IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE ROY LOVE,

Petitioner,

OPINION AND ORDER

v.

06-C-722-C

SGT. JAEGER, Bathhouse Supervisor;
ELIZABETH LEMERY, Management Services Director;
WILLIAM POLLARD, Warden of Green Bay Correctional Institution,

Respondents.

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Green Bay Correctional Institution in Green Bay, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fee for filing this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

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, if the

litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999). Unoppos

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is presently confined at the Green Bay Correctional Institution in Green Bay, Wisconsin. Respondent Sgt. Jaeger is employed as bathhouse supervisor at the institution, respondent Elizabeth Lemery is employed as the management services director and respondent William Pollard is the warden.

On December 11, 2006, respondent Jaeger deducted two hours' pay for each eight-

hour period petitioner and six other inmates had worked in the bathhouse. Petitioner did not learn about the deduction until he saw his trust fund account statement showing the two-week pay period. When petitioner asked respondent Jaeger about the matter, Jaeger told him nothing could be done because "its business office orders and inmates should write them or file a grievance." The two free hours of labor each day is applied to "a small select few inmates and is an inconsistently enforced policy within the institution" that violates the Department of Corrections' own rules and policy directives.

On January 4, 2006, petitioner wrote to the business office to ask why his pay had been cut from 80 hours to 60 hours every two weeks and the supervisor in the office told petitioner, "The Bathroom Supervisor is changing the work hours to better reflect the hours actually worked." However, petitioner worked a full 80 hours because respondent Jaeger required inmates to work eight hours a day or be fired.

On January 13, 2006, petitioner filed a group complaint with the institution complaint examiner complaining that a "policy change" had been made with respect to the pay for bathhouse employees without having been posted as required by Wisconsin state law and without making the change to affect all inmate employees in the state's institutions. On January 17, 2006, the inmate complaint examiner recommended dismissal of the complaint with modification, stating,

Complainants claim the Business Office is enforcing a new policy without

> informing inmates or posting a notification of a policy change. They claim they found out about this when they received their trust account statements. This examiner spoke with Ms. Basten in the Business Office, and according to Ms. Basten, bathroom workers started to receive pay for 30 hours a week on 12/11/05. They had previously received pay for 40 hours each week. She stated that Sgt. Jaeger submitted pay sheets indicating the work hours were actually 30 instead of forty. Staff may adjust inmate work assignments hours based on institution needs. GBCI work assignment policies, Offender Compensation states in part as follows, "offender workers will be compensated based upon hourly pay rate, work performance level, individual work assignment classification, and hours worked." It also states that work assignments are paid by normal work week hours. The position description for all work assignments states, "projected work schedule." Work assignment supervisors complete offenders' pay sheets with the hours offenders have worked in a week. There will be times when adjustments must be made on hours worked due to institution needs. Cutting back on hours or increasing hours is based on institution need, and offenders are paid accordingly. This policy has been in effect for several years—since approximately 6/01. These policies are available to inmates in the institution library. Inmates are also given a copy of the position description prior to or when they begin a new work assignment. This examiner does not find that there has been any policy change but rather a staff member enforcing the policies to adjust to the needs of the institution. It is important, however, for these policies to be enforced consistently within the institution. Based on this information, I find no rules have been violated but do find that staff should be given some refresher training on the current policies and the need to comply with the policies that are in effect. Therefore, I recommend this complaint be dismissed with modification. The modification for the institution Work Committee to follow-up with review for training staff on the current policies and review for accuracy of current work assignment position descriptions.

Respondent William Pollard accepted the institution complaint examiner's recommendation on January 26, 2006, and dismissed petitioner's group complaint with modification.

On February 6, 2006, petitioner appealed the warden's decision to a corrections

complaint examiner. In his appeal, petitioner noted that it is not proper for the Department of Corrections to pay bathhouse workers for hours actually worked when "inmates attending school are paid 40 hours each week for being in a classroom for maybe 2-3 hours a day." Petitioner then pointed out that chapel workers, office clerks and runners, "tier tenders," canteen workers, garden crew, recreation aide, yard crews and others are paid for 40 hours' work regardless of the actual number of hours worked. Petitioner asked the corrections complaint examiner "to be made whole again working 40 hours a week like everyone else who does not actually work a full 8 hour day but is still paid for a 40 hour week."

On February 14, 2006, Corrections Complaint Examiner Sandra Hautamaki recommended dismissal of petitioner's complaint with modification. In her recommendation, Hautamaki stated,

> While complainants state there was a policy change and they were not notified, I am advised those policies have been in effect since 6/01. And, as noted by the ICE, the position descriptions for work assignments indicate it is a projected work schedule. Hours may vary. The ICE also indicated the bathroom workers had a change in hours from working 7 days a week to 5 days a week due to the manner in which clothing distribution is now handled and so their hours were cut back. Other areas that need to be reviewed for accuracy are being reviewed by the work committee. On that basis, and as I note no administrative rule violations, it is recommended this complaint be dismissed with the noted modification.

On February 20, 2006, Rick Raemisch accepted the recommendation of the corrections complaint examiner and dismissed petitioner's appeal with modification.

On May 13, 2006, petitioner tried again to resolve "the issue of hours actually worked" by sending an interview request to respondent Pollard and the business office. This communication was prompted by a memorandum that had posted on the institution's closed circuit television channel stating,

> Contrary to rumor, we will not be making changes to offender pay or pay ranges at this time. Supervisors of inmate work crews have been asked to review their inmate job descriptions for accuracy. This is being done to come into compliance with Administrative Code. We will continue this review of duties, pay ranges, and pay. However, if changes are needed, these changes will occur at the time the position becomes vacant.

Respondent Elizabeth Lemery responded to petitioner's interview request saying, "There will be no back pay compensation after discussing with the warden. You were paid for the hours you worked."

Petitioner's "paper work" shows that he provided two hours of "free labor" for every eight hours he worked over a four-month period "before being returned to normal."

DISCUSSION

Petitioner argues in his complaint that respondents' actions violated his rights under Wis. Admin. Code §§ 309.55(1)(b)(1) and (6)(d)(2) which, respectively, promote uniform and fair compensation standards for prisoners and provide that "full-time program assignments other than vocational training and school are equivalent to 8 hours a day." In

addition, he contends that respondents failed to follow state law when they applied a new wage rule to the bathhouse employees and not to other inmate employees. Finally, petitioner asserts that respondents deprived him of a "liberty interest of hours he had already actually worked from 1:00 p.m. until 9:00 p.m. five days per week . . ." in violation of the Fifth and Fourteenth Amendments to the United States constitution.

As an initial matter, I note that petitioner's state law claims are not properly raised in an action in federal court unless they are so related to claims arising under federal law that they form part of the same case or controversy. 28 U.S.C. § 1367(a); Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999). Therefore, I will examine petitioner's potential claims under federal law before addressing his state law claims.

1. Due process

Petitioner suggests that he was deprived of a liberty interest when his paycheck was docked for two hours of pay out of every eight hours he worked. 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). 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), and to long-term confinement in extraordinarily restrictive environments such as super maximum prisons, Wilkinson v. Austin, 545 U.S. 209, 227 (2005).

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" is not "atypical and significant hardship" that raises 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)).

To the extent that petitioner is alleging that he had a property interest in wages already earned, his due process claim fails as well. 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 claim that the state deprived him of due process in the taking of his earned income. In sum, petitioner has failed to state a claim that respondents violated his procedural due process rights when they changed the amount of his pay for his work in the prison bathhouse.

2. Equal protection

Petitioner does not say expressly that he is raising a claim under the Fourteenth Amendment's equal protection clause. Indeed, the exact nature of his claim is unclear. Twice in his complaint, petitioner suggests that the only thing he wants from this lawsuit is to recover money owed to him for hours he actually worked:

> The [petitioner's] argument is that nobody properly investigated whether or not his claim is true of actually working from 1:00 pm until 9:00 pm five days a week without being fully compensated for 8 hours per day in accordance

> with DOC rules and policy directives is the only question herein this case that needs to be answered, and, if the court finds that the [petitioner] did not work the said hours and was fully compensated then the [petitioner] has no further argument and his case should be dismissed forthwith.

Cpt. at p. 6, lines 9-15.

> The [petitioner] agrees that staff may [adjust] inmate work assignments hours based on institution needs. However, the problem, and his argument is, that staff cannot demand inmate work 8 hours a day 40 hours a week and then after the fact deduct 2 of every 8 hours actually worked like what has happened here in this case.

Cpt. at p. 7, lines 7-10.

If petitioner's claim is that he was not paid for hours that he actually worked, his lawsuit does not belong in federal court. As noted above, he has no constitutional right to be paid anything for working in a job during his incarceration. If his pay was inappropriately docked, he will have to take the issue up in state court. However, petitioner did not make this argument in his inmate grievance. Rather, the claim petitioner raised in his inmate grievance and may be raising as well in his complaint in this court is that he did *not* work forty hours each week, but believes he should have been paid for forty hours' work because inmates in other jobs who also failed to work a full forty hours were nevertheless paid for forty hours' work.

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 a prisoner does not place him in a suspect class. United States v. Vahovick, 160 F.3d 395, 398 (7th Cir. 1998). Therefore, if petitioner were to pursue an equal protection claim, it would 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).

In his complaint, petitioner alleges that in response to his institutional grievance, prison staff told him that "there will be times when adjustments must be made on hours worked due to institution needs. Cutting back on hours or increasing hours is based on institution need, and offenders are paid accordingly." In addition, he was told that work

assignment supervisors have a responsibility to complete offenders' pay sheets with the hours offenders have worked in a week. Finally, he was told that the pay sheets submitted by respondent Jaeger, his supervisor, indicated that the time petitioner and others in the bathhouse had worked amounted to thirty hours, not forty hours. Insuring that inmates are paid an hourly wage for the actual hours they work is entirely rational.

Moreover, an equal protection claim fails if a petitioner cannot ultimately show that he has been the victim 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."). Nowhere does petitioner allege that Jaeger is responsible for overseeing the pay of inmates other than those who worked in the bathhouse or that he could have adjusted the pay of

inmates working in jobs other than those at the bathhouse but chose not to do so purposely and intentionally. Therefore, if petitioner were to pursue an equal protection claim against respondent Jaeger, he will have an uphill battle to prove that Jaeger violated plaintiff's Fourteenth Amendment right to equal protection.

With respect to respondent Elizabeth Lemery, petitioner alleges only that she is management services director and that she told petitioner in response to his interview request that she had spoken with the warden, who had determined that petitioner would not be given back pay because he had been paid for the hours he worked. Petitioner does not allege any responsibility on Lemery's part for adjusting petitioner's pay or that of similarly situated inmates. Therefore, petitioner would be hard pressed to prove that respondent Lemery violated his Fourteenth Amendment right to equal protection.

Finally, to the extent that petitioner may be intending to sue respondent Pollard for failing to insure that petitioner was paid in the same manner as other similarly situated prisoners, the facts alleged in petitioner's complaint suggest that Pollard did not purposefully or intentionally discriminate against petitioner. If petitioner were to prosecute an equal protection claim against Pollard, it appears likely that Pollard could supply evidence that he did not learn that petitioner and the inmates in the bathhouse were being treated differently from other prisoners until he saw petitioner's inmate complaint and the institution complaint examiner's recommendation that the complaint be dismissed with modification.

The modification was that staff be provided refresher training on policies governing the accuracy of work assignments and making pay adjustments to meet the institution's needs. If respondent Pollard understood, as it appears he did, that steps were being taken to insure that the institution's policies pertaining to inmate pay and hours' adjustments were made throughout the institution, petitioner would not be able to succeed on an intentional discrimination claim against Pollard.

As noted above, however, it is unclear whether petitioner wishes to press a claim in this court that one or more of the respondents violated his Fourteenth Amendment right to equal protection or, as he stated, his only claim was one to recover back pay for hours he actually worked. Therefore, I will give petitioner fourteen days in which to advise the court whether he wishes to pursue an equal protection claim in this court and, if so, against whom he wishes his claim to be asserted.

3. State law claims

Petitioner contends that respondent Jaeger violated Department of Corrections rules and policy directives when he made petitioner work for eight hours and paid him for only six hours without first giving his advance notification. These state law claims are related to petitioner's procedural due process claims, which are being dismissed from this action.

Furthermore, it is unlikely that plaintiff may enforce Department of Corrections

regulations in federal court; I am not aware of any law stating that a violation of one of these regulations may be enforced through a civil action. Kranzush v. Badger State Mutual Insurance Co., 103 Wis. 2d 56, 74-79, 307 N.W.2d 256, 266-68 (1981) (right of action to enforce statute or regulation does not exist unless directed or implied by legislature). Most often, challenges to actions under these regulations may be brought only in state court by certiorari, if at all. See, e.g., State ex rel. L'Minggio v. Gamble, 2003 WI 82, ¶23, 263 Wis. 2d 55, 667 N.W.2d 1; see also Outagamie County v. Smith, 38 Wis. 2d 24, 34, 155 N.W.2d 639, 645 (1968) (with respect to laws that are not made enforceable by statute expressly, action is reviewable only by certiorari). Accordingly, I decline to exercise supplemental jurisdiction over these claims. 28 U.S.C. § 1367(c)(3); see also Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (recognizing that "a district court has the discretion to retain or to refuse jurisdiction over state law claims").

ORDER

IT IS ORDERED that

1. Petitioner Willie Roy Love's request for leave to proceed in forma pauperis on his procedural due process claim is DENIED, as is his request for leave to proceed in forma pauperis on his claim that respondents violated § DOC 309.55 when they adjusted his pay but did not adjust the pay of other inmates. I decline to exercise supplemental jurisdiction

over petitioner's remaining state law claims.

2. A decision is STAYED whether petitioner will be allowed to proceed in forma pauperis in this action on a Fourteenth Amendment equal protection claim against respondents until February 13, 2007, to allow petitioner to advise the court whether he wishes to pursue such a claim and, if so, against which of the respondents. If, by February 13, 2007, petitioner does not advise the court that he wishes to proceed on an equal protection claim against one or more of the respondents, this case will be DISMISSED in its entirety.

3. Whether or not petitioner pursues his equal protection claim, he owes the balance of his filing fee in the amount of $334.39; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. 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 petitioner's state law claims are part of the action and some of those claims have not been dismissed for one of the reasons enumerated in § 1915(g), a strike will not be recorded against petitioner under § 1915(g), even if he decides not to pursue an equal protection claim against respondents.

Entered this 30th day of January, 2007.

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