IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

TITUS HENDERSON,

ORDER

Petitioner,

04-C-0039

v.

VICKI SEBASTIAN, GERALD BERGE, MATTHEW FRANK, and CATHERINE BROADBENT,

Respondents.

- -

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 Wisconsin Secure Program Facility in Boscobel, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Petitioner alleges that respondents violated the First Amendment and the Religious Land Use and Institutionalized Persons Act by denying him certain Taoist texts, forcing his adherence to Christianity and using tax dollars to purchase access to a Christian television network. 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. 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Titus Henderson is currently incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Respondent Matthew Frank is the secretary of the Wisconsin Department of Corrections. Respondent Gerald Berge is the warden at the

Secure Program Facility. Respondents Vicki Sebastian and Catherine Broadbent are facilitators of a behavioral modification program at the facility.

Petitioner was transferred to the Wisconsin Secure Program facility on January 10, 2003. After being transferred, petitioner was forced to participate in the behavioral modification program at the facility. Respondents Sebastian and Broadbent forced petitioner to listen and submit to their Judeo-Christian beliefs. Petitioner will not be transferred to a less secure prison unless he submits to the Judeo-Christian teachings of respondents Sebastian and Broadbent.

Petitioner's faith is Taoism. He requested two Taoist texts from respondents Sebastian and Broadbent: Tao Te Ching and Chuang Tzu. He argued that he should be given these two books because Christian inmates have access to the Christian television network, "Trinity Broadcast Network: Sky Angel." Respondents Sebastian and Broadbent refused petitioner's request and sent him a memo, stating that they would not accommodate Taoism to the same extent they accommodate Judeo-Christianity. Defendants Berge and Frank dismissed petitioner's inmate complaint in which he complained of the disparate accommodation of Taoism and Christianity. Defendants Berge and Frank also permitted tax payer dollars to be used in purchasing the "Trinity Broadcast Network." Other religious networks are not provided.

DISCUSSION

A. First Amendment: Free Exercise

The First Amendment prohibits prison regulations that burden an inmate's right to freely exercise the religion of his choosing unless the regulation is reasonably related to the prison's legitimate penological interests. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)). The Court of Appeals for the Seventh Circuit has identified several factors that can be used in applying the "reasonableness" 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 v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991) (quoting Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988)) (additional quotation marks omitted).

1. Denial of Taoist texts

Government burdens free exercise by directly restraining or indirectly discouraging individuals from engaging in their religion. Sherbert v. Verner, 374 U.S. 398, 404 n.5 (1962) (citing American Communications Assn. v. Douds, 339 U.S. 382, 402.) Petitioner has alleged that respondents Sebastian and Broadbent restrained his right to exercise Taoism by denying him copies of Tao Te Ching and Chuang Tzu. Denial of a religious text may constitute a violation of an inmate's free exercise rights unless the denial is reasonably related to a legitimate penological interest. See, e.g., Tarpley v. Allen County, Indiana,312 F.3d 895 (7th Cir. 2002). At this early stage, petitioner's allegations about being denied copies of these two book are sufficient to state a claim for the violation of his First Amendment rights. See Alston v. DeBruyn, 13 F.3d 1036, 1039-40 (7th Cir. 1994) (concluding that district court abused its discretion by dismissing petitioner's free-exercise complaint as frivolous where record did not contain evidence of prison's need for restriction). Accordingly, petitioner will allowed to proceed on this claim against respondents Sebastian and Broadbent.

2. Forced affirmation of Judeo-Christian beliefs

Violations of the free exercise clause are not limited to government actions deterring individuals from engaging in religious observances. Free exercise is burdened when government "compel[s] affirmation of a repugnant belief." See Sherbert, at 402. In

addition, prison officials may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." Id. (citations omitted). Petitioner alleges that respondents Sebastian and Broadbent forced him to hear their Judeo-Christian beliefs and submit to them and that they told him that he would be denied transfer to a less secure prison if he refused to do so.

At this stage, petitioner's allegations are rather conclusory; petitioner does not indicate whether he was taught certain Christian beliefs, forced to pray, made to recite religious material or compelled to affirm allegiance to a Christian faith, etc. However, a "plaintiff is not required to plead facts or legal theories or cases or statutes, but merely to describe his claim briefly and simply." Shah v. Inter-Continental Hotel Chicago Operating Corp., 314 F.3d 278, 282 (7th Cir. 2002); see also Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002) ("[T]here is no requirement in federal suits of pleading the facts or the elements of a claim."). So long as the complaint gives the defendant sufficient notice of the claim to file an answer, it "cannot be dismissed on the ground that it is conclusory or fails to allege facts." Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). Accordingly, petitioner will be allowed to proceed on his claim that respondents Sebastian and Broadbent violated his First Amendment free exercise rights by forcing him to hear and submit to their Christian beliefs through the behavioral modification program.

B. Religious Land Use and Institutionalized Persons Act

The Religious Land Use and Institutionalized Persons Act prohibits governmental imposition of a "substantial burden on the religious exercise" of a prisoner, unless the defendant can show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1. The rule applies in any case in which

> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

Id. In another lawsuit, I found that the Wisconsin state penal institutions receive federal financial assistance. See Charles v. Verhagan, 220 F. Supp. 2d 937, 943 (W.D. Wis. 2002). Therefore, petitioner may bring his claim under the Religious Land Use and Institutionalized Persons Act.

The Act is to be construed broadly to favor the protection of inmates' religious exercise, 42 U.S.C. § 2000cc-3(g), however, it protects inmates only against "substantial burden[s]," which means "something that necessarily bears direct, primary and fundamental responsibility for rendering religious exercise . . . effectively impracticable." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003). Largely for the same reasons discussed above in the free exercise context, petitioner will be allowed to

proceed on his claims that respondents Sebastian and Broadbent violated the Religious Land Use and Institutionalized Persons Act by denying him copies of Tao Te Ching and Chuang Tzu and forcing him to submit to their Christian beliefs.

C. First Amendment: Establishment Clause

The establishment clause provides that "Congress shall make no law respecting an establishment of religion." The clause is violated when "the challenged governmental practice either has the purpose or effect of 'endorsing' religion." County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (citations omitted). In this context, the prohibition on the government's "endorsement" of religion means that the gov't is precluded "from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." Id. at 593 (citations omitted). Petitioner alleges that respondents Berge and Frank used taxpayer money to purchase the Christian television network "Trinity Broadcast Network" but did not provide equal accommodations to other religions. Because this could be construed as an endorsement of Christianity, petitioner will be allowed to proceed on this claim against respondents Berge and Frank.

ORDER

IT IS ORDERED that

1. Petitioner Titus Henderson is GRANTED leave to proceed on his claims that

a. Respondents Vicki Sebastian and Catherine Broadbent violated petitioner's First Amendment right to freely exercise his religion by denying him copies of two Taoist texts and forcing him to submit to Christianity as part of the behavior modification program;

b. Respondents Sebastian and Broadbent violated the Religious Land Use and Institutionalized Persons Act by denying him copies of two Taoist texts and forcing him to submit to Christianity as part of the behavior modification program;

c. Respondents Matthew Frank and Gerald Berge violated the Establishment Clause by using tax dollars to purchase the Christian television network "Trinity Broadcast Network: Sky Angel."

2. 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.

3. 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.

4. The unpaid balance of petitioner's filing fee is $145.47; petitioner is obligated to

pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 6th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge