

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

JERRY CHARLES,

Plaintiff,

v.

MATTHEW J. FRANK, JON LITSCHER,
and DICK VERHAGAN,

Defendants.

OPINION AND
ORDER

02-C-0626-C

This is a civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § § 2000cc-2000cc-5. Plaintiff Jerry Charles is a Wisconsin prisoner and practicing Muslim confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Defendant Matthew J. Frank is Secretary of the Department of Corrections. Defendant Jon Litscher is former Secretary of the Department of Corrections. Defendant Dick Verhagen is the former administrator of the Wisconsin Department of Corrections Division of Adult Institutions. Plaintiff contends that defendants' refusal to allow him to wear Muslim prayer beads around his neck and under his shirt violates his rights under both the free exercise

clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act. In an order dated February 3, 2003, I granted plaintiff leave to proceed in forma pauperis on these claims.

Presently before the court is (1) defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for plaintiff's failure to exhaust his administrative remedies; and (2) plaintiff's motion for summary judgment. Defendants contend that plaintiff failed to exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a). In Perez v. Wisconsin Department of Corrections, 182 F.3d 532 (7th Cir. 1999), the court held that when a defendant in a prisoner's civil rights suit asserts the affirmative defense of failure to exhaust administrative remedies, a district court must first consider that defense before addressing the merits of the case. Therefore, I will resolve defendants' motion before turning to plaintiff's motion for summary judgment.

MOTION TO DISMISS

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), prohibits the bringing of any action "with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Section 1997(a)'s exhaustion requirement is mandatory and applies to all prisoners seeking redress for wrongs occurring

in prison. Porter v. Nussle, 534 U.S. 516 (2002). The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures.” Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999).

In this case, defendants do not contend that plaintiff failed to follow ordinary inmate complaint procedures to challenge defendants’ decision to refuse to allow him to wear his Muslim prayer beads around his neck and under his shirt. Instead, defendants argue that (1) plaintiff’s wearing of Muslim prayer beads is not a recognized religious practice of the Islamic faith; (2) because the wearing of beads it is not a recognized religious practice, it constitutes a “personal” religious practice; (3) before personal religious practices can be approved, an inmate must use form 2075 to request permission to engage in a “new religious practice; and (4) plaintiff has not completed a form 2075.

Plaintiff opposes defendants’ motion by contending that (1) he is not engaging in a new religious practice requiring completion of form 2075; (2) the wearing of his beads is an age-old religious practice; and (3) the beads constitute a religious emblem, which is already permitted to be worn around his neck under the prison’s internal management procedure 6A.

Both plaintiff’s and defendants’ arguments require the court to take notice of matter they have submitted outside the pleadings. Defendants rely on averments made in the affidavit of Susan Clark and an admission made by plaintiff in the documents supporting

his motion for summary judgment. Plaintiff relies on unauthenticated documents he filed in support of his summary judgment motion. (I assume plaintiff could resubmit these documents in admissible form if he were given another chance to do so.) This extraneous matter is relevant and material to determining which administrative procedure plaintiff was required to follow prior to bringing his action in federal court.

Fed. R. Civ. P. 12(b) states in pertinent part:

If, on a motion asserting the defense numbered (6), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Because defendants' motion cannot be decided without considering factual evidence bearing on the questions whether plaintiff's beads are a religious emblem already permitted to be worn under the prison's internal management policies or whether plaintiff's desire to wear his beads constitutes a "new religious practice," I will convert defendants' motion to one for summary judgment and allow the parties to submit proposed findings of fact and additional evidence as required by Fed. R. Civ. P. 12(b).

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff has moved for summary judgment. In support of his motion, plaintiff has submitted proposed findings of fact and conclusions of law, as well as a supporting brief and

attachments. However, plaintiff's supporting documentation does not comply with this court's procedures to be followed on motions for summary judgment. Although this may sometimes lead the court to grant another opportunity to file a motion that complies with the court's rules, plaintiff is a seasoned litigant in this court who already should be familiar with the rules. See, e.g., Charles v. Verhagan, 220 F.Supp.2d 937 (W.D.Wis. 2002). Plaintiff asserts numerous facts in each numbered paragraph and then fails to provide supporting evidence for each fact. See, e.g., Plt.'s PFOF #'s 3, 4, 5, 6, dkt. #19. Furthermore, the exhibits on which plaintiff relies as supporting evidence are unauthenticated documents. See e.g., Plt.'s Brf., exhibits 1-9, dkt. #18. Because the exhibits are not certified as true copies of the documents they purport to be or accompanied by an affidavit of a person attesting to their validity, they cannot be considered as evidence or relied upon to support proposed findings of fact.

Before plaintiff filed his summary judgment motion, the magistrate judge held a preliminary pretrial conference at which he cautioned the parties to follow the instructions contained in this court's "Procedure to Be Followed on Motions for Summary Judgment," a copy of which he sent to the parties on March 28, 2003.

Having eliminated the vast majority of plaintiff's proposed facts from consideration for his failure to support them with admissible evidence, I conclude that plaintiff has failed to put in sufficient evidence to show that he is entitled to judgment as a matter of law.

Therefore, plaintiff's motion for summary judgment will be denied.

ORDER

IT IS ORDERED that

1. The motion to dismiss filed by defendants is converted to a motion for summary judgment. Defendants may have until September 1, 2003, in which to serve and file proposed findings of fact and evidentiary materials in support of the motion. Plaintiff may have until September 22, 2003, in which to oppose to the motion. Defendants may have until October 2, 2003 in which to serve and file a reply. In briefing the motion, the parties are to comply with this court's "Procedures to be Followed on Motions for Summary Judgment," a copy of which was sent to them earlier.

2. Plaintiff's motion for summary judgment is DENIED.

Entered this 18th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge