

FILED: December 7, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6875
(2:16-cv-00597-MSD-LRL)

DARREL A. WHITE

Plaintiff - Appellant

v.

W. JACKSON, Chaplain; FOSTER, Treatment Program Supervisor; V.
ANTORN, Health Administrator

Defendants - Appellees

and

J. ADAMS, Operations Officer; A. DAVID ROBINSON, Chief of Corrections
Operations; E. P. WITT, Grievance Coordinator

Defendants

J U D G M E N T

In accordance with the decision of this court, the judgment of the district
court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

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DARREL A. WHITE,

Plaintiff - Appellant,

v.

W. JACKSON, Chaplain; FOSTER, Treatment Program Supervisor; V. ANTORN,
Health Administrator,

Defendants - Appellees,

and

J. ADAMS, Operations Officer; A. DAVID ROBINSON, Chief of Corrections
Operations; E. P. WITT, Grievance Coordinator,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at
Norfolk. Mark S. Davis, District Judge. (2:16-cv-00597-MSD-LRL)

Submitted: November 29, 2017

Decided: December 7, 2017

Before DUNCAN, WYNN, and DIAZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

Darrel A. White appeals the district court's order* granting summary judgment in favor of Appellees in White's 42 U.S.C. § 1983 (2012) action. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *White v. Jackson*, No. 2:16-cv-00597-MSD-LRL (E.D. Va. June 28, 2017). We grant White's motion for leave to use the original record but deny his motions for appointment of counsel and for a transcript at government expense. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

* We construe White's informal brief as also challenging the district court's December 22, 2016, and March 29, 2017, orders. While we conclude that we have jurisdiction to review those orders, *see Jackson v. Lightsey*, 775 F.3d 170, 176-77 (4th Cir. 2015) (discussing compliance with Fed. R. App. P. 3), White has forfeited appellate review of the December 22 order, *see id.* at 177 (limiting appellate review to issues raised in informal brief). Further, contrary to White's apparent assertion on appeal, the March 29 order did not rule that any of his claims should be rejected for failure to exhaust administrative remedies.

Darrel A. White, Appellant Pro Se. Laura Maughan, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia; Ramon Rodriguez, III, RAWLS LAW GROUP, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

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O R D E R

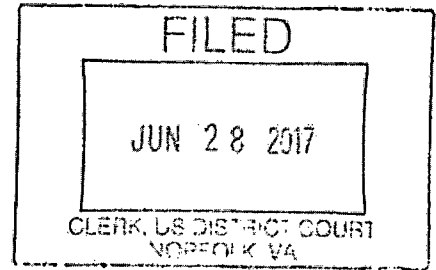
The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Duncan, Judge Wynn, and
Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division



DARREL A. WHITE,

Plaintiff,

v.

ACTION NO. 2:16cv597

W. JACKSON, *et al.*,

Defendants.

MEMORANDUM ORDER

Plaintiff, a Virginia inmate currently incarcerated at Sussex I State Prison ("SISP"), filed this *pro se* action pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 *et seq.*, to redress alleged violations of his constitutional and statutory rights. Plaintiff contends that Defendants Chaplain W. Jackson, Program Supervisor Foster, and Health Administrator V. Antorn violated his rights under RLUIPA and the First Amendment by failing to provide a special pill call time for those participating in Ramadan in 2016, which forced Plaintiff to break his fast.

This matter is before the Court on a number of motions filed by the parties, namely:

- (1) Defendants Jackson and Foster's Second Motion for Summary Judgment (ECF No. 48);
- (2) Defendant Antorn's Motion for Summary Judgment (ECF No. 51);
- (3) Plaintiff's Motion to Dismiss the Second Motion for Summary Judgment (ECF No. 54);
- (4) Plaintiff's Motion to Dismiss Defendants' Qualified Immunity (ECF No. 55);
- (5) Plaintiff's Motion to Dismiss Antorn's Motion for Summary Judgment (ECF No. 56); and

- (6) Plaintiff's Motion for Judgment on the Pleadings and Judgment as a Matter of Law (ECF No. 58).

For the reasons set forth below, the Motions for Summary Judgment (ECF Nos. 48, 51) will be **GRANTED**, and Plaintiff's Motions (ECF Nos. 54, 55, 56, 58) will be **DENIED**.

I. Procedural History

On October 7, 2016, the Court received Plaintiff's initial Complaint, which named sixteen (16) John and Jane Does as the Defendants. (Compl. at 1, ECF No. 1.) By Order entered on October 14, 2017, the Court directed Plaintiff to respond to interrogatories designed to particularize his claims and to provide the names of the individuals who allegedly violated his rights. (ECF No. 3.) In his response, which was docketed as an Amendment to the Complaint, Plaintiff named Chaplain W. Jackson, Program Supervisor Foster, Operations Officer J. Adams, Chief of Corrections Operations A. David Robinson, Health Administrator V. Antorn, and Grievance Coordinator E.P. Witt as Defendants. (Am. to Compl. 1-2, ECF No. 4.)

By Order entered on December 22, 2016, the Court dismissed Defendants Adams, Robinson, and Witt pursuant to 28 U.S.C. § 1915A(b)(1). (ECF No. 15 at 1-2.) Specifically, the Court stated:

Plaintiff contends that Witt violated his rights by failing to file his grievance. (Am. to Compl. at 7, ECF No. 4.) Plaintiff also contends that Adams violated his rights by not ensuring that Witt filed his grievance, and that Robinson violated his rights by authorizing the Operating Procedure that allowed Witt and Adams to reject Plaintiff's grievance. (*Id.* at 8.) However, Plaintiff has "no constitutional right to participate in grievance proceedings." *Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994) (citing *Flick v. Alba*, 932 F.2d 728, 729 (8th Cir. 1991)). Moreover, a prison official's failure to comply with the grievance procedures is not actionable under § 1983. *See, e.g., Chandler v. Cordova*, No. 1:09cv483, 2009 WL 1491421, at *3 n.3 (E.D. Va. May 26, 2009); *Banks v. Nagle*, Nos. 3:07CV419-HEH, 3:09CV14, 2009 WL 1209031, at *3 (E.D. Va. May 1, 2009). Furthermore, "there is no liability under § 1983 for a prison administrator's response to a grievance or appeal." *Brown v. Va. Dep't of Corr.*, No. 6:07CV00033, 2009 WL 87459, at *13

(W.D. Va. Jan. 9, 2009).

(ECF No. 15 at 1-2.)

On February 1, 2017, Defendants Jackson and Foster filed a Motion for a Protective Order, requesting that the Court stay discovery because, *inter alia*, they intended to raise the defense of qualified immunity. (ECF No. 21.) On February 24, 2017, Defendants Jackson and Foster filed a Motion for Summary Judgment, arguing that summary judgment was appropriate because Plaintiff had not exhausted his administrative remedies. (ECF No. 26.) By Order entered on March 29, 2017, the Court denied the Motion for Summary Judgment, concluding that the record presented “a genuine issue of material fact as to whether all levels of the VDOC’s administrative remedy procedure were available to Plaintiff.” (ECF No. 39 at 14.) The Court also construed Defendants’ Motion for a Protective Order as a motion to stay discovery, and stayed discovery pending resolution of the issue of qualified immunity. (*Id.* at 15-16.) The Court directed the parties to submit any dispositive motions with respect to the merits of Plaintiff’s claims within forty-five days. (*Id.* at 16.) The parties subsequently filed the Motions mentioned above.

II. Summary Judgment Standard

Summary judgment is appropriate only when the Court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists no genuine dispute “as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* Fed. R. Civ. P. 56(a); *Seabulk Offshore, Ltd. v. Am. Home Assur. Co.*, 377 F.3d 408, 418 (4th Cir. 2004). “A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party . . . [and] [a] fact is material if it might affect the outcome of the suit under the governing law.” *Jacobs v. N.C.*

Admin. Office of the Courts, 780 F.3d 562, 568 (4th Cir. 2015) (citations omitted). The moving party has the initial burden to show the absence of an essential element of the nonmoving party's case and to demonstrate that the moving party is entitled to judgment as a matter of law. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 185 (4th Cir. 2004); *McLean v. Patten Cmty's, Inc.*, 332 F.3d 714, 718 (4th Cir. 2003); *see Celotex*, 477 U.S. at 322-25.

When the moving party has met its burden to show that the evidence is insufficient to support the nonmoving party's case, the burden then shifts to the nonmoving party to present specific facts demonstrating that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Honor*, 383 F.3d at 185; *McLean*, 332 F.3d at 718-19. Such facts must be presented in the form of exhibits and sworn affidavits. *Celotex*, 477 U.S. at 324; *see also M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 163 (4th Cir. 1993). In order to successfully defeat a motion for summary judgment, the nonmoving party must rely on more than conclusory allegations, "mere speculation," the "building of one inference upon another," the "mere existence of a scintilla of evidence," or the appearance of "some metaphysical doubt" concerning a material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002); *Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc.*, 330 F. Supp. 2d 668, 671 (E.D. Va. 2004). Rather, there must be sufficient evidence that would enable a reasonable fact-finder to return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 252.

Moreover, while the Court is required to "determine whether there is a genuine issue for trial," *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (quoting *Anderson*, 477 U.S. at 249), the

Court “may not ‘weigh the evidence and determine the truth of the matter,’ because genuine disputes as to the truth of material facts should be submitted to the jury.” *Bowman v. Bank of Am., N.A.*, No. 3:13-cv-3436-TLW, 2016 U.S. Dist. LEXIS 184655, at *11 (D.S.C. June 16, 2016 (quoting *Tolan*, 134 S. Ct. at 1866); see *Arthur v. Pet Dairy*, 593 F. App’x 211, 216 (4th Cir. 2015). “The relevant inquiry is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Stewart v. MTR Gaming Grp., Inc.*, 581 F. App’x 245, 247 (4th Cir. 2014) (quoting *Anderson*, 477 U.S. at 251-52).

In support of their Motion for Summary Judgment, Defendants Jackson and Foster have submitted: (1) Jackson’s Affidavit (Mem. Supp. Second Mot. Summ. J. Attach. 1 (“Jackson Aff.”), ECF No. 49-1); (2) a copy of the April 7, 2016 Memorandum from A. David Robinson to Wardens and Superintendents regarding the observance of Ramadan in 2016 (*id.* Encl. A); (3) copies of Plaintiff’s signed forms for signing up for Ramadan in 2016 (*id.* Encl. B); (4) Foster’s Affidavit (*id.* Attach. 2 (“Foster Aff.”), ECF No. 49-2); and (5) a copy of the 2016 Master Pass List for Ramadan, with all inmate names except Plaintiff’s redacted (*id.* Ex. 1, ECF No. 49-3).

In support of her Motion for Summary Judgment, Defendant Antorn has submitted: (1) her Affidavit (Mem. Supp. Mot. Summ. J. Attach. 1 (“Antorn Aff.”), ECF No. 52-1); (2) a copy of the April 7, 2016 Memorandum (*id.* Ex. 1); (3) a copy of a grievance deemed to be founded from an unknown inmate arguing that he was not provided his medication after sunset in accordance with Ramadan (*id.* Ex. 2); (4) a copy of a Quality Improvement Corrective Action Plan, dated October 1, 2016 (*id.* Ex. 3); (5) a copy of the 2017 Master Pass List for Ramadan,

with all inmate names except Plaintiff's redacted (*id.* Ex. 4); and (6) a Population Notice from Antorn, dated May 10, 2017, regarding the Ramadan medication pass procedure (*id.* Ex. 5).

At this stage, the Court must determine whether Plaintiff "has proffered sufficient proof, in the form of *admissible* evidence, that could carry the burden of proof of his claim at trial." *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) (emphasis added). Plaintiff verified under the penalty of perjury that the contents of his Complaint are "true and correct." (Compl. at 1.) Therefore, Plaintiff's verified Complaint "is the equivalent of an opposing affidavit for summary judgment purposes." *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991). However, Plaintiff failed to swear to the contents of his Amendment under penalty of perjury. Therefore, the allegations contained therein fail to constitute admissible evidence. See *United States v. White*, 366 F.3d 291, 300 (4th Cir. 2004). Plaintiff has also submitted two Affidavits (ECF Nos. 54-1, 56-1), copies of his signed 2016 Ramadan participation forms (ECF No. 54-2), and a copy of VDOC Operating Procedure § 841.3, *Offender Religious Programs* (*id.*).

In light of the foregoing principles and submissions, the following facts are established for purposes of the Motions for Summary Judgment. All permissible inferences are drawn in favor of Plaintiff.

III. Summary of Pertinent Facts

On April 27, 2016, Plaintiff signed a contract to participate in Ramadan at SISP. (Compl. at 11.) Plaintiff's religious beliefs require that he participate in the Ramadan month of fasting. (*Id.*) During Ramadan in 2016, Plaintiff was given his medication after sunrise and before sunset, which caused him to break his fast. (*Id.* at 11-12.)

A. Facts Pertaining to Defendants Jackson and Foster

Defendant Jackson was the Chaplain at SISP during the 2016 Ramadan observation. (Jackson Aff. ¶ 1.) Chaplain Jackson is “responsible for creating the annual Master Pass List of Ramadan participants at SISP.” (*Id.* ¶ 3.) The Master Pass List is a “list used by prison officials throughout the facility to determine which offenders are permitted to be in certain parts of the prison at various times, and to determine who is participating in relevant programs.” (*Id.* ¶ 3 n.1.)

Prior to the 2016 Ramadan observation, Chaplain Jackson received a memorandum outlining the policies and procedures for celebrating Ramadan from the Chief of Corrections Operations, A. David Robinson. (*Id.* ¶ 5.) Pursuant to the memorandum, inmates wishing to participate in Ramadan had to sign up no later than May 5, 2016. (*Id.* Encl. A.) To sign up, an inmate needed to “submit a signed ‘Ramadan/MSTA and NOI Month of Fasting Participant Menu Choice Form 2016’ and a ‘Ramadan/MSTA and NOI Month of Fasting 4-Hour Rule Food Safety Form’ on or before the deadline.” (*Id.* ¶ 7.) Chaplain Jackson was responsible for reviewing and processing those forms and adding the inmates’ names to the Ramadan Master Pass List. (*Id.*)

Defendant Foster was the Institutional Programs Manager at SISP during this time. (Foster Aff. ¶ 1.) Foster “was responsible for processing paperwork for offenders who wished to sign up for Ramadan in 2016 at SISP.” (*Id.* ¶ 3.) He assisted the chaplain in this regard. (*Id.* ¶ 5.) Foster “was responsible for handing out the [sign-up] forms to institutional counselors who then were to distribute the forms to interested offenders.” (*Id.* ¶ 7.) Inmates then completed the forms and returned them to their counselors, who submitted them to the chaplain

for review. (*Id.*) Foster was not responsible for creating the Master Pass List and deciding which inmates to add to the list. (*Id.*)

Chaplain Jackson received Plaintiff's signed forms to participate in Ramadan on May 3, 2016. (Jackson Aff. ¶ 9; *see id.* Encl. B.) He added Plaintiff to the Ramadan Master Pass List on May 23, 2016. (*Id.* ¶ 10.) The Master Pass List was accessible through the Department of Corrections' inmate database called CORIS (Corrections Information System). (*Id.* ¶¶ 8, 11.) "Correctional officers, medical personnel, and prison staff have access to CORIS and are permitted to view the Ramadan Master Pass List to determine who is and is not celebrating Ramadan." (*Id.* ¶ 12.)

Neither Chaplain Jackson nor Foster supervise inmate or staff compliance with the Ramadan observation. (Jackson Aff. ¶ 13; Foster Aff. ¶ 11.) Chaplain Jackson and Foster are not trained medical providers. (Jackson Aff. ¶ 14; Foster Aff. ¶ 12.) Chaplain Jackson and Foster were not involved in the medication distribution process, and they were not aware of the medical department's procedures regarding pill call times for Ramadan. (Jackson Aff. ¶¶ 14-15; Foster Aff. ¶¶ 12, 14.) Chaplain Jackson and Foster did not pressure Plaintiff to alter his religious practices or force Plaintiff to take his medication in violation of his religious beliefs. (Jackson Aff. ¶¶ 17-18; Foster Aff. ¶¶ 16-17.)

B. Facts Pertaining to Defendant Antorn

Antorn is the Health Services Administrator at SISP. (Antorn Aff. ¶ 1.) As such, she is responsible for "supervising certain nurses at SISP in addition to ensuring that inmates received proper medical care." (*Id.*) Antorn is also responsible for familiarizing herself with relevant provisions of the VDOC Operating Procedures. (*See id.* ¶ 5.)

Pursuant to Operating Procedure § 841.3, *Offender Religious Programs*, “[o]ffenders participating in Ramadan/Month of Fasting shall be provided the opportunity to take their medications before dawn or after sunset either through special pill calls or self-medication.” (Op. Proc. § 841.3(IV)(C)(4)(e). At the time of Ramadan in 2016, Antorn was unaware of this operating procedure. (Antorn Aff. ¶ 4.) Although it was Antorn’s responsibility to comply with this procedure, she “mistakenly believed that the Section 700 of the VDOC Procedures, which is titled ‘Health Services & Mental Health Services,’ contained all of the guidelines that [she] was required to follow.” (*Id.* ¶ 5.)

On April 7, 2016, Chief of Corrections Operations A. David Robinson issued a memorandum to all Wardens and Superintendents regarding the observation of Ramadan. (*Id.* Ex. 1.) Antorn does “not recall reading this memorandum prior to July 5, 2016.” (*Id.* ¶ 6.) The memorandum instructs that “[i]f medically allowable, medications should be issued before astronomical twilight and after sunset for those who have signed up for Ramadan fast.” (*Id.* Ex. 1.) It further provided that “[m]edical staff will follow the astronomical twilight to sunset times as provided in this memorandum and may seek guidance from Food Service regarding these times.” (*Id.*) However, during Ramadan in 2016, Antorn “believed that a Ramadan-compliant pill pass was not part of the mandatory accommodations under VDOC rules or any common law or statutory rule.” (*Id.* ¶ 7.)

On July 15, 2016, Plaintiff asked Nurse Huvall why there was not a Ramadan pill call time. (Compl. at 12.) Nurse Huvall told Plaintiff that “per medical administrator Ms. Antorn the VDOC isn’t recognizing a Ramadan pill call time this year.” (*Id.*) Antorn never spoke with Plaintiff about this matter, and she never received or reviewed any grievances filed by

Plaintiff about this matter. (Antorn Aff. ¶¶ 9-10.)

At some point before August 9, 2016, “another inmate filed an administrative grievance that made similar complaints about the lack of Ramadan-compliant pill-passes.” (*Id.* ¶ 11; *see id.* Ex. 2.) The grievance was determined to be founded. (*Id.* Ex. 2.) The grievance was forwarded to Antorn around mid-September 2016. (Antorn Aff. ¶ 11.) After reviewing the grievance, Antorn reviewed Operating Procedure § 841.3 and “realized that [she] was responsible for implementing a Ramadan-compliant pill pass.” (*Id.*) Although it was too late for the 2016 Ramadan observation, Antorn “filed a Quality Improvement Corrective Action [Plan] (‘CAP’) on October 1, 2016.” (*Id.*) This CAP referenced the founded grievance and stated that the following would be done for corrective action:

An alternate medication pass will be initiated at Sussex I State Prison for Offenders participating in Ramadan/Motion of Fasting[. These offenders] shall be provided the opportunity to take their medications before dawn or after sunset either through this special pill call or self-medication.

(*Id.* Ex. 3.)

Since implementing the CAP, Antorn “ha[s] also developed a list of inmates who must be accommodated with Ramadan-compliant medication rounds for May 27, 2017 through June 25, 2017 (the month of Ramadan in 2017). (*Id.* ¶ 12; *see id.* Ex. 4.) Antorn also created a Population Notice “that informs inmates of their rights and obligations during Ramadan.” (*Id.* ¶ 13; *see id.* Ex. 5.)

During the 2016 observation of Ramadan, Antorn “did not believe that [she] had violated any inmate’s rights, including those of Plaintiff. [She] did not intend to deny any inmate’s rights, including those of Plaintiff.” (*Id.* ¶ 14.) Had Antorn known that Plaintiff was entitled to the pill pass, she “would have taken measures consistent with those mentioned [in] O.P. 841.3

to ensure that pill-pass nurses accommodated the rights of inmates like Plaintiff.” (*Id.* ¶ 15.)

IV. Chaplain Jackson and Foster

In support of their Motion for Summary Judgment, Jackson and Foster contend that they are entitled to qualified immunity. (Mem. Supp. Second Mot. Summ. J. 11-12, ECF No. 49.) “Qualified immunity protects officers who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful.” *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 898 (4th Cir. 2016) (quoting *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc)). This protection “balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Yates v. Terry*, 817 F.3d 877, 884 (4th Cir. 2016) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). To determine whether an officer is entitled to qualified immunity, courts engage in a two-step inquiry. “The first step is to determine whether the facts, taken in the light most favorable to the non-movant, establish that the officer violated a constitutional [or statutory] right. At the second step, courts determine whether that right was clearly established.” *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Here, the Court must consider whether Chaplain Jackson and Foster violated Plaintiff’s statutory rights under RLUIPA, as well as his constitutional rights under the First Amendment, by causing Plaintiff to break his fast during Ramadan by not providing a pill call time for those inmates participating in Ramadan.

The second step of the qualified immunity analysis—the “clearly established” prong—is “a test that focuses on the objective legal reasonableness of an official’s acts.” *Harlow v.*

Fitzgerald, 457 U.S. 800, 819 (1982). “A clearly established right is one that is ‘sufficiently clear that every reasonable official would have understood that what he [wa]s doing violates that right.’” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)). Ordinarily, to determine whether a right is clearly established in this circuit, the court “‘need not look beyond the decisions of the Supreme Court, [the Fourth Circuit] court of appeals, and the highest court of the state in which the case arose’ to determine whether a reasonable officer would know that his conduct was unlawful in the situation he confronted.” *Yates*, 817 F.3d at 887 (quoting *Wilson v. Kittoe*, 337 F.3d 392, 402-03 (4th Cir. 2003)); *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999). An official violates a clearly established constitutional right when, “‘in the light of preexisting law[,] the unlawfulness’ of the actions is apparent.” *Iko v. Shreve*, 535 F.3d 225, 237-38 (4th Cir. 2008) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The “clearly established” inquiry “‘must be undertaken in light of the specific context of the case, not as a broad general proposition.’” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier*, 533 U.S. at 201). There need not be a case “directly on point” in order for an officer to know that his or her conduct violates a clearly established right, “but existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (citing *Anderson*, 483 U.S. at 640; *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

District courts have discretion in deciding which of the two steps of the qualified immunity analysis to first address. *Pearson*, 555 U.S. at 236. The Court will therefore first consider whether Plaintiff has demonstrated that Chaplain Jackson and Foster actually violated his rights under RLUIPA and the First Amendment.

Plaintiff contends that Chaplain Jackson and Foster violated his rights under RLUIPA by failing to ensure that medical staff knew that Plaintiff was on the Ramadan participation list so that his medication needs could be managed accordingly. (Am. to Compl. at 7, ECF No. 4.) As discussed below, Plaintiff fails to demonstrate that Chaplain Jackson and Foster were personally involved in the alleged deprivation of his rights under the First Amendment and RLUIPA.

“Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must [demonstrate] that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir. 1977) (noting that the doctrine of *respondeat superior* is inapplicable to § 1983 actions); see *Trulock v. Freeh*, 275 F.3d 391, 402 (4th Cir. 2001) (noting that liability in a civil rights case is “personal, based upon each defendant’s own constitutional violations”). “To survive summary judgment, a plaintiff claiming a violation of § 1983 must produce evidence that the defendant knew of a deprivation and ‘approved it, turned a blind eye to it, failed to remedy it, or in some way personally participated.’” *Oakley v. Cowan*, 187 F. App’x 635, 638 (7th Cir. 2006) (some internal quotation marks omitted) (quoting *Johnson v. Snyder*, 444 F.3d 579, 584 (7th Cir. 2006)). “Absent direct participation, there must at least be a showing that the defendants ‘acquiesced in some demonstrable way’ in the alleged violation.” *Id.* (quoting *Palmer v. Marion Cty.*, 327 F.3d 588, 594 (7th Cir. 2003)).

Here, the record before the Court establishes that neither Chaplain Jackson nor Foster had any involvement in the alleged violation of Plaintiff’s rights. Chaplain Jackson and Foster were responsible for processing the paperwork for inmates who wished to participate in Ramadan during 2016. (Jackson Aff. ¶ 7; Foster Aff. ¶ 3.) Chaplain Jackson was responsible for ensuring

that those inmates who were approved to participate in Ramadan were added to the Master Pass List. (Foster Aff. ¶ 7.) Chaplain Jackson received Plaintiff's completed forms on May 3, 2016 and added Plaintiff's name to the Master Pass List on May 23, 2016. (Jackson Aff. ¶¶ 9-10; *id.* Encl. B.) The Master Pass List was available for officers, staff, and medical personnel to view through CORIS. (Jackson Aff. ¶¶ 8, 11-12.) Chaplain Jackson and Foster do not supervise inmate or staff compliance with the Ramadan observation. (Jackson Aff. ¶ 13; Foster Aff. ¶ 11.) They were not aware of the medical department's procedures regarding pill call times for Ramadan and were not involved in the medication distribution process. (Jackson Aff. ¶¶ 14-15; Foster Aff. ¶¶ 12, 14.) Chaplain Jackson and Foster did not pressure or force Plaintiff to take his medication in violation of his religious beliefs. (Jackson Aff. ¶¶ 17-18; Foster Aff. ¶¶ 16-17.)

In response, Plaintiff contends that Chaplain Jackson and Foster were responsible for notifying the medical department at SISP "by way of having medical sign and date the contract that [Plaintiff] was participating in the 2016 Ramadan." (Mot. Dismiss Second Mot. Summ. J. 1; ECF No. 54.) Plaintiff contends that Operating Procedure § 841.3 requires medical staff to sign the Ramadan forms before they are processed. (ECF No. 54-1 at 1.) After reviewing Operating Procedure § 841.3, the Court has located no such requirement. Rather, medical staff must approve participation in Ramadan for those inmates who are diabetic, wish to participate in Ramadan, and desire to fast during the day and not pick up their diabetic trays. (ECF No. 54-2 at 1.) Other than his sheer speculation, Plaintiff has not demonstrated that Chaplain Jackson and Foster were responsible for notifying the medical department by having them sign and date all Ramadan participation forms.

In sum, the record demonstrates that Chaplain Jackson and Foster did not violate Plaintiff's rights under RLUIPA and the First Amendment because they had no personal involvement in the medical department's procedures for medication distribution during Ramadan. Because Plaintiff has not demonstrated that Chaplain Jackson and Foster actually violated his rights under RLUIPA and the First Amendment, the Court declines to consider the second step of the qualified immunity analysis. For these reasons, the Motion for Summary Judgment filed by Chaplain Jackson and Foster (ECF No. 48) will be **GRANTED**. Plaintiff's Motion to Dismiss the Motion for Summary Judgment (ECF No. 54) and Motion to Dismiss Qualified Immunity (ECF No. 55) will be **DENIED**.

V. Defendant Antorn

Plaintiff next contends that Antorn violated his rights under RLUIPA and the First Amendment by failing to provide a special pill call time for those participating in Ramadan in 2016. (Am. to Compl. at 7.)

RLUIPA provides, in pertinent part, that:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). Thus, under RLUIPA, Plaintiff must first demonstrate that the challenged action imposed a "substantial burden" on his religious exercise. Similarly, under the First Amendment, Plaintiff must demonstrate that Antorn's conduct substantially burdened his religious exercise. *Whitehouse v. Johnson*, No. 1:10cv1175 (CMH/JFA), 2011 WL 5843622, at *5 (E.D. Va. Nov. 18, 2011). Here, Antorn does not contest that the failure to provide a special

pill call time for Ramadan participants substantially burdened Plaintiff's religious exercise. (Mem. Supp. Mot. Summ. J. 8 n.4 (citing *Lovelace v. Lee*, 472 F.3d 174, 187-88 (4th Cir. 2006)), ECF No. 52.) Instead, Antorn argues that Plaintiff cannot recover against her under either RLUIPA or the First Amendment because she did not intentionally burden Plaintiff's religious exercise. (*Id.* at 7.)

[In *Lovelace*, the United States Court of Appeals for the Fourth Circuit noted that "only intentional conduct is actionable under the Free Exercise Clause." *Lovelace*, 472 F.3d at 201. Thus, "negligent acts by officials causing unintended denials of religious rights do not violate the Free Exercise Clause. . . . [A plaintiff] must [demonstrate] conscious or intentional interference with his free exercise rights to state a valid claim under § 1983." *Id.* The Fourth Circuit further concluded that "simple negligence, the 'lowest common denominator of customary tort liability,' does not suffice to meet the fault requirement under . . . RLUIPA." *Id.* at 194 (citing *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 848-49 (1998)); see *Lowery v. Edmondson*, 528 F. App'x 789, 792 (10th Cir. 2013) (citing *Lovelace* for the same proposition).]

With respect to the upper threshold of the culpability spectrum, the Fourth Circuit held "that RLUIPA at least reaches intentional conduct because that is what the Free Exercise Clause reaches." *Lovelace*, 472 F.3d at 194-95 (citations omitted). The Fourth Circuit noted: "As we said earlier, Congress passed RLUIPA to give institutionalized persons greater protection of religious exercise than what the Constitution affords. Because the Constitution prohibits intentional burdens on free exercise, RLUIPA must, at a minimum, prohibit these burdens as

well.” *Id.* at 195;¹ *see, e.g., Browning v. Seifert*, No. 1:13CV23, 2015 WL 1280948, at *7 (N.D. W. Va. Mar. 20, 2015) (noting that “‘simple negligence’ is insufficient to meet this fault requirement, but that RLUPA ‘at least reaches intentional conduct’” (quoting *Lovelace*, 472 F.3d at 194)); *Abdul-Mateen v. Phipps*, No. 7:11CV00051, at *3-4 (W.D. Va. Feb. 23, 2012) (noting that “inadvertent or negligent interference with an inmate’s religious practice does not rise to constitutional proportions” and that mere negligence “does not give rise to a constitutional claim or a claim under RLUIPA”).

The record before the Court establishes that Antorn’s actions with respect to Plaintiff’s religious exercise amount, at most, to simple negligence. Plaintiff has not provided any evidence demonstrating that Antorn suspected that she was wrong with respect to her belief that a Ramadan-compliant pill pass was a necessary accommodation or that Antorn willfully tried to prevent a correction of the policy. On the contrary, at the time of the 2016 observation of Ramadan, Antorn “mistakenly believed that the Section 700 of the VDOC Procedures, which is titled ‘Health Services & Mental Health Services,’ contained all of the guidelines that [she] was required to follow.” (Antorn Aff. ¶ 5.) Plaintiff herself never spoke with Antorn about the lack of a Ramadan-compliant pill call, and Antorn never received or reviewed any grievances from Plaintiff about the matter. (*Id.* ¶¶ 9-10.)

Antorn learned of her mistake in mid-September 2016, when she received a copy of a grievance submitted by another inmate regarding the lack of a Ramadan-compliant pill call that was deemed to be founded. (*Id.* ¶ 11; *see id.* Ex. 2.) Rather than ignoring her mistake, Antorn

¹ The *Lovelace* court declined to “decide . . . whether RLUIPA reaches beyond the Free Exercise Clause to prohibit conduct, such as deliberate indifference, that is less than intentional but more than negligent.” 472 F.3d at 195.

“filed a Quality Improvement Corrective Action [Plan] (‘CAP’) on October 1, 2016.” (*Id.* ¶ 11.) The CAP indicated that “[a]n alternative medication pass [would] be initiated at [SISP] for offenders participating in Ramadan/Month of Fasting.” (*Id.* Ex. 3.) Inmates participating in Ramadan would “be provided the opportunity to take their medications before dawn or after sunset either through this special pill call or self-medication.” (*Id.*) Antorn also developed a list of inmates who would need to be accommodated with Ramadan-compliant medication pill calls for the 2017 observation of Ramadan, as well as a Population Notice “that informs inmates of their rights and obligations during Ramadan.” (*Id.* ¶¶ 12-13; *see id.* Exs. 4-5.)

Antorn “regret[s] [her] failure to review and implement a proper Ramadan pill pass in 2016.” (*Id.* ¶ 15.) Had she known, she “would have taken measures consistent with those mentioned [in] O.P. 841.3 to ensure that pill-pass nurses accommodated the rights of inmates like Plaintiff.” (*Id.*) The Court is cognizant that Antorn’s regret does not allay the fact that Plaintiff was unable to fully adhere to his religious exercise during the 2016 observation of Ramadan. However, Plaintiff has not provided any evidence to the Court that creates a genuine issue of material fact as to whether Antorn acted intentionally to impede Plaintiff’s religious exercise.² *See Parker v. Trent*, No. 1:10-cv-120, 2011 WL 6967994, at *6 (N.D. W. Va. Dec. 21, 2011) (concluding that summary judgment was warranted because the defendants had not intentionally violated the plaintiff’s First Amendment rights by failing to provide the plaintiff his medication prior to daybreak), *R&R adopted by* 2012 WL 71695 (N.D. W. Va. Jan. 10, 2012), *aff’d*, 502 F.

² The Court notes that on June 2, 2017, the Court received a “Notice” from Plaintiff, in which Plaintiff indicates that there may have been issues with his receipt of medication on several days during the 2017 celebration of Ramadan. (ECF No. 57 at 1-4.) To the extent that Plaintiff believes his constitutional and statutory rights have been violated during the 2017 observation of Ramadan, he remains free to file a new lawsuit regarding such.

App'x 307 (4th Cir. 2012). Because the record establishes that Antorn was, at most, negligent, her Motion for Summary Judgment (ECF No. 51) will be **GRANTED**. Plaintiff's Motion to Dismiss the Motion for Summary Judgment (ECF No. 56) will be **DENIED**.

VI. Outstanding Motion

As noted above, Plaintiff has filed a Motion for Judgment on the Pleadings or Motion for Judgment as a Matter of Law. (ECF No. 58.) In this Motion, Plaintiff requests that the Court rule in his favor because he has "show[n] that Defendants have no argument basis." (*Id.* at 1.) As discussed above, however, Defendants Jackson, Foster, and Antorn are entitled to summary judgment based upon the record before the Court. Accordingly, Plaintiff's Motion (ECF No. 58) will be **DENIED**.

VII. Conclusion

For the foregoing reasons, the Motions for Summary Judgment (ECF Nos. 48, 51) are **GRANTED**. Plaintiff's Motions (ECF Nos. 54, 55, 56, 58) are **DENIED**. The Clerk is **DIRECTED** to enter judgment in favor of Defendants.

Plaintiff may appeal from this Memorandum Order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days from the date of entry of this Memorandum Order. If Plaintiff wishes to proceed *in forma pauperis* on appeal, the application to proceed *in forma pauperis* is to be submitted to the Clerk, United States Court of Appeals, Fourth Circuit, 1100 E. Main Street, Richmond, Virginia 23219.

The Clerk is **DIRECTED** to send a copy of this Memorandum Order to Plaintiff and counsel of record.

IT IS SO ORDERED.

Handwritten signature of Mark S. Davis in black ink, appearing as 'msd' with a stylized flourish.

Mark S. Davis
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

June 28, 2017

**Additional material
from this filing is
available in the
Clerk's Office.**