

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**SCOTT NJOS,
Plaintiff**

v.

**CARNEY, et al.,
Defendants**

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No. 3:12-cv-01375

(Judge Kane)

(Magistrate Judge Carlson)

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Before the Court is the June 21, 2017 Report and Recommendation of Magistrate Judge Carlson (Doc. No. 128), recommending that the Court grant Defendants’ second motion to dismiss and for summary judgment. (Doc. No. 68.) In his Report and Recommendation, Magistrate Judge Carlson recommends granting Defendants’ motion to dismiss on the basis that Plaintiff’s subsequent transfer to the Administrative Maximum Facility in Florence, Colorado from the United States Penitentiary at Lewisburg, Pennsylvania (“USP-Lewisburg”), renders moot his claims for injunctive relief stemming from Defendants’ alleged failure to adequately accommodate his religious dietary requirements in adherence to his professed belief in Judaism. Furthermore, Magistrate Judge Carlson recommends entering summary judgment in Defendants favor on qualified immunity grounds as to Plaintiff’s constitutional and statutory claims for damages predicated on Defendants’ brief suspension of Plaintiff’s religious diet due to his possession or consumption of non-Kosher food products, and failure to provide Plaintiff with 4.5 ounces of sacramental grape juice per Sabbath meal, for a total of 13.5 ounces per day. (Doc. No. 128.)

Plaintiff has filed objections to the Report and Recommendation, wherein he principally argues that he has presented sufficient evidence to create a genuine issue of material fact regarding the proper amount of sacramental grape juice that should be provided to Plaintiff to meet his professed religious dietary demands. (Doc. No. 131.) Specifically, Plaintiff challenges Defendants’

failure to comply with the section of the Bureau of Prison’s (“BOP”) guide to religious practice in prison pertaining to Judaism (id.), a copy of which Plaintiff submits as an exhibit to his objections. (Doc. No. 132.) According to Plaintiff, his receipt of a 6.75 ounce carton of Kosher grape juice per day contravenes the BOP’s best practices manual, which explains that the “Kiddush is normally recited while holding a full cup of Kosher grape juice (about 4.5 ounces).” (Id. at 6.) Plaintiff also contests Defendants’ stated penological interest in apportioning only 6.75 ounces of grape juice to Plaintiff per day and their position that 6.75 ounces of grape juice is sufficient to perform Sabbath services. (Id.) Finally, Plaintiff objects to Magistrate Judge Carlson’s sua sponte application of the qualified immunity doctrine to dismiss his constitutional and statutory religious freedom claims against Defendants, noting that Defendants did not raise the qualified immunity defense in connection with their presently pending dispositive motion. (Id. at 8.)

Having thoroughly reviewed Plaintiff’s objections in conjunction with Magistrate Judge Carlson’s Report and Recommendation, the Court finds that Magistrate Judge Carlson correctly and comprehensively resolved the substance of Plaintiff’s objections in the Report and Recommendation itself by virtue of having found that the complete defense of qualified immunity, raised for the first time in Defendants’ answer to the complaint, warranted the entry of summary judgment in favor of Defendants.¹ Thus, the Court will not write separately to address Plaintiff’s objections and will adopt Magistrate Judge Carlson’s Report and Recommendation in its entirety.

¹ With regard to Plaintiff’s argument that Magistrate Judge Carlson improperly recommended, sua sponte, disposal of Plaintiff’s claims on qualified immunity grounds, the Court observes that the Report and Recommendation does not explicitly articulate the source of Magistrate Judge Carlson’s authority to raise qualified immunity sua sponte. To clarify for Plaintiff, in this Circuit, a qualified immunity defense cursorily raised in an answer to a complaint and not referenced in a motion for summary judgment is not necessarily deemed abandoned. Rather, in appropriate circumstances, the court may consider qualified immunity sua sponte. Doe v. Delie, 257 F.3d 309 (3d Cir.2001) (affirming sua sponte recommendation of qualified immunity by the United States Magistrate Judge). Specifically, the Court is vested with the authority to sua sponte grant summary judgment on grounds not raised by the Defendants, such as qualified immunity, so long as the non-moving party has notice and an opportunity to be heard. The issuance of a report and recommendation,

ACCORDINGLY, on this 28th day of July 2017, upon independent review of the record and the applicable law, **IT IS ORDERED THAT**:

1. The Court **ADOPTS** the Report and Recommendation (Doc. No. 128), of Magistrate Judge Carlson;
2. Defendants' second motion to dismiss and for summary judgment (Doc. No. 68), is **GRANTED**; and
3. The Clerk is directed to enter judgment in favor of Defendants and against Plaintiff, and to **CLOSE** this case.

s/ Yvette Kane
Yvette Kane, District Judge
United States District Court
Middle District of Pennsylvania

together with the objection period following entry of a report and recommendation, have been found to satisfy the notice and response requirements. Watts v. Herbick, No. CIV. A. 07-824, 2009 WL 3152089, at *7 n.9 (W.D. Pa. Sept. 28, 2009), aff'd sub nom. Watts v. Herbik, 364 F. App'x 723 (3d Cir. 2010). Thus, here, Magistrate Judge Carlson did not err in resting his recommendation of dismissal of Plaintiff's claims against Defendants on qualified immunity grounds, as Plaintiff was provided with adequate notice and an opportunity to respond following the issuance of his Report and Recommendation.