DLD-136 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3893

CURRY ROBINSON,
Appellant
v.

SUPERINTENDENT HOUTZDALE SCI;
SECRETARY DEPARTMENT OF CORRECTIONS;
VINCENT DEFELICE, Unit Manager;
SHANNON SAGE, Activities Manager

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 16-cv-00044)
District Judge: Kim R. Gibson

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
February 16, 2017

Before: CHAGARES, VANASKIE and KRAUSE, Circuit Judges

(Opinion filed March 6, 2017)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Curry Robinson appeals from an order of the District Court dismissing his amended complaint under Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, we will summarily affirm.

Robinson, an inmate at the State Correctional Institution in Houtzdale, Pennsylvania, filed a civil rights action in the United States District Court for the Western District of Pennsylvania, against the Secretary of the Department of Corrections ("DOC"), John E. Wetzel, Superintendent Kenneth Cameron, Unit Manager Vincent DeFelice, and Activities Manager Shannon Sage. In his amended complaint, Robinson alleged violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, et seq., his First Amendment Free Exercise rights and his Fourteenth Amendment right to equal protection. Specifically, Robinson alleged that he was unable to participate in the sex offender's treatment program at SCI-Houtzdale because it requires him to "confess" to a therapist. Robinson, a Christian, claimed that the Bible does not permit him to confess his sins to anyone other than God and thus the requirements of the program substantially burden his religious rights. Moreover, because he cannot participate in the program, he cannot reap its benefits, which include a transfer to be closer to his family and "privileged blocks/status." Robinson asserted that he grieved the program policy on this ground and on the ground that the policy already "allows a given group to be comprised of 20% deniers." He alleged that, when he met with defendant DeFelice to discuss his grievance, DeFelice told him to "set aside his religious beliefs." With respect to his equal protection claim, Robinson alleged that a DOC policy allows inmates to spend up to $500 dollars for the

purchase of a guitar, while inmates seeking to purchase a keyboard are limited by both the amount they may spend and the options available for purchase. Robinson complained that the policy "permits racially profiling and bias by allowing disparity to those who are African American who predominantly play keyboard…." Robinson sought injunctive relief only.

The defendants filed a motion to dismiss the amended complaint under Rule 12(b)(6) and attached Robinson's grievances as exhibits. They argued that dismissal of the amended complaint was proper on the basis of lack of personal involvement in the actual alleged constitutional and statutory violations. In the alternative, the defendants argued that Robinson failed to state a claim under either RLUIPA or the First Amendment. They argued generally that Robinson had not made sufficient allegations regarding either the elements of the sex offender program which allegedly burdened his practice of the Christian religion, or the particular aspects of his religious beliefs or practices which were substantially burdened by the program. They noted that Robinson had not been asked to "confess" or "to make a confession" in any religious sense, although they acknowledged that, were he to participate in the program, he would have to admit responsibility for his offenses. With respect to the equal protection claim, the defendants argued that Robinson failed to allege that he was subjected to intentional discrimination on the basis of race, religion, gender, or national origin.

Robinson submitted a brief in opposition to dismissal of his amended complaint, in which he argued, among other things, that his allegations were sufficient to survive Rule 12(b)(6) dismissal because RLUIPA protects him from having to "modify his behavior [by] 'confessing guilt' to someone other than God [ ] in order to obtain the same

benefits that other inmates received when they did say they were responsible." Plaintiff's Brief in Opposition to Dismissal, at 4. He also asserted that he continued to be interested in participating in the sex offender treatment program at SCI-Houtzdale and thus that his claim was not time-barred, and he reiterated that the DOC's own policy permits any given treatment group to be made up of "20% deniers," id. at 5, suggesting that the prison could accommodate his religious beliefs.

Following the completion of briefing, the Magistrate Judge filed a Report and Recommendation, in which she concluded that Robinson's amended complaint should be dismissed. With respect to the defendants' lack of personal involvement argument, the Magistrate Judge correctly noted that Robinson alleged that Secretary Wetzel and Superintendent Cameron were liable as policymakers, and liability under 42 U.S.C. § 1983 may be imposed on an official with final policymaking authority, see McGreevy v. Stroup, 413 F.3d 359, 367-68 (3d Cir. 2005) ("[E]ven one decision by a school superintendent, if s/he were a final policymaker, would render his or her decision district policy" and subject him or her to liability under § 1983). Nevertheless, the Magistrate Judge concluded, Robinson had failed to state a claim against any of the defendants under either RLUIPA, the First Amendment, or the Equal Protection Clause of the Fourteenth Amendment.

The Magistrate Judge reviewed the standards applicable to First Amendment claims, including the factors set forth in Turner v. Safley, 482 U.S. 78, 89 (1987), and the standards applicable to claims under RLUIPA, see Holt v. Hobbs, 135 S. Ct. 853, 860 (2015). The Magistrate Judge properly noted that RLUIPA provides greater protection to plaintiffs, and that, under RLUIPA, the burden is on the prison to show that its policy

"(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000cc-1(a). The Magistrate Judge then based her conclusion on the threshold "substantial burden" issue, concluding that Robinson had not stated a plausible claim that the sex offender treatment program's requirement that an inmate admit the facts of his offense had a serious effect on the exercise of his Christian religion. Specifically, she agreed with the defendants that Robinson had not been asked to "confess" or to "make a confession" in any religious sense. Rather, in the "Sex Offender Candidacy Evaluation," he was asked to describe what occurred in his offense, and notified that, if he agreed to participate in the Sex Offender Therapeutic Community (SOPTC), he would have to assume full responsibility for the aforementioned offense. The Magistrate Judge noted further that Robinson voluntarily chose to not participate in the SOPTC, and, thus, he was not subjected to any requirements of the program.[1]

In the alternative, the Magistrate Judge concluded that, even if Robinson could show that his religious rights were substantially burdened by the program's requirements, courts generally have held that (1) there is a rational connection between a sex offender treatment program's requirement that an inmate admit the facts of his offense and take responsibility for his crime and a state correctional agency's legitimate penological interest in rehabilitating sex offenders; and (2) there is no alternative method of accommodating an inmate's concern that the admission of guilt in the context of the

[1] We note that Chief Grievance Officer Dorina Varner denied Robinson's grievance on this same basis, stating: "You failed to provide any evidence of a substantial burden on your religious practice." Defendants' Motion to Dismiss Amended Complaint, Exhibit 1.

treatment program would violate his religious beliefs, see, e.g., Searcy v. Simmons, 299 F.3d 1220 (10th Cir. 2002).

The Magistrate Judge rejected Robinson's equal protection claim on the ground that all inmates who are similarly situated are treated alike under the DOC policy at issue, in that an inmate who wishes to purchase a guitar is treated the same as all other inmates who seek to purchase a guitar, and an inmate who wishes to purchase a keyboard is treated the same as all other inmates who seek to purchase a keyboard. Furthermore, the Magistrate Judge concluded, Robinson had failed to allege that the defendants engaged in any intentional prohibited discrimination against inmates who wish to purchase keyboards.

Robinson filed Objections to the Report and Recommendation, and he included with his Objections some suggestions for how prison officials could accommodate his religious beliefs. In an order entered on September 26, 2016, the District Court dismissed Robinson's amended complaint with prejudice and adopted the Report and Recommendation as the Opinion of the Court.

Robinson appeals. Our Clerk granted him leave to appeal in forma pauperis and advised him that the appeal was subject to summary dismissal under 28 U.S.C. § 1915(e)(2) or summary action under Third Cir. LAR 27.4 and I.O.P. 10.6. He was invited to submit argument in writing, but he has not done so.

We will summarily affirm. Summary action is appropriate where no substantial question is presented by this appeal, Third Circuit LAR 27.4 and I.O.P. 10.6. Review of a District Court's decision to grant a motion to dismiss pursuant to Rule 12(b)(6) is plenary. A Rule 12(b)(6) motion tests the sufficiency of the factual allegations contained

in the amended complaint. See Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A motion to dismiss should be granted if the plaintiff is unable to plead "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

The threshold question in any First Amendment or RLUIPA case is whether the prison's challenged policy or practice has substantially burdened the practice of the inmate-plaintiff's religion. See Washington v. Klem, 497 F.3d 272, 277-78 (3d Cir. 2007). In his Objections to the Report and Recommendation, Robinson attempted to cure the deficiencies in his allegation of a substantial burden on his practice of Christianity, as follows:

> The Plaintiff [sic] belief as a Christian is not personalized in order to fit some desire to undermined [sic] the system of Government that God allowed to exist. (Rom. 13:1-3)[.] However, the line is drawing [sic] when there is a conflict with what man say the Plaintiff must do, versus what God says in his word. (Acts. 4:19-20). The Bible does not teach to be rebellious against authority, but pray for our leaders and aid in the endeavors of righteousness and lawful living. However, Confession is and [sic] foundational precept of mustly [sic] every Christian branch of believers. As a Christian may [sic] confession is connected to my salvation and repentance of sins, whether it broke a law of the land or not. (Rom. 10:10)[.] The from [sic] this confession is not just Spiritual but of the soul also from dead thought which lead me to actions (Mt. 15:19). The SOPTC may call this red flag; awful's.

Objections to Report and Recommendation, at 10. We have considered fully this assertion of Robinson's sincerely held beliefs about confession but are compelled to agree with the Magistrate Judge and District Court that no plausible First Amendment or RLUIPA claim is stated. Robinson's amended complaint and other submissions do not reveal "enough facts to raise a reasonable expectation that discovery will reveal evidence

of the necessary elements of" a claim for relief, Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (quoting Twombly, 550 U.S. at 556), and thus dismissal under Rule 12(b)(6) was proper.[2]

We also uphold dismissal of Robinson's equal protection claim. To state an equal-protection claim, Robinson must allege intentional discrimination. Washington v. Davis, 426 U.S. 229, 240 (1976). It is not enough for him to allege that he is African American and that the prison has different policies relating to the purchase of guitars versus keyboards. Rather, race must have been a substantial factor in that different treatment. See Hassan v. City of New York, 804 F.3d 277, 294 (3d Cir. 2015) (citing Davis, 426 U.S. at 235). Robinson's allegations fall well short of this "substantial factor" requirement.

For the foregoing reasons, we will summarily affirm the order of the District Court dismissing Robinson's amended complaint pursuant to Rule 12(b)(6).

[2] Because we uphold the order of the District Court on this basis, we need not address the Magistrate Judge's alternative determination that there is a rational connection between the program's requirement that an inmate admit the facts of his offense and the DOC's legitimate penological interest in rehabilitating sex offenders; and that there is no alternative method of accommodating an inmate's concern that the admission of guilt in the context of the treatment program would violate his religious beliefs.