IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KEVIN L. GUIBORD,

Petitioner,

v.

CITY OF EAU CLAIRE, ET AL.,

Respondents.

ORDER

01-C-0453-C

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This is a civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201-02. Petitioner Kevin L. Guibord requests leave to proceed in forma pauperis, alleging that respondent city of Eau Claire's non-smoking ordinance pertaining to restaurants violates his First and Fourteenth Amendment rights.

Petitioner receives monthly income of $625 in social security disability payments, is unemployed and owes approximately $17,000 in child support. Under this court's indigency standard, petitioner may proceed without any prepayment of fees and costs.

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, leave to proceed in forma pauperis will be denied if, even under a liberal construction, the petitioner'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. See 42 U.S.C. § 1915e.

Because petitioner's claims are legally frivolous, I will deny his request for leave to proceed in forma pauperis.

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

ALLEGATIONS OF FACT

Petitioner Kevin L. Guibord resides in Eau Claire, Wisconsin. Respondent city of Eau Claire is a municipal entity.

In June 2000, respondent enacted a non-smoking ordinance pertaining to restaurants, which states that "[i]t shall be unlawful for any person to engage in smoking in all enclosed, indoor areas of any establishment requiring a restaurant license" subject to several enumerated exceptions. City of Eau Claire, Wis., Ordinance, § 8.05.030 (June 2000). One exception includes "any establishment requiring a restaurant license whose sales of alcohol beverages is more than 50% of its gross receipts." Id. at § 8.05.020(A)(1). The ordinance has been adopted "for the purpose of protecting public health, safety, comfort and general welfare of the people of the city of Eau Claire, especially recognizing the rights of nonsmokers who constitute a majority of the population." Id. at § 8.05.020. The ordinance

states that "[i]t is recognized that smoking of tobacco-related products is hazardous to an individual's health and may affect the health of nonsmokers when in th presence of smokers in certain public places." Id.

Respondent failed to provide any scientific or medical evidence establishing that a person will suffer any direct or indirect hazard to his or her health if that person frequents a smoking section several times a week for approximately one hour.

DISCUSSION

I understand petitioner to allege that by enacting a non-smoking ordinance, respondent (1) violated his First Amendment right to smoke in a restaurant and (2) violated his Fourteenth Amendment due process rights because the ordinance is unsupported by any scientific or medical evidence.

Two preliminary matters need to be addressed. First, although petitioner contends that he has a First Amendment right to smoke in a restaurant, I am unaware of any such right. Accordingly, I will deny his request for leave to proceed on this First Amendment claim as legally frivolous. Second, although it appears from the overall content of petitioner's proposed complaint that he is a smoker affected by respondent's ordinance, he fails to allege concretely that he is such a person. Therefore, it is unclear whether petitioner has standing to bring this lawsuit. Standing is the determination whether a specific person

is the proper party to bring a matter to the court for adjudication. The "question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975); see also Bennett v. Spear, 520 U.S. 154, 167 (1997) (plaintiff must allege that he has suffered or imminently will suffer an injury, injury is fairly traceable to defendant's conduct and favorable federal court decision is likely to redress injury). Because petitioner's due process claim fails for other reasons, I will assume he has standing for the purpose of determining whether to grant his request for leave to proceed in forma pauperis.

The Supreme Court held that when reviewing challenged social legislation, a court must look for "plausible reasons" for the legislative action, regardless whether such reasons were the actual basis for the legislature's action. See United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980). A court need find only some "reasonably conceivable state of facts that could provide a rational basis" for the legislative action. Heller v. Doe, 509 U.S. 312, 320 (1993) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)). A court will not strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish, Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 50 (1966), because the problem could have been better addressed in some other way, Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 378 (1973), or because the statute's classifications lack sharp precision, Dandridge v. Williams, 397 U.S. 471, 485 (1970).

Moreover, a statute may not be overturned on the basis that no empirical evidence supports the assumptions underlying the legislative choice. Vance v. Bradley, 440 U.S. 93, 110-11 (1979). To succeed, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." Id. at 111. So long as the legislation does not burden fundamental rights or single out suspect classifications, lawmakers are free to engage in "rational speculation unsupported by evidence." Beach Communications, 508 U.S. at 315.

On its face, the ordinance is rationally related to the legitimate government interest of protecting the health of its citizenry. Petitioner argues that respondent violated his due process rights because it failed to provide and scientific or medical data that a person who frequents a smoking section several times a week for approximately one hour will suffer deleterious affects on his or her health. (It is unclear why petitioner has determined the non-smoker's exposure rate to be several times a week for one-hour increments. For example, a restaurant employee would be subject to continuous exposure.) However, because the legislation does not burden petitioner's fundament rights or single out a suspect class, lawmakers are free to engage in "rational speculation unsupported by evidence." Beach Communications, 508 U.S. at 315; see also Vance, 440 U.S. at 110-11; see also Beatie v. City of New York, 123 F.3d 707 (2d Cir. 1997) (court rejected cigar smoker's contention

that the ordinance was unconstitutional as applied to cigars because there was no reliable scientific evidence to show that second-hand cigar smoke has same adverse effects on nonsmokers as second-hand cigarette smoke). Therefore, the fact that respondent failed to provide evidence at the level of medical or scientific specificity petitioner desires does not render the legislation irrational. Moreover, there is evidence above and beyond the threshold of rational speculation regarding the dangers of second-hand smoke. See, e.g., The Health Consequences of Involuntary Smoking: A Report of the Surgeon General (1986), available at http://www.cdc.gov/tobacco/sgr_1986.htm.

In addition, petitioner argues that because the ordinance has exceptions, it proves that its stated purpose (to protect public health) is a sham. However, a legislature need not "'strike at all evils at the same time or in the same way,'" and "'may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.'" Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (quoting Semler v. Oregon Bd. of Dental Examiners, 294 U.S. 608, 610 (1935) and New Orleans v. Dukes, 427 U.S. 297, 303 (1976), respectively). Because petitioner's due process claim is legally frivolous, I will deny his request for leave to proceed in forma pauperis.

ORDER

IT IS ORDERED that petitioner Kevin L. Guibord's request for leave to proceed in forma pauperis is DENIED and this case is DISMISSED as legally frivolous.

Entered this 22nd day of August, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge