

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES L. PHILLIPS,

Plaintiff,

v.

MICHAEL THURMER,

Defendant.

ORDER

10-cv-352-bbc

In this proposed civil action for injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff James Phillips contends that defendant Michael Thurmer has prevented him from visiting or contacting his daughter in violation of his constitutional rights. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the

complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). After reviewing the complaint, I conclude that plaintiff may proceed on his claim that defendant is violating his constitutional right to familial association by prohibiting him from visiting with or contacting his daughter.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff James Phillips was convicted of second-degree sexual assault and is a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin. Defendant Michael Thurmer is the warden at the Waupun Correction Institution.

On February 1, 2010, plaintiff's daughter's mother attempted to place plaintiff's daughter on his visitor list. On February 4, 2010, defendant informed plaintiff that plaintiff's daughter was not permitted to visit him. Defendant's reasons for prohibiting the visits were that (1) defendant had reasonable grounds to believe that plaintiff's reintegration into the community or rehabilitation would be hindered by visits with his daughter; (2) plaintiff's history provided defendant with reasonable grounds to believe there would be problems with the proposed visitation; and (3) defendant had grounds to believe that plaintiff's daughter would be subject to victimization. Plaintiff filed an administrative complaint on February 6, 2010, explaining that his daughter was not a victim in his criminal

case, she would not be victimized during visits and that a family judge had granted plaintiff the right to have visits with his daughter. Plaintiff's complaint was dismissed. Plaintiff has suffered physical, emotional and mental injuries because he cannot call, write or visit with his daughter.

DISCUSSION

Plaintiff contends that defendant's refusal to allow him to see or contact 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. Because application of the Turner standard requires a court to assess the reasonableness of the justifications asserted by the prison officials, the Court of Appeals for the Seventh Circuit has suggested that district courts should wait until summary judgment or trial to determine whether a particular restriction is constitutional. Lindell v. Frank, 377 F.3d 655, 657-58 (7th Cir. 2004) (holding that it was error for district court to conclude at screening stage that policy was reasonably related to legitimate interest). Thus, plaintiff may proceed on his claim that defendant is violating his right to familial association by prohibiting him from visiting with or contacting his daughter.

However, plaintiff should be aware that prison officials are afforded substantial deference in determining the legitimate goals of the institution and determining the most appropriate means to accomplish those goals. Overton, 539 U.S. at 132. On the other hand, defendant should be aware that deference does not imply abdication. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Even under the deferential Turner standard, courts have a duty to insure that a restriction on the constitutional rights of prisoners is not an exaggerated response to legitimate concerns. As I explained in Krispin, 2010 WL 431906, *5, prison officials cannot rely on vague and conclusory assertions to support restriction of a prisoner's visitation rights with his family. Instead, prison officials "must provide a specific

explanation” for such a restriction. Id.; see also Beard v. Banks, 548 U.S. 521, 535 (2006) (“Turner requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective.”)

Finally, accompanying plaintiff’s complaint is a motion for appointment of counsel. The Court of Appeals for the Seventh Circuit has held that before a district court can consider such a motion, it must first find that the plaintiff made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers who he asked to represent him in this case and who turned him down. Because plaintiff has not complied with that requirement, his motion will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff James Phillips is GRANTED leave to proceed on his claim that defendant Michael Thurmer is denying plaintiff the ability to contact and visit with his daughter, in violation of his constitutional right of familial association.
2. Plaintiff’s motion for appointment of counsel, dkt. #4, is DENIED.
3. Pursuant to an informal service agreement between the Wisconsin Department

of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint for the defendants on whose behalf it accepts service.

4. For the remainder of this lawsuit, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.

5. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 30th day of July, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

