IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MUSTAFA-EL K.A. AJALA,
formerly known as Dennis E. Jones-El,

Plaintiff,

v.

KELLI WEST, RICK RAEMISH,
TODD OVERBO, PETER HUIBREGTSE,
TIM HAINES and GARY BOUGHTON,

Defendants.[1]

OPINION AND ORDER

13-cv-545-bbc

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This case was severed from a larger case in which pro se prisoner Mustafa-El K.A. Ajala brought many claims about his ability to practice his Muslim faith at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Ajala v. West, No. 13-cv-184-bbc (W.D. Wis.). In this case, plaintiff alleges that prison officials are interfering with his ability to attend Jumuah and Taleem, in violation of the Religious Land Use and Institutionalized Persons Act, the free exercise clause, the establishment clause and the equal protection

[1] In the caption of his complaint, plaintiff lists "Huibregtse" as a defendant without a first name. Because plaintiff refers to that defendant as "Peter Huibregtse" in the body of the complaint, I have amended the caption to reflect that defendant's full name.

clause. Plaintiff says that Jumuah "is an obligatory congregate worship service held on Fridays for Muslims" and that Taleem is an "Islamic Study Servic[e]" that is "necessary" for Muslims to learn more about their faith. Cpt. ¶¶ 117-18, dkt. #2. Plaintiff has made an initial partial payment of the filing fee as required by 28 U.S.C. § 1915(b)(1), so his claims are ready for screening under 28 U.S.C. § 1915A, which requires the court to determine whether the complaint states a claim upon which relief may be granted.

In the order severing the case, I read plaintiff's complaint as raising only one claim about Jumuah and Taleem, which is that prisoners in segregation such as plaintiff are not allowed to attend those services. Dkt. #2. Plaintiff named Kelli West, Rick Raemisch, Todd Overbo, Peter Huibregtse, Tim Haines and Gary Boughton as defendants on this claim. However, further review of plaintiff's complaint shows that he raised at least one other claim as well. In particular, plaintiff says that defendants Raemisch, West, Haines, Overbo, Boughton and Huibregtse, along with Charles Cole, Amy Smith, Gary Hamblin, Steve Casperson and Cathy Jess are enforcing a rule that prohibits prisoners from holding religious services unless a nonprisoner volunteer is available to lead the service, even though they know that the rule disproportionately affects Muslim prisoners. Plaintiff alleges that he has been unable to attend Jumuah and Taleem because of this rule.

I conclude that plaintiff has stated a claim upon which relief may be granted with respect to both of these claims under RLUIPA, the free exercise clause, the establishment

clause and the equal protection clause. Accordingly, I am amending the caption to include defendants Cole, Smith, Hamblin, Casperson and Jess.

Plaintiff includes other allegations in his complaint about prison chapels, but it is not clear whether he intended to raise separate claims about those issues because he did not say anything about those allegations in his request for relief, as he did for his other claims. If plaintiff did intend to bring a separate claim, I cannot allow him to proceed on it because his allegations do not provide fair notice as required by Fed. R. Civ. P. 8. Plaintiff alleges that "nearly every DOC correctional facility has a Christian chapel which is distinctly Christian in nature" because the chapels are adorned with Christian imagery and do not provide adequate space for Muslims to pray. Cpt. ¶ 136, dkt. #2. However, plaintiff's allegations are so vague that it is impossible to infer reasonably that the design of the chapel imposes a substantial burden on plaintiff's religious exercise. In addition, plaintiff does not explain how any of the defendants was personally involved in maintaining the chapel's design. Finally, and perhaps most important, plaintiff does not say whether his allegations apply to the chapel at the Boscobel prison, where he is incarcerated. If plaintiff wishes to pursue a claim about the chapels, he will have to file an amended complaint that includes these missing allegations.

OPINION

Plaintiff raises each of his claims under RLUIPA, the free exercise clause, the establishment clause and the equal protection clause. Under RLUIPA, plaintiffs have the burden to show that defendants "substantially burdened" their religious exercise. 42 U.S.C. § 2000cc-1(a). See also 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." 42 U.S.C. § 2000cc-1(a). See also Cutter v. Wilkinson, 544 U.S. 709, 712 (2005).

With respect to the free exercise clause, judges in this district have 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 (7th Cir. 2006) (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 burdened 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). In this case, 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 plaintiff's claims on the ground that they are redundant. Soldal v. Cook County, Illinois, 506 U.S. 56, 70–71 (1992).

A. Jumuah and Taleem for Prisoners in Segregation

Plaintiff alleges that he is in segregation and that defendants do not allow prisoners in segregation to attend Jumuah or Taleem, even though they allow prisoners in segregation to participate in other group activities. I conclude that this allegation states a claim under RLUIPA, the free exercise clause, the establishment clause and the equal protection clause.

With respect to RLUIPA, it is plausible to infer that from the allegations in the complaint that being unable to attend Jumuah or Taleem substantially burdens plaintiff's religious exercise. If plaintiff can prove that fact at summary judgment or trial and that defendants Kelli West, Rick Raemisch, Todd Overbo, Peter Huibregtse, Tim Haines and Gary Boughton are responsible for the restriction, it will be defendants' burden to show that prohibiting prisoners in segregation from attending religious services furthers "a compelling governmental interest," and does so by "the least restrictive means."

With respect to plaintiff's claims under the Constitution, I may infer from the complaint that he is contending that the restriction is neither reasonable nor neutral because plaintiff alleges that defendants allow prisoners in segregation to participate in nonreligious group activities. At summary judgment or trial, plaintiff will have to come forward with specific facts proving each element of his claims and defendants will have an opportunity to come forward with evidence showing that any differential treatment is justified by a legitimate secular interest.

B. Nonprisoner Volunteer Requirement

Plaintiff says that, even when he is not housed in segregation, defendants do not provide services for Jumuah and Taleem unless a nonprisoner volunteer is available to lead the services. Again, I conclude that plaintiff has stated a claim upon which relief may be

granted under RLUIPA, the free exercise clause, the establishment clause and the equal protection clause.

With respect to plaintiff's RLUIPA claim, as stated above, it is plausible to infer from plaintiff's allegations in his complaint that missing Jumuah and Taleem imposes a substantial burden on his religious exercise. If plaintiff can prove that fact at summary judgment or trial and that defendants Raemisch, West, Cole, Smith, Hamblin, Casperson and Jess are responsible for enforcing the rule requiring nonprisoner volunteers to lead religious services, it will be defendants' burden to show that the rule furthers "a compelling governmental interest," and does so by "the least restrictive means."

Plaintiff's constitutional claims present a closer question. In the context of claims brought under the free exercise clause, the Court of Appeals for the Seventh Circuit has rejected arguments that it is unreasonable for prison officials to require a nonprisoner volunteer to lead religious services. Johnson-Bey v. Lane, 863 F.2d 1308, 1310-11 (7th Cir. 1988) (prison officials "need not . . . allow inmates to conduct their own religious services, a practice that might not only foment conspiracies but also create (though more likely merely recognize) a leadership hierarchy among the prisoners"); Hadi v. Horn, 830 F.2d 779, 784-85 (7th Cir. 1987) (rejecting claim that Muslim prisoners were entitled to lead their own services when chaplain or volunteer was not available). See also Adkins v. Kaspar, 393 F.3d 559, 565 (5th Cir. 2004) (upholding prison requirement that volunteer must supervise

religious services); Spies v. Voinovich, 173 F.3d 398, 402, 405-06 (6th Cir. 1999) (same); Tisdale v. Dobbs, 807 F.2d 734, 738-39 (8th Cir. 1986) (same).

However, in Johnson-Bey, 863 F.2d at 1311-12, the court suggested that prison officials may have a heightened burden to justify a decision to deny prisoners the ability to lead worship services when no other alternatives may be found, stating that "the reasonableness of the ban on inmates' conducting their own religious services is related to the availability of substitutes, whether chaplains employed by the prison or ministers invited on a visiting basis." Other language in the same case suggests that prison officials may have an obligation to find someone to lead the service if they do the same for other religious groups. Id. at 1312-13 ("The potential financial burden on small sects of providing visiting ministers to prison—the prison authorities deem them 'volunteers' and will not compensate them even to the extent of reimbursing them for their expenses, while picking up the full tab for full-time chaplains for Catholic and Protestant prisoners—is troubling.").

In this case, plaintiff alleges that the purpose of the rule requiring nonprisoners to lead religious services is to "promote Christianity and suppress Islam," that defendants employ many Christian chaplains but very few Muslim chaplains and that defendants know that the rule against nonprisoner volunteers affects Muslim prisoner disproportionately. Accordingly, I will assume at this stage that the rule is neither neutral nor reasonable. However, at summary judgment or trial, plaintiff will have to come forward with specific

evidence proving that each of the defendants is intentionally treating Muslims less favorably than members of other faiths.

ORDER

IT IS ORDERED that

1. The caption is AMENDED to include Charles Cole, Amy Smith, Gary Hamblin, Steve Casperson and Cathy Jess as defendants.

2. Plaintiff Mustafa-El K.A. Ajala formerly known as Dennis Jones-El is GRANTED leave to proceed on the following claims:

> (a) defendants Kelli West, Rick Raemisch, Todd Overbo, Peter Huibregtse, Tim Haines and Gary Boughton are refusing to allow plaintiff to attend Jumuah or Taleem while he is housed in segregation, in violation of the Religious Land Use and Institutionalized Persons Act, the free exercise clause, the establishment clause and the equal protection clause;
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> (b) defendants Raemisch, West, Haines, Overbo, Huibregtse, Cole, Smith, Hamblin, Casperson, Boughton and Jess are enforcing a rule that prohibits prisoners from holding religious services unless a nonprisoner volunteer is available to lead the service, in violation of the Religious Land Use and Institutionalized Persons Act, the free exercise clause, the establishment clause and the equal protection clause.

3. For the time being, 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 who 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.

4. 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 his documents.

5. 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 defendants. Plaintiff should not attempt to serve defendants on his own at this time. 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 it accepts service for defendants.

6. Plaintiff is 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 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 accounts until the filing fee has been paid in full.

Entered this 17th day of October, 2013.

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