IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MALCOLM W. HOLLIMAN,

OPINION and ORDER

Plaintiff,

10-cv-443-slc[1]

v.

JOHN PAQUIN, LYNDA SCHWANDT,
CHAPLAIN KUHENS,
UNIT MANAGER WINKLESKI,
CAPT. J. ANDERSON, CAPT. HESSELBERG,
CAPT. JORGERSON, CAPT. STICH,
LT. SKIME AND C/O HAYES,

Defendants.

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Plaintiff Malcolm Holliman has responded to this court's September 16, 2010 order directing him to choose one of four options because his complaint violated Fed. R. Civ. P. 20:

> Option # 1: Proceed with his religion claims in this lawsuit. All other claims will be dismissed without prejudice to plaintiff's refiling them in a different lawsuit.
>
> Option # 2: Proceed with his claim that defendants Skime and Winkleski put

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

him under investigation and threatened to put him in segregation after he complained about cameras in the bathroom. All other claims will be dismissed without prejudice to his refiling them in a different lawsuit.

Option # 3: Proceed with the claims in Option # 1 and Option # 2. If he chooses this option, he will be required to pay a separate filing fee for the second lawsuit. In addition, he may be subjected to a separate strike for each of the separate lawsuits that he pursues if any claim in the lawsuit is dismissed for failure to state a claim upon which relief may be granted or because it is legally meritless. As plaintiff may be aware, once a prisoner receives three strikes, he is not able to proceed in new lawsuits without first paying the full filing fee except in very narrow circumstances. 28 U.S.C. § 1915(g).

Option # 4: File an amended complaint that complies with Rule 8 and Rule 20. Plaintiff should choose this option only if he has additional facts to show that more of his claims may be joined under Rule 20 (because they are part of the same transaction or series or transactions) and satisfy review under Rule 8 (because they rise above the level of speculation). If plaintiff chooses this route, he must file an amended complaint that replaces the original complaint.

In his response, he writes that he "fully understand[s] [his] options and will proceed with option 1." Dkt. #14. Accordingly, I will screen plaintiff's religion claims under 28 U.S.C. § 1915 and dismiss the complaint as to all other claims. Plaintiff may refile those other claims at a later date in a new lawsuit if he wishes.

Plaintiff's remaining claims are against defendant John Paquin (the warden of Prairie du Chien Correctional Institution) and defendant Kuhens (the chaplain for the prison) for putting burdens on his ability to practice his faith of Islam and for demonstrating a preference for Christian prisoners. In particular, plaintiff is asserting the following four claims:

(1) defendants Paquin and and Kuhens violated plaintiff's rights under the establishment clause because they have refused to remove or cover various Christian symbols throughout Prairie du Chien Correctional Institution, where plaintiff was formerly housed;

(2) defendants Paquin and Kuhens have substantially burdened plaintiff's ability to practice his Muslim faith by forcing him to worship in a room that has "images of animated creatures" or "other religious symbols," in violation of the free exercise clause and the Religious Land Use and Institutionalized Persons Act;

(3) defendants Paquin and Kuhens have substantially burdened plaintiff's ability to practice his Muslim faith by allowing staff to walk through the room during Jumu'ah services, have loud conversations and make other "disruptive" noises, in violation of the free exercise clause and the Religious Land Use and Institutionalized Persons Act;

(4) defendant Paquin and Kuhens have violated the establishment clause and the equal protection clause by providing a state employee to lead Christian prisoners in Bible study, but failing to do the same for Muslim prisoners;

Because each of these claims states a claim which relief may be granted, I will allow plaintiff to proceed. However, plaintiff's motion for appointment of counsel will be denied as premature.

DISCUSSION

A. Screening under § 1915

1. Establishment clause and equal protection clause

Plaintiff has two claims in which he asserts that defendants treated adherents of other

religions more favorably than Muslim prisoners like him. First, he alleges that defendants placed Christian imagery and symbolism in common areas of the prison. Second, he alleges that defendants provide a staff member to Christian prisoners to lead group study, but defendants do not provide this service to Muslim prisoners.

The First Amendment prohibits the government from taking action "respecting an establishment of religion." In interpreting the establishment clause, the Court of Appeals for the Seventh Circuit uses the test that was articulated first in Lemon v. Kurtzman, 403 U.S. 602 (1971). See also Milwaukee Deputy Sheriffs' Association v. Clarke, 588 F.3d 523 (7th Cir. 2009) (applying Lemon); Vision Church v. Village of Long Grove, 468 F.3d 975, 991-92 (7th Cir. 2006) (same). Under Lemon, government action violates the establishment clause if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion; or (3) it fosters an excessive entanglement with religion.

The court of appeals sometimes describes the first two parts of the Lemon test as the "endorsement test." E.g., Linnemeir v. Board of Trustees of Purdue University, 260 F.3d 757, 764 (7th Cir. 2001) (Lemon test requires courts to "determin[e] . . . whether [government action] constitutes an impermissible endorsement or disapproval of religion"); Freedom from Religion Foundation, Inc. v. City of Marshfield, Wisconsin, 203 F.3d 487, 493 (7th Cir. 2000) (purpose of Lemon test is "to determine whether government action constitutes an endorsement of religion"). This means that "Lemon's inquiry as to the

purpose and effect of [government action] requires courts to examine whether government's purpose is to endorse religion and whether the [government] actually conveys a message of endorsement." Wallace, 472 U.S. at 69. See also Allegheny, 492 U.S. at 592 ("[W]e have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence.")

Neither the Supreme Court nor the court of appeals has held expressly that the same standard applies to claims brought by prisoners, but the court of appeals has assumed on several occasions that it does. E.g., Nelson v. Miller, 570 F.3d 868, 881 (7th Cir. 2009); Kaufman v. McCaughtry, 419 F.3d 678, 683-84 (7th Cir. 2005). I will do the same.

Both of plaintiffs' claims state a claim upon which relief may be granted. Displaying Christian symbolism on public property may violate the establishment clause under some circumstances. Compare Van Orden v. Perry, 545 U.S. 677 (2005) (monument of Ten Commandments on public property did not violate establishment clause), with McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 877 (2005) (monument of Ten Commandments on public property violated establishment clause). The question for summary judgment or trial will be whether a reasonable observer would view defendants' conduct as an endorsement of Christianity.

With respect to the study group leader, the Supreme Court held in Cruz v. Beto, 405

U.S. 319, 322 (1972), that prison officials must give each prisoner "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to [other] religious precepts." However, the Court qualified that statement by saying that members of different faiths are not entitled to receive identical treatment in every case. Id. ("A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest or minister be provided without regard to the extent of the demand."). Under both the equal protection clause and the establishment clause, the key question is whether the defendants were treating members of some religious faiths more favorably without a secular reason for doing so. Goodvine v. Swiekatowski, No. 08-cv-702-bbc, 2010 WL 55848, *3 (W.D. Wis. Jan. 5, 2010); see also Board of Education of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."). If plaintiff is correct that defendants are providing a group study leader for Christians but not Muslims, the question for summary judgment or trial will be whether defendants have a secular reason for the differential treatment.

2. Free Exercise Clause and RLUIPA

Plaintiff alleges that defendants have burdened his religious exercise in two ways. First, plaintiff says that defendants have forced him to worship in a room that has "images of animated creatures" or "other religious symbols." This puts a burden on his religious exercise because it is "impermissible" in Islam for these depictions to be present during Jumu'ah and Sa'alim, two weekly Muslim services. Second, defendants allow staff to walk through the room during Jumu'ah services, have loud conversations and make other "disruptive" noises, even though silence is required during the service.

a. RLUIPA

Under RLUIPA plaintiff has the initial burden to show that he has a sincere religious belief and that his religious exercise was substantially burdened. Koger v. Bryan, 523 F.3d 789, 797-98 (7th Cir. 2008); Vision Church v. Village of Long Grove, 468 F.3d 975, 996-97 (7th Cir. 2006). 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). Because plaintiff alleges that he is a Muslim and that it violates his religious beliefs to worship under the alleged conditions, it is reasonable to infer at this stage that his religious exercise was substantially burdened. If plaintiff shows at summary judgment or trial that

defendants substantially burdened his sincerely held beliefs, the burden will shift to defendants to show that their actions further "a compelling governmental interest," and do so by "the least restrictive means." Cutter v. Wilkinson, 544 U.S. 709, 712 (2005).

Plaintiff should be aware that he may not obtain monetary relief under RLUIPA. Nelson v. Miller, 570 F.3d 868, 883-89 (7th Cir. 2009). Further, a possibility exists that injunctive relief may be moot, on this claim and his other claims as well. The alleged violations occurred while he was housed at the Prairie du Chien Correctional Institution but he is now housed at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Generally, "[w]hen 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." Lehn v. Holmes, 364 F.3d 862, 871 (7th Cir. 2004). In this case, plaintiff alleges that he has been transferred back and forth between Prairie du Chien and Boscobel multiple times, so it is reasonable to infer at this stage of the proceedings that plaintiff may be subjected to the same conditions again. However, if defendants can show at summary judgment or trial that plaintiff is unlikely to be transferred back to Prairie du Chien, this claim may be moot.

b. Free exercise clause

The court of appeals has applied the same "substantial burden" test to free exercise

claims brought by prisoners as it applies to RLUIPA claims. E.g., Koger, 523 F.3d at 798-99; Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005). Because I have concluded that it is reasonable to infer from plaintiff's allegations that his religious exercise was substantially burdened for the purpose of his RLUIPA claims, I reach the same conclusion with respect to his claims under the free exercise clause.

Generally, the next question under the free exercise clause is whether the burden is one that applies equally to everyone or whether it targets plaintiff's beliefs in particular; if the rule applies to everyone without regard to a particular 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, 523 F.3d at 796, the court assumed that it did, at least in some cases. Id. To the extent Smith applies, I will assume at this stage that defendants did not act under a generally applicable rule.

Finally, actions by prison officials do not violate the Constitution if they are 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). Because an assessment under this test requires a district court to evaluate the prison officials' reasons for the restriction, the Court of Appeals for the Seventh Circuit has suggested that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest. 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 his claims under the free exercise clause.

B. Motion for Appointment of Counsel

Accompanying plaintiff's complaint is a motion for appointment of counsel. Dkt. #4. The Court of Appeals for the Seventh Circuit has held that before a district court can consider such motions, it must first find that the plaintiff made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers who he asked to represent him in this case and who turned him down.

Because plaintiff has not complied with that requirement, his motion will be denied.

C. Questions Raised in Plaintiff's Response

Finally, I will address three questions that plaintiff included in his response to the September 16 order:

> (1) How long from the date of the incident do I have to refile my claim?
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> (2) If someone with the same claim as [me] against the same defendant wanted to join with me in my retaliat[ion]claim, would we have to both pay a filing fee?
>
> (3) If I'm released before I refile and have no monies, can I still request leave to proceed in forma pauperis?

Dkt. #14, at 1.

I cannot answer plaintiff's first question because there are many facts that can affect the timeliness of a claim. Generally, claims brought under 42 U.S.C. § 1983 that arise in Wisconsin have a six-year statute of limitations. Reget v. City of La Crosse, 595 F.3d 691, 694 (7th Cir. 2010); Wudtke v. Davel, 128 F.3d 1057, 1061 (7th Cir. 1997). The clock starts running "when the prospective plaintiff discovers (or should if diligent have discovered) both the injury that gives rise to his claim and the injurer." Jay E. Hayden Foundation v. First Neighbor Bank, N.A., 610 F.3d 382, 386 (7th Cir. 2010). However, even if a claim is filed within the limitations period, a defendant may assert other defenses, such as laches or a failure to file a timely grievance with the prison, as required by 42 U.S.C.

§ 1997e(a). It is ultimately plaintiff's responsibility to determine when he should bring a claim.

The answer to plaintiff's second question is yes. If multiple prisoners join their claims in one lawsuit, each plaintiff must pay a separate filing fee. Boriboune v. Berge, 391 F.3d 852, 856 (7th Cir. 2004).

The answer to the third question is yes. Nonincarcerated persons may qualify for indigent status under 28 U.S.C. § 1915.

ORDER

IT IS ORDERED that

1. Plaintiff Malcom Holliman is GRANTED leave to proceed on the following claims:

(a) defendants Paquin and and Kuhens violated plaintiff's rights under the establishment clause because they have refused to remove or cover various Christian symbols throughout Prairie du Chien Correctional Institution;

(b) defendants Paquin and Kuhens have substantially burdened plaintiff's ability to practice his Muslim faith by forcing him to worship in a room that has "images of animated creatures" or "other religious symbols," in violation of the free exercise clause and the Religious Land Use and Institutionalized Persons Act;

(c) defendants Paquin and Kuhens have substantially burdened plaintiff's ability to practice his Muslim faith by allowing staff to walk through the room during Jumu'ah services, have loud conversations and make other "disruptive" noises, in violation

of the free exercise clause and the Religious Land Use and Institutionalized Persons Act; and

(d) defendant Paquin and Kuhens have violated the establishment clause and the equal protection clause by providing a state employee to lead Christian prisoners in Bible study, but failing to do the same for Muslim prisoners.

2. All other claims are DISMISSED without prejudice to plaintiff's refiling them at a later date, including plaintiff's claims against defendants Schwandt, Kuhens, Winkleski, Anderson, Hesselberg, Jorgerson, Stich, Skime and Hayes .

3. Plaintiff's motion for appointment of counsel, dkt. #4, is DENIED as premature.

4. 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 that 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.

5. 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 their documents.

6. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on 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 the department accepts service on behalf of defendantsw.

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.

Entered this 27th day of September, 2010.

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