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

PATRICK KELLER,

Plaintiff,

v.

LIZZIE TEGELS, ET AL.,

Defendants.

OPINION and ORDER

Case No. 18-cv-945-wmc

On September 25, 2019, the court denied *pro se* plaintiff Patrick Keller, a prisoner at Jackson Correctional Institution ("Jackson"), leave to proceed on a claim that Jackson officials are violating his right to visitation by continuing to refuse his requests to add his wife and minor children to his visitors list. On October 24, 2019, plaintiff filed a motion to alter or amend the judgment. While Keller brings the motion under Federal Rule of Civil Procedure 59, it is more properly brought under Rule 60(b). For the reasons that follow briefly, the court is granting plaintiff's motion and will allow him to proceed against certain defendants on a constitutional claim related to his right to visitation with his biological children.

OPINION

As previously noted, plaintiff's claim related to his right to visitation is governed by the four-factor test set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). The court further noted that dismissal of claims involving an analysis of the *Turner* standard is disfavored, with the narrow exception of circumstances in which the complaint and its attachments make it clear that the restriction is justified.

Munson v. Gaetz, 673 F.3d 630, 635 (7th Cir. 2012). Based on Keller's allegations, the court concluded that dismissal was appropriate because the court could

> foresee no possibility by which a reasonable trier of fact would infer that JCI's denials of visitation rights were not reasonably related to legitimate penological interests. To the contrary, with respect to the first *Turner* factor, the resolution of plaintiff's grievances and Tegels' September letter to Alicyn confirm that defendants had indisputable reasons for denying Patrick's wife and children visitation, each plainly related to legitimate penological interests set forth in DOC regulations and policies. . . . .
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> While plaintiff was not convicted of causing mental harm to *his* children (as opposed to a non-biological, stepchild also in his case), it would be logical for prison staff to be concerned that his children may also become victims, particularly since the children had apparently been groomed by the defendant and his wife to participate in criminal behavior towards plaintiff's stepdaughter. Indeed, Warden Tegels explained in his September 21 letter to Alicyn that plaintiff's children were indirectly involved with the events comprising the criminal charges, since Patrick allowed them to refer to the victim as "stinky." In short, Tegels and the other defendants handling plaintiff's requests for visitation had multiple, undisputed justifications, grounded in DOC policies, to support what was their discretionary denials of those requests.
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> The remaining *Turner* factors further bolster defendants' denials. Plaintiff has not suggested that he is unable to communicate with Alicyn and his children over the phone or through letter writing, meaning that they still have other means to foster their relationships. As importantly, the denial was explicitly *not* permanent. Indeed, Tegels suggested that plaintiff may seek to reapply to include Alicyn and his children to his visitor list in the future, provided that he make efforts at rehabilitation. Therefore, the second prong is, at best, neutral, but appears to weigh in favor of defendants. Finally, the third and fourth prongs of *Turner* both support defendants' denials. JCI staffing resources would need to be devoted to monitoring plaintiff's visits with Alicyn and his children to ensure their safety and to thwart any further, inappropriate behavior by plaintiff and Alicyn, imposing an adverse impact on the prison. Plaintiff has offered no readily available alternative, further buttressing defendants' denials. *See Stojanovic v. Humphreys*, 309 F. App'x 48, 51-52 (7th Cir. 2009) (affirming judgment in defendants' favor where prisoner challenged denial of visitation with daughter and niece, but prisoner offered no obvious, less restrictive, alternatives).

(9/25/19 Order (dkt. #17) 5-7.)

Now, however, plaintiff claims that he is disputing the factual bases that Jackson officials used to deny his requests to put his two children on his visitation list. Specifically, he claims that (1) Jackson staff improperly concluded that Alicyn made a false representation when she stated that she and Patrick were their daughters' biological parents; and (2) that Warden Tegels incorrectly concluded that his daughters should not be able to visit him because they were involved in the conduct underlying the crime, including referring to the victim as "stinky." Plaintiff further claims that Jackson has an "unwritten policy of denying visitation to all inmates with domestic victims, regardless of their situations." (Dkt. #21 at 3.) He claims that this policy would be unconstitutional, and thus dismissal of his claim would be premature. *Harris v. Donahue*, 175 F. App'x 746, 748 (7th Cir. 2006) (vacating dismissal of a challenge to a visitation policy because the "defendants were never required to explain the basis for their no-visitation policy").

Given that plaintiff alleges that (1) Jackson staff and Tegels made mistaken, or improper, factual determinations with respect to the decision to exclude Patrick's daughters from his visitor list, and (2) an unwritten policy exists that essentially precludes his children from visiting without any consideration by staff, the court will allow him to proceed on a claim related to his children's visitation. Since plaintiff alleges that defendants Tegels, Derus, Solberg, Hakes and Jess were involved in the denials (*see* dkt. #17, at 2), the court will allow him to proceed against these defendants. Plaintiff also names as defendants Dougherty, Hompe, Buesgen and O'Donnell, the inmate complaint examiners that handled his grievance about the denied visitation. Yet ruling against a prisoner on an inmate complaint does not qualify as personal involvement in a constitutional violation, and it is not sufficient to state a claim. *McGee v. Adams*, 721 F.3d 474, 485 (7th Cir. 2013);

George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) ("Ruling against a prisoner on an administrative complaint does not cause or contribute to the violation."); *see also Owns v. Hinsley*, 635 F.3d 950, 953 (7th Cir. 2011) ("Prison grievances procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of Owen's grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim."). Therefore, the court will not grant plaintiff leave to proceed against these individuals, who will be dismissed.

Finally, plaintiff does not address the court's conclusions with respect to his right to visitation with Alicyn. Therefore, the court will not revisit its analysis of his ability to have her name on his visitors' list.

ORDER

IT IS ORDERED that:

1. Plaintiff Patrick Kelly's motion to alter or amend (dkt. #21) is GRANTED.

2. Plaintiff is GRANTED leave to proceed a First Amendment right to association claim related to his ability to have visits with his biological children, against defendant Tegels, Derus, Solberg, Hakes and Jess.

3. Plaintiff is DENIED leave to proceed on any claim related to visitation from Alicyn. Defendants Dougherty, Hompe, Buesgen and O'Donnell are DISMISSED.

4. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to the plaintiff's complaint if it accepts service for the defendants.

5. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be

representing the defendants, he should serve the lawyer directly rather than the defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to the defendant or to the defendants' attorney.

6. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. If plaintiff is transferred or released while this case is pending, it is plaintiff's obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his claims may be dismissed for his failure to prosecute.

Entered this 16th day of September, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge