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United States District Court, S.D. New York.

Thomas HIGGINS, Plaintiff,
v.
Dr. Reverend Earnest DAVIS, Senior Chaplain G.H.C.F.; Dr. Reverend Earl Moore, Deputy Commissioner of Ministerial Services for the Department of Correctional Services (D.O.C.S.); Reverend Edwin Muller, Regional Director of Ministerial Services (D.O.C.S.); Christopher Artuz, Superintendent G.H.C.F.; and Dennis Bliden, Deputy Superintendent of Programs, G.H.C.F. Defendants.

No. 95 Civ. 3011(DAB). | March 15, 2001.

Opinion

MEMORANDUM AND ORDER

BATTS, J.

***1** Plaintiff, an inmate proceeding *pro se,* brings suit under 42 U.S.C. § 1983 for violation of the First Amendment and the Religious Freedom Restoration Act ("RFRA"), against the Senior Prison Chaplain at Green Haven Correctional Facility ("Green Haven") and his superiors, for allegedly preventing Plaintiff from practicing his religion. Specifically, Plaintiff alleges that under Dr. Reverend Earnest Davis' tenure as chaplain, the practice of one Protestant denomination—Methodist—was allowed to dominate all others.

Defendants move for summary judgment. For the following reasons, Defendants' motion is GRANTED in its entirety.

I. PROCEDURAL ISSUES

A. Failure to Prosecute

During the pendency of this action, Plaintiff appeared to have abandoned this suit for several years. Thus, notwithstanding the unique summary judgment rules affecting *pro se* litigants, the Court finds that the history of the instant action supports dismissal for failure to prosecute.

"[I]t is not obvious to a layman that when his opponent files a motion for summary judgment supported by affidavits he must file his own affidavits contradicting his opponent's if he wants to preserve factual issues for trial." *Vital v. Interfaith Med. Ctr.,* 168 F .3d 615, 620 (2d Cir.1999) (internal quotations and citations omitted). *Accord Sawyer v. American Fed. of Govt. Employees, AFL–CIO,* 180 F.3d 31 (2d Cir.1999). Reflecting this concern, on November 18, 1999, the Southern District of New York adopted Local Rule 56.2 requiring represented parties moving for summary judgment against a *pro se* litigant to provide a form notice explaining the nature and requirements of a summary judgment motion. *See* Local Rule 56.2. The Second Circuit has also held that district courts have an obligation to make certain that *pro se* litigants are aware of the "nature and consequences of summary judgment." *McPherson v. Coombe,* 174 F.3d 276, 281 (2d Cir. Apr. 22, 1999) (citing *Vital,* 168 F.3d at 620–21.). District courts may meet this obligation by providing the requisite notice, ensuring that an opposing party has provided adequate notice, or determining that "the record otherwise makes clear that the litigant understood the nature and consequences of summary judgment." *Vital,* 168 F.3d at 621 (citations omitted).

In the instant case, Defendants notified the Court of their intent to file a Motion for Summary Judgment and filed a statement of undisputed facts in accordance with Local Rule 56.1 and the Individual Rules of this Court, on April 30, 1997. *See* Local Rule 56.1; Individual Rules of Hon. Deborah A. Batts dated January 1, 1997, Rule 21. Plaintiff failed to file a responsive 56.1 statement within 20 days as required by the Individual Rules of this Court. *See Id.*

After numerous attempts to notify Plaintiff of his duty to file a responsive 56.1 Statement, the Court issued an Order scheduling the motion. *See* Order dated Sept. 2, 1999. Finally, on December 6, 1999, more than two and a half years after service of Defendants' 56 .1 Statement, the Court received a document from Plaintiff purporting to be a response to the 56.1 Statement, containing additional requests for discovery and leave to file an Amended Complaint. The Court denied these requests by Order dated December 16, 1999, and deemed all facts admitted as stated in Defendants' 56.1 Statement. *See* Order dated Dec. 16, 1999 at 2 (citing the Court's numerous extensions of time, and its efforts to explain the necessary procedures of summary judgment through prior Orders, letters, and referrals to the *Pro Se* Office).

***2** On December 16, 1999, the Court provided Plaintiff with Local Rule 56.2 and afforded Plaintiff "one final opportunity to respond to Defendants' Memorandum of Law," which had been served upon him in the interim. *Id.*

at 3. Plaintiff was notified that should he fail to serve his Memorandum of Law by January 31, 2000, the action would be dismissed for failure to prosecute. Plaintiff failed to serve a Memorandum of Law in opposition to Defendants' Motion for Summary Judgment. Defendants' submitted their Motion to the Court unopposed on April 10, 2000.

Plaintiff, a frequent filer of *pro se* litigation,[1] was likely aware of the nature of summary judgment following this Court's numerous attempts to assist and advise him on summary judgment procedures. Although Plaintiff is *pro se,* his persistent tardiness, defiance of Court Orders, and filing of meager papers at his apparent leisure, present sufficiently extreme circumstances for the Court to dismiss this action for failure to prosecute pursuant to Fed.R.Civ.P. 41.

Notably, had Plaintiff submitted a timely 56.1 statement, this Court would nonetheless grant summary judgment for Defendants. Plaintiff's 56.1 statement merely contains "responses" which are general denials of the factual statements in Defendants' 56.1 statement and restatements of the claims outlined in his Complaint. Plaintiff's statement is also unaccompanied by supporting affidavits and exhibits. Although Plaintiff is *pro se,* his bald assertions, unsupported by evidence, are insufficient to overcome Defendants' motion for summary judgment. *See Carey v. Crescenzi,* 923 F.2d 18, 21 (2d Cir.1991); *Lee v. Coughlin,* 902 F.Supp. 424, 429, *reh'g granted on other grounds,* 914 F.Supp. 1004 (S.D.N.Y.1996). Nevertheless, in an abundance of caution, the Court will address the merits of Plaintiff's claims.[2]

II. BACKGROUND

Plaintiff challenges the actions of prison officials in implementing the Department of Correctional Services' ("DOCS") policies concerning religion.

Green Haven's official policy for accommodating the religious beliefs of inmates is codified in DOCS Directive No. 4202. (*See* Defs' Ex. K.) In general, inmates are offered the opportunity to participate in religious services, activities, counseling, and study. (*Id.*) The Senior Chaplain schedules these programs, and is responsible for assessing the religious needs of the inmate population and identifying resources necessary for conducting religious programs. (*Id.*)

Green Haven has established a Protestant Church ("Church") to provide religious services for members of the Protestant, Buddhist, Jehovah's Witness, Rastafarian, Nation of Islam, and Quaker faiths. (Moore Aff. ¶¶ 6–7.) In order to accommodate the diverse religious populations at Green Haven, several inmates serve as "Inmate Pastors" or "Inmate Coordinators,"[3] and religious volunteers are recruited from the outside community. (Muller Aff. ¶¶ 7–8, 14–16.) Under Davis' leadership, the Church offered a wide variety of religious services and activities, including weekly bible classes, religious seminars, and special events. (Defs' 56.1 ¶¶ 29, 38–59; Defs' Ex. C–G.) In fact, Davis increased the number of weekly religious activities and recruited approximately two-hundred-fifty religious volunteers. (Moore Aff. ¶¶ 17, 21). Most importantly, all faith groups were permitted weekly worship services and regular group meetings. (Moore Aff. ¶¶ 21–22.)

***3** Plaintiff is a Baptist who admittedly participates in a wide variety of religious activities, including the Quaker ministry. (Higgins Dep. at 48–49; Moore Aff. ¶ 52; Defs' Ex. H.) Prison records from 1994, indicate that Plaintiff attended Quaker worship services forty-six times throughout that year. (Defs' Ex. H.)

Plaintiff's chief claim is that programs and services at the Church deteriorated during Reverend Dr. Earnest Davis' tenure as Senior Chaplain.[4] (Compl. at 6.) Specifically, Plaintiff alleges that Davis appointed inmate Nathaniel Grady, an ordained minister, to the position of Inmate Pastor and that Grady conducted religious services in an Orthodox Methodist format when Davis was absent. (*Id.* at 6–9.) As a result, Plaintiff vaguely alleges that his right to practice religion at the Church was obstructed. (*Id.* at 9.) Plaintiff further claims that Grady required volunteers to follow a Methodist format and caused Inmate Pastors and Coordinators of other denominations to be fired or transferred. (*Id.* at 9–10.)

Plaintiff expressed his concerns with the management of the Church in a series of letters to prison officials. (Compl. Ex. B–C; Defs' Ex. I.) Plaintiff alleges that Green Haven staff retaliated against him for these complaints. Plaintiff's Complaint also makes the following generalized assertions: 1) Plaintiff was not permitted to participate in programs offered at the Church on several occasions; 2) religious services and special events were canceled several times per year. (Compl. at 11–13, 18.)

Plaintiff seeks a declaratory judgment that the administration of the Church is contrary to DOCS' policies and unconstitutional, injunctive relief with many specific directives organizing religious services, and compensatory and punitive damages totaling $12,000.00. (Compl. at 23–27.)

III. DISCUSSION

The principles applicable to summary judgment are familiar and well-settled. Summary judgment may be granted only when there is no genuine issue of material fact remaining for trial, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505 (1986); *Corselli v. Coughlin,* 842 F .2d 23 (2d Cir.1988). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548 (1986). As a general rule, all ambiguities and all inferences drawn from the underlying facts must be resolved in favor of the party contesting the motion, and all uncertainty as to the existence of a genuine issue for trial must be resolved against the moving party. *LaFond v. General Physics Servs. Corp.,* 50 F.3d 165, 171 (2d Cir.1995). As is often stated, "[v]iewing the evidence produced in the light most favorable to the nonmovant, if a rational trier could not find for the nonmovant, then there is no genuine issue of material fact and entry of summary judgment is appropriate." *Binder v. LILCO,* 933 F.2d 187, 191 (2d Cir.1991) (subsequent history omitted).

A. Religious Freedom Restoration Act Claim

***4** Plaintiff's claim under the Religious Freedom Restoration Act ("RFRA"), is barred by the Supreme Court's finding that the statute was unconstitutional. *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157 (1997) (overturning RFRA on the basis that Congress had exceeded the scope of the Fourteenth Amendment enforcement clause). *See Bronx Household of Faith v. Community Sch. Dist. No. 10,* 127 F.3d 207, 217 (2d Cir.1997) (noting same), *cert. denied,* 523 U.S. 1074, 118 S.Ct. 1517 (1998). Accordingly, Plaintiff's RFRA claim is DISMISSED.

B. The Free Exercise Clause

The Free Exercise Clause is an "unflinching pledge to allow our citizenry to explore diverse religious beliefs in accordance with the dictates of their conscience." *Patrick v. LeFevre,* 745 F.2d 153, 157 (2d Cir.1984). Inmates retain their right to religious freedom and are entitled to reasonable religious accommodations. *Jackson–Bey v. Hanslmaier,* 115 F.3d 1091, 1096 (2d Cir.1997). *See also Salahuddin v. Coughlin,* 999 F.Supp. 526 (S.D.N.Y.1998) ("It is well established that prisoners have a constitutional right to participate in congregate religious services.").

However, during incarceration "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment." *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 125, 97 S.Ct. 2532, 2537–38 (1977). Therefore, regulations and policies that are alleged to infringe upon on inmate's First Amendment rights are to be assessed under a relaxed reasonableness standard. *See Turner v. Safley,* 482 U.S. 78, 89, 107 S.Ct. 2254, 2261 (1987); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349, 107 S.Ct. 2400, 2404–05 (1987). Under this standard, a prison regulation that impinges on an inmate's constitutional rights is valid if it is reasonably related to legitimate penological interests. *O'Lone,* 482 U.S. at 349; *Benjamin v. Coughlin,* 905 F.2d 571, 574 (2d Cir.1990), *cert. denied,* 498 U.S. 951 (1990).

In the instant case, Plaintiff makes only conclusory allegations that he was not permitted to attend programs at the Church on several occasions. Plaintiff has failed to establish when and how often he was denied religious services. In contrast, Defendants have submitted records indicating that Plaintiff regularly participated in religious services and activities. (Higgins Dep. at 49; Defs' Ex. H.) Clearly, Plaintiff was afforded the means to exercise his right to practice religion.

Further, Plaintiff's central claim is not that he was denied access to religious programs, but rather that there was a decline in the variety of religious programs during Davis' tenure as Senior Chaplain. Plaintiff attributes this decline primarily to Davis' appointment of inmate Grady as an Inmate Pastor. Although Grady conducted religious services in an Orthodox Methodist format, the religious activity schedules clearly establish that Grady was not the sole source of religious instruction at Green Haven and that alternative religious services were regularly available. (*See* Defs' Ex. D–F.) These included regular worship services conducted by Davis and Quaker worship services. (*Id.*) In addition, Grady's appointment served the legitimate penological interest of providing adequate religious services to a large inmate population. Accordingly, Plaintiff's Free Exercise claim lacks merit, and Defendants are entitled to summary judgment.

C. The Establishment Clause

***5** "The Establishment Clause guarantees ... that the government may not 'coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion" '. *Muhammad v. City of New York Dep't of Corrections,* 904 F.Supp. 161, 197 (S.D.N.Y.1995) (quoting *Lee v. Weisman,* 112 S.Ct. 2649, 2654 (1992)) (internal quotations and subsequent history omitted). Thus, the government must remain neutral by neither encouraging nor discouraging religious practice. *Rosenberger v. Rector and Visitors of the Univ. of Va.,* 515 U.S. 819, 839–840, 115 S.Ct. 2510, 2521–22 (1995). A government practice satisfies the Establishment

Clause, if it (1) has a secular purpose; (2) neither advances nor inhibits religion; and (3) avoids excessive entanglement between the state and religion. *Lemon v. Kurtzman,* 403 U.S. 602, 612–13, 91 S.Ct. 2135, *reh'g denied,* 404 U.S. 876, 92 S.Ct. 24 (1971). However, in the prison setting, this test is tempered by an inmate's Free Exercise rights and legitimate penological interests. *See Warburton v. Underwood,* 2 F.Supp.2d 306, 316 (W.D.N.Y.1998).

Plaintiff has failed to produce any evidence in support of his assertion that the Orthodox Methodist faith is promoted at Green Haven in contravention of the Establishment Clause. In contrast, Defendants' have submitted volunteer lists, religious service attendance records, religious activity schedules, and a report by Dr. Rev. Davis, demonstrating that the Church regularly offered a diverse program of religious services. (Defs' Ex. C–G.) As stated above, Davis' appointment of inmate Grady to the position of Inmate Pastor, was proper and served the legitimate penological interest of accommodating a diverse inmate population.

Finally, Defendants assert that any reduction in the number of Inmate Pastors, Inmate Coordinators and civilian volunteers representing other faith groups was due to Davis' efforts to eliminate unnecessary or redundant jobs, and Green Havens' efforts to tighten security. (Bliden Aff. ¶¶ 17–20; Muller Aff. ¶¶ 8–9.) These policies are reasonably related to the legitimate penological interest of managing Green Haven's facilities efficiently, while maintaining security. Plaintiff has failed to counter this assertion in any way. Accordingly, Plaintiff's Establishment Clause claim lacks merit and summary judgment is GRANTED.

D. Retaliation Claims

Plaintiff claims that he was subjected to acts of retaliation for exercising his First Amendment right of free speech by complaining to Green Haven officials about the Church.

A claim under § 1983 may be stated if otherwise routine administrative decisions are made in retaliation for the exercise of constitutionally protected rights. *Gill v. Mooney,* 824 F.2d 192, 194 (2d Cir.1987). Thus, prison officials may not retaliate against prisoners for exercising their constitutional right to file lawsuits and grievances. *Colon v. Coughlin,* 58 F.3d 865, 872 (2d Cir.1995). *See Gagliardi v. Village of Pawling,* 18 F.3d 188, 194 (2d Cir.1994) (noting that a plaintiff must establish that the alleged retaliation was motivated by or substantially caused by his exercise of free speech). However, a court must examine a prisoner's retaliation claims with "skepticism and particular care." *Colon,* 58 F.3d at 872.

***6** In the instant case, Plaintiff claims that Davis retaliated by (1) not allowing Plaintiff to make emergency telephone calls, (2) telling other inmates that they could not make telephone calls because of Plaintiff's complaints, (3) having Plaintiff removed from the Inmate Liaison Committee office on one occasion, and (4) not allowing Plaintiff to participate in religious programs such as the Protestant Family Day Event on June 25, 1994. (Compl. at 14–17, Exs. B–C.) However, Defendants have provided a DOCS Directive clearly establishing that the Senior Chaplain has no authority to grant general inmate telephone privileges. (Defs' Ex. B.) Plaintiff therefore cannot show that Davis' alleged actions would not have been taken in the absence of his complaints.

Further, Plaintiff has failed to demonstrate more than *de minimus* injury. *See Davidson v. Chestnut,* 193 F.3d 144, 150 (2d Cir.1999) (citing *Thaddeus–X v. Blatter,* 175 F.3d 378, 397 (6th Cir.1998) (a retaliation against a prisoner must be likely to chill a person of ordinary firmness from continuing to engage in activity protected by the First Amendment)). Accordingly, Defendants are entitled to summary judgment on Plaintiff's retaliation claim.

E. Remaining Claims

Plaintiff's remaining Due Process, Equal Protection, and Eighth Amendment claims are frivolous and do not merit further consideration by the Court. In addition, such claims are barred by the doctrine of qualified immunity. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982) ("government officials performing discretionary [functions] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). As the Court finds that none of the Defendants violated Plaintiff's First Amendment rights, Plaintiff's remaining claims, which all hinge on a violation of his religious rights, are barred by the doctrine of qualified immunity.

IV. CONCLUSION

For the reasons set forth above the Court hereby GRANTS summary judgment for Defendants. The Clerk of the Court is directed to close the docket in this matter.

SO ORDERED.

Footnotes

1 *See Higgins v. Coombe,* No. 95 Civ. 8696, 1997 WL 328623, at *1 n. 1 (S.D.N.Y. June 16, 1997) (noting that Plaintiff is an "active litigant"). *See also Higgins v. Coombe,* No. 95 Civ. 8696, 1999 WL 760658 (S.D.N.Y. Sept. 27, 1999); *Higgins v. Cuomo,* No. 95 Civ. 6725; *Higgins v. Artuz,* No. 95 Civ. 2275; *Higgins v. Coombe,* No. 94 Civ. 7942, 1998 WL 113955 (S.D.N.Y. Mar. 13, 1998); *Higgins v. Davis,* No. 94 Civ. 6565; *Higgins v. Artuz,* No. 94 Civ. 4810, 1997 WL 466505 (S.D.N.Y. Aug. 14, 1997).

2 A conservative reading of *Vital,* 168 F.3d 615, and, *McPherson,* 174 F.3d 276, appears to require the Court to reach the merits, since, although it defies belief, Plaintiff's response suggests he did not understand the nature of summary judgment and he did not receive the specific notice approved by the Second Circuit until after December 16, 1999.

3 Plaintiff refers to these titles as "Clerk" or "Senior Clerk ."

4 Reverend Dr. Earnest Davis served as Chaplain from 1986 until his death on December 28, 1998. Plaintiff failed to make a motion for substitution pursuant to Fed.R.Civ.P. 25(a)(1) within 90 days of notification of Davis' death. Thus, this action may be dismissed as to Defendant Davis. *Id.* Nevertheless, as Defendants request that their 56.1 statements be considered on behalf of the deceased party and/or his estate and as this Memorandum and Order dismisses this action in its entirety, the issue of substitution is rendered moot.