

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SULAIMAN WALI MU'MINUN
(formerly known as ROBERT A. HARRISON),¹

Plaintiff,

vs.

4:98cv265-WS

MICHAEL W. MOORE,
TYRONE BOYD,
CHARLES MASK,
WILSON MEARS,
and DAVID PIPPING,



Defendants.

REPORT AND RECOMMENDATION

Previously, counts two, three, and five of Plaintiff's amended complaint were dismissed. Docs. 52, 59. Defendants' special report, construed as a motion for summary judgment, doc. 64, is pending. Plaintiff, an inmate proceeding *pro se*, was given notice of his obligation to respond to the motion, *id.*, and has been given

¹ Plaintiff's name was legally changed during the pendency of this lawsuit. Doc. 49.

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an extension of time in which to do so. Doc. 69. No response has been received from Plaintiff.

I. Allegations of the amended complaint

Plaintiff alleges that Defendants have violated his First Amendment right to the free exercise of his religion. Plaintiff is an Orthodox Muslim and adheres to the teachings of Islam. Doc. 15; *see also* doc. 1, p. 8. This cause proceeds only upon grounds one and four of the amended complaint. Counts two, three, and five have been dismissed. Docs. 52 (report and recommendation) and 59 (order adopting).

Ground one asserts that pursuant to policy established by the Department of Corrections' Central Office (Defendants Moore² and Boyd), there is only one Jumah prayer, regardless of the presence of different Muslim groups. Doc. 15, pp. 10-12. Within ground one, he also challenges the policy that non-qualified inmates (such as followers of Louis Farrakhan's Nation of Islam) are allowed to speak at Muslim functions. *Id.* Plaintiff states that "Orthodox Muslim[s] do not consider the Nation of Islam to be Muslims therefore worship at a service with them would be blasphemy." *Id.*, at 12. He contends that the Nation of Islam and his religion are distinctly different religions, particularly since the Nation of Islam recognizes a different prophet and treats his religion as a branch of Christianity.

² Michael Moore as current secretary of the department has previously been substituted for Harry K. Singletary, former secretary.

In ground four, Plaintiff claims that Defendants Mask, Mears, and Pipping have denied him the right to practice his religion by denying Id prayer on April 8, 1998. *Id.*, at 25. Plaintiff states that Id prayer was scheduled for 10:00 a.m. on April 8, 1998, to "celebrate the end of the official Hajj season" ³ *Id.* Plaintiff contends that this is an obligatory congregational prayer. Doc. 15, p. 26. A memorandum was issued giving notice of call-out for chapel for the inmates listed. *See* Doc. 15, ex. T. However, when Plaintiff arrived at the chapel, he "was turned away because the chaplains were not there and security claimed to have no knowledge [of] the scheduling of the prayer." Doc. 25, p. 25.

II. Legal standards governing a motion for summary judgment

On a motion for summary judgment Defendants initially have the burden to demonstrate an absence of evidence to support the nonmoving party's case. Celotex Corporation v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986). If they do so, the burden shifts to the Plaintiff to come forward with evidentiary material demonstrating a genuine issue of fact for trial. *Id.* Plaintiff must show more than the existence of a "metaphysical doubt" regarding the material facts, Matsushita Electric Industrial Co., LTD. v. Zenith Radio Corporation, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986), and a "scintilla" of evidence is insufficient. There must be such evidence that a jury could reasonably return a verdict for the party bearing the burden of

³ Hajj is the obligatory, once in a lifetime, pilgrimage to Mecca.

proof. Anderson v. Liberty Lobby, 477 U.S. 242, 251, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986). However, "the evidence and inferences drawn from the evidence are viewed in the light most favorable to the nonmoving party, and all reasonable doubts are resolved in his favor." WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988).

III. The relevant Rule 56(e) evidence

The events about which Plaintiff complains took place while he was incarcerated at Liberty Correctional Institution. Doc. 15. Liberty C.I. employs two full-time Chaplains. Doc. 46, ex. A. As a matter of policy, the Department of Corrections extends "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." Doc. 46, ex. A; ex. B.. Financial and facility limitations are considerations, however, in matters of scheduling and allowing religious expression. Doc. 15, ex. A. These "finite resources" must be considered in offering a "fair and balanced schedule providing for numerous faith group activities" *Id.*

There are "46 Muslim offenders at the institution, representing 4.2% of the offender population." Doc. 46, ex. D. "Of the 26.5 hours scheduled for various faith group programs at the chapel, 11.3% of those hours are scheduled for the Islamic community" *Id.* The space designated for religious programming at Liberty C.I. is a building with a small library, offices for the Chaplains, bathrooms,

and a large area than can be partitioned into two separate meeting areas. Doc. 46, ex. A. Religious activities are to be located primarily in this space⁴ as events that take place in the recreational yard "require special supervision by security staff and are open to the entire inmate population." Doc. 46, ex. A. Activities in the recreational yard "have popular entertainment value" and are very different than "using the recreational yard as a place for the sacred activity of a specific faith group" *Id.*

"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." Doc. 46, ex. A. "General Islamic teachings derived from the Koran provide a Jumah prayer opportunity that is available to every Muslim inmate." *Id.* Because of time, space, and supervision limitations, "separate services for the various Muslim schools of teaching would create a disturbance of the orderly operation of the facility." *Id.* The institution is unable to separate all of the various religious groups that currently meet together in "one Christian non-Roman Catholic service" and if separate services were instituted for the Muslims, an impossible precedent would be set. *Id.*

Muslim inmates may have personal scriptural or devotional books, and may also possess a prayer rug and koofi. Doc. 46, ex. C. Inmates may seek additional

⁴ Additionally, appropriate supervision can be afforded in this setting. Doc. 15, ex. A.

personal religious fulfillment through "religious correspondence," literature, and "may be visited by the spiritual advisor of his/her choice." Doc. 46, ex. A. The library at Liberty C.I. "has numerous books about Islam that are available for study in the library as reference books to all inmates . . . on an equal basis." Doc. 46, ex. A. Additionally, the chapel library has numerous audio and video Islamic tapes that inmates may utilize. Doc. 46, ex. D. The Chaplains also subscribe to a monthly educational and instructional paper called "The Muslim Journal" which may be read by the inmates. Doc. 46, ex. D.

Muslim inmates may celebrate the Islamic Feast of Eid al Adha by attending a congregational prayer in the morning and an afternoon feast. Doc. 46. It is also a "work proscription day." *Id.* Muslim inmates may choose pork-free diets and the institution makes special arrangements for the month-long observance of Ramadan. Doc. 46.

"On April 8, 1998, the Islamic Feast of Eid al Adha was scheduled." Doc. 46, ex. D. "The feast took place as scheduled at 3:00 p.m. However, a special congregational prayer service before noon did not materialize due to a staffing shortage and related security concerns." *Id.* Inmates were, however, able to pray on an individual basis. *Id.* Florida Administrative Code section 33-3.014(3)(a) provides that "[a]ll religious services, rituals or activities at the institution shall be conducted or supervised by the chaplain." Doc. 46, ex. B.

Small groups of inmates are not permitted to gather in the recreational yard for a number of reasons. Doc. 15, ex. A. A few of those reasons are that: "[i]nmates are not permitted to have authority over other inmates;" the disruption created by distinguishing between religious groups and non-religious groups meeting in the yard; inability to properly supervise numerous groups in the recreational yard; need to minimize opportunities for disruptive groups (like gangs) to conduct meetings; and "[d]esignated religious space is already available on an equitable basis." *Id.*

IV. Analysis

While prisoners retain First Amendment rights, including the First Amendment right of free exercise of religion, regulations or policies "alleged to infringe constitutional rights [in prison] 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. 340, 349, 107 S. Ct. 2400, 2404, 96 L. Ed. 2d 282 (1987).⁵ Challenged prison regulations should be upheld if they are "reasonably related to legitimate penological interests." O'Lone, 482 U.S. at 350, *utilizing the standard of* Turner v. Safley, 482 U.S. 78,

⁵ In City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), the Court held the Religious Freedom Restoration Act, (RFRA) 42 U.S.C. § 2000bb et seq., unconstitutional as exceeding Congress's authority under the Constitution. The Court's decision marks the return to the standard employed in Employment Div., Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), and in the context of prison cases, O'Lone v. Shabazz, 482 U.S. 342.

107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Also relevant to the court's consideration is whether an "alternative means of exercising the right . . . remain open to prison inmates." *Id.* at 351.

Thus, to find a free exercise violation in the prison context, a plaintiff must demonstrate that prison officials have employed a policy or regulation, not reasonably related to any legitimate penological interest or security measure, which substantially burdens a practice of his religion or prevents him from having a religious experience which his faith mandates. This interference must be more than an inconvenience. The burden must be substantial and interfere significantly with Plaintiff's practice of his religious beliefs. *Cf. Thornburgh v. Abbott*, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884, 104 L. Ed. 2d 459 (1989) (noting that O'Lone found prison regulations valid in part because the prisoners were permitted to participate in other Muslim religious ceremonies.).

Measured by these standards, Plaintiff's two remaining claims fail. The policy which allows followers of the Nation of Islam to speak at Muslim functions and permits only one prayer service for the two groups is reasonable in a prison. 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.⁶ There are similarly sharp doctrinal conflicts

⁶ Defendants point out that in Muhammad v. City of New York Dept. of Corrections, 904 F. Supp. 161, 167 (S.D. N.Y. 1995), the court found some twenty to twenty-six different Muslim sects emerging from just the Nation of Islam

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.

The claim that Plaintiff's First Amendment rights were violated by having been denied "Id prayer" on a single occasion is likewise without merit. While Plaintiff and other Muslim inmates were unable to congregate together for prayer and that day, they were permitted to pray individually. It is undisputed that the cancellation of the service was an oversight resulting from a staffing shortage. Indeed, the feast was celebrated as planned. This isolated occurrence did not substantially burden the exercise of Plaintiff's religion.

alone. If each of these groups wanted a separate service, it is easy to see that no time would be left for any other groups to meet in the chapel. Doc. 46, p. 14.

V. Conclusion

In light of the foregoing, it is respectfully **RECOMMENDED** that Defendants' motion for summary judgment, doc. 46, be **GRANTED**, and the Clerk be directed to enter judgment in favor of Defendants on all claims.

IN CHAMBERS at Tallahassee, Florida, this 16th day of August, 2000.



WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SULAIMAN WALI MU'MINUN,
f/k/a ROBERT A. HARRISON,

Plaintiff,

v.

4:98cv265-WS

MICHAEL W. MOORE,
TYRONE BOYD, CHARLES
MASK, WILSON MEARS, and
DAVID PIPPING,

Defendants.

ORDER ADOPTING THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Before the court is the magistrate judge's report and recommendation docketed August 16, 2000. See Doc. 71. The magistrate judge recommends that Defendants' motion for summary judgment be granted.

The parties have been furnished copies of the report and recommendation and have been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1). Upon de novo review of the record, the court has determined that the report and recommendation should be adopted.

U.S. DISTRICT CT.
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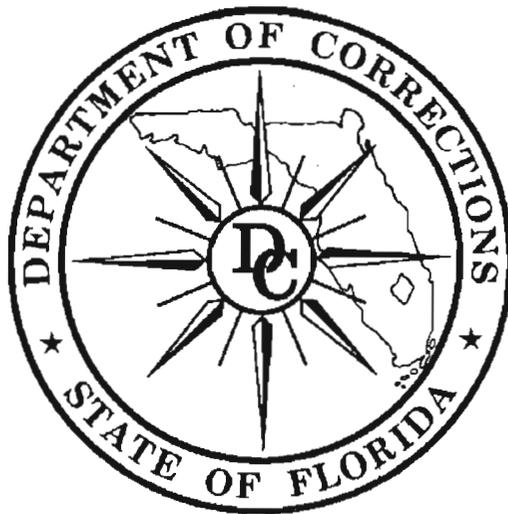
Accordingly, it is ORDERED:

1. The magistrate judge's report and recommendation is ADOPTED and incorporated by reference into this order.
2. Defendants' motion for summary judgment (doc. 46) is GRANTED.
3. The clerk is directed to enter judgment in favor of Defendants on all claims.

DONE AND ORDERED this 11th day of September, 2000.


WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

**FLORIDA
DEPARTMENT OF CORRECTIONS
CHAPLAINCY SERVICES**



**RELIGION TECHNICAL GUIDE
FOR
SELECTED RELIGIOUS GROUPS**

Governor
CHARLIE CRIST

Secretary
JAMES McDONOUGH



Islam

Sacred Text:

Holy Qur'an

Special Days/Holy Days: *Islamic Holy Days*

Work Proscription Days: (Note: The Islamic calendar (or Hijri calendar) is a purely lunar calendar. It contains 12 months that are based on the motion of the moon, and because 12 synodic months is only $12 \times 29.53 = 354.36$ days, the Islamic calendar is consistently shorter than the western calendar year. The calendar is based on the Qur'an (Sura IX, 36-37) and its proper observance is a sacred duty for Muslims. Work proscription days for Muslims change yearly and will be noted on the Department's Religion Calendar)

Eid ul Fitr—the feast of fast breaking.

Eid ul Adha—the feast of sacrifice.

Significant Days: (Note: Muslims use a lunar calendar, thus the dates of their work proscription days change yearly and will be noted on the Department's Religion Calendar)

1. *Eid ul Fitr
2. *Eid ul Adha
3. *Ramadan (30 days)
4. *Lailat ul Qadr [Night of Power (during the last ten days of Ramadan)]

*Note: See Appendix 1 for *general guidelines* regarding these significant days.

Devotional Items/Head Gear/Clothing:

1. One Koofi (Kufi) (for men) cap color should be white only (may be worn at all times)
2. Scarf (for women) may be white or blue (two of each color) (may be worn at all times)
3. Prayer rug (1)
4. Religious Beads (Dhikr beads) they are either 99 or 33 in number, for security reasons the strand of 33 is preferable. Beads must be all of one color—black, white, clear, or natural (wood or seed) and should be carried in the pocket, not worn around the neck. Note: Islam adopted the practice of saying pieties while counting with beads. The usual *subha* or *tasbeeh* ("to praise") has 99 beads on which the devotee says the 99 names of Allah found in the Quran. This may be abbreviated to 33 beads cycled three times. Dhikr beads are not to be confused with "worry beads." Worry beads are used in some Muslim countries but carry no religious purpose and serve only to occupy the hands.

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Diet:

Pork and all of its derivatives are not permitted.

Private Worship:

All individual Muslim inmates must be permitted to take the time from assigned duties to pray five times a day:

- Before sunrise at the first break of day
- Noon, between midday and before the time for the midafternoon prayer
- Afternoon, midway between the noon prayer and the sunset prayer
- Sunset, anytime immediately after sunset and up to the disappearance of the red glow of twilight (~90 minutes)
- Night, anytime after the disappearance of the red glow of twilight. All prayers are to be performed at a clean place.

Note: All prayers are to be performed in a clean place. Any of these prayers can be said in a ten to fifteen minute time period. The Muslim must face Mecca. Normally, routine Muslim prayer is not to interrupt scheduled educational, vocational, work or treatment assignments.

Group Worship:

Friday is the most important day of worship in Islam. It is the weekly occasion earmarked by God for Muslims to express their collective devotion, Jumah Prayer. Islamic lay jurists generally agree that two or more adult Muslims are usually required to hold the Friday congregational service. Ritual washing (ablution) is required before the prayer. The Qur'an makes peculiar reference to circumstances where a full ablution may not be possible. The prayer starts with a formal sermon (Khutbah) and is followed by the prayers. ***If a volunteer is not present then inmate speakers for the Khutbah must be rotated on a weekly basis. The choice of speakers is at the chaplain's discretion as long as the speakers are rotated.*** All kinds of normal work are allowed on Fridays as on any other weekday. Friday congregational prayer is obligatory for all Muslim inmates, both male and female. Jumah prayer for Muslims is scheduled every Friday between 11:30 a.m. and 2:30 p.m. for a one to two hour service.

Taleem services are studies on Islamic beliefs, culture and /or history. Taleem services may be accomplished with videos, study times with qualified volunteers or even through scheduled individual study.

Clergy:

An Imam generally leads the prayer and gives the sermon. An Imam can also serve as a spiritual advisor.

Basic Beliefs:

The most important aspects of the Islamic practices are the five pillars of Islam:

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- The Shahada or declaration of faith: The individual Muslim is to believe and pronounce that “There is no God worthy of worship except Allah (God) and Muhammad is his servant and messenger.”
- Prayer (Salat) is the obligatory (Fardh) worship which is observed five times a day (see above under Private Worship) and prostrates himself/herself before God in prayer as prescribed by religious law.
- Charity (Zakat) is a religious tax that entails payment of two and one half percent of one’s annual savings or capital. It is to be used primarily for aiding the poor and the needy.
- Fasting (Saum) during the month of Ramadan is obligatory for every Muslim man and woman. In Islam, fasting means abstaining completely from food, drink, smoking, and marital relations every day of Ramadan before the break of dawn until sunset. Ramadan, the holy month of fasting, is the ninth lunar month of the Islamic calendar. Fasting infuses the individual with a genuine virtue of deprivation, vigilance, and sound conscience, discipline, patience self control, and sympathy to the needy and poor. Adequate, suitable food and drink should be provided at the commencement and the conclusion of the fast each day to prevent ill health. A Muslim may be exempt from fasting if he/she is ill. Women are exempt when they are pregnant or when menstruating. All missed days however have to be made up on other days. It is highly recommended that Muslims increase the recitation of the holy Qur’an and observe the nightly prayers called Taraweeh.
- Pilgrimage (Hajj) to the holy city of Mecca, in which the Ka’ba, the holiest shrine of Islam is located. The sacred Ka’ba, toward which all Muslims turn their faces in prayer, was built by the patriarch prophet Abraham as the First House of God. The performance of Hajj is obligatory, at least once in a lifetime, upon every Muslim, male or female, who is financially and physically capable.

References:

Khouj, Dr. Abdullah Muhammad. Islam: Its Meaning, Objectives, and Legislative System. Arlington, VA.: Saudi Arabian Television in the USA, 1994.
Magida, Arthur J. and Matlins, Stuart M., eds. How to Be a Perfect Stranger, Vol. I. Woodstock, Vermont: Skylight Paths Publishing, 1999.
Siddiqui, Muhammad Abdul Aleem. Elementary Teachings of Islam. Chicago: Kazi Publications, 1992.
White, Gayle Colquitt. Believers and Beliefs. New York: Berkley Books, 1997.
<http://www.islamworld.net>

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**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' Notice of Filing Exhibit K to Defendants' Motion for Summary Judgment

Defendants, through counsel, give notice of filing Exhibit K to Defendants' Motion for Summary Judgment [DE # 81] which was inadvertently omitted from the initial filing.

Respectfully Submitted,

**PAMELA JO BONDI
Attorney General**

/s/Joy A. Stubbs

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 5th day of March, 2012.

/s/ JOY A. STUBBS

Joy A. Stubbs

Assistant Attorney General

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION



ALBERT BROWN, JR.,

Plaintiff,

v.

Case No. 8:10-cv-2101-T-17TGW

SEC., DEPT. OF CORRECTIONS,
ALEX TAYLOR,
JEFFERY TROVILLION,
FRANCISCO TREPALACIOS,
STEVEN CLARK,

Defendants.

ORDER

This cause is before the court on Defendants McNeil, Trovillion, Trespalacios, Clark, and Taylor's motion to dismiss Plaintiff Brown's 42 U.S.C. § 1983 civil rights complaint. (Doc. 22). A review of the motion, Brown's response to the motion (Doc. 24) and applicable law, demonstrates that, for the following reasons, Defendants' motion to dismiss will be granted.

PLAINTIFF'S ALLEGATIONS

Brown alleges that Defendants have violated his constitutional rights by failing to provide him, a Nation of Islam follower, chapel services and religious videos separate and apart from the Islamic services currently provided by the institution. (Doc. 1, Section VII.) Brown claims that he is a devout member of the Nation of Islam (N.O.I.) religion and that N.O.I. is different from “conventional” Islam. Id. Brown states he has suffered mental stress for being forced to conform to the concept of Islam that is fundamentally different from his own. (Doc. 1, Section, VI.) He alleges that other religions are provided greater access to religious services and material. (Doc. 1, Section VII.) Brown seeks an “equal opportunity to practice his faith.” (Doc. 1, Section VIII). Brown seeks injunctive relief in addition to compensatory and punitive damages from each Defendant. (Id.)

STANDARD FOR RULE 12(b)(6) MOTION TO DISMISS

On a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must view the complaint in the light most favorable to the plaintiff. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). Thus, “when ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89 (2007). The rules of pleading require only that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a)(2), Fed.R.Civ.P.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court expressly “retired” the “no set of facts” pleading standard under Rule 8(a)(2) that the Court had previously established in *Conley v. Gibson*, 355 U.S. 41, 47 (1957). *Twombly*, 550 U.S. at 563.

While a complaint attacked by a Rule 12(b)(6) motion need not be buttressed by

detailed factual allegations, the plaintiff's pleading obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. As a general proposition (and setting aside for the moment the special pleading requirements that attach to § 1983 claims subject to a qualified immunity defense), the rules of pleading do "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. Judicial 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*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555). Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. *Twombly*, 550 U.S. at 555-56.

Twombly applies to § 1983 prisoner actions. *Douglas v. Yates*, 535 F.3d 1316 (11th Cir. 2008). As the Eleventh Circuit has explained, "[w]e understand *Twombly* as a further articulation of the standard by which to evaluate the sufficiency of all claims brought pursuant to Rule 8(a)." *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 n. 43 (11th Cir. 2008).

The Supreme Court has since applied the *Twombly* plausibility standard to another civil action, *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937 (2009). In evaluating the sufficiency of *Iqbal's* complaint in light of *Twombly's* construction of Rule 8, the Court explained the "working principles" underlying its decision in *Iqbal*. 129 S. Ct. at 1949.

First, the Court held that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* Second, restating the plausibility standard, the Court held that "where the well-pleaded facts do not

permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show [n]'-that the pleader is entitled to relief.' " *Id.* at 1950 (quoting Fed.R.Civ.P. 8(a)(2)). The Court suggested that courts considering motions to dismiss adopt a "two-pronged approach" in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* Importantly, the Court held in *Iqbal*, as it had in *Twombly*, that courts may infer from the factual allegations in the complaint "obvious alternative explanation[s]," which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer. *Id.* at 1951-52 (quoting *Twombly*, 550 U.S. at 567). Finally, the Court in *Iqbal* explicitly held that the *Twombly* plausibility standard applies to all civil actions because it is an interpretation of Rule 8. *Id.* at 1953.

DISCUSSION

Brown's claims should be dismissed pursuant to 28 U.S.C. §1915(e)(2)(B)(ii) and (iii). Because Brown is proceeding in forma pauperis, his complaint is subject to the provisions of 28 U.S.C. §1915(e)(2), which provide:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that-

- (A) the allegation of poverty is untrue; or
- (B) the action or appeal--
 - (i) is frivolous or malicious;
 - (ii) fails to state a claim on which relief may be granted; or
 - (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915. Brown's complaint should be dismissed pursuant to provisions (ii) and (iii) of 28 U.S.C. 1915(3)(2) the aforementioned statute.

Provision (ii) – failure to state a claim on which relief may be granted.

Brown's allegations, considered separately or collectively, and read in the light most favorable to Brown, are insufficient to state a claim on which relief may be granted. In determining whether a complaint should be dismissed pursuant to §1915(e)(2)(b)(ii), courts utilize the same guidelines as when proceeding under Federal Rule of Civil Procedure 12(b)(6). *Mitchell v. Farcass*, 112 F.3d 1483, 1485 (11th Cir.1997). The allegations are accepted as true and are construed in the light most favorable to Plaintiff. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1393 (11th Cir.1997); see also, *Welch v. Lahey*, 57 F.3d 1004, 1008 (11th Cir.1995).

Brown has failed to allege specific constitutional violations. However, assuming Brown alleges that Defendants' actions violated Brown's First Amendment rights or the Equal Protection Clause of the Fourteenth Amendment, Brown has failed to state a cause of action on which relief may be granted.

First Amendment Claim

To the extent Brown challenges the Defendants' actions pursuant to the Free Exercise Clause of the First Amendment, Brown has not demonstrated a violation. 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(1972). Additionally, "while inmates maintain a constitutional right to freely exercise their sincerely held religious beliefs, this right is subject to prison authorities' interests in maintaining safety and order." Jackson, at *2 (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987); *Turner v. Safley*, 482 U.S. 78 (1987); *Cruz*, 405 U.S. at 322). A prison regulation may impinge on an inmate's constitutional rights when the regulation is

reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 89. To determine whether a prison policy is reasonable, a court must determine (1) whether there is a “valid, rational connection” between the prison regulation and the legitimate governmental interest put forth to justify the regulation; (2) whether, under the restriction imposed, a prisoner has alternative means for exercising the asserted constitutional right; (3) the impact that accommodating the asserted constitutional right will have on prison staff, inmates, and the allocation of prison resources; and (4) whether the regulation in question is an “exaggerated response” to prison concerns. *Id.* at 89-91.

However, prior to determining whether a policy is reasonable pursuant to *Turner*, an infringement must first be established. *Jackson*, at *3. That is, whether a policy substantially burdens the Plaintiff's ability to practice his religion or prevents him from “engaging in conduct or having a religious experience” mandated by his faith. *Id.* The Supreme Court has held that a substantial burden is one that “puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981). Here, Brown does not allege that a worship group or ministry is essential to practicing his religion nor that watching religious videos is conduct mandated by his religion. (Doc. 1) He also does not state the failure to engage in these activities places a substantial burden on him to modify or violate his beliefs. (*Id.*) Further, while Brown claims that attending the “conventional” Islam services causes him mental stress, Brown attends these services by his own choosing. The Institution does not force or require prisoners to attend religious services. Brown is free to pray and perform his own individual religious exercises in a manner that does not violate the Department's rules and regulations. Based on the foregoing, Brown has not demonstrated that the

Department's policy creates a substantial burden on Brown's ability to exercise his religion nor does it place pressure on him to modify or violate his religious beliefs.

However, assuming that the Institution's policy of providing religious services for a broad range of religious groups and not specific sects or subsets, does impinge on Brown's First Amendment rights, similar policies have survived *Turner* analysis against similar claims. See *Boxer v. Donald*, 169 Fed.App. 555, 2006 WL 463243 (11th Cir. 2006)(holding that the denial of inmate's request for Lost-Found Nation of Islam services did not violate his First Amendment rights); *Shabazz v. Barrow*, 2008 WL 647524,*1(M.D. Ga. 2008)(finding no First Amendment violation where a member of the Nation of Islam was denied a separate worship service); *Nation of Islam v. Michigan Dept. of Corrections*, 1995 WL 631589, 1 (6th Cir. 1995) (finding that the decision to deny the Nation of Islam prisoners' request for individual services and meetings was reasonable).

In *Al-Hakim v. Taylor, et al.*, 4:01cv187, the United States District Court for the Northern District of Florida reviewed the case of an inmate of the Florida Department of Corrections. Among his contentions, Al-Hakim claimed that the Nation of Islam did not have an official scheduled place and time for worship services at Wakulla Correctional Institution. See Exhibit 1 to this Order at page 2 (Report and Recommendation of Magistrate William C. Sherrill). Despite Plaintiff's allegation that the Department had combined the Nation of Islam service with that of another Muslim group, the Magistrate wrote:

Lack of available space and volunteers are limitations which make it reasonably necessary to combine services for groups of similar faiths. Various Islamic groups undoubtedly have distinctions and differences in their beliefs, but that does not mean that they cannot combine to worship. Indeed, the evidence shows that Christian religious groups combine to worship as

well.

See Exhibit 1 at page 17.

Accordingly, to the extent Brown claims the Defendants' actions were a violation of the First Amendment, he has failed to state a claim upon which relief may be granted.

Equal Protection Claim

To the extent Brown raises an Equal Protection claim, he has not demonstrated a violation. The Equal Protection Clause requires that the government treat similarly situated people in a similar manner. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To establish an equal protection claim, “a prisoner must demonstrate that (1) he is similarly situated to other prisoners who received more favorable treatment; and [that] (2) the state engaged in invidious discrimination against him based on race, religion, national origin, or some other constitutionally protected basis.” *Sweet v. Sec’y Dep’t of Corr.*, 467 F.3d 1311, 1318-19 (11th Cir.2006); see also *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 n. 6 (11th Cir.2008) (noting that “the equal protection clause prohibits only intentional discrimination”). Here, the facts do not support either component of the test.

First, as Brown states, he practices a sect of Islam that is different from the “conventional” Islam. Thus, Brown must first allege that similarly situated prisoners, such as inmates that are Baptist or Methodist, have been provided separate chapel services outside of the Christian services already provided. Cf. *Boxer X*, at * 4. Brown makes no such statement. Brown only states that services are provided for “Protestants, Jewish, Catholic, and Hebrew Israelites adherents.” (Doc. 1, Section VII). However, even assuming Brown has alleged that the Institution provides similarly situated prisoners with more favorable treatment, that allegation only goes to the first equal protection requirement. With

regard to the second requirement, the facts, viewed in the light most favorable to Brown, do not establish that the Defendants' decision to limit the number of chapel services provided by the Institution is a product of intentional discrimination.

Therefore, Brown has failed to allege and demonstrate an Equal Protection claim. See *Patel v. United States Bureau of Prisons*, 515 F.3d 807, 815-16 (8th Cir.2008) (concluding that prisoner's equal protection claim failed because he had not shown that the prison's decision to serve kosher entrees and not halal entrees was motivated by intentional or purposeful discrimination).

Provision (ii) - seeks monetary relief against a defendant who is immune from such relief.

Eleventh Amendment Immunity

To the extent Brown sues Defendants in their official capacities, Defendants are immune from suit in federal court pursuant to the Eleventh Amendment. The Eleventh Amendment provides immunity by restricting federal courts' judicial power:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

The Eleventh Amendment protects a State from being sued in federal court without the State's consent. *McClendon v. Georgia Dep't of Cmty. Health*, 261 F.3d 1252, 1256 (11th Cir. 2001). Eleventh Amendment immunity also bars suits brought against employees or officers sued in their official capacities for monetary damages because those actions actually seek recovery from state funds. See *Kentucky v. Graham*, 473 U.S. 159, 165-68

(1985); *Hobbs v. Roberts*, 999 F.2d 1526, 1528 (11th Cir. 1993). Eleventh Amendment immunity applies unless Congress validly abrogates that immunity or the state waives the immunity and consents to be sued. See *Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1524 (11th Cir. 1990). It is well established that Congress did not intend to abrogate a state's Eleventh Amendment immunity in § 1983 damage suits. See *Quem v. Jordan*, 440 U.S. 332, 340-45 (1979); *Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490 (11th Cir. 1995). Additionally, Florida has not waived its sovereign immunity or consented to be sued in damage suits brought pursuant to § 1983. See *Gamble v. Florida Dep't of Health & Rehabilitative Servs.*, 779 F.2d 1509, 1513 (11th Cir. 1986); *Zatler v. Wainwright*, 802 F.2d 397, 400 (11th Cir. 1986); *Schopler v. Bliss*, 903 F.2d 1373, 1379 (11th Cir. 1990).

Brown brings this action in federal court pursuant to 42 U.S.C. §1983. Brown fails to allege or prove that Congress has abrogated the State of Florida's immunity from suits of this nature, or that the State of Florida has otherwise waived its immunity from suit. Moreover, states and state officials acting in their official capacities are not persons for the purposes of lawsuits brought pursuant to Title 42 U.S.C. §1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). Thus, to the extent that Brown is suing Defendants in their official capacity, his complaint must be dismissed.

Qualified Immunity

To the extent Brown sues Defendants in their individual capacities; they are entitled to qualified immunity. "Qualified immunity allows government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, and protects from suit "all but the plainly incompetent or one who is knowingly violating the federal law."

Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002)(quoting *Willingham v. Loughnan*, 261 F.3d 1178, 1187 (11th Cir 2001)). “Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Kingsland v. City of Miami*, 382 F.3d 1220, 1231 (11th Cir.2004) (quotations marks omitted). The defense of qualified immunity serves important public policies. *Ray v. Foltz*, 370 F.3d 1079, 1082 (11th Cir. 2004)(citing *Richardson v. McKnight*, 521 U.S. 399. 408-11(1997)). Qualified immunity protects “government”s ability to perform its traditional functions by providing immunity where necessary to preserve the ability of government officials to serve the public good or to ensure that talented candidates were not deterred by the threat of damage suits from entering public service.” *Id.* (citing *Richardson* at 408). The doctrine provides immunity from suit, and is not just a defense to be raised at trial. *Id.*

To be entitled to qualified immunity, a defendant must first establish that he was acting within the scope of his discretionary authority. *Mathews v. Crosby*, 480 F.3d 1265, 1269 (11th Cir. 2007), cert. denied, --- U.S. ----, 128 S.Ct. 865 (2008). Here, it is apparent from the face of the complaint that Brown has sued Defendants for performing official duties within the scope of her discretionary authority as employees of the Florida Department of Corrections.

Once the defendant has established that he or she was acting within his or her discretionary authority, “the burden shifts to the plaintiff to show that qualified immunity is not appropriate.” *Id.* When evaluating a claim for qualified immunity, a court must determine (1) whether the facts alleged, viewed in the light most favorable to the plaintiff, show that the officer's conduct violated a constitutional right, and (2) whether, under the facts alleged,

there was a violation of “clearly established law.” See *Pearson v. Callahan*, 555 U.S. ----, 129 S.Ct. 808, 820-21 (2009) (modifying *Saucier v. Katz*, 533 U.S. 194 (2001)). In applying either prong of the *Saucier* test, the facts alleged by Brown do not demonstrate that Defendants are not entitled to qualified immunity.

First Amendment

To the extent Brown contends that the Defendants violated the Free Exercise Clause of the First Amendment by not providing a separate and individual service for Nation of Islam followers, Brown has not demonstrated that Defendants are not entitled to qualified immunity. Regarding the first prong of *Saucier*, Brown has not alleged or demonstrated that Defendants' actions constituted a violation of the First Amendment. In addressing the second prong, whether Defendants violated a clearly established constitutional right, there is no binding precedent that would have made it clear to Defendants that any of their actions violated Brown's constitutional rights. “In order to determine whether a right is clearly established, we look to the precedent of the Supreme Court of the United States, this Court's precedent, and the pertinent state's supreme court precedent, interpreting and applying the law in similar circumstances.” See *Oliver v. Fiorino*, 586 F.3d 898, 905, 907(11th Cir. 2009). If there is no precedent on point, a right is clearly established only if the law has “earlier been developed in such [a] concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law.” *Crawford v. Carroll*, 529 F.3d 961, 977-78 (11th Cir. 2008) “We have noted that, [i]f the law does not put the [official] on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” See *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir.2002) (quoting *Saucier v. Katz*, 533 U.S.

194, 202 (2001)).

As demonstrated *supra*, there is no precedent or law mandating that prisoners belonging to specific sects or subsets of religious denominations receive separate religious services. On the contrary, case law from this circuit supports the opposite conclusion. See cases above and *Boxer v. Donald*, 169 Fed.App. 555 (11th Cir. 2006). Accordingly, to the extent Brown raises a First Amendment claim, Defendants are entitled to qualified immunity.

Equal Protection

To the extent Brown contends that the Defendants violated the Equal Protection Clause of the Fourteenth Amendment, Brown has not demonstrated that Defendants are not entitled to qualified immunity. With regard to the first prong, when viewing the facts in the light most favorable to Brown, he established a constitutional violation, Brown has not demonstrated a constitutional violation. See *Oliver*, 586 F.3d at 905. Brown has not established that Defendants: (1) treated similarly situation prisoners more favorably; and [that] (2) their decision to limit the number of religious services was result of invidious discrimination against him based on race, religion, national origin, or some other constitutionally protected basis. As to the second prong, again, there is no precedent or law which would have placed Defendants on notice that their conduct would amount to a violation of the Equal Protection Clause. Thus, Defendants are entitled to qualified immunity for Equal Protection claims raised by Brown.

Respondent Superior is not cognizable in a Section 1983 action.

To the extent Brown attempts to hold Defendants liable for the actions of their subordinates, Brown is not entitled to relief. The doctrine of respondeat superior is not applicable to section 1983 actions. See *La Marca v. Turner*, 995 F. 2d 1526 (11th Cir. 1993) and *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982). Supervisory authority does not create liability for the acts of subordinates under section 1983, "without any evidence that the supervisory employee participated in or condoned the alleged deprivations." *Geter v. Wille*, 846 F. 2d 1352, 1355 (11th Cir. 1988). "The mere right to control, without any control or direction having been exercised and without any failure to supervise is not sufficient to support 42 U.S.C. 1983 liability." *Monell v. Department of Social Services*, 436 U.S. 658, 694 n. 58 (1979).

Section 1997e(e) bars claims for compensatory and punitive damages for mental or emotional injury suffered while in custody where there is no showing of physical injury.

Pursuant to Section 1997e(e) Brown may not seek compensatory or punitive damages for mental or emotional injuries suffered while in custody where there is no showing of physical injury. In *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007), the Court held that the plaintiff prisoner who demonstrated no physical harm was not entitled to compensatory or punitive damages. Accordingly, claims for compensatory and punitive damages arising from alleged mental and emotional injuries must be dismissed.

Brown has failed to state a cause of action that entitles him to injunctive relief.

Brown has not demonstrated that injunctive relief is warranted in this case. First, while Brown states he seeks injunctive relief, he does not specify the action(s) with which he seeks to have this Court direct the Defendants comply. (Doc.1, Section VIII) Second,

assuming Brown seeks an order directing the Department to provide Nation of Islam services and/or videos, Brown has not demonstrated the requisite criteria for injunctive relief. (Doc. 1) This Court has the discretion of whether to grant or deny a temporary restraining order or preliminary injunction. *Carillon Importers, Ltd. v. Frank Pesce Intern. Group Ltd.*, 112 F.3d 1125, 1126 (11th Cir.1997) (citing *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir.1983)); *Johnson v. Radford*, 449 F.2d 115 (5th Cir.1971). In exercising its discretion, the Court will consider whether: (1) there is a substantial likelihood that Brown will prevail on the merits; (2) there exists a substantial threat that Brown will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to Brown outweighs the threatened harm the injunction will do to the defendant; and (4) the granting of the preliminary injunction will not disturb the public interest. *CBS Broadcasting, Inc. v. Echostar Communications Corp.*, 265 F.3d 1193, 1200 (11th Cir. 2001); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774 (11th Cir.1984); *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567 (5th Cir.1974). "preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *All Care Nursing Serv. v. Bethesda Mem'l Hosp.*, 887 F.2d 1535, 1537 (11th Cir.1989) (quotations omitted). See *Baer v. McNeil*, 2010 WL 2306429 *1 (N.D. Fla. 2010)

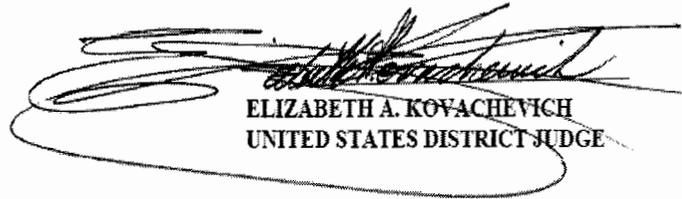
Brown has not met the first criteria, specifically, a substantial likelihood that he will prevail on the merits. Brown has also failed to demonstrate that a substantial threat to an irreparable injury exists if the Institution does not provide a separate and individual service for Nation of Islam followers. As to the third factor, the issuing of such an injunction, would adversely affect Defendants and their discretion over operational and management matters

of the correctional institution. Last, Brown has not demonstrated that granting his request for injunctive relief will not disturb the public interest. As Brown has failed to meet his burden of persuasion as to each of the requisites required for an injunction, his request for injunctive relief must be denied.

Accordingly, the Court orders:

That Defendants' motion to dismiss the complaint (Doc. 22) is granted. Plaintiff's complaint is dismissed, without prejudice. The Clerk is directed to close this case.

ORDERED at Tampa, Florida, on February 25, 2011.



ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Counsel of Record
Albert Brown, Jr.