IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

PRINCE ATUM-RA UHURU MUTAWAKKIL,
also known as NORMAN GREEN,

OPINION and ORDER

Plaintiff,

11-cv-471-bbc

v.

PETER HUIBREGTSE, JUDITH HUIBREGTSE,
LEBBEUS BROWN, CHAD LOMEN,
ELLEN RAY, BRIAN KOOL
and DIANE ALDERSON

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Pro se plaintiff Prince Atum-Ra Uhuru Mutawakkil, also known as Norman Green, is proceeding on a claim that various prison officials are refusing to allow him to use his spiritual name (Mutawakkil ), in violation of the Religious Land Use and Institutionalized Persons Act, the free exercise clause, the free speech clause and the equal protection clause. Defendants have filed a motion for summary judgment, which I am granting because plaintiff has failed to show that any of the defendants have violated his rights or that there are any genuine issues of material fact requiring a trial. Fed. R. Civ. P. 56.

In their summary judgment materials, the parties have made it clear that none of the defendants have prohibited plaintiff from using his spiritual name. Rather, he is allowed to identify himself with that name so long as it is accompanied by his birth name, which was the only name he used at the time of his incarceration in 1991. Dfts.' PFOF ¶ 45, dkt. #26; Plt.'s Resp. to Dfts.' PFOF ¶ 45, dkt. #38. (Although plaintiff disputes this proposed finding of fact, his objections are related to the validity of the practice; he does not deny that he is permitted to use his spiritual name in conjunction with his birth name and he cites no evidence to the contrary.) In addition, plaintiff is not challenging defendants' requirement that he use both names within the prison. Plt.'s Br., dkt. #41, at 17-18. Rather, his sole argument is that defendants are violating his rights by refusing to accept incoming mail for him unless both names are on the envelope. Id. at 43.

Plaintiff cannot prevail under any of the legal theories he is asserting. With respect to his RLUIPA claim, he must show that defendants' actions imposed a "substantial burden" on the exercise of his religion. 42 U.S.C. § 2000cc-1; Koger v. Bryan, 523 F.3d 789, 797-98 (7th Cir. 2008). 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); see also Koger, 523 F.3d at 798-99 (applying Civil Liberties standard to prisoner RLUIPA claim).

Plaintiff has not shown that defendants have substantially burdened his religious exercise. To begin with, plaintiff did not submit any of his own proposed findings of fact, only a response to defendants' proposed findings of fact. Under this court's summary judgment procedures, if a party wants the court to consider a new fact, he must include it in a proposed finding of fact; he may not simply include the fact in his brief or bury it somewhere in the record. Helpful Tips for Filing a Summary Judgment Motion #2 ("The court will not search the record for factual evidence. Even if there is evidence in the record to support your position on summary judgment, if you do not propose a finding of fact with the proper citation, the court will not consider that evidence when deciding the motion."); Procedure to Be Followed on Motions for Summary Judgment I.B.4. ("The court will not consider facts contained only in a brief."). In addition, he may not include new facts in his responses to the other side's proposed findings of fact; his responses must be limited to disputing facts proposed by defendants. Id. at II.D.4 ("When a responding party disputes a proposed finding of fact, the response must be limited to those facts necessary to raise a dispute. The court will disregard any new facts that are not directly responsive to the proposed fact. If a responding party believes that more facts are necessary to tell its story, it should include them in its own proposed facts, as discussed in II.B."). These procedures were attached to the preliminary pretrial conference order dated September 23, 2011, dkt. #10, and were mailed to plaintiff again with the briefing schedule for defendants' summary

judgment motion. Because neither side proposed facts showing a substantial burden on plaintiff's religious exercise, that is a sufficient reason to dismiss this claim.

Even if I disregard the court's procedures, plaintiff cannot prevail. In his declaration, he says that he is an adherent of the Divine Vision of Growth and Development. Although he describes his belief system in significant detail, he says little in the declaration about the role his name plays in any religious exercise. However, in an unsworn statement that is attached to his declaration, he describes how his religious name represents his spiritual rebirth. Dkt. #40-1, exh. 47. Even if I assume that the statement is admissible and shows that the use of his spiritual name is a religious exercise, plaintiff does not explain how the requirement to use both names has had any effect on his religious exercise, much less how it imposes a substantial burden.

Plaintiff's argument on this issue is that he has not received many pieces of mail as a result of defendants' requirement because defendants return or destroy mail that does not also include his birth name. This may show that plaintiff has been injured by the requirement, but it does not show a substantial burden *on his religious exercise*. For example, plaintiff does not suggest that his religious beliefs prohibit him from being addressed by both names or that any religious exercise is demeaned or lessened in some way by the inclusion of his birth name. In fact, plaintiff could not make that argument plausibly because he does not object to the use of both names in any context other than mail. Plaintiff's argument is

simply that he is being inconvenienced by the nondelivery of mail. It is understandable that plaintiff is frustrated by the loss of his mail, but that is not a religious claim.

It is not clear whether claims under the free exercise clause require a plaintiff to show a "substantial burden" on his religious exercise. Compare St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 631 (7th Cir. 2007) (imposing substantial burden requirement on claim brought under free exercise clause), with Sasnett v. Sullivan, 91 F.3d 1018, 1020 (7th Cir. 1996) (ignoring substantial burden requirement). However, even if that is not an element of the claim, under the free exercise clause, plaintiff must show that his religious exercise was affected in some way. Thomas v. Review Board of the Indiana Security Division, 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause."). Accordingly, I am dismissing plaintiff's claims under RLUIPA and the free exercise clause.

In his brief, plaintiff says in passing that some of the mail items he did not receive were "religious materials." Plt.'s Br., dkt. #41, at 29. To the extent plaintiff means to argue that his religious exercise was substantially burdened because he did not receive those materials, that argument fails. First, plaintiff does not suggest that any defendant is prohibiting him from receiving those religious materials, only that his birth name must be included on the envelope. Because plaintiff presumably could ask any of his correspondents to include his birth name on any mail they send him, it is difficult for him to argue that

defendants are burdening his religious exercise, substantially or otherwise. (It is undisputed that defendants informed plaintiff in a memo several years ago that "[y]ou are responsible to inform those who may correspond with you from outside the Institution that mail will not be delivered to you if it does not include your incarcerated name." Dkt. #27-8.) In any event, plaintiff does not describe the religious materials or explain why he needs them, so he has forfeited that argument by failing to develop it. Hall v. Bodine Electric Co., 276 F.3d 345, 354 (7th Cir. 2002) ("It is well-settled that conclusory allegations . . . do not create a triable issue of fact."); Borzych v. Frank, 439 F.3d 388, 390 (7th Cir. 2006) (prisoner's "unreasoned say-so" not sufficient to show that religious exercise is substantially burdened).

With respect to plaintiff's free speech claim, both sides assume that the requirement on plaintiff's incoming mail implicates the First Amendment. I will follow the parties' lead, though one might argue that any First Amendment interest plaintiff has is slight with respect to overturning a requirement on a third parties to include additional information on an envelope. There seems to be little difference between this requirement and one that requires correspondents to include the prisoner's identification number on the envelope, which is a common practice in many prisons.

A rule that restricts a prisoner's First Amendment rights must be reasonably related to a legitimate penological interest. Turner v. Safley, 482 U.S. 78 (1987). Plaintiff says that Procunier v. Martinez, 416 U.S. 396 (1974), imposes a heightened standard of review "when

it comes to mail outside the prison." Plt.'s Br., dkt. #41, at 18. However, under current law, a heightened standard applies to *outgoing* mail only, under the rationale that prison officials have a lesser interest in regulating speech that is not coming into the prison. Thornburgh v. Abbott, 490 U.S. 401 (1989) (declining to apply test to censorship of incoming publications). See also Koutnik v. Brown, 456 F.3d 777, 784 n.1 (7th Cir. 2006).

In defense of the requirement for plaintiff to use both names, defendants say that their general rule is to require prisoners to use whatever name is on their judgment of conviction unless the prisoner has obtained a court order changing his name. Dfts.' PFOF ¶¶ 32-36, dkt. #26. Originally, plaintiff's judgment of conviction identified him as "Norman C. Green Jr.," but a state court later allowed him to amend it to state "Norman C. Green, Jr. aka Prince-Atum-Ra Uhuru Mutawakkil." Dkt. #27-5. Defendants rely on that amended judgment for their determination that plaintiff must use both names on his mail and must inform those sending mail to him to do the same. In Azeez v. Fairman, 795 F.2d 1296, 1299 (7th Cir. 1986), the court concluded that it was reasonable for prison officials and consistent with the First Amendment to recognize a prisoner's name change only to the extent that it has been changed by law. A number of other courts have concluded that a reasonable accommodation for a prisoner's First Amendment rights is to allow him to use his new name so long as he includes the old name as well. E.g., Hakim v. Hicks, 223 F.3d 1244, 1248 (11th Cir. 2000); Malik v. Brown, 16 F.3d 330, 334 (9th Cir. 1994); Ali v.

Dixon, 912 F.2d 86, 90 (4th Cir. 1990); Salaam v. Lockhart, 905 F.2d 1168, 1174 (8th Cir. 1990); Felix v. Rolan, 833 F.2d 517, 519 (5th Cir. 1987). The rationale of these cases is that a "dual name" policy allows prisoners to self-identify as they like while still allowing prison officials to prevent the confusion and administrative burden that might accompany a name change. Because defendants have acted consistently with all of these cases, they are entitled to summary judgment on plaintiff's First Amendment claim. Plaintiff fails to cite a single case in which a court held in any context that prison officials could not require prisoners to use both the name on their judgment and their preferred name.

Plaintiff makes several other arguments in his brief, but none of them are persuasive. First, he says that he changed his name to his spiritual name legally, using the common law process for doing so. That argument is a nonstarter because the Court of Appeals for the Seventh Circuit has rejected it, concluding that it was reasonable for prison officials to require prisoners to use the statutory rather than common law procedure for name changing to "prevent capricious, incessant, casual, sudden, harassing, on-the-spot name changes." Azeez, 795 F.2d at 1299. In any event, even if plaintiff's new name would be recognized under Wisconsin common law, this would not undermine the authority that allows prison officials to adopt a "dual name" policy to prevent confusion.

Second, plaintiff says in his brief that requiring both names for incoming mail serves no purpose because all mail room staff have access to an "inmate location and identification

sheet" that includes both of plaintiff's names so there is no reason to reject mail that identifies him by his spiritual name only. Plt.'s Br., dkt. #41, at 19-20. One problem with this argument is that plaintiff cites no evidence to support it or even explains how he knows this information. The statements in his brief are not evidence. Box v. A & P Tea Co., 772 F.2d 1372, 1379 (7th Cir. 1985). Thus, I must find as undisputed defendants' proposed finding of fact that allowing plaintiff to use his spiritual name only is not feasible because not all mail room staff will be familiar with that name. Dfts.' PFOF ¶¶ 78-79, dkt. #26. Further, plaintiff does not suggest that the sheet lists his spiritual name separately from his birth name, so it is not clear whether a mail room employee could identify plaintiff's mail easily if it uses plaintiff's spiritual name only. (Neither side says whether incoming mail must include the prisoner's identification number and plaintiff does not argue that using his prisoner identification number could accomplish the same purpose as using his birth name, so I do not consider that question.)

Plaintiff points to several pieces of mail that he received at the prison since 2007, even though his spiritual name was the only one listed on the envelope. Plaintiff says that this shows that "defendants have no problem identifying" him by his spiritual name. Plt.'s Resp. to Dfts.' PFOF ¶ 73, dkt. #38, but all it shows is that some mail room staff may know both of plaintiff's names and are either unaware of the requirement on plaintiff to use both names or are disregarding the requirement. "The failure to enforce a rule consistently does

not make the rule unconstitutional." Azeez, 795 F.2d at 1299.

In any event, even if it were possible administratively to allow plaintiff to receive mail that does not include his birth name, it is reasonable for defendants to apply a uniform rule that requires prisoners to use both names in all contexts. One of defendants' stated interests in requiring plaintiff to use both names is to insure that members of the public know who they are dealing with and do not become the victims of fraud. This is a legitimate concern and one reasonable way to address that concern is to require all of plaintiff's mail to include both names. Presumably, some of plaintiff's mail does not include his birth name because he is not telling all of his correspondents what that name is, which means that he could be communicating with people from his past, even victims, without alerting them to the fact that Prince Atum-Ra Uhuru Mutawakkil is also Norman Green. Particularly because plaintiff does not make any showing that it would be burdensome for him to correct the problem by informing those he corresponds with to use both names, I cannot conclude that the requirement violates his First Amendment rights. Toston v. Thurmer, No. 11-3913, — F.3d —, 2012 WL 3124915 (7th Cir. Aug. 2, 2012) (upholding prison restriction speech because "the curtailment challenged in this case is slight and the justification adequate, though not ample").

Plaintiff's last argument is a bit hard to follow, but I understand him to be saying that the requirement to use both names is unconstitutional because it did not always apply to

mail. The evidence plaintiff cites does not show that defendants have changed their policy, but even if they had, this would not make the requirement unconstitutional because the First Amendment does not prohibit prison officials from changing their rules. I have concluded that the requirement is reasonably related to a legitimate penological interest; this conclusion would not change simply because defendants had a different rule at some point. Plaintiff raises various other issues about the authority of defendants under state law to impose the requirement, but that issue is outside the scope of this case.

Plaintiff's final claim is that defendants are requiring him to use both names because of his race, in violation of the equal protection clause, but he has no admissible evidence to support this claim. Various other prisoners who had their judgments of conviction amended to include a spiritual name received the same notice plaintiff did, informing them that they may use their spiritual name, "but *only* as an AKA, along with your incarcerated name and DOC number." Dkt. #27-8. Although defendants did not file a written policy with the court, plaintiff does not point to any prisoners who did not have to use they names they had at the time they were incarcerated, other than those who had their names legally changed under Wisconsin's statutory procedure.

In his brief, plaintiff says that defendants have falsely labeled his spiritual name as gang-related "to block him from using it" and that defendants' actions constitute "racial and cultural discrimination." Plt.'s Br., dkt. #41, at 53. In addition, plaintiff says that two of

the defendants told him only "American names" could be used in the prison and plaintiff could use "Arab names" when he is released and goes "to Africa or wherever." Plt.'s Br., dkt. #41, at 53. These arguments fail for two reasons. First, he cites no evidence to support them; again, I cannot consider statements in a brief as evidence. Second, whether or not defendants believe plaintiff's spiritual name is gang-related or "un-American" has no bearing on this case. The sole issue is whether defendants are violating plaintiff's constitutional rights by requiring him to use his birth name in addition to his spiritual name; plaintiff points to no evidence that any defendant has ever "blocked" him from using his spiritual name for any purpose. Because he cites no evidence to show that defendants are treating him differently from other similarly situated prisoners, I am dismissing this claim as well.

In his responses to defendants' proposed findings of fact, plaintiff says repeatedly that defendants have refused to provide documents or other information that he requested in discovery. In many instances, plaintiff fails to identify with any specificity what he believes he was wrongly denied or why any objections by defendant were unfounded. In other instances, it is clear that the information would not make a difference to his claim, such as his requests for evidence related to plaintiff's belief that defendants are falsely accusing him of gang behavior. In any event, if plaintiff believed that he was entitled to information that defendants were refusing to provide, the proper response was to file a motion to compel under Fed. R. Civ. P. 37. Plaintiff cannot defeat defendants' motion for summary judgment

by complaining generally in his opposition materials that defendants were uncooperative during discovery. Cf. James Cape & Sons Co. v. PCC Construction Co., 453 F.3d 396, 400 (7th Cir. 2006) (motion must be filed in separate document; cannot be buried in summary judgment brief).

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Peter Huibregtse, Lebbeus Brown, Diane Alderson, Chad Lomen, Judith Huibregtse, Brian Kool and Ellen Ray, dkt. #25, is GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 20th day of August, 2012.

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