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United States District Court, S.D. New York.

Dennis REYNOLDS, Plaintiff,
v.
G. GOORD, Commissioner, D.O.C.S.; Christopher C. Artuz, Supt., Green Haven Correctional Facility; Norman Selwin, MD, Faculty Health Service Director; Larry Zwillinger, Regional Health Service Administrator; Catherine Metzler, RN II; and Don Stevens, Nurse Administrator, Defendants.

No. 98 CIV. 6722(DLC). | March 1, 2000.

Attorneys and Law Firms

Dennis Reynolds, pro se, Green Haven Correctional Facility, Stormville, for Plaintiff.

Tiffany M. Foo, Assistant Attorney General, New York, for Defendants.

Opinion

OPINION AND ORDER

COTE, District J.

***1** Plaintiff Dennis Reynolds ("Reynolds") filed this *pro se* action pursuant to 42 U.S.C. § 1983. The plaintiff, a Rastafarian inmate at Green Haven Correctional Facility ("Green Haven"), alleges that his religious convictions do not permit him to submit to a tuberculosis ("TB") screening test as required by the New York State Department of Correctional Services ("DOCS") Health Services Policy. The plaintiff therefore contends that, by forcing him to have a purified protein derivative ("PPD") injected into his body, defendants violated his First and Eighth Amendment rights. Plaintiff seeks monetary damages as well as injunctive relief.[1] After discovery closed on May 28, 1999, the defendants moved for summary judgment. In support of that motion, the defendants have submitted Reynolds's deposition testimony as well as his medical records, and the declarations of defendants Catherine Metzler, R.N. ("Metzler"), Norman Selwin, M.D. ("Selwin"), Donald Stevens, Nurse Administrator ("Stevens"), and Christopher P. Artuz, Superintendent of Green Haven ("Artuz").

For the reasons that follow, defendants' motion is granted in part. Counsel will be appointed for plaintiff's remaining claims.

BACKGROUND

The following facts are undisputed, unless otherwise indicated. Health Services Policy § 1.18[2] establishes a TB control program within DOCS that determines TB infection by means of both medical diagnostic tools—PPD reactions, chest x-rays, and sputum samples—and clinical indications such as cough, fever, chills, night sweats, and weight loss. The DOCS' guidelines require every inmate to submit to an annual PPD test, which involves injecting a small amount of purified protein into the skin; a skin reaction signifies that the individual has been infected with the bacteria that causes TB. Infection with the TB bacteria, however, is not synonymous with "active" TB, but merely signals "latent" infection. Latent TB is not generally contagious, but may develop into active, contagious TB. A diagnosis of active TB is made through chest x-rays, sputum samples, and an evaluation of clinical symptoms. These procedures, however, reveal only whether an individual is suffering from active TB, and are unable to detect latent infection with the bacteria.[3]

Pursuant to the DOCS' policy, an inmate who refuses to take the PPD test will be placed on "Tuberculin Hold." While neither respiratory isolation, infirmary housing, nor placement in special housing units are required for inmates on Tuberculin Hold, these inmates must remain in their cells at all times except for one hour of recreation per day and three showers per week; only legal visits are permitted. Inmates on Tuberculin Hold receive a monthly medical history, physical exam, and weight check and a chest x-ray every six months. An inmate who exhibits no signs or symptoms of TB and three negative chest x-rays is released from Tuberculin Hold after one year.[4]

***2** Plaintiff has been an inmate at Green Haven since June 1991. His medical records indicate that he was given the PPD test on an approximately annual basis from December 1991 through 1996. Reynolds contends, however, that he consistently objected to the annual PPD test on religious grounds, but "was told in each instan[ce] that Rastafari was not a recognized religion by the DOCS and [Green Haven]."

In 1998, plaintiff's yearly PPD test was scheduled to be administered on January 5. When plaintiff reported to the Green Haven clinic that day, he indicated that he would not submit to the test on religious grounds, and requested non-invasive alternative means of testing.[5] Plaintiff admits that Metzler explained that a refusal to take the PPD test

would result in confinement.[6] On medical records dated January 5, 1998, Metzler notes that "[Reynolds] [w]ants it documented on chart that he took [PPD] test under duress." On January 7, 1998, plaintiff received the negative results of his PPD test, at which point he again requested that his medical records reflect the fact that he submitted to the PPD "under duress." Indeed, his medical records include the following note:

> Inmate is a Rastafarian and wants it charted that he took his PPD, however it is against his belief to have anything injected into his body. He states, "I took it under duress."
> Plaintiff was permitted to sign this note in his medical chart.[7]

Plaintiff filed the present action with a complaint dated June 3, 1998, and received by this Court's Pro Se Office on June 15, 1998. Plaintiff stated that

> there was not a medical emergency and my religious and civil rights as a Rastafarian [were] violated, when I was forced to have a foreign substance injected into my body, when I requested a chest x-ray or sputum sample be taken.

On November 9, 1998, Reynolds wrote to Artuz, stating that in light of the upcoming TB testing,

> I am requesting that if I am to take such a test, that I may be given an X–Ray or Sputum sample test. This request is based on my faith as a Rastafarian to omit any foreign substance being injected into my body.

Artuz informed Reynolds that this letter was being forwarded to Health Services Administrator at Green Haven Larry Zwillinger ("Zwillinger"), who, by letter dated November 23, 1998, advised Reynolds that

> you are due to take your annual TB test in January. The Infection Control Nurse, C. Metzler, explained the TB Hold status to you last year when you allowed her to test you "under duress". The situation has not changed. If you do not take your test in January, you will be placed on TB Hold. This will allow you three weekly showers, one hour of daily recreation, and legal visits only. This is a departmental rule in place for your safety, as well as the staff, visitors, and other inmates. I suggest you cooperate with Nurse Metzler.[8]

On January 29, 1999, Reynolds was scheduled for a PPD test; he failed to show up for this appointment, and the test was rescheduled for February 1, 1999. On February 1, plaintiff refused the PPD, reiterating his request for alternative, noninvasive testing, offering documentation of the pending federal court proceedings, and requesting access to his medical file in order to ascertain whether his history of correspondence on the issue of alternative testing had been included in his file. Reynolds was refused access to his file. Metzler and Stevens assert that they counseled and explained Policy § 1.18 to Reynolds, including the repercussions of a refusal to take the PPD test, and produced a written copy of Policy § 1.18. As reflected in both a letter of February 1, and a grievance complaint filed that same day,[9] Reynolds maintains that he was "threatened" to take the PPD test or be confined. Upon Reynolds's continuing refusal to submit to the PPD test, a permit was issued for his placement on Tuberculin Hold. That same day Selwin ordered a chest x-ray for plaintiff. The x-ray was performed on February 2 and determined to be normal.

***3** Pursuant to DOCS' policy, Reynolds was, on a daily basis, given the opportunity to submit to the TB test and return to the general inmate population. On February 2 and 3, plaintiff continued to refuse the offered PPD test; he remained on Tuberculin Hold. On February 4, 1999 at 5:30 p.m., plaintiff submitted to the PPD test, requesting that it be noted on his medical charts that his acquiescence was "under duress."

STANDARD

Summary judgment may not be granted unless the submissions of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed.R.Civ.P. The moving party bears the burden of demonstrating the absence of a material factual question, and in making this determination the Court must view all facts in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Azrielli v. Cohen Law Offices,* 21 F.3d 512, 517 (2d Cir.1994) ("[T]he court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party."). When the moving party has asserted facts showing that the nonmovant's claims cannot be sustained, the opposing party must "set forth specific facts showing that there is a genuine issue for trial," and cannot rest on the "mere allegations or denials"

of his pleadings. Rule 56(e), Fed.R.Civ.P. *See also Goenaga v. March of Dimes Birth Defects Found.,* 51 F.3d 14, 18 (2d Cir.1995). In deciding whether to grant summary judgment, therefore, this Court must determine (1) whether a genuine factual dispute exists based on the evidence in the record, and (2) whether the fact in dispute is material based on the substantive law at issue.

The Court is mindful of the fact that where a litigant is *pro se,* his pleadings should be read liberally and interpreted "to raise the strongest arguments that they suggest." *McPherson v. Coombe,* 174 F.3d 276, 280 (2d Cir.1999) (internal quotations omitted). Nevertheless, proceeding *pro se* does not otherwise relieve a litigant from the usual requirements of summary judgment, and a party's "bald assertion," unsupported by evidence, is insufficient to overcome a motion for summary judgment. *See Carey v. Crescenzi,* 923 F.2d 18, 21 (2d Cir.1991).

DISCUSSION

Section 1983 provides a mechanism through which a violation of a constitutional right may be remedied and states that

> Every person who, under color of any statutes, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured.

42 U.S.C. § 1983.

1. ***First Amendment Claim***

In the context of considering an inmate's First Amendment claim, the Second Circuit has recently confirmed its characterization of the Free Exercise Clause as an "unflinching pledge to allow our citizenry to explore ... religious beliefs in accordance with the dictates of their conscience." *Jackson v. Mann,* 196 F.3d 316, 320 (2d Cir.1999) (internal quotation omitted). Because prisoners retain their right to religious freedom, an inmate is entitled to reasonable accommodation of his religious beliefs. *See id.* Nevertheless,

> ***4** [t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration.

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977). Thus, a prison inmate retains only those First Amendment rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier,* 417 U.S. 817, 822 (1974). As a result, many prison policies restricting inmates' First Amendment rights are upheld, although the same policies would not be permissible outside a prison's walls. *See, e.g., Giano v. Senkowski,* 54 F.3d 1050, 1053 (2d Cir.1995) (citing cases).

The standard of review for a prison regulation that impinges on an inmate's constitutional rights is that set forth in *Turner v. Safley,* 482 U.S. 78 (1987): a prison regulation is "valid if it is reasonably related to legitimate penological interests." *Id.* at 89. *Accord O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349 (1987); *Nicholas v. Miller,* 189 F.3d 191, 194 (2d Cir.1999). The methodology to be followed in determining the reasonableness of such prison regulations requires the Court to consider the following:

> First, there must be a valid and rational connection between the regulation and the governmental interest put forward to justify it, and the governmental objective must be legitimate and neutral. The court must then consider whether there are alternative means of exercising the proscribed right, the impact that accommodating the right will have on other inmates, on prison guards, and on the allocation of prison resources generally, and the availability of ready alternatives to the regulation.

Nicholas, 189 F.3d at 194 (citing *Turner,* 482 U.S. at 89–91.).

In support of their argument that plaintiff's First Amendment claim must be dismissed, defendants argue that controlling the spread of tuberculosis is a compelling governmental interest which is directly related to DOCS' mandatory screening policy. While it is well-established that correction officials have an affirmative obligation to protect inmates from infectious disease, *see Jolly,* 76 F.3d at 477, the restatement of that principle does not resolve the inquiry. On the basis of the current record, the relationship between the Tuberculin Hold and the control of TB is unclear. While inmates who refuse to submit to the PPD test are placed on Tuberculin Hold, they are not placed in respiratory isolation, and so continue to share

the same breathing space with the general prison population and DOCS' staff. Moreover, because a chest x-ray was immediately ordered upon Reynolds's refusal to take the PPD test, DOCS was promptly able to determine that, even if the plaintiff had latent TB, his infection was not currently active, and so was not contagious. Finally, the intensive medical surveillance program would appear to be available whether a prisoner is in the general population or in Tuberculin Hold. Thus, while the Court recognizes both the importance of a comprehensive policy for combating the spread of infectious disease and the discretion that must be afforded prison authorities toward such policy's effective implementation, it also notes that the health concerns directly addressed by Reynolds's confinement on Tuberculin Hold are not readily apparent on the basis of the defendants' submissions. It is unclear on the record before the Court whether there is a rational connection between a policy that limits the mobility and visitation privileges of an inmate who refuses to submit to a PPD test on religious grounds—particularly one who has subsequently been found not to have active TB—and the undoubtedly legitimate goal of controlling the spread of an infectious disease.

***5** The lack of available alternatives to the current policy and the impact of those alternatives is equally unsettled given the current record. Defendants rely on the fact that x-rays and sputum samples do not reveal latent infection, and therefore contend that these alternatives "provide none of the benefits of PPD screening." The Court is mindful of its obligation not to substitute its own judgment on difficult and sensitive matters of institutional administration for the determination of those charged with the formidable task of running a prison. *See Shabazz,* 482 U.S. at 353. Indeed, plaintiff may ultimately be unable to establish that there are any "easy, obvious alternatives" to the current DOCS' policy that accommodate the plaintiff's rights at *de minimis* costs to valid penological interests, *see Turner,* 482 U.S. at 93; the Court may ultimately determine that there is a need to identify individuals at risk before they become contagious and that that need is appropriately achieved through mandatory annual PPD testing. Nevertheless, given the seriousness of the constitutional rights at stake, the Court is unwilling to make such a finding on the limited and undeveloped record currently before it.[10]

2. *Eighth Amendment Claim*

Plaintiff's Eighth Amendment theory is not that the conditions of his confinement while on Tuberculin Hold amounted to a constitutional violation, but rather that the skin puncture that accompanied the PPD test amounts to "cruel and wanton infliction of mental [and] physical pain." The Court construes plaintiff's claim as an allegation of excessive force.[11]

The Eighth Amendment prohibits the infliction of "cruel and unusual punishment," U.S. Const. Amend. VIII, including the "unnecessary and wanton infliction of pain." *Gregg v. Georgia,* 428 U.S. 153, 173 (1976).

> When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being.

Blyden v. Mancusi, 186 F.3d 252, 262 (2d Cir.1999) (internal quotation omitted). The appropriate test under the Eighth Amendment involves both subjective and objective elements. *Id.* The subjective element requires that the defendant "had the necessary level of culpability, shown by actions characterized by wantonness." *Id.* In the context of a claim of excessive force, the "wantonness" inquiry turns on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian,* 503 U.S. 1, 7 (1992). *Accord Blyden,* 186 F.3d at 262–63 (discussing good-faith standard). Similarly, the objective element of the Eighth Amendment—generally requiring that the injury actually inflicted is sufficiently serious—is context specific. A claim of excessive force may be established even if the victim does not does not suffer " 'serious' " or " 'significant' " injury, so long as the amount of force used is more than *de minimis* or involves force that is " 'repugnant to the conscience of mankind.' " *United States v. Walsh,* 194 F.3d 37, 47–48 (2d Cir.1999) (quoting *Hudson,* 503 U.S. at 7–10). *See also Blyden,* 186 F.3d at 263 (noting that "certain actions, including the malicious use of force to cause harm, constitute Eighth Amendment violations *per se* "). Under this standard, "some degree of injury is ordinarily required." *Walsh,* 194 F.3d at 50 (finding pain suffered by victim sufficient to satisfy injury requirement).

***6** Although plaintiff alleges that he was "forced and coerced to take the PPD test under duress," he fails to provide any specific details of either the force used to secure his submission or any injury that resulted. Plaintiff alleges only in general terms that the PPD injection "caused physical injury," "psychological imbalance," as well as the "inability to sleep." Moreover, plaintiff does not allege any facts that suggest that any of the defendants used force maliciously or sadistically to cause harm rather than in a good-faith effort to comply with the procedures established by the DOCS' policy. Plaintiff's allegations are thus insufficient to sustain a claim of excessive force. *Cf. Boddie v. Schnieder,* 105 F.3d 857, 862 (2d Cir.1997).

3. *The Prison Litigation Reform Act*

Defendants contend that plaintiff's First Amendment claim is barred by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(e), because of Reynolds's failure to allege sufficiently a physical injury. The PLRA, which became effective on April 26, 1996 provides that

> *[n]o Federal civil action may be brought by a prisoner* confined in a jail, prison, or other correctional facility, *for mental or emotional injury* suffered while in custody *without a prior showing of physical injury.*

42 U.S.C. § 1997e(e) (emphasis supplied). In support of the argument that a prisoner can only bring a federal civil suit when he has sustained a physical injury, defendants rely primarily on cases dismissing Eighth Amendment excessive force claims and cases in which the plaintiff explicitly sued for mental and emotional injury. The defendants fail to cite to any case where the Court relied on Section 1997e(e) to dismiss a prisoner's claim for violation of that individual's First Amendment rights.

Indeed, despite defendants' contention that the applicability of this statute to the facts alleged by the plaintiff is "irrefutable", the plain language of the statute—specifically prohibiting only those federal civil actions brought to redress "mental or emotional injury" without a prior showing of physical injury—is to the contrary. Nominal damages as well as injunctive relief are available for violations of constitutional rights. *See, e.g., Horne v. Coughlin,* 191 F.3d 244, 250 (2d Cir.) (noting availability of injunctive relief for constitutional challenge to prison regulation by adversely affected inmate), *cert. denied,* 120 S.Ct. 594 (1999); *Amato v. City of Saratoga Springs,* 170 F.3d 311, 317 (2d Cir.1999) ("[A] litigant is entitled to an award of nominal damages upon proof of a violation of a substantive constitutional right even in the absence of actual compensable injury."). Section 1997e(e) limits an inmate's right to obtain compensatory damages in the absence of physical injury, but does not otherwise restrict access to the courts. Although the Second Circuit has not spoken directly on the applicability of the language of Section 1997e(e) to claims brought under the First Amendment, courts that have addressed defendants' argument have rejected it. For example, in *Canell v. Lightner,* 143 F.3d 1210, 1213 (9th Cir.1998), the Ninth Circuit noted that the plaintiff, who was asserting a violation of his First Amendment rights, was

> ***7** not asserting a claim for "mental or emotional injury." ... The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment Claims regardless of the form of relief sought.

See also Birth v. Pepe, 98 Civ. 1291, 1999 WL 684162, at *2 (E .D.N.Y. July 21, 1999); *Amaker v. Hapoknik,* 98 Civ. 2663, 1999 WL 76798, at *6–*7 (S.D.N.Y. Feb. 17, 1999). In sum, Section 1997e(e) does not bar Reynolds's First Amendment claims, and defendants' motion to dismiss the claim on this ground is denied.

4. *Personal Involvement of the Defendants*

Defendants next assert that, with the exception of Metzler, they were not personally involved in the alleged violation of Reynolds's constitutional rights and so cannot be held liable. A defendant will be liable under Section 1983 in his individual capacity only when he is personally involved in the violation.[12] *Fischl v. Armitage,* 128 F.3d 50, 55 (2d Cir.1997); *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995). Liability for damages in a Section 1983 action may not be based on the respondeat superior or vicarious liability doctrines. *See Monell v. Dep't of Social Services of the City of New York,* 436 U.S. 658, 691 (1978); *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994). Nor may a defendant be held liable merely by his connection to the events through links in the chain of command. *See Colon,* 58 F.3d at 873–74 ("The bare fact that [the defendant] occupies a high position in the New York prison hierarchy is insufficient to sustain [plaintiff's] claim."). Personal involvement of a supervisory defendant, however, may be shown by evidence that the defendant created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue, or by direct participation in a violation. *Id.,* at 873.

Plaintiff has sufficiently described acts by Stevens to avoid dismissal of this defendant at the present juncture. Stevens was the prison employee who in 1999 ordered Reynolds to submit to the PPD test or face the loss of privileges.

Reynolds contends that Goord, Artuz, Zwillinger, and Selwin created or maintained the policy under which plaintiff's rights were violated. These assertions, which are undisputed, are sufficient to survive defendants' motion for summary judgment based on lack of personal involvement. To the extent that the plaintiff is seeking injunctive relief, it is appropriate to have these officials as defendants sued in their official capacity.

5. *Qualified Immunity*

Defendants next argue that plaintiff's claims should be dismissed under the doctrine of qualified immunity. Qualified immunity protects state actors sued in their

individual capacity from a suit for damages. *Lewis v. Cowen,* 165 F.3d 154, 166 (2d Cir.), *cert. denied,* 120 S.Ct. 70 (1999). A state actor will be qualifiedly immune where his actions did not violate rights that a reasonable person would have known were clearly established. *Stuto v. Fleishman,* 164 F.3d 820, 825 (2d Cir.1999). A court evaluating a claim of qualified immunity must

> ***8** first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.

Wilson v. Layne, 526 U.S. 603, 119 S.Ct. 1692, 1697 (1999) (internal quotations omitted). *But see Horne,* 191 F.3d at 246 (noting that the "circumstances that favor reaching the constitutional issue are not always present"). Three factors determine whether a right is clearly established:

> (1) whether the right in question was defined with reasonable specificity; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Shechter v. Comptroller of the City of New York, 79 F.3d 265, 271 (2d Cir.1996) (internal quotations omitted).

The Court is mindful of "the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v.. Bryant,* 502 U.S. 224, 227 (1991). Nevertheless, it is simply premature at this stage of the proceedings to find that the defendants are entitled to qualified immunity. As discussed above, the record is sufficiently lacking in information bearing on the factors that must guide the determination of whether the defendants violated a constitutional right of the plaintiff, much less one that was clearly established at the time they acted. The Court is unable to determine whether there is a legitimate justification for placing an inmate who refuses a PPD test on religious grounds and is found not to have active TB in Tuberculin Hold or whether there are alternative means of achieving the intended public health goals and what impact these alternatives or other accommodations would have on personnel, other inmates, and prison resources generally. Thus a finding of qualified immunity is premature. *Cf. Sound Aircraft Servs., Inc. v. Town of East Hampton,* 192 F.3d 329, 334–35 (2d Cir.1999) (instructing that district court considering constitutional claim before making qualified immunity determination should "insist on a full briefing of the constitutional issues"). In any event, a determination of qualified immunity affects only the issue of damages, and not the question of injunctive relief. The defendants' motion for summary judgment on the ground of qualified immunity is therefore denied without prejudice to its renewal after a more complete record is available.

CONCLUSION

For the reasons explained above, the defendants' motion to dismiss the plaintiff's Eighth Amendment claim is granted. The motion to dismiss is denied in all other respects.

Plaintiff's application for appointment of counsel, previously denied without prejudice, is granted.[13] During a conference with all counsel, to be held following the appearance of counsel on behalf of the plaintiff, a schedule for the further conduct of this litigation shall be set.

***9** SO ORDERED:

Footnotes

1 In his complaint, Reynolds sought only monetary damages. On December 22, 1999, however, the Court received a letter from the plaintiff "requesting that an injunction order be set against [his] taking the PPD TB test until this issue is resolved." By letter dated January 4, 2000, defendants responded to this request, arguing that because DOCS' Health Services Policy provides for alternative monitoring when an inmate refuses testing, such injunctive relief was unnecessary. The Court expresses no opinion at this juncture as to the appropriateness of injunctive relief, ruling only on the summary judgment motion.

2 A comprehensive TB control program was first introduced by DOCS in 1991. The contours of that program were subsequently modified in light of the Second Circuit's ruling in *Jolly v. Coughlin,* 76 F.3d 468 (2d Cir.1996). It appears that the policy has been in effect in its present state—at least in the respects relevant here—since May 1996.

3 This general description of TB is taken from the declaration of Dr. Selwin, a licensed physician employed by DOCS as a physician at Green Haven. Dr. Selwin notes that active TB is highly contagious and is spread through airborne particles generated when an individual with active TB sneezes, coughs, or speaks.

4 Among the factual issues not addressed in the parties' submissions are the seriousness of contracting TB, the length of any latency period, how the restrictions on movement, activities, and visitors are related to any health concerns, and whether an annual refusal to take the PPD test will result in an indeterminate placement on Tuberculin Hold.

5 Defendants also contend that as part of his refusal, the plaintiff cited a federal case named "Jolly." Defendants therefore speculate that it was plaintiff's awareness of the Second Circuit's decision in *Jolly v. Coughlin,* 76 F.3d 468 (2d Cir.1996), rather than genuine religious conviction, that motivated Reynolds's refusal to submit to testing in 1998.

6 Plaintiff contends that he was not notified of Policy § 1.18 and was erroneously told that a refusal to submit to the PPD test would result in "indefinite" confinement; defendants maintain that the details of Policy § 1.18, including the one year placement in Tuberculin Hold were properly explained.

7 On January 14, 1998, Reynolds filed a grievance that he was "forced/threatened to take the PPD" despite the fact that he requested a chest x-ray or sputum sample as an alternative means of testing. In the space provided for the inmate to indicate the nature of the action he is requesting from DOCS, Reynolds wrote: "That no PPD test be given to me as it violates my Religious Tenets as a Rastafarian, and sputum or chest x-ray be given." A form bearing the title "Inmate Grievance Program, Investigation" that is both unsigned and undated but bears the Grievance Number assigned to Reynolds's complaint of January 14, 1998, concludes that the plaintiff was not forced or threatened into taking the PPD test. It is unclear on what information or investigation this conclusion was based. Nevertheless, on what appears to be the second page of Reynolds's January 14 grievance, the Inmate Grievance Resolution Committee ("IGRC") recommended that "when inmates request a chest x-ray or sputum test for TB due to his religious affiliations, inmates should be given that option." This page indicates that it was returned to Reynolds on February 2, 1998, and reflects his signature on that date and his agreement with the IGRC response.

8 On November 30, 1998, Reynolds responded to Zwillinger's letter, requesting that he be provided with a written explanation as to why he was being denied the option of a chest x-ray or sputum test. It is unclear from the record whether any explanation, written or otherwise, was provided to Reynolds in response to this request. Nevertheless, Metzler made the following notation in the plaintiff's medical records on January 25, 1999:

> In acknowledgment of inmate's written request to superintendent requesting a CXR [chest x-ray] and sputum test instead of PPD, L. Kloff RN—Central Office Infection Control was called to discuss inmate's request. I have been advised by Ms. Kloff that there is no change in the [DOCS'] policy 1.18 last reviewed 5/96. Inmate is to be offered TB test or TB Hold. Will proceed as directed by Central Office.

9 The IGRC response to this complaint was split: two staff representatives recommended denying Reynolds's request for alternative testing while two prisoner representatives indicated their support for the plaintiff's position. On March 22, 1999, plaintiff reviewed the deadlocked response of the IGRC and requested that the grievance be appealed to the Superintendent. The Court has not been provided with any information as to the current status of this grievance.

10 The Court is also unwilling to accept defendants' argument that plaintiff's history of submitting to the PPD test establishes as a matter of law a lack of sincerity with respect to his religious beliefs.

11 Alternatively, plaintiff appears to base his Eighth Amendment theory in the denial of a chest x-ray as an alternative means of TB testing, analogizing the refusal of noninvasive TB testing to the denial of adequate medical care. To state an Eighth Amendment claim for denial of adequate medical care, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. *Farmer v. Brennan,* 511 U.S. 825, 834 (1994); *Estelle v. Gamble,* 429 U.S. 97, 104 (1976). Objectively, the alleged deprivation must involve a condition that may produce death, degeneration, or extreme pain. *See Hathaway v. Coughlin,* 99 F.3d 550, 553 (2d Cir.1996). Subjectively, the charged official must act with a state of mind "that is the equivalent of criminal recklessness; namely, when the prison official knows of and disregards an excessive risk to inmate health or safety." *Id.* (internal quotation omitted). It is clear that the plaintiff is able to satisfy neither the objective nor subjective element of an Eighth Amendment claim based on the denial of noninvasive means of TB testing.

12 A plaintiff in a Section 1983 action who has not clearly identified in his complaint the capacity in which a defendant is sued should not have the complaint automatically construed as focusing on one capacity to the exclusion of the other. *Frank v. Relin,* 1 F.3d 1317, 1326 (2d Cir.1993). Typically, the course of proceedings will indicate the nature of the liability sought. *Id.* Here, it now appears that the plaintiff has sued at least the supervisory defendants in their individual and official capacities.

13 Plaintiff's original application for appointment of counsel, submitted July 16, 1999, was denied without prejudice by Order dated July 20, 1999, for lack of a sufficiently developed record. Since that time, defendants' motion for summary judgment has been briefed and plaintiff has requested injunctive relief. The Court, having considered

> the merits of plaintiff's case, the plaintiff's ability to pay for private counsel, his efforts to obtain a lawyer, the availability of counsel, and the plaintiff's ability to gather the facts and deal with the issues if unassisted by counsel,

Cooper v. A. Sargenti Co., Inc., 877 F.2d 170, 172 (2d Cir.1989), determines that counsel should be appointed. Reynolds's claim raises important First Amendment issues with significant policy implications that should only be decided by this Court after full and considered briefing.