

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

FRADARIO BRIM,

Plaintiff,

v.

OPINION & ORDER

CHAPLAIN MIKE DONOVAN and
CORR. OFFICER II FRAPPIER,

15-cv-658-jdp

Defendants.

Pro se plaintiff Fradario Brim is currently incarcerated at the Green Bay Correctional Institution (GBCI). He has filed this proposed civil action alleging that defendants have violated his right to freely exercise his religion—Islam—by preventing him from attending Talim service, participating in Salatual Jumu'ah, fasting for Ramadan, and maintaining a Halal diet. He also alleges that defendants' actions were in retaliation for filing formal complaints against the defendants. He seeks to proceed under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a), and under the First Amendment via 42 U.S.C. § 1983.

Plaintiff has paid his full filing fee as directed by the court. As a next step, I must screen his complaint and dismiss any portion that is legally frivolous, malicious, or fails to state a claim upon which relief may be granted, or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, I must read the allegations made in the complaint generously. *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010).

Plaintiff named Chaplain Mike Donovan, the chaplain of GBCI, and Correctional Officer II Frappier, a correctional officer at GBCI as defendants in both their individual and

official capacities. After considering plaintiff's complaint, I conclude that he may proceed on his RLUIPA and First Amendment claims, but I will add a third defendant in his official capacity to perfect plaintiff's requested equitable relief.

ALLEGATIONS OF FACT

In his complaint, plaintiff alleges the following facts.

Plaintiff has been a practicing and observing Muslim since 1998. While incarcerated, plaintiff has practiced his Muslim faith by attending an Islamic Talim service, participating in Salatual Jumu'ah, fasting for Ramadan, and maintaining a Halal diet. A Talim service is a study group where inmates engage in Islamic teaching by reciting the Qur'an, pray, and study the history and practices of the Prophet Muhammad. Salatual Jumu'ah is a congregational prayer that Muslims hold every Friday. Ramadan is the yearly practice by Muslims of fasting from sunrise to sunset. And Halal is the practice of maintaining a diet conforming to the Islamic faith.

GBCI recognizes the practice of Islam and permits Muslims to attend religious services if they are on the religious services pass list. GBCI also accommodates Muslims fasting for Ramadan by providing them with meals before sunrise and after sunset if they are on the Ramadan list. For Muslims wishing to maintain Halal, GBCI provides them with a Halal diet. Until recently, plaintiff was on the list for all of these accommodations.

In January 2015, plaintiff had a conversation with another inmate while attending a Talim service. The inmate sought advice from plaintiff about how to respond to a correctional officer "soliciting" the inmate. Defendant Frappier overheard the conversation. Believing that the conversation was about his current or former wife, Frappier interrupted the

conversation stating, “if you[’re] over here to run your mouth[,] you can go back to your cell.” Dkt. 1, ¶ 2. A week later, Frappier issued a conduct report against plaintiff, for inciting a disturbance, disobeying orders, and disruptive conduct. Plaintiff alleges that Frappier falsified the report. Plaintiff was later found guilty of disruptive conduct. Plaintiff appealed the conduct report, but his appeal was dismissed.

In April 2015, plaintiff attended another Talim service. During the service, another inmate began loudly making comments towards the group, disrupting the service. Plaintiff responded to the inmate by asking if he would like to join the group. The inmate, however, refused. As the inmate became louder, Frappier stated, “I’ll end this entire service.” Dkt. 1 ¶ 11. Plaintiff claims that he was neither loud nor disruptive during the service.

The following Friday, plaintiff discovered that he was removed from the pass list. This prevented him from attending Talim Service and participating in Salatual Jumu’ah. Plaintiff wrote to defendant Donovan asking why he had been removed. Donovan responded that the decision was not his to make. Plaintiff also wrote to the warden, Scott Eckstein, and received a response from the security director explaining that he had been removed for refusing to follow a staff directive. In response, plaintiff asked about the incident reports related to his removal and was told that none existed. In May 2015, plaintiff filed a formal complaint for being denied the ability to participate in Salatual Jumu’ah. His complaint was dismissed. His appeal was also dismissed.

In June 2015, plaintiff sought to observe the Ramadan fast by eating before sunrise. However, on the first day of fasting, he did not receive a breakfast meal bag. Staff told him that he was not on the Ramadan list. Plaintiff requested to be on the list before Ramadan

started and the next day he wrote to Donovan to correct the omission. He filed another complaint, and weeks later, he was also removed from the Halal diet list.

Plaintiff alleges that defendants intentionally sought to remove him from the pass list, Ramadan list, and Halal diet list. He alleges that defendants acted in retaliation for him appealing the conduct report and filing formal complaints against the defendants.

Plaintiff filed this action on October 13, 2015. The court has jurisdiction under 28 U.S.C. § 1331.

ANALYSIS

Plaintiff alleges that defendants violated his religious rights under RLUIPA, and his free exercise rights and free speech rights under the First Amendment.

A. RLUIPA

Plaintiff alleges that defendants violated RLUIPA by preventing him from attending Talim service, participating in Salatual Jumu'ah, fasting for Ramadan, and maintaining a Halal diet.¹ RLUIPA protects an inmate's religious rights from substantial burden unless prison officials can show that the burden is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest. *See* 42 U.S.C. §2000cc-1; *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008). A substantial burden "is one that necessarily bears direct, primary, and fundamental responsibility for

¹ In his complaint, plaintiff alleges that defendants violated RLUIPA by preventing him from participating in Salatual Jumu'ah and excluding him from the Ramadan list. However, I will read the allegations in the complaint generously and construe it to include defendant's alleged actions of preventing plaintiff from attending Talim service and from maintaining a Halal diet.

rendering religious exercise . . . effectively impracticable.” *Kroger*, 523 F.3d at 799 (quoting *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003)).

Under RLUIPA, plaintiff must first make out a prima facie case demonstrating that he seeks to engage in religious exercise, but defendants have substantially burdened that exercise. *Id.* at 796. Once plaintiff makes this prima facie case, the burden then shifts to defendants to show that their practice is the least restrictive means of furthering a compelling governmental interest. *Id.*

Plaintiff is a practicing Muslim and seeks to attend Talim service, participate in Salatual Jumu’ah, fast for Ramadan, and maintain a Halal diet in order to practice his religion. He alleges that defendants burdened his exercise by removing him from the relevant lists. Based on these allegations, he has alleged a substantial burden on his religious rights and made out a prima facie case. Accordingly, plaintiff may proceed under RLUIPA against defendants in their official capacities for declaratory and injunctive relief. *Sossamon v. Texas*, 563 U.S. 277, 295 (2011); *Nelson v. Miller*, 570 F.3d 868, 889 (7th Cir. 2009).

However, injunctive relief is effective only if defendants have the authority to enforce it. *See Gonzalez v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011). The named defendants do not appear to have that authority. When plaintiff wrote to Donovan to ask why plaintiff was removed from the pass list, Donovan claimed that “the decision is not his to make.” Dkt. 1 ¶ 14. And although it is unclear whether plaintiff wrote to Correctional Officer Frappier, I assume that if the chaplain does not have the authority to add plaintiff to the relevant lists, a correctional officer would not either. But the warden of GBCI, Scott Eckstein, would likely have authority to enforce an injunction. Accordingly, I will add Eckstein as a defendant in his official capacity under Federal Rule of Civil Procedure 19(a)(1)(A). If defendants later

identify a more appropriate defendant with enforcement authority, they may move for addition substitution. *See* Fed. R. Civ. P. 25.

B. Constitutional claims

Plaintiff alleges that defendants violated his First Amendment rights by preventing him from attending Talim service, participating in Salatual Jumu'ah, fasting for Ramadan, and maintaining a Halal diet. For the alleged First Amendment violations, plaintiff is proceeding under 42 U.S.C. § 1983, which requires him to show that defendants intentionally deprived him of a constitutional right while acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (overruled in part on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986)).

1. Free exercise

Plaintiff alleges that defendants violated his right to freely exercise his religion. Generally, prison officials may restrict an inmate's ability to practice his faith as long as the restriction is reasonably related to a legitimate penological interest. *See Turner*, 482 U.S. at 89. The four factors relevant to this determination are: (1) whether a valid, rational connection exists between the restriction and a legitimate government interest; (2) whether the prisoner retains alternatives for exercising the right; (3) the impact that the accommodation of that right will have on prison administration; and (4) whether easy alternatives exist to the restriction that show that it is an exaggerated response to penological interest. *Id.* at 89-91.

However, in the context of claims brought under the free exercise clause, there are open questions regarding whether there may be additional elements. In particular, it is not clear whether a plaintiff must prove that the defendants placed a "substantial burden" on his

exercise of religion, or that the restriction is not just a neutral rule of general applicability, but instead targets the plaintiff's religion for adverse treatment. *See e.g., Lewis v. Starnes*, 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 Chi.*, 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. Here, plaintiff alleges that defendants are preventing him from practicing his religion by removing him from the relevant lists that allow him to practice his religion. I will wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest. *See e.g., Ortiz v. Downey*, 561 F.3d 664, 669-70 (7th Cir. 2009). For now, plaintiff may proceed on his free exercise claim against Frappier and Donovan in their official and individual capacities and against Eckstein in his official capacity.²

2. Retaliation

As a general rule, the First Amendment prohibits governmental retaliation against an inmate for engaging in constitutionally protected speech. *See Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009). To make out a *prima facie* case of First Amendment retaliation, plaintiff

² Section 1983 allows claims against individuals in their official and individual capacities, but claims against individuals in their official capacities can be sued for only declaratory or injunctive relief, *McDonough Associates, Inc. v. Grunloh*, 722 F.3d 1043, 1050-51 (7th Cir. 2013), while individual capacity claims may also be for money damages. *Johnson v. Supreme Court of Illinois*, 165 F.3d 1140, 1141 (7th Cir. 1999).

must demonstrate that: (1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in the defendants' decision to take retaliatory action. *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006). With respect to the first element, filing a non-frivolous grievance is an activity protected by the First Amendment. *Perez v. Fenoglio*, 792 F.3d 768, 783 (7th Cir. 2015). Additionally, religious worship may be protected speech. *Widmar v. Vincent*, 454 U.S. 263, 269, n.6 (1981). With respect to the second element, harassment by numerous prison employees over a period of several months could deter an inmate from exercising his First Amendment activity in the future. *See Bridges*, 557 F.3d at 552. And with respect to the third element, a plaintiff's allegation that defendants retaliated against him because he engaged in the First Amendment activity is enough to state a retaliation claim at the pleadings stage. *Id.* at 553.

Here, plaintiff alleges that he engaged in a discussion during a Talim service with another inmate about the "solicitation" issue that the other inmate was facing. Although the facts are not clear, the discussion may have been about Quranic or Islamic instruction on how to handle the situation. Plaintiff also alleges that he filed formal complaints against the defendants and appealed the disciplinary proceedings against him. Later on, between April 2015 and July 2015, defendants prevented him from attending services or participating religious practices, all of which could deter an inmate from exercising his First Amendment rights. Finally plaintiff has alleged that defendants acted because of his protected activities. I conclude that plaintiff has stated a First Amendment free speech retaliation claim under § 1983, and may proceed against Frappier and Donovan in their official and individual capacities and against Eckstein in his official capacity.

ORDER

IT IS ORDERED that:

1. Pursuant to Rule 19, Scott Eckstein is added as a defendant in his official capacity.
2. Plaintiff Fradario Brim is GRANTED leave to proceed on his RLUIPA claim against defendants Chaplain Mike Donovan, Corr. Officer II Frappier, and Scott Eckstein in their official capacities.
3. Plaintiff is GRANTED leave to proceed on his First Amendment free exercise and retaliation claims against Donovan, Frappier, and Eckstein in their official capacities, and against Donovan and Frappier in their individual capacities.
4. 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.
5. 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 or lawyers 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.
6. 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.
7. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for his failure to prosecute it.

Entered July 1, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge