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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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Arrello Barnes, 00A0597,

Plaintiff,

-v-

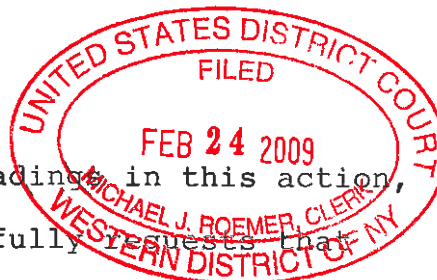
Fedele, et. al.,

Defendants.

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REPLY TO OPPOSITION  
Rule 12(b)(b)

07-CV-6197



PLEASE TAKE NOTICE, that upon the pleadings in this action, Arrello Barnes, Plaintiff, Pro-Se, respectfully requests that this Court not dismiss the claims against the defendants herein. Plaintiff has a constitutional right to practice his religion, insofar as such practice does not impose a threat to the security of the facility. Plaintiff was denied a Kosher Meal at Southport Correctional Facility by prison officials, resulting from the lack of acknowledgment of his religion. Said staff created their own policy by denying Plaintiff his Kosher Meals, even though they were aware that he received Kosher Meals in three other facilities.

On January 21, 2007, Coreectional Officer ("CO") Fedele, maliciously confiscated Plaintiff's religious headwear. The religious headwear was approved by the facility Rabbi, Jay Kellman (see "Memo") and the Department of Corrections ("DOCS") own directives (see Directive No. 4202).

### I. Fed. R. Civ. Proc. 12(b)(6) Standard

The standard of review for Rule 12(b)(6) motion to dismiss Pro-Se claims was recently summarized in Harris v. McGinnis, 2004 U.S. Dist. Lexis 19500 (S.D.N.Y. 2004), "[I]n considering a motion to dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Fed.R.Civ.Proc."), the court must accept as true the material facts alleged in the complaint and draw all reasonable inferences in the Plaintiffs favor."

Grandson v. Merrill Lynch & Co., 147 F.3d 184, 188 (2nd. Cir. 1998), "[A] motion to dismiss should only be granted if 'it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claims which would entitle him to relief.'"

### II. Official Capacity Claims Should Not be Dismissed

When a constitutional violation is found, the power of a federal court to injunctive relief is circumscribed by the nature and extent of the constitutional violation. (Al-Alamin v. Gramley, 926 F.2d 680 [7th Cir. 1991]).

The Court concluded that the Plaintiff's right to exercise their religious beliefs were sufficiently clear in light of prior precedent; thus, the Dixion officials could not advance the qualified immunity defense. (Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042). A Plaintiff can file a 42 U.S.C. §1983 complaint for injunctive relief (if) he/she is requesting the court to change the DOCS's policy and/or remedy a constitutional violation. (See Al-Alamin v. Gramley, supra.).

Once a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." Accordingly, the official capacity claims should not be dismissed.

### III. Failure to Protect Claims Should Not be Dismissed

Plaintiff has alleged facts herein that support an Eighth Amendment violation. As a result of the confiscation of his religious headwear and the fact that Plaintiff was ridiculed about his religious beliefs by prison officials; Plaintiff suffered mental harm. The Defendant's often called Plaintiff "fake Jew" and told him "Blacks can't be Jewish." The Eight Amendment of the United States Constitution "requires prison officials to take reasonable measures to guarantee the safety of inmates in their custody." (Hayes v. New York City Dept. of Corr., 84 F.3d 614, 620 [2nd Cir. 1996]). Prison officials bear some responsibility for the safety of inmates, Defendants Kerbein, Stanley, Fischer, Chappius, Bartlett, McGinnis, Napoli and Eagan were fully aware of the first constitutional violation to Plaintiff. (See: Letter, correspondence). The named defendants, however, did not prevent nor stop the constitutional violations of Plaintiff's rights. Accordingly, the failure to protect claims should not be dismissed.

#### IV. Equal Protection Claims

In order to establish an Equal Protection Claim, Plaintiff must prove purposeful discrimination directed at an identifiable or suspect class. Giano v. Senkowski, 54 F.3d 1050, 1057 (2nd Cir. 1995). Plaintiff had written letters explaining to defendants Nuttall, Fischer, Bartlett, McGinnis, Napoli and Stanley that his First Amendment Rights has been violated. The named defendants had personal knowledge of these violations. A defendant may be personally involved in a constitutional deprivation within the meaning of 42 U.S.C. §1983 in several ways.

The defendant may have directly participated in the violations as CO Fedele did by confiscating Plaintiff's religious headwear. A supervisory official, after learning of the violation through a report or appeal, have failed to remedy the wrong. A supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue.

Lastly, a supervisory official may be personally liable if he or she was grossly negligent in managing subordinates who caused the unlawful condition or event. Blackshear v. Coughlin, 1995 U.S. Dist. Lexis 21945 (N.D.N.Y. 1995). Plaintiff has produced documentary evidence that he named defendant's were aware that Plaintiff's headwear was confiscated and he was being denied Kosher meals. The named defendants created their own policy and custom to deny Plaintiff his First Amendment Constitutional rights. (See: Letters, Grievances,

Correspondence, etc.). Accordingly, the Equal Protection Claims should not be dismissed.

#### VI. Due Process Claims

Plaintiff claims he was denied Due Process in connection with the confiscation of his "Religion Crown" and seeks to have it returned.

It is well established by the Fourteenth Amendment, a person should not have been deprived of their liberty, property, etc., without the standards of due process. On January 21, 2007, CO Fedele confiscated the Plaintiff's religious headwear without the required standards of due process according to the fourteenth amendment.

Plaintiff was/is protected by the First Amendment to practice his religion. U.S. Const. Amend. 1. By Plaintiff wearing the religious headwear, in no way did that act impose on the security of the facility, as that type of headwear is approved by the DOCS. (See: Letter by RABBI Kellman).

The religious headwear was/is Plaintiff's property and should not have been confiscated by prison officials. U.S. Const. Amend. 14. Therefore, the due process claims should not be dismissed.

#### VII. Defendant's Kerbein, Nuttall, Fischer, McGinnis, Napoli and Eagen had Personal Involvement

When an individual defendant is sued under section 1983, that defendant's personal involvement in the alleged

constitutional deprivation is a prerequisite to an award of damages. Wright v. Smith, 21 F.3d 496, 501 (2nd Cir. 1994).

An inmate must allege and prove that the official had some degree of personal involvement in the alleged constitutional deprivation. Wright, at 501. On January 23, 2007, at approximately 4:56 PM, Defendant Kerbein interviewed the Plaintiff concerning the confiscation of his religious headwear.

Had Kerbein fully investigated, the investigation would have revealed that Plaintiff's religious headwear was confiscated on January 21, 2007, (See: Letter of Complaint), the day the Plaintiff wrote the Superintendent. Defendant Kerbein altered the investigation. The fact Kerbein had direct contact with the Plaintiff establishes his personal involvement. (Department of Corrections has continuing duty that requires them to correct a known error). Maguire v. New York State Division of Parole, 757 N.Y.S.2d 391, 304 A.D.2d 1003 (2003). Defendant's Nuttall and McGinnis were aware that Plaintiff was being denied Kosher meals. Plaintiff sent both Nuttall and McGinnis the approval forms from three different facilities' Rabbi's and the Deputy Superintendent that he religion requires him to receive a Kosher diet. (See: Memorandum). These defendants created their own policy and custom, by upholding the constitutional violations of their co-workers. These defendants should be held liable (Supervisors), can be held liable under section 1983, if he (1) learned of the violation through a report and failed to remedy the wrong, (2) created or continued a policy or custom

under which unconstitutional practices occurred, or (3) was grossly negligent in managing subordinates who caused unlawful conditions or events. Hodge v. Ruperto, 739 F.Supp. 873 (Prison supervisory officials have a duty to make reasonable inquires into activities of subordinates and conditions of inmates, 42 U.S.C., section 1983).

Defendants' Nuttall, Napoli and Fischer were aware of and had personal knowledge Plaintiff's constitutional rights were violated when CO Fedele confiscated his religious headwear. Plaintiff sent the defendants letters and copies of their own directives, establishing proof that he was could have and was allowed to wear the religious crown. A supervisory official may be held liable under section 1983 when he/she created a policy or custom which violated an inmates constitutional rights. Blackshear, supra. The correspondence from the defendants will establish that they supported the violations carried out by their subordinates. (See: Memorandum).

Defendant Eagen learned of the constitutional violations by way of Plaintiff's grievance appeal. (See: Grievances). Eagen created his own policy by going against and in violation of Directive No. 4202, Religious Practices.

Eagen had personal involvement when he based his grievance ruling and supported the constitutional violations of his co-workers.

A prison official may be held liable under section 1983, when he/she after learning of the violation through an appeal, have failed to remedy the wrong. See Blackshear, supra. Accordingly, the claims against defendants Kerbein, Nuttall, Fischer, McGinnis, Napoli and Eagen should not be dismissed.

#### Conclusion

The issue is not whether a Plaintiff will ultimately prevail, but

whether the Plaintiff is entitled to offer evidence in support of the claims. Villager Pond, Inc. v. Town of Darien, 56 F.3d 375. After the motion of discoveries, correspondence will be produced to establish the defendants were aware of the constitutional violations and created their own policies and customs to support their wrongful acts.

THEREFORE, the complaint should not be dismissed and a trial conducted.

Dated: February 19<sup>th</sup>, 2009

Respectfully submitted,



Arrello Barnes

Plaintiff, Pro-Se

**AFFIDAVIT IN SUPPORT**

STATE OF NEW YORK )

COUNTY OF ERIE ) ss.:

I, Arrello Barnes, duly sworn deposes and says:

I am the Plaintiff in this complaint and make this affidavit truthfully to my own knowledge.

I was denied the Kosher diet due to prison officials at Southport Correctional Facility not recognizing my religion. I wrote to the supervisory official and explained to them that I am supposed to receive, as I did at three other facilities in New York State, and sent the appropriate documents. I was still denied. On January 21, 2007, my religious headwear was confiscated by CO Fedele. I produced a letter from RABBI Kellman, where he stated that my religious headwear was approved. I wrote several letters of complaint to the Supervisors and filed grievances. The prison officials supported the wrongful acts by allowing this to continue.

Respectfully submitted,



Arrello Barnes

Plaintiff, Pro-Se

I swear under penalty of perjury (28 U.S.C. section 1746) that the foregoing is true and correct.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK )

COUNTY OF ERIE ) ss.:

I, Arrello Barnes, being duly sworn, deposes and says:

I reside at the Wende Correctional Facility, located at P.O. Box 1187, Alden, New York, 14004-1187. On the 19 day of February, 2009, I placed in the facility mailbox a true and exact copy of the within wrapped in an envelope addressed to the following parties:

Maritza Buitrago  
Assistant Attorney General  
144 Exchange Blvd., Suite 200  
Rochester, New York 14614

I swear under the penalty of perjury, pursuant to 28 U.S.C. section 1976, the foregoing is true and correct.

Respectfully submitted,



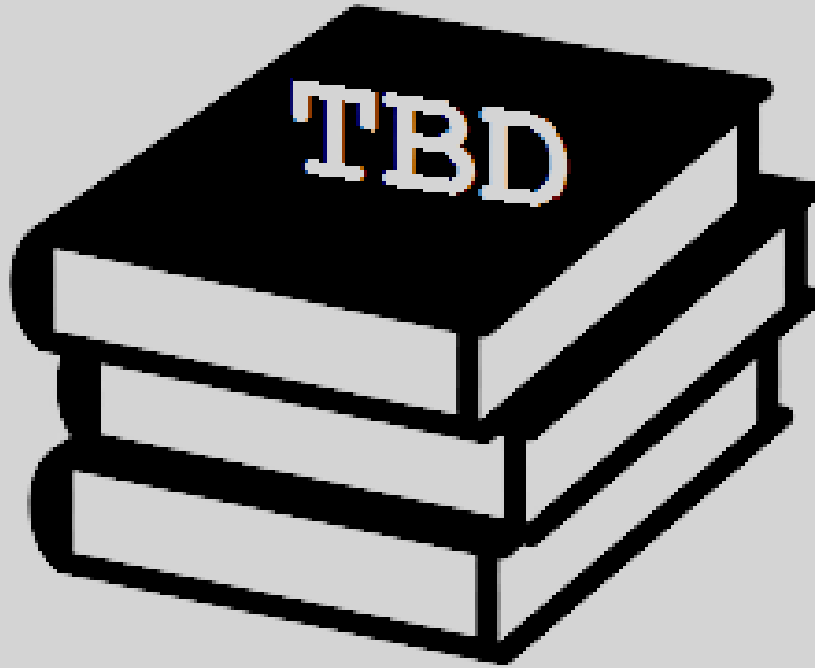
Arrello Barnes

Plaintiff, Pro-Se

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