

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

MICHAEL A. GRINDEMANN,

Plaintiff,

v.

JON E. LITSCHER (Secretary of WI DOC),
JANE GAMBLE (Warden KMCI)

Defendants.

ORDER

02-C-0429-C

This is a civil action for injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Michael A. Grindemann, an inmate at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin, has been granted leave to proceed on his claim that defendants violated his First Amendment rights by denying him a Pentacle, which is a religious necklace.

At the time he filed his complaint, plaintiff moved for a preliminary injunction in which he requested that defendants be forbidden from transferring him to another penal institution. On August 19, 2002, I denied that motion. On August 30, 2002, plaintiff filed a motion to reconsider the order denying his request for a preliminary injunction. This motion will be denied. Nothing in plaintiff's motion for reconsideration persuades me that I erred in denying his request for a preliminary injunction. Finally, on September 11, 2002, plaintiff filed motions for class certification and appointment of counsel, both of which will be denied for the reasons discussed below.

DISCUSSION

1. Class certification

Fed. R. Civ. P. 23 requires a two-step analysis to determine whether class certification is appropriate. See Rosario v. Livaditis, 963 F.2d 1013, 1017 (7th Cir. 1992). First, plaintiff must satisfy four prerequisites in Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequate representation). See id.; see also Fed. R. Civ. P. 23(a).

At minimum, plaintiff fails the numerosity prong of Rule 23(a). Although plaintiff alleges that “most Wiccans . . . would prefer a pentacle over other religious emblems if only one emblem were permitted,” this is nothing more than speculation. Two sentences later, plaintiff contradicts this speculation by alleging that some Wiccans at the institution prefer emblems other than the Pentacle, such as the “Celtic cross, triskele, Thor’s hammer, ankh, etc. depending on one’s discipline.” Although plaintiff alleges that joinder is impossible because there are over 30 registered Wiccans at the institution, he identifies only five who wish to join this lawsuit regarding the denial of the *Pentacle*. Although plaintiff does not have to specify the exact size of the class, he “cannot rely on conclusory allegations that joinder is impracticable or on speculation as to the size of the class.” Marcial v. Coronet Insurance Company, 880 F.2d 954, 957 (7th Cir. 1989) (citing Vergera v. Hampton, 581 F.2d 1281, 1284 (7th Cir. 1979); Valentino v. Howlett, 528 F.2d 975, 978 (7th Cir. 1976)); see also Arenson v. Whitehall

Convalescent & Nursing Home, Inc., 164 F.R.D. 659, 662-63 (N.D. Ill. 1996) (although only good faith estimate of proposed class size is required, it cannot be purely speculative). Joinder of those individuals who have been denied a Pentacle is not impractical. Accordingly, plaintiff's motion for class certification will be denied.

2. Appointment of counsel

In considering whether counsel should be appointed, I must determine first whether plaintiff made reasonable efforts to retain counsel and was unsuccessful or whether he was precluded effectively from making such efforts. See Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Ordinarily, before the court will find that plaintiff has made reasonable efforts to secure counsel it requires him to provide the names and addresses of at least three lawyers that he has asked to represent him and who have declined to take the case. In this case, plaintiff has submitted letters he has written to the ACLU of Wisconsin, Pagan Educational Network and Circle Sanctuary. However, it appears plaintiff did not wait for a reply before filing this motion. Thus, I cannot say that plaintiff has made a reasonable effort to obtain counsel and a showing that the parties he contacted have declined to take his case. Moreover, it is not even clear that there are lawyers at the Pagan Educational Network or Circle Sanctuary.

Even if three lawyers were to decline to represent plaintiff, plaintiff fails to argue why appointment of counsel is warranted in this case. In this court, persons representing themselves are not penalized for failing to know the rules applying to their cases. In most instances, if proper procedure

is not followed, the pro se litigant is directed to the relevant rule and given a second opportunity to comply. Plaintiff's case is not complex and he seems competent to represent himself given the non-complexity of the case. See Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). Moreover, the law governing plaintiff's First Amendment claim is well settled. See, e.g., Sasnett v. Litscher, 197 F.3d 290 (1999). Basically, plaintiff will have to show that denying him his Pentacle is not reasonably related to legitimate penological interests. See O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Turner v. Safley, 482 U.S. 78 (1987). Plaintiff need not study the law to obtain additional precedent. His ability to succeed on his claim will rest entirely on the facts presented on a motion for summary judgment or at trial. At this early stage of the proceedings, I am convinced that plaintiff has the ability to prosecute a case such as this. Accordingly, I will deny plaintiff's motion to appoint counsel without prejudice.

ORDER

IT IS ORDERED that

1. Plaintiff Michael A. Grindemann's motion for reconsideration of this court's August 19, 2002 order denying his request for a preliminary injunction and his motion for class certification are DENIED; and
2. Plaintiff's motion for appointment of counsel is DENIED without prejudice.

Entered this 19th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge