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

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SCOTT HEGWOOD,
NASTY HABIT, INC. (a Minnesota Corporation) and NASTY HABIT, INC. (a Wisconsin Corporation),

Plaintiffs,

v.

CITY OF EAU CLAIRE, CHIEF JERRY MATYSIK, DEPUTY CHIEF BRADLEY VENAAS, RETIRED DEPUTY CHIEF GARY FOSTER and OFFICER DEREK THOMAS,

Defendants.

OPINION and ORDER

09-cv-350-wmc

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In this civil rights lawsuit, plaintiffs allege that: (1) defendants violated their equal protection rights by treating the Nasty Habit Saloon differently from other bars; and (2) defendant City of Eau Claire violated their due process rights by application of Wisconsin's unconstitutionally vague, "disorderly house" statute, Wis. Stat. § 125.12(2)(ag)2, to revoke the bar's liquor license. Now before the court is defendants' motion for summary judgment. For the reasons that follow, the motion will be granted.

UNDISPUTED FACTS[1]

A. **Parties**

Two of the plaintiffs have the same name, "Nasty Habit, Inc." One is a Wisconsin corporation and the other a Minnesota corporation, each set up to own and operate the Nasty Habit Saloon located on Water Street in Eau Claire, Wisconsin and to hold the liquor license for that bar. Plaintiff Scott Hegwood is an "agent" for both Nasty Habit corporations.[2]

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[1] From the parties proposed findings of fact and the record, the following facts are material and undisputed when viewed in a light most favorable to plaintiffs. Many of the parties' proposed facts are so conclusory, vague or unsubstantiated, however, as to preclude meaningful consideration. This includes (1) statements from plaintiffs' expert that the Nasty Habit was "treated in a disparate manner," "forced" to face "excessive scrutiny" and treated "unlike . . . similarly licensed businesses;" (2) statements that certain bars were "similarly situated" to the Nasty Habit from the point of view of "a patron with experience working in bars;" and (3) generalized statements about use of force at the Nasty Habit and in other bars, such as assertions that the Nasty Habit did not use physical force to handle problems "any more" than certain other bars, that other bars "dealt with these problems in the same way" and that police would generally assist a bouncer using force at another establishment, but do "the exact opposite . . . in identical circumstances" at the Nasty Habit. Statements about which bars are "similarly situated" or are "exact opposites" involve ultimate legal determinations based pm am application of facts to law best left to the trier of fact. Generalized statements about different bars' use of force and police treatment are simply too vague to be admissible. *Ellison v. Aceved*, 593 F.3d 625, 635 (7th Cir. 2010) (evidence that people who shake infants to death typically continue shaking "until their arms are tired" likely inadmissible because it is vague and lacks foundation). Under Fed. R. Civ. P. 56(e)(2), a plaintiff is required to "set out *specific facts* showing a genuine issue for trial;" vague comparisons and generalizations do not suffice.

[2] As the court explained when it denied defendants' motion to dismiss, Hegwood's alleged role as an "agent" does not establish his standing to sue for equal protection violations in this case; instead, Hegwood was allowed to proceed because of his wife's alleged ownership interest in the bar, which he presumably shared pursuant to Wisconsin's Marital Property law. *(See* Order (dkt. #21) at 22.) Neither side explores this issue further on summary judgment, nor will this court since ultimately, it has no bearing on the outcome here.

Defendant City of Eau Claire is a Wisconsin municipal corporation. The remaining defendants are or were police officers for Eau Claire. Defendant Jerry Matysik has been the chief of police and defendant Bradley Venaas has been the deputy chief since September 2003. Defendant Gary Foster was deputy chief, but has since retired. As Deputy Chief, Venaas oversees about 70 police officers, including the patrol units that police Water Street in Eau Claire. Defendant Derek Thomas is an officer.

B. **Hegwood's Previous Job as a Police Officer**

Hegwood served as a police officer for the Eau Claire Police Department from 1983 to 1990. While employed as a police officer, Hegwood saw a fellow officer, Dick Fredricks, having sexual relations with a woman other than his wife in a squad car. About two months later, Hegwood saw Fredricks speeding in his squad car down Birch Street at 80 mph being chased by a civilian car driven by the woman he had seen in the squad car with Fredricks. A few days later, a police lieutenant, McNally, called Hegwood into his office and asked if he knew of the relationship between Fredricks and the woman. Hegwood told McNally what he had seen. The department conducted an investigation into the facts and about six months later, Fredricks was fired.[3]

While Hegwood worked as a police officer, McNally, Fredricks, Matysik and Foster were very friendly to each other. In 1990, Hegwood seriously injured his knee during active

[3] The parties dispute whether Hegwood also saw defendant Matysik cheating on his wife in his squad car around the same time.

duty and, no longer able to perform the job of a police officer, retired from the Eau Claire Police Department.

C. **The Nasty Habit Saloon**

1. **Problems leading up to City's initial action**

Whether or not typical of "similarly situated" bars, there is no dispute that the Nasty Habit Saloon was a source of periodic disturbances during the late spring and summer of 2005, all of which required some level of police intervention.[4] On May 9, 2005, a customer threw a couple of punches at a bouncer and told another employee, John Stebbins, he wanted to wrestle him. The customer then started kicking another patron. Stebbins stepped in to take control of the situation and a fight ensued. During the fight, Stebbins punched the rowdy patron a couple of times and had him pinned to the floor when the police arrived.[5]

A police officer came up from behind Stebbins. Another employee of the Nasty Habit, Carter, grabbed the officer's arm and told him that Stebbins was a bouncer. The officer pushed Carter away and tazed Stebbins anyway. Stebbins was cooperative with

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[4] On November 20, 2003, an employee of the Nasty Habit, Michael T. Wagner, let three underage girls use the Nasty Habit's basement to hide from officers doing bar checks. The employee was convicted of a misdemeanor disorderly conduct after pleading guilty or no contest. The Nasty Habit was found not guilty of serving these minors, who had used fake identification cards to get into the bar. On October 29, 2004, another of the establishment's employee, John Stebbins, was in a fist fight with a customer who became upset and been escorted out of the bar at closing time, though no charges arose out of this incident.

[5] The parties dispute whether that customer struck the first blow.

police, but only after he was tazed; Stebbins claims that before then he was unaware that the police had arrived. The police arrested both Stebbins and the customer for disorderly conduct. Stebbins was formally charged because the officer believed his use of a taser required him to do so.

Less than two weeks later, on May 27, 2005, a customer punched an employee of the Nasty Habit, Konkol, in the face when he tried to intervene in a dispute between customers at bar time. Konkol tried to wrap his arms around the customer, who then tried to grab Konkol's throat and was sticking his finger in Konkol's mouth. Konkol bit the customer's finger, leaving a superficial wound.

During the course of removing that customer from the bar, another employee, Lynch, placed the customer in a choke hold. During the choke hold, the customer went limp. Lynch and Konkol carried the customer out of the bar and set him on the sidewalk. Immediately after he was placed on the sidewalk, the customer got to his feet and walked away. Half an hour later, the customer ran into police at another bar and complained about the incident. Police then arrested and filed charges against Lynch and Konkol. Konkol eventually pled guilty or no contest to disorderly conduct; Lynch was ultimately found not guilty of felony battery.

On July 20, 2005, one customer punched another customer. The second customer believed that Stebbins had punched him. A fight ensued, with Stebbins punching the customer in the face and the customer punching Stebbins in the face. (The parties dispute

who threw the first punch.) The customer was friends with Stebbins and no charges were filed against either of them for fighting.

2. **City takes initial action**

On September 19, 2005, Hegwood met with Venaas, as well as Eau Claire's city attorney Steve Nicks and others. The purpose of the meeting was to discuss the City's concerns with the operation of the Nasty Habit. The concerns included the Nasty Habit's failure to have uniformed employees, to train employees or to count customers, as well as the Nasty Habit's use of their "dancing box." Prior to the September 19, 2005 meeting, Hegwood had received a couple of letters warning him that the Nasty Habit could be suspended if something occurred.

After the meeting on September 19, 2005, the Nasty Habit agreed to make certain changes. Among other things, the City and the police department told Hegwood that they wanted his employees to be trained by police officers. Hegwood followed up with Venaas approximately three to six times.[6] Venaas never sent officers to train the employees.

3. **Problems following City's initial action**

On November 1, 2005, a customer started taunting an employee of the Nasty Habit, Rolbiecki, because of his race. The customer then spat on and punched Rolbiecki and

[6] There is a dispute over whether Hegwood asked Venaas for officer training or instead maintained that he did not need any help training Nasty Habit employees.

Stebbins. Stebbins "reacted" by fighting with the customer across the street from the Nasty Habit.[7] After the police showed up, Stebbins went back into the bar and Rolbiecki stayed at the door. Rolbiecki helped Stebbins into the basement. When police officers came looking for Stebbins, Rolbiecki failed to disclose where Stebbins was. Only after the officers asked to go into the basement did Rolbiecki open the basement door. After this incident, both Stebbins and Rolbiecki were fired.

On December 21, 2005, City Attorney Stephen Nicks wrote Hegwood regarding the Nasty Habit. The letter catalogued a number of incidents to "support the City's position that you are maintaining a disorderly house at the Nasty Habit." The letter also noted that, despite the expectation the Nasty Habit would change some of the concerns expressed by the City and its police department at the September 19, 2005 meeting, "the City has not seen a change of policies in these areas." Instead, "since the meeting," the City's attorney wrote "you have had another violent incident involving your employees being charged criminally." The City provided an ultimatum: either Nasty Habit "voluntar[ily] clos[es]" for 3 weeks or the City would seek suspension or revocation of the bar's alcohol license before the City's Administrative Review Board. Hegwood rejected the offer for a temporary suspension.

On January 23, 2006, a customer of the Nasty Habit was sent to the hospital for detoxification. Defendant Thomas investigated the incident to determine whether the Nasty Habit had overserved the customer. He contacted Nicholas Pope, a bartender at another bar

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[7] Although plaintiffs proposed as a fact that Rolbiecki was spat on and punched and "reacted," the cited hearing testimony indicates it was Stebbins, not Rolbiecki, who was involved in the fight. Dkt. #48-12, at 80-81, 93, 95.

in the area, and told him that he was concerned that the customer might make a claim related to the detox incident. Thomas asked Pope to provide a statement related to the customer's intoxication that night. The Nasty Habit did not receive any charges for this incident.

On February 11, 2006, another fight broke out in front of the Nasty Habit. An angry, shirtless customer kept trying to enter the Nasty Habit. Officers were parked across the street. The customer started taking swings from the sidewalk at people inside the Nasty Habit while employees tried to keep the customer out. The customer punched Nasty Habit's employee, Rasmus. The manager, Leonard, came up to assist and then 10-15 people piled out of the door on top of the customer. Several employees and several patrons were involved in restraining the customer. People were rolling around on the ground and were difficult to separate. Another employee, Wagner, came up to assist and started kicking at the customer's face. At one point, his foot made contact with the customer.

Police officers came running across the street. As soon as Wagner saw the police, he put his hands up and followed orders. The customer was charged with four counts of battery and one count of disorderly conduct.

4. **Revocation Proceedings**

In March 2006, defendant Matysik and city attorney Nicks acted as co-complainants in an administrative complaint filed with the City Council, seeking revocation or suspension of the Nasty Habit's alcohol license. The complaint listed eight incidents from 2003 to 2006 to support the proposed revocation, including (1) the four incidents in which Stebbins

got into a fight with customers, (2) the incident in which Lynn and Konkol had injured a customer, (3) the incident in which Wagner kicked at a customer's face, (4) the detox incident and (5) the incidents involving hiding people from police in the basement (the underage girls and later Stebbins). These incidents spanned a period of 800 days. Although six of the incidents dealt with use of force, none involved any weapons, only five resulted in charges and a "number of" those five charges resulted in not guilty findings.

Aside from the eight incidents listed, the city used the Nasty Habit's use of its licensed dance box to support revocation. The police expressed concern about a customer-enforced rule prohibiting men from dancing on the box, which police believed might "create a disturbance." No incident ever arose from the dance box. During the revocation proceedings, Nicks claimed inaccurately that one of Hegwood's employees punched an officer in the head.

After the City council conducted an administrative hearing on the complaint, it revoked the Nasty Habit's alcohol license, concluding that it kept or maintained a "disorderly house" in violation of state law. From 2003 to 2006, the Nasty Habit was the only alcohol license holder in the city that had its alcohol license suspended or revoked by the City Council under the State of Wisconsin's disorderly house statute, Wis. Stat. § 125.12(2)(ag)2.

D. **Overall Comparison of the Nasty Habit With Other Problem Bars**

Between 2003 and 2006, the Nasty Habit had 17 battery incidents and 17 resisting or obstructing an officer incidents at its address. Four of the battery incidents and three of

the resisting incidents happened after the Nasty Habit had already been sold. The number of customer-versus-customer fights at the Nasty Habit was similar to those of other bars in the area.

In addition, other bars in the area had problems with incidents of detox, battery and obstructing an officer and made regular calls for police service including fighting disturbances and battery. From 2003 to 2006, SheNannigans had seven incidents of detox, 28 battery incidents and 16 resisting or obstructing officer incidents. Over the same time period, the Brat Kabin had seven incidents of detox and Brothers had two incidents of detox.[8] Also, in 2005, a short-lived establishment called Down South Club had more than 54 police contacts including an "unusual number" of fights, batteries, thefts and other disturbances.

The Nasty Habit, SheNannigans, the Brat Cabin, and Brothers had the same clientele as the Nasty Habit. In fact, customers would often go up and down Water Street (where all these bars are located) stopping in each bar. In 2006, the Bull Pen received a letter from Venaas summarizing issues they had "discussed," including lack of employee cooperation with police, gambling and cash payouts from slot machines, being open after closing hours, allowing alcohol to be carried out after hours, having an unlicensed bartender on duty, over-serving customers and failing to prevent drug use in the tavern.

After the City revoked the Nasty Habit's liquor license, the Nasty Habit reopened as "The Pickle." The Pickle retained all of Nasty Habit's employees and did not make changes

[8] Plaintiffs offer other data about the number of police calls from several bars, but without comparable data for the Nasty Habit, a meaningful comparison is difficult, if not impossible.

or train security staff. In October 2006, an 18-year-old customer entered without having his ID checked and was served alcohol until he passed out at the bar. There were more fights in the first 18 months of the Pickle's operation than there had ever been at the Nasty Habit. Customers and employees have received more than 150 citations including for aggravated batteries with intentional great bodily harm, resisting and obstructing officers and disorderly conduct. In one incident, an employee hid underage girls in the basement.

There were five other Eau Claire establishments that lost their liquor license between 1996 and 2006: Coffee Grounds; DRBMJV, Inc.; Embers; Abbie's/Malibu Club; and Down South Club. None of these licenses were revoked on the ground that the establishment was a "disorderly house." In that time period, the "disorderly house" statute was used only once, against the Nasty Habit. These five other licenses were revoked because they were not being actively used.

E. **Officers' Treatment of Hegwood**

Venaas was the deputy in charge of Water street, where the Nasty Habit was located. Venaas offered to send his men to aid other bars but did not do so for Hegwood. In addition, for years, Venaas would station officers outside of the Nasty Habit rather than patrolling up and down the street or sitting in front of other bars. In general, the police also came to check up on the Nasty Habit a lot more than the other bars.

Hegwood was told that a number of officers were "out to get" him, including defendants Foster and Matysik. During the relevant times, each defendant knew that

Hegwood was Nasty Habit's agent. Between 2000 and 2006, the Nasty Habit was the only licensed tavern in Eau Claire that was billed for "police overtime" not associated with a special event.

OPINION

A. Due Process

Wisconsin's "disorderly house" statute provides that a liquor license holder may have its license revoked if the license holder "keeps or maintains a disorderly or riotous, indecent or improper house." Wis. Stat. § 125.12(2)(ag)2. According to plaintiffs, this language is so vague as to render its application to revoke the Nasty Habit's liquor license an arbitrary, discriminatory and unfair act in violation of the Due Process Clause of the United States Constitution.

In their reply brief, plaintiffs appear to take a different tack, arguing the key phrase in the statute -- "disorderly house" -- does have a specific meaning, "which is a house of prostitution or gambling." (Dkt. #56 at 12.) Of course, if the statute must be read as such, it obviously cannot be said to be vague. Despite the tension between plaintiffs' argument that a phrase is vague and has a specific meaning that was misapplied, the court will assume plaintiffs do not wish to abandon their vagueness challenge.

To survive a vagueness challenge, a law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). This serves two basic purposes:

(1) "providing fair warning" and (2) preventing "arbitrary and discriminatory enforcement" of the law by the risk of blindsiding individuals subjected to the law; "impermissibly delegat[ing] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Id.*

"The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Thus, much more precision is required in the context of criminal statutes proscribing an individual's conduct than in the context of statutes with merely civil penalties, particularly if the civil penalties arise in the context of "economic regulation." *Id.* In the latter context, the Supreme Court has explained that the subject matter tends to be narrower; the regulated enterprise is more likely to consult relevant legislation; and it can often clarify the meaning of regulation by its own inquiry or through an administrative process. *Id.*

Here, plaintiffs are constrained to a challenge of the statute "as applied to the particular facts at issue." This is because "a plaintiff who engaged in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (citing *Village of Hoffman Estates*, 455 U.S. at 495.) In other words, plaintiffs cannot complain that the disorderly house statute has unclear boundaries if it is clear that its provisions would apply to the Nasty Habit. Plaintiffs' challenge arises from eight incidents listed in a complaint the

City used to revoke plaintiffs' license. Many of these incidents included fights, while others included obstructing officers and a highly intoxicated patron. The illegal activities at the Nasty Habit, therefore, fit any natural reading of a "disorderly" house, making plaintiffs something less than ideal candidates to challenge the boundaries of Wisconsin's disorderly house statute.

Even if the disorderly house statute did not "clearly proscribe" the activities of the Nasty Habit, however, plaintiffs cannot prevail on their vagueness challenge. Plaintiffs advance a "scatter shot" approach in their challenge to § 125.12(2)(ag)2, arguing that (1) "disorderly" laws run a risk of being used in a discriminatory fashion; (2) other "disorderly house" statutes have been found to be vague; (3) as the statute was used against the Nasty Habit, it included incidents that were "admittedly reasonable and privileged under the law"; and (4) Wisconsin's "disorderly house" statute differs in important ways from its constitutional "disorderly conduct" statute.

As to plaintiffs' first point, disorderly conduct statutes have been used in a discriminatory fashion in the past. In particular, the Supreme Court addressed in a series of cases Louisiana's use of its criminal "breach of the peace" statute against blacks participating in different protests and sit-ins. *See Brown v. State of Louisiana*, 383 U.S. 131 (1966); *Cox v. State of Louisiana*, 379 U.S. 536 (1965); *Taylor v. State of Louisiana*, 370 U.S. 154 (1962); *Garner v. State of Louisiana*, 368 U.S. 157 (1961). While this suggests that a "disorderly" statute may be at risk for abuse, this alone does not make every "disorderly"

statute vague. On the contrary, Wisconsin's disorderly *conduct* statute has already withstood constitutional challenge. *Ovadal v. City of Madison*, 416 F.3d 531, 536 (7th Cir. 2005).

The cases plaintiffs cite as finding "disorderly house" statutes vague are all distinguishable. First, plaintiffs point to *Foster v. Zeeko*, 540 F.2d 1310 (7th Cir. 1976). The Seventh Circuit did not determine the constitutionality of the statute in that case. *Id.* at 1313 ("The defendants have appealed only that part of the judgment awarding damages to the plaintiffs. Consequently the constitutionality of [the statute] is not directly before us.") According to the court of appeals at least, the "only aspect [of the challenged statute] mentioned specifically was with relation to the words 'common . . . room . . . kept for the encouragement of idleness." *Id.* at 1312. The next case plaintiffs cite is even less useful. In *McTavish v. Spiotto*, 500 F. Supp. 703 (N.D. Ill. 1980), the district court simply found the same statute vague because the district court in *Foster* already concluded that it was. *Id.* at 704-07. Finally, plaintiff points to *Warren v. State*, 572 So. 2d 1376 (Fla. 1991), and *Wolfe v. State*, 576 So. 2d 915 (Fla. Dist. Ct. App. 1991), applying *Warren*. In *Warren*, the Florida Supreme Court struck down a criminal statute prohibiting individuals from "keep[ing] a house of ill fame, resorted to for the purpose of prostitution or lewdness." 572 So. 2d at 1377.

The *Warren* court concluded that the terms "prostitution" and "lewdness" were sufficiently clear to overcome a vagueness challenge, but found the term "ill fame" too vague. *Id.* The court explained:

> While the general population might have understood the meaning of 'ill fame' a century ago, the lack of definition in the statutes, jury instructions and cases

> is fatal to its continued validity. Since the legislature first adopted the ill-fame statute, both our society and our language have changed. The statute, however, has not.

Id. The court concluded that the term "ill fame" is unconstitutionally vague because it is now outdated and fails to provide an "objective standard for differentiating between permitted and prohibited conduct" or "fair notice in language relevant to today's society." *Id.* Ultimately, what plaintiffs offer in *Warren* and these other cases, therefore, are court rulings that some terms are vague: "common . . . room . . . kept for the encouragement of idleness" and "ill fame." None of these cases address the language at issue in this case, which is the phrase "keeps or maintains a disorderly or riotous, indecent or improper house," and none provide analysis that would be helpful in this case.[9]

Though not cited by either party, there is at least one federal district court decision supporting the conclusion that "disorderly" and "riotous" may be too vague, at least in some circumstances. *Squire v. Pace*, 380 F. Supp. 269, 275-79 (W.D. Va. 1974), *aff'd*, *Squire v. Pace*, 516 F.2d 240 (4th Cir. 1975). In *Squire*, the court examined Virginia's disorderly conduct statute. 380 F. Supp. at 276. The court noted that "the operative words–'behaves in a riotous or disorderly manner'–provide practically no guidance to the individual who might violate the statute or to police, prosecutors, judges or juries." State courts had interpreted the statute, one applying what it called the "usual definition" of disorderly conduct as "acts and conduct as are of a nature [to] corrupt the public morals or to outrage

[9] This is not to say that terms like "indecent" or "improper" are not subject to similar criticism, but rather that the terms "disorderly or riotous" have sufficient meaning to overcome such criticism in their application.

the sense of public decency" and another court finding no violation where there was no "vicious or injurious tendency, offensive to good morals or public decency." *Id.* (citations omitted). Even so, the *Squire* court concluded that the "judicial gloss placed on these words has simply been that of asking whether a given set of facts amounts to a corruption of public morals or an outrage to public decency," which failed to limit the "open-ended scope of the statute." *Id.* at 277. Thus, the statute did not provide notice of what actions violate the statute and did not give sufficient guidance to officers, judges or juries about what behavior would be considered disorderly or riotous. *Id.* at 277.[10]

The *Squire* decision illustrates how the words "disorderly" or "riotous" may not be sufficient to provide the required notice and guidance, as well as why a dictionary definition of disorderly, like that defendants offer here, may be no more specific than the "corruption of public morals" and "outrage to public decency." Nonetheless, there are important differences between *Squire* and this case. As a starting point, unlike the criminal statute at issue in *Squire*, the statute being challenged in this case involves "economic regulation." While the economic interest in a liquor license should not be minimized, less precision in the statute is tolerated because a license-holder would be expected to consult "relevant legislation" and take its own measures to clarify the meaning of the regulation. *See* discussion, *supra; Village of Hoffman Estates*, 455 U.S. at 498. Moreover, as defendants point out, Wisconsin's disorderly conduct statute has withstood a vagueness challenge precisely

[10] The court also noted that the state courts' construction of the statute left a "strong potential for inhibiting the exercise of First Amendment rights." Plaintiffs do not suggest that is a concern in this case.

because it includes sufficient detail to clarify what "disorderly" means. *Ovadal*, 416 F.3d at 536 (citing *State v. Zwicker*, 41 Wis. 2d 497, 508, 164 N.W.2d 512 (1969)). Specifically, the statute prohibits "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct," which has led state courts to interpret "disorderly conduct" as "of a type not previously enumerated but similar thereto." *State v. Givens*, 28 Wis. 2d 109, 115, 135 N.W.2d 780 (1965). In other words, disorderly conduct includes the types of conduct listed and "similar" conduct.

Plaintiffs contend that the disorderly *house* statute is distinguishable from the *conduct* statute upheld in *Zwicker*, because it does not include "disorderly" or any of the other terms among a list of specific words found in the disorderly conduct statute, but instead describes only a "disorderly or riotous, indecent or improper house." Plaintiffs offer no reason that Wisconsin's disorderly conduct statute should be ignored when determining the meaning of "disorderly" in a sister statute. Nor could they since it is appropriate to construe statutes together: when statutes "deal with the same subject matter or have a common purpose," courts apply the doctrine of *in pari materia* "by reading, applying and construing [the statutes] together in a manner that harmonizes all in order to give each full force and effect." *In re Termination of Parental Rights to Caleb J.F.*, 2004 WI App 36, ¶ 15, 269 Wis. 2d 709, 676 N.W.2d 545 (citation omitted). As defendants point out, the legislative intent of the liquor licensing includes providing regulation "for the benefit of the public health and welfare," a purpose that overlaps the public safety concerns behind the disorderly conduct statute. Wis. Stat. § 125.01.

The disorderly conduct statute provides a definition that liquor licensees should appreciate. First, bars in the area regularly dealt with problems involving the disorderly conduct of their customers and sought police aid when resolving those problems. Second, while the meaning of "disorderly" does not translate perfectly across statutes for the simple reason that in one statute the term modifies "conduct" while in the other it modifies "house," the use of the term "house" in this context cannot be read literally. A house is never "disorderly or riotous;" actors in (or around) the house might be. Applying the statutory definition of "disorderly conduct," a "disorderly house" is one in or around acts which occur that are "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly." Wis. Stat. § 947.01. Third, plaintiffs and other bars subject to Wisconsin's disorderly house statute may be reasonably expected to draw these obvious lessons, or at least, to seek clarification for any remaining uncertainty.

Finally, plaintiffs contend that the City's application of the statute to incidents that were "admittedly reasonable and privileged under the law" proves its unconstitutional vagueness, referencing the City's pursuit of revocation against the Nasty Habit based on its employees' use of force. (Dkt. #45 at 22.) The facts cited for this proposition were not, however, necessarily "reasonable" nor "privileged under the law." A general admission that bouncers are allowed to use force in certain settings is not an admission that the particular circumstances of any of the incidents justified the force the bouncer actually used. And while no charges were filed or convictions obtained in many of the incidents cited, this does not mean the bouncers' behavior was in fact "reasonable" or "privileged," nor necessarily

prevent the City from using the incidents as evidence of "violent, abusive, boisterous . . . or otherwise disorderly conduct."[11]

B. **Equal Protection**

Plaintiffs' equal protection claim boils down to their contention that defendants did not like Hegwood and treated him unfairly by overpolicing and ultimately revoking the license of the Nasty Habit. While this claim is not without some plausibility as a matter of fact, at least on the record before the court on summary judgment, defendants' dislike of plaintiff does not by itself support an equal protection claim.[12] Instead, plaintiffs were required to show that defendants treated the Nasty Habit more harshly than they would have any other "similarly situated" bar. *McDonald v. Village of Winnetka*, 371 F.3d 992, 1009 (7th Cir. 2004). To satisfy the "similarly situated" element, "the persons alleged to have been treated more favorably must be identical or directly comparable to plaintiff in all material respects." *Reget v. City of La Crosse*, 595 F.3d 691, 695 (7th Cir. 2010). A "meaningful application" of this requirement is necessary to limit equal protection claims to claims of *discrimination*; not every beef about municipal services counts. *McDonald*, 371 F.3d at 1009.

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[11] Plaintiffs point to one other incident suggesting the statute lacked sufficient guidance: the City's effort to eliminate the Nasty Habit's "dance box" by reference to the disorderly house statute. As defendants point out, however, requests to remove the dance box went to concerns about the potential *future* acts of disorderly conduct.

[12] *See* Order (dkt. #21) at 10.

In this case, the point of reference for equal treatment is plaintiffs' bar. Defendants contend that plaintiffs cannot satisfy the "similarly situated" requirement because they can point to no bar that had identical or directly comparable problems with employees fighting and engaging in other misconduct to that of the Nasty Habit "in all material respects." That is correct.

The closest plaintiffs can come to such proof is that generally other bars had the same "problems" and that police would simply address these problems differently -- by helping the bars' employees, rather than charging them, and working with the bars, rather than revoking their license. Unfortunately, these general statements are not sufficiently specific to save plaintiffs from summary judgment. At most, plaintiffs provided general data about patron fighting and misconduct at the other bars, but provided no evidence of the specific details of any employee fighting or misconduct at those bars that would permit a trier of fact to find them identical or directly comparable in kind, rather than number. No jury could reasonably find that the police, much less the City, treated the Nasty Habit any worse under Wisconsin's disorderly house statute than they would other bars when presented with directly comparable incidents.

Plaintiffs contend that defendants' concern with employee misconduct is a pretext for discrimination, but they have no facts to support this contention. Plaintiffs fall back on nothing but conclusory, vague and largely inadmissible assertions that Nasty Habit bouncers faced "excessive scrutiny" and "every time" police found bouncers at the Pickle physically struggling with a customer they would help, although they did the "exact opposite" for the Nasty Habit bouncers.

Plaintiffs' final point goes to an asserted lack of "seriousness" of the employee misconduct and fighting incidents the police and the City cited against the bar. As plaintiffs point out, not all these incidents resulted in charges and even fewer resulted in convictions. As already discussed in the context of plaintiffs' due process claims, however, there is no requirement that the police or the city consider only "convictions" or criminally- prohibited acts in dealing with a bar or in determining whether to suspend or revoke a liquor license. The police were entitled to consider any incident in which employees engaged in misconduct or fighting when responding to disturbances or shaping their ongoing contacts with the bar, just as the City was entitled to consider those incidents when deciding whether to revoke the bar's liquor license. More to the point, the presence of employee fighting and misconduct at the Nasty Habit was a "material difference" from other bars. Holding bars more accountable for its employees' misbehavior than for its patrons' misbehavior is plainly rational because employees are, or should be, under the employer's control. Because plaintiffs have failed to present sufficient evidence to permit a finding that they are in fact similarly situated to any bar, their equal protection claim fails. Therefore, defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that:

1. The motion for partial summary judgment filed by plaintiffs Scott Hegwood, Nasty Habit, Inc. (a Minnesota corporation) and Nasty Habit, Inc. (a Wisconsin corporation), dkt. #25, is DENIED.

2. The motion for summary judgment filed by defendants City of Eau Claire, Jerry Matysik, Bradley Venaas, Gary Foster and Derek Thomas, dkt. #31, is GRANTED.

3. The motions to strike declarations of Dennis Waller, Dana Allen and Katie Brackey, dkts. ##60 and 62, are DENIED as moot.

4. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 29th day of March, 2011.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge