifestations, and otherwise injured Plaintiffs to their detriments [sic]." Plaintiffs allege that Defendants were acting pursuant to and under authority of the color of law in their official capacity as agents of ISU. The allegations against these three individuals are brought in their individual capacity. Defendants now move to dismiss the claims against them on the theory that Plaintiffs have failed to state a claim upon which relief can be granted.

LEGAL STANDARD

The purpose of the Rule 1209)(6) motion to dismiss for failure to state a claim upon which relief can be granted is to test the sufficiency of the complaint and not to decide the merits of the case. In ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff, and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. See Bontkowski v. First National Bank of Cicero, 998 F.2d 459,

461 (7th Cir. 1993). The allegations of a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." See Conley v, Gibson, 355 U.S. 41, 45-46 (1957); Sherwin Manor Nursing Center, Inc. v. McAuliffe, 37 F.3d 1216, 1219 (7th Cir. 1994). In order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. See Lucien v. Preiner, 967 F.2d 1166, 1168 (7'h Cir. 1992). It is with these principles in mind that we address the motion before us.

ARGUMENT

Defendants wish to dismiss the claim against them on the ground that as employees of ISU, a public state institution, they are entitled to qualified immunity. We agree. Civil rights actions against state officials in their individual capacities are permitted under section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 ("§ 1983"), the tort remedy for deprivations of rights secured by federal law by persons acting under color of state law. Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. §1983.

Defendants are such state officials covered by the statute. See, e.g., Propst v. Bitzer, 39 F.3d 148

(7th Cir. 1994). However, the Supreme Court has held that Congress did not intend §1983 to abrogate the common law immunities traditionally accorded government officials, and that public officials are entitled to a certain degree of immunity, known as qualified immunity. See Pierson v. Ray, 386 U.S. 547 (1967). There is therefore a remedy to individuals injured by government officials' overreaching while at the same time protection for the ability of the officials to make decisions in the public interest and without disproportionate fear of the consequences. Were the law otherwise, public service to all citizens would suffer. See Butz v. Economou, 438 U.S. 478, 504-507 (1978); Stephen Balcerzak, "Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation," YALE LAW JOURNAL, vol. 95, no. 126 (1985).

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court held that an official is "shielded from liability for civil damages insofar as [his/her] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". Id.. at 818. Harlow thus announced an objective standard for determining whether a government official is entitled to qualified immunity. Id., at 816-819. The 7th Circuit has outlined a two-step approach in analyzing a defendant's qualified immunity defense: "(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question?" See Kernats v. O'Sullivan, 35 F.3d 1171, 1176 (7th Cir. 1994) (citing Siegert v. Gilley 500 U.S. 226, 231-232 (1991)). A negative answer to either prong of this test will decide

the matter. See Montville v. Lewis, 87 F.3d 900, 902 (7th Cir. 1996).

Once the defendant raises the qualified immunity defense, the plaintiff bears the burden of establishing the existence of the allegedly clearly established constitutional right. See Rakovich v. Wade. 850 F.3d 1180, 1209 (7th Cir. 1988). While the plaintiff need not demonstrate that the exact situation being considered was previously held unlawful, "[e]losely analogous cases, those decided before the defendants acted or failed to act, are required to find that a constitutional fight is clearly established" unless the violation is obvious. Id.; see Kernats v. O'Sullivan, 35 F.3d 1171, 1176 (7th Cir. 1994) (stating "[I]ndeed, one need not cite a case at all if the constitutional violation is obvious"). Further, in order not to require too much hesitation from our public officials, this Circuit has recognized that the "test for immunity should be whether the law was clear in relation to the *specific facts* confronting the public official when he acted." See Colaizzi v. Walker, 812 F.2d 304, 308 (7t~ Cir. 1987) (emphasis added). As such, a "clearly established" right must be sufficiently clear so that a reasonable officer would understand that he is violating that fight. See Anderson v. Creighton, 483 U.S. 635, 640 (1987).

It is beyond doubt that Defendants' conduct, as alleged by Plaintiffs, does not constitute a constitutional violation. Without attendant duty to prevent the sale and distribution of the materials exposing Plaintiffs, Defendants cannot be held responsible solely on the basis of knowing of the existence of such media. See Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983) (holding that plaintiffs have no affirmative constitutional fight to competent rescue

services); Hilton v. City of Wheeling, 209 F.3d 1005 (7 Cir. 2000) (holding the plaintiffs have no affirmative constitutional right to police assistance). Plaintiffs generally allege Defendants violated their constitutional fights to free speech, privacy, and access to the courts. Although these rights are indeed constitutional, it is unclear, and Plaintiffs fail to allege, how Defendants' conduct did actually violate those rights.

Plaintiffs first assert that Defendants violated Plaintiffs right to free speech by retaliating against Plaintiffs for an unrelated lawsuit previously filed by Plaintiffs against Defendants. We disagree. Although a first amendment cause of action is well recognized in response to retaliatory action by the administration of a university, see, e.g., Papish v. Board of Curators of the Univ. of Missouri, 410 U.S. 667 (1973), Plaintiffs fail to allege any *affirmative* acts by Defendants to retaliate against Plaintiffs for the filing of the lawsuit. See Qvyjt v. Lin, 953 F. Supp. 244, 248 (N.D.Ill. 1997) (holding that it is a clearly established that a university may not act to "punish" a student for the content of his speech). Moreover, Defendants point out that only one member of the Plaintiffs class was involved in the filing of the prior lawsuit. Given that Defendants acted indiscriminately with regard to the entire class in the present case, any support for a first amendment cause of action on the basis of retaliatory action by Defendants simply vanishes.

Plaintiffs secondly allege that Defendants violated their right of privacy by failing to alert Plaintiffs about the availability of the media exposing Plaintiffs. We disagree. Again, while the constitutional right to privacy is well recognized, see, e.g., Whalen v. Roe, 429 U.S. 589 (1977), knowledge alone of disclosure of personal matters by non-public private parties is not actionable

under § 1983. Plaintiffs provide no adequate support for their contention that Defendants should be liable. Plaintiffs cite Slayton v. Willingham. 726 F.2d 631 (10th Cir. 1984) and York v. Story, 324 F.2d 450 (9th Cir. 1963) for the proposition that, "the right to prevent disclosure of photographs or videotapes of one's nude body is a clearly established part of the right to privacy." Be that as it may, these cases are inapposite. Slayton involved plaintiff asserting a claim against the police chief for displaying nude photos of the plaintiff to plaintiff's acquaintances, York involved police officers photographing and distributing indecent pictures of plaintiff, who had contacted police to report an assault. Plaintiffs also rely heavily on James v. City of Douglas. 941 F.2d 1539 (11~ Cir. 199 i), where the court concluded that the plaintiff had asserted a sufficient violation of her constitutional rights when police officers improperly handled a videotape of plaintiff engaged in sexual activity such that the videotape was viewed by and distributed to a large number of individuals. Finally, Plaintiffs put forth Doe v. Knox County Bd. of Educ., 918 F. Supp. 181 (E.D.Ky. 1996) in which the court found the defendants liable for disclosing intimate personal details of a student during a hearing on the student's educational plan. In each of these cases cited by Plaintiffs in alleging Defendants' liability for violating Plaintiffs' right to privacy, the defendants have had an active role in intruding on the plaintiffs' constitutional rights and public officials themselves violated the plaintiffs' constitutional rights. The present case involves a situation where Defendants themselves are alleged to have done nothing to intrude on Plaintiffs' right to privacy. Inaction by public officials, without more, is insufficient to generate

liability. See, e.g., Jackson v. City of Joliet, 715 F.2d 1200 (1983). In the absence of an affirmative duty to disclose, Plaintiffs have not alleged how Defendants violated Plaintiffs' right to privacy by failing to disclose the existence of media displaying Plaintiffs in various states of undress.

Finally, Plaintiffs claim Defendants violated their right of access to the courts by concealing the existence of the media exposing Plaintiffs. Plaintiffs claim that Defendants concealed the existence of the media in order to prevent Plaintiffs from asserting a claim against Defendants for neglecting to provide a locker room free from unauthorized videotaping by failing to properly lock the locker room doors. Though the constitutional right of access to the courts is clearly established, see, e.g., Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142 (1907), Plaintiffs cite to cases which address active efforts by public officials to conceal information from plaintiffs, preventing the plaintiffs from pursuing a cause of action. These cases are unlike the instant case.

Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998) involved a situation where those suing through the plaintiff alleged a conspiracy among police officers, one of whom was a relative of the defendant, to cover up deliberate failures to fully investigate plaintiff's death. In Gonsalves v. City of New Bedford 939 F. Supp. 921 (D. Mass. 1996), the court found sufficient evidence to sustain a jury verdict of an intentional cover up of constitutional violations in a police beating of the deceased when the jury could not identify who was responsible for the constitutional violations. Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) involved a conspiracy by

police officers to prevent information from reaching the family of the deceased regarding an allegedly racially motivated shooting by a police officer. The plaintiffs in Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) alleged that police officers actively concealed and prevented a full investigation of the murder of the plaintiffs' daughter by a local prosecutor. In the case at bar, Plaintiffs allege that Defendants' concealment consists of failing to inform; it cannot be otherwise, for the offending media were already in the public domain and could not be concealed. There is a difference between failing to do something versus active concealment. See Flores v. Satz, 137 F.3d 1275 (11th Cir. 1998); see also Slagel v. Shell Oil Refinery, 811 F. Supp. 378, 382 (N.D.Ill.1993), aff'd 23 F.3d 410 (1994) (police officer has no federal constitutional mandate to conduct investigation into plaintiffs assault charge). For example, the defendants in Flores v. Satz, 137 F.3d 1275 (11th Cir. 1998) were not liable when the plaintiff alleged the defendants violated plaintiff s constitutional rights by failing to investigate properly and expeditiously. By analogy, Defendants in the present case cannot be held liable for failing to do something they did not have an obligation to do. Thus, Plaintiffs have failed to allege the violation of a clearly established constitutional right.

Given that we find that Plaintiffs have not alleged a violation of a clearly established constitutional right, the second prong of the 7th Circuit's qualified immunity analysis is irrelevant. Where a right is not clearly established, it is futile to inquire into whether Defendants were aware of the nonexistent, or at best marginal, right. Plaintiffs have not carried their burden of

demonstrating that Defendants are not entitled to qualified immunity. As such, we grant Defendants' motion to dismiss.

CONCLUSION

For the reasons stated above, this Court grants Defendants' motion to dismiss for failure to state a claim on the ground that Defendants are entitled to qualified

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Charles P. Kocoras
United States District Judge

Dated: July 12, 2000