

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

TROY S. BURTON,

Petitioner,

v.

MATTHEW FRANKS and
JEFFREY P. ENDICOTT,

Respondents.

ORDER

03-C-374-C

This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Redgranite Correctional Institution in Redgranite, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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).

At this early stage of the proceedings, I must allow petitioner to proceed because his claim is not legally frivolous or malicious, does not fail to state a claim upon which relief may be granted and does not seek monetary relief against a defendant who is immune from such relief. However, petitioner should be aware that his claim is vulnerable to dismissal on a motion for summary judgment if respondents put in evidence to show that there is a rational basis for the restriction.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is an inmate at the Redgranite Correctional Institution in Redgranite, Wisconsin. Respondent Matthew Franks is the Secretary of Corrections at the Wisconsin Department of Corrections and respondent Jeffrey Endicott is the warden at Redgranite Correctional Institution.

On April 21, 2003, petitioner made a written inter-library loan request for a copy of the Satanic Bible. The request was denied "per institution policy." A second written request was made to the Redgranite Correctional Institution Chaplain Bo Campbell. In response, Campbell explained that Satanism was not a religion recognized by the Wisconsin Department of Corrections.

Petitioner then filed an inmate complaint, which was investigated by inmate complaint examiner Sally Wess. It was dismissed thereafter by respondent Warden Jeffrey Endicott. The warden stated that "Satanism is not recognized as a religion in accordance with the Department of Corrections DOC 309, IMP 6" and "[p]ossessing materials or symbolism on Satanism is in violation of Department of Corrections 303.20, Group Resistance and Petitions."

Following the prescribed appeal process, the decision to deny petitioner a copy of the Satanic Bible was upheld by the office of respondent Matthew Franks, Secretary of the Wisconsin Department of Corrections.

DISCUSSION

Petitioner contends that respondents violated his First Amendment rights by denying him a copy of the Satanic Bible. It is well-settled that prisoners do not leave their First Amendment rights at the prison gates. See Al-Alamin v. Gramley, 926 F.2d 680, 686 (7th Cir. 1991); Caldwell v. Miller, 790 F.2d 589, 596 (7th Cir. 1986). However, a prisoner's free exercise claims are analyzed on a rational basis standard. Turner v. Safley, 482 U.S. 78 (1987); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

The Court of Appeals for the Seventh Circuit has identified several factors that can be used in applying the rational basis standard:

1. whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule;
2. whether there are alternative means of exercising the right in question that remain available to prisoners;
3. the impact accommodation of the asserted constitutional right would have on guards and other inmates and on the allocation of prison resources; and
4. although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable.

Al-Alamin, 926 F.2d at 685 (quoting Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988)) (additional quotation marks omitted).

Other courts applying similar standards have held that a prison's interest in institutional security and order is a legitimate state interest that is rationally related to the

prison's restriction of access to Satanic literature. McCorkle v. Johnson, 881 F.2d 993 (11th Cir. 1989); Doty v. Lewis, 995 F. Supp. 1081 (D. Ariz. 1998); Carpenter v. Wilkinson, 946 F. Supp. 522 (N.D. Ohio 1996). However, in each of these cases, there was evidence in the record to substantiate the court's conclusions on the issues of a legitimate state interest and the relatedness of that interest to the restriction. See id.

A district court should dismiss a claim under 28 U.S.C. § 1915(e) only if it is legally frivolous or malicious, fails to state a viable constitutional claim or seeks monetary relief against a defendant who is immune from such relief. Although the government must prove only a rational basis for the regulation, it would be improper to characterize petitioner's claim as legally frivolous or malicious or as failing to state a claim in the absence of evidence that the restriction is reasonable. Anders v. Janklow, 163 F.3d 601 (8th Cir. 1998) (holding that the district court abused its discretion by characterizing as frivolous petitioner's claim that he was denied his free exercise rights when a prison denied him a Satanic Bible); see Alston v. DeBruyn, 13 F.3d 1036, 1039-40 (7th Cir. 1994) (concluding that the district court abused its discretion by dismissing petitioner's free-exercise complaint as frivolous where the record did not contain evidence of the prison's need for the restriction).

Petitioner's complaint and attachments indicate that respondents' likely defense to this claim will be based on security and safety concerns that meet the rational basis standard. However, because the present record consists entirely of allegations made in the complaint

and its attachments and respondents have not had an opportunity to submit evidence to the court, I cannot conclude that there is a rational basis for the restriction. Accordingly, the motion for leave to proceed will be granted.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis is GRANTED on his claim against respondents that his First Amendment rights were violated when he was denied a Satanic Bible.

- For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. 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.
- The unpaid balance of petitioner's filing fee is \$140.40; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 20th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge