IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES TURNER,

Plaintiffs,

v.

GARY HAMBLIN, MICHAEL MEISNER,
CHARLES COLE, CHARLES FACKTOR,
JOANNE LANE, TIM DOUMA, DIANA KIESLING,
MARK TESLIK, CAMPBELL,

Defendants.

OPINION AND ORDER

12-cv-699-bbc

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This is a proposed civil action under 42 U.S.C. § 1983. Plaintiff James Turner, a prisoner at the Columbia Correctional Institution, alleges that prison officials violated his right to practice his religion under the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA) by canceling the religious services of Jumuah and Talim when the outside Islamic volunteer did not show up and by not allowing inmates to lead these services themselves.

Plaintiff is proceeding in forma pauperis and has made the necessary partial payment. Because he is a prisoner, the 1996 Prison Litigation Reform Act requires me to screen his complaint and deny 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. 28 U.S.C. § 1915. In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Having reviewed the complaint, I conclude that plaintiff may proceed on his First Amendment and RLUIPA claims against all named defendants because it is possible that they (1) personally denied plaintiff the opportunity to participate in Jumuah and Talim; (2) had the authority to change the policy prohibiting inmate-led religious services; or (3) denied plaintiff's grievances regarding the ongoing denial of the services.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Plaintiff James Turner is a prisoner at the Columbia Correctional Institution, located in Portage, Wisconsin. Defendant Gary Hamblin is Secretary of the Department of Corrections, and defendant Charles Cole is Deputy Secretary. The remaining defendants work at the Columbia Correctional Institution: defendant Michael Meisner is the warden, defendant Tim Douma is the deputy warden, defendant Joanne Lane is an inmate complaint examiner, defendant Charles Facktor is a corrections complaint examiner, defendant Diana Kiesling is the program coordinator and defendants Mark Teslik and Campbell are chaplains.

B. Denial of Jumuah and Talim

Plaintiff sought to participate in the Islamic services of Jumuah and Talim. On more than 128 occasions, plaintiff was unable to participate in these services. Defendants do not allow the services to be held unless an outside volunteer show up and lead them; defendants do not allow inmates to lead these services themselves. Therefore, when the volunteer does not show up, defendants do not permit plaintiff or others to participate in Jumuah or Talim.

C. Grievances

Plaintiff has filed multiple grievances about the denial of Jumuah and Talim services. (Plaintiff does not describe in the body of his complaint what he said in the grievances or how the Department of Corrections responded to them, but he has submitted copies of his grievances and the department's responses.) Complaint examiner Lane repeatedly denied these grievances, citing a policy prohibiting inmates from conducting or leading religious services. On appeal, defendants Meisner and Cole denied the claim on the same grounds.

OPINION

A. Free Exercise Claim

1. Substantive standard

Plaintiff's free exercise claims are generally governed by the standard set out in Turner v. Safley, 482 U.S. 78 (1987), which requires the court to determine whether the restriction

is reasonably related to a legitimate penological interest. In determining whether a reasonable relationship exists, the Supreme Court usually considers four factors: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether the plaintiff has alternatives for exercising the right; what impact 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. Id. at 89.

In addition, some courts have suggested that courts must answer other questions as well, including (1) whether the plaintiff's claim involves "religious" beliefs that are "sincere"; (2) whether defendants placed a "substantial burden" on the plaintiff's exercise of religion; (3) whether the plaintiff's claim involves a "central religious belief or practice"; and (4) whether the restriction targets the plaintiff's religion for adverse treatment or is a neutral rule of general applicability. This court and the court of appeals has treated one or more of these issues as an element in some cases brought by prisoners, e.g., Borzych v. Frank, 2006 WL 3254497, *4 (W.D. Wis. 2006) (requiring all of these elements), but in other prisoner cases at least some of the elements have been ignored, e.g., Ortiz v. Downey, 561 F.3d 664, 669 (7th Cir. 2009) (applying Turner without discussing other elements). See also Mayfield v. Texas Dept. of Criminal Justice, 529 F.3d 599, 608 (5th Cir. 2008) (applying Turner without imposing other requirements).

It is unnecessary to sort out in this screening order the exact standard to be applied.

Construing plaintiff's complaint liberally, I conclude that it is possible that defendants' repeated cancellations of Jumuah and Talim were not reasonably related to a legitimate penological interest.

On numerous occasions, the court of appeals has held that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest because an assessment under Turner requires a district court to evaluate the prison officials' particular reasons for the restriction. E.g., Ortiz, 561 F.3d at 669-70 (holding that it was error for district court to conclude without evidentiary record that policy was reasonably related to legitimate interest); Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004) (same). Accordingly, plaintiff may proceed on his free exercise claims.

2. Personal liability under § 1983

In order to be liable under § 1983, a defendant must have participated directly in a violation of the plaintiff's constitutional rights. Hildebrandt v. Illinois Dept. of Natural Resources, 347 F.3d 1014, 1036 (7th Cir. 2003); Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) ("Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation."). An official may be held personally liable "if the conduct causing the constitutional deprivation occurs at [his] direction or with [his]

knowledge and consent. That is, he must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye. In short, some causal connection or affirmative link between the action complained about and the official sued is necessary for § 1983 recovery." Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995).

Plaintiff alleges that defendants violated his rights under the free exercise clause of the First Amendment by denying him the opportunity to participate in the Islamic services of Jumuah and Talim when the outside volunteer did not show up. Other than the allegation that defendants Teslik and Keisling canceled services when the volunteer did not show up, plaintiff does not state how the remaining defendants violated his rights. However, for the purposes of screening, the facts plaintiff pleaded along with the documents he attached are sufficient to draw conclusions that would support findings of personal liability under § 1983. At the next stage of litigation, plaintiff will need to prove that each of these defendants met the personal liability requirement of § 1983.

Defendants Teslik and Keisling were involved personally in denying plaintiff the opportunity to participate in Jumuah and Talim because they made the decision to cancel services when the volunteer did not show up. I will also assume that Chaplain Campbell participated in the decision to cancel services. Defendants Hamblin, Meisner and Douma may have maintained the policy that prohibited inmates from leading religious services when no outside volunteer was available.

It is less clear whether defendants Lane, Facktor and Cole would have any possible

liability. Their only apparent involvement was processing plaintiff's grievances. In George v. Smith, the court limited the extent to which a prisoner may sue an official for denying a grievance:

> Only persons who cause or participate in the violations are responsible. Ruling against a prisoner on an administrative complaint does not cause or contribute to the violation. A guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not.

George v. Smith, 507 F.3d 605 (7th Cir. 2007). A broad reading of this statement would suggest that administrators can never be sued for denying a grievance. However, one reading is that the limitation applies only to a "completed act of misconduct." Norwood v. Tobiasz, No. 11-507, dkt. #5, at 9 (allowing suit to proceed against grievance examiner because examiner may have had ability to correct ongoing violation). Under this rationale, a suit would not be appropriate against an examiner or an administrator who processed a complaint regarding a completed physical assault because the person could not undo the harm. However, a suit may be appropriate against an examiner if that person is in a position to stop an ongoing violation of a plaintiff's constitutional rights. In the present case, it is possible that the persons reviewing plaintiff's complaints could have stopped the recurring cancellation of religious services. Instead, they denied plaintiff's grievances and allowed defendants to continue canceling services. Because this area of the law is unclear, I will allow plaintiff to proceed against defendants Lane, Facktor and Cole. Defendants remain free to argue at later stages in the case that they did not have sufficient involvement in the alleged

constitutional violation to be held liable.

B. Religious Land Use and Institutionalized Persons Claim

1. Substantive standard

Plaintiff's allegations also state a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc-1(a)(1)-(2), which overlaps with the free exercise clause of the First Amendment. 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 v. Bryan, 523 F.3d 789, 797-98 (7th Cir. 2008); Vision Church v. Village of Long Grove, 468 F.3d 975, 996-97 (7th Cir. 2006). 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). Construing plaintiff's complaint liberally, I conclude that plaintiff has alleged enough to state RLUIPA claims regarding the repeated deprivations of Jumuah and Talim.

As this case proceeds on these claims, if plaintiff shows at summary judgment or trial that defendants substantially burdened his sincerely held beliefs, then the burden will shift to defendants to show that their actions further "a compelling governmental interest," and that their actions are "the least restrictive means" for doing this. Cutter v. Wilkinson, 544 U.S. 709, 712 (2005).

2. Appropriate relief

Under the Federal Rules of Civil Procedure, a complaint must include a claim for relief. Fed. R. Civ. P. 8(a)(3). In his complaint, plaintiff asks only for monetary relief. Although plaintiff's free exercise claim under § 1983 may support a monetary award, he cannot recover monetary damages under RLUIPA because that statute authorizes only claims for injunctive relief. Nelson v.Miller, 570 F.3d 868, 883-89 (7th Cir. 2009). An injunction is a court order that tells a defendant to do or stop doing something, rather than requiring a defendant to pay money. I will grant plaintiff two weeks to supplement his complaint with a request for appropriate relief under RLUIPA by asking for an injunction. If he fails to file a supplement, the court will dismiss this claim.

ORDER

IT IS ORDERED that plaintiff is GRANTED leave to proceed on his free exercise and Religious Land Use and Institutionalized Persons Act claims against defendants Gary Hamblin, Michael Meisner, Charles Cole, Charles Facktor, Joanne Lane, Tim Douma, Diana Kiesling, Mark Teslik and Campbell. Plaintiff may have until December 17, 2012 to request appropriate injunctive relief under the Religious Land Use and Institutionalized Persons Act.

If he does not do so by this deadline, the claim will be dismissed.

Entered this 3d day of December, 2012.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge