IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES L. PHILLIPS,

OPINION and ORDER

Plaintiff,

10-cv-352-bbc

v.

MICHAEL THURMER,

Defendant.

- -

In this civil action for injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff James Phillips is proceeding on a claim that defendant Michael Thurmer has prohibited his daughter from visiting him in violation of his constitutional right to familial association. Now before the court are the parties' cross motions for summary judgment. Dkt. #16 & #20.

Having reviewed the parties' proposed findings of facts and arguments, I conclude that defendant is entitled to summary judgment. Although "the constitutional interest here is an important one," Beard v. Banks, 548 U.S. 521, 535 (2006), defendant has shown that the visitation restriction is reasonably related to an interest in plaintiff's rehabilitation and reintegration into the community, as well as an interest in protecting plaintiff's visitors from

harm.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff James Phillips is an inmate at the Oshkosh Correctional Institution. Plaintiff was housed previously at the Waupun Correctional Institution, where defendant Michael Thurmer was the warden. Plaintiff is serving a five-year sentence for second-degree sexual assault of a child for engaging in repeated acts of sexual assault of the same child. He was convicted previously of two counts of burglary to a building or dwelling. Amber Peirce was the victim in plaintiff's sexual assault and was also a party to his burglary charge. The November 21, 2006 judgment of conviction in plaintiff's sexual assault case states that plaintiff "shall not have contact, direct or indirect, with Amber P. without express permission of agent. [He] shall not have any contact, direct or indirect, with children, to include own children, without permission of agent."

All inmates under the administration of the Wisconsin Department of Corrections are required to have an approved visitor list and may visit only with persons on that list. Wis. Admin. Code § DOC 309.08(1). If an inmate wishes to have an individual added to his or her approved visitor list, the requested visitor must fill out a visitor questionnaire and

submit it to the institution for consideration. If the request for a visitor is denied, the inmate may resubmit the proposed visitor's name for reconsideration six months after the denial.

Prison wardens, or their designees, determine whether a person may be approved for placement on an inmate's list. § DOC 309.08(4)(a)-(j). The administrative code lists grounds for the warden to consider in making such a determination. These include whether the warden has reasonable grounds to believe that the inmate's offense history indicates that there may be a problem with the proposed visitation; whether there are reasonable grounds to believe that the proposed visitor would be subjected to victimization; and whether there are reasonable grounds to believe that the inmate's reintegration into the community or rehabilitation would be hindered. Id. There is no rule prohibiting persons under the age of 18 from visiting prisoners convicted of a sex offense. However, children under 18 must be accompanied by a custodial parent or another authorized adult who is on the approved list. § DOC 309.08(5).

If a visitor is approved to visit an inmate at the Waupun Correctional Institution, the visitor meets the inmate in the visiting room. The Department of Corrections has policies and procedures in place to secure the safety and security of the institution, staff, inmates and visitors during visitation. In particular, one sergeant and three officers are assigned to work in the visiting room and cameras are used to monitor activities and behavior there. However,

there are often more visitors than staff in the area and staff cannot always anticipate inappropriate behavior and stop it before it occurs. Staff cannot monitor every conversation or completely eliminate the risk of inappropriate behavior. Thus, visitors may be subject to victimization during contact visits.

Prison wardens have the option and authority to order no-contact visits. § DOC 309.11. No-contact visits are allowed at Waupun only on rare occasions because the institution does not have facilities and staffing to supervise no-contact visits adequately. In particular, the no-contact booths are too small to allow staff to fit in the booth with the prisoner. Thus, there is the potential for victimization of the visitor through inappropriate gestures or conversation. In addition, staff presence is not always a deterrent to no-contact victimization.

On January 31, 2007, plaintiff asked to have approved contact with Amber Peirce and his minor daughter, Tavia Peirce. (Plaintiff has the ability to contact Tavia Peirce, as well as other friends and family, by telephone or mail and there are no limits on the number of letters he may send or receive or quantity of telephone calls he may place each week.) Amber Peirce completed and submitted a visitor questionnaire dated January 9, 2010, requesting that she and Tavia be placed on plaintiff's approved visitor list. On the questionnaire, Amber stated that she had been arrested with plaintiff in 2005. Amber also stated that she was the non-incarcerated guardian and custodial patent of Tavia, who would be

accompanying her on visits. Amber completed and submitted a separate visitor questionnaire for Tavia.

Plaintiff's request was reviewed by his probation and parole agent, Ronald Seekins. Seekins told plaintiff that his request would not be approved at that time because, among other reasons, plaintiff was an untreated sex offender. Seekins advised plaintiff to obtain his high school equivalency diploma and all the treatment he could while in prison. Seekins told plaintiff that anything positive he accomplished would enhance his chances of having contact with Amber and Tavia Peirce when he was released.

The warden's office also reviewed the request. On February 4, 2010, the warden's designee, Janet Johnson, filed a "Removal From or Disapproval of Placement on Visitor List," denying plaintiff's visitation request. The form noted that the request was denied because (1) the warden had reasonable grounds to believe that the inmate's reintegration into the community or rehabilitation would be hindered, Wis. Admin. Code § DOC 309.08(4)(e); (2) the warden had reasonable grounds to believe that the inmate's offense history indicates there might be a problem with the proposed visitation, § DOC 309.08(4)(f); and (3) the warden had reasonable grounds to believe that the proposed visitor might be subjected to victimization, § DOC 309.08(g). Johnson reached these conclusions after considering plaintiff's judgment of conviction, the recommendation of plaintiff's probation and parole agent, his history of sexual assault of a minor, his lack of offense-related treatment and the

fact that Amber was plaintiff's victim and a party to his crimes. After exhausting his administrative remedies, plaintiff filed this lawsuit. He has not resubmitted a formal request for Amber or the minor child to be placed on his visitor list.

OPINION

Plaintiff contends that defendant's refusal to allow him to have visits with his daughter is a violation of his constitutional rights. I have concluded in other cases that prisoners retain a limited right of association while they are incarcerated and that limitations on that right are evaluated under the standard set forth in Turner v. Safely, 482 U.S. 78, 89-90 (1987). E.g., Krispin v. Thurmer, 2010 WL 431906, *3 (W.D. Wis. Feb. 5, 2010); King v. Frank, 328 F. Supp. 2d 940, 945 (W.D. Wis. 2004). See also Overton v. Bazzetta, 539 U.S. 126, 131-32 (2003) (assuming that prisoners retain some right of intimate association while incarcerated and applying Turner standard).

Under Turner, the question is whether the restriction on plaintiff's ability to visit with his daughter is reasonably related to a legitimate penological interest. Turner, 482 U.S. at 89. In determining whether a reasonable relationship exists, the Supreme Court usually considers four factors: whether there is a "valid, rational connection" between the restriction and a legitimate government interest; whether alternatives for exercising the right remain to the prisoner; what impact accommodation of the right will have on prison administration;

and whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Id. at 89-91.

Under the first factor, defendant has the initial burden to show a logical connection between the restriction and a legitimate penological interest. Beard, 548 U.S. at 535; see also Singer v. Raemisch, 593 F.3d 529, 536 (7th Cir. 2010) ("[T]he burden shift[s]" to the prisoner "[o]nce the prison officials provid[e] the court with a plausible explanation."). This "first Turner 'factor' is more properly labeled an 'element' because it is not simply a consideration to be weighed but rather an essential requirement." Salahuddin v. Goord, 467 F.3d 263, 274 (2d Cir. 2006); see also Singer, 593 F.3d at 534 ("[T]he first [Turner factor] can act as a threshold factor.").

In this case, defendant identifies three legitimate penological interests to support the restriction on plaintiff's visitation rights: (1) plaintiff's reintegration into the community; (2) his rehabilitation; and (3) the safety of children and other visitors. Plaintiff does not deny that these are legitimate penological interests, but contends that defendant has not shown that prohibiting visits from Amber and Tavia Peirce is rationally related to those legitimate goals.

I disagree. Plaintiff is serving a sentence for a conviction of second-degree sexual assault and Amber was the victim of plaintiff's sexual assault, as well as a party to plaintiff's burglary crimes. As both the sentencing judge and plaintiff's probation officer recognized,

not allow plaintiff to have visits with Amber and Tavia avoids the potential for further victimization. Additionally, plaintiff is a sex offender with unmet treatment needs. It is rational for prison officials to keep from having contact with former or potential victims until he participates in treatment. E.g. Overton, 539 U.S. at 132-33 (prison officials meet burden if they shown rational connection between their interest in protecting minors and restriction on plaintiff's visitation rights).

Plaintiff contends that he should at least be allowed to visit his daughter because she was not a victim to his crime and he has never been accused or convicted of sexually assaulting a child close to Tavia's age. However, plaintiff's argument ignores the fact that Amber, the victim of plaintiff's sexual assault, is proposed as the visitor who would accompany Tavia to the prison; he offers no evidence or argument to overcome the warden's decision not to permit Amber to visit plaintiff. Moreover, plaintiff has not averred that he asked the prison to add Tavia to his accompanied by an adult on his approved visitor list.

With respect to the second factor (whether plaintiff has alternatives to exercising his constitutional right), defendant contends that plaintiff may write letters and talk to his daughter over the telephone. (The parties provides no details about plaintiff's ability to call or write Tavia, such as whether such contact involves indirect communication with Tavia's mother, Amber. However, plaintiff does not argue in response that it would be difficult for him to call or write Tavia so long as she is living with Amber and he is prohibited from

writing or calling Amber.) Many would agree that those are poor substitutes for visits. But see Overton, 539 U.S. at 135 (responding to objections that letters and phone calls are inadequate substitutes for visits by saying that "[a]lternatives to visitation need not be ideal"). On the other hand, there is the possibility that plaintiff's daughter would be allowed to visit him if he completed sex offender treatment and she were accompanied by an adult other than Amber.

As to the third and fourth factors, courts must determine whether there are "obvious, easy alternatives to the . . . regulation that [would] accommodate the right . . . while imposing a de minimis burden on the pursuit of security objectives." Turner, 482 U.S. at 98. Under these factors, prison officials do not need to prove that a regulation is the "least restrictive" means to advance their legitimate interest. Jackson v. Frank, 509 F.3d 389, 392 (7th Cir. 2007). However, even if prison officials' concerns are legitimate and rational, a restriction may be unconstitutional if "less exaggerated responses [were] available to the prison." Lindell v. Frank, 377 F.3d 655, 659-60 (7th Cir. 2004).

Plaintiff contends that a less restrictive means of accomplishing the legitimate penological objectives would be to permit no-contact visits between him and his daughter. E.g., Valdez v. Woodford, 308 Fed. Appx. 181, 182-83 (9th Cir. 2009) (upholding limitation on visitation with minors to no-contact visits); Garber v. Pennsylvania Dept. of Corrections Secretary, 851 A.2d 222, 225-26 (Pa. 2004) (same). Defendant disagrees, contending that

no-contact visitations are not a viable option for two main reasons. First, a lack of touching would not protect plaintiff's visitors from being subjected to potential predatory behavior or address the effect of plaintiff's developing an in-person relationship with his victim. Second, defendant says that the institution does not have the resources to provide proper protection to visitors during no-contact visits with sex offenders. In particular, because officers cannot be present in the visitation booths, they cannot stop a prisoner from acting inappropriately until it is too late. Plaintiff has not adduced any evidence to counter defendant's arguments.

In sum, although I agree with plaintiff that his relationship with his daughter is important and deserving of some protection, the undisputed facts show that defendant did not violate plaintiff's constitutional rights by denying his request to receive visits from his daughter accompanied by the victim of his sexual assaults. Therefore, I will deny plaintiff's motion for summary judgment and grant summary judgment in favor of defendant. Because I conclude that defendant did not violate plaintiff's constitutional rights, I need not consider defendant's arguments about the remedies available for plaintiff's claims.

ORDER

IT IS ORDERED that

1. Plaintiff James Phillips's motion for summary judgment, dkt. #16, is DENIED.

2. Defendant Michael Thurmer's motion for summary judgment, dkt. #20, is

GRANTED.

3. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 9th day of June, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge