

1996 WL 1185122

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Superior Court of Massachusetts.

Randall Shield Wolf TRAPP et al.,¹

v.

Lawrence DUBOIS et al.²

No. 950779. | Feb. 26, 1996.

Opinion

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

TRAVERS.

*1 The plaintiffs in this action are inmates within the lawful custody of the Massachusetts Department of Correction. Plaintiffs have sued officials within the Department of Corrections for violations of their rights to religious freedom under various federal and state statutes, the First Amendment of the Constitution and the Massachusetts Declaration of Rights. Plaintiffs now move for summary judgment on their counts alleging religious freedom violations based on the denial of space and funding for a sweat lodge and the prohibition of the storage of religious objects in their cells. For the following reasons, plaintiffs' motion for partial summary judgment is *DENIED*.

BACKGROUND

The Native American Spiritual Awareness Council ("Council"), a religious group, has been in existence at the North Central Correctional Institution in Gardner, Massachusetts since 1982.

According to defendants, the Council is permitted to meet twice a week. Additionally, Council participants are permitted access to an outside prayer area each morning for fifteen minutes. The board members are permitted to use office space Monday through Friday, 8 a.m. to 3 p.m.

The Council is allowed one ceremonial pipe which is held by plaintiff Randall Trapp and on Thursdays is used by the Council. The council is permitted to smoke sage, sweetgrass, and kinnikinnic. John Marshall, Superintendent of the North Central Correctional Institute, has allegedly offered to make available other ceremonial items, such as beads and a medicine bag, for

use at the Council meetings. None of these items are allowed to be kept by individual prisoners in their cells.

Allegedly in response to institutional problems, including serious gang issues, a revised property regulation was implemented. The revised regulation limits the ability of inmates to wear or display any logos, insignias, colors, medallions, emblems, or other adornments which might identify them as members of a particular group. Prisoners who were members of the Council at the time the regulation took effect are permitted to wear a religious headband. However, prisoners who joined the group after the regulation must produce some evidence of their Native American Heritage. This requirement is allegedly to prevent inmates from using the unrestricted participation in the Council as a means of bypassing the revised property regulations. Allegedly, any prisoner who wishes to obtain access to the special privileges of any religion must verify his or her affiliation with that religion.

There is no sweat lodge at the North Central Correctional Institute. According to plaintiffs' verified complaint, plaintiffs have been denied both the space and the funding for the construction of a sweat lodge.

DISCUSSION

This court grants summary Judgment where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422, 456 N.E.2d 1123 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553, 340 N.E.2d 877 (1976); Mass.R.Civ.P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Penderson v. Time, Inc.*, 404 Mass. 14, 16-17, 532 N.E.2d 1211 (1989). The court does not "pass upon the credibility of witnesses or the weight of the evidence [or] make [its] own decision of facts" in considering a motion for summary Judgment. *Hub Assocs. v. Goode*, 357 Mass. 449, 451, 258 N.E.2d 733 (1970). "A court should not grant a party's motion for summary judgment merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial. Instead, the court should only determine whether a genuine issue of material fact exists." *Attorney General v. Bailey*, 386 Mass. 367, 370, 436 N.E.2d 139 (1982) (internal citations omitted).

*2 In order to prove a violation of their right to the free exercise of religion, plaintiffs must prove that the activity

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interfered with by the State is motivated by and rooted in a legitimate and sincerely held religious belief. *Bailey*, 386 Mass. at 375, 436 N.E.2d 139. The sincerity of plaintiffs' religious beliefs is a question of fact. *Id.* at 376, 436 N.E.2d 139. Plaintiffs allege that they are members of the Council. Defendants have offered prison records, verified by affidavit, showing that each plaintiff with the exception of Rubin Jett has previously declared himself a member of a christian religion. These records create a genuine issue of material fact. As such, this court cannot grant summary Judgment on this issue. *Id.* at 370, 436 N.E.2d 139. A Jury must determine whether plaintiff's desire for the funds and space for a sweat lodge and for the right to possess in their cells ceremonial items such as pipes, beads, herbal tobaccos, and medicine bags is motivated by and rooted in a legitimate and sincerely held religious belief.

Even if this court could determine that plaintiffs are motivated by sincerely held religious beliefs, summary judgment would not be appropriate because there is a genuine issue of fact material to the determination of whether there is a compelling state interest in regulating the possession and use of these religious items and whether the present regulations are the least restrictive means of so regulating. See *Attorney General v. Desilets*, 418 Mass. 316, 331, 636 N.E.2d 233 (1994); *Bailey*, 386 Mass. at 376, 436 N.E.2d 139. Defendants have alleged that the compelling state interest is prison security. The affidavit of John Marshall, Superintendent of the North Central Correctional Institution, states that prison security dictates the regulation of religious items. Security in prisons, assuming it is properly proven at trial, is a compelling state interest. *Alvarez v. Flynn*, Civil No. 95-0275 (Worcester Super. Ct. July 6, 1995)

Defendants bear the burden of proving a compelling state interest and least restrictive means at trial. In order for this court to grant summary judgment against them on the issue, plaintiffs must either submit affirmative evidence negating an essential element of the defendants' case, or show that defendant is unlikely to submit proof of that

element at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809, 575 N.E.2d 1107 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, 575 N.E.2d 734 (1991).

Plaintiffs allege that security would not be compromised by the construction and use of a sweat lodge or by the In-cell possession of ceremonial items. As support for this challenge to defendants' pro-offered compelling interest, plaintiffs have offered an affidavit of Little Rock Reed, a Native American who has conducted extensive research on the practice of the Native American religion in prisons throughout the United States and Canada. The affidavit states that several other prisons have allowed Native Americans to possess ceremonial items and construct a sweat lodge and those prisons have not experienced security problems associated with that access.

*3 This evidence creates a genuine issue of material fact; it does not negate the pro-offered compelling interest of prison security. It is possible that access to ceremonial items and sweat lodges poses a security threat at the North Central Correctional Institution even though it does not pose a threat at other prisons. Defendants have shown that they may be able to prove a compelling state interest and least restrictive means at trial. There are disputed material facts bearing on this question. See *Desilets*, 418 Mass. at 331, 636 N.E.2d 233. As such, summary judgment on this issue is not appropriate. See *Flesner*, 410 Mass. at 809, 575 N.E.2d 1107; *Kourouvacilis*, 410 Mass. at 716, 575 N.E.2d 734.

ORDER

It is therefore *ORDERED* that plaintiffs' motion for partial summary judgment pursuant to Mass.R.Civ.P. 56 be denied.

Footnotes

¹ William Whitefeather Durfee, Robert Fish, Rubin Jett, James Crow Feather Manley, Bernard R. Bailey, Sr., and Christopher Bousquet.

² John Marshall, P.J. Chalapatás, Michael Dorian.