IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

SEFIDKAR JANALI, #12202-078 **PLAINTIFF**

v. **CIVIL ACTION NO. 5:11-cv-119-KS-MTP**

CORRECTION CORPORATION OF AMERICA, ET AL. **DEFENDANTS**

REPORT AND RECOMMENDATION

This matter is before the Court on the Motion for Summary Judgment [63] filed by Plaintiff Sefidkar Janali and the Motion for Summary Judgment [65] filed by Defendants Corrections Corporation of America, Vance Laughlin, Victor Orsolits, and Jon Shonebarger. Having considered the motions, responses, record, and applicable law, the undersigned finds that Plaintiff's Motion for Summary Judgment [63] should be denied and Defendants' Motion for Summary Judgment [65] should be granted.

FACTUAL BACKGROUND

On August 11, 2011, Plaintiff Sefidkar Janali, proceeding *pro se* and *in forma pauperis*, filed his Complaint [1] pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)[1] and 28 U.S.C. § 1331. Plaintiff is currently incarcerated at Adams County Correctional Center ("ACCC") in Adams County, Mississippi, and his claims arose while he was a post-conviction inmate at ACCC. Plaintiff asserts claims against Correction Corporation of America (the owner and operator of ACCC), Warden Vance Laughlin,

[1] A *Bivens* action mirrors a civil rights action brought under 42 U.S.C. § 1983, the difference being that a *Bivens* action applies to alleged constitutional violations by federal actors, while a Section 1983 action applies to alleged constitutional violations by state actors. *See Izen v. Catalina*, 398 F.3d 363, 367 n.3 (5th Cir. 2005).

Associate Warden Victor Orsolits, and Chaplin Jon Shonebarger. Through his Complaint [1] and Amended Complaint [52], Plaintiff claims that Defendants violated his First Amendment right to free exercise of religion. Also, Plaintiff claims Defendants violated the Religious Land Use and Institutionalized Person Act ("RLUIPA") and the Religious Freedom Restoration Act ("RFRA"). (Amend. Compl. at 30-37.)

Plaintiff is a Shiite Muslim and claims that he should be allowed to attend a worship service apart from Sunni Muslims.[2] The worship service at issue is the Jummah[3] congregational prayer service held on Fridays. Plaintiff alleges that the Jummah service is presided over by a Sunni Muslim. Plaintiff demands a separate Jummah service for Shia[4] Muslims. Plaintiff alleges that other religious denominations are allowed different worship times, yet Muslims are required to attend a unified service. (Amend. Compl. at 5-14.)

Additionally, Plaintiff claims that he should be provided the Halal diet (lawful Muslim diet). When Plaintiff arrived at ACCC, he allegedly was given a choice between regular meals, vegetarian meals, or Jewish Kosher meals. Plaintiff chose the Kosher diet because it was similar to the Halal diet. Defendant Shonebarger allegedly discontinued Plaintiff's Kosher diet because Plaintiff purchased clams which are not allowed on the Kosher diet. According to Plaintiff, clams are allowed as part of a Halal diet. Plaintiff asserts that he should not have to follow

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[2] Accordingly to Plaintiff, the "principal difference between Sunni and Shias is the significance which Shias afford the twelve Imams, or religious leaders, who came after Prophet Muhammad and were part of the Prophet's family. Shias consider these twelve imams to be the legitimate successors to Prophet Muhammad and divine in nature, while Sunnis do not." (Amend. Compl. at 5.)

[3] Jummah is also spelled Jum'ah and Jumah in the record.

[4] Shia is also spelled Shi'a in the record.

Jewish dietary laws and should be provided a Halal diet. (Amend. Comp. at 15-28.)

Plaintiff's claims under the First Amendment, RLUIPA, and RFRA include demands for injunctive relief and monetary damages.

ANALYSIS

Summary Judgment Standard

This Court may grant summary judgment only if, viewing the facts in a light most favorable to the non-movant, the movant demonstrate that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. *Woods v. Smith*, 60 F.3d 1161, 1164 (5th Cir. 1995). If the movant fails to discharge the burden of showing the absence of a genuine issue concerning any material fact, summary judgment must be denied. *John v. Louisiana*, 757 F.2d 698, 708 (5th Cir. 1985). The existence of an issue of material fact is a question of law that this Court must decide, and in making that decision, it must "draw inferences most favorable to the party opposing the motion, and take care that no party will be improperly deprived of a trial of disputed factual issues." *Id*. at 712.

There, however, must be adequate proof in the record showing a real controversy regarding material facts. "Conclusory allegations,"[5] unsubstantiated assertions,[6] or the presence of a "scintilla of evidence,"[7] is not enough to create a real controversy regarding material facts. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no

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[5] *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 902 (1990)

[6] *Hopper v. Frank*, 16 F.3d 92, 96-97 (5th Cir. 1994)

[7] *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994)

genuine issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In the absence of proof, the Court does not "assume that the nonmoving party could or would prove the necessary facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (emphasis omitted).

***Bivens* Claims Against Defendant CCA**

Plaintiff's claims for violation of his First Amendment right to free exercise of religion are brought as a *Bivens* action. *Bivens* provides a limited cause of action against *individual officers* acting under color of federal law alleged to have acted unconstitutionally. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70 (2001). A *Bivens* action cannot be maintained against private entities such as CCA. *Id*. at 63; *Brown v. Laughlin*, 2012 WL 1365221, at *2 (S.D. Miss. April 19, 2012). Accordingly, to the extent Plaintiff asserts *Bivens* claims against CCA, those claims should be dismissed with prejudice.

***Bivens* Claims Against Individual Defendants in their Official Capacity**

Plaintiff brings this action against Defendants Laughlin, Orsolits, and Shonebarger in their individual and official capacities. "[A] *Bivens* action may be maintained against a defendant only in his or her individual capacity, and not in his or her official capacity." *Pollack v. Meese*, 737 F. Supp. 663, 666 (D. D.C. 1990); *see also Gibson v. Federal Bureau of Prisons*, 121 Fed. App'x. 549, 551 (5th Cir. 2004). Accordingly, to the extent Plaintiff asserts claims against Defendants Laughlin, Orsolits, and Shonebarger in their official capacities, those claims should be dismissed with prejudice.[8]

[8] The Supreme Court also declined to extend *Bivens* to the employees of private correctional facilities in their individual capacities under certain circumstances. *Minneci v. Pollard*, 132 S. Ct. 617, 622-23 (2012). *Minneci* barred an Eighth Amendment claim against

Separate Worship Services

First Amendment

The Free Exercise Clause of the First Amendment requires the government to refrain from interfering with the religious beliefs and practices of individuals. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). As a prisoner, Plaintiff retains only those First Amendment freedoms which are "not inconsistent with his status as a prisoner or with legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Therefore, a government regulation may interfere with the religious beliefs and practices of a prisoner if it is reasonably related to a legitimate peneological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

Pursuant to *Turner*, courts consider four factors in deciding the reasonableness of a regulation: (1) whether there is a rational relationship between the regulation and the legitimate government interest asserted; (2) whether the inmates have alternative means to exercise the right; (3) the impact that accommodation of the right will have on the prison system; and (4) whether ready alternatives exist which accommodate the right and satisfy the governmental interest. *Id*. at 89-90. Courts must balance the inmates' right to free exercise of religion with the interest of prison officials charged with complex duties arising from administration of the penal system. Prison officials are afforded great deference in carrying out their complex duties.

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employees of a private correctional facility for denial of medical care because such a claim was of the type that falls within the scope of traditional tort law and the prisoner had alternative state court remedies. *Id*. at 626. It is not clear that the First Amendment claims asserted by Plaintiff are of the type that fall within the scope of traditional tort law; therefore, the undersigned will consider Plaintiff's claims on the merits.

O'Lone v. Shabazz, 482 U.S. 342, 349 (1987);[9] *Oliver v. Scott*, 276 F.3d 736, 745 (5th Cir. 2002).

The *Turner* factors are not weighed equally; the first factor is controlling. *See Scott v. Miss. Dep't of Corr.*, 961 F.2d 77, 81 (5th Cir. 1992); *Mayfield v. Texas Dep't. Of Criminal Justice*, 529 F.3d 599, 607 (5th Cir. 2008). The record demonstrates that the unified Jummah services are rationally related to legitimate penological interests. Defendants have expressed concerns regarding security and limited resources. (MJS [11] Ex. 1: Shonebarger Affidavit at ¶ 5.) Such concerns have been found to be legitimate penological interests. A prisoner's right to free exercise of his religion "may be curtailed in order to achieve legitimate correctional goals or to maintain prison security." *O'Lone*, 482 U.S. at 348.

The other factors reinforce the relationship between the regulation and the penological interest. Skipping to the third factor, the record demonstrates that separate Jummah services would have a serious impact on the prison system's security and resources. Separate worship services would burden the staff and add expense during a difficult fiscal climate. In his sworn testimony, Chaplain Shonebarger stated that it would be extremely expensive to allow separate services for each religious sect. (MSJ [11] Ex. 1 at ¶ 5.) He further stated that it could not be done in an orderly fashion. (MSJ [11] Ex. 1 at ¶ 5.) Additionally, the unified services are used to combat divisiveness. Chaplain Shonebarger stated that "[i]f the inmate population of Muslims were divided into Shia and Sunni, the groups would be a security threat" because it would

[9] In *O'Lone*, the Supreme Court faced a situation in which policies adopted by prison officials prevented Muslim prisoners from attending Jummah services, and the Court held that it would not substitute its judgment on difficult and sensitive matters of institutional administration for the judgment of those charged with the formidable task of running a prison. 482 U.S. at 353.

increase "the potential for sectarian violence." (MSJ [11] Ex. 1 at ¶ 5.)[10] Prison officials are given particular deference in regard to security concerns. *Cutter*, 544 U.S. at 722-23.

Turning to the second factor, the record demonstrates that Plaintiff has many alternative means to exercise his religious rights. In addition to the unified Jummah services, inmates "are allowed unlimited time for independent study and worship." (MSJ [11] Ex. 1 at ¶ 2.) Inmates are allowed to pray, meditate, and read religious literature. (MSJ [11] Ex. 1 at ¶¶ 2, 4.) Inmates may possess copies of the Koran, prayer rugs, Kufi caps, and religious oils. (MSJ [11] Ex. 1 at ¶ 2.) Also, inmates may pray in the chapel when it is available. (MSJ [11] Ex. 1 at ¶ 4.)

After Plaintiff complained to prison officials about the unified services, Plaintiff was offered the opportunity to lead the services, but Plaintiff declined the offer. (MSJ [11] Ex. 1 at ¶ 6.) Plaintiff claims that he is not qualified to lead the service, but he also claims the "self-professed inmate Sunni 'imam' and/or religious advisor and leader, willy-nilly appointed by Defendants" is not qualified to lead the services. (Amend. Compl. at 8.) Plaintiff's own submissions demonstrate that Shia Muslims, like Sunni Muslims, are afforded opportunities to lead the worship services.

Prison officials have legitimate security and administrative concerns relating to separate services for Shia and Sunni Muslims. Plaintiff has not offered alternatives that would alleviate those concerns. Application of the *Turner* factors establishes that denying Plaintiff separate Jummah services is reasonably related to legitimate penological objectives. Consequently, Defendants are entitled to summary judgment on the First Amendment free exercise claims

[10] ACCC's other religious groups are not allowed to have sectarian worship services. (MSJ [11] Ex. 1 at § 4.)

based on denial of separate worship services.

RLUIPA and RFRA Claims

Pursuant to the RLUIPA and the RFRA,[11] the government shall not impose a substantial burden on a prisoner's religious exercise unless the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." 42 U.S.C. §§ 2000bb and 2000cc. The Fifth Circuit has held that a government regulation places a substantial burden on a religious exercise if it pressures the prisoner to significantly modify his religious behavior and significantly violate his beliefs. *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004). A government regulation, however, is not a substantial burden on a religious exercise "if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." *Id*.

Plaintiff bears the burden to establish the existence of a substantial burden. *Diaz v. Collins*, 114 F.3d 69, 71 (5th Cir. 1997). Also, courts must give deference to the prison officials responsible for creating and establishing policies and maintaining order and security. *Cutter*, 544 U.S. at 722-23.

Plaintiff contends that the unified Jummah services do not meet his spiritual needs because he cannot receive proper religious guidance from Sunni Muslims. According to Plaintiff:

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[11] The language of the RLUIPA creates a question regarding the applicability of the law to Plaintiff as a *federal* inmate, but the parties did not address this issue. *See Doyon v. U.S.*, 2008 WL 2626837, at *4 (W.D. Tex. June 26, 2008). However, the legal standards under the RLUIPA and the RFRA are similar, and the undersigned's conclusions and recommendations are not affected by the applicability of the RLUIPA claims. *See Longoria v. Dretke*, 507 F.3d 898, 902 (5th Cir. 2007).

> The principal tenets of Islam, regardless of sect, are (1) belief that Allah is God; (2) acceptance that the Holy Qur'an is the book of guidance and contains the words of Allah; (3) acknowledgment of the Prophet Muhammad as the final messenger and Prophet of Allah; (4) acceptance of the "five pillars" of Islam–Shahada (declaration of faith), Salat (prayer), Zakat (Charity), Saum (fasting) and Hajj (pilgrimage to Mecca); and (5) the practice of Oiblah, or praying facing Mecca.
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> All believers of the Islamic faith accept these principles, whether they are Sunni, Shia, or belong to another of the multiple sects that constitute Islam.

(Amend. Compl. at 5.)

Plaintiff has failed to establish that attendance in the unified worship service truly pressures him to significantly modify his religious behavior and significantly violate his beliefs. Plaintiff can comply with the five tenets he listed without having separate services for Shia Muslims. In fact, Plaintiff admits that if Defendants would have sought out advice from Islamic scholars, Defendants would have learned that "Shia inmates [can] worship in the same religious services as Sunni Muslims" (Amend. Compl. at 10.) At most, the unified services diminish Plaintiff's spiritual fulfillment, and a regulation that causes only "diminishment of spiritual fulfillment–serious though it may be–is not a 'substantial burden' on the free exercise of religion." *Navajo Nation v. United States Forest Service*, 535 F.3d 1058, 1070 (9th Cir. 2008).

As previously discussed, Plaintiff has many alternative means to exercise his religious rights. Plaintiff is allowed to independently worship, pray, meditate, and study. (MSJ [11] Ex. 1 at ¶¶ 2, 4.) He is allowed to possess the Koran, prayer rugs, Kufi caps, and religious oils. (MSJ [11] Ex. 1 at ¶ 2.) He, or another Shiit Muslim, may lead the Jummah services. (MSJ [11] Ex. 1 at ¶ 6.)

The undersigned previously discussed the difficulties with providing separate Jummah services. Defendants have shown that there are compelling interests relating to the unified

Jummah services, including security and administrative concerns. Defendants demonstrated a rational relationship between the policy of unified services and compelling governmental interests. Also, Defendants have demonstrated that unified services are the least restrictive means of achieving the compelling governmental interests.

Equal Protection

Plaintiff does not specifically mention a violation of the Equal Protection Clause as a cause of action in his Amended Complaint, but to the extent Plaintiff has asserted this claim, it fails as a matter of law. To establish a violation of the Equal Protection Clause, Plaintiff "must allege and prove that he received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent." *Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir. 2001). "Discriminatory purpose in an equal protection context implies that the decision-maker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group." *Woods v. Edwards*, 51 F.3d 577, 580 (5th Cir. 1995). However, prison officials generally need not provide identical facilities or personnel for every religious group. *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

Plaintiff states that "resources are being continuously afforded to twelve faith groups as well as the twenty-four sub-groups, that include, five sects of Judaism, six sects of Christanity, three sects of Rastafarianism and ten sects of Orisha as well as the Sunni faith group." (Amend. Compl. at 12.) The record, however, demonstrates that Shia Muslims are treated no differently than the other religious sub-groups. According to Chaplain Shonebarger's sworn testimony,

> Adams County has 12 active faith groups with numerous sects within each group. For example there are five sects of Judaism; six sects of Christianity; three sects of

> Rastafarianism; and ten sects of Orisha. As Chaplain, I often get requests from inmates to have separate worship services for their unique/distinct sectarian practices. *ACCF does not allow any religion to have sectarian worship services*. Inmates may practice their sectarian convictions individually in their own cells by praying, meditating, and reading literature about their religion.

(MSJ [11] Ex. 1 at ¶ 4.) (emphasis added). The record is devoid of any fact that would support a plausible showing of discriminatory intent as it relates to unified worship services. Accordingly, Plaintiff's equal protection claim should be dismissed.

Religious Diet

Plaintiff alleges that he was given a choice between regular meals, vegetarian meals, or Jewish Kosher meals when he arrived at ACCC. Plaintiff chose the Kosher diet because it was similar to the Halal diet (lawful Muslim diet). Prison officials took Plaintiff off the Kosher diet because he purchased clams which are not allowed on the Kosher diet. According to Plaintiff, clams are allowed as part of a Halal diet. Plaintiff asserts that he should not have to follow Jewish dietary laws and should be provided a Halal diet.

The record demonstrates that Plaintiff's claims under the Free Exercise Clause, RLUIPA, RFRA, and Equal Protection Clause fail as a matter of law. The Fifth Circuit "has already ruled that prisons need not respond to particularized religious dietary requests. The principal basis for decision in *Udey* was the court's recognition that if one such dietary request is granted, similar demands will proliferate, with two possible results: either accommodation of such demands will place an undue burden on the prison system, or the prisons would become entangled with religion while drawing fine and searching distinctions among various free exercise claimants." *Kahey v. Jones*, 836 F.2d 948, 950 (5th Cir. 1988) (citing *Udey v. Kastner*, 805 F.2d 1218 (5th Cir. 1986)).

Plaintiff seeks a very particularized diet which includes, among other things, having meat inspected by an Imam and slaughtered so that the blood flows out freely and completely with the name of Allah invoked over the animal. (Amend. Comp. at 25-26.) The result of accommodating Plaintiff's diet along with all the similar demands from the twelve religions and numerous religious sects at ACCC would place an undue burden on ACCC.

Furthermore, ACCC has accommodations for Plaintiff and other Muslims. "At ACCF there are two diets that are halal or lawful for Muslims. The vegetarian diet is completely lawful for Muslims to eat. In addition, the Kosher or Jewish diet is also lawful for Muslims." (MSJ [11] Ex. 1 at ¶ 8.) Plaintiff lists multiple complaints regarding the content and preparation of food at ACCC. (Amend. Compl. at 20-26.) Plaintiff, however, has demonstrated no personal knowledge regarding the content and preparation of food at ACCC. (MSJ [65] Ex. A: Plaintiff's Response to Requests for Interrogatories.) He has not come forward with competent summary judgment evidence to show that ACCC does not provide lawful diets for Muslims. *See Hopper*, 16 F.3d at 96-97 (holding that unsubstantiated assertions are not enough to create a real controversy regarding material facts). Accordingly, Plaintiff has failed to show that the diets provided at ACCC substantially burden his religion.

Also, Plaintiff has failed to present evidence that he has been treated differently from persons who are similarly situated. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Plaintiff failed to demonstrate that Defendants' reason for denying his request stemmed from a discriminatory intent. Additionally, Plaintiff failed to come forward with competent summary judgment evidence demonstrating that no diet at ACCC complies with Islamic teachings.

Plaintiff's Motion for Summary Judgment

Plaintiff has failed to come forward with adequate proof in the record which establishes all of the elements of his claims. In fact, Defendants have demonstrated that Plaintiff lacks proof on at least one element of each of his claims. Accordingly, Plaintiff is not entitled to summary judgment, but Defendants are entitled to summary judgment as a matter of law.

CONCLUSIONS AND RECOMMENDATIONS

Based on the foregoing, the undersigned recommends:

1. Defendants' Motion for Summary Judgment [65] be GRANTED,

2. Plaintiff's Motion for Summary Judgment [63] be DENIED, and

3. this action be dismissed with prejudice.

NOTICE OF RIGHT TO OBJECT

In accordance with the rules and 28 U.S.C. § 636(b)(1), any party within fourteen days after being served a copy of this recommendation, may serve and file written objections to the recommendations, with a copy to the judge, the magistrate judge and the opposing party. The District Judge at the time may accept, reject or modify in whole or part, the recommendations of the Magistrate Judge, or may receive further evidence or recommit the matter to this Court with instructions. The parties are hereby notified that failure to file written objections to the proposed findings, conclusions, and recommendations contained within this report and recommendation within fourteen days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the proposed factual findings and legal conclusions accepted by the district court to which the party has not objected. *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1428-29 (5th Cir. 1996).

THIS the 30th day of October, 2013.

s/ Michael T. Parker
United States Magistrate Judge