UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

KEVIN CURTIS,

Plaintiff,

v

C. CALDWELL,

Defendant.

No. 2:11-cv-14337

HON. DAVID M. LAWSON

MAG. PAUL J. KOMIVES

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/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant brings this motion under Fed. R. Civ. P. 56(a), and asks the Court to enter its order granting summary judgment in Defendant's favor, based on the grounds set forth in Defendant's accompanying brief.

Respectfully submitted,

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Dated: December 29, 2011

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DEFENDANT'S BRIEF IN SUPPORT OF SUMMARY JUDGMENT

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CONCISE STATEMENT OF ISSUES PRESENTED

1. A prisoner must exhaust his administrative remedies before filing a complaint under 42 U.S.C. § 1983. To properly exhaust, a prisoner must attempt to resolve the issue verbally within two business days of the offending event. A prisoner must then file a Step I grievance within five business days after attempting to verbally resolve the issue with the staff member involved. If not resolved, a prisoner must then file a Step II and III appeal. Plaintiff did not file a grievance regarding his allegations against Defendant Caldwell. Should the Court dismiss Plaintiff's Complaint against Defendant Caldwell?

2. A Plaintiff must make a clear showing that each named Defendant was personally involved in the activity that forms the basis of the complaint. Liability under § 1983 must be based on active unconstitutional behavior and cannot be based upon "a mere failure to act." Defendant Caldwell is not authorized to grant or deny Plaintiff's request for group religious services. Should Plaintiff's claims against Defendant Caldwell be dismissed?

3. Defendant is a state employee who acted in her official capacity at all times. Defendant acted reasonably and did not violate Plaintiff's clearly established constitutional rights. Is Defendant entitled to Eleventh Amendment and Qualified immunities?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

1. Legal Standard for Exhaustion under 42 U.S.C. § 1997e(a)

A prisoner-plaintiff no longer has to plead or demonstrate exhaustion to satisfy the PLRA requirements of 42 U.S.C. § 1997e(a); failure to exhaust administrative remedies is an affirmative defense that must be raised by a defendant. *Jones v. Bock*, 549 U.S .199 (2007). Under 42 U.S.C. § 1997e(a), a prison inmate cannot maintain a civil rights action challenging prison conditions if he did not first exhaust all available administrative remedies. 42 U.S.C. § 1997e(a). The Supreme Court has held that exhaustion requires proper exhaustion, which means that the prisoner must complete the administrative review process. *Woodford v. Ngo*, 548 U.S. 81 (2006). Exhaustion of administrative remedies is a prerequisite to filing a prisoner lawsuit challenging prison conditions. 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

2. Lack of Personal Involvement

To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. *Baker v. McCollan,* 443 U.S. 137 (1989). A plaintiff must make a clear showing that each named defendant was personally involved in the activity that forms the basis of the complaint. *Rizzo v. Goode*, 423 U.S. 362 (1976); *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir.), *cert. denied,* 469 U.S. 845 (1984).

3. Eleventh Amendment and Qualified Immunity

The Eleventh Amendment provides jurisdictional immunity to state officials when the state is the real, substantial party in interest. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). As when the state itself is named as the defendant, a suit against state officials that is, in fact, a suit against a state is barred regardless of whether it seeks damages or injunctive relief. *Pennhurst*, 465 U.S. at 101-02. Claims against the Michigan Department of Corrections are barred by the Eleventh Amendment. *Abick v. Michigan*, 803 F.2d 874, 876-77 (6th Cir. 1986).

The qualified immunity inquiry must focus on the "objective reasonableness" of the official's conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The burden of proof is on plaintiffs to show that defendants are *not* entitled to qualified immunity. *Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir. 1991).

STATEMENT OF FACTS

Plaintiff, Kevin Curtis, ("Curtis"), is a *pro se* prisoner who is currently incarcerated with the Michigan Department of Corrections (MDOC) at the Ryan Correctional Facility (RRF), Detroit, Michigan. Curtis' Complaint is filed under 42 U.S.C. § 1983 and protests infringement of his civil rights, alleging a violation of the First Amendment of the United States Constitution.

RRF Chaplain, Carron Caldwell is the only named Defendant.

The gravamen of Curtis' Complaint is that his request for group Native American religious services was denied. [D/E #1]. Curtis sues Chaplain Caldwell in her official and individual capacities. In terms of relief, Curtis seeks an order requiring Chaplain Caldwell to recognize Native Americans as a religious group approved for group worship, as well as $1.5 million in compensatory damages for violating his First Amendment right to freely exercise his religion.

ARGUMENT

I. A prisoner must exhaust his administrative remedies before filing a complaint under 42 U.S.C. § 1983. To properly exhaust, a prisoner must attempt to resolve the issue verbally within two business days of the offending event. A prisoner must then file a Step I grievance within five business days after attempting to verbally resolve the issue with the staff member involved. If not resolved, a prisoner must then file a Step II and III appeal. Plaintiff did not file a grievance regarding his allegations against Defendant Caldwell. The Court should dismiss Plaintiff's Complaint against Defendant Caldwell.

A. Legal Standard

A prisoner-plaintiff no longer has to plead or demonstrate exhaustion to satisfy the PLRA requirements of 42 U.S.C. § 1997e(a); failure to exhaust administrative remedies is an affirmative defense that must be raised by a defendant. *Jones v. Bock*, 549 U.S. 199 (2007). Under 42 U.S.C. § 1997e(a), a prison inmate cannot maintain a civil rights' action with respect to prison conditions brought under any federal law if he did not first exhaust all available administrative remedies. 42 U.S.C. § 1997e(a). The Supreme Court has held that exhaustion requires proper exhaustion, which means that the prisoner must complete the administrative review process. *Woodford v. Ngo*, 548 U.S. 81 (2006). Exhaustion of administrative remedies is a prerequisite to filing a prisoner lawsuit challenging prison conditions. 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524 (2002). "The plain language of the statute makes exhaustion a precondition to filing an action in federal court." *Nussle*, 534 U.S. at 523; *Freeman v. Francis*, 196 F.3d 641, 645 (6th Cir. 1999). Exhaustion is an issue that must be determined

before the Court can review the merits of the plaintiff's claims and the remaining defenses raised by the defendants.

The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons, and thus seeks to "affor[d] corrections officials' time and opportunity to address complaints internally before allowing the initiation of a federal case." *Nussle*, 534 U.S. at 525. The PLRA also was intended to "reduce the quantity and improve the quality of prisoner suits." *Nussle*, 534 U.S. at 524.

Requiring proper exhaustion serves all of these goals. It gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors. *Woodford,* 548 U.S. at 94. This is important in relation to prison systems because it is "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973). Thus, it is essential for a plaintiff to properly exhaust his administrative remedies before filing suit by filing a grievance that complies with the prison grievance system regarding the allegations made in his complaint.

An untimely grievance, or otherwise improperly filed grievance, even though appealed through all steps of a grievance procedure, does not fulfill the exhaustion requirement of 42 U.S.C. § 1997e(a). Permitting an untimely or otherwise improperly filed grievance, even though appealed through all steps, to satisfy § 1997e(a)'s requirement "would permit a prisoner to bypass deliberately and

flagrantly administrative review without any risk of sanction." *Woodford,* 548 U.S. at 97. The *Woodford* Court explained:

> A prisoner who does not want to participate in the prison grievance process **will have little incentive to comply** with the system's procedural rules **unless noncompliance carries a sanction** …. For example, a prisoner wishing to bypass available administrative remedies could simply file a late grievance without providing any reason for failing to file on time. If the prison then rejects the grievance as untimely, the prisoner could proceed directly to federal court. And **acceptance of the late grievance would not thwart the prisoner's wish to bypass the administrative process; the prisoner could easily achieve this by violating other procedural rules until the prison administration had no alternative but to dismiss the grievance on procedural grounds. We are confident that the PLRA did not create such a toothless scheme.**

Woodford, 548 U.S. at 95. [Emphasis Added].

"The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones*, 549 U.S. at 219.

B. The applicable MDOC grievance policy, PD 03.02.130

The administrative process applicable to Plaintiff's claims is governed by MDOC Policy Directive 03.02.130 "Prisoner/Parolee Grievances" (Effective date 07/09/2007). The policy directive states, in pertinent part, as follows:

> E. Grievances may be submitted regarding alleged violations of policy or procedure or unsatisfactory conditions of confinement which directly affect the grievant, including alleged violations of this policy and related procedures.
>
> * * *

P. Prior to submitting a written grievance, **the grievant shall attempt to resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue**, unless prevented by circumstances beyond his/her control or if the issue falls within the jurisdiction of the Internal Affairs Division in Operations Support Administration. If the complaint is not resolved, the grievant may file a Step I grievance. The Step I grievance must be filed within five business days after the grievant attempted to resolve the issue with staff.

* * *

R. A grievant shall use the Prisoner/Parolee Grievance form (CSJ-247A) to file a Step I grievance; a Prisoner/Parolee Grievance Appeal form (CSJ-247B) shall be used to file a Step II or Step III grievance. The forms may be completed by hand or by typewriter however, handwriting must be legible. The issues shall be stated briefly but concisely. Information provided shall be limited to the facts involving the issue being grieved (i.e., who, what, when, where, why, how). Dates, times, places and **names of all those involved in the issue being grieved are to be included**.

* * *

V. Within five business days after attempting to resolve a grievable issue with staff, a grievant may send a completed Prisoner/Parolee Grievance form (CSJ-247A) to the Step I Grievance Coordinator designated for the facility, field office or other office being grieved....

Defendant's Exhibit A. [Emphasis added].

C. Curtis has not properly exhausted as to Chaplain Caldwell because he did not file a grievance naming her regarding any issue raised in his complaint.

Curtis acknowledges in his Complaint that he did not file a Step I or Step II grievance. [D/E #1 at p.3]

Consistent with this admission, Sherry Curenton, the Acting Step I Grievance Coordinator at RRF, avers in her affidavit that she has reviewed the

records and files and could not locate a Step I grievance in which Curtis complained about the lack of Native American group religious services. (Defendant's Exhibit B, Affidavit of Sherry Curenton at ¶3). Likewise, Frank Konieczki, the Step II Grievance Coordinator at RRF, avers in his affidavit that he has reviewed the records and files and could not locate a Step II grievance in which Curtis complained about the lack of Native American group religious services. (Defendant's Exhibit C, Affidavit of Frank Konieczki at ¶3).

Furthermore, MDOC records indicate that Curtis has not filed any Step III grievance appeals while incarcerated at RRF. (Defendant's Exhibit D.)

Curtis has not properly exhausted; which requires that the procedures of the policy be followed before a lawsuit may be maintained. *Woodford v. Ngo*, 548 U.S. at 94-95. Furthermore, *Jones v. Bock* reiterated the requirement of *Woodford* that "to properly exhaust administrative remedies prisoners must 'complete the administrative review process in accordance with the applicable procedural rules,' rules that are defined not by the PLRA, but by the prison grievance process itself." *Jones*, 549 U.S. at 218. [Internal citation omitted]. The *Jones* Court further stated, "[t]he level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones*, 549 U.S. at 219. Chaplain Caldwell is entitled to dismissal.

II. A Plaintiff must make a clear showing that each named Defendant was personally involved in the activity that forms the basis of the complaint. Liability under § 1983 must be based on active unconstitutional behavior and cannot be based upon "a mere failure to act." Chaplain Caldwell is not authorized to grant or deny Plaintiff's request for group religious services. Plaintiff's claim against Chaplain Caldwell should be dismissed

To state of claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins,* 487 U.S. 42, 48 (1988). A plaintiff must make a clear showing that each named defendant was personally involved in the activity that forms the basis of the complaint. *Rizzo v. Goode,* 423 U.S. 362 (1976); *Copeland v. Machulis,* 57 F.3d 476, 481 (6th Cir. 1995). Defendants are cognizant of the well-settled maxim that *pro se* complaints are held to a "less stringent standard" than those drafted by attorneys. *Haines v. Kerner,* 404 U.S. 519 (1972). But even under the less stringent standard allowed for *pro se* complaints, the complaint must allege facts sufficient to show that a legal wrong has been committed and that it was committed by the named defendants. Conclusory, unsupported allegations of constitutional deprivation do not state a claim. *Ana Leon T v. Fed. Reserve Bank,* 823 F.2d 928, 930 (6th Cir.), *cert. denied*, 484 U.S. 945 (1987); *Chapman v. City of Detroit,* 808 F.2d 459, 465 (6th Cir. 1986).

Allegations premised on respondeat superior liability are foreclosed in § 1983 actions. *Monell v. Dep't of Social Servs,* 436 U.S. 658 (1978); *Bellamy v. Bradley,* 729 F.2d 416, 421 (6th Cir.), *cert. denied,* 469 U.S. 845 (1984). A claimed

constitutional violation must be based upon active unconstitutional behavior. *Greene v. Barber,* 310 F.3d 889, 899 (6th Cir. 2002). The acts of one's subordinates are not enough, nor can supervisory liability be based upon the mere failure to act. *Greene,* 310 F.3d at 899; *Summers v. Leis,* 368 F.3d 881, 888 (6th Cir. 2004). In *Bellamy v. Bradley Bellamy,* 729 F.2d at 421 (citing *Hays v. Jefferson County,* 668 F.2d 869, 872-74 (6th Cir. 1982), the Sixth Circuit stated that in order to impose liability on supervisory personnel, a plaintiff must show more than having brought offending conduct to the attention of supervisory officials:

There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved and knowingly acquiesced in the unconstitutional conduct of the offending subordinate.

According to Chaplain Caldwell, MDOC Policy Directive 05.03.150, *Religious Beliefs and Practices of Prisoners,* which governs the scheduling of new religious services at facilities, provides at ¶X that "a service is not required to be conducted at a CFA institution if there are less than five prisoners within the same security level of that institution who actively participate in the religious activities of a group." (Defendant's Exhibit E, Affidavit of Carron Caldwell at ¶¶7-8). Chaplain Caldwell asserts that she has not received requests from the minimum number (5) of prisoners who indicate that their faith is Native American and want to have group services scheduled at RRF. In addition, Chaplain Caldwell asserts that

Curtis' allegation that he provided correspondence from ten other prisoners during a conversation with her on August 17, 2011 is false. (Defendant's Exhibit E, Affidavit of Carron Caldwell at ¶9).

Liability under § 1983 must be based on active unconstitutional behavior and cannot be based upon "a mere failure to act." *Shehee v. Lutrell,* 199 F.3d 295, 300 (6th Cir. 1999) (citing *Salehpour v. Univ. of Tenn.,* 159 F.3d 199, 206 (6th Cir. 1998), *cert denied,* 119 S. Ct. 1763 (1999). In *Shehee,* the plaintiff brought a First Amendment retaliation claim against two prison employees, Fleming and Morgan, alleging that they instigated his termination from a prison job after the plaintiff had filed an institutional grievance on them alleging harassment. *Shehee,* 199 F.3d at 297-98. Fleming and Morgan asserted that they could not be liable since they did not have the authority to terminate the plaintiff's employment. The court agreed. *Shehee,* 199 F.3d at 300. Because neither employee had the authority to bring about the adverse action, the plaintiff "simply does not set forth a valid First Amendment retaliation claim." *Shehee,* 199 F.3d at 301.

Moreover, a prisoner's allegations that he was denied "official recognition [of Satanism] and time for group services and books'" pursuant to MDOC Policy Directive 05.03.150, was found not to state a claim against prison officials who did not have authority pursuant to that policy to grant his request. *Hendrickson v. Caruso,* No. 1:07-cv-304, 2008 U.S. Dist. LEXIS 117875, at *17 n.5 (W.D. Mich. Feb. 1, 2008) (Defendants' Exhibit F).

Here, the conclusion should have been no different. MDOC Policy Directive 05.03.150 "Religious Beliefs and Practices of Prisoners" provides "[t]he CFA Deputy Director shall make the final decision as to whether a religious group will be granted Department recognition". (Defendant's Exhibit E, Affidavit of Carron Caldwell at ¶7, Attachment A).

Since Chaplain Caldwell is authorized to grant or deny Curtis' request, Curtis has failed to set forth a valid claim against her.

III. Chaplain Caldwell is entitled to Eleventh Amendment and Qualified immunities.

The Eleventh Amendment bars any suit, absent consent, against the state:

> 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.

US CONST Amen XI.

The Supreme Court has held that that amendment's fundamental principles of sovereign immunity negate federal exercise of jurisdiction over suits by citizens against their own states as well. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *Mumford v. Basinski*, 105 F.3d 264, 267 n.3 (6th Cir. 1997). A suit against a state employee in his official capacity is tantamount to a suit against the state itself and must be dismissed on the basis of Eleventh Amendment immunity. *See Brandon v. Holt*, 469 U.S. 464, 471 (1985). Chaplain Caldwell is an employee of the State of Michigan who acted in her official capacity. The State of

Michigan has not consented to suit and Chaplain Caldwell enjoys Eleventh Amendment immunity in her official capacity.

Officials or employees of the Michigan Department of Corrections who are sued in their individual capacities "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *Dietrich v. Burrows*, 167 F3d 1007, 1012 (6th Cir. 1999); *Noble v. Schmitt*, 87 F.3d 157, 160 (6th Cir. 1996). The Sixth Circuit applies a three-part test to determine whether a government official is entitled to the defense of qualified immunity: (1) whether a constitutional violation has occurred; (2) whether the right that was violated was a clearly established right of which a reasonable person would have known; and (3) whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001); *Higgason v. Stephens*, 288 F.3d 868, 876-77 (6th Cir. 2002); *Williams v. Mehra*, 186 F.3d 685, 690 (6th Cir. 1999). While the defendants bear the initial burden of presenting facts that, if true, would entitle them to immunity, the ultimate burden of proof falls on the plaintiff to show that the defendants violated a right so clearly established that any official in defendants' positions would have clearly understood that he was under an affirmative duty to refrain from such conduct. *Noble*, 87 F.3d at 161.

Defendant is entitled to qualified immunity unless a plaintiff's "rights were so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct." *Ramirez v. Webb*, 835 F.2d 1153, 1156 (6th Cir. 1987). Moreover, if officials "of reasonable competence could disagree on whether the conduct violated the plaintiff's rights," then the defendants are entitled to qualified immunity. *Caldwell v. Woodford County Chief Jailor*, 968 F.2d 595, 599 (6th Cir. 1992).

As discussed above, Curtis' constitutional rights were not violated and Chaplain Caldwell acted reasonably at all times. Chaplain Caldwell is entitled to qualified immunity.

CONCLUSION AND RELIEF REQUESTED

Curtis has failed to properly exhaust his claim by following each step of the grievance process. Chaplain Caldwell had no authority to grant or deny Curtis' request for group religious services and Curtis' Complaint fails to set forth a valid claim against her. Finally, Chaplain Caldwell is entitled to Eleventh Amendment and qualified immunity.

Chaplain Caldwell requests that summary judgment be granted in her favor.

Respectfully submitted,

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Dated: December 29, 2011

soros/2011-0028052-A/Brf SJ 12-28-11

CERTIFICATE OF SERVICE: I certify that on December 29, 2011, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system and I certify that my secretary has mailed by U.S. Postal Service the papers to any involved non-ECF participant.

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