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,

Plaintiff,

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.[1]

OPINION AND ORDER

13-cv-544-bbc

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This case was severed from a larger case in which pro se prisoner Mustafa-El K.A. Ajala brought many claims about his ability to practice his Muslim faith. Ajala v. West, No. 13-cv-184-bbc (W.D. Wis.). In this case, plaintiff alleges that prison officials interfered with his ability to maintain a halal diet. In particular, he alleges that defendants refused to provide him a halal diet for several years and then, when they finally approved his request, failed to provide meals that were truly halal, even though "Non-Black" Jewish prisoners receive kosher meals. In addition, he alleges that defendants required him to sign a

[1] In the caption of his complaint, plaintiff lists "Huibregtse" as a defendant without a first name. Because plaintiff refers to that defendant as "Peter Huibregtse" in the body of the complaint, I have amended the caption to reflect that defendant's full name.

statement in violation of his religious beliefs that the meal he received accurately reflected his religious needs. He raises claims under the Religious Land Use and Institutionalized Persons Act, the free exercise clause, the establishment clause and the equal protection clause.

Plaintiff has made an initial partial payment of the filing fee in accordance with 28 U.S.C. § 1915(b)(1), so his complaint is ready for screening under 28 U.S.C. § 1915A. Having reviewed the complaint, I conclude that most of plaintiff's allegations state a claim upon which relief may be granted under one or more legal theories. The one exception is plaintiff's allegation that defendants have engaged in race discrimination because he does not have standing to bring that claim.

Plaintiff fairly alleges the following facts in his complaint.

ALLEGATIONS OF FACT

Plaintiff Mustafa-El K.A. Ajala is a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He is a Muslim.

In 2006, Muslim prisoners who requested a halal diet received a "Vegan/Vegetarian" diet. However, the "Vegan/Vegetarian" diet is more restrictive than a halal diet, which may include dairy products and meats "from animals properly slaughtered according to Islamic dietary laws." Before being approved for the vegetarian halal diet, a prisoner must sign an agreement that the diet "accurately reflect[s] my religious needs." Under plaintiff's religious beliefs, it is a "grave sin" to declare something to be impermissible when it is not because

it "usurp[s] some of Allah's Dominion." Both plaintiff and an Islamic scholar have informed the Wisconsin Department of Corrections of this problem.

The policy requiring prisoners to sign the agreement as a condition of receiving a halal diet was "implemented" by defendants Steve Casperson (the former administrator for the Division of Adult Institutions), Cathy Jess (the new administrator), Rick Raemisch (the former secretary of the Wisconsin Department of Corrections), Gary Hamblin (another former secretary of the Wisconsin Department of Corrections), Kelli West (the religious practice advisor), Charles Cole (the secretary's designee) and Amy Smith.

In December 2006, plaintiff requested the halal diet, but defendants Raemisch and Casperson denied plaintiff's request. In February 2007, those same defendants, along with defendants Todd Overobo (the chaplain), Peter Huibregtse (the warden), Anthony Broadbent (the associate warden) and Gary Boughton "continued to deny Ajala the halal diet." In March 2008, plaintiff again requested the halal diet, but defendants Raemisch, Casperson, Overbo, Huibregtse, Boughton, Broadbent and Smith denied the request.

In the summer of 2008, the halal diet at the prison changed from the "Vegan/Vegetarian" diet to add five servings of meat each week. However, the diet continued to exclude dairy products and eggs, which are permitted in a halal diet.

In September 2009, plaintiff again requested the halal diet, but defendants Tim Haines (the new warden), Raemisch, Casperson, Overbo, Huibregtse, Boughton, Broadbent, Smith, Jess, West and Cole denied the request.

In October 2009, plaintiff requested a halal diet and he was approved for it, but he

was required to sign a statement that the diet accurately reflected his religious needs. Plaintiff is on this diet today.

"Non-Black Jews" at the prison are allowed to have kosher meals.

OPINION

All of plaintiff's claims arise out of his desire as a Muslim to receive a halal diet. In particular, I understand plaintiff to be raising the following claims under the Religious Land Use and Institutionalized Persons Act, the free exercise clause, the establishment clause and the equal protection clause:

> (a) from 2006 to September 2009, defendants repeatedly denied plaintiff's request for a halal diet;
>
> (b) defendants "implemented" a policy that required plaintiff in October 2009 to sign an agreement that the prison's version of a halal diet "accurately reflect[s]" plaintiff's "religious needs," even though that diet is more restrictive than a true halal diet;
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> (c) "Non-Black Jews" may receive true kosher meals, but Muslims are not provided true halal meals.

Under RLUIPA, plaintiffs have the burden to show that defendants "substantially burdened" their religious exercise. 42 U.S.C. § 2000cc-1(a). See also 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); see also Koger, 523 F.3d at 798-99 (applying Civil Liberties standard to

prisoner RLUIPA claim). Once plaintiff shows a substantial burden on a religious exercise, defendants must show that the restriction furthers "a compelling governmental interest," and does so by "the least restrictive means." 42 U.S.C. § 2000cc-1(a). See also Cutter v. Wilkinson, 544 U.S. 709, 712 (2005).

With respect to the free exercise clause, judges in this district have stated in previous cases that there remains some uncertainty regarding the appropriate standard of review. E.g., Kramer v. Wisconsin Department of Corrections, No. 10-cv-224-slc (W.D. Wis. Jul. 26, 2011). The primary question is whether Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), Turner v. Safley, 482 U.S. 78, 89–91 (1987), or both, are controlling. Under Smith, the question is whether the restriction targets the plaintiff's religion for adverse treatment and is not a neutral rule of general applicability. In other words, a believer is not entitled to a religious accommodation under Smith unless adherents of other faiths are receiving more favorable treatment. Under Turner, the question is 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 alternatives for exercising the right remain to the prisoner; 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.

The confusion arises because the Supreme Court applied Turner to a prisoner free

exercise claim in O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), three years *before* the court decided Smith. Because the Supreme Court has not addressed another prisoner's free exercise claim since O'Lone, the Court of Appeals for the Seventh Circuit has stated that it is an "open question" whether prisoners are entitled to religious accommodation under the free exercise clause. Lewis v. Sternes, 712 F.3d 1083, 1085 (7th Cir. 2013). But see Borzych v. Frank, 439 F.3d 388, 390 (7th Cir. 2006) (assuming that Smith applies to prisoner claims), and Koger, 523 F.3d at 796 (same). In Crouthers v. Zager, No. 10-cv-308-bbc (W.D. Wis. Feb. 28, 2011), I concluded that Smith did apply to prisoner claims, reasoning that it would make no sense to interpret the free exercise clause as granting a right of religious accommodation to prisoners but not to nonprisoners because it would result in prisoners having more expansive free exercise rights than nonprisoners under some circumstances. See also Grayson v. Schuler, 666 F.3d 450, 452-53 (7th Cir. 2012) (stating in dicta that Smith's "holding should apply to prison inmates along with everyone else").

Another question under the free exercise clause is whether the plaintiff must show that the defendants substantially burden the practice of his religion or whether he must show only that his beliefs are sincere. Compare Grayson, 666 F.3d at 454-55 (question is whether prisoner's conduct is "religiously motivated"), with Kaufman v. McCaughtry, 419 F.3d 678, 682-83 (7th Cir. 2005) (requiring prisoner to show substantial burden in free exercise claim brought by prisoner). In this case, it is unnecessary to choose one of these standards over the others because the result for each claim would be the same regardless.

