COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP536 **Cir. Ct. No. 2012CV128**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

HARLAN RICHARDS,

PLAINTIFF-APPELLANT,

V.

MARK HEISE,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Reversed and cause remanded.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Harlan Richards appeals an order dismissing his federal civil rights action against a prison official based upon the reclassification of Richards' custody status, and an additional order denying reconsideration. The circuit court concluded that Richards' complaint failed to allege facts upon which

relief could be granted under either of his two legal theories. For the reasons discussed below, we conclude that Richards' complaint did state an equal protection claim upon which relief could be granted. Accordingly, we reverse the decision of the circuit court and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 The parties do not dispute the relevant facts set forth by the circuit court. Richards is serving a life sentence for first-degree intentional homicide. In April 2008, the parole commission issued a twelve-month deferral on Richards' parole. Due to the deferral, a program review committee elevated Richards' custody status from community to minimum level, and the classification chief approved the change. The change in custody status, in turn, resulted in Richards losing his work release privileges and being transferred to another institution.

¶3 In June 2010, following a deferral of only eight months, Richards' custody status was reduced to the community level, he regained his work release privileges and was transferred back to a lower security facility.

¶4 In January 2011, after another twelve-month deferral, prison officials elevated Richards' custody status all the way to the medium level. Richards again lost his work release privileges and was again transferred to a higher security facility.

¶5 In the present lawsuit, Richards complains that the actions of prison officials have infringed his substantive due process rights by arbitrarily depriving him of a significant degree of freedom that he was able to enjoy working as a truck driver ferrying prisoners across the state. He further alleges the actions of prison

officials have violated his equal protection rights because he "is the only prisoner to ever be returned to medium security based on a 12 month defer[al] without an adverse change in circumstances to cause the increased defer[al]."

STANDARD OF REVIEW

¶6 Whether a complaint states a cognizable claim upon which relief can be granted presents a question of law subject to *de novo* appellate review. ***DeBruin v. St. Patrick Congregation***, 2012 WI 94, ¶10, 343 Wis. 2d 83, 816 N.W.2d 878. When reviewing a circuit court's decision to dismiss based upon the pleadings, we assume as true any facts set forth in the complaint and draw all reasonable inferences to be made therefrom in the plaintiff's favor. ***Id.***, ¶11. Any documents attached to the complaint are considered part of the complaint and prevail over any inconsistent allegations therein. ***Peterson v. Volkswagen of America, Inc.***, 2005 WI 61, ¶15, 281 Wis. 2d 39, 697 N.W.2d 61. We will dismiss a claim only if it is clear the plaintiff cannot recover under any circumstances. ***Evans v. Cameron***, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985).

DISCUSSION

¶7 Both the United States and Wisconsin constitutions provide protection against the arbitrarily different treatment of similarly situated classes. *See* U.S. CONST. amend XIV, WIS. CONST. art I, § 1. We employ a three-step analysis to equal protection claims, considering, first, whether the challenged statute or government action creates any distinctive classifications to be treated differently; and if so, whether any such classes are similarly situated; and finally, whether there is a constitutionally sufficient justification for the disparate treatment of any such similarly situated classes. ***Metropolitan Assocs. v. City of Milwaukee***, 2011 WI 20, ¶12, 332 Wis. 2d 85, 796 N.W.2d 717. Unless a

classification infringes upon a fundamental right or discriminates against a suspect class, the principle of equal protection requires only that the classification bear a "rational relation to some legitimate end." ***Romer v. Evans***, 517 U.S. 620, 631 (1996).

¶8 Here, Richards acknowledges that prison officials could properly create two separate classes for security classification consideration: prisoners whose deferrals of parole or extended supervision were based upon disciplinary problems or other changes of circumstances, and prisoners whose deferrals of parole or extended supervision were not linked to disciplinary problems or any stated change of circumstances. However, Richards contends that prison officials improperly created a sub-class of one within the category of those whose deferrals of parole were *not* based upon disciplinary problems—with prison officials changing Richards' security status from the community level to the medium level, while all other similarly situated prisoners had their security status raised to no more than the minimum security level.

¶9 The State correctly points out that the rational basis test applies because the alleged classification does not burden a protected fundamental right or suspect class. However, the State's contention that it was rational to treat Richards differently than other prisoners based upon his current offense and prior criminal record entirely misses the point that Richards has alleged that he is being treated differently than *all other prisoners*—which it is reasonable to infer includes some others with similar criminal histories and lengthy sentences. In other words, the question is not whether it is rational to assign higher security classifications to anyone with a substantial criminal history who is serving a life term or other lengthy sentence, but whether it is rational to *raise* the security classification of one such prisoner who has previously qualified for the lowest

level of security up *two* steps to medium security without any disciplinary problem or change of circumstances, when it has been alleged that no other prisoner who had qualified for the lowest security classification has had his security level raised more than *one* step to the minimum level absent a disciplinary problem or other change of circumstances.

¶10 We recognize that it is entirely possible that prison officials will be able to produce evidence refuting Richards' factual assertion that no other similarly situated prisoner has received a two-step raise in his security level. It is also possible that prison officials may be able to provide more distinguishing facts for Richards' disparate treatment. However, based solely upon the allegations of the complaint, we cannot conclude there is no set of circumstances under which Richards could recover.

¶11 Because we conclude that his complaint stated at least one viable theory of recovery, we need not address Richards' alternate claim of a due process violation. We remand to have the circuit court reinstate the complaint and allow the case to proceed consistent with this opinion.

By the Court.—Orders reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.