

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

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HENRY F. POCAN,

Plaintiff,

v.

DEBORAH MCCULLOCH, SGT. PATTY JONES  
and LLOYD SINCLAIR,

Defendants.  
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OPINION and ORDER

10-cv-592-bbc

In this civil action for monetary and injunctive relief, plaintiff Henry Pocan, a patient civilly committed at the Sand Ridge Secure Treatment Center under Wisconsin's Sexually Violent Persons Law, Wis. Stat. ch. 980, contends that he was denied three religious books in violation of his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), the First Amendment, Wis. Stat. § 51.61(1)(m), and Wis. Admin. Code §§ DHS ch. 94 and 95.

Now before the court is defendants' motion for summary judgment, dkt. #9. Plaintiff has not responded in any way defendants' motion or proposed findings of fact, so defendants' proposed findings of fact must be taken as undisputed. Procedure to Be

Followed on Motions for Summary Judgment, II.A, II.B and II.C and Memorandum to Pro Se Litigants Regarding Summary Judgment Motions, attached to Preliminary Pretrial Conference Order (Nov. 22, 2010), dkt. #4. Because there is no evidence to support a conclusion that defendants violated plaintiff's rights under the First Amendment or RLUIPA, I will grant defendants' motion for summary judgment with respect to those claims. I will decline to exercise jurisdiction over plaintiff's state law claims.

From defendants' proposed findings of fact, I find the following facts to be material and undisputed.

#### UNDISPUTED FACTS

Plaintiff Henry Pocan was committed as a chapter 980 sexually violent person on February 10, 1998 and resides at the Sand Ridge Secure Treatment Center. Defendant Deborah McCulloch is the director at Sand Ridge, where defendant Patricia Jones works as a correctional sergeant and defendant Lloyd Sinclair works as associate treatment director.

The Sand Ridge Secure Treatment Center administers the Sexually Violent Persons Treatment Program, an inpatient research and training program for sexually violent persons. The goal of the treatment is to return patients to the community with reduced risk of sexual violence and sexual recidivism. The success of the treatment program depends on a safe, secure and therapeutic environment. Plaintiff has consented to participate in the treatment

program.

The treatment program allows patients the opportunity to receive reading materials and pictures. However, allowing patients unrestricted access to reading materials and pictures is not conducive to a therapeutic setting for sexually violent persons. Many civilly committed sex offenders have cognitive distortions and sexual deviance; pictures that can trigger and reinforce such distortions and deviance are banned. Accordingly, all reading materials and pictures entering Sand Ridge are reviewed by staff for contraband or counter-therapeutic content before being delivered to the patient. Items suspected of containing counter-therapeutic material are given by the mailroom or property staff to the treatment director or associate treatment director for review. Under Sand Ridge's policy, counter-therapeutic items include pictures containing full frontal nudity of adults, full or partial nudity of children or juveniles, sexually explicit materials, sexually violent materials and sexual material relating to children or juveniles. Counter-therapeutic materials are not allowed at Sand Ridge even if the materials are religious or are the personal property of a patient.

Sand Ridge also has policies addressing security and treatment concerns related to the management of patients' personal property. The management and control of personal property for patients is critical to achieve a safe and secure environment for patients, staff, visitors and the general public. Policy #115 states the type and quantity of property a

patient may possess, how the items may be obtained and other details concerning allowable patient property. Patients are not allowed to receive or possess any personal property items or articles not included in the policy. All property items must be sent new from an approved retail vendor. This policy reduces the likelihood that contraband will be introduced into the institution. The institution will store approved property for patients, but non-approved property or contraband is not stored because the institution does not have the resources to do so. Thus, non-approved items ordered by a patient must either be returned to the vendor or disposed of.

All patients at Sand Ridge have the right to participate in religious worship or services, including individual and group study and congregational services. Additionally, all patients at Sand Ridge may possess religious items as personal property. However, religious property items are subject to the normal considerations of safety and security. Religious property items may be obtained only from approved retail vendors or the Sand Ridge canteen and are subject to review regarding their content and therapeutic concerns.

Plaintiff has ordered and has been allowed to possess the following books at Sand Ridge concerning his Wicca faith: Book of Shadows (approved on January 11, 2010); The Encyclopedia of Magickal Ingredients (approved on January 19, 2010); and The Only Wiccan Spell Book You'll Ever Need (approved on June 21, 2010).

On March 15, 2010, a book titled Witches, Siren and Soothsayers arrived at Sand

Ridge for plaintiff from the Edward R. Hamilton Bookseller Company in Falls Village, Connecticut. Defendant Jones determined that the book required a treatment review and referred the book to defendant Sinclair. On March 15, defendant Sinclair reviewed the book, which contained pictures depicting full frontal nudity. Sinclair believed that the book was counter-therapeutic and contrary to plaintiff's treatment program. Sinclair concluded that the book should be denied for the entire facility. On March 16, 2010, plaintiff filled out a disbursement request form so that the book could be sent back to the sender. It cost plaintiff \$7.50 to return the book.

On July 19, 2010, a book arrived for plaintiff titled Witches: True Encounters with Wicca, Wizards, Covens, Cults and Magick at Sand Ridge. Defendant Jones determined that the book required a review before it could be delivered to plaintiff and referred the book to defendant Sinclair. After reviewing the book, Sinclair concluded that it was counter-therapeutic and should not be allowed for anyone in the facility because it contained pictures depicting full frontal nudity. The book was sent back to the sender at a cost of \$9.00 to plaintiff.

On February 16, 2010, a book titled Secrets of a Witch's Coven arrived at Sand Ridge for plaintiff. The package was handwritten as coming from Dunraven House, LLC and the envelope was addressed in handwriting to plaintiff. A "form receipt" in the amount of \$26.90 for the book was included in the package. The receipt was "generic in style," with

a small printed address label attached to the top that read “Dunraven House, LLC, P.O. Box 403, Boulder, CO 80306.” The receipt did not have any printed logo or company information on it and defendant Jones believed that the receipt and address label could have been purchased and used by any person, including a family member or friend in attempt to get the book into the facility for plaintiff. Jones decided that the book should not be allowed for delivery to plaintiff because she could not determine whether the book had been mailed from a retail vendor. The religious nature of plaintiff’s book had nothing to do with the determination to deny it. On February 16, 2010, plaintiff completed a disbursement request form and elected to ship the book back to Dunraven House, LLC at a cost off \$5.15.

## OPINION

### A. First Amendment Free Exercise Clause

Plaintiff contends that defendants violated the free exercise clause of the First Amendment by denying him three religious publications. Generally, this court has analyzed First Amendment claims brought by civilly committed patients under the standard set forth in Turner v. Safley, 482 U.S. 78 (1987), a case holding that restrictions on expression are acceptable in the prison setting if the restriction is reasonably related to a legitimate penological interest. Hedgespeth v. Bartow, 2010 WL 2990897, \*6 (W.D. Wis. Jul 27, 2010) (applying Turner to chapter 980 patient’s claim for computer, CDs, DVDs and video

games); *Stewart v. Timberlake*, 09-cv-687-bbc, dkt. 7, (W.D. Wis. Jan. 26, 2010) (applying *Turner* to chapter 980 patient's First Amendment claim for video games); *Amble v. Watters*, 2007 WL 5674493, \*2-3 (W.D. Wis. Aug. 3, 2007) (analyzing chapter 980 patient's First Amendment claim for visitation rights under *Turner*); *Riley v. Doyle*, 2006 WL 2947453, \*4 (W.D. Wis. Oct. 16, 2006) (applying *Turner* to plaintiff's free speech claim).

However, for free exercise claims, courts often also require a showing that: (1) the plaintiff's claim involves "religious" beliefs that are "sincere"; (2) defendants placed a "substantial burden" on the plaintiff's exercise of religion; (3) the plaintiff's claim involves a "central religious belief or practice"; and (4) the restriction targets the plaintiff's religion for adverse treatment and is not a neutral rule of general applicability. E.g., *Borzych v. Frank*, 2006 WL 3254497, \*4 (W.D. Wis. 2006) (requiring all of these elements). It is unclear whether all of these are truly elements of a free exercise clause; as another judge from this district recently pointed out, current case law leaves open whether neutrality and a "substantial burden" are required for prisoners to show a First Amendment violation. *Liebzeit v. Thurmer*, 10-cv-170-slc, slip op, dkt. #129, at 16 (W.D. Wis. Jun. 13, 2011). The Court of Appeals for the Seventh Circuit has decided a free exercise claim by applying *Turner* without discussing any of the other possible elements. *Ortiz v. Downey*, 561 F.3d 664, 669 (7th Cir. 2009); see also *Mayfield v. Texas Dept. of Criminal Justice*, 529 F.3d 599, 608 (5th Cir. 2008) (applying *Turner* to prisoner free exercise claims without imposing

other requirements).

It is not necessary to sort out the exact standard in this case, however. Regardless which standard applies, plaintiff cannot establish a violation of his rights under the free exercise clause. First, plaintiff has produced no evidence that defendants substantially burdened his religious exercise. Plaintiff may establish a substantial burden by adducing evidence that the restriction rendered his religious exercise “effectively impracticable,” Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003), or placed “substantial pressure on [him] to modify his behavior and violate his beliefs,” Koger v. Bryan, 523 F.3d 789, 799 (7th Cir. 2008). Plaintiff has presented no evidence to support a finding that the denial of three publications led to any of these situations. Although there is no dispute that he was denied three religious publications, he has been allowed several other Wicca publications and avenues to practice his faith, including congregate services, study groups, videotapes and possession of religious property.

Second, plaintiff has not shown that Sand Ridge’s property restrictions target his religion. The first two publications were denied because they contained full frontal nudity and the third book was denied because it was not clear whether it was sent new from a recognized retail vendor. Sand Ridge’s policies and procedures prohibiting full frontal nudity and requiring that property come new from a retail vendor apply equally to all patient property regardless whether it has religious content. Thus, plaintiff’s books were denied on



the basis of rules of general applicability.

Finally, even if plaintiff is not required to show that his religion was substantially burdened or that defendants' policies are non-neutral, his claim must be analyzed under the standard of Turner. Under Turner, 482 U.S. at 89, whether a restriction on a prisoner's constitutional right is reasonably related to a legitimate penological interest depends on: (1) whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; (2) whether the plaintiff has alternative ways to exercise the right; (3) how much effect accommodating the right will have on institution administration; and (4) whether there are other ways that institution officials can achieve the same goals without encroaching on the right.

It is undisputed that Sand Ridge's property policies are intended to keep contraband and counter-therapeutic material from reaching patients and raising security issues or disrupting rehabilitative efforts. Both security and rehabilitation are legitimate government interests. Additionally, it is undisputed that plaintiff had alternative means to exercise his religious rights. He has submitted no evidence suggesting otherwise. Finally, it is undisputed that allowing patients to possess contraband or counter-therapeutic materials would affect the institution adversely. Plaintiff has made no suggestions about how defendants could allow such materials without undermining the goals of its rehabilitative programs. In sum, Sand Ridge's restrictions on plaintiff's ability to possess and receive certain publications are

reasonably related to legitimate government interests. I conclude, therefore, that defendants have not violated plaintiff's rights under the First Amendment. Accordingly, I will grant defendants' motion for summary judgment on plaintiff's free exercise claim.

B. Religious Land Use and Institutionalized Persons Act (RLUIPA)

Defendants are entitled to judgment on plaintiff's claim under RLUIPA as well. Under RLUIPA, plaintiff has the initial burden to show that he has a sincere religious belief and that his religious exercise was substantially burdened. *Koger*, 523 F.3d at 797-98; *Vision Church v. Village of Long Grove*, 468 F.3d 975, 996-97 (7th Cir. 2006). If a plaintiff shows that the defendants substantially burdened his sincerely held beliefs, the burden shifts to the defendants to show under RLUIPA that their actions further "a compelling governmental interest," and do so by "the least restrictive means." *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005).

As discussed above, plaintiff has presented no evidence or argument that defendants substantially burdened his religious exercise. Because he has not made this threshold showing, defendants are entitled to judgment on this claim.

C. State Law Claims

When all the federal claims in a case have been dismissed, the general rule is that a district court should decline to exercise jurisdiction over any remaining state law claims under 28 U.S.C. § 1367(c)(3). Redwood v. Dobson, 476 F.3d 462, 467 (7th Cir. 2007). Although exceptions to this general rule exist, neither side asks the court to retain jurisdiction over the state law claims in the event the federal claims are dismissed. Defendant argues specifically that the court should decline to exercise jurisdiction and plaintiff has not responded to this issue. Because I do not believe it would be an efficient use of judicial resources to resolve the state law claims, I am declining to exercise jurisdiction over them.

#### ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Patty Jones, Deborah McCulloch and Lloyd Sinclair, dkt. #9, is GRANTED with respect to plaintiff Henry Pocan's claims under the First Amendment and the Religious Land Use and Institutionalized Persons Act. Those claims are DISMISSED WITH PREJUDICE. I decline to exercise supplemental jurisdiction over plaintiff's state law claims. Those claims are DISMISSED WITHOUT PREJUDICE to plaintiff's refiling them in state court. The clerk

of court is directed to enter judgment accordingly.

Entered this 23d day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge