

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

STEPHEN M. BOTTILA,

Petitioner,

v.

MADISON POLICE DEPARTMENT,
and NOBLE WRAY, Chief of Police,
Madison Police Department,

Respondents.

ORDER

08-cv-00432-slc

Because Judge Shabaz is on a medical leave of absence from the court for an indeterminate period, the court is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. It is this court's expectation that the parties in a case assigned to the magistrate judge will give deliberate thought to providing consent for the magistrate judge to preside over all aspects of their case, so as to insure that all cases filed in the Western District of Wisconsin receive the attention they deserve in a timely manner. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the sole purpose of issuing this order, I am assuming jurisdiction over the case.

This is a proposed civil action for monetary and injunctive relief brought by petitioner Stephen Bottila for violations of Title II of the Americans with Disabilities Act. 42 U.S.C. §§ 12131-12134. Petitioner has requested leave to proceed under the in forma pauperis statute, 28 U.S.C. §1915.

To determine whether a petitioner qualifies for indigent status, the court uses the following calculation: From petitioner's annual gross income, the court subtracts \$3400 for each dependent, excluding the petitioner. If the balance is less than \$15,000, the petitioner may proceed without any prepayment of fees and costs; if the balance is greater than \$15,000 but less than \$28,000, the petitioner must prepay half the fees and costs; and if the balance is greater than \$28,000, the petitioner must prepay all fees and costs. Substantial assets or debts require individual consideration.

From petitioner's affidavit of indigency, I find that he has an annual gross income of \$12,480 and that he has no dependents. Petitioner also has \$2,000 in common stocks from which he receives \$45.00 in dividends every year. Therefore, petitioner qualifies financially to proceed without prepaying the fees and costs of filing his action.

The next step is determining whether petitioner's proposed action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a respondent who is immune from such relief. 28 U.S.C. § 1915(e)(2). In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously.

Haines v. Kerner, 404 U.S. 519, 521 (1972).

From the allegations of petitioner's complaint, I draw the following facts.

ALLEGATIONS OF FACT

Petitioner Stephen Bottila alleges that he is an individual with a disability and requires the use of a service dog. On September 3, 2007 at 652 State Street in Madison, Wisconsin, petitioner was approached by Officer Kipling Kellogg and asked to provide documentation of his disability and proof of his service animal's validity. He provided the documentation as asked for by the officer. The officer then proceeded to prohibit petitioner from being accompanied by his service dog. On another date, while petitioner was at Peace Park in Madison, he was told by Officer Meredith York that his service dog was not allowed in the park. (Peace Park has a prohibition against dogs in the park.) Petitioner alleges that on a previous occasion Officer York had reviewed petitioner's documentation for his service dog and had allowed him the use of his dog at the same park. Petitioner has attempted to lodge complaints about these incidents with Chief of Police Noble Wray but Wray has not responded. Instead, Lieutenant Kristen Roman, who has handled petitioner's complaints, told him that Officer Kellogg did not act inappropriately.

DISCUSSION

The Americans with Disabilities Act prohibits discrimination against qualified persons with disabilities. An individual has a disability under the Americans with Disabilities Act if he has a “physical or mental impairment that substantially limits one or more of the major life activities of such individual[.]” 42 U.S.C. § 12102(2)(A). Title II of the Act prohibits public entities from excluding qualified persons with disabilities “from participation in or be[ing] denied the benefits of the services, programs or activities offered by the public entity” and from discriminating against them. 42 U.S.C. § 12132. “Public entity” includes any department, agency or instrumentality of a state or local government. 42 U.S.C. § 12131(1)(B).

As an initial matter, petitioner has named Chief of Police Wray as a respondent in this cause of action. Although there is no personal liability under Title II, Walker v. Snyder, 213 F. 3d 344, 346 (7th Cir. 2000), Ex Parte Young might authorize suits against individuals in their official capacity for prospective injunctive relief for violations under Title II. Bruggeman ex rel. Bruggeman v. Blagojevich, 324 F.3d 906, 912-13 (7th Cir. 2003) (internal citation omitted). Determining whether Title II authorizes a suit against the chief of police in this instance would be necessary only if the petitioner were barred from bringing his claim against a state or local entity because of sovereign immunity. I need not decide this issue because petitioner is not barred from enforcing his rights under Title II against the Madison Police Department. Thus, the chief of police will be dismissed from this case.

Petitioner does not allege facts explaining his disability. From his allegation that he has received authorization to have a service dog, however, I will assume for the purpose of this order that he is a qualified individual with a disability and therefore protected from discrimination by public entities under the Americans with Disabilities Act. Petitioner alleges that he and his service dog were denied access to a place of public accommodation and a public park by police officers of the Madison Police Department who are employees of a department of a local governmental, the City of Madison. Therefore, petitioner has pleaded sufficient facts to state a claim under Title II of the Americans with Disabilities Act. Thus, I will grant plaintiff leave to proceed in forma pauperis on his ADA claim against the Madison Police Department.

Petitioner should be aware that in order to succeed ultimately on his claim against the Madison Police Department he must show that: (1) his disability is a mental or physical impairment that substantially limits a major life activity (thus, entitling him to protection under Title II), 42 U.S.C. § 12102; (2) he requires the use of his service dog in public streets and parks; and (3) allowing him the use of his service dog in public streets and parks is a “reasonable modification[] to rules, policies or practices” that would entitle him to services provided by the public entity, 42 U.S.C. §12131(2).

ORDER

IT IS ORDERED that:

1. Petitioner Stephen Bottila is GRANTED leave to proceed in forma pauperis against the Madison Police Department on his claim for violation of his rights under Title II of the Americans with Disabilities Act.

2. Petitioner's claim against Chief of Police Wray for violation of his rights is DISMISSED because Wray is not a necessary party to this case.

3. 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.

4. Petitioner should keep a copy of all documents for his own files.

5. A copy of petitioner's complaint and this order are being sent today to the United

States Marshal for service on the respondent Madison Police Department.

Entered this 3rd day of September, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge