

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DAVID SOLAN	:	CIVIL ACTION
	:	
v.	:	
	:	
JANET RENO; R.M. REISCH, Warden,	:	
F. C. I. Schuylkill; AMY KINDER, Case	:	
Manager, F. C. I. Schuylkill	:	NO. 99-1017

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 6th day of August, 1999, in accordance with the accompanying Memorandum filed on this date, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion for Leave to Proceed In Forma Pauperis is **GRANTED**;
2. Plaintiff's Complaint is **DISMISSED AS FRIVOLOUS** pursuant to 28 U.S.C. § 1915 (e); and
3. Plaintiff's Motion for Issuance of a Temporary Restraining Order is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability will not issue because petitioner has not made a substantial showing of the violation of a constitutional right.

MEMORANDUM

1. NATURE OF ACTION. This action is before the Court under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Plaintiff pro se David Solan is an inmate at the Federal Correctional Institute ("FCI") Schuylkill. He brought this action alleging that defendants, Attorney General Janet Reno, Warden R.M. Reisch, and Case Manager Amy Kinder deprived him of his constitutional rights under the Due Process Clause, the Equal Protection Clause and the First and Eighth Amendments. The case is based on petitioner's

claim that the Bureau of Prisons Inmate Financial Responsibility Program (“IFRP”) is unconstitutional as applied to indigent inmates. In addition, plaintiff asserts claims that his indigence in prison prevents him from obtaining necessities, rendering his punishment “cruel and unusual”, and hindering his ability to access the courts. Plaintiff also seeks a temporary restraining order to prevent the destruction of a radio confiscated as contraband by prison officials.

2. BACKGROUND. Under the Bureau of Prisons’ Program Statement 5380.05, Inmate Financial Responsibility Program (“IFRP”), codified at 28 C.F.R. §§ 545.10 and 545.11 (1988), inmates work with prison staff to develop a financial responsibility plan to pay their court-ordered obligations including special assessments that takes into account the inmate’s outside resources and other sources of funds. The inmate then has the responsibility to allocate a certain percentage of his resources to meet this obligation. At subsequent reviews, prison staff are instructed to “consider the inmate’s efforts to fulfill those obligations as indicative of that individual’s acceptance and demonstrated level of responsibility.” 28 C.F.R. § 545.10. The provisions of the IFRP apply to almost every inmate housed in federal facilities.¹

Participation in the IFRP program is not mandatory. The program provides that an inmate who agrees to participate shall remain in "participate" status as long as he or she meets the financial obligations imposed under the program. If an inmate fails to exhibit financial responsibility, prison officials may place him in "refuse" status which amounts to removal from the program. One consequence of removal or nonparticipation in the IFRP is a limitation on the

¹The only inmates not covered under § 545.10 are study and observation cases, pretrial detainees, and inmates in holdover status pending designation.

ability of an inmate to earn more than a minimum level of pay, referred to as maintenance pay, at the inmate's prison job.

The pertinent facts of the case are set forth by the plaintiff in the Complaint and attached exhibits. They are summarized below.

Plaintiff was sentenced and incarcerated at FCI Fairton in 1994. At sentencing, among other things, a special assessment of \$550 was imposed under 18 U.S.C. § 3013. To date, plaintiff has paid \$100 toward this obligation.

During his incarceration at FCI Fairton, plaintiff had been placed in IFRP “refuse” status five different times for failing to make adequate payments on account of his special assessment under his financial responsibility plan. He was in “refuse” status when transferred to FCI Schuylkill on August 25, 1997.

On September 3, 1997, plaintiff met with Amy Kinder, his Case Manager at FCI Schuylkill, and signed a contract in which he agreed to make \$25 IFRP payments on a quarterly basis, with the first payment due in December of 1997. Plaintiff alleges that Ms. Kinder gave him the impression that immediately after signing the contract he would be placed in IFRP “participate” status, which would allow him to earn more than maintenance pay, referred to as performance pay.

The Complaint recites that plaintiff was not removed from “refuse” status after signing the September 3, 1997 contract. As a result he claims he was prevented from earning more than maintenance pay of \$5.25 per month. The exhibits attached to the Complaint disclose that Ms. Kinder decided not to remove plaintiff from "refuse" status until he made a payment on account of his financial obligation pursuant to his contract. In that regard the Bureau of Prisons Program

Statement 5380.05(6)(d) provides that an inmate who has been placed in "refuse" status twice must produce receipts of outside payments demonstrating "a willingness to pay and participate in the program" before his status may be changed to "participate".

Upon learning that defendants refused to remove him from "refuse" status until he made a payment, plaintiff filed an administrative request to be removed from IFRP "refuse" status. His request was denied at each level of review based on the determination that he had income, including outside contributions, and had not made the recommended \$25 payment or demonstrated a willingness to pay and participate in the IFRP.

Plaintiff asserts that he is unable to meet his financial obligation because he is paid insufficient wages and needs his maintenance pay and "small" outside contributions to defray the legal expenses of a 28 U.S.C. § 2255 action challenging his conviction and sentence. He contends that his inability to earn normal wages violates his constitutional right to due process and equal protection. He further claims that his poverty, caused by his inability to receive full wages, has restricted his constitutional right of access to the courts and has prevented him from purchasing "necessary" items from the commissary, rendering his life in prison "torturous" and hence violative of the Eighth Amendment. Plaintiff asks the Court to grant injunctive relief by ordering defendants to pay him at performance level which would allow him to pursue his habeas petition, purchase certain items, and pay the remainder of his \$550 special assessment.

With his Complaint, plaintiff filed a request for leave to proceed In Forma Pauperis. As it appears he is unable to pay the cost of commencing this action, leave to proceed In Forma Pauperis is granted. However, the Court concludes that the allegations of the Complaint have no basis in law and accordingly the action is dismissed as legally frivolous pursuant to 28 U.S.C. §

1915(e). See Nietzke v. Williams, 490 U.S. 319, 327 (1989) (holding that dismissal under § 1915(e) is appropriate when the action is “based on an indisputably meritless legal theory” or when it posits “factual contentions [that] are clearly baseless.”).

3. DISCUSSION.

A. Constitutionality of the IFRP. 18 U.S.C. § 3013 requires the sentencing court to impose a special assessment for each criminal conviction. Plaintiff argues that because the statute contains no special provision for indigents, Congress believed that indigent inmates would be able to earn sufficient wages in prison to satisfy the special assessment. Plaintiff therefore asserts that passage of 18 U.S.C. § 3013 created a due process liberty interest in a prisoner’s ability to work and earn full pay, an interest upon which his placement in IFRP "refuse" status infringes. This argument is frivolous.

The Third Circuit upheld the constitutionality of the IFRP in James v. Quinlan, 866 F.2d 627 (3d Cir. 1989). In that case, the court held that the establishment of the IFRP did not create a protected liberty interest in either having a prison job or in receiving a certain level of payment. Id. at 630. Since an inmate does not have a liberty interest in the terms or conditions of his prison job, the Bureau of Prisons may place conditions on a prisoner’s receipt of salary above the maintenance level without violating the Constitution. Id. at 630 (explaining that because inmates have no constitutional right to their Federal Prison Industry jobs, they “could be presented with a choice of assigning one-half of their prior savings or losing their Federal Prison Industries job assignments without any violation of their constitutional rights occurring.”).

The decision in James is not undermined by the more recent Supreme Court decision in Sandin v. Conner, 515 U.S. 472 (1995). The Court in Sandin took a more restrictive view of the

creation of liberty interests for prison inmates. Earlier cases focused on whether language in a regulation or prison guideline created an enforceable liberty interest. The ruling in Sandin, however, found this methodology unworkable and shifted the inquiry to the nature of the deprivation itself. As the Court explained, “the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concern undergirding the liberty protected by the Due Process Clause.” Id. at 483. The Court held instead that as long as the conditions of confinement do not “[impose] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life”, id. at 484, the Due Process Clause is not implicated. Id.; see also Montayne v. Haymes, 427 U.S. 236, 242 (1976).

In the present case, plaintiff’s placement in IFRP “refuse” status for failing to satisfy his financial obligation is a consequence mandated by statute, see 28 C.F.R. § 545.11, and imposed on most inmates in federal prisons. The Court concludes that placement in IFRP “refuse” status for failing to make payments toward the special assessment, under the circumstances of this case, does not impose an atypical hardship in relation to the ordinary incidents of prison life and is therefore not violative of plaintiff’s constitutional rights.

With respect to Ms. Kinder’s action in not removing plaintiff from IFRP “refuse” status until he demonstrated his financial responsibility, the Supreme Court has explained that broad discretionary authority of prison officials is necessary because the administration of a prison is “at best an extraordinarily difficult undertaking.” Wolff v. McDonnell, 418 U.S. 539, 566 (1974). Plaintiff was already in IFRP “refuse” status upon his arrival at FCI Schuylkill and had been removed from the IFRP on five previous occasions for his failure to meet his financial obligations. Bureau of Prisons Program Statement 5380.05 provides that once an inmate has

been placed in “refuse” status twice, he must show proof of outside payments to indicate a willingness to participate in the program. Ms. Kinder decided that plaintiff's conduct as of September 3, 1997 did not demonstrate the requisite "willingness to pay and participate in the program." It was within Ms. Kinder's discretion to condition plaintiff's IFRP "participate" status on a showing of financial responsibility. The decision that plaintiff pay \$25 towards his financial obligation by December 1997 in order to gain IFRP "participate" status, affirmed in the administrative process that followed, was within the discretion of prison officials. Plaintiff's claim that defendants “knowingly and illegally” prevented him from earning full pay in prison is therefore dismissed as frivolous.

B. Equal Protection Claim. Plaintiff claims that defendants violated his equal protection rights by discriminating against him because of his indigence without a rational basis. He alleges that his inability to satisfy his obligation under the IFRP, and his resulting inability to earn pay above the maintenance level, stem from his poverty. Moreover, he contends that wealthier inmates, with greater access to outside resources, do not face similar hardships in paying their IFRP obligations. Plaintiff argues that penalizing indigent inmates for their inability to satisfy IFRP payments constitutes a violation of equal protection. This claim is frivolous.

Courts have held that the imposition of penalties on indigent inmates for the failure to pay special assessments and fines does not violate the Equal Protection Clause. See United States v. Pagan, 785 F.2d 378 (2d Cir. 1986). See also Bieregu v. Reno, CIV. A. No. 93-4894 (JEI), 1994 WL 530665 (D.N.J. Sept. 23, 1994). The Pagan Court explained that the collection of special assessments raises constitutional issues “only if the government seeks to enforce collection of the assessments at a time when [the inmate is] unable, through no fault of his own, to comply.”

Pagan, 785 F.2d at 381 (citing United States v. Hutchings, 757 F.2d 11, 14-15 (2d Cir. 1985)).

In the instant case, prison records attached to the Complaint show that plaintiff received performance salary and contributions from outside sources in the past, but he nevertheless failed to make any significant attempt to satisfy his special assessment. Plaintiff's claim that he needs whatever funds he has to pursue his legal action does not free him of his responsibility to make IFRP payments. This is not a case in which the inmate was unable to meet his financial obligation due to indigence; it is a case in which an inmate chose to allocate his available funds to other sources. Because plaintiff failed to satisfy his financial obligation, he lost the privilege of participation in the IFRP. Although plaintiff's indigence may have made it more difficult for him to make the required payments, the exhibits attached to the Complaint establish that the action of which he complains was taken because of his failure to show financial responsibility, not because of his indigence. Thus, there has been no violation of plaintiff's equal protection rights.

In rejecting an equal protection challenge to a prison regulation, this Court has explained that, "[a] prison regulation does not violate the Equal Protection Clause as long as the classifications established by it serve a legitimate interest and are reasonably related to that justification." Parke v. Guarini, CIV. A. No. 95-4341, 1997 WL 129015 (E.D. Pa. March 19, 1997). In addition, at least one other court in this District has held that denying an indigent inmate the opportunity to participate in the IFRP if a lack of financial responsibility is shown is "rationally related to the legitimate governmental interest of attempting to impress upon inmates the importance of responsible financial behavior by encouraging inmates to meet court ordered financial obligations and imposing appropriate sanctions on those who fail to do so." Cash v.

Wigen, CIV. A. No. 94-CV-4356, 1995 WL 479311 (E.D. Pa. Aug. 10, 1995). Since any discrimination that plaintiff may have suffered on account of his indigence served a legitimate penological interest, defendants have not violated the Equal Protection Clause.

C. Eighth Amendment Claim. Plaintiff claims that his indigence and inability to earn money in prison have prevented him from purchasing “necessities” from the commissary, rendering his life “torturous” in violation of the Eighth Amendment.² The deprivations that plaintiff claims, however, do not rise to the level of cruel and unusual punishment sufficient to establish an Eighth Amendment violation.

While acknowledging that “[n]o static test can exist by which courts determine whether conditions of confinement are cruel and unusual,” Rhodes v. Chapman, 452 U.S. 337, 346 (1981), the Supreme Court has established some basic guidelines regarding what constitutes an Eighth Amendment violation. For example, conditions that “[result] in [an] unquestioned and serious deprivation of basic human needs” may result in cruel and unusual punishment. Id. at 347. Following this reasoning, the Third Circuit has ruled that a district court “must inquire whether the challenged conditions ‘alone or in combination’ violate Eighth Amendment standards, recognizing that the totality of the conditions ‘may deprive inmates of the minimal civilized measure of life’s necessities.’” Peterkin v. Jeffes, 855 F.2d 1021 (1988) (quoting

²In his Complaint, plaintiff lists a number of items that he claims he is deprived of as a result of his indigence. The list includes: telephone calls; postage; photocopying; typewriter ribbons; new athletic shoes; a radio and headphones; laundry detergent, bleach and fabric softener; toiletries such as special soap, shampoo, mouthwash, hand lotion, deodorant, dental floss; vitamins and medicinals such as natural laxatives, band aids, and petroleum jelly; a variety of clothing such as gloves, athletic shorts, thermal underwear, and rain apparel; an electric fan; a watch; cooking materials; and food items to supplement the prison diet he claims is high in carbohydrates.

Rhodes, 452 at 347) (internal quotation marks omitted). The factors to be considered in the Court's inquiry include "food, medical care, sanitation, control of vermin, lighting, heating, ventilation, noise level, bedding, furniture, education and rehabilitation programs, safety and security and staffing." Tillery v. Owens, 907 F.2d 418, 427 (3d Cir. 1990); see also Farmer v. Brennan, 511 U.S. 825, 832 (1994).

The items that plaintiff claims to have been deprived of do not sufficiently establish a deprivation of "the minimum civilized measure of life's necessities." Although the Court's Eighth Amendment inquiry should focus on factors such as food and medical care, and the Complaint lists items that could be categorized as such, the deprivations alleged in the Complaint are not sufficient to establish an Eighth Amendment violation. While the ability to purchase these items would make the plaintiff's incarceration more comfortable, defendants' actions, which allegedly deprived him of this ability, do not constitute cruel and unusual punishment. As the Rhodes Court explained, "the Constitution does not mandate comfortable prisons, and prisons . . . [that] house persons convicted of serious crimes cannot be free of discomfort." Rhodes 452 at 349. Thus, the Court concludes that plaintiff's Eighth Amendment claim is frivolous.

D. Claim of Denial of Right of Access to the Courts. Plaintiff claims that he needs the little money he has in his account for his legal expenses, and he is thus unable to pay his IFRP obligation. He further claims that defendants' demand that he use his money, received from outside sources, towards his special assessment fee burdens his right of access to the courts. The Court concludes that this claim does not constitute an unconstitutional denial of the right of access to the courts.

In Lewis v. Casey, 518 U.S. 343, 349 (1996), the Supreme Court explained that in order for a prisoner to establish a violation of the constitutional right of access to the courts, see Bounds v. Smith, 430 U.S. 817, 821 (1977), a showing of “actual injury” is required. The actual injury requirement can be established by showing that some action of prison officials hindered the prisoner’s ability to pursue a legitimate legal claim. Lewis, 518 U.S. at 351. However, an inmate cannot simply allege that the legal services provided are inadequate. Instead, inmates are required to show a “direct injury to their access to the courts.” Reynolds v. Wagner, 128 F.3d 166, 183 (3d Cir. 1997) (citing Lewis, 518 U.S. at 351). Plaintiff has not met the burden of showing that he suffered “actual injury” in pursuing his litigation as a result of his placement in IFRP "refuse" status with the subsequent reduction in his prison salary.

Plaintiff alleges that his indigence has interfered with his litigation efforts since he does not have the money to “constantly call the district court to keep abreast of what is happening in his case,” leading to a “five month delay and the added aggravation, and, significant waste of judicial resources.” He states in the Complaint that this evidence proves “actual injury,” giving him standing to sue for a violation of his rights. However, the inconveniences alleged do not rise to the level of “actual injury” required to state a claim for denial of the right of access to the courts. As the Lewis Court explained, the right of access to the courts does not require that an inmate be given the ability to litigate effectively once in court. Lewis, 518 U.S. at 354.

Bureau of Prisons Program Statement 1315.06, codified at 28 C.F.R. § 543.10, provides that inmates will be provided with reasonable access to legal materials and counsel and a reasonable opportunity to prepare legal documents. There is no allegation that this regulation has been violated. Moreover, an exhibit attached to the Complaint shows that the Warden informed

plaintiff that he would be provided with items essential to the pursuit of his habeas petition including stamps, legal copies, and legal calls. Under these circumstances, the Court concludes that plaintiff has not pled an actual injury sufficient to establish a claim of denial of the right of access to the courts, and this claim is frivolous.

E. Plaintiff's motion for a temporary restraining order. Plaintiff has filed a motion for a temporary restraining order to prevent the Bureau of Prisons from destroying a radio that he obtained in violation of Bureau of Prisons Program Statement 5580.05. He claims that since he was informed by a prison official that FCI Schuylkill had a policy of issuing radios to indigent inmates, the institution created a liberty interest for indigents to obtain radios. The complaint, filed after the date set for destruction, does not state whether the radio and headphones were destroyed. Because it appears that the date set for destruction of this radio has already passed, the granting of this motion would be futile.

“[T]he confiscation of inmate property for violations of prison regulations is not a ‘taking’ under the Fifth Amendment.” Robinson v. Vaughn, CIV. A. No. 92-7048, 1993 WL 451495, *6 (E.D. Pa. Nov. 1, 1993). Under Program Statement 5580.05, any radio that does not bear the possessing inmate’s registration number is contraband and will be confiscated and destroyed. Because plaintiff’s radio did not bear his registration number, his possession of the item was in violation of a valid prison regulation which justified the confiscation. Since plaintiff was not entitled to possess the property in the first place, due process concerns are not implicated by the confiscation of this property. Furthermore, even if plaintiff could prove that the confiscation of his radio was not in accordance with prison regulations, and that he is entitled to a remedy, the availability of a post-deprivation legal remedy by which he can recover the value of

the property provides plaintiff with all the process that he is due. See Parratt v. Taylor, 451 U.S. 527 (1981). In the instant case, plaintiff's remedy for his alleged property loss is found in the Federal Tort Claims Act, 28 U.S.C. § 2672, et seq. Because plaintiff has a post deprivation remedy, his claim for injunctive relief is frivolous.

4. CONCLUSION. In light of the foregoing, the Court concludes that plaintiff has failed to state any claim sufficient to establish a constitutional violation by defendants. Thus, the Court will dismiss the Complaint as frivolous under 28 U.S.C. § 1915(e).

BY THE COURT:

JAN E. DUBOIS, J.