UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

JOHNNIE C. BOUIE, JR.,

Plaintiff,

v. CASE NO. 2:10-CV-14277−JEM

WALTER A McNEIL, et al.,

Defendants.

AMENDED MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Comes now Plaintiff Johnnie C. Bouie, Jr., through counsel, and opposes Defendants' Motion for Summary Judgment as follows.

I. Procedural History

A. History Prior to the Pending Motion for Summary Judgment

Mr. Bouie is a Florida inmate currently incarcerated at Avon Park Correctional Institute ("APCI"). On October 14, 2010, Mr. Bouie filed a verified complaint naming the following Defendants: Shawn Collins, Lead Chaplain for Region IV of the Florida Department of Corrections; Alex Taylor, Chaplaincy Services Administrator for the Florida Department of Corrections; James Hardaker, Acting Chaplain and Classification Officer for Okeechobee Correctional Institution; Powell Skipper, Warden of Okeechobee Correctional Institution; and Walter McNeil, Secretary of the Florida Department of Corrections. (D.E. 1, at 1). Mr. Bouie, a devout follower of the teachings of the Nation of Islam, alleged that Defendant Collins violated his religious rights by terminating prayer meetings for Nation adherents in March 2008. (D.E. 1,

at 4-7). Defendant Collins merged Nation services with mainstream Muslim services, disregarding the significant doctrinal differences and hostility towards Nation adherents. The other Defendants, made aware of the issue through grievances and other means, acquiesced in Collins's decision, and knowingly allowed the termination of separate services for Nation adherents. (D.E. 1, at 8-11). Mr. Bouie sought declaratory, nominal, compensatory, and punitive damages. (D.E. 1, at 14-15).

Defendant McNeil filed a motion to dismiss (D.E. 24), as did Defendants Hardaker and Skipper. (D.E. 25). On May 12, 2011, the Magistrate Judge recommended that the motions be denied in part and granted in part. (D.E. 31). Subsequently, Defendant Collins filed an answer to the complaint (D.E. 42), as did Defendant Taylor (D.E. 64)

On January 20, 2012, the Court adopted in part the Report and Recommendation. (D.E. 74). As to Defendants McNeil, Hardaker, and Skipper, the Court dismissed Mr. Bouie's claims for declaratory judgment, Mr. Bouie's claims for compensatory and punitive damages, and Mr. Bouie's claims against defendants in their official capacity. (D.E. 74, at 2-3).

B. Defendants' Motion for Summary Judgment and Plaintiff's *pro se* Response.

On March 1, 2012, Defendants filed the pending motion for summary judgment. (D.E. 81). Defendants Collins and Taylor argue that:

1) The Eleventh Amendment bars Plaintiff's official capacity claims. (D.E. 81, at 16).

2) The Prison Litigation Reform Act (42 U.S.C. § 1997e(e)) bars Plaintiff's claims for compensatory and punitive damages because Plaintiff sustained no physical injury. (D.E. 81, at 16-20).

Additionally, all Defendants argue that:

3) Defendants did not violate Plaintiff's religious rights. (D.E. 81, at 20-25)

4) Even if Defendants did violate Plaintiff's rights, Plaintiff has no recourse because those rights were not clearly established at the time. (D.E. 81, at 25-28).

On May 29, 2012, pursuant to Local Rule 56.1, Mr. Bouie filed a *pro se* Statement of Material Facts in Opposition to Defendant's Motion for Summary Judgment. (D.E. 99). This statement contains affidavits and documents in support of Mr. Bouie's claims. On June 8, 2012, Mr. Bouie filed a Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment. (D.E. 101).

Subsequently, the undersigned counsel, through the Volunteer Lawyers Program, agreed to represent Mr. Bouie. On July 30, 2012, the Court granted Mr. Bouie's Motion for an Extension of Time to File an Amended Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment. (D.E. 107).

II. Standard of Review

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court should view the evidence and any inferences that may be drawn from it in the light most favorable to the non-movant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

III. Facts on Summary Judgment

A. Plaintiff's Statement of Facts

Mr. Bouie is a sincere adherent of the teachings of the Nation of Islam ("the Nation") currently incarcerated by the Florida Department of Corrections ("FDOC") at Avon Park Correctional Institution ("APCI"). Mr. Bouie was incarcerated at Okeechobee Correctional Institute ("OCI") at all times relevant to this lawsuit. (D.E. 99, at 18).

The Nation describes itself as Islamic and shares with mainstream Islam certain tenets of faith. For example, as with Islam, "Friday congregational prayer is obligatory…" (D.E. 81-11, at 3). The Nation also believes that "There is no God worthy of worship except Allah (God) and Muhammad is his servant and messenger." (D.E. 81-11, at 4).

In many other respects, the Nation differs greatly from mainstream Islam. (D.E. 99, at 20). For example, the Nation teaches that Allah is literally Master Fard Muhammad, a black man who led the Nation from 1929 until his disappearance in 1934, and that his successor, Elijah Muhammad, was his messenger and the Messiah. (D.E. 1, at 22; D.E. 99, at 22). Nation adherents also espouse black separatism, advocate the immediate release of all black prisoners in the United States, and are forbidden to intermarry with whites. (D.E. 1, at 18-22).

Nevertheless, the FDOC classifies the Nation as a sect of Islam. Recognizing the profound doctrinal dissimilarities, OCI officials offered separate Jumah services for mainstream Muslims and for Nation adherents in August 2006, when Mr. Bouie arrived. (D.E. 99, at 18-19). From August 31, 2006, through March 7, 2008, between seven and eleven Nation adherents attended weekly Jumah services. (D.E. 99, at 19).

On March 7, 2008, Defendant Collins terminated separate services, merging the two Jumah services into one. (D.E. 99, at 20). The existence of separate services for Nation

adherents had not caused any disturbances or security issues, nor had any Nation adherent threatened OCI's institutional security. (D.E. 99, at 65, 68-69). Moreover, "time, space, and supervision" were already available at the chapel, which was reserved for Muslim inmates only on Friday afternoons, and separate services by the Nation easily could have been monitored by Defendant Collins or other officials through closed circuit television, with no additional expenditure of resources. (D.E. 99, at 21, 24-26). Nevertheless, Defendant Collins invoked "[t]he institutional need to maintain security and order where limited time, space, and supervision is available" to justify bringing OCI into conformance with FDOC's policies. (D.E. 99, at 68).

The merged service was "Sunni-led, Sunni dominated, and [its] Khutbahs [were] strictly from the Sunni perspective and not Nation of Islam." (D.E. 99, at 21). The Sunni inmates did not allow Mr. Bouie to lead prayers or stand in prayer ranks, and would not do unless he was willing to "conform and accept Sunni Khutbah perspectives and practices by modifying [his] conduct to comply with purely Sunni sectarian views and denounce [his] sincerely held beliefs." (D.E. 99, at 22). Mr. Bouie filed an informal grievance to Defendant Hardaker on March 13, 2008, which was denied on March 17, 2008. (D.E. 99, at 22). On March 27, 2008, Mr. Bouie appealed the denial to the warden in a formal grievance, which was denied on April 7, 2008. (D.E. 99, at 22). On April 18, 2008, Mr. Bouie filed an administrative appeal to the Secretary of the Department of Corrections, which was denied on May 7, 2008. (D.E. 99, at 23). Mr. Bouie subsequently began another round of grievances, submitting an informal grievance to the Warden on September 9, 2008 and a second to Chaplain Potter on September 15, 2008, followed by a formal grievance to the Warden on September 22, 2008. (D.E. 99, at 23). The Warden denied the formal grievance on September 30, 2008. (D.E. 99, at 23).

On December 17, 2009, Mr. Bouie and two Nation co-plaintiffs filed an action in this Court, seeking a preliminary injunction and other relief.[1] (D.E. 99, at 24). Although his co-plaintiffs received legal mail regarding the case on January 21, 2010, Mr. Bouie did not. (D.E. 99, at 24). FDOC transferred Mr. Bouie out of OCI on January 26, 2010, and into Avon Park Correctional Institute on February 9, 2010. Also on February 9, 2010, Mr. Bouie filed a formal grievance of reprisal for being transferred because he exercised a protected right by filing grievances and lawsuits. (D.E. 99, at 13). FDOC officials never responded to his grievance. (D.E. 99, at 12).

B. Plaintiff's Response to Defendants' Statement of Undisputed Facts

Plaintiff responds to the assertions of each paragraph in Defendants' Statement of Undisputed Facts (D.E. 81, at 10-14) as follows:

1. Plaintiff does not dispute the assertions in this paragraph.

2. Plaintiff does not dispute the assertions in this paragraph.

3. Plaintiff does not dispute the assertions in this paragraph.

4. Plaintiff does not dispute the assertions in this paragraph but notes that "Islam," not "Muslim," is the correct term for describing the faith.

5. Plaintiff does not dispute the assertions in this paragraph but notes that "Islam," not "Muslim," is the correct term for describing the faith.

6. Plaintiff does not dispute that the Department has articulated a rule purporting to extend to all inmates equally the right to practice their respective religions, or that the Department's resources are finite.

[1] That case was dismissed without prejudice on February 9, 2011. Bouie et. al v. McNeil, et. al, No. 2:09-cv-14430 (S.D. Fl).

7. Plaintiff disputes the assertions in paragraph 7. The "policy" requiring inclusive services for all Muslims was merely a series of responses to individual inmate grievances, not a formal FDOC policy. (D.E. 99, at 64). Plaintiff also notes that Defendants fail to provide any specific evidence that Nation of Islam inmates routinely engaged in communal services with other inmates classified as Muslim.

8. Plaintiff agrees that institutional chapels are multipurpose buildings. Plaintiff disputes the general assertions in this paragraph to the extent that Defendants argue that overcrowding, noise and overflow, and staff shortages precluded separate services for Nation adherents at OCI in 2008. Defendants have identified no change in FDOC resources that required terminating the separate services that existed before Defendants Taylor and Collins terminated separate services in March 2008. The existence of separate services for Nation adherents had not caused any disturbances or security issues, nor had any Nation adherent threatened OCI's institutional security. (D.E. 99, at 65, 68-69). Moreover, "time, space, and supervision" were already available at the chapel, which was reserved for Muslim inmates Friday afternoons, and separate services by the Nation could have been easily monitored by Defendant Collins or other officials through closed circuit television, with no additional expenditure of resources. (D.E. 99, at 21, 24-26).

9. Plaintiff agrees that consolidating groups theoretically promotes efficiency, but denies that any such gains were achieved by consolidating services for all inmates classified as Muslim at OCI in 2008. (*See* paragraph 8, *supra*).

10. Plaintiff disputes that Defendant has adequately supported the assertion that any FDOC policy required combined services for all inmates classified as Muslim. Defendant Taylor admits that no such formal policy existed. According to Defendant Taylor, the FDOC's policy

was to deny any grievances related to the combined services – a policy equally consistent with affording institutional staff discretion to combine or separate services for Muslim inmates. (D.E. 99, at 64).

11. Plaintiff recognizes that Defendants did not prohibit his attendance at communal Muslim services, but denies that the mainstream Muslims attendees countenanced his attendance or participation. The merged service was "Sunni-led, Sunni dominated, and [its] Khutbahs [were] strictly from the Sunni perspective and not Nation of Islam." (D.E. 99, at 21). The Sunni Muslims at OCI did not recognize Plaintiff as a "legitimate Muslim" because, as a Nation adherent, he believes that Allah appeared in the person of a Master Fard Muhammad, a black man from who led the Nation from 1929 until his disappearance in 1934, and that his successor, Elijah Muhammad, was his messenger and the Messiah. (D.E. 99, at 22). The Sunni inmates did not allow him to lead prayers or stand in prayer ranks, and would not do unless he was willing to "conform and accept Sunni Khutbah perspectives and practices by modifying [his] conduct to comply with purely Sunni sectarian views and denounce [his] sincerely held beliefs." (D.E. 99, at 22).

12. Plaintiff does not dispute this paragraph.

13. Plaintiff does not dispute this paragraph.

14. Plaintiff does not dispute this paragraph.

15. Plaintiff does not dispute this paragraph.

16. Plaintiff disputes the assertions in this paragraph to the extent that Defendants claim that OCI offered a non-sectarian Islamic service capable of accommodating the religious needs of both mainstream Muslims and Nation adherents. *See* paragraph 11, *infra*.

17. Plaintiff does not dispute this paragraph.

18. Plaintiff does not dispute this paragraph.

19. Plaintiff disputes this paragraph. Plaintiff submitted a grievance regarding his retaliatory transfer on February 9, 2010. (D.E. 99, at 12). Plaintiff never received a response. At APCI, no procedure permits an appeal or requires further action when officials fail to respond to a level one grievance. (D.E. 99, at 14-17).

C. Additional Facts

20. Upon terminating separate services for Nation adherents, Defendant Collins told Plaintiff that "There is only one Islam, and the Nation of Islam will not be tolerated on [OCI]'s compound as long as I have the say so." (D.E. 1, at 7).

IV. Argument

A. The Eleventh Amendment Permits Plaintiff's Claims against Defendants in their Official Capacity.

Binding precedent requires this Court to dismiss official capacity claims under 42 U.S.C. § 1983 against state officials. However, no such bar exists with respect to claims under the Religious Land Use and Institutionalized Persons Act ("RLUIPA), 42 U.S.C. § 2000cc *et seq*. Smith v. Allen, 502 F.3d 1255, 1274 (11th Cir. 2007) (acknowledging that RLUIPA permits official capacity suits).[2] Although the Supreme Court abrogated Smith's holding that monetary damages are available in such claims, Sossamon v. Texas, --- U.S. ----, 131 S. Ct. 1651, 1663 (2011), this doctrine should not be extended to nominal damages. See Harkless v. Toney, No. 11-0530-CG-N, 2012 U.S. Dist. Lexis 78527 (S.D. Al. May 7, 2012), *Report and Recommendation adopted by* Harkless v. Toney, 2012 U.S. Dist. Lexis 78527 (S.D. Al. June 5, 2012). Similarly, Mr. Bouie's claims may proceed under Florida's Religious Freedom

[2] Although Plaintiff did not explicitly invoke RLUIPA in his *pro se* complaint, the Court should "look beyond the labels" and evaluate Plaintiff' claims under the appropriate law. Means v. Ala., 209 F.3d 1241, 1242 (11th Cir. 2000).

Restoration Act ("FRFA").[3] Fl. Stat. §761.01 *et seq.*; see Muhammad v. Crosby, 922 So. 2d 236 (Fl. 2006) (applying FRFA to an inmate's petition for a writ of mandamus barring enforcement of prison regulations).

Therefore, the Eleventh Amendment does not bar consideration of Mr. Bouie's claims against Defendants Collins and Taylor in their official capacities.

B. Defendants Violated Plaintiff's Rights to Religious Expression.

The Supreme Court has explained that "prisoners do not shed all constitutional rights at the prison gate." Sandin v. Conner, 515 U.S. 472, 485 (1995). Prison officials may intrude upon a constitutional guarantee only with restrictions that are reasonable, considering: (1) whether there is a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forth to justify the regulation; (2) whether, under the restriction imposed, a prisoner has alternative means for exercising the asserted constitutional right; (3) the impact that accommodating the asserted constitutional right will have on prison staff, inmates, and the allocation of prison resources; and, (4) whether the regulation in question is an "exaggerated response" to prison concerns. Turner v. Safley, 482 U.S. 78, 89-91 (1987).

For religious rights, RLUIPA grants a more favorable standard of review.[4] "RLUIPA reanimates the strict scrutiny long applied to the states in disputes regarding the free exercise of religion both before and after Employment Division v. Smith, [494 U.S. 872] (1990)." Benning v. Georgia, 391 F.3d 1299, 1306 (11th Cir. 2004) (citation omitted). RLUIPA prohibits the government from imposing a "substantial burden" on the religious exercise of a prisoner unless the burden on that person "(1) is in furtherance of a compelling governmental interest; and (2) is

[3] Plaintiff's RFRA claim arises from the same facts as his First Amendment and RLUIPA claims. The Court may exercise jurisdiction under 28 U.S.C. § 1367.

[4] Plaintiff's claims under the FRFA should be evaluated according to the same standard. Westgate Tabernacle, Inc. v. Palm Beach County, 14 So. 3d 1027, 1030-32 (Fl. 2009)

the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1. A substantial burden occurs when the government exerts "'significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.'" Smith, 502 F.3d at 1277 (*quoting* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004)). RLUIPA also protects every exercise of religion, barring inquiry into whether a particular belief or practice is "compelled by or central to" a prisoner's system of religious belief. 42 U.S.C. § 2000cc-5(7)(A).

Here, Defendants fail to show that they respected Mr. Bouie's rights. Mr. Bouie did not have any alternative means to engage in group worship, a central tenet of his religion.[5] Due to the significant theological differences from mainstream Islam, group worship with the general Muslim population is not an acceptable substitute for separate gatherings with Nation adherents. *See generally* Marria v. Broaddus, 200 F. Supp. 2d 280, 282-83 & n.3 (S.D.N.Y. 2002) (outlining some of the cosmological beliefs Nation adherents share with the Five Percenter schism of the Nation). As for institutional concerns, Defendants' assertions are belied by the fact that prior to 2008, concerns of budgeting and security did not require combined Muslim services; Defendants have identified no change in the recourses available at OCI.[6] Indeed, not only were resources available for separate services, but those resources were expended without any other FDOC personnel even *noticing* for at least sixteen months, allegedly in violation of FDOC policy. *See* (D.E. 81-9, at 4). In any event, Defendant have not provided the information this

[5] Defendant Taylor's general assertion that "Different schools of Muslim teaching in the inmate population have participated in communal services and activities together" does not demonstrate that Nation adherents generally worship with other inmates classified as Muslim. (D.E. 81-9, at 5).

[6] In support of this proposition, Defendant Taylor offers the conclusory assertion that budget cutbacks and staff shortages have impacted the services available to inmate, but does not set out the resources that separate services would have required, or why those were unavailable after March 2008. (D.E. 81-9, at 2-3). Defendant Taylor's bare conclusions, devoid of factual support, should not be considered competent evidence on summary judgment.

Court needs to evaluate their argument that resources do not allow separate services. Therefore, Summary judgment on Mr. Bouie's First Amendment claim is improper.

Likewise, Mr. Bouie's RLUIPA and RFRA claims are sufficient to withstand Defendants' Motion for Summary Judgment. "[A]n individual's exercise of religion is 'substantially burdened' if a regulation completely prevents the individual from engaging in religiously mandated activity." Midrash, 355 F.3d at 1227 (citation omitted). By terminating group worship for Nation adherents, Defendants substantially burdened Mr. Bouie's exercise of religion. Thus, Defendants must demonstrate that terminating separate services for Nation adherents was the least restrictive means of furthering a compelling interest. 42 U.S.C. §§ 2000cc-1(a), 2000cc-2(b). Defendants' bare recitation of security and budget concerns cannot fulfill this obligation. Washington v. Klem, 497 F.3d 277, 283 (3d Cir. 2007) ("[T]he mere assertion of security or health reasons is not, by itself, enough . . . to satisfy the compelling government interest requirement."); Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 40-41 (1st Cir. 2007); Lovelace v. Lee, 472 F.3d 174, 189-90 (4th Cir. 2006) (explaining that although Courts defer to the judgment of prison officials, this does not excuse them from "tak[ing] the unremarkable step of providing an explanation for the policy[]"); Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 989 (8th Cir. 2004) (requiring authorities to provide "some basis" for linking accommodation of a request with a security threat). Defendants therefore have failed to carry their burden on summary judgment with respect to Mr. Bouie's RLUIPA claims.

C. Qualified Immunity Does Not Shield Defendants from Liability for their Violations of Plaintiff's Rights.

"Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known." Kingsland v. City of Miami, 382 F.3d 1220, 1231 (11th Cir.2004) (quotations marks omitted). A "clearly established" right is one whose contours are fixed "so clearly that a reasonable official would have understood his acts were unlawful." Dolihite v. Maughon, 74 F.3d 1027, 1040-41 (11th Cir. 1996). The notice need not arise from "a case 'on all fours,' with materially identical facts"; a right can be clearly established even by factually distinct cases, "so long as the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights." Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1277 (11th Cir. 2004) (internal quotation marks and citation omitted).

The precedents cited in Section IV.(B), *supra*, clearly establish Mr. Bouie's right to be free from undue burdens on his religious rights, especially where, as here, the restrictions are an exaggerate response to institutional concerns and fail to take into account the ease with which his rights could have been accommodated. Moreover, the cases Defendants cite would not give them any reason to conclude they had not violated Mr. Bouie's rights. The plaintiff in Mu'Minun v. Moore, et al., No. 4:98CV265-WS (N.D. Fl. Aug. 16, 2000) (D.E. 81-10) was an orthodox Muslim who objected to the presence of Nation adherents at an integrated Muslim service. That plaintiff objected to the presence and occasional participation of a minority sect during a basically traditional service. Here, Mr. Bouie objects to the complete domination of services by another sect hostile to his beliefs. As for the other authority, Defendants cannot rely on Brown v. Sec., Dept. of Corr, because it was decided subsequent to the violations of Mr. Bouie's rights. No. 8:10-cv-2101-T-17TGW (M.D. Fl. Feb. 2, 2011) (D.E. 82-1). Defendants therefore have not established their right to summary judgment on the issue of qualified immunity.

V. Conclusion

WHEREFORE, for the foregoing reasons, Plaintiff Bouie opposes Defendants Motion for Summary Judgment and respectfully requests that the Court deny the Motion and allow his claims to proceed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 10, 2012, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and is also being served on all counsel of record listed via transmission of Notices of Electronic Filing generated by CM/ECF.

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