

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

DENNIS JOSEPH BERRY,)	
)	Civil Action No. 7:99CV00254
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
GEORGE DEEDS, WARDEN, et al.,)	
)	By: Samuel G. Wilson
Defendants.)	Chief United States District Judge
)	

Plaintiff Dennis Joseph Berry (“Berry”), a Virginia inmate proceeding *pro se*, brings this action for injunctive and monetary relief under 42 U.S.C. § 1983 against defendants George Deeds, Warden of Red Onion State Prison,¹ and Ronald A. Young, Regional Director of Western Region of the Virginia Department of Corrections (collectively, the “defendants”), alleging violations of the Free Exercise and Establishment Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. This court has jurisdiction pursuant to 28 U.S.C. § 1343. This matter is before the court on cross motions for summary judgment.² Finding that it is moot, the court dismisses without prejudice Berry’s claim for injunctive relief. Additionally, the court concludes that the defendants are entitled to qualified immunity from monetary liability in their individual capacities on Berry’s free exercise and establishment claims and, thus, grants the defendants’ motion for summary judgment on those claims. Finally, finding that there are genuine issues of material fact, the court denies Berry’s and the defendants’ motion

¹ Defendant George Deeds is no longer the Warden of Red Onion State Prison, but he held that position for the duration of Berry’s confinement there.

² Berry moved for judgment on the pleadings pursuant to Rule 12(c). *See* Fed. R. Civ. P. 12(c). However, both parties presented to the court materials outside the pleadings, and the court has not excluded those materials. Consequently, the court will treat Berry’s motion as one for summary judgment. *See id.*

for summary judgment on Berry's equal protection claims.

I.

Berry, an inmate in the Virginia Department of Corrections ("VDOC"), filed this 42 U.S.C. § 1983 suit while confined at the Red Onion State Prison ("Red Onion") in Wise County, Virginia. Berry arrived at Red Onion on December 17, 1998. While at Red Onion, Berry, a Roman Catholic, requested access to a Catholic priest in order to receive the sacraments. Red Onion is a Level VI, maximum-security institution. Thus, inmates incarcerated at Red Onion are not allowed contact visits except for visits between an inmate and his attorney. That rule applies to all inmates and is religion-neutral. In addition, Red Onion is a "contained" institution, meaning that nothing from outside of the prison may be brought into it. Consequently, because receiving the sacraments necessitates contact visits and bringing items from outside of the prison into it, the defendants denied Berry's request for access to a Catholic priest. By denying that request, Berry argues, the defendants violated his rights under the First Amendment's Free Exercise Clause.

Red Onion does have an institutional chaplain, provided by the Chaplain Service of the Churches of Virginia, Inc., ("Chaplain Service"), to coordinate time and space for religious activities for all religious groups. That chaplain is not a Commonwealth of Virginia employee, although his assignment at Red Onion is permanent in nature. However, the chaplain can have contact visits with the inmates because he has been screened and trained according to VDOC security procedures to meet the religious needs of the inmates. (Elswick Aff. ¶ 6.) Berry complains that, because the chaplain is a Baptist minister, Baptist inmates can have contact visits similar to those that he was denied having with a Catholic priest. Consequently, Berry contends that the defendants violated the First Amendment's Establishment Clause.

Likewise, Berry refers to the use of correctional officers for delivering meals to Muslim inmates during Ramadan. In order to control the general prison population during regular meal times, Red Onion only releases one pod of inmates at a time for dining. However, Ramadan requires meals to be served at the same time to all of the Muslims. For security reasons, and because Ramadan meals are not served during regular meal times, Red Onion cannot release all of the Muslim inmates at one time for dining. (Elswick Aff. ¶ 8.) Consequently, the correctional officers deliver meals to requesting inmates at the appropriate times, but they do so only during Ramadan. By doing so, Berry argues, the defendants misallocate security resources and favor Muslims over other religions in violation of the First Amendment's Establishment Clause.

Finally, Berry maintains that the defendants violated his rights under the Fourteenth Amendment's Equal Protection Clause by treating Catholics less favorably than other religions. In support of that contention, Berry points to the fact that, because the institutional chaplain is Baptist, Baptist inmates have religious opportunities unavailable to Catholics; namely, contact visits with the Baptist equivalent to a Catholic priest. He also points to the use of correctional officials for delivering meals to Muslim inmates during Ramadan. Thus, Berry argues, the defendants treated Catholic inmates less favorably than other religions in violation of the Constitution.

On June 22, 1999, VDOC transferred Berry to Keen Mountain Correctional Center ("Keen Mountain") in Buchanan County, Virginia. VDOC transferred Berry there because he scored as a Level IV inmate, and Keen Mountain is a Level IV, medium-security institution. Keen Mountain's security procedures do not prohibit Berry from receiving the sacraments from a Catholic priest.

II.

As a preliminary matter, the court concludes that Berry's claim for injunctive relief is moot. Generally, claims for injunctive relief become moot when the plaintiff no longer is subject to the conditions of which he or she complains. See Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991); see also Magee v. Waters, 810 F.2d 451, 452 (4th Cir. 1987) (holding that the transfer of a prisoner rendered the prisoner's claim for injunctive relief moot). Here, Berry complains of conditions at Red Onion that prohibited him from receiving the sacraments from a Catholic priest. However, VDOC has transferred Berry from Red Onion to Keen Mountain. Keen Mountain's security procedures, unlike those of Red Onion, do not prohibit Berry from receiving the sacraments. Thus, because he can show only past exposure to the actions of which he complains, the court dismisses without prejudice Berry's claim for injunctive relief as moot.

III.

The court next addresses Berry's claims for monetary damages against the defendants in their individual capacities.³ The defendants assert that they are entitled to qualified immunity from monetary liability. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). The defendants are entitled to qualified immunity if they demonstrate that their actions did not violate any clearly established statutory or constitutional rights of which a reasonable person would have been aware. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). When addressing qualified immunity at the summary judgment stage, the court first must determine whether the plaintiff has alleged the violation of a clearly-established constitutional right. See Pittman v. Nelms, 87 F.3d 116, 119

³ Although Berry's claim for injunctive relief is moot, his claim for monetary damages remains. See Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991) (holding that inmate's transfer mooted claims for injunctive and declaratory relief, but that claims for monetary damages were not moot); Taylor v. Rogers, 781 F.2d 1047, 1048 n.1 (4th Cir. 1986) (same).

(4th Cir. 1996). If so, the court then must inquire into whether the defendants knew or should have known that their conduct was illegal. See id. “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The court first considers whether Berry has alleged a violation of his clearly-established rights under the First Amendment’s Free Exercise Clause. To demonstrate that the defendants violated his free exercise rights, Berry must show that the defendants restricted his observance of practices required by his sincerely-held religious beliefs. See O’Lone v. Estate of Shabazz, 482 U.S. 342, 345 (1987). Even if that is shown, a prison regulation that impinges on an inmate’s constitutional rights is valid if it is reasonably related to legitimate penological interests. See Turner v. Safely, 482 U.S. 78, 79 (1987).⁴ Moreover, courts generally defer to the judgment and expertise of prison officials in the enactment of prison regulations designed to maintain institutional security and preserve internal order and discipline. See Bell v. Wolfish, 441 U.S. 520, 547 (1979). However, if the evidence shows that prison officials exaggerated their response to those considerations, then the court does not afford prison officials that deference. See id.

Here, even if the defendants violated Berry’s free exercise rights, those rights were not clearly established.⁵ Berry’s claim necessarily contests the validity of Red Onion’s prison

⁴ When assessing the reasonableness of the prison regulation, the court considers four factors: (1) whether the regulation is rationally related to a legitimate and neutral government objective; (2) whether the inmate has alternative means of exercising the right in question; (3) whether accommodation of the asserted constitutional right will have a significant impact on the guards, other inmates, and the allocation of prison resources; and (4) whether alternatives to the regulation exist. See O’Lone, 482 U.S. at 350-53; Turner 482 U.S. at 89-90.

⁵ Even if Berry’s federal rights were clearly established at the time of the alleged violation, prison officials might nevertheless enjoy qualified immunity if it was “objectively reasonable” for them to believe that their actions did not violate those rights. See Anderson v. Creighton, 483 U.S. 635, 639, 641 (1987).

regulations that prohibit contact visits and that establish a “contained” institution, as those regulations mandated denial by the defendants of Berry’s request for access to a Catholic priest. However, Berry has pointed to no authority from the United States Supreme Court or the Court of Appeals for the Fourth Circuit mandating that prison officials must recognize an exception to those common prison regulations challenged by Berry for religious visitors such as priests. Nor has the court located such authority. Thus, the court concludes that nothing at the time of the defendants’ conduct suggested, much less established, that, to avoid violation of Berry’s free exercise rights, the defendants were required to approve Berry’s request for access to a Catholic priest to receive the sacraments. There being no evidence that the defendants acted unreasonably or contrary to clear constitutional or statutory rights, the defendants are entitled to qualified immunity on Berry’s free exercise claim. Consequently, the court grants the defendants’ motion for summary judgment on that claim.

Next, the court considers whether Berry has alleged a violation of his clearly-established rights under the First Amendment’s Establishment Clause. In considering that claim, the Court must determine whether established precedent at the time of the defendants’ actions put them on notice that allowing the institutional chaplain to be assigned at Red Onion or that accommodating Muslim inmates’ dietary needs during Ramadan violated the Establishment Clause. Having considered the relevant Establishment Clause decisions in the prison context at the time of the defendants’ actions, the court concludes that, even if the court found that the challenged actions violated the Establishment Clause, the defendants’ actions did not violate a clearly-established constitutional right.

The issues raised by Berry never have been addressed by the Supreme Court or the Fourth Circuit. Moreover, although the majority of cases from the circuit courts dealing with the First

Amendment rights of prisoners appear to be free exercise, not establishment, cases, at least one court specifically has held that “the mere fact that a prison chaplain is of one particular faith’ does not constitute an Establishment Clause violation.” Ingram v. Ault, 50 F.3d 898, 900 (11th Cir. 1995) (quoting the decision of the district court); see also Johnson-Bey v. Lane, 863 F.2d 1308, 1312 (7th Cir. 1988) (stating that “[p]risons are entitled to employ chaplains and need not employ chaplains of each and every faith to which prisoners might happen to subscribe, but may not discriminate against minority faiths except to the extent required by the exigencies of prison administration”). In addition, the Chaplain Service has been associated with the VDOC since 1979, yet there are no Supreme Court or Fourth Circuit decisions addressing the program’s constitutionality.⁶ Accordingly, the court cannot conclude that the defendants acted unreasonably or contrary to clear constitutional or statutory rights by allowing the institutional chaplain to be assigned at Red Onion, or, stated differently, by adhering to the prevailing agreement between the VDOC and the Chaplain Service. Thus, the defendants are entitled to qualified immunity on Berry’s first Establishment Clause claim. Consequently, the court grants summary judgment in the defendants’ favor on that claim.

The court reaches the same result with respect to Berry’s Establishment Clause claim surrounding the defendants’ accommodation of Muslim inmates’ dietary needs during Ramadan. The inherent tension between the Establishment and Free Exercise Clauses is exacerbated in the prison context, where inmates often cannot practice their religious beliefs without some active involvement of the prison administration. Prison officials sometimes are required under the Free Exercise Clause to take an active role in enabling inmates to exercise their religious beliefs, even

⁶ For a discussion of the relationship between the VDOC and Chaplain Services, see McGlothlin v. Murray, 993 F. Supp. 413 (W.D. Va. 1997). That case also presents a detailed discussion of the role of the institutional chaplain assigned by Chaplain Services.

though the same conduct outside of the prison context may run afoul of the Establishment Clause. See Abington Sch. Dist. v. Schempp, 374 U.S. 203, 296-99 (1963) (Brennan, J., concurring); see also Johnson-Bey, 863 F.2d at 1312; Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 341 (3d Cir. 1987). For those reasons, courts often apply the Establishment Clause less strictly in the prison environment, especially when the claim at issue involves accommodation issues as well as Establishment Clause issues.

The defendants are in the unenviable position of having to balance their obligations under the Free Exercise Clause to reasonably accommodate inmates' religious rights with their obligations to maintain security and effective prisons, while at the same time avoiding excessive governmental entanglement with religion as prohibited by the Establishment Clause. Here, the defendants accommodated Red Onion's Muslim inmates during Ramadan. However, without that accommodation, those inmates' religious needs otherwise could not be met. As stated, the established precedent at the time of defendants' actions does not prohibit such accommodation, but rather recognizes its necessity. Accordingly, the court concludes that, even if their actions violated the Establishment Clause, the defendants did not violate a clearly-established constitutional right by accommodating the dietary needs of Muslims during Ramadan. Thus, because they did not act unreasonably or contrary to clear constitutional or statutory rights, the defendants are entitled to qualified immunity on Berry's second Establishment Clause claim. Consequently, the court grants the defendants' motion for summary judgment on that claim.

IV.

Finally, Berry alleges that the defendants violated his rights under the Equal Protection Clause by denying him access to a Catholic priest and by accommodating the Muslim inmates' dietary needs during Ramadan. In their motion for summary judgment, the defendants failed to

address this claim or to raise the affirmative defense of qualified immunity to it. Finding that there are genuine issues of material fact as to whether the defendants violated the Equal Protection Clause, the court denies Berry's and the defendants' motion for summary judgment on those claims. Further, the court will direct the defendants to file an answer to Berry's claims under the Equal Protection Clause.

VI.

For the reasons stated, the court dismisses Berry's claim for injunctive relief as moot. In addition, the court concludes that the defendants are entitled to qualified immunity on Berry's Free Exercise and Establishment Clause claims and, thus, grants the defendants' motion for summary judgment on those claims. Finally, the court denies Berry's and the defendants' motion for summary judgment on Berry's equal protection claims. An appropriate order will be entered this day.

ENTER this ____ day of March, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

DENNIS JOSEPH BERRY,

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Civil Action No. 7:99CV00254

Plaintiff,)	
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v.)	<u>ORDER</u>
)	
GEORGE DEEDS, WARDEN, <i>et al.</i>,)	
)	By: Samuel G. Wilson
Defendants.)	Chief United States District Judge

In accordance with the court’s Memorandum Opinion entered this day, it is **ORDERED** and **ADJUDGED** that:

- 1) Berry’s claim for injunctive relief is **DISMISSED** without prejudice;
- 2) Defendants’ motion for summary judgment is **GRANTED** in-part and **DENIED** in-part; and
- 3) Berry’s motion for judgment on the pleadings, construed by the court as a motion for summary judgment, is **DENIED**.

It is further **ORDERED** that Defendants file an answer to Berry’s claims under the Equal Protection Clause.

ENTER this ____ day of March, 2001.

CHIEF UNITED STATES DISTRICT JUDGE