IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JERRY CHARLES,

Plaintiff,

v.

MATTHEW J. FRANK, JON LITSCHER, and DICK VERHAGAN,

Defendants.

OPINION AND ORDER

02-C-626-C

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This is a civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § § 2000cc-2000cc-5. Plaintiff Jerry Charles is a Wisconsin prisoner and practicing Muslim presently confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. He contends that defendants Matthew Frank, Jon Litscher and Dick Verhagan have violated his rights under both the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act by interpreting an Internal Management Procedure as restricting him from wearing his Muslim prayer beads around his neck and under his shirt. Jurisdiction is present under 28 U.S.C. §§ 1331 and 1343(a)(3).

Presently before the court is defendants' motion for summary judgment. Defendants

contend that plaintiff has failed to exhaust his administrative remedies with regard to his desire to wear his prayer beads around his neck. In the alternative, defendants argue that Islamic prayer beads are not religious emblems and that wearing the beads is not a generally recognized practice in the traditional Islamic faith. Because I find that plaintiff has exhausted his administrative remedies with respect to the question whether Islamic prayer beads are a religious emblem under Department of Corrections 309 IMP 6A and that defendants have failed to show a legitimate penological or compelling interest for their implementation of the procedure that prevents plaintiff from wearing his beads, I will deny defendants' motion for summary judgment.

As an initial matter, I once again draw plaintiff's attention to this court's summary judgment procedures. As I noted in the August 18, 2003, order, plaintiff is a seasoned litigant in this court. However, plaintiff discussed facts in his brief that he did not propose in response to defendants' proposed findings of fact. Section I(B) of the procedures for summary judgment states that the court will not consider facts contained only in a brief. This is to insure that the opposing party has an opportunity to respond to the proposed fact. Because plaintiff failed to comply with the procedure, I rejected a number of proposed facts contained in his brief. For example, I did not consider plaintiff's membership in the Sufi (Mystic) Order and the Sufi perspective on the wearing of prayer beads. Plt.'s Br., dkt. # 50, at 5. If plaintiff thought that these facts were important, he should have included them

in the proposed findings of fact. 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 and from the record, I find that the following facts are material and undisputed.

UNDISPUTED FACTS

Plaintiff Jerry Charles is an inmate and practicing Muslim at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Defendant Matthew J. Frank is Secretary of the Department of Corrections. Defendant Jon Litscher is former Secretary of the Department of Corrections. Defendant Dick Verhagan is the former administrator of the Wisconsin Department of Corrections Division of Adult Institutions.

Department of Corrections internal management procedure 309 IMP 6A allows inmates to possess Islamic prayer beads. The procedure states that inmates may wear religious emblems around the neck on a single strand necklace underneath an undergarment. The procedure defines "religious emblem" as an object that functions as a religious symbol and is generally recognized by the inmate's religion as having religious significance. A religious emblem may not exceed two inches in length by two inches in width by one-eighth inch in depth or weigh more than two ounces. Furthermore, the procedure specifies that a religious emblem must be a single unit that cannot be disassembled, except that it may have

a single link to which a necklace can be affixed. Religious beads, such as Catholic rosaries and Buddhist prayer beads, are not considered religious "emblems." In these religions, beads are not meant to be worn around the neck but to be used as a prayer tool. Therefore the internal management procedure does not allow Catholic and Buddhist inmates to wear their beads under their shirts.

If an inmate wants to request a new religious practice or activity that is not offered at the institution, he must fill out Department of Corrections form 2075, "Request for New Religious Practice," as required by Wisconsin Administrative Code DOC § 309.61(2). Inmates may request form 2075 from the chaplain at the institution. Plaintiff has not filled out a form 2075.

Plaintiff is allowed to carry his prayer beads in his pocket at all times. A photo of plaintiff's prayer beads shows each bead placed next to another on a single strand to make a complete circle, with a few larger beads suspended from one end of the circle.

On July 15, 2002, plaintiff filed an inmate complaint, complaining that he was not allowed to wear his prayer beads around his neck inside his shirt. The inmate complaint examiner dismissed the complaint two days later, stating that Muslim prayer beads are not intended to be worn as jewelry or as an emblem. The next day, plaintiff requested a review of the complaint examiner's decision, alleging that it is a Muslim practice to wear Dhikr (prayer) beads. Upon review, the complaint examiner dismissed plaintiff's complaint on the

grounds that the Department of Corrections' Muslim representative, Ron Beyah, had stated that Dhikr beads in Islam are used as a prayer tool and are not worn around the neck. Beyah serves as the staff chaplain at Dodge Correctional Institution. He follows the Islamic faith and serves as a spiritual leader within that faith. On August 8, 2002, defendant Matthew Frank dismissed plaintiff's inmate complaint in reliance on the complaint examiner's review.

OPINION

Before I can reach the merits of this case, I must address defendants' argument that plaintiff has failed to exhaust his administrative remedies, as required under § 1997e(a) of the Prison Litigation Reform Act. The exhaustion issue is somewhat technical. Defendants are not contending that plaintiff failed to use the inmate complaint procedures; they are arguing that the claim he pursued within the Department of Corrections is not the same one he is asserting at this stage of the proceedings. As I understand defendants' position, it is that plaintiff complained internally and in his complaint in this case about the general practice of using prayer beads and has now changed his claim to one involving his personal desire to wear his prayer beads around his neck. Defendants maintain that this is a new version of his original request that requires him to submit a request for a new religious practice, using form 2075.

If plaintiff's argument had changed in the way defendants characterize it, plaintiff

would be required to use form 2075. However, from the inception of this case, plaintiff has maintained that prayer beads are an "emblem" in Islam and therefore that Muslims should be able to wear prayer beads under their shirt, according to 309 IMP 6A. For example, in his complaint to the Department of Corrections, plaintiff states that 309 IMP 6A says "explicitly that religious emblems can be worn under [a] shirt." Aff. Jim Zanon, dkt. #22, exh. A. In plaintiff's request for corrections complaint examiner review, he states that "for hundreds of years Muslims ha[ve] worn their Dikr beads around their necks. Now the Chaplain Susan Clark is interpreting the differen[ce] between religious jewelry or emblem in Islam." Aff. Jim Zanon, dkt. # 22, exh. A. In his complaint in this action, plaintiff complained that defendants were restricting him from wearing an "Islamic Emblem (prayer beads), that is approved by their own policy, around the neck and inside of T-shirt or shirt." Plt.'s Compl., dkt. # 3. In his proposed findings of fact, plaintiff asserts that wearing prayer beads is a "standing pro[po]sition in Islam and that Muslims ha[ve] always performed invocation on different Islamic prayer beads for healing and spiritual n[ur]tu[r]ing." Plt.'s Response to Dfts.' PFOF, dkt. # 51, ¶ 15. Furthermore, in his affidavit, plaintiff avers that prayer beads are an "emblem to the majority of Muslims for the practice of Ruqya and Tawiz." Plt.'s Aff., dkt. #50, exh. 6, ¶9.

It is undisputed that 309 IMP 6A defines "religious emblem" as an object that functions as a religious symbol and is generally recognized by the inmate's religion as having

religious significance. Yet the procedure also states that a religious emblem may not exceed two inches in length by two inches in width by one-eighth inch in depth or weigh more than two ounces and that it must be a single unit that cannot be disassembled, except that it may have a single link to which a necklace can be affixed. Plaintiff appears to ignore the language regulating the physical description of an allowable emblem in 309 IMP 6A. Plaintiff's prayer beads do not fit this physical description of religious emblems and are therefore not allowable as an emblem. Thus, plaintiff cannot argue that defendants have interpreted 309 IMP 6A incorrectly by excluding Dhikr beads, at least according to the physical description of religious emblems under the procedure.

It is another matter if plaintiff is also arguing that defendants are violating the Religious Land Use and Institutionalized Persons Act and the free exercise clause of the First Amendment in relying on the procedure to determine whether a religious object or practice has religious significance. As an alternative to the exhaustion argument, defendants contend that in the religion of Islam, as well as in Catholicism and Buddhism, "beads are not meant to be worn around the neck but rather are a prayer tool." Dfts.' Br., dkt. # 43, at 7. Plaintiff disagrees, stating that the wearing of prayer beads is a "standing pro[po]sition in Islam." In effect, plaintiff is arguing that defendants' interpretation of "religious significance" and "generally recognized" symbol discriminates against Muslims and places a substantial burden on his ability to wear his prayer beads. For example, in his complaint

to the Department of Corrections, plaintiff asks why "Muslims always have to go through this type of matter all the time." Aff. Jim Zanon, dkt. # 22, exh. A.

I note that neither the Religious Land Use and Institutionalized Persons Act nor the First Amendment contains explicit prohibitions that would prevent defendants from having internal policies or procedures addressing the use and wearing of religious items. A prison procedure will not violate the free exercise clause of the First Amendment if it is neutral and generally applicable even if it compels activity forbidden by an individual's religion, Employment Division, Oregon Dept. of Human Resources v. Smith, 494 U.S. 872, 880-82 (1990), and is related reasonably to a legitimate, penological interest. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)). Under the Religious Land Use and Institutionalized Persons Act, a prison procedure is valid so long as it does not impose a substantial burden on a plaintiff's religious exercise, unless the government can show that it has a compelling interest in having the procedure and that the procedure is the least restrictive means of furthering that interest. 42 U.S.C. § 2000cc-1. Under both the First Amendment and the Religious Land Use and Institutionalized Persons Act, a substantial burden on the exercise of religion is "one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 760-61 (7th Cir. 2003).

Although 309 IMP 6A appears neutral and generally applicable on its face, "facial neutrality is not determinative" of a First Amendment free exercise clause claim. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993). A court must also consider the operation of the rule or procedure. Id. at 535. In arguing that defendants' *implementation* of 309 IMP 6A discriminates against Muslims, plaintiff calls into question the procedure's neutrality and general applicability under the First Amendment. Defendants contend that as currently implemented, the procedure prohibits Catholics, Buddhists and Muslims from wearing their prayer beads. Plaintiff does not dispute this fact. Therefore, it cannot be said that defendants "gerrymandered" the procedure against Muslims. Id. at 542 (finding text of city ordinance to be "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings"). Because defendants' implementation of 309 IMP 6A affects several, diverse religions, the procedure is neutral and generally applicable, as required under the free exercise clause of the First Amendment.

However, the inquiry is not over. In order for defendants' implementation of its procedure to survive under the First Amendment, defendants must show that it reasonably serves a legitimate penological interest. O'Lone, 482 U.S. at 349; see also Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir. 1999) (stating that Smith was decided after Turner and O'Lone, that it did not involve prisoners, that it did not purport to overrule or limit Turner and O'Lone and that Supreme Court has instructed lower courts to leave overruling

of its decisions to it). Furthermore, defendants' implementation of 309 IMP 6A will not survive scrutiny under the Religious Land Use and Institutionalized Persons Act unless defendants can show that the implementation serves a compelling interest and that its implementation is the least restrictive means of furthering that interest.

Defendants have not offered any evidence to show that their implementation of the procedure serves a legitimate penological interest or a compelling government interest. Rather, defendants hinge their case on two arguments: 1) plaintiff has not exhausted his administrative remedies, as required under the Prison Litigation Reform Act, 42 U.S.C. § 1997(e), on the question whether he can wear his prayer beads because it is a personal religious practice as opposed to a generally accepted one in Islam; and 2) plaintiff's desire to wear prayer beads around his neck instead of carrying them in his pocket is not a religious exercise in the Islamic faith. As I have already noted, defendants' first argument fails because plaintiff has exhausted his administrative remedies as to the question before the court.

As to defendants' second argument, the question is whether defendants are imposing a substantial burden on plaintiff's religious exercise by reading the term "religious emblem" to exclude the wearing of Islamic prayer beads on the ground that it is not a recognized religious practice. Plaintiff argues that they are. First, as implemented, the procedure imposes a substantial burden because it makes plaintiff's ability to wear his prayer beads

"effectively impracticable." Second, plaintiff has offered enough evidence to show that his belief in wearing prayer beads in Islam constitutes a religious exercise. In his affidavit and proposed findings of fact, plaintiff avers that prayer beads are an "emblem" to the majority of Muslims, indicating that they have religious significance and should be allowed to be worn, and that wearing prayer beads is a standing proposition in Islam.

Under the Religious Land Use and Institutionalized Persons Act, "religious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7); Civil Liberties for Urban Believers, 342 F.3d at 760. Under the First Amendment, the religious exercise inquiry is "whether government has placed a substantial burden on the observation of a *central* religious belief or practice." Hernandez, 490 U.S. at 699 (emphasis added). Simply by asserting that wearing prayer beads in Islam is widely recognized and important to the majority of Muslims, plaintiff has brought the practice within the definition of religious exercise of both the Religious Land Use and Institutionalized Persons Act and the First Amendment. It is of no consequence that defendants' expert, Beyah, says otherwise. "[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989); see also Smith, 494 U.S. at 887 ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to

his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'"). Furthermore, as I noted in Charles v. Verhagen, 220 F.Supp.2d 937, 946 (W.D. Wis. 2002), when the question comes down to the importance of a religious practice, it is precisely "the type of dispute that courts should avoid refereeing." Under Hernandez and Smith, plaintiff has made a sufficient claim that 309 IMP 6A imposes a substantial burden on his religious exercise under the First Amendment and the Religious Land Use and Institutionalized Persons Act.

As a result, defendants cannot prevail on their second argument that wearing prayer beads is not a religious exercise in the Islamic faith. To avoid a holding that they have violated the First Amendment, they have the burden of showing that 309 IMP 6A reasonably serves a legitimate penological interest. In order to avoid liability under the Religious Land Use and Institutionalized Persons Act, defendants must show that the procedure serves a compelling government interest and is the least restrictive means in furthering that interest. Defendants may be able to make such a showing, but because they have failed to do so at this time, I must deny their motion for summary judgment.

ORDER

IT IS ORDERED that

1. The motion for summary judgment by defendants Matthew Frank, Jon Litscher and Dick Verhagan is DENIED as it relates to plaintiff Jerry Charles's alleged failure to exhaust his administrative remedies on his claim that defendants' implementation of Department of Corrections procedure 309 IMP 6A imposes a substantial burden on his right to religious exercise under the First Amendment and the Religious Land Use and Institutionalized Persons Act.

Entered this 6th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge