

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES A. TANKSLEY,

Plaintiff,

v.

OPINION & ORDER

EDWARD WALL, WILLIAM POLLARD, and
WISCONSIN DEPARTMENT OF CORRECTIONS,

15-cv-126-jdp

Defendants.

Pro se plaintiff James A. Tanksley is currently incarcerated at the Waupun Correctional Institution. He has filed a proposed civil action, alleging that defendants have violated his right to freely exercise his religion—the Hermetic Order of the Golden Dawn—by prohibiting his access to specific tarot cards. Dkt. 1. He seeks to proceed under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1(a), and under the First Amendment via 42 U.S.C. § 1983.

Plaintiff also seeks to proceed *in forma pauperis* and has made an initial partial payment of the filing fee as directed by the court. As a next step, I must screen his complaint and dismiss any portion that is legally frivolous, malicious, or fails to state a claim upon which relief may be granted, or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. In addressing any pro se litigant’s complaint, I must read the allegations of the complaint generously. *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010).

Plaintiff named as defendants Edward Wall, the former secretary of the Wisconsin Department of Corrections, William Pollard, the former warden of the Waupun Correctional Institution, and the Wisconsin Department of Corrections. He has sued both defendants in

their official capacities and requested only injunctive relief. Because Wall and Pollard are no longer serving in those roles, I will substitute the current secretary and warden in their place under Federal Rule of Civil Procedure 25(d). I will direct the clerk's office to amend the caption accordingly. After considering plaintiff's complaint, I conclude that he may proceed on his RLUIPA claims against all three defendants and on his First Amendment claims against only the current secretary and warden.

ALLEGATIONS OF FACT

In his complaint, plaintiff alleges the following facts.

Plaintiff is an initiate into the Hermetic Order of the Golden Dawn. He has been a practicing believer for 25 years. Believers in the Golden Dawn use the Initiatory Tarot of the Golden Dawn deck and the Golden Dawn Enochian Skrying Tarot deck. These tarot decks are designed specifically for believers to use in practicing their faith. They are an important part of that practice and include unique aspects that cannot be found in other tarot decks that are allowed under prison policy. The tarot also has a companion instruction book.

Waupun recognizes the Hermetic Order of the Golden Dawn as a legitimate faith, and regulates religious property according to DIA Policy 309.61.02. But the policy prohibits inmates from having the tarot cards and instructional materials that are related to the Golden Dawn.

On May 13, 2013, plaintiff tried to obtain the tarot deck and companion instruction book. On September 5, 2013, his request was denied. The denial included the following statement: "Tanksley prefers the look and flavor of this new deck over the existing allowed deck of tarot cards not because it is a requirement but as a personal preference." Dkt. 1, at 6.

Tanksley filed an offender complaint about the denial, but the institution complaint examiner dismissed his complaint and the deputy warden “signed off” on the dismissal. Plaintiff appealed, but the corrections complaint examiner dismissed his appeal on October 23, 2013. Plaintiff then wrote to defendant Edward Wall, the former secretary of the Wisconsin Department of Corrections, to ask for reconsideration. It is not clear whether he ever received a response.¹ The Office of the Secretary denied plaintiff’s appeal of his complaint.

Plaintiff then filed this action on February 27, 2015. The court has jurisdiction under 28 U.S.C. § 1331.

ANALYSIS

To proceed, plaintiff must allege facts that articulate a plausible claim for relief. That means that plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (citing *Bell Atl. Corp. Twombly*, 550 U.S. 544, 556 (2007)).

A. RLUIPA

Plaintiff alleges that defendants violated RLUIPA by denying him access to the tarot cards and book that he needs to practice his religion. RLUIPA protects an inmate’s religious rights from substantial burden unless that burden is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest. *See* 42 U.S.C. § 2000cc-1; *Koger v. Bryan*, 523 F.3d 789, 796, 799 (7th Cir. 2008). A substantial

¹ Plaintiff requests only injunctive relief. If he also seeks monetary damages against Wall in his personal capacity under his § 1983 claim, then he must amend his complaint to include facts about what Wall specifically did to violate his rights.

burden “is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable.” *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003). The RLUIPA analysis uses a burden-shifting framework in which plaintiff must first make out a *prima facie* case demonstrating a substantial burden on his religious rights. *Koger*, at 796. Then defendants must show that their policy is the least restrictive means of furthering a compelling governmental interest. *Id.* RLUIPA allows for claims against the state, but it limits plaintiff to only declaratory and injunctive relief; he may not obtain money damages against any party. *Sossamon v. Texas*, 563 U.S. 277, 295-96 (2011).

Plaintiff maintains that he needs the tarot deck and book to practice his religion. He alleges that the Wisconsin Department of Corrections’ policy denying them to him substantially burdens his practice. It is reasonable to infer that defendants have the authority to grant plaintiff’s requested relief. *See Gonzalez v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011). I conclude that plaintiff has stated a claim under RLUIPA and may proceed against all three defendants for injunctive relief.

B. First Amendment

The standard for proving a claim under the free exercise clause of the First Amendment is less clear than the standard under RLUIPA. Generally, when a prisoner brings a claim under the First Amendment, the question is whether the challenged restriction is reasonably related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987). Four factors are relevant to the determination under *Turner*: (1) whether there is a “valid, rational connection” between the restriction and a legitimate governmental interest; (2) whether the prisoner retains alternatives for exercising the right; (3) the impact that

accommodation of the right will have on prison administration; and (4) whether there are other ways that prison officials can achieve the same goals without encroaching on the right. *Id.* at 89-91.

However, in the context of claims brought under the free exercise clause, there are open questions regarding whether there may be additional elements. In particular, it is not clear whether a plaintiff must prove that the defendants placed a “substantial burden” on his exercise of religion, or that the restriction is not just a neutral rule of general applicability, but instead targets the plaintiff’s religion for adverse treatment. *See e.g., Lewis v. Sternes*, 712 F.3d 1083, 1085 (7th Cir. 2013) (stating that it is open question whether prisoner must prove discrimination in free exercise claim); *World Outreach Conf. Ctr. v. City of Chi.*, 591 F.3d 531, 534 (7th Cir. 2009) (plaintiff may prove free exercise claim with evidence of substantial burden or intentional religious discrimination).

Even if I assume that a free exercise claim requires plaintiff to prove that defendants substantially burdened his religious exercise and that the restrictions are not part of a generally applicable neutral rule, I conclude that plaintiff has stated a claim upon which relief may be granted. Plaintiff alleges that the withholding the tarot deck and book substantially burdens his religious exercise. I will wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest, *e.g., Ortiz v. Downey*, 561 F.3d 664, 669-70 (7th Cir. 2009). For now, I conclude that plaintiff has stated a First Amendment claim.

However, neither states nor state agencies may be sued under § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989). Therefore, plaintiff may not proceed against the Wisconsin Department of Corrections on this claim. But state officials like the secretary and

the warden may be sued in their official capacities for injunctive relief, as plaintiff is requesting here. *Id.* at 71 n.10. Accordingly, plaintiff may proceed on his First Amendment claim against only the secretary and warden for injunctive relief.

ORDER

IT IS ORDERED that:

1. Jon E. Litscher is substituted for Edward Wall, and Brian Foster is substituted for William Pollard.
2. Plaintiff James A. Tanksley is GRANTED leave to proceed on his RLUIPA claim against defendants Jon E. Litscher, Brian Foster, and the Wisconsin Department of Corrections.
3. Plaintiff James A. Tanksley is GRANTED leave to proceed on his First Amendment claim against only Litscher and Foster. He is DENIED leave to proceed on this claim against the Wisconsin Department of Corrections.
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 defendant. 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. 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 or lawyers 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.
6. 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.
7. Plaintiff is obligated to pay the unpaid balance of his filing fee 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.

8. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for his failure to prosecute it.

Entered April 28, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge