IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KARL H. AMENSON,
ROBERT C. BEESE,
JONATHAN D. PEARSON,
MICHAEL G. BRANDT,

OPINION AND ORDER

Plaintiffs,

00-C-419-C

v.

JON LITSCHER, STEPHEN PUCKETT,
JUDY P. SMITH,

Defendants.

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This is a proposed civil action for injunctive, declarative and monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiffs are presently confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, and wish to bring this suit as a class action, on behalf of themselves and all others imprisoned and similarly situated. Plaintiffs have paid the full fee for filing their complaint. However, because they are prisoners and defendants are "employee[s] of a governmental entity," this court is required to screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be

granted or seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. §§ 1915A(a), (b). Subject matter jurisdiction is present. See 28 U.S.C. § 1331.

In order to certify a class action, the court must find, among other things, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). I cannot make this finding in the present action for two reasons. First, plaintiffs are not represented by an attorney, and it appears from the complaint and from the circumstances that the named plaintiffs are not attorneys. Since absent class members are bound by a judgment whether for or against the class, they are entitled at least to the assurance of competent representation afforded by licensed counsel. See Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); see also Ethnic Awareness Org. v. Gagnon, 568 F. Supp. 1186, 1187 (E.D. Wis. 1983); Huddleston v. Duckworth, 97 F.R.D. 512, 51415 (N.D. Ind. 1983) (prisoner proceeding pro se not allowed to act as class representative). Second, even lawyers may not act both as class representative and as attorney for the class because that arrangement would eliminate the checks and balances imposed by the ability of the class representatives to monitor the performance of the attorney on behalf of the class members. See, e.g., Sweet v. Bermingham, 65 F.R.D. 551, 552 (1975); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973); see also Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 n. 5 (7th Cir. 1977), appeal after remand, 587 F.2d 866 (1978); Conway v. City of Kenosha, 409 F. Supp.

344, 349 (E.D. Wis. 1975) (plaintiff acting both as class representative and as class attorney precludes class certification). Consequently, class certification will be denied.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). In their complaint, plaintiffs make the following allegations of fact.

ALLEGATIONS OF FACT

Plaintiffs are Wisconsin state inmates residing at Oshkosh Correctional Institution. All plaintiffs were sentenced to Wisconsin state prisons for violations of Wisconsin laws.

Defendant Jon Litscher is Secretary of the Department of Corrections. Defendant Stephen Puckett is Director of the Office of Offender Classification for Out-of-state Transfer by Program Review Committees. Defendant Judy P. Smith is Warden of Oshkosh Correctional Institution.

Hundreds of prisoners are transferred against their will to out-of-state prisons. The Department of Corrections has spent millions of dollars a year to send prisoners out-of-state instead of using a state statute, Wis. Stat. § 304.02, that was created to relieve overcrowding of the state prison system. Parole agents recommend that parole violators serve more time than indicated by the penalty schedules. In cases where a violator faces 6-9 months for a violation,

parole agents are recommending 1½-3 years incarceration, knowing they are far beyond the penalty schedule. The administrators or their designees require the violators to serve the recommended time.

The transfer and potential transfer of plaintiffs penalizes plaintiffs' families because they do not have the funds to travel long distances for visits and must pay more for telephone calls.

All women prisoners are being transferred back to Wisconsin by the end of 2000, causing more men to be placed out-of-state to accommodate the return of the women prisoners.

Many inmates, including some plaintiffs, are serving concurrent sentences and are eligible for parole on each sentence, yet are not on the lists for parole commission review and are not listed as eligible for parole. Instead, their sentences are termed continuous and they are kept beyond the actual sentence imposed.

Plaintiffs have not waived extradition. Plaintiffs are denied many programs that were recommended as needed by the A&E center at Dodge Correctional Institution by being transferred out-of-state. When they are returned to Wisconsin, they are allegedly placed on waiting lists for the programs but are denied parole for "non-completion of programs" in the meantime, thereby keeping the prisons overcrowded.

DISCUSSION

I understand plaintiffs to contend that their status as eligible for transfer to out-of-state prisons violates the federal Constitution and state extradition laws and discriminates on the basis of sex in violation of the equal protection clause. I understand plaintiffs to contend as well that at the out-of-state facilities they will be denied access to the courts in violation of the First Amendment and that they will be denied access to prison programs that were recommended as needed by the assessment and evaluation center in violation of the due process clause of the Fourteenth Amendment. I understand plaintiffs to contend that defendants' treatment of plaintiffs' sentences as consecutive rather than concurrent and their failure to parole plaintiffs violates plaintiffs' rights under the due process clause of the Fourteenth Amendment and under state law.

I. OUT-OF-STATE TRANSFERS

Plaintiffs contend that because they were sentenced by Wisconsin courts to Wisconsin prisons, they may not be transferred to private, out-of-state prisons without their consent or a court order. However, the Court of Appeals for the Seventh Circuit has held that "[a] prisoner has no due process right to be housed in any particular facility." Whitford v. Boglino,

63 F.3d 527, 532 (7th Cir. 1995); see also Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (a prisoner has no legally protected interest "in [his] keeper's identity"). In Pischke, the court of appeals concluded that the housing of Wisconsin prisoners with private prisons in other states did not violate the Thirteenth Amendment. See 178 F.3d at 500. In addition, the court stated that it could not "think of any other provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government." Id. Thus, plaintiffs' claim that such a transfer violates the Fourteenth Amendment is legally frivolous.

Because plaintiffs were not summoned by the Tennessee courts to be tried for a crime or to be witnesses at a proceeding, they were not extradited and the extradition statutes do not apply. See Wis. Stat. ch. 976.

Plaintiffs do not have standing to raise a claim that their transfer to an out-of-state facility creates a hardship for their families. Furthermore, it is unlikely that plaintiffs' families would be able to raise a constitutional claim because defendants do not prevent those families from traveling to the out-of-state prisons to visit plaintiffs. See also Spear v. Sowders, 71 F.3d 626, 630 (6th Cir. 1995) (en banc) ("[A] citizen simply does not have a right to unfettered visitation of a prisoner that rises to a constitutional dimension."). Plaintiffs' contention that they have a right to familial association that will be violated if they are sent to an out-of-state

facility does not state a cognizable claim. See Mayo v. Lane, 867 F.2d 374, 375 (7th Cir. 1989)("Prison necessarily disrupts the normal pattern of familial association, so lawful imprisonment can hardly be thought a deprivation of the right of relatives to associate with the imprisoned criminal."). Plaintiffs' claim will be dismissed as legally frivolous.

II. SEX DISCRIMINATION

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 be "similarly situated," groups need not be identical in makeup, they need only share commonalities that merit similar treatment. However, the equal protection clause does not prevent different treatment of men and women when their situations are different in fact. See Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981). The Fourteenth Amendment does not deny states the power to treat different classes of persons differently. See Reed v. Reed, 404 U.S. 71 (1971).

In considering prisoner claims based on gender discrimination, courts have not required identical treatment of female and male prisoners. Instead, courts have required that male and female prisoners be treated "in parity" unless there is a sufficient reason to treat them differently. See McCoy v. Nevada Dept. of Prisons, 776 F. Supp. 521, 523 (D. Nev.

1991)(educational, vocational and recreational privileges); Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W.Va. 1981); Bukhari v. Hutto, 487 F. Supp. 1162 (E.D. Va. 1980); Glover v. Johnson, 478 F. Supp. 1075, 1079 (E.D. Mich. 1979)(educational and rehabilitation opportunities).

"Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." United States v. Virginia, 518 U.S. 515, 531 (1996). The state must show that the unequal treatment serves "'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Id. at 533 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). "That [the challenged] policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." Mississippi Univ. for Women, 458 U.S. at 723.

Plaintiffs contend that men are being transferred out-of-state to accommodate the return of all women prisoners to Wisconsin by the end of 2000. Because men and women are housed in different prisons, the causal relationship alleged by plaintiffs appears tenuous. However, plaintiffs do allege that female prisoners will no longer be transferred to out-of-state prisons even though male prisoners continue to be transferred out-of-state. Although men have no right not to be transferred to out-of-state prisons, they may not be transferred for a

discriminatory reason. Plaintiffs might have an actionable claim. However, they have failed to submit proof that they have exhausted their administrative remedies on this claim. Therefore, their equal protection claim will be dismissed pursuant to 42 U.S.C. § 1997e(a).

III. ACCESS TO COURTS

Plaintiffs allege that they will be denied adequate and meaningful access to the courts because out-of-state facilities lack law books such as the Wisconsin statutes and reporters and other legal materials. (Plaintiff Amenson and plaintiff Pearson have sent letters to this court after their complaint was filed, in which they allege that legal materials have been seized and legal mail read. In these letters, plaintiffs do not ask to amend the complaint but seem to want only to update the court on things that have happened to them since the filing of the complaint. Because the letters are not signed by all four plaintiffs, the letters are not appropriate as amendments in any event.)

It is well established that inmates have a fundamental constitutional right of access to the courts. See Bounds v. Smith, 430 U.S. 817, 821 (1977). However, "[t]he prison system is free to eliminate one kind of protection - be it inmate writ-writers or prison libraries - if it supplies adequate substitutes, such as lawyers." Gometz v. Henman, 807 F.2d 113, 116 (7th Cir. 1987) (citing Bounds, 430 U.S. at 830-32). To state a claim, the prisoner must allege facts

from which an inference can be drawn of "actual injury." See Lewis v. Casey, 518 U.S. 343, 349 (1996). This rule is derived from the doctrine of standing, see id., and requires the prisoner to demonstrate that a non-frivolous legal claim has been frustrated or impeded. See id. at 353-54 nn. 3-4 and related text. In light of Lewis, a plaintiff must plead at least general factual allegations of injury resulting from defendants' conduct or suffer dismissal of his complaint for failure to state a claim upon which relief may be granted. Because plaintiffs have failed to allege any facts from which an inference of actual injury may be drawn, they will not be allowed to proceed on this claim. To the extent that plaintiffs allege violations of the Wisconsin Administrative Code, I decline to exercise supplemental jurisdiction over the state law claims.

IV. DENIAL OF ACCESS TO RECOMMENDED PROGRAMS

A prisoner has no constitutional right to prison educational programs. See Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996) (holding that loss of " social and rehabilitative activities" are not "atypical and significant hardships " that are constitutionally actionable rights under Sandin v. Conner, 515 U.S. 472 (1995)). The fact 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' claim that they are denied programs that were recommended as needed by the assessment and evaluation center will be dismissed for failure to state a claim upon which relief may be granted.

V. TIME SERVED - PAROLE

Plaintiffs allege that parole agents recommend that parole violators serve more time than established by the penalty schedules. They allege also that by treating some inmates' sentences as consecutive rather than concurrent, defendants have kept inmates, including some plaintiffs, in prison beyond the actual sentence imposed. I understand plaintiffs to allege violations of their rights under the due process clause of the Fourteenth Amendment.

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).

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.").

To the extent that plaintiffs are challenging the fact of their imprisonment, plaintiffs must file a petition for a writ of habeas corpus, 28 U.S.C. § 2254, after exhausting available state court remedies.

> [W]hen a prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to

> immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.

Preiser v. Rodriguez, 411 U.S. 475, 484 (1973); see also Viens v. Daniels, 871 F.2d 1328, 1330-1331 (7th Cir. 1989). District courts are not authorized to convert a § 1983 action into a § 2254 action. See Copus v. City of Edgerton, 96 F.3d 1038 (7th Cir. 1996). In a section 1983 action such as this one, plaintiffs may challenge only the process by which the decision was rendered. Because plaintiffs do not have a protected liberty interest in parole, they do not have a right to due process in the determination of their eligibility for parole. Plaintiffs' claim will be dismissed for their failure to state a claim upon which relief may be granted.

VI. VIOLATION OF WIS. STAT. § 304.02

Plaintiffs challenge defendants' failure to use Wis. Stat. § 304.02 to release prisoners on parole to relieve overcrowding instead of sending them out-of-state. To the extent plaintiffs contend that this failure violates their due process and equal protection rights, I have already noted that plaintiffs have no constitutional right to parole or to not be transferred out-of-state. To the extent plaintiffs are contending that defendants' actions violate state law, I decline to exercise supplemental jurisdiction over the state law claim.

OPINION

IT IS ORDERED that this action is DISMISSED

1) pursuant to 28 U.S.C. § 1915A(b)(1) as to plaintiffs' claims that at the out-of-state prison, they will be denied access to the courts under the First Amendment and access to prison programs under the Fourteenth Amendments, and that defendants' failure to release plaintiffs' on parole and to treat plaintiffs' sentences as concurrent violates the due process clause of the Fourteenth Amendment, for plaintiffs' failure to state a claim upon which relief may be granted;

2) pursuant to 28 U.S.C. § 1915A(b)(1) as to plaintiffs' claim against defendants that their transfer to an out-of-state prison violates the Thirteenth Amendment or the due process clause of the Fourteenth Amendment on the ground that such a claim is legally frivolous; and

3) pursuant to 42 U.S.C. § 1997e(a) as to plaintiffs' claim that defendants discriminated on the basis of sex in violation of the equal protection clause in finding plaintiffs eligible for transfer to an out-of-state prison for plaintiffs' failure to exhaust their administrative remedies.

28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because failure to exhaust is not one of the enumerated grounds, a strike will not be recorded against plaintiffs under § 1915(g).

Entered this 5th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge