

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

DAVID LaFRANCHI,

Plaintiff,

v.

MICHAEL DITTMANN, GARY HAMBLIN,
CHAPLAIN MEJCHAR, SALLY WESS AND
LT. TRINUD,

Defendants.

OPINION AND ORDER

11-cv-143-slc

Plaintiff David LaFranchi, an inmate at the Redgranite Correctional Institution in Redgranite, Wisconsin, has been granted leave to proceed on his civil complaint under 42 U.S.C. § 1983 against defendants Michael Dittmann, Gary Hamblin, Chaplain Mejchar, Sally Wess and Lt. Trinud for violating his rights under the First Amendment's free exercise clause by interfering with the practice and dietary needs of his Hebrew Israelite Messianic Natsarim faith.¹ Plaintiff's complaint was triggered by a January 2011 decision by the institution's chaplain that plaintiff's religious group belonged in the prison's "Protestant" umbrella group rather than the "Jewish" group.

Plaintiff seeks a preliminary injunction:

[To] stop Wisconsin Department of Corrections and Redgranite Correctional Institution from violating the people of the Hebrew Israelite Messianic Natsarim Religious Civil and Constitutional Rights under the First Amendment of the United States Constitution to be able to exercise and practice their religious beliefs, and their dietary needs which is part of that religion.

Dkt. 1 at 1.

¹ Although not expressly addressed in this court's screening order, the complaint also states a viable claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a). *See, e.g., Ortiz v. Downey*, 561 F.3d 664, 670 (7th Cir. 2009) (to state a claim under RLUIPA, plaintiff need only allege that defendant imposed substantial burden on ability to exercise religion).

I am denying plaintiff's motion for a preliminary injunction. While plaintiff's motion was pending, the Wisconsin Department of Corrections reversed the chaplain's decision and determined that plaintiff's religious group could remain under the "Jewish" umbrella religious group. This decision entitles plaintiff to resume the religious practices that he had exercised under that designation. As a result, plaintiff cannot meet his burden of showing that he will be harmed irreparably if an injunction does not issue.

One preliminary matter needs mention: As an addendum in response to defendants' opposition to a preliminary injunction, plaintiff questions whether Captain Brian Gustke should be added to the complaint for his alleged role in confiscating mail from plaintiff's religious leaders. This issue is beyond the proper scope of this injunction proceeding. If plaintiff wishes to add a defendant to his suit, then he must file a proposed amended complaint and obtain leave to proceed on it.

For the sole purpose of deciding the motion for preliminary injunction, I find from the parties' submissions that the following facts are material and undisputed:

FACTS

Plaintiff David LaFranchi is a prisoner at the Redgranite Correctional Institution in Redgranite, Wisconsin. He has resided at RGCI since January 11, 2010. Defendant Gary Hamblin is the Secretary of the Wisconsin Department of Corrections. Defendant Michael Dittman is the Warden of RGCI. Defendant Sally Wess is the Food Service Administrator at RGCI. Defendant Randall Trinrud is a Supervising Officer 1.

Defendant Deborah Mejchar was the chaplain at RGCI; she transferred to Fox Lake Correctional Institution in February 2011. After her transfer, Chaplain Mejchar came to RGCI once a week until June 2011 to assist with providing religious needs for inmates.

A. Prison Policies Related to Religious Umbrella Groups

Under a policy of the Department of Corrections' Division of Adult Institutions, DAI Policy #309.61.01, religious groups are organized into "Umbrella Religion Groups" which are "inclusive group[s] designed to appeal to a wide range of religious beliefs within a given faith group." The department's designated Umbrella Religion Groups include Protestant, Islam, Native American, Catholic, Jewish, Eastern Religions and Pagan. The Department of Corrections provides opportunities for inmates to practice their religious faith through religious services and study groups, which are led by outside spiritual leaders or volunteers approved by the institution. In addition, if required by a religion, institutions may provide special symbolic foods as supplements to the inmates' standard diet and may provide a full religious feast once a year. In general, inmate access to religious study groups, services, property and diets is dictated by the Umbrella Religion Group that the inmate designates on his religious preference form, known as the DOC-1090.

An inmate who chooses not to select one of the seven umbrella religious groups as his religious preference still is permitted to practice his religion individually, through individual study, personal meditation, religious books and literature, approved religious property, pastoral visits, other approved individual religious observances in his living quarters and correspondence with fellow believers.

As chaplain, Mejchar is responsible for educating inmates about the various religious umbrella groups and advising them which group may best suit their religious needs. Some inmates find that some of their desired practices fall into more than one religious group. It is up to the inmate, however, to select the religious umbrella group that suits most of his needs, while retaining the option to supplement his religious needs through individual practice. If an inmate wants to change his religious preference, he may do so, but must wait six months from the date he last filled out the DOC-1090.

Prisoners who designate “Jewish” as their umbrella group may attend Jewish religious services and study groups, possess religious property approved for the Jewish umbrella group, and choose to participate in either a kosher diet or vegan diet plan. A kosher diet is provided only to inmates who choose Jewish as their religious preference and whose request for a kosher diet has been approved by the chaplain. Additionally, inmates in the Jewish Umbrella Group may elect to participate in an annual celebratory meal, which is known as the Jewish Passover. Matzo (Matzah) crackers and macaroons are provided for the meals. Matzo crackers are not served at any other time to Jewish inmates as part of the kosher diet, nor have Jewish inmates ever had access to “natural salt” or “salt covenants.”

II. Plaintiff’s Religious Practices

In January 2010, plaintiff chose Jewish as his religious preference. Under the Jewish Umbrella Group, plaintiff participated in the 2010 Jewish Passover, which began at sunset on Monday, March 29, 2010 and ended at sunset on Tuesday, April 6, 2010. On May 24, 2010, plaintiff signed and submitted a “Religious Diet Request” form DOC-2167. On May 27, 2010,

Chaplain Mejchar approved his request; plaintiff was placed on a kosher diet shortly thereafter. For reasons unknown, plaintiff stopped receiving kosher meals on October 2, 2010, and has not received kosher meals since that date.

At some point in 2010, plaintiff and many other inmates informed Chaplain Mejchar that they had stopped attending the Jewish service conducted by volunteer Rabbi Stallman because they did not feel the rabbi was meeting their religious needs. At the inmates' request, Chaplain Mejchar approved a Hebrew Roots religious study group for inmates who chose Jewish as their religious preference. The Hebrew Roots religious study group began meeting in August 2010, and was led by volunteers Bruce and Victoria Olson. Plaintiff participated in the Hebrew Roots religious study group at RGCi under the Jewish Umbrella Group.

Although Chaplain Mejchar initially determined that the Hebrew Roots study group fell under the Jewish Umbrella Group, she changed her mind after observing and being informed that the Olsons were teaching Bible-based messages from the Old and New Testament. Based on this, Chaplain Mejchar decided that it was more appropriate to classify the Hebrew Roots religious study group under the Protestant Umbrella Group.

On or about January 11, 2011, Chaplain Mejchar met with plaintiff and other inmates who participated in the Hebrew Roots religious study group. She advised the inmates that the Hebrew Roots study group was mistakenly classified as a Jewish Umbrella Group religious study group when it should have been classified as a study group under the Protestant Umbrella Group. Chaplain Mejchar advised the inmates, including plaintiff, that they had a choice: they could either remain in the Jewish Umbrella Group, in which case they would not be able to

participate in the Hebrew Roots religious study group, or they could change their religious preference to the Protestant Umbrella Group and continue their studies.

On January 11, 2011, plaintiff submitted a new DOC-1090 and placed a check in the box on the form next to “other,” designating his religious preference to be “Hebrew Roots.” As a result, he was no longer included in the Jewish Umbrella Group, which in turn excluded him from participating in the Jewish Passover and kosher diet. He also was not allowed to attend Jewish religious services conducted by a volunteer rabbi. However, because of Chaplain Mejchar’s determination that Hebrew Roots fell under the Protestant umbrella group, plaintiff could have attended Protestant study group or services.

On February 9, 2011, letters from Bruce and Victoria Olson were found in plaintiff’s cell. Sometime thereafter, the Olsons were terminated as volunteers at RCGI for violating the fraternization policy, which prohibits employees and volunteers with the Department of Corrections from having personal contact with any inmate. The Olsons are free to reapply for participation as volunteers at RCGI, but their application must be approved by the warden.

On February 22, 2011, plaintiff filed a motion for a preliminary injunction in this court. At the court’s direction, he then filed a complaint that incorporated by reference his previously-filed motion for injunctive relief. Dkt. 7. Plaintiff says that after the chaplain’s decision, the defendants: 1) refused to allow plaintiff to eat Kosher meals and matzah bread; 2) told plaintiff his group no longer could observe annual feasts; 3) told plaintiff he could no longer meet with his religious leaders; and 4) deprived him of natural salt for the salt covenant.

On September 8, 2011, the Department of Corrections reversed Chaplain Mejchar’s determination and concluded that the Hebrew Roots group to which plaintiff belonged at RCGI

should be moved back under the Jewish Umbrella Group. Plaintiff is eligible to submit a new DOC-1090 designating the Jewish Umbrella Group, which in turn would allow him to participate in the Hebrew Roots study group (provided that there is volunteer to lead it), a kosher diet, the Jewish celebratory feast and all of the other Jewish practices and property allowed under the Jewish Umbrella Group. As of today, it is unclear if plaintiff has submitted a new DOC-1090 form.

OPINION

A plaintiff asking for emergency or preliminary injunctive relief is required to make a showing with admissible evidence that: (1) he has no adequate remedy at law and will suffer irreparable harm if the injunction is not granted; (2) the irreparable harm he would suffer outweighs the irreparable harm defendants would suffer from an injunction; (3) he has some likelihood of success on the merits; and (4) the injunction would not frustrate the public interest. *See Palmer v. City of Chicago*, 755 F.2d 560, 576 (7th Cir. 1985). At the threshold, plaintiff must show some likelihood of success on the merits and that irreparable harm will result if the requested relief is denied. If plaintiff makes both showings, then the court moves on to balance the relative harms and public interest, considering all four factors on a "sliding scale." *See In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997). When there is no ongoing violation of federal law, injunctive relief is not available. *Al- Alamin v. Gramley*, 926 F.2d 680, 685 (7th Cir. 1991). *See also Milwaukee Police Association v. Jones*, 192 F.3d 742, 748 (7th Cir. 1999) (cessation of illegal conduct does not necessarily render claim moot but may affect availability of injunctive relief).

In this case, it is unnecessary to address whether plaintiff has a likelihood of success on the merits of his First Amendment or RLUIPA claims because it is clear that he has not met his burden of showing that he will be irreparably harmed if an injunction does not issue. By virtue of the Department's determination that the Hebrew Roots study group can remain under the "Jewish" Umbrella Group, plaintiff and other members of the Hebrew Roots group again will be able to engage in Jewish religious practices such as a kosher diet and a Jewish celebratory feast. They also will be permitted to participate in their Hebrew Roots study group, provided that a volunteer is found to lead it. In other words, plaintiff will not be harmed if an injunction does not issue because the department voluntarily has provide the relief plaintiff is seeking.²

Plaintiff asserts that injunctive relief still is necessary because, as of September 19, 2011, his ability to practice his faith had not yet been restored and he does not trust the department to keep its word. As proof, he points out that when he asked the new chaplain if he could come up to the chapel to view Hebrew Roots study material, the chaplain responded that study materials were for use only during religious services and that he had no time in his schedule for "that type of activity." Plaintiff has submitted no admissible evidence, however, to show that before the prior chaplain's January 11, 2011 decision, plaintiff or other members of the Hebrew Roots study group were allowed to view study materials in the chapel absent a volunteer leader; further, I do not understand plaintiff to be challenging the department's policy of prohibiting inmate-led religious study groups. In fact, the court of appeals established long ago that prison

² As for plaintiff's contention that he is entitled to a "salt covenant," he has presented no admissible evidence to show that he was provided with such salts in the past, he has not explained the significance of natural salts to his religious practice and he has not provided any evidence suggesting that his religious practice is burdened by the absence of natural salts. Accordingly, to the extent that plaintiffs' vague request for injunctive relief includes a request that this court order the defendants to provide him with natural salts, that request is denied.

officials are justified in requiring an approved nonprisoner to lead prisoners in group worship. *Johnson-Bey v. Lane*, 863 F.2d 1308, 1310-11 (7th Cir. 1988) (prison officials “need not . . . allow inmates to conduct their own religious services, a practice that might not only foment conspiracies but also create (though more likely merely recognize) a leadership hierarchy among the prisoners”); *Hadi v. Horn*, 830 F.2d 779, 784-85 (7th Cir. 1987) (rejecting claim that Muslim prisoners were entitled to lead their own services when chaplain or volunteer was not available). See also *Adkins v. Kaspar*, 393 F.3d 559, 565 (5th Cir. 2004) (upholding prison requirement that volunteers must supervise religious services); *Tisdale v. Dobbs*, 807 F.2d 734, 738-39 (8th Cir. 1986) (same).

Defendants have asserted that if a new volunteer can be found to lead plaintiff’s Hebrew Roots study group, then the group will be allowed to meet. The fact that the chaplain denied a single request by plaintiff to view study materials in the chapel is insufficient to show that defendants do not intend to keep their word or that plaintiff will be irreparably harmed if an injunction does not issue.

Plaintiff also asserts that his kosher diet has not yet been restored. However, plaintiff has not said whether he submitted a new DOC-1090 form changing his religious preference to Jewish. According to defendants, once plaintiff submits a new DOC-1090 form, which he is eligible to do, he will receive a kosher diet if he requests it. Absent evidence that plaintiff has used the internal prison procedures available to him, plaintiff cannot show irreparable harm. *Accord Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (even prisoner alleging he faces imminent harm must utilize available prison procedures before seeking relief from court).

If, after completing his new religious preference form and taking any other procedural steps ordinarily required by the prison regarding religious practices, plaintiff believes that defendants still are imposing unreasonable burdens on the exercise of his religion, then plaintiff may renew his request for an injunction. On the existing record, however, this court has no basis to order the extraordinary remedy of injunctive relief.

ORDER

IT IS ORDERED that plaintiff David LaFranchi's motion for a preliminary injunction, dkt. 7, is DENIED.

Entered this 6th day of October, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge