

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

ORLANDO LARRY,

Petitioner,

v.

CHAPLAIN DELL GOETZ
and DANE COUNTY JAIL,

Respondents.

ORDER

06-C-197-C

This is a proposed civil action for monetary relief under 42 U.S.C. § 1983. Petitioner Orlando Larry contends that his First Amendment rights were violated while he was detained at the Dane County jail. 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. He is not subject to the Prison Litigation Reform Act because he was released from jail before he filed this lawsuit. From the financial affidavit petitioner submitted, I conclude that he is unable to prepay the fees and costs of instituting this lawsuit.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally, Haines v. Kerner, 404 U.S. 519, 521 (1972), and grant leave to proceed if there

is an arguable basis for a claim in fact or law. Neitzke v. Williams, 490 U.S. 319 (1989). However, if the action is frivolous or malicious, fails to state a claim upon which relief may be granted or seeks monetary relief against a defendant who is immune from such relief, the case must be dismissed promptly pursuant to 28 U.S.C. § 1915(e)(2).

Petitioner attached to his complaint copies of grievances he filed while detained in the Dane County jail and responses he received to those grievances. I have considered them as part of his complaint. Fed. R. Civ. P. 10(c). Also, petitioner's complaint contains several references to "Chaplain Dale" and "pastor Dale," which I assume to be references to respondent Goetz.

From his complaint, I understand petitioner to be alleging the following.

ALLEGATIONS OF FACT

At all times relevant, petitioner Orlando Larry was detained at the Dane County jail. Respondent Dell Goetz is the chaplain at respondent Dane County jail. On December 18, 2005 and after that date, petitioner filed requests for a copy of the Quran and for permission to participate in "Jumah Services."¹ On December 25, 2005, petitioner filed grievance

¹ According to the online encyclopedia Wikipedia, "Jumu'ah" is "a congregational salat (prayer) that Muslims hold every Friday, just after noon. . . . It is an obligation for men to pray the Friday prayer (jumu'ah) in congregation (jama'ah). <http://en.wikipedia.org/wiki/Jumu%27ah>."

#4418 in which he stated:

I've constantly been putting in requests for a "Holy Quran" none of my requests have been answered. On or around 12-20-05 I was fortunate enough to catch [respondent Goetz] making his rounds passing out bibles and answering other request from inmates, so, I inquired to him personally about providing me with a Holy Quran.

He told me that he didn't think he'd be able to provide me with one because it would be something he would have to purchase and he didn't have the finances because finances were scarce [sic]. I never saw or heard from him since.

I need a Holy Quran as a continuation of the word of God for further edification toward my spiritual growth and needs not having access to one is destroying me spiritually and mentally.

On January 3, 2006, petitioner spoke with respondent Goetz as he delivered Bibles to inmates in petitioner's cell block. Petitioner asked respondent Goetz about obtaining a copy of the Quran. Respondent Goetz told petitioner that he could not find one and that it was too expensive in light of the jail's limited budget. On January 6, 2006, a Sgt. Lurquin responded to petitioner's grievance #4418 as follows:

I have received your grievance as noted above. After investigation I have concluded that your grievance is substantiated. Appropriate action will be taken to remedy the situation.

Thank you for bringing this issue to our attention. I will order some of these, but please understand that it will take some time for them to arrive. Also, I see you average about \$30 a week in canteen orders. You could have a friend use some of that money to purchase a Quran for you. They may mail it to you in an envelope. (no larger than 10" x 13")

On January 7, 2006, petitioner filed a request “to make arrangements to have Juma Services held” at the jail. On January 13, 2006, petitioner asked “Pastor John” what petitioner could do to have Juma services held at the jail. Pastor John told him that “they’ve been trying to have Jumah Services here for the last 10 to 12 years now, but [respondent Goetz] wouldn’t let them do it.” Later that day, petitioner filed inmate grievance #4463 in which he stated

I[‘]m not happy with the fact that since I[‘]ve been here (Dec. 18, 2005) I[‘]ve been putting in request slip constantly in regards to Juma Services being held here at the Dane County Jail. None of them have been responded to.

It is unconstitutional for my requests to be deliberately ignored as I am an inmate (in the Dane County jail) that cannot provide for my own needs.

Fortunately, I had an opportunity to speak with [respondent Goetz] personally in regard to what I can [do] to have Juma Service held here at the Dane County Jail, (This was shortly after I had prayer with pastor John from the Gideons), [Goetz] told me that the numbers didn’t warrant it. I then asked him what he meant by that? He stated 2 or 3 Muslims wasn’t enough to hold Juma Services here. I told him I didn’t believe that, then asked him if he actually believed that there were only 2 or 3 Muslims out of all these inmates here at Dane County Jail? He sarcastically stated that: The “Bible” says where there’s 2 or 3 gathered together in my name I will be there in the midst of them now challenge me. Then he walked away. This event took place today shortly after I requested this grievance.

On February 5, 2006, petitioner submitted a request to respondent Goetz in which he wrote:

I’m writing to inform you that I’ve been sending you request slips in regards to my religious sacrements [sic] since Dec. 2005, consistently, but you haven’t responded to any. All you did was make sarcastic remarks whenever I caught you in the halways [sic]. I feel you’re totally disregarding my need. Why is

this?

On February 7, 2006, a Lt. Hook responded to grievance #4463 as follows:

I have received your grievance as noted above. After investigation I have concluded that your grievance is unfounded with the following exception.

We are currently exploring the possibility of providing Juma services in the Dane County Jail. We are discussing the possibility with area Muslims. Thank you for bringing this matter to our attention. Hopefully we can work out a solution in the near future.

Petitioner appealed grievance #4463 on February 10, 2006. He wrote that he was

appealing the decision that my grievance is unfounded as [respondent Goetz] shows a display of total disregard for, not only my religious sacraments [sic], but my religion itself. This attitude hurt me mentally and spiritually and I strongly disagree with the decision that the grief I experienced as a result is unfounded. However, thanks for now exploring the possibility of providing Jumuah Services.

Lt. Hook responded to petitioner's appeal on February 15, 2006, as follows:

I have received your appeal as noted above. After investigation I have concluded that your grievance is substantiated. Appropriate action will be taken to remedy the situation.

Your initial grievance was inadvertently marked "Unfounded with Exception." I apologize for the mistake and have changed the finding to "Sustained." We are still exploring the possibility of providing Juma Services in the Dane County Jail.

On March 13, 2006, petitioner addressed another request to respondent Goetz in which he wrote the following:

I was told by Sergeant [sic] Lurquin that my grievance was substantiated in

regards to my religious sacraments [sic] being provided for and that appropriate [sic] action will be taken to remedy the situation I would like to attend Juma Services because I am being spiritually destroyed without my religious sacraments [sic].

DISCUSSION

Petitioner's allegations raise possible claims under the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1. I understand petitioner to allege that his rights under the First Amendment and RLUIPA were violated because respondent Goetz failed to provide him with a copy of the Quran and failed to arrange Jumah services at the jail before petitioner was released from custody. (As I noted in an order dated April 25, 2006, the fact that petitioner listed a return address of 834 W. Badger Rd. #2, Madison, Wisconsin, in his complaint leads me to believe that he is no longer detained at the jail.)

Before addressing petitioner's claims, I note that respondent Dane County jail is not a proper defendant in this case. Wis. Stat. § 302.30-37 governs jails and does not authorize jails to sue or be sued. The Dane County jail is a building, not a legal entity; it is incapable of accepting service of petitioner's complaint or responding to it. (In addition, even if Wisconsin law did not stand in the way, federal law holds that jails and prisons are not suable entities under § 1983. Powell v. Cook County Jail, 814 F. Supp. 757, 758 (N.D. Ill.

1993); Brooks v. Pembroke City Jail, 722 F. Supp. 1294, 1301 (E.D.N.C. 1989).) The jail will be dismissed from this case.

A. First Amendment

The First Amendment contains two clauses that pertain to religion. The free exercise clause guarantees every individual the right to freely exercise his religion and the establishment clause prohibits the government from establishing an official religion or “from favoring one religion over another without a legitimate secular reason.” Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005). I will discuss petitioner’s allegations under each clause separately.

1. Free exercise clause

Although a jail inmate retains the right to practice his religion while incarcerated, O’Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987), this right may be “restricted by the fact of confinement and the needs of the penal institution.” Young v. Lane, 922 F.2d 370, 374 (7th Cir. 1991). More specifically, an inmate’s ability to practice his religion may be circumscribed by restrictions that are reasonably related to legitimate penological interests. Conyers v. Abitz, 416 F.3d 580, 585 (7th Cir. 2005); Tarpley, 312 F.3d 895, 899 (7th Cir. 2002) (“Prisons are only required to make reasonable efforts to provide an opportunity for

religious practice.”). To assert a free exercise claim, petitioner must allege facts from which an inference may be drawn that the government has placed “a substantial burden on the observation of a central religious belief or practice.” Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989). In addition, because the free exercise clause allows states to enforce neutral laws of general applicability even when those laws significantly burden religious practices, Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990), the clause is violated only when the government intentionally targets a particular religion or religious practice. Sasnett v. Sullivan, 91 F.3d 1018, 1020 (7th Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997).

Petitioner never identifies himself explicitly as a Muslim in the allegations in his complaint or in the grievances and requests he filed at the jail, but I assume from his requests that Islam is his religion. With respect to his allegations concerning the Quran, petitioner’s grievance #4418 indicates that he asked multiple times to be provided a copy of the book. Further, the grievance indicates that petitioner asked respondent Goetz for a copy but that respondent told him he did not have the money to purchase a copy for petitioner. However, in his January 6, 2006 response to petitioner’s grievance, Sgt. Lurquin told petitioner that he would order copies of the Quran but that they would not arrive immediately. In addition, Sgt. Lurquin suggested that if petitioner used some of his own money to purchase a copy of

the book, the book would be allowed.

Petitioner's allegations fail to state a claim under the free exercise clause. The clause forbids the government from interfering with religious exercise. Venters v. City of Delphi, 123 F.3d 956, 969 (7th Cir. 1997); Morrison v. Garraghty, 239 F.3d 648, 656 (4th Cir. 2001). However, it does not impose an affirmative obligation on the government to provide an inmate with the accoutrements of his religion, especially where the inmate is able to purchase the items himself. Cf. Kimberlin v. Dept. of Justice, 318 F.3d 228, 238 (D.C. Cir. 2003) (Tatel, concurring in part and dissenting in part) ("Even in the prison context, if the government denies federal funds for purchasing magazines, books, stationery, or even electric guitars, it has placed no governmental obstacle in the path of prisoners seeking to read, write, or play, since they remain free to purchase those items on their own.") (citation omitted). Petitioner's status as an inmate does not entitle him to a government subsidy for the items necessary to practice his religion. The response petitioner received to his grievance indicates that he had money in his jail account to purchase a copy of the Quran. Moreover, although respondent Goetz told petitioner he did not have the money to purchase a copy of the book, Sgt. Lurquin informed petitioner that he would order copies. This indicates that petitioner's concern was being addressed and that jail officials did not intend to discriminate against petitioner's religion. Petitioner will be denied leave to proceed on this claim.

Petitioner's second possible free exercise claim concerns his requests that the jail

conduct Jumah services. According to his allegations, petitioner first requested the services in a request dated January 7, 2006. On January 13, 2006, a man named “Pastor John” told petitioner that respondent Goetz had blocked previous efforts to hold the services. That same day, petitioner filed an inmate grievance asking that the services be held. In the grievance, petitioner wrote that he had been filing requests since December 18, 2005, asking for services to be held. Also, he wrote that respondent Goetz had informed him that “the numbers didn’t warrant” holding the services. On February 7, 2006, Lt. Hook told petitioner that the jail was “currently exploring the possibility of providing Juma services” and that jail officials had discussed the possibility with Muslims outside the jail. One week later, on February 15, Lt. Hook responded to another grievance petitioner filed by stating that the jail was “still exploring the possibility of providing Juma Services.” The two responses from Lt. Hook suggest that the jail was working towards meeting petitioner’s request. However, in light of the fact that nearly two months passed between petitioner’s first request and any indication that the jail was following up on his request, I cannot say with certainty that petitioner would be unable to establish a violation of his rights under the free exercise clause. Therefore, I will allow him to proceed on this claim against respondent Goetz. However, petitioner should be aware that it will be his burden to demonstrate that the jail’s failure to provide for Jumah services substantially burdened a belief or practice central to his religion. Kaufman, 419 F.3d at 683. Also, I note that under the free exercise clause, prison officials

are liable only for intentional discrimination and that Lt. Hook's responses suggest that the jail's failure to provide for the services was not the result of intentional discrimination.

2. Establishment clause

The establishment clause prevents the government from promoting any religious doctrine or organization or affiliating itself with one. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 590 (1989). Also, it "prohibits the government from favoring one religion over another without a legitimate secular reason." Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005). The clause is violated when "the challenged governmental practice either has the purpose or effect of 'endorsing' religion." County of Allegheny, 492 U.S. at 592 (citations omitted); it is not violated when a governmental entity provides opportunities for institutionalized inmates to practice their religion, provided that the entity does so in an even-handed way.

Petitioner alleges that respondent Goetz told him he did not have the funds to purchase a copy of the Quran on January 3, 2006. However, three days later, Sgt. Lurquin told petitioner that he would order copies for the jail. The act of making available to inmates a Christian text but not an Islamic text might have the effect of endorsing Christianity. However, in light of Sgt. Lurquin's statement that copies of the Quran would be ordered, petitioner's claim is limited to the jail's failure to have copies of the Quran

available immediately upon request. As a practical matter, however, prison officials must be afforded a certain amount of time to respond to inmate requests. On top of that, the Constitution grants prison and jail officials considerable discretion in the day-to-day management of correctional institutions. E.g., Scarver v. Litscher, 434 F.3d 972, 976-77 (7th Cir. 2006). Accordingly, the fact that respondent Goetz did not have a copy of the Quran available for petitioner when he first requested it fails to state a claim under the establishment clause. Therefore, he will be denied leave to proceed on this claim.

Petitioner's allegations concerning Jumah services fail to state a claim under the establishment clause. The clause does not obligate correctional institutions to offer religious services to inmates; it requires only that if services are provided, they are extended to all religious groups. Petitioner's allegations indicate that the jail did not offer Jumah services to Muslim inmates but that jail officials began exploring the possibility of offering the services after petitioner requested them. Nothing in these allegations suggests that the jail violated the establishment clause. Accordingly, petitioner will be denied leave to proceed on this claim.

B. Religious Land Use and Institutionalized Persons Act

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1)-(2), prohibits the government from imposing "a substantial burden

on the religious exercise of a person residing in or confined to an institution,” unless the burden furthers “a compelling governmental interest,” and does so by “the least restrictive means.” Cutter v. Wilkinson, 504 U.S. 709, 712 (2005). RLUIPA is designed to “protect[] institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion.” Id. at 2122.

The protections afforded by RLUIPA apply where 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. § 2000cc-1(b). Petitioner does not allege that the Dane County jail receives financial assistance from the federal government. However, it is possible that petitioner will be able to make this showing. Therefore, I will not deny him leave to proceed on this ground. However, petitioner should be mindful that to prevail on a RLUIPA claim, it will be his burden to show that the jail receives financial aid from the federal government.

In Cutter, the Supreme Court upheld the constitutionality of RLUIPA. In doing so, the Court noted that RLUIPA targets “obstructions institutional arrangements place on religious observances” and that it “does not require a State to pay for an inmate's devotional accessories.” Id. at 720 n.8. Therefore, petitioner's allegation that respondent Goetz refused

to purchase a copy of the Quran for petitioner fails to state a claim under RLUIPA. Petitioner will be denied leave to proceed on this claim.

However, he will be granted leave to proceed on a claim under RLUIPA concerning his requests for Jumah services. In Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 878 (1990), the Court noted that a religious exercise can include “assembling with others for a worship service.” Because petitioner was in jail, his ability to gather with other Muslims for Jumah services depended solely on the jail’s “permission and accommodation.” Cutter, 544 U.S. at 721. Respondent Goetz’s failure to arrange Jumah services during petitioner’s detention at the jail could constitute a substantial burden on petitioner’s religious exercise. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (substantial burden is “one that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable”). Therefore, I will allow him to proceed on this claim.

The next step in this case is to have petitioner's petition served on respondent Goetz. Because petitioner is proceeding in forma pauperis, the court will arrange to have his complaint served on the respondent.

ORDER

IT IS ORDERED that

1. Petitioner's Orlando Larry's request for leave to proceed in forma pauperis is GRANTED with respect to his claims that respondent Goetz violated petitioner's rights under the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act by failing to arrange for Jumah services to be held in the Dane County jail during petitioner's incarceration;

2. Petitioner's request for leave to proceed in forma pauperis is DENIED with respect to his claims that

a. respondent Goetz's failure to provide petitioner with a copy of the Quran violated his rights under the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act; and

b. respondent Goetz's failure to provide petitioner with a copy of the Quran and failure to arrange for Jumah services to be held in the Dane County jail violated petitioner's rights under the establishment clause of the First Amendment;

3. Respondent Dane County jail is DISMISSED from this case.

4. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 18th day of May, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge