IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHNSON W. GREYBUFFALO #229871,

ORDER

Plaintiff,

03-C-559-C

v.

MATTHEW J. FRANK,
DANIEL BERTRAND,
MICHAEL BAENEN,
ROBERT NOVITSKI,
MICHAEL DONOVAN and
WENDY BRUNS, individually
and in their official capacities,

Defendants.

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This is a civil action for declaratory, monetary 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 Johnson Greybuffalo is an inmate at the Green Bay Correctional Institution in Green Bay, Wisconsin. He contends that all defendants except defendant Bruns violated his statutory and constitutional rights to exercise his religion when they denied his various requests for religious accommodation. In addition, he contends that defendant Bruns violated his constitutional rights when she failed to adequately investigate

his inmate complaint.

Although plaintiff has paid the filing fee in full, because he is a prisoner, his complaint must be screened pursuant to 28 U.S.C. § 1915A. In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under a liberal construction, it is legally frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. 42 U.S.C. § 1915e.

From my review of plaintiff's complaint, I conclude that plaintiff has stated a claim upon which relief may be granted on his claims that (1) defendant Robert Novitski denied his request to purchase medicinal herbs for smudging, in violation of the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act; (2) defendant Novitski denied his request to allow the Native American drum singers to have practice time, in violation of the First Amendment and the Religious Land Use and Institutionalized Persons Act; (3) defendant Michael Baenen denied his request to allot more time for the Native American pipe and drum ceremony and Native American study group, in violation of the free exercise clause of the First Amendment; and (4) defendant Bertrand denied his proposal for a religious group for Native American inmates, in violation of the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act. For the reasons discussed below, plaintiff's remaining claims will be dismissed.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

A. Smudging

Plaintiff Johnson Greybuffalo is an inmate at the Green Bay Correctional Institution in Green Bay, Wisconsin. He is Native American. Part of his religion involves burning medicinal herbs, a practice known as smudging. On April 13, 2002, plaintiff wrote a letter to the American Indian Religious Rights Foundation, informing it that he was not allowed to smudge in his living area. He received a letter from a representative of the foundation in July, stating that she had contacted defendant Daniel Bertrand, the prison's warden, about plaintiff's letter. In a response to the foundation's letter, defendant Bertrand cited Internal Management Procedures #6 and #6a, which restrict the practice of smudging to "Pipe/Drum Ceremonies and Sweat Lodges." Defendant Matthew Frank, Secretary of the Wisconsin Department of Corrections, is "ultimately responsible" for the internal management procedures.

Plaintiff renewed his request with defendant Michael Donovan, the prison's chaplain. Defendant Donovan denied plaintiff's request to smudge in his cell, also citing the Internal Management Procedures. The enforcement of these procedures burdens plaintiff in exercising his religion.

On September 9, 2002, plaintiff wrote defendant Robert Novitski, the prison's social services director. Plaintiff sought permission to purchase medicinal herbs. Novitski refused the request.

B. Inmate Complaint Procedure

On August 18, 2002, plaintiff filed an inmate complaint because he believed that he had been searched in retaliation for complaining about the differential treatment received by inmates who practice a Native American religion. Defendant Wendy Bruns, an inmate complaint examiner, dismissed his complaint, writing, "This search was conducted because of contraband that was found in the area where inmates from [the] Sweat Lodge had congregated." After the dismissal was affirmed by defendant Bertrand, plaintiff appealed to the corrections complaint examiner, realleging that he had been the victim of retaliation and challenging defendant Bruns's "investigative methods." Both the corrections complaint examiner and the Office of the Secretary affirmed the dismissal.

C. Requests for Religious Accommodation

On September 4, 2002, plaintiff asked defendant Novitski whether the Native American drum singers could be given time to practice. Plaintiff pointed out that the Catholic and Protestant choir groups were allotted practice time. Defendant Novitski denied

plaintiff's request, writing, "We have worked very hard to improve the opportunity for inmates to be able to practice their religion at GBCI and a recent survey conducted of membership of congregate groups indicates a very even distribution of time and resources for inmates to practice their religion." Plaintiff requested a time slot for the drum singers a second time in February 2003, but defendant Novitski did not respond.

On September 9, 2002, plaintiff wrote another letter to defendant Novitski, asking to be transferred to another prison so that he could "properly practice his religion." Defendant Novitski denied the request.

On March 17, 2003, plaintiff wrote a letter to defendant Bertrand, requesting a "time extension" for both the Native American pipe and drum ceremony and the Native American monthly study group. Defendant Michael Baenen, the prison's deputy warden, responded by saying, "You have already received an answer to these requests . . . the amount of time allotted to each faith group monthly is almost precisely proportional to the percentage of participants in each group."

On March 26, 2003, plaintiff sent a written proposal to defendant Bertrand for a new "inmate activity group." The group would be called "Seven Fires Indian Council" and its purpose would be "to preserve and exercise the religious and social aspects of the Native American culture." Members would learn about "the Native American way of life through religious and traditional ceremonies, arts & crafts and languages." Defendant Bertrand

rejected the proposal the following day, writing that the proposal was "well written" but that he did "not believe that we have sufficient resources to properly supervise this request." In addition, he wrote that "the programs currently offered via our Chapel, Hobby Crafts and the expanding use of Channel 8 for inmates, adequately meet the needs of the Native American population at GBCI."

Plaintiff filed two inmate complaints about this incident: one in which he alleged that defendant Bertrand had not followed the administrative regulations in rejecting the proposal and one in which he alleged that the Christian population in the prison had more programs and services than Native Americans. Both of these complaints were dismissed and affirmed on appeal.

Defendants' actions limiting group activities for inmate adherents of Native American religions have burdened plaintiff's ability to have meaningful religious experiences.

DISCUSSION

A. Smudging

I understand plaintiff to be contending that the refusal of defendants Bertrand, Donovan and Frank to allow plaintiff to smudge in his living area and defendant Novitski's refusal to allow plaintiff to purchase medicinal herbs violated his right to exercise his religion under the First Amendment and the Religious Land Use and Institutionalized Persons Act.

The Religious Land Use and Institutionalized Persons Act prohibits the governmental imposition of a "substantial burden on the religious exercise" of a prisoner, unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1. The rule applies in any case in which -

> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

The act is to be construed broadly to favor the protection of inmates' religious exercise. 42 U.S.C. § 2000cc-3(g). In Charles v. Verhagen, 220 F. Supp. 2d 955 (W.D. Wis. 2002), I concluded that the act was a valid exercise of Congress's power under the spending clause, U.S. Const. Art. I, § 8, cl. 1, and that it did not violate the Tenth Amendment or the establishment clause of the First Amendment. This decision was affirmed recently by the Court of Appeals for the Seventh Circuit. Charles v. Verhagen, No. 02-3572, slip op. (7th Cir. October 30, 2003).

The act defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5. Although the act does not define the term "substantial burden," the court of appeals has held that a substantial burden under the act 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).

Plaintiff's allegations regarding smudging in his cell do not show that defendants substantially burdened plaintiff's ability to practice his religion. Although I will assume at this stage that the act applies because the Wisconsin Department of Corrections receives federal funding and that smudging is part of the exercise of plaintiff's religion, his allegations show that defendants Bertrand, Donovan and Frank have not prohibited him from smudging altogether. Rather, he alleges only that he is restricted from burning herbs *in his living area*. As part of his complaint, plaintiff has provided the prison's internal management procedures #6 and #6A. See Beanstalk Group Inc. v. AM General Corp., 283 F.3d 856, 858 (7th Cir. 2002) (documents attached to complaint become part of it for all purposes). Procedure #6 provides that "Each institution will allow opportunities for ceremonial smoking, smudging and the use of incense consistent with its policy on use of smoking materials. Ceremonial smoking, smudging and the use of incense will be authorized as set forth by the institution *in the Chapel or other designated areas*." (Emphasis added.) There is no allegation in plaintiff's complaint that defendants are not complying with this procedure. Rather, he says that the procedures themselves are unconstitutional. Also, plaintiff does not allege that smudging is somehow less meaningful if it occurs in a specially designated area rather than in his cell.

In short, I cannot reasonably infer from the allegations in plaintiff's complaint that

plaintiff's ability to practice smudging was rendered "effectively impracticable" by a rule prohibiting him from burning herbs in his cell. Plaintiff has alternative means of engaging in this practice.

Plaintiff's claim under the First Amendment fails for the same reason. Like plaintiffs asserting a claim under the statute, those bringing free exercise claims under the Constitution must show that the exercise of their religion has been substantially burdened. Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). In Civil Liberties for Urban Believers, 342 F.3d at 760-61, the court suggested that the test for making this determination is the same under both the First Amendment and the act. Because plaintiff fails to allege facts showing that his ability to practice smudging has been substantially burdened, I will dismiss his claims under both the First Amendment and the statute.

With respect to plaintiff's allegation that defendant Novitski refused to approve his request to purchase medicinal herbs, I conclude that plaintiff has alleged the bare minimum of facts necessary to state a claim upon which relief may be granted under both the statute and the First Amendment. Although plaintiff does not allege this expressly, I may reasonably infer that plaintiff intended to purchase medicinal herbs for the purpose of using them for smudging. I may reasonably infer also that smudging is a religious exercise within the meaning of both the statute and the First Amendment. See Hernandez, 490 U.S. at 699 (defining "religious exercise" under First Amendment as "the observation of a central

religious belief or practice"). Finally, at this stage of the proceedings, I will assume that defendant Novitski had the authority to approve plaintiff's purchase and that his refusal to do so made it impossible for plaintiff to engage in smudging. Therefore, plaintiff has sufficiently alleged that defendant Novitksi substantially burdened his ability to exercise his religion.

However, in later stages of the proceedings, plaintiff will have to prove that defendant Novitski was personally involved in preventing plaintiff from obtaining medicinal herbs, meaning that he directed or consented to the unconstitutional conduct. Rasche v. Village of Beecher, 336 F.3d 588, 597 (7th Cir. 2003). If defendant Novitski did not have authority to grant plaintiff's request or directed him to seek permission from a more appropriate official, such as the chaplain, plaintiff may not be able to succeed on this claim. In addition, plaintiff will have to show that he had no other means of obtaining medicinal herbs and that as a result of Novitksi's denial, he was unable to smudge. Plaintiff's ability to practice his religion would not be substantially burdened by a short delay in receiving medicinal herbs.

If plaintiff does prove that the exercise of his religion was substantially burdened, the Religious Land Use and Institutionalized Persons Act will require defendant Novitski to show that he had a compelling interest in preventing plaintiff from having medicinal herbs and that he employed the least restrictive means in advancing that interest. 42 U.S.C. §

2000cc-1. To avoid liability under the First Amendment, defendant Novitksi will have to show that his actions were reasonably related to a legitimate penological interest. See Tarpley v. Allen County Indiana, 312 F.3d 895, 898 (7th Cir. 2002) ("Prison restrictions that infringe on an inmate's exercise of his religion are permissible if they are reasonably related to a legitimate penological interest.") He may do this by showing that: (1) a valid, rational connection exists between the regulation and a legitimate government interest behind the rule; (2) there are alternative means of exercising the right in question that remain available to prisoners; (3) the accommodation of the asserted constitutional right would have an adverse impact on guards and other inmates and on the allocation of prison resources; and (4) there are no obvious, easy alternatives that might suggest that the regulation is not reasonable. Id.

B. Inmate Complaint Procedure

I understand plaintiff to be asserting a claim that defendant Bruns failed to investigate his inmate complaint rather than asserting a claim based on the search itself. He describes the complaint process only, not the search, and he does not identify who it was that searched his cell or what the differential treatment was, if any.

Plaintiff's claim against defendant Bruns is legally frivolous. Although the due process clause of the Fourteenth Amendment requires prison officials to provide inmates with certain

procedural protections when a liberty interest is implicated, Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980), plaintiff does not enjoy a liberty interest in obtaining relief from the inmate complaint examiner. The Constitution does not require prisons to have an effective complaint review system or for that matter, *any* mechanism for reviewing prisoner grievances.

Plaintiff does have a right to complain about prison conditions and a right to *seek* redress for his injuries in court. Walker v. Thompson 288 F.3d 1005 (7th Cir. 2002). For that reason, prison officials may not *prevent* inmates from filing inmate complaints or from filing lawsuits. However, plaintiff does not allege that defendant Bruns prevented him from doing anything. Rather, he alleges only that she failed to investigate his claim adequately. This allegation does not a state a claim under the Constitution. See Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002) ("As long as they did not deprive Strong of his opportunity to contest the merits of the charge before the grievance board or sabotage his chance to obtain redress in court, the defendants' uncooperative approach is not an independent constitutional tort; there is no duty to assist in an effort to obtain private redress."). Plaintiffs' claim that defendant Bruns violated his constitutional rights by failing to investigate his complaint will be dismissed as legally frivolous.

C. Religious Accommodation Requests

Plaintiff alleges that defendant Novitski denied his request to allow the Native American drum singers to have time to practice and to transfer him to another prison, that defendant Baenen denied his request to give more time for the Native American pipe and drum ceremony and study group and that defendant Bertrand rejected his proposal to form a new religious group for Native Americans. Plaintiff's allegation that he was denied a transfer needs little duscussion. Although plaintiff has a right to practice his religion, he does not have a right to be incarcerated in the prison of his choice, even if he believes that other institutions would be more accommodating to his religious beliefs. He does not allege that adherents of other faiths were transferred out of the prison when they expressed dissatisfaction with available opportunities to practice their religion. To the extent plaintiff is being denied his religious rights, he may receive injunctive relief, but that relief may "extend no further than necessary to correct the violation of the Federal right." 18 U.S.C. § 3626. Generally, a prison transfer would be a much broader form of relief than that necessary to remedy a constitutional or statutory rights violation. Rather than a transfer, the appropriate remedy would be to provide plaintiff with the item he requested or allow him to engage in the desired religious practice. Accordingly, I will dismiss as legally frivolous plaintiff's claim that defendant Novitski violated his right to freely exercise his religion by denying his request to transfer to another prison.

With respect to the other claims, plaintiff's complaint contains allegations that his

requests were denied because defendants disfavored his religion. He alleges that Christian groups were allowed time to practice and given more opportunities for group worship and more study time. In addition, he alleges that his ability to exercise his religion was burdened by defendants' actions limiting his ability to engage in religious group activities.

An inmate of a minority faith is entitled under the free exercise clause of the First Amendment to "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." Cruz v. Beto, 405 U.S. 318, 322 (1972). Further, in deciding which religions are entitled to certain privileges, prison officials may not "pick and choose between religions without any justification." Sasnett v. Litscher, 197 F.3d 290, 292-93 (7th Cir. 1999) (holding that prison officials violated free exercise clause when they limited wearing of crosses to those attached to rosary, a Catholic item, even though crosses on rosaries are more dangerous than crosses by themselves); see also Native American Council of Tribes v. Solem, 691 F.2d 382, 385 (8th Cir. 1982) (holding that inmate stated claim under free exercise clause when he alleged that Christian inmates were allowed to participate in religious ceremonies with friends and family but Native American inmates were not allowed to do so).

Liberally construed, plaintiff's complaint includes allegations that he has not been given a reasonable opportunity to practice his religion as compared to Christians. Accordingly, I will allow him to proceed on a claim that defendants Novitski, Baenen and

Bertrand violated his First Amendment rights by denying requests related to his religion when they granted similar requests from Christian prisoners.

However, plaintiff should be aware that the Constitution does not prohibit all differential treatment of prisoners in matters relating to religion. In Cruz, 405 U.S. at 322 n.2, the Supreme Court noted that the requirement of providing all faiths with a reasonable opportunity to practice their faith does not mean that each faith is entitled to "identical facilities and personnel." In choosing how to allocate resources, prison officials are entitled in some instances to consider factors such as the number of inmates that belong to a particular faith. Id. This does not mean that defendants may avoid liability simply by stating that they denied plaintiff's requests because there are more Christians than Native Americans at the prison. Rather, if plaintiff shows that defendants treated Native Americans differently from Christians, defendants will have to show that their denials were *reasonably related to* a legitimate penological interest in providing Christian inmates with more privileges than Native American inmates. See Tarpley, 312 F.3d at 898. As discussed above, a court considers four factors in determining whether government conduct is reasonably related to a legitimate penolgical interest: (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) the impact accommodation of the asserted constitutional right would have on guards and

other inmates and on the allocation of prison resources; and (4) the existence of obvious, easy alternatives as evidence that the regulation is not reasonable. Id.

With respect to the Religious Land Use and Institutionalized Persons Act, some of plaintiff's allegations are sufficient to state a claim but some are not. Although the act does contain a nondiscrimination provision, 42 U.S.C. § 2000cc(b), it applies only to land use regulations. Thus, to obtain relief under the statute, plaintiff must show that defendants' actions impose a substantial burden on his religious exercise. As noted above, the court of appeals has interpreted the term "substantial burden" as one that makes it "effectively impracticable" to engage in a particular religious exercise. At this stage, I will assume that participating in the Native American drum singers is an exercise of plaintiff's religion. Because plaintiff alleges that defendant Novitski has prohibited him completely from practicing with the drum singers, I will allow plaintiff to proceed on this claim.

The rejection of the group proposal is a closer call. Although plaintiff alleges that defendant Bertrand prevented him from forming a religious group, plaintiff also alleges that he was already involved in a Native American "study group." If plaintiff wanted to do nothing more than form a second study group that performed the same function as the first, defendant Bertrand's denial of this request would not be a substantial burden on plaintiff's ability to exercise his religion. However, plaintiff has not alleged enough facts to allow me to determine whether this is the case. Therefore, I will assume at this stage that the existing

study group and plaintiff's proposed new group would engage in distinct "religious exercise[s]" as that term is used in § 2000cc-5(7). I will allow plaintiff to proceed on his claim that defendant Bertrand violated plaintiff's right to freely exercise his religion under the Religious Land Use and Institutionalized Persons Act by denying his request to form a religious group for Native Americans.

Finally, with respect to plaintiff's allegation that defendant Baenen refused to give plaintiff additional time for the pipe and drum ceremony and Native American study group, the facts do not satisfy the requirements for showing a substantial burden under the statute. It is clear from plaintiff's complaint that he was able to participate in both the ceremony and study group; his only complaint is that he wants more time for these activities. However, there is no suggestion in plaintiff's complaint that additional time is necessary to make either of these activities meaningful. Plaintiff does allege that the denial imposed a substantial burden on his religious exercise, but this is a legal conclusion that the court is not compelled to accept. Zimmerman v. Tribble, 226 F.3d 568, 572 (7th Cir. 2000). Rather, in order to state a claim, plaintiff was required to allege facts that would permit the drawing of a reasonable inference that by imposing time limits, defendant Baenen was making it almost impossible to engage in the religious exercise. Plaintiff has not done this. Accordingly, I will

dismiss this claim for failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Plaintiff Johnson Greybuffalo is GRANTED leave to proceed under 28 U.S.C. § 1915A on his claims that

(1) defendant Robert Novitski denied plaintiff's request to purchase medicinal herbs for smudging, in violation of the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act;

(2) defendant Novitski denied plaintiff's request to allow the Native American drum singers to have practice time, in violation of the First Amendment and the Religious Land Use and Institutionalized Persons Act;

(3) defendant Michael Baenen denied plaintiff's request to allot more time for the Native American pipe and drum ceremony and Native American study group, in violation of the free exercise clause of the First Amendment;

(4) defendant Bertrand denied plaintiff's proposal for a religious group for Native American inmates, in violation of the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act.

2. The following claims are DISMISSED for failure to state a claim or on the ground

that they are legally frivolous:

(1) defendants Matthew Frank, Daniel Bertand and Michael Donovan violated plaintiff's rights under the First Amendment and Religious Land Use and Institutionalized Persons Act by prohibiting plaintiff from smudging in his cell;

(2) defendant Wendy Bruns violated plaintiff's constitutional rights by failing to adequately investigate his inmate complaint;

(3) defendant Novitski violated plaintiff's rights under First Amendment and the Religious Land Use and Institutionalized Persons Act by denying plaintiff's request to be transferred to another prison;

(4) defendant Baenen violated plaintiff's rights under the Religious Land Use and Institutionalized Persons Act by denying his request to allot more time for the Native American pipe and drum ceremony and Native American study group.

3. Because plaintiff has not a stated a claim upon which relief may be granted against defendants Michael Donovan, Matthew Frank and Wendy Bruns, these defendants are DISMISSED from the case.

4. For the remainder of this lawsuit, 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 that will be representing the 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 plaintiff has sent a copy to defendant or to defendant's attorney.

5. 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.

Entered this 4th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge