IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHRISTOPHER SCOTT ATKINSON,

OPINION AND ORDER

Plaintiff,

14-cv-736-bbc

v.

FELIPA MACKINNON,
JOSEPH WARNKE and
CRYSTAL SCHWERSENSKA,

Defendants.

- -

In this proposed civil action, plaintiff Christopher Scott Atkinson, a prisoner at the Federal Correctional Institution at Oxford, Wisconsin, contends that prison officials have violated his rights by giving him harsh discipline and poor work performance evaluations because of his Muslim religious practices and because he complained about his poor treatment. Plaintiff alleges that the prison officials committed these acts because plaintiff wears a kufi and practices Islam. Because plaintiff is a prisoner, I must screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). After reviewing the

complaint, I conclude that plaintiff may proceed on his claims that defendants Joseph Wernke, Crystal Schwersenka and Felipa Mackinnon have violated plaintiff's rights under the free exercise and establishment clauses of the First Amendment; the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(a)-(b); and the equal protection clause of the Fifth Amendment.

Plaintiff alleges the following facts in his proposed complaint.

ALLEGATIONS OF FACT

In November 2013, plaintiff worked in food service at the Oxford prison. On November 12, 2013, "Kangas," one of plaintiff's supervisors in food service, told plaintiff that he suspected plaintiff of stealing some food. Later in the day, another supervisor, defendant Warnke, observed plaintiff eating a chicken patty. Warnke asked plaintiff whether the chicken patty was a "Muslim thing," Plt.'s Cpt., dkt. #1, at 3, confiscated the patty and ordered plaintiff to stay away from food service for the rest of the day.

On November 13, 2013, plaintiff returned to work at food service. Approximately four or five hours into plaintiff's work schedule, defendant Warnke accused plaintiff of theft from the day before. Plaintiff told Warnke to "shut up and stop harassing" him. Id. at 4. Defendant Warnke responded by telling plaintiff that "'if [he] wanted to be treated like an American, [he] needed to remove [his] kufi' (Islamic Headdress)." Id. Plaintiff did not remove his kufi and asked defendant Warnke what he had done to deserve the treatment. Defendant Warnke told plaintiff to "beat it . . . before we beat you down on your way to the

shu (segregation)." Id. Plaintiff then left the area.

Defendant Schwersenska was acting as plaintiff's supervisor that day and she informed him that she and defendant Warnke were "taking" his job and grade and reducing his hours from 8 hours to 1.5 hours a day. At the time that Schwersenska informed plaintiff of the decision, Warnke said, "Now that's American justice; down with the funny hats and Shariah law." Id.

Other prisoners have been disciplined differently when accused of theft: they were formally charged or offered informal resolution. (Plaintiff does not explain why his discipline is not considered an informal resolution.)

Plaintiff reported the incident to the assistant food service administrator Scott; Scott took no action with respect to the incident. Plaintiff then contacted the warden of the prison, who informed plaintiff that there would be an investigation. Defendant Mackinnon, Food Service Administrator, summoned plaintiff and Kangas to her office and reinstated plaintiff's pay.

When plaintiff returned to work he realized that Mackinnon had not reinstated his job title, duties or hours. Plaintiff filed a written complaint. Mackinnon told plaintiff that his refusal to accept responsibility for theft and the fact that he had complained about Warnke were problems. She told plaintiff he had until January to find a new job.

In February 2014, plaintiff learned that he had received four consecutive months of poor work performance evaluations. He told his immediate supervisor, Goldsmith, who said that he had given plaintiff positive reviews. Plaintiff then reported the problem to the

associate warden, who referred him to the assistant food service administrator, Scott. Scott referred plaintiff to Mackinnon, who admitted that she had been responsible for the poor job evaluations and Mackinnon told plaintiff she would change the evaluations to "good" but that plaintiff must find a new job.

In March 2014, the poor evaluations had been removed from plaintiff's record. Plaintiff then filed a formal complaint against defendants Mackinnon, Warnke and Schwersenka. These defendants continue to inform plaintiff that he is barred from a promotion in food service and that he must find a job elsewhere. (Plaintiff does not say what will happen if he does not find a job elsewhere.)

OPINION

Plaintiff alleges that defendants Warnke and Schwersenska treated him adversely by changing his pay, job title, duties and hours because he wears a kufi and follows Islam. Plaintiff says this discipline was different from what other prisoners received for similar offenses. Further, he says that defendant Mackinnon treated him adversely by refusing to correct Warnke's and Schwersenska's discipline, informing plaintiff that he must find a new job and giving him poor performance evaluations. He alleges that Mackinnon took these actions because plaintiff complained about Warnke's and Schwersenska's treatment.

Plaintiff contends that defendants treated him poorly because of his religion and religious practices and this poor treatment was discriminatory and burdensome to his free speech and free exercise of religion. These allegations are sufficient to state claims under the

free speech and free exercise clauses of the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(a)-(b), both of which protect persons from substantial government burdens on the exercise of their religion. For the purposes of screening plaintiff's complaint, I have assumed that defendants' adverse treatment as a result of plaintiff's religious practice may constitute a "substantial burden" under RFRA. Cf. Koger v. Bryan, 523 F.3d 789, 799 (7th Cir. 2008) (applying the related statute, RLUIPA, 42 U.S.C. §§ 2000cc–2000cc-5, "a government imposes a substantial burden on a person's beliefs when it 'put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs.'") (quoting Thomas v. Review Board, 450 U.S. 707, 718 (1981)).

Further, plaintiff's allegations are sufficient to state claims under the establishment clause of the First Amendment and the equal protection clause of the Fifth Amendment, both of which prohibit the government from singling out particular religions for special treatment without a secular reason for doing so. Cruz v. Beto, 405 U.S. 319 (1972); Kaufman v. McCaughtry, 419 F.3d 678, 683-84 (7th Cir. 2005). When religion is the basis for discrimination, the analysis is the same whether the claim is viewed under the establishment clause or the equal protection clause. Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 715 (O'Connor, J., concurring) ("[T]he Religion Clauses . . . and the Equal Protection Clause as applied to religion . . . all speak with one voice on this point."). However, I note that plaintiff characterizes his equal protection claim against defendant Schwersenska as a "class of one" claim. This type of claim is not available to plaintiff because the challenged action by its nature "involve[s] discretionary

decision-making based on a vast array of subjective, individualized assessments." By their nature, decisions on employment and discipline involve individualized determinations. Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591, 603-04 (2008). Therefore, plaintiff will be allowed to proceed on his equal protection claims only on the theory of religious discrimination.

ORDER

IT IS ORDERED that

1. Plaintiff Christopher Scott Atkinson is GRANTED leave to proceed on his claims that defendants Joseph Warnke and Crystal Schwersenska violated his rights under the free exercise and establishment clauses of the First Amendment, the equal protection clause of the Fifth Amendment and RFRA when they changed plaintiff's pay, job title, duties and hours and on his claims that defendant Felipa Mackinnon violated the free speech, free exercise and establishment clauses of the First Amendment, the equal protection clause of the Fifth Amendment and RFRA by refusing to reinstate his job privileges, submitting poor work performance evaluations of plaintiff and telling plaintiff that he must find new work.

2. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer or lawyers will be representing defendants, he should serve the lawyers directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows 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 plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

4. I am sending copies of plaintiff's complaint and this order to the United States Marshal for service on defendants. Plaintiff should not attempt to serve defendants on his own at this time.

5. Plaintiff is obligated to pay the unpaid balance of his 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 7th day of January, 2015.

BY THE COURT:
/s/

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BARBARA B. CRABB
District Judge