

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

WALTER SMITH,

Plaintiff,

v.

OPINION AND ORDER

14-cv-796-slc

BETH LIND, SANDRA HAUTAMAKI,
JANE/JOHN DOE, MICHAEL THRUMER,
CAPT. MURASKI, THERESA MURPHY, AMY SMITH,
WELCOME ROSE, BELINDA SCHRUBBE,
MR. LUNDQUIST, MICHAEL MEISNER,
TOM GOZINSKE, MR. TUCKWELL, RONALD BAYEH,
CHAPLAIN NURDEEN, FRANCIS PALIEKARA, ISMAEL
OZANNE, JANN JOHNSTON, WILLIAM POLLARD,
ANGELIA GROLL, CHARLES FAKTOR, CHARLES COLE,
STEVEN LIND, and JON LITSCHER,

Defendants.

In this proposed civil class action, plaintiff Walter Smith, a prisoner at Stanley Correctional Institution in Stanley, Wisconsin, alleges that defendants, various employees of the Wisconsin Department of Corrections employed at Waupun and at the DOC's central office, violated his First and Eighth Amendment rights and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-2(b), by providing him nutritionally-inadequate Ramadan meals that made him sick over several years in spite of his repeated complaints, denied him traditional foods for a Muslim feast, denied him a nutritionally-adequate Halal diet consistent with his religious beliefs, and denied him regular access to group religious prayer and study meetings.

The parties consented to magistrate judge jurisdiction, and on February 5, 2016, this case was reassigned to me. (Dkt. 11.) Because Smith 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. For the reasons that follow, the court will allow plaintiff to proceed on First Amendment, RLUIPA and Eighth Amendment claims against some of the defendants as detailed below.

ALLEGATIONS OF FACT¹

A. Parties

Plaintiff Walter Smith is currently incarcerated at the Stanley Correctional Institution ("SCI"), but was previously incarcerated at Waupun Correctional Institution, and the allegations in the complaint concern his time at Waupun.

As evidenced by the caption, Smith seeks to bring an action against a large number of defendants. Smith contends that the following defendants are or were employed at Waupun for all times relevant to his complaint. Defendant Beth Lind was the food service manager, and defendant Mr. Tuckwell is the food services manager. Defendant Sandra Hautamaki is the program director. Defendant Jane/John Doe is the DOC dietician who ordered "cold and unhealthy bag meals to be served to fasting Muslims during [the] month of Ramadan." (Compl. (dkt. #1) p.2.) Defendant Michael Thrumer was the warden. Defendant Capt. Muraski was the program security captain. Defendants Theresa Murphy, Jann Johnson and Angelia Groll are inmate complaint examiners. Defendant Belinda Schrubbe is the health services unit supervisor. Defendant Michael Meisner and Steven Linn were reviewing authorities. Defendant Francis Paliekara is the chaplain. Defendant William Pollard is the warden.

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.

Smith also seeks to assert claims against certain defendants, also employed with the Department of Corrections, but apparently centrally in Madison, Wisconsin. Defendants Amy Smith, Welcome Rose, Tom Gozinske and Charles Facktor are or were corrections complaint examiners for the DOC. Defendant Mr. Lundquist is the DAI (department of adult institutions) representative for the DOC. Defendant Ismael Ozanne is the "OOS" for the DOC. Defendant Charles Cole is the representative for the Office of the Secretary of the DOC. Defendant Rick Raemisch was the Secretary of the Department of Corrections; the court has replaced Raemisch with current Secretary Jon Litscher.

Smith also seeks to assert claims against certain officials at other institutions. Defendant Ronald Beyah is the chaplain of the Milwaukee Secure Detention Facility. Defendant Chaplain Nurdeen is the chaplain at the Racine Correctional Institution.

All defendants are being sued in their individual and official capacity.

B. Denial of Adequate Ramadan Bag Meals

Smith alleges that he is a practicing Sunni Muslim and has been for more than 20 years. As part of his faith, Smith fasts every year for the month of Ramadan. Dating back to 2007, Smith contends that he has been denied nutritionally and religiously adequate meals for the month of daily fasting during Ramadan.

I. 2007

On June 3, 2007, Smith wrote to defendant Hautamaki, Thrumer and Muraski regarding the approaching month of Ramadan and his concerns about the "unhealthy cold meals" that would be served. (Compl. (dkt. #1) 3.) Smith complained that his receipt of those bags of food at Green Bay Correctional Institution from 1997 to 2006 resulted in "severe stomach cramps,

constipation followed by extreme diarrhea, bloody stools, intestine burning, vomiting, weight loss, fatigue, dizzy spells, and headaches," and that he was infected on three separate occasions with a bacterial infection requiring treatment with antibiotics. (Id. at 4, 6.) Smith further complained that these symptoms would have six to seven months after Ramadan before returning to normal, only to start again with the next month of Ramadan. Smith received no response. On each day from September 13, 2007, to October 12, 2007, Smith was served cold bag meals consisting of food for dinner and breakfast. The food was nearly frozen, having been stored in a cooler for 24-26 hours before being given directly to Smith. Besides being frozen, the condition of the food was poor -- bread was old, hard and moldy, and lacking in nutritional and caloric value. Smith had terrible abdominal pains, cramps, diarrhea, etc., which continued for six to seven months.

Smith and other Muslim inmates filed an inmate complaint. Defendant Kroll ordered Smith to contact Food Services Administrator Lind, which he did on September 29, 2007. Lind responded on October 1, 2007, that the bag meals had no problems, and that the Food Services Manual required two bag meals, neither of which had to be hot. Smith refiled his inmate complaint, and defendant Murphy dismissed it without investigation, stating that there is no requirement to provide hot meals, and directing Smith to HSU for medical issues. Defendant Thrumer, Rose, Smith and Raemisch agreed with the dismissal.

ii. 2008

In 2008, the events of 2007 repeated themselves. Smith wrote a letter to Hautamaki, Muraski, and Thrumer complaining of his history of abdominal and other health issues relating to the Ramadan bag meals. Smith received no response.

Between September 2, 2008, and October 2, 2008, Smith received unhealthy cold bags, with cold and frozen food and no way to heat the food. The bags also contained far less in calories than that served to non-fasting inmates. Plaintiff began experiencing health issues again. On October 12, 2008, Smith and other fasting Muslims sent a complaint about the bag meals. Defendant Kroll returned the complaint for raising multiple issues. Smith removed the one-sentence line referring to medical issues and resubmitted it. Defendant Murphy rejected the grievance and defendant Thrumer affirmed the rejection.

On October 16, 2008, Smith sought medical treatment for his health issues. He was given several medications and placed on a bland diet, and continued to be treated for the next six to seven months.

At some unknown time, Smith filed another grievance complaining about the Ramadan bag meals and defendant Murphy and Meisner dismissed his grievance, stating that "if Ramadan bags cause medical issues Smith should not fast." (Compl. (dkt. #1) 28.)

iii. 2009

Again in 2009, Smith complains of the inadequate Ramadan meals. On July 8, 2009, he sent a letter to defendants Thrumer and Hautamaki concerning the cold bag meals for Ramadan, and the effect those meals had on his health in the past. Neither defendant responded to his letter. Smith also sent a letter to defendant Schrubbe complaining of the cold meals, explaining the impact they had on his health, explaining the importance of Ramadan, and giving her suggestions on how to warm the meals.

From August 22, 2009, through September 20, 2009, Smith was served "unhealthy cold bag meals with food being cold/ frozen with no way to heat the food." (Compl. (dkt. #1) 69.)

Smith further alleges that the bag meals were far less in calories and nutritional value than the meals provided to non-fasting inmates.

As a result of the meals, Smith alleges that he again experienced gastrointestinal issues. On September 2, 2009, he filed a complaint about these problems. Defendant Kroll returned Smith's complaint, instructing him to first attempt to resolve the issue with Food Service Administrator Tuckwell. On September 15, 2009, Smith wrote to Tuckwell, and Tuckwell responded that the meals prepared for Ramadan were in accordance with DAI and DOC policy. Smith reasserted his grievance and that grievance was ultimately rejected, with Kroll, Murphy and Meisner involved in that grievance process. Smith sought medical treatment for his symptoms.

iv. 2010

In June 2010, Smith again wrote Hautamaki, Tuckwell and Meisner regarding the cold bag meals for Ramadan. In that letter, he informed defendants that for several years he had suffered gastrointestinal and other health-related issues as a result of consuming the food in the bagged meals and that they lacked necessary nutritional value. Plaintiff contends that he again received no response.

During Ramadan, Smith again experienced gastrointestinal issues and submitted a Health Services Request on August 22, 2010. Smith was prescribed several medications, and was provided other medications for the next six to seven months. Again, Smith filed inmate grievances about the bag meals. Specifically, Smith represented that he lost 18 pounds in 12 days in one grievance. (Compl. (dkt. #1) 150.) Defendant Johnson recommended that the complaint be dismissed on the basis that the calories provided in the bag meals fall within the guidelines of 2200 calories. Meisner agreed with the proposed dismissal.

v. 2011

In 2011, Smith continued his pre-Ramadan efforts to improve the meals provided during the fast. In early July, Smith wrote to Schrubbe and Tuckwell asking to be served warm meals, describing in great detail his prior health concerns during and for months following Ramadan. Smith alleged that Tuckwell did not respond (but does not allege if Schrubbe also failed to respond).

After the start of Ramadan, on August 10, 2011, Smith filed an inmate grievance complaining of gastrointestinal issues caused by eating the bag meals and requested warm meals. Johnston rejected his grievance on the basis that the concern had already been addressed as part of a 2007 grievance. Johnston also stated that Smith could skip the fast. On appeal, defendant Linn agreed with the rejection. On August 11, Smith filed a second grievance, in which he stated that he had lost 10 pounds and was suffering from health issues. The grievance was returned by defendant Kroll and informed Smith that he should contact Schrubbe. That grievance was eventually dismissed by defendant Pollard. A subsequent grievance -- noting a loss of 17 pounds -- was also dismissed by defendants Groll and Facktor. Again, Smith alleges that he suffered from stomach and intestine pain for approximately six to seven months after Ramadan.

C. Denial of Traditional Muslim Feast Foods

On August 27, 2008, Smith and other Muslim inmates wrote defendant Hautamaki, Paliekara and Thrumer requesting to have traditional foods such as halal lamb and dates served at the Eid-ul-Fitr (feast after Ramadan fast), volunteering to pay for the feast. These defendants denied the request.

On October 2, 2008, Smith was served a vegan dinner for Eid-ul-Fitr. Smith alleges that the meal was for Buddhist and Hindus, and "it is haram (not permissible) to innovate such practices as Islam." (Compl. (dkt. #1) 33.) Smith and other Muslims filed a joint grievance regarding "not being served a feast meal that was festive under Islamic tradition." (Id. at 34.) Murphy rejected the grievance and Thrumer agreed with the rejection. Smith contends that Waupun served festive items for Christian and Jewish traditions, including for Christmas and Hanukkah.

Smith was again denied Halal and traditional foods for Eid-ul-Fitur in 2009. In July and again in September 2009, Smith wrote to Thrumer requesting Halal and traditional foods for this Islamic feast. On September 23, 2009, Tuckwell denied Smith's request stating that per DAI and DOC policy, no special foods will be used in the fest. Instead, a regular meal will be served as requested by Chaplain Paliekara and Program Director Hautamaki. On October 2, 2009, Smith was served leftover food with no Halal meat or traditional Islamic foods thus "violating Islamic custom and dietary laws." (Comp. (dkt. #1) 91.)

On October 4, 2009, Smith filed a grievance, but Kroll returned it, instructing him to contact Tuckwell, which he had already done. On October 12, 2009, Smith refiled his grievance, but the grievance was dismissed by Murphy with defendant Gozinske and Ozanne agreeing in the dismissal.²

² Smith further alleges that he and other Muslims were required to celebrate Eid-ul-Fitr on the wrong day in 2009, as further support for his First Amendment and RLUIPA claims premised on defendants' treatment of this Islamic holiday. (Compl. (dkt. #1) ¶¶ 94-106.) Smith filed grievances concerning this particular issue. Defendant Paliekara, Hautamaki, Kroll, Murphy, Meisner, Ozanne and Rose were involved in this alleged violation, either directly (Paliekara and Hautamaki) or through the grievance process.

Relatedly, Smith also alleges that defendant Paliekara held the Eid on September 23, 2009 the wrong day, even after Smith had informed him that the religious service had to be held no later than September 22. On October 4, 2009, Smith filed a complaint about this. Defendant Kroll returned the grievance, requiring Smith to attempt to resolve the matter with Paliekara. Paliekara responded, but Smith alleges that he failed to provide any reason for this error. Smith refiled his grievance, but Meisner and Murphy dismissed his complaint, finding no administrative rule violated, and defendant Ozanne and Rose agreed with the dismissal.

D. Denial of Nutritionally Adequate Halal Diet

In June or July 2008, Smith began receiving a vegan plant-based diet with a soy patty approximately four times per week. Smith began having complications from the diet, including fatigue, headaches, constipation, intestine pressure and muscle and joint pain. The conditions worsened at the start of Ramadan on September 2, 2008. On October 22, 2008, Smith was seen by a nurse, who informed Smith that she was removed him from the Halal diet because of his medical issues. After Smith objected, explaining that he was religiously required to eat only Halal meat and the vegan Halal diet was the only option, the nurse informed Smith that the vegan diet was nutritionally inadequate. On October 23, 2008, Smith was removed from the Halal diet and placed on a bland diet per order of HSU.

Smith filed a complaint, requiring that the Halal diet be modified to make the meal more nutritional and easy to digest. Defendant Murphy dismissed the complaint on the basis that the Halal diet met the nutritional standards in the DOC manual and that there was no obligation to serve meat. Murphy also stated that Smith could choose a vegan meal or self-select, meaning choose not to eat the meat in other meals. Defendants Meisner and Gozinske agreed with

Murphy's dismissal, and defendants Smith and Raemisch accepted the recommendation to dismiss Smith's complaint.

Smith also alleges that the Halal diet is a Buddhist or Hindu diet. Unlike those religions, eggs and dairy products are permissible in Islam. Smith alleges that "it is Haram (not permissible) to shirk (to worship other than [Allah]) to make unlawful what [Allah] has made lawful." (Compl. (dkt. #1) 50.) In other words, by accepting a vegan diet, which is stricter than the required Halal diet, Smith contends that he is forced to "innovate" which is not allowed under Islam. (*Id.* at 51.)³

Smith filed another complaint in August 2008, similarly complaining about the vegan Halal diet, and suggesting instead that the institution simply swap Halal meat for that served in the non-religious diet meals. Defendants Paliekara, Beyah and Nurdeen rejected, at least in part, Smith's religious concerns about having to eat a vegan diet. On November 4, 2008, Hautamaki, Lundquist and Thrumer denied Smith's request to modify the diet. Murphy, Gozinske, Smith and Raemisch were also involved in denying Smith's request.

E. Denial of Religious Services

In addition to alleging claims concerning religious diet, plaintiff also alleges that he was denied religious services. On September 28, 2009, Smith filed a grievance, alleging that Waupun "denied Muslim inmates the right to have Jumu'ah services, Ta'alim, teach or have group discussion on Islam anywhere at WCI." (Compl. (dkt. #1) 107.) Specifically, Smith complained that Jumu'ah had been cancelled several times due to a lack of volunteers, that

³ Smith further contends that limiting meat to certain days also constitutes "innovation" since it is lawful to eat meat every day. (Compl. (dkt. 1) ¶ 52.)

Ta'alim (or study group) had not been held in years, and there were no other opportunities for Muslims to discuss, teach or learn in a group setting, in violation of the Qur'an. Defendant Kroll returned the grievance to Smith, directing him to contact Hautamaki. Smith responded that the DOC code did not require him to contact Hautamaki and doing so would be futile. Defendant Murphy then recommended dismissal of Smith's grievance because of his failure to contact Hautamaki. Defendants Thrumer, Gozinske and Ozanne agreed with the dismissal.

Since then until 2012 when Smith left WCI, Jumu'ah services continued to be cancelled, sometimes for months on end, and there was no Ta'alim or other group learning opportunities.⁴

OPINION

From the allegations of the complaint, the court understands Smith to allege violations of the Free Exercise Clause of the First Amendment and of RLUIPA based on (1) denial of nutritionally-adequate Ramadan meals; (2) denial of special religious foods for the Muslim holiday of Eid-ul-Fitr; (3) denial of a nutritionally-adequate and religiously-consistent Halal diet; and (4) denial of regular Jumu'ah religious services and any group-related religious sessions, including Ta'alim. In addition, Smith also appears to allege an Eighth Amendment conditions of confinement claim based on his allegations that the Ramadan bag meals were not nutritionally adequate and caused severe gastrointestinal issues over extended periods of time.

⁴ In part of his lengthy complaint, Smith also complains about alleged contaminated water. (Compl. (dkt. 1) ¶¶ 122-35.) Because these allegations are in no way related to his other allegations concerning his religious practice, the court will not review these allegations here or the possible claims connected with them. Rather, if Smith seeks to bring a claim based on these allegations, he should file a separate lawsuit.

I. First Amendment and RLUIPA Claims

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).⁵ 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). A "substantial burden" is one that "seriously violates his religious beliefs." *Schlemm v. Wall*, 784 F.3d 362, 364 (7th Cir. 2015). 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

⁵ Although plaintiff does 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).

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") (internal citations and quotation marks omitted).

While RLUIPA may provide more expansive protection, the only remedy afforded is injunctive and declaratory relief, not monetary damages. *Easterling v. Pollard*, 528 Fed. Appx. 653, 656 (7th Cir. 2013) (unpublished) ("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.") (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)) In light of Smith's transfer from Waupun to Stanley Correctional Institution, his RLUIPA claims against Waupun employees for alleged violations specific to Waupun are now moot. *See, e.g., Vinning-El*, 657 F.3d at 592 ("Vinning-El is no longer at Pinckneyville and is receiving a vegan diet at his current prison, so damages would be the only potential relief.").

For the purposes of screening plaintiff's proposed complaint, the court, however, will infer that Waupun's policies concerning Ramadan meals, food for religious feasts, halal diet, and availability of group religious services reflect a Department of Corrections' policy. *See West v. Grams*, No. 14-3623, 607 F. App'x 561, 566 (7th Cir. Apr. 22, 2015) (unpublished) ("[T]hough a prison transfer might moot a claim for injunctive relief if the transfer means that the inmate no longer is laboring under the allegedly unconstitutional policy or practice, that is not the case here. West's lawsuit challenges under RLUIPA a system-wide Department of Corrections policy that applied at Columbia, still applies at Green Bay, and-unless modified-will apply wherever West is next sent until his release."). Therefore, the court will consider whether Smith can

pursue RLUIPA claims against DOC employees not specifically assigned to Waupun, including Secretary Litscher, for alleged violations due to DOC policy.

First, with respect to Smith's claim that he was denied nutritionally-adequate Ramadan meals, 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); *see also Powell v. Raemisch*, No. 10-CV-202-BBC, 2010 WL 2429709, at *4 (W.D. Wis. June 11, 2010) ("Many courts have held that denying a Muslim prisoner the opportunity to participate in fasting during the month of Ramadan may be a substantial burden on that prisoner's religious exercise.").

Plaintiff alleges that over a several year period, defendants repeatedly refused to provide a nutritionally-adequate Ramadan diet, and, indeed, provided one that caused significant gastrointestinal issues over a period of time extending far beyond the one-month fast. The court finds these facts sufficient to allow plaintiff to proceed on RLUIPA and First Amendment claims based on the Ramadan bag meals. As for the appropriate defendants, the court will allow plaintiff to proceed on a First Amendment claim against defendants Hautamaki, Thrumer, Muraski, Lind, Meisner, Schrubbe, Tuckwell, Pollard and Litscher.⁶ The court also will grant Smith leave to proceed on a RLUIPA claim based on the same allegations against defendant

⁶ Smith also seeks to assert a claim against an unidentified dietician. If through the course of discovery, Smith learns the name of that dietician, then he can seek leave to amend his complaint and add him or her as a defendant.

Litscher, assuming Smith can demonstrate that Waupun's treatment of Ramadan meals reflect DOC policy.⁷

Second, Smith complains of denial of traditional Muslim feast foods for the religious holiday of Eid-ul-Fitr. The Seventh Circuit has recognized that the denial of certain food required for religious feasts may implicate a prisoner's religious rights. *See, e.g., Schlemm*, 784 F.3d at 365 (reversing grant of summary judgment, finding prisoner had raised genuine issue of material fact as to whether denial of venison game meat for a Navajo Tribe celebration has a serious effect on plaintiff's religious practice). Here, too, Smith alleged that he was denied traditional foods such as Halal lamb and dates in 2008 and again in 2009. The court will grant Smith leave to proceed on a First Amendment claim based on the denial of feast foods against defendants Hautamaki, Paliekara, Thrumer, Tuckwell, Meisner, and Ozanne. The court will also allow Smith to proceed on a RLUIPA claim against defendant Ozanne, who holds a position in the DOC, not specific to Waupun, assuming, again that Smith can demonstrate that Waupun's treatment of feast foods for Eid-ul-Fitr reflects a broader DOC policy.

Third, Smith complains that defendants' provision of a vegan plant-based Halal diet violated his First Amendment rights and RLUIPA because the vegan diet was (1) nutritionally inadequate and (2) constituted an "innovation," not allowed under Islam. As for the first theory, the court will allow plaintiff to proceed on a claim that the vegan Halal diet was nutritionally inadequate, for the same reasons that the court allowed Smith to pursue claims based on the Ramadan bag meals. Smith's second theory -- that the stricter vegan diet forces him to "innovate" by not eating certain allowed foods like dairy, Halal meat and eggs -- appears more

⁷ The court did not include inmate complaint examiners as defendants because there is no allegation or reasonable inference that those proposed defendants could have changed Waupun or DOC policy, nor does Smith allege that they somehow violated his rights in the processing of his complaints.

of a stretch. While the court questions whether Smith will be able to demonstrate that the eating of a Halal diet which contains dairy, eggs and Halal meat is required (and not just allowed) under Islam, the court will nonetheless allow Smith to proceed on this theory as well. Based on the pertinent allegations, Smith may proceed on a First Amendment claim against defendants Meisner, Litscher, Paliekara, Beyah, Nurdeen, Hautamaki, Lundquist and Thrumer. The court will also allow Smith to pursue a RLUIPA claim against defendants Lundquist, Litscher, Beyah and Nurdeen, to the extent that he can demonstrate that Waupun's provision of a vegan diet for Halal dietary purposes implicates DOC policy.

Fourth, Smith also alleges First Amendment and RLUIPA claims based on defendants' denial of religious services. Specifically, Smith contends that Waupun's cancellation of Jumu'ah due to a lack of volunteers, and refusal to allow Ta'alim or other group study violates his religious rights. In a recent case, the Seventh Circuit appears to have drawn a distinction between the First Amendment and RLUIPA on denial of religious services claims. Whereas "[i]t has never been clearly established that inmates have a right to inmate-led group worship under the First Amendment . . . where non-inmate volunteers are unavailable and prison administrators justify the restriction for security reasons," such a denial could "seriously" violate[] or contradict[] an inmate's religious beliefs" to state a claim under RLUIPA. *West*, 607 F. App'x at 567. Accordingly, the court will grant Smith leave to proceed on a RLUIPA claim against defendant Ozanne, assuming that he can show that the denial of Jumu'ah and Ta'alim services reflects a DOC practice or policy, rather than one specific to Waupun.

Whether any of these restrictions or policies are "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 they are the "least restrictive means of achieving a compelling

interest," *O'Bryan*, 349 F.3d at 401, to defend against a RLUIPA claim, are issues which will await another day. *See Lindell v. Frank*, 377 F.3d 655, 657-58 (7th Cir. 2004) (finding error where district court assumed security justified policy). For now, Smith will be allowed to proceed on the above-identified RLUIPA and First Amendment claims.

II. Eighth Amendment Failure to Protect Claim

In addition to a First Amendment and RLUIPA claim, Smith's allegations also support a claim under the Eighth Amendment given his detailed allegations about health issues, in particular serious and lengthy bouts with gastrointestinal issues, during and in the months following Ramadan. The Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement" and to ensure that "reasonable measures" are taken to guarantee inmate safety and prevent harm. *Farmer v. Brennan*, 511 U.S. 825, 834-35 (1994). To state an Eighth Amendment failure to protect claim, a prisoner must allege that (1) he faced a "substantial risk of serious harm" and (2) the prison officials identified acted with "deliberate indifference" to that risk. *Id.* at 834.

While Smith contends that he was provided adequate medical treatment for these issues -- and therefore he does not assert an Eighth Amendment claim against health care professionals -- the court views Smith as alleging a failure to protect claim against those defendants to whom he repeatedly complained about the significant health effects of the Ramadan bag meals. Accordingly, the court will grant leave to proceed on an Eighth Amendment failure to protect claim against defendants Lind, Thrumer, Litscher, Hautamaki, Muraski, Meisner, Schrubbe, and Tuckwell.

ORDER

IT IS ORDERED that:

- 1) Plaintiff's request to proceed against defendants Sandra Hautamaki, Michael Thrumer, Capt. Muraski, Beth Lind, Michael Meisner, Belinda Schrubbe, Mr. Tuckwell, William Pollard, Francis Paliekara, Mr. Lundquist, Ronald Beyah, Chaplain Nurdeen, Ismael Ozanne, and Jon Litscher on claims under the First Amendment Free Exercise clause is GRANTED.
- 2) Plaintiff's request to proceed against defendants Mr. Lundquist, Ronald Beyah, Chaplain Nurdeen, Ismael Ozanne and Jon Litscher on claims under RLUIPA's substantial burden provision, 42 U.S.C. § 2000cc-2(b) is GRANTED.
- 3) Plaintiff's request to proceed against defendants Beth Lind, Michael Thrumer, Jon Litscher, Sandra Hautamaki, Capt. Muraski, Michael Meisner, Belinda Schrubbe, and Mr. Tuckwell on an Eighth Amendment failure to protect claim is GRANTED.
- 4) In all other respects, plaintiff's request to proceed is DENIED, and defendants Theresa Murphy, Amy Smith, Welcome Rose, Tom Gozinske, Jann Johnston, Angelia Groll, Charles Factor, Charles Cole and Stephen Lind are DISMISSED.
- 5) 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.
- 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) 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 25th day of March, 2016

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge