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

THOMAS J. BLAKE,

OPINION & ORDER

Plaintiff,

v. 14-cv-903-jdp

WISCONSIN DEPARTMENT OF CORR.,
MICHAEL DONOVAN, MICHAEL BAENEN,
CATHY FRANCOIS, MICHAEL MOHR,
DENNIS MOSHER, KELLI R. WILLARD-WEST,
CHARLES FACKTOR, BRIAN FOSTER,
KELLY SALINAS, CINDY O'DONNELL,
and JODENE PERTTU,

Defendants.

Plaintiff Thomas Blake, a prisoner in the custody of the Wisconsin Department of Corrections at the Green Bay Correctional Institution, has filed a complaint alleging that prison officials are violating his right to practice the Asatru religion by prohibiting him from possessing certain religious items, in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA), the free exercise clause of the First Amendment, and equal protection clause of the Fourteenth Amendment. Plaintiff has also filed a motion for appointment of counsel and seeks leave to proceed *in forma pauperis*. After the court calculated an initial partial payment of the $350 filing fee for *in forma pauperis* filers, plaintiff submitted the entire filing fee.

The next step is for the court to screen the complaint and dismiss any portions that are legally frivolous, malicious, fail to state a claim upon which relief may be granted, or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. In screening any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

After considering plaintiff's allegations, I will allow plaintiff to proceed on his RLUIPA, free exercise, and equal protection claims. I will deny plaintiff's motion for appointment of counsel without prejudice to his refiling it at a later date.

ALLEGATIONS OF FACT

Thomas Blake is an inmate at the Green Bay Correctional Institution. He is an adherent of the Asatru religion. Several times in 2013 and 2014, defendants Michael Donovan (the chaplain), Dennis Mosher (the former social services director), and Kelli Willar-West (a DOC Religious Practices Advisory Committee member) denied plaintiff's requests for "Rune Tiles" and "Rune Cards" for false "security" reasons even though plaintiff needed these items to practice his religion. Plaintiff also seems to be saying that at some point these defendants similarly denied him several other items, including an Altar Cloth, Blunted Mead Horn, Wood Blot Bowli, and Wood Mead Vessel.

After plaintiff filed inmate grievances about the problem, several defendants' responses "fell below the expected standard of a civil servant," Dkt. 1, at 6. Defendant Charles Facktor dismissed plaintiff's inmate grievances without actually investigating the problem. Defendant Cathy Francios denied an inmate grievance based on a technical error in the date on the grievance form (plaintiff had inadvertently listed the date of incident as "8/32/2013") rather than contact plaintiff to fix the error. Plaintiff appears to have filed a grievance about Francios's treatment of his grievance. Defendant Michael Mohr denied that grievance and defendant Michael Baenen, the former GBCI warden, denied the complaint after failing to investigate it. I understand plaintiff to be saying that these denials were grounded in animus toward his religion.

Plaintiff states that "[t]he following people are only involved by proxy (by signature) and showed no malice towards my complaints": Warden Brian Foster and complaint examiners

Jodene Perttu, Kelly Salinas, and Cindy O'Donnell. Dkt. 1, at 6. I understand plaintiff to mean that these defendants were involved in denying grievances he filed about the denials, but plaintiff does not take issue with the way they processed them.

ANALYSIS

A. RLUIPA

Under RLUIPA, the plaintiff has the initial burden to show that he has a sincere religious belief and that his religious exercise was substantially burdened. 42 U.S.C. § 2000cc-1; *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). If the plaintiff makes the showing, the burden shifts to the defendants to show that their actions further "a compelling governmental interest," and do so by "the least restrictive means." *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005). If a plaintiff prevails on a RLUIPA claim, he is limited to declaratory and injunctive relief; he cannot obtain money damages. *Grayson v. Schuler*, 666 F.3d 450, 451 (7th Cir. 2012).

In this case, plaintiff alleges that the restrictions on Rune Tiles and other religious materials substantially burden his religious exercise, so I will allow him to go forward on his claim under RLUIPA. If, at summary judgment or trial, plaintiff can prove a substantial burden with specific facts, the burden will shift to defendants to prove that the restrictions are the least restrictive means of furthering a compelling governmental interest.

The remaining question on plaintiff's RLUIPA claim relates to the proper defendants. On a claim for injunctive relief, the question is whether the defendant has any authority to grant

the relief requested. *Gonzalez v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011); *Williams v. Doyle*, 494 F. Supp. 2d 1019, 1024 (W.D. Wis. 2007). Plaintiff states that defendant Foster is the GBCI warden, defendant Donovan is the GBCI chaplain, and defendant Willar-West is a DOC Religious Practices Advisory Committee member. At this stage of the proceedings, it is reasonable to infer that each of these defendants may have some role in deciding which religious practices are permissible, so I will allow plaintiff to proceed on his RLUIPA claim against these defendants. I will not include defendant complaint examiners Mohr, Francios, Facktor, Salinas, and Perttu or Office of the Secretary employee O'Donnell as defendants on the RLUIPA claim, because there is no indication that these defendants can change DOC religious policy. Also, plaintiff states that defendants Baenen and Mosher are "former" holders of their positions, so I will not include them as defendants on the RULIPA claim.

B. Free exercise clause

The standard for proving a claim under the free exercise clause is less clear than the standard under RLUIPA. Generally, when a prisoner brings a claim under the First Amendment, the question is whether the challenged restriction is reasonably related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Four factors are relevant to the determination under *Turner*: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether the prisoner retains alternatives for exercising the right; the impact that 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. *Turner*, 482 U.S. at 89-91.

However, in the context of claims brought under the free exercise clause, there are open questions regarding whether there may be other elements as well. In particular, it is not clear

whether a plaintiff must prove that the defendants placed a "substantial burden" on his exercise of religion, or the restriction is not a neutral rule of general applicability but instead targets the plaintiff's religion for adverse treatment. In some cases, courts have applied one or both of these other elements and in some cases the courts have omitted them. *E.g.*, *Ortiz v. Downey*, 561 F.3d 664, 669 (7th Cir. 2009) (applying *Turner* standard without discussing other elements); *Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006) (requiring prisoner to show that restriction was discriminatory); *Kaufman v. McCaughtry*, 419 F.3d 678, 682-83 (7th Cir. 2005) (requiring showing of substantial burden). *See also Lewis v. Sternes*, 712 F.3d 1083, 1085 (7th Cir. 2013) (stating that it is open question whether prisoner must prove discrimination in free exercise claim); *World Outreach Conf. Ctr. v. City of Chicago*, 591 F.3d 531, 534 (7th Cir. 2009) (plaintiff may prove free exercise claim with evidence of substantial burden or intentional religious discrimination).

Even if I assume that a free exercise claim requires plaintiff to prove that defendants substantially burdened his religious exercise and that the restrictions are not part of a generally applicable neutral rule, I conclude that plaintiff has stated a claim upon which relief may be granted under the free exercise clause. As discussed above, plaintiff has alleged that the withholding of the religious items at issue substantially burden his religious exercise. In addition, it is reasonable to infer at this early stage that the restrictions are not neutral because plaintiff seems to be saying that prisoner of other religions are allowed to use traditional worship items. Finally, because an assessment under *Turner* requires a district court to evaluate the state officials' reasons for the restriction, the Court of Appeals for the Seventh Circuit has suggested that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest, *e.g.*, *Ortiz*, 561 F.3d at 669-70 (7th Cir. 2009); *Lindell v. Frank*, 377 F.3d 655, 658 (7th Cir. 2004), so I

will allow plaintiff to proceed on his First Amendment claim.

This raises the question as to which named defendants are proper defendants for this claim. Plaintiff names the Wisconsin DOC as a defendant, but constitutional claims brought under 42 U.S.C. § 1983 cannot be brought against state agencies. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65-66 (1989). Plaintiff states that defendants Donovan, Mosher, and Willar-West directly denied his requests for various religious items, which is sufficient to include them as defendants. Plaintiff seems to separate the prison officials involved in denying his grievances into two camps: defendants Facktor, Francios, Mohr, and Baenen, whose responses "fell below the expected standard of a civil servant," and defendants Foster, Perttu, Salinas, and O'Donnell, who "showed no malice towards [his] complaints." This distinction does not matter for purposes of this lawsuit, because mishandling of grievances does not create an independent claim. *Owens v. Hinsley*, 635 F.3d 950, 953 (7th Cir. 2011). Rather, the question is whether each defendant was personally involved in enforcing the policies plaintiff claims burdens his religion. *Morfin v. City of East Chicago*, 349 F.3d 989, 1001 (7th Cir. 2003). Construing his allegations generously, I will allow him to proceed on a free exercise claim against each of the defendants enforcing the policies through the denial or rejection of his grievances.

C. Equal protection clause

I understand plaintiff to be arguing that defendants' restrictions on his religious materials violate the equal protection clause as well. Courts have suggested that an equal protection claim adds little to a case already including a free exercise claim. *See, e.g., Board of Educ. of Kiryas Joel Vill. Sch. 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."); *World Outreach Conf. Ctr.*, 591 F.3d at 534 ("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 plaintiff's claims on the ground that they are redundant. *Soldal v. Cook Cnty.*, 506 U.S. 56, 70-71 (1992). Rather, I will allow plaintiff to proceed on equal protection claim against each of the defendants against whom he is proceeding on his free exercise claim.

D. Recruitment of Counsel

Plaintiff has filed a motion for appointment of counsel, Dkt. 5. The term "appoint" is a misnomer, as I do not have the authority to appoint counsel to represent a pro se plaintiff in this type of a case; I can only recruit counsel who may be willing to serve in that capacity. To show that it is appropriate for the court to recruit counsel, plaintiff must first show that he has made reasonable efforts to locate an attorney on his own. *See Jackson v. Cnty. of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992) ("the district judge must first determine if the indigent has made reasonable efforts to retain counsel and was unsuccessful or that the indigent was effectively precluded from making such efforts"). To meet this threshold requirement, this court generally requires plaintiffs to submit correspondence from at least three attorneys to whom they have written and who have refused to take the case. Plaintiff did not submit such correspondence, which would be reason enough to deny his motion.

In any event, this court will seek to recruit counsel for a pro se litigant only when the litigant demonstrates that his case is one of those relatively few in which it appears from the record that the legal and factual difficulty of the case exceeds his ability to prosecute it. *Pruitt v.*

Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). It is too early to tell whether plaintiff's claims will outstrip his litigation abilities. In particular, the case has not even passed the relatively early stage in which defendant may file a motion for summary judgment based on exhaustion of administrative remedies, which often ends up in dismissal of cases such as plaintiff's before they advance deep into the discovery stage of the litigation. Should the case pass the exhaustion stage and plaintiff believes that he is unable to litigate the suit himself, he may renew his motion after seeking out outside help from lawyers.

ORDER

IT IS ORDERED that:

1. Plaintiff Thomas J. Blake is GRANTED leave to proceed on the following claims regarding restrictions on plaintiff possessing Rune Tiles and other religious items:

    a. RLUIPA claims against defendants Brian Foster, Michael Donovan, and Kelli Willar-West.

    b. Free exercise and equal protection claims against defendants Foster, Donovan, Willar-West, Dennis Mosher, Charles Facktor, Cathy Francios, Michael Mohr, Michael Baenen, Jodene Perttu, Kelly Salinas, and Cindy O'Donnell.

2. Defendant Wisconsin Department of Corrections is DISMISSED from the lawsuit.

3. Plaintiff's motion for appointment of counsel, Dkt. 5, is DENIED without prejudice.

4. Under 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. 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 on behalf of defendants.

5. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve defendants' lawyer directly rather

than defendants themselves. The court will disregard any documents submitted by plaintiff unless he 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.

Entered July 6, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge