

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

JOHNSON W. GREYBUFFALO,

Plaintiff,

v.

EDWARD WALL, KELLI WILLARD WEST,
GARY BOUGHTON, SAMUEL APPUA,

Defendants.

OPINION and ORDER

15-cv-8-bbc

Pro se prisoner Johnson Greybuffalo brought this lawsuit to challenge what he says are unlawful restrictions on his ability to practice his religion. In his original complaint, plaintiff alleged that several prison officials had refused his request to recognize the Native American Church as one of its “umbrella” religious groups, in violation of the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act. I dismissed the complaint without prejudice under Fed. R. Civ. P. 8 because plaintiff failed to identify particular religious exercises that he was unable to perform because of the lack of recognition. Dkt. #3.

In response to that order, plaintiff has filed an amended complaint in which he alleges that, without recognition, he cannot participate in a number of religious exercises. First, he says that he is unable to observe “devotional services” of the Native American Church, which include group prayer and religious songs. Second, he says that he is unable to purify himself

in a sweat lodge “pursuant to Native American Church principle[s].” In particular, plaintiff says that he wants to be able to incorporate items such as a gourd rattle, water drum and wing fan into the sweat lodge ceremony. Third, plaintiff says he is unable to end religious ceremonies with a feast, as is customary for ceremonies of the Native American Church. (Plaintiff also says that he is unable to possess religious property related to the Native American Church, but he does not identify any property he wishes to possess except for the items he wants to use during the sweat lodge ceremony, so I have not considered that issue.) Because plaintiff alleges that the restrictions on group services, sweat lodge ceremonies and religious feasts are interfering with his ability to practice his faith, I will allow him to proceed on claims under RLUIPA and the free exercise clause.

OPINION

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 devotional services, sweat lodge ceremonies and religious feasts substantially burden his religious exercise, so I will allow him to go forward on his claims 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 only 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 alleges that defendant Edward Wall is Secretary of the Wisconsin Department of Corrections; defendant Kelli Willard West is the religious practices coordinator; defendant Gary Boughton is the warden of the Wisconsin Secure Program Facility, where plaintiff is incarcerated. At this early stage of the proceedings, it is reasonable to infer that each of those defendants may have some role in deciding which religious practices are permissible, so I will allow plaintiff to proceed on a RLUIPA claim against Wall, West and Boughton. However, plaintiff says that defendant Samuel Appua is a *former* prison chaplain. Because plaintiff does not allege that Appua has any authority now to implement religious policies at the Wisconsin Secure Program Facility,

plaintiff may not proceed against Appua with respect to his RLUIPA clam.

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 (1987); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). Four factors are relevant to that determination: 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.

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: (1) the defendants placed a "substantial burden" on his exercise of religion; or (2) 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 Conference Center 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 noted above, plaintiff has alleged that all the restrictions substantially burden his religious exercise. In addition, it is reasonable to infer at this early stage that the restrictions are not neutral because other religious groups are recognized in the prison. Finally, with respect to the question whether the restrictions are reasonably related to a legitimate penological interest, the general rule is that courts should not make that assessment in the context of a screening order. Ortiz, 561 F.3d at 669–70. Because I see no reason to depart from that general rule in this case, I will allow plaintiff to proceed on this claim as well.

With respect to the proper defendants, I will allow plaintiff to proceed against defendants Wall, West and Boughton for the purpose of declaratory and injunctive relief. However, with respect to money damages, plaintiff must show that each defendant was personally involved in violating his rights. Gonzalez, 663 F.3d at 315. Plaintiff alleges that

defendant West and Appua were involved in denying his request for religious recognition, but he does not include similar allegations against Wall and Boughton. Accordingly, plaintiff's claim for money damages will be limited to West and Appua.

ORDER

IT IS ORDERED that

1. Plaintiff Johnson Greybuffalo is GRANTED leave to proceed on his claims that defendants Edward Wall, Gary Boughton, Kelli Willard West and Samuel Appua are violating the Religious Land Use and Institutionalized Persons Act and the free exercise clause by prohibiting plaintiff from (1) engaging in devotional services with other members of the Native American Church; (2) purifying himself in a sweat lodge according to the principles of the Native American Church; and (3) having religious feasts after religious ceremonies. Plaintiff's claims against defendants Wall and Boughton are for declaratory and injunctive relief only. Plaintiff's claims against defendant Appua are for damages only.

2. 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 the defendants.

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

document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the 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 the 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. Plaintiff is obligated to pay the unpaid balance of his filing fee 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.

6. 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 defendant or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 24th day of February, 2015.

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