IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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A'KINBO JIHAD-SURU HASHIM; a.k.a
JOHN D. TIGGS, JR., and ALL SIMILARLY
CIRCUMSTANCED INMATES,

ORDER

Petitioner,

01-C-266-C

v.

SECRETARY JON E. LITSCHER,
WARDEN GERALD A. BERGE,
RECORD CUSTODIAN YVETTEE
DUESTERBECK, SECURITY CAPTAIN
REED RICHARDSON, INSTITUTION
COMPLAINT EXAMINER JULIE M. BIGGAR,
SOCIAL WORKER RON EDWARDS,
MAILROOM OFFICER T. BAST, PROGRAM
ASSISTANT KELLY COON and SGT. B. BROWN,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude

that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted an affidavit, averring that 100% of his income is being taken to pay fees in other cases. Therefore, petitioner is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

Petitioner wishes to bring this suit as a class action on behalf of himself and all other inmates who are situated similarly. In order to certify a class action, the court must find, among other things, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). I cannot make this finding in the present action for two reasons. First, petitioner is not represented by an attorney, and it appears from the complaint and from the circumstances that petitioner is not an attorney. Since absent class members are bound by a judgment whether for or against the class, they are entitled at least to the assurance of competent representation afforded by licensed counsel. Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975). See also Ethnic Awareness Org. v. Gagnon, 568 F. Supp. 1186, 1187 (E.D. Wis. 1983); Huddleston v. Duckworth, 97 F.R.D. 512, 51415 (N.D. Ind. 1983) (prisoner proceeding pro se not allowed to act as class representative). Second, even a lawyer may not act both as class representative and as attorney for the class because that arrangement would eliminate the checks and balances imposed by the ability of the class representatives to monitor the performance of the attorney on behalf of the class members. See, e.g., Sweet v. Bermingham, 65 F.R.D. 551,

552 (1975); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973); see also Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 n. 5 (7th Cir. 1977), appeal after remand, 587 F.2d 866 (1978); Conway v. City of Kenosha, 409 F. Supp. 344, 349 (E.D. Wis. 1975) (plaintiff acting both as class representative and as class attorney precludes class certification). Consequently, class certification will be denied.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner filed a proposed amended complaint before his original complaint could

be screened. The proposed amended complaint will be accepted in place of the original complaint and treated as the only complaint. In it, petitioner alleges that respondents violated his right to the free exercise of religion under the First Amendment, as applied to the states under the Fourteenth Amendment, and that respondents violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1. From my screening of the complaint as required by 28 U.S.C. § 1915(e)(2), I conclude that petitioner must be denied leave to proceed in forma pauperis on all claims because he has failed to state a claim upon which relief may be granted.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Petitioner is a state inmate who was incarcerated at Supermax Correctional Institution at all relevant times. Respondent Jon Litscher is Secretary of the Wisconsin Department of Corrections. Respondent Gerald Berge is Warden of Supermax Correctional Institution. Respondents Duesterbeck, Reed, Biggar, Edwards, Bast, Coon and Brown are prison officials employed at Supermax Correctional Institution.

B. Use of Muslim Name

Petitioner began practicing the Islamic religion in 1980. On October 31, 1990, petitioner changed his legal name from John D. Tiggs, Jr., to A'Kinbo Jihad-Suru Hashim in civil case no. 9009-CV-672 in the District Court of Leavenworth County, Kansas.

In 1996, petitioner was convicted of a felony in Wisconsin. Because the Criminal Investigation Bureau registered his name as Tiggs, that name followed petitioner to the Department of Corrections. Petitioner told the Criminal Investigation Bureau and the Department of Corrections that his name had been changed legally, as reflected on petitioner's driver's license and social security cards. The Department of Corrections will recognize petitioner's chosen name only as an alias.

Petitioner contacted the court in which his name was changed and obtained authenticated copies of the name change order. On December 19, 2000, petitioner served copies of the name change on all major departments at Supermax Correctional Institution. Respondents refused to allow petitioner to use his holy name. On December 26, 2000, respondent Duesterbeck told petitioner, "This (name change order) has to come directly from the court to us. Contact the court and have them send this (name change order) directly to me." In response to petitioner's grievance # SMCI-2000-36876, petitioner was told that "In order for the Department of Corrections to change the complainant's name, certified documents must be received DIRECTLY from the District Court that ordered, adjudged and decreed that the name change take place."

Respondent Julie Biggar rejected petitioner's grievances when petitioner used both his current and former names. Petitioner filed grievance #SMCI-2001-710 against respondent Biggar. Respondent Biggar interviewed herself and made the complaint examiner's recommendation to dismiss the grievance. In the recommendation, respondent Biggar said that "a check of WITS revealed the complainant's alias to be 'Hashim, Akinbo Jhad [sic].' An alias used by someone is not the same as a legal name change. . . Although complainant did provide this [institution complaint examiner] and the [Supermax Correctional Institution] Records Supervisor with photocopies of a court order, it is mandatory that the Records Office receive such document directly from the court."

Respondent Duesterbeck refuses to change prison records or allow petitioner to use his legally changed name. Petitioner's holy name means "the courageous araiver [sic] struggling in the cause of Allah to destroy evil." Respondents Bast and Richardson refuse to allow incoming or outgoing mail that contains petitioner's holy name without his original name. Respondents Biggar and Kelly Coon refuse to process grievances or otherwise allow petitioner to exhaust his administrative remedies when he uses his holy name.

When petitioner asked respondent Edwards not to call him "Tiggs," Edwards became irate, called petitioner "Tiggs" repeatedly and banged on petitioner's cell door. Edwards retaliated against petitioner for filing grievance #SMCI-2001-7550 against Edwards by writing adult conduct report #1210780 for using false names and titles. As a sanction,

respondent Berge gave petitioner five days of solitary segregation and 180 days of program segregation.

During petitioner's incarceration, he has gone by the name "Yahya," which is the Arabic equivalent of "John," because he has had insufficient knowledge and resources to have the prison records changed. Respondent Richardson has refused to deliver letters to petitioner or from petitioner to Rufus Lynch, William Madina, Alphoncy Dangerfield, Charles Jokey, Cornelious Maddox and Vencent Whitaker when petitioner uses the name "Yahya" along with "John Tiggs." Respondent Richardson says that "Yahya" is listed as a gang nickname in a file. Inmates are not given any opportunity to rebut the claim that a name is a sign of gang affiliation. On several occasions, petitioner has told respondent that he is a Muslim and explained his holy name; petitioner has also given respondent Richardson legal documentation of his name. Respondent refuses to acknowledge petitioner's holy name.

In response to grievance #SMCI-2000-30924 filed by petitioner, institution complaint examiner Hautamaki reported on an interview with respondent Richardson:

> Captain Richardson was contacted on this issue. He stated that the name Mr. Tiggs is using, "Yahya," is one of his nicknames that was entered by the DCI Disruptive Groups' Coordinator. It is not Mr. Tiggs' legal name. He stated that Mr. Tiggs has been notified of this in a letter from him. Capt. Richardson stated Mr. Tiggs is using this gang nickname under the guise of a Muslim name.
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> Mr. Tiggs' profile was checked in WITS and showed his alias to be Hashim, A'kinbo-

> Jihad. . . . If Mr. Tiggs has had his name changed legally, he needs to show such proof to the institution Registrar in order to be permitted to use that name.

C. Religious Modesty

Islamic sacred law prohibits nude and naked display. A Muslim's wife must refrain from direct glances at the male genitalia and vice-versa. Inmates at Supermax Correctional Facility are isolated from human contact. The physical structure of the cells include solid box-car front doors with a two-foot window and observation cameras. Showers are offered three times a week during a second shift period, often during the 4:15 p.m. hour count of inmates. The inmate count requires a physical view of each inmate. At least 27% of the staff at Supermax Correctional Institution are women. During shower days, petitioner must wrap his body in an inadequately-sized terry cloth towel and give up all of his prison clothing to receive an exchange of clothes. The clothing exchange requires petitioner to turn on a brightened cell light and stand in the center of the cell with his palms exposed to staff's view. Respondent Berge tells staff that non-compliance constitutes an inmate's refusal. The terry cloth towels given to petitioner to wrap himself in are too small to cover his body fully and often fall to the floor when clothing is being exchanged. Respondents do not provide robes and do not allow inmates to purchase robes to protect their modesty during clothing exchanges. Respondents do not provide privacy curtains and do not shut down the

observation camera in petitioner's cell when he is showering or using the facilities. Respondents allow male prisoners to be subject to cross-sex surveillance to desensitize its female staff and so that the female staff may become callous to male nakedness. In response to grievance #SMCI-2001-719, petitioner was told that, "[t]he institution does not hold the officer's job in the [bona fide occupational qualifications] category (nor can it) because direct monitoring of nude bodies is not one of the officer's duties."

D. Denial of Religious Books

Muslims are required to study the Koran, Figh (sacred law), Summah (the ways of prophet Muhommad), fundamental principles of Islam, purification, correct prayer, Islamic mannerisms, Hadith, the Arabia language, fasting and Islamic jurisprudence. A majority of Islamic literature is published in hard-covered books that respondents do not allow prisoners to possess. On May 29, 2001, petitioner ordered a Figh book, The Reliance of the Traveller. Although petitioner purchased the book at the Islamic Book Center "with the hardcover removed," respondents Berge and Richardson destroyed the book, alleging that it was contraband. The notice of non-delivery from respondent Berge states, "After discussing the book with the Chaplain it is not a required book to practice religion. The book does not meet the institution policy for books because it is damaged or altered property and violates 303.35. The book is considered contraband and must be disposed of per the property

policy."

Petitioner prevailed on an internal grievance for staff's erroneous destruction of his personal book. As a result of the successful grievance, petitioner was given money to replace the specific book that had been destroyed, which was titled "Post Conviction Remedies: A Self-Help Manual." Petitioner tried to order replacement books that were Islamic; his request was denied by respondent Biggar, who gave only the reason that petitioner had to order legal publications. Petitioner appealed Biggar's decision to respondent Berge, who also insisted that petitioner order non-Islamic publications. Petitioner wrote Deputy Secretary Cindy O'Donnell about respondent's actions and O'Donnell told respondents that petitioner could order what he wanted. Because Biggar did not follow O'Donnell's directions, petitioner filed grievance #SMCI-2001-5649. Respondent Biggar made a partial recommendation in the complaint against her own actions, writing,

> Complainant did, in fact, receive a credit to his account in order to replace the legal book in question. In addition, the [institution complaint examiner] went out of her way by ensuring that said amount was frozen to complainant's account solely for this purpose, as any credits to his account would immediately go toward restitution and/or court costs. Complainant attempted to order said publication on a couple of occasions, only to have his check returned to the institution. This credit to complainant's account is not to be used for any purpose he chooses, as his next immediate obligation is to the courts.

The reviewer adopted respondent Biggar's recommendation.

E. Loud Prayer

On May 18, 2001, respondent Sgt. B. Brown wrote adult conduct report #1209863 because petitioner was reciting a prayer. Respondent Biggar sanctioned petitioner to six days solitary confinement for "praying too loud."

F. Policy Prohibiting Prayer Caps and Rugs

On April 17, 2001, respondent Litscher enacted internal management procedure 6A, prohibiting multi-color prayer caps for Muslims and allowing only black caps. Internal management procedure 6A bans all prayer rugs that are not 20" x 46". Petitioner's cap and two prayer rugs have been confiscated. Respondents have given no reason for requiring prayer in black caps. Islam encourages prayer in white or light colored prayer caps. Respondents have given no reason for taking prayer rugs that were in the possession of prisoners before the implementation of internal management procedure 6A. Islamic prayer caps and rugs have not been connected to disturbances, gang activity or other illegal activity.

DISCUSSION

I understand petitioner to contend that respondents violated his right to free exercise of religion under the First Amendment, as applied to the states through the Fourteenth Amendments. In addition, petitioner contends that respondents violated his rights under

the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc.

A. First Amendment

"[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987). In O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), the Supreme Court enunciated the proper standards to be applied in considering prisoners' free exercise claims. The Court held that prison restrictions that infringe on an inmate's exercise of his religion will be upheld if they are reasonably related to a legitimate penological interest. See id. at 349 (applying same standard to free exercise claims that applies where prison regulations impinge on inmates' constitutional rights). The Court of Appeals for the Seventh Circuit has identified several factors that can be used in applying the "reasonableness" standard:

> 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 that remain available to prisoners;
> 3. the impact accommodation of the asserted constitutional right would have on guards and other inmates and on the allocation of prison resources; and
> 4. although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable.

Al-Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991) (quoting Williams v. Lane, 851

F.2d 867, 877 (7th Cir. 1988)) (additional quotation marks omitted).

1. Muslim name

I understand petitioner to allege that respondents' refusal to allow him to use his Muslim name violated his right to freely exercise his religion. It appears to be an open question in the Seventh Circuit whether prison officials may be required to recognize a prisoner's use of a Muslim name. See Azeez v. Fairman, 795 F.2d 1296, 1302 (7th Cir. 1986) ("Even in 1986 the right to make prison staff recognize a religiously motivated name change in prison is not clearly established"). The Court of Appeals for the Ninth Circuit reviewed federal courts' responses to cases dealing with inmates' use of religious names, noting that

> [t]he cases have consistently supported three propositions. First, an inmate has a First Amendment interest in using his religious name, at least in conjunction with his committed name. Second, an inmate cannot compel a prison to reorganize its filing system to reflect the new name. Third, in states where inmates are allowed to change names legally, prisons are generally required to recognize only legally changed names.

Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995) (internal citations omitted). In Malik, the court held that "the law regarding a prisoner's First Amendment right to use his new legal name in conjunction with his committed name was clearly established in 1990." Id. at 730. Other courts of appeals have agreed. See Salaam v. Lockhart, 905 F.2d 1168 (8th Cir.

1990) (holding that state authorities must deliver mail to prisoner addressed to him only as his legally-changed name and not the name under which he was committed; not addressing whether prisoner could send mail bearing only his legally changed name); Felix v. Rolan, 833 F.2d 517 (5th Cir. 1987) (holding First Amendment not violated in situation in which "prison has not refused to recognize Al Uqdah's new name, it merely requires that for administrative efficiency he include his former name as an identifying alias"); Barrett v. Commonwealth of Virginia, 689 F.2d 498, 503 (4th Cir. 1982) ("it would be unlawful for Virginia to refuse to deliver mail addressed to a prisoner under his legal religious name"; not addressing whether prisoner could send mail bearing only his legally changed name).

Petitioner alleges that respondents have refused to allow him to use his legally changed name because he has not had the court that changed his name send certified documents verifying the name change directly to the Department of Corrections. This is not an unreasonable requirement. Petitioner was able to obtain copies of the name change order from the court so it should not be difficult for him to request that the court send the documents directly to the Department of Corrections. Respondents have a legitimate penological interest in insuring that they recognize only name changes that have received legal sanction; requiring proof to be sent directly from the court that ordered the name change is rationally connected to that interest.

Petitioner contends that respondents Bast and Richardson will not allow him to send

or receive mail that contains only his Muslim name and that respondents Biggar and Coon will not process grievances bearing his Muslim name. Although petitioner's letters may not be rejected because he used his new legal name, they may be rejected for his failure to include his committed name. Prisons have a legitimate interest in protecting the public by insuring that recipients of mail from inmates are able to recognize who the mail is from. Until petitioner follows the proper procedure to have his name change recognized by the Department of Corrections, respondents may require him to use his original name.

Petitioner alleges that respondent Richardson has refused to allow petitioner to send or receive intra-prison mail when petitioner uses the name "Yahya" along with "John Tiggs." Although "Yahya" is the Arabic translation of petitioner's name, "John," petitioner does not allege that he has had his name changed legally to "Yahya." Respondent Richardson refused to deliver letters bearing the name because prison records indicate that "Yahya" is a gang nickname. This is a legitimate reason to prohibit use of the name. Petitioner will be denied leave to proceed in forma pauperis on his claim that respondents' refusal to recognize either of his Muslim names violates his rights under the First Amendment.

Petitioner alleges that respondent Edwards retaliated against him by writing a conduct report for using false names and titles. To state a claim of retaliatory treatment, petitioner must "'allege a chronology of events from which retaliation may be inferred.'" Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994) (quoting Benson v. Cady, 761 F.2d 335, 342 (7th Cir.

1985)). It is insufficient to allege the ultimate fact of retaliation. See Benson, 761 F.2d at 342. In addition, the facts alleged must be sufficient to show that absent a retaliatory motive, the prison official would have acted differently. See Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). As discussed above, the prison's refusal to recognize petitioner's Muslim name until petitioner follows proper procedures for changing his name for prison purposes does not violate the Constitution. Because petitioner has alleged that he was using names that are not recognized by the prison, petitioner has failed to suggest that the conduct report was a result of retaliation only and not written because petitioner was using false names. Petitioner has failed to state a claim upon which relief may be granted that respondent Edwards retaliated against him in violation of the First Amendment.

2. Religious Modesty

Petitioner contends that his right to free exercise of religion is violated when female staff participate in clothing exchanges during which petitioner's towel may fall to the floor and expose him. The Court of Appeals for the Seventh Circuit has held that a guard's monitoring of a naked inmate neither violates the inmate's right of privacy nor constitutes cruel and unusual punishment, as long as the monitoring policy was not adopted to embarrass or humiliate the inmate. Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995). In Johnson, the court noted that "Cross-sex monitoring is not a senseless imposition. As a

reconciliation of conflicting entitlements and desires, it satisfies the Turner standard." Id. at 150-51. Respondents' failure to provide privacy curtains, robes or shut down the observation camera in his cell is related reasonably to a legitimate interest in security. See id. ("Surveillance of prisoners is essential, as [Bell v. Wolvish, 441 U.S. 520 (1979)] establishes. Observation of cells, showers, and toilets is less intrusive than the body-cavity inspections Wolfish held permissible."). Petitioner will be denied leave to proceed in forma pauperis on his claim that cross-sex surveillance violates his rights under the First Amendment because he has failed to state a claim upon which relief may be granted.

3. Books

Petitioner contends that he is not allowed to receive hardcover religious books and that respondent was not allowed to order Islamic publications to replace personal books destroyed erroneously by staff. Even assuming that the restrictions petitioner complains of impinge on his rights under the First Amendment, he has not shown that such regulations are not related reasonably to legitimate penological interests. Respondents have a legitimate penological interest in controlling the types of books allowed into the prison, including prohibiting the entry of books that have been altered by removing their covers or of hardcover books that may be used as weapons or to conceal contraband. Judges must respect the choices made by prison administrators, who need not adopt the best alternatives. See Johnson, 69 F.3d at 145 (citing Bell v. Wolfish, 441 U.S. 520, 559-60 (1979)). It is clear

from the response to petitioner's grievance that he was given money to replace a specific legal book that was erroneously destroyed. The prison may place restrictions on the money it gives him to compensate him for the loss of his book. Because petitioner has failed to state a claim upon which relief may be granted, he will be denied leave to proceed in forma pauperis on his claim that his inability to receive hardcover religious books or to order Islamic publications to replace a destroyed legal book violates his rights under the First Amendment.

4. Loud Prayer

Petitioner does not have a constitutional right to pray loudly. He will be denied leave to proceed in forma pauperis on his claim that respondent Brown sanctioned him for praying too loudly because he has failed to state a claim upon which relief may be granted.

5. Prayer cap and rug

Petitioner contends that his inability to choose the color of his prayer cap or to possess a prayer rug with dimensions other than 20" x 46" burdens his free exercise of religion. Such a de minimis restriction does not violate the First Amendment. Petitioner will be denied leave to proceed in forma pauperis on this claim because he has failed to state a claim upon which relief may be granted.

B. Religious Land Use and Institutionalized Persons Act

The Religious Land Use and Institutionalized Persons Act prohibits governmental imposition of a "substantial burden on the religious exercise" of a prisoner, unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1. The rule

> applies in any case in which –
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

Petitioner is a state prisoner confined at a state prison suing state employees. Nothing in his complaint suggests that his religious exercise is being burdened in a program or activity that receives federal financial assistance or that any burden on his religious exercise affects foreign, tribal or interstate commerce. Petitioner will be denied leave to proceed in forma pauperis under the Religious Land Use and Institutionalized Persons Act because he has failed to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Petitioner A'Kinbo Jihad-Suru Hashim's request for leave to proceed in forma pauperis on his claims under the First and Fourteenth Amendments and under the Religious Land Use and Institutionalized Persons Act is DENIED with prejudice for petitioner's failure

to state a claim upon which relief may be granted;

2. Petitioner's motion for class certification is DENIED;

3. The unpaid balance of petitioner's filing fee is $150; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. A strike will be recorded against petitioner pursuant to § 1915(g); and

5. The clerk of court is directed to close the file.

Entered this 27th day of July, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge