IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD MEANS,

ORDER

Plaintiff,

11-cv-003-slc[1]

v.

GREG GRAMS, Warden, S. SEVERSON, Sergeant, MARDELL PETRAS, LEO CAMPBELL and BRIAN FRANSON,

Defendants.

- -

In this proposed civil action for monetary relief, plaintiff Donald Means contends that defendants Greg Grams, S. Severson, Mardell Petras, Leo Campbell and Brian Franson prevented him from attending the Eid-ul-Fitr Ramadan feast, in violation of his rights under the free exercise clause of the United States Constitution, the Religious Land Use and Institutionalized Persons Act and the Wisconsin Constitution. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform

[1] For purpose of issuing this order, I am assuming jurisdiction over the case.

Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. 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).

After reviewing the complaint, I conclude that plaintiff may proceed with his claim that defendant Severson violated his rights under the free exercise clause. Plaintiff may not proceed on his claims under RLUIPA or the Wisconsin Constitution or on any of his claims against defendants Campbell, Petras, Franson or Greg Grams.

Also before the court is plaintiff's motion for appointment of counsel, dkt. #4. I will deny that motion without prejudice.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Donald Means is an inmate at the Wisconsin Resource Center, located in Winnebago, Wisconsin. At all times relevant to this complaint, he was incarcerated at the Columbia Correctional Institution located in Portage, Wisconsin. Defendant Greg Grams is the warden at the Columbia Correctional Institution, where defendant Mardell Petras is a program supervisor, defendant Leo Campbell is a prison chaplain, defendant Brian Franson

is a unit manager in the Special Management Complex and defendant Sergeant Severson is a correctional officer.

Plaintiff is a practicing Muslim, who fasts during the month of Ramadan. Successful completion of Ramadan requires the adherent to fast during daylight hours for thirty days and then participate in Eid-ul-Fitr, a three-day feast that marks the end of Ramadan. In August 2010, defendant Leo Campbell, the prison chaplain, put plaintiff's name on the list of inmates who would be participating in the Ramadan fast beginning on August 11, 2010 and ending September 9, 2010. During this time, plaintiff was incarcerated in Unit 6 of the Special Management Complex, an area for inmates with mental illnesses. The list of inmates participating in the Ramadan fast was posted in the unit. Plaintiff's name was on the list.

Plaintiff takes medication for his mental health problems. However, during the fast, plaintiff took his medication at night only because Ramadan participants are not supposed to consume anything intentionally during the day. Plaintiff was not affected by forgoing his medication during the day. On September 9, 2010, the final night of the Ramadan fast, the unit psychologist, Andrea Nelson, told plaintiff she was concerned that he was not taking his medication. Nelson decided to move plaintiff from Unit 6 to Unit 7, a more secure unit. Defendant Sergeant Severson was responsible for making sure that plaintiff's name was transferred to the Ramadan list for Unit 7. However, Severson did not notify Unit 7 that plaintiff was participating in the fast and the Eid-ul-Fitr feast was held without plaintiff.

On September 10, 2010, plaintiff learned that he had missed the feast. He wrote to defendant Campbell, the chaplain, asking why no one made sure he was brought to the feast. Campbell responded that plaintiff was not on the Ramadan list. Then, plaintiff wrote to defendant Mardell Petras, the program supervisor in the Special Management Complex, asking why Campbell said he was not on the list and why no special provisions were made for him to attend the feast. Petras responded that plaintiff had been on the list for Unit 6, but not Unit 7.

Plaintiff filed a grievance, complaining that no provision had been made for him to attend the Ramadan feast because he was in the Special Management Complex. The complaint examiner dismissed the complaint after contacting defendant Brian Franson, a unit manager of the Special Management Complex. Franson told the complaint examiner that inmates in the complex were notified about the feast through a posting in the unit and that other inmates from the complex had attended the feast. Franson's statement was false, however, because plaintiff was the only Muslim in Unit 7 and was not notified because his name was not transferred to the Unit 7 list.

DISCUSSION

A. Federal Law Theories

I understand plaintiff to be raising a claim that defendants' actions violated the free

exercise clause of the Constitution and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1. I will address each theory separately.

1. 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). If plaintiff shows that defendants substantially burdened his sincerely held beliefs, the burden shifts to defendants to show under RLUIPA 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).

Because plaintiff alleges that he is a Muslim and that the feast of Eid-ul-Fitr is a central part of Ramadan, it is reasonable to infer at this stage that his religious exercise was substantially burdened by being unable to attend the feast. However, a plaintiff may not obtain monetary relief under RLUIPA, Nelson v. Miller, 570 F.3d 868, 883-89 (7th Cir. 2009), and may obtain injunctive relief only if he or she is able to show that another similar

violation is likely to recur, id. at 880-83. In his complaint, plaintiff seeks monetary relief only. Further, he would not be able to show that a similar violation is likely to recur because he is no longer housed at the Columbia Correctional Institution. Lehn v. Holmes, 364 F.3d 862, 871 (7th Cir. 2004) ("[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."). Therefore, plaintiff has failed to state a claim under RLUIPA.

2. Free exercise clause

The court of appeals has applied the same "substantial burden" test to free exercise claims brought by prisoners that it applies to RLUIPA claims. E.g., Koger, 523 F.3d at 798-99 (applying same standard to prisoner RLUIPA and free exercise clause claims). See also Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005). I stated above that it is reasonable to infer from plaintiff's allegations that his religious exercise was substantially burdened. I reach the same conclusion with respect to his claim 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 plaintiff was not prohibited from attending the Eid-ul-Fitr under a generally applicable rule. However, plaintiff should be aware that if the evidence shows at summary judgment or trial that prison staff's *negligence* prevented plaintiff from attending the feast, rather than staff's *intent* to prevent plaintiff from practicing his religion, judgment may be entered against plaintiff on his free exercise claim.

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, 89-91 (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).

3. Personal involvement

It is a separate question whether each defendant may be held liable for imposing a substantial burden on plaintiff's constitutional free exercise rights. Although it is a close call, at this stage I can infer from plaintiff's allegations that defendant Severson knew that plaintiff was scheduled to attend the feast but intentionally failed to transfer his name to the list that would have allowed him to do so. Plaintiff should be aware though, that if Severson's failure to transfer plaintiff's name was a result of negligence only, there is no constitutional violation.

Plaintiff's allegations do not imply that any of the other defendants were personally responsible for depriving plaintiff the opportunity to attend the feast. Plaintiff's allegations suggest that he would have attended the feast had his name been on the appropriate list and that defendant Severson was the person responsible for that list. Plaintiff alleges that defendants Campbell, Petras and Franson did not become aware of the problem until *after*

the feast took place. With respect to defendant Grams, it is not clear that he knows of the problem even now. Plaintiff's claims against these defendants seems to be premised on a view that as supervisors, they should have taken the problem more seriously, but an unsympathetic attitude is not a violation of federal law. In addition, these defendants cannot be held liable solely because they are in supervisory capacities. Aschroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Plaintiff must show that these defendants *caused* him to miss the feast. George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) ("Only persons who cause or participate in the violations are responsible."); Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002) (if "defendants learned [of violation when it was] too late [to prevent it] . . . they did not offend the Constitution"). Because there was nothing defendants Campbell, Petras, Franson or Grams could have done to help plaintiff attend the feast at the time they learned of the problem, they cannot be held liable for violating plaintiff's rights.

B. Article I, §1 and § 6 of the Wisconsin Constitution

Plaintiff asserts claims under these provisions of the Wisconsin constitution, which set forth various rights regarding personal freedom, but they are not enforceable in federal court. The state constitution does not authorize suits for money damages except in the context of a takings claim. W.H. Pugh Coal Co. v. State, 157 Wis. 2d 620, 627-28, 460 N.W.2d 787, 789-90 (1990) (holding that plaintiff could sue state for money damages

arising from unconstitutional taking of property because article I, section 13 of Wisconsin Constitution requires that state provide "just compensation" when property is taken); Jackson v. Gerl, 2008 WL 753919, *6 (W.D. Wis. 2008) ("Other than one very limited exception inapplicable to this case, I am not aware of any state law provision that allows an individual to sue state officials for money damages arising from a violation of the Wisconsin Constitution.") With respect to injunctive relief, sovereign immunity principles prohibit federal courts from enjoining state officials under state law. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100-02 (1984). Thus, if plaintiff wishes to assert a claim under the state constitution, he must do so in state court.

C. Motion for Appointment of Counsel

Accompanying plaintiff's complaint is a motion for appointment of counsel, dkt. #4, in which plaintiff states that he suffers from mental illnesses, including paranoid schizophrenia. In addition, he has no legal knowledge and the inmate who has assisted him thus far can no longer work with him. 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, 1072-73 (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. Plaintiff has fulfilled this requirement.

Appointment of counsel is appropriate in those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). Although plaintiff may lack legal knowledge, that is not a sufficient reason alone to appoint counsel, because lack of knowledge is almost universal among pro se litigants.

As this case progresses, plaintiff will improve his knowledge of court procedure. To help him, this court instructs pro se litigants at a preliminary pretrial conference about how to use discovery techniques available to all litigants so that he can gather the evidence he needs to prove his claim. In addition, plaintiff will be provided with a copy of 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.

As for the other issues raised by plaintiff, it is too early to tell whether they will overwhelm plaintiff's ability to litigate this case. Although the inmate assisting plaintiff may no longer be available to assist him, he may still be able to get assistance from another inmate. Finally, plaintiff's mental health issues may be a concern, but he has not yet shown that they have affected his litigation of this case. As this case progresses, it may become

apparent that appointment of counsel is warranted, but for now I will deny the motion. Plaintiff is free to renew his motion at a later date.

ORDER

IT IS ORDERED that

1. Plaintiff Donald Means is GRANTED leave to proceed on his claim that defendant Sergeant Severson prohibited him from attending a feast for Eid-ul-Fitr, in violation of the free exercise clause.

2. Plaintiff is DENIED leave to proceed on his claims under RLUIPA, Wis. Const. Art. I, §§ 1, 6 and his claims that defendants Leo Campbell, Mardell Petras, Brian Franson and Greg Grams violated his free exercise rights by preventing him from attending a feast for Eid-ul-Fitr. The complaint is DISMISSED as to defendants Campbell, Petras, Franson and Grams.

3. Plaintiff's motion for appointment of counsel, dkt. #4, is DENIED without prejudice to him renewing his motion at a later date.

4. 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 state defendant. 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 for the defendant on whose behalf it accepts service.

5. For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.

6. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the officials at the Wisconsin Resource Center of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 10th day of February, 2011.

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