



Herring v. Keenan

218 F.3d 1171 (2000)

Country: United States

Region: Americas

Year: 2000

Court: 10th Circuit Court of Appeal

Health Topics: Health information, HIV/AIDS, Infectious diseases

Human Rights: Right to due process/fair trial, Right to liberty and security of person, Right to privacy

Facts

The Appellant, Herring, brought this suit alleging a violation of his constitutional right to privacy after his federal probation officer, Keenan, improperly disclosed his HIV status to his sister and to his restaurant employer.

In December 1993, Herring voluntarily informed his probation officer that he had taken an HIV test and that he might be positive; however, he never disclosed that the results of the test were in fact positive. Nevertheless, Keenan immediately informed Herring's employer that Herring was HIV positive, believing that a Colorado state law prohibited a person who had tested positive for HIV from working in a food preparation position. Keenan also informed Herring's sister that her brother had been tested for HIV and might be positive.

The District Court ruled against Keenan, holding that the officer was not entitled to qualified immunity because she had violated a clearly established constitutional right of privacy in one's actual or potential HIV status. This appeal followed.

Decision and Reasoning

The court held that Keenan, as a federal probation officer, was protected by qualified immunity. The court held that it must first determine whether the plaintiff [had] alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established. Thus Herring was required to identify a clearly established statutory or constitutional right of which a reasonable person would have known, and then allege facts to show that [Keenan's] conduct violated that right.

The Court held that there was indeed a constitutional right to privacy that protected information concerning a person's health from being disclosed to others by government officials. The court stated that it had repeatedly interpreted the U.S. Supreme Court's decision in *Whalen v. Roe*, 429 U.S. 589 (1977), to have created a right to privacy in the non-disclosure of personal information. The court also noted its decision in *A.L.A. v. West Valley City*, 26 F.3d 989 (1994), which recognized a constitutional right to privacy regarding disclosure by a police officer of the results of an arrestee's HIV test. It reiterated that there was no dispute that confidential medical information was entitled to constitutional privacy protection.

However, the court held that the constitutional right to privacy in the nondisclosure of information regarding one's HIV status by a government official was not clearly established at the time of the alleged disclosure (December 1993). It held that while the constitutional right to privacy in the nondisclosure of personal health information, including HIV status, did exist at the time of the alleged conduct, it was not settled to such an extent that Keenan should have been on notice that her actions would have violated the right.

The court distinguished between the rights of ordinary citizens and those of probationers, citing the U.S. Supreme Court's decision in *Griffin v. Wisconsin*, 483 U.S. 868 (1987). It stated that in late 1993 it was clearly established that a probationer's right to privacy was limited; therefore, a reasonable probation officer at the time could not have presumed to know whether a limited disclosure of a probationer's HIV status to his sister and restaurant employer would [have] violated a probationer's constitutional rights.

In order to determine whether the right to privacy in the nondisclosure of personal health information was clearly established in late 1993, the court considered whether there was sufficient correspondence between Keenan's conduct and the prior law establishing the right. It discussed a number of cases identified by Herring and held that, while the decisions indicated that under some circumstances a release of personal

information by a government officer may violate a constitutionally protected right to privacy, "none of the cases discuss[ed] the question whether the right to privacy protect[ed] a probationer who may [have been] HIV positive from a limited disclosure by his or her probation officer to persons whom the probation officer believed might [have been] affected by their contact with the probationer."

The court also considered Herring's claim that "a reasonable government officer in Keenan's position would have known that she was violating Herring's clearly established constitutional right to privacy because policies governing Keenan's conduct as a probation officer prohibited her from disclosing his HIV status without his consent." However, the court held that "the fact that an official disclose[d] information in violation of his own internal procedures [did] not make the disclosure a violation of a clearly established constitutional right to privacy." It added that officials sued for constitutional violations "did not lose their qualified immunity merely because their conduct violat[ed] some statutory or administrative provision."

Decision Excerpts

"Herring did not allege any facts showing that Keenan had [an] improper motive in her limited disclosures concerning Herring's medical condition. To the contrary, the second amended complaint alleges facts that demonstrate that Keenan's sole purpose was to protect others from being accidentally exposed to HIV. The plaintiff alleged in the second amended complaint that Keenan disclosed Herring's medical condition to his employer, and requested that Herring be discharged, because she believed that it was unlawful under Colorado law for a restaurant to employ a person as a waiter who has tested positive for HIV." 218 F.3d, p. 1177.

"[T]he plaintiff has shown that there is "a clearly established right in the abstract" to privacy from disclosure of personal information by government officials. []. The plaintiff has not shown, however, that the district court cases cited amount to a sufficient weight of authority establishing a clearly established right of privacy in this case. The plaintiff has further failed to demonstrate that the contours of that right were sufficiently clear in late 1993 so that a reasonable probation officer would understand that he or she could not disclose to a probationer's close relative or restaurant employer that the probationer had tested positive to HIV." 218 F.3d, p. 1179.

"The plaintiff also argues that a reasonable government officer in Keenan's position would have known that she was violating Herring's clearly established constitutional right to privacy because the policies governing Keenan's conduct as a probation officer prohibited her from disclosing his HIV status without his consent . . . To ensure that a government official is subject to liability only for a violation of a clearly established constitutional right, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts." []. Thus, without a stronger indication from the courts that a reasonable probation officer in Keenan's position would have known that she was violating Herring's constitutional rights by disclosing his HIV status, rather than simply violating an internal policy, we cannot say that Keenan violated Herring's clearly established constitutional right to privacy." 218 F.3d, p. 1180-81.