IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK LESLIE, MATTHEW BEAUDRY, KEITH PISCHKE, MARK NEAL, RAMON RODRIGUEZ, DAVID OAKLEY, TRAVIS FAIR, STEVE WITTROCK, DUSTIN MARSHALL, CORY DEMEYER, W. ROBERT SMITH JR., EUGENE BIRNER, LYNDON ANDERSON, JEFFERY GARCIA, DENNIS CROPPER, ALLEN SHECKLES, DANA HOPE, JAMES BROMELAND, CORY RETZKE, KELSEY WILLIAMSON, RICKY HOWARD, ANTHONY ROYAL and CORY WILKINS,

ORDER

Plaintiffs,

00-C-519-C

v.

MICHAEL J. SULLIVAN, DOCTOR CRANTS, and RICK L. HUDSON,

Defendants.

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This is a proposed civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. §§ 1983 and 1985. Plaintiffs are presently confined at the North Fork Correctional Facility in Sayre, Oklahoma. Plaintiffs have paid the full fee for filing their

complaint. This case was removed to this court from the Circuit Court for Dane County. In an order entered on September 27, 2000, I dismissed plaintiffs' federal law claims pursuant to 42 U.S.C. § 1997e(a) for their failure to exhaust their administrative remedies and remanded plaintiffs' state law claims to the Dane County court. Plaintiffs then filed a motion for reconsideration of the judgment dismissing their case, which I construed as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59. After reviewing the motion, I concluded that plaintiffs' federal law claims should not have been dismissed for their failure to exhaust their administrative remedies at the screening stage and vacated the September 27, 2000 order.

Presently before this court is plaintiffs' motion to remand this case back to the Circuit Court for Dane County. In addition, because plaintiffs are prisoners, I must screen their complaint and dismiss any claim that is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." 42 U.S.C. § 1997e(c). I did not do such a screening when the case was here originally because I believed then that plaintiffs' failure to exhaust their administrative remedies was a barrier to their proceeding.

In their complaint, plaintiffs make the following allegations of fact.

I. ALLEGATIONS OF FACT

A. Parties

Plaintiffs are Wisconsin state prisoners who are currently confined at North Fork Correctional Facility in Sayre, Oklahoma. Defendant Michael Sullivan is the former secretary of the Wisconsin Department of Corrections. Defendant Doctor Crants is the C.E.O. of the Corrections Corporation of America. Defendant Rick Hudson is the warden of North Fork.

B. Federal Law Claims

1. Due process (count II)

By contractual agreement, defendant Sullivan has given North Fork the authorization to make sensitive rule making decisions on disciplinary and program review hearings. Employees of North Fork have the authority to make classifications and program review decisions without oversight from employees of the Wisconsin Department of Corrections. Plaintiffs are denied minimum status classification by not being returned to the state of Wisconsin. Some of plaintiffs' program needs cannot be met at North Fork.

On July 25, 1999, one of the plaintiffs was taken to segregation. On July 26, 1999, he received a conduct report. At a disciplinary hearing on July 29, 1999, the plaintiff asked why he was not allowed to call two witnesses and confront his accuser. An officer responded that

it was not North Fork's policy to call witnesses and that there was not enough staff available. The officer found the plaintiff guilty and sentenced him. At that time, the plaintiff was advised of his rights to appeal the decision and was threatened that defendant Hudson would give plaintiff 30 days in segregation.

On November 17, 1999, one of the plaintiffs was strip searched by a male officer in front of a female counselor. He was ordered to bend over and spread his buttocks five times and was taken to the lock-up unit in front of dozens of inmates and staff. The plaintiff was left naked in lock-up for hours. He was taken to a hearing without receiving any documentation or notice of his charge. After being found guilty of disrespect, he was taken back to lock-up. Six days later, the plaintiff was taken to another hearing.

2. Conditions at North Fork (count V)

Defendant Sullivan did not thoroughly inspect North Fork or the training and qualifications of the prison's employees. North Fork's staff members do not have experience in prisons. North Fork has 12 housing pods and approximately 120 inmates of mixed classifications in each pod. Each pod is overseen by one unranked officer. When staff start work at North Fork, they are trained for one day by an unranked officer and then they run a pod on their own.

The environment is loud and full of tension, anxiety and fear. Although medical reports reflect a high number of inmates receiving medical attention for such things as slipping and falling, tripping down stairs, running into doors or cabinets, the reality is that inmates are receiving treatment because of violent beatings from other inmates and gang members. Activities such as work, school and recreation have been canceled or denied many times because of the lack of staff.

3. Idleness (count VII)

Prison officials have taken actions to restrict activities at North Fork. Many inmates lose their jobs or right to participate in programs because of minor and major rule infractions that are not related to job or school. When an inmate is disciplined, he may lose his position for 90 days, lose canteen privileges and spend time in the "hole." An inmate has to reapply for his job through the job committee. This process takes months and inmates lose their positions because other inmates fill the positions. The overall effect is to create conditions of idleness that make degeneration likely and self-improvement impossible.

Recreation programs at North Fork include limited access to the gym and library. The recreation staff restricts the use of gym equipment to a limited number of inmates. North Fork was built to house 960 inmates but has been expanded to house 480 additional inmates.

Despite the expansion, nothing has been done to expand recreation and educational activities, the cafeteria and the library.

4. Equal protection (count X)

Plaintiffs are denied access to the Legal Assistance to Institutionalized Persons program because the program will not assist any Wisconsin prisoner who has been transferred to an out-of-state facility.

5. Visitation, phone and mail (count XI)

Defendants have transferred plaintiffs over one thousand miles away from their families and friends. If and when family members are able to make the long and costly trip to North Fork, they are greeted by disrespectful staff, made to wait hours for their visits to start and sometimes turned away because the visiting room is being used by staff. The cost to talk on the phone is unreasonably high; plaintiffs and their families are not allowed to use an alternative phone company with lower rates.

North Fork staff open inmates' outgoing mail without any reason. The majority of inmates' incoming mail is read by staff, which delays inmates receipt of their mail. Most catalogs and periodicals are thrown away. Correspondence through the United States mail falls

way below the standards to which plaintiffs are accustomed.

6. Equal protection: parole board hearings (count XII)

When an inmate becomes eligible for parole, an initial eligibility hearing is held. Wisconsin prisoners who are confined at institutions in Wisconsin attend these initial hearings in person and can make presentations on their own behalf, but inmates in out-of-state institutions cannot attend the hearing in person or make a presentation. It is important to be present at parole hearings. Plaintiffs' parole hearings have been held late and over the phone. Plaintiffs' initial parole hearings are not being held on time. Sometimes they are held months late or not held at all. Sometimes inmates' parole eligibility is reviewed by a file review without any of the criteria being taken into consideration. When some of the plaintiffs appealed their parole decisions to the commissioner, arguing that they have met the criteria for parole or that they should be paroled because of overcrowding problems in Wisconsin state prison system, the commissioner has sent them a notice stating, "The appeal has been placed in your file without any consideration to the facts presented."

C. State Law Claims

In counts I, III, IV, VI, VIII and IX, plaintiffs make allegations to support state law

claims, including claims that defendants violated various provisions in the contract between the Corrections Corporation of America and the Wisconsin Department of Corrections. Because I will decline to exercise supplemental jurisdiction over these claims, it is unnecessary to specify their allegations supporting these claims.

II. MOTION TO REMAND

Plaintiffs have asked this court to decline to decide the merits of this case and remand it to state court, arguing that defendants are bound by a forum selection clause in the contract between the Corrections Corporation of America and the Wisconsin Department of Corrections. Section 6.11 of the contract states that "Any judicial action relating to the construction, interpretation or enforcement of the Contract shall be brought and venued in Dane County Circuit Court in Madison, Wisconsin."

As a non-party to the contract, plaintiffs do not have standing to sue for a violation of the contract unless they can demonstrate that they are third-party beneficiaries to the contract by showing that the parties to the contract entered into it directly and primarily for their benefit. See Goosen v. Estate of Standaert, 189 Wis. 2d 237, 249, 525 N.W.2d 314, 319 (Ct. App. 1994). "The contract must indicate that the third-party either was specifically intended by the contracting parties to benefit from the contract or is a member of a class the contracting

parties intended to benefit." Dorr v. Sacred Heart Hospital, 228 Wis. 2d 462, 597 N.W.2d 462 (Ct. App. 1999); see also Restatement (Second) of Contracts § 302(1)(b) ("intended beneficiary" if "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance"). The contract states:

> Nothing contained in this Contract or inferable from this Contract is intended to confer any rights or remedies upon any person whatsoever other than the parties named herein. Furthermore, no portion of this contract is intended to relieve or discharge the obligation of any third persons to any party to this Contract, and no provision herein contained shall be construed to give any third party any claim, action or right of subrogation against any party hereto.

The clear and unambiguous terms of the contract demonstrate that Wisconsin state prisoners, including plaintiffs, were not intended to be third-party beneficiaries. As a result, plaintiffs cannot rely on any provisions in the contract between the parties to grant them particular rights. Their motion to remand will be denied.

III. SCREENING

A. Federal Law Claims

1. Fourteenth Amendment: due process

I understand plaintiffs to allege that defendant Sullivan violated their Fourteenth Amendment rights by giving North Fork officials the authority to make decisions at disciplinary

and program review hearings without oversight from Wisconsin Department of Corrections' officials. In addition, I understand plaintiffs to allege that defendants violated their Fourteenth Amendment rights by delaying or denying their initial parole hearings and rejecting their parole appeals. A procedural due process violation against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protectible liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. See Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty). Plaintiffs' allegation that decision making authority at disciplinary and program review hearings has been assigned to North Fork officials does not support a Fourteenth Amendment due process claim. Plaintiffs have failed to allege that "atypical, significant deprivations" were at stake at these hearings. Plaintiffs' allegations about denial of parole fail as well. There is no independent constitutional right to parole, see

Heidelberg v. Illinois Prisoner Review Board, 163 F.3d 1025, 1026 (7th Cir. 1998), and Wisconsin has not created such a right through its parole statute, Wis. Stat § 304.06, because under the statute parole is discretionary rather than mandatory. See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (whether state creates protected liberty interest in parole depends upon whether parole is discretionary or mandatory under state law); State v. Borrell, 167 Wis. 2d 749, 772, 482 N.W.2d 883,891 (1992) ("The possibility of parole does not create a claim of entitlement nor a liberty interest."). Plaintiffs' due process claims will be dismissed for their failure to state a claim upon which relief may be granted.

2. Programming

a. Educational programs

Plaintiffs allege that the lack of educational programming at North Fork violates their constitutional rights. In Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit held that a prisoner has no constitutional right to prison educational programs. Id. (holding that loss of " social and rehabilitative activities" are not "atypical and significant hardships " that are constitutionally actionable rights under Sandin, 515 U.S. 472. That completion of these programs may have allowed plaintiffs to earn

good-time credits does not change the outcome of their claim. See Higgason, 83 F.3d at 809-810 ("Even if Higgason had been given the opportunity, it was not inevitable that he would complete an educational program and earn good time credits. Thus, denying the opportunity to earn credits did not `inevitably affect the duration of the sentence,' and did not infringe on a protected liberty interest.") Plaintiffs' contention that North Fork has insufficient educational offerings will be dismissed for failure to state a claim upon which relief may be granted.

b. Exercise

Denial of exercise may constitute an Eighth Amendment violation in extreme circumstances where lack of movement causes muscle atrophy, threatening the health of the prisoner. See Thomas v. Ramos, 130 F.3d 754, 763 (7th Cir. 1997). However, in Thomas, 130 F.3d at 764, the Court of Appeals for the Seventh Circuit held that a prisoner's Eighth Amendment rights were not violated when he could not exercise out of his cell for seventy days because he could do exercises in his cell. Similarly, in Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988), the court of appeals held that a prisoner's rights were not violated when he spent twenty-eight days in confinement during which the only exercise was activity that he could do in a cell, such as push-ups or running in place: "Unless extreme and prolonged, lack

of exercise is not equivalent to a medically threatening situation." See also Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986) (no Eighth Amendment violation even though inmates confined to cells twenty-four hours a day for a one-month period after a lockdown).

Plaintiffs allege that there is a gym but that access to the equipment is limited. Significantly, plaintiffs have not alleged that lack of movement has caused muscle atrophy that threatens their health or that they were unable to exercise within their cells, such as by doing push-ups or running in place. See Thomas, 130 F.3d at 764. Plaintiffs' allegations that the institution has not expanded its facilities following the increase of inmates is insufficient by itself to support a constitutional claim. Plaintiffs fails to state a claim upon which relief may be granted.

c. Work

Plaintiffs contend that it is unconstitutional for inmates to lose their jobs because of minor and major rule infractions that are not related to their jobs. They have failed to state a claim under Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992), and Higgason, 83 F.3d 807. Vanskike holds that a prisoner has no constitutional right to a prison job and by implication holds that a prisoner has no right to an unearned stipend, that is, plaintiffs' inmate pay. See Vanskike 974 F.2d at 809 ("compensation for prison labor is 'by grace of the state'") (quoting

Sigler v. Lowrie, 404 F.2d 659, 661 (8th Cir. 1968). Plaintiffs' contention that their prison jobs are revoked as punishment fails to state a claim in light of the fact that plaintiffs do not have a constitutional right to a prison job. This claim will be dismissed.

3. Eighth Amendment: failure to protect

Plaintiffs allege that staff members at North Fork are inexperienced and lack proper training and that inmates are beaten by other inmates. I understand plaintiffs to be alleging that defendant Sullivan and the institution's staff have failed to protect them from harm. The Eighth and Fourteenth Amendments give prisoners a right to remain safe from assaults by other inmates. See Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996). "'[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.'" Farmer v. Brennan, 511 U.S. 825 (1994). "Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' see Hudson v. Palmer, 468 U.S. 517, 526 (1984), having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." Farmer, 511 U.S. at 833.

In a failure to protect case, "[t]he inmate must prove a sufficiently serious deprivation, i.e., conditions which objectively 'pos[e] a substantial risk of serious harm.'" Pope v. Shafer, 86

F.3d 90, 92 (7th Cir. 1996). The inmate must also prove that the prison official acted with deliberate indifference to the inmate's safety, "effectively condon[ing] the attack by allowing it to happen." Langston, 100 F.3d at 1237 (quoting Haley v. Gross, 86 F.3d 630, 640 (7th Cir. 1996)). A prison official may be liable for knowing that there was a substantial likelihood that the prisoner would be assaulted and failing to take reasonable protective measures. See Farmer, 511 U.S. at 847. The prison official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and the official must draw that inference. See Pavlick v. Mifflin, 90 F.3d 205, 207-08 (7th Cir. 1996). The prisoner does not have to show that the prison official intended that the prisoner be harmed; it is enough that the official ignored a known risk to the prisoner's safety. See id. at 208. In failure to protect cases, "[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991).

Plaintiffs' broad allegations are insufficient to state a claim. Plaintiffs have failed to allege that (1) they faced a substantial risk of serious harm; (2) they informed any prison official about the specific threat to their safety; (3) defendants (or other prison officials) knew that there was a substantial likelihood that any of the plaintiffs would be assaulted; (4) defendants failed to take reasonable protective measures to prevent any assaults; and (5) plaintiffs suffered

actual physical injury as a result of an assault by other inmates. Plaintiffs' bald assertions about the lack of training of prison officials and injuries to inmates fall far short of establishing the elements of a failure-to-protect claim. Accordingly, this claim will be dismissed.

4. Miscellaneous

a. Family members

Plaintiffs allege that when their family members visit, North Fork officials make them wait and sometimes turn them away if the visiting room is in use and charge excessive rates for phone calls. The United States Supreme Court has long recognized that the right to familial association is encompassed within the concept of liberty of the Fifth and Fourteenth Amendments. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494 (1977). Although incarcerated individuals do not enjoy the same rights to familial association as those with no restrictions on their liberty, prisoners do not surrender all rights to family relations upon incarceration. See Kentucky Dept. of Corrections, 490 U.S. at 465 (Kennedy, J. concurring) (prison regulation forbidding visits would implicate due process clause although "precise and individualized restrictions" do not). Rather, prison officials have the right to limit an inmate's access to visitation, phone calls and mail to the extent that such limitations are designed to achieve legitimate penological interests. See Turner v. Safley, 482 U.S. 78, 89 (1987) ("[W]hen

a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."). Plaintiffs have not alleged that they are not allowed to visit with or call their family members at all; instead, they allege that there are inconveniences associated with both. That is not enough to support a constitutional claim. Prisoners are not entitled to unlimited visits or inexpensive phone calls to their family members under the Constitution.

b. Mail

Prisoners have a limited liberty interest in their mail under the First Amendment. See Thornburgh v. Abbott, 490 U.S. 401, 407 (1989). Prison actions that affect an inmate's receipt of non-legal mail must be "reasonably related to legitimate penological interests." Thornburgh, 490 U.S. at 409; see also Turner, 482 U.S. 89-90 (setting forth four factor test); Bell, 441 U.S. 520. Legitimate practices include inspection of inmate mail for contraband, escape plans or other threats to prison security. See Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986); see also Royse v. The Superior Court of the State of Washington, 779 F.2d 573, 575 (9th Cir. 1986) (inspection of inmate mail for contraband does not constitute mail censorship). Plaintiffs' sole allegations on this issue are that North Fork officials

> have been opening inmates outgoing mail without any just cause. The majority of incoming mail is read by staff and causes the mail to be received extremely

> late, most catalogs and periodicals are thrown away, so staff don't have to deal with them. Correspondence through [United States] Mail Service here at [North Fork] falls way below regular standards plaintiffs are accustom to.

These allegations are insufficient to support a viable constitutional claim. First, plaintiffs' allegations about what prison officials are doing to the catalogs or periodicals of inmates generally does not establish that *plaintiffs* have been affected by the alleged illegal act of throwing them away. Plaintiffs fail to allege that they personally sent for catalogs or periodicals that have been thrown away. To the extent that plaintiffs allege that the delivery of mail is delayed, the Seventh Circuit has held that "[a]llegations of sporadic and short-term delays in receiving mail are insufficient to state a cause of action grounded upon the First Amendment." Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) (citing Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999)); see also Sizemore v. Williford, 829 F.2d 608, 610-11 (7th Cir. 1987) ("we want to emphasize that merely alleging an isolated delay or some other relatively short-term, non content-based disruption in the delivery of inmate reading materials will not support, even as against a motion to dismiss, a cause of action grounded upon the First Amendment".

5. Fourteenth Amendment: equal protection

I understand plaintiffs to allege that their right to equal protection has been violated

because they have been denied (1) the ability to attend their initial parole hearings and make presentations on their own behalf; and (2) the ability to secure legal representation by the Legal Assistance to Institutionalized Persons program, a University of Wisconsin program available to some in-state Wisconsin prisoners. The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985). To show an equal protection violation, petitioners must demonstrate intentional or purposeful discrimination. See Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982). If the claim does not involve a suspect class or a fundamental right, the court will apply a rational basis standard. See Pryor v. Brennan, 914 F.2d 921, 923 (7th Cir. 1990). Because prisoners are not a suspect class, see United States v. Vahovick, 160 F.3d 395, 398 (7th Cir. 1998), and they do not have a fundamental right to a parole hearing, I will apply the rational basis test. The creation of two classes of Wisconsin inmates (in-state and out-of-state) does not violate the equal protection clause. The costs and difficulties of transporting prisoners provides a rational basis for the classification. Plaintiffs' claim that they have been discriminated against in their access to the Legal Assistance to Institutionalized Persons program fails as well. That program provides legal assistance to a limited number of Wisconsin inmates with certain types of legal claims. If plaintiffs were in Wisconsin, it is far from clear that they would benefit from the program. In

any event, the difficulties of attempting to represent prisoners with whom the program cannot meet or correspond with easily is a rational reason for the difference. That plaintiffs do not have access to the program as a result of their placement out-of-state does not violate the Constitution.

B. State Law Claims

Because plaintiffs have not raised a viable federal law claim, I decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over plaintiff's state law claims. See 28 U.S.C. § 1367(c)(3). The Court of Appeals for the Seventh Circuit has recognized that "a district court has the discretion to retain or to refuse jurisdiction over state law claims." Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999). Plaintiffs' state law claims will be remanded back to the Circuit Court for Dane County.

ORDER

IT IS ORDERED that

1. Plaintiffs' motion to remand is DENIED; and

2. Plaintiffs' First, Eighth and Fourteenth Amendment claims are DISMISSED for failure to state a claim upon which relief may be granted;

3. Plaintiffs' state law claims are REMANDED to Dane County Circuit Court.

4. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 13th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge