

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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LOUIE E. AIELLO,

Plaintiff,

v.

MATTHEW J. FRANK, DANIEL  
BERTRAND, ROBERT NOVITSKI,  
GERALD BERGE and TODD OVERBO,

Defendants.  
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ORDER

03-C-0127-C

On April 10, 2003, I granted plaintiff leave to proceed in forma pauperis in this action on claims that while he was incarcerated at the Wisconsin Secure Program Facility (plaintiff is now at the Green Bay Correctional Institution), defendants violated his rights under state law and the First Amendment free exercise clause of the United States Constitution by enforcing a policy forbidding inmates in segregation from having a Tallith, yarmulke and Siddurim. In addition, I granted plaintiff leave to proceed on a claim that defendants violated his First Amendment free expression rights by enforcing a policy forbidding inmates in segregation from receiving all but first-class mail. Now plaintiff has filed a motion to amend his complaint to add a claim for relief under the Religious Land Use

and Institutionalized Persons Act and the Fourteenth Amendment equal protection clause of the United States Constitution. Defendants object to the proposed amendment on the ground that the court has not screened the merits of plaintiff's proposed new legal theories pursuant to 28 U.S.C. § 1915 and that "the civil rights action [plaintiff] filed adequately covers his constitutional claims" and "he should not be allowed to manipulate the system and file amended complaints every time a new legal theory occurs to him."

Federal Rule of Civil Procedure 15(a) allows a party in plaintiff's position to amend his pleading by leave of court or by written consent and provides that "leave shall be freely given when justice so requires." The Court of Appeals for the Seventh Circuit has enumerated four conditions that justify denying a motion to amend: undue delay; dilatory motive on the part of the movant; repeated failure to cure previous deficiencies; and where the amendment would be futile. Cognitest Corporation v. Riverside Publishing Company, 107 F.3d 493, 499 (7th Cir. 1997). In addition, because he is a prisoner, plaintiff's proposed amended complaint is subject to screening under 28 U.S.C. § 1915A. This means that leave to amend will be denied if the proposed amendment is frivolous or malicious, fails to state a claim upon which relief may be granted, or is attempting to add a defendant who is immune from suit. None of these conditions is present with respect to plaintiff's proposal to add a claim that his rights under RLUIPA were violated. This case is very new. Although defendants have filed an answer to plaintiff's original complaint, the preliminary pretrial

conference is not scheduled to be held until July 1, 2003. Moreover, allowing plaintiff to add a claim under RLUIPA does not require alteration of any of the factual allegations in plaintiff's complaint. This means that if the amendment is allowed, defendants will not need to amend their answer other than to set out additional affirmative defenses to the claim, if defendants believe such additional defenses are appropriate. Therefore, I will allow plaintiff to amend his complaint to include a claim under RLUIPA.

However, I will not allow plaintiff to amend his complaint to add an equal protection claim, because with respect to this proposed amendment, plaintiff fails to state a claim upon which relief may be granted. The equal protection clause of the Fourteenth Amendment provides that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Nevertheless, not "every religious sect or group within a prison – however few in number – must have identical facilities or personnel." Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972). To show an equal protection violation, a plaintiff must demonstrate intentional or purposeful discrimination. Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982). In other words, plaintiff's allegations must suggest that defendants "singled out a particular group for disparate treatment and selected [their] course of action at least in part for the purpose of causing its adverse effects on" Jews. Id. Nothing in plaintiff's original complaint or his proposed amendment includes factual allegations suggesting that defendants are singling out inmates who practice Judaism for

particularly adverse treatment in comparison to fellow inmates who practice other religions.

One final matter needs to be addressed. In a letter dated May 26, 2003, plaintiff asked the court to invite the Aleph Institute to present an affidavit or amicus brief on his behalf in this case. The request will be denied.

First, there is no motion presently before the court for which affidavits or briefs on the merits of plaintiff's claims is required. In any event, even if the defendants were to move for summary judgment at a later date, it is not the practice of this court to solicit affidavits or amicus briefs from persons or entities not parties to the case. Perhaps plaintiff is aware that Rules 706 and 614 of the Federal Rules of Evidence give district courts discretion to appoint an impartial expert witnesses in a civil case *to assist the court* in evaluating complex scientific evidence. See McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991) (district court might appoint impartial expert to help court evaluate scientific evidence on health effects of exposure to secondary cigarette smoke). In that instance, the court has the discretion to apportion the costs of the expert to one side. Ledford v. Sullivan, 105 F.3d 354, 361 (7th Cir. 1997).

In this case, however, plaintiff appears to be asking the court to obtain expert testimony to assist him in presenting his claim, rather than to assist the court to evaluate conflicting evidence. As helpful as the testimony of an expert might be to the prosecution of plaintiff's claim, the funds to pay for his expert are not available under 28 U.S.C. § 1915

and are not compelled under Fed. R. Evid. 614 or 706(b). Therefore, I will deny plaintiff's request for the court's assistance in obtaining expert evidence, bearing in mind that if it becomes necessary at a later time for the court to decipher conflicting expert testimony, the Aleph Institute has indicated its willingness to respond to a direct inquiry for information from the court.

#### ORDER

IT IS ORDERED that plaintiff is allowed to amend his complaint to include a claim that defendants' policy of forbidding inmates in segregation from having a Tallith, yarmulke and Siddurim violated his rights under the Religious Land Use and Institutionalized Persons Act. Plaintiff's request for leave to amend his complaint to add a claim under the equal protection clause is DENIED.

Further, IT IS ORDERED that defendants may have until June 16, 2003, in which to serve and file an amended answer or advise the court that they wish to stand on their answer to the original complaint.

Finally, IT IS ORDERED that plaintiff's request that the court obtain expert testimony from the Aleph Institute is DENIED.

Entered this 3rd day of June, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge