IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TERRANCE PRUDE and
SCOTTIE BALDWIN,

OPINION AND ORDER

Plaintiffs,

13-cv-718-bbc

v.

MILWAUKEE COUNTY and
DAVID. A CLARKE, JR.,[1]

Defendants.

- -

Pro se plaintiffs Terrance Prude and Scottie Baldwin are both prisoners housed in the Waupun Correctional Institution in Waupun, Wisconsin. Plaintiffs have brought this lawsuit under 42 U.S.C. § 1983, alleging that they were denied visitation with their children while housed at the Milwaukee County jail under a policy of defendants Milwaukee County and David A. Clarke, Jr. (the Milwaukee County sheriff) that prohibits anyone under the age of 18 from visiting the jail. Plaintiffs contend that defendants' policy violated their rights of familial association and equal protection under the First Amendment and Fourteenth

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[1] Plaintiffs listed "Milwaukee County Jail (Municipality)" as a defendant on their caption, but the jail is a building, so it cannot be sued. Smith v. Knox County Jail, 666 F.3d 1037, 1040 (7th Cir. 2012). However, because plaintiffs included the word "municipality" in parentheses, I understand them to be saying that the real party in interest is Milwaukee County. I have amended the caption accordingly. Lewis v. City of Chicago, 496 F.3d 645, 657 n.1 (7th Cir. 2007) (amending caption to identify municipality as real party in interest).

Amendment to the United States Constitution. In addition to the complaint, plaintiff Prude filed two separate motions to certify the case as a class action under Fed. R. Civ. P. 23(b)(2). Dkt. ##3 and 6. (Prude does not say why he filed two motions. Although they are not identical, I do not see any relevant differences between the two.) Plaintiff Baldwin did not sign either of those motions.

Because plaintiffs are prisoners, I am required to required to screen the complaint under 28 U.S.C. § 1915A to determine whether it states a claim upon which relief may be granted. Having reviewed the complaint, I conclude that plaintiffs may proceed on their claim regarding their right of familial association but I am dismissing their claim under the equal protection clause. In addition, I am denying the motions for class certification.

OPINION

A. Familial Association

I understand plaintiffs to contend that defendants violated their right of familial association by establishing a blanket policy that prohibits all persons under the age of 18 from visiting the jail, even an inmate's own children. I have concluded in the past 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 (1987). E.g., King v. Frank, 328 F. Supp. 2d 940, 945 (W.D. Wis. 2004). See also Overton v. Bazzetta, 539 U.S. 126 (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 plaintiffs' visitation is reasonably related to a legitimate penological interest. Although it is not clear whether plaintiffs were pretrial detainees or convicted prisoners at the time of each of the alleged violations, the standard is similar in either situation. Bell v. Wolfish, 441 U.S. 520, 538-539 (1979) ("[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'").

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 governmental interest; whether alternatives for exercising the right remain to the plaintiff; what effect 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. Turner, 482 U.S. at 89. Because an assessment under Turner requires a district court to evaluate the prison officials' reasons for the restriction, the Court of Appeals for the Seventh Circuit has suggested that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest, e.g., Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009); Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004), unless it is clear from the complaint and any attachments that the restriction is justified. Munson v. Gaetz, 673 F.3d 630, 635 (7th Cir. 2012). In this case, I cannot make that determination from plaintiffs' allegations, so I will allow them to proceed on this claim.

I give plaintiffs a few words of caution. First, plaintiffs should be aware that courts

"must accord substantial deference to the professional judgment of prison administrators," Overton, 539 U.S. at 132, particularly on matters of security. E.g., Thornburgh v. Abbott, 490 U.S. 401 (1989) (upholding regulation that prohibited prisoners from receiving publications "detrimental to the security, good order, or discipline of the institution"); Singer v. Raemisch, 593 F.3d 529 (7th Cir. 2010) (deferring to prison staff's assessment that role playing games were detrimental to security); Koutnik v. Brown, 456 F.3d 777 (7th Cir. 2006) (deferring to prison staff's assessment regarding gang symbols). Thus, if defendants come forward with "a plausible explanation" for their actions, Singer, 593 F.3d at 536, plaintiffs may be required to come forward with evidence showing that it would be unreasonable to believe that the visits at issue posed a threat to security or other legitimate penological interest. Beard v. Banks, 548 U.S. 521 (2006) (concluding that prisoner failed to meet burden on summary judgment, because he failed to "offer any fact-based or expert-based refutation" of defendants' opinion).

On the other hand, defendants 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 the Supreme Court held recently in Beard, 548 U.S. at 535, "Turner requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective."

B. Equal Protection

To state a claim for a violation of their right to equal protection, plaintiffs would have to allege that defendants were treating them differently from other prisoners without a rational basis. Hudson v. Palmer, 468 U.S. 517, 523 (1984). Plaintiffs' complaint shows that they cannot prevail on their equal protection claim because they allege that defendants deny visitation from minors to *all* inmates at the jail. To the extent that plaintiffs are being treated differently from prisoners at *other* institutions, that is not something for which defendants may be held liable because they are treating all inmates in their custody the same. I am not aware of any authority that would require officials at one jail to adopt a particular policy simply because officials at another institution adopted that policy. Polzin v. Huibregtse, 08-cv-437-slc, 2008 WL 3200745 (W.D. Wis. Aug. 4, 2008) (dismissing equal protection claim in which plaintiff alleged different visitation policies at different prisons). Cf. Radue v. Kimberly-Clark Corp., 219 F.3d 612, 618 (7th Cir. 2000) (explaining that where "different decision-makers are involved, two decisions are rarely similarly situated in all relevant respects"). Accordingly, I am dismissing this claim for plaintiffs' failure to state a claim upon which relief may be granted.

C. Motion for Class Certification under Fed. R. Civ. P. 23(b)(2)

I am denying the motions for class certification because they were not signed by both plaintiffs, as required by Fed. R. Civ. P. 11. Plaintiffs are reminded that any motion or other document they file on behalf of both of them must be signed by both of them. If it is not,

the court cannot consider it.

Even if plaintiff Baldwin had signed the motions, I could not grant them. To begin with, pro se plaintiffs may not represent a class action. Fed. R. Civ. P. 23(g) (requiring class counsel in class action cases; setting standard for appointing such counsel). See also King, 328 F. Supp. 2d at 950. Further, plaintiffs seeking class certification must satisfy all the requirements in Fed. R. Civ. P. 23(a): (1) the class is sufficiently numerous; (2) the claims of the class members present common questions of law or fact; (3) the named plaintiff's claims are typical of those of other class members; and (4) the named plaintiff will be an adequate class representative. In addition, plaintiffs must meet the requirements of at least one of the types of class actions listed in Rule 23(b). Plaintiffs may not simply allege generally that each of these requirements is met as plaintiff Prude has done. Rather, "a party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52 (2011).

Although I give no opinion on the outcome of a future motion, I see at least one potential problem that plaintiffs may have in satisfying the requirements of Rule 23. In particular, plaintiffs are seeking to certify a class for injunctive relief under Rule 23(b)(2), but plaintiffs do not allege that there is any likelihood that they will be incarcerated at the Milwaukee County jail in the future. If that is the case, then plaintiffs would not be able to seek an injunction for themselves, City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983),

which likely would make them inadequate representatives for the class. Arreola v. Godinez, 546 F.3d 788, 799 (7th Cir. 2008) (class action must have named plaintiff for each type of relief sought); Rahman v. Chertoff, 530 F.3d 622, 626 (7th Cir. 2008) ("the certified class must correspond to the injuries received by the representative plaintiffs"). See also Dukes, 131 S. Ct. at 2550 (requirements of Rule 23 "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims") (internal quotations omitted).

ORDER

IT IS ORDERED that

1. Plaintiffs Terrance Prude and Scottie Baldwin are GRANTED leave to proceed on their claim that defendants Milwaukee County and David A. Clarke, Jr. refused to allow plaintiffs visitation with their children under the age of 18, in violation of their constitutional right of familial association.

2. Plaintiffs' claim that defendants discriminated against them in violation of the equal protection clause is DISMISSED for plaintiffs' failure to state a claim upon which relief may be granted.

3. Plaintiff Prude's motions for class certification, dkt. ##3 and 6, are DENIED.

4. For the time being, plaintiffs must send defendants a copy of every paper or document that they file with the court. Once plaintiffs learn the name of the lawyer who will be representing defendants, they should serve the lawyer directly rather than defendants. The court will disregard documents plaintiffs submit that do not show on the court's copy that

they have sent a copy to defendants or to defendants' attorney.

5. Plaintiffs should keep a copy of all documents for their own files. If they are unable to use a photocopy machine, they may send out identical handwritten or typed copies of their documents.

6. Plaintiffs are obligated to pay any unpaid balance of their filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiffs' institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiffs' trust fund accounts until the filing fees have been paid in full.

7. Copies of plaintiffs' complaint, this order and summonses will be forwarded to the United States Marshal for service on defendants.

Entered this 9th day of January, 2014.

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