UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT CARDEW and **BARRY ARKIM,**

Plaintiffs, **9:09-cv-775 (GLS/ATB)**

v.

JOSEPH F. BELLNIER, et al.,

Defendants.

APPEARANCES: **OF COUNSEL:**

FOR THE PLAINTIFFS:
Robert Cardew
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Attica Correctional Facility
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Barry Arkim
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FOR THE DEFENDANTS:
HON. ERIC T. SCHNEIDERMAN
New York State Attorney General
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DEAN J. HIGGINS
Assistant Attorney General

Gary L. Sharpe
District Court Judge

MEMORANDUM-DECISION AND ORDER

I. Introduction

Pro se plaintiffs Robert Cardew, a former inmate of Upstate Correctional Facility and Wende Correctional Facility, and Barry Arkim, a former inmate of Wende, bring this action under 42 U.S.C. § 1983, claiming violations of the First and Fourteenth Amendments and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[1] (*See* Compl., Dkt. No. 1.) Plaintiffs allege that defendants have implemented a policy of segregation in double occupancy housing assignments that violates the Equal Protection Clause and the right to practice one's religion as protected by the First Amendment. Plaintiffs also allege that defendants' policy of serving "non-red-meat meals" on Fridays during Lent and the Catholic holiday of Ash Wednesday compels plaintiffs, who are not Catholic, to participate in a "Catholic Religious Dietary Ritual" in violation of the First Amendment and the RLUIPA. (*See id.*)

On May 25, 2010, defendants moved to dismiss plaintiffs complaint pursuant to FED. R. CIV. P. 12(c). (Dkt. No. 107.) In a Report and Recommendation (R&R) filed December 9, 2010, Magistrate Judge

[1] 42 U.S.C. § 2000cc-1, *et seq*.

Andrew T. Baxter recommended that defendants' motion be granted in part and denied in part.[2] (*See* R&R at 2-9, Dkt. No. 133.) Pending are plaintiffs' objections to the R&R. (Dkt. Nos. 134, 135.) For the reasons that follow, the R&R is adopted in its entirety.

II. Standard of Review

Before entering final judgment, this court routinely reviews all report and recommendation orders in cases it has referred to a magistrate judge. If a party has objected to specific elements of the magistrate judge's findings and recommendations, this court reviews those findings and recommendations de novo. *See Almonte v. N.Y. State Div. of Parole*, No. 04-cv-484, 2006 WL 149049, at *6-7 (N.D.N.Y. Jan. 18, 2006). In those cases where no party has filed an objection, or only a vague or general objection has been filed, this court reviews the findings and recommendations of a magistrate judge for clear error. *See id.*

III. Discussion

A. Equal Protection Claims

In the R&R, Judge Baxter recommended that plaintiffs' as-applied

[2]The Clerk is directed to append the R&R to this decision, and familiarity therewith is presumed.

equal protection claims be dismissed because plaintiffs failed to allege that the housing policies of the Department of Correctional Services (DOCS) were applied against them in a racially, religiously, or otherwise discriminatory manner. (*See* R&R at 25, 27, Dkt. No. 133.) Given plaintiffs' specific, though misguided, objections, (*see* Objections at 1-4, Dkt. No. 134), the court has reviewed this portion of the R&R de novo and concurs with and adopts Judge Baxter's assessment. In particular, the court echoes Judge Baxter's findings that plaintiffs' allegations are conclusory and implausible, and their legal assertions inaccurate. (*See* R&R at 18-27, Dkt. No. 133.) Therefore, plaintiffs' as-applied equal protection claims are dismissed.

As to plaintiffs' facial challenge, Judge Baxter concluded that in light of plaintiffs' allegations—suspect as they are—and due to defendants' failure to adequately brief this issue, plaintiffs' challenge should survive against defendants Bezio, Cascaceli, Jordan, Kearney, LeClaire, Quinn, Sheahan, and Sticht. (*See id.* at 28-30.) As none of the parties have objected to this recommendation, the court has reviewed it for clear error and finds none. Accordingly, plaintiffs' facial claims are dismissed against all but the above-specified defendants.

B. First Amendment Claims

Judge Baxter further recommended that plaintiffs' First Amendment claims be dismissed. (*See id.* at 30-39.) Plaintiffs essentially claim that defendants violated their First Amendment rights in two ways. First, that because religion is a criterion used when making Double Occupancy Housing Unit (DOHU) assignments, defendants are "endorsing religion over non-religion" and "trying to coerce Cardew into acting contrary to his beliefs to declare a religion in order to be housed in a DOHU." (Compl. ¶ 84, Dkt. No. 1.) And second, plaintiffs claim that the "non-red-meat" menu served on Ash Wednesday and Fridays forces them to participate in a "Catholic religious dietary ritual." (*Id.* at ¶¶ 86, 94, 101.)

In objecting to Judge Baxter's recommendation, plaintiffs simply reassert the factual and legal assertions contained in their complaint. But as Judge Baxter already pointed out, "[n]othing alleged in plaintiffs' complaint plausibly indicates that the DOCS criteria for [housing] required inmates to declare membership in a religion as a prerequisite to receive a DOHU, or otherwise infringed in any way on either of their religious beliefs." (R&R at 30, Dkt. No. 133.) Thus, Judge Baxter correctly concluded that defendants' "us[e of] religion as a criterion in DOHU assignments does not

implicate the First Amendment under the facts presented." (*Id.*) Accordingly, the court concurs with Judge Baxter that the first prong of plaintiffs' First Amendment challenge fails.

As to the second prong of plaintiffs' First Amendment challenge, Judge Baxter opined that plaintiffs' allegations with respect to the meatless menu failed to state a claim under either the Establishment Clause or Free Exercise Clause of the First Amendment. (*See id.* at 31-39.) With respect to the Establishment Clause, Judge Baxter found that plaintiffs' claim concerning the menu policies of DOCS should be dismissed as meritless. In reaching this conclusion, Judge Baxter analogized the facts alleged here with those presented to the Third Circuit in *Travillion v. Leon*:

> [The prison's] actions had the secular purpose of feeding the inmates. The services of these meals did not have the primary effect of advancing Catholicism or inhibiting other religions, nor did it foster the excessive entanglement of government with religion. The eating of a vegetarian repast is not inherently linked to a religious practice. Vegetarian meals are regularly eaten by many different people on an everyday basis, regardless of their religion.

248 F. App'x 353, 355-56 (3d Cir. 2007). In other words, "[t]he fact that some religions are required to eat certain foods or to abstain from eating certain foods on specific days does not render those foods 'religious' if they

are otherwise acceptable under another person's belief system." (R&R at 36, Dkt. No. 133.) The court agrees with this assessment and adopts the recommendation that plaintiffs' Establishment Clause claim be dismissed.

The court likewise concurs with Judge Baxter's recommendation as to plaintiffs' free exercise claim. Plaintiffs' attempt to specifically object to the R&R. Mainly, plaintiffs assert that defendants' contention that the meatless menu is not a Catholic religious dietary ritual is contrary to the Seventh Circuit's holding in *Nelson v. Miller*, 570 F.3d 871, 878 (7th Cir. 2009), that a meatless diet on Fridays during the Lenten holiday is a Catholic religious dietary ritual. (*See* Objections at 6-7, Dkt. No. 134.) However, plaintiffs misinterpret *Nelson*, which simply reasserted the already well-established, yet limited, rule that "requiring a prisoner to show that his preferred diet is compelled by his religion was unlawful, as such a requirement was contrary to RLUIPA." *Nelson*, 570 F.3d at 878 (citation omitted). *Nelson* renders no explicit—or implicit—holding that abstaining from eating meat is a dietary ritual specific to any religion, Catholic or otherwise. Giving plaintiffs' the benefit of de novo review, the court adopts Judge Baxter's recommendation that plaintiffs' free exercise claim is not actionable and should be dismissed.

C. RLUIPA Claim

As to plaintiffs' RLUIPA claim, Judge Baxter concluded that plaintiffs' allegations fail to factually invoke the RLUIPA. Plaintiffs specifically object to this finding, referencing *Williams v. Morton*, 343 F.3d 212, 219 (3rd Cir. 2003), for the proposition that changing all meals to halal meals could be considered imposing Islam on the whole prison. Plaintiffs miss the mark.

As explained in the R&R, the RLUIPA applies where the government has imposed "a substantial burden on the religious exercise of a person residing in or confined to an institution." 42 U.S.C. § 2000cc-1. Judge Baxter concluded, and the court agrees, that the "defendants are not interfering with plaintiffs' exercise of their religion (or non-religion), [and therefore] RLUIPA does not apply." (*See* R&R at 39, Dkt. No. 133.) Accordingly, the court adopts Judge Baxter's recommendation that defendants' motion be granted as to the RLUIPA claim and the claim is dismissed.

D. Leave to Amend

Rule 15(a) provides that where a party seeks to amend his pleading before trial, "[t]he court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2). "A motion to amend should be denied only for

such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party." *Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987) (internal quotation marks and citation omitted). "An amendment to a pleading will be futile if a proposed claim could not withstand a motion to dismiss pursuant to Rule 12(b)(6)." *Dougherty v. Town of N. Hempstead*, 282 F.3d 83, 88 (2d Cir. 2002) (citation omitted). Upon review of plaintiffs' complaint and other submissions, the court finds that leave to amend would be both factually and legally futile, and therefore denies the request.

IV. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Magistrate Judge Andrew T. Baxter's Report and Recommendation (Dkt. No. 133) is **ADOPTED** in its entirety; and it is further

ORDERED that defendants' motion to dismiss (Dkt. No. 107) is **GRANTED** as to plaintiffs' First Amendment, RLUIPA, and as-applied equal protection claims, and those claims are **DISMISSED**; and it is further

ORDERED that defendants' motion to dismiss (Dkt. No. 107) is **DENIED** as to plaintiffs' facial equal protection claims against defendants

Bezio, Cascaceli, Jordan, Kearney, LeClaire, Quinn, Sheahan, and Sticht, but is **GRANTED** as to the other defendants; and it is further

ORDERED that plaintiffs are **DENIED** leave to amend their complaint; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

August 2, 2011
Albany, New York

Gary L. Sharpe
U.S. District Judge