IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EDWARD J. PISCITELLO,

Plaintiff,

OPINION and ORDER

v.

02-C-0252-C

GERALD BERGE,

Defendant.

- -

Plaintiff Edward J. Piscitello, an inmate at the Columbia Correctional Institution in Portage, Wisconsin, was granted leave to proceed on two claims arising under 42 U.S.C. § 1983 concerning his conditions of confinement at the Wisconsin Secure Program Facility: (1) that he was denied biblical counseling courses in violation of the First Amendment; and (2) that the totality of his conditions of confinement violated the Eighth Amendment.

On November 5, 2002, I granted defendant's motion to dismiss plaintiff's Eighth Amendment claim for his failure to exhaust his administrative remedies. Presently before the court is defendant's motion for summary judgment on plaintiff's First Amendment claim.

Before I address defendant's motion, three preliminary matters require attention.

First, in his complaint, plaintiff asked for declaratory, injunctive and monetary relief. However, the record reveals that on March 21, 2002, plaintiff was transferred from the Wisconsin Secure Program Facility and is no longer subject to the religious practice restriction at issue in this case. Indeed, it appears from the record that even before plaintiff was transferred, defendant granted plaintiff an exception to the correspondence course rule challenged in plaintiff's complaint and allowed him to participate in a biblical counseling correspondence course. Therefore, plaintiff's claims for declaratory and injunctive relief are moot.

Second, plaintiff alleged in his complaint that denying his request to take a biblical correspondence course violated the First Amendment and the Religious Land Use and Institutionalized Persons Act. Through inadvertence, I did not identify the RLUIPA claim in the order allowing plaintiff leave to proceed on his First and Eighth Amendment claims. Nevertheless, defendant answered all of the allegations in plaintiff's complaint, including plaintiff's contention that his rights had been denied under RLUIPA. Def.'s Ans., dkt. #8, ¶¶ 30, 35.

In support of his motion for summary judgment, defendant did not refer to plaintiff's RLUIPA claim. However, plaintiff reiterated his entitlement to relief under RLUIPA in his response brief. In his reply, defendant countered plaintiff's argument with the statement that plaintiff had not been allowed to proceed on his RLUIPA claim. Nevertheless,

defendant argued the merits of the claim, contending that plaintiff would not be entitled to relief under RLUIPA in any event because his claim for injunctive relief has been mooted by his transfer from the Wisconsin Secure Program Facility and because defendant is entitled to qualified immunity on plaintiff's claim for money damages.

Because the RLUIPA claim remains an active claim to be resolved in this case and because the parties have addressed the claim in their briefs, I will consider the claim along with plaintiff's First Amendment claim in resolving defendant's motion for summary judgment.

Finally, plaintiff has filed a motion for reconsideration and to vacate judgment or alter or amend the February 18, 2003 order in which I denied his motion to amend his complaint to include additional defendants and a claim of false imprisonment and illegal custody. Because plaintiff has failed to persuade me that I erred in denying his motion to amend the complaint, his motion for reconsideration will be denied.

From the proposed findings of fact and the record, I find the following facts material and undisputed.

UNDISPUTED FACTS

Plaintiff Edward J. Piscitello is an inmate at the Columbia Correctional Institution. Defendant Gerald Berge is the warden at the Wisconsin Secure Program Facility (formerly

known as the Supermax Correctional Institution). At all times relevant to this lawsuit, plaintiff was housed at the Wisconsin Secure Program Facility.

The prison is a maximum security facility that ordinarily houses inmates serving long periods of disciplinary segregation. However, plaintiff was transferred to the prison on May 2, 2000, because he was in need of protective confinement. Inmates transferred to the prison move through several security levels. The progressive structure allows inmates to obtain increased privileges and more property in direct relation to demonstrated improvements in their attitude and behavior. For a period of time, protective confinement inmates moved through the security levels. After August 1, 2001, these inmates were placed in security level 3, the level that most closely resembles program segregation at other institutions.

Plaintiff was transferred to the Wisconsin Secure Program Facility on May 2, 2000. Before he was transferred to the facility, plaintiff was permitted to participate in correspondence courses through the Truth Bible Church, located in Waukesha, Wisconsin. Upon arrival at the prison, plaintiff was placed at security level 1. On May 31, 2000, he moved to level 2. On March 13, 2001, he moved to level 4. On July 13, 2001, he moved to level 5. On August 9, 2001, he moved back to level 3, where he stayed until he was transferred out of the prison on March 21, 2002.

Inmates at the Wisconsin Secure Program Facility are not allowed to possess privately

owned hardcover books. This prohibition exists regardless of the content of the book. All library books that an inmate can possess in his cell are softcover. A very limited number of inmates are allowed to possess a hardcover, institution-issued book for a small business course. This is allowed because there is no reasonably available softcover book appropriate for the course. Only a small number of inmates possess these books, which are considered less of a security risk than privately owned hardcover books in the possession of a large number of inmates.

Hardcover books are a security concern. Inmates may slit open the binding and conceal weapons and other contraband within it. Also, inmates are more likely to use hardcover books as weapons because they are heavier and have hard, pointed corners. Plaintiff's biblical correspondence course included hardcover books.

As part of the security level incentive program, inmates are allowed to possess an increasing number of softcover books as they progress through the security levels. This includes religious material.

Originally, the prison did not allow inmates to participate in correspondence courses operated by non-institution sponsors for either educational or religious purposes. Instead, the prison's education department provided all educational and vocational coursework and the chaplain or the program services unit coordinated all religious programming. Correspondence courses have the potential to generate a high volume of incoming and

outgoing mail, which would place a substantial burden on mailroom staff. Inmates may use correspondence courses to send material that is gang-related, promotes racial hatred or that would compromise security. Correspondence course sponsors may be defrauded by inmates who order material for which they are unable or do not intend to pay. Because hardcover books are not allowed at the prison, there is a risk that inmates may order and pay for impermissible material. Allowing correspondence courses increases the burden on the institution because it must process vouchers to pay for such courses.

Defendant wanted inmates to concentrate on the rehabilitative and educational programming available from the institution instead of outside correspondence courses, which might not fulfill their educational or rehabilitation needs. The prison had extensive religious resources available to inmates.

In late July of 2000, the Department of Corrections hired Chaplain Todd T. Overbo as the chaplain for the Wisconsin Secure Program Facility. Chaplain Overbo is a minister of The Bible Way Association, a Protestant Christian organization. Protestant inmates are allowed to pray in their cells and possess a softcover copy of the Bible. They are allowed to correspond with religious leaders through writing, telephone, face-to-face visits. Inmates can obtain books concerning Protestant beliefs and practices from the prison's libraries.

In June 2000, plaintiff wrote an "interview/information request" to "whom it may concern," stating the following:

> Am writing to receive information on my study courses. I am currently doing one course from P.M.I. Center for Biblical studies out of Battle Creek, MI as well doing non-credit courses from my church in Waukesha, Wis. Through Rev. Tenaglia. Please reply!! Can I do 7 courses? God bless!

The handwritten response on the form states, "Study Courses/Correspondence Courses are not allowed at SMCI."

On an unknown date, plaintiff completed an "interview/information request" form addressed to V.J. Sharpe which reads,

> Ms. Sharpe, As is known through Madison, Wisc., am housed here at Supermax Corr Inst due to my status as a protection case. This has nothing to do with personal behavior. I've been told that I'll need to do the program here before leaving, however, am never going into general pop in any Wisconsin prison, so why do this program; beside I do two courses which are Biblical and very rewarding. Am asking to do these studies. My church (Rev. Tenaglia) has helped me dearly and the need is in this area as to personal behavior both spiritually and physically. Thank you and God bless.

Ms. Sharpe responded to plaintiff's information request form on June 28, 2000, stating, "I am returning your Bible Studies material. Correspondence course[s] of any kind are not allowed at SMCI. Sorry for the delay in getting back to you."

In November 2000, plaintiff filed inmate complaint #SMCI-2000-33233, alleging that he was being denied biblical correspondence courses. His complaint was dismissed in January 2001, on the ground that prison rules permitted different property allowances at different institutions.

On April 29, 2001, plaintiff completed form DOC-1090 and declared his religious

preference to be Protestant and his pastor or spiritual leader to be Richard Tenaglia, in Waukesha, Wisconsin. This was the only such form that plaintiff submitted to the chaplain's office.

In September 2001, prison officials changed the correspondence course policy to allow level 4 and 5 inmates to participate in pre-approved correspondence courses taken at their own expense. Inmates wanting to participate in such correspondence courses are required to fill out a DOC-1117 form first to gain permission. This requirement allows prison officials to check whether the organization offering the course is a legitimate course sponsor or a supplier of gang, racist or hate literature. It also allows prison authorities to determine how the inmate will pay for the course and insure that the institution will not be obligated to pay for the course.

Although plaintiff was at security level 3 when the policy change occurred, a special exception was made for him to participate in correspondence courses provided they complied with the general institution policy precluding hardcover books, because as a protective confinement inmate, he could not be expected to progress beyond security level 3. On March 12, 2002, plaintiff filled out a DOC-1117 form to request participation in a biblical studies correspondence course. The request was approved. On March 21, 2002, plaintiff was transferred out of the Wisconsin Secure Program Facility.

OPINION

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986).

A. 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.

The act is to be construed broadly to favor the protection of inmates' religious exercise. 42 U.S.C. § 2000cc-3(g). Although there is little case law interpreting the act's key terms, its predecessor, the Religious Freedom Restoration Act, had an analogous requirement that

plaintiffs demonstrate a "substantial burden" on their exercise of religion before defendants were called upon to show a compelling interest furthered by the least restrictive means available. In Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996), judgment vacated and remanded by O'Leary v. Mack, 522 U.S. 801 (1997), the Court of Appeals for the Seventh Circuit elaborated on what the Religious Freedom Restoration Act meant by "substantially burdening" a person's exercise of religion. Although the court of appeal's decision in that case was vacated after the Supreme Court invalidated the Religious Freedom Restoration Act as it applied to the states in City of Boerne v. Flores, 521 U.S. 507 (1997), the court of appeals' reasoning in Mack is instructive nonetheless. The court of appeals held that

> a substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.

Mack, 80 F.3d at 1179. In determining whether a prisoner's religious freedom is substantially burdened, the question is not whether a particular practice is required by the prisoner's faith, but whether "the practices in question are important to the votaries of the religion." Charles v. Verhagen, 220 F. Supp. 2d 937, 948 (W.D. Wis. 2002) (quoting Mack, 80 F.3d at 1180).

In Charles v. Verhagen, I concluded that a restriction on the number of annual religious feasts and on the possession of prayer oil violated the inmate's rights under the

Religious Land Use and Institutionalized Persons Act because the inmate demonstrated why religious feasts and prayer oil were significant to those practicing Islam. In plaintiff's brief in opposition to defendant's motion for summary judgment, he states in one sentence that the correspondence course policy violates the Religious Land Use and Institutionalized Persons Act, but he has failed to provide any evidence to show how the inability to take a biblical correspondence course substantially burdens the exercise of his religious beliefs. Indeed, plaintiff did not put in evidence to show that he was, in fact,"force[d] to refrain from [his] religiously-motivated conduct," that is, studying the Bible, or that participation in biblical *correspondence courses* is important to the devotees of his religion. Mack, 80 F.3d at 1179. No one disputes that Bible study is rewarding to numerous practitioners of many religious faiths, but plaintiff has not shown that his inability to take a correspondence course prevented him from studying the Bible. The facts are that plaintiff is allowed to possess a Bible and other soft cover religious material and to correspond with his spiritual leader in writing and by telephone or face-to-face visits. These freedoms should have given plaintiff ample opportunity to continue his biblical studies.

From the undisputed facts, I cannot find that the prison's correspondence course policy imposed a substantial burden on the exercise of plaintiff's religion. I conclude therefore that plaintiff is not entitled to relief under the Religious Land Use and Institutionalized Persons Act. As a result, it is unnecessary to address whether defendant is

entitled to qualified immunity on this claim.

B. First Amendment Claim

Plaintiff contends that the denial of his request for a biblical correspondence course violated his right to the free exercise of religion under the First Amendment as well as the Religious Land Use and Institutionalized Persons Act. Prisoners do not forfeit all constitutional protections by reason of their conviction and confinement. Woods v. O'Leary, 890 F.2d 883, 884 (7th Cir. 1989) (quoting O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987)). In general, "when 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). The Supreme Court has held that "it [is] important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." Id. at 90. Prison officials violate the First Amendment, when for reasons unrelated to legitimate penological interests, they engage in "censorship of . . . [the] expression of 'inflammatory political, racial, religious, or other views,' and matter deemed 'defamatory or 'otherwise inappropriate.'" Procunier v. Martinez, 416 U.S. 396, 415 (1974).

Because the prison's policy denying plaintiff's request to take a biblical correspondence course was a neutral regulation of general applicability and not specifically

targeted at preventing religious correspondence courses, plaintiff cannot succeed on his First Amendment claim. "[T]he Free Exercise Clause does not require states to make exceptions to neutral and generally applicable laws even when those laws significantly burden religious practices." Goshtasby v. Board of Trustees of Univ. of Ill., 141 F.3d 761, 769 (7th Cir. 1998) (citing Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990)); see also City of Boerne v. Flores, 521 U.S. 507 (1997) (Scalia, J., concurring) ("Religious exercise shall be permitted so long as it does not violate general laws governing conduct."); Sasnett v. Sullivan, 91 F.3d 1018, 1020 (7th Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997) ("After Smith the only way to prove a violation of the free-exercise clause is by showing that government discriminated against religion, or a particular religion, by actually targeting a religious practice, rather than accidentally hit it while aiming at something else. . . . [O]nly intentional discrimination . . . is actionable under Smith."). In other words, the policy plaintiff complains about must target religion or amount to intentional discrimination against religion.

The correspondence course policy at issue in this case did not specifically target religious correspondence courses. The facts show that out of administrative, safety and rehabilitative concerns, prison officials prohibited all correspondence courses by non-institution sponsors, without regard to the educational or religious purpose of the course. Accordingly, plaintiff has failed to state a First Amendment free exercise claim.

Even if the denial of a biblical correspondence course could be construed to violate the First Amendment, plaintiff's claim would not survive the Turner test for determining the reasonableness of a prison regulation: (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) whether accommodation of the asserted constitutional right will have negative effects on guards, other inmates or prison resources; and (4) whether there are obvious, easy alternatives at a de minimis cost. Turner, 482 U.S. at 89-91; O'Lone, 482 U.S. at 350-353. The Supreme Court adopted a reasonableness standard to allow prison administrators "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration" and to prevent unnecessary federal court involvement in the administration of prisons. Turner, 482 U.S. at 89.

1. Legitimate penological interest

The first Turner factor is whether a valid, rational connection exists between the regulation and a legitimate penological interest. Id., 482 U.S. at 89. 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. Id. at 89-90.

The original decision by prison administrators was to not allow inmates to participate

in correspondence courses operated by non-institution sponsors for either educational or religious purposes. Defendant listed several reasons for the policy relating to prison security and preservation of scarce prison resources. These concerns included: (1) the substantial burden placed on mail room staff because correspondence courses have a high potential to generate a high volume of incoming and outgoing mail; (2) the risk that inmates may use correspondence courses to send material that is gang-related, promotes racial hatred or that could compromise security; (3) the possibility that correspondence course sponsors may be defrauded by inmates who order material for which they are unable to pay or do not intend to pay; (4) the extra burden that allowing correspondence courses will place on the institution to process vouchers to pay for such courses; and (5) the risk that inmates would order and pay for impermissible material because hardcover correspondence material is not allowed at the prison. These concerns relate reasonably to legitimate security, administrative and rehabilitative interests of the prison. See Al-Alamin v. Gramley, 926 F.2d 680, 686 (7th Cir. 1991) ("Both security and economic concerns are legitimate penological demands."). Plaintiff has failed to put in credible evidence to cast doubt on defendant's asserted penological reasons for denying all inmates housed at the Wisconsin Secure Prison Facility the ability to participate in correspondence courses. Moreover, plaintiff does not dispute the fact that under the revised policy, he was allowed to participate in a biblical correspondence course, despite the fact that the change in policy did not occur until two weeks before he was

transferred to another institution.

2. Alternative means of exercising right

The second Turner factor focuses on the existence of alternative means of exercising the right in question. Turner, 482 U.S. at 90. In Turner, the Supreme Court considered whether inmates were deprived of "all means of expression." Id. at 92. When alternative possibilities for the exercise of the asserted right remain available, courts should be particularly conscious of judicial deference owed to prison officials in assessing the validity of the regulation. Id. at 90 (citing Pell v. Procunier, 417 U.S. 817, 827 (1974)).

Plaintiff argues that the teachings of the Truth Bible Church differ from the teachings of other faith programs offered at the prison. Plaintiff does not deny that when he completed the prison's religious preference form DOC-1090 in April 2001, he identified his religion as "Protestant" and identified Rev. Tenaglia as his pastor or spiritual leader. It is fair to assume that at least from April 2001 until he was transferred in March 2002, prison officials relied on what plaintiff stated on his religious reference form in determining that he had ample opportunities to practice his religious faith.

Like all inmates, plaintiff was allowed to pray in his cell, possess a softcover copy of the Bible in his cell and correspond in writing or by telephone and meet face-to-face with religious leaders. As he progressed through the security levels, he was allowed to possess

more personal property, including more softcover religious material. He could obtain books concerning Protestant beliefs and practices from the prison's library. Thus, plaintiff had alternate means of exercising his right to practice his religion.

Although plaintiff argues in his brief that none of the avenues for practicing religion provided by the prison were adequate to allow him to practice his religious beliefs, he has put in no evidence to support the contention. Indeed, he does not provide any evidence to show how one practices the teachings of the Truth Bible Church or how participating in a biblical correspondence course conforms to the teachings of his religion.

Because the facts show that defendant gave plaintiff reasonable opportunities to practice his religion once plaintiff proclaimed his faith to be Protestant and because plaintiff has failed to show that a biblical correspondence course was his only meaningful means of practicing his faith, he has failed to meet the second prong of the Turner test.

3. Impact on guards, inmates or prison resources

The third Turner factor is whether accommodation of the asserted right will have a significant negative effect on guards, inmates or prison resources. Turner, 482 U.S. at 90. When the accommodation of an asserted right will have a significant "ripple effect" on fellow inmates or prison staff, courts should be particularly deferential to the informed discretion of prison officials. Id.

The facts reveal that before the correspondence course rule was changed in September 2001, defendant believed that changing the rule regarding correspondence courses would have had a significant negative effect on fellow inmates, prison staff and prison resources. Defendant believed that the prison's mailroom staff would be required to handle an increased volume of incoming and outgoing mail and that there would be an increased burden on the institution in processing vouchers to pay for such courses. He believed that correspondence courses could be used to obtain or send material that is gang-related, promotes racial hatred and could compromise security and he believed that because hardcover books are not allowed at the prison, there was a risk that inmates would order and pay for material that is not permitted in the prison. These concerns are the type that a prison warden such as defendant may take into consideration when shaping the prison's correspondence course policy.

Plaintiff contends that accommodating his desire to take a biblical correspondence course would not have had a significant "ripple effect" on fellow inmates, prison staff or prison resources because there were inmates who were allowed to possess a hardcover book for a small business course. Although these inmates were allowed to possess a hardcover book, the book was institution-issued and there was no reasonably available softcover book. Plaintiff's requested books were from a correspondence course. Prison policy prohibited correspondence course material from non-institution sponsors for either educational or

religious purposes.

Defendant has succeeded in showing that accommodation of plaintiff's asserted right to participate in a biblical correspondence course would have had a significant negative effect on guards, inmates and prison resources.

4. Obvious and easy alternatives

The fourth and final Turner factor is whether there are obvious, easy alternatives to achieve the valid penological interests at a de minimus cost. Id. at 90. Plaintiff failed to offer any obvious, easy alternatives that would show the policy adopted by defendant was an "'exaggerated response' to prison concerns." Id.

In September 2001, prison officials changed the correspondence course policy to allow participation for level 4 and 5 inmates. These inmates were eligible for pre-approved correspondence courses taken at their own expense. Inmates filed form DOC-1117 to seek permission. Even though plaintiff was in level 3 at the time the new policy came into effect, he was allowed to participate because his level 3 status was due to his protective confinement, not poor behavior. By allowing only certain inmates to take correspondence courses and requiring that these courses be pre-approved, defendant was able to alleviate some of the security and administrative concerns behind the original prohibition of all correspondence courses. Prison officials should be allowed flexibility to alter and improve

prison policies so long as the reasons for the original policy served legitimate penological interests. Any other approach would undermine the ability of prison officials to address complex and "intractable problems of prison administration." See Turner, 482 U.S. at 89.

In sum, because the defendant has shown the correspondence policy was a neutral regulation of general applicability, that the denial of his request to take a biblical correspondence course was reasonably related to legitimate penological interests, that there were alternative means of exercising his practice of his religion, that the accommodation of plaintiff's request would have had a negative effect on guards, other inmates or prison resources; and there were no obvious, easy alternatives at a minimal cost, I will grant defendant's motion for summary judgment on plaintiff's claim that defendant's policy deprived him of his First Amendment right to practice his religion.

ORDER

IT IS ORDERED that

1. Plaintiff Edward Piscitello's motion for reconsideration of the February 18, 2003 order denying plaintiff's motion to amend his complaint is DENIED;

2. Defendant Gerald Berge's motion for summary judgment is GRANTED; and

3. The clerk of court is directed to enter judgment in favor of defendant and to close

this case.

Entered this 17th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge