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

DAVID SCHLEMM,

Plaintiff,

OPINION AND ORDER

v.

11-cv-272-wmc

JON E. LITSCHER,

Defendant.

After a bench trial in March of 2016, this court found that the Wisconsin Department of Corrections ("DOC") violated inmate David Schlemm's rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") by failing to accommodate his requests for a multi-colored headband, game meat and fried bread at the annual Ghost Feast. (Dkt. #211.) The court then entered an injunction requiring defendant to: (1) permit Schlemm to possess a "Four Directions," multi-colored headband, and (2) accommodate Schlemm in obtaining the traditional foods needed to hold a meaningful Ghost Feast at the Green Bay Correctional Institution. (*Id.*) Claiming newly discovered evidence with respect to the Ghost Feast, Schlemm now has filed a motion for relief pursuant to Federal Rule of Civil Procedure 60(b), seeking an order that would set aside the court's November 8, 2016, final judgment and establish a date for a new trial. (Dkt. #280.) As the court continues to see no merit in Schlemm's post-judgment challenges, his motion will be denied.

BACKGROUND

On September 26, 2017, the court denied plaintiff's first-round of post-judgment motions. Among other things, Schlemm sought to alter the injunction to require *fresh* foods at the Ghost Feast to be brought in by a volunteer, local tribe or a caterer. (Dkt. #274.) Because there was *no* evidence at or following trial that dried or preserved meat was unacceptable -- in fact, the evidence was to the contrary -- the court specifically declined to alter the injunction to require defendant to provide fresh game meat.[1]

The court similarly found that plaintiff offered no rebuttal to defendant's evidence that the DOC was unable to find a caterer. More importantly, "plaintiff offered no evidence establishing that a full meal from a Native American caterer or restaurant is necessary for a religiously significant Ghost Feast, nor that a full meal of traditional foods is required at all." (Dkt. #211 at 13-14.) Therefore, the court declined to amend the injunction to permit Native American inmates to obtain food for the Ghost Feast from local tribes or a catering company.

While Rule 60(b) authorizes relief from "a final judgment, order, or proceeding" on many grounds, including mistake, misconduct, or "any other reason that justifies relief," relief "is an extraordinary remedy and is granted only in exceptional circumstances." *Bakery Mach. & Fabrication, Inc. v. Trad. Baking, Inc.*, 570 F.3d 845, 848 (7th Cir. 2009). Here, plaintiff is essentially asking for reconsideration of his previously rejected argument that

[1] Even Schlemm acknowledges that no witness testified during trial that the foods must be "fresh," only that the foods must be "traditional." (*Id.* at 3-4.)

proper observance of the Ghost Feast requires fresh meat, and seeks a new trial on two grounds. First, Schlemm now claims that Kelly Willard-West, a DOC employee who provided information about its ability to locate a local vendor to cater the Ghost Feast, perjured herself in her December 2016 declaration by averring that she was unable to locate a "commercial establishment that served venison Indian Tacos anywhere in the Green Bay area." (West decl. (dkt. #235) ¶ 2.) Second, Schlemm again argues that he needed the testimony of Randy Cornelius to support his argument that the Ghost Feast requires fresh, not dried or preserved, meat. Neither presents a basis for relief under Rule 60, much less "exceptional circumstances."

As to his first point, plaintiff claims he found local businesses willing to provide fresh food for the November 2017 Ghost Feast, which he argues is proof that Kelli West lied in her December 2016 declaration. More specifically, on September 7, 2017, plaintiff reports receiving a letter dated September 5, 2017, from Fern K. Diamond, a member of the Oneida Tribe, providing two business cards of Native American catering businesses, "Four Eagles Café" and "Doo Bar's Cooking." (Dkt. #281-3.) Diamond further stated in the letter that these two businesses needed more information to prepare for the Ghost Feast, specifically menu items, the date of the event and the number of meals to be prepared. Based on this alone, plaintiff would have the court conclude that (1) these two caterers are willing to provide foods for the feast and (2) West lied in representing otherwise.

These assertions are flawed on a number of levels. Even on the surface, this evidence leaves many questions unanswered about the feasibility of either business providing the

Ghost Feast foods inside GBCI. Setting aside willingness and cost, there remains the questions of security and health challenges anytime a private caterer is allowed to escort in fresh food, which the court acknowledged was a legitimate concern for any correctional facility. More to the point, the fact that two caterers *may* have been willing to consider catering in 2017 does not constitute evidence that West perjured herself as to her knowledge of the availability of commercial venison tacos in December of 20*16*. Absent evidence that West knew, or at least had reason to know, that these vendors were suitable and available when she submitted her declaration, there is nothing exceptional here.

More fundamental still, even if West's statements were inaccurate, plaintiff's submissions ignore the court's previous rejections of his request to require defendant to use a caterer to provide the foods for the Ghost Feast, having found on the evidence presented at trial that fresh foods are not necessary for plaintiff to celebrate the Ghost Feast in accordance with his sincerely held beliefs. (Dkt. #274, at 4-7.) As previously found, this is not to say that fresh game meat is not preferable, and the court continues to urge the DOC to work with inmates and tribes to afford a Ghost Feast that is as fulfilling as it is practical. However, the court's findings as to what is *necessary* remains unchanged by evidence that more may be possible.

Plaintiff's second ground for a new trial fares no better, since the court previously rejected his claimed need for the testimony of Randy Cornelius at trial, as well as the claim that defendant threatened Cornelius not to testify.

> This argument also flounders on a number of levels. As an initial matter, plaintiff has submitted no admissible evidence in support of his allegation that DOC threatened Randy Cornelius. Rather, plaintiff's allegation is

supported solely by hearsay statements in several identical declarations signed by inmates.

In contrast, defendant submitted an email exchange between Cornelius, GBCI's chaplain Michael Donovan, and DAI's Religious Practice Coordinator Kelli West, regarding Cornelius's potential testimony on behalf of plaintiff. (Dkt. #235-1.) This email exchange was initiated *by Cornelius*, who wrote to Donovan on August 5, 2015, as follows:

> Question for you. I've been contacted by David [Schlemm's] lawyer to write an expert report on his pending court case about feast foods and ceremonial headgear. Would this jeopardize the volunteer work that I do @ GBCI? I haven't committed to writing the letter, thought I'd better check with the "expert" first……

Donovan responded that he did not think it would jeopardize Cornelius's volunteer work, but forwarded Cornelius's email to Kelli West for further confirmation. West thanked Cornelius for his volunteer work and for asking in advance of providing testimony for plaintiff. She then wrote, in pertinent part:

> Mr. Schlemm's attorney is asking you to provide your personal opinions regarding the claims Mr. Schlemm has made in his civil litigation against DOC. He is not asking you to serve as a representative of DOC or GBCI on policy matters. As a free citizen, you may choose to serve as an expert witness in civil litigation or not to serve in this capacity, at your own discretion. Based upon review of the DAI volunteer policy, DOC cannot prohibit you from acting as an expert witness on behalf of Mr. Schlemm if you choose to do so.

(*Id.*) West went on to note, however, that Cornelius may wish to consider potential challenges that could arise if he acted as an expert witness, including, among other things: (1) whether his testimony would interfere with his role in providing spiritual care to plaintiff or other inmates; (2) that defendant may attempt to discredit his testimony through cross-examination or through other witnesses, which could affect the way inmates or DOC staff perceive his role; and (3) that other inmates may request his assistance in future litigation, which could take time away from his ability to provide spiritual care and programming to GBCI inmates. (*Id.*)

The tone of West's email is not threatening or demeaning. Rather, West's email appears to be a thoughtful response to Cornelius's question. Which brings up the final flaw in plaintiff's argument: at the time of these

> exchanges with plaintiff's counsel and DOC with Cornelius, plaintiff was being represented by outstanding lawyers who agreed to take his case through trial at the court's request after remand by the Seventh Circuit Court of Appeals. In turn, those attorneys successfully recruited an impressive expert, Dr. Deward Walker, who testified at trial about the nature of the Ghost Feast and prison practices. At no time did counsel raise concerns about an inability to recruit experts effectively, much less that their efforts to recruit Cornelius in particular was blocked by DOC. For plaintiff to do so now, after effectively dismissing his recruited counsel, rings hollow at best. Regardless, plaintiff's lack of admissible evidence of improper threats or actions dooms his request to reopen the trial or alter the judgment on this basis as well.

(Dkt. #274, at 11-13.)

Having simply reargued a position the court already considered and rejected, plaintiff's motion for Rule 60(a) relief on this ground fails on its face. Indeed, by again stressing that if Cornelius had testified, he would have laid a foundation to enable to the court to conclude that the Ghost Feast requires fresh meat ignores that it was *plaintiff's* sincerely held beliefs that were at issue, not Cornelious's (or anyone else's), and therefore his own credibility that determined whether dried meat was sufficient, an issue resolved largely on plaintiff's own inability to articulate any credible personal, religious, historical, or literary basis as the foundation for his claimed belief at trial to the contrary. In short, this argument amounts to little more than an attempt to retread old ground related to trial testimony, which is a far cry from circumstances warranting relief under Rule 60.

While plaintiff is clearly frustrated with the contours of the permanent injunction issued in this case, this court is no longer the forum to air those grievances, and plaintiff's notice of appeal suggests that he realizes that as well. In that light, he would be wise going forward to focus his resources on pursuing the relief he is seeking from the Seventh Circuit Court of Appeals, or better yet pursuing greater relief than a lawsuit can provide by working

directly with the prison, tribes and caterers to implement a practical and meaningful Ghost Feast.

ORDER

IT IS ORDERED that plaintiff David Schlemm's motion for relief (dkt. #280) is DENIED.

Entered this 30th day of January, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge