IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BERNARD TAINTER,

Plaintiff,

v.

STEVE WATTERS, SRSTC Director;
and MICHAEL DITTMAN, SRSTC Security Director,,

Defendants.

OPINION AND ORDER

02-C-540-C

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This is a civil action for injunctive, declaratory and monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Bernard Tainter, a patient at the Sand Ridge Secure Treatment Center, contends that defendants violated his First Amendment right to freely exercise his religion, by denying him access to his religious property.

Presently before this court are defendants' motion for summary judgment and defendants' motion to strike plaintiff's motion for partial summary judgment on the ground that it was filed outside the dispositive motions deadline. Plaintiff's motion is moot; plaintiff has informed the court that he mislabeled his motion for partial summary judgment and supporting proposed findings of fact. He states that he was merely proposing his own

findings of fact in opposition to defendants' motion, as he is allowed to do under this court's summary judgment procedure II(B). Defendants have not been prejudiced by plaintiff's misidentification of his proposed facts. They have filed a response to the proposed facts, which will be considered in deciding their motion. Therefore, I will deny defendants' motion to strike.

As for defendants' motion for summary judgment, I will grant the motion because (1) plaintiff has not met his burden of showing that the denial of an offering bag, necklace, wolf dolls and braided piece of hemp imposes a substantial burden on the practice of his Native American religion; (2) defendants have shown that the denial of plaintiff's chokers (or headbands) serves a legitimate governmental interest; and (3) plaintiff has not met his burden of showing that defendants Watters and Dittman were personally involved in denying him access to his medicine bag and medicine pouch.

For the purpose of deciding the motion for summary judgment, I have looked to the parties' proposed findings of fact to determine whether there are any material facts in dispute. In reviewing the proposed facts, I rejected a number of plaintiff's proposed findings of fact because plaintiff did not follow this court's summary judgment procedures. In particular, procedure I(D) states that the court will not consider any factual propositions contained in the proposed findings of fact that are not supported properly and sufficiently by admissible evidence and that the court will not search the record for factual matter that

might support a statement of fact. Plaintiff repeatedly proposed statements of fact and then cited to parts of the court's record that did not relate to the fact asserted. See, e.g., PFOF ¶¶ 12, 13, 15, 17, 18, 23, 24, 25, 29. Plaintiff has not been harmed by my decision to ignore these facts; the outcome would be the same if I had considered them.

From the parties' proposed findings of fact, I find that the following facts are material and undisputed.

UNDISPUTED FACTS

Plaintiff Bernard Tainter is a patient at Sand Ridge Secure Treatment Center. He is an enrolled member of the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians. Plaintiff has practiced the Native American religion since 1988. He arrived at Sand Ridge on April 8, 2002, after a period of confinement at the Wisconsin Resource Center.

Defendant Steven Watters is the director of Sand Ridge and has been since April 17, 2000. As director of Sand Ridge, defendant Watters is responsible for overseeing the development and implementation of administrative policies and procedures to insure consistency with applicable laws and treatment goals and supervising treatment center administrative staff. Defendant Michael Dittman was the security director at Sand Ridge from December 3, 2000 to November 2, 2002, and is currently the security director of the Kettle Moraine Correctional Institution. As security director of Sand Ridge, defendant

Dittman was responsible for developing the overall security plan for the treatment center and developing and recommending security policies.

At the time defendant Dittman was at Sand Ridge, property room staff conducted initial inspections of property coming into the treatment center. They directed any question or concerns regarding property to Captain William Parker, to whom defendant Dittman had delegated the responsibility of overseeing the mail and property room staff.

The Sand Ridge facility provides court ordered evaluation, treatment and supervised release programs for civilly committed sexually violent persons. All property items received at Sand Ridge are subject to inspection and approval prior to being given to a patient. This allows the staff to insure that the items conform to personal property regulations and pose no security concerns.

In conjunction with plaintiff's transfer, Sand Ridge received a brown paper bag from the Wisconsin Resource Center containing a plastic bag holding plaintiff's religious property items. Security staff under defendant Dittman's supervision relied upon Sand Ridge policy #412, dated August 6, 2001, titled "Religious Property" when considering the safety and security concerns of plaintiff's religious property. Policy #412 provides that "[p]atients are permitted to possess approved religious property associated with their designated religious preference, unless the item presents a threat to the order and safety of the institution." Native American patients at Sand Ridge are allowed to possess as religious property a

medicine bag, medicine plants (sage, cedar, sweet grass, tobacco), a ceremonial pipe, choker necklaces (subject to restrictions), a small medicine pouch, a dream catcher and eagle feathers. In addition, Sand Ridge offers Native American pipe and drum ceremonies on a weekly basis, six sweat lodge ceremonies every other month, a Talking Circle every other month and special prayer groups.

A few days after plaintiff's arrival, a property officer brought all of plaintiff's personal property to him, including clothing, books, a television and religious items. Plaintiff removed the religious items from the bag and explained them to the property officer. The property officer was concerned about the length of the chokers and said that the religious items had to be reviewed. The property officer kept all of plaintiff's religious items.

Shortly thereafter, plaintiff requested his religious property. On or about May 3, 2002, Sand Ridge Chaplain Neil Jensen informed Captain Parker that plaintiff had submitted a patient request form requesting his religious property items. Parker viewed plaintiff's religious property items and met with plaintiff on May 6, 2002 to discuss them. He did not bring any of plaintiff's religious items with him to the meeting. Parker advised plaintiff that he would not be allowed to have some of the religious property items because of security concerns. He described the items being questioned and advised plaintiff that the property would require further review. Parker offered to take plaintiff to the chaplain's office so that he could immediately take possession of the religious property items that did

not pose security concerns. Plaintiff responded that he had been able to possess all of his religious items at the Wisconsin Resource Center, and he would not go with Parker to the chaplain's office if he could not retrieve all of his religious property.

On May 10, 2002, Captain Parker received an email from Chaplain Jensen, stating that plaintiff had asked again about the status of his property. In his email, Jensen asked Parker about sewing plaintiff's medicine bag shut and transferring all of his property to him. At the time a Sand Ridge policy permitted Native Americans to possess medicine bags and required the bags not to be sewn shut. Parker replied to Jensen's email, advising Jensen that he had spoken with plaintiff, who was not very agreeable during the conversation, and that plaintiff would not be allowed to have several of the items in his possession because of security concerns. Parker wrote that plaintiff had "refused my offer to go your office to get the items he would presently be allowed and never attempted to contact me the next day as he stated he would." Parker added that he was "having the issue of whether the medicine bag needed to be sewn or not [raised] with the security director." Parker never discussed the matter with defendant Dittman.

On May 19, 2002, plaintiff completed a patient request for the following items: a medicine bag, offering bag, chokers (also referred to as "headbands"), necklace, and wolf dolls. In addition, plaintiff wanted to possess his medicine pouch and a braided piece of hemp. Plaintiff's choker or headband contains metal straps or spacers and metal beads.

Plaintiff made his medicine bag while housed at the Wisconsin Resource Center. It contains sage, cedar, tobacco, and sweet grass; his choker contains white beads; and his medicine pouch has a metal earring and eagle feather attached to it.

Plaintiff never spoke to Parker after their meeting on May 6, 2002. Plaintiff usually walked away from Chaplain Jensen whenever the chaplain tried to discuss plaintiff's religious property items with him.

Ultimate determinations regarding plaintiff's religious property have not yet been made. Sand Ridge Security staff and chaplains wanted plaintiff's explanation of the religious significance or purpose of the property items so that they could make informed determinations regarding the disposition of certain property. However, no one, including Parker, told plaintiff that he would need to explain the religious significance of his property items before a decision would be made about his entitlement to them.

Although defendant Dittman did not have any personal contact with plaintiff regarding his religious items and never made any ultimate determinations regarding plaintiff's religious property items, he reviewed some of plaintiff's religious property and had security concerns about some of the items. Defendant Dittman believed some of plaintiff's religious property could be used to manufacture weapons. Also, he had concerns about Native American chokers made of bone or polished stone material because they are not detected by metal detectors and the materials could be fashioned into a wide variety of

sharp-pointed weapons or lock picks to assist in escapes. Dittman believed it was necessary to discuss plaintiff's property items with him to learn the religious significance of those items.

Defendant Watters had no involvement or contact with plaintiff involving his religious property items. Although Watters has general supervisory authority of Sand Ridge, the day-to-day operations of maintaining and monitoring security measures at Sand Ridge are the responsibility of the security director and the security department. Defendant Watters had no involvement with any decisions made by Sand Ridge security staff regarding security concerns of plaintiff's religious property, and he did not encourage, authorize, direct or acquiesce in the denial of any of plaintiff's Native American religious property items.

OPINION

Defendants contend that they are entitled to summary judgment on plaintiff's claim that defendants Watters and Dittman failed to provide plaintiff access to his religious property items and that such denial deprived plaintiff of a reasonable opportunity to exercise his religious freedom guaranteed by the First Amendment. The undisputed facts reveal that defendants have been willing to allow plaintiff to retrieve some of his religious property but that plaintiff has refused to take the items, apparently engaging in an "all or nothing" mentality. Neither party has identified the specific property in dispute. I have inferred from

the patient request form plaintiff completed on May 19, 2002, and the fact that plaintiff has requested his medicine pouch and a braided piece of hemp that the only items plaintiff has been unable to receive to date are a medicine bag, offering bag, chokers or headbands, necklace, wolf dolls, a medicine pouch and a braided piece of hemp.

A party moving for summary judgment will prevail if it demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anetsberger v. Metropolitan Life Ins. Co., 14 F.3d 1226, 1230 (7th Cir. 1994). When the moving party succeeds in showing the absence of a genuine issue as to any material fact, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Whetstine v. Gates Rubber Co., 895 F.2d 388, 392 (7th Cir. 1990). If the nonmovant fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex, 477 U.S. at 322.

As an initial matter, I acknowledge that plaintiff is a patient at Sand Ridge under Wisconsin statute chapter 980. "Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Youngberg v. Romeo, 457 U.S. 307,

321-22 (1982). However, states have the unquestioned duty to "provide reasonable safety for all residents and personnel within the institution" and "may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety." Id. 324. Therefore, "decisions made by the appropriate professional are entitled to a presumption of correctness." Id.

It is unnecessary to reach the issue whether defendants Watters and Dittman exercised professional judgment in relation to the denial of plaintiff's religious property, with the exception of the chokers or headbands, because plaintiff failed to meet his burden in two respects. First, although plaintiff identifies his offering bag, necklace, wolf dolls and braided piece of hemp as religious items, he has provided no evidence to show how the absence of those items imposes a substantial burden on the practice of his Native American religion. "To show a free exercise violation, the religious adherent . . . has the obligation to prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates." Graham v. Commissioner, 822 F.2d 844, 850-51 (9th Cir. 1987); Hernandez v. Commissioner, 490 U.S. 680 (1989). The burden must be substantial and more than a mere inconvenience. Id. at 851. Plaintiff has failed to carry his burden in proving a First Amendment violation.

Defendants concede that the chokers, medicine bag and medicine pouch are religious items necessary to the practice of the Native American religion. However, plaintiff has not put in any evidence to prove that either defendant Watters or defendant Dittman or both personally denied plaintiff these items. It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie, 699 F.2d at 869. It is not necessary that a defendant participate directly in the deprivation; the official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). It does not help plaintiff to show that defendants Watters and Dittman had authority over the Sand Ridge policies at the relevant time because those policies *allowed* Native Americans to possess medicine bags and small medicine pouches. Plaintiff does not dispute that defendant Watters was not personally involved in any decisions regarding plaintiff's religious property. He appears to be trying to hold defendant Watters responsible for failing to provide plaintiff his religious property through the doctrine

of respondeat superior. The doctrine of respondeat superior allows a supervisor to be held responsible for the acts of his subordinates, but it does not apply to claims brought under § 1983. See Gentry, 65 F.3d at 561; Del Raine, 32 F.3d at 1047; Wolf-Lillie, 699 F.2d at 869. Defendant Watters must be dismissed from this lawsuit.

The undisputed facts show that defendant Dittman reviewed some of plaintiff's religious property and had some concerns about them. However, plaintiff put in no evidence that Dittman had any concerns with plaintiff's medicine bag and medicine pouch or that defendant Dittman even knew that plaintiff was not allowed to have his medicine bag and pouch or that there was talk about possibly sewing plaintiff's medicine bag shut. I conclude that plaintiff has failed to show that Dittman was personally involved in denying plaintiff access to his medicine bag and medicine pouch.

The proposed findings of fact reveal specific concerns Dittman had about plaintiff's chokers. Therefore, I assume for the purpose of this opinion that Dittman was personally involved in denying plaintiff's chokers. Having made this assumption, I must decide whether plaintiff's constitutional rights have been violated, which is an issue that "must be determined by balancing his liberty interests against the relevant state interests." Youngberg, 457 U.S. at 321 (extending "professional judgment" standard to substantive due process claim brought by involuntarily committed mental patient and noting that such a presumption was "necessary to enable institutions of this type – often, unfortunately,

overcrowded and understaffed - to continue to function). It is of no consequence to this analysis that Youngberg was decided in the context of a substantive due process claim rather than a First Amendment claim of freedom to practice one's religion. The Court of Appeals for the Second Circuit has noted that the Fourteenth Amendment serves as an instrument for transmitting the principles of the First Amendment to the states. Winters v. Miller, 446 F.2d 65, 69 (2d Cir. 1971) (finding that forced medication of involuntarily admitted patient who objected to such medication on religious grounds violated First Amendment). Id. at 67. The state has an unquestioned duty to provide reasonable safety for all residents and personnel within state institutions. Youngberg, 457 U.S. at 324. The Court of Appeals for the Seventh Circuit has noted that "facilities dealing with those who have been involuntarily committed for sexual disorders are 'volatile' environments whose day-to-day operations cannot be managed from on high." Thielman v. Leean, 282 F.3d 478, 483 (7th Cir. 2002). Thus, Youngberg requires this court to show deference to the judgment exercised by an appropriate professional. This deference is necessary so that the professionals in charge of state institutions can make decisions without fear of being sued for damages. Youngberg, 457 U.S. at 324-25 (stating that institution administrators, "and particularly professional personnel, should not be required to make each decision in the shadow of an action for damages").

As Sand Ridge security director, defendant Dittman was responsible for insuring

safety of the institution. Defendant Dittman concluded that plaintiff's chokers presented a security risk because they contained bone or polished stone material not detectable by metal detectors and because these materials could be fashioned into a wide variety of sharp-pointed weapons or lock picks to assist in escapes. Plaintiff does not dispute that the metal spacers in his headband could be used to manufacture tools or keys to effect an escape; he does disagree that the white beads could be used to fashion a handcuff key. However, Youngberg requires me to presume the correctness of defendant Dittman's concern about plaintiff's chokers. Id. at 324 (noting that decisions made by the appropriate professional are entitled to presumption of correctness). Given defendant Dittman's concern, I conclude that his denial of plaintiff's access to his chokers did not impermissibly infringe plaintiff's First Amendment right to exercise his religion. Defendants are entitled to summary judgment on plaintiff's claims.

I must confess to some perplexity about why plaintiff brought this case. The record reveals that before he filed his lawsuit, he had been given the opportunity to retrieve some of his religious property items and had refused to do so. His refusal is inexplicable in light of his failure to show that his First Amendment argument depended on his inability to possess all of the property. Also, the record shows that both sides failed to take advantage of opportunities to resolve the dispute without the court's involvement. It is unfair to parties with more complex disputes and to the taxpayers that fund the courts to ask for

judicial decisions in matters that could have been disposed of with a little effort and good will on the part of counsel.

ORDER

IT IS ORDERED that:

1. Defendants' motion to strike plaintiff's motion for partial summary judgment is DENIED;

2. Plaintiff's motion for partial summary judgment is DENIED as moot; and

3. The motion for summary judgment filed by defendants Steve Watters and Michael Dittman is GRANTED.

The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 5th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge