IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FREDERICK ROGERS,

Plaintiff,

v.

JENNIFER HELLENBRAND and
JEAN THIEME,

Defendants.

OPINION AND ORDER

03-C-230-C

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This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. At all times relevant in this case, plaintiff Frederick Rogers was incarcerated at the Racine County Correctional Institution in Racine, Wisconsin. Plaintiff claims that he suffered a mental relapse (schizoeffective-PTSD), had auditory and visual hallucinations that his teacher was killing him, had "symptoms of past assaults," had dreams that God was killing him and endured physical pain because defendant Jennifer Hellenbrand, a teacher at a school within the Racine Institution, and defendant Jean Thieme, an educational director at the school, forced him to attend a holiday party at which another inmate read a passage from the Bible in violation of his rights under the Religious Land Use and Institutionalized

Persons Act and the free exercise and establishment clauses of the First Amendment. Currently before the court are defendants' two motions for summary judgment and motion to exclude the expert testimony of Dr. Kenneth Clark and plaintiff's motion to exclude the expert testimony of Dr. Lisa Buhs. Jurisdiction is present under 28 U.S.C. § 1331. It is unclear why defendants have filed two separate motions for summary judgment; it may have been that they feared that the single argument raised in the first motion would be insufficient. Whatever the reason, both motions were timely filed.

Defendants' first motion for summary judgment will be denied. In it, defendants argue that plaintiff's claims must fail because he has failed to adduce evidence to show that his psychological injuries were caused by his attendance at the holiday program. However, plaintiff need not prove that he suffered physical or psychological injury in order to prevail on his claims, which arise under the First Amendment and the Religious Land Use and Institutionalized Persons Act. Thus, his ability to prove that his psychological injuries were caused by the holiday program is immaterial for summary judgment purposes.

Defendants' second motion for summary judgment will be granted. With respect to his free exercise claim, plaintiff has failed to identify the religious exercise burdened by his exposure to another's expression of their religious beliefs. Plaintiff's claim under the Religious Land Use and Institutionalized Persons Act must fail also; plaintiff has not explained much less proved that his ability to practice his religion was "substantially

burdened" by hearing another inmate reading a Biblical passage. Finally, although it is a much closer case, plaintiff's claim fails under the establishment clause. Defendants had a secular purpose for the holiday party; the religious speech was that of an individual and not speech by the government itself; the holiday party was a limited public forum; and the application and approval processes for student performances at the party were religion neutral.

Finally, the motions to exclude the expert testimony of Drs. Kenneth Clark and Lisa Buhs will be denied as moot. Both witnesses's testimony relates to whether plaintiff's attendance at the holiday party caused his alleged mental anguish. As noted above, this issue is not material to the determination that defendants are entitled to summary judgment. Because I am granting defendants' motion for summary judgment with respect to all claims, it is unnecessary to determine whether these witnesses could testify at trial.

Before finding the undisputed findings, I note first that plaintiff has attempted to dispute a number of defendants' factual proposals by indicating that he will present witnesses at trial prepared to dispute the proposed fact. This is insufficient. As this court's procedures to be followed on motions for summary judgment indicate, parties must refer to evidence that supports their version of the proposed fact. Procedure to be Followed on Motions for Summary Judgment II.D.2. Acceptable forms of evidence include depositions, answers to interrogatories, admissions, affidavits and properly authenticated documentary

evidence. See Procedure I.C.1.a-f. The court has provided plaintiff with two copies of these instructions: one copy was sent with the pretrial conference order dated July 16, 2003 and the other was included with an order dated December 2, 2003, in which I extended plaintiff's deadline for responding to plaintiff's second motion for summary judgment. Summary judgment is the moment in a lawsuit when "a party must show what evidence it has that would convince a trier of fact to accept its version of events." Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir. 1999).

Second, plaintiff submitted a set of proposed facts to which defendants have not responded. See Pltf.'s PFOF, dkt. #33. All proposed facts that are material, supported by admissible evidence and not contradicted by defendants' proposed facts will be treated as undisputed. See Procedure to be Followed on Motion for Summary Judgment II.C (court will treat as undisputed any fact opposing party fails to put in dispute).

Finally, much of the "evidence" plaintiff has submitted is inadmissable. Plaintiff has attached a number of documents to his affidavit. In order to make a document admissible, the proponent of a piece of evidence must provide "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901. In other words, a proponent must provide evidence that a document is a true and accurate reflection of what he claims it to be. A proponent may do this by swearing to the document's authenticity in an affidavit. See Procedure to be Followed on Motion for Summary

Judgment II.C.1.f. Because plaintiff has not done this, I am bound by the Federal Rules of Evidence to exclude these documents from consideration.

From the parties' proposed findings of facts, I find that the following facts are material and undisputed.

UNDISPUTED FACTS

Plaintiff Frederick Rogers was incarcerated at the Racine County Correctional Institution in Racine County, Wisconsin, at all times relevant in this case. Defendant Jennifer Hellenbrand was a teacher and defendant Jean Thieme was an educational director at the Belle Venture School, which is run by the Racine facility on its grounds. The mission of the school is to provide inmates with literacy, vocational and community living education programs. Plaintiff attended several classes taught by defendant Hellenbrand during 2002.

Plaintiff signed a Department of Corrections "Religious Preference" form dated January 26, 2002, indicating that he was a member of a protestant faith. Also on that form, plaintiff identified his parent or legal guardian to be "Jesus Christ, Father God & Holy Spirit." This is the only religious preference form in plaintiff's inmate file. During 2000 and 2001, Rogers completed several courses through Emmaus Bible College Correspondance School, including "Doing Time with Jesus," "Knowing Jesus Christ" and "Lessons for Christian Living."

The Racine facility's education department sponsored a holiday party that took place on December 17, 2002. Only the school's students and facility staff were allowed to attend or participate. It is not uncommon for inmates to experience sadness or emotional stress during the holiday season because of their separation from their friends and family. The party was intended to counteract some of this sadness and stress and to provide students with an opportunity to use the skills they had learned, specifically their vocabulary, writing and speaking skills. Several of the teachers at the school formed a committee, supervised by defendant Theime, to plan and coordinate the holiday program. In an attempt to keep the program secular in nature, the committee adopted a neutral theme: "Peace on Earth, Good Will to All." Teachers at the school encouraged their students to perform a song, dance, poem or skit at the party. However, students were not required to perform and no student suffered any negative consequences for failing to do so.

Students interested in performing were permitted to choose their own presentation. However, the prison set forth several criteria for presentations: (1) the material had to reflect the theme of the program, "Peace on Earth, Good Will to All"; (2) the material could last no longer than five minutes; (3) performers had to be students of the school; (4) performers had to use appropriate language and subject material; (5) presentations could be a song, dance, poem, reading, choral group or skit and credit had to be given to the author of any non-original work; and (6) any proposed material would be subject to review by one of the

teachers. The planning committee reviewed all the applications but did not consider religious content in determining the appropriateness of the performance proposals.

Although performance was not required, attendance was mandatory. The program took place during regular school hours. Plaintiff was concerned that the program might conflict wit his religious beliefs and indicated that he did not wish to attend. Defendant Hellenbrand explained to plaintiff that if he chose not to attend, he would be marked absent, she would report the absence to the guidance department, as she reports all absences, and the guidance department would take further action if he had numerous other absences. The school had a standing policy to record all absences. If a student exhibited a pattern of chronic absences, he would be referred to the guidance office for counseling, a schedule change or removal from the school, depending on the circumstances. Conduct reports were issued only for a failure to attend a testing session, but not for normal absences.

Plaintiff attended but did not participate in the program. He watched the presentations of other students and staff, which lasted approximately two hours. Audience members were free to remain silent during the program; they were not required to sing or read along during any of the presentations. One of the student performers read from the Bible during his presentation. Plaintiff also witnessed persons engaging in prayer. Other student performed the songs, "Spiritual Gifts," "A Rendition of the Prodigal Son," "Rain to Peace," "There is Light" and "I Open Up My Heart" and the poems, "Santa Goes to Prison"

and "I Got to Get Back Home." None of the staff performances contained any religious content or references. One included an activity in which students were instructed to fill in missing verbs, nouns and adjectives in the poem, "A Visit from St. Nick." Other staff performed the songs, "Jingle Keys," "Alvin's Christmas" and "Feliz Navidad." Some of these performances conflicted with plaintiff's religious beliefs.

OPINION

A. Evidence of Harm

In their first motion for summary judgment, defendants argue that they are entitled to summary judgment because plaintiff has not submitted any admissible evidence that he suffered a mental relapse (schizoeffective-PTSD), had auditory and visual hallucinations that his teacher was killing him, had "symptoms of past assaults," had dreams that God was killing him and endured physical pain as a result of his attendance at the holiday program. See Dfts.' Br. in Supp. of Mot. for Summ. J., dkt. # 18. They argue that in order to succeed on his claims, "Rogers must show that the defendants' alleged violation of his federal rights under [the Religious Land Use and Institutionalized Persons Act] and the First Amendment caused his alleged psychological and physical injuries." Id. at 4. Defendants rely primarily on this court's holding in another case brought by plaintiff, Rogers v. Lockwood, 01-C-589-C (W.D. Wis. Sept. 26, 2003), in which I granted the defendant's motion for summary

judgment because plaintiff had failed to produce any evidence to suggest that his alleged injuries (again the triggering of post-traumatic stress disorder and schizoaffective disorder) had been caused by the defendant's cigar smoking.

This holding was premised on the well-established principle that there can be no *Eighth Amendment* violation without some showing of harm. Id. at 7. See also Hudson v. McMillian, 503 U.S. 1, 9 (1992) ("not . . . every malevolent touch by a prison guard gives rise to a federal cause of action"); Farmer v. Brennan, 511 U.S. 825, 834 (1994) (alleged Eighth Amendment deprivation must be objectively sufficiently serious); Leslie v. Doyle, 125 F.3d 1132, 1135 (7th Cir. 1997) (Eighth Amendment proportionality analysis need not be undertaken if no serious harm). However, in the context of a claim arising under the First Amendment or the Religious Land Use and Institutionalized Persons Act, a palintiff need not prove a physical or psychological injury. Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) (inmates need not allege physical injury in First Amendment context because "deprivation of the constitutional right is itself a cognizable injury").

Defendants suggest that plaintiff's inability to show causation will preclude him from recovering the only form of relief he seeks: money. This argument ignores plaintiffs ability to recover nominal or punitive damages for First Amendment violations. Id. (citing Searles v. Van Bebber, 251 F.3d 869, 879-81 (10th Cir. 2001) (nominal and punitive damages for First Amendment violation not barred)). Defendants' first motion for summary judgment

will be denied; to succeed on his claims under the First Amendment and the Religious Land Use and Institutionalized Persons Act, plaintiff need not prove that his alleged psychological injuries were the result of his attendance at the holiday party

B. First Amendment

Plaintiff claims that respondents violated his free exercise rights by forcing him to attend the holiday party. Specifically, he argues that his right to freely exercise his religion was burdened by hearing another inmate reading a passage out of the Bible. After defendants submitted evidence showing that plaintiff had identified himself as a Protestant and participated voluntarily in a number of Christian programs prior to the holiday party, plaintiff appears to have changed his story or at least added to it. In his brief responding to defendants' motion for summary judgment, plaintiff claims that "defendants snow-washed [his] true belief[s] with blasphemy against the spirit of Jesus[,] which is an unpardonable sin by imposing Santa Claus and St. Nick[,] a pagan and mystical lie that takes form [his] true beliefs of Christmas." Pltf.'s Resp. to Dfts,' M. for Summ. J., dkt. # 50, at 14.

The First Amendment prohibits prison regulations that burden an inmate's right to freely exercise the religion of their choosing unless the regulation is reasonably related to the prison's legitimate penological interests. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (citing Turner v. Safley, 482 U.S. 78, 89 (1987). Plaintiff's free exercise claim must

fail because he has failed to identify a "religious exercise" burdened by defendants acts.

In the First Amendment context, religious exercise typically refers to an act or practice mandated by or central to a particular religion. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 760 (7th Cir. 2003) (citing Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (religious exercise defined as observation of central religious belief); Thomas v. Review Board of the Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981) (religious exercise defined as behavior compelled by faith); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (same)). See also Watchtower Bible & Tract Society of New York v. Village of Stratton, 536 U.S. 150, 162 (2002) (door-to-door canvassing is religious exercise to Jehovah's Witness because evangelicalism is both mandated and central to faith). Government burdens free exercise by directly restraining or indirectly discouraging individuals from engaging in such practices. Sherbert v. Verner, 374 U.S. 398, 404 n.5 (1962) (citing American Communications Assn. v. Douds, 339 U.S. 382, 402.) See also School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the *coercive* effect of the [government act] as it operates against him in the practice of his religion.") (emphasis added).

Violations of the free exercise clause are not limited to government actions deterring individuals from engaging in religious observances. Free exercise is also burdened when government "compel[s] affirmation of a repugnant belief." See id. at 402 ("The door of the

Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views.") (citations omitted). For example, in Torcaso v. Watkins, 367 U.S. 488 (1961), the Court struck down a state provision requiring a religious oath as a qualification to hold office, because it violated principles of free exercise of religion.

Under either approach, plaintiff's free exercise claim must fail. Plaintiff has not even identified his religion, let alone adduced evidence suggesting that his religion mandates insulation from contrary views. (At most, evidence submitted by defendants indicates that plaintiff has adhered to the Christian faith of some Protestant denomination in the years preceding the events at issue in this suit). There is no suggestion that plaintiff would have been prevented from expressing his own religious beliefs at the holiday party. Moreover, the undisputed facts show that plaintiff was not compelled or even encouraged to read from the Bible or acknowledge Santa Claus. In short, plaintiff has failed to identify or demonstrate how exposure to religious views contrary to his own burdened his ability to exercise the religion of his choice. Plaintiff may well have been offended by the thoughts and expressions to which he was exposed at the holiday party, "but offense alone does not in every case show a violation." Lee v. Weisman, 505 U.S. 599, 597 (1992). Accordingly, defendants will be

granted summary judgment with respect to plaintiff's free exercise claim.

C. Religious Land Use and Institutionalized Persons Act

The Religious Land Use and Institutionalized Persons Act defines "religious exercise" more broadly than that term has been defined in the free exercise context. Civil Liberties for Urban Believers, 342 F.3d at 760. The activity need not be central to one's religion or mandated by it to qualify as a protected religious exercise under the act. 42 U.S.C. § 2000cc-5(7). However, RLUIPA protects against only "substantial burden[s] on the religious exercise" of a prisoner. 42 U.S.C. § 2000cc-1. The Court of Appeals for the Seventh Circuit has construed "substantial burden" to mean something that necessarily bears direct, primary and fundamental responsibility for rendering religious exercise . . . effectively impracticable." Civil Liberties for Urban Believers, 342 F.3d at 761. Plaintiff's claim misses this mark by a wide margin. There is no indication in his briefs, evidence or proposed facts that simply being exposed to the religious views of others hinders his ability to exercise his own religion in any way, let alone that such exposure would render observation of his faith "effectively impracticable." As noted above, plaintiff has failed even to adduce evidence identifying his religious beliefs or indicating how he practices or observes his religion. Without this information, it is impossible to determine whether

defendants' actions make it impracticable for plaintiff to exercise his religion.

D. Establishment Clause

Finally, plaintiff contends that defendants violated the establishment clause by allowing inmates to engage in religious activity at holiday party. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Lee, 505 U.S. at 587. The establishment clause provides that "Congress shall make no law respecting an establishment of religion." Its prohibition on government intervention with religious affairs extends to state actors under the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

The three-prong test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971), remains the prevailing standard by which establishment clause claims are to be evaluated, despite criticism of the test from certain members of the Court. Books v. City of Elkhart, Indiana, 235 F.3d 292, 301 (7th Cir. 2000). Under Lemon, courts are to determine (1) whether a program has a secular purpose, (2) whether its primary purpose is to advance or inhibit religion, and (3) whether it fosters excessive entanglement between government and religion. Id. (citing Lemon, 403 U.S. at 612-13). If any one

of these three prongs are not met, the program violates the establishment clause. Id. (citing Edwards v. Aguillard, 482 U.S. 578, 583 (1987)). Plaintiff does not suggest how the holiday party could entangle government with religion. Given the apparently one-time nature of the party, concerns of excessive entanglement are unwarranted. With respect to the first two prongs, in subsequent cases, the court has analyzed them together under a single endorsement test, id. (citing County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989)), for which courts are to determine whether a program has either the purpose or effect of endorsing religion. County of Allegheny, 492 U.S. at 592. This inquiry is judged from the perspective of a reasonable observer. Id. at 620.

1. Governmental or private speech

Of primary concern in determining whether religious speech constitutes an endorsement of religion by the government is whether the speech was governmental or private. Lee, 505 U.S. at 587-88 (prayer at public school function violated establishment clause because speaker statements were attributable in part to government) Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 302-03 (2000) (same). See also Charles, 348 F.3d at 610 ("it must be fair to say that the *government*

itself has advanced religion through its own activities and influence") (citation omitted). "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Santa Fe Independent School Dist., 530 U.S. at 302 (quoting with approval Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.)).

In Lee, 505 U.S. 577, the Court held that a prayer delivered by a rabbi at a middle school graduation ceremony violated the establishment clause. The Court reasoned that the rabbi's speech was attributable to the government because the school principal made the decision to have a prayer, selected the rabbi, and exercised some control over the content of the prayer. Id. at 587-88. In a similar case, Sante Fe Independent School Dist., 530 U.S. 290, involving a challenge to student-led prayer before football games, the defendants argued that their case was distinguishable from Lee because the pre-game speaker was chosen by a majority vote of the students and not directly by the school itself. The Court rejected this distinction as determinative and concluded that the student's speech was not "private" under the school's program. Id. Of central concern to the Court in reaching this conclusion was the fact that the school had not created a public forum; the Court noted that the district had not evinced any

intent to open the pregame ceremony to indiscriminate use and that "the majoritarian process implemented by the [school] district guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." Id. at 302-04.

In a number of other cases, the Supreme Court has held that individual contributions at government created public forums to be private speech. Rosenberger v. Rector and Visitors of the University of Va., 515 U.S. 819 (1995); Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981). Government creates a public forum when it designates a place for use by the public for assembly and speech, by certain speakers or for discussion of certain subjects. Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 802 (1985) (citing Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45-46 n.7 (1983)). The holiday party in this case qualifies as a limited public forum; members of the school were given a place and time to express their own views about the holiday season and the party theme of peace on earth, good will to all. Plaintiff has adduced no evidence suggesting that inmates were pressured to adopt or express a religious view on the subject or that defendants discouraged a particular religious

viewpoint.

Such limitations as the five minute cap on performances do not strip the holiday program of its status as a public forum. "Reasonable time, place and manner restrictions are permissible." Perry, 460 U.S. at 46. Similarly, application and approval processes are not problematic so long as they are neutral in both criteria and application. Capital Square Review and Advisory Board, 515 U.S. at 763 (no establishment clause violation when religious expression at public forum was not sponsored by government and "permission was requested through [] same application process and on [] same terms required of other private groups.").

By creating a generally open forum for expressions of a wide variety of religious and non-religious viewpoints, government does not sponsor or endorse the views of the individual speakers and "'any benefit to religion . . . [is] no more that incidental.'" Capital Square Review and Advisory Bd., 515 U.S. at 762 (quoting Lamb's Chapel, 508 U.S. at 395). Plaintiff has failed to adduce evidence showing that the speech involved in this case was anything other than individual expressions at a limited public forum.

2. Purpose

The creation of a public forum does not shield defendants from all scrutiny under

the establishment clause. Sante Fe Independent School Dist., 530 U.S. at 303 n.13 (citing Capital Square Review and Advisory Board, 515 U.S. at 772 (O'Connor, J., concurring)). The holiday party may violate the establishment clause if defendants' primary purpose for holding it is to advance or inhibit religion. See Lemon, 403 U.S. at 612-13; Agostini v. Felton, 521 U.S. 203, 222-23 (1997). According to the undisputed facts guiding this analysis, the purpose of the holiday program was neutral: counteracting some of this sadness and stress and providing the school's students with an opportunity to use the skills they had learned.

Plaintiff has neither argued nor submitted evidence suggesting that defendants had any other motive. In Sante Fe Independent School Dist., 530 U.S. at 306-09, the Court indicated that the stated policy of "solemnizing" football games had religious overtones and the history of the particular policy reinforced the conclusion that the school's policy explicitly and implicitly encouraged public prayer; the policy had evolved from the "long-sanctioned office of 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation." Plaintiff has not identified anything about the structure of the holiday program having religious overtones or suggesting that the holiday party is the descendant of a more devout tradition.

Although plaintiff has not developed his argument, he seems to be saying that the

holiday party is a Christmas party and therefore, inherently Christian. As noted above, plaintiff suggests also that the references to Santa Claus were an endorsement of anti-Christian, pagan beliefs. Many aspects of the winter holiday season have attained secular status in our society, although they are derived from religious practices. E.g., County of Allegheny, 492 U.S. at 616 n.65 (Christmas tree and Santa Clause have become secular symbols). Moreover, plaintiff has failed to support the bald assertion he makes in his briefs that this was explicitly a Christmas party. There is no evidence suggesting that performances with Christmas themes were encourage d or that expressions of other faiths were discouraged. Similarly, there is no evidence suggesting that pagan themes were favored or disfavored. "[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Rosenberger, 515 U.S. at 839.

3. Effect of endorsing religion

In addition to evaluating whether government had a neutral purpose for its acts, "an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents . . . as an endorsement, and by the nonadherents as a disapproval." Books,

235 F.3d at 305 (citation and internal punctuation omitted). This concern is negligible in the present case. Only students of the school and staff members attended the holiday party; all students were informed of the religion-neutral guidelines for student performances. The party theme, peace on earth, good will to all, is neutral; the program name, "holiday party," is neutral; and the majority of the performances focused on secular themes. In evaluating establishment clause claims, courts must analyze religious expressions in their full context. Books, 235 F.3d at 304 (when evaluating the effect of a religious expression, courts are "charged with the responsibility of assessing the totality of the circumstances of the [expression] to determine whether a resonable person would believe the [expression] amounts to an endorsement of religion) (citing County of Allegheny, 492 U.S. at 597). The religious import of an expression can be diminished substantially when it is surrounded by secular messages. See County of Allegheny, 492 U.S. at 598 ("the effect of a creche display turns on its setting" because "the context of the display [could] detract[] from the creche's religious message"); Lynch V. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (secular symbols surrounding creche in city's holiday display "change[d] what viewers may understand to be the purpose of the display" and "negate[d] any message of endorsement").

Even when religious invocations are authorized by the government, made on government property and at a government sponsored event, they are not necessarily

attributable to the government. Lee, 505 U.S. 587-88. The First Amendment "'forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma . . . . [and] [t]he state has no legitimate interest in protecting any or all religions from views distasteful to them.'" Linnemeir v. Board of Trustees of Purdue Univ., 260 F.3d 757 (7th Cir. 2001) (quoting Epperson v. Arkansas, 393 U.S. 97, 106-07 (1968)). Government may grant access to its facilities to individuals who wish to express their religious views without running afoul of the establishment clause so long as it does so on a religion-neutral basis. E.g., Rosenberger, 515 U.S. 842 ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises."). Because plaintiff adduced no evidence to suggest that the holiday party was anything other than a limited public forum at which individual expressions where subject only to religion neutral regulations, defendants will be granted summary judgment with respect to plaintiff's claim under the establishment clause.

ORDER

IT IS ORDERED that

(1) Defendants' first motion for summary judgment is DENIED. Plaintiff need not prove psychological or physical injury to succeed on his claims under the First Amendment or the Religious Land Use and Institutionalized Persons Act;

(2) Defendants' second motion for summary judgment is GRANTED. Plaintiff has failed to adduce evidence that would allow a reasonable juror to find in his favor on any of his claims; and

(3) Defendants' motion to exclude the expert testimony of Dr. Kenneth Clark and plaintiff's motion to exclude the expert testimony of Dr. Lisa Buhs will be DENIED as moot;

(4) This case is DISMISSED and the clerk of court is directed to enter judgment for defendants Hellenbrand and Thieme.

Entered this 4th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge