IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GARRY A. BORZYCH, JAMES E. SANICKI, JOHN WEBER and those yet to be named,

ORDER

Plaintiffs,

02-C-0128-C

v.

JON LITSCHER, DANIEL BERTRAND, CINDY O'DONNELL, SANDY HAUTAMSKI, JOHN RAY, GLEN RIPLEY, WORK REVIEW COMMITTEE and those yet to be named,

Defendants.

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Plaintiffs Garry A. Borzych, James E. Sanicki and John Weber are presently confined at the Green Bay Correctional Institution in Green Bay, Wisconsin. Although plaintiffs have paid the full $150 filing fee, because they are prisoners the court must screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious or is not a claim upon which relief may be granted. See 28 U.S.C. §§ 1915A(a), (b). Because I find that plaintiffs' due process and equal protection claims

relating to inmate pay and the time limits imposed on certain inmate jobs fail to state a claim upon which relief can be granted and plaintiffs' equal protection challenge to defendants' smoking ban is legally frivolous, plaintiffs' claims will be dismissed. Also before the court is plaintiffs' motion for a temporary restraining order and preliminary injunction. Because I am dismissing plaintiffs' claims, I will deny plaintiffs' motion as moot.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). In their complaint, plaintiffs make the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Plaintiffs Garry A. Borzych, James E. Sanicki and John Weber are inmates at Green Bay Correctional Institution. Defendant Jon Litscher is Secretary of the Department of Corrections. Defendants Cindy O'Donnell, Sandy Hautamski and John Ray are corrections complaint examiners. Defendant Daniel Bertrand is Warden of the Green Bay Correctional Institution, where defendant Glen Ripley is an institutional complaint examiner. Defendant work review committee is an administrative body at the Green Bay Correctional Institution.

B. Job Time Limits and Pay

On July 1, 2001, new policies and procedures were introduced at the Green Bay Correctional Institution imposing time limits on inmate jobs and affecting inmate pay. A two-year limit on working certain jobs was imposed retroactively on plaintiffs. According to defendant Ripley, the time limit was imposed to insure "the secure operation of the institution." Also on July 1, 2001, each plaintiff's pay was reduced without a hearing. Reduction of pay is a recognized punishment under the state's administrative code. On September 25, 2001, each plaintiff was forced to sign an inmate job description sheet or be fired from his prison job. Each plaintiff signed the sheet, noting parenthetically that it was being signed under duress. Inmates employed by the Badger State Industries laundry shop, textiles shop and the Fabry glove factory are not subject to a two-year time limit on their jobs. Plaintiffs are similarly situated to the laundry, textile and glove factory workers. The work review committee is not insuring that plaintiffs are paid the same as other inmates doing comparable work even though rules require compensation to be fixed according to skill and responsibility.

C. Smoking Ban

On June 1, 2000, a smoking ban was imposed at Green Bay Correctional Institution. The smoking ban does not apply to all Wisconsin inmates. For instance, inmates at Fox Lake, Kettle Moraine, Waupun, Oshkosh, Columbia and Taycheedah correctional

institutions are not banned from smoking cigarettes. As a result of the ban, there is a black market in cigarettes at Green Bay Correctional Institution that is run by institution staff. Defendant Bertrand is aware of the black market but has no effective policy preventing institution staff from bringing in tobacco. After visits, prisoners are strip searched before they are allowed to return to their cells. Nevertheless, on or about February 2, 2002, a carton of cigarettes was found in the prison bathhouse. In addition, there have been numerous conduct and incident reports issued for possession of tobacco since the ban took effect.

OPINION

A. Job Time Limits and Pay

1. Due Process

I understand plaintiffs to allege that they were denied procedural due process in violation of the Fourteenth Amendment when defendants imposed a retroactive, two-year limitation on the duration of prison jobs and reduced their pay without a hearing.

A procedural due process violation 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). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited

to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty). In Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit held that the loss of "social and rehabilitative activities" are not "atypical and significant hardships" that are constitutionally actionable rights under Sandin, 515 U.S. 472, and in Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992), the court stated expressly that a prisoner has no protected liberty interest in a prison job. In Vanskike, the court of appeals also noted that the Constitution does not require that prisoners be paid for their work. Id. ("[T]here is no Constitutional right to compensation for [prison] work; compensation for prison labor is by 'grace of the state'") (quoting Sigler v. Lowrie, 404 F.2d 659, 661 (8th Cir. 1968)). Accordingly, plaintiffs' contentions that their due process rights were violated by the imposition of a two-year limit on the duration of their prison jobs and the reduction of their pay without a hearing fails to state a claim upon which relief can be granted.

2. Equal Protection

Plaintiffs also allege that their equal protection rights have been violated because the two-year job limit is inapplicable to inmates employed in certain prison jobs and the prison work review committee has not insured that plaintiffs are being payed the same as other inmates performing similar work. Although procedural due process claims require that a recognized liberty or property interest be at stake, there is no similar requirement for claims brought under the Fourteenth Amendment's equal protection clause. DeWalt v. Carter, 224 F.3d 607, 613 (7th Cir. 2000). 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 show an equal protection violation, a plaintiff must demonstrate intentional or purposeful discrimination. Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982). Statutes or regulations that allegedly violate the equal protection clause are subject to varying levels of court scrutiny. If the statute or regulation interferes with a fundamental right or discriminates against a suspect class, it will have to withstand strict scrutiny. Otherwise, a statute or regulation will generally survive an equal protection challenge if "the legislative classification . . . bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631 (1996). Plaintiffs' complaint identifies no fundamental right at stake and prisoners are not a suspect class. United States v. Vahovick, 160 F.3d 395, 398 (7th Cir. 1998). Therefore, plaintiffs' equal protection claims must be evaluated under the

rational basis test. Under rational basis review, classifications "must be upheld against 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).

In their complaint, plaintiffs allege that in response to institutional grievances, prison staff told them that the two-year limit was instituted "for the secure operation of the institution." Indeed, security concerns may well lead a rational prison administrator to cycle inmates through different jobs periodically. However, I need not (and likely could not) assess the rationality of defendants' security concerns by considering only plaintiffs' complaint and its various attachments. Instead, plaintiffs' equal protection claim must fail because plaintiffs have failed to allege they are victims of purposeful or intentional discrimination. The Court of Appeals for the Seventh Circuit has noted that equal protection violations require purposeful or intentional discrimination and that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences." Shango, 681 F.2d at 1104 (quoting Personnel Administrator of Massachusetts v. Feeny, 442 U.S. 256, 279 (1979)). Rather, "[i]t implies that the decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group." Id.; see also Payton v. Rush-Presbyterian-St. Luke's Medical Center, 184 F.3d 623, 632 (7th Cir.

1999) ("We have held that 'to state an equal protection claim, a § 1983 plaintiff must aver that a state actor purposefully discriminated against him because of his identification with a particular (presumably disadvantaged) group."). Plaintiffs have not alleged that defendants' imposition of a two-year limit on most prison jobs was at least partly motivated by animus or a desire to discriminate against them. Accordingly, their equal protection claim will be dismissed.

Plaintiffs also allege that the prison work review committee has not insured that plaintiffs are being paid a wage comparable to other inmates performing similar work even though regulations require inmate pay to be based on skill and responsibility. To the extent this allegation is an attempt to state a due process claim it fails because, as noted above, prisoners have no liberty or property interests in their prison jobs and no constitutional right to payment for their prison labor. Vanskike, 974 F.2d at 809. The existence of a regulation requiring inmate pay to be related to skill and responsibility does not create a liberty interest. In Sandin, 515 U.S. at 481, the Supreme Court sought specifically to discourage prisoners from "comb[ing] regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." Nor does the allegation that plaintiffs "are being denied the right to be paid equally comparable to other jobs in the institution" state an adequate equal protection claim. Even under a liberal pleading regime, plaintiffs' bare assertion that they are not being paid the same as other unidentified prisoners for

performing unidentified work does not provide defendants with adequate notice of the conduct plaintiffs deem constitutionally objectionable.

Accordingly, plaintiffs' procedural due process and equal protection claims relating to the retroactive two-year limitation on the duration of their prison jobs; the reduction in their pay; and the prison work review committee's failure to insure that plaintiffs are being paid a wage comparable to other inmates performing similar work will be dismissed for plaintiffs' failure to state a claim upon which relief can be granted.

B. Smoking Ban

Plaintiffs allege that their Fourteenth Amendment equal protection rights are violated because, unlike inmates at other Wisconsin prisons, they cannot smoke cigarettes. Plaintiffs' claim is legally frivolous. In Beauchamp v. Sullivan, 21 F.3d 789 (7th Cir. 1994), the Court of Appeals for the Seventh Circuit considered an inmate's challenge to prison regulations severely limiting smoking on cruel and unusual punishment and equal protection grounds. The court of appeals noted that "with the Supreme Court having just held that prison officials may have a constitutional duty to protect inmates from high levels of ambient cigarette smoke . . . a prison could hardly be thought to be violating the Constitution by restricting smoking." Id. at 790-91 (citing Helling v. McKinney, 509 U.S. 25 (1993)); see also Alvarado v. Litscher, 267 F.3d 648 (7th Cir. 2001) (allegation that inmate was exposed

to environmental tobacco smoke that aggravated his chronic asthma stated a claim under the Eighth Amendment). Plaintiffs' additional allegations that a black market in cigarettes exists at the prison adds nothing to their equal protection claim and I am not aware of any other constitutional issue it raises. Plaintiffs' equal protection challenge to defendants' smoking ban will be dismissed as legally frivolous.

C. Motion for Preliminary Injunction and Temporary Restraining Order

Because plaintiffs will be denied leave to proceed on all their claims, their motion for a temporary restraining order and preliminary injunction will be denied as moot.

ORDER

IT IS ORDERED that

1. Plaintiffs Garry A. Borzych, James E. Sanicki and John Weber's due process and equal protection claims relating to inmate pay and the time limits imposed on certain inmate jobs are DISMISSED pursuant to 28 U.S.C. § 1915A for plaintiffs' failure to state a claim upon which relief may be granted.

2. Plaintiffs' equal protection claim relating to defendants' smoking ban is DISMISSED as legally frivolous.

3. Plaintiffs' motion for a temporary restraining order and preliminary injunction is

DENIED as moot.

4. A strike will be recorded against plaintiffs in accordance with 28 U.S.C. § 1915(g).

5. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 14th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge