IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES FLORES,

Plaintiff,

ORDER

99-C-787-C

v.

CINDY O'DONNELL, GARY R. McCAUGHTRY,
LT. TARR, CAPTAIN STRAHOTA,
LT. O'DONOVAN and CAPT. GRAHL,

Defendants.

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This is a civil action for monetary and declaratory relief brought pursuant to 42 U.S.C. § 1983. Plaintiff James Flores is a prisoner at the Green Bay Correctional Institution in Green Bay, Wisconsin. In an order entered February 16, 2000, I granted plaintiff leave to proceed in forma pauperis against defendants Cindy O'Donnell, Gary R. McGaughtry, Lieutenant Tarr, Captain Strahota, Lieutenant O'Donovan and Captain Grahl on his claim that the extreme cold in his cell violated the Eighth Amendment. Defendants filed an answer to plaintiff's complaint on April 25, 2000. Plaintiff then filed a proposed amended complaint on May 1, 2000, and defendants filed an answer to the amended complaint on May 8, 2000. On October

18, 2000, defendants filed a motion for summary judgment on plaintiff's Eighth Amendment claim. Briefing is scheduled to be complete on this motion on December 4, 2000.

Because plaintiff is a prisoner, his proposed amended complaint should have been screened at the time it was filed pursuant to the 1996 Prison Litigation Reform Act. See 28 U.S.C. §§ 1915A(a), (b). Although I have not screened plaintiff's proposed amended complaint, this is of no consequence because plaintiff's proposed amended complaint is almost identical to his original complaint. In his amended complaint, plaintiff alleges a few additional details and specific dates for some of the incidents he described in his original complaint. Because plaintiff has not alleged any facts to support a new claim, it is unnecessary to screen his amended complaint. Plaintiff's amended complaint and defendants' answer to the amended complaint will be treated as the operative pleadings in this case.

One more issue needs to be addressed. Plaintiff appears to be confused as to the scope of this lawsuit. Plaintiff was granted leave to proceed on the sole claim that he was subjected to cold temperatures in violation of his Eighth Amendment rights. He was denied leave to proceed on his other Eighth Amendment claims and his Fourteenth Amendment due process claim. At paragraph 9 of both the original and amended complaints, plaintiff alleges that "On 12-08-98, plaintiff was told that his visit was now denied because his children were not listed as such on his visiting list. This being untrue, plaintiff began to request to see a supervisor, but

was ignored." When I screened plaintiff's original complaint, I did not address whether this allegation was sufficient to state a viable claim that he had been denied a visit with his family in violation of the First Amendment.

In a motion to compel discovery and for sanctions filed on November 24, 2000, plaintiff renews his assertion from an earlier motion that he is entitled to certain visitation records. In support of his motion, plaintiff points out that although he made the same allegation in paragraph 9 of his original and amended complaints, defendants' response to the allegation in the amended complaint differs from their original answer. In defendants' answer to the original complaint, defendants state, "Admit that a visit was denied because children were not listed on the visiting list." In defendants' answer to the same allegation in plaintiff's amended complaint, they state "Admit that visit was interrupted because of a fire in the cell hall area." Although it is unclear why defendants' response to plaintiff's allegation changed, it is not relevant to this lawsuit because plaintiff was not granted leave to proceed on a claim that he was denied visitation with his family in violation of the First Amendment.

Plaintiff's allegation that he was denied a visit with his family on December 8, 1998 does not support a viable First Amendment claim. 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."). Plaintiff has not alleged that he is not allowed to visit with his family members at all; instead, he alleges that his children were turned away on one occasion because they were not on the visiting list. That is not enough to support a constitutional claim.

ORDER

IT IS ORDERED that plaintiff James Flores's request to file an amended complaint

is GRANTED.

Entered this 27th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge