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

ROBERT TATUM, and all similarly situated DOC/CCI Inmates,

Plaintiff,

v.

MIKE MEISNER, JIM SCHWOCHERT, CATHY JESS, JANE NICKELS, RICK PHILLIPS, MARK TESLIK, CHAP. CAMPBELL, CHAP. DORN, KELLI WEST, MALONEY, PROG. DIRECTOR SCHUELLER, PROG. DIRECTOR IRIZAY, UNIT MANAGER HAUTAMAKI, LT. MORRISSON, LT. PEACHIE, CAPT. PEIRCE, SRGT. PAUL, SRGT. BERLUND, JEFF CAPELLE, DR. SULIENE, DAI DIETICIAN, DR. SCOTT HOFTIEZER, RN KAY DEGNER, MARY LEISER, JOANNE LANE, JOANNE BOVEE, RICK SCHNIEIER, CHARLES FACKTOR, CHARLES COLE, EDWARD WALL, 5 UNKNOWN OFFICERS, and 2 UNKNOWN NURSES,

Defendants.

OPINION AND ORDER

13-cv-44-wmc

In this proposed civil class action, plaintiff Robert Tatum, a prisoner at Columbia Correctional Institution, originally sought leave to proceed on various, unrelated claims against more than two dozen defendants alleging that defendants violated his and other, similarly-situated inmates' constitutional rights in numerous ways. In response, this court found that (1) Tatum's original complaint violated Fed. R. Civ. P. 20; (2) identified as many as five possible independent causes of action in the original complaint that he might wish to pursue; and (3) required Tatum to choose which lawsuit he wished to pursue as Case No. 13-cv-44. (9/30/13 Opinion & Order (dkt. #11).) In response to that order, Tatum filed two motions for reconsideration, arguing that the court failed to

consider his original complaint in light of the fact that he sought to bring it as a class action under Fed. R. Civ. P. 23. (Dkt. ##12, 14.) The court denied both motions, reiterating that Tatum was required to choose among his multiple, unrelated claims to pursue in this case. (11/1/13 Order (dkt. #13); 11/5/13 Order (dkt. #15).) After the twice-extended deadline had lapsed for responding to the court's original order, this action was dismissed without prejudice for failure to prosecute. (12/3/13 Order (dkt. #16).)

Approximately three weeks later, Tatum filed a *third* motion for reconsideration, directing the court to a cover letter accompanying one of his earlier motions for reconsideration, in which Tatum stated, "I am willing to drop claims vs. the Warden of DCI, Jim Schwochert, but I still contend the Complaint is valid as it is. All the other issues were asserted against 1 defendant in compliance with FRCP Rule 18, CCI's Warden Mike Meisner." (2nd Mot. for Reconsideration, Letter (dkt. #14-1.) On this basis, Tatum contends that he wishes to pursue claims against a single defendant. (3d Mot. for Reconsideration (dkt. #19).) While Tatum's prior filings to this court did not clearly state his wish to proceed on claims solely against Warden Meisner, the court will, nonetheless, grant his motion for reconsideration and screen his complaint solely as to defendant Meisner.

Because Tatum is incarcerated, the court will screen the complaint as required by the Prison Litigation Reform Act ("PLRA") to determine whether it is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Because

plaintiff meets this step as to his First Amendment and Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-2(b), claims concerning the inadequacy of CCI's Ramadan meals, plaintiff will be allowed to proceed and defendants required to respond.

ALLEGATIONS OF FACT[1]

I. Parties

Plaintiff Robert Tatum is currently incarcerated at the Columbia Correctional Institution ("CCI"). He was previously incarcerated at Dodge Correctional Institution ("DCI") and some other unidentified maximum security facility. Tatum seeks to represent a class consisting of inmates also incarcerated at DCI, CCI, and (perhaps) other institutions operated by the Department of Corrections ("DOC"). Mike Meisner is the warden of CCI and serves as the Appropriate Reviewing Authority.[2] Meisner is alleged to act under color of state law and is being sued in both his individual and official capacities.

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[1] In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this screening order, the court assumes the probative facts above based on the allegations in his complaint. The court previously recounted these facts in its first opinion and order. For ease of reference, the court recounts only those facts relevant to claims directed against Meisner.

[2] It appears that Meisner may no longer be the Warden of CCI. To the extent that is the case, defendant's counsel should substitute CCI's current warden as the proper defendant in this action.

II. Nature of Complaints

A. Religious Diet

Tatum alleges that on about June 27, 2011, DCI Chaplain Dorn placed Tatum on a vegan diet, which did not meet his religious diet requirement and left him malnourished. Tatum further alleges that he was placed on a vegan diet pursuant to a DAI's "Religious Affiliation Umbrella Group" policy, which is allegedly promulgated by Cathy Jess, the DOC's Administrator of the Division of Adult Institution ("DAI"). Tatum alleges that this policy "classified related religions into a group, and forces inmates to accept the exact same services designated to that group regardless of whether the services meet your particular religion's requirements." (Compl. (dkt. #1) ¶ 29.) Tatum complained to Dorn and DCI Warden Schwochert that the diet did not meet his religious dietary restrictions or provide the minimum intake standards as required under DOC-309.23.

On August 8, 2011, Tatum was transferred to CCI, at which time he filed a new religious preference and religious diet form that was denied by Irizay, a program director at DCI, as "outside of practice currently required by DCI." The denial was affirmed by Kelli West, DAI head member of the religious request review committee, and Meisner and the subsequently-filed grievance was also rejected. Subsequent requests were similarly denied.

Tatum participated in the Ramadan fast at DCI / CCI during the 2011 fast. As established by DAI (Jess in particular), Ramadan meals consist of two bags provided at approximately 4:00 a.m. and at sundown. The food in the two bags is supposed to be

comparable to the three meals of the general diet in terms of nutrition intake. Tatum alleges that the two bags combined do not equal the nutrition of the three daily, general diet meals and, more importantly, do not meet the minimum intake standards established in the DOC Diet Manual. Tatum alleges that he exhausted administrative remedies on this issue as well.[3] Because of the inadequate nutrition, Tatum further alleges that his religious practice was substantially burdened and he suffered health consequences, including "atypical damages" because of his unique diet and health and body type. (*Id.* at ¶ 60.)

B. Grievance Process

Tatum also alleges that CCI Warden Meisner "affirms any decision of the ICEs without reviewing the merits of their actions / determinations or the inmates' grievance, and is in effect a 'rubber stamp' for affirming any actions against inmates regardless of [whether] that action was valid or violated an inmate's substantial rights." (*Id.* at ¶ 64.) Tatum cites to examples from his own administrative challenges to the religious diet policy. As such, Tatum alleges that defendants cause Tatum and "his class to suffer loss of time and monetary expense in seeking court interve[n]tion that are more properly venued with the ICRS [to] resolve." (*Id.* at ¶ 69.)

C. CD/DVD Ban

Tatum separately challenges DAI/CCI policy instituted by Jess and Meisner of banning inmates' possession of CDs/DVDs for legal purposes. Tatum specifically alleges

[3] Tatum also alleges that he was later denied Ramadan meals in 2012 because of his 2011 grievance over the lack of nutrition in those meals.

that on July 20, 2012, two CD/DVDs containing evidence in another of Tatum's *pro se* lawsuits were confiscated during a unit wide shakedown search. Tatum further maintains that the content of these discs were copied off the chapel library computer, allowing any inmate or officer to view the contents. Tatum alleges that this policy violates his Sixth and First Amendment rights and that defendants Jess and Meisner lack a "legitimate penological interest in the CD/DVD ban for legal use." (*Id.* at ¶ 80.)

D. Laptop Ban

Tatum also challenges defendants Jess's and Meisner's policy banning possession of laptop computer and email / internet access in CCI, contending that defendants have "no substantial penological interest" in this ban.

E. Tort Claim based on Release Account Policy

Defendants Jess, Hamblin and Meisner are separately alleged to have a policy denying inmates use of their release accounts, regardless of an inmates' sentence and eligibility for release. Tatum alleges that "release accounts are trust accounts, in which a percentage of an inmates' total received money is set aside up to $5000 to ensure the inmate has funds for basic expenditures such as transport & clothes upon release from incarceration." (*Id.* at ¶ 86.) Tatum alleges, therefore, that he and other inmates with life sentences with no parole eligibility should be able to access their release accounts "because the purpose of the trust account cannot be achieved" in these cases. (*Id.* at ¶ 100.) In Tatum's view, this policy is "basically a robbing on inmates' money without

legitimate purpose" and seeks release of the funds through a state law conversion or replevin action.

F. Phone Access Policy

Tatum separately challenges Meisner's policy denying him and other inmates pursuing cases *pro se* from "making phone calls to further their legal pursuits, calling courts for case updates & information, conferring with opposing counsel, witnesses, or other necessary parties during business hours, by not allowing inmates phone use during business hours or access to direct-line phone services." (*Id.* at ¶ 102.) Once again, Tatum challenges the justification for this policy and further contends that the policy limits his and other inmates' effectiveness at pursuing *pro se* lawsuits.

G. Library Access

Tatum also challenges Meisner and Maloney's policy limiting access to the library to ten inmates per unit on assigned dates and times, which forces inmates to choose between recreation and library participation. Tatum similarly challenges a new policy that removed all legal books from the library and only allows caselaw and statute searches via LEXIS computer access allowed during law library time. As a result, Tatum contends that defendants have prevented Tatum and others from pursuing their legal claims for no legitimate penological interest.

H. Mail Use Policy

Tatum similarly alleges that on March 19, 2012, Tatum turned a brief over to the prison mail personnel with three valid postage stamps, containing sufficient pre-paid

postage for the brief. On March 23, 2012, the package was returned with "void" written on the stamps with an ink pen, destroying the stamps' value and preventing the filing of Tatum's brief. Tatum further alleges that the stamps were destroyed pursuant to Meisner's policy. Plaintiff alleges that a similar incident occurred on May 2, 2012, and that he was disciplined for his use of the stamps. Tatum further alleges that this incident was in retaliation for Tatum's filing of grievances for rights violations and his active court cases against prison personnel.

I. Photocopy Policy

Finally, plaintiff alleges that Meisner instituted a new photocopy policy on January 1, 2013, which requires inmates to send material through inter-institution mail to the Education Department for scanning and approval outside of the inmate's presence. Previously, inmates copied materials during their scheduled library period with the library correctional officer reviewing and approving materials in the inmate's presence. Tatum contends that the new policy threatens disclosure of confidential legal documents and introduces the risk that the legal papers will be lost. In turn, Tatum contends that the new policy obstructs inmates' access to courts.

OPINION

As identified in the court's earlier order, the court identified five lawsuits, the following three of which are directed against defendant Meisner:

- **Lawsuit #1 (Denial of Adequate Religious Diet as violation of First Amendment and RLUIPA)**
    - Defendants' religious diet policy fails to account for an individual's

specific religious requirements.

- Defendants' religious diet policy fails to provide adequate nutrition, in particular for those inmates observing Ramadan.

- **Lawsuit #3 (Meisner's Treatment of Grievances in Violation of Fourteenth Amendment)**

  - Defendant Meisner's automatic affirmance of any action against inmates violates inmates' Fourteenth Amendment rights.

- **Lawsuit #4 (Access to Courts Claim Challenging Various Prison Access Policies)**

  - Defendants Jess, Meisner and Maloney implemented various policies that limit inmates' ability to represent themselves in *pro se* cases, including (1) CD/DVD ban, (2) laptop ban, (3) phone access policy, (4) library access, (5) treatment of legal materials during a search, (6) mail use policy, and (7) photocopy policy.

I. Denial of Adequate Religious Diet in Violation of the First Amendment and RLUIPA

The Supreme Court has held that "reasonable opportunities must be afforded all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972). Still, a prison restriction on religious exercise must be upheld so long as it is reasonably related to a legitimate correctional purpose. *Turner v. Safley*, 487 U.S. 78, 89 (1987). The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a)(1)-(2), provides more expansive protection than that afforded under the First Amendment, requiring that any state prison which receives federal funding "must demonstrate . . . that the rule is the least restrictive means of achieving a compelling

interest." *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).[4] RLUIPA is designed to "protect[] institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005).

Ultimately, to prove a RLUIPA claim, a plaintiff bears the burden of establishing that defendants placed a substantial burden on the exercise of the plaintiff's religious beliefs. 42 U.S.C. § 2000cc-2(b); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). Although RLUIPA does not define the term "substantial burden," the Court of Appeals for the Seventh Circuit has held that 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 Chi.*, 342 F.3d 752, 761 (7th Cir. 2003). Under the statute, a "religious exercise" is "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

While the religious exercise impacted by the prison regulation need not involve a central tenet, plaintiffs still must show either (1) loss of benefits or (2) that the prison applied pressure to modify behavior. *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008) (holding that government conduct is "substantially burdensome when it put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs")

[4] Although plaintiffs do not allege as much, it is reasonable to infer that the Waupun Correctional Institution receives and uses federal grant money. Therefore, the requirements of the Act apply to it. *See* 42 U.S.C. § 2000cc-1(b).

(internal citations and quotation marks omitted). Under both the First Amendment and RLUIPA, the Seventh Circuit has found a substantial burden on the exercise of religious beliefs where a prison refused to grant a nutritionally adequate non-meat diet during the 40 days of Lent. *See Nelson v. Miller*, 570 F.3d 868, 880 (7th Cir. 2009).

Whether the restriction is "reasonably related to a legitimate correctional purpose" as required under *Turner*, 487 U.S. at 89, to rebut plaintiff's First Amendment claim, or whether it is the "least restrictive means of achieving a compelling interest," *O'Bryan*, 349 F.3d at 401, to defend against an RLUIPA claim, are issues which will await another day. In summary, the court will allow plaintiff to proceed on his claims that Meisner violated the First Amendment's Free Exercise Clause and RLUIPA's substantial burden provision, 42 U.S.C. § 2000cc-2(b), by denying him and other similarly-situated inmates a nutritionally adequate diet during Ramadan. Moreover, because these are the only claims for plaintiff is granted leave to proceed, the court will also allow him to proceed against defendant Cathy Jess, especially in light of her alleged central role in establishing the policy challenged in this action.[5]

[5] To the extent plaintiff intends to pursue monetary damages on behalf of himself individually or the class, qualified immunity may bar that form of relief for his § 1983 First Amendment claim, and "RLUIPA does not permit claims for money damages against states or prison officials in their official capacity or against prison officials in their individual capacities." *Easterling v. Pollard*, 528 Fed. Appx. 653, 656 (7th Cir. 2013) (unpublished) (citing *Vinning–El v. Evans*, 657 F.3d 591, 592 (7th Cir. 2011); *Nelson v. Miller*, 570 F.3d 868, 886–89 (7th Cir. 2009)).

II. Treatment of Grievances in Violation of Fourteenth Amendment

Next, plaintiff complains about Meisner's "rubber-stamping" of decisions of the ICEs without reviewing the merits of the inmates' grievances. Specifically, plaintiff complains of Meisner's response to his grievance concerning denial of nutritionally-adequate Ramadan meals. There is, however, no substantive due process right to an inmate grievance procedure. *See Grieveson v. Anderson*, 538 F.3d 763, 772 (7th Cir. 2008); *Antonelli v. Sheahan*, 81 F.3d 1422, 1430 (7th Cir. 1996). Even if there were, no practical way exists to challenge Meisner's claimed approach to grievances in the abstract, while any specific challenge to Meisner's review of the Ramadan diet grievance will be subsumed as part of Tatum's First Amendment and RLUIPA claims.

III. Access to Courts Claims

Finally, Tatum seeks to bring claims concerning Meisner's implementation of policies which restrict prisoners' ability to litigate cases. Specifically, Tatum challenges (1) CD/DVD ban, (2) laptop ban, (3) phone access policy, (4) library access, (5) treatment of legal materials during a search, (6) mail use policy, and (7) photocopy policy. The court construed these various challenges as an access to courts claim.

"[P]risons are obligated to assist or, put another way, may not impinge on a prisoner's efforts to pursue a legal claim attacking, as relevant here, his criminal judgment." *In re Maxy*, 674 F.3d 658, 660 (7th Cir. 2012) (citing *Lewis v. Casey*, 518 U.S. 343, 355 (7th Cir. 1996)). "[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief

for some wrong." *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002). Prisoners have the right to complain about prison conditions under the free speech clause, *Bridges v. Gilbert*, 557 F.3d 541, 551 (7th Cir. 2009), and to file grievances under the petition clause, *Powers v. Snyder*, 484 F.3d 929, 932 (7th Cir. 2007).

All of that said, to state a claim for denial of access to the courts, plaintiff must allege facts suggesting that the actions of prison officials have caused him an "actual injury" in the form of prejudice to an underlying cause of action. *Lewis v. Casey*, 518 U.S. 343, 351-52 (1996); *see also In re Maxy*, 674 F.3d at 660 ("[T]o satisfactorily state a claim for an infringement of the right of access, prisoners must also allege an actual injury."); *Eichwedel v. Chandler*, 696 F.3d 660, 673 (7th Cir. 2012) ("[A]n inmate may prevail on a right-of-access claim only if the official actions at issue hindered his efforts to pursue a legal claim." (internal citation and quotation marks omitted)). Here, plaintiff fails to allege any underlying court actions, much less that any of these policies prejudiced his ability to access the courts. Accordingly, the court will deny plaintiff leave to proceed on an access to courts claim.[6]

ORDER

IT IS ORDERED that:

1) Plaintiff Robert Tatum's motion for reconsideration (dkt. #19) is GRANTED. The clerk of court is directed to reopen this case.

[6] In addition to these lawsuits identified in the prior order, Tatum also seeks to bring a state law replevin or conversion claim based on defendants' refusal to release funds from his trust account. Because this state law claim is not related to the federal claims for which Tatum has been granted leave to proceed, it falls outside of the court's supplemental jurisdiction under 28 U.S.C. § 1367(a).

2) Plaintiff's request to proceed against defendants Michael Meisner and Cathy Jess on claims under the First Amendment Free Exercise clause and RLUIPA's substantial burden provision, 42 U.S.C. § 2000cc-2(b) is GRANTED. In all other respects, plaintiff's request to proceed is DENIED, and all other defendants are DISMISSED.

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

4) 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.

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 the 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 for defendants.

Entered this 16th day of September, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge