IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DANIEL W. YODER,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS,
DAVID M. FORD,
RANDY J. FREIHOEFER,
KARA L. RHEINGANS,
COLLEEN M. McCOSHEN,
CHRISTOPHER LINDLOFF and
LISA M. KENYON,

Defendants.

OPINION AND ORDER

03-C-193-C

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Plaintiff Daniel Yoder is currently on parole supervision after spending several years in prison for sexually assaulting two children. In this civil case brought pursuant to 42 U.S.C. § 1983, plaintiff contends that defendants, who are parole agents or corrections field supervisors, violated his constitutional rights when they placed various restrictions on him. Plaintiff does not clearly identify the actions that he believes violated his constitutional rights or which rights these actions violated. However, from plaintiff's complaint, proposed findings of fact and brief, I gather that plaintiff is asserting that the following actions

violated his right to due process, equal protection or free exercise of religion:

(1) defendant David Ford's decision to prohibit plaintiff from receiving visits from minors while in prison because he had refused to watch videos, an activity that is contrary to his religious beliefs;

(2) defendant Randy Freihoefer's restrictions on plaintiff's prison visiting list, home visiting privileges and church visit privileges;

(3) defendant Kara Rheingans's photographing of plaintiff contrary to his religious beliefs;

(4) defendant Rheingans's decision to keep plaintiff at the ATTIC Transitional Living Center for two years and require him to undergo additional treatment while refusing his requests to return home and move to other locations;

(5) defendant Rheingans's decision to deny plaintiff permission to attend church services until June 2001;

(6) defendant Rheingans's decision to withdraw plaintiff's visitation privileges with his children;

(7) defendant Rheingans's requirement for plaintiff to use birth control, a practice that is contrary to plaintiff's religious beliefs;

(8) defendant Rheingans's decision to petition for revocation of plaintiff's parole;

(9) defendant Colleen McCoshen's refusal to grant permission to plaintiff to move

in with the Shepards;

(10) defendant Lindloff's decision to revoke plaintiff's social passes;

(11) defendant Lindloff's failure to assist plaintiff in finding a job;

(12) defendant Lindloff's and Lisa Kenyon's requirement for plaintiff to have photo identification.

To the extent that plaintiff may have intended to assert other claims, he has waived them by failing to develop any facts or argument supporting them.

Defendants have filed both a motion to dismiss and a motion for summary judgment. In addition, defendants filed a motion to stay discovery, which plaintiff has not opposed. In their motion to dismiss, defendants argue that plaintiff's claim should have been brought as a petition for habeas corpus rather than a § 1983 action. Alternatively, defendants contend that defendant Wisconsin Department of Corrections cannot be sued under § 1983. With respect to their motion for summary judgment, defendants argue that defendant Rheingans is entitled to absolute immunity and that the remaining defendants are entitled to qualified immunity.

I agree with defendants that under Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977), and Williams v. Wisconsin, 336 F.3d 576 (7th Cir. 2003), plaintiff's challenges to his parole conditions must first be made in a habeas petition. I also agree that defendant Wisconsin Department of Corrections is not amenable to suit under § 1983. Defendants'

motion to dismiss will be granted with respect to these claims. Because all of plaintiff's claims against defendant Rheingans should have been brought under § 2254, I need not consider defendants' argument that Rheingans is entitled to absolute immunity. In addition, it is unnecessary to decide whether defendants are entitled to qualified immunity on plaintiff's remaining claims that do not involve his parole conditions conditions because he has failed to show that a reasonable jury could find that his constitutional rights were violated. Therefore, defendants' motion for summary judgment on these claims will be granted.

Before setting forth the undisputed facts, a word is required regarding their source. Both sides submitted proposed findings of fact, as they are permitted to do under this court's procedures. See Procedure to Be Followed on Motions for Summary Judgment, I.A.2; II.B, attached to Preliminary Pretrial Conference Order, dkt. #5. Although plaintiff filed a response to defendants' proposed findings of fact, defendants did not respond to plaintiff's proposed factual findings. As a result, I must find that all of plaintiff's proposed findings of fact are undisputed unless they conflict with facts in defendants' own proposed findings or unless they are not properly supported. Stewart v. McGinnis, 5 F.3d 1031, 1034 (7th Cir. 1993).

In accordance with Stewart, I have not considered plaintiff's proposed findings that fail to satisfy the requirement of Fed. R. Civ. P. 56(e) to set forth *specific facts* showing that

there is a genuine issue for trial. Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990) ("The object of [summary judgment] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 887 (7th Cir. 1998). ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted."). For example, I have not considered plaintiff's proposed factual finding in which he alleges that "most of the defendants . . . denied him permission to reside at every single place he wanted to live." Plt.'s PFOF ¶7, dkt. #24, at 2. Because he neither identifies *which* defendants were involved in these decisions nor provides any specific information about the requests that he made, this proposed finding cannot be relied upon to show that there is a genuine issue for trial.

In addition, I have not included in the facts those proposed findings that are really no more than plaintiff's own inferences that he has drawn from the facts. E.g., Plt.'s PFOF ¶ 40, dkt. #24, at 12 (stating that plaintiff's actions "clearly showed him to be innocent of a true parole violation"); id. at ¶ 47 ("That *some* of the Amish people *appeared* unwilling to cooperate is not only false and discriminatory, but also, logically, it is not adequate support for a meaningful or informed decision.") (Emphasis in original.) It is the job of the court, not plaintiff, to determine what inferences may be reasonably drawn from the undisputed

facts.

I note also that both parties and particularly plaintiff proposed facts as if many of the facts of the case were already well known to the court and established in the record, allowing the parties to focus on only those facts that they believed were disputed or most important. However, this court's summary judgment procedures make clear that parties should treat their proposed findings of fact "as telling a story to someone who knows nothing of the controversy." The parties were required to propose all facts necessary to sustain their position. A plaintiff may not rely on the allegations in his complaint (or in his brief) to defeat a summary judgment motion. Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001). I have not considered facts that were alleged in the complaint or discussed in a brief that were not properly proposed as facts.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

In 1993, plaintiff Daniel Yoder was convicted and sentenced to prison for sexually assaulting two children multiple times. In 2000, he was granted parole, which was revoked in 2002. Currently, plaintiff is again on parole supervision. Plaintiff is Amish; he is married and has two children.

A. Defendant David Ford

Defendant David Ford is a probation and parole agent for the Wisconsin Department of Corrections. Ford was assigned to supervise plaintiff from the time of plaintiff's conviction until he was released on parole in 2000. In October 1994, Ford told plaintiff that he would be required to participate in sex offender training, either while he was in prison or following his release. Either plaintiff himself or members of the program review committee told Ford that plaintiff's religious beliefs prohibited him from watching videos as part of the sex offender treatment program. In August 1997, Ford told plaintiff that he would not be allowed to have any minors on his visiting list, including his son, because of the nature of his conviction and because he would not participate in sex offender treatment. (Plaintiff denies that he refused to participate altogether. Rather, he insisted only that he would not watch videos.) In the presentence investigation report that he prepared, Ford had not recommended an age limitation on plaintiff's visitors and the court did not order such a limitation. In October 1998, Ford told plaintiff, "[W]hile I appreciate your religious beliefs and the fact that you cannot forfeit those beliefs, my responsibility is the safety of the community." Plaintiff appealed the decision and it was reversed.

B. Defendant Randy Freihoefer

Defendant Randy Freihoefer is a corrections field supervisor for the Wisconsin

Department of Corrections. His duties include supervising probation and parole agents. Freihoefer supervised defendants Ford and Kara Rheingans from 1993 until November 2002. Defendant Freihoefer modified plaintiff's prison visiting list, home visit privileges and church visit privileges at various times after consulting with department management and plaintiff's agents. Eventually, Freihoefer allowed plaintiff to attend church services.

C. Defendant Kara Rheingans

When plaintiff was released in 2000, defendant Kara Rheingans became plaintiff's parole agent. She photographed plaintiff without his consent. It is against plaintiff's religious beliefs to have his picture taken. The picture was placed on Wisconsin's online sex offender registry.

After plaintiff was released, he was required to live at ATTIC Transitional Living Center in Baraboo, Wisconsin. In April 2000, defendant Rheingans told plaintiff that he could return to live with his family by September 2000, but plaintiff was not allowed to leave at that time. After plaintiff's daughter was born in July 2001, Rheingans told him that he would not be able to move home because there were young children there.

During the time plaintiff was at the center, the "standard" amount of time to be kept there was 90 days. To plaintiff's knowledge, no one else was kept at the center close to two years, as he was. Defendant Rheingans required him to wear an electronic monitoring

bracelet during this time; the policy of the Department of Corrections requires that all residents of the ATTIC Center wear electronic monitoring bracelets.

In 2000, defendant Rheingans ordered plaintiff to undergo a second round of sex offender treatment.

Plaintiff first requested permission to attend church services in April 2000, but defendant Rheingans initially denied this request. After plaintiff, his wife and the church pastors had a meeting with Rheingans and defendant Freihoefer, Freihoefer approved chaperoned church visits. Plaintiff's first church visit was in June 2001.

In September 2001, plaintiff asked defendant Rheingans for permission to move to Kentucky. Although initially Rheingans did not object to his request, she later denied it after she learned that electronic monitoring was unavailable in Kentucky. Rheingans believed that in Kentucky, there was a possibility that plaintiff would have unsupervised contact with children. However, plaintiff's wife and his parents would have been available to supervise.

In February 2002, defendant Rheingans withdrew plaintiff's visitation privileges with his children. Rheingans did not allege that plaintiff had violated a rule. Instead, she told him that if she allowed him to continue his visits, it would lead to his permanent return home. In addition, she told him that the decision was consistent with advice from her supervisor, defendant Freihoefer. Two weeks later, Rheingans restored plaintiff's privileges with respect to his son but not his daughter.

At some point, defendant Rheingans told plaintiff that being united with his family would be more "difficult" if he had more children because of the risk that he would sexually assault them. However, she told him that she understood that his religious beliefs might prevent him from using birth control.

At a church service in March 2002, plaintiff unwrapped a piece of candy for a three-year-old girl and held it out in his hand for her to take. Plaintiff was speaking to another adult at this time. Defendant Rheingans was informed of this incident by both plaintiff and others that were present at the church service. Rheingans filed a petition to revoke plaintiff's parole as a result of this incident. She asked that plaintiff be ordered to serve an additional three years and four months. The administrative law judge granted Rheingans's petition to revoke plaintiff's parole, but imposed a sentence of seven months, noting that the time period requested by Rheingans "was not within the realm of reason regarding the standard penalty schedule grid."

Rheingans has stated to plaintiff and his wife that "Amish men are dominant and Amish women have to do what the men say." Rheingans told plaintiff's wife that she could not trust her because Amish women do not speak out against Amish men. Rheingans later told plaintiff's wife that she was a liar. In addition, she told him that "more crimes are committed by Amish people than are ever reported, because the Amish protect each other."

D. Defendant Colleen McCoshen

In 2002, plaintiff requested permission to move from Rock County to Columbia County so that he could live with Connie and Bill Shepard, who are not Amish but are "friendly with the people in the Amish community." This request required the approval of defendant Colleen McCoshen, who is a correction fields supervisor for the Wisconsin Department of Corrections. She is responsible for supervising probation and parole agents in Columbia County. McCoshen denied plaintiff's request, noting that agents had reported to her that the Shepards did not appear to be capable of adequately supervising plaintiff. However, the Shepards have been approved by others in the department of corrections for years. McCoshen also cited her concern that the Shephards' residence was surrounded by several outbuildings, which could provide a location for a sexual assault. In December 2002, plaintiff's parole officer told him that defendant McCoshen had called plaintiff's wife "a little liar."

E. Defendant Christopher Lindloff

Defendant Christopher Lindloff has been plaintiff's parole agent since January 2003. Pursuant to the policy of the Department of Corrections, Lindloff told plaintiff that he should seek and obtain employment. Plaintiff responded that he could not get a job because he did not have a photo ID, which is contrary to his religious beliefs. Lindloff told the case

manager at plaintiff's halfway house that plaintiff had to "do what it takes to get a job, even if that means getting a picture ID or watching videos."

When plaintiff did not obtain employment, defendant Lindloff revoked his social passes. Approximately 20 other residents in plaintiff's halfway house retained their social passes even though they did not have a job and were not looking for one. At least four or five of these residents were supervised by Lindloff. Soon after, plaintiff obtained a position at the halfway house without having a photo ID. He obtained this job without any help from Lindloff.

Defendant Lindloff told plaintiff that he had not informed plaintiff about the job because he had not been aware that it was available. However, plaintiff's new employer told plaintiff that he had informed Lindloff of the opening many times.

F. Defendant Lisa Kenyon

Defendant Lisa Kenyon is a corrections field supervisor for the Wisconsin Department of Corrections; she supervises defendant Lindloff. In January 2003, plaintiff filed a request for an administrative review, in which he wrote that he had been ordered to do various things that were against his religious beliefs. Kenyon wrote back to plaintiff, telling him that he was required to find a job and that he "should strategize with your case manager, your agent, and the Job Center staff to assist you with the parameters you have set

for yourself in terms of employment." She later told him that he was not required to get a photo ID, but he did have to obtain employment.

OPINION

I. MOTION TO DISMISS

A. § 2254 vs. § 1983

Defendants contend that plaintiff's suit must be dismissed because it was brought improperly as a civil action under 42 U.S.C. § 1983 rather than as a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Section 2254 provides a remedy to persons contending that they are "in custody" in violation of the Constitution; § 1983 authorizes civil actions for deprivations of constitutional rights. Although the potential exists for a substantial overlap between the two statutes, the Supreme Court has held on multiple occasions that when a person can obtain relief for a violation of federal law through a petition for a writ of habeas corpus, he may not bring a claim under § 1983 until he has prevailed under § 2254. E.g., Preiser v. Rodriguez, 411 U.S. 475 (1973). Even when a person seeks only damages and not release, habeas corpus remains the sole federal remedy when a ruling in the plaintiff's favor would call into question the validity of his confinement. Heck v. Humphrey, 512 U.S. 477 (1994). Courts refer to the rule in Presier and Heck as the "favorable termination requirement." E.g., Alejo v. Heller, 328 F.3d 930, 937 (7th Cir.

2003); Carr v. O'Leary, 167 F.3d 1124, 1129 (7th Cir. 1999). Challenges to the *circumstances* of confinement rather than the confinement itself cannot be remedied by a petition for a writ of habeas corpus and therefore may be brought as an action under § 1983. Muhammad v. Close, 124 S. Ct. 1303 (2004).

In applying these principles to the facts of this case, it is clear that plaintiff's claim against defendants Ford and Freihoefer for restricting his visiting privileges while in prison would not be preempted by § 2254. This claim is not a challenge to the fact or duration of plaintiff's confinement but to his conditions of confinement. See Overton v. Bazzetta, 539 U.S. 126 (2003) (considering prison visitation restriction under § 1983).

The analysis is not as straightforward with respect to plaintiff's challenges to the events that occurred while he was on parole. There is no question that a parolee is still "in custody" for the purpose of § 2254 because his liberty is still restrained. Jones v. Cunningham, 371 U.S. 236 (1963). However, plaintiff is not challenging his conviction, the fact that he is on parole or the length of his sentence, but only various restrictions placed on him, suggesting that habeas corpus might not be the proper route to seek relief. Nevertheless, the Court of Appeals for the Seventh Circuit has stated that, in the context of probation and parole, "the distinction between the fact of confinement and the conditions thereof is necessarily blurred." Drollinger v. Milligan, 552 F.2d 1220, 1225 (7th Cir. 1977). Because a parolee's confinement is defined not by his placement in a prison but by various

lesser restrictions on his liberty, a challenge to even one condition of parole is, according to the court of appeals, a challenge to the parolee's custody. Williams v. Wisconsin, 336 F.3d 576, 579 (7th Cir. 2003). Accordingly, a challenge to a parole or probation condition must be brought first in a habeas corpus petition before a § 1983 action can be maintained.

The court of appeals has made it clear that the rule in Drollinger and Williams is not limited to restrictions on a parolee's freedom of movement; it extends to all probation or parole conditions. Although Williams involved a restriction on international travel, the conditions at issue in Drollinger included requirements to support the plaintiff's daughter and attend church and prohibitions on associating with particular people and accepting gifts. Interestingly, under the approach of Drollinger and Williams, some restrictions that a prisoner could challenge under § 1983, a parolee would have to challenge first under § 2254, making it easier for a prisoner to recover money damages for a constitutional violation in some situations than a parolee. For example, if the plaintiff in Drollinger had been a prisoner, she could have challenged the requirement to attend church directly under § 1983. However, because she was on parole, she was required to exhaust her state remedies and then bring a petition for habeas corpus.

Applying Drollinger and Williams to the facts of this case, I must conclude that he is required to bring each of his challenges to the various restrictions and requirements defendants placed on him while on parole in a petition for habeas corpus. This disposes of

the vast majority of plaintiff's claims: his retention at the ATTIC Center, the limitations on his visitation with his children and his attendance at church services while on parole, the denial of his requests to relocate and the requirements to use birth control and have his picture taken.

A potential wrinkle in this case is the fact that a habeas corpus petition could be unavailable to challenge many of the conditions that are at issue in this case because plaintiff is no longer subject to them. Although plaintiff is still on parole and thus is still "in custody," his claims might be moot if the restrictions of which he complains have since been lifted. This problem would apply to plaintiff's challenge of his confinement at the ATTIC Center, the initial restrictions on plaintiff's church visits and visits with his children and the rescission of his social passes. (Although the proposed facts are not clear on this point, I presume that defendant Lindloff returned plaintiff's social pass privileges once plaintiff obtained employment.)

Of course, there is a possibility so long as plaintiff is on parole that a particular restriction will be imposed again. Although this possibility would likely be sufficient to defeat a mootness challenge in a § 1983 action, Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resournces, 532 U.S. 598, 609 (2001), it may not be sufficient to sustain a petition for habeas corpus. The Supreme Court has held that when a petitioner is no longer subject to confinement, he must show that he still

experiences "collateral consequences" as a result of his confinement, at least when he is challenging past confinement while on parole. Spencer v. Kemna, 523 U.S. 1 (1998) (habeas corpus petition challenging parole revocation procedures was moot when reincarceration was finished).

A moot habeas petition could affect the availability of relief under § 1983. The court of appeals has held that "a prisoner may bring a § 1983 claim 'challenging the conditions of his confinement where he is unable to challenge the conditions through a petition for habeas corpus.'" DeWalt v. Carter, 224 F.3d 607, 613 (7th Cir. 2000) (quoting Jenkins v. Haubert, 179 F.3d 19, 21 (2d Cir. 1999)). However, neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has decided whether a *moot* habeas petition may be brought as a § 1983 action. DeWalt was a case involving a challenge to prison discipline that did not affect the length of the prisoner's sentence; the court said that the prisoner could pursue a § 1983 claim because he was not challenging the fact or length of his confinement. The facts in this case present a much different situation.

In concurring opinions, some Justices have suggested that a moot habeas petition could open the door for a civil rights action. E.g., Spencer, 523 U.S. at 21 ("Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's 'broad reach.'") (Ginsburg, J., concurring); Heck, 512 U.S. at 500 (suggesting that " individuals . . . who were

merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences" should be permitted to bring damages actions under § 1983) (Souter, J., concurring).

Under Justice Souter's rationale, an individual would be permitted to bring a § 1983 action when his habeas petition is moot *if* he had a good reason for not first obtaining relief under § 2254, perhaps because he was unaware of the constitutional violation while in custody or he tried to bring a habeas petition but his confinement was too short to permit expeditious litigation before it expired. This is the view adopted by the Court of Appeals for the Ninth Circuit. Nonette v. Small, 316 F.3d 872 (9th Cir. 2002); see also Guerrero v. Gates, 357 F.3d 911 (9th Cir. 2004) (no § 1983 action permitted when plaintiff could have brought timely habeas petition but failed to do so). Regardless of the proper resolution of this issue, I need not resolve it in this case because plaintiff has neither argued that habeas corpus would be unavailable to him or that, if it were, his failure to bring a habeas petition would be justified. Accordingly, plaintiff's challenges to his parole conditions must be dismissed without prejudice to his refiling them after he has successfully challenged the conditions in a petition for a writ of habeas corpus brought under 28 U.S.C. § 2254.

Two of plaintiff's parole-related claims do not involve a challenge to his parole conditions: his claim that defendant Rheingans filed a petition to revoke his parole and

recommended a prison sentence of three years and four months because of plaintiff's religion and his claim that defendant Lindloff refused to help plaintiff find a job. Although the claim against Rheingans does not challenge a parole condition, it, too, should have been brought in a habeas corpus action under § 2254 because a ruling in plaintiff's favor would call into question the validity of his revocation. If plaintiff could prove that his parole was revoked because of his religion and not because he violated his parole conditions, this would show that his revocation was unlawful. Barton v. Malley, 626 F.2d 151 (10th Cir. 1980) (parole revocation may not be based on parolee's race, religion or exercise of constitutional rights); cf. United States v. Armstrong, 517 U.S. 456, 464 (1996) (decision to prosecute may not be based on a person's race or religion). The favorable termination rule from Heck is not limited to challenging convictions; it applies to parole revocations as well. Spencer, 523 U.S. at 17. Accordingly, plaintiff's claim that defendant Rheingans sought to revoke his parole because he is Amish must be dismissed as well.

B. Wisconsin Department of Corrections

It is not clear why plaintiff has named the Department of Corrections as a defendant. To the extent that he means to argue that his parole conditions were the result of the policy of the department, these claims are barred by 28 U.S.C. § 2254. To the extent that plaintiff has any remaining claims against the department, I agree with defendants that neither a state

nor a state agency is a "person" within the meaning of 42 U.S.C. § 1983 and thus cannot be sued under the statute. Will v. Michigan Department of State Police, 491 U.S. 58 (1989); Ryan v. Illinois Department of Children and Family Services, 185 F.3d 751, 758 (7th Cir. 1999). Plaintiff argues that the rule of Will applies only for money damages and not for injunctive relief, which he is seeking in this case, but he misunderstands the Court's holding. A state agency is either a "person" under § 1983 or it is not. The statute does not define the term differently depending on the type of remedy the plaintiff is seeking. If a plaintiff wishes to obtain injunctive relief, he must sue a public official in his or her official capacity. Powers v. Summer, 226 F.3d 815, 819 (7th Cir. 2000). Accordingly, plaintiff's claims against the department must be dismissed.

II. MOTION FOR SUMMARY JUDGMENT

Two claims remain that are not barred by the favorable termination rule: plaintiff's claim that defendants Ford and Freihoefer restricted his visitation privileges while he was in prison and his claim that defendant Lindloff refused to help him find employment. (An initial problem with plaintiff's claim against Freihoefer is that plaintiff has not proposed any specific facts about what Freihoefer did to him. The facts show only that Freihoefer "modified" plaintiff's prison visiting list; plaintiff has not adduced any evidence specifying *how* Freihoefer modified any of plaintiff's privileges. However, I will assume for the purpose

of this opinion that Freihoefer was personally involved in Ford's decision to prohibit plaintiff from receiving visits from minors, including his children.) Although plaintiff did not make it clear in his brief, I will assume that he means to argue that both of these actions violated his rights to due process, equal protection and free exercise of religion.

Defendants argue that they are entitled to qualified immunity on plaintiff's claims because there is no clearly established law that their conduct was unconstitutional. Hope v. Pelzer, 536 U.S. 730 (2002). In any case in which the defendants assert a qualified immunity defense, the court must first determine whether the facts viewed in the light most favorable to the plaintiff establish a constitutional violation. Id. at 736.

A. Due Process

Plaintiff does not specify whether he is asserting that defendants failed to provide him with sufficient procedural protections (a procedural due process claim) or that defendants' actions would have violated his rights regardless of the procedures implemented (a substantive due process claim). Zinermon v. Burch, 494 U.S. 113, 125 (1990) (due process both guarantees fair procedures when government deprives individual of life, liberty or property and prohibits certain government actions regardless of fairness of procedures used). To the extent that plaintiff is asserting a procedural due process claim, the Supreme Court has made it clear that the liberty interests of prisoners are "generally limited to freedom from

restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted). Plaintiff has not argued or adduced any evidence to show that the restrictions imposed on him while he was in prison meet this test. See Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 460 (1990) (restrictions on visitation privileges of inmates does not implicate liberty interest).

Once a prisoner is released on parole, the due process clause does require certain procedural protections before the parole may be revoked. Morrissey v. Brewer, 408 U.S. 471 (1972). However, I have concluded that plaintiff's challenge to his parole revocation should have been brought in a habeas corpus petition. Plaintiff's only remaining parole-related claim is defendant Lindloff's failure to notify him about the availability of a job. Even if such an action did implicate a liberty interest (which is a very generous assumption), plaintiff fails to explain how additional procedures would have prevented whatever deprivation occurred. See Washington v. Harper, 494 U.S. 210 (1990) (no procedural due process violation when state procedures are adequate).

With respect to a substantive due process claim, defendant Lindloff's failure or refusal to help plaintiff find a job may have been a breach of Lindloff's duties as a parole officer, but it was not a violation of plaintiff's substantive due process rights. The due process clause

prohibits government interference in certain aspects of life; it does not impose an affirmative duty on the government to assist individuals in making their lives better. DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) (due process clause does not impose affirmative duty on government to assist individuals).

The Supreme Court has assumed that prisoners retain some right of familial association. Overton, 539 U.S. 126. However, to the extent that plaintiff did retain this right, any restrictions on plaintiff's visitation would be scrutinized under the test set forth in Turner v. Safley, 482 U.S. 78, 89 (1987), which asks whether the restriction is reasonably related to a legitimate penological interest. Plaintiff does not deny that defendants have a legitimate interest in preventing him from reoffending or that making visits with minors contingent on successfully completing treatment is a rational means of furthering that interest. Id. Further, plaintiff has not even attempted to meet his burden of showing that he had no other means of communicating with his family or that defendants could easily further their interest with less restrictive means. Id. at 90-91 (holding that it is inmate's burden to "point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests"). In fact, plaintiff does not even acknowledge that Turner provides the controlling framework for this claim. Instead, he argues only that prisoners do not forfeit all of their constitutional rights while in prison. Although this observation is true, such a general proposition provides little support for plaintiff's particular

claim. Accordingly, defendants' motion for summary judgment will be granted with respect to plaintiffs claims under the due process clause.

B. Free Exercise of Religion

Of plaintiff's two remaining claims not barred by § 2254, the only one that would even arguably implicate his rights under the free exercise clause is his claim that defendants Ford and Freihoefer restricted his visitation privileges because he would not watch videos, an activity is contrary to his religious beliefs. (Defendants deny that they required plaintiff to watch videos. They maintain that they modified plaintiff's treatment program so that he could complete it without violating his religious beliefs. However, on a motion for summary judgment, I must view the facts in the light most favorable to the non-moving party. Butera v. Cottey, 285 F. 3d 601, 605 (7th Cir. 2002).)

Plaintiff does not argue that defendants included videos in the treatment program for the purpose of suppressing the religious beliefs of Amish prisoners. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."). Generally, rules that are neutral and generally applicable do not violate the free exercise clause even if they have the incidental effect burdening religious beliefs.

Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990); Goshtasby v. Board of Trustees of Univ. of Ill., 141 F.3d 761, 769 (7th Cir. 1998). In other words, under Smith, the government is not obligated to accommodate religious beliefs so long as it treats religious adherents the same as everyone else. Endres v. Indiana State Police, 349 F.3d 922, 924 (7th Cir. 2003).

However, the court of appeals has suggested that, in the prison context, the controlling precedent is O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), rather than Smith. Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir. 1999). Under O'Lone, courts apply the same test to burdens on a prisoner's free exercise of religion as they do to burdens on his speech: whether the restriction is reasonably related to a legitimate penological interest. Thus, under Sasnett and O'Lone, prisoners do have a limited right to religious accommodation, a conclusion that leads to the peculiar result of giving prisoners a more expansive right under the free exercise clause than non-prisoners have.

To the extent that plaintiff's free exercise claim is governed by O'Lone (the same test from Turner), plaintiff's free exercise claim still fails because, again, he has not even tried to show that defendants' actions stifled his ability to exercise his religion or that there were easy alternatives that defendants could have employed that would have accommodated his religious beliefs without undermining defendants' legitimate interests or causing an undue burden. Defendants' motion for summary judgment will be granted with respect to

plaintiff's free exercise claims.

C. Equal Protection

If plaintiff was denied employment assistance or visitation privileges because he is Amish, this would support a claim for a violation of his right to equal protection of the laws under the Fourteenth Amendment. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (recognizing equal protection claim based on religion). However, this claim fails because plaintiff has not adduced any evidence that defendants were motivated by religious animus. As noted above, there is no indication that defendants made videos part of the treatment program out of a desire to coerce Amish prisoners into acting against their religion. Although I must accept plaintiff's averment that defendants Ford and Freihoefer refused to accommodate his request to be exempt from viewing videos, a refusal to provide special treatment to plaintiff does not give rise to an inference that the refusal was based on religious animus. If plaintiff had adduced evidence that other, non-Amish prisoners were given exemptions or accommodations, this might support his claim. In the absence of any such evidence, however, defendants' motion for summary judgment on this claim must be granted.

I reach the same conclusion with respect to plaintiff's claim against defendant Lindloff. An initial question on this claim is whether a failure to receive assistance in seeking

employment is an actionable injury under the equal protection clause, particularly in this case where plaintiff obtained the job that defendant Lindloff did not tell him about. Swick v. City of Chicago, 11 F.3d 85, 87 (7th Cir. 1993) ("The maxim de minimis non curat lex retains force even in constitutional cases, even in civil rights cases. Its particular function is to place outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a federal case out of.") (Citations omitted.)

Assuming, however, that plaintiff could at least recover nominal damages for differential job-seeking assistance, he points to no evidence that defendant Lindloff gave other parolees more assistance or that Lindloff would have done more to help him if he had not been Amish. Plaintiff's only evidence on this claim is a hearsay statement that plaintiff's current employer had told Lindloff about the job opportunity before plaintiff learned about it from another source. (Although plaintiff is using the statement for the truth of the matter asserted, I may consider it because defendants have not objected to its admissibility. United States v. Haynie, 179 F.3d 1048, 1050 (7th Cir. 1999).) At most, this evidence shows that Lindloff did not do as much for plaintiff as he could have. It does not support the drawing of a reasonable inference that Lindloff's failure to provide as much assistance as plaintiff wanted him to was a result of animus against the Amish.

Plaintiff has not shown that there is a genuine issue for trial on any of his claims.

Even if I construe the facts in favor of plaintiff as I must, he has not established a violation of his constitutional rights. It is therefore unnecessary to consider whether plaintiff's rights were clearly established. Defendants' motion for summary judgment on plaintiff's remaining claims against Ford, Freihoefer and Lindloff will be granted.

ORDER

IT IS ORDERED that

1. The motion to dismiss filed by defendants Wisconsin Department of Corrections, David Ford, Randy Freihoefer, Kara Rheingans, Colleen McCoshen, Christopher Lindloff and Lisa Kenyon is GRANTED with respect to plaintiff Daniel Yoder's claims that

(1) defendant Freihoefer restricted plaintiff's home visiting privileges and church visit privileges, in violation of his rights to due process, free exercise of religion and equal protection;

(2) defendant Rheingans required plaintiff to be photographed, in violation of his rights to due process, free exercise of religion and equal protection;

(3) defendant Rheingans kept plaintiff at the ATTIC Transitional Living Center for two years and required him to undergo additional treatment while refusing his requests to return home and move to other locations, in violation of his rights to due

process, free exercise of religion and equal protection;

(4) defendant Rheingans denied him permission to attend church services until June 2001, in violation of his rights to due process, free exercise of religion and equal protection;

(5) defendant Rheingans withdrew plaintiff's visitation privileges with his children, in violation of his rights to due process, free exercise of religion and equal protection;

(6) defendant Rheingans required plaintiff to use birth control, in violation of his rights to due process, free exercise of religion and equal protection;

(7) defendant Rheingans filed a petition to revoke plaintiff's parole, in violation of his rights to due process, free exercise of religion and equal protection;

(8) defendant Colleen McCoshen denied him permission to move in with the Shepards, in violation of his rights to due process, free exercise of religion and equal protection;

(9) defendant Lindloff revoked plaintiff's social passes, in violation of his rights to due process, free exercise of religion and equal protection;

(10) defendants Lindloff and Kenyon required plaintiff to have photo identification, in violation of his rights to due process, free exercise of religion and equal protection.

These claims are DISMISSED without prejudice to plaintiff's refiling them after he has obtained a writ of habeas corpus under 28 U.S.C. § 2254.

2. Defendants' motion to dismiss plaintiff's claims against defendant Wisconsin Department of Corrections is GRANTED; the department is not a "person" amenable to suit under 42 U.S.C. § 1983.

3. The motion for summary judgment filed by defendants is GRANTED with respect to plaintiff's claims that

(1) defendants Ford and Freihoefer restricted his visitation privileges while in prison, in violation of his rights to due process, free exercise of religion and equal protection;

(2) defendant Lindloff refused to help him find employment in violation of his rights to due process, free exercise of religion and equal protection.

4. Defendants' motion to stay discovery is DENIED as moot.

5.. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 11th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge