

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

TITUS HENDERSON,

Plaintiff,

ORDER

v.

04-C-39-C

GERALD BERGE,
MATTHEW FRANK,

Defendants.

Plaintiff Titus Henderson is proceeding in this civil action on a claim that between January 10, 2003 and March 1, 2004, defendants endorsed Christianity in violation of the First Amendment establishment clause by forcing him to participate in a behavior modification program that included watching Christian programming on the television in his cell at the Wisconsin Secure Program Facility. The parties have briefed defendants' motion for summary judgment and the court has made a preliminary review of the parties' proposed findings of fact. In the course of the review, I have determined that clarification of certain facts is necessary before I can rule on the motion.

I am not certain how to treat plaintiff's failure to dispute the following facts proposed

by defendants: (1) # 42, that he was transferred to the Wisconsin Secure Program Facility on January 10, 2003; (2) #43, that since January 10, 2003, he has housed in levels 1 through 3 at the facility, and (3) proposed fact #39, that since March 1, 2004, the facility provides no religious-oriented channel through its satellite television provider, in light of plaintiff's attempt to put into dispute defendants' proposed fact #34, which reads, "Inmates were not coerced or forced to view the Christian-oriented programming." In his response, plaintiff states,

Trinity Broadcast Network was implemented in Level 5 Behavioral Modification Program to change and teach prisoners moral thoughts with the Christian Way Study group. This was mandatory regulations that this program must be completed to be transferred to a less restrictive prison. If program of Christianity was not completed, prisoners would receive negative marks on their record, denied parole and other guaranteed rights.

To support these statements, plaintiff has cited his own affidavit, in which he avers, "I have been denied parole because of my refusal to complete the level 5 Behavior Program with Christian program." Henderson Affidavit ¶ 33. This averment raises questions that must be resolved in order to decide defendants' motion. These questions are whether plaintiff was in fact on level 5 during the time period relevant in this lawsuit, and whether he was denied parole from level 5 because of his refusal to watch Christian programming on his television. If, as defendants proposed and he agreed, he was never in Level 5, how could he have been denied parole because of his refusal to comply with the requirements of that level?

Fed. R. Civ. P. 56(e) requires affidavits to be made on personal knowledge and to set forth *specific facts* showing that there is a genuine issue for trial. Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990) ("The object of [summary judgment] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 887 (7th Cir. 1998). ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.").

Plaintiff's affidavit contains at least one averment in which he simply states an inference he has drawn from facts that are not in the record. For example, in ¶ 26, plaintiff avers, "I felt at the time of the Christian Way program in support with Trinity Broadcast Network was to force prisoners into Christianity" Plaintiff does not put in any facts to show how it was that he came to feel the way he did. It is the job of the court, not plaintiff, to determine what inferences may be reasonably drawn from the undisputed facts.

Plaintiff's averment in ¶ 33 of his affidavit may also be speculative or inferential. If it is, it would explain the conflict between plaintiff's averment that he has been denied parole because of his refusal to complete the level 5 behavior program "with Christian program" and his concession that he has been in levels 1-3 during all times relevant to his claim. If plaintiff simply inferred from the fact that a Christian television station was available as part of the

facility's program channels, that *if* he were to make it to level 5 and *if* he were to refuse to watch the programming, he would be denied parole, then it will be insufficient to put defendant's proposed fact #34 into dispute. However, if plaintiff's averment is based on fact, such as documentary evidence showing he was denied parole for his refusal to watch Christian programming while he was on level 5, then plaintiff's averment would satisfy the requirements of Fed. R. Civ. P. 56(e).

Because resolution of the motion for summary judgment may turn on whether plaintiff's averment in ¶ 33 of his affidavit is speculation or based on fact, I will stay a decision on the motion to allow the parties to supplement the proposed findings of fact.

ORDER

IT IS ORDERED that the parties clarify the factual record as follows:

Plaintiff may have until February 15, 2005, in which either to 1) advise the court that his averment in ¶ 33 of his affidavit is based on his speculation that if he were to have been housed on level 5, he would have refused to watch Christian programming and would have been denied parole; or 2) submit supplemental proposed findings of fact and evidentiary materials showing that he was on level 5 during the time period between January 10, 2003 and March 1, 2004; he was denied parole during that time period; and the reason he was denied parole was his refusal to watch Christian television programming.

If plaintiff submits supplemental proposed findings of fact and documentary evidence in accordance with option 2, above, defendants may have until February 28, 2005, in which to supplement their proposed findings of fact and evidentiary materials in response to plaintiff's submissions.

Entered this 4th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge