UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RASHAD AHMAD REFAAT EL BADRAWI	:	
Plaintiff	:	**CIVIL ACTION**
	:	**3:07-CV-01074-JCH**
v.	:	
	:	
	:	
	:	
DEPT. OF HOMELAND SECURITY, ET AL.	:	
	:	
Defendants	:	**September 10, 2010**

STATE DEFENDANTS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

I. INTRODUCTION

The defendants, Charles Lee, Albert Pitts, and Thomas McGrail, (collectively "State Defendants") hereby move pursuant to Fed. R. Civ. 56 for summary judgment as to Counts three, four and five of the plaintiffs' Second Amended Complaint (Docket # 83). The State Defendants are entitled to summary judgment on plaintiff's Section 1983 claims because he cannot establish that his First Amendment rights were substantially burdened by Warden Lee or that Warden Lee was deliberately indifferent to his serious medical need. Warden Lee is also entitled to qualified immunity base upon the undisputed facts in this case. The State Defendants are also entitled to summary judgment plaintiff's claims under RLUIPA because they cannot be held individually liable for money damages under RLUIPA; plaintiff cannot establish a "substantial burden" on his religious exercise; plaintiff cannot establish that he is a

"person" covered by RLUIPA and the defendants are also entitled to qualified immunity on plaintiff's RLUIPA claims.

II. FACTUAL BACKGROUND

The plaintiff, Rashad El Badrawi, is a citizen of Lebanon and Egypt and a practicing Muslim who attended school and worked in the United States from approximately 1995 to 2004. He is a highly educated professional; he has an undergraduate degree from the American University in Beirut, Lebanon, (Pl. depo. 22); a master's degree in Pharmaceutical Sciences from Northeastern University, (id.), and a master's degree in Information systems from Northeastern University. (Id. at 26). Plaintiff was also admitted to two separate Ph.D. programs at Northeastern University in Pharmacology and a Ph.D. program in Computer System Engineering. (Id. at 40-41). Plaintiff describes himself as "highly educated" (id. at 42), fluent in English, (id. at 11), and "somewhat social" (id. at 38).

Before beginning employment at UConn Health Center ("UConn"), plaintiff worked at two other companies in the United States: Proteome in the Boston area (id. at 26); and Curagen in New Haven, Connecticut. (id.). In June 2003, plaintiff was hired at UConn where he continued to work as a researcher until approximately 2004. (Id. at 28). Plaintiff was close with some of his co-workers there. (Pl. depo. 30, 108).

Plaintiff suffers from Crohn's disease, a disease that is an inflammation of the gastrointestinal tract. (Pl. depo. 47; Exhibit 24, p.2). Plaintiff was first diagnosed with Crohn's disease in 1996 at age 27 by Dr. Gail Kaufman, a physician in Boston, Massachusetts and his Crohn's has been stable since 1996. (Pl. depo. 48-49, 53-54, 59). Dr. Kaufman diagnosed plaintiff's Crohn's disease as a "mild" case and prescribed 400 milligrams of Asacol taken as

six tablets as day. (Id. at 55-56). Dr. Kaufman also advised plaintiff to avoid stress. (Id. at 57, 65). Later treating physicians concurred with Dr. Kaufman's diagnosis of a mild case of Crohn's disease. (Exhibit 26).

Since the onset of Crohn's disease, plaintiff has experienced infrequent "flare up" episodes of his Crohn's disease. (Pl. depo. 58). From 1996-2000, plaintiff experienced fewer than ten minor episodes of Crohn's disease, a minor episode being one that involves moderate pain and lasting less an hour or less, (id. at 58, 60), and no major episodes between 1996-2000, a major episode being one that involved abdominal pain for more than hour, some bleeding and difficulty digesting. (Id. at 58, 61). From 2000-2003, plaintiff experienced a "handful", approximately five, minor flare up episodes. (Id. at 62). From 2005-2007, plaintiff experienced five minor flare up episodes and no major episodes. (Id. at 62).

Plaintiff believes emotional stress and stress at work triggered, or contributed to, these flare up episodes. (Id. at 63). Plaintiff does not obtain his prescribed medication, Asacol, through a conventional means – - i.e. a drug store near his home or work or through mail order - but instead gets his medication in Lebanon while he is there on a visit. (Pl. depo. 65). Plaintiff also pays for his prescription medication in cash, (id. at 69), so there are no records of his transactions for his prescription medication. Plaintiff then brings the medication from Lebanon to the country where he resides. (Id. at 65). In September 2009, plaintiff did not know how much Asacol he had purchased in Lebanon in January 2009 and did not know how much of a supply remained. (Pl. depo. 71). Plaintiff testified that he could not recollect whether he used the UConn pharmacy to obtain Asacol while he was working at UConn, (id. at 75), or whether he used a CVS pharmacy near his home in Hartford. (Id. at 76).

Plaintiff was born in a Sunni Muslim family and continues to practice that faith. (Pl. depo. 80). Plaintiff abstains from drugs, alcohol and pork products and prays five times a day and occasionally attends a mosque (Pl. depo. 81, 83- 84). Plaintiff usually goes to Friday services every week and only misses Friday prayer services if he is ill or far from a location where a prayer service is offered. (Pl. depo. 84-85). When Plaintiff resided in Connecticut, he did not attend a mosque in Connecticut but would go to Friday prayer services at chapel at UConn. An Imam would not preside at the UConn Friday prayer service, which lasted only ten minutes. (Pl. depo. 86-87).

As a practicing Muslim, plaintiff has observed the Muslim Holy Month of Ramadan since the age of 10. (Pl. depo. 93). Ramadan is the Muslim Holy Month during which Muslims are required to fast during daylight hours, and abstain from material pleasures, among other practices-fasting is the main requirement of observing Ramadan. (Pl. depo. 88-89). If a Muslim is suffering from a medical condition, he or she is excused from fasting. (Id. at 92). During the Ramadan fast, a Muslim is required to eat and drink only before dawn, (id at 113), and after sunset. (Id. at 94). In 2004, Ramadan occurred from October 14, 2004 to November 13, 2004. (Exhibit 15).

On October 29, 2004, at approximately 8:00 a.m., federal Immigration and Customs Enforcement (ICE) officials arrested plaintiff outside his apartment in Hartford, Connecticut in his parking garage as he prepared to leave for work. (Docket # 83, ¶ 2, Pl. depo. 100-101). Federal officials arrested plaintiff on charges that he violated federal immigration laws. (Docket # 83, ¶ 51). The State of Connecticut and the individual state defendants were not involved in the decision to arrest or detain plaintiff or the actual arrest. Plaintiff was initially

detained at a federal building in Hartford and remained there until the evening of October 29, 2004. Throughout the day of the 29th, plaintiff believed he was going to be released on bail because a federal official had told him several times that day that he would be released, and had advised him to contact a bail bondsman. (Pl. depo. 107).

While at the federal building in Hartford, plaintiff contacted his supervisors at UConn and apprised them of his arrest by the federal officials. (Pl. depo. 105). In the afternoon or evening of October 29, 2004, plaintiff was told by a federal official that he would not be released that day but would instead be transferred to Hartford Correctional Center (HCC) that evening. (Pl. depo. 107). Plaintiff does not clearly understand the difference between the state and federal governments in the United States and he did not understand the difference between state and federal facilities. (Pl. depo. 114-115).

Plaintiff was transported alone in a van to Hartford Correctional Center between 5-6 p.m. on October 29, 2004. (Pl. depo. 110-111). Plaintiff was initially put in room with forty other prisoners and/or pretrial detainees at HCC. (Id. at 114). He recalls he had his picture taken and was asked some questions, but he does not remember what those questions were. (Pl. depo. 114). After being photographed, plaintiff was searched, he showered and was issued some HCC property, such as inmate clothing, a mattress and personal hygiene products. (Pl. depo. 118). Plaintiff was very confused throughout the HCC admission process. (Pl. depo. 114). He does not recall who he spoke with at HCC during the admission process. (Pl. depo. 115). Plaintiff did not ask for a meal and does not recall telling any HCC personnel or federal official that he was observing Ramadan or that he had not eaten that day. (Pl. depo. 115). Plaintiff was

shocked, depressed and confused at this time and his mind was not clear and this may have contributed to his failure to inform any official that he was fasting for Ramadan. (Pl. depo. 110, 115-116).

Plaintiff then underwent the standard medical intake process at HCC, which included a mental health and physical health screening and evaluation. (Pl. depo. 120, 125; Lee Decl. ¶ 12; Exhibits 1-4). During his mental health screening, plaintiff told the mental health nurse that he had a history of depression. (Exhibit 2). He told the medical nurse that the suffered from Crohn's disease and took the medication Asacol. (Pl. depo. 126; Exhibits 1-3). The nurse noted that plaintiff had not taken his Asacol since October 2, 2004, twenty-seven (27) days before his admission to HCC. (Exhibit 1). CMHC did not stock Asacol onsite in the HCC medical unit and the nurse faxed the request for Asacol to the pharmacy at UConn that night. Plaintiff felt stressed during his intake, (Pl depo. 125), and he does not recall if he said anything about Ramadan to the medical or mental health intake nurses. (Pl. depo. 128). Plaintiff was not mistreated by any of the HCC intake or admission personnel. (Pl. depo. 128). Plaintiff found the entire experience of being arrested, detained by the federal officials and then transported to HCC "too shocking, too intimidating" and was overwhelmed by this situation. (Pl. depo. 116).

The HCC admission process lasted 3-4 hours, (Pl depo. 119), and plaintiff was brought to his housing unit, Dorm 3, between 9-9:30 p.m. (Id. 118-119, Exhibit 22). The HCC personnel on the housing unit did not mistreat plaintiff upon his arrival to the housing unit. (Pl. depo. 120). After plaintiff arrived at Dorm 3, he told another inmate that he was in pain and the inmate alerted a Dorm 3 correction officer. The correction officer responded to the complaint and brought plaintiff to the HCC medical unit. (Pl. depo. 131; Exhibit 22). At the medical unit,

plaintiff spoke with an African-American female nurse and told her he was "beginning to have serious pain" and that he had brought medication for his Crohn's disease to HCC. (Pl. depo. p. 132). Plaintiff understood from federal officials that his medication was going to be brought to HCC. (Id. at 109). The nurse informed plaintiff that she did not have documentation that indicated he should be taking medication and said he should see doctor. (Pl. depo. 132). Plaintiff was then returned to his cell. (Pl. depo. p. 133).

Plaintiff does not recall what steps he took on his first full day in HCC, Saturday, October 30, 2004, to obtain a Ramadan meal accommodation or prescription medication. Plaintiff believes he had a meal on Saturday and went to the HCC dining hall that day. (Pl. depo. 134). He does not recall if spoke with any correction officer in dining hall on Saturday morning during breakfast about obtaining a Ramadan meal accommodation but he thinks he "probably… started talking about it on that day." (Pl. depo. p. 135). During the plaintiff's incarceration at HCC the regularly scheduled evening meal for his dorm occurred after sunset so plaintiff did not require a schedule accommodation for the evening meal in order to observe Ramadan. (Pl. depo. 136).

On Sunday, October 31, 2004, plaintiff experienced abdominal pain after he awoke. (Pl. depo. 137). Plaintiff was unable to eat due to pain and he does not recall eating any meals on Sunday. (Pl. depo. 137). Plaintiff does not recall if he spoke to any HCC personnel about fasting for Ramadan on that Sunday. (Pl. depo. 137). Plaintiff also did not recall hearing of any religious services announcements at HCC on that Sunday. (Pl. depo. 138). He did recall hearing announcements meals and in the morning. (Pl. depo. 134, 138). He thinks that at one

time he may have mentioned fasting or "something like that" to a correction officer. (Pl. depo. 139).

Plaintiff received orientation to HCC on Monday November 1, 2004. Orientation is a scheduled a presentation provided to all new inmates at HCC by several HCC personnel on a variety of subjects, including but not limited to, medical care programs available at HCC, religious programs, how to make an inmate request using an inmate request form, and how to file an inmate grievance. (Lee Decl. ¶ 44; Exhibit 11). The HCC "orientation counselor" covers the topic addressed in the HCC handbook. (Pitts Decl. ¶ 14). Plaintiff recalls that orientation was held in the HCC dining hall and that multiple HCC personnel made presentations during orientation but he does not recall the day orientation was held. (Pl. depo. 139, 141-142). Plaintiff also does not recall the name of any HCC staff who conducted orientation or how many inmates were in the room during orientation or how long it lasted. (Id. 143). Plaintiff thinks he completed forms at orientation but does not remember what forms he completed. (Pl. depo. 141; Exhibits 8-9). Although plaintiff does not recall the forms he completed, he acknowledged that he signed a document stating that he had received the HCC handbook. (Pl. depo. 141-142; Exhibit 8). Although plaintiff signed a form acknowledging receipt of the HCC handbook, plaintiff testified at his deposition that he was not provided a handbook at orientation and does not remember whether he ever received a HCC handbook. (Pl. depo. 141, 144). Plaintiff does recall learning about the grievance process during orientation. (Pl. depo. 147).

Plaintiff remembers there was something said about religion at orientation and about identifying one's religion, (Pl. depo. 145), but he does not recall hearing anything about

specific religious services or the presence of chaplains at HCC. (Id. at 147). Plaintiff does not recall any religious staff being present at orientation, or in particular any women, such as, Sister Loretta Sullivan, a chaplain who was on duty at HCC that day and toured plaintiff's housing unit, Dorm 3, that day. (Dep. p. 143, 146; Exhibit 23, p.2). Plaintiff recalls that a religious designation form was provided to him at orientation, (Exhibit 9), but he does not recall if he requested the form or if it was simply given to him. (Pl. depo. 146). Plaintiff does not recall saying anything to the HCC staff person to whom he submitted his religious designation form at orientation, or informing the HCC staff person that he was fasting for Ramadan. (Pl. depo. 148). In fact, plaintiff does not recall whether he spoke to anyone about Ramadan at orientation. (Pl. depo. 148). Religious programs are always discussed at orientation. (Avci depo. 78-79; Pitts Decl. ¶ 14; Bruno Decl. ¶ 19). New inmates to HCC in 2004 were permitted to join the Ramadan List after the Ramadan and plaintiff could have completed a Ramadan sign-up form at his orientation or requested one. (Avci depo. 84).

Plaintiff learned about the inmate request form process from inmates and correction officers during the first few days at HCC. Inmates and correction officers instructed him on how to complete an inmate request form. (Pl. depo. 146-147). Plaintiff completed an inmate request form on November 1, 2004 requesting the prescription medication Asacol. (Exhibit 5).

At the time of his orientation, plaintiff had very little understanding of the prison environment and did not understand what orientation meant. (Pl. depo. 139). He did not understand common prison terminology, such as the abbreviation "C.O." for correction officer. He recalls that correction officers often used inmate numbers. (Pl. depo. 140). Plaintiff purposely avoided contact with other people while at HCC including other inmates and

correction officers. (Pl. depo. 156). There was a turnover of inmates in plaintiff's dorm and he did not go to any particular inmate with questions and for assistance the first weeks at HCC. (Pl. depo. 133-134). Plaintiff had no visitors and made no phone calls while he was at HCC. (Pl. depo. 156). Plaintiff did not purchase food or other items at the HCC commissary, did not open an inmate trust account, and did not use the HCC library. (Pl. depo. 155). Plaintiff had access to recreation but spent most of his time sitting in his cell. (Pl. depo. 155-156).

On October 29, 2004, the CMHC intake nurse faxed a request for Asacol for plaintiff to UConn and noted in the medical notes that plaintiff had not taken Asacol since October 2, 2004. On first night at HCC, plaintiff started to experience pain, which he believes was probably brought on by the stress he was experiencing from being arrested and one missed dose of Asacol. (Pl. depo. p. 179). That night, plaintiff was seen by a CMHC nurse in the medical unit and later returned to his cell. Plaintiff does not allege that he requested that his name be added to the "sick call" list at HCC. On Monday, November 1, 2004, plaintiff filled out an inmate request form requesting Asacol for his Crohn's disease. (Exhibit 5). Plaintiff filled out the inmate request form for Asacol because this is what he was instructed to do by someone at HCC. (Pl. depo. 170). On Wednesday, November 3, 2004, a CMHC nurse delivered a thirty day supply of Asacol to plaintiff's housing unit and plaintiff was permitted to keep the Asacol "on his person" (KOP) at his bed and take it as it was prescribed to him. (Exhibit 6, p.1).

On November 12, 2004, plaintiff was seen by Dr. James McKenna, a CMHC physician, at HCC. (Pl. depo. p. 180; Exhibit 7). Plaintiff does not recall if he was already receiving Asacol when he met Dr. McKenna on November 12, 2004. (Pl. depo. 180). Plaintiff believes he told Dr. McKenna that he had had severe pain and small amount of blood in his stool but

that that issue resolved. (Pl. depo. 180, 182). Plaintiff testified that he had blood in his stool two days after being admitted to HCC. (Pl. depo. 179). Dr. McKenna did not note a report of severe pain by plaintiff. (Exhibit 7). A report of severe pain would be relevant to Dr. McKenna's course of treatment of plaintiff's Crohn's disease because severe abdominal pain could indicate a serious medical problem and could require further tests to rule out a more serious condition. (Exhibit 24, p.6). Plaintiff believes that the "flare up" of his Crohn's disease hindered his ability to fast during Ramadan and that this flare up was a major reason he could not fast the last weeks of Ramadan. (Pl. depo. 176-177). Plaintiff also testified that he missed a few days of fasting for Ramadan "because of the lack of medication." (Pl. depo. 164). Plaintiff is not sure if he would fast at HCC those first days even if put on Ramadan List. (Pl. depo. 176-177).

Plaintiff never filed a medical grievance or an emergency medical grievance while he was at HCC. (Pl. depo. 179). Plaintiff testified that he did not receive his medication for one week after entering HCC, which would have been November 5, 2004, and that if a CMHC medication administration form indicates that he received his medication earlier than one week following October 29, 2004, that document is false and inaccurate. (Pl. depo. 180).

October 29, 2004, the date of plaintiff's admission to HCC, was the approximate half-way point of the Muslim holy month of Ramadan. Plaintiff did not request a Ramadan meal accommodation during the HCC intake process or otherwise apprise the medical staff or HCC intake staff that he was fasting or had not eaten all day. At some uncertain date following his admission to HCC, plaintiff learned from one or more HCC correction officers or staff that there was a Ramadan List for inmates who were fasting for Ramadan. (Pl. depo. 165). Plaintiff

does not recall seeing any other inmates in Dorm 3 receive a bag breakfast delivered to their cell before dawn. (Pl. depo. 166). Since the sun was setting by roughly 5 p.m. each evening after October 30, 2004, plaintiff did not require a meal accommodation for the evening meal because his dorm went to the dining hall after sunset. (Exhibit 15). Plaintiff did not learn of the existence of a Ramadan sign-up form at HCC and he did not ask anyone for the form. (Pl. depo. 167). DOC policy required inmates who wanted to fast for Ramadan complete a Ramadan sign-up form, and that no inmate would be permitted to join the Ramadan List unless he completed the Ramadan sign-up form and signed it before a Chaplain. (Bruno Decl. ¶¶ 26-27, 32; McGrail Decl. ¶ 6).

At some point- plaintiff is not sure when- plaintiff spoke with HCC personnel about joining the Ramadan List. At his deposition, he was not sure when he first inquired with HCC staff about Ramadan but in his responses to interrogatories he indicated he believed it was within the first few days of his arrival at HCC. (Exhibit 25, p.3). Plaintiff testified he "probably" made three requests to join the Ramadan List. (Pl. depo. 167). Plaintiff recalls asking a blond correction officer about fasting for Ramadan because he had been told by another inmate that this blond correction officer had a reputation for being helpful. (Pl. depo. 167). This blond correction officer was not "necessarily" assigned to plaintiff's housing unit. (Pl. depo. 167). Plaintiff recalls "probably" complaining to other inmates about fact he could not fast and those inmates may have given him a name or description of the blond officer but he does not recall if he was given a name. (Pl. depo. 168). The blond correction officer directed plaintiff to speak with someone of higher authority than him and told plaintiff that he would have to "start at the top" with his request for a meal accommodation. (Exhibit 25, p.5). At his

deposition, plaintiff did not recall whether his requests regarding a Ramadan meal schedule accommodation were ever made in writing but in his responses to interrogatories, plaintiff indicated that all requests were verbal. (Pl. depo. 170; Exhibit 25, p.5).

Plaintiff does recall that he completed an inmate request form requesting a "common fare" diet but is uncertain about when he made the request and believes it was "probably" after Ramadan ended on November 13, 2004. (Pl. depo. 157). Plaintiff does not recall how much time elapsed between his submitting the inmate request form for the common fare diet, and when he began receiving a common fare diet. (Pl. depo. 158). When plaintiff was in the HCC dining hall, he did not speak to inmates who are employed on the kitchen staff in the dining hall about a desire to get on the Ramadan List. (Pl. depo. 153). Plaintiff never filed a grievance relating to Ramadan and contends he was not aware of grievance process at HCC. (Pl. depo. 171). Plaintiff also does not recall ever seeing any mailboxes in the housing units for different subject areas, such as grievances or religion, but he might have seen a box in his housing unit. (Pl. depo. 171-172). Plaintiff also did not observe the postings in his housing unit regarding religious programming, Ramadan sign-up or the listing of Reverend Pitts as the appropriate HCC staff to whom to address any religious inquiries. (Lee Decl. ¶ 49; Pitts Decl. ¶ 15; Bruno Decl. ¶ 20).

Plaintiff testified that during the first three weeks of his detention at HCC - roughly October 29, 2004 to November 19, 2004 - he was unaware that HCC had religious personnel on staff. (Pl. depo. 169). The fact that religious personnel were on staff at HCC was discussed at orientation, noted in posting in the HCC housing units and covered in the HCC handbook. (Lee Decl. ¶¶ 44, 53, 54; Pitts Decl. ¶¶ 14-15; Bruno Decl. ¶ 20; Exhibit 11). Plaintiff does not

recall ever seeing any religious personnel on tours in Dorm 3 during this time there. (Pl. depo. 165, Exhibit 23). HCC religious personnel routinely toured HCC housing units. (Lee Decl. ¶ 56; Pitts Decl. ¶17; Exhibit 23). During his first weeks at HCC, plaintiff did not request a Quran or a prayer rug. (Pl. depo. 157). He later received a Quran from the Muslim Chaplain at a November meeting in the Chaplain's office. (Pl. depo. 156-157). Plaintiff was unaware that HCC held an end of Ramadan feast known as the Eid Ul Fitr on or after November 13, 2004. (Pl. depo. p. 166; see also Bruno Decl. ¶ 37). If plaintiff had known about the Eid, he "might have attended." (Pl. depo. 167).

Plaintiff is not certain, but he believes, the first time he saw any religious personnel at HCC was approximately three weeks after his arrest, and about a month before his December 22, 2004 release from HCC. On or about November 22, 2004, plaintiff met with the Islamic Chaplain, Imam Avci[1], in the Chaplain's office. (Pl. depo. 159). Plaintiff did not know that there was a part-time Imam or Muslim Chaplain at HCC until this meeting. (Pl. depo. p. 160). Before he learned there was an Imam on staff at HCC, plaintiff did not request meeting with any Chaplain. (Pl. depo. p. 165).

Plaintiff was also not aware that Imam Avci, or another DOC Imam, conducted weekly Friday Jumah services at HCC until after he met with Imam Avci and Imam Avci told plaintiff about the Jumah services. (Pl. depo. p. 160-161). Plaintiff also doesn't recall learning about or attending Taleem, or Islamic religious studies, those first three weeks and he never attended

[1] Although plaintiff could not recall the name of the Imam with whom he spoke in November 2004, Durmas Avci, was the only Islamic Chaplain assigned to HCC in 2004 and has worked as an Islamic chaplain in the DOC since 2003. Plaintiff did remember that the Imam had a Turkish accent and Imam Avci is a native of Turkey. (Exhibit 25, p.5; Avci depo. 10).

Taleem at HCC. Plaintiff recalls attending Jumah only two or three times during the entire time he was at HCC, which was October 29, 2004 to December 22, 2004. (Pl. depo. 161). Instead, plaintiff would pray inside cell. (Pl. depo. p. 162). He recalls that on one occasion when he requested to go to a Friday Jumah service, a correction officer declined to release him go to Jumah initially because he did not know Jumah was scheduled, but after plaintiff "insisted" he be permitted to go he was released to attend Jumah. (Pl. depo. 163).

Plaintiff does not recall how the one meeting with Imam Avci was scheduled. He does not recall if he made verbal or written request to meet with the Chaplain, but he recalls the meeting lasted approximately one half-hour. (Pl. depo. p. 172). During the meeting, plaintiff complained to Imam Avci that he had not been able to fast for Ramadan. (Pl. depo. p. 173). Plaintiff also may have complained to Imam Avci about the delay in receiving his medication. (Pl. depo. 173). Plaintiff believes he "might" have told Imam Avci that his Crohn's disease hindered his ability to fast during Ramadan. (Pl. depo. 174). Plaintiff was not put on the Ramadan List because he did not speak with a Chaplain during Ramadan. (Avci depo. 71, line 16 – 72, line 13). Imam Avci would have put plaintiff on the Ramadan list if plaintiff attended Jumah services on November 5, 2004. (Avci depo. 81, line 1 – 10).

Plaintiff testified at his deposition that Imam Avci confirmed what he had heard from the unnamed correction officer: that he was required to be at HCC from beginning of Ramadan in order to be allowed to join the Ramadan List. (Pl. depo. 173). Imam Avci testified that if plaintiff had told him could not get on the Ramadan List simply because the inmate entered HCC after the start of Ramadan he would have "solve[d] the problem (id.) and added his name to the Ramadan List. (Avci depo 72, line 8). Imam Avci testified that 2004 was his first

Ramadan in a DOC facility, (Avci depo. 9), and that he recalled he put newly admitted inmates on the Ramadan List after the start of Ramadan in 2004. (Avci depo. 97, lines 10-21; Exhibit 17).

Plaintiff does not recall whether Imam Avci advised him to submit a complaint, grievance or inmate request form to the Warden regarding his complaint about not being added to the Ramadan List. (Pl. depo. 174). Plaintiff does not recall if he told Imam Avci that he thought he was treated differently than other inmates because he was a Muslim. (Pl. depo. 174). Plaintiff testified that he made up for a few days of missed fasting caused by his medical issue. (Pl. depo. 175). Plaintiff acknowledges that throughout Ramadan, he was able to eat one meal a day in the evening but that that meal was "less than filling." (Pl. depo.178). Plaintiff does not remember if he abstained from drinking water during the day. (Pl. depo. 178). Plaintiff noted that no one forced him to eat, so he tried to satisfy Ramadan while he was at HCC. (Pl. depo. 178).

Plaintiff does not recall if ever personally met or saw Warden Lee, Reverend Pitts, or Thomas McGrail while he was incarcerated at HCC. (Pl. depo. 187-188). Each of these defendants toured HCC housing units (Pitts Decl. ¶ 17; McGrail Decl. ¶ 10). Plaintiff acknowledges that he never complained to Warden Lee about either a medical issue or religious issue. He does not know if anyone informed Warden Lee, Reverend Pitts or Thomas McGrail about his desire for a Ramadan meal accommodation. (Pl. depo. 188). Plaintiff claims that it was too difficult for him to learn about the complaint process or Ramadan sign-up processes on his own. (Pl. depo. 188). Plaintiff claims that he did not inquire further about his Ramadan

request or in writing because he believed he was "going through what that system tells me." (Pl. depo. 169).

Plaintiff was removed from HCC by federal officials on December 22, 2004. On the day of his release, CMHC personnel noted that they provided plaintiff with a supply of Asacol, (Exhibit 6), but plaintiff contends that no one gave him any medication to take with him on December 22, 2004. (Pl. depo. p. 184). Plaintiff never filed an inmate grievance regarding either his medical care or religious practices. Plaintiff departed the United States for Lebanon in December 2004 and eventually moved to Toronto, Canada in 2007, where he continued to reside as of September 2009.

III. STANDARD OF REVIEW

Summary judgment is a favored remedy: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather . . . . must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate. . . , prior to trial, that the claims and defenses have no factual basis." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (emphasis added.)

A moving party is entitled to summary judgment if there is no genuine issue or dispute as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322; *Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995); *Larkin v. Town of West Hartford*, 891 F. Supp. 719, 723 (D. Conn. 1995). Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary disposition

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

As the Supreme Court has emphasized, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Thus factual disputes that are irrelevant or unnecessary to the resolution of the legal issues shall be disregarded in a motion for summary judgment. *Anderson*, 477 U.S. at 248.

A factual issue is not "genuine" unless "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *Larkin*, 891 F. Supp. at 723-24. A factual issue is not "material" unless it "might affect the outcome of the suit under the governing law." Id.

To defeat the motion, the nonmoving party must show more than that "some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986); *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996). "A party may not 'rely on mere speculation or conjecture as to the true nature of facts to overcome a motion for summary judgment.'" *McCloskey v. Union Carbide Corp.*, 815 F. Supp. 78, 81 (D.Conn. 1993) (quoting *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12, (2d. Cir. 1986) *cert. denied*, 480 U.S. 932 (1987). "To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars would necessitate a trial in all Title VII cases." *Meiri v. Dacon*, 759 F.2d

989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985). Moreover, "summary judgment must be entered against 'a party who fails . . . to establish the existence of an element essential to [its] case, and on which it will bear the burden of proof at trial,'" *Larkin*, 891 F. Supp. at 723, aff'd without opinion, 101 F.3d 109 (2d Cir. 1996), quoting *Celotex*, 477 U.S. at 322.

IV. ARGUMENT

Plaintiff has brought suit against three State of Connecticut defendants, Charles L. Lee, the former Warden of Hartford Correctional Center (HCC), Reverend Albert Pitts, the Institutional Religious Facilitator (IRF) at HCC in 2004, and Thomas McGrail, a former DOC Kitchen Supervisor III at HCC. When plaintiff commenced this action, his only claims against a State defendant were two claims under Section 1983 and a Religious Land Use and Institutionalized Person Act, (RLUIPA), 42 U.S.C. § 2000cc et seq., against Warden Lee. Warden Lee moved to dismiss both the Section 1983 claims and the official capacity RLUIPA claim. In 2008, this Court dismissed the official capacity RLUIPA claim against Warden Lee because sovereign immunity barred a claim for money damages against a state official in his official capacity and in enacting RLUIPA Congress had not validly abrogate that state sovereign immunity. (Docket # 82, p.19). The Court also permitted plaintiff to amend his complaint to add an individual capacity claim against defendant Lee under RLUIPA and permitted plaintiff's Section 1983 claims to proceed.

On October 13, 2008, nearly four years after the events alleged in his complaint, plaintiff sought leave to amend his complaint to add individual capacity RLUIPA claims against Warden Lee and two additional state defendants, Reverend Pitts and Thomas McGrail.

Warden Lee is the only state defendant who is alleged to have violated plaintiff's rights under both Section 1983 and RLUIPA, the remaining two state defendants, Pitts and McGrail, are alleged to have violated plaintiff's right protected under RLUIPA only. Plaintiff alleges Warden Lee violated his constitutional rights to medical care and free exercise of his religion protected under Section 1983 while he was detained at HCC. Plaintiff alleges all three State Defendants violated his religious exercise rights protected under RLUIPA and should be held individually liable for money damages under that statute.

A. Plaintiff's Section 1983 Claims

Plaintiff brings two Section 1983 claims against Warden Lee, one for deliberate indifference to his serious medical needs under the Due Process Clause of the Fourteenth Amendment; and another for deprivation of his right to free exercise of his religion under the First Amendment. It is well established that in order for plaintiff to prevail on a Section 1983 individual capacity claim against Warden Lee, plaintiff must establish Warden Lee had direct or personal involvement in the actions which are alleged to have caused him constitutional harm. *Gill v. Mooney*, 824 F.2d 192, 196 (2d. Cir. 1987). It is insufficient for plaintiff to establish only that Warden Lee had supervisory role as the warden of HCC and that a subordinate inflicted a constitutional tort. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 692-95 (1978) (Doctrine of respondeat superior does not apply in Section 1983 cases.). "A supervisor may not be held liable under section 1983 merely because his subordinate committed a constitutional tort." *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002), *see also Blyden v. Mancusi*, 186 F.3d 252, 264 (2d Cir. 1999).

Here, plaintiff alleges Warden Lee established a policy at HCC where newly admitted inmates were not permitted to join the Ramadan List once Ramadan had begun. Plaintiff will also allege that Warden Lee failed to supervise or train HCC personnel and thereby created or condoned policies and practices at HCC that caused plaintiff to: (1) not be permitted to join the Ramadan List; and (2) not be provided his medication for Crohn's disease. A supervisor who has not directly participated in the alleged unconstitutional tort may be found personally involved if:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995)(internal citations and quotations omitted).

The Supreme Court has recently held that a supervisor may be held personally liable only for "his or her own misconduct." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948-1949 (2009). A "supervisor's mere knowledge of his subordinate's discriminatory purpose" is insufficient to establish the individual liability of the supervisor. *Id.* In *Iqbal*, the Supreme Court stated that the relevant inquiry is the supervisor's purpose in establishing policies or practices and not his knowledge of the conduct of subordinates. *Id.* As another court in this district has noted, personal liability of a supervisor under the *Colon* factors listed above, based on a claim of a supervisor's passive acquiescence in the misconduct of subordinates, may no longer be

appropriate after *Iqbal*. *See Vega v. Lantz*, No. 04 Civ. 1215 (DFM), 2009 U.S. Dist. LEXIS 88550 (D. Conn. Sept. 25, 2009).

> The Colon factors have recently been thrown into some doubt by the Supreme Court's ruling in Ashcroft v. Iqbal, U.S. , 129 S.Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009), which discussed issues of supervisory liability. *See Bellamy v. Mount Vernon Hosp.*, No. 07 Civ. 1801(SAS), 2009 U.S. Dist. LEXIS 54141 (S.D.N.Y. June 26, 2009) (under Iqbal, "a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation or if that supervisor creates a policy or custom under which unconstitutional practices occurred. The other Colon categories impose the exact types of supervisory liability that *Iqbal* eliminated -- situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate"); *Estate of Young v. N.Y. Office of Mental Retardation & Developmental Disabilities*, No. 07Civ.6241(LAK), 649 F. Supp. 2d 282, 2009 U.S. Dist. LEXIS 78049 (S.D.N.Y. Aug. 27, 2009). The court need not reach this unbriefed issue in this matter.

Id., at *15 n.12. After *Iqbal*, Warden Lee cannot be found personally liable for the misconduct of his subordinates based on a claim that he should have known about the misconduct or the likelihood of the misconduct occurring and passively acquiesced in the misconduct of his subordinates. After *Iqbal*, any claim based on establishment of an unconstitutional policy would have to demonstrate, at a minimum, in the absence of actual Lee's personal involvement, that Warden Lee established the unconstitutional policy <u>because</u> of the unconstitutional effect on plaintiff and not merely in spite of the effect.

Even if *Iqbal* did not eliminate supervisory liability based upon mere acquiescence, which defendants contend that it did, plaintiff still cannot state a claim under the *Colon* factors. Plaintiff cannot establish personal liability of Warden Lee under the prongs set forth in *Colon*, and in a manner consistent with *Iqbal*, because Warden Lee had no direct involvement in either plaintiff's alleged requests for medical care or religious accommodation; Warden Lee was

never informed of either request through a report, grievance or inmate request by plaintiff or anyone else; he did not create any a policy or custom governing either medical care or religious programs at HCC; he was not grossly negligent in supervising subordinates because, even assuming the truth of plaintiff's allegations and that the conduct of subordinates and CMHC staff alleged rises to the level of a constitutional tort, which it does not, Warden Lee had no notice of the alleged deficiencies in medical care and religious program accommodations plaintiff alleges; and, lastly, Warden Lee did not exhibit deliberate indifference to the rights of plaintiff because he had no notice of any of the facts alleged in plaintiff's complaint at the time he was at HCC and, therefore, could not have been deliberately indifferent to plaintiff's request. A finding of personal liability on these facts would be grossly unjust because of the information and procedures so readily available to plaintiff that could have permitted him to quickly remedy any of his complaints alleged in this lawsuit. Plaintiff could have easily availed himself of reasonable formal and informal HCC procedures and information, which he was informed of in written and oral form shortly after entering HCC, which would have quickly remedied the constitutional harms he claims in this lawsuit.

i. Plaintiff's Section 1983 Medical Claim Against Warden Lee

Plaintiff's medical claim against Warden Lee arises out of plaintiff's allegation that Warden Lee unconstitutionally deprived him of adequate medical care when plaintiff did not receive his Crohn's disease medication, Asacol, until November 3, 2004, a period of four days after he entered HCC. Warden Lee is entitled to summary judgment on this Section 1983 medical claim because plaintiff cannot establish that Warden Lee knew of and disregarded an excessive risk to plaintiff's health or safety and that he was both aware of facts from which he

could have drawn an inference that a substantial risk of serious harm to plaintiff existed, and that he actually drew that inference or that Warden Lee supervised medical personnel. *Caiozzo v. Koreman*, 581 F.3d 63, 71, 72 (2d Cir. 2009) citing *Farmer v. Brennan*, 511 U.S. 825 (1994).

As a pretrial detainee, plaintiff's right to be free from deliberate indifference to his serious medical needs was protected by the Due Process Clause of the Fourteenth Amendment and this right has been interpreted by the Second Circuit and other Circuits to be the same as the deliberate indifference standard applied in Eighth Amendment "cruel and unusual punishment" claims.

> A convicted prisoner's claim of deliberate indifference to his medical needs by those overseeing his care is analyzed under the Eighth Amendment because the right the plaintiff seeks to vindicate arises from the Eighth Amendment's prohibition of "cruel and unusual punishment." *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996). In the case of a person being held prior to trial, however, "the 'cruel and unusual punishment' proscription of the Eighth Amendment to the Constitution does not apply," because "as a pre-trial detainee [the plaintiff is] not being 'punished,'" *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000); *see also Weyant*, 101 F.3d at 856. Instead, a person detained prior to conviction receives protection against mistreatment at the hands of prison officials under the … Due Process Clause of the Fourteenth Amendment if held in state custody.

Caiozzo v. Koreman, 581 F.3d 63, 69 (2d Cir. N.Y. 2009).

Even construing the facts in the light most favorable to him, plaintiff cannot meet the high legal standard required in a "deliberate indifference" claim, which requires a showing of both an objectively excessive risk of serious harm, and that Warden Lee had subjective knowledge of the excessive risk to his health and chose to disregard the excessive risk. There is no dispute that Warden Lee was not aware of plaintiff while he was at HCC and had no knowledge of plaintiff's request for Asacol or that he suffered from Crohn's disease. It is also undisputed

that under long standing DOC policy, Warden Lee did not supervise medical personnel at HCC. It is also undisputed that through a Memorandum of Understanding between the Department of Correction and the University of Connecticut, healthcare for all inmates is provided by the University of Connecticut Correctional Managed Healthcare ("CMHC"), a subdivision of the University of Connecticut Health Center. (Lee Decl. ¶ 13, Exhibit 14). CMHC provides medical, dental and mental health services to all inmates as well as ancillary services including radiology, laboratory, pharmaceutical, hospitalization/inpatient care, outpatient/medical clinic care, and physician specialty care and Warden Lee does not supervise medical care. (Exhibit 14, Exhibit 24, p. 5). It is undisputed that CMHC personnel provided all medical care to plaintiff at HCC, including the mental health and medical screening of plaintiff at the time of his admission to HCC and that CMHC personnel are not employees of the DOC. (Exhibits 14).

Plaintiff's allegations center on the conduct of CMHC personnel. CMHC personnel determined how to process plaintiff's request for Asacol and when to deliver it to plaintiff. CMHC staff faxed a prescription request to UConn that same night of plaintiff's intake. CMHC staff also assessed plaintiff's medical condition when he went to the HCC medical unit on October 29, 2004 with a complaint of pain. It was CMHC staff who determined whether plaintiff required immediate medical attention at that time and when he should be seen by a physician. Plaintiff completed an inmate request form requesting Asacol on November 1, 2004 and that inmate request form was submitted to CMHC personnel per the DOC's protocol governing medical care. (Exhibits 5, 14; Lee Decl. ¶ 13). There is no evidence that Warden Lee had any knowledge of any of plaintiff's requests. In fact, the evidence demonstrates that HCC custody personnel, over whom Warden Lee did have supervisory authority, responded

appropriately to plaintiff's request for medical treatment by escorting him to the medical unit when he complained of pain on October 29, 2004 and by instructing him on how to complete an inmate request form regarding his Asacol request on or near November 1, 2004. (Exhibit 5, Pl. depo. 176). There is also no evidence that plaintiff made any further requests for medical care to HCC custody staff or to CMHC staff beyond his statement to CMHC intake staff that he took Asacol; his visit to the medical unit on October 29, 2004; and submission of an inmate request form on November 1, 2004.

Plaintiff does not allege that correction officers ignored requests by him for medical care. Plaintiff does not allege that he requested to be placed on the HCC daily "sick call" list on any day and that this request was ignored by either CMHC personnel of HCC custody staff. Plaintiff does not allege that he spoke with CMHC medical staff on their daily tours of Dorm 3. Plaintiff does not allege that he told any of the HCC Captains, Majors or Lieutenants, who toured Dorm 3 that he was in severe or excessive pain and needed to see a physician. In fact, plaintiff testified that while he was at HCC he purposely avoided contact with other inmates and staff. Plaintiff further testified that he was shocked, anxious and disoriented during his initial incarceration and had difficulty understanding prison protocol and procedure.

Notwithstanding plaintiff's subjective difficulty in understanding the operation of HCC, which he never conveyed to HCC personnel to permit a clearer explanation of appropriate procedure, plaintiff was provided with reasonably sufficient information about how to obtain adequate services from HCC staff and CMHC staff. He received an orientation that covered topics relevant to this litigation – medical care, religious programs and grievances; he resided in an open dorm unit where access to other inmates, correction officers and supervisory officers

was easily had; his dorm had clearly posted information regarding a host of programming information such as to the appropriate individuals to send inmate requests to about medical or other issues and religious programming. His dorm correction officers made daily announcements about "sick call" and the presence of CMHC personnel in the dorm. There were prominently displayed mailboxes for correspondence on grievances, medical issues and, as is discussed below, religious issues, in his dorm.

Not only can plaintiff not establish that Warden Lee was deliberately indifferent to his serious medical need, plaintiff also cannot establish facts that would permit a trier of fact to conclude that a delay in receiving Asacol created an excessive risk of serious harm to him. Plaintiff cannot establish based on his assertions of severe pain alone, which are not corroborated by the contemporaneous medical documentation, that a four day delay in providing him with Asacol caused his pain and subjected him to an excessive risk of serious medical harm. The unrebutted expert testimony, which is based upon plaintiff's own medical records and testimony, is that the abdominal pain he alleges would not have been caused by four days of missed dosages of Asacol. (Exhibit 24, p. 5 ¶ 2). Plaintiff has not adduced expert medical testimony to the contrary.

Plaintiff's claim of the gravity of his medical situation during those first days at HCC is also belied by the fact that his medical issues quickly resolved. By the time plaintiff saw Dr. McKenna on November 12, 2004, he reported that his issues from the previous week – a small amount of blood in his stool - had resolved and Dr. McKenna made no notation of plaintiff reporting severe pain. It is undisputed that plaintiff suffered no lasting effects from the flare-up of his Crohn's disease he alleges was caused by four days of missed Asacol. It is undisputed

that since plaintiff departed HCC he has continued to suffer from a "mild" case of Crohn's disease, which continues to be stable and, as of September 2009, did not even see a treating physician for his Crohn's disease. (Pl. depo. 66).

Moreover, Plaintiff cannot establish by a preponderance of the evidence that the missed doses of Asacol was the cause of his alleged Crohn's disease flare-up and not the stress and anxiety he felt due to his arrest. Plaintiff testified that his sudden arrest and detention by federal officials caused him extreme stress and even mental disorientation. He also testified that external factors such as stress caused or contributed to his Crohn's disease flare-ups and that he was advised by his doctor to avoid stress. He also testified that he would experience flare-ups of his Crohn's disease in the past, when he was presumably taking his Asacol regularly, due to external stressful events in his life. The unrebutted expert medical testimony is that a failure to receive Asacol for four or five days would not cause a severe flare up of Crohn's disease or any flare up at all. Plaintiff has adduced no expert medical testimony that would establish that the four day delay in receiving Asacol caused the flare-up or that plaintiff would not have experienced the flare-up anyway because of the external stress and anxiety of being suddenly and indefinitely incarcerated. Accordingly, plaintiff cannot establish by a preponderance of the evidence that any delay in receiving Asacol was the cause of his abdominal pain.

CMHC personnel noted plaintiff had not taken his Asacol for twenty-seven days before he was admitted to HCC, (Exhibit 1), a notation that is consistent with both a mild case of the disease and plaintiff's noncompliance with prescribed course of treatment. Plaintiff cannot establish his regular compliance with his Asacol medication because he provided defendants no

medical records regarding his prescription refills, could not recall what drug store he went to in the Hartford area, had no medical records from a pharmacy although records were subpoenaed from CVS in this lawsuit. (Exhibit 27). Plaintiff also cannot establish that he did not receive his Asacol on an expedited basis because CMHC staff concluded from this medical notation that he did not urgently need to take Asacol on a daily basis. While plaintiff disputes that he told the CMHC personnel he did not take his Asacol for twenty-seven days before coming to HCC, and testified that this medical notation was in error, this is at most a claim of negligence or medical malpractice by CMHC personnel and not a claim of deliberate indifference against Warden Lee who had absolutely no supervisory authority over these CMHC staff or knowledge of what they were doing regarding plaintiff's medical treatment.

> Mere negligence will not support a section 1983 claim; the Eighth Amendment is not a vehicle for bringing medical malpractice claims, nor a substitute for state tort law. Thus, not every lapse in prison medical care will rise to the level of a constitutional violation; rather, the conduct complained of must "shock the conscience" or constitute a barbarous act.

Klemonski v. Semple, 2010 U.S. Dist. LEXIS 49472 (D. Conn. May 19, 2010) (*citing* Smith v. Carpenter, 316 F.3d 178, 184 (2d Cir. 2003) (internal quotations and citations omitted)). The alleged lapse in medical claimed by plaintiff clearly does not rise to the level of a constitutional violation cognizable under the Fourteenth Amendment.

Plaintiff also cannot establish that Warden Lee knew of his request for Asacol, and his abdominal pain and deliberately chose to disregard or ignore plaintiff's request for medical care. Plaintiff did not file an inmate grievance regarding his lack of Asacol, he did not file an emergency medical grievance, which Warden Lee would have responded to within 24 hours, and he did not file an inmate request form that was directed to Warden Lee. Warden Lee had

no knowledge of plaintiff's need or request for Asacol. "[N]o reasonable trier of fact could conclude, based on [plaintiff's] evidence, that any action or inaction on [Warden Lee's] part[…] "caused" his injury. *Shirback v. Lantz*, 2008 U.S. Dist. LEXIS 25840 (D. Conn. Mar. 28, 2008). Allegations of negligent medical care provided by CMHC personnel are insufficient to state a claim for supervisory liability against Warden Lee.

The facts alleged by plaintiff and the undisputed testimony of the State defendants establish that Warden Lee is entitled to qualified immunity on plaintiff's medical claim. Warden Lee is entitled to qualified immunity on plaintiff's Section 1983 claim unless his conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz*, 533 U.S. 194, 200 (2001), overruled on other grounds by *Pearson v. Callahan*, U.S. , 129 S.Ct. 808, 818, 172 L. Ed. 2d 565 (2009) (internal quotations omitted).

"In order to overcome a qualified immunity defense, a plaintiff must demonstrate that taken in the light most favorable to the plaintiff, the facts alleged show that the officer's conduct violated a constitutional right, and that the right allegedly violated was 'clearly established.'" *Amore v. Novarro*, 610 F.3d 155, 162 (2d Cir. 2010) (internal quotations and citations omitted). The second prong of qualified immunity is whether the right was clearly established such that a reasonable officer in those circumstances would have thought or clearly understood her or his conduct violated a constitutional right. *Saucier*, 533 U.S. at 201; *Amore*, 610 F.3d at 166. These prongs need not be addressed by the Court in any particular order. *Pearson*, 129 S.Ct. at 818. "In the context of determining whether there is a violation of clearly

established right to overcome qualified immunity, purpose rather than knowledge is required to impose [] liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

Warden Lee did not establish medical policy at HCC or in the DOC. (Lee Decl. ¶ 5; Exhibit 24, p. 5, ¶ 4); *Kirwan v. Lantz,* 2007 U.S. Dist. LEXIS 30746 (D. Conn. Apr. 24, 2007) (granting summary judgment to warden did not hire medical personnel or supervise their clinical practices). Warden Lee was not aware of how long CMHC took to provide medication to individual inmates but understood CMHC's practice to be as soon as possible and always within medically acceptable timeframes. (Lee Decl. ¶ 28). Any time a medical issue came to Warden Lee's attention, he would refer it to the CMHC Health Services Administrator (HSA) for HCC, Sharon Brown, and seek to address the inmate's medical concern in collaboration with CMHC. (Lee Decl. ¶¶ 6, 15). There is no evidence that Warden Lee had actual or constructive notice of an ongoing problem at HCC regarding undue delay in inmate's receipt of prescription medication for chronic or acute medical problems. There is no evidence that Warden Lee had any knowledge of plaintiff being at HCC, until this lawsuit, or that he had any knowledge of his medical needs. (Lee Decl. ¶ 29). Moreover, plaintiff never took reasonable steps to bring his problem to the attention of Warden Lee. He never wrote to him, filed a grievance, spoke with Warden Lee when he toured Dorm 3. (Lee Decl. ¶¶ 28, 29). Plaintiff never spoke with any HCC supervisory personnel such as a Captain, Major or Lieutenant, on their regular tours of HCC about his medical issue.

The undisputed evidence demonstrates HCC custody staff responded appropriately to plaintiff's request for medical assistance when he requested their help: they escorted him to CMHC medical staff when informed he was in pain and, later, assisted him in preparing an inmate request form for Asacol which was later submitted to CMHC personnel. (Lee Decl. ¶ 23). These facts demonstrate that as a matter of law Warden Lee is entitled to a finding of qualified immunity on plaintiff's medical claim. Even if the court finds that plaintiff was subjected to an excessive risk of serious medical harm as a result of a four day delay in receiving Asacol, which it should not for the reasons discussed above, it should find Warden Lee is entitled to qualified immunity because a reasonable warden in his position would not have known that his conduct violated a clearly established constitutional right.

ii. Plaintiff's Section 1983 "Free Exercise of Religion" Claim Against Warden Lee

Plaintiff also brings a Section 1983 claim asserting Warden Lee violated the Free Exercise Clause of the First Amendment, which provides that "Congress shall make no law. . . prohibiting the free exercise" of religion. *U.S. Const. Amend. 1*. Prisoners retain some rights to freely exercise their religion while incarcerated.

> Prisoners have long been understood to retain some measure of the constitutional protection afforded by the First Amendment's Free Exercise Clause. *See Pell v. Procunier*, 417 U.S. 817, 822, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974). "Balanced against the constitutional protections afforded prison inmates, including the right to free exercise of religion, [however,] are the interests of prison officials charged with complex duties arising from administration of the penal system." *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir. 1990). The free exercise claims of prisoners are therefore "judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Farid v. Smith*, 850 F.2d 917, 925 (2d Cir. 1988) (*quoting O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987)).

Ford v. McGinnis, 352 F.3d 582, 588 (2d Cir. 2003). Warden Lee is entitled to summary judgment on this claim because plaintiff cannot satisfy his burden of proof to establish that Warden Lee created any policy or practice that caused a deprivation of plaintiff's religious freedom; or that Warden Lee had any personal involvement in the alleged deprivation of plaintiff's rights. Moreover, Warden Lee is entitled to a finding of qualified immunity

The following facts are undisputed: plaintiff is a practicing Muslim, Ramadan occurred between October 14, 2004 – November 13, 2004, plaintiff entered HCC midway through Ramadan on October 29, 2004; that Plaintiff was not placed on the list of inmates in his dorm, Dorm 3, who received a Ramadan meal accommodation (the "Ramadan List"). The formal policy within the DOC, and within HCC, at the time permitted newly admitted and transferred inmates to join the Ramadan List even if Ramadan had already begun. (Bruno Decl. ¶ 26). The year following plaintiff's incarceration at HCC, the DOC instituted a sign-up deadline for Ramadan for reasons of administrative ease. (Bruno Decl. ¶ 33; Pitts Decl. ¶ 3). There was no sign up deadline in the Ramadan Guidelines issued by the Director of Religious Services, Father Bruno, in 2004 because there was no sign up deadline at all. In order to participate in Ramadan in 2004 and present, an inmate must have: 1) previously designated his religion as Islamic, and 2) sign the Ramadan sign-up form in the presence of a Chaplain. (Bruno Decl. ¶¶ 26, 32; Pitts Decl. 19-21).

It is also undisputed that: plaintiff did not ask for a Ramadan meal accommodation when he was admitted to HCC on October 29, 2004 or at his first meal in the HCC dining hall on Saturday, October 30, 2004; plaintiff did not ask for a Ramadan meal accommodation when he completed his religious designation form at HCC orientation on Monday, November 1, 2004;

plaintiff did not ask a Chaplain or orientation counselor at orientation for a Ramadan meal accommodation; plaintiff never sought out an HCC Chaplain during Ramadan and he never completed a Ramadan sign-up form in the presence of an HCC chaplain – the required procedure for joining the Ramadan List; plaintiff never filed an inmate grievance about his Ramadan request, never spoke with Warden Lee when the Warden toured his housing unit, Dorm 3, never wrote a letter or inmate request to Warden Lee. Plaintiff cannot establish that he never spoke with any HCC supervisory custody staff – captains, lieutenants, or majors – about his request when they toured his unit. Plaintiff cannot establish that he placed written correspondence in the "religious" mailbox located in his housing unit regarding his request. Plaintiff has no clear recollection about whether he put his request for Ramadan meal accommodation in writing at all. That plaintiff allegedly spoke to three (or four) correction officers about fasting for Ramadan and was allegedly told he could not join the Ramadan List.

It is also undisputed that: plaintiff signed a form at HCC orientation acknowledging receipt of the HCC handbook; that the HCC handbook made clear that HCC employed religious personnel and that these religious personnel (i.e. chaplains) coordinated all religious programs at HCC; that chaplains regularly toured plaintiff's housing unit and visited other inmates in his unit and that chaplains were announced when they arrived at his unit by custody staff and wore clothing and items that clearly identified them as clergy; that information regarding religious programs at HCC was posted in Dorm 3; that HCC held religious programs for Muslim inmates during those first three weeks of plaintiff's detention there, such as Taleem and Jumah, and that those programs were announced on his unit either through a loud voice or over an intercom. Plaintiff did not attend any of the Islamic programs at HCC until a month after his arrival at

HCC. Plaintiff did not speak with any religious personnel until approximately November 22, 2004, approximately a week after Ramadan had ended. If plaintiff had attended any of the Islamic programs at HCC during Ramadan, he would have meet HCC's Islamic Chaplain, Imam Durmas Avci and Imam Avci could have put plaintiff on the Ramadan List if he made the request to Imam Avci. It is undisputed that had plaintiff spoken with any religious personnel at HCC during Ramadan, he would have likely been placed on the Ramadan List almost immediately and no later than the length of time it took the chaplain to verify his religious designation as Muslim; consult with the IRF; and travel to the kitchen to add plaintiff's name to the kitchen's Ramadan List.

It is also undisputed that Plaintiff was extremely shocked and anxious about being suddenly arrested, uprooted from his life and employment in Connecticut, and detained by federal officials for what could have been an indeterminate period of time. It is undisputed that plaintiff experienced some abdominal pain due to extreme anxiety and stress and an alleged flare -up of his Crohn's disease when he first entered HCC and that his physical discomfort hindered his desire or ability to fast during Ramadan after he entered HCC. It is undisputed that the formal policy at HCC in 2004, and at all times, was to permit newly admitted inmates to join the Ramadan List.

Plaintiff alleges from these facts that Warden Lee created or condoned a covert and rogue policy at HCC of denying Muslim inmates' access to the Ramadan List in clear contravention of DOC's Administrative Directive 10.8 and the policies of the Religious Services Director. Based upon the undisputed facts, no reasonable trier of fact could find that Warden Lee

established a policy of prohibiting new inmates from joining the Ramadan List or that this policy imposed a "substantial burden" on plaintiff's Free Exercise rights.

Warden Lee had no direct involvement in running religious programs at HCC and he had no direct involvement in establishing religious policy. (Pitts Decl. ¶ 7, Lee Decl. ¶ 32) Religious policy at HCC was established by the Director of Religious Services in the DOC headquarters through the DOC Commissioner. (Bruno Decl. ¶ 7). Warden Lee's involvement in religious issues was relegated to religious issues that intersected with facility safety and security concerns, such as religious garments, articles and the scheduling of inmate collective religious activities throughout the facility. (Lee Decl. ¶ 32).

There is no evidence of a widespread practice of new inmates being denied access to the Ramadan List. No grievances on the issue were filed at HCC during 2004 or the multiple years before or after 2004 for which grievances were reviewed at plaintiff's request. Several clergy were deposed in this action, Father Anthony Bruno, Reverend Albert Pitts, Imam Durmas Avci and Imam Abdul Hasan, and each testified that newly admitted inmates at DOC and HCC were always permitted to join the Ramadan List. Imam Avci testified that he was not aware of any grievances at HCC regarding Ramadan. (Avci depo. 104, line 11). Furthermore, the Director of Religious Services and the Islamic consultant retained by the DOC had never heard of a complaint involving a new inmate was kept off the Ramadan List because he entered a facility after the start of Ramadan. (Bruno Decl. ¶¶ 39, 41-42). The testimony and documentary evidence also demonstrates that the Imams employed by the DOC meet and confer frequently to discuss the religious practices of Muslims in the DOC and have no reservations about voicing any concerns they may have or problems they learn about. (Exhibits 28-29). These

DOC Imams have never reported to Warden Lee, Father Bruno or the Commissioner that there was a problem at HCC with new inmates receiving a Ramadan meal accommodation. (Bruno Decl. ¶ 39).

Three vague statements by three unnamed correction officers, without more, cannot as a matter of law, support a finding that Warden Lee established any "policy" at HCC of barring new inmates from the Ramadan List. "A Section 1983 action may be maintained based on a practice that "was so 'persistent or widespread' as to constitute 'a custom or usage with the force of law.'" *Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004) (*quoting Sorlucco v. N.Y. City Police Dep't*, 971 F.2d 864, 870 (2d Cir. 1992)). The alleged practice "must be so manifest as to imply the constructive acquiescence of senior policy-making officials." *Sorlucco,* 971 F.2d at 871. Here, there is no evidence that there was a persistent or widespread custom or policy at HCC of not permitting newly admitted inmates to join the Ramadan List. In fact, the undisputed evidence establishes that the opposite was true, newly admitted inmates and transferred inmates were routinely added to the Ramadan List at HCC. (Avci depo. 112; Pitts Decl. ¶ 9; McGrail Decl. ¶ 8).

Since there is no real dispute that the actual policy at HCC in 2004 was that new inmates could join the Ramadan List, plaintiff will allege that Warden Lee should be held personally liable because he failed to train or supervise the three correction officers who allegedly provided plaintiff with incorrect information about the HCC Ramadan policy in 2004. A reasonable trier of fact could not reach this conclusion. Even assuming three unnamed correction officers did erroneously tell plaintiff he could not get on the Ramadan List, Warden Lee is still entitled to summary judgment on a failure to train or failure to supervise claim

because plaintiff cannot meet the high legal standard of establishing Warden Lee was deliberately indifferent to the need to train or supervise these three correction officers on this issue.

A prison official may be liable under Section 1983 for inadequate training or supervision only upon a showing that his inaction amounted to deliberate indifference to the need for training or supervision. *City of Canton v. Harris,* 489 U.S. 378, 388 (1989). The Second Circuit has established three requirements for showing that a lack of training manifests deliberate indifference.

> First, to reach the jury, the plaintiff must offer evidence from which a reasonable jury could conclude that a policy-maker knows "to a moral certainty" that her employees will confront a given situation. Next, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation. Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights. In addition, at the summary judgment stage, plaintiffs must identify a specific deficiency in the [defendant's] training program and establish that that deficiency is closely related to the ultimate injury, such that it actually caused the constitutional deprivation.

Green v. City of New York, 465 F.3d 65, 81 (2d Cir. N.Y. 2006) *citing Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992) (later district court proceedings vacated by and remanded by *Green v. City of New York,* 359 Fed. Appx. 197, 2009 U.S. App. LEXIS 28590, 22 Am. Disabilities Cas. (BNA) 1384 (2d Cir. 2009) (cert. petition filed May 21, 2010).

There is evidence that Warden Lee was aware that new inmates entered HCC during Ramadan and that some of these inmates may request a Ramadan meal accommodation. It is less clear that he knew to a "moral certainty" an inmate would inquire only with custody staff,

be ignorant of the existence of religious staff at HCC, and not consult HCC religious staff regarding a religious issue. However, even assuming that Warden Lee did know or should have known to a "to a moral certainty" that HCC custody staff would be exclusively asked for a Ramadan meal accommodation, and assuming Warden Lee could be considered a "policy-maker" on this topic, plaintiff cannot establish the other requirements necessary to show a deliberate indifference to the need for additional training. Plaintiff cannot establish that being asked about a Ramadan meal accommodation presented the correction officers "with a difficult choice of the sort that training or supervision will make less difficult." The undisputed evidence demonstrates that HCC staff were trained at the DOC Academy by Father Bruno to refer all religious questions to religious personnel. HCC custody staff were also provided this instruction on the job at HCC by the IRF, Reverend Pitts, and Reverend Pitts testified that he frequently fielded questions from correction officers on religious programs issues.

Warden Lee had no notice that any correction officer incorrectly responded to a question about religious programming incorrectly and did not refer a religious policy question to HCC religious personnel. Plaintiff also cannot establish that there was a history of "employees mishandling the situation;" there is no record of complaints of this type, no grievances at HCC about Ramadan during the relevant time period. None of the witnesses deposed by plaintiff, including two Imams, had ever heard of a problem with new inmates getting on the Ramadan List and the Islamic Chaplain at HCC actually recalled adding new inmates to the Ramadan List in 2004. The Imams who testified in this case stated they would have remedied any such problem if it came to their attention.

Plaintiff also cannot show that the incorrect information provided to him is the sort of act that will frequently cause the deprivation of an inmate's rights; or that the incorrect information is closely related to his particular constitutional injury. In other words, plaintiff cannot establish such that the failure to train these three correction officers was the legal cause of plaintiff's alleged constitutional deprivation. Plaintiff cannot establish the requisite causal connection between the alleged incorrect information provided by three correction officers and his failure to obtain a Ramadan meal accommodation because accurate information was readily available to him and easily attainable from religious staff. Plaintiff could have easily overcome any burden to his religious exercise imposed by the allegedly incorrect information, if he had taken some very modest steps to vindicate his rights.

The DOC had two easily achievable and reasonable prerequisites to joining the Ramadan List that was applied to all inmates – the inmate must have already designated his religion as Muslim and the inmate had to complete a Ramadan sign-up form and sign it in the presence of a Chaplain. "[A] generally applicable policy will not be held to violate a plaintiff's right to free exercise of religion if that policy is reasonably related to legitimate penological interests." *Redd v. Wright*, 597 F.3d 532, 536 (2d Cir. 2010) (internal quotation marks omitted). Plaintiff failed to comply with this DOC procedure and was therefore not placed on the Ramadan List. Plaintiff also failed to take reasonable steps to inquire further about what religious programs were available to him at HCC during Ramadan.

DOC policy required plaintiff take some affirmative steps to sign up for the religious program of Ramadan. This requirement, that plaintiff take measures that "entailed a modest act of commitment by the inmate," did not violate plaintiff's free exercise of religion. *See Johnson*

v. Delaunay, 2010 U.S. Dist. LEXIS 62038, 10-11 (S.D.N.Y. June 18, 2010) (finding prison's requirement that plaintiff designate his religion before being permitted to participate in religious programs did not violate the Free Exercise Clause).

While it may be regrettable that a correction officer may have provided plaintiff with incorrect information, there is no dispute that plaintiff could have received a Ramadan meal accommodation if he had just taken the time and modest effort required to reach out to a Chaplain at HCC at some date earlier than late November, 2004. The HCC Chaplains passed plaintiff's bunk, walked through his dorm, announced their presence in his housing unit, wore clearly identifiable religious garb. Chaplains of other religious denominations carried Ramadan sign-up sheets with them and assisted Muslim inmates with signing up for Ramadan. (Avci depo. 113-114). One small word, one short note dropped in the Religious mailbox and plaintiff's problem would have been "solved" and he would have been added to the Ramadan List. (Avci depo. 99, Pitts Decl. ¶ 21) Plaintiff may have just as easily gotten on the list if he stopped Warden Lee when he walked past him in Dorm 3, or one of Warden Lee's supervisory subordinates such as a Captain, Major, or Lieutenant. (Lee Decl. ¶ 56).

Instead, plaintiff remained almost willfully blind to the various modes of communication available to him to speak with religious personnel or the Warden. Plaintiff claims to have been ignorant of the presence of religious personnel at HCC until on or about November 22, 2004. This claim is contrary to the overwhelming evidence that a reasonable person of reasonable intellect would have known there were religious programs and staff at HCC within days of entering HCC. Plaintiff is a highly educated and intelligent individual who spoke and read English fluently in 2004. He claims to have not read the HCC handbook that

clearly lists religious programs, although he acknowledged receiving it with his signature; he claims to not have heard the religious programs portion of orientation although he may have heard "something" about religion there; he claims to have not seen the mailbox marked "religious" in his dorm; he claims to have not heard any of the announcements in his unit regarding religious programs; he claims to have not noticed the arrival of religious staff on the unit when they toured Dorm 3; he claims to have not witnessed other inmates leaving for religious programs of all denominations after announcement; he claims to have been ignorant of the weekly Jumah and Taleem services, claims to have not witnessed other inmates receiving bagged breakfast during Ramadan.

Plaintiff's pleas of ignorance to all these patently obvious facts cannot be fairly attributed to Warden Lee such that he can be said to have caused plaintiff to not complete a Ramadan sign-up form in the presence of a Chaplain, which was the required protocol to join the Ramadan List. Warden Lee cannot be found to have imposed a substantial burden on plaintiff's First Amendment rights through the acts of unnamed subordinates when any alleged burden could have been so easily and ameliorated by plaintiff himself. The only person who truly caused plaintiff to not join the Ramadan List was plaintiff, through his own apathy, neglect and disregard for obvious and easy access to religious programs. Plaintiff's indifference to religious programs at HCC may have been occasioned by his withdrawal from contact with inmates or staff or his extreme emotional distress or anxiety about being arrested by federal officials but this cannot be a basis for finding Warden Lee individually liable, when Warden Lee did not and could not have known about plaintiff's subjective mental state.

Warden Lee is entitled to a finding of qualified immunity on the facts alleged by plaintiff because he had no knowledge of plaintiff's situation and did not know any correction officer had provided incorrect information to him. (Lee Decl. ¶ 61). In *Iqbal*, the Supreme Court stated "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution," and it explicitly rejected the argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution."

Here, Warden Lee had no knowledge of plaintiff's complaint or any complaint from any other inmate regarding access to the Ramadan List. A reasonable warden in Warden Lee's position would have reasonably relied upon the Director of Religious Services to provide the all necessary information in the Ramadan Guidelines and for the religious personnel at HCC to conduct religious programs. A reasonable warden in Warden Lee's position would have also reasonably concluded that new inmates know about the existence of religious programs and could direct any specific questions about religion to religious staff. It is not clear what "clearly established" right plaintiff contends was violated by Warden Lee. It cannot be his clearly established right to a Ramadan meal accommodation because that accommodation was available to him provided he followed the protocol of completing the Ramadan sign-up form. Plaintiff appears to be alleging that he had a clearly established right to the free exercise of his religion in a jail unburdened by a requirement that he follow facility protocol regarding signing up for programs or filing a written request for a program or grievance when that request is denied or make reasonable inquiries with appropriate personnel. There was no such clearly

established constitutional right in 2004 such that Warden Lee can be held personally liable for violating it.

B. Plaintiff's RLUIPA Claims

Plaintiff also brings individual capacity claims against Lee, Pitts and McGrail under RLUIPA but those defendants are entitled to summary judgment on these claims because they cannot be individually liable for money damages under RLUIPA. Moreover, plaintiff was not an institutionalized person when he commenced this action and the facts alleged by him do not rise to the level of a "substantial burden" on his religious practice because his allegations are ones of mistake and negligence by prison officials that he could have easily rectified. Furthermore, there was not policy or official decision that denied him a properly made request to exercise his religious freedom and the State Defendants should be found to have qualified immunity on this RLUIPA claim.

RLUIPA provides in relevant part that:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person-
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> 42 U.S.C. § 2000cc-1(a).

RLUIPA also provides that a person may "obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). RLUIPA defines the term "government" to include[s] a branch,

department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity; 42 USC § 2000bb-2 (1).

Plaintiff should not be permitted to continue to pursue a claim for money damages against the State Defendants in their individual capacities because an overwhelming number court that have considered the question of whether RLUIPA permits money damages against state officials in their individual capacities have found that it does not. Our Circuit has not yet addressed this precise issue, but four Circuit Courts of Appeals have addressed this issue since 2007, the 4th 5th 7th and 11th Circuits, and have concluded that individual liability under RLUIPA is not appropriate because RLUIPA was enacted pursuant to the federal government spending clause powers.[2] *Smith v. Allen*, 502 F.3d 1255, 1272-1273 (11th Cir.2007) ; *Sossamon v. The Lone Star State of Texas,* 560 F.3d 316, 328-29 (5th Cir. 2009) *cert. petition granted, Sossamon v. Texas*[3]*, 130 S.Ct. 3319 (Sept. 3, 2010 U.S.); Nelson v. Miller*, 570 F.3d 868, 889 (7th Cir.2009); *Madison v. Commonwealth of Virginia*, 474 F.3d 118, 131-32 (4th Cir. 2006).

Courts in this district and circuit have also concluded, that because the cause of action permitted in RLUIPA is predicated on "contract based" relationship between the federal government and the recipient of federal funds, individual liability is inappropriate.

---

[2] While RLUIPA does contain a reference to the commerce clause, there is no evidence here of an effect on interstate or international commerce to indicate that RLUIPA should be interpreted under the Commerce Clause.

[3] The petition was granted on the question of: "Whether an individual may sue a State or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. (2000 ed.)."

> In a 2008 opinion, this Court held that RLUIPA does not abrogate state sovereign immunity and does not authorize suits for damages against individuals in either their individual or official capacities. *See Pugh v. Goord*, 571 F. Supp. 2d 477, 506-509 (S.D.N.Y. 2008). Since that time, every court in this circuit to consider the issue has reached the same conclusion. *See Singh v. Goord*, No. 05 Civ. 9680 (SCR), 2010 U.S. Dist. LEXIS 45330, 2010 WL 1903997, at *3 (S.D.N.Y. May 10, 2010) (adopting conclusion of magistrate judge that RLUIPA does not authorize suits for damages); *Vega v. Lantz*, No. 04 Civ. 1215 (DFM), 2009 U.S. Dist. LEXIS 88550, 2009 WL 3157586, at *4 (D. Conn. Sept. 25, 2009) (concluding "that RLUIPA provides no cause of action for damages against state officials in their individual capacities," in a case where the official capacity claims had already been dismissed); *Sweeper v. Taylor*, No. 06 Civ. 379 (NAM) (GJD), 2009 U.S. Dist. LEXIS 27318, 2009 WL 815911, at *9 (S.D.N.Y. Mar. 27, 2009) (citing Pugh and noting that "it has been held that a RLUIPA plaintiff may not obtain monetary damages under the statute either from defendants in their individual or official capacities" and that the plaintiff "would not be able to obtain money damages from defendants"); *El-Badrawi v. Dep't of Homeland*, Sec, 579 F. Supp. 2d 249, 261-62 & n.13 (D. Conn. 2008) (holding "that RLUIPA lacks an 'unmistakably clear' waiver of sovereign immunity" and noting that "RLUIPA was not meant to extend to claims for money damages"); *see also Bock v. Gold*, No. 05 Civ. 151 (JGM), 2008 U.S. Dist. LEXIS 9326, 2008 WL 345890, at *1 (D. Vt. Feb. 7, 2008) (adopting a magistrate judge's conclusion that "RLUIPA does not create an action for damages against state employees in either their official or individual capacities").

Johnson v. Delaunay, 2010 U.S. Dist. LEXIS 62038 (S.D.N.Y. June 18, 2010), *see also Fortress Bible Church v. Feiner*, 2010 U.S. Dist. LEXIS 82043 (S.D.N.Y. Aug. 11, 2010) ("This Court agrees and therefore finds that Plaintiffs are not entitled to monetary damages under RLUIPA."); *Prescott v. Annetts*, 2010 U.S. Dist. LEXIS 75025 (S.D.N.Y. July 22, 2010) ("RLUIPA should not be construed as permitting the recovery of money damages against defendants in their individual capacities because such a construction would be incongruent with the reach of Congress' spending power")(internal quotations omitted).

Accordingly, plaintiff's claims against the defendants in their individual capacity should be dismissed. And since this Court has previously held that claims in their official capacity for

money damages are not proper under RLUIPA, defendants are entitled to summary judgment on plaintiff's RLUIPA claims in their entirety.

Plaintiff's RLUIPA claims should also be dismissed because a reasonable trier of fact could not conclude that his religious exercise rights were substantially burdened by any of the State Defendants. While RLUIPA does not define "substantial burden," the Second Circuit has interpreted the phrase as a "term of art" synonymous with same term used in "the Supreme Court's free exercise jurisprudence." *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007). "A substantial burden on religious exercise exists when an individual is required to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand." *Westchester Day Sch.*, 504 F.3d at 348 (citing *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)); *see also San Jose Christain College v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004) ("For a burden to be substantial under RLUIPA, it must be oppressive to the extent that it renders religious exercise effectively impracticable.").

Where there is "reasonable opportunity for [a plaintiff] to submit a modified application, the denial does not place substantial pressure on [plaintiff] to change [his] behavior and thus does not constitute a substantial burden on the free exercise of religion." *Westchester Day Sch.*, 504 F.3d at 349, *see also Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (substantial burden is something that "puts substantial pressure on an adherent to modify his behavior.").

Here, plaintiff cannot allege that there was an actual denial of a properly made request for a religious meal accommodation. Plaintiff cannot allege that anyone actually forced him or

pressured him not to fast; he cannot allege that if he had modified his request for a Ramadan meal accommodation to follow established protocols and put his request in writing in an inmate request form, or a grievance form, or directed his verbal request to a Chaplain, or that his request would have been denied. At most, he can make out a claim that three unnamed correction officers negligently provided him with incorrect information about Ramadan and that he opted to rely exclusively upon that information. This is insufficient, as a matter of law, to constitute a "substantial burden" on an inmate's free exercise rights.

Moreover, plaintiff cannot state a RLUIPA claim against defendant McGrail because he played absolutely no role in determining who was put on the Ramadan List, was not aware of plaintiff at HCC, did not supervise any correction officer and simply worked in the HCC kitchen preparing the food served to inmates. (McGrail Decl. ¶¶ 6, 10). In addition, Plaintiff should be found to not be a "person" for purposes of RLUIPA because plaintiff was "residing in or confined to an institution" at the time he commenced this action and therefore is not entitled to bring a RLIUPA claim under this provision. The State Defendants should also be found to be entitled to qualified immunity for this RLUIPA claim for the same reasons discussed above in, Section A, ii and iii.

C. Defendants Are Entitled to Summary Judgment Before Trial Based Upon Plaintiff's Failure to Attempt to Reenter the Jurisdiction to be Present for Trial.

The State Defendants should also have plaintiff's claims against them dismissed before trial unless plaintiff returns to the District of Connecticut for trial or demonstrates that he had made reasonable efforts to lawfully return to the District of Connecticut. Plaintiff testified at his deposition that he ceased his attempts to obtain an entry visa to the United States in 2007.

(Pl. depo. 192), and that he may choose to decline to enter the District of Connecticut even if he were granted an entry visa. (Id.) The State Defendants played no role in the removal of plaintiff from the United States or in any decision to permit him a visa to travel here.

The Federal Rules require that a "witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Fed. R. Civ. P. 43; *see also El-Hadad v. United Arab Emirates*, F.3d 658, 669 (D.C. Cir. 2007) (finding the requirements of Rule 43 met where the "district court insisted that El-Hadad prove he had pursued and repeatedly been denied a visa to the United States"); *Matovski v. Matovski*, 2007 U.S. Dist. LEXIS 65519 (S.D.N.Y. 2007) (authorizing testimony via live video line for party who had been denied an entry visa into the U.S.). Plaintiff's cannot establish good cause in compelling circumstance as to the State Defendants because he has not established that he was denied an visa to return to Connecticut for his trial and he has indicated he might not return even if he received one.

Plaintiff has sued the State Defendants in their personal capacity for money damages and they are entitled to effectively cross examine him at trial. Plaintiff was unable to recall many significant facts at his deposition and as the party with the burden of proof the defendants should be permitted an thorough opportunity to press plaintiff on his recollections or any new facts he recalls at the time of trial. "The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a

powerful force for truthtelling." *Dagen v. CFC Group Holdings Ltd.*, 2003 U.S. Dist. LEXIS 20029 (S.D.N.Y. 2003) (internal citation omitted).

IV. CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that the Court enter summary judgment in their favor on Counts three, four and five of plaintiff's Second Amended Complaint.

Respectfully Submitted,

DEFENDANTS
CHALRES LEE, ALBERT PITTS AND
THOMAS MCGRAIL

RICHARD BLUMENTHAL
ATTORNEY GENERAL

BY: _/s/ *Maura Murphy Osborne*_____

Maura Murphy Osborne
Assistant Attorney General
Federal Bar No. ct19987
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5020
Fax: (860) 808-5347
Maura.MurphyOsborne@ct.gov

CERTIFICATION

I hereby certify that on September 10, 2010, a copy of the foregoing Memorandum of Law in Support of Summary Judgment was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ *Maura Murphy Osborne*
Maura Murphy Osborne