IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JERRY CHARLES,

ORDER

Petitioner,

02-C-626-C

v.

MATTHEW J. FRANK[1], JON LITSCHER & DICK VERHAGEN,

Respondents.

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5. Petitioner, who is presently confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this

[1]In January 2002, Matthew J. Frank succeeded Jon Litscher as Secretary of the Wisconsin Department of Corrections. To the extent petitioner seeks injunctive and declaratory relief, Frank will be substituted as a respondent for Litscher, in accordance with Fed. R. Civ. P. 25(d).

lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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, on three or more previous occasions, the prisoner has 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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 contends that respondents violated his rights under the Religious Land Use and Institutionalized Persons Act and the First Amendment by prohibiting him from wearing Muslim prayer beads under his shirt, limiting the size of his prayer rug, denying him access to Internet and cassette-based distance learning courses on Islam, forbidding him from helping an outside Islamic representative make and distribute photocopies of Islamic

materials to other prisoners and preventing him from bringing religious books to the prison day room. Petitioner will be granted leave to proceed in forma pauperis on his claim that respondents violated his rights under the act and the First Amendment by prohibiting him from wearing Muslim prayer beads under his shirt. He will be denied leave to proceed on all other claims. In addition, petitioner has filed a motion to amend his complaint, which will be denied because the amendment does nothing more than attempt to add a state law claim unrelated to the only federal claim on which he will be allowed to proceed.

In his complaint, petitioner alleges the following facts.

## ALLEGATIONS OF FACT

Petitioner Jerry Charles is a Wisconsin prisoner and practicing Muslim presently confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Respondent Matthew J. Frank is Secretary of the Wisconsin Department of Corrections. He replaced respondent Jon Litscher in that position in January 2002. Respondent Dick Verhagen is an "administrator" in the Department of Corrections.

Petitioner is not allowed to wear his religious emblem, "Dikr beads," around his neck and inside his shirt, even though such prayer beads are approved by respondents' own policy. Members of all other religious groups are allowed to wear their particular religious emblem inside their shirts. Respondents maintain that Muslim prayer beads do not meet the criteria

of a religious emblem.

A regulation promulgated by respondents, IMP 309 6A, allows inmates to use a prayer rug of a particular size. Under the regulation, a prayer rug must be the same size as a bath towel, notwithstanding the fact that prayer rugs and bath towels are used for different purposes. The prayer rugs allowable under the regulation are too small for men of average height. The size restriction prevents petitioner from performing his prayers properly.

Petitioner is not allowed to purchase a cassette tape player. Petitioner wishes to take religious distance learning courses, which are available mostly on cassettes. Petitioner is also denied access to Internet web sites for Islamic studies and free Internet Islamic distance learning courses. Petitioner's religion requires him to continue his religious education until he dies.

Petitioner is not allowed to help the outside Islamic representative, who has a limited amount of time, to collect and make copies of different Islamic topics that are used in prison study groups. The representative has asked petitioner to prepare certain papers and make copies for upcoming classes, but the prison's chaplain department gives petitioner the run around. This is true even though petitioner is one of the most knowledgeable Wisconsin prisoners on Islamic matters. The chaplain has told petitioner that the materials he wants to copy and distribute must be approved by the outside representative, but petitioner has the same qualifications as the representative, whose biweekly visits are not frequent enough

to fully learn the Islamic study courses.

Respondents' policy prevents petitioner from bringing religious and legal books to the regular day room, which is for all inmates, even though another policy permits petitioner to bring a book to the recreation yard. Petitioner and his fellow Muslims meet in the day room and the recreation yard to study their religion together and to discuss legal issues.

## OPINION

### 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 RFRA 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; but see Henderson v. Kennedy, 253 F.3d 12, 17 (D.C. Cir. 2001) (rejecting this definition of "substantial burden" as "read[ing] out of RFRA the condition that only *substantial* burdens on the exercise of religion trigger the compelling interest requirement") (emphasis added).

1. Prayer Beads

Petitioner alleges that he is not allowed to wear his religious emblem, "Dikr beads," around his neck and inside his shirt, even though prayer beads are generally approved by

respondents' own policy. In addition, he alleges that members of all other religious groups are allowed to wear their particular religious emblem inside their shirts. At this early stage of the litigation these allegations are sufficient to state a claim under the act. See, e.g., Alameen v. Coughlin, 892 F. Supp. 440 (E.D.N.Y. 1995) (evaluating prison regulation prohibiting display of prayer beads under standards of former Religious Freedom Restoration Act); Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994) (evaluating under RFRA and First Amendment prison regulation prohibiting the wearing of Santeria beads under clothing). Plaintiff will be allowed to proceed on a claim that respondents' policy prohibiting him from wearing Muslim prayer beads under his shirt violates the Religious Land Use and Institutionalized Persons Act.

2. Prayer Rug Size

Petitioner objects to a prison regulation prescribing the maximum size for prayer rugs. He believes the prayer rug he is allowed to use is too small. Even though what constitutes a "substantial burden" on a prisoner's religious exercise is to be defined generously so as to be "sensitive to religious feeling," courts interpreting that term are nonetheless required "to separate center from periphery in religious observances" because "prison officials do not have to do handsprings to accommodate the religious needs of inmates." Mack, 80 F.3d at 1179-80. A document attached to petitioner's complaint indicates that he is allowed to possess

a 24 inch by 40 inch prayer rug. Petitioner does not indicate what size rug he deems satisfactory, but the fact that he must use a marginally smaller rug than he would prefer is not a substantial burden on his religious practice if the word "substantial" is not to be drained of all meaning.

3. Cassette and Internet Distance Learning Courses

Petitioner alleges that he is not allowed to purchase a cassette tape player. This prevents him from taking religious distance learning courses, many of which are available only on cassettes. Petitioner is also denied access to Internet web sites for Islamic studies and free Internet Islamic distance learning courses. In Hensley v. Verhagen, case no. 01-C-495-C (W.D. Wis. May 23, 2002), I concluded that a prison regulation banning cassette tapes and players was reasonably related to legitimate penological interests and therefore did not violate the First Amendment. Although Hensley is not dispositive of petitioner's claim under the Religious Land Use and Institutionalized Persons Act, because the act affords prisoners engaged in religious conduct federal statutory protections above and beyond those embodied in the First Amendment, Charles v. Verhagen, 220 F. Supp. 2d 937, 943 (W.D. Wis. 2002), petitioner has failed to state a claim under the act because he has not alleged facts suggesting his inability to take distance learning courses on cassettes or the Internet substantially burdens the exercise of his religion. Petitioner alleges that his religion requires

him to continue his religious education until he dies, but he does not suggest that the only way he can educate himself in the ways of his religion is by using the Internet or cassette-based distance learning courses. Petitioner's allegation that distance learning courses are available "mostly" on cassette tapes does not change this conclusion. The allegations in petitioner's complaint make clear that he has access to an outside representative from the Islamic community on a bi-weekly basis, that he participates in Islamic study groups and has access to Islamic study materials. Moreover, there is no indication that petitioner is prohibited from corresponding with experts in Islam or receiving a variety of conventionally published materials on Islam. Because petitioner's complaint does not indicate that his inability to use cassettes or the Internet "forces [him] to refrain from religiously motivated conduct," that is, forces him to refrain from continuing his religious education until he dies, he will be denied leave to proceed on this claim. Mack, 80 F.3d at 1179.

4. Helping the outside Islamic representative

Petitioner alleges that is not allowed to help the outside Islamic representative, who has a limited amount of time, to collect and make copies of different Islamic topics that are used in prison study groups. This claim is flawed in at least two ways. First, petitioner does not allege that his inability to help the Islamic representative is the result of an official prison policy for which respondents are responsible. Rather, he alleges that the prison chaplain is

preventing him from assisting the representative. Even if plaintiff had named the chaplain as a respondent, which he did not, it is implausible that petitioner's inability to assist the representative in making photocopies substantially burdens the exercise of his religion.

5. Religious books in the day room

Petitioner alleges that prison policy prevents him from bringing a religious book to the regular day room, which is for all inmates, even though another policy permits petitioner to bring a book to the recreation yard. Petitioner and his fellow Muslims meet in the day room and the recreation yard to study their religion together and to discuss religious issues. These allegations do not suggest that the day room regulation substantially burdens petitioner's exercise of his religion. Petitioner does not allege that this regulation prevents him from studying his religion together with fellow believers. Indeed, the factual allegations in petitioner's complaint makes clear that he participates in a prison Islamic study group and that he is also able to study Islamic texts with other prisoners in the recreation yard. These allegations undermine petitioner's claim that the day room regulation works a substantial burden on his religious observance.

B. First Amendment

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' First Amendment 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. Id. at 349. 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). Largely for the reasons discussed earlier in the context of the Religious Land Use and Institutionalized Persons Act, petitioner will be allowed to proceed on a claim that respondents' policy prohibiting him from wearing Muslim prayer beads under his shirt violates the First Amendment. Respondents may have a legitimate penological interest in prohibiting petitioner from wearing prayer beads under his clothing, but none is apparent from the facts alleged in petitioner's complaint. Moreover, petitioner alleges that members of all other religious groups are allowed to wear their particular religious emblem inside their shirts. By

itself, this allegation states a claim because the free exercise clause of the First Amendment "forbids government to discriminate between religions." Mack, 80 F.3d at 1181; Sasnett v. Litscher, 197 F.3d 290, 292-93 (7th Cir. 1999) (prison regulation that discriminates against Protestants violates the First Amendment).

As I noted in assessing petitioner's claims under the act, the size of petitioner's prayer rug and his inability to (1) take Internet or cassette-based distance learning courses; (2) help the Islamic representative photocopy and distribute materials; and (3) bring religious books to the day room do not impose substantial burdens of his religious exercise. "To show a free exercise violation, the religious adherent . . . has the obligation to prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates." Graham v. Commissioner, 822 F.2d 844, 850-51 (9th Cir. 1987), aff's sub nom. Hernandez v. Commissioner, 490 U.S. 680 (1989). The burden must be substantial and more than a mere inconvenience. Id. at 851.

Petitioner does not allege that his Islamic faith mandates a prayer rug larger than 24 by 40 inches. Similarly, petitioner's claim that he is not allowed to bring religious books to the day room cannot be deemed anything more than an inconvenience. He acknowledges in his complaint that multiple other avenues exist for him to engage in group study of his

religion. In addition, petitioner's inability to study his religion in an Internet or cassette-based format is little more than an inconvenience. Moreover, as noted above, I already have held in another case that a prison regulation banning cassette tapes and players is reasonably related to legitimate penological interests and therefore does not violate the First Amendment. See Hensley, case no. 01-C-495-C. Finally, petitioner's inability to help the outside Islamic representative make photocopies and distribute materials cannot seriously be considered a substantial burden on his religious exercise and in any case, petitioner's failure to allege any personal involvement on the part of respondents with respect to this claim is fatal. "'Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation.'" Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir.1994)); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) ("A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary."). Accordingly, petitioner will be denied leave to proceed on each of these First Amendment claims.

C. Motion to Amend Complaint

On December 18, 2002, petitioner filed a motion to amend his complaint to add a

claim that respondents violated a Wisconsin statute prescribing the appropriate method for promulgating administrative regulations when they implemented certain prison internal management procedures. (In his proposed amendment, petitioner mentions the Religious Land Use and Institutionalized Persons Act, but does not suggest how respondents' alleged failure to promulgate regulations in accordance with state law substantially burdens the exercise of his religion). Petitioner's proposed amendment contains no indication that the allegedly improperly promulgated regulations pertain to the single claim regarding the wearing of prayer beads on which he will be allowed to proceed. Because petitioner's state law claim appears to be based on facts that are entirely separate from his viable federal law claim, even if petitioner amended his complaint I would decline to exercise supplemental jurisdiction over his proposed state law claim pursuant to 28 U.S.C. § 1367(a). See Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or to refuse jurisdiction over state law claims). Accordingly, petitioner's motion to amend his complaint will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Jerry Charles's request for leave to proceed in forma pauperis on his claim that respondents Matthew Frank, Jon Litscher and Dick Verhagen violated his rights

under the Religious Land Use and Institutionalized Persons Act and the First Amendment by prohibiting him from wearing Muslim prayer beads under his shirt is GRANTED;

2. Petitioner's request for leave to proceed in forma pauperis on his other claims under the Religious Land Use and Institutionalized Persons Act and the First Amendment is DENIED for petitioner's failure to state a claim upon which relief may be granted;

3. Petitioner's motion to amend his complaint is DENIED;

4. The unpaid balance of petitioner's filing fee is $130.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and

5. Petitioner should be aware of the requirement that he send respondent a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondent, he should serve the lawyer directly rather than respondent. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to

respondent or to respondent's attorney.

Entered this 31st day of January, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge