IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MUSTAFA-EL K.A. AJALA
f.k.a. Dennis E. Jones-El, and
SPENCER A. BROWN,

ORDER

Plaintiffs,

13-cv-184-bbc

v.

KELLI WEST, RICK RAEMISCH,
TODD OVERBO, CATHY JESS,
PETER HUIBREGTSE, TIM HAINES,
CHARLES COLE and ANTHONY BROADBENT,

Defendants.

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In a previous order, I severed this case in accordance with Fed. R. Civ. P. 20 and 21 and this court's inherent authority. The following claims remain in this case:

(a) in 2012, defendant Todd Overbo denied Spencer A. Brown's request to be "added to the list for Ramadan participation" on the ground that Brown's request was untimely, even though Overbo granted an even later request of a white Muslim; plaintiff complained to Tim Haines, Kelli West and Charles Cole, who refused to take action;

(b) in 2012, defendant Overbo denied plaintiff Mustafa-El K.A. Ajala's request "to be added to the list for Ramadan fast meals" on the ground that Ajala's request was untimely, even though Overbo granted an even later request of a white Muslim; plaintiff complained to defendants Haines, West and Cole, who refused to take action;

(c) in 2008, 2009 and 2010 defendant Anthony Broadbent failed to provide plaintiff Ajala's Ramadan meals before the dawn prayer; Ajala complained to defendants Overbo, Peter Huibregtse and Richard

Raemisch, but they refused to take action;

(d) in 2008, 2009 and 2010 defendants Overbo, Huibregtse and Broadbent failed to provide Ajala hot meals during Ramadan; Ajala complained to defendant Raemisch, but he refused to take action;

(e) in 2008, 2009 and 2010 defendants Overbo, Huibregtse and Broadbent "shortened the meal portions on all Muslims fasting during Ramadan to approximately one whole meal less each day"; Ajala complained to defendant Raemisch, but he refused to take action;

(f) in 2012 defendants West, Cathy Jess, Overbo, Broadbent, Haines and Cole denied plaintiff Brown's request for an Eid-ul-Fitr meal;

(g) in 2010 defendants Overbo, Broadbent and Huibregtse denied Ajala's request for an Eid-ul-Fitr meal;

(h) in 2011 and 2012 defendants Overbo, Broadbent, Haines, West, Jess and Cole denied Ajala's request for an Eid-ul-Fitr meal.

For the reasons discussed below, I will allow plaintiffs to proceed on some of these claims but I am dismissing others for plaintiffs' failure to state a claim upon which relief may be granted.

OPINION

All of plaintiffs' claims arise out of allegations that prison officials refused to accommodate the exercise of plaintiffs' Muslim faith. In particular, plaintiffs allege that various actions by defendants prevented plaintiffs from participating in Ramadan, a month long observance in which Muslims fast from sunrise to sunset. In addition, plaintiffs allege that defendants refused to allow plaintiffs to celebrate Eid-ul-Fitr, a feast held at the end of Ramadan. Plaintiffs contend that defendants violated their rights under the free exercise

clause, the establishment clause, the equal protection clause and the Religious Land Use and Institutionalized Persons Act.

Under RLUIPA, plaintiffs have the burden to show that defendants "substantially burdened" their religious exercise. 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); see also Koger, 523 F.3d at 798-99 (applying Civil Liberties standard to prisoner RLUIPA claim). Once plaintiff shows a substantial burden on a religious exercise, defendants must show that the restriction furthers "a compelling governmental interest," and does so by "the least restrictive means." Cutter v. Wilkinson, 544 U.S. 709, 712 (2005).

With respect to the free exercise clause, this court has stated in previous cases that there remains some uncertainty regarding the appropriate standard of review. E.g., Kramer v. Wisconsin Department of Corrections, No. 10-cv-224-slc (W.D. Wis. Jul. 26, 2011). The primary question is whether Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), Turner v. Safley, 482 U.S. 78, 89–91 (1987), or both, are controlling. Under Smith, the question is whether the restriction targets the plaintiff's religion for adverse treatment and is not a neutral rule of general applicability. In other words, a believer is not entitled to a religious accommodation under Smith unless adherents of other faiths are receiving more favorable treatment. Under Turner, the question is

whether the restriction is reasonably related to a legitimate penological interest. In determining whether a reasonable relationship exists, the Supreme Court usually considers four factors: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether alternatives for exercising the right remain to the prisoner; what impact 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. Id. at 89.

The confusion arises because the Supreme Court applied Turner to a prisoner free exercise claim in O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), three years *before* the court decided Smith. Because the Supreme Court has not addressed another prisoner's free exercise claim since O'Lone, the Court of Appeals for the Seventh Circuit has stated that it is an "open question" whether prisoners are entitled to religious accommodation under the free exercise clause. Lewis v. Sternes, 712 F.3d 1083, 1085 (7th Cir. 2013). But see Borzych v. Frank, 439 F.3d 388, 390 (assuming that Smith applies to prisoner claims), and Koger, 523 F.3d at 796 (same). In Crouthers v. Zager, No. 10-cv-308-bbc (W.D. Wis. Feb. 28, 2011), I concluded that Smith did apply to prisoner claims, reasoning that it would make no sense to interpret the free exercise clause as granting a right of religious accommodation to prisoners but not to nonprisoners because it would result in prisoners having more expansive free exercise rights than nonprisoners under some circumstances. See also Grayson v. Schuler, 666 F.3d 450, 452-53 (7th Cir. 2012) (stating in dicta that Smith's "holding should apply to prison inmates along with everyone else").

Another question under the free exercise clause is whether the plaintiff must show that the defendants substantially burden the practice of his religion or whether he must show only that his beliefs are sincere. Compare Grayson, 666 F.3d at 454-55 (question is whether prisoner's conduct is "religiously motivated"), with Kaufman v. McCaughtry, 419 F.3d 678, 682-83 (7th Cir. 2005) (requiring prisoner to show substantial burden in free exercise claim brought by prisoner). As discussed further below, it is unnecessary to choose one of these standards over the others because the result for each claim would be the same regardless.

I have stated in previous cases that the equal protection clause and the establishment clause often add little to a claim under the free exercise clause when the claim is about more favorable treatment to adherents of other faiths, which is the situation in this case. Rather, these claims raise the same general question, which is whether "the defendant [is] 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."). The court of appeals has gone as far as suggesting that parties should not assert claims under both theories. World Outreach Conference Center v. City of Chicago, 591 F.3d 531, 534 (7th Cir. 2009) ("Discrimination by an official body can always be attacked as a

violation of the equal protection clause—but that would usually add nothing, when the discrimination was alleged to be based on religion, to a claim under the religion clauses of the First Amendment."). However, the Supreme Court has stated that it is not for courts to pick and choose legal theories for a plaintiff on the ground that one is a better fit than another, so I will not dismiss any of plaintiffs' claims on the ground that they are redundant. Soldal v. Cook County, Illinois, 506 U.S. 56, 70–71 (1992).

A. Failure to Provide Meals before Dawn Prayer, Failure to Provide Hot Meals and Reduced Portions

Plaintiff Ajala alleges that, in 2008, 2009 and 2010, defendant Anthony Broadbent (who plaintiff says is the "associate warden . . . who handles food service") took various actions in an attempt to deter him and other Muslim prisoners from participating in Ramadan: (1) served meals after dawn, when plaintiff could no longer eat them; (2) reduced portion sizes of the meals; and (3) provided cold meals instead of hot ones. Ajala complained to defendants Overbo (the prison chaplain), Peter Huibregtse (the warden) and Richard Raemisch (Secretary of the Wisconsin Department of Corrections), but they refused to take action.

I conclude that plaintiff Ajala has stated a claim upon which relief may be granted under the free exercise clause. To the extent Ajala is required to show that defendants substantially burdened his religious exercise, at this stage I must accept Ajala's allegations that his faith requires him to fast at particular times during the day, so a refusal to give Ajala

food before and after the fast each day could impose a substantial burden on plaintiff's ability to maintain the fast. In addition, I will infer at this stage that the reduced meal portions were a substantial burden as well because they were not sufficient to provide Ajala with adequate nutrition. Nelson v. Miller, 570 F.3d 868, 879-80 (7th Cir. 2009) ("[A] prisoner's religious dietary practice is substantially burdened when the prison forces him to choose between his religious practice and adequate nutrition."). Although cold meals would not be enough on their own to impose a substantial burden, I will consider them collectively with the missed meals and reduced portion sizes because they are all part of the same religious practice.

At summary judgment or trial, Ajala will have to come forward with specific evidence to support his allegations of a substantial burden. If he makes that showing, the burden will shift to defendants to show that their actions further "a compelling governmental interest" and do so by "the least restrictive means.

To the extent that Turner applies, it would be premature to resolve this claim because it is impossible to tell at this stage whether the scheduling of the Ramadan meals or other alleged acts were reasonably related to a legitimate penological interest. Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009) (generally, district court should not determine at screening whether a restriction is reasonably related to a legitimate penological interest unless reasonableness is apparent from complaint.)

To the extent that Smith applies, plaintiff Ajala has alleged that defendants were acting "deliberately" to "deter" Muslims from practicing their faith, Cpt. ¶ 53, dkt. #1, so

I will assume at this stage that defendants were not applying a neutral rule. Accordingly, I will allow plaintiff to proceed on these claims against defendants Broadbent, Overbo, Huibregtse and Raemisch. In addition, plaintiff's allegation that defendants were trying to inhibit Islam is sufficient at this stage to state a claim upon which relief may be granted under the establishment clause and equal protection clause.

Plaintiff cannot proceed under RLUIPA because that claim is moot. Prisoners are not entitled to money damages under RLUIPA, regardless whether the claim is brought against a defendant in his official or individual capacity. Vinning-El v. Evans, 657 F.3d 591, 592 (7th Cir. 2011); Nelson v. Miller, 570 F.3d 868, 883-89 (7th Cir. 2009). Thus, the only relief plaintiff Ajala 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 Ajala 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). In this case, Ajala admits in his complaint that the Ramadan meals were served at the correct time in 2011 and 2012 and he does not suggest that the reduced portions and cold meals continued during those years. Because he does not identify any reason to believe that there will be a change in the future, I am dismissing the complaint as to this claim.

B. Refusal to Provide Eid-ul-Fitr Meals

Both plaintiffs allege that defendants West, Jess, Overbo, Broadbent, Haines and Cole

refused their request for an Eid-ul Fitr meal in 2012 because defendants want to suppress Islam in prison; plaintiff Ajala alleges that the same thing occurred to him in 2010 and 2011 (and that the same defendants were responsible in 2011 and that defendants Overbo, Broadbent and Huibregtse were responsible in 2010). In addition, plaintiffs allege that Christian prisoners are allowed to purchase their own holiday meals from outside the prison, but Muslim prisoners are not allowed to do the same thing.

Because plaintiffs allege that the feast of Eid-ul-Fitr is an important part of their faith, defendants are refusing to allow them any means to celebrate it and are doing so out of animus for Islam, I conclude that plaintiffs have adequately pleaded that defendants are substantially burdening plaintiffs' religious exercise and are discriminating against them on the basis of religion. In addition, because plaintiffs allege that the problem has continued to the present, it is reasonable to infer that a claim for injunctive relief is not moot. Accordingly, I will allow plaintiffs to proceed on their claims under RLUIPA, the free exercise clause, the establishment clause and the equal protection clause.

C. Refusal to Include Plaintiffs on List for Ramadan Meals

Plaintiffs allege that prisoners who wish to receive Ramadan meals must submit a request to officials. Each year before 2012, officials provided notice through a memorandum and through the prison television of the deadline for submitting such a request, which usually was 14 to 30 days after the notice issued. However, in 2012, officials provided notice on June 20 through the television only, stating that prisoners must submit a request

by June 25. Ramadan fasting began on July 20. Plaintiff Brown had no way of receiving the notice because he was on the "entry" unit, which did not have a television.

Plaintiff Ajala submitted his request on June 26 and it was denied because it was one day late. On June 29, another prisoner told plaintiff Brown about the requirement to submit a request. Plaintiff submitted a request the same day and again on July 7. The request was denied on the ground that it was late. On July 18, defendant Overbo granted a request by a white Muslim prisoner to receive Ramadan meals. Both plaintiffs are African Americans.

1. Plaintiff Ajala

Plaintiff Ajala has failed to state a claim upon which relief may be granted under RLUIPA, the free exercise clause or the establishment clause. With respect to RLUIPA, Ajala does not deny that he received the notice on June 20 saying that he was required to submit a request by June 25. Although five days is a relatively short period of time, plaintiff does not identify any reason that he could not comply with the deadline, so he has not alleged that defendants substantially burdened his religious exercise by imposing the deadline.

To the extent that the free exercise clause includes a substantial burden element, that claim would fail for the same reason. To the extent that Smith applies, the claim would fail because plaintiff Ajala does not allege that defendants applied a rule that discriminated against him on the basis of his religion. Although he says that white Muslims received preferential treatment over black Muslims, that would not be relevant to a claim of religious discrimination under the free exercise clause or the establishment clause.

Plaintiff Ajala's claim would fail under the Turner standard as well because I am not aware of any authority that would prohibit prison officials from giving prisoners a deadline for requesting a religious accommodation. Such a requirement would be reasonable under Turner because of the administrative burdens imposed by an accommodation request. Again, although Ajalala says he had only a few days to make the request, he does not identify any reason that he would have been unable to comply within the deadline.

I will allow plaintiff Ajala to proceed on his claim under the equal protection clause. Ajala alleges that Overbo, the chaplain, denied his request but accepted another late request from a white Muslim prisoner, which is sufficient to state a claim upon which relief may be granted for discrimination. However, plaintiff does not allege that any other defendants were involved in that decision, so the claim will be limited to defendant Overbo.

2. Plaintiff Brown

Plaintiff Brown's situation is different from plaintiff Ajala's because he alleges that he had no way of finding out that he was required to submit a request before the deadline already had passed. Thus, in his situation it is reasonable to infer that the deadline imposed a substantial burden on him. However, the problem with Brown's claim under RLUIPA is that he identifies no reason to believe that he will experience the same problem in years to come, which means he does not have a claim for injunctive or declaratory relief, the only relief authorized under RLUIPA. Brown alleges that he did not receive timely notice because he was housed in the "entry" unit, which does not have televisions, but he does not allege

that he is still in that unit or suggest that there is a significant chance that he will return to that unit.

In any event, Brown does not need prison officials to tell him when Ramadan begins. Now that he knows that he is required to submit an accommodation request to receive Ramadan meals, he can do so on his own without waiting to receive notice from the prison.

Plaintiff Brown's claims under the free exercise clause and establishment clause fail for the same reason as plaintiff Ajala's, which is that Brown does not allege that defendants were engaging in any form of religious discrimination. Further, under Turner, it would not necessarily be unreasonable for defendants to enforce the deadline against Brown, even if it is true that he was not aware of the deadline. The proper defendants in that case would not be the officials who applied an otherwise valid rule, but the person or persons responsible for failing to provide adequate notice to plaintiff about the rule. Plaintiffs do not identify who those officials might be and they do not seem to be asserting a claim against any John Doe defendants.

Plaintiff Brown's claim under the equal protection clause against defendant Overbo may proceed for the same reason as plaintiff Ajala's. Because Brown alleges that defendant Overbo accepted late requests from white prisoners, that is sufficient to state a claim upon which relief may be granted under a discrimination theory.

ORDER

IT IS ORDERED that

1. Plaintiff Mustafa-El K.A. Ajala, formerly known as Dennis E. Jones-El, is GRANTED leave to proceed on the following clams:

(a) in 2012, defendant Todd Overbo denied plaintiff Ajala's request "to be added to the list for Ramadan fast meals" on the ground that Ajala's request was untimely, even though Overbo granted an even later request of a white Muslim, in violation of the equal protection clause;

(b) in 2008, 2009 and 2010 defendant Anthony Broadbent failed to provide plaintiff Ajala's Ramadan meals before the dawn prayer, failed to provide hot Ramadan meals and decreased the portion size of the Ramadan meals; Ajala complained to defendants Overbo, Peter Huibregtse and Richard Raemisch, but they refused to take action, in violation of the free exercise clause, the establishment clause and the equal protection clause;

(c) in 2010 defendants Overbo, Broadbent and Peter Huibregtse denied Ajala's request for an Eid-ul-Fitr meal, in violation of the Religious Land Use and Institutionalized Persons Act, the free exercise clause, the establishment clause and the equal protection clause; and

(d) in 2011 and 2012 defendants Overbo, Broadbent, Tim Haines, Kelli West, Cathy Jess and Charles Cole denied Ajala's request for an Eid-ul-Fitr meal, in violation of the Religious Land Use and Institutionalized Persons Act, the free exercise clause, the establishment clause and the equal protection clause.

2. Plaintiff Spencer A. Brown is GRANTED leave to proceed on the following claims:

(a) in 2012, defendant Todd Overbo denied Spencer A. Brown's request to be "added to the list for Ramadan participation" on the ground that Brown's request was untimely, even though Overbo granted an even later request of a white Muslim, in violation of the equal protection clause; and

(b) in 2012 defendants West, Jess, Overbo, Broadbent, Haines and Cole denied plaintiff Brown's request for an Eid-ul-Fitr meal, in violation of the Religious Land Use and Institutionalized Persons Act, the free exercise clause, the establishment clause and the equal protection clause.

3. All other claims are DISMISSED for plaintiffs' failure to state a claim upon which relief may be granted.

4. For the time being, plaintiffs must send defendants a copy of every paper or document that they file with the court. Once plaintiffs learn the name of the lawyer who will be representing defendants, they should serve the lawyer directly rather than defendants. The court will disregard documents plaintiffs submit that do not show on the court's copy that they have sent a copy to defendants or to defendants' attorney.

4. Plaintiffs should keep a copy of all documents for their own files. If they are unable to use a photocopy machine, they may send out identical handwritten or typed copies of their documents.

5. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiffs' 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 plaintiffs' complaint if it accepts service for defendants.

6. Plaintiffs are obligated to pay the unpaid balance of their 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 plaintiffs' institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiffs' trust fund accounts until the filing fees have been paid in full.

Entered this 12th day of August, 2013.

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