

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

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DUANE R. BULL,

Petitioner,

ORDER

97-C-192-C

v.

WAUPUN CORRECTIONAL INSTITUTION  
and GARY McCAUGHTRY,

Respondents.  
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In April 1997, I denied petitioner leave to proceed in forma pauperis in this case because he had failed to submit documentation to show that he had exhausted his administrative remedies with respect to each of the claims he raised in the lawsuit. Specifically, petitioner alleged in his complaint that defendants were infringing his First Amendment right to exercise religious freedom in the following respects: 1) he was being deprived of his Bible and written religious materials while confined in temporary lockup and the adjustment center; 2) his religious cassette tapes had been destroyed; 3) his requests to attend communion services had been denied; and 4) Bible study had been scheduled so that he could not attend. In

addition, petitioner alleged that defendants had retaliated against him for expressing his religious beliefs by removing his son from his visitor list, refusing to permit him to attend his father's wake and not allowing him to call his mother at the time of his father's death.

Also in April 1997, petitioner filed a second case in this court, Bull v. Waupun Correctional Institution, 97-C-180-C, in which he alleged that his constitutional right of access to the courts had been denied by defendants' interference with his legal mail and that he had been deprived of his Fourteenth Amendment due process rights when defendants rummaged through his legal materials, did not return some of them to petitioner and overcharged petitioner for postage. I found petitioner's claims to be without legal merit and denied his request for leave to proceed in forma pauperis.

In September 1999, petitioner filed a document titled "Civil Complaint," which was accompanied by 125 exhibits, a document titled "Supplemental Information," and a motion for appointment of counsel. In a cover letter accompanying these submissions, petitioner asked to be allowed to file these documents in his closed cases. I denied his request in an order entered on September 29, 1999. As to petitioner's request to reopen case no. 97-C-180-C, I noted that I had given full and fair consideration to petitioner's claims at the time I denied his request for leave to proceed in forma pauperis and that petitioner had suggested no rational reason why I should entertain a motion to reopen filed more than two years after the case had

been closed. With respect to case no. 97-C-192-C, I advised petitioner that it would be reasonable for him to move to reopen that case on the ground that he had satisfied the precondition to suit that had barred his earlier filing; that is, if he could show that he had exhausted his administrative remedies with respect to each of the claims he had raised in that lawsuit. However, because the volume of petitioner's submission was so vast and because the papers were disorganized and covered numerous topics reaching far outside the boundaries of the claims petitioner had raised in his earlier lawsuit, I advised petitioner that I would consider a motion to reopen case no. 97-C-192-C only under the following conditions:

1) that he rewrite his proposed amended complaint to raise only those claims he had raised in his earlier lawsuit; and

2) that he narrow and organize his exhibits so that the documentation he was submitting to prove exhaustion of his administrative remedies with respect to each individual claim was bundled separately and clearly identified.

In hindsight, it was misleading to encourage petitioner to submit a proposed amended complaint with his motion to reopen, because the only justification for allowing him to reopen the case would be if he were to prove that he exhausted his administrative remedies with respect to the claims he had raised in the complaint already filed. In any event, six months later, on March 23, 2000, petitioner filed two new proposed amended complaints, both dated February

28, 2000, which he captioned and numbered for filing in case no. 97-C-192-C. I construed this submission to include a second motion to reopen case no. 97-C-192-C. That motion is presently before the court.

One of petitioner's proposed amended complaints, which I will refer to as the first proposed amended complaint, is prepared on standard complaint forms and comprises two paragraphs of conclusory allegations as follows:

Denial of religious rights -- withholding of religious pamphlets; denial of right to take Bible correspondence courses; making it complicated for pastor and pastor's wife to visit him. Petitioner's complaints resulted in harassment, threats and retaliation.

Interference with family and visitation -- Refusal of visitation by son under supervision of petitioner's wife and son's mother, despite court approved supervised visitation and numerous requests for permission by petitioner and wife.

The other proposed amended complaint, which is bound in blue paper and which I will refer to as petitioner's second proposed amended complaint, raises the same claims that petitioner raises in the first proposed amended complaint, but adds significantly more factual information regarding the bases for petitioner's claims and is accompanied by several exhibits in support of the claims.

Because no consideration could be given petitioner's motion to reopen and proposed amended complaints until his file was retrieved from the Federal Records Center in Chicago,

I set the papers aside to await return of the file. In the meantime, petitioner began filing a series of new papers. On April 3, 2000, the court received a letter in which petitioner complained about a Captain Bruce Moraski, calling Moraski's actions threatening and in retaliation for the exercise of his right to petition the courts. On April 12, 2000, petitioner wrote to complain that an envelope he had addressed to a Bible college had been stamped by the prison and was unusable and that this constituted retaliation for the exercise of his constitutional rights. On April 14, 2000, he wrote to complain that another envelope had been stamped by the mail room, that he had been threatened by Captain Moraski and that his wife had "received a very disturbing letter" that she took as a threat for her support of petitioner's actions. On April 26, 2000, petitioner wrote to inquire about the status of his case. On May 31, 2000, petitioner filed a "motion to conditionally amend previous motion." In this document, petitioner appears to be asking to amend the relief he requests in his proposed amended complaint. On June 15, 2000, petitioner wrote to update the court on his circumstances and to reiterate his claim that he is being retaliated against. On June 19, 2000, he wrote again to inquire about the status of his case. Finally, on August 14, 2000, petitioner submitted a thick packet of papers that he describes as "supplemental and additional information and exhibits which have come to the petitioner since originally filing case no 97-C-192-C."

None of petitioner's submissions complies with the requirements of the September 29,

1999 order. Even petitioner's second proposed amended complaint does not include documentation properly identified and organized in bundled sets to show that he exhausted his administrative remedies with respect to each of the claims he raised in his complaint in case no. 97-C-192-C. Furthermore, petitioner's second amended complaint does not confine the claims to those raised in the original complaint in case no. 97-C-192-C. Instead, petitioner piggy-backs onto his retaliation claim two new claims: that his right to due process has been denied by respondents' failure to comply with a state court order and that he is being denied his right to familial association with his son.

Because petitioner has not complied with the requirements of the September 29, 1999 order, his motion to reopen will be denied. In any event, there was another obstacle to reopening petitioner's closed case which, when combined with the fact that petitioner appears to want to modify or amend his original complaint, convinces me that petitioner should abandon his attempts to reopen this case and file a new lawsuit instead.

In April 1997, when I denied petitioner's requests for leave to proceed in these lawsuits, the law in the Seventh Circuit on application of the 1996 Prison Litigation Reform Act was in the earliest stage of development. It was not clear then, as it is now, that a prisoner requesting leave to proceed in forma pauperis must pay an initial partial payment of the fee for filing his lawsuit *before* the court undertakes a review of the merits of his claims and that he is always

required to pay the remainder of the fee in monthly installments even when his request for leave to proceed in forma pauperis is denied. Because this requirement was not clear in April 1997, I did not assess petitioner an initial partial payment of the fee for filing either of his cases and I did not require him to pay any part of the fees after his requests for leave to proceed were denied. Indeed, until July 1997, when Newlin v. Helman, 123 F.3d 429 (7th Cir. 1997), was decided, I did not require any indigent prisoner to make an initial partial payment before I reviewed the merits of his complaint or pay the filing fee after his request for leave to proceed in forma pauperis was denied. Although I have not applied Newlin retroactively in any other prisoner case and would not do so here if the case were to remain closed, I cannot allow petitioner to reactivate the case without requiring him to comply with the requirements of the Prison Litigation Reform Act, including the requirement that he pay an initial partial payment of the filing fee and the remainder of the fee in monthly installments until it is paid in full.

Because petitioner must pay a filing fee and because it appears that he wishes to file a complaint that differs from the one he filed in case no. 97-C-192-C, he will suffer no prejudice by being required to present his claims in a new lawsuit. Petitioner should bear in mind that the complaint he chooses to file in a new lawsuit cannot be a moving target, changing every few days to allege a new or continuing invasion of his legal rights. He will have to settle on a single document that constitutes his proposed complaint. If he chooses, petitioner may advise the

court that he wishes his second proposed amended complaint dated February 28, 2000, to be filed as a complaint in a new lawsuit. Otherwise, he may decide to file a completely new complaint in which he incorporates all of the claims and all of the exhibits he has submitted separately to the court since March of 2000. In either event, before I will consider petitioner's request for leave to proceed in forma pauperis in a new lawsuit, I will require him to make an initial partial payment of the filing fee. Therefore, any new complaint or request that the court file his February 28 complaint as a new complaint must be accompanied by a certified copy of petitioner's trust fund account statement for the six-month period beginning approximately March 10, 2000 and ending approximately September 10, 2000, so that the amount of an initial partial payment may be determined in accordance with 28 U.S.C. § 1915(b)(1).

ORDER

IT IS ORDERED that petitioner's motion to reopen case no. 97-C-192-C is DENIED.

Entered this 14th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB  
District Judge