IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS



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| **ROBERT WESTEFER, et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **vs.** | ) | **CIVIL NO. 00-162-GPM** |
| | ) | |
| **DONALD SNYDER, et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |

## MEMORANDUM AND ORDER

**MURPHY, Chief District Judge:**

This is an action brought pursuant to 42 U.S.C. § 1983 and the Illinois Unified Code of Corrections (IUCC), 730 ILCS 5/1-1-1 *et seq*. Plaintiffs, inmates at Tamms Correctional Center ("Tamms"), seek to represent a class of Illinois state prisoners whom Defendants, officers and employees of the Illinois Department of Corrections (IDOC), have transferred to Tamms allegedly in violation of Plaintiffs' constitutional rights and the IUCC. Plaintiffs seek certification of two subclasses, a "litigation subclass" consisting of inmates who have been transferred to Tamms allegedly in retaliation for litigation activities, and a "gang subclass" consisting of inmates who have been transferred to Tamms allegedly for belonging to gangs or "security threat groups."

This action is subject to preliminary review under 28 U.S.C. § 1915A, and a motion to dismiss for failure to state a claim upon which relief can be granted brought pursuant to Federal Rule of Civil Procedure 12(b)(6) is before the Court (Doc. 10). The same standards govern preliminary review under § 1915A and consideration of a Rule 12(b)(6) motion. *Hemphill v. DeTella*, No. 97 C 6122, 1997 WL 792966, at *1 (N.D. Ill. Dec. 17, 1997). A court must accept as true the

allegations of the complaint and the inferences that may be reasonably drawn from them. *Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir. 1997). Dismissal for failure to state a claim upon which relief can be granted is warranted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Casteel v. Pieschek*, 3 F.3d 1050, 1056 (7th Cir. 1993) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

The Court addresses first Count One of Plaintiffs' complaint, which is brought pursuant to 42 U.S.C. § 1983. In Count One, Plaintiffs seeking to represent the putative litigation subclass allege that they have been transferred to Tamms in retaliation for their litigation activities, in violation of their First Amendment right of access to the courts. The Court concludes that Count One withstands dismissal under 28 U.S.C. § 1915A and Federal Rule of Civil Procedure 12(b)(6). If a prisoner is transferred for exercising his or her own right of access to the courts, or for assisting others in exercising their right of access to the courts, the prisoner has a claim under § 1983. *See Matzker v. Herr*, 748 F.2d 1142, 1150-51 (7th Cir. 1984); *Buise v. Hudkins*, 584 F.2d 223, 227-28 (7th Cir. 1978). Defendants' contention that Plaintiffs have failed to state a claim because they have not alleged a chronology from which retaliation may be inferred is not well taken. Under Federal Rule of Civil Procedure 8(a)(2) Plaintiffs need only make "a short and plain statement" of their claim for relief, and the Supreme Court has expressly rejected the application of heightened pleading standards in § 1983 cases. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165-68 (1993). *See also Billman v. Indiana Dep't of Corrections*, 56 F.3d 785, 790 (7th Cir. 1995) (noting the "highly doubtful propriety" of imposing heightened pleading standards in § 1983 cases). Nor is Defendants' invocation of the qualified immunity doctrine well founded. Under the qualified immunity doctrine, government officials, as individuals, are immune from suits

for damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The right of prisoners to be free from retaliation for exercising their right of access to the courts is a clearly established one, so that Defendants may not assert a defense of qualified immunity as to Count One. *See, e.g., Abel v. Miller*, 824 F.2d 1522, 1534 (7th Cir. 1987) (right to be free from retaliation for exercise of constitutional right of access to courts was clearly established at time prison officials banned prisoners' rights organization and its employees from prison, so that officials were not protected by qualified immunity from liability to organization and its employees).

The Court turns next to Count Two of Plaintiffs' complaint, which is brought pursuant to 42 U.S.C. § 1983. In Count Two, Plaintiffs seeking to represent the gang subclass in this action allege that they have been transferred to Tamms in retaliation for gang membership. According to Plaintiffs' complaint, until 1996 the IDOC cooperated with gangs, allowing gang leaders to make cell assignments and permitting gang members to cell together. Plaintiffs allege that they are gang members who cooperated with the IDOC and have been penalized for their cooperation through transfer to Tamms, in violation of their First Amendment right of association and the Ex Post Facto Clause of the Constitution. The Court will address first Plaintiffs' associational claim, then their claim under the Ex Post Facto Clause.

It is well established that a prisoner retains only those First Amendment rights that are not inconsistent with his or her status as a prisoner or with legitimate penological objectives like maintaining prison security and discipline. *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Thus, by necessity, prison officials are permitted to forbid prisoners from undertaking numerous activities permitted to those in free society. The need to restrict prisoners is of course particularly acute in the

context of the First Amendment right of association, and so long as such restrictions are reasonably related to valid correctional goals, courts will not interfere with decisions of prison administrators that limit the associational rights of inmates. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125-30 (1977). No doubt there are many legitimate reasons for regulating gang activity in prison. Indeed, the Seventh Circuit Court of Appeals has stated that where "the viability of prison gangs" is concerned, "associational rights are 'barely implicated.'" *Rios v. Lane*, 812 F.2d 1032, 1036 (7th Cir. 1987) (citation omitted). Put another way, if in *Jones* the Supreme Court concluded that a prisoners' labor union, with its emphasis on the encouragement of adversary relations with corrections officials "would rank high on anyone's list of potential trouble spots," 433 U.S. at 133, then *a fortiori* a prison gang ranks even higher. The complained-of conduct is clearly reasonably related to a legitimate penological objective, namely, regulation of the serious threat to prison security posed by gangs. Thus, Plaintiffs' allegations of violations of their First Amendment right of association fail to state a claim upon which relief can be granted.

Turning next to Plaintiffs' allegations of violations of their rights under the Ex Post Facto Clause, the Court finds that these too fail to state a claim upon which relief can be granted. The Ex Post Facto Clause prohibits "laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" *California Dep't of Corrections v. Morales*, 514 U.S. 499, 504 (1995) (quoting *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)). Plaintiffs contend that the change in IDOC policy concerning gang members comprises punishment for purposes of the Ex Post Facto Clause because inmates transferred to Tamms for alleged gang activity are subjected to a different and stricter prison regime by reason of confinement there. A change in the conditions determining a prisoner's confinement while serving his or her sentence is an allowed alteration in the prevailing

"legal regime" rather than an increased penalty for purposes of the Ex Post Facto Clause. *Morales*, 514 U.S. at 510 n.6. The Ex Post Facto Clause does not "require that [a prisoner's] sentence be carried out under the identical legal regime that previously prevailed." *Id.* Nor does the Ex Post Facto Clause encourage close scrutiny by the federal courts of ongoing procedural and operational changes in prisons to coordinate treatment, promote security, and protect the public safety. *Id.* at 508. Reasonable regulation of the conditions of prison confinement and reasonable amendment to such regulation is not punishment so as to violate the Ex Post Facto Clause. *Gilbert v. Peters*, 55 F.3d 237, 238 (7th Cir. 1995) (citing *Ewell v. Murray*, 11 F.3d 482, 485 (4th Cir. 1993)). Because the complained-of conduct does not comprise punishment for purposes of the Ex Post Facto Clause, Plaintiffs have failed to state a claim upon which relief can be granted.

In short, Count Two of Plaintiffs' complaint fails to state a claim upon which relief can be granted concerning alleged violations of Plaintiffs' right of association under the First Amendment and their rights under the Ex Post Facto Clause. Accordingly, Count Two will be dismissed.

The Court turns next to Count Three of Plaintiffs' complaint, which is brought pursuant to 42 U.S.C. § 1983. In Count Three, Plaintiffs allege that they have been transferred to Tamms without a hearing, in violation of the Due Process Clause of the Fourteenth Amendment. As a rule, a prisoner has no Due Process liberty interest in remaining in a particular prison, *Meachum v. Fano*, 427 U.S. 215, 224 (1976), or in the general prison population, *Hewitt v. Helms*, 459 U.S. 460, 466-67 (1983). An inmate has a Due Process liberty interest in being in the general prison population only if the conditions of his or her confinement impose "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Plaintiffs allege that segregation and administrative detention in Tamms comprise an atypical, significant

deprivation of liberty. However, the Seventh Circuit Court of Appeals has adopted an extremely stringent interpretation of *Sandin*. In this Circuit, a prisoner in disciplinary segregation at a state prison has a liberty interest in remaining in the general prison population only if the conditions under which he or she is confined are substantially more restrictive than administrative segregation at the most secure prison in that state. *Wagner v. Hanks*, 128 F.3d 1173, 1175 (7th Cir. 1997). If the inmate is housed at the most restrictive prison in a state, he or she must show that disciplinary segregation there is substantially more restrictive than administrative segregation at that prison. *Id.* In the view of the Seventh Circuit Court of Appeals, *Sandin* means that "the right to litigate disciplinary confinements has become vanishingly small." *Id.* Indeed, "when the entire sanction is confinement in disciplinary segregation for a period that does not exceed the remaining term of the prisoner's incarceration, it is difficult to see how after *Sandin* it can be made the basis of a suit complaining about a deprivation of liberty." *Id.* at 1176.

Under *Wagner*, administrative segregation is the baseline for determining whether a prisoner has a Due Process liberty interest in remaining in the general prison population. Put another way, implicit in the reasoning of *Wagner* is the view that administrative segregation cannot give rise to a Due Process liberty interest at all. Thus, in the case at bar, no Plaintiff who is in administrative detention at Tamms has any claim under the Due Process Clause. Moreover, Plaintiffs who are in disciplinary segregation at Tamms have failed to state a claim upon which relief can be granted as well. Assuming that, as Plaintiffs contend, Tamms is the most restrictive prison in Illinois, nothing Plaintiffs allege suggests that disciplinary segregation at Tamms is substantially more restrictive than administrative segregation there or, indeed, at the most restrictive prison in the country. In fact, Plaintiffs' complaint alleges that, at Tamms, conditions in administrative segregation and conditions

in disciplinary segregation are identical. Thus, Plaintiffs have failed to state a claim for relief for violations of their rights under the Due Process Clause, and Count Three will be dismissed.

The Court turns finally to Count Four of Plaintiffs' complaint, in which Plaintiffs allege that they have been transferred to Tamms in violation of the IUCC. Count Four appears to be brought pursuant to the Court's supplemental jurisdiction under 28 U.S.C. § 1367. Under § 1367, federal courts can exercise jurisdiction over state law claims that are so related to claims within original federal jurisdiction that they "form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). However, courts can decline to exercise such jurisdiction if a claim "raises a novel or complex issue of State law." 28 U.S.C. § 1367(c).

Count Four raises a novel issue of state law, namely, whether there is a private right of action under the IUCC. The IUCC itself does not indicate that a private cause of action exists thereunder, and no Illinois court has addressed the issue. In certain circumstances, Illinois courts imply a private cause of action under a statute which does not expressly provide for one. *See, e.g., Sawyer Realty Group, Inc. v. Jarvis Corp.*, 432 N.E.2d 849, 853 (Ill. 1982) (enumerating factors that a court should consider in determining whether to imply a private right of action). Thus, Count Four asserts the type of pendent state law claim that this Court should not decide. *See, e.g., Willis v. Bell*, 669 F. Supp. 229, 231-34 (N.D. Ill. 1987) (federal courts generally should not decide state law claims raising novel issues of state law). Federal courts should not decide novel issues of state law because federal courts are not the authorized expositors of state law, and there is no mechanism by which their errors can be corrected on appeal by state courts. *Id.* at 233. A federal court's holding on a novel issue of state law may also limit later state court consideration of that issue. Because parties may have relied on the federal holding, state courts will be hesitant to create a conflict with that

holding. *Id.* Accordingly, the Court in its discretion declines to exercise jurisdiction over Count Four, and it will be dismissed.

To conclude, the Court finds that Count One of Plaintiffs' complaint withstands dismissal under 28 U.S.C. § 1915A and Federal Rule of Civil Procedure 12(b)(6). However, the Court concludes also that Counts Two and Three of Plaintiffs' complaint fail to state a claim upon which relief can be granted. Accordingly, Defendants' motion to dismiss (Doc. 10) is **GRANTED in part** and **DENIED in part**. Defendants' motion is **GRANTED** to the extent that Count Two and Count Three of Plaintiffs' complaint are **DISMISSED without prejudice**. Defendants' motion is **DENIED** as to Count One of Plaintiffs' complaint. The Court **DECLINES** to exercise jurisdiction over Count Four of Plaintiffs' complaint and, pursuant to 28 U.S.C. § 1367, Count Four is **DISMISSED without prejudice** to refiling it in an Illinois state court. As per Federal Rule of Civil Procedure 12(a)(4)(A), Defendants are **ORDERED** to answer Plaintiffs' complaint within **ten (10) days** from the date of this Order.

**IT IS SO ORDERED.**

**DATED:** 12/20/00

G. Patrick Murphy

**HON. G. PATRICK MURPHY**
**Chief United States District Judge**