940 F.3d 329
United States Court of Appeals, Seventh Circuit.

Paul **NIGL**, et al., Plaintiffs-Appellants,
v.
Jon **LITSCHER**, et al., Defendants-Appellees.

No. 19-1618
|
Argued September 17, 2019
|
Decided October 7, 2019
|
Rehearing and Rehearing En Banc Denied November 21, 2019

Synopsis

Background: State inmate and his former prison psychologist filed § 1983 action alleging that prison officials' denial of inmate's request to marry psychologist violated their fundamental right to marry. The United States District Court for the Eastern District of Wisconsin, No. 17-cv-925, J. P. Stadtmueller, J., 378 F.Supp.3d 729, entered summary judgment in officials' favor, and plaintiffs appealed.

[Holding:] The Court of Appeals, Flaum, Circuit Judge, held that denial of inmate's request did not violate his right to marry.

Affirmed.
On AppealMotion for Summary Judgment

West Headnotes (7)

[1] Federal Courts
Summary judgment

Federal Courts
Summary judgment

Court of Appeals reviews de novo district court's entry of summary judgment and consider record in light most favorable to party against whom summary judgment was entered.

[2] Constitutional Law
Family and family law in general

Marriage and Cohabitation
Civil status or condition

Prisoners retain, under Fourteenth Amendment, constitutional right to marry, which like many other rights, is subject to substantial restrictions as result of incarceration. U.S. Const. Amend. 14.

[3] Prisons
Regulation and supervision in general; role of courts

Prison policy decision that impinges on inmate's constitutional rights does not violate Constitution if decision is reasonably related to legitimate penological interests.

[4] Prisons
Regulation and supervision in general; role of courts

In determining whether prison policy decision that impinges on inmate's constitutional right is reasonably related to legitimate penological interests, court should consider: (1) whether there was rational connection between decision and legitimate penological interest put forward to justify denial; (2) whether alternative means of exercising right remained open to inmate; (3) what impact accommodation of asserted right would have on guards and other inmates; and (4) whether obvious, easy alternatives existed to accommodate inmate's rights at de minimis cost to valid penological interests, tending to show that denial was exaggerated response to prison concerns.

[5] Prisons
Judicial supervision, intervention, or review

Courts must give substantial deference to professional judgment of prison administrators, who bear significant responsibility for defining legitimate goals of corrections system and for determining most appropriate means to accomplish them.

Appendix A

[6] Prisons

Regulation and supervision in general; role of courts

Although burden of persuasion is on prisoner to disprove regulation's validity, prison officials must still articulate their legitimate governmental interest in regulation and provide some evidence supporting their concern.

[7] **Marriage and Cohabitation**

Civil status or condition

Prisons

Particular rights and disabilities

State prison officials' denial of inmate's request to marry his former prison psychologist was rationally related to their interests in maintaining secure prison capable of effectively monitoring inmate contacts and in promoting respect for its rules and, thus, did not violate inmate's right to marry, where inmate and psychologist had engaged in pattern of rule-breaking and deception in furtherance of their relationship up to and through date of marriage request, and psychologist violated professional rules designed to protect psychologists' clients and patients.

***330** Appeal from the United States District Court for the Eastern District of Wisconsin. No. 17-cv-925 — **J. P. Stadtmueller**, *Judge*.

Attorneys and Law Firms

Mark G. Weinberg, Attorney, LAW OFFICE OF MARK G. WEINBERG, Chicago, IL, Adele D. Nicholas, Attorney, LAW OFFICE OF ADELE D. NICHOLAS, Chicago, IL, for Plaintiffs - Appellants.

Steven C. Kilpatrick, Attorney, OFFICE OF THE ATTORNEY GENERAL, Wisconsin Department of Justice, Madison, WI, for Defendants - Appellees.

Before Flaum, Rovner, and Scudder, Circuit Judges.

Opinion

Flaum, Circuit Judge.

Wisconsin Department of Corrections officials denied inmate Paul **Nigl**'s request to marry his former prison psychologist, Dr. Sandra Johnston. **Nigl** and Johnston filed suit, arguing that the denial violates their fundamental right to marry. The denial, however, was reasonably related to legitimate penological interests. **Nigl** and Johnston had engaged in a pattern of rule-breaking and deception in furtherance of their relationship leading up to the date of the marriage request, and the Psychology Examining Board concluded that Johnston had violated rules designed to protect patients in connection with her relationship with **Nigl**. The defendants also represent that the decision to deny the marriage request in January 2017 is not tantamount to a permanent denial. We therefore affirm the district court's entry of summary judgment for the defendants.

I. Background

Since 2001, plaintiff-appellant John **Nigl** has been a prisoner within the Wisconsin Department of Corrections ("Department"), where he is currently serving a 100-year bifurcated sentence for two counts of intoxicated homicide by use of a vehicle. From 2001 until September 2015, **Nigl** was incarcerated at Waupun Correction Institution ("Waupon"). Plaintiff-appellant Dr. Sandra Johnston worked at Waupon as a prison psychologist from April 2013 until January 2015, during which time she provided psychological services to **Nigl** and had numerous contacts with him. On Johnston's last day of work at Waupon, **Nigl** kissed her. [1]

After Johnston's last day at Waupon, **Nigl** asked his brother to find Johnston's contact information. Johnston and **Nigl** then began communicating regularly by mail, email, and phone and became engaged in April 2015.

Johnston returned to employment with the Department as a psychologist in the Department's central office in July 2015. On her first day of work, she submitted a "fraternization policy exception request" form to her supervisor, requesting permission to have contact with **Nigl**. Where the form asks for the "Nature of Employee Relationship to Offender," Johnston checked the box marked "other" and wrote "Met at [Waupon] approximately 04/13. Relationship [is] professional." Johnston did not disclose that she was engaged to **Nigl** or that she was otherwise in a romantic relationship with him. Johnston's supervisor never processed the fraternization ***331** policy exception request, but **Nigl** and Johnston continued to have contact anyway. Because Johnston's fraternization request

Appendix A

had not been approved, those contacts were a violation of the Department's fraternization policy, which prohibits Department employees from having "personal contacts ... [and] knowingly forming close relationships" with inmates. The Department's fraternization policy "is designed to eliminate any potential conflict of interest or impairment of the supervision and rehabilitation" that Department employees provide inmates.

Around the same time that **Nigl** was transferred to Redgranite Correctional Institution ("Redgranite") in September 2015, the Department learned about Johnston's relationship with **Nigl**. The Department then terminated Johnston in October 2015 for violations of the Department's fraternization policy.

A month after Johnston was terminated, she requested to visit **Nigl**. She disclosed on the visitation request form that she was **Nigl**'s "friend" but did not disclose any romantic relationship with **Nigl**. Johnston noted that the details of how they met were confidential under the Health Insurance Portability and Accountability Act. Department personnel denied Johnston's request pursuant to Wis. Admin. Code § DOC 309.08(4)(j) because she had been an employee of the Department less than twelve months earlier.

In ensuing investigations of Johnston's conduct, Redgranite staff found cards, letters, and photographs from Johnston in **Nigl**'s cell, some of which were sent under the alias "Cassie Fox" or "Cass." Some of the photographs depicted Johnston in various stages of undress and in sexually suggestive poses. The parties dispute whether Johnston sent **Nigl** these items while employed by the Department. Defendant-appellee Michael Meisner, warden of Redgranite, testified that if Johnston sent the items while employed by the Department, then those items would be considered contraband.

Johnston had also set up an account with the prison's phone system under the name Cassie Fox and engaged in phone sex with **Nigl**. The Department prohibits using an alias when communicating with an inmate because it thwarts the effective monitoring of inmate communications. Meisner believed that Johnston used the alias to conceal her identity as a former Department employee and to thwart the security protocol of the institution.

The Department reported Johnston's relationship with **Nigl** to the Psychology Examining Board (the "Board"). The Board concluded that Johnston, in furtherance of her relationship with **Nigl**, had violated Wis. Admin. Code §§ Psy 5.01(14)(a) and (b), which prohibit licensed psychologists from "[e]ngaging in sexual contact, sexual conduct, kissing, or any other behavior which could reasonably be construed as seductive, romantic, harassing, or exploitative" with a client or former client within two years of the end of professional services. The Board's rules aim to "protect the health, safety or welfare of clients or patients." *Bar-Av v. Psychology Examining Bd.*, 299 Wis.2d 387, 728 N.W.2d 722, 728 (2007). As a result of the Board's findings, it entered an order in August 2016 suspending Johnston's license for one year and limiting her license to practice.

In November 2016, Johnston submitted another request to visit **Nigl**. She again indicated that she was **Nigl**'s friend but did not disclose a romantic relationship with him. Department personnel also denied that request because, among other reasons, she had shown a willingness to violate rules by communicating with **Nigl** outside of her professional relationship.

***332** In December 2016, **Nigl** requested permission to marry Johnston. Under the Department's policies and procedures, an inmate could submit a request to marry if the following conditions were met:

A. The marriage does not pose a threat to the security of the facility or a threat to the safety of the public;

B. There are no legal impediments to the marriage;

C. The inmate is not scheduled for release within nine months;

D. The proposed spouse or the proposed spouse's children are not victims of the inmate;

E. The proposed spouse has never been convicted in any criminal activity with the inmate; and

F. The proposed spouse has been on the inmate's visiting list for a minimum of one year or is able to demonstrate a longstanding relationship with the proposed spouse.

The decision to approve or deny the request falls within the warden's discretion. The parties agree that the Department could accommodate a brief ceremony without compromising prison security or placing undue strain on prison resources.

Defendant-appellee Sara Hungerford, who was a social worker at Redgranite at the time, received and reviewed the marriage request. Hungerford conferred with her supervisor defendant-appellee Zachary Schroeder and recommended denial of the request to marry because

Appendix A

> there are reasonable grounds to believe the marriage poses a threat to the security of the facility or a threat to the safety of the public, or threatens other legitimate penological interests ... [and the] proposed spouse has not been on the visiting list for at least one year and is not able to demonstrate a longstanding relationship.

Schroeder and Meisner agreed with Hungerford's recommendation because of Johnston and **Nigl**'s violations of Department rules in furtherance of their relationship; Johnston's violations of the code of professional conduct for psychologists and, relatedly, Meisner's concern that Johnston may have victimized **Nigl**; Meisner's belief that the relationship was grounded in deception and rule-breaking; **Nigl** and Johnston's failure to demonstrate a longstanding relationship; and the threat the marriage would pose to the security of the facility and other penological interests. Meisner made the final decision to deny **Nigl**'s request to marry Johnston in January 2017.

Nigl submitted two inmate grievances about the marriage denial in early 2017. The inmate complaint examiner recommended denial of the grievances, finding that the staff acted in accordance with Department policy. **Nigl** appealed the denials of his grievances, and those appeals were also denied. Jon **Litscher** was the Department Secretary and final decision-maker on internal inmate grievances at the time the grievances and appeals were denied. Defendant-appellee Kevin Carr is the current Department Secretary and is substituted for former Secretary **Litscher** pursuant to Fed. R. App. P. 43(c)(2).

In June 2017, Johnston submitted a third visitation request, again stating that **Nigl** was a "friend" but declining to disclose their romantic relationship. The request was denied for reasons similar to the reasons the previous visitation requests were denied. Since June 2018, **Nigl** has been housed at Fox Lake Correctional Institution ("Fox Lake").

Nigl and Johnston filed suit under 42 U.S.C. § 1983 based on the denials of the marriage and visitation requests. The parties filed cross-motions for summary judgment, and the district court granted the ***333** defendants' motion, dismissing all claims as to all parties. The district court concluded that the denial of the marriage request was "reasonably related to [the defendants'] goal of ensuring a secure prison where staff and inmates respect the rules." The plaintiffs appeal the district court's judgment only as to the denial of the marriage request.

The plaintiffs argue that the district court misapplied the four-factor test the Supreme Court set forth in *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) when evaluating the plaintiffs' right to marry claim because it relied solely on the first factor and ignored the others. The plaintiffs also argue that the district court's decision conflicts with this Court's precedent in *Riker v. Lemmon*, 798 F.3d 546 (7th Cir. 2015), a case where we held that the defendants had not adequately justified their denial of an inmate's marriage request. The defendants respond that the district court correctly concluded that the denial of the marriage request was reasonably related to legitimate penological interests in institutional security and inmate rehabilitation.

II. Discussion

[1] We review de novo the district court's entry of summary judgment and consider the record in the light most favorable to the plaintiffs, the party against whom summary judgment was entered here. *Pagel v. TIN Inc.*, 695 F.3d 622, 624 (7th Cir. 2012). The district court's entry of summary judgment for the defendants was proper only if no material issue of fact exists that would allow a jury to find in favor of the plaintiffs. *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 449 (7th Cir. 2013).

A. Prisoners' Right to Marry

[2] **[3]** **[4]** Prisoners retain, under the Fourteenth Amendment, a constitutional right to marry, which "like many other rights, is subject to substantial restrictions as a result of incarceration." *Turner v. Safley*, 482 U.S. 78, **95**, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). A prison policy decision that impinges on an inmate's constitutional rights does not violate the Constitution if the decision "is reasonably related to legitimate penological interests." *Id.* at 89, 107 S.Ct. 2254; *see also Siddiqi v. Leak*, 880 F.2d 904, 909 (7th Cir. 1989) (*Turner* test applies to prison policy decisions as well as prison regulations).[2] The Supreme Court has set forth four factors for the Court to consider in making this determination:

(1) whether there was a rational connection between the decision to deny the marriage request and the legitimate penological interest put forward to justify the denial;

Appendix A

(2) whether alternative means of exercising the right remained open to the plaintiffs;

(3) what impact accommodation of the asserted right would have on guards and other inmates; and

(4) whether obvious, easy alternatives existed to accommodate the plaintiffs' rights at de minimis cost to valid penological interests, tending to show that the denial was an exaggerated response to prison concerns.

Turner, 482 U.S. at 89–91, 107 S.Ct. 2254. The defendants argue that the case can be disposed of under the first factor whereas ***334** the plaintiffs argue that the Court must consider the first and fourth factors.[3] Although "the first one can act as a threshold factor regardless of which way it cuts," *Riker v. Lemmon*, 798 F.3d 546, 553 (7th Cir. 2015) (citation omitted), the ultimate question remains whether the defendants' decision to deny the marriage request was reasonably related to legitimate penological interests, *Turner*, 482 U.S. at 89, 107 S.Ct. 2254.

[5] **[6]** Courts must give "substantial deference 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." *Van den Bosch v. Raemisch*, 658 F.3d 778, 786 (7th Cir. 2011) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003)). The defendants cannot, however, "avoid court scrutiny by reflexive, rote assertions." *Riker*, 798 F.3d at 553 (citation omitted). "Although the burden of persuasion is on the prisoner to disprove the validity of a regulation, prison officials must still articulate their legitimate governmental interest in the regulation and provide some evidence supporting their concern." *Id.* (citation and internal quotation marks omitted).

B. Denial of Plaintiffs' Marriage Request

The defendants' denial of the plaintiffs' one-time marriage request in January 2017 was reasonably related to their legitimate penological interests in preserving the security of the prison, inducing compliance with and promoting respect for the prison's rules governing inmate contacts, and rehabilitating **Nigl**. The defendants have pointed to several instances of misconduct by Johnston and **Nigl** in furtherance of their relationship: Johnston and **Nigl** kissing on Johnston's last day at Waupon (a fact that Johnston now denies); Johnston and **Nigl** developing and continuing their relationship in violation of Department rules; Johnston using an alias to communicate with **Nigl**; Johnston continuing to have contact with **Nigl** even though her fraternization policy exception request had not been approved; Johnston misrepresenting her relationship as merely "professional" and stating that she was only a "friend" of **Nigl** on fraternization policy exception and visitation forms; and Johnston having violated professional rules meant to protect clients or patients like **Nigl** by engaging in seductive, romantic, or exploitative conduct with him.

The plaintiffs' pattern of rule-breaking and deception in furtherance of their relationship continued up to and through the date of the marriage request. As recently as one month before the marriage request, Johnston falsely identified herself as merely **Nigl**'s "friend," and she again identified herself as merely a friend on a visitation request form after **Nigl** submitted the marriage request. Considering these continued failures to disclose the true nature of their relationship in the context of the previous uses of an alias and other forms of deception, the defendants could have reasonably concluded that the couple's pattern of rule-breaking and deception was ongoing through the time of the marriage request.

[7] Taking steps to prevent this kind of conduct from recurring in the future is rationally related to the defendants' interests in maintaining a secure prison capable ***335** of effectively monitoring inmate contacts and in promoting respect for its rules. Requiring the defendants to grant the plaintiffs' marriage request at a time when the plaintiffs were engaged in an ongoing pattern of rule-breaking and deception in furtherance of their relationship would eliminate or reduce the "sting" from the Department's sanction for the plaintiffs' misconduct. *Cf. Martin v. Snyder*, **329** F.3d 919, 922 (7th Cir. 2003) ("Restrictions on visitation, though not enough to justify prohibiting marriage, may well justify deferment, so that the sanction for misconduct will have some sting.").

Moreover, sanctioning the plaintiffs for misconduct to promote respect for the prison's rules was not the only reason for denying the marriage request. The defendants also denied the request because of Meisner's concern that Johnston, given her position of authority over **Nigl**, may have been exploiting or otherwise victimizing **Nigl**. That concern is supported by the Psychology Examining Board's finding, published just four months before the marriage request, that Johnston violated rules designed to protect psychologists' clients and patients.[4] The denial of the marriage request was therefore rationally related to the defendants' goal of protecting **Nigl**

Appendix A

from the same exploitation that those rules were designed to prevent.

At the time of the marriage request, Johnston was already not permitted to visit **Nigl**. The plaintiffs assert that the defendants still could have segregated **Nigl** or restricted his phone privileges as punishment for the rule violations instead of denying the marriage request. The *Turner* test, however, is not a least restrictive alternative test, 482 U.S. at 90, 107 S.Ct. 2254, and the defendants are entitled to "substantial deference" in determining the most effective means to accomplish their legitimate penological goals, *Overton*, 539 U.S. at 132, 123 S.Ct. 2162. The plaintiffs have not made any showing that either one of their proposed alternative means was "obvious [and] easy," *Turner*, 482 U.S. at 90, 107 S.Ct. 2254, or could have been substituted at only de minimis cost to the defendants' pursuit of their legitimate penological goals, *id.* at 90–91, 107 S.Ct. 2254; *see also Overton*, 539 U.S. at 132, 123 S.Ct. 2162 (prisoners bear burden to prove invalidity of prison regulations).

The plaintiffs rely heavily on our decision in *Riker*, but the marriage request issue in that case was decided based on a "fundamental infirmity" that does not exist here. 798 F.3d at 556. The fundamental infirmity, we explained, was that the justification the defendants offered for denying the marriage request was "premised entirely on its ex-employee visitation policy and the security justifications that support that policy." *Id.* at 556 & n.28 (explaining that the Department "fundamentally misconceive[d] the issue before the court" by resting justifications for the denial of the marriage request on reasons for denying visitation privileges). Here, the defendants have articulated reasons for the denial of the marriage request that exist independently of concerns surrounding visitation.

It is worth clarifying that before this Court is the January 2017 denial of the plaintiffs' request to get married. The defendants ***336** readily concede that the denial was a one-time rather than permanent denial; that the decision was made, in part, because of the temporal proximity between the rule-breaking and the request; and that the plaintiffs are welcome to submit a new marriage request at Fox Lake, **Nigl**'s new place of incarceration. While it would weigh on the Court's balancing of the *Turner* factors if this were a de facto permanent ban, *see, e.g.*, *Beard v. Banks*, 548 U.S. 521, 535, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006); *Overton*, 539 U.S. at 134, 123 S.Ct. 2162, "*Turner* does not say that every delay violates the Constitution," *Martin*, **329** F.3d at 922. Under the circumstances relevant to the one-time denial of the marriage request in January 2017, the logical connection between the denial and the asserted penological interests was not "so remote as to render the [decision] arbitrary or irrational," nor was the denial an "exaggerated response" to concerns regarding the plaintiffs' pattern of misconduct, rule-breaking, and deception in furtherance of their relationship. *Turner*, 482 U.S. at 89–90, 107 S.Ct. 2254. [5]

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

All Citations

940 F.3d 329

Footnotes

1 Johnston initially admitted to kissing **Nigl** but later denied it.

2 The standard is the same for both **Nigl** and Johnston. *See Keeney v. Heath*, 57 F.3d 579, 581 (7th Cir. 1995) ("[S]o far as challenges to prison regulations as infringing constitutional rights are concerned, the standard is the same whether the rights of prisoners or of nonprisoners are at stake.") (citation omitted).

3 The parties agree that the defendants cannot justify their denial of the marriage request based on the second or third factors.

4 The plaintiffs concede that Johnston provided psychological services to **Nigl** and had a professional relationship with him. Johnston also wrote on a Department form that the details of how she met **Nigl** were protected by the Health Insurance Portability and Accountability Act, which safeguards medical information. The plaintiffs nevertheless dispute the characterization of **Nigl** as Johnston's former "patient." Regardless of how the relationship is labeled, the Board concluded that Johnston, a licensed psychologist, violated rules designed to protect clients and patients in connection with her relationship with **Nigl**.

5 The Court need not reach, and does not address, issues of qualified immunity, standing, or mootness.

Appendix A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 21, 2019

JOEL M. FLAUM, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 19-1618

PAUL NIGL, et al.,
Plaintiffs-Appellants,

v.

JON LITSCHER, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:17-cv-00925

J.P. Stadtmueller,
Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by the plaintiffs-appellants in the above case on November 6, 2019, no judge in active service has requested a vote thereon and all judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

378 F.Supp.3d 729
United States District Court, E.D. Wisconsin.

Paul M. **NIGL** and Sandra Johnston, Plaintiffs,
v.
Jon **LITSCHER**, Michael Meisner, Sara Hungerford, and Zachary Schroeder, Defendants.

Case No. 17-CV-925-JPS
|
Signed 03/29/2019

Synopsis

Background: Prisoner and former prison employee brought § 1983 action against corrections officers and secretary alleging violation of their Fourteenth amendment rights arising out of refusal to allow prisoner and former employee to marry and denial of visitation privileges. Parties filed cross-motions for summary judgment.

Holdings: The District Court, J. P. Stadtmueller, J., held that:
[1] decision was reasonably related to goal of ensuring secure prison;
[2] litigants in other cases were not sufficiently comparable; and
[3] decision was rational exercise of discretion.

Correction officers and secretary's motion granted.
Motion for Summary Judgment

West Headnotes (14)

[1] **Marriage and Cohabitation**
⇐ Civil status or condition

Prisons
⇐ Particular rights and disabilities

The Constitution protects a prisoner's fundamental right to marry; he does not lose that constitutional protection simply because he is imprisoned.

[2] **Marriage and Cohabitation**
⇐ Civil status or condition

Prisons
⇐ Particular rights and disabilities

A prisoner's fundamental right to marry is subject to substantial restrictions as a result of incarceration.

[3] **Marriage and Cohabitation**
⇐ Civil status or condition

Prisons
⇐ Particular rights and disabilities

A prison regulation that impinges on an inmate's right to marry is permitted so long as it is reasonably related to legitimate penological interests.

[4] **Prisons**
⇐ Regulation and supervision in general; role of courts

Courts consider four factors to determine the reasonableness of a prison regulation that restricts a constitutional right: (1) whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule, (2) whether there are alternative means of exercising the right in question, (3) what impact accommodation of the asserted constitutional right would have on guards, other inmates, and on the allocation of prison resources, and (4) what easy alternatives exist to the regulation because, although the regulation need not satisfy a least restrictive alternatives test, the existence of obvious alternatives may be evidence that the regulation is not reasonable.

[5] **Prisons**
⇐ Regulation and supervision in general; role of courts

Factors to determine the reasonableness of a prison regulation that restricts a constitutional right tend to blend together and are not meant to be weighed according to any precise formula.

[6] **Prisons**

Appendix B

Regulation and supervision in general; role of courts

Although all factors to determine the reasonableness of a prison regulation that restricts a constitutional right to marry are important, the first factor, which considers whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule, can act as a threshold factor regardless which way it cuts.

[7] **Prisons**

Regulation and supervision in general; role of courts

In applying test to determine the reasonableness of a prison regulation that restricts a constitutional right, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.

[8] **Prisons**

Evidence

Although the burden of persuasion is on the prisoner to disprove the validity of a prison regulation that restricts a constitutional right, prison officials must still articulate their legitimate governmental interest in the regulation and provide some evidence supporting their concern.

[9] **Prisons**

Regulation and supervision in general; role of courts

When considering factors to determine the reasonableness of a prison regulation that restricts a constitutional right, courts must accord substantial deference 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.

[10] **Prisons**

Discipline, security, and safety in general

Prisons

Conduct and control in general

Decision of corrections officers and secretary to forbid marriage between prisoner and former prison employee was reasonably related to goal of ensuring secure prison where staff and inmates respect rules; officers and secretary were tasked with protecting safety and security of inmates, staff, and public who entered corrections' institutions, corrections had strict rules against fraternization between inmates and staff in order to ensure security, and prisoner and former prison employee demonstrated willingness to bend corrections' rules in furtherance of their relationship.

[11] **Constitutional Law**

"Class of one" claims

In a class-of-one equal protection case under the Fourteenth Amendment, the plaintiff must prove that he was intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. U.S. Const. Amend. 14.

[12] **Constitutional Law**

Prisons

Prisons

Visitors

Litigants in other cases involving visitation requests by former corrections employees were not sufficiently comparable to prisoner and former prison employee, and thus there were no similarly-situated comparators to prisoner and former prison employee who were denied visitation by corrections officers and secretary, as required for class-of-one equal protection claim under the Fourteenth Amendment; other cases involved different prison officials at different institutions, former prison employee's final visitation request was denied less than two years after she was terminated, several years had passed after litigants fraternization with inmates

Appendix B

before they were permitted to visit those inmates, former prison employee was psychologist who fraternized with prisoner, and litigants did not have similar positions relative to inmates. U.S. Const. Amend. 14.

[13] **Constitutional Law**
Prisons

Prisons
Visitors

Decision of corrections officers and secretary to deny visitation to prisoner and former prison employee was rational exercise of discretion, as related to class-of-one equal protection claim under the Fourteenth Amendment; officers and secretary believed that former prison employee posed threat to institution security because she had demonstrated willingness to break institution's rules, and they believed visits would have compromised prisoner's rehabilitation because the pair would have essentially been rewarded despite breaking fraternization rules. U.S. Const. Amend. 14.

[14] **Constitutional Law**
"Class of one" claims

Class-of-one equal protection claims under the Fourteenth Amendment are very difficult, if not impossible, to prove in the context of an official's discretionary decision-making. U.S. Const. Amend. 14.

Attorneys and Law Firms

*731 Mark G. Weinberg, Law Office of Mark G. Weinberg, Chicago, IL, for Plaintiffs.

Anne M. Bensky, Wisconsin Department of Justice Office of the Attorney General, Madison, WI, for Defendants.

ORDER

J. P. Stadtmueller, U.S. District Judge

1. INTRODUCTION

Plaintiffs Paul M. **Nigl** ("**Nigl**"), a prisoner, and Sandra Johnston ("Johnston"), his fiancée, filed a *pro se* complaint under 42 U.S.C. § 1983, alleging their civil rights were violated. (Docket #1). Specifically, the Plaintiffs allege that the Defendants, officers of the prison where **Nigl** was previously housed and the Wisconsin Department of Corrections secretary, violated Plaintiffs' Fourteenth Amendment right to form an intimate relationship by not allowing them to marry. Plaintiffs also allege a violation of their Fourteenth Amendment right to equal protection because Defendants have denied them visitation privileges but have, according to Plaintiffs, permitted visitation for similarly-situated persons.

The parties have filed cross-motions for summary judgment. (Plaintiffs' Motion, Docket #46; Defendants' Motion, Docket #51). Those motions are now fully briefed and ripe for adjudication. *See* (Docket #46–#59, #65–#68, #72–#75). For the reasons explained below, Defendants' motion will be granted, Plaintiffs' motion will *732 be denied as moot, and this case will be dismissed.

2. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Boss v. Castro*, 816 F.3d 910, 916 (7th Cir. 2016). A fact is "material" if it "might affect the outcome of the suit" under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The court construes all facts and reasonable inferences in the light most favorable to the non-movant. *Bridge v. New Holland Logansport, Inc.*, 815 F.3d 356, 360 (7th Cir. 2016).

3. RELEVANT FACTS

The following facts are material to the disposition of Defendants' motion for summary judgment. They are drawn from the parties' factual briefing, (Docket #48–#50, #52–#58, #66–#68, #72–#73, #75), unless otherwise noted. The

Appendix B

Court will discuss the parties' principal factual disputes as appropriate.

3.1 The Parties

Nigl has been a prisoner within the Wisconsin Department of Corrections ("Corrections") since 2001. He is serving a 100-year bifurcated sentence for two counts of intoxicated homicide by use of a vehicle. From the time he was first incarcerated until September 2015, he was housed at Waupun Correctional Institution ("Waupun"). Between September 2015 and June 2018, he was housed at Redgranite Correctional Institution ("Redgranite"). It was during his incarceration at Redgranite that Johnston, his fiancée, sought to be placed on his visitor list and the couple requested permission to be married. Since June 2018, he has been housed at Fox Lake Correctional Institution.

Johnston is a former Corrections employee. From April 2013 until January 2015, Johnston worked as a psychologist at Waupun, where she met **Nigl**. She provided psychological services to **Nigl** and had numerous clinical contacts with him while working at Waupun. [1] On January 10, 2015, Johnston left her job at Waupun and began to work at the Wisconsin Resource Center, which is not a Corrections facility. Her hiatus from employment with Corrections lasted about six months. On or around July 13, 2015, Johnston returned to employment with Corrections, this time as a psychologist in Corrections' central office in Madison. Her position in the central office was terminated in October 2015, for reasons explained below.

Defendant Michael Meisner ("Meisner") has been the warden of Redgranite since March 2014. Meisner was the final decisionmaker who denied Johnston's requests to be placed on **Nigl's** approved visitor list at Redgranite and denied **Nigl** and Johnston's request to marry.

Defendant Sara Hungerford ("Hungerford") is a licensed social worker. She ***733** worked for Corrections from 2009 through 2017, when she retired from state service. She was a social worker at Redgranite from April 2015 through June 2017. She reviewed and ultimately recommended denial of Johnston's requests to be placed on **Nigl's** approved visitor list and **Nigl** and Johnston's request to marry.

Defendant Zachary Schroeder has been a unit manager at Redgranite since February 2016. He was Hungerford's supervisor and he conferred with her in the decision to recommend denial of Johnston's requests to be placed on **Nigl's** approved visitor list and **Nigl** and Johnston's request to marry.

Finally, Defendant Jon **Litscher** served as the secretary of Corrections from March 2016 until his retirement in June 2018.

3.2 Nigl and Johnston's Relationship

On January 12, 2015, days after Johnston left her employment at Waupun, **Nigl** asked his brother to seek out Johnston's contact information. **Nigl** began communicating with Johnston by letter, and then also by phone and email, on a regular basis. In April 2015, **Nigl** asked Johnston to marry him and she said yes.

As noted above, Johnston returned to employment with Corrections in July 2015. On her first day of work at the central office in Madison, she submitted a "fraternization policy exception request" to her supervisor, Gary Ankarlo ("Ankarlo"), requesting permission to have contact with **Nigl**. On the form, under the section titled, "Nature of Employee Relationship to Offender," Johnston checked the box marked "other" and wrote, "Met at WCI approximately 04/13. Relationship ♦ professional." (Docket #55-1 at 1). Johnston did not disclose that she was engaged in a romantic relationship with **Nigl**. Ankarlo refused to process the fraternization request as he was supposed to, for reasons not entirely clear from the record, and he returned the form to Johnston. **Nigl** and Johnston continued to have contact anyway.

In September 2015, Corrections learned from an anonymous survey submission that Johnston had a relationship with an inmate. Johnston was placed on administrative leave and then, on October 29, 2015, her position was terminated "due to allegations that have been made against you pertaining to violation of the Department's fraternization policy." (Docket #55-3 at 2).

Two investigations ensued. First, Corrections undertook an investigation to determine whether Johnston had violated department rules—such as Executive Directive #16, which prohibits staff from having unapproved relationships with offenders—and whether she had violated the Prison Rape Elimination Act by engaging in a relationship with a patient inmate (the "Employee/PREA Investigation").

After this investigation commenced, Meisner, the warden of Redgranite, contacted the Wisconsin Department of Safety and Professional Services ("DSPS") to complain

Appendix B

to the Wisconsin Psychology Examining Board about Johnston's alleged relationship with **Nigl**. Meisner testifies by declaration that he felt he had a duty to report what he believed was a significant professional ethical violation. DSPS undertook its own investigation (the "DSPS Investigation").

3.3 The Employee/PREA Investigation

The Employee/PREA investigation began in early November 2015 at Redgranite, as that was where **Nigl** was housed at the time. During the investigation, Redgranite staff searched **Nigl's** cell and found ***734** numerous cards, letters, and photographs from Johnston. Some of the photos depicted Johnston in various stages of undress and in sexually provocative poses. Johnston sent some of these items under the alias "Cassie Fox" or "Cass." She had also set up an account with the prison's phone system under the name Cassie Fox.

Meisner testifies that because of Johnston's status as a current employee of Corrections, these items were considered contraband. He also says that he concluded Johnston's use of an alias was done with the intent of concealing her identity as a former Corrections employee and demonstrated her willingness and ability to thwart security protocol of the institution. The Plaintiffs insist that Johnston sent these items during the period when she was not employed by Corrections. *See* (Docket #73 at 13).

On or around December 7, 2015, the Employee/PREA Investigation concluded. The allegation that Johnston was in a relationship with **Nigl** was determined to be substantiated. The question of whether Johnston had violated the PREA was not substantiated, based on inconclusive evidence as to whether the couples' intimate relationship began while Johnston was employed at Waupun.

3.4 The DSPS Investigation

The DSPS conducted its own investigation, which culminated in an order from the Psychology Examining Board dated August 25, 2016. (Docket #52-7 at 2–10). That order begins with findings of fact learned in the investigation. *Id.* at 1. According to the order, Johnston admitted to a DSPS investigator that **Nigl** had kissed her on her last day at Waupun, but she did not report it. *Id.* at 4. She also admitted that she had at least one sexual fantasy about **Nigl** before leaving Waupun. *Id.* Johnston and **Nigl** now testify that they did not kiss on that day; they only hugged. (Docket #68 at 1). DSPS found that Johnston engaged in unprofessional conduct and was subject to discipline under state law. *Id.* at 4–5. Her license was suspended for one year. *Id.* at 5.

3.5 Requests for Visitation and Marriage

In November 2015, Johnston submitted an application to be placed on **Nigl's** approved visitors' list. On December 2, 2015, Joli Grenier, a social worker, recommended denial of the visitor application because Wis. Admin. Code § DOC 309.08(4)(j) prohibits visits for people who were employed by Corrections within the previous 12 months. Johnston, of course, had been employed by Corrections in the previous 12 months. Johnston wrote to Meisner about her visitation request, and Meisner told her that the denial was appropriate, but she could resubmit an application after six months.

A year later, in November 2016, Johnston submitted a second application to be placed on **Nigl's** approved visitors' list. On November 30, 2016, Hungerford, then a social worker at Redgranite, recommended denial of the second application on the grounds that:

> The warden has reasonable grounds to believe that you, the proposed visitor, have attempted to bring contraband into any penal facility, or that you otherwise pose a threat to the safety and security of visitors, staff, offenders or the facility[;]
>
> The warden has reasonable grounds to believe that the offender's reintegration into the community or rehabilitation would be hindered[; and]
>
> The warden has reasonable grounds to believe that the offender's offense history indicates there may be a problem with the proposed visitation[.]

***735** (Docket #52-6 at 5). Schroeder, Hungerford's supervisor, adopted Hungerford's recommendation.

On December 7, 2016, **Nigl**, believing Corrections' denial of visitation to be unreasonable, submitted an inmate grievance. The inmate complaint examiner ("ICE") recommended dismissal of the grievance because denial of visitation and marriage was "reasonable given the fact the proposed visitor has shown disregard for [Corrections] policy when she was employed by [Corrections]. The propensity for the same/similar behavior to reoccur could pose a threat to the safety and security of visitors, staff, offenders and the facility." *Id.* at 3–4. **Nigl** appealed, and his appeals were denied.

Sometime in early December 2016, Johnston and **Nigl** submitted a request for marriage. They included confirmation

Appendix B

of an officiant who had agreed to officiate the wedding. Pursuant to Division of Adult Institutions Policy and Procedure #309.00.06, an inmate may request to marry while incarcerated if the following conditions are met:

A. The marriage does not pose a threat to the security of the institution/center or a threat to the safety of the public;

B. There are no legal impediments to the marriage;

C. The inmate is not scheduled for release within nine months;

D. The proposed spouse or the proposed spouse's children are not victims of the inmate;

E. The proposed spouse has never been convicted in any criminal activity with the inmate; and

F. The proposed spouse has been on the inmate's visiting list for a minimum of one year, or is able to demonstrate a longstanding relationship with the proposed spouse.

(Docket #52-9 at 1–2). The decision to approve or deny a marriage request is ultimately a matter within the warden's discretion.[2] Hungerford received the marriage request and she reviewed it first, in consultation with Schroeder. On January 25, 2017, Hungerford recommended that the warden deny the request because

> there are reasonable grounds to believe the marriage poses a threat to the security of the facility or a threat to the safety of the public, or threatens other legitimate penological interests ... [and the] proposed spouse has not been on the visiting list for at least one year and is not able to demonstrate a longstanding relationship.

(Docket #52-8 at 4–5) (internal punctuation omitted). Schroeder and Meisner agreed with Hungerford's recommendation. Meisner states this his decision was based on Johnston having violated the code of professional conduct as a psychologist, as evidenced by the DSPS final order; Johnston having violated department work rules; Meisner's belief that **Nigl** is the victim of Johnston, a former Corrections employee; Meisner's belief that the marriage would pose a threat to the security of the facility and would threaten other legitimate penological interests; and the lack of longstanding relationship. He believes ***736** their relationship was established on lies, deception, and rule breaking. *See* (Docket #52).

On January 26 and February 11, 2017, **Nigl** submitted inmate grievances about the marriage denial. The ICE recommended denial of the grievances, finding that staff had acted in accordance with relevant policy in prohibiting the marriage. **Nigl** appealed, and his appeals were denied.

4. ANALYSIS

Plaintiffs and Defendants each claim that the undisputed facts show they are entitled to summary judgment. Plaintiffs seek an injunction ordering Defendants to approve their request to marry and an award of compensatory and punitive damages. Defendants deny liability and claim that they are immune from a suit for damages under the doctrine of qualified immunity. As described more fully below, the Court finds that Defendants are entitled to summary judgment as a matter of law on each of Plaintiffs' claims.

4.1 Right to Marry

[1] **[2]** **[3]** The Constitution protects a prisoner's fundamental right to marry; he does not lose that constitutional protection simply because he is imprisoned. *Riker v. Lemmon*, 798 F.3d 546, 551 (7th Cir. 2015) (citing *Turner v. Safley*, 482 U.S. 78, 94–96, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)); *see also Obergefell v. Hodges*, —— U.S. ——, 135 S. Ct. 2584, 2598, 192 L.Ed.2d 609 (2015) (recognizing that "[o]ver time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause"). That protection, however, "is subject to substantial restrictions as a result of incarceration." *Turner*, 482 U.S. at 95, 107 S.Ct. 2254. A prison regulation that impinges on an inmate's right to marry is permitted so long as it is "reasonably related to legitimate penological interests." *Id.* at 89, 107 S.Ct. 2254.

[4] **[5]** **[6]** Courts consider four factors to determine the reasonableness of a prison regulation that restricts the right to marry:

> (1) whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule; (2) whether there are alternative means

Appendix B

> of exercising the right in question; (3) what impact accommodation of the asserted constitutional right would have on guards, other inmates, and on the allocation of prison resources; and (4) what easy alternatives exist to the regulation because, although the regulation need not satisfy a least restrictive alternatives test, the existence of obvious alternatives may be evidence that the regulation is not reasonable.

Riker, 798 F.3d at 552 (citation omitted).[3] These factors tend to blend together and are not meant to be weighed according to any precise formula. *Aiello v. **Litscher***, 104 **F. Supp.** 2d 1068, 1075 (W.D. Wis. 2000). Although all four factors are important, the first can act as a "threshold factor" regardless which way it cuts. *Riker*, 798 F.3d at 553 (quoting *Singer v. Raemisch*, 593 F.3d 529, 534 (7th Cir. 2010)); *see also Mays v. Springborn*, 575 F.3d 643, 648 (7th Cir. 2009) ("Where there is only minimal evidence suggesting that the prison's regulation is irrational, running through each factor at length is unnecessary.").

***737** [7] In applying this test, "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Riker*, 798 F.3d at 553 (internal citations omitted) (finding that a prison's unsubstantiated concerns regarding institutional safety precluded summary judgment for the defendants in a case where a former prison employee challenged the facility's decision to prohibit her marriage to an inmate).

[8] [9] "Although the burden of persuasion is on the prisoner to disprove the validity of a regulation, prison officials must still articulate their legitimate governmental interest in the regulation and provide some evidence supporting their concern." *Id.* (internal citations omitted). Nonetheless, courts "must accord substantial deference 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." *Id.* (citation omitted).

[10] Because the first *Turner* factor can be a "threshold" inquiry, and because Defendants do not argue that any other *Turner* factor supports their decision to prohibit **Nigl** and Johnston from marrying, *see* (Docket #59 at 11–15), the Court's analysis will focus on the first factor.[4] It asks whether the Defendants have presented a valid, rational connection between the marriage prohibition and a legitimate penological interest. The Defendants have provided several reasons to justify their decision to prohibit the marriage.

First, Defendants say the marriage poses a threat to the institution because of Johnston's demonstrated willingness to break the rules—both Corrections' rules and the ethical rules of her profession. (Docket #59 at 12). As to the latter, the Defendants point to the DSPS order finding that she had committed professional misconduct by engaging in "seductive, romantic, or exploitive" conduct with a patient and suspending her license. *Id.* As to her violation of Corrections' rules, Defendants cite many instances of misconduct:[5] Johnston and **Nigl** kissing on Johnston's last day at Waupun (though Plaintiffs now deny that happened), Johnston sending **Nigl** mail using an alias in order to deceive the prison (though Plaintiffs deny a deceptive intent), Johnston misrepresenting her relationship with **Nigl** as "professional" on the fraternization request form she submitted upon her re-employment with Corrections, and Johnston ignoring Corrections policy by continuing to have contact with **Nigl** even though her fraternization request had not been approved. ***738** *Id.* at 14–15. The Defendants argue that allowing these rulebreakers to marry would "threaten[ ] prison security and undermine[ ] inmate rehabilitation." *Id.* at 15.

Second, Meisner believes that Johnston, in her position as a professional psychologist and Corrections employee, has victimized **Nigl**. *Id.* at 13. This, Meisner says, establishes "reasonable grounds to believe the marriage poses a threat to the security of the facility and threatens other legitimate penological interests." *Id.* at 13.

Finally, Defendants argue the marriage denial was appropriate because Johnston and **Nigl** have not demonstrated a longstanding relationship. This is premised in part on Johnston not being an approved visitor for **Nigl** (though it was Defendants' decision to keep her off his visitor list, based on a violation of the fraternization rule), *id.* at 12, and Meisner's belief that Johnston and **Nigl** "have demonstrated a relationship that was established on lies, deception, and rule breaking." (Docket #52 at 15). On this point, Plaintiffs aver that they have been "dating" since January 2015, have spoken on the phone or by email daily since then, became "betrothed" by entering into a "Covenant of Love" in November 2015, and

Appendix B

love each other and desire to enter into the sacred covenant of marriage. (Docket #49 at 1–2).

The Court finds that Defendants' decision to deny Plaintiffs' request to marry was reasonably related to a legitimate penological interest. Corrections and the Defendants in this case are tasked with protecting the safety and security of inmates, staff, and the public who enter Corrections' institutions. Corrections has strict rules against fraternization between inmates and staff in order to ensure that security. As part of their charge, wardens must carefully monitor staff and inmate relationships to ensure that the institution's rules are obeyed and its security is not breached.

In this case, Plaintiffs have demonstrated a willingness to bend Corrections' rules in furtherance of their relationship. Developing a personal relationship while Johnston was employed at Waupun, communicating under an alias, misrepresenting the nature of their relationship on Johnston's fraternization request, and continuing their relationship, without approval, when Johnston was employed at the central office collectively demonstrate that Plaintiffs do not have respect for the integrity of Correction's rules and its process for approving inmate-staff relationships. These considerations are relevant to the orderly management of the institution. Defendants' decision to forbid Plaintiffs' marriage, then, is reasonably related to their goal of ensuring a secure prison where staff and inmates respect the rules.

4.2 Equal Protection

[11] Next, Plaintiffs allege a class-of-one equal protection claim under the Fourteenth Amendment based on Defendants' refusal to allow visitation for them but not for other couples they say are similarly situated to them. In a class-of-one equal protection case, the plaintiff must prove that he was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). The Seventh Circuit has implied that it is possible for an inmate, or his would-be visitor, to state a class-of-one equal protection claim based on denial of visitation if the plaintiff alleges that the prison allows visits between similarly-situated inmates and visitors. *Bilka v. Farrey*, 447 F. App'x 742, 744 (7th Cir. 2011).

***739 4.2.1 No Similarly-Situated Comparators**

Plaintiffs point to two cases involving visitation requests by former Corrections employees as evidence that they are being treated differently than similarly-situated people with no rational basis: *Bilka* and *State of Wisconsin ex rel. David W. Bentley v. Edward Wall, et al.*, Dane County Case No. 15-CV-333 (Wis. Cir. Ct. 2015). However, the litigants in those cases are not sufficiently comparable to Plaintiffs. [6]

The plaintiff in *Bilka* was Susan Bilka ("Bilka"), a former Corrections employee who had befriended an inmate, Mackenzie Burse ("Burse"), while working in food services for the New Lisbon Correctional Institution. *Id.* at 743. She began smuggling him contraband, including cocaine, marijuana, and alcohol. *Id.* The prison discovered Bilka's misconduct, and she resigned from her position and pleaded guilty to delivering illegal articles to an inmate. *Id.* Once Bilka's sentence ended, she asked the prison to place her on Burse's visitor list. *Id.* The prison denied her request and explained that she posed a threat to the safety and security of the facility. *Id.* Bilka continued to apply for visitation with Burse for two years but the prison would not permit it. *Id.*

Bilka brought a class-of-one equal protection claim and the district court dismissed it for failure to state a claim. The Seventh Circuit affirmed, stating that even if Bilka believed that prison administrators were acting out of spite, she did not allege "that the prison allows other state offenders who have secreted contraband to inmates to continue to visit those inmates. Absent such an assertion, she has no class-of-one claim for an equal protection violation." *Id.* at 744.

Plaintiffs state that, sometime after the Seventh Circuit's order, Corrections began permitting visits between Bilka and Burse. To support this fact, Plaintiffs provide a declaration from Edward Jackson ("Jackson"), an inmate who was housed at Green Bay Correctional Institution in 2012 and 2013 along with Burse. (Docket #47-2 at 84–85). Jackson confirms that while Bilka was originally prohibited from visiting Burse, she was later placed on Burse's approved visitors' list. *Id.* Between January 2012 and September 2013, Jackson says that he was often in the visiting room together with Burse and Bilka. *Id.*

In *Bentley, Jr.*, the other case on which Plaintiffs rely, David W. Bentley, Jr. ("Bentley") was an inmate at Waupun who complained about the prison's refusal to place Kristina Rickman ("Rickman") on his visitors list. *See* (Docket #47-2 at 71–78). Rickman and Bentley became romantically involved while Rickman was a Corrections employee. She left Corrections when the relationship was discovered and ultimately pleaded guilty to misconduct in public office. In October 2015, the Dane County Circuit Court affirmed the prison's decision to forbid visitation between Bentley

Appendix B

and Rickman. *Id.* Plaintiffs provide evidence in the form of a Corrections memorandum that in March 2016, Rickman was placed on Bentley's visitors list for no-contact visits at the Wisconsin Secure Program Facility. (Docket #67 at 9). Defendants *740 do not dispute this. (Docket #72 at 2).

[12] The circumstances surrounding Defendants' decision to prohibit Johnston and **Nigl** from visiting are not similar to those in *Bilka* or *Bentley* in several material respects. First, and most obviously, *Bilka* and *Bentley* involve different prison officials at different institutions. The wardens at those institutions have made judgments, in their discretion, about the propriety of visitation in their prisons between certain former Corrections employees and inmates; but that is not relevant to whether the Defendants in this case have treated Johnston and **Nigl** different from other similarly situation people.

Next, Johnston's final visitation request was denied less than two years after she was terminated from Corrections for fraternization violations. By contrast, several years had passed after Bilka's and Rickman's fraternization with inmates before they were permitted to visit those inmates.[7] As the Defendants note, the passage of time is a relevant factor in the warden's determination of whether visitation is appropriate.

Finally, Johnston is a psychologist who violated the ethical rules of her profession by fraternizing with **Nigl**. Based in part on her professional position relative to **Nigl**, Meisner believes that Johnston victimized **Nigl** and continues to pose a threat to **Nigl**. There is no evidence that Bilka or Rickman had similar positions relative to the inmates with whom they formed relationships.

4.2.2. Defendants' Rational Basis to Deny Visitation

[13] [14] In addition to a lack of comparators, Plaintiffs' equal protection claim fails because the Defendants' denial of visitation was a rational exercise of discretion.[8] The Defendants believed that Johnston posed a threat to institution security because she had demonstrated her willingness to break the institution's rules. They also believed Johnston's visits would compromise **Nigl's** rehabilitation because the pair would have essentially been rewarded despite breaking fraternization rules. Therefore, the Defendants' decision to deny visitation was not arbitrary; their exercise of discretion was based on legitimate reasons.

5. CONCLUSION

On the undisputed facts in the record, summary judgment is appropriate in favor of the Defendants on both of Plaintiffs' claims.[9] The Court must, therefore, grant *741 the Defendants' motion, deny Plaintiffs' motion as moot, and dismiss this action with prejudice.[10]

Accordingly,

IT IS ORDERED that the Defendants' motion for summary judgment (Docket #51) be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED that the Plaintiffs' motion for summary judgment (Docket #46) be and the same is hereby **DENIED as moot**;

IT IS FURTHER ORDERED that the Plaintiffs' motion to compel (Docket #41) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that the Plaintiffs' motion for appointment of counsel (Docket #77) be and the same is hereby **DENIED**; and

IT IS FURTHER ORDERED that this action be and the same is hereby **DISMISSED with prejudice**.

All Citations

378 F.Supp.3d 729

Footnotes

1 Plaintiffs attempt to dispute that **Nigl** was, in a technical sense, Johnston's patient, noting that "it is not unusual for inmates to drop into see a psychology staff member whether or not they were on a professional mental health caseload." (Docket #66 at 2; #67 at 7–8). But Plaintiffs do not actually dispute that **Nigl** saw Johnston for professional services, and Defendants cite sufficient evidence to show this to be true. *See, e.g.*, (Docket #52-7 at 2–3; #54-2 at 21; #54-5 at 18, 21). This fact is not, therefore, genuinely disputed.

2 As this Court has previously noted, there is no section of DAI 309.00.06 specifically dedicated to providing the warden guidance on his/her decision to grant or deny a marriage request, seemingly leaving the warden with unfettered discretion. *see Reed v. Kemper*, No. 15-CV-208-JPS, 2015 WL 9239813, at *3 (E.D. Wis. Dec. 17, 2015), *aff'd in part, vacated in*

Appendix B

part, remanded, 673 F. App'x 533 (7th Cir. 2016). In other words, the policy does not mandate which—if any—factors the warden must consider in evaluating an inmate's marriage request. *Id.*

3 The standard is the same for **Nigl** and Johnston, even though **Nigl** is incarcerated and Johnston is not. *Keeney v. Heath,* 57 F.3d 579, 581 (7th Cir. 1995) ("[S]o far as challenges to prison regulations as infringing constitutional rights are concerned, the standard is the same whether the rights of prisoners or of nonprisoners are at stake.") (citation omitted).

4 Nor could Defendants reasonably justify the marriage denial with reference to the other factors. As to the second factor, there are no alternative means for **Nigl** and Johnston to marry the person of their choosing besides marrying each other; the right to marry includes the right to select one's spouse. *see Obergefell*, 135 S.Ct. at 2599; *see also Riker*, 798 F.3d at 555 (dismissing defendants' argument that because a former prison employee was free to marry anyone but an inmate, the prohibition imposed a minimal burden). As to the third and fourth factors, Defendants have not put forward evidence that arranging and monitoring a one-time meeting for a brief ceremony would strain prison resources. *see Riker*, 798 F.3d at 557 ("It is implausible to suggest, without some supporting evidence, that a brief marriage ceremony cannot be accommodated without threatening institutional security and without imposing more than a *de minimis* impact on prison resources.").

5 Some of these instances of misconduct are premised on disputed facts, as explained parenthetically in text. Those disputes do not preclude summary judgment because, even apart from those instances of misconduct that Plaintiffs dispute, Defendants had other legitimate reasons to prohibit the marriage.

6 Before filing their summary judgment motion, Plaintiffs filed a motion to compel the Defendants to produce prison visitation logs related to Burse and Bentley. (Docket #41). Because the Plaintiffs have provided other evidence to prove the fact for which they wanted these records—that Burse and Bentley are now permitted visits with women with whom they started relationships while the women were Corrections employees—the visitation logs are not necessary. The other evidence they sought in the motion is not relevant. The motion will be denied.

7 Bilka's misconduct was committed in 2004 and she was allowed to visit Burse in 2012. *Bilka v. Farrey*, No. 11-C-0430, 2011 WL 2444045, at *1 (E.D. Wis. June 15, 2011), *aff'd*, 447 F. App'x 742 (7th Cir. 2011). The criminal complaint charging Rickman with misconduct in office was filed in January 2012 and she was permitted to visit Bentley in 2016. *see Wisconsin v. Rickman,* Brown County Case No. 2012CF333, available by searching the Wisconsin Circuit Court Access website at *wcca.wicourts.gov*.

8 Class-of-one equal protection claims are very difficult, if not impossible, to prove in the context of an official's discretionary decision-making. *see Atkinson v. Mackinnon*, No. 14-CV-736-BBC, 2015 WL 506193, at *1 (W.D. Wis. Feb. 6, 2015) (prison disciplinary decisions not subject to equal protection challenge) (citing *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 603–04, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008) (class-of-one equal protection claims not available for discretionary decisions "based on a vast array of subjective, individualized assessments.").

9 Because the Court finds summary judgment in favor of the Defendants is appropriate on the merits, the Court does not reach the Defendants' request for application of the doctrine of qualified immunity. *See* (Docket #59 at 23–25).

10 In light of this dismissal, the Court will also deny Plaintiffs' motion to appoint counsel to assist them at trial. (Docket #77).

End of Document

Appendix B