

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Roanoke Division

KELVIN E. BROWN, #207902,

Plaintiff,

v.

Civil Action No. 7:09cv00180

TRACY S. RAY, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT

COME NOW Defendants Tracy S. Ray, Warden, L. Fleming, Major, and T. Pease, Mailroom Supervisor, (hereinafter collectively referred to as "Correctional Defendants"), by counsel and in support of their motion for summary judgment for claims #2-6 submit the following.

Plaintiff Kelvin E. Brown, #207902 ("Brown"), an inmate with the Virginia Department of Corrections, has filed this action pursuant to 42 U.S.C. § 1983 alleging violation of his constitutional rights under the First Amendment, the Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Person Act of 2000 (RLUIPA). Specifically he alleges:

Claim # 1: Plaintiff is being denied his religious newspaper "The Final Call" based on race and religious discrimination;¹

Claim # 2: Plaintiff is being denied access to religious services for Nation of Islam (NOI);

¹ By contemporaneous filing, Defendants are requesting an additional 10 days to respond to Claim # 1.

Claim # 3: Plaintiff is being denied the documentation necessary to appeal the Publication Review Committee's decisions regarding his disapproved publications;

Claim # 4: Plaintiff is being discriminated against based on his race and religion;

Claim # 5: The Publication Review Committee does not afford due process; and

Claim # 6: Defendant Fleming is denying Plaintiff access to his publications because of Plaintiff's race and religious views.²

He requests relief in the form of the permission to receive the "religious and cultural material" and monetary damages of One Thousand Dollars (\$ 1,000.00).

The Defendants enclose and incorporate by reference the following affidavits: F. Taylor, Grievance Coordinator at Red Onion State Prison ("Taylor Affidavit"), and Tracy S. Ray, Warden of Red Onion State Prison ("Ray Affidavit"). Defendants respectfully request that this Court consider these exhibits as evidence in support of Defendants' motion.

Claims 2-6

As to Claims # 2-6, Plaintiff has not exhausted his administrative remedies and Defendants do not waive the exhaustion requirement.

Pursuant to 42 U.S.C. § 1997e(a):

No action shall be brought with respect to prison conditions under § 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

² Plaintiff lists a total of eight claims but omitting repetitive claims, it would appear that there are six.

Exhaustion of remedies is mandatory and is required “regardless of the relief offered through administrative procedures.” Booth v. Churner, 532 U.S. 731 (2001). The remedies “need not meet federal standards, nor must they be ‘plain, speedy, and effective.’” Porter v. Nussle, 534 U.S. 516, 524 (2002). Exhaustion is required for all actions brought with respect to prison conditions whether under § 1983 or any other federal law. Porter, 524. “Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules...” Woodford v. Ngo, 548 U.S. 81, 126 S. Ct. 2378, 2386 (2006).

Plaintiff has filed several grievances regarding the disapproval of his publications and has properly appealed to the appropriate levels. Accordingly, Claim # 1 is properly exhausted. Taylor Affidavit ¶ 9; Ray Affidavit ¶ 8 (explaining that the grievance was deemed founded based on DOC’s failure to respond to Brown’s informal complaint). Plaintiff however has not filed any grievances regarding Claims # 2-6. Taylor ¶ 10.

Accordingly, Plaintiff has not exhausted his administrative remedies pertaining to Claims 2-6 and these issues should be dismissed.

Wherefore, Defendants respectfully request this Court grant their motion, enter summary judgment on their behalf as to Claims # 2-6.

Respectfully Submitted,

TRACY S. RAY,
L. FLEMING
T. PEASE

By _____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2009, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following: N/A

And I hereby certify that I will mail the document by U.S. mail to the following non-filing user:

Kelvin E. Brown, #207902
Red Onion State Prison
Post Office Box 1900
Pound, Virginia 24279

_____/s/_____
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