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,

ORDER

13-cv-546-bbc

v.

KELLI WEST, RICK RAEMISCH,
TODD OVERBO, PETER HUIBREGTSE
and GARY BOUGHTON,

Defendants.

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Plaintiff Mustafa-El K.A. Ajala, formerly known as Dennis Jones-El, is proceeding on a claim that defendants Kelli West, Rick Raemisch, Todd Overbo, Peter Huibregtse and Gary Boughton are refusing to allow plaintiff to wear his kufi outside his cell and the chapel, in violation of the Religious Land Use and Institutionalized Persons Act, the free exercise clause, the establishment clause and the equal protection clause. Defendants have filed a motion for summary judgment, dkt. #11, which is ready for review.

Unfortunately, defendants' motion raises a number of questions that the parties do not answer. First, it is undisputed that plaintiff has been housed in segregation since he has been confined at the Wisconsin Secure Program Facility, Dfts.' Rep. to Plt.'s Resp. to Dfts.' PFOF ¶ 26, dkt. #27, but neither side identifies when plaintiff is scheduled to be released from segregation. This is important because the justifications for restricting religious

headgear could be different for prisoners in segregation than for prisoners in general population and because defendants suggest that their rules for wearing headgear are different for prisoners in segregation than they are for other prisoners. Compare id. at ¶ 52 ("Inmates are allowed to order and wear some approved headgear outside of their cells, such as stocking hats, baseball caps, crusher khaki caps, and sweatbands from approved vendors in basic neutral colors, such as gray, white and green.") with id. at ¶ 64 ("Inmates in segregation are escorted by staff when outside of their cells, and the wearing of headgear of any type is prohibited during escorts to recreation, visits, etc.").

Both sides seem to assume that plaintiff is challenging restrictions on wearing kufis in both segregation and in general population, but if plaintiff is going to remain in segregation for the foreseeable future, then it is not clear whether he has standing to challenge the restrictions on prisoners in general population. Clapper v. Amnesty International USA, 133 S. Ct. 1138, 1147 (2013) ("[W]e have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact and that allegations of possible future injury are not sufficient [to demonstrate standing.]") (internal quotations and alterations omitted); Texas v. United States, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."). Accordingly, I am directing the parties to show cause why plaintiff's claim should not be limited to challenging restrictions on prisoners like him who are housed in segregation.

A second, related problem with the parties' filings is that they conflate many of their

arguments regarding the rules in segregation with their arguments regarding the rules in general population, even though defendants acknowledge that both the rules and the justifications may be different in the different custody statuses. Accordingly, in their response to this order, the parties should supplement their summary judgment materials in a number of ways.

First, the parties should identify with more specificity the differences between the prison's rules regarding wearing religious headgear in segregation and general population. This directive is intended primarily for defendants because they are most likely to have access to this information, but plaintiff is free to address this issue as well if he has personal knowledge of relevant facts.

Defendants provided one proposed finding of fact about this issue (no. 52), but it is incomplete. For example, defendants say that, in segregation, the "wearing of headgear of any type is prohibited during escorts to recreation, visits, etc." but they do not explain whether the "etc." means that headgear is always prohibited outside the cell or if there are some situations in which headgear is permitted.

Second, with respect to each of the justifications that defendants offered for restricting the wearing of kufis, the parties should address individually how those justifications apply in segregation and in general population instead of conflating those arguments. For example, arguments regarding concerns about using kufis to hide contraband might be stronger for prisoners in segregation, but concerns about other prisoners being offended by the kufi might be weaker in segregation in light of the limited group activities

for those prisoners.

Third, to the extent defendants are relying on plaintiff's status in segregation as a justification for prohibiting plaintiff from wearing a kufi, the parties should address the question whether defendants should be required to consider plaintiff's individual circumstances rather than simply his status in segregation. E.g., Haight v. Thompson, 763 F.3d 554, 562 (6th Cir. 2014) ("Rejecting accommodation requests on the ground that an exception to a general prison policy will make life difficult for prison wardens is a fine idea in the abstract . . . but it has no place as a stand-alone justification under RLUIPA."); Yellowbear v. Lampert, 741 F.3d 48, 57 (10th Cir. 2014) (RLUIPA requires that government "prove the 'compellingness' of its interest in the context of 'the burden on that person'—suggesting an inquiry that proceeds in light of the particular burden the government has placed on the particular claimant."); Spratt v. Rhode Island Dept. of Corrections, 482 F.3d 33, 39, 40 n. 9, 41 (1st Cir. 2007) (rejecting prison officials' "all or nothing" argument and finding that officials "must . . . establish that prison security is furthered by barring [the plaintiff] from engaging in" the disputed conduct); Beebe v. Birkett, 749 F. Supp. 2d 580, 588 (E.D. Mich. 2010) ("The defendants have the burden of demonstrating that the policy directive is the least restrictive means to achieve security as applied to [the plaintiff]."). Further, to the extent that defendants have not yet considered plaintiff's individual circumstances, the parties should address the question whether any injunctive relief plaintiff receives in this case should be limited to directing defendants to consider those circumstances.

Fourth, the parties should address the issue raised in a similar case, Caruso v. Zenon, 2005 WL 5957978, at *20 (D. Colo. 2005), which I have attached to this order. In Caruso, the court considered whether other types of headgear, such as a stocking cap, could serve a Muslim prisoner's religious desire to cover his head while also addressing the prison officials' concerns about using the kufi as a gang symbol and about the potential offense it could cause non-Muslim prisoners. Perhaps a similar solution would be appropriate in this case. In his declaration, plaintiff says that his religious beliefs require him to wear a head covering, but he does not say that the head covering must be a kufi. Plt.'s Decl. ¶ 4, dkt. #25.

Finally, the parties should address the question raised in cases such as O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401-02 (7th Cir. 2003), regarding the extent to which prison officials need to adduce specific evidence under RLUIPA to show that a prisoner's religious exercise will create a security problem rather than rely on speculation, particularly when the concern is the potential reaction of other prisoners to the religious exercise at issue.

ORDER

IT IS ORDERED that the parties may have until February 20, 2015, to submit supplemental materials addressing the questions raised in this order. If the parties do not respond by then, I will dismiss for lack of standing plaintiff's challenge to the restriction on

wearing a kufi by prisoners in general population and limit my consideration to prisoners in segregation.

Entered this 14th day of January, 2015.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge