IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JONATHAN L. LIEBZEIT,

OPINION AND ORDER

Plaintiffs,

10-cv-170-slc[1]

v.

WISCONSIN DEPARTMENT OF CORRECTIONS,
RICK RAEMISCH, MICHAEL THURMER,
and SAM APPAU,

Defendants.

- -

Plaintiff Jonathan Liebzeit is a prisoner who contends that prison officials are violating his right to practice the religion of Odinism in various ways, in violation of the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act. Although this case is just getting started, it already has a significant procedural history.

Plaintiff filed his complaint jointly with another prisoner, Derek Kramer, and sought to represent a class of prisoners. Dkt. ##1 and 3. However, in an order dated April 27,

[1] I am exercising jurisdiction over this case for the purpose of this order.

2010, I severed plaintiff's and Kramer's claims and denied the motion for class certification after concluding that the claims were not joined properly under Fed. R. Civ. P. 20. Dkt. #33. At that time, the complaint included five defendants: Rick Ramisch, Michael Thurmer, William Pollard, Dennis Mosher and Peter Huibregtse, but I dismissed defendants Pollard, Mosher and Huibregtse from this case because those defendants were relevant to Kramer's claims only.

Kramer filed a notice of appeal with this court regarding the denial of class certification, but the Court of Appeals for the Seventh Circuit administratively closed that appeal because Kramer should have petitioned the court of appeals directly for permission to appeal. Dkt. #37. See also Fed. R. Civ. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."). A few days later, the court of appeals denied a petition for permission to appeal. Dkt. #39. Plaintiff and Kramer then filed a motion for reconsideration of the order severing the case. Dkt. #38. Although I denied that motion, I gave plaintiff and Kramer leave to file an amended complaint that complied with Rule 20. Dkt. #40.

Next, Kramer filed another document called "notice of appeal," but which seems to be a copy of a petition for permission to appeal that Kramer filed with the court of appeals. Dkt. #41. Although that petition is pending, I may proceed with the case because a petition

under Rule 23(f) "does not stay proceedings in the district court unless the district judge or the court of appeals so orders." The court of appeals has not issued such an order and I do not intend do so.

In the meantime, plaintiff and Kramer took advantage of the opportunity to file a joint amended complaint. In the new complaint, plaintiff and Kramer added more factual detail as well as two more defendants, the Wisconsin Department of Corrections and Sam Appau. Dkt. #45. In an order dated June 15, 2010, I declined to rejoin the cases because the new complaint still violated Rule 20, but I accepted the proposed amended complaint as the operative pleading in both cases. Dkt. #46. Because both the Wisconsin Department of Corrections and Sam Appau are relevant to plaintiff's claims, I have amended the caption to add those two defendants.

The amended complaint is now before the court for screening under 28 U.S.C. § 1915. Plaintiff contends that defendants violated his free exercise rights in three ways: (1) denying his request to engage in group religious exercise; (2) refusing to allow him to possess various religious items; and (3) refusing to allow him to consume pork as part of a religious diet and at religious feasts. I conclude that plaintiff may proceed under the free exercise clause against defendants Thurmer and Appau with respect to the first two claims, but that plaintiff's remaining claims under RLUIPA and the free exercise clause are either moot or unripe.

Also before the court is plaintiff's motion for appointment of counsel. Because plaintiff's filings thus far do not show that the case is too complex for him to represent himself, that motion will be denied.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). In the amended complaint, plaintiff fairly alleges the following facts.

ALLEGATIONS OF FACT

A. Plaintiff's Religious Beliefs

Plaintiff Jonathan Liebzeit is incarcerated at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. He practices the religion of Odinism, which is also known as Asatru. Odinists believe that "gods and goddesses are 'kin' who live close to the Earth and indulge in the experiences of everyday life." The religion teaches Nine Noble Virtues: courage, truth, honor, fidelity, discipline, hospitality, industriousness, self-reliance and perseverance. Plaintiff became an Odinist because he "was drawn to the emphasis in Odinism placed in the Nine Noble Virtues, codes of conduct, community and family."

Odinists engage in a group service called a Blot. This begins with a "hallowing of the room" using a Thor's Hammer and continues with the choosing of runes, invoking the gods, the drinking of Mead, a blessing, "a giving and the leaving." A service called Sumbel

follows the Blot. This involves a three-round toast, first to a god or goddess, then to "an admired person" and finally to "a hope for the future." Both the Blot and the Sumbel must be performed as a group and are necessary to the practice of Odinism.

B. Plaintiff's Requests for a New Religious Practice

In November 2008 plaintiff was housed at the Waupun Correctional Institution in Waupun, Wisconsin. He filled out a form called "Request for New Religious Practice" and submitted it to the prison chaplain, defendant Sam Appau. In the form, plaintiff asked for an "Asatru/Odinism Service-Study Group 1-2 Hours Per Week." Without group worship, plaintiff cannot participate in the religious ceremonies Blot and Sumbel. In addition, he asked for approval of sixteen different religious items:

> (1) a Thor's Hammer emblem, which is a symbol of one's faith and used to perform daily rites;
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> (2) a "Rune Set with storage bag, Rune Lay Cloth, and Instruction Book," which is used to contact the gods and to aid in meditation;
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> (3) a book called Poetic Edda, which is "one of the most important texts to Odinism";
>
> (4) a sacrificial bowl called a Bowli;
>
> (5) mead, which is a "sacrificial offering" made of honey, water and fruit juice;
>
> (6) a Mead Horn, which is a "cow horn . . . used to accept the sacrificial mead by worshipers";

(7) an evergreen twig, which is used to "disperse blessings" during group worship;

(8) an altar or "properly adorned table";

(9) an altar cloth;

(10) Mjollnir, a large version of Thor's Hammer that is used for rituals;

(11) an oath ring, which is used to make oaths to the gods;

(12) a Gandr, which is a wooden object that "represents the spear of Odin" and is used during rituals and blessings;

(13) "statues of gods and goddesses/religious art," which are used to "focus energy" during rituals;

(14) candles, which represent "the eternal light of Asgard, the realm of the gods and goddesses";

(15) a Sun Wheel, which is a "circle with two intersecting lines emphasizing the four compass directions" and is used during group worship to perform rituals; and

(16) a Hlath, which is a headband use during rituals.

Defendant Appau denied all of plaintiff's requests even though members of other faiths are allowed to meet in groups and all of the requested items are constructed of similar materials and are of similar sizes as items that are permitted for adherents of other religions. Appau's decision was affirmed by defendant Michael Thurmer, the warden.

In April 2009 plaintiff filed a grievance in which he complained about the denial of his requests. The inmate complaint examiner and the corrections complaint examiner recommended dismissal of the complaint. Amy Smith affirmed the dismissal, stating that

the "recommendation to dismiss this complaint is accepted as the decision of the Secretary."

C. Special Diet

Although Odinists are not required to eat particular foods, they hold pork to be a "sacred food, to be used in group offerings to their gods and consumed on Odinist holy days." Plaintiff believes that the offering and consumption of pork is necessary to the exercise of his religion.

OPINION

A. Group Study and Worship

Plaintiff's first claim is that "defendants have violated and continue to violate" his free exercise rights under RLUIPA and the Constitution "by refusing to permit Odinist inmates to participate in group study or worship." Because his constitutional and statutory claim raises different procedural questions, I will address them separately.

1. RLUIPA

RLUIPA prohibits the government from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden furthers a "compelling governmental interest," and does so by "the least restrictive means."

42 U.S.C. § 2000cc-1; Cutter v. Wilkinson, 544 U.S. 709, 714-15 (2005). However, plaintiffs bringing claims under RLUIPA may not obtain money damages against individual defendants or government entities. Nelson v. Miller, 570 F.3d 868, 883-89 (7th Cir. 2009). Thus, the only relief plaintiff could obtain on this claim is an injunction or a declaration.

The problem with a claim for injunctive or declaratory relief is that plaintiff made his request for group study or worship while he was incarcerated at the Waupun Correctional Institution, but he has since been transferred to the New Lisbon Correctional Institution. Thus, plaintiff can no longer sue defendants Thurmer and Appau because they are prison officials at the Waupun prison who have no authority to provide plaintiff with relief. Williams v. Doyle, 494 F. Supp. 2d 1019, 1024 (W.D. Wis. 2007) ("[A] claim for injunctive relief can stand only against someone who has the authority to grant it."). See also Lehn v. Holmes, 364 F.3d 862, 871 (7th Cir. 2004) ("When a prisoner who seeks injunctive relief for a condition specific to a particular prison is transferred out of that prison, the need for relief, and hence the prisoner's claim, become moot.").

As Secretary of the Department of Corrections, defendant Raemisch has authority over the New Lisbon prison, but any claim regarding conditions at that prison is not ripe. Texas v. United States, 523 U.S. 296 (1998) (internal quotations omitted) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."). As noted in the June 15 order, plaintiff is not

challenging the legality of a Department of Corrections policy prohibiting Odinist prisoners from having a study group or religious services, but the decisions of individual prison officials at the Waupun prison. Because plaintiff has not *asked* officials at the New Lisbon prison for permission to engage in group study or worship, it would be premature to consider any order against those officials. Even apart from jurisdictional concerns, a district court is not required to entertain a claim for injunctive relief before a prisoner has sought relief from those he wishes to enjoin. As the Supreme Court explained in Farmer v. Brennan, 511 U.S. 825, 847 (1994):

> "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity," Meredith v. Winter Haven, 320 U.S. 228, 235 (1943), and any litigant making such an appeal must show that the intervention of equity is required. When a prison inmate seeks injunctive relief, a court need not ignore the inmate's failure to take advantage of adequate prison procedures, and an inmate who needlessly bypasses such procedures may properly be compelled to pursue them.

Accordingly, I decline to consider plaintiff's RLUIPA claim.

2. Free exercise clause

Plaintiff's free exercise claim is not moot because it arises under 42 U.S.C. § 1983, which authorizes damages against public officials sued in their individual capacities. Memphis Community School Dist. v. Stachura, 477 U.S. 299, 306-07 (1986). However, it is not clear which defendants plaintiff wishes to sue on this claim because he does not

match up his claims and defendants, but simply says at the end of his complaint that "defendants" have violated his rights.

To the extent plaintiff wishes to sue the Wisconsin Department of Corrections for a free exercise violation, he may not do so because the Supreme Court has held that § 1983 does not apply to state agencies. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65-66 (1989). Further, a plaintiff may not sue individual defendants for damages unless they were "personally involved" in a decision to violate his rights, which means they participated in the violation or somehow facilitated it. Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). The only defendants who satisfy that requirement are Appau and Thurmer because they denied his request to create an Odinism group. Defendant Raemisch did not participate in that decision or even approve it. Even with respect to the grievance plaintiff filed, defendant Raemisch did not personally deny it. Rather, a staff member named Amy Smith reviewed the grievance and denied it on behalf of Raemisch. That is not sufficient to hold Raemisch liable under § 1983. Burks v. Raemisch, 555 F.3d 592, 593-94 (7th Cir. 2009) ("Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise.").

Turning to the merits, I note that a threshold question under the free exercise clause is whether the plaintiff can show that defendants substantially burdened his religious exercise. Hernandez v. C.I.R., 490 U.S. 680, 699 (1989); Kaufman v. McCaughtry, 419

F.3d 678, 683 (7th Cir. 2005). The court of appeals has described the meaning of "substantial burden" as similar under RLUIPA and the Free Exercise Clause. Vision Church v. Village of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (stating that meaning of "substantial burden" under RLUIPA "was intended to be interpreted by reference to First Amendment jurisprudence"). Thus, a "substantial burden" 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). See also Nelson, 570 F.3d at 878 (applying this test to both First Amendment and RLUIPA claims). Because plaintiff alleges that group worship is required for Odinists, plaintiff has satisfied his burden for the purpose of pleading that defendants Thurmer and Appau substantially burdened his religious exercise.

Once a plaintiff shows a substantial burden, generally the next question under the First Amendment is whether the burden is one that applies equally to everyone or whether it targets religious beliefs in particular; if the rule applies to everyone without regard to a religion, there is no constitutional violation. Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990). In Sasnett v. Litscher, 197 F.3d 290 (7th Cir. 1999), the court of appeals questioned whether Smith applies to prisoner claims, but in Koger v. Bryan, 523 F.3d 789, 796 (7th Cir. 2008), the court assumed that it did, at least in some cases. Id. To the extent Smith applies, plaintiff alleges that members

of other faiths are allowed to meet, so I will assume at this stage that defendants Thurmer and Appau were not applying a neutral and generally applicable rule to plaintiff's request.

The last question is whether the restriction of plaintiff's free exercise rights is reasonably related to a legitimate penological interest. O'Lone v. Estate of Shabazz, 482 U.S. 342, 350-51 (1987). Four factors are relevant to that determination: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether the prisoner retains alternatives for exercising the right; the impact that accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Turner v. Safley, 482 U.S. 78 (1987).

In the past, the court of appeals has upheld restrictions on group meetings on the ground that they raise security concerns. Kaufman, 419 F.3d at 683. However, the court of appeals has stated also that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest because an assessment under Turner requires a district court to evaluate the prison officials' particular reasons for the restriction, E.g., Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009) (holding that it was error for district court to conclude without evidentiary record that policy was reasonably related to legitimate interest); Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004) (same). Accordingly, I will allow plaintiff to proceed on

a claim that defendants Appau and Thurmer violated his constitutional right to practice his religion by refusing his request to engage in group study or worship.

B. Religious Items

The procedural posture of plaintiff's claim regarding the denied religious items is the same as his claim regarding group study or worship. Plaintiff made each of these requests while he was at the Waupun prison and has not made new requests at the New Lisbon prison. Thus, his claim for injunctive and declaratory relief under RLUIPA is moot with respect to defendants Appau and Thurmer and unripe with respect to anyone else. Further, he cannot sue the Wisconsin Department of Corrections under § 1983 because it is a state agency and he cannot sue defendant Raemisch under § 1983 because Raemisch was not personally involved in the decision to deny plaintiff's request for religious items.

With respect to his free exercise claim against defendants Appau and Thurmer, plaintiff alleges that he needs each of the requested items to exercise his religion properly and that similar items are permitted for members of other faiths. Although it seems unlikely that plaintiff requires such a large number of items, it is not the court's role to challenge the sincerity of plaintiff's religious beliefs, particularly at the pleading stage. Ortiz, 561 F.3d at 669 ("A person's religious beliefs are personal to that individual; they are not subject to restriction by the personal theological views of another."). Accordingly, I conclude that

plaintiff has adequately alleged that defendants Appau and Thurmer substantially burdened his religion by denying his requests and that they did not apply a neutral and generally applicable rule. Further, I cannot determine at this stage whether the restrictions on plaintiff's religious property are reasonably related to a legitimate penological interest. I will allow plaintiff to proceed on a claim that defendants Appau and Thurmer violated his constitutional right to practice his religion by denying his requests for religious items.

C. Religious Diet

Plaintiff's claim regarding "the offering and consumption" of pork is unripe as well. Plaintiff does not allege that he has asked *any* prison official about using pork as part of a religious exercise, so there is no decision that this court can review. He states in his complaint that the Wisconsin Department of Corrections will not provide pork as part of a religious diet unless it is "required by that religion." However, the exhibit that plaintiff cites for this proposition is a chart regarding religious property that does not include the quoted language or anything similar. Am. Cpt., dkt. #45, exh. 8. Plaintiff appears to be inferring that officials would deny a request to allow him to incorporate pork into his religious exercise because pork is not included on the chart like other food and drink such as sacramental wine and prayer bread. However, even if I assume that pork is "religious property" that would be addressed in the chart, as I noted in the June 15 order, there is no

indication that officials at individual prisons are prohibited from granting requests that go beyond what is listed in the chart. Borzych v. Frank, 2010 WL 1026977, *2 (W.D. Wis. 2010) (religious property chart represents "the minimum property items that inmates in approved umbrella religions may have access to or possess as religious personal property," but "each institution has the authority to apply [policy regarding religious property] in a manner consistent with their specific security levels and concerns."). And even if the chart binds wardens, the chart itself states that the Division of Adult Institutions "reserves the right to add, delete or change items in this chart whenever necessary," which means that plaintiff could request a change from the division.

Further, if plaintiff has not asked prison officials for pork, this means that he could not have exhausted his administrative remedies as required by 42 U.S.C. § 1997e(a). A prisoner must complete the grievance process even when he believes that his grievance will be denied. Booth v. Churner, 532 U.S. 731, 741 n.6 (2001). Although a prisoner's failure to exhaust his administrative remedies is an affirmative defense that normally must be proven by the defendants, a district court may raise an affirmative defense on its own if it is clear from the face of the complaint and any documents attached to it that the defense applies. Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002); 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).

D. Motion for Appointment of Counsel

In deciding whether to appoint counsel, I must first find that plaintiff has made a reasonable effort to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such an effort. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir.1992). Because plaintiff has attached to his motion copies of letters from several law firms declining to represent him in this case, he has made the necessary showing of having made a reasonable effort to find a lawyer on his own.

Second, I must consider both the complexity of the case and the plaintiff's ability to litigate it himself. Pruitt v. Mote, 503 F.3d 647, 655 (7th Cir. 2007). At this stage, it is too early to tell whether plaintiff has the ability to represent himself adequately in this case. His primary argument is that he needs a lawyer because he does not have the skill necessary to litigate a class action, but that concern is moot now that I have denied the motion for class certification. In addition, he argues that he is inexperienced and that his incarceration limits his ability to investigate the facts of his case. Both of these concerns apply to the vast majority of prisoner litigants, but that does not necessarily mean they are entitled to appointment of counsel in every case. Thus far, plaintiff has demonstrated his knowledge of procedural and substantive law and his ability to respond to court orders. Further, he does not identify a specific reason he will be hindered in conducting discovery. The facts

relevant to this case will involve evaluating the burden placed on plaintiff's religious exercise and the reasons for defendants' decisions. Plaintiff should have personal knowledge of the first issue and should be able to get the rest that he needs from defendants.

After defendants have answered the complaint, the court will schedule a telephonic pretrial conference with Magistrate Judge Stephen Crocker. At the conference, plaintiff will be given the opportunity to ask the magistrate judge any questions he has about litigating his case. In addition, plaintiff will be instructed about how to use discovery techniques available to all litigants under the Federal Rules of Civil Procedure so that he can gather the evidence he needs to prove his case. He will receive this court's procedures for filing or opposing dispositive motions and for calling witnesses, both of which were written for the very purpose of helping pro se litigants understand how these matters work.

In sum, at this early stage I conclude that plaintiff has not shown that he is incapable of prosecuting this case on his own in light of its complexity. His motion for appointment of counsel will be denied without prejudice to his refiling it at a later date.

ORDER

IT IS ORDERED that

1. Plaintiff Jonathan Liebzeit is GRANTED leave to proceed on the following claims:

(a) defendants Michael Thurmer and Sam Appau violated plaintiff's rights under the

free exercise clause by denying his request to engage in group religious exercise; and

(b) defendants Thurmer and Appau violated plaintiff's rights under the free exercise clause by refusing to allow him to possess these religious items:

(i) a Thor's Hammer emblem;
(ii) a "Rune Set with storage bag, Rune Lay Cloth, and Instruction Book";
(iii) a book called Poetic Edda;
(iv) a sacrificial bowl called a Bowli;
(v) mead;
(vi) a Mead Horn;
(vii) an evergreen twig;
(vii) an altar or "properly adorned table";
(ix) an altar cloth;
(x) Mjollnir;
(xi) an oath ring;
(xii) a Gandr;
(xii) "statues of gods and goddesses/religious art";
(xiv) candles;
(xv) a Sun Wheel; and
(xvi) a Hlath.

2. Plaintiff is DENIED leave to proceed with respect to his claim that defendants have refused to provide him with pork for religious use and with respect to all of his claims under the Religious Land Use and Institutionalized Persons Act. Because I am dismissing those claims on the ground that they are moot or unripe and not because plaintiff has failed to state a claim upon which relief may be granted, I will not issue a strike under 28 U.S.C. § 1915(g).

3. The complaint is DISMISSED as to defendants Wisconsin Department of

Corrections and Rick Raemisch.

4. Plaintiff's motion for appointment of counsel, dkt. #26, is DENIED.

5. 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 who will be representing 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 he has sent a copy to defendants or to defendants' attorney.

6. 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 documents.

7. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fees have been paid in full.

8. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of

this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 21st day of June, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge