

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

WENDY MELENDREZ RIVAS,	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO: 1:10-CV-197-JTM-RBC
	)	
TERRY MARTIN, SHERIFF OF	)	
LAGRANGE COUNTY, in his individual	)	
and official capacity; JOHN DOE I,	)	
LAGRANGE COUNTY JAIL	)	
COMMANDER; AND JOHN DOE 2,	)	
LAGRANGE COUNTY ASSISTANT JAIL	)	
COMMANDER, in their individual	)	
capacities,	)	
Defendants.	)	

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

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Defendants move pursuant to Fed. R. Civ. P. 12(b)(6), and submit the following memorandum of law in support of their Motion to Dismiss Plaintiff's claims for failure to state a claim upon which relief can be granted.

**Plaintiff's Factual Allegations**

The Plaintiff filed her lawsuit seeking redress for the alleged deprivation of her civil rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 and 28 U.S.C. § 2201. Complaint, Document #1, ¶ 1. On January 29, 2010, Plaintiff was taken into custody in Coldwater, Michigan, based on a warrant issued for Plaintiff from LaGrange County, Indiana for felony charges of check fraud. *Id.*, ¶ 21-23. Prior to Plaintiff's

January 29, 2010 detention, an immigration detainer was placed on Plaintiff by the Immigration and Naturalization Service (“INS”).<sup>1</sup> *Id.*, ¶ 25. On Friday, February 12, 2010, Plaintiff posted her bond of \$250.00 with LaGrange County for her state felony charge. *Id.*, ¶ 30. However, Plaintiff was not released from LaGrange County Jail on Friday, February 12, 2010, because a INS detainer was placed on Plaintiff. *Id.*, ¶ 35. Plaintiff was released from LaGrange County Jail on Monday, February 22, 2010. *Id.*, ¶ 41.

Plaintiff’s due process claim relies on 8 C.F.R. § 287.7, which provides,

*“Upon a determination by the Department [INS] to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.”*

Plaintiff claims that her due process rights were violated when she was detained beyond the 48-hour period stated in 8 C.F.R. § 287.7. Complaint, ¶ 47. Plaintiff posted her bond on February 12, 2010, thus she alleges that she should have been released on Wednesday, February 17, 2010.<sup>2</sup> *Id.* ¶ 32. Plaintiff alleges that she has a liberty interest in being free from unlawful and prolonged detention, specifically, being detained by the LaGrange County Jail once the 48-hour period expired. *Id.* ¶ 47. Thus, Plaintiff alleges that she was deprived of her protected liberty interest without due process of law, when she was detained from Wednesday, February 17, 2010 to Monday February 22, 2010. *Id.*, ¶ 48. Plaintiff

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<sup>1</sup> Plaintiff does not dispute the validity of the INS detainer in her Complaint.

<sup>2</sup> Plaintiff acknowledges that the 48-hour time limit excludes weekends and holidays, Monday, February 15, 2010, was a federal holiday.

alleges that Sheriff Terry Martin's policies, practices, and procedures with regard to ICE detainees failed to protect Plaintiff from an unlawful and prolonged detention. *Id.*, ¶ 49. Further, Plaintiff alleges that John Doe 1 and John Doe 2 violated Plaintiff's due process rights by holding her beyond the 48-hour period. *Id.*, ¶ 56-57.

### **Argument**

#### **1. Standard of Review**

Under Fed. R. Civ. P. 12(b)(6), claims may be dismissed for "failure to state a claim upon which relief can be granted." *Luttman v. Sheriff of Jay County*, No. 1:10-CV-66, 2010 U.S. Dist. LEXIS 47536, at \*3 (N.D. Ind. May 13, 2010). To survive a Rule 12(b)(6) motion to dismiss, the complaint must comply with Rule 8(a)(2) by providing a short and plain statement of the claim showing that the pleader is entitled to relief. *Id.*, at 4. The complaint must contain enough facts to state a claim to relief that is plausible on its face. *Skinner v. Metro. Life Ins. Co.*, 2010 U.S. Dist. LEXIS 53040, \*8 (N.D. Ind. 2010). To meet this standard, a plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, citing *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). When the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has not shown that the pleader is entitled to relief as required by Rule 8(a)(2). *Id.*, citing *Ashcroft*, 129 S.Ct. at 1949.

- 2. Plaintiff's due process claim brought pursuant to 8 C.F.R. § 287.7, fails to state a claim upon which relief can be granted because a cause of action cannot be created by an administrative regulation.**

The United States Constitution is clear that lawmaking power is vested in the Congress, “*All legislative Powers herein granted shall be vested in a Congress of the United States....*” U.S. CONST. art. I, § 1. Additionally, Congress may “*make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*” U.S. CONST. art. I, § 8. The Constitution does not subject this lawmaking power of Congress to presidential control. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952). Congress has exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution “in the Government of the United States, or any Department or Officer thereof.” *Id.*, at 588-589.

Plaintiff fails to state a claim because her cause of action is based on an administrative regulation, 8 C.F.R. § 287.7. A cause of action cannot be created by an administrative regulation. *Chairez v. U.S.*, 790 F.2d 544, 545 (6<sup>th</sup> Cir. 1986). An agency’s rulemaking power cannot exceed the authority granted to it by Congress. *Angelaastro v. Prudential-Bache Secur.*, 765 F.2 939, 947 (3<sup>rd</sup> Cir. 1985). It is fundamental that the Constitution grants the power to Congress, and not to the executive branch, to expand federal jurisdiction or to create a new cause of action. *Marx v. Centran Corporation*, 747 F.2d 1536, 1544 (6<sup>th</sup> Cir. 1984), see also *Kress v. CCA of Tenn., LLC*, Cause No. 1:08-cv-0431, 2008 U.S. Dist. LEXIS 83378, \*6 (S.D. Ind. Oct. 17, 2008) (“a state’s administrative regulations do not provide the source of an implied cause of action for damages against a local government.”) A violation of

an administrative regulation does not alone establish a procedural due process violation. *Carlisle v. Bensinger*, 355 F.Supp. 1359, 1362 (N.D. Ill. 1973). In *Carlisle*, the Court granted Defendant's Motion to Dismiss finding that "although the Administrative Regulations of the State of Illinois Department of Corrections provide for a hearing within 72 hours after a disciplinary ticket is written, the Constitutional requirements of procedural due process do not impose such a 72-hour rule." *Id.* at 1362.

Plaintiff has only alleged a violation of an administrative regulation. In a typical case in which an implied cause of action is asserted, a plaintiff asserts the cause of action under a federal statute which prohibits some conduct, or which at least protects the rights of a certain class of persons. *Marx*, 747 F.2d at 1544. In *Marx*, the Plaintiff relied on a federal statute that created no substantive federal right. *Id.* The Plaintiff in *Marx* also relied on an administrative regulation. *Id.* The *Marx* Court made clear that an administrative agency is without Constitutional authority to create a cause of action. *Id.*

Additionally, in *Chairez*, the Sixth Circuit dismissed Plaintiff's Complaint where Plaintiff alleged that his forty-six hour detention violated the procedural protections created by 8 U.S.C. § 1357(a)(2) and 8 C.F.R. § 287.3. 790 F.2d at 545. The Sixth Circuit held that a cause of action can only be inferred from a statute and not from an administrative agency. *Id.* Ultimately, the question was whether Congress, not an administrative agency, created a private cause of action. *Id.* at 546. The Sixth Circuit found that the Plaintiff could not recover because Congress

had no intent to create a private cause of action under 8 U.S.C. § 1357. Similarly, Plaintiff Rivas has not alleged that the LaGrange County Defendants violated any federal statutes. Rather, Plaintiff relies only on administrative regulations to support her claim. The law is clear that Plaintiff cannot rely on 8 C.F.R. § 287.7, as it does not create a cause of action upon which relief can be granted.

**3. Defendants are entitled to qualified immunity because their actions did not violate a clearly established statutory or constitutional right of the Plaintiff.**

Plaintiff's claim does not allege a violation of a clearly established statutory or constitutional right. Government officials performing discretionary functions are shielded from liability for civil damages to the point that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Sivard v. Pulaski County*, 17 F.3d 185, 189 (7<sup>th</sup> Cir. 1994). A clearly established right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Id.* While a case that is on all fours with this case is not required, "closely analogous cases, those decided before the defendants failed to act, are required to find that a constitutional right is clearly established." *Id.* Once a defendant has pleaded qualified immunity, the plaintiff has the burden to demonstrate the existence of the clearly established constitutional right. *Abel v. Miller*, 824 F.2d 1522, 1534 (7<sup>th</sup> Cir. 1987).

Plaintiff's claim must fail because Defendants' actions in detaining Plaintiff based on an INS detainer did not violate any clearly established constitutional rights. Plaintiff alleged the following facts in her Complaint:

- January 29, 2010 – Plaintiff was arrested and taken into custody for a

state felony charge. Complaint, ¶ 23.

- Prior to Plaintiff's January 29, 2010 arrest, Federal Immigration and Customs Enforcement filed an immigration detainer against Plaintiff. Complaint, ¶ 25.
- February 12, 2010 – Plaintiff posted bond on her state felony charge at 10:12 a.m. Complaint, ¶ 30.
- February 17, 2010 – Plaintiff alleges that she should have been released pursuant to 8 C.F.R. § 287.7. Complaint, ¶ 32.
- February 22, 2010 – Plaintiff released from LaGrange County Jail. Complaint, ¶ 40.

Plaintiff alleges that her five-day detention beyond February 17, 2010, violated her due process rights. *Id.*, ¶ 57. Though it is not clear that Plaintiff has alleged a violation of a constitutional right, even if she did, all Defendants are entitled to qualified immunity because it is not clearly established that Plaintiff's five-day detention beyond February 17, 2010, violates Plaintiff's due process rights. In *Sivard*, Plaintiff alleged that the Pulaski County Sheriff's Department wrongfully detained him in violation of the Fourteenth Amendment, when Pulaski County held Plaintiff for seventeen days pending extradition to Massachusetts. 17 F.3d at 187. A fugitive may be detained by an asylum state "for a reasonable time necessary to enable a requisition to be made." *Id.* at 190, citing *Stallings v. Splain*, 253 U.S. 339, 341 (1920). The Seventh Circuit held that it was not clearly established that Sivard's seventeen-day detention was unconstitutional. *Id.* at 191.

Similarly, Plaintiff cannot point to any clearly established law that her five-day detention based on a valid INS detainer violated her due process rights. See *Panfil v. City of Chicago*, 45 Fed. Appx. 528, 534 (7<sup>th</sup> Cir. 2002) (“Panfil did not suffer a constitutional deprivation despite his confinement because he was confined for only four days, which is fewer than any of the time periods in our past case law, and he was afforded due process.”) Plaintiff does not dispute the validity of the INS detainer placed on her. Additionally, Plaintiff relies only on an administrative regulation which does not establish a constitutional violation. Plaintiff simply cannot point to any clearly established law that supports her claim that her due process rights were violated when she was detained five days by LaGrange County Jail based on a valid INS detainer.

### Conclusion

For the above-stated reasons, this Court should grant the Defendants’ Rule 12(b)(6) Motion to Dismiss Plaintiff’s action for failure to state a claim upon which relief can be granted.

**NEWBY LEWIS KAMINSKI & JONES, LLP**

By: /s/ Nicholas T. Otis  
Martin W. Kus, # 5377-46  
Nicholas T. Otis, # 27992-64  
Attorneys for Defendants  
916 Lincolnway, P.O. Box 1816  
LaPorte, IN 46352-1816  
(219) 362-1577



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**PROOF OF SERVICE**

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I hereby certify that on the 19th day of July 2010, I electronically filed a complete copy of Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss and this Proof of Service with the Clerk of the Court CM/ECT system

Christopher C. Myers, [cmyers@myers-law.com](mailto:cmyers@myers-law.com)  
Ilene M. Smith, [ismith@myers-law.com](mailto:ismith@myers-law.com)  
James Posey, [jposey@beersmallers.com](mailto:jposey@beersmallers.com)

NEWBY, LEWIS, KAMINSKI AND JONES, LLP

By: /S/ Nicholas T. Otis