

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Yassin Muhiddin AREF, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No.:1:10-cv-00539-BJR
)	
Eric HOLDER, et al.,)	
)	
Defendants.)	
_____)	

**DEFENDANTS’ REPLY TO PLAINTIFFS’ SURREPLY AND IN FURTHER
SUPPORT OF THEIR CONSOLIDATED MOTION TO DISMISS**

Defendants have moved to dismiss the official-capacity claims of Plaintiff Daniel McGowan on grounds of mootness because he has been transferred from a Communications Management Unit (“CMU”) to a Residential Reentry Center (“RRC”), commonly referred to as a halfway house, pending his imminent release from the custody of the Bureau of Prisons (“BOP”).¹ *See* Defendants’ Consolidated Motion to Dismiss (“MTD”) at 8-12, ECF No. 99. Although Plaintiffs initially decided not to oppose Defendants’ mootness motion, *see* Plaintiffs’ Mem. of Law in Opp. to Defendants’ Consolidated Motion to Dismiss (“Opp.”) at 2, ECF No. 102, they have now filed a sur-reply contending that McGowan’s official-capacity claims are not moot because he was briefly placed in a federal detention center, which generally houses inmates on a temporary basis, *see* Plaintiffs’ Surreply in Further Opposition to Defendants’ Consolidated Motion to Dismiss (“Sur-reply”), ECF No. 106-1. For the reasons discussed below, McGowan does not face any reasonable prospect of spending the short

¹ Defendants also moved to dismiss, as moot, the claims of Royal Jones because, like McGowan, Jones was transferred to a RRC. MTD at 8-12. On May 1, 2013, the Court issued an order dismissing Jones from the case. Minute Order, May 1, 2013, ECF No. 110.

period of time he has left in BOP's custody in a CMU. As a result, his official-capacity claims are moot.

Moreover, on June 5, 2013, McGowan will be released from BOP's custody entirely and placed back into the community for a three-year period of supervised release under the control of the U.S. Probation Office. As a result, even if the Court were to conclude that McGowan's official-capacity claims are not currently moot, there can be no doubt they will become so when he is released from the RRC and placed on supervised release on June 5. In fact, Plaintiffs have previously conceded that under the law of the case doctrine McGowan's official-capacity claims will be moot once he is placed on supervised release. Therefore, Plaintiffs' request in their sur-reply for the Court to maintain jurisdiction over McGowan's official-capacity claims until his period of supervised release concludes in the middle of 2016 is directly contrary to established precedent and should be denied.

Defendants also briefly respond to a new argument made in Plaintiffs' sur-reply that the Defendants have mischaracterized a statement about martyrdom made by Plaintiff Kifah Jayyousi, which was cited by individual-capacity Defendant Leslie H. Smith, Chief of BOP's Counter Terrorism Unit, in his written recommendation that Jayyousi remain in a CMU. As explained below, Plaintiffs are mistaken that Defendants have mischaracterized Jayyousi's statement.

BACKGROUND

I. McGowan's Brief Transfer To A Federal Detention Center.

BOP seeks to have inmates serve the end of their sentences in RRCs as a means of transitioning the inmate from a life of incarceration to a return to life in the community.

See Declaration of Kerry Kemble, offered in support of Defendants' MTD ("First

Kemble Decl.”) ¶¶ 4-6, ECF No 99-1. To this end, on December 11, 2012, McGowan was released from the CMU at Terre Haute FCI in Indiana and transferred to a RRC in Brooklyn, New York. *Id.* ¶ 8. On June 5, 2013, McGowan will be released from the RRC and placed on supervised release subject to the authority of the U.S. Probation Office. *Id.*; *see also* Second Declaration of Kerry Kemble (“Second Kemble Decl.”) (attached hereto as Ex. A) ¶ 9.

Until he is released from BOP’s custody, McGowan, like any other inmate in a RRC, remains subject to the rules and regulations of the RRC. First Kemble Decl. ¶ 13. While many violations of a RRC’s rules are addressed and resolved by staff at the RRC itself, an inmate may also be transferred from a RRC to a county jail or a federal detention center where BOP will conduct a further review of an incident. *Id.* ¶ 13. Importantly, however, an inmate will not be permanently returned to prison unless, following a hearing, BOP determines that a violation has occurred and that the violation is serious enough to warrant officially re-designating the inmate from a RRC to a BOP prison facility, which is typically the facility where the inmate was previously incarcerated. *Id.*

On April 4, 2013, McGowan was placed in a federal detention center in Brooklyn after BOP personnel believed he had committed a violation of BOP Program Statement 1480.05, News Media Contact, which states in relevant part that “an inmate currently confined in an institution may not be employed or act as a reporter or publish under a byline.” *Id.* ¶ 4 (Program Statement 1480.05 § 8.d). Program Statements interpret BOP’s regulations in the Code of Federal Regulations. While BOP’s regulations in the C.F.R. previously prohibited inmates from publishing articles under a byline, that is no

longer the case. *See* 28 C.F.R. §540.20(b) (2006).² Rather, in response to a court decision striking down the rule, BOP rescinded the byline prohibition in 28 C.F.R § 540.20(b) in an interim rule on April 23, 2010, 75 Fed. Reg. 21162, and in a final rule on April 3, 2012, 77 Fed. Reg. 19932. As explained below, the BOP personnel who issued McGowan the incident report were initially unaware of this change in BOP policy. *See* Second Kemble Decl. ¶¶ 4-5.

As a result, on April 4, 2013, after it was discovered that McGowan had published a Huffington Post article under a byline, staff at his Brooklyn House RRC, a halfway house that accepts BOP inmates on a contractual basis, issued an incident report to McGowan for purportedly violating Program Statement 1480.05. *Id.* ¶ 4. In response, McGowan was transferred that same day to the Federal Detention Center in Brooklyn. *Id.*

After the transfer, BOP staff quickly reviewed the incident report and determined that BOP no longer generally prohibits inmates from publishing under a byline. *Id.* ¶ 5; *see also* 75 Fed. Reg. 21162 (interim rule rescinding CFR byline regulation); 77 Fed. Reg. 19932 (final rule rescinding CFR byline regulation). As a result, BOP staff concluded that the publication of the Huffington Post article did not violate BOP policy and arranged for McGowan's transfer back to the Brooklyn House RRC as quickly as practicable. Second Kemble Decl. ¶ 5. McGowan was housed in the MDC for less than

² Among other reasons for the prior rule, BOP was concerned that if inmates were permitted to publish under a byline, BOP would be faced with a substantial increase in the number of incoming periodicals it would be required to review.

twenty-two hours, and he continues to be subject to the same BOP rules and regulations as he was prior to the transfer.³ *Id.* ¶¶ 6-7.

ARGUMENT

I. McGowan’s Brief Placement In A Federal Detention Center Does Not Change The Fact That His Official-Capacity Claims Are Currently Moot.

McGowan’s equitable claims are now moot because he has been transferred from a CMU to a RRC and faces no plausible prospect of being returned to a CMU. *See* MTD at 8-12. As the D.C. Circuit has explained, “[n]ormally, a prisoner’s transfer or release from a prison moots any claim he might have for equitable relief arising out of the conditions of his confinement in prison.” *Scott v. Dist. of Columbia*, 139 F.3d 940, 941 (D.C. Cir. 1998); *see* MTD at 9. This is true not only for claims of injunctive relief but claims for declaratory relief as well. *See Dorman v. Thornburgh*, 955 F.2d 57, 58 (D.C. Cir. 1992) (prisoner’s claim for injunctive or declaratory relief regarding prison conditions “becomes moot once prisoner is no longer subject to those conditions”).

McGowan’s brief transfer to a federal detention center does not alter the fact that his equitable claims are currently moot. Upon learning of a potential violation by McGowan of Program Statement 1480.05, BOP placed him in a federal detention center in Brooklyn while it investigated the matter. Second Kemble Decl. ¶¶ 4-7. As a result of this review, within less than a day, BOP determined that no violation had occurred and McGowan was quickly returned to his RRC. *Id.* ¶ 6. As these events indicate, there is no reasonable prospect that McGowan will be erroneously designated to a prison facility,

³ When McGowan was returned to the RRC, a contractor provided him with a written “case note.” Second Kemble Decl. ¶ 7. Upon further review of the document by BOP, it was determined that it should be removed from his file. *Id.* This document therefore has no effect on the rules and regulations governing McGowan’s conduct while he remains in BOP’s custody. *Id.*

which could only occur after a hearing and after BOP determined that McGowan had committed a violation of a rule that was serious enough to warrant re-designating him to prison. *See* First Kemble Decl. ¶¶ 13, 15. Therefore, because McGowan faces no likelihood of being re-designated to prison, much less a CMU, in the little time he has left in BOP's custody, his official-capacity claims are moot and the Court should dismiss them for want of jurisdiction pursuant to Rule 12(b)(1).⁴

Even assuming *arguendo* that McGowan's equitable claims are not currently moot, they will become so on June 5, 2013 when he will be released from the RRC and placed on supervised release. Second Kemble Decl. ¶ 8. At that point, he will no longer be subject to *any* of BOP's rules or regulations. *Id.* Instead, his conduct will be governed by the terms set forth by the sentencing court in his Judgment and Commitment Order, and the U.S. Probation Service will be charged with monitoring his compliance with those court-imposed restrictions. *Id.* Accordingly, Plaintiffs' request for the Court to maintain jurisdiction over McGowan's official-capacity claims throughout the three-year years of his supervised release, *see* Sur-reply at 4, makes no sense because he will not be under the control of BOP during this period.

Moreover, this request flatly conflicts with established authority and the law of the case doctrine, which dictates that "the same issue presented a second time in the same case in the same court should lead to the same result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*) (emphasis omitted). This Court has already ruled that the claims of former Plaintiff Avon Twitty became moot at least by the time he was

⁴ McGowan's claims are moot despite the possibility that he could be placed back in prison for intentionally violating a rule or regulation. As Plaintiffs acknowledge, such a prospect does not preclude a finding of mootness because courts assume that inmates will abide by prison regulations. *See* MTD at 10-11; Plaintiffs' Sur-reply at 4.

placed on supervised release under the control of the U.S. Probation Office. *See* 3/31/11 Mem. Op. at 16, ECF No. 37. Therefore, McGowan's official-capacity claims, if not already moot, will clearly become so once he is placed on supervised release. Indeed, Plaintiffs have previously conceded this point. *See* Pls.' Opp. at 37 ("Mr. McGowan will be released from BOP custody on June 5, 2013, and his claims will then be moot under this Court's prior ruling."). Consequently, there is no basis for the Court to exercise jurisdiction over McGowan's official-capacity claims until his period of supervised release concludes in the middle of 2016.

For the reasons explained above, Defendants respectfully request that the Court dismiss McGowan's official-capacity claims because they are currently moot. To the extent the Court is not inclined to do so, Defendants are prepared to submit a supplemental declaration once McGowan is released from the RRC in early June and will seek to dismiss his official-capacity claims for reasons of mootness at that point in time.

II. Plaintiffs Offer No New Arguments In Their Sur-Reply To Show that Jayyousi Has Plausibly Alleged A Claim Of First Amendment Retaliation.

Defendants have moved to dismiss the official- and individual-capacity retaliation claims of Plaintiff Kifah Jayyousi because they fail to state a claim for legal relief and because Leslie Smith, Chief of BOP's Counter Terrorism Unit ("CTU") who is accused of retaliating against Jayyousi, is entitled to qualified immunity. *See* MTD at 12-24. In his Amended Complaint, Jayyousi alleges that Mr. Smith retaliated against him without a legitimate penological basis because of statements Jayyousi made during an August 2008 Jumah prayer. Am. Compl. ¶¶ 196-99. In his memorandum recommending that Jayyousi remain in the CMU, Mr. Smith referred to statements made by Jayyousi in August 2008, which Mr. Smith wrote included Jayyousi's statement that "Muslims should martyr

themselves to serve Allah and meet hardship in their lives.” Am. Compl. ¶ 197. In their Motion to Dismiss and Reply in support of their Motion to Dismiss, Defendants referred to Mr. Smith’s characterization of Jayyousi’s statement about martyrdom. *See, e.g.*, Defendants’ Reply in Support of Their Consolidated Motion to Dismiss at 9 (“Defs.’ Reply”) (ECF No. 105) (quoting Am. Compl. ¶ 197). In their sur-reply, Plaintiffs contend that Defendants’ Reply mischaracterized Jayyousi’s statement and attach a transcript of Jayyousi’s speech purportedly in support of this claim. Sur-reply at 4-5. As seen below, Plaintiffs are mistaken.

The attached transcript of Jayyousi’s speech, which was not attached to the Amended Complaint, states that “you are going to return to your lord to meet him with your hard work and the hardships that you have faced and done in this life; this is why we martyr [sic] but (Arabic) we created the human in hardship why full of hardship from the minute you are born you grow teeth [sic] you feel pain.” Pls.’ Surreply, Ex. 2 at 2. Jayyousi’s reference to “martyr” immediately following his discussion of meeting the lord through one’s “hard work” is therefore consistent with Mr. Smith’s characterization, which was quoted in Defendants’ Reply, that Jayyousi stated that “Muslims should martyr themselves to serve Allah and meet hardship in their lives.” Defs.’ Reply at 9 (quoting Am. Compl. ¶ 197).

For the reasons set forth at length in Defendants’ Motion to Dismiss, the allegations in the Amended Complaint demonstrate that Jayyousi has failed to plausibly allege a First Amendment retaliation claim. Specifically, Jayyousi has not plausibly alleged that Mr. Smith’s recommendation in favor of CMU placement was not an exercise of legitimate penological judgment. *See* MTD at 15-17. Likewise, Jayyousi has

failed to plausibly allege that his speech was protected by the First Amendment. *See id.* at 17-19. Consequently, his retaliation claim should be dismissed.

CONCLUSION

For the aforementioned reasons, and for the reasons set forth in Defendants' Motion to Dismiss, the Court should dismiss McGowan's official-capacity claims as moot and also dismiss McGowan's and Jayyousi's retaliation claims for failing to state a claim for legal relief and because individual-capacity Defendant Leslie Smith is entitled to qualified immunity.

Dated: May 23, 2013

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

ANTHONY J. COPPOLINO
Deputy Branch Director
Federal Programs Branch

By: ____/s/_____
NICHOLAS CARTIER
(D.C. Bar # 495850)
TIMOTHY JOHNSON
(D.C. Bar # 986295)
NATHAN SWINTON
(NY Bar)

Trial Attorneys
U.S. Department of Justice
Civil Division/Federal Programs
Mail: P.O. Box 883
Washington, D.C. 20044
Street: 20 Massachusetts Ave., N.W.
Washington, DC 20001
Ph: (202) 616-8351

Fax: (202) 616-8470

Email: nicholas.cartier@usdoj.gov

Attorneys for Defendants