

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

TITUS HENDERSON,

Plaintiff,

v.

MATTHEW FRANK; PETER HUIBREGTSE; BRIAN
KOOL; TRACEY GERBER; J. STARKY; RUSSELL
BAUSCH; ROBERT SHANNON; TODD OVERBO;
DICK VERHAGEN; and RICHARD SCHNEITER,

Defendants.

OPINION AND
ORDER

06-C-0012

This is a civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Titus Henderson, a prisoner at the Wisconsin Secure Program Facility, was granted leave to proceed with respect to numerous constitutional claims regarding his experiences at the facility. Neither side filed dispositive motions and the case is proceeding to trial on March 26, 2007. In reviewing this case in preparation for trial, I have reconsidered my decision granting plaintiff leave to proceed in forma pauperis with respect to his claims. I conclude that it was error to grant plaintiff leave to proceed with respect to his claims that (1) defendant Dick Verhagen violated his rights under the

establishment clause of the First Amendment by implementing DOC 309 IMP 6, which does not recognize Taoism as an umbrella religious group and (2) defendant Todd Overbo violated plaintiff's rights under the free exercise clause of the First Amendment by refusing to purchase two Taoist texts. Therefore, I will dismiss these claims under 28 U.S.C. § 1915A for plaintiff's failure to state a claim upon which relief may be granted.

DISCUSSION

As discussed in the court's March 6, 2006 screening order, dkt. #4, plaintiff alleged that he is a practicing Taoist, that Taoists are required to study and practice according to the teachings of two religious texts, the Tao te Ching and the I-Ching, and that defendant Overbo refused to purchase these texts for him. Plaintiff alleged that defendant Overbo purchased religious texts for religions categorized in DOC 309 IMP 6 as "umbrella religions," including Catholicism, Protestantism, Judaism and Islam. In screening plaintiff's complaint, I found that plaintiff had stated an establishment clause claim against defendant Verhagen that the department's policy of creating umbrella religions might favor certain religions over Taoism and that he had stated free exercise and establishment clause claims against defendant Overbo for refusing to purchase Taoist texts when he purchased texts for other religions. Although I am allowing plaintiff's establishment clause claim against defendant Overbo to go forward to trial, plaintiff has not stated a claim with respect to his free exercise

claim against defendant Overbo and his establishment clause claim against defendant Verhagen.

A. Constitutionality of DOC 309 IMP 6

The establishment clause provides that Congress “shall make no law respecting an establishment of religion;” it prevents the government from promoting any religious doctrine. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 590 (1989) (citations omitted). In addition, it "prohibits the government from favoring one religion over another without a legitimate secular reason." Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005). The clause is violated when "the challenged governmental practice either has the purpose or effect of 'endorsing' religion." County of Allegheny, 492 U.S. at 592 (citations omitted); it is not violated when a governmental entity provides opportunities for institutionalized persons to practice their religion, provided that the entity does so in an evenhanded way.

After reviewing DOC 309 IMP 6, I am convinced that the regulation does not violate the establishment clause. DOC 309 IMP 6 defines an “Umbrella Religious Group” as “[a]n inclusive group designed to appeal to a wide range of religious beliefs within a given faith group. Presently, these are designated in Wisconsin Department of Corrections as Eastern Religions, Catholic, Islam, Jewish, Native American, Pagan and Protestant.” Although the

policy creates seven “umbrella religions” under which all other religions are determined to fall, the policy does not bestow any particular benefit on those broad categories that are denied to individual traditions. Instead, it appears to be merely a system for managing institutional understanding and accommodation of the countless faith traditions practiced by prisoners in the Wisconsin correctional system. To the extent prison officials offer support, financial or otherwise, to one religion that they do not offer to others (whether the favored religion is an umbrella group or not), they may run afoul of the establishment clause. However, a regulation that simply makes a broad categorization of religions does not have this effect, in and of itself. Therefore, plaintiff’s claim that defendant Verhagen violated his rights under the establishment clause of the First Amendment by implementing DOC 309 IMP 6, which does not recognize Taoism as an umbrella religious group, fails to state a claim upon which relief may be granted.

B. Defendant Overbo’s Refusal to Purchase Taoist Texts

The free exercise clause forbids the government from interfering with religious practice. Venters v. City of Delphi, 123 F.3d 956, 969 (7th Cir. 1997); Morrison v. Garraghty, 239 F.3d 648, 656 (4th Cir. 2001). However, it does not impose an affirmative obligation on the government to provide a prisoner with the accoutrements of his religion, especially where the inmate is able to purchase the items himself. Cf. Kimberlin v.

Department of Justice, 318 F.3d 228, 238 (D.C. Cir. 2003) (Tatel, concurring in part and dissenting in part) ("Even in the prison context, if the government denies federal funds for purchasing magazines, books, stationery, or even electric guitars, it has placed no governmental obstacle in the path of prisoners seeking to read, write, or play, since they remain free to purchase those items on their own.") (citation omitted). Plaintiff's status as a prisoner does not entitle him to a government subsidy for the items necessary to practice his religion. E.g., Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002) ("[T]here is no constitutional entitlement to subsidy."). Prison officials are required only to refrain from interfering with prisoners' ability to locate, purchase and obtain religious materials on their own, at least insofar as obtaining such items is not inconsistent with legitimate prison interests. Therefore, plaintiff does not state a free exercise claim against defendant Overbo based on defendant Overbo's refusal to purchase Taoist texts for plaintiff. As noted above, plaintiff may attempt to prove at trial that defendant Overbo violated the establishment clause when he purchased texts for other faiths, but not for plaintiff's.

ORDER

IT IS ORDERED that, on the court's own motion and pursuant to 28 U.S.C. § 1915A:

1. Plaintiff's claims that (a) defendant Dick Verhagen violated his rights under the

establishment clause of the First Amendment by implementing DOC 309 IMP 6, which does not recognize Taoism as an umbrella religious group and (b) defendant Todd Overbo violated plaintiff's rights under the free exercise clause of the First Amendment by refusing to purchase two Taoist tests are DISMISSED.

2. Defendant Dick Verhagen is DISMISSED from this lawsuit.

Entered this 15th day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge