



Defendant argues that Plaintiff has failed to state a due process violation for two separate reasons. First, he notes that Plaintiff has not alleged that he has in fact been disciplined for refusing to work, let alone that he was disciplined without a hearing. Second, and more basic, Defendant argues that the due process clause is not implicated under these circumstances, because Plaintiff makes no allegation regarding the disciplinary action contemplated.

Plaintiff has failed to respond to Defendant's argument regarding his due process claim, and is thus held to have waived objection. Accordingly, the Motion is properly granted on this issue pursuant to Local Rule 19. Further, Defendant is substantively correct in his assertion. The United States Supreme Court has recently held that the question whether a plaintiff has a liberty interest protected by the due process clause in a given circumstance depends upon the nature of the disciplinary action itself. *Sandin v. Conner*, 115 S. Ct. 2293 (1995). Plaintiff's failure to allege what specific disciplinary action he refers to is fatal to his due process claim.

### ***III. Cruel and Unusual Punishment.***

Defendant argues Plaintiff's assertion that the threat of disciplinary action constitutes cruel and unusual punishment under the Eighth Amendment is belied by the Thirteenth Amendment, which reads in pertinent part:

Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.

U.S. CONST. amend. XIII, § 1. Plaintiff's sole rebuttal to this argument is that the cases Defendant cites would apply only if the threat of disciplinary action in this case were a prison policy, as opposed to simply a memorandum.

Plaintiff's position is without merit. As a factual matter, Maine Department of Corrections Policy and Procedures *does* provide that it is a disciplinary infraction to refuse to "obey any lawful order, instruction or assignment." The policy does not violate the Eighth Amendment as long as Plaintiff is not "compelled to perform physical labor which is beyond [his] strength, endangers [his life] or health, or causes undue pain." *Berry v. Bunnell*, 39 F.3d 1056, 1057 (9th Cir. 1994) (citations omitted). Further, the "Thirteenth Amendment does not apply where prisoners are required to work in accordance with prison rules." *Id.* (citations omitted).

### ***Conclusion***

For the foregoing reasons, I hereby recommend Defendant's Motion to Dismiss Plaintiff's Complaint be GRANTED in its entirety.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated in Bangor, Maine on October 10, 1996.