

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

NATHAN J. GAUSTAD,

Plaintiff,

MEMORANDUM AND ORDER

v.

06-C-501-S

JODINE DEPPISCH and MEL PULVER,

Defendant.

Plaintiff was allowed to proceed on his substantive due process claim against defendants Jodine Deppisch and Mel Pulver. He alleges that the Wisconsin Administrative Code § DOC 303.20(3) is unconstitutionally vague.

Defendant filed a motion to dismiss plaintiff's complaint on November 6, 2006. Plaintiff filed his brief in opposition to this motion on November 30, 2005. No reply has been filed.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery

under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

FACTS

For purposes of deciding defendant's motion to dismiss the facts as alleged in plaintiff's complaint are taken as true.

At all times material to this action plaintiff was an inmate at the Fox Lake Correctional Institution, Fox Lake, Wisconsin (FLCI). Defendant Jodine Deppisch is the warden at FLCI. Defendant Mel Pulver is the segregation Supervisor.

On June 27, 2006 plaintiff was issued an adult conduct report No. 1442908 for violating Wis. Admin. Code § DOC 303.20, Group Resistance and Petitions and § 303.47, Possession of Contraband. As a result of this conduct report, materials from "Creativity Prison Ministries" were seized from plaintiff's cell. The conduct report stated that "Creative Prison Ministries" had been identified as a non-sanctioned group which poses a security threat. The group is associated with the white supremacy movement.

MEMORANDUM

Plaintiff claims that his substantive due process rights were violated because the regulation, Wisconsin Administrative Code § DOC 303.20, is unconstitutionally vague. He argues that the

regulation did not provide him notice of what conduct was prohibited.

Wis. Admin. Code § 303.20(3) states:

Any inmate who participates in any activity with an inmate gang, as defined in s. DOC 303.02(11), or possess any gang literature, creed, symbols or symbolism is guilty of an offense. An inmate's possession of gang literature, creed, symbols or symbolism is an act which shows that the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

Wis. Admin. Code § DOD 303.02(11) defines inmate gang as a group of inmates which is not sanctioned by the warden.

In Koutnik v. Brown, 456 F.3d 777, 793-784 (7th Cir. 2006) the United States Court of Appeals addressed an inmate's claim that this regulation was unconstitutionally vague. The Court stated, "Furthermore, the fact that the regulation provides some latitude to prison officials in defining gang symbols does not render it void for vagueness." The Court held that the regulation informed the inmate population as to what symbols were prohibited. The Court found that the regulation was not unconstitutionally vague and that the inmate's substantive due process rights were not violated.

Plaintiff is making the same challenge to the same regulation. The Court finds that the regulation provided plaintiff sufficient notice of that conduct which was prohibited. Accordingly, his substantive rights were not violated. Defendants are entitled to

judgment in their favor as a matter of law on plaintiff's substantive due process claim.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claim must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that defendants' motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 13th day of December, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge