

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK MARVIN PHILLIPS,
Plaintiff-Appellee,
v.
LYNN HUST, Library Staff,
Defendant-Appellant.

No. 04-36021
D.C. No.
CV-01-01252-ALH
District of Oregon,
Portland
ORDER DENYING
PETITION FOR
REHEARING AND
PETITION FOR
REHEARING
EN BANC

Filed September 14, 2007

Before: James R. Browning, Dorothy W. Nelson, and
Diarmuid F. O'Scannlain, Circuit Judges.

Order;
Dissent by Judge Kozinski

ORDER

Judge Browning and Judge Nelson have voted to deny the petition for rehearing and have recommended denying the petition for rehearing en banc. Judge O'Scannlain has voted to grant the petition for rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc, and a judge requested a vote on whether to rehear the matter en banc. The case failed to receive a majority of the

votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**.

KOZINSKI, Circuit Judge, dissenting from the order denying the petition for rehearing en banc, joined by O'SCANNLAIN, KLEINFELD, GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, M. SMITH and IKUTA, Circuit Judges:

All I can add to Judge O'Scannlain's bulls-eye dissent is my utter astonishment that we're leaving an opinion on the books that not only denies the prison librarian qualified immunity but actually holds her liable. Her transgression? Failing to help a prisoner bind a brief in a way that's not even permitted, and certainly not required, by the Supreme Court's rules. It's perfectly clear that a timely cert. petition, bound or unbound, would have been accepted under Supreme Court Rule 39.3. If the prisoner didn't file it, he has only himself to blame. How the prison librarian violated any of his rights, let alone his clearly established rights, is a mystery that repeated readings of the majority opinion do not dispel. I suspect that the Justices, who know their precedents and filing procedures all too well, would not agree with our opinion.

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