

APPENDIX A

**Opinion of the United States Court of
Appeals for the Tenth Circuit**

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**FILED
United States Court of Appeals
Tenth Circuit**

October 13, 2017

**Elisabeth A. Shumaker
Clerk of Court**

MURTAZA ALI,

Plaintiff - Appellant,

v.

**JUSTIN JONES, Director; ED EVANS,
Warden, Interim Director; ROBERT
PATTON, Director; MARK KNUTSON,
Director's Designee; JIM FARRIS,
Warden; TIFFANY POWELL, Warden's
Assistant; (FNU) TERRY, Kitchen
Supervisor; (FNU) FOX, Kitchen
Supervisor; MIKE DUNCAN, Unit
Manager; JOSH LEE, Lieutenant; JAY
DRAWBRIDGE, Chaplain; KELLY
CURRIE, Kitchen Supervisor; K.
SACKET, Mail Room Supervisor; LEO
BROWN, Chaplin; (FNU) DENTON,
Chief of Security, (FNU) JONES, Kitchen
Supervisor; (FNU) HADDOCK, Kitchen
Supervisor; JANET DOWLING, Warden;
OKLAHOMA DEPARTMENT OF
CORRECTIONS,**

Defendants – Appellees.

**No. 17-6050
(D.C. No. 5:14-CV-01174-C)
(W.D. Okla.)**

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **KELLY, MURPHY, and MATHESON**, Circuit Judges.**

Plaintiff-Appellant Murtaza Ali appeals from the district court's dismissal of various claims and defendants, including a grant of summary judgment in favor of three defendants. The parties are familiar with the facts so we need not restate them here other than to state that Mr. Ali claimed that defendants violated his civil rights by failing to provide a Halal diet and denying him access to a religious text, the Noble Quran, as well as retaliating against him. The district court adopted a series of reports and recommendations by the magistrate judge and entered judgment in favor of defendants. See Ali v. Drawbridge, No. CIV-14-1174-C, 2017 WL 401254 (W.D. Okla. Jan. 30, 2017); ECF No. 188. We affirm.

Mr. Ali claims that the district court erred in dismissing his Religious Land Use and Institutionalized Persons Act (RLUIPA) claims as moot because he is no longer incarcerated. "RLUIPA claims regarding prison conditions become moot if the inmate plaintiff is released from custody." Pfeil v. Lampert, 603 F. App'x 665, 668 (10th Cir. 2015). Once Mr. Ali was released from Oklahoma Department of Corrections custody, his RLUIPA claims became moot.

Mr. Ali argues that his First Amendment rights were violated by various defendants under 42 U.S.C. § 1983. Specifically, he claims that he was denied a

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Halal diet and a copy of the Noble Quran, and he also claims that his cell was searched in retaliation for him being a Muslim.¹

Mr. Ali has not marshaled facts tending to show that any defendants had any personal involvement in denying him a Halal diet, therefore he cannot maintain a § 1983 action against them. See Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). Mr. Ali also argues that his right to freely exercise his religion was substantially burdened because he was not allowed a copy of the Noble Quran. But no such right was substantially burdened because the prison regulations relied upon to deny Mr. Ali a copy were rationally related to a valid penological interest. Moreover, Mr. Ali had alternative means by which to exercise his religion (several different translations of the Quran were available to him). See Turner v. Safley, 482 U.S. 78, 90–91 (1987).

Mr. Ali claims that his cell was raided and a copy of the Noble Quran taken from his cell in retaliation against him for being a Muslim. Mr. Ali has no Fourth amendment rights to privacy in his jail cell. Hudson v. Palmer, 468 U.S. 517, 525–26 (1984). Additionally, he was not allowed to have a copy of the Noble Quran and no facts support his claim of retaliation in these circumstances. See Shero v. City of Grove, 510 F.3d 1196, 1203 (10th Cir. 2007) (discussing the elements of a retaliation claim).

¹ Mr. Ali also claims an Establishment Clause violation. Because he raises this issue for the first time on appeal, we will not consider it. McDonald v. Kinder-Morgan, Inc., 287 F.3d 992, 999 (10th Cir. 2002).

For his remaining claims, Mr. Ali has failed to persuade us of any legal errors of the district court. Thus, we affirm the district court for substantially the same reasons regarding: (1) dismissing the complaints against defendants Terry, Haddock, and Jones as untimely and for ineffective service (ECF No. 182); (2) dismissing Mr. Ali's third amended complaint (ECF No. 81); (3) the denial of Rule 56(d) motion (ECF No. 180, magistrate report and recommendation); (4) denial of motion for Martinez report (ECF No. 167); (5) denial of motion for appointment of counsel (ECF No. 80); and (6) dismissal of claims against defendant Fox for failure to exhaust administrative remedies (ECF No. 165, magistrate report and recommendation).

AFFIRMED. We DENY all pending motions including Mr. Ali's motion to proceed in forma pauperis:

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

APPENDIX B

**Opinion of the United States District Court
for The Western District of Oklahoma**

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

MURTAZA ALI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-14-1174-C
	)	
JAMES DRAWBRIDGE, et al.,	)	
	)	
Defendants.	)	

ORDER ADOPTING SIXTH SUPPLEMENTAL
REPORT AND RECOMMENDATION

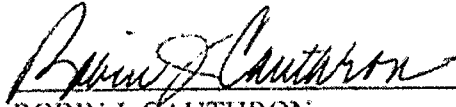
This civil rights action brought by a former state prisoner, proceeding pro se, was referred to United States Magistrate Judge Gary M. Purcell, consistent with the provisions of 28 U.S.C. § 636(b)(1)(B). Judge Purcell entered his Sixth Report and Recommendation on December 22, 2016, to which Plaintiff has timely objected. The Court therefore considers the matter de novo.

The facts and law are accurately set out in the Magistrate Judge's Report and Recommendation and there is no purpose to be served in repeating them yet again. In his objection, Plaintiff raises no issue not fully and accurately addressed and rejected by the Magistrate Judge.

Accordingly, the Court adopts, in its entirety, the Report and Recommendation of the Magistrate Judge, and for the reasons announced therein, Defendant Robert Denton's Motion for Summary Judgment (Dkt. No. 141) and Defendants Leo Brown and James (Jay) Drawbridge's Motion for Summary Judgment (Dkt. No. 142) are DENIED as to the issue of

exhaustion of administrative remedies and GRANTED as to Plaintiff's remaining claims against them. A judgment will enter accordingly.

IT IS SO ORDERED this 30th day of January, 2017.

A handwritten signature in cursive script, reading "Robin J. Cauthron", written over a horizontal line.

ROBIN J. CAUTHRON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

MURTAZA ALI,

Plaintiff,

vs.

JUSTIN JONES, et al.,

Defendants.

No. CIV-14-1174-C

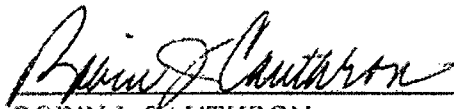
JUDGMENT

Upon consideration of the civil rights Complaint filed herein, the Reports and Recommendations of the Magistrate Judge, as well as Plaintiff's objections thereto, and the Court's accompanying Orders,

IT IS ORDERED, ADJUDGED AND DECREED that:

Consistent with the Court's Orders on January 27, 2016 (Dkt. No. 81); January 12, 2017 (Dkt. No. 182), and January 30, 2017 (Dkt. No. 187), Judgment is entered in favor of Defendants and against Plaintiff.

DATED this 30th day of January, 2017.



ROBIN J. CAUTHRON

United States District Judge

APPENDIX C

United States District Magistrate's Report and Recommendation

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

MURTAZA ALI a/k/a ALI MURTAZA,	)	
	)	
Plaintiff,	)	
	)	
	)	No. CIV-14-1174-C
v.	)	
	)	
JAMES DRAWBRIDGE, et al.,	)	
	)	
Defendants.	)	

SIXTH SUPPLEMENTAL REPORT AND RECOMMENDATION

Plaintiff, a former state prisoner appearing *pro se*, filed this civil rights action pursuant to 42 U.S.C. § 1983.¹ At the time Plaintiff filed his initial pleading on October 27, 2014, Plaintiff was confined at the James Crabtree Correctional Center (“JCCC”) in Helena, Oklahoma, serving two, concurrent 25-year terms of imprisonment in the custody of the Oklahoma Department of Corrections (“ODOC”) for two convictions of Accessory After the Fact to Murder in the First Degree. The matter was referred by District Judge Cauthron to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636(b)(1)(B).

Plaintiff was discharged from ODOC custody on December 11, 2014. Plaintiff is currently confined in a jail in Texas. Notice (Doc. # 85). Plaintiff’s “Third Amended Complaint” filed December 28, 2015 (Doc. # 73) was previously stricken from the record.

¹Plaintiff initially appeared with counsel in this action. His counsel was previously allowed to withdraw, and Plaintiff has proceeded *pro se* since that time.

Order Adopting Report and Recommendation (Doc. # 81). Thus, Plaintiff's Second Amended Complaint (Doc. # 14) provides the genesis for his claims.²

In his Second Amended Complaint filed January 12, 2015 (Doc. # 14), Plaintiff alleges a multitude of constitutional deprivations stemming from his previous confinement at JCCC and the Lexington Assessment and Reception Center ("LARC") while in the custody of ODOC.³

Before the Court are two dispositive motions filed in this action by the three remaining Defendants. Defendant Denton has moved for summary judgment pursuant to Fed. R. Civ. P. 56 (Doc. # 141), and Defendants Brown and Drawbridge have moved for summary judgment pursuant to Fed. R. Civ. P. 56 (Doc. # 142). Plaintiff has filed a response (Doc. # 176) to Defendant Denton's motion and a response (Doc. # 175) to Defendants Brown and Drawbridge's motion.

I. Standard of Review - Motion for Summary Judgment

Summary judgment may be granted when there is no genuine dispute as to any

²In the Third Supplemental Report and Recommendation, the undersigned referred to this pleading as Plaintiff's Amended Complaint. However, the pleading is actually Plaintiff's Second Amended Complaint. The Amended Complaint, previously filed by Plaintiff at a time when he was represented by counsel, was not signed by counsel as required by Fed. R. Civ. P. 11. Plaintiff was directed to re-file the Amended Complaint with his attorney's signature. Plaintiff re-filed the same pleading except that it bore his then-attorney's signature. The re-filed Amended Complaint is considered to be Plaintiff's Second Amended Complaint.

³In the Fifth Supplemental Report and Recommendation entered October 28, 2016, the undersigned recommended that Plaintiff's cause of actions against Defendants Terry, Haddock, and Jones be dismissed without prejudice and the motions for summary judgment filed by Defendants Sacket (Vales) and Fox be granted and judgment be entered in favor of Defendants Sacket (Vales) and Fox and against Plaintiff.

material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, the court reviews the evidence and inferences drawn from the record in the light most favorable to the nonmoving party. Burke v. Utah Transit Auth. & Local, 462 F.3d 1253, 1258 (10th Cir. 2006)(quotation omitted), cert. denied, 550 U.S. 933 (2007). A dispute is “genuine” if a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “Material facts” are “facts which might affect the outcome of the suit under the governing law.” Id. “At the summary judgment stage, a complainant cannot rest on mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true.” Burke, 462 U.S. at 1258 (internal quotation marks and citations omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)(quotations omitted).

II. Qualified Immunity

In their Motions for Summary Judgment, Defendants Denton, Brown and Drawbridge assert, among other grounds, that they are protected from Plaintiff’s claims against them seeking monetary damages under 42 U.S.C. § 1983 by the doctrine of qualified immunity. This doctrine “shields government officials performing discretionary functions from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Toeys v. Reid, 646

F.3d 752, 755 (10th Cir. 2011) (internal quotations and citations omitted). When the defense asserts a qualified immunity defense, the summary judgment standard is subject to a “somewhat different analysis from other summary judgment rulings.” Steffey v. Orman, 461 F.3d 1218, 1221 (10th Cir. 2006).

When a defendant raises qualified immunity, the burden shifts to the plaintiff. Medina v. Cram, 252 F.3d 1124, 1128 (10th Cir. 2001) (internal quotations and citations omitted). The plaintiff “must show that the defendant’s actions violated a specific statutory or constitutional right,” and that the right was “clearly established at the time of the conduct at issue.” Steffey, 461 F.3d at 1221. If a plaintiff does succeed in carrying his or her burden, the defendant(s) then bear the burden of showing that there are no material issues of fact that would defeat their claim of qualified immunity. Lighton v. University of Utah, 209 F.3d 1213, 1221 (10th Cir. 2000).

III. Plaintiff’s Remaining Claims Against Defendants Denton, Brown, and Drawbridge

Plaintiff’s 42-page Second Amended Complaint is verbose, in many instances unintelligible, and repetitive. As best as it can be interpreted, Plaintiff’s remaining claims involving Defendants Denton, Brown, and Drawbridge as alleged in the Second Amended Complaint are:

1. Plaintiff alleges that he was transferred by ODOC from LARC to JCCC on March 28, 2014, that he applied for a special religious Halal diet under ODOC’s policy governing the provision of special religious meals, and that the request was approved on April 25, 2014, by the appropriate officials. Plaintiff complains that during the period of time he was

awaiting approval of his religious diet request he was served non-Halal meals by JCCC food service staff, and that staff explained to him that until his religious diet request was approved he would not receive a Halal diet pursuant to ODOC's policy in effect at that time. Second Amended Complaint, at 3h. In essence, Plaintiff contends Defendant Drawbridge, who approved his request for a Halal diet, denied his First Amendment rights by failing to provide him a Halal diet between March 28, 2014 until April 25, 2014 at JCCC.

2. Plaintiff alleges his request to purchase/possess a religious text entitled "Noble Quran" was denied by Defendant Drawbridge on June 9, 2014, in violation of Plaintiff's First Amendment right to freely exercise his chosen religion, although Plaintiff admits he was able to possess a Quran.

3. Plaintiff alleges both a violation of his right to freely exercise his religion and unconstitutional retaliation for his grievance(s) occurred when his cell was searched at JCCC on August 19, 2014, by Defendant Drawbridge at the direction of Defendants Brown and Denton, and his copy of the "Noble Quran," "other religious text," unidentified "legal . . . documents," and other personal property were seized from his cell. Second Amended Complaint, at 4, 31.

IV. Rule 56(d) Affidavit

With Plaintiff's Response to the Motion for Summary Judgment filed by Defendants Brown and Drawbridge, Plaintiff has submitted a "Sworn Affidavit Pursuant to Rule 56(f)." Rule 56(f) allows a court to grant summary judgment for a nonmovant, grant a motion for summary judgment on grounds not raised by a party, or consider summary judgment on its

own after identifying for the parties material facts that may not be genuinely in dispute. In Plaintiff's "Sworn Affidavit Pursuant to Rule 56(f)," Plaintiff requests that the court defer consideration of Defendants' Motions for Summary Judgment until he obtains "the necessary information requested [from Defendants] on September 29, 2016 and November 10, 2016." "Sworn Affidavit Pursuant to Rule 56(f)" (Doc. # 175), Ex. 3.

In this affidavit, Plaintiff is not requesting relief under Rule 56(f). Rather, Plaintiff appears to be requesting deferral of the Court's consideration of the pending dispositive motions on the basis, as provided in Rule 56(d), that he "cannot present facts essential to justify" opposition to Defendants' Rule 56 summary judgment motions. However, Plaintiff has presented lengthy responsive pleadings, and numerous exhibits are attached to his responsive pleadings. Plaintiff has not shown that he is unable to present facts in support of his objections to Defendants' motions. Plaintiff's request, presented in his "Sworn Affidavit Pursuant to Rule 56(f)," which is construed as a request to defer consideration of Defendants Denton, Brown, and Drawbridge's summary judgment motions pursuant to Rule 56(d), is DENIED.

V. Exhaustion of Administrative Remedies

Defendants Denton, Brown, and Drawbridge assert very briefly that Plaintiff failed to exhaust available administrative remedies concerning his remaining claims. Defendants have not provided evidence of ODOC's administrative grievance policy in effect during the relevant time period related to Plaintiff's claims. Defendants have also not provided evidence of Plaintiff's grievances or grievance appeals with their motions.

In support of their exhaustion defense, Defendants Denton, Brown, and Drawbridge have presented only the affidavit of Mr. Knutson, ODOC's Administrative Review Authority ("ARA") manager. In his affidavit, Mr. Knutson avers that Plaintiff attempted to appeal grievances numbered 14-307, 14-77, and 14-116, but these grievances were not answered due to procedural errors. Mr. Knutson further avers that the ARA did not receive appeals concerning Plaintiff's grievances numbered 14-150, 14-001, 14-003, or 14-118, and that Plaintiff did not exhaust administrative remedies with the ARA, which is the final step required to exhaust ODOC's administrative grievance process.

The Prison Litigation Reform Act ("PLRA"), enacted in 1996, requires a prisoner to exhaust his or her administrative remedies prior to filing a lawsuit in federal court challenging prison conditions under 42 U.S.C. § 1983 or any other Federal law. 42 U.S.C. § 1997e(a). "[E]xhaustion requirements are designed to ... give the agency a fair and full opportunity to adjudicate their claims" before the plaintiff proceeds to file an action in federal court. Woodford v. Ngo, 548 U.S. 81, 90 (2006). This mandatory exhaustion requirement, see Jones v. Bock, 549 U.S. 199, 211 (2007), applies "to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 524, 532 (2002).

To properly exhaust administrative remedies, a plaintiff must "us[e] all steps that the agency holds out, and [do] so *properly* (so that the agency addresses the issues on the merits)." Woodford, 548 U.S. at 90 (quotation and citation omitted). "An inmate who

begins the grievance process but does not complete it is barred from pursuing a § 1983 claim.” Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002).

Having asserted the affirmative defense of failure to exhaust administrative remedies, Defendants bear the initial burden of proof. See Jones v. Bock, 549 U.S. 199, 215-216 (2007)(holding failure to exhaust administrative remedies is affirmative defense); Roberts v. Barreras, 484 F.3d 1236, 1241 (10th Cir. 2007)(“We . . . hold that the burden of proof for the exhaustion of administrative remedies in a suit governed by the PLRA lies with the defendant.”). “Once a defendant proves that a plaintiff failed to exhaust, however, the onus falls on the plaintiff to show that remedies were unavailable to him. . . .” Tuckel v. Grover, 660 F.3d 1249, 1254 (10th Cir. 2011).

“The ODOC grievance process has a requirement of informal consultation with staff, then three written steps: a Request to Staff form, a formal grievance, and an appeal to the administrative review authority.” Thomas v. Parker, 609 F.3d 1114, 1117 (10th Cir. 2010).

In his response to Defendants Denton, Brown, and Drawbridge’s motions, Plaintiff asserts that ODOC’s ARA obstructed his efforts to exhaust available administrative remedies concerning his remaining claims. Plaintiff has submitted with his responsive pleading a copy of a Request to Staff (“RTS”) directed to Defendant Drawbridge and dated June 10, 2014. In this RTS, Plaintiff states, “On 6-9-14 you denied me the provision of the Noble Quran that was ordered via Islamic community of JCCC account on 5/27/14. In doing so absent legitimate penological [sic] interest you are violating my various U.S. Const. Rights and thereby substantially burdening my religious exercise.” Defendant Drawbridge responded

to the RTS on June 20, 2014, and advised Plaintiff that “[t]he order was denied in accordance with OP-030117 and the instructions from Les Brown (Agency Chaplain). A new order can be placed for Qurans authored by different people.” Plaintiff’s Response (Doc. # 175), Ex. 19, at 1.

Plaintiff has also submitted with his response a copy of a grievance, identified on its face as grievance “JCCC 14-116,” in which Plaintiff complains that Defendant Drawbridge’s denial of his request to possess a Noble Quran “without stating legitimate penological [sic] interests” substantially burdened his right to exercise his chosen Islamic religion. JCCC Warden Dowling responded to the grievance on July 29, 2014, and Plaintiff received a copy of this grievance response on August 1, 2014, as shown on the face of the grievance response. Id., Ex. 19, at 5. In response to Plaintiff’s grievance, Warden Dowling stated that “[t]he order was denied in accordance with OP-030117, and the instructions from Mr. Leo Brown who is the Agency’s Chaplain.” Id.

Plaintiff attempted to appeal this grievance response to ODOC’s ARA. However, Plaintiff was advised by Mr. Knutson in a letter dated August 11, 2014, that his “grievance/correspondence” was “filed improperly” because he was at that time on administrative grievance restriction and he failed to properly submit an affidavit with the “grievance.” Plaintiff was advised in this letter of the opportunity to resubmit his “grievance” within 10 days of receipt of the letter.

Plaintiff submits that at the time he submitted his grievance appeal to the ARA the ODOC’s administrative grievance policy, OP-090124, did not impose the additional

requirement of an affidavit for a grievance appeal submitted to the ARA. Plaintiff's argument has merit.

In Burnett v. Jones, 437 Fed. App'x 736 (10th Cir. 2011)(unpublished op.), the Tenth Circuit Court of Appeals addressed a similar claim and found that during the time the prisoner-litigant in that case was on grievance restriction "OP-090124 impose[d] no additional requirements for grievance appeals submitted by prisoners on grievance restriction" and "[t]here [was] no provision authorizing the [ARA] to reject a grievance appeal for failure to comply with grievance-restriction procedures when the prisoner has received a response on the merits from the reviewing authority." Id. at *5. Based on these findings, the court concluded that "under OP-090124 the [ARA] lack[ed] the authority to reject a grievance appeal for failure to comply with the grievance-restriction procedures when the reviewing authority responds on the merits." Id. Thus, the ARA had erred in rejecting the prisoner-litigant's grievance appeals and the ARA's "actions in rejecting these appeals rendered proper exhaustion unavailable," excusing proper exhaustion of the prisoner-litigant's claims. Id.

In this case, the ARA advised Plaintiff that his "grievance/correspondence was filed improperly" because he "was on grievance restriction" and he did not submit an affidavit with his "grievance." Plaintiff's Response (Doc. # 175), Ex. 19, at 7; Ex. 21, at 8. The ARA gave Plaintiff an opportunity to resubmit his grievance appeal with the proper affidavit. The record shows that Plaintiff did submit an affidavit with his grievance submitted to the warden. Plaintiff's Response (Doc. # 175), Ex. 19, at 4. Thus, it appears that the ARA's

rejection of Plaintiff's attempted appeal of the grievance decision was predicated on his failure to submit an affidavit with his grievance appeal. Burnett is persuasive authority that the ARA lacked the authority to reject Plaintiff's grievance appeal on this basis.

In another case involving ODOC's grievance policy in effect in 2014, United States Magistrate Judge Goodwin found that under that version of ODOC's grievance policy "the ARA had the authority to reject an appeal based upon an inmate's failure to adhere to grievance-restriction requirements at the grievance level" and the ARA was therefore authorized to reject the prisoner-litigant's grievance appeal for procedural defects in his grievance presented to the reviewing authority. Smith v. Jones, 2014 WL 5448890, *12 (W.D. Okla. 2014)(unpublished Report and Recommendation)(Goodwin, M.J.).

The Smith decision would be persuasive if the ARA in this case was referring to Plaintiff's grievance presented to the reviewing authority (warden) rather than to his grievance appeal. But the ARA's letter appears to have advised Plaintiff of a procedural defect in his grievance appeal, rather than a procedural defect in his grievance submitted to Warden Dowling because (1) the ARA gave Plaintiff the opportunity to resubmit his grievance appeal to cure the defect and (2) the record shows Plaintiff did submit an affidavit with his grievance submitted to Warden Dowling. Thus, Smith provides no basis upon which to find that the ARA had the authority to reject Plaintiff's grievance appeal due to his failure to comply with ODOC policy then in effect.

Under the version of ODOC's grievance policy now in effect, the ARA has the same authority as a reviewing authority (warden) to reject a grievance appeal for an inmate on

grievance restriction who “has not complied with all requirements for submitting a grievance or appeal.” Plaintiff’s Response (Doc. # 175), Ex. 12, at 18 (ODOC policy OP-090124, effective July 19, 2016, at § IV(B)(2)(c). But Defendants have not shown that this policy was in effect at the time Plaintiff submitted his grievance appeal, and Judge Goodwin’s Report and Recommendation in the Smith decision, in which Judge Goodwin addressed the difference in the versions of the pertinent ODOC grievance policy, shows that the grievance policy now in effect is not the policy that was in effect during the relevant time period for Plaintiff’s claims in 2014.

Plaintiff has demonstrated that the administrative grievance process was unavailable to him with respect to grievance number JCCC 14-116, concerning the issue of the denial of his request for a copy of the religious text “Noble Quran.”

Plaintiff asserts that his administrative remedies were not available with respect to another attempted appeal of a grievance decision to ODOC’s ARA, identified as ARA 14-307. In this attempted grievance appeal, Plaintiff states only that he had sent an RTS to Mr. Leo Brown on June 10, 2014, and he did not receive a response to the RTS, and he then submitted a grievance to Mr. Ed Evans on July 10, 2014, which was forwarded to Mr. Clint Castleberry, and that he was “forwarding this grievance appeal to ARA . . . requesting reply to grievance sent to Ed Evans on 7-10-14 which was forwarded to Clint Castleberry on 7-18-14.” Plaintiff’s Response (Doc. # 175), Ex. 20, at 3. Plaintiff never describes or provides the actual “grievance” itself. Plaintiff was advised in a letter dated August 25, 2014, by Mr. Knutson, ODOC Director’s Designee with the ARA, that his attempted grievance appeal was

“filed improperly” because “YOU CANNOT APPEAL A NON-RESPONSE.” Id., Ex. 20, at 2.

With this attempted grievance appeal, and in the absence of any evidence concerning the subject matter of the purported “grievance” submitted to Mr. Evans, Plaintiff has not demonstrated that he completed the administrative grievance process or that the administrative grievance process was unavailable to him as to the remaining claims asserted in his Second Amended Complaint.

In support of his assertion that administrative remedies were unavailable to him, Plaintiff has also submitted with his response a copy of a Request to Staff directed to Defendant Denton dated August 19, 2014. In this RTS, Plaintiff asserts that “[o]n 8-19-14 . . . you stated . . . that you authorized [Defendant] Drawbridge a chaplain at JCCC, not a security officer, to search and seize all my property . . . without allowing me to remain within view of the property searched in violation of OP-040110” and conducted “an unlawful search and confiscation of legal, religious and miscellaneous property.” Plaintiff’s Response (Doc. # 175), Ex. 21, at 1-2. Plaintiff requested the “[r]eturn [of] my Noble Quran, 3 other Islamic religious books, various legal documents and [a] radio adapter . . .” In response to this RTS, Plaintiff was advised that “[t]he Warden has already resolved this issue with you.” Id.

Plaintiff submitted a grievance dated September 4, 2014, directed to JCCC Warden Dowling, and identified on its face as grievance “JCCC 14-147,” in which Plaintiff complained that his “Noble Quran, . . . Radio charger, and various legal documents” were “unlawfully confiscated under false premise and unsubstantiated reasons based on [Mr.]

Drawbridge's religious bias of adherents of Islamic faith, be returned to me." Id. at 3. The grievance was accompanied by an affidavit setting forth Plaintiff's previously-submitted grievances in compliance with ODOC's grievance restriction policy. Id. at 4-5.

In response to this grievance, Warden Dowling stated that the grievance was denied because "[t]here were no legal documents taken from you during the search of your property. The items given back to you are the only items you will be able to receive. All other items are deemed contraband and will not be returned to you per OP-030120." Id. at 6.

Plaintiff attempted to appeal the grievance decision in grievance JCCC 14-147. However, he was advised in a letter from the ODOC's ARA dated October 3, 2014, that his "grievance/correspondence" was not properly filed because he was on administrative grievance restriction at that time and he did not comply with the grievance restriction policy by presenting an "affidavit." Id. at 7-8.

For the same reasons previously stated with respect to Plaintiff's grievance JCCC 14-116, Plaintiff has provided evidence showing that the administrative grievance process was unavailable to him with respect to grievance JCCC 14-147, in which he sought administrative relief concerning his claims of constitutional violations related to the confiscation of religious texts and personal property during a cell search conducted at JCCC.

With respect to Plaintiff's remaining First Amendment claim involving the denial of a Halal diet between March 28, 2014 and April 25, 2014, Plaintiff avers in an affidavit included with his responsive pleading that the administrative grievance process was not available to him to grieve this issue because his request to Defendant Drawbridge for

placement on the religious Halal diet was granted, and he was therefore not required to complete the remaining steps of the grievance process. Plaintiff's argument has merit.

Plaintiff specifically avers that Defendant Drawbridge assured him in an informal meeting with Defendant Drawbridge in his office conducted on April 10, 2014, Drawbridge had granted his request for a special religious diet. It is not disputed that on April 10, 2014, following Plaintiff's transfer to JCCC, Plaintiff requested to be placed on a religious Halal diet by submitting a request on an ODOC-approved form for such requests to Defendant Drawbridge, JCCC's chaplain. See Defendants Brown and Drawbridge's Statement of Undisputed Facts (Doc. # 142), at 2. This request was approved by Defendant Drawbridge on the same date. Id. On April 11, 2014, Defendant Drawbridge forwarded the approved religious diet request form to Ms. Curry in the JCCC Food Services Department, so that Halal meals could be ordered for Plaintiff. Id. Plaintiff began receiving Halal meals on or about April 24, 2014. Id. Although neither party has demonstrated that Plaintiff actually grieved the issue concerning his receipt of Halal meals, it appears that administrative remedies would be unavailable to him given the circumstances and undisputed facts.

In light of the foregoing findings, Defendants' motions seeking summary judgment on the ground of failure to exhaust administrative remedies should be denied.

VI. First Amendment right to religious diet

"The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment . . . means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Employment Div.

Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 876-877 (1990). However, as recognized by the Supreme Court in Smith, "the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws." Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 424 (2006)(citing Smith, 494 U.S. at 883-890). In the context of prisons, the First Amendment's Free Exercise Clause requires "a reasonable opportunity to pursue [one's] religion." Stewart v. Beach, 701 F.3d 1322, 1330-1331 (10th Cir. 2012)(quotation omitted).

It is clearly-established law in this circuit that prisoners have a constitutional right to a diet conforming to their sincerely held religious beliefs, unless denying the diet is "reasonably related to legitimate penological interests." Beerheide v. Suthers, 286 F.3d 1179, 1184-1185 (10th Cir. 2002).

It is not disputed that on April 10, 2014, following Plaintiff's transfer to JCCC, Plaintiff requested to be placed on a religious Halal diet by submitting a request on an ODOC-approved form for such requests to Defendant Drawbridge, JCCC's chaplain. This request was approved by Defendant Drawbridge on the same date. On April 11, 2014, Defendant Drawbridge forwarded the approved religious diet request form to Ms. Curry in the JCCC Food Services Department, so that Halal meals could be ordered for Plaintiff. Plaintiff began receiving Halal meals on or about April 24, 2014.

"Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead 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). Thus, "[i]ndividual

liability under §1983 must be based on personal involvement in the alleged constitutional violation.” Foote v. Spiegel, 118 F.3d 1416, 1423 (10th Cir. 1997); see Jenkins v. Wood, 81 F.3d 988, 994-995 (10th Cir. 1996)(“[P]laintiff must show the defendant personally participated in the alleged violation, and conclusory allegations are not sufficient to state a constitutional violation.”)(internal citation omitted).

Plaintiff appears to be upset that he was required to submit a new request to be provided a special religious diet after his transfer to JCCC. Plaintiff argues that ODOC policy OP-030112, entitled “Religious Services,” is “facially unconstitutional . . . to deny Halal religious meals, violating Plaintiff’s free exercise of religious rights at JCCC.” Plaintiff’s Response, at 14. Plaintiff has not alleged or shown, however, that Defendant Drawbridge was responsible for or involved in adopting this policy.

Defendant Drawbridge has averred, and Plaintiff has not disputed, that Defendant Drawbridge held the position of Chaplain II at JCCC. The form entitled “Special/Religious Diet Request Form,” completed by Plaintiff and dated April 10, 2014, reflects that under ODOC guidelines “[t]he chaplain will verify the offender’s religious practice and that the offender’s religion mandates a Kosher/Halal diet. The chaplain will approve Kosher/Halal diet requests in accordance with OP-030112 entitled ‘Religious Services.’” The form contains Defendant Drawbridge’s signature attesting that he approved Plaintiff’s request on April 10, 2014. Defendant Drawbridge avers in an affidavit attached to his motion that he sent the form to JCCC Food Services on April 11, 2016, and Plaintiff has not disputed this statement.

Pursuant to ODOC policy OP-030112, an inmate requesting to receive a Kosher or Halal diet must submit a "Kosher/Halal Diet Request Form" . . . to the facility chaplain or the food service supervisor in community corrections facilities." Plaintiff's Response (Doc. # 175), Ex. 18, at 9-10. The chaplain is directed by the policy to review the diet request form, verify the offender's religious faith, and verify that the offender's religion mandates a Kosher or Halal diet. Id. at 10. Pursuant to the policy, the diet request form also sets forth rules for those receiving a Kosher or Halal diet and the consequences for violating those rules. Id. The diet request form bearing Plaintiff's signature includes information concerning these rules, as well as his attestation, by his signature on the form, that he would comply with those rules.

There is no material issue of fact for trial with respect to Plaintiff's claim of denial of a Halal diet between March 28, 2014 and April 25, 2014. Plaintiff did not submit the form required by ODOC policy until April 10, 2014, and Defendant Drawbridge approved the request on the same day and transferred it to the facility's food services department the following day. Defendant Drawbridge complied with established ODOC policy in reviewing and approving Plaintiff's request for a special religious diet. Nothing in the record demonstrates or creates an inference that Defendant Drawbridge was either involved in adopting the religious-diet policy or was personally involved in denying Plaintiff access to a Halal diet. Defendant Drawbridge is entitled to summary judgment with respect to Plaintiff's claim of a First Amendment deprivation stemming from an alleged denial of receipt of Halal meals between March 28, 2014 and April 25, 2014, at JCCC.

VII. First Amendment Right to Possess a Particular Religious Text

Plaintiff alleges his request to purchase/possess a religious text entitled “Noble Quran” was denied by Defendant Drawbridge on June 9, 2014, in violation of Plaintiff’s First Amendment right to freely exercise his chosen religion, although Plaintiff admits he was able to possess a Quran. Second Amended Complaint, at “3j” - “3K” (ECF page nos. 21-22). The translation of the Quran known as the “Noble Quran” is, according to Plaintiff, “compiled by Dr. Muhammad Taqi-ud-Din Al-Hilali and Dr. Muiyammad Mushin Khan.” Plaintiff’s Response (Doc. # 175), Ex. 1 (Plaintiff’s Affidavit), at 4.

The following facts are not disputed:

1. Leo Brown is employed by ODOC as the Agency Chaplain.
2. In 2007, a determination was made by ODOC officials not to allow offenders to obtain copies of the “Noble Quran,” which is a particular translation of the Quran, Islam’s scripture.
3. While at JCCC, Plaintiff requested the ability to purchase a “Noble Quran.”
4. In response to Plaintiff’s request, Leo Brown conducted a survey of other corrections agencies regarding the “Noble Quran” and found that other agencies restricted access to the “Noble Quran,” including the Texas Department of Criminal Justice and the Nebraska Department of Corrections.
5. In response to Plaintiff’s complaints regarding the denial of his request to purchase a “Noble Quran” Mr. Brown met with a representative of the Oklahoma Chapter of the Council on American-Islamic Relations (“CAIR-OK”) to discuss the “Noble Quran.” The CAIR-OK representative supported ODOC’s decision regarding the “Noble Quran” and provided

literature for distribution to offenders in ODOC custody which recommended alternate versions of the Quran available for free through CAIR-OK. CAIR-OK recommended two translations of the Holy Qur'an for ODOC inmates, including *The Qur'an*, translated by M.A.S. Abedel-Haleem, and *The Message of the Qur'an*, translated by Muhammad Asad. Defendants Brown and Drawbridge's Motion for Summary Judgment (Doc. # 142), Ex. 1, at 3.

6. Plaintiff's request was denied due to an email directive from ODOC's Agency Chaplain Leo Brown stating that the "Noble Quran" was not an authorized translation for use in ODOC facilities.

7. Brown's decision, and the reason for the decision, was communicated to Plaintiff and others at JCCC, and steps were taken to make sure that other versions of the Quran were available to offenders. Plaintiff was informed that all other translations were approved for use in ODOC facilities and that there were a number of other translations he could order or that were available in the Islamic Communities lockers located in the JCCC chapel building.

"Prisoners must be provided reasonable opportunities to exercise their religious freedom guaranteed under the First Amendment." Hudson v. Palmer, 468 U.S. 527, 523 (1984)(internal quotations omitted). Although prisoners retain a First Amendment right to practice their chosen religion, this constitutional right is limited by valid penological objectives. O'Lone v. Shabazz, 482 U.S. 342, 348 (1987). Those legitimate goals include deterrence of crime, rehabilitation of prisoners, and institutional security. Id. In furthering these goals, prison officials are afforded appropriate deference, and a prison regulation is

valid if it is reasonably related to legitimate penological interests. Id. at 349 (quotation and citation omitted).

“In determining the constitutionality of restrictions on the exercise of religion, the Court must balance four factors: (1) the existence of a rational connection between the prison restriction and a legitimate governmental interest advanced as its justification; (2) the presence of alternatives for inmates to exercise the right; (3) the effect that elimination of the restriction would have on guards, other prisoners, and prison resources; and (4) the existence of alternatives for prison officials without restricting inmates’ rights to religious expression.” Derrick v. Ward, 91 Fed. App’x 57, 61 (10th Cir. 2004)(unpublished order)(citing Makin v. Colo. Dep’t of Corr., 183 F.3d 1205, 1209 (10th Cir. 1999)). In making this determination, the Court must be careful not to “substitute [its] judgment on . . . difficult and sensitive matters of institutional administration,” even concerning First Amendment claims. Id. at 353 (quotation and citation omitted).

Defendants have cited “safety concerns” as a legitimate penological goal which supports the decision to prohibit Oklahoma inmates from obtaining or possessing the “Noble Quran” religious text. Defendants Brown and Drawbridge have submitted as an exhibit with their motion a copy of an essay that appeared in the Middle East Quarterly entitled “Assessing English Translations of the Qur’an” by Khaleel Mohammed, an assistant professor in the Department of Religious Studies at San Diego State University. Defendants Leo Brown and James (Jay) Drawbridge’s Motion for Summary Judgment (Doc. # 142), Ex. 6.

In this essay, Mr. Mohammed states that the translation known as the “Noble Qur’an” by Muhammad Taqi al-Din al-Hilali and Muhammad Muhsin Khan, which is the translation Plaintiff requested to possess, “reads more like a supremacist Muslim, anti-Semitic, anti-Christian polemic than a rendition of the Islamic scripture.” Id., Ex. 6, at 6. For instance, as the author describes it, this translation states as a verse “Guide us to the Straight Way, the way of those on whom You have bestowed Your Grace, not (the way) of those who have earned Your anger (such as the Jews), nor of those who went astray (such as the Christians).” The author describes other portions of the translation and concludes that “[a]lthough this Saudi-sponsored effort, undertaken before 9-11, is a serious liability for American Muslims in particular, it still remains present in Sunni mosques, probably because of its free distribution by the Saudi government.” Id.

Defendants have also provided a copy of a document from CAIR-OK directed to ODOC inmates advising them that CAIR-OK recommends two translated meanings of the Holy Qur’an for ODOC inmates, including *The Qur’an*, translated by M.A.S. Abdel-Haleem, and *The Message of the Qur’an*, translated by Muhammad Asad.

The undersigned can locate no authority that favorably addresses the particular translation of the Quran requested by Plaintiff. In one essay appearing in the online website, The American Muslim, entitled the “Hilali-Khan Qur’an Translation,” the author notes that this particular translation of the Quran “seriously distorts the concept of jihad,” is found “on Muslim extremist sites,” and should be “removed from every mosque in the U.S.” http://theamericanmuslim.org/tam.php/features/articles/through_the_looking_glass_hilali

_khan_quran_translation/.

ODOC guidelines prohibit the possession by inmates of correspondence or publications that “[a]dvocate terrorism, criminal behavior, racial, religious, or national hatred, or any material that creates an unsafe environment for the offenders or staff.” Plaintiff’s Response (Doc. # 175), Ex. 13 (ODOC policy OP-030117 (I)(B)(5)(c)).

Inmates in ODOC custody are allowed to possess certain religious items. Plaintiff’s Response (Doc. # 175), Ex. 18 (ODOC policy OP-030112 (IX)(B)(2)). Inmates may request to have additional religious property items added to the list of allowable religious property, and such a request must be reviewed by the facility head and facility chaplain, who will then forward such a request to ODOC’s Religious Services Unit and the agency chaplain. Id. (B)(3).

In a RTS directed to JCCC Chaplain Drawbridge and dated June 10, 2014, Plaintiff stated that “[o]n 6-9-14 you denied me the provision of the Noble Quran that was ordered via Islamic community . . . In doing so absent legitimate penological [sic] interest you are violating my various U.S. Const. Rights and thereby substantially burdening my religious exercise.” Plaintiff’s Response (Doc. # 175), Ex. 19, at 1. In response to this RTS, Defendant Drawbridge advised Plaintiff that his “order was denied in accordance with OP-030117 and the instructions from Leo Brown (Agency Chaplain). A new order can be placed for Qurans authored by different people.” Id. In response to Plaintiff’s grievance concerning the denial of his request to order a “Noble Quran,” Plaintiff was advised by JCCC Warden Dowling that the grievance was denied because his “order was denied in accordance with

OP-030117, and the instructions from Mr. Leo Brown who is the Agency's Chaplain." Id. at 2-5.

There is a rational connection between the ODOC's restriction against personal possession of the version of the Quran known as the "Noble Quran" and the legitimate safety concerns posited by Defendants. Defendant Brown, in his capacity as Agency Chaplain, made a reasonable decision to interview a representative of a local CAIR chapter and, in light of the information he received from that representative, made a reasonable decision to deny Plaintiff's request to possess the "Noble Quran" religious text based on institutional safety concerns. Also, as Defendant Brown avers in his affidavit attached to Defendants Brown and Drawbridge's motion (Doc. # 142), other versions of the Quran are available to offenders. Defendants Leo Brown and James (Jay) Drawbridge's Motion for Summary Judgment (Doc. # 142), Ex. 1 (Defendant Brown's Affidavit). Plaintiff admits he was able to possess other versions of the Quran. Plaintiff's Response (Doc. # 175), Ex. 1 (Plaintiff's affidavit), at 3-4. Thus, alternatives existed for Plaintiff to exercise his chosen Islamic religion.

The third factor looks to the impact accommodation of the asserted right would have on prison staff and other inmates. In determining that he could not accommodate Plaintiff's request to possess the "Noble Quran," Defendant Brown reasonably considered the advice he received from the CAIR representative and from other sources showing that this version of the Quran used language of a divisive religious nature that could threaten the safety of other inmates and guards.

Plaintiff's assertion that the "Noble Quran" was the "true" translation of the Quran

and is therefore vital to his ability to exercise his chosen religion is not supported by the evidence. It is not clear how ODOC could have otherwise accommodated Plaintiff's request, as he admits he has other opportunities for exercising his First Amendment rights. Therefore, Plaintiff has not demonstrated that his right to freely exercise his religion was improperly infringed by ODOC's restriction on the purchase/possession of the "Noble Quran" version of the Islamic scripture. Defendants are entitled to summary judgment with respect to Plaintiff's claim of a First Amendment violation stemming from the denial of his request to purchase or possess the "Noble Quran."

VIII. Confiscation of Religious Items and Personal Property in Cell Search

Plaintiff lastly claims that his First Amendment rights were violated and he was subject to unconstitutional retaliation when his cell was searched at JCCC on August 19, 2014, by Defendant Drawbridge at the direction of Defendants Brown and Denton, and his copy of the "Noble Quran," "other religious text," unidentified "legal . . . documents," and other personal property were seized from his cell. Second Amended Complaint, at 4, 31.

The following facts, as set forth in Defendants Brown and Drawbridge's Statement of Undisputed Facts, are not disputed:

1. Defendant Drawbridge, the chaplain at JCCC, was away from JCCC from August 14, 2014 until August 18, 2014. On August 18, 2016, Defendant Drawbridge was informed of an incident where a male individual appeared at the facility claiming to be a volunteer and sought to bring copies of the "Noble Quran" into JCCC and to participate with the inmates in the Islamic Ju-mah service.

2. The unidentified person was only allowed into the facility after returning the copies of the "Noble Quran" to his vehicle. The unidentified male did not sign in or out on the volunteer log sheet, as volunteers are instructed to do during their volunteer training, and did not produce a volunteer ID.
3. Defendant Drawbridge is the volunteer coordinator for JCCC and is responsible for submitting memos, for approval, for any volunteers that wish to gain entrance to JCCC and conduct or participate in any service or class that is not one of JCCC regular volunteers. No volunteer had requested authorization to come to JCCC and enter the facility grounds during the time of this security breach.
4. Defendant Drawbridge obtained a still photograph of the unidentified person and found that he did not look like any volunteer that had been to JCCC. A copy of the photograph was sent to Leo Brown, the Agency Chaplain and Agency Volunteer Coordinator for ODOC, and Mr. Brown could not identify the individual as a ODOC volunteer.
5. Defendant Drawbridge spoke to Plaintiff and others in the Muslim inmate community at JCCC. They did not correctly identify the individual that had attended their August 15, 2014 Ju'mah service.
6. Defendant Drawbridges believes Plaintiff knew the identity of the person and had coordinated with the individual in an effort to obtain copies of Noble Qurans.
7. In an effort to determine the identity of the unauthorized individual, Defendant Drawbridge requested authorization to conduct a search of Plaintiff's personal property.
8. On August 19, 2014, JCCC Chief of Security, Defendant Denton, authorized a cell search

based upon a request from Defendant Drawbridge for the purpose of determining whether the cell or Plaintiff's belongings contained information related to the identity of an undocumented volunteer who had gained access to JCCC on or about August 15, 2014.

9. Based on the authorization received from Defendant Denton, Defendant Drawbridge conducted a search of the contents of Plaintiff's cell on August 19, 2014.

9. A "Noble Quran" was seized during the search as contraband, as well as other items, some of which were later returned to Plaintiff. The contraband "Noble Quran" was not returned to Plaintiff due to the directive from ODOC's Religious Services Department that the "Noble Quran" was not allowed in ODOC facilities.

The Supreme Court has firmly established that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." Hudson, 468 U.S. at 526. "Virtually the only place inmates can conceal weapons, drugs, and other contraband is in their cells. Unfettered access to these cells by prison officials, thus, is imperative if drugs and contraband are to be ferreted out and sanitary surroundings are to be maintained." Id. at 527. Institutional security is central to all other correctional goals, and "[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." Id. at 527-28.

The search of Plaintiff's personal possessions by Defendant Drawbridge, as

authorized by Defendant Denton, did not violate his Fourth Amendment rights. Further, Defendant Brown and ODOC officials reasonably prohibited possession of the “Noble Quran” in furtherance of the valid goal of institutional security. Thus, Plaintiff’s First Amendment rights were not violated by the confiscation of contraband in the form of a “Noble Quran” found during the search.

“[P]rison officials may not retaliate against or harass an inmate because of the inmate’s exercise of his constitutional rights.” Peterson v. Shanks, 149 F.3d 1140, 1144 (10th Cir. 1998) (quotations omitted). To establish a First Amendment retaliation claim, a plaintiff must demonstrate three elements: “(1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant’s actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant’s adverse action was substantially motivated as a response to the plaintiff’s exercise of constitutionally protected conduct.” Shero v. City of Grove, 510 F.3d 1196, 1203 (10th Cir. 2007).

“[I]t is not the role of the federal judiciary to scrutinize and interfere with the daily operations of a state prison, and our retaliation jurisprudence does not change this role.” Peterson, 149 F.3d at 1144. “[A]n inmate is not inoculated from the normal conditions of confinement experienced by convicted felons serving time in prison merely because he has engaged in protected activity.” Id. Thus, a prisoner claiming retaliation “must prove that ‘but for’ the retaliatory motive, the incidents to which he refers, . . . , would not have taken place.” Id.

There is no dispute that search of the contents of Plaintiff's cell was conducted by Defendant Drawbridge in an effort to obtain information concerning an unidentified individual who had gained access to the prison only a few days prior to the search. Plaintiff admits in his responsive pleading that he knew the first name of this individual, giving credence to Defendant Drawbridge's assertion that Plaintiff may have more information concerning the identity of the individual. See Plaintiff's Response (Doc. # 175), at 52. Plaintiff has not shown that the search was conducted because of any protected activity by Plaintiff, including the filing of grievances related to the denial of his request to purchase a "Noble Quran." There is no material issue of fact concerning Plaintiff's claim of unconstitutional retaliation, and Defendants are entitled to summary judgment concerning Plaintiff's First Amendment free exercise and First Amendment retaliation claims.

RECOMMENDATION

Based on the foregoing findings, it is recommended that Defendant Denton's Motion for Summary Judgment (Doc. # 141) and Defendants Brown and Drawbridge's Motion for Summary Judgment (Doc. # 142) be DENIED as to the issue of exhaustion of administrative remedies and GRANTED as to Plaintiff's remaining claims against them, and that judgment issue in favor of Defendants and against the Plaintiff. The parties are advised of their respective right to file an objection to this Sixth Supplemental Report and Recommendation with the Clerk of this Court by January 11th, 2017, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Sixth

Supplemental Report and Recommendation would waive appellate review of the recommended ruling. Moore v. United States, 950 F.2d 656 (10th Cir. 1991); cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996) (“Issues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.”).

This Sixth Supplemental Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not specifically addressed herein is denied.

ENTERED this 22nd day of December, 2016.


GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

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