IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JOSEPH A. WILLIAMS,

OPINION AND ORDER

Plaintiff,

13-cv-819-bbc

v.

WARDEN ROBERT WERLINGER,
AW MICHELLE AIRSMAN,
STEVEN ROBINSON and MARK STRIGUZL,

Defendants.

- -

Pro se plaintiff Joseph A. Williams contends that his constitutional rights were violated when prison staff members at the Federal Correctional Institution in Oxford, Wisconsin denied him visits and communication with a particular visitor, froze funds he received from that visitor and retaliated against him for his attempts to seek relief over these matters. I dismissed plaintiff's original complaint after screening it under 28 U.S.C. § 1915A because plaintiff failed to identify how any particular defendant was personally involved in violating his rights. However, I gave plaintiff an opportunity to file an amended complaint, which he has now done. Dkt. #14.

After reviewing plaintiff's amended complaint, I conclude that he may proceed on his claims that defendant Robert Werlinger restricted his communication and visitation and froze his prison account, in violation of his right of association under the First Amendment

and his rights to equal protection and due process under the Fifth Amendment. However, I am dismissing the complaint as to all other claims and defendants, for the reasons discussed below. Plaintiff has also moved for assistance in recruiting counsel, but that motion will be denied because it is too early in the case to determine whether counsel will be necessary.

Plaintiff alleges the following facts in his proposed amended complaint.

ALLEGATIONS OF FACT

In December 2012, Karyl Masset came to the Oxford prison to visit plaintiff Joseph A. Williams. Masset did not have identification, which prompted the prison staff members to review Masset's visitor file. This review revealed that Masset had checked a box indicating that she did not know plaintiff prior to his incarceration. Although the prison staff members allowed Masset to visit plaintiff on that day, defendant Warden Robert Werlinger decided that Masset would not be allowed to visit plaintiff thereafter under Federal Bureau of Prisons Program Statement 5267.08, which provides that wardens must approve visitation by any individual with whom the prisoner did not have a relationship prior to incarceration. Werlinger also prohibited plaintiff from communicating with Masset by phone or corresponding with her by letter. Finally, Werlinger froze the funds that Masset deposited in plaintiff's account, and he informed plaintiff that the funds would be returned to Masset. (Plaintiff does not say whether the funds were actually returned.)

Plaintiff did not receive a hearing or other process before these decisions were made. However, he later complained about the decisions to Werlinger during a meeting between

the two. In addition, plaintiff filed a formal grievance, but that grievance was denied initially and on appeal.

Plaintiff says staff members denied him visitation and communication with Masset and froze his accounts on two grounds: he is African American and Masset is Caucasian and they have a significant age difference. Plaintiff says all defendants engaged in a "conspiracy to interfere with civil rights," Plt.'s Am. Cpt., dkt. #14, at 2, but, other than the actions of Werlinger and defendant Steven Robinson, plaintiff does not explain what each person did or said. He says that Robinson told him about the visitation decision and remarked that the "cross on [plaintiff's] neck should be burning through [his] shirt." Id. at 3. Further, plaintiff says that all defendants "humilate[d]" plaintiff by making him the "butt of jokes" and "the point of taunts and ridicule." Id. at 2-3.

"Defendants" prolonged plaintiff's stay in segregation at the Oxford prison in retaliation over his filing grievance procedures about Masset's visitation. In addition, "defendants" ordered his transfer from the Oxford prison in retaliation over his filing this civil action. (He is now located at the Federal Correctional Institution in Forrest City, Arkansas.)

OPINION

A. Personal Involvement

Plaintiff alleges that he was kept longer in segregation and then transferred to a different prison as a result of his filing grievances and this lawsuit. Prison officials may not

retaliate against a person for exercising a constitutional right, such as the rights to free speech and to access the courts. Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006). However, plaintiff has not explained which defendant or defendants may be held personally responsible for the decisions to keep him in segregation and to transfer him to a different prison. In order to state claims under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which plaintiff is attempting to do, plaintiffs must explain the personal involvement of each defendant in each claim. Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009). Plaintiff says only that "defendants" retaliated against him and that they conspired together, without specifying any defendant's individual contribution to the alleged retaliation. Therefore, plaintiff does not specify a responsible defendant or defendants, and he cannot proceed on his retaliation claims. Id.

Plaintiff asserts several other theories for relief: the right to associate, equal protection of the laws and due process. The substance of these claims will be considered in the following sections, but first I must determine whether plaintiff has named a responsible defendant. For each of these claims, plaintiff alleges specifically that defendant Werlinger was responsible for the underlying decision, so plaintiff may proceed against him, to the extent he states a claim. However, plaintiff has alleged nothing about individual actions of the other defendants, except to say that defendant Steven Robinson informed plaintiff of the decisions and made an insulting remark about plaintiff's religion. Neither of these alleged acts states a violation of plaintiff's constitutional rights. Ashcroft, 556 U.S. at 677 (defendant cannot held liable if he is merely messenger or recipient of unlawful decision);

DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000) (verbal harassment by prison staff does not violate the Constitution). Thus, defendants other than Werlinger will be dismissed from the lawsuit.

B. First Amendment

I understand plaintiff to contend that he was denied his right to associate under the First Amendment when he was denied the ability to visit and communicate with Masset. Thornburgh v. Abbot, 490 U.S. 401, 407 (1989) (prisoners have rights to communicate with those outside the prison); Turner v. Safley, 482 U.S. 78, 89 (1987). Prisoners retain First Amendment rights to associate with others, but those rights may be curtailed so long as the limitation is related reasonably to legitimate penological interests. Turner, 482 U.S. at 89.

In determining whether a reasonable relationship exists, the Supreme Court considers four factors: (1) whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; (2) whether alternatives for exercising the right remain to the plaintiff; (3) what effect accommodation of the right will have on prison administration; and (4) whether there are other ways that prison officials can achieve the same penological goals without encroaching on the right. Id. at 90-91. According to the amended complaint and the grievance documents attached to it, Werlinger's stated reason for terminating plaintiff's contact with Masset was because the lack of a prior relationship between plaintiff and Masset suggested that the relationship may be harmful to the prison or public. Because I cannot yet determine whether Werlinger's reasons for restricting

plaintiff's visitation are legitimate or whether they are rationally related to the restriction imposed, I will allow plaintiff to proceed on this claim. E.g., Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009) (unless clear from complaint that reason for curtailing right was "reasonably related to legitimate penological interest," complaint should not be dismissed).

Nevertheless, I note that plaintiff will face several obstacles in proving his case. First, plaintiff should be aware that courts "must accord substantial deference to the professional judgment of prison administrators," Overton v. Bazzetta, 539 U.S. 126, 132 (2003), particularly on matters of security, e.g., Thornburgh, 490 U.S. at 401 (upholding regulation that prohibited prisoners from receiving publications "'detrimental to the security, good order, or discipline of the institution'") (quoting 28 C.F.R. §§ 540.70(b), 540.71(b) (1988)). To prove his case, plaintiff will be required to come forward with evidence showing that it would be unreasonable to believe that Masset's visits posed a threat to security or threatened some other legitimate penological interest. Beard v. Banks, 548 U.S. 521, 532 (2006). On the other hand, defendant 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. 482 U.S. at 89.

Next, plaintiff should be aware that although he believes the prison's justifications for restricting Masset's visitation may be a pretext for prejudice, with respect to plaintiff's First Amendment claim, a prison official's actual reasons for taking a particular action are irrelevant. Rather, Turner requires "an objective inquiry," which means the court asks

"whether a rule is rationally related to a legitimate goal" and whether the decision applied to plaintiff was reasonable. Hammer v. Ashcroft, 570 F.3d 798, 803 (7th Cir. 2009).

C. Equal Protection

1. Race discrimination

Plaintiff is an African American, and he argues that the decisions to deprive him of visitation and access to funds were influenced by his race and the difference between his race and Masset's race (she is Caucasian). These allegations state an equal protection claim under the Fifth Amendment. McNabola v. Chicago Transit Authority, 10 F.3d 501, 513 (7th Cir. 1993) ("To establish a prima facie case of discrimination under the equal protection clause, McNabola was required to show that he 'is a member of a protected class,' that he 'is otherwise similarly situated to members of the unprotected class,' and that he 'was treated differently from members of the unprotected class.'") (quoting McMillian v. Svetanoff, 878 F.2d 186, 189 (7th Cir.1989); Weinberger v. Wiesenfeld, 420 U.S. 636, 655 (1975) ("[T]he Supreme Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

Therefore, I conclude that plaintiff's equal protection claim on the basis of race discrimination may proceed, but I warn plaintiff that discrimination claims are classic examples of claims that are easy to allege but hard to prove. Many pro se 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 his claim with the allegations in his complaint,

Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007).

There are a number of ways that plaintiff may prove his race discrimination claim, but the hurdles are high. Plaintiff may use direct evidence of racial animus, which usually means an admission from the defendant that he made his decision on racial grounds. Williams v. Seniff, 342 F.3d 774, 788 (7th Cir. 2003) ("Mr. Williams can prevail on his equal protection claim by offering direct proof of discriminatory intent . . . ").

Because such direct proof is rare, plaintiff can also prove his claim through indirect methods of proof. For example, plaintiff may adduce evidence that defendant treated similarly situated prisoners who are not African American better than defendant treated him. Chavez v. Illinois State Police, 251 F.3d 612, 636 (7th Cir. 2001). A "similarly situated" prisoner is one who is "'directly comparable' to plaintiff in all material respects." Grayson v. O'Neill, 308 F.3d 808, 819 (7th Cir. 2002). In this case, a "similarly situated" person might be a prisoner who also sought visitation from a person who prison staff members believed the prisoner did not know prior to incarceration. Plaintiff may also prove his claim with evidence that defendant's reasons for his actions are pretextual, Williams, 342 F.3d at 788, that is, a "cover up." Forrester v. Rauland-Borg Corp., 453 F.3d 416, 419 (7th Cir. 2006) ("pretext" is more than just a mistake or a foolish decision; it is a lie covering up a true discriminatory or retaliatory motive).

2. Age discrimination

In addition to race discrimination, plaintiff says that the decisions about his visitation and account would have been different had there not been such an age difference between him and Masset. Although age is not a suspect classification like race, government actors must have a rational reason for treating parties differently on the basis of age. Varner v. Illinois State University, 226 F.3d 927, 931 (7th Cir. 2000) ("Because age is not a suspect classification under the Equal Protection Clause, States may discriminate on the basis of age without offending the Fourteenth Amendment if the challenged age classification is rationally related to a legitimate state interest."). Because plaintiff alleges that age discrimination was the real reason for defendant's restrictions on plaintiff's visitation and communication with Masset, plaintiff has stated a claim.

Nevertheless, plaintiff should be aware that he will be required to show that he "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). Furthermore, if defendant provides a nondiscriminatory reason for his decisions, that reason will be presumed rational, and plaintiff will have to prove facts that overcome this presumption. 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 should consider whether he can prevail despite these obstacles as he proceeds with his case.

D. Due Process

1. Visitation

Plaintiff also contends that he was denied due process when prison staff failed to give him an opportunity to be heard before restricting his communication and freezing his prison account. However, as a prisoner, plaintiff does not have the right to due process for most deprivations of liberty, including limitations on communication with nonprisoners, so he has not stated a due process claim with respect to his loss of visitation and communication rights. Sandin v. Conner, 515 U.S. 472, 484 (1995) (liberty interests for which due process rights attach are limited to "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"); Kentucky Department of Correction v. Thompson, 490 U.S. 454, 461 (1989) ("The denial of prison access to a particular visitor 'is well within the terms of confinement ordinarily contemplated by a prison sentence,' . . . and therefore is not independently protected by the Due Process Clause.") (quoting Hewitt v. Helms, 459 U.S. 460, 468 (1983)); Cherry v. McCaughtry, 49 F. App'x 78, 2002 WL 31408905 (7th Cir. 2002) ("Cherry's temporary inability to visit his fiancée does not implicate a liberty interest.") (citing Sandin, 515 U.S. at 483-84).

2. Trust account

It is less clear whether freezing plaintiff's trust account implicates a liberty or property interest. The Court of Appeals for the Seventh Circuit has not resolved that issue. Campbell v. Miller, 787 F.2d 217, 222 (7th Cir. 1986). The Court of Appeals for the Third Circuit

has held that "assessing" portions of trust accounts implicates a property interest, Burns v. Pennsylvania Department of Correction, 544 F.3d 279, 291 (3d Cir. 2008), but the Court of Appeals for the Tenth Circuit has analyzed the freezing of prisoner accounts under Sandin. Clark v. Wilson, 625 F.3d 686, 691 (10th Cir. 2010) ("[W]e cannot find Clark had a protected property interest in the frozen funds without first applying the Sandin test to his claim."). It is unnecessary to resolve this question at this stage of the proceedings because plaintiff alleges that the money sent to his account by Masset has not only been frozen but will also be returned to her, in which case it would implicate a property interest. Cambell, 787 F.2d at 222.

The next question is whether plaintiff received the process he was due. Although plaintiff's complaint and attached exhibits show that he received postdeprivation process through the grievance procedures, I will assume at this stage of the proceedings that predeprivation process was required. Cf. Cambell, 787 F.2d at 222 (holding that process for freezing plaintiff's account was sufficient because prisoner had notice and predeprivation hearing). Thus, plaintiff will be allowed to proceed on a Fifth Amendment claim for the freezing and holding of monies in his account.

E. Assistance in Recruiting Counsel

Finally, plaintiff asks that the court "appoint" him counsel, dkt. #14, which I construe as a motion for assistance in recruiting counsel because I do not have the authority to appoint counsel in civil cases like this one. It is too early at this stage in the proceedings

to determine whether the complexity of the case or plaintiff's skills in prosecuting it will warrant the assistance of a lawyer. Pruitt v. Mote, 503 F.3d 647, 663 (7th Cir. 2007) ("A judge may justifiably conclude that a pro se plaintiff who can articulate the essential nature of his injury and present his version of the facts does not truly need the services of an attorney in the early stages of the case."). In addition, plaintiff must make reasonable efforts to find a lawyer on his own before the court will intervene. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Plaintiff has not stated whether he has attempted to recruit counsel on his own. To prove that he has made reasonable efforts, he should give the court rejection letters from at least three lawyers. Therefore, plaintiff's motion will be denied without prejudice to his refiling it at a later date.

ORDER

IT IS ORDERED that

1. Plaintiff Joseph A. Williams is GRANTED leave to proceed on his claims that defendant Warden Robert Werlinger (1) restricted plaintiff's visitation and communication with Karyl Masset because of his race and age, in violation of the First Amendment and equal protection component of the Fifth Amendment; and (2) froze his prison account without providing predeprivation process because of his race and age, in violation of the due process clause and equal protection component of the Fifth Amendment;

2. Plaintiff's complaint is DISMISSED as to all other claims and as to defendants AW Michelle Airsman, Steven Robinson and Mark Striguzl for plaintiff's failure to state a

claim against them upon which relief may be granted.

3. Plaintiff's motion for appointment of counsel, dkt. #13, is DENIED without prejudice to his refiling it at a later date.

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

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

6. I am sending copies of plaintiff's complaint and this order to the United States Marshal for service on defendant. Plaintiff should not attempt to serve defendant on his own at this time.

8. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust

fund accounts until the filing fee has been paid in full.

Entered this 2d day of June, 2014.

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