

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

MICHAEL A. GRINDEMANN,

Plaintiff,

v.

JON E. LITSCHER (Secretary of WI DOC),
JANE GAMBLE (Warden KMCI),

Defendants.

OPINION AND ORDER

02-C-0429-C

This is a civil action for injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Michael A. Grindemann, an inmate at Kettle Moraine Correctional Institution in Plymouth, Wisconsin, contends that defendants violated his First Amendment rights by denying him a Pentacle, which is a religious necklace.

Presently before the court is defendants' motion for summary judgment in which they argue that (1) the denial of plaintiff's Pentacle is reasonably related to legitimate security concerns regarding gang-related activity; (2) defendant Litscher was not involved in any alleged wrongdoing; and (3) defendants enjoy qualified immunity from plaintiff's First Amendment claim.

Applying the law as it has developed in cases such as O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), and Turner v. Safley, 482 U.S. 78 (1987), I find that denying plaintiff's Pentacle is reasonably related to legitimate penological interests. Accordingly, I will grant defendant's motion for summary judgment. Therefore, it is unnecessary to address defendants' remaining arguments in support of summary judgment.

From the proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Michael A. Grindemann is an inmate at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Defendant Jon E. Litscher is Secretary of the Wisconsin Department of Corrections. Defendant Jane Gamble is warden of the prison.

At the prison, if an inmate wishes to purchase a particular religious symbol, he must make a request to the chaplain. The chaplain normally refers the request to Lieutenant Scot Galligan, the prison's disruptive group coordinator. Galligan determines whether the requested object is affiliated with non-sanctioned groups and whether the object would cause a possible threat to the security and order of the institution. Typically, Galligan makes the final determination whether to approve the inmate's request.

On April 28, 2002, plaintiff asked Chaplain Kenneth George to send him a religious

emblem approval form because he wished to order a Pentacle. The Pentacle is a religious necklace depicting a five-pointed star enclosed in a circle. Chaplain George was aware of prior requests for Pentacles that had been rejected by the security director or the disruptive group coordinator. He assumed plaintiff's request would not be approved and advised plaintiff accordingly.

On April 30, 2002, plaintiff filed an inmate complaint regarding the chaplain's denial of his request for a Pentacle. On May 9, 2002, defendant Gamble reviewed the complaint and dismissed it. The corrections complaint examiner rejected his appeal on May 24, 2002.

Wiccans are recognized in the Department of Corrections as a sanctioned, religious group. The Wiccan religious practice includes the use of a Pentacle. Although the Pentacle is perhaps the most often used emblem, it is not the definitive symbol of the Wiccan faith. There are many other important Wiccan emblems such as the Triskele, Green Man, Spiral Goddess, Triple Moon and Celtic Knot. Inmates who practice the Wiccan religion are allowed a Book of Shadows, religious art, religious books and publications. Some Wisconsin prisons allow Pentacles.

Gang activities are present at the prison and pose a threat to the order and security of the institution. Gang members threaten, intimidate, injure and attempt to injure members of rival gangs and other non-member inmates. Gangs use symbolic items to depict group affiliation and intentions toward rival group members. The pentagram (a five-pointed

star) is a known symbol of the Vice Lords gang (“People”). The pentagram is worn by a rival gang (“Folks”) as a sign of disrespect.

Lieutenant Scot Galligan, the prison’s disruptive group coordinator, determines whether a requested object is gang affiliated or would pose a threat to the security and order of the institution. In his view, the Pentacle is a known symbol of the Vice Lords gang and is worn by a rival gang as a sign of disrespect. He believes that, if Wiccans were allowed to wear a Pentacle, it could be mistaken as disrespect to gang members and result in inmate assaults, violence and disruptive behavior.

Before April 28, 2002, the former security director at the prison disallowed Pentacles because, as gang symbols, they threaten the orderly confinement, safety and security of the institution. The former security director also disallowed objects such as Thor’s Hammer, a six-pointed Pentacle and certain colored rosaries, all of which are known to be highly symbolic gang symbols.

OPINION

Prisoners do not forfeit all constitutional protections by reason of their conviction and confinement. Woods v. O’Leary, 890 F.2d 883, 884 (7th Cir. 1989) (quoting O’Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987)). When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate

penological interests. Turner v. Safley, 482 U.S. 78, 89 (1987). To determine the reasonableness of the prison regulation, courts examine four factors set out in Turner and O’Lone: (1) whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule; (2) whether there are alternative means of exercising the right in question that remain available to prisoners; (3) whether accommodation of the asserted constitutional right will have negative effects on guards, other inmates or prison resources; and (4) whether there are obvious, easy alternatives at a de minimis cost. Turner, 482 U.S. at 89-91; O’Lone, 482 U.S. at 350-353.

A. Legitimate Penological Interests

The first Turner factor is whether a valid, rational connection exists between the regulation and a legitimate government interest. Id., 482 U.S. at 89. A regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. Id. at 89-90.

Defendants argue that the Pentacle is disallowed because it is a known gang-related symbol at the prison and its use would raise security concerns. Although plaintiff concedes that “there may be some Latin Kings and Vice Lords at [the prison],” he nevertheless argues that the connection between the regulation and the security concerns is based upon “pure conjecture.”

In support of his conjecture theory, plaintiff cites Reed v. Faulkner, 842 F.2d 960 (7th Cir. 1988). In Reed, the plaintiff sued prison officials, claiming that they violated his religious liberty as a Rastafarian when they forced him to cut several inches off his shoulder-length dreadlocks. Among the Rastafarian tenets are the beliefs that Rastafarians are the chosen people, that black people are superior to white people and that men should not shave, cut or comb their hair. Id. at 962. The defendants argued, among other things, that dreadlocks posed a danger of racial conflict because they symbolize black superiority. Id. However, the Court of Appeals for the Seventh Circuit found no evidence that dreadlocks remind white inmates of the Rastafarian belief in black superiority. Id. at 963. The only relevant evidence presented by the defendants was testimony from a prison administrator “that a person who is wearing the symbol of the dreadlock might indeed be wearing something as a symbol that blacks are superior to whites.” Id. The court found it also troubling that the defendants did not enforce the same regulation on hair length against American Indians. Id. at 964.

The present case can be distinguished from Reed on two counts. First, the evidence defendants provided is more concrete and less speculative than in Reed. In fact, it is undisputed that the pentagram is a known symbol of the Vice Lords gang and is worn by rival gangs as a sign of disrespect. Second, the present case does not implicate the arbitrary enforcement of the regulation against Wiccan religion. Plaintiff has offered no evidence

showing that Wiccans receive less favorable treatment than other religious groups.

In his “rebuttal,” dkt. #45 at ¶33, plaintiff repeats his assertion that the alleged security concern is “heaping conjecture upon conjecture.” Other than this conclusory remark, plaintiff has not produced any evidence to dispute the facts proposed by defendants. When the constitutionality of a prison regulation is at issue, plaintiff carries the burden of proving that there is no reasonable relationship between the regulation and alleged penological interests. See O’Lone, 482 U.S. at 350. In order to avoid summary judgment, plaintiff must make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Plaintiff’s self-serving affidavits without factual support in the record cannot create a genuine issue of material fact. See Patterson v. Chicago Ass’n for Retarded Citizens, 150 F.3d 719, 724 (1998).

Plaintiff contends that some Wisconsin prisons allow the Pentacle in prison cells and, therefore, no reasonable relationship exists between the prohibition and defendants’ alleged security concerns. However, plaintiff failed to introduce evidence showing that the Pentacle is used to identify gang membership in those institutions as well. In other words, if the Pentacle is not perceived as a gang-related symbol at other institutions, the same security concerns would not be present.

Plaintiff concedes that the pentagram is “a known gang symbol.” However, he argues

that the Pentacle (a five pointed star in a circle) differs from the pentagram (a five pointed star). This argument is not persuasive. The only difference between these two symbols is the circle. Plaintiff has not presented any evidence showing that the circle obviates or significantly reduces the possibility that the Pentacle will not be construed as gang-related.

B. Alternative Means of Exercising Right

The second Turner factor focuses on the existence of alternative means of exercising the right in question. Id., 482 U.S. at 90. There are, of course, no alternative means of obtaining the Pentacle and plaintiff asserts that the Pentacle is his religious emblem of choice. In Turner, the Supreme Court considered whether inmates were deprived of “all means of expression.” Id. at 92. When alternative avenues for the exercise of the asserted right remain available, courts should be particularly conscious of the judicial deference owed to prison officials in assessing the validity of the regulation. Id. at 90 (citing Pell v. Procunier, 417 U.S. 817, 827 (1974)). In this case, inmates who practice the Wiccan religion are allowed a Book of Shadows, religious art, religious books and publications. It is undisputed that the Pentacle is not the definitive Wiccan symbol and that there are many other equally important symbols, such as the Triskele, Green Man, Spiral Goddess, Triple Moon and Celtic Knot. Plaintiff’s ability to use other Wiccan symbols indicates that the regulation is reasonable.

C. Impact on Guards, Inmates or Prison Resources

The third Turner factor is whether accommodation of the asserted right will have a negative effect on guards, inmates or prison resources. Turner, 482 U.S. at 90. When the accommodation of an asserted right will have a significant “ripple effect” on fellow inmates or prison staff, courts should be particularly deferential to the informed discretion of correctional officials. Id.

In Galligan’s affidavit, in which he cites specific gang activities at the prison, he states that there are gang-related safety concerns associated with the Pentacle. This is the kind of discretionary determination that Galligan should make as a disruptive group coordinator. Plaintiff argues that the prison requires inmates to wear under their clothing unless they are in their cells or the chapel. He also alleges that it is implausible for any gang member to misinterpret the Pentacle when it is hidden from view. However, plaintiff has proposed no facts that substantiate his assertion that emblems cannot be revealed outside inmates’ cells or the chapel. Moreover, he has not presented any evidence as to the manner in which emblems are actually worn. Mere assertion without factual support in the record cannot create a genuine issue of material fact.

D. Obvious and Easy Alternatives

The fourth and final Turner factor is whether there are obvious, easy alternatives to

achieving valid penological interest at a de minimis cost. Id. at 90. Plaintiff proffered no obvious, easy alternatives to the policy adopted by defendants. He implies the existence of alternatives when he alleges that other prisons within the Department of Corrections allow Pentacles. However, plaintiff does not show what security considerations were in place or whether inmates at those institutions used five-pointed stars as a symbol of gang affiliation.

In sum, because defendants have shown that the denial of the Pentacle is reasonably related to legitimate penological interests, I will grant their motion for summary judgment. As a result, it is unnecessary to address whether defendant Litscher lacked personal involvement or whether defendants are entitled to qualified immunity.

ORDER

IT IS ORDERED that

1. The motion by defendants Jon E. Litscher and Jane Gamble for summary judgment is GRANTED; and
2. The clerk of court is directed to enter judgment in favor of defendants and close

this case.

Entered this 20th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge