14 Civ. 4355 (ARR)(LB)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERTO NIEVES,

Plaintiff,

-against-

THE CITY OF NEW YORK, CAPTAIN HARVEY (G.R.V.C.), C.O. ROGERS (G.R.V.C.),

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

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Matter No. 2014-027638

PRELIMINARY STATEMENT

Pro Se Plaintiff Roberto Nieves, an inmate at Rikers Island's George R. Vierno Center ("GRVC"), brings this civil rights action pursuant to 42 U.S.C. § 1983, alleging that Defendants violated his First and Fourteenth Amendment rights in connection with Defendants' temporary withholding of three books – a "Wicca Bible", a "book of shadows", and a religious history book titled "The Chalice and the Blade" – and the lack of an established Wicca religious program at GRVC.

Defendants the City of New York, Captain Harvey, and Corrections Officer ("C.O.") Rogers now respectfully move the Court for an Order dismissing this action pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that: (1) Plaintiff's Free Exercise Claim under the First Amendment fails to rise to the level of a constitutional violation; (2) Plaintiff's First Amendment retaliation claim fails absent an allegation of adverse action; (3) Plaintiff fails to state a cognizable claim under the Equal Protection Clause; and (4) Plaintiff is not entitled to compensatory damages under the Prison Litigation Reform Act.

FACTS ALLEGED IN THE COMPLAINT

Plaintiff alleges that on May 18, 2014, his brother, Ruben Nieves, visited Plaintiff at GRVC and attempted to leave three books on the subject of Wicca – a "Wicca Bible", a "book of shadows", and a religious history book titled "The Chalice and the Blade" – at the facility's package window for Plaintiff. See Complaint dated July 1, 2014 (Dkt No. 1) at p. 9 of 13. Defendant C.O. Rogers examined the books and told Plaintiff's brother Ruben that she "had to ask her supervisor if [Plaintiff] was allowed to have the religious material". Id. at p. 10 of 13. Plaintiff alleges that C.O. Rogers then spoke with Defendant Captain Harvey who subsequently denied Plaintiff's request for the books. Id.

Plaintiff claims that his brother, Ruben, shared the above facts with him. Id. Plaintiff then asked C.O. Morris if he could speak with Captain Harvey. Id. Non-party C.O. Morris spoke with Captain Harvey who asked C.O. Morris for the name of Plaintiff's religion. Id. Plaintiff told C.O. Morris that his religion is Wicca. Id. Plaintiff claims that Captain Harvey told him that Wicca "is not documented on [the DOC computer] as one of the choices when it comes to religions". Id. Plaintiff claims that Captain Harvey told Plaintiff that he should speak with a representative of the social services department in order to add his religion to their data and print the name of his religion on his identification card before he will be allowed any religious materials. Id. Plaintiff informed Captain Harvey that the United States Government recognizes Wicca as a religion. Id. Plaintiff also told Captain Harvey that he already had four Wicca books in his cell that he had received since he was admitted to Rikers Island. Id.

Plaintiff claims that he then approached C.O. Rogers about the situation and that C.O. Rogers said that "if [Plaintiff's brother Ruben Nieves] continues to persue [sic] the issue [Ruben] would not be allowed to visit [Plaintiff] for 45 days". Id.

Plaintiff claims that Captain Harvey told C.O. Rogers that "the reason why she [Captain Harvey] denied [Plaintiff's] books was because they were detrimental to the staff and the Inmates . . . at (GRVC)". Id.

Lastly, Plaintiff alleges that DOC "does not offer any program what so ever so that [Plaintiff] may exercise [his] religion just like the Christians, Muslims, Catholics and the Jewish Community". Id. at p. 11 of 13.

Plaintiff attaches several grievance forms to his Complaint. The first is an "Inmate Grievance and Request Program Disposition Form," dated May 30, 2014, in which Plaintiff requested to "meet with the administrative chaplain regarding the Religious programs that are

not available to me at this facility." Id. at p. 12 of 13. Plaintiff also requested that Wicca be "posted as a program call out and documented on [his] I.D. card". Id. GRVC's grievance department proposed the following resolution: "IGRC confirmed that grievants [sic] request was accepted and the Administrative Chaplain will in fact meet with the grievant." Id. Plaintiff signed the form and dated it June 4, 2014. Id.

Plaintiff also attaches an "Inmate Grievance and Request Program Statement Form", dated June 3, 2014, which recounts the events surrounding Plaintiff's brother's attempted delivery of the Wicca books. See id. at p. 9 of 13 ("June 3 Statement Form"). In it, Plaintiff requested that DOC "[c]omply with minimum standards and the Constitution and stop blocking my 1st and 14th ammendment [sic] rights for my religious bible and reading material." Id. Plaintiff also attached a "Disposition Form", dated June 5, 2014, that proposed the following resolution:

> IGRC confirmed with the Deputy Warden and the Administrative Chaplin [sic] that the grievant can receive the books so long as the books are not hard cover and/or have not been manipulated, therefore, [Plaintiff's] action requested is accepted.

Id. at p. 8 of 13. Plaintiff signed the form on June 12, 2014, and indicated that he accepted the proposed resolution. Id. In response to the question in the Complaint, "What was the result [of filing a grievance], if any?", Plaintiff claims that he "received [the] books . . . only because it was granted by Higher Ranking Superiors". Id. at p. 4 of 14 (section IV.E.2).

In response to the question "What steps, if any, did you take to appeal that decision?", Plaintiff states "The Chaplain interviewed me and said that I was correct but there still isn't any services established for Wicca." Id. (section IV.E.3).

Plaintiff claims injuries consisting of "extreme emotional distress", "dinied [sic] right to practice [his] religion", "dinied [sic] religious bible and meterials [sic]," and "undo [sic] sexual harrasment [sic]". Id. at p. 3 of 13 (section III).

As relief, Plaintiff seeks an injunction requiring the DOC to establish a "full and complete Wicca Religion in New York City, state and federal prisons" and "officer training or handling of religious meterials [sic]." Id. at p. 5 of 15 (section V).Plaintiff also seeks compensatory damages of $10 million, and punitive damages totaling $30 million (of which $10 million would allegedly be donated to the City, State and Federal government to run and monitor the religious programs). Id.

ARGUMENT

FED. R. CIV. P. 12(b)(6) STANDARD

Pursuant to Fed. R. Civ. P. 12(b)(6), in a motion to dismiss a court must accept a complaint's factual allegations as true and must draw reasonable inferences in the plaintiff's favor. See Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010). While the court must accept all factual allegations as true, it must "giv[e] no effect to legal conclusions couched as factual allegations." Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d. Cir. 2007). In order to withstand a motion to dismiss the complaint must assert "enough facts to state a claim for relief that is plausible on its face," which requires that the "plaintiff plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Bell Atl. v. Twombly, 550 U.S. 544, 570 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

It is well established that complaints of *pro se* litigants must be liberally construed and interpreted to "raise the strongest arguments that they suggest." Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, this liberal pleading standard does not excuse a *pro se* plaintiff from

complying with the pleading standard of alleging factual allegations that state a plausible claim. See Pandozy v. Segan, 518 F. Supp. 2d 550, 554 (S.D.N.Y. 2007). Even a *pro se* plaintiff's complaint may be dismissed if the plaintiff fails to properly state a claim upon which relief can be granted. See Praseuth v. Werbe, 99 F.3d 402, 402 (2d. Cir. 1995).

POINT I

PLAINTIFF FAILS TO STATE A CLAIM UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.[1]

Plaintiff alleges that the temporary denial of access to this three Wicca books violated the First Amendment. See Compl. at p. 10 of 13 (see also id. p. 4 of 13). The First Amendment's Free Exercise Clause provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. "Prisoners have long been understood to retain some measure of the constitutional protection afforded by the First Amendment's Free Exercise Clause." Ford v. McGinnis, 352 F.3d 582, 588 (2d Cir. 2003) (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)). However, in the prison context, the Free Exercise Clause is subject to some limitation, given both "the fact of incarceration" and various "valid penological objectives[,]" including "deterrence of crime and institutional security." O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). A regulation that burdens a prisoner's protected right passes constitutional muster "'if it is reasonably related to legitimate penological interests.'" Id. at 349 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)). See, e.g., Bell v. Wolfish, 441 U.S. 520, 550-551 (1979) (upheld limitations on hard-bound books stating "[i]t

[1] Although Plaintiff's claim does not allege such a case of action, Plaintiff's factual allegations could also implicate the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Similar principles inform the analysis of plaintiff's free exercise claim as well as any potential RLUIPA cause of action, although the two claims are analyzed under somewhat different frameworks. See Salahuddin v. Goord, 467 F.3d 263, 264 (2d Cir. 2006). Any RLUIPA claims that Plaintiff intended to state is nonetheless dismissible for the reasons articulated below.

hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings. . . . They also are difficult to search effectively.")

The Second Circuit has stated that as a threshold issue, an inmate must show that the disputed policy "substantially burdens his sincerely held religious beliefs." Salahuddin v. Goord, 467 F.3d 263, 274-75 (2d Cir. 2006) (citing Ford v. McGinnis, 352 F.3d 582, 291 (2d Cir. 2003)).

While Plaintiff refers to the three Wicca books temporarily withheld, as well as the four Wicca books available in his cell, he fails to allege that the temporary withholding of any books violated a "sincerely held belief". See, generally, Compl. Indeed, Plaintiff does not provide any clarification of what sincerely-held beliefs attach to his Wicca religion. Id.

Moreover, the Second Circuit has noted that not every possible restriction on religious practices is a violation, and "[t]here may be inconveniences so trivial that they are most properly ignored." McEachin v. McGuinnis, 357 F.3d 197 (2d Cir. 2004). McEachin, 357 F. 3d at 206 n.6. In other words, "[d]e minimus burdens on the free exercise of religion are not of constitutional dimension." Rapier v. Harris, 172 F.3d 999, 1006, n.4 (7th Cir. 1999).

Here, Plaintiff fails to allege that the temporary denial of access to the books prevented him from practicing his professed faith of Wicca. Id. Indeed, Plaintiff claims that he had access to four Wicca books in his cell (id. at p. 10 of 13), and he does not allege that he was restricted from reading or using the books in his possession to practice his religion (see, generally, id.). See O'Lone, 482 U.S. at 349 (finding that a regulation which prevents Muslim inmates from attending weekly afternoon services does not impinge on freedom of religion because inmates were allowed to attend other ceremonies); Abdul Matiyn, No. 6 Civ. 1503, 2010 U.S. Dist.

LEXIS 102972, at *27-29 (N.D.N.Y. Mar. 4, 2010) (dismissing plaintiff's "conclusory claims that he was not provided appropriate Halal food for months" and finding that even if the Court were to credit plaintiff's separate, factually supported, claims that he was denied Halal meals for a few days, such a claim does not rise to the level of a substantial burden (citing McEachin v. McGuinnis, 357 F.3d 197, 203 n.6 (2d Cir. 2004) (in the First Amendment context "[t]here may be inconveniences so trivial that they are most properly ignored . . . [thus] the time-honored maxim *de minimus non curat lex* applies.")); Merriweather v. Sherwood, 235 F. Supp. 2d 339, 345-46 (S.D.N.Y. Dec. 19, 2002) citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1986) (where prison failed to provide Jumu'ah service to Muslim inmates, the Court found no interference with inmates' ability to exercise their religion because the inmates had alternative means of expressing their Muslim faith). Because the lack of three Wicca books did not prevent Plaintiff from practicing his religion, Plaintiff fails to allege any facts that could plausibly give rise to the inference that the temporary deprivation of the three books imposed anything more than a *de minimus* burden upon his religious practice that does not meet the threshold substantial burden requirement to state a constitutional (or RLUIPA) violation.

Furthermore, Courts have held that the temporary deprivation of a religious item does not necessarily rise to the level of a constitutional violation. See, e.g., Marsh v. Corr. Corp. of Am., 134 F.3d 383, at *3 (10th Cir. 1998) (concluding plaintiff's allegations that defendants temporarily deprived her of religious items for 15 days failed to satisfy her burden of establishing a First Amendment violation); McCroy v. Douglas County Corrections Center, No. 10 Civ. 69, 2010 U.S. Dist. LEXIS 38643, at *3 (D. Neb. Apr. 20, 2010) (prisoner did not state a claim for relief where his religious items were confiscated during a shakedown and then returned 15 days later after prisoner filed a grievance form).

Here, Plaintiff was denied access to three books for 25 days. Plaintiff's brother tried to deliver the books to Plaintiff on May 18, 2014. See Compl. at p. 8 of 13. Plaintiff submitted a grievance and requested the return of the books on June 3, 2014 – *sixteen* days later. Id. at p. 9 of 13. Two days later, on June 5, 2014, the GRVC's grievance department upheld Plaintiff's grievance and proposed a resolution, which acknowledged that Plaintiff could "receive the books so long as the books are not hard cover and/or have not been manipulated". Id. at p. 8 of 13. Plaintiff accepted the proposed resolution and signed the grievance disposition form one week later, on June 12, 2014. Id. Plaintiff admits he received his books. Id. at p. 4 of 13 (IV.B) (Plaintiff "[r]eceived [the] books . . . because it was granted by Higher Ranking Superiors")). A total of 25 days passed between when Plaintiff was first denied access to the books and when the books were returned. More importantly, only 9 days passed between when Plaintiff filed his grievance requesting the return of his books and when his books were returned to him. The temporary deprivation, which was promptly remedied following his filing of a grievance, coupled with the fact that Plaintiff had access to other four Wicca books in his cell, is insufficient to establish a violation of the First Amendment (or RLUIPA).

With respect to Plaintiff's allegation that the New York City Department of Corrections ("DOC") fails to offer an established Wicca religious program to inmates at Rikers Island, Plaintiff's claims are dismissible as a matter of law because, *inter alia*, he failed to allege that he communicated to DOC officials his belief that his right to practice his religion freely was being infringed upon. Courts in this Circuit have routinely held that such failure is fatal to a plaintiff's claim, both on summary judgment and at the pleading stage. Marczeski v. Handy, 2004 U.S. Dist. LEXIS 22167 * 29-30 (D. Conn. Sept. 9, 2004) (plaintiff's Free Exercise claim dismissed where predicated upon an allegation that she was denied a priest, rabbi, or minister during her

confinement but where she failed to allege when, or to whom she made a request that she be granted a meeting with a priest or rabbi.); Nicholas v. Raro, No. 95 Civ. 379H, 1997 U.S. Dist. LEXIS 6367 at *13 (W.D.N.Y. Apr. 4, 1997) (plaintiff failed to satisfy the pleading requirements where plaintiff alleged officials had pursued a false disciplinary charge against him based upon his religion but failed to allege that he requested and was denied an accommodation from officials with respect to his dietary or other religious practices.); Eze v. Higgins, No. 95 Civ. 6S(H), 1996 U.S. Dist. LEXIS 20758 at *12 (W.D.N.Y. Oct. 4, 1996) (dismissing complaint and recognizing in the analogous context of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq.*, that before Courts undertake a "substantial burden" analysis, Plaintiff must demonstrate that a request for accommodation was made; although Plaintiff alleged that he was denied the opportunity to attend church on Saturday evenings when Catholic services were held, Plaintiff did not allege that he conveyed his desire to attend to [correction officials]); Messina v. Mazzeo, 854 F. Supp. 116, 137 (E.D.N.Y. 1994) (defendant's motion to dismiss granted where plaintiff failed to allege "that he requested the right to practice his religion and was denied that right; that is, that he or she requested certain foods, diets, access to books, *or religious services* and was denied the same.") (emphasis added).

Here, Plaintiff attaches two grievances to his Complaint. The first requests access to the three Wicca books. Compl. at pp. 8-9 of 13. Plaintiff grievance was upheld and Plaintiff received his books. Id. p. 4 of 13. In the second grievance, Plaintiff requests a "meet[ing] with the administrative chaplain regarding to [sic] Religious programs that are not available to me at this facility." Id. at p. 12 of 13. Plaintiff also requests that "[Wicca] be posted as a program call out and documented on [his] I.D. card". Id. Plaintiff's request was granted and he met with the administrative chaplain. Id. at p. 4 of 13 (IV.E.3). Plaintiff says nothing else in his Complaint

with respect to his identification card or a "program call out". See, generally, id. That is, Plaintiff does not connect any purported failure to print or identify the Wicca religion on his identification card to his ability to freely exercise his religion. Plaintiff's request for a "program call out" is also too vague and conclusory to infer that Plaintiff communicated a specific belief that his right to practice his religion freely was being infringed upon. Indeed, Plaintiff does not allege that he requested, and was denied, the opportunity to meet with a spiritual advisor or participate in any other Wicca religious practice. Id.

Moreover, while an inmate has a constitutional right to practice his religion, the prison staff "is not under an affirmative duty to provide each inmate with the spiritual counselor of his choice". Davidson v. Davis, No. 92 Civ. 4040, 1995 U.S. Dist. LEXIS 1696, at *5-6 (S.D.N.Y. 1995) (citing 42 U.S.C. § 2000bb-1(b)); see also Reimers v. Oregon, 863 F.2d 630, 632 (9th Cir. 1988) (an inmate does not have the right under the Free Exercise Clause to have the particular clergyman of his choice provided to him). The Constitution does not require that a religious advisor be provided for every sect in a penitentiary. Weir v. Nix, 114 F.3d 817, 820-821 (8th Cir. 1997) (citing Cruz v. Beto, 405 U.S. 319, 322 n. 2 (1972)) (prison officials need not provide exactly the same religious facilities or personnel to prisoners of every faith).

Finally, a plaintiff cannot demonstrate that his ability to practice his religion is substantially burdened by the requirement that he bear the responsibility for coordinating visits with spiritual advisors. See Pogue v. Woodford, No. 05 Civ. 1873, 2009 U.S. Dist. LEXIS 75943, at *8 (E.D. Cal. 2009) ("[i]f the rule were to the contrary, prisons would have to fund any other religion facilitating request without which an inmate could claim a substantial burden") (citations omitted). Only when a prisoner's sole opportunity for group worship arises under the guidance of someone whose beliefs are significantly different from his own is there a possibility

that the prisoner's free exercise rights are substantially burdened in this manner. Id. (citing SapaNajin v. Gunter, 857 F.2d 463, 464 (8th Cir. 1988)). Again, Plaintiff fails to allege that he was prevented from meeting with a spiritual advisor or participating in any other Wicca religious practice, and Defendants' failure to establish a formal Wicca program – and a "call out" announcing the program – does not violate the constitution. Cruz, 405 U.S. at 322 n.2.

In light of the fact that Plaintiff failed to plead that he made any affirmative request to practice his religion and that he was subsequently denied that right, all of Plaintiff's Free Exercise (and any RLUIPA) claims, should be dismissed as a matter of law. See e.g., Messina, 854 F. Supp. at 137. Accordingly, Plaintiff's First Amendment (and any RLUIPA) claim should be dismissed for failure to state a claim.

POINT II

PLAINTIFF FAILS TO STATE A FIRST AMENDMENT RETALIATION CLAIM.

Plaintiff alleges that "[a]fter the visit [Plaintiff] approached C.O. Rogers about the situation and she stated that 'if my brother continues to persue [sic] the issue he [Plaintiff's brother] would not be allowed to visit [Plaintiff] for (45) days." Compl. at p. 10 of 13. To the extent that Plaintiff intended for this statement to allege a First Amendment retaliation claim, his claim fails.

To survive a motion to dismiss, a plaintiff asserting a First Amendment retaliation claim must plausibly allege: (1) that the speech or conduct at issue was protected; (2) that the defendant took adverse action against the plaintiff; and (3) that there was a causal connection between the protected speech and the adverse action. Davis v. Goord, 320 F.3d 346, 352 (2d Cir. 2003). "Only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action for a claim of

retaliation." Id. at 353, quoting Dawes v. Walker, 239 F.3d 489, 493 (2d Cir. 2001). "Insulting or disrespectful comments directed at an inmate generally do not rise to this level." Id., quoting Dawes, 239 F.3d at 492. And if the claimed adverse action does not rise to this level, it is "simply *de minimis* and therefore outside the ambit of constitutional protection." Dawes, 239 F.3d at 489. As the Second Circuit stated in Dawes, "certain means of 'retaliation' may be so *de minimis* as not to inhibit or punish an inmate's right to free speech. Many verbal responses by officials of resentment or even ridicule would fall into this safe harbor of permitted response." 239 F.3d at 493 (internal quotations omitted). Indeed, the Second Circuit has admonished district courts to approach prisoner retaliation claims "with skepticism and particular care," because "virtually any adverse action taken against a prisoner by a prison official--even those otherwise not rising to the level of a constitutional violation-can be characterized as a constitutionally proscribed retaliatory act." Dawes, 239 F.3d at 491.

Here, Plaintiff's allegation is insufficient to allege a retaliation claim because Plaintiff identifies his *brother* as the speaker of the protected speech. Id. Moreover, C.O. Rogers's alleged threat was directed at Plaintiff's *brother*. Id. Plaintiff's brother is not, however, a plaintiff in the Complaint. Id. at p. 1 of 13 (I.A.). Indeed, Plaintiff does not allege that his brother's visits were restricted in any way. See, generally, Compl. With these limitations, the alleged retaliation fails to rise to the level of a constitutional violation and Plaintiff's First Amendment retaliation claim should be dismissed.

POINT III

PLAINTIFF FAILS TO STATE A COGNIZABLE CLAIM UNDER THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

To the extent that Plaintiff intended to allege a violation of the Fourteenth Amendment's Equal Protection Clause (see Compl. at p. 11 of 13), his claim fails on the basis that he fails to allege that similarly situated prisoners were treated differently than he was with respect to the failure to establish a Wicca program at GRVC.

The Equal Protection Clause of the Fourteenth Amendment provides that no person shall be denied "the equal protection of the laws." U.S. Const, amend. XIV, § 1. "Essentially, it prohibits the disparate treatment of a plaintiff from similarly situated individuals." Spavone v. City of New York, 420 F. Supp. 2d 236, 240 (S.D.N.Y. 2005) (citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985)). The equal protection clause does not, however, require absolutely equal treatment of all similarly situated persons, or the absolutely equal division of governmental benefits. Ross v. Moffitt, 417 U.S. 600 (1974) (holding that the Equal Protection Clause did not guarantee indigents state-appointed counsel for discretionary state appeals or applications to the United States Supreme Court). "In order for [a plaintiff] to state an equal protection claim, [he] must allege that [he was] *intentionally* discriminated against on the basis of [his] religion" People United for Children, Inc. v. City of New York, 108 F. Supp. 2d 275, 298 (S.D.N.Y.2000) (emphasis added) (citing Hayden v. Cnty. of Nassau, 180 F.3d 42, 48 (2d Cir. 1999)); see also Phillips v. Girdich, 408 F.3d 124, 129 (2d Cir. 2005) ("To prove a violation of the Equal Protection Clause . . . a plaintiff must demonstrate that he was treated differently than others similarly situated as a result of intentional or purposeful discrimination.").

Plaintiff's allegation with respect to the provision establishment of a Wicca program is insufficient to state an Equal Protection claim. Plaintiff alleges that DOC "does not offer any program what do ever [sic] so that [he] may exercise [his] religion just like the Christians, Muslims, Catholics and the Jewish Community here at Rikers Island". Compl. at 11 of 13. That allegation, even if true, is not enough to support an Equal Protection claim. There are no facts alleged that support a claim that Plaintiff was treated differently on account of his religion; nothing in the Complaint suggests that similarly-situated inmates of other faiths were treated more favorably than Plaintiff, or that Plaintiff was singled out for discriminatory treatment on account of his religion. Rather, Plaintiff merely makes the conclusory allegation that "Christians, Muslims, Catholics and the Jewish Community" were allowed free exercise. However, conclusory allegations of disparate treatment or a plaintiff's personal belief of discriminatory intent are insufficient to plead a valid equal protection claim. Parks v. Smith, 08 Civ. 0586, 2009 U.S. Dist. LEXIS 87210, *33-34 (N.D.N.Y. Aug. 17, 2009); Nash v. McGinnis, 585 F. Supp. 2d 455, 462 (W.D.N.Y. 2008).

Because Plaintiff does not allege that Defendants intentionally or purposefully treated Wiccan inmates differently from any similarly-situated inmates who adhere to other religions, Plaintiff fails to state a claim against Defendants under the Equal Protection Clause with respect to the absence of a Wicca program at GRVC. See Lloyd v. City of New York, No. 12 Civ. 03303, 2014 U.S. Dist. LEXIS 119706, at *17-18 (S.D.N.Y. Aug. 4, 2014) (holding class failed to state equal protection claim where they alleged no facts in their complaint to support an inference that Defendants did anything to influence the provision of religious materials in a discriminatory manner); Bussey v. Phillips, 419 F. Supp. 2d 569, 582 (S.D.N.Y. 2006) (holding prisoner stated equal protection claim where he pointed to two particular incidents of allegedly

unequal treatment in his complaint); Barnes v. Fedele, 760 F. Supp. 2d 296, 301 (W.D.N.Y. 2011) (holding prisoner failed to state equal protection claim where he alleged no facts in his complaint to support a claim that he was treated differently on account of his religion).

To the extent that Plaintiff's complaint can be read to assert an equal protection claim on the fact that Christians, Muslims, Catholics and Jewish, but not Wiccan, inmates have established religious programs, however, this claim is still subject to dismissal, because it is both derivative and duplicative of Plaintiff's claim that Defendants violated his First Amendment right to freely exercise his religion. See Barnes v. Fedele, 760 F. Supp. 2d 296, 302 (W.D.N.Y. 2011). Plaintiff has no freestanding right to an established Wiccan religious program, separate from any First Amendment right that he may have in that regard. If Plaintiff has a right to an established Wiccan program at GRVC, then that right exists by virtue of his right to practice his religion. If he does not have such a right (because, for example, his purported religious beliefs are not sincerely held), then the fact that the inmates (such as Muslims) have established religious programs does not give rise to an equal protection claim, since plaintiff and those other inmates would not be similarly situated. This claim is therefore subject to dismissal as duplicative of Plaintiff's free-exercise claim. See Borzych v. Frank, No. 06 Civ. 475, 2006 U.S. Dist. LEXIS 82289, at *8 (W.D.Wis. Nov. 9, 2006) ("Plaintiff's equal protection claim is simply a repackaging of his free exercise and establishment claims. Accordingly, I will dismiss this claim as duplicative") (citing Grossbaum v. Indianapolis-Marion County Bldg. Auth., 100 F.3d 1287, 1295-96 (7th Cir. 1996)). Accordingly, any equal protection claim that Plaintiff attempted to claim must be dismissed.

POINT IV

PLAINTIFF IS NOT ENTITLED TO COMPENSATORY DAMAGES UNDER THE PRISON LITIGATION REFORM ACT.

Plaintiff fails to allege a physical injury arising from Defendants' alleged actions, thus he is not entitled to compensatory damages under the Prison Litigation Reform Act ("PLRA").

The PLRA bars plaintiffs from recovering compensatory relief where they did not endure any physical injuries in connection with the allegations in their complaints. In relevant part, the statute states that "[n]o Federal civil action may be brought *by a prisoner confined in a jail, prison, or other correctional facility*, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997e(e) (emphasis added); Garcia v. Watts, No. 08 Civ. 7778, 2009 U.S. Dist. LEXIS 84697, at *67 (S.D.N.Y. 2009) (citing Thompson v. Carter, 284 F.3d 411, 416 (2d Cir. 2002) and Jenkins v. Haubert, 179 F.3d 19, 28-29 (2d Cir. 1999)); see also Lloyd v. City of New York, No. 12 Civ. 03303, 2014 U.S. Dist. LEXIS 119706, at *31-32 (S.D.N.Y. Aug. 4, 2014) (class barred from recovering compensatory damages for failure to allege physical injuries from alleged First Amendment, RLUIPA and Equal Protection claims); Banks v. Argo, No. 11 Civ. 4222 (LAP), 2014 U.S. Dist. LEXIS 42715 (S.D.N.Y. Mar. 11, 2014) (plaintiff barred from recovering compensatory damages because he failed to allege physical injury resulted from alleged constitutional violations); Wilson v. City of New York, No. 12 Civ. 3021 (JMF), 2013 U.S. Dist. LEXIS 124686, *5 (S.D.N.Y. Aug. 30, 2013) (plaintiff barred from recovering compensatory damages for First Amendment and RLUIPA claims because he failed to allege any physical injuries); Richardson v. Castro, 1998 U.S. Dist. LEXIS 7457, No. 97 Civ. 3772, at *7 (E.D.N.Y. April 24, 1998) (dismissing prisoner § 1983 suit for mental and emotional distress where prisoner suffered no injury). "Courts have strictly construed this requirement, barring claims by

prisoners who demonstrate solely emotional or mental injury and barring physical injury claims where the injury alleged is de minim[i]s." Petty v. Goord, No. 00 Civ. 803, 2008 U.S. Dist. LEXIS 38975, at *17 (S.D.N.Y. Apr. 22, 2008). Here, Plaintiff clearly fails to allege any physical injury; he alleges only "extreme emotional distress". Id. at p. 3 of 13 (III). Because he fails to allege any physical injury suffered as a result of Defendants' actions, his relief is limited to nominal and punitive damages as well as declaratory relief.

CONCLUSION

Based on the foregoing, Defendants respectfully request that their motion to dismiss the Complaint be granted in its entirety, that the Order of dismissal apply to any substantively identical complaints subsequently filed or identified by the Court and for such other and further relief as the Court deems just and proper.

Dated: New York, New York
October 9, 2014

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