

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

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FREDERICK ROGERS,

Petitioner,

ORDER

v.

03-C-0230-C

HELLEN BRANDT, JEAN THIEME,  
CINDY O'DONNELL, JENNIFER MIKUTIS,  
SANDY HAUTAMAKI, PAMELA WALLACE,  
JOHN LISTER,

Respondents.  
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This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Frederick Rogers, an inmate at the Racine Correctional Institution in Sturtevant, Wisconsin, alleges that by forcing him to attend a religious holiday program, respondents violated the Religious Land Use and Institutionalized Persons Act, Religious Freedom Restoration Act and First Amendment.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, the prisoner's complaint must be dismissed if, even under a liberal construction, it is legally frivolous,

malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. See 42 U.S.C. § 1915e. Although this court will not dismiss petitioner's case on its own for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint and attachments, petitioner makes the following material allegations of fact.

#### ALLEGATIONS OF FACT

Petitioner Frederick Rogers is an inmate at the Racine Correctional Institution in Sturtevant, Wisconsin. Respondent Hellen Brant is a teacher at the Belle Venture School at the Racine prison. Respondent Jean Thieme is the education director. Respondents Cindy O'Donnell, Jennifer Mikutis and Sandy Haukamaki are complaint examiners. Respondent Pamela Wallace is the assistant warden at the Racine prison. Respondent John Lister is the head of the Department of Corrections.

Respondents Brandt and Thiemes informed petitioner that he must attend the Belle

Venture School holiday program on December 17, 2002. Rather than attend the program, petitioner preferred to be in school. Petitioner does not believe that the program or the state shares his beliefs and views on religion.

Petitioner wrote to respondent Wallace before and after the program, “seeking help.” Respondent Wallace did not reply. (Although petitioner alleges that he wrote to Wallace “before and after” the holiday program, he alleges that those dates were December 15 and 16.)

As a result of attending the holiday program, petitioner suffered a mental relapse (schizoeffective-PTSD), had auditory and visual hallucinations that his teacher was killing him, had “symptoms of past assaults,” had dreams that God was killing him and endured physical pain. Doctor Buhs labeled petitioner unstable and did not allow him to go to a lower classification (work release).

## DISCUSSION

Although petitioner’s complaint is sparse, I understand him to allege that respondents Brandt and Thieme required him to attend a religious holiday program that conflicts with his own religious beliefs in violation of the Religious Land Use and Institutionalized Persons Act, Religious Freedom Restoration Act and First Amendment.

A. Religious Land Use and Institutionalized Persons Act  
and Religious Freedom Restoration Act

The Religious Land Use and Institutionalized Persons Act prohibits governmental imposition of a “substantial burden on the religious exercise” of a prisoner unless the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000cc-1. The rule applies in any case in which:

- (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
- (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

The act is to be construed broadly to favor the protection of inmates’ religious exercise. 42 U.S.C. § 2000cc-3(g). Although there is little case law interpreting the act’s key terms, its predecessor, the Religious Freedom Restoration Act, had an analogous requirement that plaintiffs demonstrate a “substantial burden” on their exercise of religion before defendants were called upon to show a compelling interest furthered by the least restrictive means available. In Mack v. O’Leary, 80 F.3d 1175 (7th Cir. 1996), judgment vacated and remanded, O’Leary v. Mack, 522 U.S. 801 (1997), the Court of Appeals for the Seventh Circuit elaborated on what the Religious Freedom Restoration Act meant by “substantially burdening” a person’s exercise of religion. Although the court of appeals’ decision in that

case was vacated after the Supreme Court invalidated RFRA as it applied to the states in City of Boerne v. Flores, 521 U.S. 507 (1997), the court of appeals' reasoning in Mack is instructive nonetheless. The court of appeals held that:

a substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.

Mack, 80 F.3d at 1179; but see Henderson v. Kennedy, 253 F.3d 12, 17 (D.C. Cir. 2001) (rejecting this definition of “substantial burden” as “read[ing] out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement”).

Petitioner alleges that he was required to attend a religious holiday program that conflicted with his own religious beliefs. At this early stage of the litigation, petitioner's allegations are sufficient to state a claim under the act. Accordingly, petitioner will be allowed to proceed on a claim that respondents Brant and Thieme violated the Religious Land Use and Institutionalized Persons Act by requiring him to attend the holiday program. However, as the above discussion reveals, because the Religious Freedom Restoration Act has been invalidated as it applies to the states, petitioner will be denied leave to proceed as to this claim.

## B. First Amendment

In O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), the Supreme Court set out the proper standards to be applied in considering a prisoner's First Amendment free exercise claims. The Court held that prison restrictions that infringe on an inmate's exercise of his religion will be upheld if they are reasonably related to a legitimate penological interest. Id. at 349. The Court of Appeals for the Seventh Circuit has identified several factors that can be used in applying the "reasonableness" standard:

1. whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule;
2. whether there are alternative means of exercising the right in question that remain available to prisoners;
3. the impact accommodation of the asserted constitutional right would have on guards and other inmates and on the allocation of prison resources; and
4. although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable.

Al-Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991) (quoting Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988)) (quotation marks omitted). Largely for the reasons discussed earlier in the context of the Religious Land Use and Institutionalized Persons Act, petitioner will be allowed to proceed on his claim that respondents Brandt and Thieme violated his First Amendment rights by requiring him to attend the holiday program.

### C. Individual Liability

As to the remaining respondents, petitioner has failed to allege that they were involved in the decision to require his attendance at the holiday program. To establish individual liability under § 1983, petitioner must allege that the individual respondents were involved personally in the alleged constitutional deprivation or discrimination. Individual respondents cannot be held liable under a theory of respondeat superior under § 1983. See Hearne v. Board of Education of City of Chicago, 185 F.3d 770, 776 (7th Cir. 1999). “Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation.” Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir. 1994)); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) (“A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary.”). Petitioner has not alleged that respondents O’Donnell, Mikutis, Haukamaki, Wallace or Lister participated in the decision to require petitioner’s attendance at the holiday program. Accordingly, petitioner will not be granted leave to proceed against these respondents.

## ORDER

IT IS ORDERED that

1. Petitioner Frederick Rogers's request for leave to proceed in forma pauperis is GRANTED in part and DENIED in part. It is GRANTED as to his Religious Land Use and Institutionalized Persons Act and First Amendment claims against respondents Hellen Brandt and Jean Thieme. It is DENIED as to his Religious Freedom Restoration Act claim;

2. Respondents Cindy O'Donnell, Jennifer Mikutis, Sandy Haukamaki, Pamela Wallace and John Lister are DISMISSED;

3. The unpaid balance of petitioner's filing fee is \$139.80; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to respondent or to respondents' attorney; and

5. Petitioner should keep a copy of all documents for his own files. If he is unable

to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 27th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge