

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

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GORDAN BATES,

Petitioner,

v.

STATE OF WISCONSIN - DEPARTMENT
OF WORKFORCE DEVELOPMENT,
STATE OF WISCONSIN - VOCATIONAL
REHABILITATION, ALLIANCE OF IMPARTIAL
HEARING OFFICERS, LESLIE MIRKIN,
MICHAEL GRECO, KAREN LAMBRIGHT,
LINDA VEGOE, MICHAEL SCHNAPP,
DEB HENDERSON-GUETHER, DAVID
BECKER and CLIENT ASSISTANCE PROGRAM,

Respondents.

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ORDER

08-cv-465-slc

Because Judge Shabaz is on a medical leave of absence from the court for an indeterminate period, the court is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. It is this court's expectation that the parties in a case assigned to the magistrate judge will give deliberate thought to providing consent for the magistrate judge to preside over all aspects of their case, so as to insure that all cases filed in the Western District of Wisconsin receive the attention they deserve in a timely manner. At

this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the sole purpose of issuing this order, I am assuming jurisdiction over the case.

This is a proposed civil action for monetary relief, in which petitioner Gordan Bates seeks 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. 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, pursuant to 28 U.S.C. § 1915(e)(2), if a litigant is requesting leave to proceed in forma pauperis, the court must deny leave to proceed if the action is frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune to such relief.

I conclude that petitioner has stated a claim under Title II of the Americans with Disabilities Act and under Wisconsin's fraudulent representation statute. I conclude further that petitioner has failed to state a claim under Section 504 of the Rehabilitation Act of 1973. Accordingly, petitioner's request for leave to proceed will be granted in part and denied in part.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Gordan Bates is a resident of Middleton, Wisconsin.

Respondent State of Wisconsin-Department of Workforce Development is a state agency responsible for the administration of job development. Respondent State of Wisconsin-Division of Vocational Rehabilitation is also a state agency. Respondents Leslie Mirkin and Michael Greco are directors at the Division of Vocational Rehabilitation. Respondents Karen Lambright and Michael Schnapp are rehabilitation counselors employed by the Division of Vocational Rehabilitation. Respondent Alliance of Impartial Hearing Officers is a state agency. Respondent David Becker is an impartial hearing officer employed by the Alliance of Impartial Hearing Officers. Respondent Client Assistance Program is a state program organized by the Wisconsin Department of Agriculture, Trade and Consumer Protection. Respondent Linda Vegoe is the director of the Client Assistance Program. Respondent Deb Henderson-Guenther is a Client Assistance Program complaint examiner employed by the Wisconsin Department of Agriculture.

B. Petitioner's Involvement with the Division of Vocational Rehabilitation

Petitioner began obtaining services from the Division of Vocational Rehabilitation in September 2005. Respondent Lambright prepared an Individualized Plan for

Employment for petitioner and requested that petitioner accept the plan. After three months of unsuccessful job searching, petitioner contacted Kyle Stasiak, a vocational specialist, to request additional support for a business plan. Stasiak agreed to help petitioner. Stasiak contacted and scheduled an appointment with respondent Lambright to discuss petitioner's business plan. Respondent Lambright canceled the appointment and when petitioner asked why, she responded, "What business!? You need psychiatric evaluation, you can't keep [a] job!"

In January 2006, petitioner appealed to respondents Greco and Vegoe regarding respondent Lambright's decision to refuse to hear petitioner's business plan. On January 30, petitioner provided his conceptual business plan to respondent Vegoe. On June 13, 2006, respondent Vegoe responded to petitioner in an email stating, "We assist individuals when DVR is not willing to move forward with an employment plan. In your case, DVR is willing to work with you."

On July 7, 2006, petitioner met with Carla Lenk, a business consultant provided by the Division of Vocational Rehabilitation. On August 21, 2006, petitioner sent his business plan and equipment list to the Division of Vocational Rehabilitation. On October 27, 2006, the Division of Vocational Rehabilitation accepted petitioner's business plan and began providing finances for a web page and office expenses. Petitioner was advised by the Division of Vocational Rehabilitation to start searching for an office. When petitioner

found an office and his first “job,” the Division of Vocational Rehabilitation canceled its previous decision and refused to pay the rent for petitioner’s office. (Although petitioner mentions “real estate” and a “builder,” he never provides information about what his potential business was or what it would do.)

In December 2006, petitioner received information from the Division of Vocational Rehabilitation that in January 2007 his business plan would be submitted to its business committee. On January 24, 2007, respondent Lambright told petitioner that the business committee had decided to return his business plan so that he could update it. The business plan that was returned to petitioner was the plan he had submitted to respondent Vegoe in January 2006 and not the most recent plan he had submitted in August 2006.

In February 2007, petitioner appealed to respondents Greco and Vegoe regarding the manner in which respondent Lambright was handling his business plan. On February 23, 2007, petitioner met with respondents Greco and Vegoe and they agreed that the Division of Vocational Rehabilitation would finance petitioner’s business plan. On March 2, 2007, petitioner received a response from the business committee informing him that they were refusing to accept his business plan. Petitioner’s business plan involved

start . . . in first year with three residential building, second year 6 residential building and for third years 9 residential building. Business plan also explains and provides information for plaintiff long term employment goal and include also licensing plan. Practically plaintiff will start this business for first three years like building not architect and he need just 0.5% - 1% from marketing to build successful business.

(Mistakes in original.)

Petitioner appealed to respondents Greco and Vegoe regarding the business committee's decision. On April 19, 2007, petitioner was provided a meeting with respondents Lambright and Henderson-Guether. At the meeting, petitioner was asked many questions including why he did not have a job and why he needed help with his business, and he was told that he needed psychiatric evaluations and that he could not work with clients. Once again, petitioner appealed to respondents Greco and Vegoe and the Division of Vocational Rehabilitation assigned petitioner to respondent Schnapps as petitioner's new counselor.

On June 1, 2007, petitioner met with respondent Mirkin. At the meeting, Mirkin agreed to finance petitioner's business plan. On July 5, 2007, petitioner had another meeting regarding his business plan at which several people were present, including Fashad Maltes, representing the financial institution Impact Seven, and respondent Schnapp. At the meeting, Maltes provided a positive opinion regarding petitioner's business plan. Petitioner participated in more meetings on August 2 and 13. At the August 13 meeting, respondent Schnapp agreed to provide petitioner with start-up financing in an amount between \$20,000 and \$35,000.

On September 24, 2007, petitioner met with respondent Schnapp and presented his relationship with "Real Estate Investment Analysis," which involved petitioner working from

home while “Real Estate Investment Analysis” represented petitioner’s business. Respondent Schnapp agreed that the Division of Vocational Rehabilitation would provide financial support for petitioner to work out of his home. On October 8, 2007, petitioner met with respondent Mirkin. At the meeting, respondent Mirkin did not remember agreeing to finance petitioner’s business plan back in June and told petitioner that petitioner’s bad credit history was the reason why he could not receive start-up financing. Respondent Mirkin told petitioner that his business plan was not “bank ready.”

On November 20, 2007, petitioner had a hearing before respondent Becker. Respondent Becker denied petitioner’s request for financial support for his business plan because “[d]uring the hearing [petitioner] did not offer any evidence to justify an award of \$70,000.00. Therefore, it is determined DVR’s decision to deny funding for the business was proper.” Respondents Greco and Veago do not remember ever agreeing to provide petitioner with financial support for his business plan. Respondents’ decision to deny petitioner a business loan was based on his disability

DISCUSSION

Although petitioner asserts a plethora of legal causes of action in his complaint, ranging from civil rights violations to Wisconsin Statutory violations, I understand his assertions to fall into two categories: (1) a state law claim of fraudulent representation and

(2) a federal law claim that he was treated in a discriminatory matter because of his disability.

A. Discrimination Because of Disability

Although petitioner cites many federal statutes, only one allegation in his complaint can be viewed as supportive of a potential federal law claim, that being his allegation that he was subject to “discrimination on the basis of [his] disability.” Looking at all of petitioner’s allegations, I understand him to be alleging that respondents refused to provide him with a business loan because he is disabled. From these allegations I understand petitioner to be attempting to raise two related federal claims: (1) a claim under Title II of the Americans with Disabilities Act, 42 U.S.C. 12132; and (2) a claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

1. ADA claim

Title II of the ADA provides that

no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Although petitioner fails to say or even hint at what his disability is, stating that he is being discriminated against because of a disability is minimally sufficient

to give respondents adequate notice of the grounds upon which his claims rest. Kyle v. Morton High School, 144 F.3d 448, 455 (7th Cir. 1998). Therefore, at this early stage in the proceedings I will infer that petitioner is a “qualified individual with a disability.”

Under Title II a “public entity” includes:

- (A) any State or local government;
- (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government.

42 U.S.C. 12131. Respondents State of Wisconsin-Department of Workforce Development, the Division of Vocational Rehabilitation, the Alliance of Impartial Hearing Officers and the Client Assistance Program are all state agencies or instrumentalities according to petitioner’s allegations. Also, the remaining individually named respondents are alleged employees of the state agencies petitioner is suing, and therefore they may be sued in their official capacities. Walker v. Snyder, 213 F.3d 344, 346 (7th Cir. 2000) (“[A]s a rule there is no personal liability under Title II either.”), abrogated on other grounds by Bruggeman ex rel. Bruggeman v. Blagojevich, 324 F.3d 906, 912-13 (7th Cir. 2003); see also United States v. Georgia, 546 U.S. 151, 154 (2006) (“Title II authorizes suits by private citizens for money damages against public entities that violate § 12132.”) (Emphasis added). Petitioner’s allegations establish that because of his disability he has been denied a benefit, that is, a business loan, by several public entities, and therefore he will be granted to leave to proceed against respondents on an ADA claim.

2. Rehabilitation Act claim

Although the elements for claims brought under the ADA and Rehabilitation Act are substantially similar, a Rehabilitation Act claim is limited to programs receiving federal financial assistance. Silk v. City of Chicago, 194 F.3d 788, 798 n.6 (7th Cir. 1999). Specifically, Section 504 of the act states that

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, . . . be denied benefits of . . . any program or activity receiving Federal financial assistance

29 U.S.C. § 794(a). Therefore, to state a claim under Section 504 of the act petitioner must provide a simple and plain statement of facts supporting four elements: (1) he is a qualified individual with a disability; (2) he is otherwise qualified for the benefit sought; (3) he was discriminated against solely by reason of his disability; and (4) the program or activity receives federal financial assistance. Grzan v. Charter Hospital of Northwest Indiana, 104 F.3d 116, 119 (7th Cir. 1997). Petitioner alleges facts supportive of the first three elements but his complaint contains no allegations regarding whether respondent State of Wisconsin Department of Workforce Development receives federal financial assistance. Therefore, petitioner fails to state a claim under section 504 of the Rehabilitation Act.

B. Fraudulent Representation

Generally, federal courts may exercise supplemental jurisdiction over state law causes of action “that are so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). This means that a federal court may hear both federal and state law claims when the central facts of the federal claim are also the central facts of the state law claim. Such is the case here.

Reading petitioner’s complaint liberally, I understand the crux of his complaint to be focused on how respondents made and broke repeated promises to him about funding his business plan. He contends that respondents made fraudulent representations about providing him a business loan and that he relied on the fraudulent representations in starting his business. These contentions are enough to raise a state law claim under Wis. Stat. § 100.18. However, petitioner should be aware that to be successful on his fraudulent representation claim he will have to prove three elements: (1) “that with the intent to induce an obligation, [] defendant[s] made a representation to ‘the public,’” (2) “that the representation was untrue, deceptive or misleading,” and (3) “that the representation caused [petitioner] pecuniary loss.” K&S Toll & Die Corp. v. Perfection Machinery Sales, Inc., 2007 WI 70, ¶19, 301 Wis. 2d 109, 121-122, 732 N.W.2d 792, 798.

ORDER

IT IS ORDERED that:

1. Petitioner Gordan Bates's request for leave to proceed in forma pauperis is GRANTED on his Title II ADA claim against respondents State of Wisconsin-Department of Workforce Development, State of Wisconsin-Division of Vocational Rehabilitation, Alliance of Impartial Hearing Officers and Client Assistance Program as well as respondents Leslie Mirkin, Michael Greco, Karen Lambright, Lenda Vegoe, Michael Schnapp, Deb Henderson-Guether and David Becker, in their official capacities.

2. Petitioner Gordan Bates's request for leave to proceed in forma pauperis is GRANTED on his state law claim of fraudulent representation against all respondents.

3. Petitioner Gordan Bates's request for leave to proceed in forma pauperis is DENIED on his claim under Section 504 of the Rehabilitation Act and that cause of action is DISMISSED from this lawsuit.

4. 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.

5. 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.

6. Included with this order are 11 blank United States Marshal Summons and Service Forms. Petitioner must fill out a form for each respondent and return them to the court by September 5, 2008, so that respondents can be served with petitioner's complaint and this order. If, by September 5, 2008, petitioner fails to return filled out summons and service forms he will be held to have withdrawn this action voluntarily. In that event, the clerk of court is directed to close this file without prejudice.

Entered this 21st day of August, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge