IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

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

Plaintiff,

v.

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

Defendants.[1]

OPINION AND ORDER

13-cv-546-bbc

- -

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 defendants are prohibiting him from wearing a 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. 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

---

[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.

requires the court to determine whether the complaint states a claim upon which relief may be granted. Having reviewed the complaint, I conclude that plaintiff may proceed on his claims.

OPINION

Plaintiff alleges that each of the defendants is responsible for a policy that prohibits Muslim prisoners like him from wearing a kufi outside their cells and the chapel, even though prisoners are allowed to wear other types of head coverings. Plaintiff says that wearing a kufi "is an important part of Islamic identity and practice."

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 other prisoners, 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).

I conclude that plaintiff has stated a claim upon which relief may be granted under each of his legal theories. With respect to RLUIPA, it is reasonable at the pleading stage to infer that the limitation on wearing kufis is a substantial burden on plaintiff's religious exercise from his allegation that wearing a kufi is an important part of his religious belief. However, at summary judgment or trial, plaintiff will be required to come forward with more specific evidence explaining how the restriction imposes a substantial burden. If plaintiff

proves that each defendant imposed a substantial burden on his religious exercise, the burden will shift to defendants to prove that the restriction is the least restrictive means to further a compelling interest.

With respect to plaintiff's constitutional claims, I may infer that the restriction is neither reasonable nor neutral from plaintiff's allegations that prisoners are allowed to wear other types of head coverings outside the chapel and their cells. 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.

ORDER

IT IS ORDERED that

1. Plaintiff Mustafa-El K.A. Ajala, formerly known as Dennis Jones-El, is GRANTED leave to proceed on his 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.

2. 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.

3. 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.

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 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.

5. 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 25th day of October, 2013.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge