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

NICHOLAS R. McATEE,

Plaintiff,

v.

CHAPLAIN EWING, MS. WILLARD WEST, GARY BOUGHTON, JON E. LITSCHER and JAMES SCHWOCHERT,

Defendants.

OPINION AND ORDER

18-cv-858-wmc

Pro se plaintiff Nicholas McAtee, who was previously incarcerated at the Wisconsin Secure Program Facility ("WSPF"), filed this lawsuit pursuant to 42 U.S.C. § 1983, claiming that defendants violated his constitutional rights in prohibiting him access to a religious diet and religious service and from wearing a yarmulke outside of his cell. McAtee's complaint is ready for screening as required by 28 U.S.C. §§ 1915(e)(2), 1915A. For the following reasons, the court will allow him to proceed on First and Fourteenth Amendment claims against defendant Chaplain Ewing related to his ability to wear a yarmulke and access a Kosher diet, but the remaining defendants will be dismissed.

ALLEGATIONS OF FACT[1]

At all relevant times, McAtee was incarcerated at WSPF and he practices Judaism. His religious practices include wearing a yarmulke, eating a Kosher diet and participating in worship services. Defendants include Wisconsin Department of Corrections ("DOC")

[1] In addressing any pro se litigant's complaint, the court must read the allegations generously, resolving all ambiguities and making reasonable inferences in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the following facts based on the allegations in plaintiff's complaint and attachments to his complaint, unless otherwise noted.

employees at the time McAtee filed his lawsuit, Jon Litscher, the DOC Secretary; James Schwochert, an administrator with the Division of Adult Institutions ("DAI"); and Ms. Willard West, the religious practices coordinator. Plaintiff also names WSPF employees Chaplain Ewing and Warden Gary Boughton.

On January 7, 2018, McAtee changed his religious preference to Judaism. On January 25, 2018, McAtee wrote to Ewing asking to be signed up for Passover, and Ewing approved this request. However, later that month McAtee requested to be placed on the Kosher diet, but that request was denied. Apparently Ewing explained to McAtee that he could "self select," but because McAtee did not know enough about Judaism, he would not be allowed the Kosher diet. On February 1, 2018, McAtee filed a DOC-2075, appealing Ewing's denial of a religious Kosher diet, but he never heard back. McAtee also filed an inmate complaint about the Kosher diet denial, and his complaint was dismissed. McAtee has not alleged who was involved in either the denial or the dismissal.

In April, McAtee wrote to Ewing asking about the requirements for a Kosher diet. On July 14, 2018, Ewing responded that McAtee should reapply to be placed on the Kosher diet. It is unclear whether McAtee reapplied or has since been placed on the Kosher diet.

Also in April, McAtee noticed that while he was not allowed to wear his yarmulke outside of his cell, other prisoners who practice Islam were allowed to wear their Kufi caps outside their cells. McAtee wrote to Chaplain Ewing, asking him whether it was true that he would not be allowed to wear his yarmulke outside of his cell for Passover, and Ewing responded that McAtee's assumption was correct. McAtee wrote the same question to non-defendant Sergeant Fredericks, who responded that McAtee could only wear his

yarmulke in his cell or for a religious ceremony. Ewing agreed with that response. McAtee then followed up with Ewing, this time inquiring about the availability of Jewish worship services and study materials. Ewing responded by confirming that there were no services available, but that if McAtee knew a rabbi willing to perform the services, McAtee should contact him. Ewing added that he should check the library and that he had a list of books.

OPINION

Plaintiff believes that the denials of the Kosher diet, worship services and the ability to wear his yarmulke outside of his cell violate his First and Fourteenth Amendment rights. While plaintiff does not cite the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-2(b), the court will also discuss the plausibility of such a claim here.

As an initial matter, however, the court is dismissing defendants Boughton, West, Litscher and Schwochert since these defendants were not involved in any of the events underlying plaintiff's claims. *Minix v. Canarecci*, 597 F.3d 824, 833-34 (7th Cir. 2010) ("[I]ndividual liability under § 1983 requires personal involvement in the alleged constitutional violation."). While it is reasonable to infer that West, Litscher and Schwochert, all DOC administrators, might be authorized to make decisions about prisoner religious accommodations (and one or more of them might be in the position to handle appeals of religious diet requests), plaintiff has not alleged any facts suggesting that any of these defendants were aware of plaintiff's unsuccessful attempts to be placed on the Kosher diet, participate in worship services or wear his yarmulke outside his cell. Similarly,

while Boughton, as warden, likely has the authority to approve exceptions to a hat prohibition or to facilitate worship services, plaintiff has not pled that Boughton was involved in either denial. Accordingly, these defendants will be dismissed, but it will be without prejudice to plaintiff's ability to file a proposed amended complaint in the event that he inadvertently excluded factual allegations that would implicate these defendants. Should plaintiff file such a proposed amended complaint, the court would screen is pursuant to § 1915A.

I. First Amendment

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); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342 (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. *Turner*, 482 U.S. at 89–91.

However, 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 the defendants placed a "substantial burden" on his exercise of religion, or 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. *Compare*, *Ortiz v. Downey*, 561 F.3d 664, 669 (7th Cir. 2009) (applying *Turner* standard without discussing other elements), *with 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); *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).

Even assuming plaintiff must show a substantial burden on his religious practice, he has pled sufficient facts to proceed on claims related to his inability to wear a yarmulke outside his cell and to have access to a Kosher diet. While plaintiff does not specifically allege as much, it is reasonable to infer that each of these denials substantially burdened his religious practice. With respect to the yarmulke, plaintiff's allegation that Muslims were allowed to wear Kufis outside of their cells permits an inference of religious discrimination with no legitimate penological justification. Likewise, plaintiff's allegations that Ewing simply denied him the Kosher diet because he did not know enough about the religious faith do not appear to be linked to any legitimate penological interest either. Accordingly, the court will grant plaintiff leave to proceed against Ewing on First Amendment Free Exercise claims related to his desire to wear his yarmulke out of his cell and his denied requests for a Kosher diet.

However, plaintiff may not proceed against Ewing on a claim related to the availability of religious services. The general rule in this circuit is that claims governed by the *Turner* standard should be resolved at the summary judgment stage. *See Ortiz v. Downey*,

561 F.3d 664, 669-70 (7th Cir. 2009); *Lindell v. Frank*, 377 F.3d 655, 658 (7th Cir. 2004). Yet, in this instance, Ewing's response to plaintiff's request for Jewish services suggests that the unavailability of services was due to a lack of volunteer rabbis to lead the religious services, not that Ewing was unwilling to allow plaintiff access to Jewish worship services, nor does it otherwise give rise to a reasonable inference that Ewing's denial was not related to a legitimate penological interest. Furthermore, plaintiff has not provided any details about whether he was prevented from locating a rabbi to perform religious services, so it would be unreasonable to infer that he suffered a substantial burden. While plaintiff is free to seek leave to amend his complaint to include omitted allegations related to how Ewing prevented him from attending Jewish religious services, he may not proceed on this claim as currently pled.

II. Fourteenth Amendment Equal Protection

Plaintiff's allegation that Muslim inmates are allowed to wear their Kufis outside of their cells supports a reasonable inference that he was discriminated against on the basis of his Jewish faith. However, plaintiff has not included any allegations suggesting that inmates of other religions received more favorable treatment related to diet or worship services. While plaintiff mentions that Muslim inmates have been allowed to sign up for Ramadan meals later, Ramadan is an annual religious celebratory meal, not a dietary preference, so it would be unreasonable to compare plaintiff's experience with the Kosher diet denial to Muslim inmate's granted requests for Ramadan meals. Accordingly, while plaintiff may proceed on an equal protection claim, it will be limited to the fact that he has been unable to wear his yarmulke outside his cell during Passover.

III. RLUIPA

Finally, while plaintiff does not cite to RLUIPA, the court considers it here because *pro se* plaintiffs are generally not required to plead legal theories. *Small v. Chao*, 398 F.3d 894, 898 (7th Cir. 2005). Under RLUIPA, the plaintiff has the initial burden to show that he has a sincere religious belief and that his religious exercise was substantially burdened. 42 U.S.C. § 2000cc-1(a); *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005). If the plaintiff makes the showing, the burden shifts to the defendants to show that their actions further a "compelling governmental interest," and do so by "the least restrictive means." *Id.*; *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (citing *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2774, n. 28 (2014)). If a plaintiff prevails on a RLUIPA claim, he is limited to declaratory and injunctive relief; he cannot obtain money damages. *Grayson v. Schuler*, 666 F.3d 450, 451 (7th Cir. 2012).

Construing plaintiff's allegations generously, it is reasonable to infer that plaintiff's inability to wear his yarmulke outside of his cell or have access to a Kosher diet substantially burdens his ability to practice his Jewish faith. Based on his allegations, it further appears that Ewing may not be able to carry his burden of showing that the denials were the least restrictive means of furthering a compelling interest. However, the problem plaintiff runs into at this point in the analysis is that his complaint limits the relief he is seeking to monetary damages. (Compl. (dkt. #1) 2.) This may be have been purposeful; by the time he filed his complaint plaintiff may have received the relief he is seeking and thus is not interested in pursuing claims under RLUIPA. In any event, plaintiff is now incarcerated at Redgranite Correctional Institution, which would render any claims for

injunctive relief moot. *See Maddox v. Love*, 655 F.3d 709, 716 (7th Cir. 2011) (holding that prisoner's claim for injunctive relief was moot because he was no longer a prisoner at the institution causing him harm and had "not shown a realistic possibility" that he would again be incarcerated at the same institution). Accordingly, the court will not grant plaintiff leave to proceed on a RLUIPA claim.

ORDER

IT IS ORDERED that:

1. Plaintiff Nicholas McAtee is GRANTED leave to proceed on:

   (a) a First Amendment Free Exercise claim against Ewing related to denying McAtee's request for a Kosher diet and to wear his yarmulke out of his cell.

   (b) a Fourteenth Amendment Equal Protection claim against Ewing related to denying his request to wear his yarmulke out of his cell.

2. Plaintiff is DENIED leave to proceed on any other claim, and defendants West, Boughton, Litscher, and Schwochert are DISMISSED.

3. 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 the defendant. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to the plaintiff's complaint if it accepts service for the defendant.

4. For the time being, plaintiff must send the defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendant, he should serve the lawyer directly rather than the 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 the 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. If plaintiff is transferred or released while this case is pending, it is plaintiff's obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his claims may be dismissed for his failure to prosecute him.

Entered this 9th day of March, 2020.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge