

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

COLIN N. GELFORD, MATTHEW
L. BEARDIN and LORENZO WINFORD,

Plaintiffs,

v.

MEMORANDUM and ORDER
07-C-258-S

MATTHEW J. FRANKS, STEVE CASPERSON,
JEFFREY P. ENDICOTT, TIMOTHY LUNDQUIST,
MICHAEL REIGH, LEO CAMPBELL and MARK TESLIK,

Defendants.

Plaintiffs Colin N. Gelford, Matthew L. Beardin and Lorenzo Winford were allowed to proceed on their First Amendment and Religious Land Use and Institutionalized Persons Act (RILUPA) claims against defendants Matthew J. Franks, Steve Casperson, Jeffrey P. Endicott, Timothy Lundquist, Michael Reigh, Leo Campbell and Mark Teslik. Plaintiffs Gelford and Beardin were also allowed to proceed on their privacy claim against defendants Endicott and Lundquist.

On August 27, 2007 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submissions by

both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Colin Gelford was transferred from the Redgranite Correctional Institution (RGCI) to the New Lisbon Correctional Institution (NLCI) on July 13, 2006. Plaintiffs Matthew Beardin

and Lorenzo Winford are currently incarcerated at RGCI. The three plaintiffs submitted Religious Preference forms indicating that they practiced the Wicca/Pagan religious faith.

Defendant Matthew J. Franks is the Secretary of the Wisconsin Department of Corrections(WDOC). Defendant Steve Casperson is the Administrator of the Division of Adult Institutions (DAI) of the WDOC. Defendant Jeffrey P. Endicott is the Warden at RGCI. Defendant Timothy Lundquist is the Warden at NLCI. Defendant Michael Reigh is the Administrative Captain at RGCI. Defendant Leo Campbell is the Chaplain at RGCI. Defendant Mark Teslik is the Chaplain at NLCI.

Expanded volumes of inmate property have had an adverse effect on the security of the WDOC correctional institutions. The need to control the amount of property is also related to health and safety concerns because it could create fire hazards or tensions between roommates. The WDOC decided that restrictions on inmate property including religious property were necessary. DOC 309 IMP 1 limits the amount of property an inmate may possess. DOC 309 IMP 6A was developed to ensure that inmates have access to religious items as personal property. Religious advisors were consulted prior to the development of IMP 6A.

In July 2004 when plaintiff Gelford was incarcerated at RGCI defendant Campbell denied his request to possess and wear a pentagram necklace which was a Wicca religious emblem. At that

time there was no pentagram allowed as personal religious property for inmates who practiced the Wicca/Pagan religion. (IMP 6A dated September 3, 2002).

On or about June 3, 2005 defendant Campbell investigated whether the publication titled, "Buckland's Complete Book of Witchcraft" should be allowed as religious property. Plaintiff Gelford was not allowed to possess this book because it depicted bondage. On or about August 2, 2005 the DOC Security Chief determined that the book would be permitted as inmate personal property for plaintiff Gelford.

On October 19, 2005 defendant Campbell denied plaintiff the publication entitled: "Secrets of the Magikal Grimoires: The Classical Texts of Magick Deciphered" as part of his personal religious property because it depicted the sacrifice of chickens.

On March 1, 2006 the Religious Property policy (IMP 6A) was revised to allow Wicca inmates to possess one emblem, oil for religious purposes, Book of Shadows Holy, logbook/notebook, feather, reflective surface, such as mirror in cell, lanyard, religious books and publications and religious art. Allowable emblems are oghan-rectangular, triangle pendant, triskele-3 circles connected and a pentagram, a 5-pointed star in the upright position stamped on a disc or printed in a circle. In April 2007 the policy was revised to include Thor's Hammer as an allowed emblem.

Talismans, amulets, charms, crystals and gems are not listed as approved Wicca religious property in IMP 6A.

IMP 6A includes the following restrictions related to religious art, a limit of 1 item of approved pictures of signs, symbols or other identifiers not to exceed 18" by 24" to be displayed only on designated display area in a cell. Faith based identifiers that have a double meaning cannot be openly displayed. There are security concerns about inmates hiding contraband items under items hung on cell walls. Inmates are allowed to have 50 personal and commercially published photographs and multiple digital photographs printed on standard size paper. (DOC 309 IMP 1). These photographs may be religious.

NLCI inmates who have designated Wicca or Pagan as their religious preference practice their religion under the Pagan (Wicca) Umbrella Group which meets weekly with an approved outside spiritual leader. The meetings usually involve a combination of ceremony and study group discussions. During their Wicca religious services inmates could have access to candles, alter cloth, bell, cauldron, chalice, pentagram, Salt and Pentacle dish and wooden wand. Inmates who want to request a new religious practice that is not offered at an institution or a new religious property item that is not on the pre-approved list may complete a "Request for New Religious Practice Form" (DOC 2075).

While they were at RGC I plaintiffs Gelford and Beardin requested to be allowed a Pendulum, Ogham sticks, Runes, tarot cards and I Ching (coins or sticks). Defendant Campbell denied their requests because these items were not allowed by IMP 6A and were determined to be not necessary for the spiritual expression of the Wicca/Pagan religion.

Plaintiff Gelford also requested that Wicca/Pagan inmates be allowed an umbrella religious study group. Defendant Campbell denied this request on May 11, 2006 because inmates are not allowed to lead or conduct religious services or study groups.

On May 19, 2006 plaintiff Gelford requested to purchase 30 posters as a part of his religious property. Defendant Campbell denied this request on May 26, 2006 based on the restrictions of religious art provided in IMP 6A. Plaintiff was allowed to purchase one religious art item which complied with IMP 6A.

After plaintiff Gelford was transferred to NLCI on July 13, 2006 plaintiff Gelford's request to possess a twin dragon with pentagram emblem was denied. This emblem was not approved religious property pursuant to IMP 6A.

On September 9, 2006 defendant Teslik inquired whether the book "Secrets of the Magikal Grimoires" could be considered as a Pagan religious text. He was advised by the NLCI Pagan Spiritual leader that it could be considered a religious text for the Pagan

adherent. On September 18, 2006 defendant Teslik approved the book as allowable religious property for plaintiff Gelford.

In October 2005 while plaintiffs Gelford and Beardin were incarcerated at the Redgranite Correctional Institution female officers monitored the shower and restroom facilities. In July 2006 plaintiff Gelford was viewed in the shower changing area by female correctional officers.

It is important to monitor these facilities because of the increased potential for inappropriate behavior including fighting, self-harm and sexual misconduct. Both male and female officers make rounds of these areas to prevent inappropriate behavior.

MEMORANDUM

Although it is not completely clear that plaintiffs have exhausted their administrative remedies for all of their claims, they have exhausted their administrative remedies on the majority of their claims and the claims are interrelated. The Court will decide defendants' motion for summary judgment on the merits.

Although plaintiffs have not submitted affidavits in opposition to the defendants' motion, the Court has reviewed the 237 exhibits that plaintiffs submitted with their original complaint. There are no remaining disputed material facts and this case may be decided as a matter of law.

Plaintiffs claim that they were denied their rights under the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA). To prevail on a claim under RLUIPA plaintiffs must demonstrate that the government has imposed a substantial burden on their religious exercise. The United States Court of Appeals for the Seventh Circuit has held that a substantial burden is one that 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). Under the statute religious exercise is any exercise of religion, whether or not compelled by, or central to a system of religious belief. 42 U.S.C. §2000cc-5(7)(A).

The government then must demonstrate that the burden imposed is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. §2000cc-1(a)(1)-(2).

It is undisputed that plaintiff Gelford was not allowed to possess a pentagram in 2004 and not allowed to possess a twin dragon with pentagram emblem in 2006. In addition plaintiffs were not allowed to possess a pendulum, ogham sticks, Runes, tarot cards, I Ching (coins or sticks), talismans, amulets, charms, crystals or gems because they were not on the pre-approved religious property list in IMP 6A.

Plaintiffs were allowed to possess one emblem, oil for religious purposes, Book of Shadows Holy, logbook/notebook, Feather, reflective surface, such as mirror in cell, lanyard, religious books, publications and religious art. Allowable emblems are oghan-rectangular, triangle pendant, triskele-3 circles connected, a pentagram, a 5-pointed star in the upright position stamped on a disc or printed in a circle and as of April 2007 a Thor's Hammer. Plaintiff Gelford has now been allowed to have Buckland's Complete Book of Witchcraft" and "Secrets of the Magikal Grimoiries" after further review. In addition plaintiffs were allowed to attend group religious services.

These undisputed facts indicate that defendants' actions did not render plaintiffs' religious exercise effectively impracticable. Plaintiffs were able to practice their Wicca religion. Further limiting the plaintiffs' religious property pursuant to IMP 6A after consulting with religious advisers was the least restrictive means of furthering the compelling government interests of security and safety in the correctional institutions. See Mark v. Gustafson, 481 F. Supp. 2d 1084, 1090 (W.D. Wis. 2006).

Plaintiffs' rights under RLUIPA were not violated. Defendants are entitled to judgment in their favor on this claim.

The protections offered by the First Amendment are more limited than those extended under RLUIPA. The First Amendment protects only religious exercise that is central to a system of

religious belief while RLUIPA protects any exercise of religion. Id. Therefore any claim that fails under RLUIPA also fails under the First Amendment's more stringent standards. Plaintiffs' First Amendment rights were not violated because they were allowed a reasonable opportunity to practice their religion, See Cruz v. Beto, 405 U.S. 319 (1972). Defendants are entitled to judgment in their favor on plaintiffs' First Amendment claims.

Plaintiffs Gelford and Berdin claim that their privacy rights were violated when they were viewed in the shower by female correctional officers at RGCJ in 2005. Plaintiff Gelford claims that his privacy rights were violated the same way in 2006 at NLCI.

In Hudson v. Palmer, 468 U.S. 517 (1984), the United States Supreme Court held that inmates do not retain a right to privacy in prison. In Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995), the United States Court of Appeals for the Seventh Circuit applied Hudson to the plaintiffs' situation. The Court held that an inmate's privacy rights are not violated when an officer of the opposite sex views the inmate naked. Plaintiffs' privacy rights were not violated when female officers monitoring the shower facilities briefly viewed them naked. Defendants are entitled to judgment in their favor on plaintiffs' privacy claims.

Defendants' motion for summary judgment will be granted. Plaintiffs are advised that in any future proceedings in this matter they must offer argument not cumulative of that already

provided to undermine this Court's conclusion that their claims must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED.

It IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiffs DISMISSING their complaint and all claims contained therein with prejudice and costs.

Entered this 28th day of September, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge