

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

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JOEVAL JONES,

Plaintiff,

v.

C.O. RUSSEL and CAPTAIN O'DONOVAN,

Defendants.  
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OPINION AND ORDER

15-cv-056-bbc

Pro se plaintiff Joeval Jones, a prisoner in the Waupan Correctional Institution, is proceeding on claims that he was punished by prison officials for exercising his First Amendment rights to free speech. In the order screening plaintiff's complaint, I denied him leave to proceed on a claim that the prison regulation under which he was punished was unconstitutionally vague and overbroad. Plaintiff has filed a motion for leave to amend his complaint, dkt. #9, and a proposed supplement to his complaint, dkt. #10, in which he asks the court to allow him to proceed on the void-for-vagueness claim. Upon review of plaintiff's materials, I conclude that he has still failed to state a claim that the regulation is unconstitutionally vague or overbroad. However, I conclude that the facts plaintiff alleges are sufficient to state a claim under the due process clause that the Wisconsin prison regulations failed to provide him notice that his actions could be punishable.

## OPINION

Plaintiff alleges that he was punished by a term in segregation of 360 days for writing an affidavit in support of another prisoner's lawsuit. In the affidavit, plaintiff discussed gang-related activity he undertook and for which he had already received punishment. Plaintiff says there was no way for him to anticipate that the prison rule against gang activity would also prohibit him from retelling the facts of the gang activity in a legal affidavit.

In the order screening plaintiff's complaint, I noted that it was not clear which regulation plaintiff believed was void for vagueness because the regulation plaintiff listed, Wis. Admin. Code DOC § 303.20, does not pertain to gang activity. In his motion, plaintiff says that this is the section he meant to cite, but that he was referring to an earlier version of the section, which was revised and renumbered in the January 2015 revision. Before then, the provision on gang activity was numbered § 330.20; the provision on gang activity is now codified at § 330.24.

Even now that plaintiff has made it clear what regulation he is citing, he has failed to identify any part of the regulation that is vague or overbroad. Rather, he says that he did not have "fair warning" of the breadth of the regulation because he could not have anticipated that he would be punished for recounting the grounds for his already-adjudicated conduct report on gang activity. As with plaintiff's original complaint, this is not an argument that the regulation is vague. Moreover, plaintiff cannot proceed on an argument that defendants C.O. Russell and Captain O'Donovan misapplied the regulation under state law because such a claim is not cognizable claim in this court. Pennhurst State School &

Hospital v. Halderman, 465 U.S. 89 (1984) (state sovereign immunity prohibits federal courts from ordering state officials to conform their conduct to state law).

Nevertheless, I conclude that plaintiff's allegations do state a claim. Although plaintiff does not identify a problem with the content of § 303.20 (2014), he does allege that none of the regulations give him notice that his actions were punishable. This is sufficient to state a claim that defendants failed to give him due process under the Fourteenth Amendment.

To state a due process claim, a prisoner must allege facts suggesting that he was deprived of a "liberty interest" and that this deprivation took place without the procedural safeguards necessary to satisfy due process. Sandin v. Conner, 515 U.S. 472, 483-84 (1995). At this stage, plaintiff's 360-day confinement in segregation meets the element of deprivation of a liberty interest. Marion v. Columbia Correction Institution, 559 F.3d 693, 697-98 (7th Cir. 2009) (240-day disciplinary segregation sufficiently harsh and atypical to meet definition of "deprivation of liberty interest"). Further, persons deprived of liberty are due certain process, generally in the form of notice and an opportunity to be heard. Sandin v. Conner, 515 U.S. at 490 ("[T]he basic, universal requirements are notice of the acts of misconduct prison officials say the inmate committed, and an opportunity to respond to the charges before a trustworthy decisionmaker."). Plaintiff appears to concede that he received a disciplinary hearing, but he contends that he did not have proper notice. In particular, he says that his actions (recounting already-punished gang activities in support of another prisoner's legal defense) do not meet the prohibitions in DOC § 303.20 (2014), and that no

one at the prison told him that his actions would be “against DOC 303.20(1)-(3) or any other rule.” Plt.’s Supp. Cpt., dkt. #10, at 7. If none of the prison rules give notice to prisoners that their activity is punishable, the prisoners’ due process rights may be violated. Toston v. Thurmer, 689 F.3d 828, 832 (7th Cir. 2012) (“A deprivation of liberty without fair notice of the acts that would give rise to such a deprivation violates the due process clause . . . .”). Accordingly, I am granting plaintiff’s motion for leave to amend his complaint, denying him leave to proceed on his void-for-vagueness claim and granting him leave to proceed on a due process claim.

#### ORDER

IT IS ORDERED that

1. Plaintiff Joeval Jones’s motion for leave to amend his complaint, dkt. #9, is GRANTED.
2. Plaintiff is DENIED leave to proceed on a claim that the prison regulations relating to gang activity are void for vagueness, but GRANTED leave to proceed on a due process claim that he did not receive notice that his writing of the affidavit was punishable under the prison regulations, as set forth in the proposed supplement to his complaint, dkt. #10.
3. The operative complaint in this proceeding is plaintiff’s original complaint, dkt. #1, and its supplement, dkt. #10, and plaintiff is proceeding his due process claim and on his claim that he was disciplined for exercising his rights to free speech in violation of the

First Amendment. If plaintiff seeks to amend his complaint again, he must file a new document that completely replaces the operative complaint, listing all defendants and alleging all necessary facts in one document.

Entered this 22d day of April, 2015.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge