IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL T. WINIUS,

Plaintiff,

v.

STATE OF WISCONSIN and
JON E. LITSCHER, Secretary of
the Department of Corrections,

Defendants.

ORDER

03-C-36-C

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This is a civil action for injunctive relief, brought under 42 U.S.C. § 1983. Plaintiff Michael Winius, who is presently confined at the Columbia Correctional Institution in Portage, Wisconsin, contends that respondents have violated his right against self-incrimination under the Fifth Amendment by enacting regulations that compel sex offenders to submit to a lie detector test. Plaintiff has paid the filing fee in full.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if, on three or more previous occasions, the prisoner has had a suit dismissed for lack of legal

merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief.

I conclude that plaintiff's claim is not ripe for adjudication because it rests on future events that may not occur. Accordingly, I will dismiss this case without prejudice.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

In 1999, plaintiff was found guilty of sexual assault of a child under Wis. Stat. § 948.02(2). The court sentenced him to 28 years in prison. Plaintiff is presently confined in Columbia Correctional Institution in Portage, Wisconsin.

After his conviction, plaintiff learned of the "lie detector requirement" set forth in the regulations of the Wisconsin Department of Corrections. This requirement applies to all "sex offenders," which includes plaintiff. It allows employees of the department of corrections to obtain incriminating statements from the offender, leading potentially to additional incarceration. Offenders who refuse to comply with the lie detector requirement are sanctioned by the department.

Plaintiff will not comply with the lie detector requirement because he believes polygraphs are unreliable and because the requirement violates his Fifth Amendment rights.

Plaintiff fears the consequences he may face if he refuses to comply with the lie detector requirement.

DISCUSSION

In essence, plaintiff is seeking a declaration that the lie detector program under Wis. Admin. Code §§ DOC 332.15-18 violates the Fifth Amendment because there is a risk that offenders may be compelled to incriminate themselves and he requests an injunction barring defendants from enforcing the law. However, regardless whether plaintiff is correct that the lie detector regulations are unconstitutional, this is not an issue that this court can address in the context of plaintiff's action. The problem with plaintiff's request is that no one has compelled him to incriminate himself under the regulations and there is no immediate danger that anyone will. An individual's Fifth Amendment right against self-incrimination is not violated until he has been compelled to make statements that could subject him to criminal prosecution or he has been penalized for refusing to incriminate himself. Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977).

Federal courts have limited authority to decide cases in the abstract or when the plaintiff has not yet been injured. Article III, § 2 of the Constitution limits the jurisdiction of the federal courts to "cases" and "controversies." Applying this limitation, the Supreme Court has held that a case must be "ripe" before a federal court can hear it, that is, there must be a clear-cut dispute between the parties that is ready for court action. Abbott

Laboratories v. Gardner, 387 U.S. 136 (1967). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296 (1998) (quoting Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 581 (1985)); see also People v. General Electric Co., 683 F.2d 206, 210 (7th Cir. 1982) ("Article III has been understood to express a policy . . . against rendering decisions that are either unnecessary to resolve a real dispute or unlikely to be made in a competent fashion.") The purpose behind the ripeness requirement is to prevent courts from being pulled into "abstract disagreements," id. at 148, and to avoid deciding unnecessary constitutional issues, Regional Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974).

Under Wis. Admin. Code § DOC 332.17(1)(a), the lie detector requirement will not be applied to plaintiff until he is "nearing [his] release date on mandatory or discretionary parole." Plaintiff will not be eligible for parole for several years. See Wis. Stat. 304.06(1)(b) (prisoner may not be paroled until he has served 25% of his sentence). Any number of events could occur before this time that would render unnecessary a decision on the constitutionality of the lie detector requirements as they are applied to plaintiff.

First, the department of corrections could repeal the regulations before plaintiff is eligible for parole. Further, even if the regulations remain in effect, this does not necessarily mean that plaintiff will be compelled to incriminate himself. Wis. Admin. Code § DOC

332.15 provides that the department of corrections "may" require a sex offender to submit to a lie detector test, but there is no requirement that it do so. Finally, even if the department of corrections required plaintiff to submit to a lie detector test, his Fifth Amendment rights would not be violated unless he was compelled to make statements that could be used against him in a criminal prosecution or if he was penalized for refusing to make such a statement. See Lefkowitz, 431 U.S. at 805.

At this time, plaintiff has no more than an "abstract disagreement" with the policy of the department of corrections, which cannot be decided by this court. Abbott Laboraties, 389 U.S. at 148. Because plaintiff's claim is not ripe, this case must be dismissed. Plaintiff will have "ample opportunity later to bring [his] legal challenge when harm is more imminent and more certain." Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726, 734 (1998).

ORDER

IT IS ORDERED that this case is DISMISSED without prejudice as unripe for judicial review. The clerk of court is directed to enter judgment for defendants and close this case. 28 U.S.C. § 1915(g) directs the court to enter a strike when an action is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because this case is being dismissed as unripe rather than under one of the

enumerated grounds, a strike will not be recorded against petitioner under § 1915(g).

Entered this 27th day of January, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge