COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1155

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

FREDERICK N. SPENCE,

PLAINTIFF-APPELLANT,

V.

JOHN HUSZ, ROSELYN EICHOFF, MOLLY OLSON, SUSAN EWERDT-JOSEPH, SUSAN DEROZIER, JAMES HARPER, JR., AND MARY J. HUIBREGTSE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Frederick Spence appeals an order dismissing his federal civil rights action against the chairman of the Wisconsin Parole Commission, another member of the parole board, the classification chief at the Kettle Moraine Correctional Institution (KMCI), three members of the KMCI

Program Review Committee, and a KMCI social worker (collectively, the state officials). Spence claims the state officials violated his First and Fourteenth Amendment rights by recommending that he participate in an alcohol and other drug abuse (AODA) program that conflicted with scheduled religious activities in which he wished to participate, and by refusing to give him minimum security classification or early parole consideration unless he successfully completed the AODA program.

BACKGROUND

¶2 Spence was sentenced to life in prison in 1982. His initial assessment for program needs did not include a recommendation for alcohol or drug treatment. However, in 1995, shortly after Spence was transferred from a maximum security institution, the KMCI Program Review Committee determined that Spence should take part in an intensive AODA program called NEXUS. The NEXUS program required an inmate to participate in strictly regimented activities from 8:00 a.m. to 6:00 p.m. everyday for sixteen weeks. Inmates were required to sign a contract agreeing, among other things, to arrange their religious observances to avoid conflict with scheduled NEXUS activities. Any unexcused absences would result in expulsion from the program.

¶3 Spence refused to participate in the NEXUS program because it would preclude him from attending Native American pipe ceremonies which were held on Thursday afternoons and because he maintained that his religious beliefs compelled him to deny treatment and rely solely on prayer for rehabilitation. Spence's social worker recommended to the Parole Commission that he complete the NEXUS program prior to being considered for release on parole. A parole board representative informed Spence that he would have to complete the NEXUS

program before being moved through minimum security, and the parole chairman endorsed the representative's statement.

¶4 After several unsuccessful attempts to obtain relief from the state officials, Spence provided notice of claim and filed this action seeking compensatory and punitive damages and a declaratory judgment that conditioning his security classification and/or parole eligibility upon completion of the NEXUS program is unlawful.

STANDARD OF REVIEW

¶5 We apply the same summary judgment methodology as that employed by the circuit court. WIS. STAT. § 802.08 (1997-98);[1] ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. ***Id.*** If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. ***Id.*** If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. ***Id.***

ANALYSIS

¶6 Spence alleged in his complaint that the state officials violated 29 U.S.C. § 722(b)(1)(A)(i) and 42 U.S.C. § 422(b) by using his security classification and parole status to coerce him into a purportedly voluntary rehabilitation program over his religious objections. The statutes Spence cited in

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

his complaint deal with eligibility for federal entitlement programs, and are plainly inapplicable to his situation. However, because Spence is a pro se prisoner, we will liberally construe his pleadings to determine whether the stated facts give rise to a cause of action. *See* ***Lewis v. Sullivan***, 188 Wis. 2d 157, 161, 164-65, 524 N.W.2d 630 (1994). Doing so, we conclude, as did the trial court, that Spence's allegations could raise a free exercise or due process claim under 42 U.S.C. § 1983.

Free Exercise Claim

¶7 The First Amendment of the United States Constitution bars governmental prohibition of the free exercise of religion. *See* U.S. CONST. amend. I. The free exercise clause of the First Amendment has been applied to the states through the Fourteenth Amendment. *See* ***Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah***, 508 U.S. 520, 531 (1993). The Wisconsin Constitution similarly prohibits governmental infringement, control or interference with religious worship or the dictates of conscience. *See* WIS. CONST. art. I, § 18. Because the purposes of the state and federal freedom-of-religion provisions are largely the same, we may look to federal cases for assistance in interpreting article I, section 18 of our state constitution. *See* ***King v. Village of Waunakee***, 185 Wis. 2d 25, 55, 517 N.W.2d 671 (1994).

¶8 The free exercise of religion may be burdened by a governmental regulation that compels an individual to perform an act contrary to religious belief or prohibits an individual from performing a religiously motivated act. *See, e.g.,* ***Wisconsin v. Yoder***, 406 U.S. 205 (1972) (requiring exemption from a compulsory education law contrary to Amish beliefs); ***Church of the Lukumi Babalu Aye***, 508 U.S. at 547 (striking down a city ordinance which prohibited the slaughter of

animals for religious purposes). However, a prison regulation which burdens an inmate's constitutional rights is nonetheless valid "if it is reasonably related to legitimate penological interests." ***Lomax v. Fiedler***, 204 Wis. 2d 196, 209, 554 N.W.2d 841 (Ct. App. 1996). In considering the reasonableness and legitimacy of a particular prison regulation, the United States Supreme Court has directed courts to consider: (1) the connection between the regulation and the asserted government interest; (2) whether the regulation allows the inmate any alternate means of exercising his asserted constitutional right; (3) whether accommodation of the inmate's asserted constitutional right would adversely impact guards, other inmates or the general allocation of prison resources; and (4) whether ready alternatives to the regulation exist. *See* ***Turner v. Safley***, 482 U.S. 78, 89-90 (1987).

¶9 If he enrolls in the NEXUS program, Spence will be precluded from attending religious pipe ceremonies.[2] Although enrollment in the NEXUS program is voluntary, Spence could suffer adverse security classification and parole decisions by choosing to attend the pipe ceremonies rather than to follow through on the PRC's treatment recommendation. This burden on the free exercise of his religion is sufficient to establish a prima facie case for a First Amendment violation.

¶10 We are satisfied, however, that the information the state officials provided about the NEXUS program, which was essentially undisputed by Spence, shows that both the program requirements and the subsequent consideration of

[2] We do not address Spence's additional claim that he should be allowed to rely on prayer for rehabilitation because he has not developed it on appeal. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

program participation for security classification and parole purposes are "reasonably related to legitimate penological interests."

¶11 First of all, the rehabilitation of offenders is a legitimate government interest, and the treatment of substance abuse in prison through an AODA program is a rational means to help achieve that goal. There is no indication that the state officials recommending AODA treatment for inmates have any purpose hostile to religion, or that Native American inmates enrolled in the NEXUS program are afforded fewer opportunities to practice their religion than are inmates belonging to other denominations.

¶12 Secondly, the NEXUS program does not preclude all religious observances. Inmates are free to attend religious services outside of the regular program hours and may be allowed to attend religious services during program hours if they do not conflict with any scheduled program activities. Here Spence would still be allowed to smoke tobacco, cedar, sage or sweetgrass in a religious pipe during recreation hours, he could participate in weekly drum ceremonies and biweekly sweat lodge ceremonies, he could request visits from a Native American spiritual advisor to be scheduled outside of program hours, he could possess a medicine bag, pipebag, feather, traditional Native American clothing and religious literature, and he could practice his faith in his room.

¶13 Third, accommodating Spencer's request to be excused from completing the NEXUS program without any effect on his security classification could adversely affect other guards or inmates by requiring them to deal with an untreated substance abuser in a minimum security context, rather than the medium security context in which the prison system is equipped to handle such addictions. Also, if Spence were to be granted discretionary parole consideration without

following the treatment recommendations for his substance abuse problems, there could be a ripple effect to other inmates.

¶14 Finally, the state officials assert the intensive and highly structured nature of the NEXUS program is integral to its rehabilitative goal. Spence has not offered any readily available alternative to the NEXUS program which would serve the asserted government interest. We therefore conclude that all four factors weigh against Spence.

Due Process Claims

¶15 Any contention that requiring completion of the NEXUS program as a prerequisite to obtaining a minimum security classification or early parole consideration deprives Spence of procedural due process must fail because he does not have a protected liberty interest in either matter. "To create a constitutionally protected liberty interest, a state law or administrative rule affecting liberty must employ 'language of an unmistakenly mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed … and that [the challenged action] will not occur absent specified substantive predicates….'" ***Robinson v. McCaughtry***, 177 Wis. 2d 293, 300, 501 N.W.2d 896 (Ct. App. 1993) (citation omitted). Unlike the mandatory parole provisions of WIS. STAT. § 302.11, which apply after an inmate has served two-thirds of his sentence, WIS. STAT. § 304.06 provides that the parole commission "may" parole an inmate who has served at least a quarter of his sentence, if certain conditions are met. Such a discretionary decision is insufficient to create a protected liberty interest. *See* ***Board of Pardons v. Allen***, 482 U.S. 369, 378 n.10 (1987). Nor does an administrative transfer within the correctional system implicate a protected liberty interest, even if it

adversely affects an inmate's conditions of confinement. *See* ***Meachum v. Fano***, 427 U.S. 215, 224 (1976).

¶16 Our conclusion that there are no disputed facts that, if resolved in his favor, would entitle Spence to judgment at trial ends our summary judgment analysis. Therefore, we need not address the additional defenses of immunity and failure to exhaust administrative remedies raised in the respondent's summary judgment motion and brief on appeal.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b).