

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

KURT W. MEYER,

Petitioner,

v.

CATHERINE J. FARREY, MARK TESLIK,
JOHN RAY and RICHARD RAEMISCH,

Respondents.

ORDER

05-C-269-C

This is a proposed civil action for declaratory and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Fox Lake Correctional Institution in Fox Lake, 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. 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); see also 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 Kurt W. Meyer is an inmate presently confined at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. The events alleged in his complaint, however, occurred at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Respondent Mark Teslik is Chaplain at the New Lisbon Correctional Institution. Respondent Catherine Farrey is Warden of the New Lisbon Correctional Institution. Respondent John Ray is a corrections complaint examiner for the Wisconsin Department

of Corrections. Respondent Richard Raemisch works in the Office of the Secretary in the Wisconsin Department of Corrections and reviews offender complaints.

On June 28, 2004, petitioner filled out a Department of Corrections form 1090 requesting an opportunity to practice Native American religious rights. Despite his request, respondent Teslik failed to put petitioner on the religious service list. As a result of Teslik's failure, petitioner was unable to practice his religion during religious ceremonies held from June 26, 2004 to October 1, 2004. On September 19, 2004, petitioner filed an inmate complaint complaining about his inability to be added to the Native American activities list. On September 22, 2004, inmate complaint examiner Jill Sweeney affirmed petitioner's complaint and stated that Chaplain Teslik would add petitioner to the Native American services list. Petitioner was dissatisfied with the result of the inmate complaint and requested a review of the inmate complaint examination, stating that respondent Teslik injured him by denying him religious services from June 28, 2004 to September 30, 2004. On November 8, 2004, respondent Ray affirmed petitioner's complaint, acknowledging that petitioner's religious preference form was overlooked inadvertently for a period of time but that someone had advised Ray that petitioner had been participating in religious activities since July 2004. This statement by respondent Ray was a lie because petitioner had been denied access to all religious services from June 26, 2004 to October 1, 2004. Respondent Raemisch affirmed respondent Ray's decision.

DISCUSSION

Petitioner alleges that by restricting his access to Native American religious services between June 26, 2004 and October 1, 2004, respondents violated his right to freely exercise his religion under the First Amendment and imposed a substantial burden on his ability to exercise his religious beliefs, in violation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1. 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. Like plaintiffs asserting claims under the Religious Land Use and Institutionalized Persons Act, those bringing free exercise claims under the Constitution must show that the exercise of their religion has been substantially burdened. Hernandez v. Commissioner, 490 U.S. 680, 699 (1989).

Petitioner is seeking monetary relief in the form of compensatory and punitive damages for the three month period he was unable to practice his religion. At this stage of the proceeding, petitioner has alleged enough facts to support his proposition that respondents’ failure to grant his request to practice his Native American religion in a timely fashion imposed a substantial burden upon his religious exercise.

However, petitioner has not alleged any facts suggesting how respondents Raemisch, Ray or Farrey violated his constitutional rights. Respondent Raemisch merely affirmed respondent Ray's recommendation that the inmate complaint examiner's affirmance of petitioner's complaint be affirmed. Petitioner has not alleged any facts to suggest that Raemisch played any part in denying petitioner the ability to participate in Native American activities between June 28 and October 1, 2004. In any event, persons making recommendations for the disposition of inmate complaints are entitled to absolute immunity from suit. Tobin for Governor v. Illinois State Board of Elections, 268 F.3d 517, 522 (7th Cir. 2001) (officials making recommendation entitled to immunity just as magistrate judge who makes recommendation to district court would be); Wilson v. Kelkhoff, 86 F.3d 1438, 1445 (7th Cir. 1996) (absolute immunity protects against both actual decision making and any act that is "part and parcel" of the decision making process). Therefore, I will grant respondent leave to proceed in forma pauperis on his First Amendment and Religious Land Use and Institutionalized Persons Act claims against respondent Teslik only.

Petitioner should note that as this case proceeds, if it turns out that Teslik's failure to put petitioner on the list for Native American services was the result of negligence, he will not be able to succeed on his First Amendment claim. A demonstration of mere negligence is insufficient to establish a claim under § 1983. Daniels v. Williams, 474 U.S. 327, 331-33 (1986) (stating that "injuries inflicted by governmental negligence are not addressed by the

United States Constitution” and rejecting § 1983 claim based on alleged due process violation).

ORDER

IT IS ORDERED that

1. Petitioner Kurt W. Meyer’s request for leave to proceed in forma pauperis is GRANTED on his claim against respondent Mark Teslik that he imposed a substantial burden on his religious exercise in violation of the First Amendment and the Religious Land Use and Institutionalized Persons Act;

2. Respondents Catherine J. Farrey, John Ray and Richard Raemisch are DISMISSED from this case.

- For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, 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 \$220.00; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).
- Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.
- Petitioner submitted documentation of exhaustion of administrative remedies with his complaint. Those papers are not considered to be a part of petitioner's complaint. However, they are being held in the file of this case in the event respondents wish to examine them.

Entered this 26th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge