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United States District Court, D. Rhode Island.

Fred DEWITT
v.
A.T. WALL, Director, Rhode Island Department of Corrections

No. 01–65 T. | July 31, 2001.

Opinion

Report and Recommendation

HAGOPIAN, Magistrate J.

***1** Fred Dewitt, *pro se,* incarcerated at the Adult Correctional Institution, Cranston, Rhode Island, has filed a Complaint pursuant to 42 U.S.C. § 1983 alleging a violation of the rights secured to him by the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution. Plaintiff also appears to assert a claim based upon the so called *Morris* rules, established pursuant to a consent judgement entered in *Morris v. Travisono,* 499 F.Supp. 149 (D.R.I.1970). Plaintiff names as a defendant Ashbel T. Wall, Director of the Rhode Island Department of Corrections.

On February 22, 2001, the defendant filed a motion for summary judgement pursuant to Rule 56 of the Federal Rules of Civil Procedure. The plaintiff objected thereto. On March 30, 2001, defendant's motion for summary judgement was referred to this magistrate judge for a report and recommendation, pursuant to 28 U.S .C. § 636(b)(1)(B).

On April 25, 2001, the plaintiff filed his own motion for summary judgement pursuant to Fed.R.Civ.P. 56. Defendant promptly objected thereto. Plaintiff's motion for summary judgement was referred to this magistrate judge for a report and recommendation on May 5, 2001, pursuant to 28 U.S.C. § 636(b)(1)(B).

For the reasons that follow, I recommend that the defendant's motion for summary judgement be granted on plaintiff's claims under the First, Fifth, Eighth, Ninth, and Fourteenth Amendments. To the extent that plaintiff asserts claims based upon the *Morris* rules, such claims should be dismissed without prejudice. Finally, plaintiff's motion for summary judgement should be denied.

I. Undisputed Facts[1]

Plaintiff Fred DeWitt was arrested on March 31, 1995, and detained at the Adult Correctional Institution("ACI"), in Cranston, Rhode Island, in the Intake Service Center("Intake Service Center" or "Intake"). Plaintiff's detention in the Intake Service Center lasted some twenty eight months. During the plaintiff's detention in Intake, he encountered Pamela Manson, a correctional officer at the Rhode Island Department of Corrections ("DOC"). Ms. Manson was assigned to an observation cubicle in Intake.

When plaintiff was released from the ACI in October 1998, the plaintiff and Ms. Manson began an amorous relationship and soon cohabitated. However, on June 24, 1999, the plaintiff was arrested and again incarcerated at the ACI in Intake.

Upon the plaintiff's return to Intake, Ms. Manson resigned her position as a correctional officer and sought permission from prison officials to visit the plaintiff. George Vose, the then Director of the DOC, denied the request citing security concerns. In October 1999, Plaintiff was released from custody.

In November 1999, following a year long courtship, Ms. Manson and the plaintiff were married. Six months later, in May 2000, plaintiff got into trouble with the law yet again. Plaintiff was arrested and detained at the Intake Service Center at the ACI. While housed at Intake, prison officials refused to allow the newlyweds visitation privileges. However, following the plaintiff's transfer to the Maximum Security Unit at the ACI, plaintiff's visitation privileges with his wife were restored by the warden of that Unit and continued regularly for over six months.

***2** On December 14, 2000, after discovering that Mrs. DeWitt was visiting her husband in the Maximum Security Unit, the Director of the Rhode Island Department of Corrections, Ashbel T. Wall, promulgated a new policy ("policy") at the ACI which prohibits former employees from visiting inmates under a myriad of circumstances.[2] As the policy is applied to the circumstances of the DeWitts, it translates into no visitation privileges between husband and wife. Defendant admits that the discovery that Mrs. DeWitt was visiting her husband in the Maximum Security Unit was the impetus for the new policy, and cite security concerns as their reasons for implementing said policy. Plaintiff, who is currently serving a sentence and has new charges pending, is only able to communicate with his wife by means of the U.S. Mail and the telephone.

Plaintiff has filed suit to seek relief alleging a violation of his First, Fifth, Eighth, Ninth, and Fourteenth Amendment rights. Plaintiff also appears to assert a claim based upon the so called *Morris* rules. Plaintiff seeks to have his visitation privileges with his wife restored.

II. Discussion

A. Summary Judgment Standard

Summary judgement's role in civil litigation is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial". *Garside v. Osco Drug, Inc.,* 895 F.2d. 46, 50 (1st Cir.1990). Summary judgment can only be granted when "the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show there is no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56.

The Rule 56 pavane has a distinctive set of steps. When requesting summary judgement, the moving party must "put the ball in play, averring 'an absence of evidence to support a nonmoving party's case." ' *Garside,* 895 F.2d at 48 (quoting *Celotex v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986)). The nonmovant then must document some factual disagreement sufficient to deflect brevis disposition. Not every discrepancy in the proof is enough to forestall summary judgment; the disagreement must relate to some issue of material fact. *See Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 247–248, 106 S.Ct. 2505, 2509–2510 (1986).

On issues where the nonmovant bears the ultimate burden of proof, he must present definite, competent evidence to rebut the motion. *See id.* at 256–257. This evidence "can not be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a fact finder must resolve at an ensuing trial." *Mack v. Great Atl. & Pac. Tea Co.,* 871 F.2d 179, 181 (1st Cir.1989). Evidence that is merely colorable or is not significantly probative cannot deter summary judgment. *Anderson,* 477 U.S. at 256–257.

B. 42 U.S.C. § 1983

Plaintiff has brought suit under 42 U.S.C. § 1983. Section 1983 provides, in pertinent part:

> ***3** Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

In order to maintain a section 1983 action, the conduct complained must be committed by a "person" acting under color of state law and the conduct must have deprived the plaintiff of a constitutional right or a federal statutory right. *Gomez v. Toledo,* 446 U.S. 635, 640, 100 S.Ct. 1920, 1923 (1980); *see also, Baker v. McCollan,* 443 U.S. 137, 99 S.Ct. 2689 (1979) (constitutional deprivations); *Maine v. Thiboutot,* 448 U.S. 1, 100 S.Ct. 2502 (1980) (statutory deprivations). Here, there is no dispute that the named defendant acted under the color of law. However, the defendant asserts that the undisputed facts demonstrate that no Constitutional provisions were offended and that he is entitled to summary judgement. I agree.

1. First Amendment Claims

Plaintiff asserts that the DOC's policy which prevents his wife from visiting him in prison denies him his right to free association as guaranteed to individuals under the First Amendment to the U.S. Constitution. There is no dispute that the policy, which prohibits former correctional officers from visiting inmates under a myriad of circumstances, prevents the plaintiff's wife from visiting. However, plaintiff's reliance on the First Amendment is misplaced.

The First Amendment, provides, in pertinent part: "Congress shall make no law... abridging the freedom of speech...." U.S. CONST.amend.I. The freedom of association, as articulated by the Supreme Court, had its genesis in freedom of speech. *NAACP v. Alabama,* 357 U.S. 449, 460, 78 S.Ct. 1163 (1958). Free members of society undoubtedly have a right to the freedom of association. *Thorne v. Jones,* 765 F.2d 1270, 1272 (5th Cir.1985). It has always meant the right to associate ideologically, "for the advancement of beliefs and ideas." *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 233, 97 S.Ct. 1782 (1977). The "right is protected because it promotes and may very well be essential to the effective advocacy of both public and private points of view, particularly controversial ones, that the First Amendment is designed to foster." *McCrary v. Runyon,* 427 U.S. 160, 175, 96 S .Ct. 2586, 2596 (1976).

However, the essence of prison visitation, is not the ideological association recognized by the Courts as protected by the First Amendment. *Thorne v. Jones* 765 F.2d 1270, 1272 (5th Cir.1985)(quoting *White v. Keller,* 438 F.Supp. 110, 114 n. 7 (D.Md.1977), aff'd. 588 F.2d 913 (4th Cir.1978)); *Mayo v. Lane,* 867 F.2d 374, 375–376 (7th Cir.1989); *Buehl v. Lehman,* 802 F.Supp. 1266, 1270 (E.D.Pa.1992); *Flanagan v. Shively,* 783 F.Supp. 922, 934 (M.D.Pa.1992); *see also Jones v. North Carolina Prisoner's Labor Union, Inc.,* 433 U.S. 119,125–126, 97 S.Ct. 2532, 2537–2538 (1977). Prisoners have no associational right to receive visitors, whether it be a spouse, children, or anyone else grounded in the First Amendment. *See Thorne,* 765 F.2d at 1272; *See also Buehl v. Lehman,* 802 F.Supp. at 1270. Freedom of association is inconsistent with an incarcerative penal system and the plaintiff's status as a convicted person. Plaintiff's right to meet and visit with whomever he chooses has been terminated by a proceeding: a criminal trial.

***4** Assuming *arguendo* that the First Amendment protected associational rights of inmates, such a right could be withdrawn or limited, justified by the considerations underlying our penal system. *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 2804 (1974). A prison inmate retains only those rights that are not inconsistent with his status as a prisoner or with the legitimate penological goals of the corrections system. *Id.* The termination of an inmate's visitation privileges would be valid if reasonably related to legitimate penological interests. *Turner v. Safely,* 482 U.S. 78, 89, 107 S.Ct. 2254 (1987). The factors used to determine reasonableness include: (1) a rational connection between the prison decision and the governmental interest; (2) the existence of alternative means of exercising the abridged right; (3) the impact of the accommodation of the abridged right on prison resources; and (4) the absence of alternatives for exercising the right at de minis costs to penological interests. *Id.* at 89–91.

Here the defendant asserts that the decision to adopt the policy which resulted in the termination of the plaintiff's visitation with his wife was based upon security concerns. There is a rational connection between restricting visitation and institutional security. *See Block v. Rutherford,* 468 U.S. 576, 586, 104 S.Ct. 3227 (1984). Visitors are security risks, and deference should be given to prison visitation decisions. *See Young v. Vaughn,* 2000 WL 1056444 at 2 (E.D.Pa.2000); *see also Bell v. Wolfish,* 441 U.S. 520, 547, 91 S.Ct. 1864 (1979). Plaintiff has alternative means of associating or communicating with his wife. Defendant contends, and it is undisputed that the DeWitts are able to communicate with each other by means of the U.S. mail and the telephone. The only way to accommodate the DeWitts would be to reinstate visitation privileges. Doing so would require close scrutiny of the visits and expend additional prison resources. *See Young,* 2000 WL 1056444 at 2. Thus, the defendant's actions, of adopting a policy which prohibits visitation between former correctional officers and an inmates, is reasonably related to legitimate penological interests, namely institutional security. *Turner,* 482 U.S. at 89–90. Therefore, even if the plaintiff had a First Amendment associational right to visitation, such a right could be curtailed.

2. Fifth Amendment Claims

Plaintiff asserts a claim based upon the Fifth Amendment's due process clause. The due process clause of the Fifth Amendment provides: "No person ... shall be deprived of life, liberty, or property, without due process of law...." U.S. CONST.amend.V. The Fifth Amendment applies to the action of the federal government, not the state government or private individuals. *Gerena v. Puerto Rico Legal Services, Inc.,* 697 F.2d 447, 448 (1st Cir.1983). Here, plaintiff has made no claims against any official of the federal government. Accordingly, plaintiff's claims based upon the Fifth Amendment should fail.

3. Eighth Amendment Claims

***5** Plaintiff avers that the DOC's policy, which prohibits visitation between him and Mrs. DeWitt, amounts to cruel and unusual punishment, proscribed by the Eighth Amendment. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted ." U.S. CONST. amend. VIII. The Cruel and Unusual Punishments Clause was designed to protect those convicted of crimes, and can limit the type of punishment that is imposed. *Ingraham v. Wright,* 430 U.S. 651, 664, 97 S.Ct. 1401, 1408 (1977). After an individual is incarcerated, only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment. *Whitely v. Albers,* 475 U.S. 312, 318–319, 106 S.Ct. 1078, 1083–1084 (1986). "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause...." *Id.* "The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for the differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Id.* at 320. What is required to establish the unnecessary and wanton infliction of pain varies according to the nature of the alleged Eighth Amendment violation. *Hudson v. McMillian,* 503 U.S. 1, 9, 112 S.Ct. 995, 1000 (1992).

Here, the undisputed facts demonstrate that plaintiff's instant cause of action is based upon a regulation that

prohibits visitation by former correctional officers, in this case plaintiff's wife. Plaintiff has made *no* assertions nor has he demonstrated that he has been subjected to the "wanton infliction of pain" or has suffered any "inhumane condition" necessary to sustain a claim based upon the Eighth Amendment. *See id.; see also Wilson v. Sietzer,* 501 U.S. 294, 111 S.Ct. 2321 (1991). Accordingly, plaintiff's claim, based on the Eight Amendment, is without merit.

4. Ninth Amendment Claims

Plaintiff asserts a claim under the Ninth Amendment to the U.S. Constitution. The Ninth Amendment provides that: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S.CONST.amend.IX. The Ninth Amendment does not create substantive rights beyond those conferred by governing law. *Vega–Rodriguez v. Puerto Rico Telephone Co.,* 110 F.3d 174,182 (1st Cir.1997);*see also Gibson v. Matthews,* 926 F.2d 532, 537 (6th Cir.1991). It is a rule of interpretation rather than a source of rights. *Froehlich v. Wisconsin,* 196 F.3d 800, 801 (7th Cir.1999). Thus, the plaintiff's claim based on the Ninth Amendment holds no merit, since the Ninth Amendment does not grant any substantive rights.

5. Fourteenth Amendment Claims

a. Due Process Claims

Plaintiff asserts that his Fourteenth Amendment due process rights were violated when the DOC implemented the policy which resulted in Mrs. DeWitt being prohibited from visiting him at the ACI. The Fourteenth Amendment provides, in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law...." U.S. CONST.amend.XIV. The concept of liberty in the Fourteenth Amendment has been held to embrace a right to associate with one's relatives. *See e.g.,Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932(1977)(plurality opinion); *Mayo,* 867 F.2d at 375. Here, that right has been curtailed by a proceeding held in with the utmost due process: a criminal trial. Prison necessarily disrupts the normal pattern of familial association. *Mayo v. Lane,* 867 F.2d 374, 375 (7th Cir.1989). A prisoner does not have a due process right to unfettered visitation. *Kentucky Dep't of Corrections v. Thompson,* 490 U.S. 454, 460, 109 S.Ct. 1904, 1908 (1989). Moreover, liberty interests do not arise when a person is barred from visiting a prison. *Flanagan v. Shively,* 783 F.Supp. 922, 934 (M.D.Pa.1992); *Smith v. Matthews,* 793 F.Supp. 998, 999 (D.Kan.1992); *Fennell v. Carl* 466 F.Supp. 56, 59 (D.Okla.1978). "The denial of prison access to a particular visitor is well within the terms of confinement ordinary contemplated by a prison sentence." *Kentucky Dep't of Corrections,* 490 U.S. at 460. Thus, plaintiff does not have a constitutionally shielded liberty interest in visiting his wife that would implicate the Fourteenth Amendment's due process clause.

***6** The policy in question also does not itself create an enforceable liberty interest. The Supreme Court has held that the only constitutionally protected liberty interest that may be created by a prison regulation is one to be free from a condition which results in an "atypical and significant hardship" in relation to the ordinary incidents of prison life. *Sandin v. Conner,* 515 U.S. 472, 484, 115 S.Ct. 2293, 2300 (1995). An inability to receive visitors is not atypical and unusually harsh compared to the ordinary circumstances contemplated by a prison sentence. *See Africa v. Vaughn,* 1996 WL 65445 (E.D.Pa.1996). Indeed, one's removal from society is a fundamental incident of imprisonment.

Accordingly, the undisputed facts demonstrate no violation of the Fourteenth Amendment's due process clause.

b. Equal Protection

Plaintiff also asserts a claim based upon the Fourteenth Amendment's equal protection clause. The equal protection clause of the Fourteenth Amendment mandates that similarly situated persons be treated alike absent a rational reason for doing otherwise. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 103 S.Ct. 3249 (1985). Plaintiff's assertion of an equal protection violation lies in the fact that his visitation privileges with his wife, a former correction officer, are curtailed, while other inmates have no such restriction. However, the defendant need only show that there is a "rational basis" for such a distinction. *Jones,* 433 U.S. at134. Here, prison administrators have a rational justification in prohibiting former correctional officers from visiting inmates on the basis of institutional security. *See Supra,* Section II, B, 1. Thus, plaintiff's equal protection claim should fail.

C. Morris Rules Claims

To the extent that plaintiff wishes to pursue a violation of the so called *Morris* rules, established pursuant to a consent judgement entered in *Morris v. Travisono,* 499 F.Supp. 149 (D.R.I.1970), plaintiff's claims properly belong in the state's jurisdiction. The U.S. District Court lacks subject matter jurisdiction to entertain such claims. *Doctor v. Wall,* 2001 WL 410737 (D.R.I.2001); *Cugini v. Ventetuolo,* 781 F.Supp. 107 (D.R.I.1992). Accordingly, plaintiff's claims for violations of the so called *Morris* rules should be dismissed, without prejudice.

III. Conclusion

Since the undisputed facts demonstrate that no Constitutional provisions were violated by the defendant, I recommend that the defendant's motion for summary judgement be granted on plaintiff's claims under the First, Fifth, Eighth, Ninth, and Fourteenth Amendments. To the extent that plaintiff asserts claims based upon the *Morris* rules, such claims should be dismissed without prejudice. Finally, plaintiff's motion for summary judgement should be denied.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten days of its receipt. Fed.R.Civ.P. 72(b); Local Rule 32. Failure to file timely, specific objections to this report constitutes waiver of both the right to review by the district court and the right to appeal the district court's decision. *United States v. Valencia–Copete,* 792 F.2d 4 (1st Cir.1986)(per curiam); *Park Motor Mart, Inc. v. Ford Motor Co.,* 616 F.2d 603 (1st Cir.1980).

Footnotes

1 The Court has gleaned the undisputed facts from the plaintiff's Complaint and memorandum, the defendant's motion for summary judgement and supporting exhibits, the plaintiff's objection thereto, and plaintiff's motion for summary judgement.

2 The Court has appended to this Report and Recommendation the policy in question.