FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

DEC 30 2009

Stephan Harris, Clerk
Cheyenne

STEVEN R. ERVIN
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PLAINTIFF

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

STEVEN R. ERVIN, Plaintiff, vs. JUSTIN SNELL, Defendant	)	Civ. No. 09-CV-44-D PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Plaintiff Steven Ervin was incarcerated in the Wyoming State Penitentiary (WSP) at all times material to this lawsuit. He is now on parole. Mr. Ervin is proceeding in this litigation *pro se*.

Plaintiff's Second Amended Complaint details efforts undertaken by ACLU attorney Stephen Pevar in 2008 and 2009 to assist Mr. Ervin challenge harmful actions undertaken against him by the defendant, Justin Snell, a guard at WSP. The Court should know at the outset that Mr. Pevar is assisting Mr. Ervin write this brief, and may soon file a Notice of Appearance in this case (along with Jennifer Horvath, Wyoming ACLU staff counsel). The ACLU usually litigates only

class actions that seek injunctive relief, and the instant case does not fit that description. However, the issues raised in this litigation bear on issues that Mr. Pevar litigated in *Skinner v. Uphoff*, 234 F. Supp.2d 1208 (D. Wyo. 2002). Moreover, it seems clear (given Defendant's Motion to Dismiss) that the state wishes to take advantage of Plaintiff's lack of legal expertise. Mr. Pevar has therefore decided to continue lending some help to Mr. Ervin in responding to Defendant's motion.

THE RULE 12(b)(6) STANDARD

Defendant Snell has filed a motion pursuant to Rule 12(b)(6) F.R.Civ.P. to dismiss Plaintiff's Second Amended Complaint. This Court is familiar with the standard to be applied in considering such motions. The following four principles are set forth in this Court's 2006 decision in *Markland v. Squeeky Kleen Car Wash, LLC*, 2006 WL 812088 (D. Wyo. 2006) (*per* Johnson, J.):

1. Consistent with the policy of "notice pleading," there is "a powerful presumption against dismissing a count or complaint pursuant to Rule 12(b)(6)." *Id.*, citing *Maez v. Mountain States Telephone and Telegraph, Inc.*, 54 F.3d 1488, 1496 (Fed. Cir. 1993);

2. A complaint "will only be dismissed under Rule 12(b)(6) if it appears beyond any doubt that the pleader can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 140 (1957)." *Markland*, 2006 WL 812088. Stated differently, a motion to dismiss under Rule 12(b)(6) must be denied "if the plaintiff is entitled to any type of relief under any possible legal theory. *Bowers v. Hardwick*, 478

U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); *Carparts Distrib. Ctr. v. Automotive Wholesalers' Ass'n of New England, Inc.*, 37 F.3d 12, 17 (1st Cir. 1998) ("For purposes of [Rule 12], the possibility of a claim is enough to defeat dismissal.") *Markland*, 2006 WL 812088.

3. "Not surprisingly, 'the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.' *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 149 (9th Cir. 1987." *Markland*, 2006 WL 812088.

4. "All paragraphs of the Complaint must be taken as true and all legal inferences or ambiguities must be construed in Plaintiffs' favor. *Nationwide Inv. Servs. Corp. v. Ray*, 2000 U.S. Dist. LEXIS 12884 (D. La. 2000)." *Markland*, 2006 WL 812088.

After enunciating these four principles, the Court in *Markland* gave a perfect example--highly relevant here--of how these principles apply. Citing *Bennett v. Schmidt*, 153 F.3d 516, 518 n.1 (7th Cir. 1988), the Court explained that in a case alleging racial discrimination in employment, "it would be adequate to survive Rule 8 and 12(b)(6) scrutiny to state as follows: '[plaintiff] was turned down for a job because of [plaintiff's] race.'" *Markland*, 2006 WL 812088.

One additional principle should be listed here. Given that Mr. Ervin filed his complaint *pro se*, his pleadings are to be construed liberally and held to a less stringent standard than pleadings drafted by lawyers. *Hammons v. Saffle*, 348 F.3d 1250, 1254 (10th Cir. 2005); *Abbott v. McCotter*, 13 F.3d 1439, 1440 (10th Cir. 1994).

ARGUMENT

Given the principles set forth above, Defendant's Rule 12(b)(6) motion must be denied. Indeed, Defendant's motion borders on the frivolous.

In *Benefield v. McDowell*, 241 F.3d 1267 (10th Cir. 2001), cited in Mr. Evrin's complaint, the Tenth Circuit held that a prison guard who informs prisoners that a certain prisoner is a "snitch" places that prisoner in danger of assault, thereby violating that prisoner's rights under the Eighth Amendment. *See Benefield*, 241 F.3d at 1270 ("labeling a prisoner a snitch violates a prisoner's constitutional rights under the Eighth Amendment . . . and constitutes deliberate indifference to the safety of that inmate.")

Plaintiff Ervin's Second Amended Complaint sets forth a hornbook "snitch jacket" complaint against Defendant Snell. Plaintiff *expressly* alleges that Defendant Snell told three African American inmates that Mr. Ervin "was in the back room with them white folks, 'snitching' on [those three] inmates." *See Second Amended Complaint* ¶ 9. Ervin's complaint further states that "Defendant's labeling the Plaintiff a snitch to the African American inmates" made Mr. Ervin "vulnerable to an eventual attack by other (WSP) inmates." *Id.* ¶ 11. The complaint also states that as a result of the rumor spread by Defendant Snell, Ervin was placed in "imminent" danger and was, in fact, cornered by the three African American prisoners and threatened with bodily harm, and that one of these prisoners has signed an affidavit admitting that Snell's comments placed Ervin in danger of assault by him. *Id.* ¶ 12. The complaint also states that "[a]t

the time the Defendant Justin Snell told (WSP) inmates the Plaintiff Steven R. Ervin was a 'snitch,' the Defendant was well aware that such a jacket or label at (WSP) has the potential for great harm because it subjects that inmate to life threatening retaliation by other inmates." *Id.* ¶ 36.

These accusations, which must be presumed true at this stage of the proceeding, clearly set forth a claim upon which relief can be granted. *See Benefield*, 241 F.3d at 1270. Consequently, Snell's motion to dismiss must be rejected on that basis alone. *See Markland*, 2006 WL 812088 (holding that a motion to dismiss must be denied "if the plaintiff is entitled to any type of relief under any possible legal theory.") *See also Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); *Carparts Distrib. Ctr. v. Automotive Wholesalers' Ass'n of New England, Inc.*, 37 F.3d 12, 17 (1st Cir. 1998) ("For purposes of [Rule 12], the possibility of a claim is enough to defeat dismissal.")"

Yet Ervin's complaint goes even further than accusing Snell of placing a snitch jacket on him. Read liberally, the complaint accuses Snell of embarking on a cruel vendetta. After Ervin succeeded in having one of Snell's orders overturned by a superior, Snell retaliated. Snell commenced his vendetta by telling three African American prisoners that Ervin was snitching on all three of them. *See Second Amended Complaint* ¶ 9. Snell then started harassing Ervin's wife. *Id.* ¶ 13. After ACLU attorney Stephen Pevar complained about Snell's misconduct to the Attorney General's office, resulting in Snell receiving some type of disciplinary action, Snell redoubled his attack. *Id.* ¶¶ 19-27. Snell persisted in harassing both Ervin and his wife, made rude comments to Ervin's

wife at her place of employment, and violated a "no contact" order in the process. *Id.* ¶¶ 26-35. This prompted another complaint by Attorney Pevar to the Attorney General's office on Ervin's behalf, which apparently resulted in additional disciplinary action for Snell and Snell's continuing retaliation against Ervin. *Id.* ¶ 29.

This Court has recognized that when a complaint avers facts which, if true, demonstrate a violation of federal law, a motion to dismiss that complaint must be denied. *See Markland* 2006 WL 812088, citing *Bennett v. Schmidt*, 153 F.3d 516, 518 n.1 (7th Cir. 1988). *See also Carparts Distrib. Ctr. v. Automotive Wholesalers' Ass'n of New England, Inc.*, 37 F.3d 12, 17 (1st Cir. 1998). Accordingly, Defendant's motion to dismiss Plaintiff's Ervin's Second Amended Complaint must be denied.

DEFENDANT'S ARGUMENTS LACK MERIT

Faced with case law squarely against him, Defendant Snell seeks to deflect the Court's attention to entirely irrelevant facts and legal theories. According to Snell, Ervin on a previous occasion made statements about Snell's behavior inconsistent with the allegations contained in Ervin's Second Amended Complaint. *See Memorandum of Law In Support Of Defendant's Motion To Dismiss* (hereinafter "Def's Mem.) at 4-7, 10-12. But even if that is true--and it is not true--it is irrelevant for our purposes here. Prior inconsistent statements have no bearing on whether a complaint sets forth facts upon which relief may be granted. At trial, Snell is free to try and impeach Ervin based on these alleged inconsistencies, but Snell cannot have the complaint dismissed because of them.

The undeniable fact is that Ervin's complaint adequately sets forth a set of facts upon which relief may be granted.

Next, Snell claims that he is entitled to summary judgment based on qualified immunity. *See Def's Mem.* 12-13. This argument is premature. Snell has not filed his answer yet and he cannot raise a Rule 56 motion for summary judgment in a Rule 12(b)(6) motion to dismiss. Besides, such a motion would have to be denied even if it were timely. The law is settled that a correctional officer may not undertake the acts that Snell is accused of undertaking in this litigation. *See Benefield*, 241 F.3d at 1270 ("labeling a prisoner a snitch violates a prisoner's constitutional rights under the Eighth Amendment . . . and constitutes deliberate indifference to the safety of that inmate.") Accordingly, Snell cannot possibly be entitled to qualified immunity, given that the law was clearly established at the time of Snell's alleged misconduct that such misconduct would violate Ervin's constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

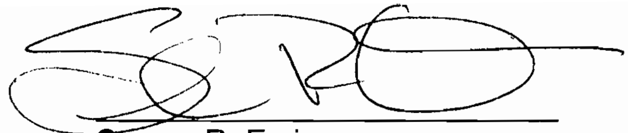
Lastly, Snell argues that the *physical conditions* of the administrative segregation cell in which Plaintiff Ervin was transferred did not fall below Due Process standards. This argument is misguided for two reasons. First, like Snell's qualified immunity argument, Snell's due process argument is premature. It seeks Rule 56 *summary judgment*, and it does so by referring to "facts" regarding the physical conditions of Ervin's segregation cell. This entire section of Snell's brief raises an issue of law--based on facts *not in the record*--that cannot be resolved by a Rule 12(b)(6) motion.

Moreover, Snell's argument misses the point. Ervin is *not claiming* the physical conditions of administrative segregation are unconstitutional. Rather, Ervin seeks relief because Snell's dangerous and retaliatory actions required that Ervin be placed *in* administrative segregation. Had Snell not labeled Ervin a snitch, Ervin would never have seen the inside of that segregation cell. In short, Snell's due process argument is entirely irrelevant. The issue is not whether the harsh conditions of administrative segregation met constitutional standards but, rather, whether Ervin should have been placed in that predicament.

CONCLUSION

Plaintiff Ervin's Second Amended Complaint alleges that Defendant Snell deliberately labeled Ervin a snitch and thereby placed him at significant and imminent risk of assault by other prisoners. Ervin also accuses Snell of constantly harassing him and his wife, and asserts that Snell's continuous misconduct was recognized and admitted by the Wyoming Attorney General's office, and yet Snell's misconduct did not abate. Accordingly, Plaintiff's complaint sets forth facts which, if true, would entitle him to relief. Snell's motion to dismiss must therefore be denied.

Dated this 30 day of December, 2009.



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Certificate of Service

I, Steven Ervin, plaintiff pro se, hereby state that I arranged to have a copy of the above document mailed to counsel for Defendant at the address listed below this 30 day of December, 2009:

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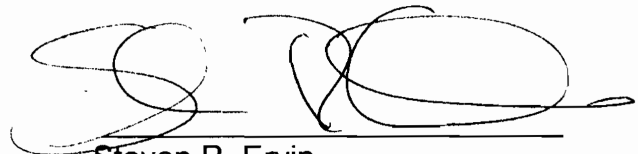

Steven R. Ervin
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