I have stated in previous cases that the equal protection clause and the establishment

clause often add little to a claim under the free exercise clause when the claim is about more favorable treatment to adherents of other faiths, which is the situation in this case. Rather, these claims raise the same general question, which is whether "the defendant [is] treating members of some religious faiths more favorably without a secular reason for doing so." Goodvine v. Swiekatowski, No. 08–cv–702–bbc, 2010 WL 55848, *3 (W.D. Wis. Jan. 5, 2010); see also Board of Education of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."). The court of appeals has gone as far as suggesting that parties should not assert claims under both theories. World Outreach Conference Center v. City of Chicago, 591 F.3d 531, 534 (7th Cir. 2009) ("Discrimination by an official body can always be attacked as a violation of the equal protection clause—but that would usually add nothing, when the discrimination was alleged to be based on religion, to a claim under the religion clauses of the First Amendment."). However, the Supreme Court has stated that it is not for courts to pick and choose legal theories for a plaintiff on the ground that one is a better fit than another, so I will not dismiss any of plaintiffs' claims on the ground that they are redundant. Soldal v. Cook County, Illinois, 506 U.S. 56, 70–71 (1992).

A. Refusal to Provide Halal Diet

Plaintiff gives few details about his claims that various prison officials refused his requests from December 2006 to September 2009 to be placed on the halal diet. However, I understand him to be alleging that officials refused to give him *any* halal diet, even the prison's vegetarian version of that diet, not that they gave him the prison's vegetarian diet instead of a true halal diet.

Because those allegations are about past incidents rather than ongoing violations, he cannot bring a claim under RLUIPA. Vinning-El v. Evans, 657 F.3d 591, 592 (7th Cir. 2011) (monetary damages not available under RLUIPA); Nelson v. Miller, 570 F.3d 868, 883-89 (7th Cir. 2009). However, I conclude that plaintiff has stated a claim upon which relief may be granted under the free exercise clause, the establishment clause and the equal protection clause. Although plaintiff does not allege expressly that the absence of a halal diet burdened the exercise of his religion, it is plausible to infer that it does from his allegation that he is a Muslim. In addition, plaintiff does not say *why* defendants denied his request for a halal meal, but I will assume at this stage that the reason or reasons were not logically connected to a legitimate interest under Turner and not neutral under Smith. At summary judgment or trial, plaintiff will have to come forward with specific evidence about the religious significance the diet has for him and defendants' reasons for denying his request. Vinning-El, 657 F.3d at 593-94. In addition, he may have to show that he would not have received adequate nutrition if he kept the regular diet and simply abstained from eating any items that were inconsistent with his religious beliefs. Nelson, 570 F.3d at 879-80.

I note that plaintiff does not explain how each of the defendants was personally involved in denying his requests. Instead, he simply lists the names of various prison officials who he says are responsible. With respect to the September 2009 request, plaintiff says that the "same defendants" denied the requests, along with four new defendants: Jess, West, Haines and Cole. A potential problem arises because plaintiff alleges that some of the additional defendants held the same position as the other defendants. For example, plaintiff alleges that both Jess and Casperson were the administrator and both Haines and Huibregtse were the warden. Because it is unlikely that there were two wardens or administrators at the same time, it may be that some of the defendants that plaintiff lists were not involved in the decisions. After reading this screening order, plaintiff should review his allegations carefully. If the court has misconstrued his allegations or if plaintiff mistakenly included some defendants in a claim, he should move to dismiss the claims as to those defendants.

B. Requirement to Sign Agreement

Plaintiff alleges that he cannot receive the prison's version of a halal diet unless he signs an agreement stating that the diet "accurately reflects" his religious needs. This is a problem, he says, because the prison's version of a halal diet is actually more restrictive than a true halal diet and it is a "grave sin" to declare something to be impermissible when it is not. Thus, plaintiff has to choose between violating his religious beliefs by signing the statement or violating his religious beliefs by going without any religious diet.

Because plaintiff alleges that the requirement to sign the agreement remains in place

today, he has standing to seek injunctive relief, which means he may assert a claim under RLUIPA. Further, it is reasonable to infer from plaintiff's allegations that the requirement to sign the agreement is imposing a substantial burden on his religious exercise. Finally, I may infer at the pleading stage that the requirement is neither reasonable nor neutral. Although plaintiff does not say whether prisoners of other faiths are required to sign the same agreement before receiving a special diet, even if they are, it is plausible to infer from the complaint that defendants are targeting Muslim prisoners. Plaintiff alleges that he has informed prison officials that the requirement violates his religious beliefs, but defendants refuse either to eliminate the requirement or provide an appropriate religious diet, even though they provide an appropriate religious diet to members of other faiths. Accordingly, I will allow plaintiff to proceed on this claim under the free exercise clause, the establishment clause and the equal protection clause.

C. Religious and Racial Discrimination

Finally, plaintiff alleges that "non-Black Jews" receive true kosher meals, but Muslim prisoners do not receive true halal meals. Because plaintiff is alleging that members of another religious faith are receiving more favorable treatment without an apparent secular reason for doing so, I will allow plaintiff to proceed on a claim under the free exercise clause, the establishment clause and the equal protection clause with respect to his allegation of religious discrimination. Goodvine, 2010 WL 55848 at *3. Plaintiff does not say which defendants are responsible for the unequal treatment, so I will allow him to proceed against

the warden, defendant Haines. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir.1981) (if prisoner does not know name of defendant, court may allow him to proceed against administrator for purpose of determining defendants' identity). If plaintiff learns during discovery that other prison officials are responsible for the allegedly unequal treatment, he will have to seek leave to amend his complaint.

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.

I am also dismissing plaintiff's race discrimination claim. Plaintiff alleges that "non-Black Jews" receive kosher meals, but Black Jews do not. Even if this is true, plaintiff does not have standing to challenge this practice because he is not Jewish and he does not allege that prison officials are discriminating between "Black Muslims" and "non-Black Muslims." Generally, a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004).

ORDER

IT IS ORDERED that

1. Plaintiff Mustafa-El K.A. Ajala formerly known as Dennis Jones-El is GRANTED leave to proceed on the following claims:

(a) in 2006 defendant Rick Raemisch, "under the direction of defendant Steve Casperson," denied plaintiff's request for a halal diet, in violation of the free exercise clause, the establishment clause and the equal protection clause;

(b) in 2007, "at the direction of defendants Raemisch and Casperson," defendants Todd Overbo, Peter Huibregtse, Gary Boughton and Anthony Broadbent denied plaintiff's request for a halal diet, in violation of the free exercise clause, the establishment clause and the equal protection clause;

(c) in 2008 defendants Overbo, Huibregtse, Boughton, Raemisch, Casperson, Boughton, Broadbent and Amy Smith denied plaintiff's request for a halal diet, in violation of the free exercise clause, the establishment clause and the equal protection clause;

(d) in September 2009, defendants Overbo, Raemisch, Casperson, Boughton, Broadbent, Smith, Cathy Jess, Kelli West, Tim Haines, Charles Cole and Huibregtse denied plaintiff's request for a halal diet, in violation of the free exercise clause, the establishment clause and the equal protection clause;

(e) defendants Casperson, Jess, Raemisch, West, Cole, Smith and Gary Hamblin "implemented" a policy that required plaintiff in October 2009 to sign an agreement that the "vegan/vegetarian" diet "accurately reflect[s]" plaintiff's "religious needs," even though that diet is more restrictive than a true halal diet, in violation of the Religious Land Use and Institutionalized Persons Act, the free exercise clause, the establishment clause and the equal protection clause;

(f) defendant Haines allows Jewish prisoners to have kosher meals, but he does not allow Muslim prisoners to have true halal meals, in violation of the free exercise clause, the establishment clause and the equal protection clause.

2. Plaintiff is DENIED leave to proceed on all other claims.

3. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. 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 defendants. Plaintiff should not attempt to serve defendants on his own at this time. 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.

6. Plaintiff is obligated to pay the unpaid balance of their filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund accounts until the filing fee has been paid in full.

Entered this 9th day of October, 2013.

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

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