IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CAROLYN ZIMMERMAN,

OPINION AND ORDER

Plaintiff,

13-cv-424-bbc

v.

PETER ERICKSEN, DANIEL WESTFIELD,
WILLIAM POLLARD and
CORRECTIONAL OFFICER POLZAR,

Defendants.

- -

Pro se plaintiff Carolyn Zimmerman has filed a proposed complaint under 42 U.S.C. § 1983 in which she alleges that each of the defendants are prison officials who refused to allow her to visit a prisoner with whom she had a relationship, in violation of her rights to equal protection, free speech and intimate association. Because plaintiff is proceeding in forma pauperis, I must screen her complaint to determine whether it states a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2). Having reviewed the complaint, I conclude that plaintiff may proceed on her claims that defendants violated her rights to free speech and intimate association, but I am dismissing her claim under the equal protection clause.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). In her complaint,

plaintiff fairly alleges the following facts.

ALLEGATIONS OF FACT

In November 2009 plaintiff Carolyn Zimmerman arrived at the Green Bay Correctional Institution to visit a particular prisoner named AT. (I am using the prisoner's initials rather than his full name because I do not know whether the prisoner wishes to be associated with the lawsuit or is even aware of it.) Defendant Polzar, a correctional officer, was sitting in a booth in the lobby. Plaintiff told Polzar the purpose of her visit and provided her state identification card. After punching some keys on his computer and looking at the screen, Polzar told plaintiff that defendant Peter Ericksen, the security director, had suspended her visitation privileges with AT. Polzar refused to allow plaintiff into the prison.

Two days later, plaintiff spoke to defendant Ericksen, who asked plaintiff whether she knew why AT was in prison and that he would be in prison until he died. Ericksen said that plaintiff "should find someone else." After Ericksen asked plaintiff about the content of her conversations with AT and plaintiff said that they discussed personal matters, Ericksen told plaintiff that she would be criminally charged with conspiring with AT to smuggle drugs into the prison and attempting to help AT escape. (Previously, prison officials had conducted an investigation into these matters, but they never disciplined AT.) Ericksen knew that plaintiff had not done anything wrong, but he suspended her visitation privileges because he disapproved of her relationship with AT. However, he "did not suspend other visitors'

visitation for that reason."

Defendant Ericksen suspended plaintiff's visitation privileges for six months. Defendant William Pollard, the warden, approved this decision.

In July 2010, defendant Ericksen told plaintiff that her visitation privileges would be suspended for an additional year, again on the false ground that plaintiff had attempted to smuggle drugs into the prison and help AT escape. The real reason for the extension was that plaintiff had complained about the initial decision to suspend her visitation privileges. Defendant Daniel Westfield, the security chief, approved this decision. Plaintiff complained to defendant Pollard, but he did not respond.

In September 2010, plaintiff complained to William Grosshans, the administrator for the Division of Adult Institutions. In October 2010, Grosshans lifted plaintiff's visitation restriction. Even then, defendants Ericksen and Pollard refused to restore plaintiff's visitation privileges until plaintiff contacted the prison's visiting coordinator.

OPINION

I understand plaintiff to contend that defendants violated her constitutional rights in three ways: (1) all defendants violated her right of intimate association by suspending her visitation privileges with prisoner AT, approving that decision or enforcing it; (2) defendants Ericksen, Pollard and Westfield violated her right to free speech when they extended the suspension for an additional year because she complained about the initial suspension; and (3) all defendants violated her right to equal protection of the laws by

suspending her visitation privileges but not others'. I will consider each claim in turn.

A. Intimate Association

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 that standard, the question is whether the restriction on plaintiff's 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, I cannot make that determination from plaintiff's allegations, so I will allow her to proceed on this claim.

I give plaintiff a few words of caution. First, plaintiff 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, 490 U.S. 401 (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, plaintiff may be required to come forward with evidence showing that it would be unreasonable to believe that her 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).

Second, plaintiff alleges in her brief that defendants did not actually suspect her of attempted drug smuggling or escape, but only used those justifications as a pretext for their disapproval of plaintiff's and AT relationship. However, in Hammer v. Ashcroft, 570 F.3d

798, 803 (7th Cir. 2009), the court stated that a prison official's actual reasons for taking a particular action are irrelevant under Turner. Rather, Turner requires "an objective inquiry": "whether a rule is rationally related to a legitimate goal." Id. Thus, under Hammer, plaintiff cannot prevail on her claim simply by showing that defendants' reasons are pretextual. Rather, the ultimate question is whether the decision was reasonable, regardless what defendants' "real" reasons were for suspending plaintiff's visitation privileges.

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. Retaliation

Prison officials may not retaliate against a person for exercising a constitutional right. Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006). The First Amendment guarantees both the right of free speech and the right to petition the government for redress of grievances, which include the right to complain about prison conditions, Powers v. Snyder, 484 F.3d 929, 932 (7th Cir. 2007); Pearson, 471 F.3d at 740-41, within the limitations imposed by Turner. Watkins v. Kasper, 599 F.3d 791, 795-96 (7th Cir. 2010).

Plaintiff alleges that defendants extended the suspension of her visitation privileges

because she complained about the initial suspension. This is sufficient to state a claim upon which relief may be granted. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). See also Swanson v. Citibank, NA, 614 F.3d 400 (7th Cir. 2010) (complaint alleging discrimination is sufficient if it "identifies the type of discrimination that she thinks occur[red] . . ., by whom . . . and when").

In going forward with this claim, plaintiff should know that she has a difficult road ahead of her. A claim for retaliation presents a classic example of a claim that is easy to allege but hard to prove. Many plaintiffs make the mistake of believing that they have nothing left to do after filing the complaint, but that is far from accurate. A plaintiff may not prove her claim with the allegations in her complaint, Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001), or her personal beliefs, Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007).

Plaintiff will have to come forward with *evidence* either at summary judgment or at trial that defendants extended the suspension of her visitation privileges because of the exercise of her constitutional rights. Further, she will have to show that *each* defendant named on this claim had a retaliatory motive, including the defendants whose only involvement was to approve the decision. Ashcroft v. Iqbal, 556 U.S. 662 (2009) ("[P]urpose rather than knowledge is required to impose . . . liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.").

Evidence of unlawful intent may include more favorable treatment to visitors who did

not engage in similar speech, cf. Scaife v. Cook County, 446 F.3d 735, 739 (7th Cir. 2006), suspicious timing or statements by a defendant suggesting that he was bothered by plaintiff's complaint. E.g., Mullin v. Gettinger, 450 F.3d 280, 285 (7th Cir. 2006); Culver v. Gorman & Co., 416 F.3d 540, 545-50 (7th Cir. 2005). Plaintiff may also support her claim by coming forward with evidence that defendants' stated reasons for extending the suspension are pretextual, meaning that they are lies covering up their true retaliatory motives.

Even when the exercise of the right and the adverse action occur close in time, this is rarely enough to prove an unlawful motive without additional evidence. Sauzek v.Exxon Coal USA, Inc., 202 F.3d 913, 918 (7th Cir. 2000) ("The mere fact that one event preceded another does nothing to prove that the first event caused the second."). If plaintiff does not have evidence necessary to prove her claim and does not have a reasonable basis to believe that she will be able to obtain such evidence after an opportunity for discovery, she should not continue to prosecute this claim.

C. Equal Protection

With respect to her equal protection claim, plaintiff does not contend that defendants suspended her visitation privileges because of her race or any other reason subject to heightened scrutiny. Plaintiff's only allegation is that defendants did not suspend the privileges of other visitors who had relationships with prisoners. This is what the courts refer to as a "class of one" claim in which the plaintiff alleges that the defendants treated her differently not because she belonged to a particular group, but because of some personal

dislike for the plaintiff. E.g., Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

Plaintiff's allegation is not sufficient to state a claim upon which relief may be granted. First, as I have noted in other cases, it is unlikely that a plaintiff may maintain a class-of-one claim in the prison context. Knowlin v. Gray, No.12-cv-926-bbc, 2013 WL 541525, *3 (W.D. Wis. Feb. 13, 2013); Jackson v. Flieger, 12-cv-220-bbc, 2012 WL 5247275, *4 (W.D. Wis. Oct. 23, 2012); Upthegrove v. Holm, No. 09-cv-206-bbc, 2009 WL 1296969, *1 (W.D. Wis. May 7, 2009). In Engquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008), the Supreme Court held that a plaintiff cannot bring a class-of-one claim under certain circumstances involving discretionary decision making, such as employment. See also Abcarian v. McDonald, 617 F.3d 931, 939 (7th Cir. 2010) ("[I]nherently subjective discretionary governmental decisions may be immune from class-of-one claims."); United States v. Moore, 543 F.3d 891, 898-901 (7th Cir. 2008) (no class-of-one claim for discriminatory prosecution). See also Dawson v. Norwood, 2010 WL 2232355, *2 (W.D. Mich. 2010) ("The class-of-one equal protection theory has no place in the prison context where a prisoner challenges discretionary decisions regarding security classifications and prisoner placement."); Alexander v. Lopac, 2011 WL 832248, *2 (N.D. Ill. 2011) (applying Engquist in prison context); Russell v. City of Philadelphia, 2010 WL 2011593, at *9 (E.D. Pa. 2010) (same). Like the employment context, decisions made in the context of running a prison "by their nature involve discretionary decision-making based on a vast array of subjective, individualized assessments." Engquist, 553 U.S. at 603. A claim about visitation in prison is no exception because it requires prison staff to consider

many factors ranging from concerns about contraband to the visitor's safety to the potential influence of the visitor on the prisoner's behavior.

Even if I assume that plaintiff could bring a class-of-one claim, she could not prevail on such a claim without a showing that she "was intentionally treated differently from other similarly situated individuals and that there was no rational basis for this difference in treatment." Thayer v. Chiczewski, 697 F.3d 514, 531-32 (7th Cir. 2012). At the pleading stage, the plaintiff must "'allege facts sufficient to overcome the presumption of rationality that applies to government classifications.' " St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 639 (7th Cir.2007) (quoting Wroblewski v. City of Washburn, 965 F.2d 452, 460 (7th Cir. 1992)). Plaintiff has not met that standard in this case. It is impossible to infer from the few facts she alleges that defendants did not have a rational basis for their decision. Accordingly, I am dismissing this claim for plaintiff's failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Plaintiff Carolyn Zimmerman is GRANTED leave to proceed on her claims that (1) defendants Peter Ericksen, Daniel Westfield, William Pollard and correctional officer Polzar violated her right of intimate association by suspending her visitation privileges with prisoner AT, approving that decision or enforcing it; and (2) defendants Ericksen, Pollard and Westfield violated her right to free speech when they extended the suspension for an

additional year because she complained about the initial suspension.

2. Plaintiff's claim that defendants violated her right to equal protection of the laws by suspending her visitation privileges but not others' is DISMISSED for her failure to state a claim upon which relief may be granted.

3. For the time being, plaintiff must send defendants a copy of every paper or document that she files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, she should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that she has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for her own files. If she is unable to use a photocopy machine, she may send out identical handwritten or typed copies of her documents.

5. Because plaintiff is not a prisoner, she is not covered by this court's informal service agreement with the Attorney General's office. Therefore, I am sending copies of plaintiff's complaint and this order to the United States Marshal for service on defendants.

Entered this 26th day of July, 2013.

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