IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARLON J. POWELL,

Plaintiff,

v.

RICK RAEMISCH, RANDY HEPP, MARIO GARCIA and JOHN C. SAMULESON,

Defendants.

OPINION AND ORDER

10-cv-202-bbc

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In this prisoner civil rights lawsuit, plaintiff Marlon Powell contends that defendants Mario Garcia and John C. Samuelson violated his First Amendment rights and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc-1(a)(1)-(2), by denying him access to food before sunrise and after sunset during the 2009 Ramadan holiday. Now before the court is defendants' motion for summary judgment. In addition, plaintiff has requested leave to file supplemental exhibits, dkt. #44. I will grant this request. Having considered the exhibits he attaches to that motion, I still conclude that defendants are entitled to summary judgment on his claims. Plaintiff has abandoned his RLUIPA claim and his First Amendment claim fails because defendants have shown that their decision to

take away his meal bag was reasonably related to a legitimate penological interest.

UNDISPUTED FACTS

Plaintiff Marlon J. Powell is a prisoner at the Jackson Correctional Institution. Defendant Mario Garcia is a correctional sergeant at the prison and defendant John Samuelson was a chaplain at the prison until December 2010.

At the Jackson Correctional Institution, food is generally served to the prisoners three times a day and must be consumed in the dining room. However, prisoners who choose Islam as their religious preference are allowed to participate in the traditional Ramadan fast, an Islamic celebration held during the ninth month of the Islamic lunar calendar. Ramadan fasting involves total abstinence from all food and drink during the daylight hours beginning at dawn and ending at sunset each day. Because typical meals are provided during daylight hours, participants in Ramadan would receive breakfast and supper "meal bags" instead of their typical three meals.

The 2009 Ramadan started August 22, 2009 and ended September 20, 2009. Plaintiff chose to participate in the 2009 Ramadan. The food items placed in the Ramadan meal bags in 2009 included one piece of fresh fruit, four ounces of juice, two boxes of cereal, one port cup of peanut butter, one port cup of jelly, two packets of sugar, one muffin, four slices of bread and two cartons of milk. The prisoners were required to report to the housing

unit's officer station to receive their breakfast meal bags, which would be available to inmates early each morning, before sunrise. At sunset the Ramadan participants would receive their supper bag.

The prison's guidelines for Ramadan in 2009 required that "[a]ll items from the Ramadan meal bag must be consumed or disposed of prior to the distribution of the next meal bag" and "[p]erishable food from each day's breakfast/supper bags must be consumed at the time the meal is being eaten." If a Ramadan participant failed to follow these rules, that prisoner could have his name removed from the Ramadan participant charts, which were used by prison officials to determine who could continue receiving meal bags. There were two charts, one for the breakfast meal and a separate one for the supper meal. A participant's name would be checked off for a given day as his meal bag was completed and placed on the cart for delivery to the housing units. Only the chaplain, defendant Samuelson, had the authority to remove an inmate from the Ramadan fast. Inmates removed from the fasting list for violating hoarding rules are not prohibited from participating in other Islamic religious activities or from participating in subsequent Ramadan fasts.

On August 31, 2009, defendant Garcia found excess food on top of plaintiff's locker in his cell during the day and gave plaintiff a warning for hoarding food in his cell. Garcia noted this warning in plaintiff's warning card, which is maintained on the housing unit.

(The parties dispute whether either defendant searched plaintiff's cell and confiscated additional food items on September 1, 2009.)

On September 2, 2009, Officer Adams searched plaintiff's room and found perishable foods in his possession. The food items found included three oranges, one apple, 18 sugar packets, two peanut butter packets, one jelly packet, three cookie bars, one butter packet, one packet of graham crackers and one ounce of salt in a baggy. Officer Adams disposed of the food items and wrote an incident report about the hoarded food. That incident report was referred to the chaplain's office for possible removal of plaintiff from the Ramadan participant list. (The parties dispute whether defendant Garcia told plaintiff that he was removing plaintiff from the Ramadan list.)

On September 3 or 4, 2009, a person with a "male voice" called the corrections food service leader, Krystal Brekke (then known as Krystal Paulson). As a result of this conversation, Brekke crossed plaintiff's name off the breakfast and supper meal bag charts and wrote "canceled" on the line corresponding with his name. (Brekke did not make a notation as to the identity of the person calling her and does not know who the person was.) On September 4 and September 5, 2009, plaintiff did not receive his meal bags. (The parties dispute whether plaintiff received any more meal bags during the 2009 Ramadan. According to plaintiff, he received no more. Defendants aver that plaintiff received meal bags from September 6 through September 11, 2009.) By September 11, 2009, at the latest, the food

service department removed plaintiff from the meal bag charts after defendant Samuelson told the department that plaintiff should be removed from the Ramadan participation list. Powell did not receive a meal bag for supper on September 11, 2009 and did not receive any additional meal bags. He would have been allowed to begin receiving regular institutional meals at that point. On September 15, 2009, Chaplain Myron Olson officially noted on the incident report that plaintiff was to be removed from the Ramadan list because of the hoarding incident on September 2, 2009. Plaintiff never received a conduct report. The guidelines provide that an inmate found hoarding is "subject to receiving a conduct report."

During the 2009 Ramadan fasting period, plaintiff placed canteen orders, on August 25 and September 8, 2009. On August 25, 2009, plaintiff received tortillas, brownies, corn chips, ramen soup, twizzlers, honey buns, popcorn and beef sticks. On September 8, 2009, plaintiff received soda, cheese curls, beans and rice, hard candy, sunflower kernels, summer sausage and ramen soup.

The prison's rule against hoarding food reduces the risk of insects and pests. It also prevents prisoners from accumulating excessive amounts of food, which could be used to barter with other prisoners or pay off debts. Hoarded food also poses a risk that prisoners will use the food to make hooch, a homemade intoxicant commonly made by prisoners using fruit and sugar-based food items. As an intoxicant, hooch could cause behavioral problems among prisoners using it. It also poses health risks because it can be made using rancid food

items and is sometimes made in the prisoner's toilets.

OPINION

A. RLUIPA Claim

In this case, I granted plaintiff leave to proceed on a claim that defendants have violated the the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc-1(a)(1)-(2). In the order screening plaintiff's claims, I noted that plaintiff did not mention RLUIPA, but allowed him to proceed on that claim anyway because it is not necessary to plead legal theories and the facts alleged supported claim for a RLUIPA violation. Dkt. #6, at 2, 11. In addition, although plaintiff did not state in his complaint that he intended to pursue injunctive or declaratory relief and other forms of relief are unavailable under RLUIPA, Sossamon v. Texas, ___ U.S. ___, 131 S.Ct. 1651, 1663 (2011); Nelson v. Miller, 570 F.3d 868, 883-89 (7th Cir. 2009), I let plaintiff proceed on the ground that it was unclear whether he may have intended to seek such relief. Dkt. #6, at 11.

Now the case has progressed and defendants have moved for summary judgment on plaintiff's RLUIPA claim, arguing that he cannot establish the basis for injunctive relief or other equitable relief. In response, plaintiff is silent. He does not attempt to identify any injunctive relief he believes he could pursue, suggest he intends to pursue declaratory relief or otherwise defend himself from dismissal of the RLUIPA claim.

By ignoring defendants' arguments altogether, plaintiff has abandoned his RLUIPA claim. Even if he hadn't, however, the facts show that injunctive relief is not available to plaintiff. It is undisputed that plaintiff will not be prohibited from participation in Ramadan in the future unless he attempts to hoard food. He has not suggested that he intends to hoard food or has any particular need to do so, so there is no reason to think his participation in Ramadan will be interfered with. As the Court of Appeals for the Seventh Circuit has explained, under RLUIPA a plaintiff may obtain injunctive relief only if he or she is able to show that another similar violation is likely to recur. Nelson, 570 F.3d at 880-83. Therefore, I will grant defendants' motion for summary judgment of plaintiff's claim that defendants violated RLUIPA by interfering with his participation in Ramadan.

B. First Amendment

Plaintiff contends that defendants violated the free exercise clause of the First Amendment by preventing him from receiving meal bags and thereby interfering with his ability to participate in Ramadan. Generally, First Amendment claims in prison are subject to Turner v. Safley, 482 U.S. 78 (1987), a case holding that restrictions on expression are acceptable in the prison setting if the restriction is reasonably related to a legitimate penological interest. However, for free exercise claims, courts often also require a showing that: (1) the plaintiff's claim involves "religious" beliefs that are "sincere"; (2) defendants

placed a "substantial burden" on the plaintiff's exercise of religion; (3) the plaintiff's claim involves a "central religious belief or practice"; and (4) the restriction targets the plaintiff's religion for adverse treatment and is not a neutral rule of general applicability. E.g., Borzych v. Frank, 2006 WL 3254497, *4 (W.D. Wis. 2006) (requiring all of these elements). It is unclear whether all of these are truly elements of a free exercise clause; as another judge from this district recently pointed out, current case law leaves open whether neutrality and a "substantial burden" are required for prisoners to show a First Amendment violation. Liebzeit v. Thurmer, 10-cv-170-slc, slip op, dkt. #129, at 16 (W.D. Wis. Jun. 13, 2011). The Court of Appeals for the Seventh Circuit has decided a free exercise claim by applying Turner without discussing any of the other possible elements. Ortiz v. Downey, 561 F.3d 664, 669 (7th Cir. 2009); see also Mayfield v. Texas Dept. of Criminal Justice, 529 F.3d 599, 608 (5th Cir. 2008) (applying Turner to prisoner free exercise claims without imposing other requirements).

It is not necessary to sort out the exact standard in this case, however. Undoubtedly, Turner applies in either context and the application of Turner disposes of the case. Thus it is not necessary to consider defendants' dubious argument that a prisoner whose religious exercise is limited as a disciplinary measure is not "substantially burdened" because he brought it upon himself. (They do not argue that plaintiff's belief is insincere or their rule was neutral.)

Under Turner, 482 U.S. at 89, whether a restriction on a prisoner's constitutional right is reasonably related to a legitimate penological interest depends on: (1) whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; (2) whether the prisoner has alternative ways to exercise the right; (3) how much of an impact accommodating the right will have on prison administration; and (4) whether there are other ways that prison officials can achieve the same goals without encroaching on the right.

It is undisputed that plaintiff was prevented from receiving further meal bags because he was found to have been "hoarding" food items after he had already been warned for doing so. Plaintiff takes some issue with this, arguing that he was not technically in violation of the rules when the food was found in his cell. However, the rules provided that plaintiff was required to consume all the food from his meal bag before the time he picked up the next meal bag, and the hoarded food was found after sunrise. Because Ramadan participants do not eat food between sunrise and sunset, any food found after sunrise creates a problem for plaintiff. To avoid violating the rule requiring plaintiff to consume the food before the next meal bag, plaintiff would have had to eat during sunlight hours, undermining the purpose of the meal bags. Under these circumstances, it is fair for prison officials to treat food left in a Ramadan participant's cell after sunrise as hoarded food. Moreover, as plaintiff himself acknowledges, the amounts and quantities of food that were found in his cell were from more

than a single meal bag.

Finally, even if defendants were in the wrong to have treated his food as having been "hoarded," the correctness of that decision is not important; prison officials decided that he had violated the rules, and the question now is whether their decision to take him off the Ramadan participation list after that violation was "reasonably related to a legitimate penological interest." The mere fact that they may have been wrong to treat his food as hoarded is not enough of a reason to undermine a conclusion that there may be a "valid, rational connection" between the religious restriction imposed and legitimate concerns of the prison.

The same reasoning undermines plaintiff's point that he stopped receiving meal bags before he should have under the prison's rules because someone authorized the removal before the chaplain. It is not important whether the prison followed their own rules; plaintiff's claim that he did not receive adequate process before losing meal bags was dismissed at the pleading stage for other reasons (losing meal bags is not "atypical and significant" as required under current law). At this point, all that matters is whether the prison's decision to cut him off from meal bags were made after it was discovered that he had hoarded food. It matters not whether the chaplain signed off on it or whether some individuals in the prison still believed plaintiff's meal bags should not have been cut off when they were. Cf. Hammer v. Ashcroft, 570 F.3d 798, 803 (7th Cir. 2009) (The test in Turner

is an "objective inquiry," so actual motive does not matter).

On the first factor to consider under Turner, defendants have more than met their burden to show that there is a "valid, rational connection" between removal from the Ramadan participant list after hoarding and a legitimate government interest. As defendants explain a prisoner's removal from the Ramadan list after having been found hoarding food prevents the prisoner from continuing to use the meal bag system as a way to hoard food. Reducing opportunities for prisoners to hoard food after they have been caught doing so makes good sense; it helps avoid sanitation issues and reduces the opportunities a prisoner may have to make intoxicants using the hoarded food. The desire to keep cells free of rotting food or pests and keep intoxicants out of the hands of prisoners are undoubtedly legitimate concerns of the prison and there is a rational connection between that interest and efforts to stop food hoarders who might bring about these problems by blocking one avenue available to them.

The next question is whether the prisoner has another way of exercising the right. Defendants show that they do. The answer is not: "avoid hoarding," as defendants seem to suggest. The present case involves people who have failed to avoid hoarding, and the question is, as to these individuals, are there other ways of exercising the right? (Remember, this is but one factor among others.) As defendants point out, these prisoners are able to fast even without collecting meal bags, although it may be more difficult. Prisoners are allowed

to purchase other food items from canteen and consume those items between sunset and sunrise, meaning prisoners may partake in the month-long fast while still receiving some nourishment each day. Moreover, although the canteen items defendants identify as having been purchased by plaintiff do not seem particularly healthy or plentiful, there is no reason to think plaintiff would not be able to purchase enough food from canteen to make Ramadan tolerable. Indeed, plaintiff managed to continue participating in Ramadan despite losing meal bags, suggesting that even his canteen was adequate to make fasting tolerable.

The third and fourth factors also weigh in defendants' favor. Plaintiff does not identify any workable accommodation as such, but does suggest that hoarders should be given a conduct report *instead* of being blocked from meal bags. To allow this would probably undermine attempts to restrict hoarding because so long as prisoners known to hoard could maintain access to food to hoard, the risk of hoarding would remain despite the threat of getting caught and disciplined. Consider: plaintiff was caught hoarding food and warned, but despite this warning and what he apparently believed was a chance of a conduct report, he hoarded food again. Perhaps with heightened supervision over known hoarders there would be less risk of reoffending, but that would require additional resources and there is no reason to think such resources are available to the prison. Indeed, there is no reason to think the prison could effectively prevent hoarding by known hoarders without cutting off their access to meal bags. (Plaintiff does not argue that the length of the restriction could

be shorter, but if he had it would be a hard argument to make. Defendants' restriction lasts only a single Ramadan season; the next year a prisoner may participate again. Any shorter restriction could reopen an ongoing threat of hoarding.)

Defendants' decision to cut plaintiff off from meal bags during 2009 Ramadan may have made it more difficult for plaintiff to practice that religious excercise, but that decision did not violate plaintiff's First Amendment rights. Under Turner, defendants' decision to stop a known hoarder by cutting off his meal bags was reasonably related to the legitimate penological interest of preventing hoarding and all the problems that may accompany it. Therefore, defendants are entitled to summary judgment on plaintiff's First Amendment claims against them.

ORDER

IT IS ORDERED that:

1. The motion for leave to file supplemental exhibits filed by plaintiff Marlon J. Powell, dkt. #44, is GRANTED.

2. The motion for summary judgment filed by defendants Mario Garcia and John Samuelson, dkt. #19, is GRANTED.

3. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 20th day of June, 2011.

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