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

ARMAND I. BAKER,

Plaintiff,

v.

DEPUTY DOHERTY
and DANE COUNTY SHERIFF'S OFFICE,

Defendants.

OPINION and ORDER

Case No. 16-cv-567-wmc

Pro se plaintiff Armand I. Baker brings this action under 42 U.S.C. § 1983, alleging that Deputy Sarah Doherty and the Dane County Sheriff's Office violated his right to practice his religion and discriminated against him because he is Muslim. Baker's complaint is now before this court for screening pursuant to 28 U.S.C. § 1915A. In addressing any *pro se* litigant's complaint, the court must construe the allegations generously. *See Haines v. Kerner*, 404 U.S. 519, 521 (1972). After reviewing Baker's allegations, the court concludes that he may proceed on claims under the First and Fourteenth Amendments.

ALLEGATIONS OF FACT[1]

At all times relevant to his complaint, Armand Baker was incarcerated at the Dane County Jail in Madison, Wisconsin. Baker is Muslim and practices daily prayer. On August 3, 2016, Baker was praying in the dayroom when defendant Sarah Doherty walked in front of him. Another inmate told Doherty that she should not cross in front of Baker while he was praying. Doherty then stopped directly in front of Baker with her buttocks in his face. Baker told Doherty that she had disrupted his prayer and that he would have to "re-purify" himself.

[1] For purposes of this order, the court assumes the facts above based on the allegations in Baker's complaint.

Doherty laughed, told Baker that he could not pray in the dayroom and said that "normal people don't pray with their face on the floor."

OPINION

I. First Amendment Free Exercise Claim

Plaintiff claims that defendant Doherty's denial of his right to pray in the dayroom violated his right under the First Amendment to practice his religion. 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 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Four factors are relevant to that determination: (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.

In the context of claims brought under the free exercise clause, there are open questions regarding whether there may be other elements as well. In particular, it is not clear whether a plaintiff must prove that: (1) the defendants placed a "substantial burden" on his exercise of religion; or (2) the restriction is not a neutral rule of general applicability but instead targets the plaintiff's religion for adverse treatment. In some cases, courts have applied one or both of these other elements and in some cases the courts have omitted them. *E.g., Ortiz v. Downey*, 561 F.3d 664, 669 (7th Cir. 2009) (applying *Turner* standard without discussing other elements); *Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006) (requiring prisoner to show that restriction was discriminatory); *Kaufman v. McCaughtry*, 419 F.3d 678, 682-83 (7th Cir. 2005)

(requiring showing of substantial burden). *See also 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 Conference Center v. City of Chicago*, 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 the court assumes that a free exercise claim requires plaintiff to prove that his religious exercise has been substantially burdened and that the restrictions are not part of a generally applicable neutral rule, the court concludes that plaintiff has stated a claim upon which relief may be granted under the free exercise clause. Although it is not entirely clear from plaintiff's allegations whether there is a general rule prohibiting all forms of praying in the dayroom, the court can draw a reasonable inference from his allegations that defendant Doherty targeted plaintiff in particular because of the form of his prayer. In particular, Doherty allegedly told him that his form of praying was not "normal." Thus, the court may infer for screening purposes that Doherty was not enforcing a generally applicable and neutral rule. Additionally, plaintiff's allegations suggest that denial of his right to pray in the dayroom at the Dane County Jail substantially burdened his religious exercise.

Finally, with respect to the question whether the restrictions are reasonably related to a legitimate penological interest, the general rule is that courts should not make that assessment in the context of a screening order. *Ortiz*, 561 F.3d at 669-70. Because there is no reason to depart from that general rule in this case, the court will allow plaintiff to proceed on this claim against defendant Doherty.

II. Fourteenth Amendment Equal Protection Claim

Plaintiff may also proceed on an equal protection claim against defendant Doherty. To establish a case of discrimination under the Equal Protection Clause, a plaintiff is required to show (1) "that he is a member of a protected class"; (2) "that he is otherwise similarly situated to members of the unprotected class"; and (3) "that he was treated differently from members of the unprotected class." *Brown v Budz*, 398 F.3d 904, 916 (7th Cir. 2005) (quoting *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir. 1993)). A plaintiff must also plead sufficient facts to show that the defendant "adopted and implemented a policy not for a neutral . . . reason but for the purpose of discriminating on account of race, religion, or national origin." *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009). In other words, a plaintiff must allege an improper motive, and not merely a discriminatory impact. *See Washington v. Davis*, 426 U.S. 229, 245 (1976).

Plaintiff's allegations suggest that defendant Doherty singled him out and interrupted his prayers because he is Muslim and prayed differently than she thought was normal. These allegations permit an inference that Doherty targeted plaintiff and treated him differently because of his membership in a protected class. Accordingly, plaintiff may proceed against Doherty with an equal protection claim.

III. Dane County Sheriff's Office

Plaintiff may not proceed on any claim against the Dane County Sheriff's Office. Although Wisconsin municipalities may be sued, *see* Wis. Stat. § 62.25, agencies and departments may not. *See Best v. City of Portland,* 554 F.3d 698, 698 n.1 (7th Cir. 2009); *Buchanan v. City of Kenosha,* 57 F. Supp. 2d 675, 678 (E.D. Wis. 1999) (collecting cases). To the extent that the Dane County Sheriff's Office form a part of the county government that

they serve, they are not "legal entit[ies] separable from the county government," so they are not subject to suit. *Whiting v. Marathon Cnty. Sheriff's Dep't*, 382 F.3d 700, 704 (7th Cir. 2004). The court will, therefore, dismiss the claims against the Dane County Sheriff's Office.

ORDER

IT IS ORDERED that:

(1) Plaintiff Armand I. Baker is GRANTED leave to proceed on claims that defendant Deputy Doherty violated his right to free exercise of his religion under the First Amendment and to equal protection under the Fourteenth Amendment.

(2) Plaintiff is DENIED leave to proceed on all other claims. Defendant Dane County Sheriff's Office is DISMISSED from this case.

(3) The clerk's office will prepare summons and the U.S. Marshal Service shall effect service upon defendant Doherty.

(4) For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to the defendant's attorney.

(5) 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.

(6) It is plaintiff's obligation to inform the court of any change in his new address. If he fails to do this and defendant or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 17th day of May, 2017.

BY THE COURT:

/s/

WILLIMAM M. CONLEY
District Judge