IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEE CROUTHERS a/k/a
KHENTI AMENTI-BEY,

Plaintiff,

OPINION and ORDER

10-cv-308-bbc

v.

SHELLEY ZAGER and KURT PAQUETTE,

Defendants.[1]

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In this prisoner civil rights case, pro se plaintiff Lee Crouthers contends that defendants Shelley Zager and Kurt Paquette, both correctional officers, prohibited him from attending a religious feast being held in the prison, in violation of his rights under the Religious Land Use and Institutionalized Persons Act, the free exercise clause of the First Amendment and Wis. Stat. § 301.33. In particular, plaintiff alleges that defendants refused to let him out of his cell so that he could attend Eid ul Fitur, a congregate prayer and feast

[1] In his complaint, plaintiff identified these defendants "Zagar" and "Paquett." I have amended the caption to reflect defendants' full names and correct spelling, as identified in their summary judgment materials.

that marks the end of Ramadan. Defendants say that they unlocked plaintiff's cell from the control room at the same time as the other attendees and they refused to open it a second time because of policies about limiting unnecessary inmate movement.

The parties' cross motions for summary judgment are ready for decision. In his summary judgment submissions, plaintiff discusses claims and defendants that I dismissed in the order screening his complaint under 28 U.S.C. §§ 1915 and 1915A. I have given no consideration to those issues because they are outside the current scope of the lawsuit. If plaintiff believed that aspects of the screening order were incorrect, he could have filed a motion for reconsideration, but he declined to do so.

Plaintiff's situation is an unfortunate one. He alleges that, through no fault of his own, he was deprived of the opportunity that many other prisoners were given to attend a religious feast and that defendants refused to remedy the situation after they became aware of the problem. Perhaps plaintiff is correct that defendants acted unreasonably in refusing to allow him to attend, but that is not enough to show that defendants violated his constitutional and statutory rights to practice his religion. Because each of plaintiff's claims has a fatal defect, I must grant defendants' motion for summary judgment and deny plaintiff's motion.

OPINION

Plaintiff's RLUIPA claim is moot. Under Nelson v. Miller, 570 F.3d 868, 883-89 (7th Cir. 2009), prisoners are not entitled to money damages under RLUIPA, whether or not the claim is brought against a defendant in his official or individual capacity. Thus, the only relief plaintiff could obtain on this claim is an injunction or a declaration. However, that type of relief is not available unless there is some likelihood that defendants will prohibit plaintiff from exercising his religion in the future. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) ("threat of injury must be both real and immediate, not conjectural or hypothetical") (internal quotations omitted). Even if I assume that defendants would like to impede plaintiff's religious exercise, they would have no ability to do so at this time. Plaintiff has been transferred to a different prison, an event that usually moots a prisoner's request for an injunction or declaration, at least when he is complaining about conduct specific to a particular prison. 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."). Because plaintiff identifies no reason why either defendant is likely to have any control over his religious exercise in the future, I must dismiss his RLUIPA claim.

Plaintiff's free exercise claim has multiple problems. First, plaintiff has not adduced any evidence showing that being unable to attend the feast imposed a substantial burden on his religious exercise, which is one of the elements of this claim. Koger v. Bryan, 523 F.3d

789, 798-99 (7th Cir. 2008); Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005). Plaintiff attaches to his affidavit a document discussing Eid ul Fitur, but he does not explain the connection between the feast and *his* religious exercise and beliefs, which is all that matters. Koger, 523 F.3d at 797-98 (no RLUIPA violation unless plaintiff shows defendants burdened his "sincerely held religious beliefs"). In his affidavit, he discusses the importance of Ramadan to his faith, Plt.'s Aff. ¶ 5, dkt. #14, but he says nothing about the significance of Eid ul Fitur or any religious feast.

Second, even if I assume that defendants substantially burdened plaintiff's religious exercise, he has not adduced any evidence on a second element of his claim, which is that defendants were targeting his religion. Under Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990), even if a plaintiff's ability to practice his religion has been hindered by the government, there is no free exercise violation if defendants were treating plaintiff in accordance with a generally applicable rule without regard to his religion. In one case, the Court of Appeals for the Seventh Circuit questioned whether Smith applies to prisoners, but the court did not resolve the matter. Sasnett v. Litscher, 197 F.3d 290 (7th Cir. 1999). In a more recent case, the court assumed that no violation occurs in "cases arising under the Free Exercise Clause of the First Amendment . . . where the burden on the prisoner results from a rule of general applicability." Koger, 523 F.3d at 796 (internal quotations omitted). Because I see no reason why the Supreme Court

would eliminate an element in prisoner claims that applies to everyone else, I will continue to apply Smith to all free exercise claims until the court of the appeals or the Supreme Court holds otherwise.

In this case, plaintiff has not adduced any evidence to suggest that defendants were discriminating against him because of his religious beliefs. After all, it is undisputed that defendants let out many other Muslim prisoners so that they could attend the feast. At the summary judgment stage, I must accept as true plaintiff's allegation that defendants did not unlock his cell door at the same time as the other prisoners, Hemsworth v. Quotesmith.Com, Inc., 476 F.3d 487, 489 (7th Cir. 2007), but plaintiff does not suggest that this was anything but an accident or an oversight. In fact, plaintiff concedes in his affidavit that no similar incidents with defendants had occurred in the past. Plt.'s Aff. ¶ 6, dkt. #14.

Plaintiff has submitted affidavits from several prisoners housed near him to show that defendants knew that they had made a mistake. One problem with the affidavits is that none of the prisoners aver that they told *defendants* that plaintiff's cell door had not opened. Rather, the prisoners refer to other officials or to "staff" generally. Plt's Aff., exhs. A-D, dkt. #15. In any event, even if I assume that defendants knew the mistake was theirs and not plaintiff's, this does not support a conclusion that defendants were treating plaintiff differently because of his religion. It may tend to show that defendants are insensitive or unfair, but that is not enough to show a violation of the free exercise clause.

Finally, with respect to plaintiff's claim under Wis. Stat. § 301.33(2), I assumed in the screening order that religious feasts are included in the meaning of "sacraments" that are guaranteed to prisoners in the statute. However, I instructed plaintiff in the screening order that "it will be his burden to show that the Wisconsin legislature intended to create a private right of action under the statute against prison staff members." Dkt. #8 (citing Kranzush v. Badger State Mutual Casualty Co., 103 Wis. 2d 56, 74-79, 307 N.W.2d 256, 266-68 (1981) (right of action to enforce statute or regulation does not exist unless directed or implied by legislature)). Plaintiff has not made this showing or even attempted to do so. The statute does not include an enforcement mechanism or specify any remedies for violations. Generally, this means that injured parties who wish to enforce the law must do so by filing a writ of certiorari in state court. Outagamie County v. Smith, 38 Wis. 2d 24, 34, 155 N.W.2d 639, 645 (1968) (with respect to laws that are not made enforceable by statute expressly, action is reviewable only by certiorari). Accordingly, this claim must be dismissed as well.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Shelley Zager and Kurt Paquette, dkt. #23, is GRANTED, and plaintiff Lee Crouthers's motion for summary judgment, dkt. #20, is DENIED. The clerk of court is directed to enter judgment

in favor of defendants and close this case.

Entered this 28th day of February, 2011.

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