

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

JESUS BARBARY,

Petitioner,

v.

CITY OF BELOIT,

Respondent.

OPINION AND
ORDER

00-C-485-C

This is a proposed civil action for injunctive relief brought pursuant to 42 U.S.C. § 1983 brought by petitioner Jesus Barbary. Subject matter jurisdiction is present. See 28 U.S.C. § 1331. Petitioner seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs pursuant to 28 U.S.C. § 1915. From his affidavit of indigency, it appears that petitioner qualifies for indigent status.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972). However, pursuant to 28 U.S.C. § 1915(e)(2), if a litigant is requesting leave to proceed in forma pauperis, the court must deny leave to proceed if the action is frivolous or malicious, fails to state a claim on which

relief may be granted or seeks monetary relief against a defendant who is immune from such relief. Because petitioner's claim fails to state a claim on which relief may be granted, his request for leave to proceed in forma pauperis will be denied.

The allegations in the complaint are as follows.

ALLEGATIONS OF FACT

On March 9, 2000, petitioner filed a timely motion for reconsideration of his indigency determination with the Circuit Court of Rock County. March 10, 2000 was the deadline for paying appeal fees. Petitioner's motion should have had the effect of extending the deadline to file a notice of appeal or pay appeal fees. Circuit Court Judge James E. Welker did not decide petitioner's motion until June 12, 2000 and petitioner did not receive Judge Welker's decision until June 20, 2000. On June 30, 2000 petitioner filed a motion to appeal, which Judge Welker denied in his order of July 6, 2000.

OPINION

Section 1983 creates a federal cause of action for "the deprivation under color of [state] law, of a citizen's rights, privileges, or immunities secured by the Constitution and laws of the United States.'" Gossmeier v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997) (citations

omitted). To prevail on a § 1983 claim, a petitioner must prove that (1) the respondent deprived him of a right secured by the Constitution and laws of the United States; and (2) the respondent acted under color of state law. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

In Monell v. Dep't of Social Services of the City of New York, 436 U.S. 658, 690 (1978), the Supreme Court established that local governing bodies can be sued directly under § 1983 for monetary, declaratory or injunctive relief if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Requiring a policy "ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body." Board of County Comm'rs of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997). The Court of Appeals for the Seventh Circuit has identified three instances in which such a "policy" or "custom" exists:

(1) an express policy that, when enforced, causes a constitutional deprivation (citing Monell, 436 U.S. at 690);

(2) a widespread practice that, although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a 'custom or usage' with the force of law" (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (plurality opinion) (quoting Adickes, 398 U.S. at 167-68; or

(3) an allegation that the constitutional injury was caused by a person with 'final

policymaking authority' (citing Praprotnik, 485 U.S. at 123; Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) (plurality opinion)).

See Baxter v. Vigo County School Corp., 26 F.3d 728, 735 (7th Cir. 1994). A local government unit, such as the City of Beloit, cannot be held liable under § 1983 under a theory of respondeat superior. Even if respondeat superior was a viable theory under § 1983, petitioner has alleged that a *state* court judge committed the alleged constitutional violations, not a municipal judge. Petitioner has alleged no wrongdoing against respondent city.

In addition, petitioner has requested that this court reverse the decision of the Circuit Court of Rock County in which the court determined that petitioner did not qualify for indigency status on appeal. Petitioner cannot appeal the decision of a state circuit court in a federal district court because this court lacks jurisdiction over such an appeal. Petitioner will be denied leave to proceed in forma pauperis on this claim.

ORDER

IT IS ORDERED that petitioner Jesus Barbary's request for leave to proceed in forma pauperis is DENIED and this case is DISMISSED with prejudice because petitioner's complaint is legally frivolous.

Entered this 11th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge