



STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:)		
)		
HAL E. BARKER,)		
)		
Complainant,)		
)		
and)	CHARGE NO:	2000SF0615
)	EEOC NO:	21BA01979
STATE OF ILLINOIS)	ALS NO:	S-11798
DEPARTMENT OF CORRECTIONS,)		
)		
Respondent.)		

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). On October 19-21, 2004, a public hearing was held before me in Carterville, Illinois. The parties have filed their post-hearing briefs. Accordingly, this matter is ripe for a decision.

Contentions of the Parties

In the instant Complaint, pro se Complainant asserts that he was the victim of discrimination based on his religion (Christian) when Respondent terminated him from his position as Chaplain II at the Tamms Correctional Center. He also contended at the public hearing that he was the victim of unlawful retaliation when he was terminated shortly after complaining about religious discrimination allegedly committed by Respondent against him as well as the inmates. Respondent, however, maintains that Complainant cannot establish a *prima facie* case of discrimination since Complainant was not performing his duties in a satisfactory manner at the time of his termination. It similarly argues that Complainant cannot show that the reason for his termination, i.e., the sending of an inflammatory memorandum to all of the inmates, was a pretext for religious discrimination or unlawful retaliation.

Findings of Fact

Based on the record in this matter, I make the following findings of facts. Proposed findings which do not appear here were either unproven or immaterial to this decision.

1. At all times pertinent to the instant Complaint, Tamms Correctional Center consisted of a closed maximum-security unit (C-Max), as well as a minimum-security unit that served to support the C-Max unit. As originally designed, the C-Max unit, which contained approximately 275 inmates, was intended to house only the most serious offenders, including those who have murdered or raped Department of Corrections staff, murdered other inmates, had other inmates killed, or caused riots or major disruptions while incarcerated in other prisons throughout the state.

2. At all times pertinent to the instant Complaint, the C-Max unit at Tamms was a “closed” environment, with the inmates being locked in their cells 23 hours a day. This also meant that the inmates ate all of their meals in their cells, had no contact with other inmates, and, to the extent allowed, had religious and academic programming on an individual basis while confined to their individual cells.

3. At all times pertinent to the instant Complaint, Tamms had two full-time chaplains who worked in the C-Max unit, consisting of Complainant, a Christian (Church of Christ), and Carl Miller, a Christian (Lutheran). Moreover, at all times pertinent to the instant Complaint Respondent employed two part-time contractual Chaplains, i.e., Father Jerome Fortenberry, a Christian (Catholic) and Imam Haqq, a Muslim.

4. At some point in March of 1998, Complainant transferred to Tamms Correctional Center from an existing prison. At that time, the C-Max unit at Tamms was beginning its operations, and Complainant was given the Chaplain II job title. At all times pertinent to the instant Complaint, Complainant served as a lead worker in the Chaplaincy Department at Tamms and performed similar job duties to a Chaplain I, except that Complainant was responsible for the day-to-day direction of the Chaplain I position (Miller), as

well as the two contractual chaplains and any volunteer chaplains that visited the facility. Complainant was also responsible for submitting work schedules and timesheets for all chaplains, monitoring the contractual chaplains and drafting the performance evaluation of the Chaplain I for the signature of the Assistant Warden of Programs. However, Complainant's Chaplain II position was still covered under the same collective bargaining agreement applicable to the Chaplain I position, such that Complainant could not be considered a "supervisor" over the Chaplain I or any of the contractual chaplain positions.

5. At all times pertinent to the instant Complaint, Complainant reported to Assistant Warden of Programs James Rouse regarding issues arising in the Chaplaincy Department.

6. In June of 1988, Complainant was directed by Rouse to take part in the interviewing process for the Chaplain I position. At some point in the process, Complainant believed that the process was a sham, and that the hiring committee was going to hire Carl Miller for political reasons. Complainant complained about the situation to Rouse because Complainant believed that there were other candidates who were more qualified than Miller, and Complainant told Rouse that it was contrary to his (Complainant's) religious beliefs to be a part of a "fraudulent" process. Rouse told him that it was "too bad", but that Complainant was going to have to do what he was told.

7. On June 9, 1998, Complainant filed a grievance with respect to having to serve on the hiring committee. The grievance did not mention Complainant's religious beliefs as a basis for the grievance, but rather asserted that Complainant's participation on the hiring committee violated terms of the collective bargaining agreement. The grievance was resolved with the notation that non-Rutan certified employees such as Complainant would not be required to conduct Rutan interviews in the future.

8. In August of 1998, Rouse assigned Complainant to serve as a hearing officer on inmate grievances. Rouse determined that the assignment was necessary because the

available pool of hearing officers was being overwhelmed with the hundreds of grievances per month that were being filed by the inmates regarding all aspects of their restricted confinement. While Complainant would not have heard grievances pertaining to religious issues, Complainant objected to Rouse because he believed that the inmates would not have confided in him on religious matters. Rouse spoke to Warden George C. Welborn, a Christian (Catholic), who granted Complainant's request to be relieved of this assignment.

9. At some point in 1998 and continuing throughout his tenure, Complainant began experiencing problems with monitoring Chaplain Imam Haqq. Whenever Complainant believed that Haqq was violating one of Respondent's personnel rules, Complainant would document the fact either in an incident report, in a quarterly contract monitoring report, or in an e-mail to Rouse and/or Welborn. The substance of the problems included: (1) many instances where Haqq was tardy coming into work, would misstate time spent in the facility, would change his scheduled hours, or would not be performing chaplain services while in the C-Max; (2) an incident in which it appeared that Haqq was selling Muslim prayer rugs to the inmates in March of 1999; and (3) Haqq's failure to carry liability insurance that was required under his contract.

10. The record is silent as to how Respondent responded with respect to the prayer rug or insurance issues. As to issues concerning Haqq's time spent at C-Max, Rouse and Welborn generally indicated to Complainant to keep a close watch on Haqq and to report any instance when Haqq did not show-up so that he would be docked in pay.

11. In September of 1998 and thereafter, Complainant requested that Respondent find an alternative part-time chaplain to Haqq due to the perceived deficiencies in Haqq's performance. At that time Haqq was scheduled to work 12 hours per week. By the fall of 1999, Haqq was scheduled to work only nine hours per week.

12. On November 23, 1998, Complainant e-mailed Rouse regarding an incident concerning Haqq and his problem obtaining dates for observances of Ramadan. In a

responsive e-mail, Rouse indicated to Complainant that Haqq could be very difficult to work with, but that the “Warden is adamant that he wants an Islamic chaplain on contract for legal reasons.” Rouse cautioned Complainant not to “run-off” Haqq unless Complainant had someone else to replace him.

13. In February of 1999, Complainant informed Rouse that Father Fortenberry sent \$10 in personal funds to an inmate, which constituted a violation of Respondent’s rules. Rouse spoke to the Warden about the incident, and it was ultimately decided to merely counsel Fortenberry about the incident since he had only been employed for approximately six months and had indicated that he had been unaware that he had committed an offense.

14. In March 17, 1999, Complainant was confronted with an issue about a Muslim practice and surveyed other prisons regarding the practice. Rouse found out about the survey and told Complainant in an e-mail that:

”it is not your role to survey all of the facilities. If you do it is without my consent. What I think will happen is that you will P.O. the Chief Chaplain[’s] Office and you will end up in a box. Your role is to serve Tamms and keep us minimally legal...P.S. I agree you are receiving no guidance from central office but that is not our problem to fix.”

15. In June of 1999, Complainant accused Father Fortenberry of passing on information to an inmate about issues raised in a staff meeting. Rouse instructed Complainant to discuss the issue with Father Fortenberry.

16. In July of 1999, Complainant informed Rouse that Carl Miller had made 20 copies of Miller’s local church bulletin on Respondent’s copier. Rouse eventually wrote a memorandum to Miller instructing him not to use the copier for personal business.

17. In August of 1999, Complainant accused Father Fortenberry of mailing a letter given to him by an inmate without submitting the letter to the prison authorities for screening. Complainant recommended that Respondent terminate Father Fortenberry’s contract, but Fortenberry was only counseled against repeating the infraction.

18. Throughout 1999, Complainant requested information from Rouse about various issues raised by inmates. Specifically, Complainant asked about funeral furloughs, use of televisions for religious purposes by certain inmates, and inmate requests to get married. Rouse rejected each of these requests by explaining that some requests required the Warden's approval, and others such as requests by segregated inmates to watch religious services on televisions were not going to be allowed at all. Complainant questioned whether these requests could be denied in a blanket fashion since he believed that the Department's written rules allowed for the requests to be decided on a case-by-case basis.

19. On November 8, 1999, Complainant sent a memorandum to an inmate in response to a question regarding use of a television for Level II inmates. In the memorandum, Complainant, after citing to a Department Rule that would permit televisions for Level II inmates for academic purposes only, informed the inmate that he had been told that a Level II inmate could not possess a television for religious purposes. Complainant further added:

"According to the Illinois Religious Freedom Restoration Act and the Constitution of the United States[,] I believe that the contradictions cited above raise an issue of religious discrimination."

Complainant copied the memorandum to the chairman of the Religious Practice Advisory Board and Chaplain Miller, but did not copy the memorandum to either Welborn or Rouse.

20. On November 10, 1999, Rouse sent Complainant a memorandum indicating that Complainant had once again been assigned duties as a grievance officer for non-religious grievances. Complainant thereafter e-mailed Rouse and others, including Art Harrison (Respondent's counsel and member of Respondent's Religious Practices Advisory Board) registering his protest as to the assignment based on the same conflict of interest grounds he mentioned in the previous year.

21. On November 22, 1999, Complainant attended a fundraiser for Michael Bost in which Respondent's Director, Donald Snyder, was a speaker. During the event, Complainant spoke to Snyder about what he perceived to be religious discrimination occurring at Tamms.

During the conversation, Complainant asserted that some of the religious needs of the inmates were not being met through the blanket denials of certain requests by Complainant's supervisors. Complainant also asserted that some of the other chaplains were violating Respondent's rules and were not being punished while he was being treated differently, and that he and Miller were now being assigned grievance officer duties, which created a conflict of interest with inmates. At the end of the conversation Snyder instructed Complainant to send an e-mail outlining his concerns to him and to his assistant Lynnette Jones so that the matters could be looked into.

22. On November 23, 1999, Complainant e-mailed both Snyder and Jones about the matters he discussed at the Bost fundraiser. In the e-mail, Complainant asserted that he was met "at times" by what he considered to be "religious prejudice and discrimination". Specifically, Complainant referred to what he perceived to be Miller's political hiring, as well as the fact that: (1) he was temporarily moved to a different office after protesting the process of Miller's hiring; (2) he was assigned grievance officer duties that created a conflict of interest; (3) he was met with hostility when attempting to clarify religious issues within the Department; and (4) his superiors were making blanket denials of certain requests made by the inmates that were contrary to Department rules. Complainant further wrote that:

"I could go on, but the point being here is a rule that says one thing and on many instances I am [e-mailed] something entirely different. I feel this is discriminatory towards me as a Chaplain, pastoral integrity (i.e. performance of ministerial duties and Chaplaincy relationship with inmates) and inmate religious rights. I cannot sit idly by while this injustice I believe continues to occur."

23. On November 28, 1999, Complainant received an e-mail from Rouse indicating that Complainant was no longer assigned to perform grievance officer duties.

24. On December 2, 1999, Complainant received an unsigned note from what he believed to be a staff person who complained about the lack of an adequate diet for Catholics during Lent and accused the Department of discriminating against Catholics in view of all of the dietary accommodations made by the Department on behalf of Muslim inmates and staff.

On December 5, 1999, Complainant forwarded the note to Art Harrison for clarification of the Department's policy, with the observation:

"This is another example of why I have been asking for MONTHS with no clarification of course, for more specific direction than the "seemingly" WAIT TIL[L] SUED policy. Forwarding this also to the Office of the Chief Chaplain and Religious Practice Advisory Board. [R]eligious services in this state are far from consistent and since I have not gotten responses on various issues sent to these people previously, I don't expect a specific response on this either." [Emphasis in original.]

25. On December 9, 1999, Harrison sent an e-mail to Complainant, Welborn, and Rouse that responded to the note by initially advising that the unknown individual should have addressed the problem through requests made with the Warden. Harrison also invited Complainant to provide a list of those matters that Complainant directed to the Religious Practice Advisory Board so that a determination could be made as to which matters were properly before the Board.

26. On December 9, 1999, Welborn forwarded Harrison's e-mail to Rouse with the notation: "JIM, I CONTINUE TO BE IMPRESSED ON HOW WELL YOU CONTROL THIS GUY."

27. At some point after Rouse received Welborn's e-mail, Rouse sent Welborn the following response:

"YOU ARE CORRECT. I HAVE BEEN A DISMAL FAILURE. EFFECTIVE MONDAY 12/6 I HAD LARRY PULL HIS [Complainant's e-mail] SIGNON AND I DON'T PLAN TO GIVE HIM OUTLOOK. I HOPE THIS WILL SLOW THE CRUSADE. YOU HAVE TOLD HIM TWICE IN MY PRESENCE TO STOP SENDING STUFF TO ART HARRISON AND YET HE PERSISTS. WE TRIED IT YOUR WAY AND NOW WE WILL TRY IT MINE. IF WE DON'T SLOW HIM DOWN HE WILL GET US BOTH CANNED. OLD CHINESE SAYING: 'NO PROFS SIGNON, NO PROFS MESSAGES.'"

28. On December 15, 1999, Rouse sent Complainant a memorandum indicating that no one in the Chaplain office was to send correspondence on official Department letterhead outside the institution without his approval. The memorandum was motivated by a December 13, 1999 letter that Complainant had sent to a Native American organization

seeking advice as to whether a peace pipe, dream chaser and sweat lodge sought by an inmate were required items for the faith and practice of a Native American.

29. On December 19, 1999, Complainant distributed a memorandum to all inmates in the C-Max section of Tamms, regardless of whether the inmate had expressed any religious preference or made any religious inquiries to Respondent. In the memorandum, which had a subject line of "Chaplaincy Issues", Complainant sets forth ten areas of concerns he had with Respondent's management that ranged from: (1) use of televisions by certain inmates: (2) management's total lack of response to inmate marriage requests and a lack of a response to approximately "99%" of inmate grievances forwarded to the Religious Practice Advisory Board; and (3) management's alleged inconsistent responses to inmate requests for religious diets. Complainant further accused the administration of resolving inmates requests by enforcing "unwritten rules" that were contrary to applicable written Department Rules. Complainant also told the inmates that he had passed on his concerns to outside organizations such as the American Civil Liberties Union and the American Center for Law and Justice, and that his forwarding of said concerns had not been "without deep personal cost", which Complainant believed to be "religious persecution or discrimination". Complainant also stated that "I realize what the Administrative response will be, but a job is not worth my soul."

30. On December 19, 1999 Complainant saw Rouse at the facility while he was passing out the memorandum, but did not inform him about the memorandum or any need for sending out the memorandum.

31. On December 21, 1999 Warden Welborn, after examining Complainant's December 19, 1999 memorandum, became disturbed about the contents of the memorandum, as well as the method of its delivery. Specifically, Welborn believed that portions of Complainant's memorandum invited the inmates to file lawsuits against Respondent in a prison population that was already prone to filing lawsuits and provided an added incentive for inmates to commit physical assaults on prison staff. Welborn also believed that while

Complainant could communicate Department policies to individual inmates on a one-on-one basis, the instant mass-mailing to all inmates, regardless of whether the inmate had previously expressed any interest in religious issues, ran contrary to his wish that all staff act as a cohesive unit in terms of implementing practices and policies that he and others in senior management had generated.

32. On December 22, 1999, Welborn called Complainant into his office and confirmed with Complainant that Complainant had authored and distributed the memorandum to all the inmates. Later that afternoon Complainant was escorted off the prison facility and was placed on suspension.

33. In January of 2000, Rouse, at the instruction of Welborn, drafted five disciplinary charges against Complainant, four of which related to the December 19, 1999 memorandum and sought Complainant's discharge. The first four charges asserted that Complainant: (1) engaged in behavior that was likely to endanger the safety and order of the prison facility and staff; (2) improperly sent a memorandum outside the facility in contravention of Rouse's December 15, 1999 memorandum; (3) improperly used Department letterhead and photocopier to disseminate the memorandum; and (4) made false statements regarding Administration's responses to inmate grievances forwarded to the Religious Practice Advisory Board. A fifth charge related to a separate December 19, 1999 memorandum that Complainant had written to a fellow correctional officer about an inmate grievance in which Complainant characterized an instruction given to him by Rouse as a "burdensome policy".

34. Complainant's case was referred to an employee review hearing officer who eventually found Complainant guilty of all charges, after concluding that the December 19, 1999 memorandum to the inmates was an "inflammatory and subversive" document that was "intended to undermine the Administration of this closed maximum security facility." The hearing officer also recommended that Complainant be given a 30-day suspension pending discharge.

35. Complainant was discharged on March 24, 2000 and thereafter filed a grievance alleging that his discharge lacked just cause and that his discharge was motivated because of his religious beliefs. The arbitrator, however, found that Complainant was guilty of misconduct on the first charge of misconduct in that Complainant took his honestly held disagreements with his supervisors' interpretations of Department policy and sent a highly inflammable memorandum to a volatile and extremely dangerous population of inmates. Moreover, the arbitrator rejected Complainant's claims of religious discrimination and found that Complainant's misconduct was sufficiently serious so as to warrant discharge. The arbitrator did not rule on the other charges of misconduct.

36. In April of 2000, Respondent received a letter from the "Uptown People's Law Center" indicating that many inmates from Tamms were going to go on a hunger strike unless 28 demands were met by Respondent. Among the demands was a demand that Complainant be reinstated as Chaplain.

Conclusion of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Complainant failed to establish a *prima facie* case of religious discrimination as to Complainant's disparate treatment claim in that Complainant failed to identify a suitable comparative co-worker who received more favorable treatment.

4. Complainant failed to establish a *prima facie* case of religious discrimination as to Complainant's failure to accommodate claim in that Complainant failed to make Respondent aware that he had a genuine religious belief that conflicted with one of Respondent's job requirements.

5. Complainant has established a *prima facie* case of unlawful retaliation for having complained about religious discrimination.

6. Respondent has articulated a legitimate, non-discriminatory reason for its decision to terminate Complainant from his Chaplain II position.

7. Complainant has failed to prove by a preponderance of the evidence that the reason given by Respondent for its termination of Complainant was a pretext for either religious discrimination or unlawful retaliation.

Determination

Complainant has failed to prove by a preponderance of the evidence that Respondent violated either sections 2-102 and 6-101(A) of the Human Rights Act (775 ILCS 5/6-101(A)) when it terminated Complainant from his position as Chaplain II.

Discussion

In a case alleging religious discrimination and retaliation in an employer's treatment of an employee in the workplace, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation under the Illinois Human Rights Act. (See, **Blair and Illinois Department of Corrections**, 43 Ill. HRC Rep. 3 (1988), and **Burnham City Hospital v. Human Rights Commission**, 126 Ill.App.3d 999, 467 N.E.2d 635, 81 Ill.Dec. 764 (4th Dist. 1984).) Under this approach, the Complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to Respondent to articulate (though not necessarily "prove") a legitimate, non-discriminatory reason for the action taken against Complainant. If the Respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (**Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), and Complainant is required to prove by a preponderance of the evidence that Respondent's articulated non-discriminatory reason is a pretext for unlawful discrimination. This latter requirement merges with Complainant's ultimate burden of proving

that Respondent discriminated unlawfully against Complainant. See, **Village of Oak Lawn v. Human Rights Commission**, 113 Ill.App.3d 221, 478 N.E.2d 1115, 88 Ill.Dec. 507 (1st Dist. 4th Div. 1985).

Section 2-102 of the Human Rights Act (775 ILCS 5/2-102) provides that it is a civil rights violation for any employer to discharge an employee because of his religion, which includes all aspects of religious observance and practice, unless the employer can demonstrate that it is unable to reasonably accommodate the employee's religious observance or practice without undue hardship on the conduct of the employer's business. Typically, courts have recognized two separate theories in asserting religious discrimination claims, which permit an employee to allege either that he or she was treated differently than other employees because of his or her religious beliefs, or that the employer discriminated against the employee by failing to accommodate his or her religious beliefs. Here, our Complainant has argued both theories in that he asserts that he was the victim of unlawful discrimination based on his religion in that: (1) Respondent treated him more harshly than other Chaplains who violated Respondent's work rules; and (2) even if Respondent could establish that the dissemination of the December 19, 1999 memorandum was a legitimate basis for his discharge, his religious need for writing the memorandum required that Respondent accommodate his conduct.

As to his disparate treatment claim, Complainant has the burden of establishing a *prima facie* case by showing that: (1) he is a member of a protected class; (2) he experienced an adverse employment action; and (3) similarly situated individuals outside his protected class were treated more favorably, or that other circumstances surrounding the adverse employment action gave rise to an inference of discrimination. (See, for example, **Loyola University of Chicago v. Illinois Human Rights Commission**, 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill.Dec. 746 (1st Dist. 3rd Div. 1986).) Both parties agree that Complainant established the first two prongs of the *prima facie* case scenario. However, Respondent submits that

Complainant cannot satisfy the third prong because none of the other Chaplains at Tamms (i.e., Miller, Fortenberry and Haqq) were similarly-situated to Complainant in terms of either the nature of misconduct or similarity of work records/experience.

Initially, I agree with Complainant that neither Chaplain Miller's Chaplain I job title nor the contractual status of the part-time Chaplains (Fortenberry or Haqq) necessarily disqualify them from being potential suitable comparatives since the record showed that all of Respondent's Chaplains were required to follow Respondent's Code of Conduct regardless of job title or contractual status, and Respondent had the ability to impose the same discipline on contractual chaplains (i.e., termination) as it did with Complainant. However, because Chaplains Fortenberry (as a Catholic) and Miller (as a Lutheran) were both of the Christian religion, and thus shared the same protected classification as Complainant, they cannot be considered as suitable comparatives for purposes of establishing a *prima facie* case of religious discrimination.¹ (See, for example, **Jordan v. City of Gary, Ind.**, 396 F.3d 825 (7th Cir. 2005).) Indeed, if he is correct that Miller's 20-page copier violation and Fortenberry's mailroom violations were terminable offenses, the lenient treatment given to both Miller and Fortenberry suggests that something other than Complainant's Christian religion was the reason for his termination.

Chaplain Haqq, as a Muslim, presents a closer question since his religion was outside of Complainant's protected classification, and the record reflects that Chaplain Haqq was certainly less than a model employee in terms of keeping a regular schedule, keeping accurate time schedules, making good use of time while at Tamms, failing to maintain insurance, and on occasion selling prayer rugs to Muslim inmates. This is especially so since Rouse, through

¹ Complainant attempted to distinguish Chaplain Fortenberry on the grounds that his Catholic religion was nothing more than a "cult", and Chaplain Miller on the grounds that he did not know whether Chaplain Miller, as a Lutheran, shared the core religious beliefs of Christians as practiced by his Church of Christ denomination. However, both Catholics and Lutherans have traditionally been categorized as Christians, and there is nothing in the record to indicate

various e-mails, essentially agreed with Complainant that Chaplain Haqq was “irresponsible”, “worthless” and “very difficult to work with”. However, the nature of Chaplain Haqq’s infractions are not comparable to Complainant’s conduct for purposes of establishing a *prima facie* case of discrimination since, unlike the contents of the December 19, 1999 memorandum, Haqq’s failings as an employee (or for that matter the infractions attributed to Miller and Fortenberry) did not have the perceived potential to motivate inmates to file lawsuits or attack prison staff.

In taking an alternative approach, Complainant maintains that Rouse’s November 23, 1998 e-mail asserting that Welborn was adamant about keeping an Islamic chaplain on contract constitutes evidence of an anti-Christian bias as to his own termination. However, leaving aside for a moment the temporal, one-year disconnect between Rouse’s e-mail and Complainant’s termination, a fair reading of Rouse’s e-mail indicates that Welborn was concerned about the legal ramifications associated with the lack of an Islamic Chaplain, especially where Christian religious services were already being provided by the prison. (See, **Berger v. Renesselaer School Corp.**, 902 F.2d 1160, 1168-69 (7th Cir. 1993) for the general proposition that the Establishment Clause precludes the government from favoring one religion over another.) In this respect, Welborn’s insistence on being able to supply a Chaplain capable of providing Islamic religious services to avoid an appearance of a “pro-Christian” bias does not readily translate into evidence of an “anti-Christian” bias.

Moreover, *prima facie* cases aside, I agree with Respondent that Complainant has not established in his disparate treatment claim that the rationale articulated by Respondent for terminating Complainant was a pretext for religious discrimination. Specifically, Welborn asserted that he found Complainant’s December 19, 1999 memorandum objectionable because: (1) Complainant’s mass-publication of allegations that Respondent was not following

whether Welborn recognized a fundamental distinction between Complainant’s denomination and others.

its own rules and regulations conflicted with his desire to have a cohesive unit implementing Respondent's practices and policies; (2) Complainant's assertions regarding Respondent's inaction on religious issues or outright denial of certain religious-related requests created a potential for physical assaults on prison staff; and (3) Complainant's suggestion that Respondent was depriving inmates of Constitutional guarantees created an incentive and a mechanism for generating lawsuits against Respondent.

Complainant, though, maintains that these concerns did not actually motivate his termination since no one in retrospect could causally link any physical assault by an inmate to his December 19, 1999 memorandum, and the Tamms facility already had stringent security measures to protect staff from inmate assaults. However, the fact that Respondent could not identify any actual physical assaults that were related to the December 19, 1999 memorandum does not demonstrate that Respondent's management did not actually believe that such assaults could occur. Moreover, unrebutted testimony indicated that in spite of the increased security measures, staff members were constantly being assaulted by inmates in terms of having urine, feces or hot water thrown at them through the cell bars and "chuck holes" based upon real or imagined slights perceived by the inmates. Indeed, Welborn's fear that inmates might take out their frustrations on prison staff due to the contents of Complainant's memorandum asserting wrongful denials of inmate grievances seems all the more reasonable given the fact that inmates were placed at Tamms precisely because of their demonstrated history of violence towards prison staff and others.

The same finding applies to Welborn's claim that he feared that the December 19, 1999 memorandum could spawn a series of lawsuits regarding inmate exercise of religious rights. In this respect, the record shows that the inmates at Tamms had a well-established history of filing hundreds of grievances per month challenging all aspects of their confinement, and a fair reading of the December 19, 1999 memorandum, which suggested that Complainant's supervisors were not following Respondent's own written rules when resolving

religious-based grievances, supports the notion that an inmate could have filed a lawsuit and argued that certain members of Respondent's own staff agreed with him that he had a viable cause of action. Too, while the record does not indicate whether any such lawsuits were actually filed, the record reflects that the contents of the memorandum did affect future actions taken by the inmates in that Respondent received a purported demand by the inmates one month after Complainant's termination that it "cease its retaliation" against Complainant for exercising his "religious beliefs and speech in exposing Tamms' system of unwritten policies". In any event, I cannot say that Welborn's belief that Complainant's memorandum posed a potential catalyst for future deleterious actions taken by inmates on the operations of the prison facility was "unworthy of belief", a showing that was required in order to establish pretext. See, **Vidal and St. Mary's Hospital of East St. Louis, Inc.**, ___ Ill. HRC Rep. ___ (1985SF0343, August 1, 1995).

However, Complainant's failure in rebutting Respondent's legitimate, non-discriminatory reason for his discharge does not end the matter since section 2-101(F) of the Human Rights Act (775 ILCS 5/2-101(F)) requires that an employer accommodate all aspects of an employee's religious observance and practice, unless to do so would create an undue hardship on the employer's business. (See, for example, **Blair and Illinois Department of Corrections**, 43 Ill. HRC Rep. 3 (1988) and **Chalmers v. Tulon Company of Richmond**, 101 F.3d 1012, 1018 (4th Cir. 1996).) Under a "failure to accommodate" claim, though, an employee must at least show that: (1) he had a genuine religious belief which conflicted with his employer's job requirements; (2) he informed his employer of the conflict; and (3) he was disciplined for failure to comply with the conflicting requirement. (See, for example, **Wilbon and Caterpillar, Inc.**, ___ Ill. HRC Rep. ___ (1989CF2165, January 11, 1985).) Here, Complainant argues that he held a bona fide religious belief that caused him to write the December 19, 1999 memorandum, and that Respondent was required to accommodate his religious belief.

Yet what was Complainant's bona fide religious belief that conflicted with the operations of Respondent's prison? A review of the December 19, 1999 memorandum provides no clue since the text of the memorandum focused on rather secular matters regarding inmate usage of televisions, as well as the processing of inmate grievances and identification of various prison policies, and Complainant makes no claim that these topics are covered in any Biblical Scriptures or other text pertaining to the observance or practice of his Christian religion. When pressed at the public hearing to explain the religious significance of the December 19, 1999 memorandum, Complainant explained that "telling the truth" was an essential element of his Christian faith, and that "following [work] rules" and obeying the law were essential tenets found in the Scriptures. Thus, Complainant submits that Respondent could not discipline him for sending the December 19, 1999 memorandum since the memorandum was an expression of the truth in accordance with his religious beliefs and Respondent's rules and regulations.

The problem with Complainant's accommodation claim, though, is that he never informed Respondent that his religious beliefs required that he send a memorandum to all inmates informing them of their religious rights and pointing out any discrepancies between Respondent's written and unwritten rules. (See, for example, **Redmond v. GAF Corp.**, 574 F.2d 897 (7th Cir. 1978) for the proposition that an employee must inform the employer of both his religious needs and his need for an accommodation.) Indeed, one of the reasons for requiring advance notice of the conflicting religious practice is to permit the employer an opportunity to limit any injury that an employee's religious conduct may have on an employer's operations. (See, **Chalmers v. Tulon Company of Richmond**, 101 F.3d 1012 (4th Cir. 1996).) Here, it is clear that Complainant did not provide Respondent with a similar opportunity to accommodate Complainant's religious need to "tell the truth" about Respondent's rules, and if anything, the instant record suggests that on the day Complainant sent out the memorandum, Complainant went out of his way not to inform Rouse about his

intention to send the memorandum or his religious obligation for doing so. As such, I find that Complainant cannot establish a *prima facie* case on a failure to accommodate theory.

However, Complainant contends that the notice requirement for religious accommodation cases should be either excused or deemed satisfied since both Rouse and Welborn were well aware of his strong religion convictions at the time he distributed the December 19, 1999 memorandum. Moreover, Complainant insists that neither Rouse nor Welborn explicitly instructed him that he could not send a mass-mailing to inmates concerning religious matters, especially where he was getting many inmate inquiries covering the same topics and resolving said inquiries on an individual basis. He similarly maintains that Respondent in fact had notice of his thoughts regarding inconsistencies within Respondent's written rules regarding inmate use of televisions, as demonstrated in a November 17, 1999 memorandum to an inmate in which Complainant asserted his belief that the alleged inconsistency "raised an issue of religious discrimination".

Initially, I doubt whether the lack of a written rule explicitly informing Complainant of a policy against writing mass-memorandums to inmates regarding his thoughts on whether Respondent's management is properly following the written rules precludes any action taken by Respondent based upon the sending of the memorandum. This is so, since courts have taken the opposite view that employers need not put down in written form every possibility for grounds of discharge prior to discharging an employee for misconduct. Indeed, the court in **Chalmers** rejected a similar contention in a religious accommodation claim where an employee was terminated after sending a letter to a co-worker suggesting that the co-worker was engaging in an adulterous relationship and urging that the co-worker put "Jesus in [his] life right now". **Chalmers**, 101 F.3d at 1019.

Moreover, given the fact that Complainant did not copy either Rouse or Welborn on the November 17, 1999 memorandum, I doubt whether either Rouse or Welborn was aware of the subject matter of the November 17, 1999 memorandum so as to establish either that

Respondent's management actually approved of the concept of Complainant suggesting Constitutional and statutory violations to inmates, or that Complainant was attempting to inform his immediate supervisors of any conflict between his religious beliefs and management's interpretation of Respondent's written rules. Additionally, while it is true that Complainant was out-spoken about his religious beliefs in general and registered his objections whenever he believed that various assignments violated his religious tenets, mere knowledge by an employer that an employee has strong religious beliefs is insufficient by itself to place an employer on notice that an employee might engage in future religious activity. (See, Chalmers, 101 F.3d at 1020.) In this respect, Complainant's failure to notify his supervisors of his religious need to inform all inmates about Respondent's allegedly incorrect interpretations of its own rules is all the more puzzling since Respondent's management had accommodated Complainant's religious-based requests to rescind Complainant's grievance officer duties on two occasions after it had become aware of the conflict.

Alternatively, even if Complainant could establish a *prima facie* claim based on Respondent's failure to accommodate his religious beliefs, I find that Complainant's conduct in distributing the December 19, 1999 memorandum is not the type of conduct that an employer could possibly accommodate even with advance notice. Specifically, Warden Welborn testified at the public hearing that he found the memorandum to be objectionable, in part, because: (1) the unique nature of running a new, super-maximum security prison required that all staff become a cohesive unit in terms of implementing Respondent's practices and policies; and (2) the memorandum suggested a roadmap for filing lawsuits against Respondent because it highlighted alleged inconsistencies in Respondent's implementation of its rules when it came to addressing inmate religious issues. Under these circumstances, where Respondent has identified both a proclivity of the inmates to physically assault staff, as well as a necessity in speaking with one voice with respect to interpretation of its own policies and rules, I agree with Respondent that Complainant's apparent religious need to inform inmates

of perceived inconsistencies between management's interpretations of the rules and the written rules themselves could not be accommodated without potential disruption within the prison. As such, and for all of the above reasons, I find that Complainant has not established a *prima facie* case of discrimination on the basis of religion under either a disparate treatment or failure to accommodate theory.

Retaliation

Prior to the public hearing Complainant sought leave to amend his Complaint to allege a count of retaliation based on unspecified protected activity and his subsequent termination. While Complainant's motion was denied because his proposed *pro se* amended Complaint failed to contain any allegations regarding his prior protests, Complainant was given leave to submit evidence at the public hearing as to incidents he believed would support a retaliation claim as long as said evidence arose out of his religious discrimination claim. In this respect Complainant testified that he believed that he was terminated in retaliation for making prior protests of religious discrimination in his November 22, 1999 conversation with Director Snyder, as well as in his follow-up November 23, 1999 e-mail. Thus, Complainant has essentially moved to conform the pleadings to the record by adding a retaliation claim. In analyzing his claim, I agree with Complainant that he has established a *prima facie* case of unlawful retaliation where: (1) Complainant's November 22, 1999 conversation and follow-up November 23, 1999 e-mail qualified as protected activity; (2) Respondent suspended Complainant within a month of these communications; and (3) the short time frame between Complainant's protected activity and the adverse action suggests a potential linkage between the protected activity and the adverse act. See, for example, **Papa and Madison County Sheriff's Department**, ___ Ill. HRC Rep. ___ (1997SF0146, June 9, 2000).

Respondent, though, contends that Complainant cannot establish a *prima facie* case of retaliation since there was no evidence that the decision-makers (Welborn or Rouse) knew about Complainant's November 22 and 23, 1999 protests. However, the record hints that

Welborn and Rouse knew about these communications since: (1) Complainant also protested his new assignment of grievance officer duties in the November 22, 1999 conversation with the Director and in the November 23, 1999 e-mail; and (2) Rouse addressed this aspect of Complainant's protest by rescinding Complainant's grievance officer duties in a November 28, 1999 e-mail. Indeed, two December 9, 1999 e-mails between Rouse and Welborn, which noted an inability to "control" Complainant, as well as the necessity to "slow down [Complainant's] crusade" before it caused them to be "canned", potentially establish that both Rouse and Welborn actually knew about Complainant's late November, 1999 communications with the Director especially where these communications contained Complainant's criticisms of the roles played by Welborn and Rouse in articulating Department policies and practices.

Yet, a closer examination of the December 9, 1999 e-mails does not actually support Complainant's claim that he was terminated because of a prior protest of religious discrimination made in late November of 1999. Specifically, Welborn's December 9, 1999 e-mail contained a forwarded e-mail from Art Harrison, Respondent's legal counsel, who, when responding to an anonymous note (from an apparent employee) passed to him by Complainant concerning the need for a Catholic diet, initially noted that the employee should have taken the matter regarding religious diets directly to the Warden of the facility (i.e., Welborn), rather than to the Religious Practices Advisory Board. Thus, the "slowing down" of Complainant, referred to by Rouse in his December 9, 1999 e-mail, as well as his stated fear of being "canned" by Complainant's actions, can be explained as nothing more than management's long-standing irritation with Complainant's practice of going to third-parties about accommodating religious-based inquiries from the inmates. After all, it was Rouse who reminded Complainant, in an March 17, 1999 e-mail in which he refused to consent to Complainant surveying other facilities about a religious question, that he was only to keep the prison "minimally legal".

Additionally, while Complainant has focused on his November 22 and 23, 1999 communications to establish his retaliation claim, such communications prove to be a double-edged sword for our Complainant since Respondent actually accommodated his request to be relieved of grievance officer duties that was contained in his November 23, 1999 e-mail to Director Snyder. More important, Complainant has not explained how Respondent could have accommodated his request in late November, 1999 to be relieved of grievance officer duties based on a stated conflict with his religious principles and yet use the same communications as a basis for retaliating against him by terminating him one month later. In this respect, the only other event that logically could have triggered Complainant's firing was his sending of the December 19, 1999 memorandum to all of the inmates and Respondent's honest perception that the memorandum had a potential for inciting the inmates to violence against staff and in encouraging inmates to file lawsuits against the institution. As such, because the record overwhelmingly supports a finding that Complainant was terminated because of the December 19, 1999 memorandum, I will deny Complainant's request to amend the Complaint to conform to the contents of the record by adding a count of unlawful retaliation.

Finally, Complainant contends that Respondent's blanket denials of prisoner requests for religious accommodations, as well as its unwillingness to address other religious-based issues regarding the housing of inmates, violated various Constitutional provisions and federal statutes, and that his own termination was based in part on his attempt to articulate those violations to an administration that was otherwise unwilling to acknowledge religious rights of inmates. Yet, these allegations, which at most raise a potential First Amendment cause of action under 42 U.S.C. §1983, gain him nothing in his religious discrimination claim under the Human Rights Act since the Human Rights Commission is the wrong forum to address any alleged federal statutory or Constitutional violations. (See, **Langley and Illinois Secretary of State**, ___ Ill HRC Rep. ___ (1991SA0096, April 23, 1999).) Here, Complainant loses on his religious discrimination claim since he failed to either: (1) establish a suitable comparative co-

worker outside his protected classification who committed a similar infraction and yet received more favorable treatment; or (2) prove that Respondent did not honestly believe at the time that he sent the December 19, 1999 memorandum that the memorandum had the potential for inciting inmates to physical violence towards prison staff or generating lawsuits against the institution. Additionally, Complainant loses on his failure to accommodate claim since he purposely neglected to notify his supervisors of any religious need to send the December 19, 1999 memorandum prior to sending the memorandum.

Recommendation

For all of the above reasons, I recommend that Complainant's request to amend the pleadings to conform the evidence to the record by adding a count of unlawful retaliation be denied, and that the instant Complaint and the underlying Charge of Discrimination of Hal E. Barker be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 26TH DAY OF SEPTEMBER, 2005