IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS D'LAMATTER,

OPINION AND ORDER

Plaintiff,

15-cv-221-bbc

v.

REED RICHARDSON, H. BROWN, SIMMON,
WEBSTER (program director), WEBSTER (program provider)
and MARK HEISE,

Defendants.

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Pro se prisoner Thomas D'Lamatter has filed a proposed complaint under 42 U.S.C. § 1983 in which he contends that his constitutional rights were violated when he lost his prison job for telling prison officials that he did not intend to take certain mental health programming twice. Under 28 U.S.C. § 1915, I must screen plaintiff's proposed complaint and dismiss any portion that 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. In doing so, I am required to read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). In this case, I conclude that plaintiff's proposed complaint fails to state a claim upon which relief may be granted because none of the wrongs he alleges involve harm that violates the United States Constitution. Accordingly, plaintiff's complaint will be dismissed and he will be assessed a strike under §

1915(g).

Plaintiff alleges the following facts in his proposed complaint.

ALLEGATIONS OF FACT

Plaintiff is a prisoner at Stanley Correctional Institution. Prison officials assigned him to participate in the "A.O.D.A. Program" (which I assume means the "Alcohol and Other Drug Program," http://doc.wi.gov/about/doc-overview/division-of-adult-institutions/ops/primary-treatment-programs/aoda). Part of that program includes the "C.G.I.P. Program" (which I assume means the "Cognitive Interventions Program," http://doc.wi.gov/about/doc- overview/division-of-adult-institutions/ops/primary-treatment-programs/cognitive-intervention-program). Sometime in 2014, prison officials told plaintiff that he would need to enroll in "C.G.I.P." as a stand-alone program. He told the prison that he did not want to participate because he would be participating in the same programming as part of the "A.O.D.A." program. Because plaintiff refused to participate in the "C.G.I.P." stand-alone program, he was removed from his work assignment, which was his only source of income.

Plaintiff lost his job without receiving a conduct report and without notice or a full hearing. Plaintiff wrote defendant Webster, a program provider; defendant Reed Richardson, the warden; defendant Webster, program director (I assume that this is not the same defendant as the first Webster named in plaintiff's complaint); defendant Simmon, a social worker; and defendant H. Brown, a unit manager, and he completed a grievance about

the situation to no avail.

OPINION

As I have noted, plaintiff's complaint fails to state a claim upon which relief may be granted. None of plaintiff's allegations involve constitutional violations by any of the defendants.

First, plaintiff wishes to pursue a claim that he did not receive due process before or after losing his prison job. In order to state a due process claim, plaintiff must allege that he has been deprived of property or a "liberty interest" and that he failed to receive the appropriate procedure before or after the deprivation. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In the prison context, only deprivations of a liberty interest amounting to an "atypical and significant hardship" bring the due process clause into play. Sandin v. Conner, 515 U.S. 472, 484 (1995).

In this case, the question is whether the loss of a prison job is such an "atypical and significant hardship." "Protected liberty interests 'may arise from two sources—the Due Process Clause itself and the laws of the States.'" Thompson, 490 U.S. at 460 (quoting Hewitt v. Helms, 459 U.S. 460, 466 (1983)). Plaintiff does not identify any Wisconsin law that provides such an interest and I am not aware of any. The federal Constitutional is no more helpful. In Wallace v. Robinson, 940 F.2d 243, 247 (7th Cir. 1991), the Court of Appeals for the Seventh Circuit concluded that the Constitution did not limit prison officials' actions in assigning jobs to prisoners. A year later, it held in Vanskike v. Peters,

974 F.2d 806, 809 (7th Cir. 1992), that "[t]here is no [c]onstitutional right to compensation for [prison] work." Id. It also held that the loss of "social and rehabilitative activities" is not an "atypical and significant hardship" under Sandin. Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996). Therefore, plaintiff's claim under the due process clause for loss of his prison job must be dismissed for his failure to state a claim upon which relief may be granted.

Second, plaintiff asserts a "class of one" equal protection claim in which he alleges that no other prisoner was "forced" to participate twice in a program. (I note that plaintiff alleges that he refused to participate in the second program, so I understand his complaint to mean that he did not participate in the program. Nothing in his complaint suggests that he intends to assert a substantive due process claim that the prison was requiring his participation in mental health treatment.) "Class of one" equal protection claims protect individuals from being singled out and treated differently from the majority with respect to legislative and regulatory acts. Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591, 602 (2008) ("We expect such legislative or regulatory classifications to apply 'without respect to persons . . . . '") (quoting 28 U.S.C. § 453). However, in situations in which the government's decision is individualized and discretionary, such as in the employment or disciplinary context, a plaintiff cannot rely on a "class of one" theory for an equal protection claim. Id. at 603 (In instances involving "discretionary decisionmaking based on a vast array of subjective, individualized assessments . . . . the rule that people should be 'treated alike, under like circumstances and conditions' is not violated when one person is treated

differently from others, because treating like individuals differently is an accepted consequence of the discretion granted."). Plaintiff's rehabilitative program assignments and the removal from his prison job fall under the category of individualized, discretionary decisions as to which "class of one" equal protection claims do not apply.

Third, plaintiff appears to seek to proceed on a claim that Wis. Admin. Code DOC § 309.55 is unconstitutionally vague under the due process clause. Plaintiff argues that "the problem" with the code provision is that "it's not clear as to the inmates who are faced with the problem of having to take the same program twice." Plt.'s cpt., dkt. #1, at 5. To state a claim that a policy is void for vagueness, plaintiff must assert that the policy is so unclear that it fails to provide warning of what actions are punishable under it. Rios v. Lane, 812 F.2d 1032, 1038 (7th Cir. 1987) (rule void for vagueness because prisoner "was given no prior warning that his conduct might be proscribed by [the prison rule]"). In this case, plaintiff has not stated a void-for-vagueness claim because he acknowledges that the prison policy was clear: it states that prisoners will lose their jobs for refusing to participate in programming. § 309.55(4)(c) ("No compensation may be paid under this section to an inmate who: . . . [r]efuses any work or program assignment."). The fact that plaintiff believes his situation should be an exception to the general policy does not make the regulation itself unclear or imprecise. Nothing in the regulation suggests that prisoners might believe that repeat programming is an exception to the rule. Plaintiff had fair warning that refusing to participate in programming might result in the loss of his prison job under § 309.55(4)(c). Accordingly, he has failed to state a claim upon which relief may be granted.

Finally, under 28 U.S.C. 1915(g), the court must assess "strikes" to prisoners whose complaints are "dismissed on the grounds that [they are] frivolous, malicious, or fail[] to state a claim upon which relief may be granted." Even assuming that all the facts plaintiff alleges are true, his complaint fails to state a claim upon which relief may be granted, Jones v. Bock, 549 U.S. 199, 215 (2007), so he will be assessed a strike. If he accumulates two more strikes, he will not be able to proceed in forma pauperis, that is, as one not required to prepay the full filing fee, unless he can show that he is "under imminent danger of physical injury." § 1915(g).

ORDER

IT IS ORDERED that

1. Plaintiff Thomas D'Lamatter is DENIED leave to proceed on his claims against defendants Reed Richardson, H. Brown, Simmon, Webster (program provider), Webster (program director) and Mark Heise that he lost his prison job without due process or equal protection under the law and that the regulation under which he lost his prison job is unconstitutionally vague. Plaintiff's complaint is DISMISSED for failure to state a claim upon which relief may be granted.

2. In accordance with 28 U.S.C. 1915(g), plaintiff will be assessed a strike.

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

Entered this 16th day of June, 2015.

BY THE COURT:
/s/

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BARBARA B. CRABB
District Judge