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

DAVID LAFRANCHI,

Plaintiff,

v.

MICHAEL DITTMANN, GARY HAMBLIN, CHAPLAIN MEJCHAR, SALLY WESS, LT. TRINUD and JOHN and JANE DOES 1-10,

Defendants.

OPINION AND ORDER

11-CV-143-slc

This is a proposed civil action in which plaintiff David LaFranchi alleges that defendants Michael Ditmann, Gary Hamblin, Chaplain Mejchar, Sally Wess, Lt. Trinud and John and Jane Does violated his First Amendment rights. The parties have consented to my jurisdiction pursuant to 28 U.S.C. § 636(c).

LaFranchi asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. He also has filed a motion for a preliminary injunction and a motion for appointment of counsel.

From the financial affidavit LaFranchi has given the court, I conclude that he is unable to prepay the full fee for filing this lawsuit. LaFranchi has made the initial partial payment of $22.39 required of him under § 1915(b)(1).

The next step is determining whether LaFranchi's proposed action is (1) frivolous or malicious, (2) fails to state a claim on which relief may be granted or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Because LaFranchi meets this step as to some defendants, he will be allowed to proceed and the state required to respond as to those defendants. At the time defendants file their response, they should also file a response to LaFranchi's motion for a preliminary injunction. LaFranchi's motion for appointment of counsel will be denied without prejudice as premature.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, LaFranchi alleges, and the Court assumes for purposes of this screening order, the following facts.

- Plaintiff David LaFranchi is an inmate at the Redgranite Correctional Institution (RCI) located in Redgranite, Wisconsin.

- Defendant Gary Hamblin is the head of the Wisconsin Department of Corrections. Defendant Michael Dittman is the warden of RCI. Defendant Chaplain Mejchar, was the chaplain at RCI. Defendant Sally Wess is the food supervisor at RCI and defendant Lt. Trinud is a supervisor at RCI.

- On January 11, 2011, Chaplain Mejchar told LaFranchi that officials at RCI and the Wisconsin Department of Corrections had decided not to acknowledge the Hebrew Israelite Messianic Natsarium Faith as a legitimate religion any longer.

- The chaplain told LaFranchi that he would have to change his faith from Hebrew Israelite Messianic Natsarium Faith to Christian. LaFranchi refused.

- That same day, everyone in LaFranchi's faith was (1) cut off of Kosher meals and matzah bread; (2) told they could no longer observe annual feasts; (3) told they could no longer meet with their religious leaders; and (4) deprived of natural salt for their salt covenant.

- Lt. Trinud confiscated LaFranchi's correspondence with his religious leaders. LaFranchi was told he could no longer communicate with these leaders.

OPINION

The free exercise clause of the First Amendment guarantees every individual the right to exercise his or her religion freely and "requires government respect for, and noninterference with, [] religious beliefs and practices." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). This protection, however, extends only to "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, LaFranchi 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). "[I]f 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). LaFranchi has alleged facts that support an inference that his religion has been targeted and that a substantial burden has been placed on a central religious practice of his religion.

When a prison regulation impinges on inmates' constitutional rights, however, the regulation is valid if it is reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987). Answering that question requires consideration of four factors: (1) whether the restriction is rationally related to a legitimate and neutral governmental objective; (2) whether there are alternative means of exercising the right that remain open to the inmate; (3) what impact an accommodation of the asserted right will have on guards and other inmates; and (4) whether there are obvious alternatives to the restriction that show that it is an exaggerated response to penological concerns. *Ortiz v. Downey*, 561 F.3d 664, 669 (7th Cir. 2009) (applying *Turner* standard in case brought under Free Exercise Clause). Defendants may be able to show that their policy infringing on LaFranchi's practice of religion was reasonably related to a legitimate penological interests. At this early stage, LaFranchi will be allowed will be allowed to proceed on his First Amendment claim against the named defendants, who he alleges were personally involved in the alleged deprivation of his rights. Because he has not alleged actions taken by John or Jane Doe defendants, he will not be allowed to proceed against them.

LaFranchi has filed a motion for a preliminary injunction to order defendants to allow him to practice his religion. Defendants shall respond to this motion at the time they file their responsive pleading.

With respect to LaFranchi's motion to appoint counsel, litigants in civil cases do not have a constitutional right to a lawyer; federal judges have discretion to determine whether appointment of counsel is appropriate in a particular case. *Pruitt v. Mote*, 503 F.3d 647, 654, 656 (7th Cir. 2007). In determining whether to appoint counsel, the court must find first that plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful, or that he has been prevented from making such efforts. *Jackson v. County of McLean*, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, LaFranchi must: (1) give the court the names and addresses of at least three lawyers who declined to represent him in this case; and (2) demonstrate his is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. *Pruitt*, 503 F.3d at 655. LaFranchi has not met the first prerequisite and his motion is premature as to the second. It is too early to make the latter determination in this case. Accordingly, LaFranchi's motion for appointment of counsel will be denied without prejudice.

ORDER

IT IS ORDERED that:

(1) Plaintiff David LaFranchi's request to proceed on his claims that defendants Michael Ditmann, Gary Hamblin, Chaplain Mejchar, Sally Wess and Lt. Trinud violated his First Amendment rights is GRANTED.

(2) Plaintiff LaFranchi's request to proceed on his claims against defendants John and Jane Does is DENIED and these defendants are DISMISSED from this case.

(3) Defendants should respond to LaFranchi's motion for a preliminary injunction at the time they file their responsive pleading.

(4) LaFranchi's motion for appoint of counsel is DENIED without prejudice.

(5) For the time being, 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.

(6) 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.

(7) Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

(8) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 30th day of June, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge