

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STEPHEN J. WEISSENBERGER, JR.

Petitioner,

v.

STEVE WATTERS, SRSTC Director,

Respondent.

OPINION and ORDER

07-C-415-C

This is a civil action for declaratory, injunctive and monetary relief, brought by petitioner Stephen J. Weissenberger, Jr., a patient detained by the state of Wisconsin at the Sand Ridge Secure Treatment Center in Mauston, Wisconsin, pursuant to Wis. Stat. Ch. 980, Wisconsin's Sexually Violent Persons Law. In his complaint, petitioner contends that respondent violated his rights under the Fair Labor Standards Act of 1938, the Fourteenth Amendment and state law when he reduced petitioner's wages from \$6.50 to \$2.00 an hour for work petitioner performs at the institution. He seeks leave to proceed with this action without prepaying the filing fee as permitted under the in forma pauperis statute, 28 U.S.C. § 1915.

From the financial affidavit petitioner has submitted, I conclude he is unable to

prepay the full fees and costs of starting this lawsuit. Because he is a patient and not a prisoner, petitioner is not subject to the 1996 Prison Litigation Reform Act.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, when a litigant requests leave to proceed in forma pauperis, the court must deny leave to proceed if the action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a respondent who is immune from such relief. 28 U.S.C. § 1915(e)(2).

Petitioner will be denied leave to proceed on his claim under the Fair Labor Standards Act because the Act does not apply to institutionalized persons like himself. Further, petitioner will be denied leave to proceed on his claims that respondent violated his Fourteenth Amendment due process and equal protection rights by reducing his wages from \$6.50 to \$2.00 an hour, because petitioner alleges no facts suggesting how his rights under the equal protection clause have been infringed and because he has a remedy in state court for return of an alleged wrongful deprivation of property. Finally, I decline to exercise supplemental jurisdiction over petitioner's state law claims, because the dismissal of petitioner's federal claims extinguishes any common nucleus of operative fact as to petitioner's alleged state and federal claims that might be tried in one proceeding. Petitioner is free to raise his state law in a separate action filed in state court.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner is a patient confined involuntarily at the Sand Ridge Secure Treatment Center in Mauston, Wisconsin. Respondent Steve Watters is employed by the Sand Ridge Secure Treatment Center.

B. Reduction in Wages

On January 30, 2007, respondent Watters issued a memorandum to all Chapter 980 patients advising them that there was to be a reduction in patient wage rates and a restructuring of the center's work program. Among other things, the memorandum explained that effective February 18, 2007, the wage rate for patient work was being reduced from wages established under federal or state minimum wage laws to a tiered wage system, with Tier 1 receiving \$2.00 an hour and Tier 2 receiving \$2.50 an hour. Whether a patient would receive Tier 1 or Tier 2 pay depended on "the nature of the work, meeting competencies and receiving good work evaluations." The memorandum advised patients also that the number of work hours would be increased significantly at the institution and would be allocated on the basis of the level of the unit where the patient resides in order to insure

“greater consistency across the different treatment tracks and groups.”

Before February 18, 2007, petitioner was employed in the patient work program 12 hours a week and receiving a minimum wage of \$6.50 an hour. After February 18, petitioner’s hours were reduced to 9 hours a week and his pay was reduced to \$2.00 an hour.

DISCUSSION

A. Fair Labor Standards Act

_____Petitioner contends that respondent Watters violated the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, when he reduced petitioner’s hourly wage to an amount falling below minimum wage laws. The Fair Labor Standards Act governs numerous aspects of employment, but is best known for its provisions establishing a minimum wage that must be paid to “employees” as those persons are defined under the Act. Although no federal court of appeals has determined whether civilly committed persons are entitled to protection under the Fair Labor Standards Act, it is well-established that neither prisoners nor pretrial detainees are covered by the Act, so long as the work they perform occurs within prison or institutional walls solely for the benefit of the institution and its wards or inmates. Vanskike v. Peters, 974 F.2d 806, 809-10 (7th Cir. 1992) (prisoners not covered by Act); Tourscher v. McCullough, 184 F.3d 236, 243 (3d Cir. 1999) (pretrial detainees not covered by Act); Gambetta v. Prison Rehabilitative Industries, 112 F.3d 1119, 1124-25 (11th Cir. 1997)

(same).

By its plain terms, the Act applies only to workers who are “employees.” 29 U.S.C.

§ 206(a). And, as the Court of Appeals for the Eleventh Circuit has explained,

Focusing on the economic reality of the situation in its entirety . . . [a pretrial detainee] is not an “employee” under the FLSA. The purpose of the FLSA is to protect the standard of living and general well-being of the American worker. Because the correctional facility meets [the detainee’s] needs, his “standard of living” is protected. In sum, the more indicia of traditional, free-market employment the relationship between the prisoner and his putative “employer” bears, the more likely it is that the FLSA will govern the employment relationship. [A pretrial detainee’s] situation does not bear any indicia of traditional free-market employment contemplated under the FLSA.

Villarreal v. Woodham, 113 F.3d 202, 207 (11th Cir. 1997). The same reasoning applies with equal force to civilly committed persons, such as petitioner. Like a prisoner or a pretrial detainee, petitioner has his basic needs met by the facility in which he is detained. By his own account, he works within the institution for only 9 hours a week. His work is performed within the institution, occupying “time that might otherwise be filled by mischief . . . [and] train[ing] [petitioner] in the discipline and skills of work.” Danneskjold v. Hausrath, 82 F.3d 37, 43 (2d Cir. 1996). His work is not employment in the traditional sense and therefore is not subject to the provisions of the Fair Labor Standards Act. Consequently, petitioner will be denied leave to proceed on his claim that respondent Watters has violated his rights under the Act.

B. Fourteenth Amendment

1. Procedural due process

Petitioner suggests that respondent Watters deprived him of a property interest without due process of law when he reduced petitioner's pay from \$6.50 an hour to \$2.00 an hour and cut his hours from 12 hours a week to 9 hours a week. A procedural due process claim against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Here, petitioner cannot contend that the state has deprived him of procedure. As long as state remedies are available for the loss of property, neither intentional nor negligent deprivation of property gives rise to a constitutional violation. Daniels v. Williams, 474 U.S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984). The state of Wisconsin provides several post-deprivation procedures for challenging the alleged wrongful taking of property. Wis. Stat. §§ 810 and 893 provide replevin and tort remedies. In particular, § 810.01 provides a remedy for the retrieval of wrongfully taken or detained property, and § 893 contains provisions concerning tort actions to recover damages for wrongfully taken or detained personal property and for the recovery of the property. Because petitioner has post-deprivation procedures available to him in state court, he cannot contend that the state deprived him of due process in the taking of his income. In sum, petitioner has failed to state a claim that respondent violated his procedural due process

rights when he changed the amount of his pay and the number of hours he was scheduled to work.

2. Equal protection

Petitioner does not explain why he is raising a claim under the Fourteenth Amendment's equal protection clause. Indeed, the exact nature of this claim is unclear. The only tangible thing he wants from this lawsuit is to recover money owed to him for hours he would have worked at the rate of pay he would have been paid if there had been no change to the patient work program.

The equal protection clause provides that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). To succeed ultimately on an equal protection claim, petitioner would have to demonstrate intentional or purposeful discrimination. Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982). Actions or rules that allegedly violate the equal protection clause are subject to varying levels of judicial scrutiny. If the act or rule interferes with a fundamental right or discriminates against a suspect class, it will have to withstand strict scrutiny. Otherwise, the act or rule will generally survive an equal protection challenge if the different treatment "bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631 (1996).

In this case, petitioner's wages are not a fundamental right and his status as an institutionalized person under Chapter 980 receiving Tier I wages does not place him in a suspect class. United States v. Vahovick, 160 F.3d 395, 398 (7th Cir. 1998). Therefore, petitioner's equal protection claim must be evaluated under the rational basis test. Under rational basis review, classifications "must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

Petitioner's complaint includes respondent's memorandum in which he explains that the reason for paying salaries at different tier levels was to take into account "the nature of the work" and whether the patient was "meeting competencies and receiving good work evaluations." The memorandum explained as well that although the number of work hours would be increased overall, allocations would differ by unit in order to insure "greater consistency across the different treatment tracks and groups." Setting pay rates according to the nature of the work and a patient's competency in his job is entirely rational, as is allocating work hours between treatment tracks and groups for greater consistency. Petitioner fails to state a claim that respondent violated his Fourteenth Amendment right to equal protection.

C. State Law Claims

The existence of supplemental jurisdiction is predicated on the existence of a

substantial federal claim and a common nucleus of operative fact as to state and federal claims such that the claims would ordinarily be tried in one proceeding. Mine Workers v. Gibbs, 383 U.S. 715 (1966). Because I am denying petitioner leave to proceed on all of his federal claims, I will decline to exercise supplemental jurisdiction over his state law claims.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis is DENIED because he has failed to state a claim of a deprivation of his rights under the United States Constitution or federal law.

Further, IT IS ORDERED that petitioner's state law claims are DISMISSED without prejudice to petitioner's refiling those claims in state court.

The Clerk of Court is requested to enter judgment dismissing this action in its entirety.

Entered this 3d day of August, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge