IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GILLIUM LEVY,

Plaintiff,

ORDER

v.

09-cv-279-slc[1]

C. HOLINKA, MARION FEATHERS and BILL L. JONES, in their individual and official capacities,

Defendants.

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In this civil action for monetary, injunctive and declaratory relief, plaintiff Gillium Levy, a prisoner at the Federal Correctional Institution in Oxford, Wisconsin, has submitted a proposed complaint in which he alleges that defendants C. Holinka, Marion Feathers and Bill Jones prevented him from wearing a kufi (or turban) with which he practices his religion in violation of his rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, and the First and Fifth Amendments. Plaintiff requests leave to proceed in

[1] While this court has a judicial vacancy, it is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the purpose of issuing this order only, I am assuming jurisdiction over the case.

forma pauperis and has made the initial partial payment required of him under 28 U.S.C. § 1915.

Because plaintiff is an inmate, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if his 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. 28 U.S.C. § 1915(e). However, plaintiff also is a pro se litigant, which means his complaint will be construed liberally as it is reviewed for these potential defects. Haines v. Kerner, 404 U.S. 519, 521 (1972). Having reviewed plaintiff's complaint, I conclude that he may proceed on claims against defendants Holinka, Feathers and Jones under the free exercise and establishment clauses of the First Amendment, RFRA and the due process clause of the Fifth Amendment.

ALLEGATIONS OF FACT

Plaintiff Gillium Levy is incarcerated at the Federal Correctional Institution in Oxford, Wisconsin. Defendant C. Holinka is the warden of the Federal Correction Institution–Oxford and ultimately in charge of religious practice at the institution. Defendant Marion Feathers is the associate warden and in charge of the religious services department. Defendant Bill Jones is the chief chaplain at the institution and operates the

religious services department. Defendant Feathers has the authority to intervene and stop any wrongdoing that defendant Jones may commit with respect to religious practices.

Plaintiff observes the customs and practice of Hebrew Israelites, including the wearing of headwear. Hebrew Israelites are not Jewish, but the two religions share some practices. One difference is that Jews wear yamulkes but Hebrew Israelites wear a kufi or kippah (turban) and a kippot (pill box cap). The Torah, the holy scripture of Hebrew Israelites, requires the wearing of headwear, which is fundamental to a Hebrew Israelite's religious practice. Because the Federal Bureau of Prisons does not recognize Hebrew Israelites as a religious group, plaintiff identified himself as Jewish upon his arrival to the Federal Correctional Institution–Oxford in February 2006.

On April 12, 2006, the first day of Passover, plaintiff attended a seder at the institution and wore a kufi. Defendant Jones told plaintiff to remove the kufi and either leave it on his desk or cut it up. When plaintiff asked to speak to supervisor, defendant Jones called Lieutenant Marten. Plaintiff took his kufi and went to Lieutenant Marten's office, where he was handcuffed and brought to the special housing unit. Five days later, a disciplinary committee found plaintiff guilty of disobeying a direct order and removed his commissary and telephone privileges for 45 days. Prison officials destroyed plaintiff's kufi without his knowledge or consent.

The institution allows followers of other religions to purchase various headwear. On May 16, 2006, plaintiff complained about not having a kufi to the previous warden, R. Martinez, who gave him permission to purchase one kufi sometime between May 20 and 27, 2006. That kufi has since deteriorated. Defendant Jones has prevented plaintiff from purchasing another kufi, stating that Warden Martinez approved the purchase of only one. Defendant Jones also has not permitted plaintiff to celebrate his "high holy days," asserting that plaintiff listed his religious preference as Jewish and that the Jewish and Hebrew Israelite faiths are essentially the same.

On June 1, 2008, plaintiff completed a "Bp-8 form," complaining that he needed more religious headwear. Defendant Jones repeated his response that Warden Martinez only approved the purchase of one kufi and that plaintiff's religious preference was Jewish. On June 8, 2008, plaintiff and another inmate submitted a "Bp-9 form," requesting that the institution recognize the Hebrew Israelite faith and allow the wearing of turbans. Defendants refused the requests. Defendant Jones also has refused to sign a "New and Unfamiliar Religious Component" form on three different occasions. In July and October, 2008, plaintiff submitted additional complaints to the regional director and National Inmate Appeals. Both denied his requests to wear a turban.

OPINION

A. First Amendment

1. Free exercise clause

The free exercise clause of the First Amendment guarantees every individual the right to freely exercise his or her religion and "requires government respect for, and noninterference with, [] religious beliefs and practices." Cutter v. Wilkinson, 544 U.S. 709, 719 (2005). However, the First Amendment protects only "the observation of a central religious belief or practice." Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989). Thus, to prevail on a free exercise claim, plaintiff must meet two requirements. First, he must show that the government has placed a substantial burden on a central religious practice. Id.; Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005). Second, plaintiff must demonstrate that the government has intentionally targeted a particular religion or religious practice. Sasnett v. Sullivan, 91 F.3d 1018, 1020 (7th Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997). In other words, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (citation omitted).

In the prison setting, an inmate's ability to practice his or her religion may be circumscribed by restrictions that are reasonably related to legitimate penological interests.

Conyers v. Abitz, 416 F.3d 580, 585 (7th Cir. 2005); Tarpley v. Allen County, Indiana, 312 F.3d 895, 898 (7th Cir. 2002). In determining whether government conduct is reasonably related to a legitimate penological interest, the court considers four factors: (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 would have a negative impact on guards, other inmates and the allocation of prison resources; and (4) whether obvious, easy alternatives exist as evidence that the regulation is not reasonable. Tarpley, 312 F.3d at 898 (citing Turner v. Safely, 482 U.S. 78, 89-91 (1987)).

At this early stage, plaintiff's allegations are sufficient to state a claim. He alleges that religious headwear prescribed by the Torah and observing high holy days are central to his faith and that defendants have substantially burdened his religious practice and targeted his faith by allowing inmates of other religions to observe their holy days and keep their religious headwear while denying plaintiff these rights. Although maintaining prison security is a legitimate interest, Kaufman, 419 F.3d at 683, it is too early to tell whether defendants' interest is reasonably related to the restriction on plaintiff's religious practices.

Plaintiff also alleges personal involvement on behalf of each defendant, as he is required to do in bringing claims against federal employees pursuant to Bivens v. Six

Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937, 1948 (2009) (assuming without deciding that pretrial detainee's First Amendment claim actionable under Bivens); Alejo v. Heller, 328 F.3d 930, 936 (7th Cir. 2003); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994). He alleges that defendants Holinka and Feathers are responsible for the policies that prevent the recognition of Hebrew Israeilites and prohibit the wearing of turbans. He alleges that defendant Jones enforced these policies when he confiscated his kufi and that defendants Holinka and Feathers approved this decision. However, plaintiff should be aware that supervisors cannot be held liable for mere "knowledge and acquiescence" of their subordinates' unconstitutional acts. Iqbal, 129 S. Ct. at 1948. If as this case progresses, it becomes apparent that defendants Holinka and Feathers merely knew of and consented to defendant Jones's alleged wrongdoing, he will not be able to establish their liability for any constitutional violation. At this stage, however, plaintiff will be allowed to proceed with his claim that defendants Holinka, Feathers and Jones violated his First Amendment right under the free exercise clause.

2. Establishment clause

The establishment clause of the First Amendment "commands a separation of church and state," Cutter, 544 U.S. at 710, by preventing the government from promoting any

religious doctrine or organization or affiliating itself with one. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 590 (1989). A governmental policy violates the establishment clause if "(1) it has no secular purpose, (2) its primary effect advances or inhibits religion, or (3) it fosters an excessive entanglement with religion." Kaufman, F.3d at 683 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)); Books v. City of Elkhart, 235 F.3d 292, 301 (7th Cir. 2000).

Plaintiff alleges that defendants recognize other religious faiths and allow inmate members of those faiths to possess religious headwear and observe holy days. I understand plaintiff to contend that the prison's policy favors other religious groups over Hebrew Israelites. Accordingly, I will grant plaintiff leave to proceed on his claim that defendants violated his right under the establishment clause of the First Amendment.

B. Religious Freedom Restoration Act

Plaintiff alleges that defendants' failure to allow him to possess religious headwear and observe holy days violated his rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, which is applicable to federal prison officials, O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003). Like the First Amendment, RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the burden furthers "a compelling

governmental interest" and does so by "the least restrictive means." 42 U.S.C. §§ 2000bb-1(a)-(b). RFRA allows a person to bring a claim "and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c).

Under RFRA, plaintiff must first establish that defendants placed a substantial burden on the exercise of his religious beliefs. RFRA does not define the term "substantial burden." However, the Court of Appeals for the Seventh Circuit has expounded on the meaning of this term in cases brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc, which is a related statute that applies religious protections to state prisoners. The court of appeals has defined a substantial burden as one "that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003). Further, "[a] government action substantially burdens religious exercise if it prevents or inhibits religiously motivated conduct or compels conduct contrary to religious beliefs." Koger v. Bryan, 523 F.3d 789, 798 (7th Cir. 2008).

Unlike cases interpreting the First Amendment, RFRA and RLUIPA broadly define a "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Once a plaintiff establishes that a policy substantially burdened his religious practice, a defendant may avoid liability by

proving that the challenged policy furthers a compelling interest by the least restrictive means. O'Bryan, 349 F.3d at 401.

Plaintiff's allegations that defendants substantially burdened his religious exercise by not recognizing his religion and forbidding him from buying and wearing a kufi are sufficient to state a claim under this standard. Because it is too early to tell whether prohibiting the kufi was the least restrictive means to enforce the policy, I will grant plaintiff leave to proceed on his RFRA claim.

C. Fifth and Fourteenth Amendments: Denial of Equal Protection

Because defendants are federal employees, they are not bound by the equal protection clause of the Fourteenth Amendment, which applies only to state actors. Instead, the equal protection analysis must proceed under the Fifth Amendment. The Fifth Amendment does not contain an equal protection clause, but the United States Supreme Court has held that the amendment's due process clause prevents the federal government from "engaging in discrimination that is 'so unjustifiable as to be violative of due process.'" Schlesinger v. Ballard, 419 U.S. 498, 500 (1975) (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)); see also Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975) (Fifth Amendment due process clause imposes obligation of equal treatment on the federal government); Nicholas

v. Tucker, 114 F.3d 17, 19 (2d Cir. 1997) ("the standards for analyzing equal protection claims under either amendment are identical").

With respect to discrimination claims based on religion, the analysis is the same whether the claim is viewed under the establishment clause or the equal protection clause. Board of Education of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 715 (O'Connor, J., concurring) ("[T]he Religion Clauses . . . and the Equal Protection Clause as applied to religion—all speak with one voice on this point."). The question is whether defendants were singling out particular religions for special treatment without a secular reason for doing so. Cruz v. Beto, 405 U.S. 319 (1972); Kaufman v. McCaughtry, 419 F.3d 678, 683-84 (7th Cir. 2005). As previously noted, plaintiff's allegations are sufficient to state a claim under this standard. Therefore, I will grant plaintiff leave to proceed on his claim that defendants violated his right to equal protection under the Fifth Amendment.

D. Other Issues

I note that in his proposed complaint, plaintiff cites the Eighth Amendment, which guarantees the right to be free from cruel and unusual punishment, and briefly mentions the destruction of his kufi, which could be construed as a violation of his Fifth Amendment right to procedural due process. Because he does not discuss these issues further, I do not understand him to be raising a claim under either the Eighth or Fifth Amendments and will

not assess a strike with respect to these potential claims. However, for the sake of completeness, I note that it is unlikely that plaintiff could state either a deliberate indifference or due process claim.

To succeed on an Eighth Amendment claim in which the purported injury is purely psychological, "[e]xtreme deprivations are required." Doe v. Welborn, 110 F.3d 520, 524 (7th Cir. 1997) (citing Hudson v. McMillian, 503 U.S. 1, 9 (1992)). "[N]ot every psychological discomfort a prisoner endures amounts to a constitutional violation." Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003). Only punishment that is inflicted unnecessarily and is "so totally without penological justification that it results in the gratuitous infliction of suffering" rises to the level of an Eighth Amendment violation. Id. (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976)). Preventing plaintiff from wearing religious headwear and observing his high holidays cannot be characterized as an "extreme deprivation." Wellborn, 110 F.3d at 524 (noting that conditions-of-confinement cases limited to deprivations of "minimal civilized measures of life's necessities") (quoting Babcock v. White, 102 F.3d 267, 272 (7th Cir. 1996)); see also Warren v. Peterson, 2008 WL 4411566, *3 (N.D. Ill. Sep. 25, 2008) (denial of vegan meals required by inmate's religion not violation of Eighth Amendment where no immediate danger to inmate's health). Whatever unhappiness plaintiff may have experienced as a result of these deprivations would not constitute "serious harm" under the Eighth Amendment.

The Fifth Amendment protects plaintiff from being deprived of life, liberty or property without due process of law by the federal government. Caldwell v. Miller, 790 F.2d 589, 602 (7th Cir. 1986). The Supreme Court has held that negligent and intentional deprivation of an inmate's property does not violate the due process clause if adequate remedies are available to compensate for the property loss. Hudson v. Palmer, 468 U.S. 517, 536 (1984) (no due process claim for random and unauthorized deprivation of property, even if taking is intentional, so long as state provides inmate suitable post-deprivation remedy); Raditch v. United States, 929 F.2d 478, 481 (9th Cir. 1991) ("Although Hudson involved § 1983 and the Fourteenth Amendment, the same due process principles apply to the federal government through the Fifth Amendment."). Only where deprivation of property is caused by conduct pursuant to established procedure is pre-deprivation process required. Logan v. Zimmerman Brush Company, 455 U.S. 422, 434-35 (1982) (employee's rights in fair employment claim terminated pursuant to state statute). Plaintiff's allegations suggest that the destruction of his kufi was a random and unauthorized act rather than one carried out pursuant to a policy of the institution or the Bureau of Prisons. For such situations, the federal government has provided a meaningful post-deprivation remedy for plaintiff's loss, the Federal Tort Claims Act. Del Raine, 32 F.3d at 1046. Further, it appears that plaintiff had some recourse within the prison itself. After complaining to Warden Martinez, he was able to obtain a replacement kufi.

ORDER

IT IS ORDERED that:

1. Plaintiff Gillium Levy's request for leave to proceed in forma pauperis is GRANTED with respect to his claims that:

a) defendants C. Holinka, Marion Feathers and Bill Jones violated his right under the First Amendment to freely exercise his religion when they substantially burdened his religious practice and targeted Hebrew Israelites by allowing inmates of other religions to observe their high holy days and wear their religious headwear while denying plaintiff permission to do the same;

b) defendants Holinka, Feathers and Jones violated his right under the establishment clause of the First Amendment when they allowed inmates of other religions to observe their high holy days and wear their religious headwear while denying plaintiff permission to do the same;

c) defendants Holinka, Feathers and Jones violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, when they substantially burdened his religious practice by depriving him of religious headwear and not allowing him to observe high holy days; and

d) defendants Holinka, Feathers and Jones violated his right to equal protection under the Fifth Amendment when they allowed inmates of other religions to

observe their high holy days and wear their religious headwear while denying plaintiff permission to do the same.

2. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

3. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

4. A copy of plaintiff's complaint, this order, summons for the defendants and a United States Marshal service form will be forwarded to the United States Marshal for service on all of the defendants.

Entered this 11th day of June, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge