

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

JOSE A. ALICEA, JESSICA BARRERA
and N.A.,

Plaintiffs,

v.

EDWARD F. WALLS, CINDY O'DONNELL
and WILLIAM POLLARD,

Defendants.

OPINION and ORDER

13-cv-302-bbc

Plaintiffs Jose Alicea, Jessica Barrera and their minor child N.A. are proceeding in this joint civil complaint raising claims against prison officials for denying prison visitation. The parties have filed an amended complaint, dkt. #9, which I will consider the operative pleading in this case. Plaintiff Alicea has paid the filing fee he owes as a prisoner and plaintiff Barrera is proceeding in forma pauperis. The next step is to screen the 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. §§ 1915 & 1915A.

In addressing a pro se complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). Having reviewed the complaint, I conclude that plaintiffs may proceed on a claim that prison officials are denying their First Amendment right of association. Also, I will set briefing on plaintiffs' motion for

preliminary injunctive relief.

In their amended complaint, plaintiffs allege the following facts.

ALLEGATIONS OF FACT

Plaintiff Jose Alicea is a prisoner in the state of Wisconsin Department of Corrections system who, at all times relevant to this complaint, was incarcerated at the Waupun Correctional Institution. Alicea is the father of plaintiff N.A., a minor. Plaintiff Jessica Barrera is N.A.'s mother and legal custodian.

In August 2012, plaintiff Alicea submitted a form requesting approval for visitation with plaintiffs Barrera and N.A. Previously, plaintiff was convicted of first-degree reckless homicide in the death of minor child N.D., the biological son of Barrera (but not of Alicea). Before a recommendation on plaintiff's request was issued, plaintiff's social worker conducted an investigation. Alicea's parole agent, an Office of Victim Services staff member and "the ADR agent" all supported Alicea's visitation request. In reliance on these recommendations and her own analysis, the social services supervisor provisionally recommended approval of the request, pending further discussion with the warden, defendant William Pollard.

On November 13, 2012, defendant Pollard denied plaintiff Alicea's visitation request in view of his offense history. Alicea filed an inmate grievance regarding the denial. Defendant Pollard dismissed the grievance. Alicea appealed, but his appeal was denied by defendant Cindy O'Donnell, acting as defendant secretary Edward Walls's designee. Plaintiff Barrera filed her own appeal to defendant Pollard. Plaintiffs do not explain what

happened in the appeal; I presume that it was denied as well.

OPINION

A. Right of Association

I have concluded in the past that prisoners retain a limited First Amendment 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 that standard, the question is whether the restriction on visitation is reasonably related to a legitimate penological interest. The same standard applies in any case involving prison administration, even when, as in this case, the rights of nonprisoners are involved. Thornburgh v. Abbott, 490 U.S. 401, 411 n.9 (1989).

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, although plaintiff Alicea's reckless homicide conviction raises obvious questions about the wisdom of child visitation, I cannot make a determination that the restriction is justified at this point. Therefore, I will allow plaintiffs to proceed on this claim, at least against defendants Pollard and O'Donnell. Plaintiffs do not allege that defendant Secretary Walls was personally involved in the denial of visitation (rather, defendant O'Donnell acted on behalf of Walls), so I will dismiss him from the case. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003) (42 U.S.C. § 1983 requires "personal involvement" in an alleged constitutional deprivation for a defendant to be liable).

Going forward, plaintiffs should be aware that courts "must accord substantial deference to the professional judgment of prison administrators," Overton, 539 U.S. at 132. Thus, if defendants come forward with "a plausible explanation" for their actions, Singer v. Raemisch, 593 F.3d 529, 536 (7th Cir. 2010), plaintiffs may be required to come forward with evidence showing that it would be unreasonable to believe that the visits 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. Preliminary Injunctive Relief

Finally, I note that plaintiffs include in their amended complaint a request for preliminary injunctive relief. Under this court’s procedures for obtaining a preliminary injunction, a copy of which is attached to this order, plaintiffs must file with the court and serve on defendants a brief supporting their claims, proposed findings of fact and any evidence they have to support their request for relief. Plaintiffs may have until December 5, 2013 to submit these documents. Defendants may have until the day their answer is due in which to file a response. I will review the parties’ preliminary injunction submissions before deciding whether a hearing will be necessary.

Plaintiffs should be aware that the bar for obtaining a preliminary injunction is significantly higher than it is for obtaining leave to proceed. In their proposed findings of fact, plaintiffs will have to lay out the facts of their case in detail. Plaintiffs will have to show that they have some likelihood of success on the merits of their claim and that irreparable harm will result if the requested relief is denied. If they make both showings, the court will move on to consider the balance of hardships between plaintiffs and defendants and whether an injunction would be in the public interest, considering all four factors under a “sliding scale” approach. In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997).

ORDER

1. Plaintiffs Jose Alicea, Jessica Barrera and N.A. are GRANTED leave to proceed on a claim that defendants William Pollard and Cindy O'Donnell violated their First Amendment right of association.

2. Plaintiffs are DENIED leave to proceed on any claims against defendant Edward Walls and defendant Walls is DISMISSED from the case.

3. Plaintiffs may have until December 5, 2013, in which to file a brief, proposed findings of fact and evidentiary materials in support of their motion for a preliminary injunction. Defendants may have until the date their answer is due to file materials in response.

4. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiffs' amended 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 plaintiffs' complaint if it accepts service on behalf of the state defendants.

6. For the time being, plaintiffs must send defendants a copy of every paper or document that they file with the court. Once plaintiffs have learned what lawyer will be representing defendants, they should serve their lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiffs unless plaintiffs show on the court's copy that they have sent a copy to defendants or to defendants' attorney.

7. Plaintiffs should keep a copy of all documents for their own files. If plaintiffs do

not have access to a photocopy machine, they may send out identical handwritten or typed copies of their documents.

Entered this 14th day of November, 2013.

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