

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-14277-CIV-MARTINEZ
MAGISTRATE JUDGE P.A. WHITE

JOHNNIE C. BOUIE, JR., :
 :
 Plaintiff, :
 :
 v. : REPORT OF
 : MAGISTRATE JUDGE
 WALTER MCNEIL, et al., : (DE#24 & 25)
 :
 Defendants. :

I. Introduction

The pro-se plaintiff, Johnnie Bouie, filed a pro-se civil rights complaint pursuant to 42 U.S.C. §1983, claiming that officers at Okeechobee Correctional Institution do not permit members of the Nation of Islam to pray separately from other Muslim sects. The plaintiff was granted permission to proceed in forma pauperis, and service was ordered upon the named defendants Walter McNeil, the Secretary of the Department of Corrections¹, Alex Taylor, Chaplaincy Services Administrator, Powell Skipper, the Warden of Okeechobee Correctional Institution, Lead Chaplain, FDOC Region IV, Garland Collins, and acting Chaplain Hardacker.

This Cause is before the Court upon the Motion to Dismiss filed by Defendant McNeil (DE#24) and the plaintiff's response (DE#30), and the Motion to Dismiss filed by Defendants Hardacker and Skipper (DE#25).

II. Analysis of Motions to Dismiss

¹Walter McNeil has now been replaced by Edwin Buss.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint because the plaintiff has failed to state a claim upon which relief may be granted. See Fed.R.Civ.P. 12(b)(6). The complaint may be dismissed if the plaintiff fails to plead facts that state a claim to relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007)(retiring the oft-criticized "no set of facts" language previously used to describe the motion to dismiss standard and determining that because plaintiffs had "not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed" for failure to state a claim); Watts v. FIU, 495 F.3d 1289 (11 Cir. 2007). While a complaint attacked for failure to state a claim upon which relief can be granted does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 127 S.Ct. at 1964-65. The rules of pleading do "not require heightened fact pleading of specifics" The Court's inquiry at this stage focuses on whether the challenged pleadings "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007)(quoting Twombly, 127 S.Ct. at 1964).

- A. McNeil's Motion to Dismiss (DE#24)
Hardacker and Skipper's Motion to Dismiss (DE#25)

The defendants argue that the complaint should be dismissed against them for the following reasons: 1) the plaintiff fails to state a claim, 2) the defendants are entitled to Eleventh Amendment immunity in their official capacity, 3) defendants are entitled to qualified immunity for claims against them individually, 4) the

plaintiff is not entitled to declaratory judgment, and 5) the plaintiff's claims for monetary damages are barred by 1997e(e). (DE#24 & 25)

The plaintiff contends that the defendants violated his rights by failing to provide him, a follower of the Nation of Islam (NOI), chapel services that are separate and apart from Islamic services provided by Okeechobee Correctional Institution. He alleges he was banned from participating in congregational prayer in the Main Unit Sanctuary from March 7, 2008 through January 23, 2010. He alleges that he was previously allowed to attend prayer services and worship in the Main Unit Chapel Sanctuary, however, when he arrived at the Main Unit Chapel on March 7, 2008, he was informed he either had to merge his services with the Wahabbi Sunni Muslims behind the portioned area in the back of the Main Chapel Sanctuary or immediately exit the building. He alleges that the Wahabbi Sunni Muslims refused to recognize him as a legitimate Muslim and they refused to line up in prayer ranks along side him, or behind him. They refused to allow him to call the Adhan and give Khutbahs sermons during Jumah prayer services, or to speak of their faith or watch videos of their faith during Taleem. He seeks nominal, as well as compensatory and punitive damages, and declarative relief. The plaintiff has since been transferred to Avon Park Correctional Institution.

Religious Freedom

The First Amendment, made applicable to the States through the Fourteenth Amendment, also "safeguards the free exercise of [one's] chosen form of religion." Cantwell v. State of Connecticut, 310 U.S. 296, 303 (1940). While prisoners retain First Amendment rights, including the First Amendment right of free exercise of

religion, see Cruz v. Beto, supra, prison regulations or policies "alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (holding that the Turner v. Safley standard of review is applicable to claims that an inmate's free exercise rights have been violated). O'Lone continued the Court's admonition to give respect and deference to the judgment of prison administrators even in First Amendment challenges raised within the confines of prisons or jails. 482 U.S. at 350.

Under the Turner/O'Lone test, a governmental regulation or practice violates a prisoner's First Amendment right to freely exercise his religion if it is not reasonably related to a legitimate penological interest. Turner, 482 U.S. at 89; O'Lone, 482 U.S. at 349. Under the Free Exercise Clause of the First Amendment, an inmate must be accorded reasonable opportunity to practice his religion. What constitutes reasonable opportunity must be evaluated with reference to legitimate penological objectives such as rehabilitation, deterrence and security. Turner, supra; Mosier v. Maynard, 937 F.2d 1521 (10 Cir. 1991); McElyea v. Babbitt, 833 F.2d 196 (9 Cir. 1987).

In other words, the alleged denial of religious services by compelling the plaintiff to worship with other Muslims antagonistic to his sect must target his religion alone or be intentional discrimination against members of this religion. So long as the restrictions promote a legitimate reason such as safety they do not run afoul of the constitution. At this point, there are insufficient facts to determine whether the defendants had a legitimate reason for imposing the restrictions. The cases cited to

by the Defendants; Shabazz v Barrow, 2008 SL 647524 (MD Ga 2008), Nation of Islam v Michigan Dept. of Corrections, 1995 WL 631589 (6th Cir. 1995); and Al-Hakim v Taylor, et al, 01-cv187 (ND Fla), which support the defendants' contentions that there is no First Amendment violation when Islamic followers were denied separate individual services, because it served a penological purpose, were all determined at the summary judgment stage. At this preliminary stage, more factual development is required to determine whether the decision to merge the services or refuse the plaintiff entry to the Chapel was made for legitimate reasons. The denial of freedom of religion claims should proceed beyond the screening and the Rule 12(b)(6) hurdles, as the plaintiff has stated a claim for relief under the Twombly or "heightened pleading" standard.

The defendants are correct that they may not be sued in their official capacity. A §1983 suit against the defendants in their official capacity is tantamount to a suit against the State, and thus the defendants would be immune from monetary damages based upon the Eleventh Amendment. Gamble v. Fla. Dept. of Health and Rehabilitative Services, 779 F.2d 1509, 1512-13 (11 Cir. 1986). The allegations of the complaint, however, state a classic case of an official acting outside the scope of his duties and in an arbitrary manner. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974). Under this construction of the complaint, this Court has jurisdiction over the defendants in their individual capacity.

The defendants further argue they are entitled to qualified immunity. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear

of personal liability or harassing litigation, Lee v. Ferraro, 284 F.3d 1188, 1194 (11 Cir. 2002) (citing Anderson v. Creighton, 483 U.S. 635, 638 (1987)), and it shields from suit "all but the plainly incompetent or one who is knowingly violating the federal law." Lee, supra, 284 F.3d at 1194 (quoting Willingham v. Loughnan, 261 F.3d 1178, 1187 (11 Cir. 2001)). Since qualified immunity is a defense not only from personal liability for government officials sued in their individual capacities, but also a defense from suit, it is important for the Court to determine the validity of a qualified immunity defense as early in the lawsuit as is possible. Lee v. Ferraro, supra, at 1194; GJR Invs., Inc. v. County of Escambia, 132 F.3d 1359, 1370 (11th Cir. 1998).

Generally, government officials performing discretionary functions are protected by qualified immunity if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In Saucier, supra, the Supreme Court set forth a two-part test for evaluating a claim of qualified immunity. As a "threshold question," a court must ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Lee, supra at 1194 (quoting Saucier, 533 U.S. 194, 201); and then, if a constitutional right would have been violated under the *plaintiff's* version of the facts, the court must then determine "whether the right was clearly established." Lee, supra, 284 F.3d at 1194 (quoting Saucier, supra). This second inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id.; see also Marsh v. Butler County, 268 F.3d 1014, 1031-33 (11 Cir. 2001) (en banc).

The facts are not sufficient at this time to enable the Court to make a determination of whether the defendants might be entitled to qualified immunity, and that issue may be decided at a later date when the facts are more developed.

The defendants argues that the complaint should be dismissed against them under the theory of respondeat superior. If a plaintiff sues a supervisor, there must be proof that the alleged injuries resulted from an official custom, policy, or practice. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978); Mandel v. Doe, 888 F.2d 782 (11 Cir. 1989). The plaintiff bears the burden of establishing a causal link between a government policy or custom and the injury which is alleged. Byrd v. Clark, 783 F.3d 1002, 1008 (11 Cir. 1986)(citing Monell, supra). See also; Ashcroft v Iqbal, supra. (Heightened pleading standard for supervisory liability) In this case the plaintiff states that in replying to his grievance sent to McNeil and Chaplain Bouie, it was explained to him that it is the policy of the Florida Department of Corrections to provide religious activities for Muslims that are inclusive of various Islamic groups. This policy includes Juma Prayer. Whether this policy, which does not appear to be discriminatory on its face, ultimately results in denial of the plaintiff's right to attend services, remains to be developed. The plaintiff has minimally stated a Monell claim at this time.

The defendants' final argument that the complaint should be dismissed pursuant to §1997e(e) because the plaintiff has failed to demonstrate any physical injuries is not persuasive. The plaintiff is not barred from seeking nominal damages. As to compensatory and punitive damages, the Courts have held that §1997e(e) does not apply to First Amendment violations. See: Cornell v Gubbles, 2010 WL 3928198 (CD Ill); Swachkhammer v Goodspeed, 2009 WL 189854 (WD

Mich); Thompson v Caruso, 08 WL 559655 (WD Mich). Whether the plaintiff is entitled to compensatory or punitive damages must be determined at a later date. The plaintiff's request for prospective declaratory judgment would be regarding past conduct, as he is no longer confined at Okeechobee CI, and not amenable to declaratory relief. Summit Medical Associates, P.C. v Pryor, 180 F.3d 1326, 1337 (11Cir. 1999)(prospective relief requires ongoing violations).

III. Recommendations

For the following reasons, it is recommended that,

1. The Motions to Dismiss filed by Defendant McNeil (DE#24) and Defendants Hardacker and Skipper (DE#25) are denied with the following exceptions:

a. The claims against the defendants in their official capacities shall be dismissed,

b. The claim for declaratory judgement relief shall be dismissed for the reasons stated in the Report.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Dated this 12th day of May, 2011.



UNITED STATES MAGISTRATE JUDGE

cc: Johnnie C. Bouie, Jr., Pro Se
Avon Park Correctional Institution
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHNNIE C. BOUIE, JR.,

Plaintiff,

vs.

CASE No. 10-14277-CIV-MARTINEZ
MAGISTRATE JUDGE P.A. WHITE

WALTER McNEIL, et . al,

Defendants.

Defendants' Objections to Report and Recommendation

Defendants McNEIL, HARDACKER and SKIPPER,¹ object to the findings and recommendations of the Honorable Magistrate (DE#31) as follows:

1. The Magistrate errs in holding that 42 U.S.C. § 1997e(e) does not apply to First Amendment violations.

BACKGROUND

Defendants argued that because no physical injury exists, no compensatory or punitive damages for mental or emotional injury are available pursuant to 42 U.S.C. § 1997e(e). DE# 24, at 9-10; DE# 25, at 9-10. However, the Magistrate wrote:

The defendants' final argument that the complaint that the complaint should be dismissed pursuant to § 1997e(e) because the plaintiff had failed to demonstrate any physical injuries is not persuasive. The plaintiff is not barred from seeking nominal damages.² As to compensatory and punitive damages, the Courts have held that § 1997e(e) does not apply to First Amendment violations. See: Cornell v. Gubbles, 2010 WL 3928198 (CD Ill); Swachhammer v. Goodspeed, 2009 WL 189854 (WD

¹ Defendants do not waive the service of process requirement as to any unserved or improperly served persons or entities. Nothing in this motion shall be construed as an appearance on behalf of or a waiver of service of process as to any unserved or improperly served persons or entities.

² Respectfully, Defendants argued that compensatory and punitive damages were not available in absence of a physical injury 42 U.S.C. § 1997e(e). DE# 24, 9-10; DE#25, at 9-10. Although Defendants argued other grounds for dismissal of Plaintiff's claims, Defendants have not argued that nominal damages were unavailable under 42 U.S.C. § 1997e(e).

Mich); Thompson v. Caruso, 08 WL 559655 (WD Mich). Whether the plaintiff is entitled to compensatory or punitive damages must be determined at a later date. . . .

DE#37, at 7-8.

Argument

In Al-Amin v. Smith, 637 F.3d 1192, 1195 (11th Cir. April 5, 2011),³ the Eleventh Circuit Court of Appeals addressed the question of whether, in the absence of physical injury, a prisoner is precluded from seeking punitive damages by the Prison Litigation Reform Act of 1995, Pub.L. No. 104–134, 110 Stat. 1321 (1996). Georgia prisoner Al–Amin had brought a First Amendment claim alleging that prison officials at Georgia State Prison allowed his legal mail to be opened outside his presence. 637 F.3d at 1193. Al-Amin appealed an order granting defendants’ motion *in limine* which concluded that 42 U.S.C. § 1997e(e) precluded Al-Amin from offering evidence of either compensatory or punitive damages in his 42 U.S.C. § 1983 action. Id

On appeal, Al-Amin argued that, even given § 1997e(e)'s limitation, the mere absence of a physical injury resulting from alleged First Amendment violations did not bar his punitive damage claim. Al-Amin, 637 F.3d at 1196. The Eleventh Circuit, however, instructed that this issue had “already been resolved” by the Court and reviewed previous Eleventh Circuit cases on punitive damages under 42 U.S.C. § 1997e(e), including: Harris v. Garner, 190 F.3d 1279 (11th Cir.1999), *reh'g en banc granted and opinion vacated*, 197 F.3d 1059 (11th Cir.1999), *opinion reinstated in relevant part*, 216 F.3d 970 (11th Cir.2000); Smith v. Allen, 502 F.3d 1255 (11th Cir.2007); and Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir.2002). See Al-Amin, 637 F.3d at 1196-1199.

³ Defendants note that pursuant to the Eleventh Circuit’s docket as seen on PACER for Al-Amin v. Smith, Case No. 10-11498, the Appellant Al-Amin filed a petition for rehearing *en banc* on April 26, 2011, which is pending.

The Al-Amin Court recounted that in Harris that while the Court had reserved an opinion on whether section 1997e(e) would bar a claim for nominal damages, it did not make a similar reservation with regards to punitive damages. 637 F. 3d 1192, at 2296. The Al-Amin Court further recounted that the Harris Court had:

affirmed the district court's dismissal of Wade's claims for compensatory and punitive damages because he failed to meet § 1997e(e)'s physical injury requirement. Id. at 1286–87, 1290 (–We also AFFIRM the district court's dismissal of plaintiff Wade's claims for compensatory and punitive damages”) Nor did the Harris Court explicitly or impliedly limit its punitive damage holding to cases in which a prisoner pleads a ~~–mental or emotional”~~ injury. [footnote omitted] Rather, the Harris Court focused only on the statute's physical injury requirement, and did not distinguish between cases in which a prisoner pleads a ~~–mental or emotional injury”~~ and those where a prisoner does not so plead.

637 F.3d at 1196 -1197 (emphasis added).

The Al-Amin Court related that, on rehearing *en banc*, the Eleventh Circuit reinstated the portion of Harris discussed,⁴ and that the *en banc* Court:

reiterated that that constitutional claims are not treated as exceptional by the PLRA: –Section 1997e(e) unequivocally states that _ No Federal Civil Action may be brought ...,‘ and _no‘ means no. The clear and broad statutory language does not permit us to except any type of claims, including constitutional claims.” Id. at 984–85 (internal citation omitted). The PLRA's preclusive effect thus applied equally to all constitutional claims, as the Court did not distinguish between constitutional claims frequently accompanied by physical injury (e.g., Eighth Amendment violations) and those rarely accompanied by physical injury (e.g., First Amendment violations).

637 F.3d at 1197 (emphasis added)

The Al-Amin Court concluded that ~~–Harris~~, standing alone, sufficiently forecloses the punitive damage relief sought by Al–Amin, given that his constitutional claim does not meet § 1997e(e)'s physical injury requirement.” 637 F.3d at 1198. Nevertheless, the Al-Amin Court discussed how other cases after Harris bolstered its conclusion.

⁴ See Al-Amin, 637 F. 3d 1197 (citing Harris v. Garner, 216 F. 3d 972).

Discussing Smith v. Allen, 502 F. 3d 1255 (11th Cir. 2007),⁵ and Napier v. Preslicka, 314 F.3d 528 (11th Cir. 2002), the Court stated:

As in Al-Amin's case, Smith alleged constitutional violations—including a First Amendment violation—but no physical harm. *Id.* As in Al-Amin's case, Smith sought punitive damages. *Id.* However, the *Smith* Court concluded that the PLRA, along with our Circuit's precedents, prevented a prisoner plaintiff from seeking punitive damages in the absence of a physical injury: “[Smith] seeks nominal, compensatory, and punitive damages. It is clear from our case law, however, that the latter two types of damages are precluded under the PLRA, *Napier*, 314 F.3d at 532, but that nominal damages may still be recoverable. *Hughes*, 350 F.3d at 1162.” *Smith*, 502 F.3d at 1271. Accordingly, the *Smith* Court stated, “it is clear that Smith's monetary award, if any, will be limited to a grant of nominal damages, in light of the limiting language of § 1997e.” *Id.*

Al-Amin attempts to sidestep the clear import of this language by arguing that (1) the *Smith* Court's citation to *Napier* is inapposite because *Napier* never addressed punitive damages, and (2) this passage is dicta because the *Smith* Court ultimately concluded that Smith failed to establish a *prima facie* RLUIPA violation.

We are unpersuaded by Al-Amin's argument that *Napier* had nothing to do with punitive damages. While it is true that the *Napier* Court did not specifically discuss punitive damages, it is evident that *Napier* followed *Harris*'s conclusion that punitive damages cannot be recovered for claims—constitutional or otherwise—that do not meet § 1997e(e)'s physical injury requirement.

First, on the same page of the *Napier* opinion cited by the *Smith* Court, the *Napier* Court cited *Harris*'s statement that the PLRA encompasses all federal claims, including constitutional claims. *Napier*, 314 F.3d at 532 (citing *Harris*, 216 F.3d at 984–85).

Second, the *Napier* Court ultimately held that “the PLRA forbids the litigation of this lawsuit while Napier is imprisoned, as he complains of injury occurring while he was in custody, and he did not allege physical injury arising from the actions of the defendant officers.” *Id.* at 534. The district court had ruled, *inter alia*, that Napier's claim for punitive damages is barred as well since 1997e(e) draws no distinction between monetary damages for punishment and damages for compensation of the victim.” [footnote omitted] *Napier v. Preslicka*, No. 3:00–cv–156, slip op. at 5 (M.D.Fla. May 12, 2000). The *Napier* Court then affirmed the district court's dismissal of Napier's entire claim. 314 F.3d at 534. Therefore,

⁵ It is noted that Smith has recently been abrogated by Sossamon v. Texas, 131 S.Ct. 1651, 1656 (U.S. 2011), for Smith's holding that the Eleventh Amendment would not shield the state (and its agents) from an official capacity action for damages under RLUIPA.

the Napier Court concluded, albeit *sub silentio*, that Napier's punitive claim was barred by § 1997e(e) just as much as his compensatory claim.

Al-Amin, 637 F.3d at 1198 -1199.

As reiterated by Al-Amin, 42 U.S.C. 1997e(e) bars punitive damages claims of alleged First Amendment violations in the absence of physical injury. See 637 F.3d at 1199. Moreover, as recognized in the caselaw cited by the Al-Amin Court, compensatory damages are also precluded under 42 U.S.C. § 1997e(e) for Plaintiff's First Amendment claims in the absence of physical injury. See Al-Amin, 637 F.3d at 1196 -1197 (recounting Harris's affirmance of the district court's dismissal of Wade's claims for compensatory and punitive damages because he failed to meet § 1997e(e)'s physical injury requirement); and 637 F. 3d at 1199 (construing Napier as concluding that Napier's punitive claim was barred by § 1997e(e) ~~just as much as his compensatory claim.~~”). Accordingly, the Magistrate's findings based upon district court cases *from circuits other than the Eleventh Circuit* (see DE#37, at 7-8) should be rejected. Plaintiff's claims seeking compensatory and punitive damages where no physical injury is alleged must be dismissed for failure to meet § 1997e(e)'s physical injury requirement.

Conclusion

WHEREFORE, for these reasons, Defendants object to the Magistrate's finding that Plaintiff has an entitlement to compensatory or punitive damages, and continue to maintain that Plaintiff's claims for compensatory and punitive damages be dismissed.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/Joy A. Stubbs

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Johnnie Bouie Jr., 111099, Avon Park Correctional Institution, P.O. Box 1100, County Road 64 East, Avon Park, Florida 33826-1100 on this 31st day of May, 2011.

/s/ Joy A. Stubbs

Joy A. Stubbs
Assistant Attorney General

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

JOHNNIE BOUIE, DC#111099,

Plaintiff,

vs.

CASE NO. 10-14277-JEM

WALTER A. MCNEIL, et al.,

Defendants.

Answer to Complaint and Defenses and Demand for Jury Trial for Defendant TAYLOR

Defendant TAYLOR, through counsel, Chaplaincy Administrator, through undersigned counsel, answer Plaintiff's Complaint, doc. 1, as follows:

1. Admit that pursuant to 28 U.S.C. §1331, the district court has original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States, otherwise denied. Admit that Plaintiff has filed an action under 42 U.S.C. § 1983, otherwise denied.
2. Admit for venue purposes that venue is proper in the Southern District of Florida.
3. Admit that Plaintiff is JOHNNIE C. BOUIE, Jr., DC# 111099. Admit that Plaintiff was incarcerated at Okeechobee C.I. during the time period of incidents alleged by Plaintiff. Admit Plaintiff was transferred to Avon Park C.I. in February 2010. Without knowledge as to the remainder.
4. Admit that Defendant McNeil served as Secretary of the Florida Department of Corrections beginning in February 2008 through February 14, 2011. Denied as to the remainder.
5. Admit that Defendant Taylor was the Chaplaincy Services Administrator during the time period of incidents alleged by Plaintiff. Denied as to the remainder.
6. Denied that Powell Skipper was warden at Okeechobee C.I. prior to November 2008.

7. Admit that Defendant Collins was the Regional Chaplain for Region IV Administrator during the time period of incidents alleged by Plaintiff. Denied as to the remainder.

8. Admit that Defendant Hardaker was a Classification Officer at Okeechobee C.I., who served as acting Chaplain from about January 2008 to about August 2008. Denied as to the remainder.

9. Admit that Plaintiff was transferred to Okeechobee C.I. Admit that Plaintiff has a life sentence. Denied as to the remainder.

10. Without knowledge.

11. Admit that Defendant Taylor knows by virtue of having been brought into the instant lawsuit that for some time prior to March 7, 2008, two Muslim services took place at Okeechobee C.I. at the main unit Chapel, one of which was attended by some inmates self-identifying as Nation of Islam. Without knowledge as to the remainder.

12. Admit that Defendant Taylor knows by virtue of having been brought into the instant lawsuit that for some time prior to March 7, 2008, two Muslim services took place at Okeechobee C.I. at the main unit Chapel, one of which was attended by some inmates self-identifying as Nation of Islam. Without knowledge as to the remainder.

13. Without knowledge.

14. Without knowledge.

15. Without knowledge.

16. Without knowledge

17. Without knowledge.

18. Without knowledge.

19. Without knowledge.

20. Without knowledge.

21. Without knowledge.

22. Without knowledge.

23. Denied.

24. Without knowledge.

25. Denied that such a statement necessarily means that Defendant Collins has the same understanding of Islam or Muslim groups as Plaintiff, or that the statement indicates that Defendant Collins has favored or shown favoritism toward any Muslim group over another. Without knowledge as to the remainder.

26. Admit that in his role as Regional Chaplain, Defendant Collins has constitutionally afforded all inmates, including those self identifying as Nation of Islam, the opportunity for religious expression within the constraints of the penal environment which include factors such as limited available time, space, and supervision. Denied as to the remainder.

27. Admit that Defendant Hardaker had is knowledgeable and trained in providing Chaplaincy services and functions. Without knowledge as to the remainder.

28. Admit that Plaintiff participates in the grievance process for reasons that are known to no one but the Plaintiff. Denied as to the remainder.

29. Admit that Plaintiff submitted an informal grievance at Okeechobee CI that was logged as received on March 13, 2008, the substance of which speaks for itself.

30. Admit that Defendant Hardaker gave a response to Plaintiff's informal grievance, the substance of which speaks for itself. Denied as to the remainder.

31. Admit that Defendant Hardaker has knowledge regarding Chaplaincy services and functions and has a general understanding of commonly known Muslim groups. Denied that this

would necessarily mean that Defendant Hardaker would have the same understanding of chaplaincy services, Islam, or Muslim groups as Plaintiff. Denied that Defendant Hardaker has favored or shown favoritism toward any Muslim group over another. Without knowledge as to the remainder.

32. Admit that Plaintiff participates in the grievance process for reasons that are known to no one but the Plaintiff. Admit that Plaintiff submitted formal grievance log # 0803-404-121 at Okeechobee CI, the substance of which speaks for itself. Denied as to the remainder.

33. Admit that a response was given to formal grievance log # 0803-404-121, the substance of which speaks for itself. Denied that the respondent was Powell Skipper.

34. Admit that, as warden, Defendant Skipper has overriding authority for all that takes place on a compound under his control. Denied as to the remainder.

35. Admit that Plaintiff has attached main unit chapel schedules for April 2008, September 2008, and August 2009, the substance of which speaks for itself. Denied as to the remainder.

36. Denied.

37. Denied.

38. Admit that Plaintiff submitted administrative appeal log # 08-6-11451 to the Central Office, the substance of which speaks for itself.

39. Admit that a response was given to administrative appeal log # 08-6-11451, the substance of which speaks for itself. Denied that the reviewing authority was either Defendant Taylor or Defendant McNeil.

40. Admit that Rule 33-503.001(2)(a), Florida Administrative Code, speaks for itself.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

47. Denied.

48. Admit that Defendant knows by virtue of having been brought into the instant lawsuit that that for some time prior to March 7, 2008, two Muslim services took place at Okeechobee C.I. at the main unit Chapel, one of which was attended by some inmates self-identifying as Nation of Islam. Denied as to the remainder.

49. Denied.

RELIEF REQUESTED

50-52. Deny that Defendants have engaged in any unlawful conduct, and that Plaintiff is entitled to any of the relief he has requested, or to any relief whatsoever in this action.

Any allegation not specifically admitted in this answer is hereby denied.

Affirmative Defenses

1. Plaintiff has not established a violation of his constitutional rights.
2. Defendant asserts that his conduct did not subject Plaintiff to a deprivation of rights, privileges or immunities secured by the United States Constitution.
3. Defendant is entitled to Eleventh Amendment Immunity for suit in his official capacity for monetary damages.
4. Defendant is entitled to qualified immunity from any damages sought in his individual capacity.

5. To the extent Plaintiff asserts a claim for mental or emotional injury, compensatory and punitive damages are not available in the absence of a physical injury under 42 U.S.C. § 1997e(e).

6. Plaintiff has failed to exhaust his administrative remedies for all claims.

Demand for Jury Trial

Defendant demands a jury trial on all issues triable, as a matter of right by jury.

Respectfully submitted,

PAMELA JO BONDI
Attorney General

/s/ Joy A. Stubbs
Joy A. Stubbs
Assistant Attorney General
Florida Bar No. 0062870

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to JOHNNIE BOUIE, DC# 111099, Avon Park Correctional Institution, P.O. Box 1100, Avon Park, Florida 33826-1100 on this on this 18th day of November, 2011.

/s/ JOY A. STUBBS
Joy A. Stubbs
Assistant Attorney General

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Fort Pierce Division

Case Number:10-14277-CIV-MARTINEZ-WHITE

JOHNNIE C. BOUIE, JR.,

Plaintiff,

vs.

WALTER MCNEIL; ALEX TAYLOR;
POWELL SKIPPER; SHAWN COLLINS;
JAMES HARDAKER; et al.,

Defendants.

**ORDER ADOPTING IN PART MAGISTRATE JUDGE WHITE'S REPORT AND
RECOMMENDATION**

THE MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge for a Report on Defendant McNeil's Motion to Dismiss (D.E. No. 24) and Defendants Hardacker and Skipper's Motion to Dismiss (D.E. No. 25). The Magistrate Judge filed a Report, recommending that these motions be granted in part and denied in part. Magistrate Judge White recommended that the motions be granted in that the claims against Defendants in their official capacities should be dismissed and the claim for declaratory judgment relief should also be dismissed. The Court has reviewed the entire file and record and has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report present. After careful consideration, the Court adopts Magistrate Judge White's Report in part.

Defendants McNeil, Hardacker, and Skipper have filed objections to Magistrate Judge White's Report, objecting to the portion of Magistrate Judge White's Report wherein he found that Plaintiff's claims for compensatory and punitive damages should not be dismissed pursuant

to 42 U.S.C. § 1997e(e). Magistrate Judge White relied on unpublished district court decisions from other circuits and found that section "1997e(e) does not apply to the First Amendment violations." (D.E. No. 31 at 7). The Court agrees with Defendant that there is Eleventh Circuit authority that finds the claims for compensatory and punitive damages are barred by section 1997e(e). The Court follows these decisions and dismisses Plaintiff's claims for compensatory and punitive damages as no physical injury has been alleged. See *Al-Amin v. Smith*, 637 F.3d 1192, 1199 (11th Cir. 2011) (finding that section 1997e(e) of the Prison Litigation Reform Act precludes all claims for punitive damages where there is no physical injury); *Hicks v. Ferrero*, 285 Fed. Appx. 585, 587 (11th Cir. 2008) (finding that section 1997e(e) barred Plaintiff from "recovering compensatory damages for such an injury because he did not allege any physical injury.") It is therefore:

ADJUDGED that United States Magistrate Judge White's Report and Recommendation (D.E. No. 31) is **AFFIRMED** and **ADOPTED in part**. Accordingly, it is

ADJUDGED that

Defendant McNeil's Motion to Dismiss (D.E. No. 24) and Defendants Hardacker and Skipper's Motion to Dismiss (D.E. No. 25) are **GRANTED in part** and **DENIED in part**. The motions are granted in that the claims against Defendants in their official capacities are dismissed, the claim for declaratory judgment relief is dismissed, and the claims for punitive and compensatory damages are dismissed without prejudice.¹ The motion is denied in all other

¹The dismissal is without prejudice to bringing this part of Plaintiff's claim after he is released as the section 1997e(e) bar only applies during the imprisonment of the plaintiff.

respects.

DONE AND ORDERED in Chambers at Miami, Florida, this 20 day of January, 2012.



JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge White
All Counsel of Record
Johnnie C. Bouie, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHNNIE BOUIE, DC#111099,

Plaintiff,

vs.

CASE NO. 10-14277-JEM

WALTER A. MCNEIL, et al.,

Defendants.

Defendants' Second Motion for Extension of Time to Submit Dispositive Motion

Defendants, COLLINS, TAYLOR, SKIPPER, HARDACKER, and MCNEIL, pursuant to Rule 6(b), Federal Rules of Civil Procedure, move for the Court for an additional extension¹ of time of ten (10) days to file and serve a motion for summary judgment and in support states the following:

1. Undersigned counsel continues to be in the midst of preparing a motion for summary judgment to comprehensively address Plaintiff's claims against the five defendants. She finds that she needs additional time to present the motion in an organized format. The undersigned's time in this case has been affected by other caseload activities which have included a settlement conference on January 23, 2012 (resulting in a signed release), in 4:10-cv-429-MP-GRJ, United States District Court, Northern District of Florida, and a case status conference on January 25, 2012 in 4:09-cv-376-RH/WCS, United States District Court, Northern District of Florida.

2. Plaintiff has not been consulted regarding this motion as he is incarcerated and proceeding pro se.

¹ It is noted that this is Defendants Collins and Taylor's second motion for extension of time to file a motion for summary judgment but it is the first motion for an extension of time on the part of Defendants Hardacker, Skipper, and McNeil who recently had their motion to dismiss granted in part and denied in part. DE #74.

3. Plaintiff should not be prejudiced if this Court granted this motion. The undersigned is cognizant of the importance of resolving cases in an orderly and efficient manner. The undersigned notes that recently another Assistant Attorney General was recently assigned to assist the undersigned in this case and several other cases containing religious and/or diet issues proceeding in federal courts.

WHEREFFORE, Defendants request an additional extension of time of ten (10) days from the date of this motion to file Defendants' motion for summary judgment.

Respectfully submitted,

PAMELA JO BONDI
Attorney General

/s/ Joy A. Stubbs
Joy A. Stubbs
Assistant Attorney General
Florida Bar No. 0062870

Office of the Attorney General
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 488-4872
joy.stubbs@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to JOHNNIE BOUIE, DC# 111099, Avon Park Correctional Institution, P.O. Box 1100, Avon Park, Florida 33826-1100 on this on this 30th day of January, 2012.

/s/ JOY A. STUBBS
Joy A. Stubbs
Assistant Attorney General

PROVIDED TO AVON PARK
CORRECTIONAL INSTITUTION
ON MES 2-5-12
FOR MAILING CFB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FILED by SS D.C.
FEB 08 2012
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. - MIAMI

JOHNNIE C. BOUIE,

Plaintiff,

vs.

Case no.: 10-14277-CIV-Martinez/White

WALTER A. McNEIL, *et al.*,

Defendants.

_____ /

MOTION FOR CLARIFICATION OF FILING PRE-TRIAL
STATEMENT BEFORE OR AFTER DISPOSITIVE MOTION SERVED

COMES NOW, the Plaintiff, Johnnie C. Bouie, pro se, and moves the Court for an order clarifying whether pre-trial statements must be served upon opposing parties prior to or after the dispositive motion has been filed.

1. Bouie's understanding is that on 1/20/12, either he or the defendant's could have submitted a dispositive motion upon opposing parties.

2. Bouie's understanding is that once the defendants have served their dispositive motion upon him, he has two weeks to submit a pre-trial statement upon defendants. When the defendants are served, they have two weeks to submit pre-trial statements.

3. Bouie is not clear as to whether he must submit his pre-trial statement before or after he receives the defendant's summary judgment.

WHEREFORE, Bouie prays that the Court will render an order clarifying whether he must submit pre-trial statement prior to receiving defendants dispositive motion or wait until defendants serve a summary judgment upon him.

Respectfully submitted,

/s/ Johnnie C. Bouie
JOHNNIE C. BOUIE # 111099
Avon Park Correctional Institution
P.O. Box 1100
Avon Park, FL 33826-1100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to: Joy A. Stubbs, Counsel of Record, Office of the Attorney General, The Capitol, Suite PL-01, Tallahassee, FL 32399-1050 on this 5TH day of February, 2012.

/s/ Johnnie C. Bouie
JOHNNIE C. BOUIE # 111099
pro se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHNNIE BOUIE, DC#111099,

Plaintiff,

vs.

CASE NO. 10-14277-JEM

WALTER A. MCNEIL, et al.,

Defendants.

**Defendants COLLINS, TAYLOR, HARDACKER,
SKIPPER, and MCNEIL'S Motion for Summary Judgment**

Defendants COLLINS, TAYLOR, HARDACKER, SKIPPER, and McNEIL, pursuant to Rule 56, Federal Rules of Civil Procedure, move for summary judgment in favor of Defendants.

As grounds, Defendants state:

I. Plaintiff's claims for monetary damages against Defendants in their official capacities are barred by the Eleventh Amendment.

II. Compensatory and punitive damages are not available in the absence of a physical injury under 42 U.S.C. § 1997e(e). As reiterated by Al-Amin v. Smith, 42 U.S.C. § 1997e(e) applies to First Amendment claims. 637 F.3d 1192, 1195 (11th Cir. April 5, 2011).

III. Plaintiff's religious expression claim fails on the merits.

IV. Defendants are entitled to qualified immunity for individual capacity claims.

V. Plaintiff has failed exhaust administrative remedies so as to state a claim for retaliation.

Plaintiff's Allegations

Plaintiff alleges that Defendants have violated his constitutional rights by failing to provide Plaintiff, a Nation of Islam (N.O.I.) follower, chapel services separate and apart from the Islamic

services provided by Okeechobee Correctional Institution which he alleges “effectively banned him from participating in congregational prayer in Main Unit Sanctuary at OCI from March 7, 2008, through January 23, 2010.” (DE# 1, pp. 10-13.) The Plaintiff alleges from August 31, 2006 through March 7, 2008, he was allowed, as a member of the N.O.I., to attend and worship in their prayer services at the Main Unit Chapel Sanctuary at Okeechobee Correctional Institution. (DE# 1, pp. 3-4) Plaintiff alleges that on March 7, 2008, when he arrived at the Main Unit Chapel he was informed that he had to “‘merge’ his sincerely held religious faith and prayer services with the Wahabbi Sunni Muslims behind the portioned area in the back of the Main Chapel Sanctuary at OIC or immediately exit the building.” (DE# 1, p. 4) Plaintiff alleges explaining to Defendants Hardacker and Collins that Wahabbi Sunni Muslims refuse to recognize him as a legitimate Muslim, that they refuse to line up in prayer ranks along side or behind him, that they refused to allow him to call the Adhan, and that they refuse to allow him to give Khutbah sermons during Jumah prayer services or to speak on their faith or to watch videos of his faith during Taleem. (DE# 1, at 5-6) Plaintiff seeks declaratory relief in addition to nominal, compensatory and punitive damages from Defendants. (DE# 1, at14-15)

Defendants’ Statement of Facts

Plaintiff is a state prison inmate incarcerated within the custody of the Department of Corrections, State of Florida. In August of 2006, Plaintiff transferred to Okeechobee C.I. See Defendants’ Exhibit A.

On March 13, 2008, Plaintiff submitted an informal grievance complaining that Chaplain Collins advised him on March 7, 2008 that there would now be one Jumah service rather than two. See Defendants’ Exhibit B (informal grievance 03-93). Plaintiff sought to continue conducting a separate Jumah prayer service. Id. Defendant Hardacker denied the request,

indicating that Plaintiff could attend the joint Muslim faith service on Friday afternoons, or any other service on the chapel calendar. Id.

Plaintiff continued to grieve, alleging that inmates identifying as Nation of Islam had previously met in the front of the Chapel Sanctuary, and that inmates identifying with another sect would meet in the back of the sanctuary behind a partition. See Defendants' Exhibit C (formal grievance log # 0803-404-121).

Plaintiff's grievance was denied by a non-party and Plaintiff was advised:

...Worship for the Muslim inmates is held on Friday afternoons at 1:00 p.m. or close to that time.

There is no separate time scheduled for different Muslim groups to meet. The Nation of Islam can meet with Muslims. Although we try to accommodate all religious groups and their variant beliefs, Nation of Islam is Muslim and should gather with all the Muslim inmates for Jumah prayer.

See Defendants' Exhibit C. Plaintiff was advised that he could obtain further administrative review of the complaint through the Bureau of Inmate Grievance appeals. Id.

Plaintiff submitted an administrative appeal with the Bureau of Inmate Grievance Appeals on or about April 18, 2008. See Defendants' Exhibit D (administrative appeal log # 08-6-11451). Plaintiff's appeal was denied and he was advised that the response he received at the institutional level had been reviewed and was found to appropriately address the concerns he presented at the institutional level as well as the Central Office level. See Defendants' Exhibit D. Plaintiff was advised:

It is the policy of the Department to provide religious activities for Muslim inmates that are inclusive of the various Islamic groups. This policy includes Jumah prayer services.

See Defendants' Exhibit D.

Plaintiff informally grieved the joint service again in September of 2008. In informal grievance 09-78, he stated he wanted to attend “Nation of Islam Jumah Prayer services.” See Defendants’ Exhibit E. Chaplain Potter (not a defendant) denied the informal grievance, responding:

You are on the list to participate in Jumah prayer every Friday at 1:00 p.m. in the Chapel. Therefore the Chapel is not denying you your right to worship. You may come and worship every Friday at 1:00 p.m. in the Chapel with the Islamic inmate population. (emphasis added)

See Defendants’ Exhibit E.

Six days later, Plaintiff informally grieved again. See Defendants’ Exhibit F (informal grievance log # 09-115). Denying this informal grievance, Chaplain Potter advised:

It is the goal of the Chapel to facilitate all inmates in their religious observance. The Chapel provides one afternoon a week for Jumah prayer to be attended by all Islamic inmates. This Jumah prayer is provided for you also.

Id.

Plaintiff then formally grieved the denial of informal grievance log # 09-115. See Defendants’ Exhibit G (formal grievance log # 0809-404-130). The formal grievance was denied. See id.

In October 2008, Plaintiff transferred to Hardee C.I. See Defendants’ Exhibit A. He returned to Okeechobee C.I. in January 2009. See id. On or about January 26, 2010, Plaintiff was transferred to Avon Park where is he presently located. See id. Plaintiff filed his civil rights action in this case on October 9, 2010. DE# 1.

Plaintiff has not filed any administrative appeals with the Bureau of Inmate Grievance Appeals on or before October 9, 2010, alleging that he was been the subject of a retaliatory institutional transfer on January 23, 2010. See Defendants’ Exhibit H (declaration of Rebecca Padgham).

Chaplaincy Services Administrator Alex Taylor, a defendant in this case, avers that the Florida Department of Corrections has more than 100,000 inmates. See Defendants' Exhibit I (Declaration of Chaplaincy Administrator Alex Taylor). 111 faith codes, an indexing of the religious preference registrations, are represented (although it is not possible to list all faiths). A listing of the faith group codes can be found in *Florida Department of Corrections Religious Technical Guide for Selected Religious Groups*. See Defendants' Exhibit I, Ex. 1 (Faith Codes). In September of 2009, Chaplaincy Services counted 3,685 inmates within the inmate population as identifying with a faith group that made up the Muslim category. See Defendants' Exhibit I, Ex. 2 (chart derived from a population report on September 25, 2009). This is about 3.6 % of the inmate population. See Defendants' Exhibit I, Ex. 3 (chart representation of Muslims in FDOC on 1/1/2010). Although there is constant change in the inmate population, the percentages of religious preference choices stay fairly constant. See Defendants' Exhibit I.

According to Chaplain Taylor, the category of Muslim is currently made up of six separate Muslim faith groups. See Defendants' Exhibit I, Ex. 2. These are: the generic selection "Muslim", Shiite, Sunni, Sufi, Nation of Islam, and Moorish Science. See Defendants' Exhibit I, Ex. 2.

It is the policy of the Department to extend to all inmates the greatest amount of freedom and opportunity for pursuing individual religious beliefs and practices consistent with the security and good order of the institution. See Defendants' Exhibit I. Chaplain Taylor relates that there are services and/or other opportunities available for each scheduled faith group to make religious observations. Id. Individual inmates are permitted religious literature subject to the Department's admissibility rules, possession of appropriate religious items, religious correspondence, and appropriate personal observation occasions. Muslims are afforded

accommodations for daily prayer, holidays, and permission to wear a kufi and possess a prayer rug. See Defendants' Exhibit L (portion of the Department's *Religion Technical Guide for Selected Religious Groups*, 2008, relating to Islam). Each inmate is provided the opportunity to meet with his or her spiritual advisor at regular intervals. See Defendants' Exhibit I.

Nevertheless, certain limitations are necessary because the practitioners are confined to a penal institution with limited resources. Chaplaincy functions amid the operations of the institution at large. While chaplains can provide input, chaplains cannot override determinations made regarding inmate movement, classification, or security. Id.

Chaplain Taylor explains that the effort of Chaplaincy to provide inmates as much freedom and opportunity for pursuing individual religious beliefs is subject to the limitations of finite resources including the designated space for religious activities, a fair and balanced program schedule providing for numerous faith group activities, and the availability of approved volunteers to supplement the chaplain's efforts. See Defendant's Exhibit I. Recent budget cuts have affected the ability of chaplains to provide as many services to inmates. As such, chaplains must rely more heavily upon approved volunteers to conduct group services. See Defendants' Exhibit I.

The policies of providing an inclusive nondenominational service for Christians and an inclusive service for Muslims were already in place when Chaplain Taylor took the role of Chaplaincy Services Administrator in July of 1999. See Defendants' Exhibit I. These policies further the Department's interest in affording the greatest number of inmates the opportunity to access institutional chapels where use is subject to appropriate time, space, and supervision. See Defendants' Exhibit I. Institutional chapels are multipurpose buildings, with inmates using the chapel for purposes of study, personal contemplation, as well as congregant worship of

groups of varying sizes. The scheduling of activities for some necessarily crowds out the activities of others. See Defendants' Exhibit I. Additional noise and overflow can impact effective supervision. Moreover, provision of chaplaincy services is affected by staff shortages and the administrative responsibilities chaplains must perform, necessitating heavy reliance upon approved volunteers to conduct group services. Accordingly, consolidating groups with major doctrinal similarities promotes efficient use of chaplaincy resources for the institution's inmate population. Holding separate services for Nation of Islam inmates undermines the fair distribution of limited resources of time, space, and supervision. See Defendants' Exhibit I. Further, separate services for Muslims would disrupt the orderly operation of facilities. It would set a precedent that would be impossible to maintain for all of the numerous faith groups currently combined in the weekly nondenominational Christian service. See Defendants' Exhibit I.

Chaplain Taylor acknowledges that from time to time, institutional chaplains unfortunately deviate from the policy of providing an inclusive service for Muslims. See Defendants' Exhibit I. Given that inmates regularly move and transfer among the Departments' institutions, Chaplaincy Administrative Services strives to standardize religious accommodations for inmates at all of the Department's institutions as reasonably as possible. Chaplain Taylor tries to ensure that the Department's practice of providing inclusive Muslim services is consistently followed. See Defendants' Exhibit I. The Department's interests in the practice is not diminished by deviations from field staff who misunderstand the practice or are otherwise reluctant to merge Muslim services for fear of engendering hard feelings by affected inmate groups. Likewise, the Department's interests are not diminished if such a deviation is not

immediately noticed by staff at higher levels or immediately addressed due to competing issues. See Defendants' Exhibit I.

Chaplain Taylor does not recall if he gave a particular order to Chaplain Collins with respect to Okeechobee C.I. See Defendants' Exhibit I. However, the Department's policy of having inclusive Muslim activities must be consistently followed by the institutions and Chaplain Taylor has instructed Chaplain Collins in this regard. See Defendants' Exhibit I. Chaplain Taylor states that Chaplain Collins was correct in ending the separate services and announcing a single service for all Muslim faith groups. According to Chaplain Taylor, consistent and proper adherence to the Department's policy required that Okeechobee C.I.'s deviant practice cease. See Defendants' Exhibit I.

Chaplain Taylor is aware that Mr. Bouie has filed a complaint alleging that the Department has allowed "eight different denominations of Christians" and "three different groups of Jews" to have separate worship and prayer services at Okeechobee Correctional Institution. See Defendants' Exhibit I. As to Plaintiff's allegation regarding Judaism, there is only one weekly service for adherents of Judaism. If Plaintiff is referring to a group such as Hebrew Israelite or Assembly of Yahweh, Chaplain Taylor states that Plaintiff is mistaken in thinking that the Department's Chaplaincy Services categorizes such groups as Judaism or sects of Judaism. See Defendants' Exhibit I. Regarding Christians, there is an inclusive group that meets weekly at every institution which is termed nondenominational (however, non-Christians are welcome to this service as well). See Defendants' Exhibit I. Where denominational group activities are scheduled, however, depends on a variety of factors including time, space, and supervision which usually falls to an approved volunteer offering to meet a specific group need. Proportionate access to the chapel may be a factor as well. See Defendants' Exhibit I. As

illustration, there are more than 70,000 inmates identifying in some manner with Christian doctrine. See Defendants' Exhibit I, Ex. 4 (Christian Groups in the FDOC). Obviously, for safety reasons, the nondenominational weekly service cannot accommodate 70% of an institution's inmate population. Therefore, in chapel scheduling, multiple opportunities for religious expression are provided to ensure the greatest number of inmates have access the chapel. See Defendants' Exhibit I.

In the Department of Corrections, different schools of Muslim teaching in the inmate population have participated in communal services and activities together for more than thirteen years for Jumah, feast days, and Ramadan. See Defendants' Exhibit I. Chaplain Taylor explains that Muslim services are conducted in such a manner as to be non-sectarian and provide for all Muslim inmates regardless of the different schools of teaching among the various Muslim faith groups. See Defendants' Exhibit I. Jumah generally starts with a short sermon known as the Khutbah and is followed by the prayers. See Defendants' Exhibit I; Defendants' Exhibit L. Khutbah in this setting should begin and end with the focal point being passages from the Koran. See Defendants' Exhibit I. If a volunteer is not present, the local chaplain may, in his or her discretion, select inmate speakers for the Khutbah on a rotation basis. See Defendants' Exhibit L. Should an inmate feel that an aspect of the service has become overtly sectarian or political, the grievance procedure is available to bring the matter to local chaplain's attention. See Defendants' Exhibit I.

Chaplain Taylor makes clear that the Department's chapels are places for peaceful expression of faith and appropriate supervision of chapel programming ensures this. See Defendants' Exhibit I. Any inmate of any faith who would abuse their chapel access by provoking a disruption in a religious service would be subject to removal from the service or

program and possibly subject to other action depending on the nature and extent of the disruption. See Defendants' Exhibit I.

According to Chaplain Taylor, each Muslim inmate may pursue more specific beliefs through religious correspondence; the Muslim inmate may possess a variety of faith specific religious literature; and may be visited by the spiritual advisor of his or her choice. See Defendants' Exhibit I. Chapel libraries may stock books donated about Islam that may be made available for study in the library as reference books to all on an equal basis. See Defendants' Exhibit I.

Defendants' Statement of Undisputed Facts

1. The Florida Department of Corrections has more than 100,000 inmates. See Defendants' Exhibit I, Ex. 2.

2. The Florida Department of Corrections maintains a faith code index of religious preference registrations. There are 111 faith codes represented. See Defendants' Exhibit I, Ex. 1 (Faith Codes).

3. In September of 2009, Chaplaincy Services counted 3,685 inmates within the inmate population as identifying with a faith group that made up the Muslim category. See Defendants' Exhibit I, Exh. 2. This is approximately 3.6% of the inmate population. See Defendants' Exhibit I, Exh. 3.

4. The category of Muslim is made up of six separate Muslim faith group religious preference registrations. See Defendant's Exhibit I, Exhibit 2. These are: the generic selection "Muslim", Shiite, Sunni, Sufi, Nation of Islam, and Moorish Science. See Defendants' Exhibit I, Exh. 2.

5. Plaintiff has represented himself to be an adherent of a faith group within the category of Muslim, to wit: Nation of Islam. DE# 1, at 14, II 49 (indicating that he identifies with a Muslim sect).

6. It is the policy of the Department of Corrections to extend to all inmates the greatest amount of freedom and opportunity for pursuing individual religious beliefs and practices consistent with the security and good order of the institution. See Defendants' Exhibit I; DE# 1, at 11, II 40 (quoting rule 33-503.001(2)(a), F.A.C.). The effort of Chaplaincy to provide inmates as much freedom and opportunity for pursuing individual religious beliefs, however, is subject to the limitations of finite resources including the designated space for religious activities, a fair and balanced program schedule providing for numerous faith group activities, and the availability of approved volunteers to supplement the institutional chaplain's efforts. See Defendant's Exhibit I.

7. The policies of providing an inclusive nondenominational service for Christians and an inclusive service for Muslims have been in place since at least July of 1999. See Defendants' Exhibit I. Different schools of Muslim teaching in the inmate population have participated in communal services and activities together for more than thirteen years in activities such as Jumah, feast days, and Ramadan. See Defendants' Exhibit I.

8. Institutional chapels are multipurpose buildings, with inmates using the chapel for purposes of study, personal contemplation, as well as congregant worship of groups of varying sizes. The scheduling of activities for some necessarily crowds out the activities of others. See Defendants' Exhibit I. Additional noise and overflow can impact effective supervision. See Defendants' Exhibit I. Provision of chaplaincy services is affected by staff shortages and the administrative responsibilities chaplains must perform. See Defendants' Exhibit I.

Recent budget cuts have affected the ability of chaplains to provide as many services to inmates, and caused chaplains to rely even more heavily upon approved volunteers to conduct group services. See Defendant's Exhibit I.

9. Consolidating groups with major doctrinal similarities promotes efficient use of chaplaincy resources for the institution's inmate population. See Defendants' Exhibit I.

10. From time to time, institutional chaplains deviate from the policy of providing an inclusive service for Muslims. See Defendants' Exhibit I. Consistent and proper adherence to the Department's policy required that the deviant practice of separate Muslim Services at Okeechobee C.I. cease. See Defendants' Exhibit I.

11. At no time was Plaintiff prohibited from attending the communal Muslim faith service instituted at Okeechobee C.I. on Friday afternoons. See Defendants' Exhibit B, E & G (responses).

12. Inmates regularly move and transfer among the Department's institutions. See Defendants' Exhibit I. Chaplaincy Administrative Services strives to standardize religious accommodations for inmates at all of the Department's institutions as reasonably as possible. See Defendants' Exhibit I.

13. There is an inclusive Christian group that meets weekly at every institution which is termed nondenominational. See Defendants' Exhibit I. It would be impossible to have separate services for all of the numerous faith groups currently combined in the weekly nondenominational Christian service. See Defendant's Exhibit I.

14. Contrasted with 3.6 % of the inmate population identifying with a Muslim faith group category; 70 % of the inmate population identify in some manner with Christian doctrine. See Defendants' Exhibit I, Exs. 3 & 4. For safety reasons, the nondenominational weekly Christian

service cannot accommodate 70% of an institution's inmate population. See Defendant's Exhibit I, Exh. 4. As chapel scheduling tries to ensure the greatest number of inmates have access to the chapel as well as provide programming commensurate to population needs, multiple opportunities for religious expression are provided subject to restrictions of appropriate time, space, and supervision - with supervision usually satisfied by an approved volunteer offering to meet a specific group need. See Defendants' Exhibit I

15. The Department's chapels are intended to be places for peaceful expression of faith and appropriate supervision of chapel programming ensures this. See Defendants' Exhibit I.

16. Muslim services are conducted in such a manner as to be non-sectarian and provide for all Muslim inmates regardless of the different schools of teaching among the various Muslim faith groups. See Defendant's Exhibit I.

17. Jumah generally starts with a short sermon known as the Khutbah and is followed by prayers. See Defendants' Exhibit L. Khutbah in the correctional setting should begin and end with the focal point being passages from the Koran. See Defendant's Exhibit I. If a volunteer is not present, the local chaplain may, in his or her discretion, select inmate speakers for the Khutbah on a rotation basis. See Defendant's Exhibit I; Defendants' Exhibit L. Any inmate of any faith who would abuse their chapel access by provoking a disruption in a religious service would be subject to removal from the service or program and possibly subject to other action depending on the nature and extent of the disruption. See Defendant's Exhibit I. Moreover, should an inmate feel that an aspect of the service has become overtly sectarian or political, the grievance procedure is available to bring the matter to local chaplain's attention. See Defendant's Exhibit I.

18. Muslims are afforded accommodations for daily prayer, holidays, and permission to wear a kufi and possess a prayer rug. See Defendants' Exhibit L. Muslim inmates may pursue more specific beliefs through religious correspondence; the Muslim inmate may possess a variety of faith specific religious literature; and may be visited by the spiritual advisor of his or her choice. See Defendant's Exhibit I. Chapel libraries may stock books donated about Islam that may be made available for study in the library as reference books to all on an equal basis. See Defendants' Exhibit I.

19. Plaintiff has not exhausted administrative remedies of alleging that he has been the subject of a retaliatory institutional transfer on January 23, 2010 prior to filing the instant legal action. See Defendants' Exhibit H.

MEMORANDUM OF LAW

This complaint is subject to review pursuant to 28 U.S.C. § 1915A.¹ The Court must dismiss a claim that is "... fails to state a claim upon which relief may be granted[,] or ... seeks monetary relief from a defendant who is immune from such relief." Jones v. Bock, 549 U.S. 199, 213, 127 S.Ct. 910, 920 (U.S. 2007)(citing 28 U.S.C. §§ 1915A(a), (b)). This review may be

¹ Sec.1915A. Screening

(a) Screening.—The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for Dismissal.—On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint if the complaint-

- (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
- (2) seeks monetary relief from a defendant who is immune from such relief.

applied *sua sponte* and at any time during the proceedings. Brazill v. Cowart, 2011 WL 900721, 1 (M.D. Fla. 2011).²

Regarding Summary Judgment, the Eleventh Circuit stated:

Summary judgment is appropriate only when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c)(2). In determining the relevant set of facts at the summary judgment stage, we must view all evidence and make any “reasonable inferences that might be drawn therefrom in the light most favorable to the non-moving party.” Rine v. Imagitas, Inc., 590 F.3d 1215, 1222 (11th Cir.2009). However, we draw these inferences only “to the extent supportable by the record.” Scott v. Harris, 550 U.S. 372, 381 n. 8, 127 S.Ct. 1769, 1776 n. 8, 167 L.Ed.2d 686 (2007) (emphasis omitted). Thus, the requirement to view the facts in the nonmoving party's favor extends to genuine disputes over material facts and not where all that exists is “some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). In other words, once a moving party has carried its burden under Rule 56(c), “the non-moving party must produce substantial evidence in order to defeat a motion for summary judgment.” Garczynski v. Bradshaw, 573 F.3d 1158, 1165 (11th Cir.2009). A dispute over a fact will only preclude summary judgment if the dispute “might affect the outcome of the suit under the governing law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A court must deny summary judgment “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id.

Penley v. Eslinger, 605 F.3d 843, 848 (11th Cir. 2010).

² The undersigned is providing Plaintiff with courtesy copies of cited opinions that are not published in the Federal Reporter of Federal Supplement with service of this motion.

I. Eleventh Amendment immunity bars claims for damages against Defendants in their official capacities.

The Court recently dismissed claims against Defendants McNEIL, HARDACKER, and SKIPPER, in their official capacities. DE# 74. Likewise, official capacity claims against Defendants COLLINS and TAYLOR must be dismissed.

The law is well established that “that a suit against a defendant governmental officer in his official capacity is the same as a suit against the entity of which the officer is an agent.” Manders v. Lee, 285 F.3d 983, 990 (11th Cir.2002) (citations omitted). Congress did not intend to abrogate a state's Eleventh Amendment immunity in § 1983 damage suits, and Florida has not waived its sovereign immunity in such suits. See Zatlner v. Wainwright, 802 F.2d 397, 400 (11th Cir. 1986). Thus, to the extent Plaintiff seeks monetary damages from Defendants, or any state official, in their official capacity, the Eleventh Amendment bars suit. See id. Further, “states and state officials acting in their official capacities are not ‘persons’ subject to liability under 42 U.S.C. § 1983.” Carr v. City of Florence, 916 F.2d 1521, 1525, n.3 (11th Cir.1990)(citing Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)). Therefore, Plaintiff's claims for monetary damages against Defendants in their official capacities are without merit and must be dismissed.

II. Compensatory and punitive damages for mental or emotional injury are not available in the absence of a physical injury under 42 U.S.C. § 1997e(e).

As no physical injury exists, no compensatory or punitive damages for mental or emotional injury are available pursuant to 42 U.S.C. § 1997e(e). The Court recently dismissed claims against Defendants McNEIL, HARDACKER, and SKIPPER, for compensatory and

punitive damages on this ground. DE# 74. Likewise, compensatory and punitive damages claims against Defendants COLLINS and TAYLOR must be dismissed.

In Al-Amin v. Smith, 637 F.3d 1192, 1195 (11th Cir. April 5, 2011), the Eleventh Circuit addressed the question of whether, in the absence of physical injury, a prisoner is precluded from seeking punitive damages by the Prison Litigation Reform Act of 1995, Pub.L. No. 104–134, 110 Stat. 1321 (1996). Georgia prisoner Al–Amin had brought a First Amendment claim alleging that prison officials at Georgia State Prison allowed his legal mail to be opened outside his presence. 637 F.3d at 1193. Al-Amin appealed an order granting defendants’ motion *in limine* which concluded that 42 U.S.C. § 1997e(e) precluded Al-Amin from offering evidence of either compensatory or punitive damages in his 42 U.S.C. § 1983 action. Id

On appeal, Al-Amin argued that, even given § 1997e(e)'s limitation, the mere absence of a physical injury resulting from alleged First Amendment violations did not bar his punitive damage claim. Al-Amin, 637 F.3d at 1196. The Eleventh Circuit, however, instructed that this issue had “already been resolved” by the Court and reviewed previous Eleventh Circuit cases on punitive damages under 42 U.S.C. § 1997e(e), including: Harris v. Garner, 190 F.3d 1279 (11th Cir.1999), *reh'g en banc granted and opinion vacated*, 197 F.3d 1059 (11th Cir.1999), *opinion reinstated in relevant part*, 216 F.3d 970 (11th Cir.2000); Smith v. Allen, 502 F.3d 1255 (11th Cir.2007); and Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir.2002). See Al-Amin, 637 F.3d at 1196-1199.

The Al-Amin Court recounted that while the Harris Court had reserved an opinion on whether section 1997e(e) would bar a claim for nominal damages, it did not make a similar reservation with regards to punitive damages. 637 F. 3d 1192, at 2296. The Al-Amin Court further recounted that the Harris Court had:

affirmed the district court's dismissal of Wade's claims for compensatory and punitive damages because he failed to meet § 1997e(e)'s physical injury requirement. *Id.* at 1286–87, 1290 (“We also AFFIRM the district court's dismissal of plaintiff Wade's claims for compensatory and punitive damages”) Nor did the *Harris* Court explicitly or impliedly limit its punitive damage holding to cases in which a prisoner pleads a “mental or emotional” injury. [footnote omitted] Rather, the *Harris* Court focused only on the statute's physical injury requirement, and did not distinguish between cases in which a prisoner pleads a “mental or emotional injury” and those where a prisoner does not so plead.

637 F.3d at 1196 -1197 (emphasis added).

In *Al-Amin*, the Court related that on rehearing *en banc* the Eleventh Circuit reinstated the portion of *Harris* discussed,³ and that the *en banc* *Harris* Court:

reiterated that that constitutional claims are not treated as exceptional by the PLRA: “Section 1997e(e) unequivocally states that ‘ No Federal Civil Action may be brought ...,’ and ‘no’ means no. The clear and broad statutory language does not permit us to except any type of claims, including constitutional claims.” *Id.* at 984–85 (internal citation omitted). The PLRA's preclusive effect thus applied equally to all constitutional claims, as the Court did not distinguish between constitutional claims frequently accompanied by physical injury (e.g., Eighth Amendment violations) and those rarely accompanied by physical injury (e.g., First Amendment violations).

637 F.3d at 1197 (emphasis added).

The *Al-Amin* Court concluded that “*Harris*, standing alone, sufficiently forecloses the punitive damage relief sought by *Al-Amin*, given that his constitutional claim does not meet § 1997e(e)'s physical injury requirement.” 637 F.3d at 1198. Nevertheless, the *Al-Amin* Court discussed how other cases after *Harris* bolstered its conclusion.

Discussing *Smith v. Allen*, 502 F. 3d 1255 (11th Cir. 2007),⁴ and *Napier v. Preslicka*, 314 F.3d 528 (11th Cir. 2002), the Court stated:

³ See *Al-Amin*, 637 F. 3d 1197 (citing *Harris v. Garner*, 216 F. 3d 972).

As in Al-Amin's case, Smith alleged constitutional violations—including a First Amendment violation—but no physical harm. *Id.* As in Al-Amin's case, Smith sought punitive damages. *Id.* However, the *Smith* Court concluded that the PLRA, along with our Circuit's precedents, prevented a prisoner plaintiff from seeking punitive damages in the absence of a physical injury: “[Smith] seeks nominal, compensatory, and punitive damages. It is clear from our case law, however, that the latter two types of damages are precluded under the PLRA, *Napier*, 314 F.3d at 532, but that nominal damages may still be recoverable. *Hughes*, 350 F.3d at 1162.” *Smith*, 502 F.3d at 1271. . . .

We are unpersuaded by Al-Amin's argument that *Napier* had nothing to do with punitive damages. While it is true that the *Napier* Court did not specifically discuss punitive damages, it is evident that *Napier* followed *Harris's* conclusion that punitive damages cannot be recovered for claims—constitutional or otherwise—that do not meet § 1997e(e)'s physical injury requirement.

First, on the same page of the *Napier* opinion cited by the *Smith* Court, the *Napier* Court cited *Harris's* statement that the PLRA encompasses all federal claims, including constitutional claims. *Napier*, 314 F.3d at 532 (citing *Harris*, 216 F.3d at 984–85).

Second, the *Napier* Court ultimately held that “[t]he PLRA forbids the litigation of this lawsuit while *Napier* is imprisoned, as he complains of injury occurring while he was in custody, and he did not allege physical injury arising from the actions of the defendant officers.” *Id.* at 534. The district court had ruled, *inter alia*, that *Napier's* “claim for punitive damages is barred as well since 1997e(e) draws no distinction between monetary damages for punishment and damages for compensation of the victim.” [footnote omitted] *Napier v. Preslicka*, No. 3:00-cv-156, slip op. at 5 (M.D.Fla. May 12, 2000). The *Napier* Court then affirmed the district court's dismissal of *Napier's* entire claim. 314 F.3d at 534. Therefore, the *Napier* Court concluded, albeit *sub silentio*, that *Napier's* punitive claim was barred by § 1997e(e) just as much as his compensatory claim.

⁴ It is noted that *Smith* has recently been abrogated by *Sossamon v. Texas*, 131 S.Ct. 1651, 1656 (U.S. 2011), for *Smith's* holding that the Eleventh Amendment would not shield the state (and its agents) from an official capacity action for damages under RLUIPA.

Al-Amin, 637 F.3d at 1198 -1199.

As reiterated by Al-Amin, 42 U.S.C. 1997e(e) bars punitive damages claims of alleged First Amendment violations in the absence of physical injury. See 637 F.3d at 1199. Moreover, as recognized in the caselaw cited by the Al-Amin Court, compensatory damages are also precluded under 42 U.S.C. § 1997e(e) for Plaintiff's First Amendment claims in the absence of physical injury. See Al-Amin, 637 F.3d at 1196 -1197 (recounting Harris's affirmance of the district court's dismissal of Wade's claims for compensatory and punitive damages because he failed to meet § 1997e(e)'s physical injury requirement); and 637 F. 3d at 1199 (construing Napier as concluding that Napier's punitive claim was barred by § 1997e(e) "just as much as his compensatory claim.").

III. Plaintiff's Religious Expression Claim Fails on the Merits

To state a claim under § 1983, a plaintiff must establish two elements: (1) that he suffered a deprivation of rights, and "(2) that the act or omission causing the deprivation was committed by a person acting under color of law." Wideman v. Shallowford Community Hosp., Inc., 826 F.2d 1030, 1032 (11th Cir.1987) (internal quotations and citation omitted). Here, Plaintiff has not sufficiently demonstrated a violation of his right of free exercise of religion under the First Amendment. A prisoner is not entitled to an unfettered exercise of his religious belief; but rather, a "reasonable opportunity" to exercise and practice his religion. Cruz v. Belo, 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263(1972). Plaintiff has always had the opportunity to participate in Jumah on Friday afternoon. At no time was Plaintiff prohibited from attending the communal Muslim faith service on Friday afternoons. See Defendants' Exhibit B, E & G (responses). Moreover, Plaintiff is permitted religious literature subject to the Department's admissibility rules, possession of appropriate religious items, religious correspondence,

appropriate personal observation occasions, and the opportunity to meet with his or her spiritual advisor at regular intervals. See Defendants' Exhibit I. Nevertheless, to the extent a deprivation is believed to have occurred, the Department's practice of providing communal services for Muslim faith groups survives constitutional review as will be demonstrated by the following.

It is well established that inmates clearly retain protections afforded by the First Amendment, including the directive that no law shall prohibit the free exercise of religion. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348, 107 S.Ct. 2400, 2404 (U.S. 1987)(citing Pell v. Procunier, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974) & Cruz v. Beto, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972)). Nevertheless, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." O'Lone, 107 S.Ct. at 2404 (citation omitted). "Regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." O'Lone, 107 S.Ct. at 2404. This reasonableness test utilizes the standard of Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

In determining whether a particular regulation is valid under this test, a Court is to consider: (1) whether the regulation has a logical connection to the legitimate government interests invoked to justify it; (2) whether there are alternative means of exercising the rights that remain open to the inmate; (3) whether accommodation of the asserted constitutional right will have an impact on other inmates, guards, and prison resources; and (4) whether there are ready alternatives that fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests. See Turner, 107 S.Ct. at 2404 .

The Department of Corrections has an interest in extending to all inmates the greatest amount of freedom and opportunity for pursuing individual religious beliefs and practices, maintaining the orderly operation of institutions, and fairly distributing the limited resources of time, space, and supervision. See Defendants' Exhibit I. The policy of providing a communal service for all Muslims is rationally related to these interests. See Defendants' Exhibit I. Institutional chapels are multipurpose buildings, with inmates using the chapel for purposes of study, personal contemplation, as well as congregant worship of groups of varying sizes. The scheduling of activities for some necessarily crowds out the activities of others. See Defendants' Exhibit I. Additional noise and overflow can impact effective supervision. Moreover, provision of chaplaincy services is affected by staff shortages and the administrative responsibilities chaplains must perform, necessitating heavy reliance upon approved volunteers to conduct group services. See id. As such, consolidating groups with major doctrinal similarities promotes efficient use of chaplaincy resources for the institution's inmate population. Thus, the Defendants' application of this policy meets the first Turner factor, rational connection to legitimate government interest. See Boxer X v. Donald, 169 Fed.Appx. 555, 560, 2006 WL 463243, 4 (11th Cir. 2006)(finding that providing generic congregational services decreased the number of denominational services from an administratively unmanageable 100-plus denominations in the prison to less than fifteen generic religious services was reasonably related to the Georgia's legitimate penological interest in not overburdening its resources); see Shabazz v. Barrow, 2008 WL 660106, 4 (M.D.Ga.,2008) ("It is clear that the prison policy of providing one service for the Islamic faith has a logical connection to the legitimate governmental interests of maintaining order and avoiding the cost and organizational demands of providing services for each and every religious sect and school of thought"). Indeed, reliance on voluntary clergy alone

to conduct some religious services has been held by the courts to be reasonably related to security and budget concerns. See e.g. Shepard v. Peryam, 657 F.Supp.2d 1331, 1347 (S.D.Fla.,2009).

As to the second Turner factor, existence of alternate means of exercising the right of free expression, Plaintiff has retained the ability to participate in Jumah and other Islamic activities. Cf. Boxer X, 169 Fed.Appx. at 560 (finding the regulation which prevented separate services for Lost-Found Nation of Islam services but provided for a generic congregational service merely constrains the congregational aspects of the prisoner's worship but did not affect, for example, the ability to consult outside ministers, read and maintain religious materials in the prison cell, or perform individual religious exercises. Muslims in the Florida Department of Corrections are afforded accommodations for daily prayer, holidays, and permission to wear a kufi and possess a prayer rug. See Defendants' Exhibit L. Each Muslim inmate may pursue more specific beliefs through religious correspondence, by possessing faith-specific religious literature (subject to the Department's admissibility rules), and by receiving visits from a spiritual advisor. See Defendants' Exhibit I. A District Court in Georgia, evaluating a similar policy for inter-faith Muslim services, found that the ability of prisoners in the Valdosta State Prison to have pastoral visits from members of a specific school of thought provided an alternate means of exercising the prisoner's right to free exercise of religion. See Shabbazz v. Barrow, 2008 WL 660106, * 2.

The third factor of the Turner test, impact of accommodating Plaintiff's demand, is that eliminating the inter-faith policy would jeopardize chaplains' ability to provide religious for all Department inmates. Requiring chaplains to provide separate services for the Nation of Islam would disrupt the orderly operation of correctional institutions and establish a precedent that would be impossible to maintain for all of the numerous faith groups currently combined in the

weekly nondenominational Christian service. See Defendants' Exhibit I. As it is, Chaplaincy resources are severely stretched, with services being reduced overall due to recent budget cuts and increased reliance on approved volunteers. See Defendants' Exhibit I.

As to the fourth Turner factor, Plaintiff's argument that the two services could have continued is essentially a least restrictive alternative test. However, the Turner standard "does not impose a least-restrictive-alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." Overton v. Bazzetta, 123 S.Ct. 2162, 2169. A second service represents more than a *de minimis* cost where it undermines the fair distribution of the limited resources of time, space, and supervision, is inconsistent with Department policy, and sets a precedent that would be impossible to maintain for all of the numerous faith groups currently combined in the weekly nondenominational Christian service. In Shepard v. Peryam, 657 F.Supp.2d 1331, 1347 (S.D.Fla. 2009)

In affording inmates a reasonable opportunity to worship, a jail or prison is not required to allocate their resources, including facilities or personnel to different faiths in proportion to the number of inmates in each faith group or denomination. See Cruz v. Beto, 405 U.S. 319, 322, n. 2, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); Thompson v. Commonwealth of Ky., 712 F.2d 1078, 1081–82 (6 Cir.1983); see also Allard v. Abramajtyis, No. 94–2161, 1995 WL 293890, at *2 (6 Cir. May 12, 1995). *Rather, an institution must make a "good faith accommodation of the [inmate/prisoner's] rights in light of practical considerations."* See Freeman v. Arpaio, 125 F.3d 732, 737 (9 Cir.1997); Allen v. Toombs, 827 F.2d 563, 569 (9 Cir.1987) (citing Gittlemacker v. Prasse, 428 F.2d 1, 4 (3 Cir.1970)). Courts have held that jail or prison officials have no affirmative duty to provide inmates of particular faiths full time chaplains or priests, and may fulfill their good faith efforts to accommodate an inmate plaintiff's rights through volunteers who come from the community outside the institution. See Allen, supra 827 F.2d at 569; Akbar v. Gomez, 122 F.3d 1069, 1997 WL 547944, *2 (9 Cir. (Cal.)). See also Burrige v. McFaul, No. 97–

3950, 1999 WL 266246, at *2 (6 Cir. Apr. 23, 1999) (unpublished decision, in which the Sixth Circuit affirmed summary judgment for defendant on claim that prison officials failed to afford the plaintiff access to a rabbi; and in so holding, the Court stated that “[t]he First Amendment does not require prison officials to provide religious *1348 leaders of the inmate’s choice ... The prison minister swore in an affidavit that he had attempted to have a rabbi visit Burrige”); *A’la v. Cobb*, No. 98–5257, 2000 WL 303014, at *1 (6 Cir. Mar. 14, 2000) (rejecting Free Exercise claim; “The First Amendment does not require that prison officials provide inmates with the best possible means of exercising their religious beliefs ...”); *Riggins–El v. Toombs*, No. 96–2484, 1997 WL 809980, at *2 (6 Cir. Dec. 23, 1997) (rejecting Free Exercise claim; “As a general principle, a prison is not required to employ chaplains representing every faith among the inmate population ... Consequently, Riggins–El’s claim regarding the lack of a Muslim chaplain at IMAX is without merit.”); *Allard v. Abramajtys*, No. 94–2161, 1995 WL 293890, at *2 n. 1 (6 Cir. May 12, 1995) (affirming summary judgment for defendants; “To the extent that some of the cancelled meetings involve the failure of a volunteer practitioner of Native American rituals to appear at the prison, the plaintiff offers no reason why this failure to appear should be held against the prison authorities.”).

In the Florida Department of Corrections, Chaplaincy Services makes good faith accommodations for all 100,000+ prisoners, including Plaintiff, to express their faith in light of the concerns of security and good order within the limitations of finite resources time, space, and supervision. See Defendants’ Exhibit I. Accordingly, Defendants are entitled to summary judgment on this ground.

IV. Defendants are entitled to qualified immunity for individual capacity claims.

The purpose of qualified immunity is to

“protect[] government officials ‘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.’ ” *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). The defense “ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful.”

Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 2158, 150 L.Ed.2d 272 (2001). “Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit.” Lassiter v. Ala. A&M Univ., Bd. of Trs., 28 F.3d 1146, 1149 (11th Cir.1994) (en banc).

Assessing a claim of qualified immunity involves a two-step process: once a defendant raises the defense, the plaintiff bears the burden of establishing both that the defendant committed a constitutional violation and that the law governing the circumstances was already clearly established at the time of the violation. Pearson, 129 S.Ct. at 815–16. Following the Supreme Court's decision in Pearson, we are free to consider these elements in either sequence and to decide the case on the basis of either element that is not demonstrated. Id. at 818.

Youmans v. Gagnon, 626 F.3d 557, 562 (11th Cir. 2010).

To overcome Defendants' qualified-immunity defense, Plaintiff bears the burden of showing both that Defendants' conduct amounted to a constitutional violation and that the right violated was already “clearly established” at the time of Defendants' conduct. Youmans v. Gagnon, 626 F.3d 557, 562 (11th Cir.2010).

At the time of the complaint, pre-existing law certainly did not dictate or compel the conclusion that conducting inter-faith services or one Jumah service for inmates self-identifying with a Muslim faith group would substantially burden an inmate's free exercise of religious belief.

In 1998, Robert A. Harrison, a self-proclaimed orthodox Muslim, brought a lawsuit in the Northern United States District Court, in and for the Northern District of Florida, claiming that the Department of Corrections had violated his religious rights by establishing a policy that affords only one Jumah prayer for all Muslim inmates. See Defendants' Exhibit J, at 2. Plaintiff Harrison further alleged that by adopting a policy of allowing followers of the Nation of Islam to speak at Muslim functions, Plaintiff's rights were compromised by having to worship with

Nation of Islam adherents. See Defendants' Exhibit J, at 2. Following review of the policy which allowed followers of Nation of Islam to speak at Muslim functions and permitted only one prayer service for the two groups, Magistrate William C. Sherrill found the policy to be reasonable. See Defendants' Exhibit J, at 8. Magistrate Sherrill opined:

There are obviously sharp doctrinal conflicts between the tenets of the Nation of Islam and sects of Orthodox Islam, just as there are sharp conflicts between the several sects of Orthodox Islam. [footnote omitted] There are similarly sharp doctrinal conflicts between Seventh Day Adventists, Mormons, Methodists, Baptists, Presbyterians, Lutherans, Episcopalians, Anglicans, and many other Protestant Christian sects. But it is too costly for the prison to provide separate services and places of worship for separate Protestant Christian sects, and it cannot do so for separate Islamic sects or splinter groups either. Further Plaintiff has alternate means of exercising his First Amendment rights. He may still worship and grow in his faith through individual prayers, possession of personal religious property, access to personal spiritual advisors, and other communal worship and prayer. The First Amendment was not violated as to count one.

See Defendants' Exhibit J, at 8-9. Senior United States District Judge William Stafford adopted the findings and recommendation of the Magistrate. See Defendants' Exhibit J, at 11-12.

More recently, a jurist from the United States District Court for the Middle District of Florida, found that an FDOC inmate from Avon Park Correctional Institution failed to state a cause of action for violation of his right to free exercise of religion under the First Amendment where Defendants did not provide a separate Nation of Islam service separate and apart from the Islamic services currently provided by the institution. See Brown v. Sec., Dept. of Corrections, 2011 WL 766388, 1 (M.D.Fla.,2011) (slip opinion attached as Exhibit K). The same Court found that Defendants were entitled to qualified immunity. Brown, 2011 WL 766388, at7 (M.D.Fla. 2011). Further, similar policies to the Department's have survived Turner analysis against similar claims. See Boxer, 169 Fed.App. 555; Shabazz, 2008 WL 647524,*1.

Accordingly, Defendants are entitled to qualified immunity for damages against them in their individual capacities.

V. Plaintiff has failed exhaust administrative remedies so as to state a claim for retaliation.

Finally, to the extent Plaintiff attempts to claim retaliation for what he alleges was a retaliatory transfer on or about January 23, 2010, Plaintiff has failed to properly demonstrate administrative exhaustion for any such claim. The Prison Litigation Reform Act requires that a prisoner exhaust all available administrative remedies *before* bringing a suit challenging prison conditions. 42 U.S.C. § 1997e(a). In Porter v. Nussle, 122 S. Ct. 983, 534 U.S. 516 (2002), the United States Supreme Court held that 42 U.S.C. § 1997e(a) applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. “Exhaustion is no longer left to the discretion of the district court, but is mandatory.” Woodford v. Ngo, 548 U.S. 81, 85, 126 S.Ct. 2378, 2382 (U.S. 2006) (citing Booth v. Churner, 532 U.S. 731, 739, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001)).

For prisoners to properly “exhaust administrative remedies in accordance with the PLRA, prisoners must ‘properly take each step within the administrative process.’” Bryant v. Rich, 530 F. 3d 1368, 1378 (11th Cir. Ga. 2008)(citing Johnson v. Meadows, 418 F.3d 1152, 1158 (11th Cir. 2005). “The ‘applicable procedural rules that a prisoner must properly exhaust, are defined not by the PLRA, but by the prison grievance process itself.’” Jones v. Bock, 127 S.Ct. 922 (U.S. 2007)(citing Woodford v. Ngo, 126 S.Ct. at 2378 (U.S. 2006). The Florida Department

of Corrections has established a grievance procedure in Fla. Admin. Code Ann. §§ 33-103.001 to 33-103.019. Chandler v. Crosby, 379 F.3d 1278, 1288 (11th Cir. 2004).

Plaintiff filed his civil rights action in this case on October 9, 2010. DE# 1. Rebecca Padgham, Management Analyst I, with the Florida Department of Corrections, Bureau of Inmate Grievance Appeals, in Tallahassee, reviewed the appeal file kept by the Bureau of Inmate Grievance Appeals for JOHNNIE BOUIE, DC# 111099. See Defendants' Exhibit H. These records reflect administrative appeals received at the Bureau of Inmate Grievances pursuant to rules 33-103.007(1), et seq. Ms. Padgham found no administrative appeal filed by Plaintiff between January 23, 2010 and October 9, 2010 alleging a retaliatory institutional transfer. See Defendants' Exhibit H. Accordingly, any claim that Plaintiff would bring alleging retaliatory transfer on or about January 23, 2010, has not been properly exhausted prior to filing the instant lawsuit and, pursuant to 42 U.S.C. § 1997e(a) may not be reviewed and must be dismissed.

Respectfully Submitted,

PAMELA JO BONDI
Attorney General

/s/Joy A. Stubbs

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to: Johnnie Bouie Jr., 111099, Avon Park Correctional Institution, P.O. Box 1100, County Road 64 East, Avon Park, Florida 33826-1100 on this 1st day of March, 2012.

/s/ JOY A. STUBBS

Joy A. Stubbs

Assistant Attorney General

NAME: BOUIE, JOHNNIE C. JR.. DOC NO: 111099 STATUS: ACTIVE

THE FOLLOWING ENTRIES REFLECT THE OFFENDER'S INTERNAL MOVEMENTS AND JOB ASSIGNMENTS DURING INCARCERATION

DATE	--- CURRENT INCARCERATION ---			
	FACILITY	HOUSING	ASSIGNMENT AM	ASSIGNMENT PM
12/24/2005	MARION C.I.	F3111L	LAW CLERK - TRAI	LAW CLERK - TRAI
01/05/2006	MARION C.I.	F3111L	LAW CLERK - CERT	LAW CLERK - CERT
08/09/2006	MARION C.I.	D2207L	CONFINEMENT-ADMI	CONFINEMENT-ADMI
08/14/2006	CFRC-EAST	E2109L	IN-TRANSIT	IN-TRANSIT
08/17/2006	S.F.R.C.	I1210L	IN-TRANSIT	IN-TRANSIT
08/22/2006	OKEECHOBEE C.I.	D1212L	RECEPTION/ORIENT	RECEPTION/ORIENT
08/29/2006	OKEECHOBEE C.I.	D1212L	HOUSEMAN	UNASSIGNED-OPEN
10/03/2006	OKEECHOBEE C.I.	D1212L	EDUCATION AIDE	EDUCATION AIDE
02/14/2007	OKEECHOBEE C.I.	D2115L	EDUCATION AIDE	EDUCATION AIDE
07/06/2007	OKEECHOBEE C.I.	D2115L	HOUSEMAN	UNASSIGNED-OPEN
10/01/2007	OKEECHOBEE C.I.	D2115L	EDUCATION AIDE	EDUCATION AIDE
10/21/2008	S.F.R.C.	A1201U	IN-TRANSIT	IN-TRANSIT
10/21/2008	S.F.R.C.	A2108L	IN-TRANSIT	IN-TRANSIT
10/23/2008	CFRC-EAST	E2142S	IN-TRANSIT	IN-TRANSIT



INTERNAL MOVEMENTS AS OF 01/30/12 PAGE: 20
NAME: BOUIE, JOHNNIE C. JR. DOC NO: 111099 STATUS: ACTIVE

THE FOLLOWING ENTRIES REFLECT THE OFFENDER'S INTERNAL MOVEMENTS AND JOB ASSIGNMENTS DURING INCARCERATION

--- CURRENT INCARCERATION ---				
DATE	FACILITY	HOUSING	ASSIGNMENT AM	ASSIGNMENT PM
10/28/2008	HARDEE C.I.	F2105L	RECEPTION/ORIENT	RECEPTION/ORIENT
10/30/2008	HARDEE C.I.	F2105L	ITA/CTTP TRAININ	ITA/CTTP TRAININ
01/13/2009	CFRC-MAIN	B4111L	IN-TRANSIT	IN-TRANSIT
01/15/2009	S.F.R.C.	J2212L	IN-TRANSIT	IN-TRANSIT
01/20/2009	OKEECHOBEE C.I.	E2113L	RECEPTION/ORIENT	RECEPTION/ORIENT
01/23/2009	OKEECHOBEE C.I.	E2113L	INMATE TEACHING	INMATE TEACHING
01/26/2010	S.F.R.C.	H3209L	IN-TRANSIT	IN-TRANSIT
02/04/2010	CFRC-EAST	E2120L	IN-TRANSIT	IN-TRANSIT
02/09/2010	AVON PARK C.I.	B3204L	RECEPTION/ORIENT	RECEPTION/ORIENT
02/15/2010	AVON PARK C.I.	A2115L	RECEPTION/ORIENT	RECEPTION/ORIENT
02/16/2010	AVON PARK C.I.	A2115L	HOUSEMAN	HOUSEMAN