IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MUSTAFA-EL K.A. AJALA,
formerly known as Dennis E. Jones-El,

OPINION and ORDER

Plaintiff,

13-cv-544-bbc

v.

KELLI WEST, AMY SMITH,
RICK RAEMISH, TODD OVERBO,
CATHY JESS, PETER HUIBREGTSE,
GARY HAMBLIN, TIM HAINES,
CHARLES COLE, STEVE CASPERSON,
GARY BOUGHTON and ANTHONY BROADBENT,

Defendants.

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Plaintiff Mustafa-El K.A. Ajala has filed a motion under Fed. R. Civ. P. 59 to alter or amend the judgment in this case. Dkt. #42. Judgment was entered on November 19, 2014, after I granted summary judgment to defendants on two claims under the free exercise clause, the establishment clause and the equal protection clause: (1) various prison officials refused plaintiff's requests to be placed on a halal diet from 2006 to 2009; and (2) defendant Tim Haines (the warden) places greater food restrictions on Muslims maintaining a halal diet than he does on Jewish prisoners maintaining a kosher diet. I declined to consider a third claim, whether defendants' handling of food for Muslim prisoners was consistent with halal law, on the ground that plaintiff had not included that claim in his complaint and he

had not even raised that issue with prison officials before filing this lawsuit. In his motion, plaintiff challenges the court's conclusion with respect to each of these claims.

A threshold problem with plaintiff's motion is that it is untimely. Under Fed. R. Civ. P. 59(e), "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." The court has no discretion to grant an extension of time. Fed. R. Civ. P. 6(b)(2) ("A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)."). See also Blue v. International Brotherhood of Electrical Workers Local Union 159, 676 F.3d 579, 582 (7th Cir. 2012) ("Civil Procedure Rule 6(b)(2) prohibits a court from" extending "the time [for filing a Rule 59 motion] past that 28 day period."). In this case, the court received plaintiff's motion on December 23, 2014, and he dated the motion December 21, 2014. Because plaintiff passed his 28-day deadline on December 17, 2014, his motion was untimely even giving him the benefit of the mailbox rule. Edwards v. United States, 266 F.3d 756, 758-59 (7th Cir. 2001) (prisoner's Rule 59 motion is deemed filed on date he gives motion to prison officials for mailing).

Plaintiff attempted to get around the deadline by filing a one-page document a few days earlier (dated December 17, 2014) that he called "Plaintiff's Rule 59(e) Motion to Alter or Amend the Judgment and for Briefing." Dkt. #41. However, the document was simply a placeholder; it did not include any substantive arguments and it did not identify any particular problems with the summary judgment opinion. Thus, to the extent I treated docket no. 41 as plaintiff's motion, I would deny it as unsupported. To the extent plaintiff believes that he was entitled to "toll" his deadline for filing a supported motion by filing a

placeholder, he cites no authority for that view. The deadline in Rule 59(e) would serve no purpose if a party could subvert it simply by filing a document in which he promises to support his motion at some future date of his choosing. Although defendants did not object to plaintiff's motion on the ground that it was untimely, defendants' oversight does not give this court authority to overlook plaintiff's tardiness. Blue, 676 F.3d at 583-84 (concluding that Rule 59 motion was untimely even though opposing party did not object and district court granted party extension of time).

When a party files an untimely Rule 59 motion, it "automatically becomes a Rule 60(b) motion." Talano v. Northwest Medical Faculty Foundation Inc., 273 F.3d 757, 762 (7th Cir. 2001). See also Williams v. Illinois, 737 F.3d 473, 475-76 (7th Cir. 2013) ("[W]e have established a bright-line rule that any motion for reconsideration filed after the deadline must be construed as a motion to vacate [the judgment under Rule 60(b).]"); Blue, 676 F.3d at 585 ("Although [the defendant] styled its motions as requests for relief under Rule 50 or 59, the window had closed on that possibility by the time it filed them and so it was necessarily pursuing relief under Rule 60."). Unlike Rule 59, legal or factual error is not a ground for relief under Rule 60(b). Banks v. Chicago Board of Education, 750 F.3d 663, 667 (7th Cir. 2014); Gleash v. Yuswak, 308 F.3d 758, 761 (7th Cir. 2002); Talano, 273 F.3d at 762. Because all of plaintiff's arguments relate to alleged legal errors, he is not entitled to relief under Rule 60.

Even if I assumed that plaintiff had filed a timely Rule 59 motion, I would reject all of plaintiff's arguments. First, plaintiff challenges my conclusion that defendants did not

violate his rights under the free exercise clause by giving him a halal diet that was vegetarian from 2006 until 2009. I wrote: "Because plaintiff does not allege that a halal diet must include meat, he cannot argue successfully that his religious exercise was burdened, substantially or otherwise. In fact, plaintiff does not identify any foods that must be included in a halal diet, so defendants would not be violating plaintiff's free exercise rights so long as they gave him a nutritionally adequate diet that did not include restricted foods." Dkt. #39 at 3 (citing Hunafa v. Murphy, 907 F.2d 46, 47 (7th Cir. 1990), and Nelson v. Miller, 570 F.3d 868, 879–880 (7th Cir. 2009)). Although plaintiff argued that his diet was not nutritionally adequate because he had a Vitamin D deficiency, I rejected this argument because plaintiff had not "adduced any evidence regarding the amount of Vitamin D in his diet now or any other time or that the amount of Vitamin D he receives is below nutritional"; he had not "provided any expert testimony that the cause of his low Vitamin D levels is the lack of sufficient meat in his diet"; and he had not "adduced any evidence that his low Vitamin D level has caused him any adverse health effects." Id. at 4.

Plaintiff does not directly challenge any of those conclusions in his motion, but he says that he does not need to be an expert to testify about his own vitamin deficiency. Regardless whether that is true, it does not address any of the problems I identified in the November 19 opinion and it does not show that defendants were giving plaintiff a nutritionally inadequate diet. Further, as I noted in the November 19 opinion, it is undisputed that defendants have addressed plaintiff's deficiency by giving him supplements, a fact that plaintiff ignores in his motion. Finally, even if I assume that the lack of meat in

plaintiff's diet was the reason for his Vitamin D deficiency, defendants had a neutral reason for excluding meat from the halal diet before 2009, which is that they could not find a halal meat supplier, so any incidental effect on plaintiff's ability to exercise his religion was reasonably related to a legitimate penological interest. Maddox v. Love, 655 F.3d 709, 719-20 (7th Cir. 2011) ("[P]rison restrictions that infringe on an inmate's exercise of his religion are permissible if they are reasonably related to a legitimate penological objective.").

Second, plaintiff challenges my conclusion that he failed to show that defendants were violating his rights under the free exercise clause, establishment clause or equal protection clause by refusing to give him the same packaged meals that prisoners on a kosher diet receive, called "My Own Meals." Defendants' reasoning for not giving those meals to prisoners on a halal diet was very simple: the packaged meals with meat and dairy products were not certified as halal. In support of their view, defendants submitted labels from the meals as well as an affidavit from the president and founder of the company that makes the meals. Surprisingly, plaintiff stated that he wanted the meals anyway, apparently believing that the manufacturer was lying about her own products. However, his only support for a contrary view consisted of declarations from prisoners who averred that they saw "My Own Meals" with meat that were labeled both "kosher" and "halal." He did not submit any actual labels showing that "My Own Meals" with meat were certified as halal.

Plaintiff challenges my conclusion that the prisoners' declarations are inadmissible because they violate the best evidence rule, Fed. R. Evid. 1002, but he did not respond to defendants' argument in their opposition brief that the best evidence rule applies to all

writings (not just "documents" as plaintiff suggests), so presumably he has abandoned that argument. In any event, even if the best evidence rule did not apply and I assume that prisoners saw "My Own Meals" with meat that were labeled as "halal," this would not show that defendants were violating plaintiff's rights by relying on the manufacturer's representation that the meals were not halal. In fact, defendants would risk violating plaintiff's rights by serving meals to plaintiff that were contrary to his religious beliefs, a risk about which plaintiff does not seem to have any concern. Thus, at the least, defendants would be entitled to qualified immunity in light of the inconsistent information regarding the meals. Phelan v. Village of Lyons, 531 F.3d 484, 489 (7th Cir. 2008) (in determining whether defendants are entitled to qualified immunity, "we may . . . take into account an officer's reasonable, but mistaken beliefs as to the facts").

Next, plaintiff argues that I construed his claim regarding "My Own Meals" too narrowly as being limited to packaged meals with meat. Plaintiff does not explain further, but presumably he means to argue that he believes that defendants are violating his constitutional rights by refusing to give him vegetarian "My Own Meals," which the parties agree are halal. The obvious problem with this argument with respect to plaintiff's claim under the free exercise clause is that plaintiff does not deny that he is receiving an adequate amount of vegetables in his diet and he does not argue that there are any types of food in the "My Own Meals" that are required by his religious beliefs that he is not receiving. Even with respect to a discrimination claim (under the theory that Jewish prisoners receive "My Own Meals" but Muslim prisoners do not), plaintiff does not identify in his motion any way

in which the "My Own Meals" vegetarian food is "better" than the vegetarian food that he is receiving. Because any discrimination claim requires a showing that the plaintiff is being treated less favorably than someone else, that failure is fatal to plaintiff's claim.

In his original summary judgment materials, plaintiff argued that the food defendants serve him is not actually halal because it has been served or stored with non-halal food, and thus contaminated. Plaintiff does not repeat that argument in his motion, so I do not understand him to be arguing now that the "My Own Meals" are better than the meals he receives because the packaged meals are not contaminated. To the extent he does mean to argue this, I adhere to my view in the summary judgment opinion that the claim is premature because plaintiff did not include the claim in his complaint, and even more important, plaintiff has cited no evidence that he ever complained to any prison official that he believed the food he was receiving was not halal because of the way it was served or stored. For this reason, plaintiff would not be entitled to damages because he could not show that defendants were intentionally violating his rights before he filed this lawsuit. United States v. Norwood, 602 F.3d 830, 835 (7th Cir. 2010). Further, injunctive relief would be improper under Farmer v. Brennan, 511 U.S. 825 (1994), in which the Court stated, "[w]hen a prison inmate seeks injunctive relief, a court need not ignore the inmate's failure to take advantage of adequate prison procedures, and an inmate who needlessly bypasses such procedures may properly be compelled to pursue them."

Plaintiff cites no contrary authority in his motion. Instead, he suggests that his complaint was broad enough to include any claim that defendants were violating his rights

under the free exercise clause, the establishment clause or the equal protection clause by refusing to give him "My Own Meals." However, when I screened plaintiff's complaint, I did not allow him to proceed on a "contamination" theory and he points to no language in his complaint that set out such a theory. Rather, I understood plaintiff to be rasing two challenges. (A third challenge was later dismissed for plaintiff's failure to exhaust his administrative remedies. Dkt. #20.) First, from 2006 to 2009, defendants flatly denied plaintiff's request for a halal diet, even a vegetarian version of that diet. Dkt. #3 at 8. (In fact, it was revealed at summary judgment that plaintiff had been offered a vegetarian version of a halal diet.) Second, defendants were discriminating against Muslims now by allowing Jewish prisoners to eat all of the foods that were permitted under kosher law but arbitrarily restricting the diet of Muslim prisoners more than what was required under halal law. Id. at 10-11. I did *not* understand plaintiff to be alleging that defendants were giving him food that violated halal law. I dismissed plaintiff's claim under the Religious Land Use and Institutionalized Persons Act because he did not allege facts suggesting that defendants were substantially burdening his religious, an element of that claim. Id. at 11 ("Plaintiff cannot proceed on this claim under RLUIPA. Although plaintiff says that the diet he receives is more restrictive than a true halal diet, plaintiff does not allege that his religious beliefs require him to eat certain foods that he is not receiving, so I cannot infer that the diet is substantially burdening his religious exercise.").

After I issued the screening order, plaintiff did not file a motion for reconsideration or an amended complaint. He did file a motion for leave to file a "supplement" to his

complaint in which he said that he wanted to "clarify" certain portions of his claims. Dkt. #9. However, I denied this motion on the ground that it did not comply with the Federal Rules of Civil Procedure and I explained to plaintiff what he needed to do if he wanted to file an amended complaint, dkt. #10. In any event, nothing in plaintiff's proposed supplement suggested that he wished to proceed on a contamination theory or that he believed that defendants' view of halal requirements was too permissive. Rather, he reaffirmed that his claim was just the opposite. In other words, he believed that defendants were violating his rights by imposing a diet that was *more* restrictive than what halal law requires. Dkt. #9-1 at 2-3 (defendants' "version of halal is not halal truly" because it is "the same vegan meals with the exception of five servings of meat each week").

Finally, plaintiff says that the court should not have restricted the scope of his claims in the summary judgment opinion because defendants did not argue in their summary judgment materials that he was raising a new claim. This argument cannot carry the day for plaintiff for two reasons. First, defendants did object repeatedly throughout their summary judgment materials that plaintiff had never "complained of contaminated halal food at WSPF to any named defendant." Dfts.' Reply to Plt.'s to Dfts.' PFOF ¶¶ 32, 34, 63, 67, 69, 71, 85, 89, 93, 97, 104, dkt. #35; Dfts.' Resp. to Plt.'s PFOF ¶¶ 111, 113, dkt. #35. Plaintiff cites no evidence to the contrary. Second, the concerns I raised in the summary judgment opinion were not related solely to protecting defendants from unfair surprise. Rather, the judiciary has its own interests in refraining from deciding issues needlessly, particularly when they involve interpretations of the Constitution and potential interference

with state institutions. In fact, under the Prison Litigation Reform Act, federal courts are prohibited from issuing an injunction unless it "is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1). It would be impossible to determine whether an injunction would meet that standard in this case without first giving defendants an opportunity to address plaintiff's alleged concerns outside the context of a lawsuit. Finally, by failing to present his concerns about potential contamination to defendants before filing his summary judgment materials, it raises the question whether there is an actual case or controversy between the parties on that issue because it is unknown how or whether defendants could accommodate plaintiff's concerns. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 138 (2007) ("Article III [of the United States Constitution] command[s] that an actual case or controversy exist before federal courts may adjudicate a question."). For all of these reasons, regardless whether defendants objected, I conclude that it would be premature to consider plaintiff's proposed contamination claim.

ORDER

IT IS ORDERED that the motion for reconsideration filed by plaintiff Mustafa-El K.A. Ajala formerly known as Dennis Jones-El, dkt. #42, is DENIED.

Entered this 28th day of January, 2015.

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