IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SEAN ANTHONY RIKER,

ORDER

Plaintiff,

12-cv-696-bbc

v.

TODD OVERBO, VICKI SEBATIAN,
KELLI R. WELLARD-WEST,
TIMOTHY HAINES, ELLIE RAY,
CHARLES FACKTOR, CHARLES E. COLE,

Defendants.

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In this civil action for monetary and injunctive relief, plaintiff Sean Anthony Riker, an inmate at the Wisconsin Secure Program Facility, contends that prison officials are violating his rights by failing to provide him a vegan diet as required by his Pagan faith. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment. Plaintiff's complaint is now before the court for screening under 28 U.S.C. § 1915A. Under that statute, I must screen plaintiff's complaint and dismiss any portion that 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. Plaintiff has also filed a motion for appointment of counsel, dkt. #6, and a motion for an order requiring the Wisconsin Secure Program Facility to take pictures of him to document his physical condition. Dkt. #8.

After reviewing plaintiff's complaint, I conclude that he may proceed on claims that defendants Todd Overbo, Vicki Sebatian, Kelli Wellard-West, Timothy Haines, Ellie Ray, Charles Facktor and Charles Cole violated his rights under the free exercise clause of the First Amendment by denying his requests for a religious vegan diet. Plaintiff may also proceed against defendants Overbo, Sebatian, Wellard-West and Haines on a claim for injunctive relief under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a), based on the same allegations. However, I am denying plaintiff's motion for appointment of counsel because he has not shown that counsel is necessary. Additionally, I am denying his request for pictures to be taken of him because plaintiff has not explained why such evidence is relevant or necessary to prove his claims and because plaintiff has not followed the proper discovery procedures for obtaining evidence or seeking relief from the court.

In his complaint, plaintiff alleges that following facts.

ALLEGATIONS OF FACT

Since being incarcerated in 2011, plaintiff Sean Anthony Riker has changed his religion three times. In January 2011, plaintiff's religious preference was Islamic and he received a halal religious diet. In July 2011, plaintiff changed his religious preference to Jewish and received a kosher diet. Six months later, plaintiff changed to a Pagan religion and in June 2012, he requested a vegan religious diet. On July 27, 2012, defendant Todd Overbo, the chaplain at Wisconsin Secure Program Facility, denied plaintiff's request, stating

that plaintiff could "self select" vegan items from his regular meals.

On July 31, plaintiff appealed Overbo's decision, arguing that "self selection" violated his Pagan religion because he could not eat from a tray containing any animal products. Plaintiff's appeal was submitted to the warden, defendant Timothy Haines, for consideration. Defendant Overbo, defendant Vicki Sebatian, the program director at the prison, and defendant Kelli Wellard-West, from the Religious Practices Advisory Committee, all recommended that plaintiff's request be denied. Overbo recommended that the request be denied because plaintiff had changed his religious preference and diet three times in 20 months. Sebatian "concurred" with Overbo's recommendation. Wellard-West noted that plaintiff had not demonstrated a sincerely held belief in the Pagan faith and vegetarianism sufficient to justify the vegan diet. On August 21, 2012, defendant Warden Haines affirmed the denial of plaintiff's request.

Plaintiff filed a prison grievance about his request for a religious diet, which was denied by defendant Ellie Ray, an inmate complaint examiner, on August 28, 2012. Ray stated that plaintiff was required to wait six months before requesting a change to his religious diet. (She did not acknowledge that plaintiff had waited six months before changing his religious preference from Judaism to Pagan.) Defendant Warden Haines affirmed the denial and plaintiff appealed. Defendant Charles Facktor, a corrections complaint examiner, dismissed plaintiff's appeal, stating that the institution had "reasonably and appropriately addressed the issue." Defendant Charles Cole affirmed the dismissal of plaintiff's appeal on behalf of the Secretary of the Department of Corrections.

DISCUSSION

A. First Amendment and Religious Land Use and Institutionalized Persons Act

I understand plaintiff to be contending that defendants have violated his rights under the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5, by failing to provide him with a proper vegan diet. The First Amendment right to freely exercise one's religion extends to inmates, Ortiz v. Downey, 561 F.3d 664, 669 (7th Cir. 2009), but prison officials may restrict this right if the restriction is reasonably related to a legitimate penological interest. Turner v. Safley, 482 U.S. 78, 89 (1987). Likewise, RLUIPA protects the right of prison inmates to practice their religion and prohibits the government from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden furthers a "compelling governmental interest," and does so by "the least restrictive means." 42 U.S.C. § 2000cc-1; Cutter v. Wilkinson, 544 U.S. 709, 714-15 (2005).

To state a claim for violation of his rights under the free exercise clause and RLUIPA, plaintiff must first allege facts suggesting that defendants "substantially burdened" his religious exercise. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989); Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005). (I note that although it is clear that "substantial burden" is an element of a RLUIPA claim, 42 U.S.C. § 2000cc-1, there is some question in the case law whether "substantial burden" remains an element in a Free Exercise case. E.g., LaFranchi v. Dittman, Case No. 11-cv-143-slc, dkt. #68 (June 27,

2012) (summary judgment order); Liebzeit v. Thurmer, Case No. 10-cv-170-slc, dkt. #129 (June 13, 2011) (summary judgment order)). At this stage, I will assume that both the First Amendment and RLUIPA require plaintiff to show that his religious exercise was substantially burdened by defendants' denial of his request for a vegan diet.)

A "substantial burden" is "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). See also Nelson v. Miller, 570 F.3d 868, 878 (7th Cir. 2009) (applying this test to both First Amendment and RLUIPA claims). Because plaintiff alleges that a vegan diet is required for Pagans, plaintiff has satisfied his burden for the purpose of pleading that denial of a vegan diet substantially burdens his religious exercise.

Once a plaintiff shows a substantial burden, the standards for pleading and proving a claim under the First Amendment differ slightly from those for claims under RLUIPA. Generally, the next question under the First Amendment is whether the burden is one that applies equally to everyone or whether it targets religious beliefs in particular. If the rule applies to everyone without regard to a religion, there is no constitutional violation. Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990). In Grayson v. Schuler, 666 F.3d 450, 452-53 (7th Cir. 2012), the court of appeals questioned whether Smith applies to prisoner claims, but in Koger v. Bryan, 523 F.3d 789 (7th Cir. 2008), the court assumed that it did, at least in some cases. Id. at 796. To the extent Smith applies, plaintiff alleges that members of other faiths are allowed

religious meals, so I will assume at this stage that defendants were not applying a neutral and generally applicable rule to plaintiff's request.

If plaintiff can prove at summary judgment or at trial that defendants substantially burdened his religious exercise and targeted his religious beliefs, defendants will have to show under the First Amendment that the restriction of plaintiff's free exercise rights is reasonably related to a legitimate penological interest. O'Lone v. Estate of Shabazz, 482 U.S. 342, 350-51 (1987). Four factors are relevant to that determination: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether the prisoner retains alternatives for exercising the right; the impact that accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Turner, 482 U.S. at 89. Under RLUIPA, defendants will have to show that denying plaintiff's request for a vegan meal was the least restrictive means to further a compelling government interest. 42 U.S.C. § 2000cc-1(a); Cutter, 544 U.S. at 712. At this stage, I cannot determine whether the denial of plaintiff's request for a vegan diet was reasonably related to a legitimate penological interest or was the least restrictive means for furthering a compelling government interest. Thus, I will allow plaintiff to proceed on claims under the free exercise clause of the First Amendment and RLUIPA.

The final question is whether plaintiff should be allowed to proceed against all defendants. Under RLUIPA, plaintiff may obtain only injunctive or declaratory relief and may not obtain money damages against individual defendants. Nelson, 570 F.3d at 883-89.

This means that plaintiff may proceed with his RLUIPA claim only against those defendants who would have the authority to grant plaintiff's request for a vegan meal. Williams v. Doyle, 494 F. Supp. 2d 1019, 1024 (W.D. Wis. 2007) ("[A] claim for injunctive relief can stand only against someone who has the authority to grant it."). From the allegations of plaintiff's complaint, it is plausible that defendants Overbo, the chaplan, defendant Sebatian, the prison program director, defendant Wellard-West, from the Religious Practices Advisory Committee, and defendant Warden Haines have the authority to grant plaintiff's request for a religious diet. Thus, plaintiff may proceed against those defendants on his RLUIPA claim. Plaintiff's allegations provide no reason to believe that the complaint examiners or Office of the Secretary have the authority to grant the request, so plaintiff may not proceed against defendants Ray, Facktor or Cole on this claim.

Under the First Amendment, plaintiff may obtain money damages from individual defendants. However, he may not sue individual defendants for damages unless they were "personally involved" in a decision to violate his rights, which means they participated in the violation or somehow facilitated it. Backes v. Village of Peoria Heights, Ill., 662 F.3d 866, 869 (7th Cir. 2011). Plaintiff alleges that all defendants were aware of his request for a religious diet and denied the request for arbitrary or incorrect reasons. Therefore, I will allow plaintiff to proceed against all defendants on his First Amendment claim.

B. Motion for Appointment of Counsel

In deciding whether to appoint counsel, I must first find that plaintiff has made a

reasonable effort to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such an effort. Jackson v. County of McLean, 953 F.2d 1070, 1073 (7th Cir. 1992). To prove that he has made a reasonable effort to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he has asked to represent him in this case and who turned him down. Armstrong v. Wisconsin, 2012 WL 4467570, *4 (W.D. Wis. Sept. 26, 2012).

It is unclear whether plaintiff has completed this preliminary step. Plaintiff attached a list of 11 lawyers to his motion for appointment of counsel who, he alleges, did not respond to his requests for representation in this case. Dkt. # 6-1. Plaintiff further states that he wrote to each of the 11 on August 5, 2012. Id., at 1. However, plaintiff has not included any rejection letters from the lawyers, a copy of the letter plaintiff sent to them or any information about what plaintiff included in his letter.

Even if I were to find that plaintiff has met this preliminary requirement, his motion for appointment of counsel must be denied at this point because it is too early to tell whether the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). Although plaintiff states that his use of the drugs Mirtazapine and Paxil inhibit his ability to think, it is simply too early to tell whether plaintiff lacks the ability to litigate this case. Thus far, plaintiff has demonstrated his knowledge of procedural and substantive law and his ability to respond to court orders. Additionally, the facts relevant to this case will involve evaluating the burden placed on plaintiff's religious exercise and the reasons for defendants' decisions. Plaintiff

should have personal knowledge of the first issue and should be able to get the rest of the evidence he needs from defendants. As for the applicable legal standard, the court will apply the appropriate law to the facts, even if plaintiff cannot provide the law on his own or does not understand how the law applies to his facts. As this case progresses, it may become apparent that appointment of counsel is warranted, but for now I will deny plaintiff's motion.

C. Motion for Pictures to be Taken

Plaintiff contends that pictures should be taken of him to document how much weight he has lost as a result of being forced to "self select" vegan items. I am denying this motion. Dkt. #8. Plaintiff has made no attempt to explain why his weight loss is relevant to his claims for violation of his religious rights. Rather, as explained above, plaintiff must prove that defendants' actions have substantially burdened the exercise of his religious rights. Further, as I have explained to plaintiff in another case, he must pursue discovery through appropriate procedures and should seek assistance from the court only after he has exhausted those procedures:

> [I]t is not proper for plaintiff to ask the court to obtain information for him that he believes he needs to prove his case. After defendant has been served, the court will schedule a preliminary conference at which the magistrate judge will provide the parties with instructions for conducting discovery and obtaining documents and other evidence. Plaintiff must follow these instructions to obtain evidence from defendant or third parties. Plaintiff should request court assistance in obtaining evidence only if he has attempted to obtain relevant evidence through proper discovery procedures and has been unsuccessful.

Riker v. Riker, Case No. 12-cv-641-bbc, dkt. #15 (Oct. 31, 2012).

ORDER

IT IS ORDERED that

1. Plaintiff Sean Anthony Riker's motion for appointment of counsel, dkt. #6, is DENIED.

2. Plaintiff's motion for the Wisconsin Secure Program Facility to take pictures of him, dkt. #8, is DENIED.

3. Plaintiff is GRANTED leave to proceed on his claims that (1) defendants Todd Overbo, Vicki Sebatian, Kelli Wellard-West, Timothy Haines, Ellie Ray, Charles Facktor and Charles Cole violated his rights under the free exercise clause of the First Amendment by denying his request for or failing to provide him a religious vegan meal; and (2) defendants Overbo, Sebatian, Wellard-West and Haines violated his rights under the Religious Land Use and Institutionalized Persons Act by failing to provide him a religious vegan meal.

4. Under 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 state 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 on behalf of the state defendants.

5. For the time being, plaintiff must send defendants a copy of every paper or

document that 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 officials at the Wisconsin Secure Program Facility of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 4th day of December, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge