IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

GARY ALLEN BORZYCH,

Plaintiff,

v.

MATTHEW J. FRANK, STEVE CASPERSON, ANA M. BOATWRIGHT, GERALD BERGE, GARY BOUGHTON, PETER HUIBREGTSE, RICHARD RAEMISCH, SGT. JUDITH HUIBREGTSE, CPT. LEBBEUS BROWN, ELLEN RAY and TODD OVERBO,

Defendants.

OPINION AND ORDER

04-C-632-C

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

This is a civil action brought under 42 U.S.C. § 1983. Plaintiff Gary Allen Borzych claims that defendants Matthew Frank, Steve Casperson, Ana Boatwright, Gerald Berge, Gary Bourghton, Peter Huibregtse, Richard Raemisch, Judith Huibregtse, Lebbus Brown, Ellen Ray and Todd Overbo denied him copies of the books "The NPKA Book of Botar," "Tower of Wotan" and "Creed of Iron" in violation of his First Amendment right to freely exercise his religion, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, the First Amendment establishment clause and the Fourteenth Amendment's

equal protection clause. Before the court is plaintiff's motion for a preliminary injunction. His motion will be denied.

In determining whether a preliminary injunction should be granted, courts are to consider the following four factors: (1) whether the plaintiff has a reasonable likelihood of success on the merits; (2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; (3) whether the threatened injury to the plaintiff outweighs the threatened harm an injunction may inflict on defendant; and (4) whether the granting of a preliminary injunction will disserve the public interest. Pelfresne v. Village of Williams Bay, 865 F.2d 877, 883 (7th Cir. 1989). A preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant carries the burden of persuasion by a clear showing. Boucher v. School Board of Greenfield, 134 F.3d 821 (7th Cir. 1998). In addition, the Prison Litigation Reform Act limits the scope of preliminary injunctive relief available in challenges to prison conditions and treatment. The act provides that:

> Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief.

18 U.S.C. § 3626(a)(2).

It is unnecessary to proceed beyond the first element in this case because plaintiff has

not shown that he has a reasonable likelihood of success on the merits. Plaintiff's arguments in support of his motion are based on his free exercise and RLUIPA claims only and thus, I will address only those claims. In order to succeed on a free exercise claim, plaintiff will have to start by showing that the denial of the texts at issue infringes on his ability to exercise his religion. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987). In order to prevail under RLUIPA, he will have to show that the denial of the texts imposes a substantial burden on his religious exercise. 42 U.S.C. § 2000cc-1.

Defendants argue that plaintiff cannot make either of these showings because Wotanism is a secular movement and not a religion. Although I make no final determination at this point, my tentative view is that plaintiff has a reasonable chance of succeeding on this issue. "A general working definition of religion for Free Exercise purposes is any set of beliefs addressing matters of 'ultimate concern' occupying a 'place parallel to that filled by . . . God in traditionally religious persons.'" Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680, 688 n.5 (7th Cir. 1994) (quoting Welsh v. United States, 398 U.S. 333, 340 (1970)). The Court of Appeals for the Seventh Circuit has held that "[w]here a district court has before it one who swears or (more likely) affirms that he sincerely and truthfully holds certain beliefs which comport with the general definition of religion, [it can be] comfortable [that] those beliefs represent his 'religion.'" Id. at 687-88. Plaintiff has averred in his affidavit in support of the motion for preliminary injunction that

Odinism has deities, codes of ethics, prayer-like incantations, guidance for meditation and various rituals. In addition, plaintiff has averred that he needs the three withheld texts in order to attain "godhead," the ultimate goal in Odinism.

However, even accepting that plaintiff's ability to exercise his religion is being burdened by the denial of these texts, plaintiff cannot prevail on his claim under the First Amendment if the denial is reasonably related to a legitimate penological interest, O'Lone, 482 U.S. at 349, or under RLUIPA if the denial furthers a compelling governmental interest and is the least restrictive means for doing so, 42 U.S.C. § 2000cc-1. If defendants can meet the heavier burden required under RLUIPA, they will be assumed to have met the lesser standard required under the First Amendment. Charles v. Frank, 03-C-626-C (W.D. Wis. Feb. 26, 2004).

Defendants have put in evidence in response to plaintiff's motion to show that the ban on the three Odinist texts furthers a compelling governmental interest, namely the safety and security of the department of corrections institutions, staff and other inmates. Thomas Laliberte, a disruptive group gang coordinator at the Oak Hill Correctional Institution in Oregon, Wisconsin who performs the duties of the Wisconsin Department of Corrections disruptive group agency trainer avers that the books"Creed of Iron," "Temple of Wotan" and "The NPKA Book of Blotar" teach ideas of Aryan supremacy and advocate the use of violence to that end. In his affidavit, Laliberte chronicles information about the authors and

publishers of these books, including their association with white supremacist movements. He has cited a number of passages from each of the three texts that teach ideas of Aryan supremacy and advocate the use of physical violence to that end. One of the texts describes the rise of Nazi Germany as an Odinist revival and all three books contain symbols associated with white supremacist movements, including swastikas, Celtic crosses and Thor's hammer.

(Defendants sought and obtained the permission of the court to file unredacted copies of the objectionable texts under seal for in camera inspection, with plaintiff getting a redacted copy. I agree with Magistrate Judge Crocker that this arrangement is an appropriate compromise between institutional security and plaintiff's ability to pursue his claims. See Order, Feb. 1, 2004, dkt. #36, at 2.) I have reviewed the redacted passages quoted from the three texts and conclude that Laliberte's summation is accurate; the passages promote ideas of Aryan supremacy and advocate the use of physical violence to that end.

It is well established that rehabilitation and security are legitimate goals of the penal system. O'Lone, 482 U.S. at 348 (security concerns are legitimate penological interests); Pell v. Procunier, 417 U.S. 817, 823 (1974) ("[a] paramount objective of the corrections system is the rehabilitation of those committed to its custody [and] . . . central to all other corrections goals is the institutional consideration of internal security within the corrections

facilities themselves."); Childs v. Duckworth, 705 F.2d 915, 920 (7th Cir. 1983). Racism, hatred and violence are incompatible with these objectives.

Plaintiff advances three arguments in response. The first is that the passages Laliberte cites do not reflect his version of Odinism. Plaintiff notes that at least one of the texts contains some unobjectionable material and that not all people adhere to every dictate of their religion. Plaintiff's current personal beliefs are beside the point. Defendants' concern is that inmates who read the texts might adopt the views expressed therein. Thus, the relevant question is whether the books advance ideas that are at odds with rehabilitative goals or encourage behavior that presents a threat to the prison's institutional security. Furthermore, even if plaintiff could establish that these texts would never persuade him to believe in racial superiority or the justifiability of inter-racial violence, his mere possession of these texts could pose a threat to institutional security. "[P]risoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow's beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly." Thornburgh v. Abbott, 490 U.S. 401, 412-13 (1989).

Plaintiff's second argument is that defendants' claimed concern about allowing inmates to possess religious texts that advocate hatred, violence and racism is pretext. Plaintiff suggests that the real reason he is not allowed to have these texts is because defendants dislike either him individually or are biased against Odinism as a whole. He

notes that Christian inmates are permitted to have copies of the New King James Bible, which according to plaintiff, teaches racial superiority, violence and hatred also. In Howard v. United States, 864 F. Supp. 1019 (D. Colo. 1994), a case on which plaintiff relies to support his argument, the plaintiff requested certain items such as candles, incense, gongs and a black robe needed to perform Satanic rituals. The prison contended that these items presented a security risk because they could be used to start fires and disguise smells, sounds and identities. Although acknowledging these as legitimate concerns, the court rejected the argument because the prison had allowed other religious groups to use the same or almost the same items in their ceremonies. Id. at 1025.

In support of his argument, plaintiff quotes several passages from the New King James Bible. However, they are not the same or almost the same as the passages Laliberte quoted from the three Odinist texts. There is a substantial difference between describing an act and advocating it; the mere fact that the New King James Bible describes acts of violence does not make it a call to arms. For example, plaintiff asserts that II Samuel 18:15 advocates gang murder ("And ten young men who bore Joab's armor surrounded Absalom, and struck and killed him"), that II Samuel 13:14 promotes incest ("He would not heed her voice; and being stronger than she, he forced her to lay him") and that Judges 19:29 encourages dismemberment ("When he entered his house, he took a knife, laid hold of his concubine, and divided her limb from limb, and sent her throughout all territory of Israel"). Nothing

in these passages suggests that the described acts are appropriate, let alone desirable. Plaintiff cites Leviticus 26:29 ("You shall eat the flesh of your sons , and you shall eat the flesh of your daughters"), for the proposition that the New King James Bible advocates cannibalism, but this passage describes part of the punishment for sinning. Prison officials are afforded substantial deference in making decisions about what actions and objects present a threat to prison security and inmate rehabilitation. Pell v. Procunier, 417 U.S. 817, 827 (1974). A court may "not substitute [its] judgment for [prison officials'] 'in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations.'" Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986) (quoting Procunier, 417 U.S. at 827). Plaintiff has not shown that it would be inappropriate to apply this standard in this case; the rule stated in Howard is not applicable here because the passages plaintiff cites from the New King James Bible are not equivalent to the express advocation of inter-racial violence found in the three Odinist texts plaintiff seeks.

Plaintiff's third and final argument is that denying him access to these books altogether is not the least restrictive means of advancing defendants' interests. He suggests that he could keep the books locked up when not in use. This would not address defendants' concerns that plaintiff might use the texts to reinforce ideas of racism and justified inter-racial violence advocated by these texts. As for plaintiff's suggestion that the troubling portions of the texts could be redacted, this would not cure the problem that other inmates

might observe plaintiff with these texts, assume that he is a white supremacist who advocates violence against them and act accordingly.

Based on the parties' submissions, I conclude that plaintiff has not met his burden to show that he has a reasonable likelihood of success on the merits of either his free exercise or RLUIPA claims entitling him to the extraordinary and drastic remedy of a preliminary injunction. Accordingly, I will deny his motion.

ORDER

IT IS ORDERED that plaintiff Gary Allen Borzych's motion for a preliminary injunction is DENIED.

Entered this 8th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge