

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

DEREK S. KRAMER,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS,
RICK RAEMISCH, WILLIAM POLLARD,
DENNIS MOSHER and PETER HUIBREGTSE,

Defendants.

OPINION and ORDER

10-cv-224-slc

Pro se plaintiff Derek Kramer has filed a proposed second amended complaint in this prisoner civil rights case. Dkt. # 15. In an order dated June 21, 2010, I screened plaintiff's first amended complaint and allowed him to proceed on the following claims:

(a) defendants William Pollard and Dennis Mosher violated plaintiff's rights under the free exercise clause by denying his request to engage in group religious exercise;

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

- (i) runes and rune cards;
- (ii) a hlath;
- (iii) "runic study books";
- (iv) an altar for use in religious ceremonies;

- (v) an altar cloth;
- (vi) “a blessing bowl”;
- (vii) a ritual drinking horn;
- (viii) candles;
- (ix) a rune staff;
- (x) a Thor’s Hammer;
- (xi) mead;
- (xii) images of Gods for use in sacred rituals;
- (xiii) an oath ring for swearing an oath to the gods;
- (xiv) an evergreen twig for “dispensing the blessings and protections of the gods;” and
- (xv) a sun wheel;

(c) defendants Wisconsin Department of Corrections, Rick Raemisch and Peter Huibregtse are violating plaintiff’s rights under the Religious Land Use and Institutionalized Persons Act and the free exercise clause by refusing to allow him to keep a Thor’s Hammer emblem while in segregation.

Dkt. #7.

However, I dismissed several of plaintiff’s claims as moot or not ripe. First, I dismissed the complaint as to plaintiff’s claim that the Wisconsin Department of Corrections refused to provide pork as part of a religious diet because plaintiff had not alleged that he had asked any prison officials to accommodate such a request. This meant that plaintiff’s claim was not ready for decision and that he had failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). Second, I dismissed the complaint as to plaintiff’s request for an injunction under RLUIPA to require defendants to permit him to engage in group worship and to possess the religious items listed above. The problem was that plaintiff made his request for group study or worship while he was

incarcerated at the Green Bay Correctional Institution, but he has since been transferred to the Wisconsin Secure Program Facility in Boscobel. Thus, officials at the Green Bay prison no longer have the authority to provide him relief. Further, because plaintiff has not made these religious requests at the Boscobel prison, his claim for injunctive relief is not ripe with respect to prison officials there. Finally, because plaintiff had not identified any policies of the Department of Corrections that would prohibit officials at particular prisons from granting plaintiff's requests, department officials were not appropriate defendants either.

After the screening order was issued, plaintiff filed a motion for reconsideration, dkt. #10, *and* a motion for leave to amend his complaint. Dkt. #9. In an order dated June 30, 2010, dkt. #11, I told plaintiff that he may seek reconsideration of the screening order *or* he may amend his complaint, but he could not do both at the same time. Accordingly, I gave plaintiff a deadline to file a second amended complaint that complied with this court's procedures. If he did not file such a complaint, I would take the motion for reconsideration under advisement. Now that plaintiff has filed a proposed second amended complaint, I will deny his motion for reconsideration as moot. Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999) (“[W]hen a plaintiff files an amended complaint, the new complaint supersedes all previous complaints and controls the case from that point forward.”)

Plaintiff's second amended complaint is similar to the previous complaint: it includes all of the claims on which I allowed him to proceed in the June 21 order. In

addition, it includes new allegations adding more defendants, adding claims under the equal protection clause and attempting to revive dismissed claims. I will accept plaintiff's proposed second amended complaint as the operative pleading and I will allow him to proceed against the new defendants and on a claim under the equal protection clause. However, I decline to allow plaintiff to proceed on the claims I concluded were moot or not ripe.

OPINION

A. Reviving Dismissed Claims

1. Consumption of pork at religious feasts

Plaintiff includes new allegations in his second amended complaint to address the problems related to ripeness and exhaustion. With respect to ripeness, he alleges that he filed a "Request for New Religious Practice," in which he asked that "pork be served at feasts." Dkt. #15, ¶ 71. In the exhibit he cites, he wrote:

It is further requested that HAM/PORK be included in with the FEAST MEAL. This is in keeping with the DAI Policy 309.61.01 (page 9), Section 11.F. Special Religious Feasts/Meals, which states that once a year the proposed ASATRU UMBRELLA GROUP can be provided a yearly Feast and that SYMBOLIC FOODS should be included.

Dkt. #5, exh. 4. (Plaintiff did not attach any exhibits to his second amended complaint, but he cites the same exhibits that he attached to his first amended complaint.) Plaintiff does

not include allegations about any of the defendants' responses to his request, but I will assume for the purpose of this opinion that one or more defendants denied the request.

With respect to exhaustion, he alleges that he filed a grievance on September 11, 2008, in which he complained that he was denied "pork for worship." Dkt. #15, ¶ 79. However, the grievance he cites contradicts that allegation. Dkt. #5, exh. 6. The grievance raises various issues, but neither the grievance nor the response to it says anything about pork in particular, or religious feasts generally. "[W]here an exhibit conflicts with the allegations of the complaint, the exhibit typically controls." Massey v. Merrill Lynch & Co., Inc., 464 F.3d 642, 645 (7th Cir. 2006). As I noted in the June 21 order, a prisoner's failure to exhaust his administrative remedies is an affirmative defense that normally must be proven by the defendants, but 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). Accordingly, plaintiff may not proceed on a claim that defendants denied his request to have pork at religious feasts. If he wishes to pursue that claim, he must file a new lawsuit after he has exhausted his administrative remedies in compliance with 42 U.S.C. § 1997e(a).

2. Group Worship and Religious Items

Plaintiff has not included any new allegations in his second amended complaint showing that I erred in concluding that many of his requests for injunctive relief are moot or not ripe. Plaintiff does not allege that he has made any religious requests since being transferred to the Boscobel prison, with the exception of his request for a Thor's Hammer emblem while housed in segregation. Because plaintiff does not identify any policies of the Department of Corrections or the Boscobel prison that would prohibit prison officials at the Boscobel prison from approving any of his requests, it would be premature to issue an injunction before plaintiff gives those officials an opportunity to consider those requests.

Plaintiff seems to believe that it would be appropriate to issue a statewide injunction against officials at the Department of Corrections, but I disagree for two reasons. First, plaintiff has not identified any department policies that prevent individual wardens from allowing particular groups to congregate or allowing individual prisoners to possess certain objects, so plaintiff cannot argue successfully that any policy of the department is substantially burdening his religious exercise. It may be that officials at plaintiff's former prison relied on the department's policies regarding religious "umbrella groups" and religious property, but that does not mean that the warden's or chaplain's decisions can be imputed to the department. As explained in previous orders, the policy on umbrella groups sets forth the department's view of the major religious groups in Wisconsin prisons, but it does not

prohibit officials at particular prisons from allowing other groups to meet. The religious property chart sets forth the religious property that prisoners are presumptively allowed, but it does not establish a limit. Thus, if the warden or chaplain cited these policies in denying plaintiff's requests, that is a decision of the warden or chaplain, not the department.

Second, even if department policies did prohibit each of plaintiff's requests, this would not mean he would be entitled to an injunction before he seeks relief from Boscobel prison officials. "[A] plaintiff must show that a favorable decision will likely, not just speculatively, relieve [his] injury." Sierra Club v. Franklin County Power of Illinois, LLC, 546 F.3d 918, 927-28 (7th Cir. 2008). For the purpose of his claims for injunctive relief, plaintiff's injuries are that he is unable to engage in group worship and possess certain religious items. However, declaring department policies to be unlawful could not redress those injuries. That is, even if the department were enjoined from enforcing department policies, plaintiff would still need to obtain permission to engage in group worship or possess religious items from officials at the Boscobel prison, who might have different reasons than the department, reasons specific to that prison, for denying plaintiff's requests. Thus, before plaintiff would be entitled to relief, he would have to file a second lawsuit if Boscobel prison officials did not agree to his demands.

Accordingly, I adhere to my conclusion that plaintiff may not obtain an injunction under RLUIPA or the free exercise clause on his claims that defendants are prohibiting him

from engaging in group worship and possessing certain religious items. Before plaintiff may seek relief in court on this claim, he must request relief from the Boscobel prison officials.

B. Equal Protection Claims

Plaintiff alleges in his second amended complaint that defendants at the Green Bay prison allowed similarly situated members of other faiths to engage in group worship and possess religious items and that defendants at the Boscobel prison allow prisoners of other faiths to keep religious emblems while they are housed in segregation. Accordingly, I will allow plaintiff to proceed on claims under the equal protection clause. At summary judgment or trial, plaintiff will have to show that “defendant[s] [were] treating members of some religious faiths more favorably [than him] without a secular reason for doing so.” Goodvine v. Swickatowski, No. 08-cv-702-bbc, 2010 WL 55848, *3 (W.D. Wis. Jan. 5, 2010). See also Ashcroft v. Iqbal, 129 S.Ct. 1937, 1948-49 (2009) (“Where the claim is invidious discrimination . . . our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose” and that defendant “undert[ook] a course of action because of, not merely in spite of, the action's adverse effects upon an identifiable group.”)

C. Additional Defendants

Plaintiff includes six new defendants in his second amended complaint: Michael Clements, Michael Donovan, Tom Gozinske, Ellen Ray, Michael Mohr and Gary Boughton. He alleges that defendants Clements, Donovan, Mohr and Gozinske were involved in the decision at the Green Bay prison to deny his request for Odinist group worship and Odinist religious items. He alleges that defendants Ray and Boughton were involved in the decision to deny his request for a Thor's Hammer emblem while housed in segregation at the Boscobel prison. Accordingly, I will add defendants Clements, Donovan, Mohr and Gozinske to plaintiff's claim under the free exercise clause at the Green Bay prison and defendants Ray and Boughton to plaintiff's RLUIPA and free exercise claim at the Boscobel prison.

ORDER

IT IS ORDERED that

1. Plaintiff Derek Kramer's second amended complaint, dkt. #15, is ACCEPTED as the operative pleading in this case.
2. Plaintiff's motion for reconsideration, dkt. #10, is DENIED as moot.
3. Plaintiff is GRANTED leave to proceed on the following claims:
 - (a) defendants William Pollard, Dennis Mosher, Michael Clements, Michael

Donovan, Michael Mohr and Tom Gozinske violated plaintiff's rights under the free exercise clause and the equal protection clause by denying his request to engage in group religious exercise;

(b) defendants Pollard, Mosher, Clements, Donovan, Mohr and Gozinske violated plaintiff's rights under the free exercise clause and the equal protection clause by refusing to allow him to possess these religious items:

- (i) runes and rune cards;
- (ii) a hlath;
- (iii) "runic study books";
- (iv) an altar for use in religious ceremonies;
- (v) an altar cloth;
- (vi) "a blessing bowl";
- (vii) a ritual drinking horn;
- (viii) candles;
- (ix) a rune staff;
- (x) a Thor's Hammer;
- (xi) mead;
- (xii) images of Gods for use in sacred rituals;
- (xiii) an oath ring for swearing an oath to the gods;
- (xiv) an evergreen twig for "dispensing the blessings and protections of the gods;" and
- (xv) a sun wheel;

(c) defendants Wisconsin Department of Corrections, Rick Raemisch, Peter Huibregtse, Ellen Ray and Gary Boughton are violating plaintiff's rights under the Religious Land Use and Institutionalized Persons Act, the free exercise clause and the equal protection by refusing to allow him to keep a Thor's Hammer emblem while in segregation.

4. Plaintiff is DENIED leave to proceed on all other claims.

5. 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 defendants Clements, Gozinske, Mohr, Ray, Boughton and Donovan. 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. Defendants Wisconsin Department of Corrections, Raemisch, Pollard, Mosher and Huibregtse may file their answer at the same time.

Entered this 23d day of July, 2010.

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