IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

HAROLD B. WILSON, and GRACY S. SEDLAK, Plaintiffs, v. FRANK HOPKINS, Asst Dir, All in their individual and professional capacities, Defendant.	)	8:13CV130 **MEMORANDUM AND ORDER**

This matter is before the court on Defendant's Motion to Dismiss (Filing No. 28). Defendant moved to dismiss the only issue remaining in this case: whether Defendant violated Harold Wilson and Gracy Sedlak's First Amendment right to freedom of association. Defendant argues Wilson and Sedlak failed to allege facts sufficient to infer their constitutional right to freedom of association has been violated. Defendant's motion to dismiss calls upon the court to revisit the question of whether Wilson and Sedlak's Complaint and Amended Complaint fail to state a claim upon which relief may be granted. Upon further review of Plaintiffs' pleadings and the relevant law, the court agrees with Defendant that the Complaint and Amended Complaint fail to state a claim upon which relief may be granted.

I. DEFENDANT'S MOTION TO DISMISS

A. Factual Allegations

Wilson is incarcerated at the Lincoln Correctional Center in Lincoln, Nebraska, a facility within the Nebraska Department of Correctional Services ("NDCS"). Sedlak is a former inmate with the NDCS who was paroled on March 23, 2012. Sedlak is undergoing hormone treatment in order to "transition from male to female." Sedlak

and Wilson are in a "committed relationship." However, Sedlak is not allowed to visit Wilson in prison because NDCS rules state that ex-felons may not visit NDCS facilities for three years after expiration of their sentences. (Filing No. 1 at CM/ECF pp. 2-4.)

Wilson filed grievances objecting to prison officials' decision not to allow Sedlak to visit him. (*See* Filing No. 1 at CM/ECF pp. 10-12.) On January 18, 2013, Defendant responded to Wilson's grievance as follows:

> You are grieving the denial of your request to have Gracy Sedlak aka John Jorvocky visit you. This person is an ex-felon who was released from the Department's custody on March 23, 2012. Therefore, he will not be allowed to visit someone in the Department's custody for three years (he can be considered at that time).

(Filing No. 1 at CM/ECF p. 12.) Plaintiffs allege they have exhausted all administrative procedures.

B. Motion to Dismiss Standard

Defendant's motion to dismiss is brought pursuant to the provisions of Federal Rule of Civil Procedure 12(b)(6). In order to survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Although a court must accept as true all factual allegations when analyzing a Rule 12(b)(6) motion, it is not bound to accept as true legal conclusions that have been framed as factual allegations.

Id. ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

C. Analysis

Plaintiffs challenge Nebraska Department of Correctional Services' Administrative Regulation 205.02 ("AR 205.02"), which sets forth the rules regarding visitation by parolees. AR 205.02 states, in relevant part:

> There is no limit to the number of visitors an inmate may have on his/her authorized visiting list, however all visitors must be approved by the Warden/designee for visiting. Specific visiting policies limiting visitation are as follows:
>
> . . . .
>
> [E]x-felons will not be granted permission to visit for three years after expiration of sentence, except for immediate family who may be considered at the end of one year.

In *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Supreme Court addressed whether restrictions on inmates' visitation privileges violated their constitutional rights. The court examined, in part, whether a Michigan Department of Corrections ("MDOC") policy that prohibited inmates from visiting with former inmates violated the First Amendment right to freedom of association. The policy at issue in *Overton* prevented inmates from *ever* placing former prisoners on their visitation lists unless the former prisoner was a member of the inmate's immediate family and the warden had given prior approval. *Overton*, 539 U.S. at 130. The Court applied the four factor test set forth in *Turner v. Safley*, 482 U.S. 78 (1987) to analyze the claims:

> In *Turner* we held that four factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a "valid, rational connection" to a legitimate governmental interest;

> whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the regulation.

Overton, 539 U.S. at 132 (quoting *Turner*, 482 U.S. at 89-91).

With respect to the first *Turner* factor, the Supreme Court stated:

> MDOC's regulation prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes. We have recognized that "communication with other felons is a potential spur to criminal behavior."

Id. at 133-134 (quoting *Turner*, 482 U.S. at 91-92).

With respect to the second *Turner* factor, the Court stated:

> [W]e consider whether inmates have alternative means of exercising the constitutional right they seek to assert. Were it shown that no alternative means of communication existed, though it would not be conclusive, it would be some evidence that the regulations were unreasonable. That showing, however, cannot be made. Respondents here do have alternative means of associating with those prohibited from visiting. . . . [I]nmates can communicate with those who may not visit by sending messages through those who are allowed to visit. . . . [T]hey may communicate with persons outside the prison by letter and telephone. Respondents protest that letter writing is inadequate for illiterate inmates and for communications with young children. They say, too, that phone calls are brief and expensive, so that these alternatives are not sufficient. Alternatives to visitation need not be ideal, however; they need only be available.

Id. at 135 (internal citation omitted).

In addressing the third *Turner* factor, the Court explained that:

> Another relevant consideration is the impact that accommodation of the asserted associational right would have on guards, other inmates, the allocation of prison resources, and the safety of visitors. Accommodating respondents' demands would cause a significant reallocation of the prison system's financial resources and would impair the ability of corrections officers to protect all who are inside a prison's walls. When such consequences are present, we are "particularly deferential" to prison administrators' regulatory judgments.

Id. at 135 (internal citation omitted).

Finally, with respect to the fourth *Turner* factor, the court explained:

> [W]e consider whether the presence of ready alternatives undermines the reasonableness of the regulations. Turner does not impose a least-restrictive-alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a de minimis cost to the valid penological goal. Respondents have not suggested alternatives meeting this high standard for any of the regulations at issue. . . As to the limitation on visitation by former inmates, respondents argue the restriction could be time limited, but we defer to MDOC's judgment that a longer restriction better serves its interest in preventing the criminal activity that can result from these interactions.

Id. at 136 (internal citation omitted).

Applying the analysis of the *Turner* factors in *Overton* to this case, it is apparent that Plaintiffs' Complaint and Amended Complaint fail to state a claim upon which relief may be granted. First, there are obvious legitimate penological interests in requiring former inmates to wait three years before being allowed to visit current

inmates; specifically the NDCS's interest in maintaining prison security and preventing future crimes. *See* *Overton*, 539 U.S. at 134.

Wilson and Sedlak argue the visitation policy at issue is not rational because there is no evidence it prevents crimes. However, this argument ignores the substantial deference due "'to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.'" *Wirsching v. Colorado*, 360 F.3d 1191, 1199 (10th Cir. 2004) (quoting *Overton*, 539 U.S. at 132). Moreover, Defendant correctly notes that the NDCS regulation at issue here is "markedly less stringent" than the one found constitutional in *Overton*. (Filing No. 29 at CM/EF p. 5.)

Second, the visitation policy at issue does not prevent Wilson and Sedlak from communicating by letter or telephone. (*See* Plaintiffs' opposition brief acknowledging they communicate by telephone and letter at Filing No. 31 at CM/ECF p. 4.) Indeed, the records in this case provide no shortage of evidence that Wilson and Sedlak are able to effectively communicate with one another, as the parties' pleadings are signed by both Wilson and Sedlak and delivered to the court by Wilson. (*See*, *e.g.*, Filing Nos. 1, 5, 19, 21, 22, 23, 24, and 31; *see also* Wilson and Sedlak's joint litigation in *Wilson v. Fletcher*, 4:12CV3061.)

Wilson and Sedlak argue they should be allowed visitation privileges because Sedlak is, essentially, Wilson's immediate family. Plaintiffs claim they were married in a "handfastings" ceremony while they were both incarcerated at the Nebraska State Penitentiary. (*See* Filing No. 1 at CM/ECF p. 3 and Filing No. 31 at CM/ECF p. 1.) While this may be true, Wilson and Sedlak are not *legally* married, as the laws of the State of Nebraska do not recognize same-sex marriages.

Wilson and Sedlak also argue they should be allowed visitation privileges because Sedlak may, at some point, donate a kidney to Wilson who is "in the final

stage of kidney failure." (Filing No. 31 at CM/ECF p. 2.) They argue that "[a]ny rational[] person would understand that [they] will have to be in the same room for this surgery to be completed, and under this total ban of contact of a personal nature this surgery can not be accomplished or successful." (Filing No. 31 at CM/ECF p. 4.) The visitation policy at issue bans Sedlak from visiting Wilson in prison for a three-year period. It says nothing about barring former inmates from donating their kidneys to current inmates.

Third, accommodating Plaintiffs' demands to lift the three-year visitation ban would, for obvious reasons, impair the corrections officers' ability to maintain prison security. As set forth by the Court in *Overton*, "prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes." *Overton*, 539 U.S. at 134. Likewise, it is self-evident that lifting the three-year ban in this case "would cause a significant reallocation of the prison system's financial resources and would impair the ability of corrections officers to protect all who are inside a prison's walls." *Id.* at 135. When such considerations exist, courts are "particularly deferential" to prison administrators' regulatory judgments. *Id.*

Finally, Wilson and Sedlak have not pointed to any obvious regulatory alternative that fully accommodates their asserted right. Rather, their argument appears to be that they should be excepted from the visitation policy because they are in a committed relationship and because Wilson is ill. However, the limitation on visitation in this case is *time limited*, as opposed to the regulation at issue in *Overton*, which supports a finding that the regulation is reasonable and not excessive when balanced against the legitimate safety concerns of the NDCS. In addition, it bears mentioning that Sedlak will be eligible to apply for visitation in only a few short months, on March 23, 2015. (*See* Filing No. 1 at CM/ECF p. 12.)

Based on the foregoing discussion, the court finds Plaintiffs have failed to set forth a constitutional claim upon which relief may be granted. As a result, the court will grant Defendant's motion to dismiss.

II. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs have filed a Motion for Summary Judgment (Filing No. 23) in this matter. They ask the court to find that Nebraska's marriage laws violate their rights under the Equal Protection Clause of the Fourteenth Amendment. However, as already explained to them in this matter (*see* Filing No. 20), their claim is foreclosed by the Eighth Circuit Court of Appeals' opinion in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). Accordingly, they are not entitled to summary judgment.

III. PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Plaintiffs also filed a motion seeking injunctive relief in this matter. (Filing No. 24.) They ask for an order from the court directing prison officials to allow them to "marry" and also "visit as spouses." To determine whether to grant preliminary injunctive relief, the court evaluates (1) the probability of petitioner's success on the merits; (2) the threat of irreparable harm to the petitioner; (3) the threat of harm to the respondent balanced against the harm to the petitioner; and (4) the public interest. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

Based on the foregoing discussion, Plaintiffs cannot show a probability of success on the merits of their claims. Therefore, they are not entitled to injunctive relief.

IT IS THEREFORE ORDERED that:

1. Defendant's Motion to Dismiss (Filing No. 28) is granted. Accordingly, Plaintiffs' Complaint is dismissed with prejudice for failure to state a claim upon which relief may be granted.

2. Plaintiffs' Motion for Summary Judgment (Filing No. 23) is denied.

3. Plaintiffs' Motion for Preliminary Injunction (Filing No. 24) is denied.

4. A separate judgment will be entered in accordance with this Memorandum and Order.

DATED this 3rd day of November, 2014.

BY THE COURT:

Richard G. Kopf
Senior United States District Judge

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