IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD HOEFT,

Petitioner,

v.

Corrections Officer LEWELLYN,
Sgt. MASON, Corrections Officer
PATROULLE, Unit Manager OLSON,
JOHN DOE and JANE DOE,

Respondents.

ORDER

09-cv-121-bbc

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This is the eighth of nine proposed civil actions for monetary relief brought under 42 U.S.C. § 1983 by petitioner Richard Hoeft. Petitioner 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 make even a partial pre-payment of the fee for filing this lawsuit. Therefore, I will screen his complaint.

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, because petitioner is requesting leave to proceed under the in forma pauperis statute, his complaint

must be dismissed if it 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. 28 U.S.C. § 1915(e)(2)(B). I conclude that petitioner has alleged facts from which it may be inferred that respondents Corrections Officer Lewellyn and Unit Manager Olson violated his rights under the Religious Land Use and Institutionalized Persons Act and the First Amendment when they did not allow him to have a drawing of a swastika. However, petitioner has failed to state a claim against respondents Sgt. Mason, Corrections Officer Patroulle, John Doe or Jane Doe and they will be dismissed from the case.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Richard Hoeft is a Wisconsin resident who was incarcerated at Stanley Correctional Institution during all times relevant to his allegations. Respondents Corrections Officer Lewellyn, Sgt. Mason, Corrections Officer Patroulle and Unit Manager Olson were employed at Stanley Correctional Institution.

B. Destruction of the Drawing of a Swastika

On January 12, 2009, respondent Lewellyn came to the door of petitioner's room and asked him to step from the room so Lewellyn could search it. After about ten minutes Lewellyn came out with a drawing of a swastika. He took the drawing to respondent Olson's office and showed the drawing to respondent Mason and an unknown officer.

Shortly thereafter, Lewellyn called petitioner to his desk and asked petitioner, "Why do you have this shit in your room?" Petitioner responded that it was his religious right and that he had the right to choose his religion. Lewellyn responded, "No you don't, not when you're in my prison." Lewellyn then crumpled up the drawing and threw it in the garbage. Lewellyn's actions created a substantial burden on petitioner's religious rights.

Respondents Mason and Patroulle witnessed Lewellyn confiscate and destroy petitioner's swastika. After the incident with respondent Lewellyn, petitioner spoke with respondent Olson about possessing a swastika. Olson said, "We don't allow inmates to possess swastikas under any circumstances."

DISCUSSION

Under either the First Amendment or the Religious Land Use and Institutionalized Persons Act, a prisoner has the initial burden to show that he has a sincere religious belief and that his religious exercise is substantially burdened. Koger v. Bryan, 523 F.3d 789,

797-98 (7th Cir. 2008); Vision Church v. Village of Long Grove, 468 F.3d 975, 996-97 (7th Cir. 2006). A "substantial burden" is "one that necessarily bears a 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); see also Koger, 523 F.3d at 798-99 (applying Civil Liberties standard to prisoner RLUIPA claim). Under the First Amendment, the religious exercise must be "central" to the adherent's belief or practice. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989). Under RLUIPA, a substantial burden on *any* religious exercise triggers the statute's protections. 42 U.S.C. § 2000cc-1(a)(1)-(2).

Once a prisoner establishes a substantial burden, the question under the First Amendment is whether the burden is one that applies equally to everyone or whether it targets the prisoner's beliefs in particular; if the rule applies to everyone without regard to a particular religion, there is no constitutional violation. Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990). Furthermore, even if a prisoner's religious exercise is substantially burdened, such a burden violates First Amendment rights only if the burden is not reasonably related to a legitimate penological interest. O'Lone v. Estate of Shabazz, 482 U.S. 342, 350-51 (1987). Four factors are relevant to that determination: (1) whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; (2) whether the prisoner retains

alternatives for exercising the right; (3) the impact that accommodation of the right will have on prison administration; and (4) whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Turner v. Safley, 482 U.S. 78 (1987).

Under RLUIPA, the analysis is quite different (and easier for a prisoner to meet). Once a prisoner establishes that a prison restriction placed a substantial burden on his religious exercise, the prison officials must show that the restriction furthers "a compelling governmental interest," and that it does so by "the least restrictive means." Cutter v. Wilkinson, 544 U.S. 709, 712 (2005).

Petitioner alleges that respondent Lewellyn placed a substantial burden on his right to practice his religion when he confiscated and destroyed petitioner's drawing of a swastika. Petitioner alleges that respondent Olson's statement that petitioner could not have a drawing of a swastika also placed a substantial burden on his right to practice his religion. At this early stage I must assume that petitioner's possession of a swastika is central to practicing his religion. Accordingly, his allegations are sufficient to state a claim under both RLUIPA and the First Amendment and I will grant him leave to proceed on both claims against respondents Lewellyn and Olson.

However, petitioner fails to allege any facts from which an inference may be drawn that anyone besides respondents Lewellyn or Olson was personally involved in violating any

of his constitutional rights. It is well established that liability under § 1983 must be based on a respondent's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987). There are no allegations from which to infer that anyone other than Lewellyn and Olson acted in any way to place a substantial burden on petitioner's religion. Thus, petitioner fails to state a claim against a respondents Mason, Patroulle, John Doe or Jane Doe and they will be dismissed from the case.

In order to prevail on his First Amendment and RLIUPA claims, petitioner will have to prove that he had a sincere religious belief and that his exercise of that belief was substantially burdened. Moreover, for his First Amendment claim he will have to show that the religious exercise was "central" to the practice of his religion and that the restriction burdening his religious exercise targets his belief and was not applied to everyone. Once petitioner shows a substantial burden, respondents have to show that the restriction was reasonably related to a legitimate penological interest. On the other hand, under RLIUPA, respondents have to show that the restriction furthers a compelling government interest by the least restrictive means.

In the heading of his complaint, petitioner states that his complaint is brought under both 42 U.S.C. § 1983 and § 1985. I understand this reference to § 1985 to mean that

petitioner may be trying to state a claim under § 1985. However, nowhere in his complaint does he allege any facts from which it can be inferred that respondents were involved in any conspiracy or any racial or class-based discrimination, as required to state a claim under § 1985. Hossman v. Blunk, 784 F.2d 793, 797 (7th Cir. 1986). Accordingly, petitioner has failed to state a claim under § 1985.

ORDER

IT IS ORDERED that:

1. Petitioner Richard Hoeft's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondents Corrections Officer Lewellyn and Unit Manager Olson violated his rights under RLIPUA and the First Amendment when they did not allow him to have a drawing of a swastika in his cell;

2. Petitioner's request for leave to proceed in forma pauperis is DENIED with respect to his claims against respondents Sgt. Mason, Corrections Officer Patroulle, John Doe and Jane Doe for failure to state a claim upon which relief may be granted;

3. Respondents Mason, Patroulle, John Doe and Jane Doe are DISMISSED from this lawsuit;

4. Petitioner's request for leave to proceed in forma pauperis is DENIED with respect to his claim under 42 U.S.C. § 1985 and that claim is DISMISSED for failure to state a

claim.

5. 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 learns the name of the lawyer that will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to respondents or to respondents' attorney.

6. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. Included with this order are two blank United States Marshals summons and service forms. Petitioner must fill out a form for each respondent and return it to the court by April 28, 2009, so that respondents can be served with petitioner's complaint and this order. If, by April 28, 2009, petitioner fails to return the 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 6th day of April, 2009.

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