IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GERALD L. PEARSON,

ORDER

Petitioner,

01-C-0364-C

v.

Warden GERALD BERGE, Food Service Director WEHRLE and Mailroom Sgt. LASKNOT,

Respondents.

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This is a proposed civil action for declaratory, monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, contends that respondents violated his First Amendment rights and various Department of Corrections regulations by interfering with his religious observance and by withholding from him certain photocopied publications mailed to him at Supermax. He 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. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the fees and costs of instituting this lawsuit and has no assets

or means with which to pay the initial partial filing fee required by 28 U.S.C. § 1915(b)(1). Accordingly, I will review petitioner's request for leave to proceed in forma pauperis without first requiring payment of an initial partial filing fee. 28 U.S.C. § 1915(b)(4).

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, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint 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. Although this court will not dismiss petitioner's case sua sponte 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).

Petitioner will be denied leave to proceed in forma pauperis on his First Amendment free exercise of religion claim. I decline to exercise supplemental jurisdiction over petitioner's state law constitutional and negligence claims. Petitioner will be granted leave

to proceed on his First Amendment right to receive information claim. Finally, petitioner will be granted leave to proceed on his claims under Department of Corrections regulations §§ 309.05(2)(a) and 309.61(5), which I will exercise supplemental jurisdiction over pursuant to 28 U.S.C. § 1367(a).

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

ALLEGATIONS OF FACT

Petitioner is an inmate at Supermax Correctional Institution and a follower of Diin-al-Islam, or the religion of Islam. Islam requires its followers to avoid pork and pork byproducts. Since petitioner arrived at Supermax on January 12, 2000, all his food has been provided by defendants Berge and Wehrle. When petitioner first arrived at Supermax he requested meals that contained no pork or pork byproducts. Defendants Berge and Wehrle told petitioner that the meals provided to him at Supermax contained no pork. Nine months later, petitioner discovered that at least two desserts frequently served at the prison (Rice Krispie treats and marshmallow Jell-O) contained pork or pork byproducts. Petitioner ate these desserts on numerous occasions before learning they contained pork byproducts. When defendant Wehrle was informed that these desserts contained pork byproducts, the prison stopped serving them. The pork byproducts petitioner consumed caused him stress, anxiety and constant headaches. For 90 days following petitioner's discovery of the pork

byproducts in the desserts, petitioner became very finicky in his eating habits, causing him to lose 11 pounds.

On January 8, 2001, defendant Lasknot refused to deliver to petitioner certain photocopied Islamic study materials mailed to petitioner from the Muslims Student Association in Madison, Wisconsin. Defendant Lasknot told petitioner that it was "criminal" for a "Caucasian-American" like petitioner to study Islam. Defendant Berge was indifferent to defendant Lasknot's actions in refusing to deliver the photocopied material.

DISCUSSION

A. Free Exercise of Religion

Petitioner alleges that by serving him desserts containing pork or pork byproducts, defendants Berge and Wehrle infringed his First Amendment right to the free exercise of his religion. "[T]he Free Exercise Clause does not require states to make exceptions to neutral and generally applicable laws even when those laws significantly burden religious practices." Goshtasby v. Board of Trustees of Univ. of Ill., 141 F.3d 761, 769 (7th Cir. 1998) (citing Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990)); see also City of Boerne v. Flores, 521 U.S. 507, 539 (1997) (Scalia, J., concurring) ("Religious exercise shall be permitted so long as it does not violate general laws governing conduct."). At the same time, prison inmates are entitled to reasonable

accommodation of their religious dietary needs. See Hunafa v. Murphy, 907 F.2d 46 (7th Cir. 1990) (remanding case involving Muslim prisoner's claim that failure to provide diet without pork violated his First Amendment rights because of insufficient evidence in record to gauge magnitude of prison's administrative and security concerns); LaFevers v. Saffle, 936 F.2d 1117 (10th Cir. 1991) (reversing district court's dismissal of prisoner's claim that prison's failure to provide vegetarian diet violated his First Amendment rights). "Inmates . . . have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion." McElyea v. Babbitt, 833 F.2d 196, 198 (9th Cir. 1987).

To establish individual liability under § 1983, petitioner must allege that the individual respondents were involved personally in the alleged constitutional deprivation or discrimination. "'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."). It is not necessary that the defendant participate directly in the deprivation. The official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of

plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). See also Kelly v. Municipal Courts of Marion County, Indiana, 97 F.3d 902, 908 (7th Cir. 1996); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995).

Petitioner alleges that defendants Berge and Wehrle told him that his food was pork-free but then served him food containing pork byproducts for nine months. Petitioner does not allege that defendant prison officials knew that they were serving food containing pork; indeed, petitioner's allegations suggest that as soon as defendants discovered the pork content of marshmallows and Jell-O, they stopped serving those foods. On the basis of these allegations, it cannot be said that defendants Berge or Wehrle "caused or participated in a constitutional deprivation," Vance, 97 F. 3d at 991, or that "the conduct causing the constitutional deprivation occur[ed] at [their] direction or with [their] knowledge and consent," Smith, 761 F.2d at 369. Petitioner will not be allowed to proceed on this claim. Petitioner also asserts a state law negligence claim against defendants Berge and Wehrle and alleges that their actions violate the Wisconsin Constitution. I decline to exercise supplemental jurisdiction over these claims because they do not depend on facts common to a federal claim upon which petitioner will be allowed to proceed. 28 U.S.C. § 1367; United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

B. "Publisher-Only" Rule

Department of Corrections regulation 309.05(2)(a) provides that "[i]nmates may only receive publications directly from the publisher or other recognized commercial sources in their packages." On January 8, 2001, petitioner was denied photocopies of religious study materials mailed to him by the Muslims Student Association in Madison, Wisconsin. According to the Institution Complaint Examiner's report attached to petitioner's proposed complaint, he was denied these materials pursuant to § 309.05(2)(a). I understand petitioner to contend that this regulation, which is enforced by defendants Berge and Lasknot, violates his First Amendment right to receive information. Alternatively, petitioner contends that defendants Berge and Lasknot misapplied the regulation in denying petitioner photocopied Islamic study materials mailed to him from the Muslims Student Association. Finally, petitioner contends that defendants Berge's and Lasknot's actions violated § 309.61(5) of the Department of Corrections regulations, which deals with the delivery of religious literature mailed to prisoners.

"Regulations affecting the sending of a 'publication' . . . to a prisoner . . . are 'valid if [they are] reasonably related to legitimate penological interests.'" Thornburgh v. Abbott, 490 U.S. 401 (1989) (citations omitted). Petitioner argues that defendants' decision to deny him the photocopies sent by the Muslims Student Association serves no such interest, but rather was motivated by defendant Lasknot's belief that it was "criminal" for a

"Caucasian-American" like petitioner to study Islam. In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court upheld a prison regulation prohibiting receipt of *hardback* books unless they were mailed from publishers, book clubs or bookstores. The Court noted that "hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons may easily be secreted in the bindings." Id. at 551. However, the Court expressed no view as to the validity of a regulation that would impose similar restrictions on soft-cover books or magazines. Id. at 550 n.31. Indeed, the Court's decision was influenced by the fact that the regulation in question "allow[ed] soft-bound books and magazines to be received from any source." Id. at 552.

Other courts have noted that a broad ban on all publications not mailed from a publisher might not survive a First Amendment challenge. Keenan v. Hall, 83 F.3d 1083, 1093 (9th Cir. 1996) ("state interest in prison security that justified the hardback rule in Bell may not justify a ban on other reading materials"); Allen v. Coughlin, 64 F.3d 77 (2nd Cir. 1995) (reversing district court grant of summary judgment for defendant prison officials because record was insufficient to establish validity of a publishers-only rule for newspaper clippings as a matter of law). On the other hand, some courts have upheld publishers-only rules that apply to magazines, newspapers and soft-cover books in the face of First Amendment challenges. Ward v. Washtenaw County Sheriff's Dep't, 881 F.2d 325, 329 (6th Cir. 1989); Kines v. Day, 754 F.2d 28 (1st Cir. 1985). The Court of Appeals for the

Seventh Circuit appears not to have ruled on this precise issue, although at least one district court in the Seventh Circuit has held that a publishers-only rule violated the First Amendment. See Green v. Peters, No. 71 C 1403, 1997 WL 769458, at *1 (N.D. Ill. Dec. 5, 1997) (citing Green v. Sielaff, No. 71 C 1403 (N.D. Ill. Jan. 9, 1976)). Petitioner alleges that § 309.05(2)(a)'s ban on photocopied material not mailed from a publisher or other commercial source violates his First Amendment right to receive information. I conclude that petitioner's allegation is sufficient to state a claim at this stage of the proceedings. Petitioner will be allowed to proceed on this claim against defendant Berge and Lasknot.

Alternatively, petitioner alleges that defendants Berge and Lasknot misapplied § 309.05(2)(a) in denying petitioner Islamic study materials mailed to him from the Muslims Student Association. Section 309.05(2)(a) permits the delivery to prisoners of publications from "publishers or other recognized commercial sources." Petitioner maintains that the Muslims Student Association is a publisher or commercial source of the material denied to him by defendants Lasknot and Berge. At this early stage, petitioner's allegation states a claim upon which he will be allowed to proceed against defendants Berge and Lasknot.

Finally, petitioner alleges that defendants Berge and Lasknot violated § 309.61(5) of the Department of Corrections regulations, which provides that "[r]eligious literature transmitted through the U.S. mail . . . shall be delivered to inmates unless . . . reasonable grounds [exist] to believe that the literature will jeopardize the safety of the institution or

that the literature promotes illegal activity." Like petitioner's First Amendment challenge to the publishers-only rule, this claim appears to hinge on whether the rule and defendants' actions were justified by "legitimate penological interests." Thornburgh, 490 U.S. at 413 (citations omitted). Accordingly, petitoner will be allowed to proceed against defendants Berge and Lasknot on this claim.

ORDER

IT IS ORDERED that

1. Petitioner Gerald Pearson's request for leave to proceed in forma pauperis on his free exercise of religion claim is DENIED and respondent Wehrle is DISMISSED from this case.

2. Petitioner's request for leave to proceed in forma pauperis on his First Amendment challenge to the "publishers-only" rule, § 309.05(2(a), against defendants Berge and Lasknot is GRANTED.

3. Petitioner's request for leave to proceed in forma pauperis on his claims under Department of Corrections regulations §§ 309.05(2)(a) and 309.61(5) against defendants Berge and Lasknot is GRANTED.

Entered this 22nd day of October, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge