FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
JUN 09 2008
MATTHEW J. DYKMAN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JIMMY KINSLOW,
Plaintiff,

vs.

No. CV-07-1164 MV/RLP

New Mexico Corrections Dept., et al.,
Defendants.

MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Plaintiff, Jimmy Kinslow, pro se, and respectfully moves the Court to enter a partial summary judgment in his favor under Count One of his Verified Complaint based upon the compelling admissions made by the Defendants in their Answer to the Complaint, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Pursuant to D.N.M. LR-Civ. 7.4, concurrence of the Defendants to this motion was not sought, and their opposition is assumed.

This motion is based exclusively on the sworn Verified Complaint, the Defendants admissions made in their Answer to the Complaint, the First Amendment to the United States Constitution, 42 U.S.C. § 2000 cc 1-5, 42 U.S.C. § 1983 and state law § 28-22-1 et seq., NMSA 1978, the New Mexico Religious Freedom Restoration Act.

UNDISPUTED MATERIAL FACTS UNDER COUNT ONE OF THE COMPLAINT

1. At paragraph 16 of the Verified Complaint plaintiff alleged that he was first made to pass a "racial screening test" to prove his Native American racial ancestry before being allowed to freely practice his Native American religion, the religion of his choice. At No. 16 of their Answer defendants ADMITS to the fact that Mr. Kinslow was

first made to pass a "racial screening test" before being allowed to freely practice the religion of his choice.

2. At paragraph 18 of the Verified Complaint plaintiff alleged that defendants had a "policy, practice and/or custom" in restricting a prisoner's practice of the Native American religions based soley on their racial ancestry, with defendant Williams personally signing this Policy. At No. 18 of their Answer defendants ADMIT to the "policy, practice and/or custom" of restricting prisoners free exercise of the religion of their choice based soley upon race.

3. At No.'s 48, 49 and 50 of their Answer defendants reiterate their ADMISSIONS that defendants do, as a policy, practice and/or custom, restrict a prisoner from freely practicing any Native American religion unless he can first pass a "racial screening test" proving Native American ancestry, as Mr. Kinslow was made to do, and unless such "proof" is available and provided, the prisoner will be prohibited from the free exercise of the religion of their choice.

4. Defendants ADMIT that all other races are as a Policy excluded from, and prohibited from, the practice of any Native American religion.

STANDARD OF REVIEW

Summary judgment (or partial summary judgment) is appropriate when there are no genuine issues of material facts which remains to be tried by the factfinder, and the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure; Rusillo v. Scarborough, 935 F.2d 167, 170 (10th Cir. 1991).

A "material fact" is one that "might affect the outcome of the suit under the governing law ..... Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Where the Record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial and summary judgment in favor of the moving party is proper. Matshushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Once a party has made a prima facie showing of entitlement to summary judgment, the burden then shifts to the party opposing summary judgment to show that specific evidentiary facts exist which would require a trial on the merits. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Pavis v. Mission Hills Bank, 60 F.3d 1486, 1490 (10th Cir. 1995) cert. den. 116 S.Ct. 1045 (1996).

ARGUMENT

There are no "genuine issues of material fact" which remains to be tried by the factfinder under Count One of the Verified Complaint. Mr. Kinslow alleged that he was first made to pass a "racial screening test" proving his Native American racial ancestry before being allowed to freely practice the religion of his choice. Defendants ADMIT this in their Answer to the Complaint.

Mr. Kinslow alleged that the NMCD defendants had a "policy, practice and/or custom" of restricting a prisoners free exercise of the religion of their choice based soley on their race. Defendants ADMIT this in their Answer to the Complaint.

No material facts remain to be proven under Count One of the Verified Complaint, the facts of this racial-exclusion policy and practice is not denied, nor is it denied that Mr. Kinslow was first made to prove his racial ancestry before being allowed to freely practice the religion of his choice.

This type of institutionalized racial discrimination / exclusion serves no legitimate governmental purpose, and religious discrimination and/or exclusion based soley upon race is unquestionably unconstitutional on its face. There is no defense for it in today's society and First Amendment legal standards.

State law § 33-10-1 et seq., NMSA 1978, the "Native American Counseling Act" does not specifically prohibit the practice of any Native American religion to only persons who can first prove their Native American racial ancestry, while excluding all other races, and nor does it empower Corrections officials to draft such a policy. §33-10-1 does not require anyone wishing to freely worship a Native American religion to first pass a "racial screening test" before being allowed to worship the religion of their choice; only NMCD Policy CD-101100 et seq.

allows for this type of racial discrimination and exclusion, and §33-10-1 did not authorize defendant Williams and the NMCD to draft a "policy" incorporating "racial screening tests" a prisoner must first pass before being allowed to practice a certain religion. The "Free Exercise Clause" of the First Amendment forbids any governmental agency from adopting laws or policies designed to suppress religious beliefs or practice, or exclude entire segments of the population based on race.

CONCLUSION

Forcing a person to first prove that he is of a certain race before prison officials will allow him to practice a certain religion is unconstitutional on its face in violation of the Free Exercise Clause of the First Amendment, violates federal statutes under both 42 U.S.C. §2000 cc 1-5 and 42 U.S.C. § 1983, and constitutes a tort violation under state law § 28-22-1 et seq., NMSA 1978, the "New Mexico Religious Freedom Restoration Act."

Excluding a whole class of persons from the freedom to worship a religion of their choice based solely upon their race is unconstitutional on its face in violation of the Free Exercise Clause of the First Amendment, violates federal statutes under both 42 U.S.C. §2000 cc 1-5 and 42 U.S.C. § 1983, and constitutes a tort violation under state law § 28-22-1 et seq., NMSA 1978, the "New Mexico Religious Freedom Restoration Act."

WHEREFORE, Plaintiff Jimmy Kinslow would respectfully request the Court to grant him summary judgment under Count One of the Verified Complaint, move this part of the proceedings into damages phase for arguments, and grant such other relief Plaintiff may be entitled to.

Respectfully submitted,

Jimmy Kinslow #27363
P.O. Box 639
Las Cruces, NM 88004-0639

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to Counsel for Defendants, Carlos Elizondo, at P.O. Box 27116, Santa Fe, NM 87502 on this the ____ day of June, 2008.

Jimmy Kinslow

SNMCF

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