IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FARD MUHAMMAD,	)	
	)	
Plaintiff	)	
	)	
vs.	)	Civil Action
	)	No. 02-CV-187
COUNTY OF LEHIGH COMMISSION,	)	
	)	
LEHIGH COUNTY PRISON,	)	
	)	
EDWARD SWEENEY,	)	
	)	
NANCY AFFLERBACH, DEPUTY WARDEN OF TREATMENT,	)	
	)	
DALE MEISEL, DEPUTY WARDEN,	)	
	)	
CINDY EGIZIO, DEPUTY WARDEN OF INMATE SER, and	)	
	)	
SAM IADIO,	)	
	)	
Defendants	)	

* * *

APPEARANCES:

FARD MUHAMMAD
Pro se

WILLIAM J. DEVLIN, JR., ESQUIRE,
On behalf of Defendants,
County of Lehigh Commission,
Lehigh County Prison,Edward
Sweeney, Nancy Afflerbach,
Deputy Warden Of Treatment,
Dale Meisel, Deputy Warden, and
Cindy Egizio, Deputy Warden
Of Inmate Ser

* * *

OPINION

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendants' Motion to Dismiss for Failure to Follow the Court's Order of January 22, 2003, which motion was filed April 24, 2003 on behalf of all defendants except Sam Iadio. For the reasons expressed below, we grant in part and deny in part defendants' motion. Specifically, we direct pro se plaintiff to serve upon all defendants by October 31, 2003, in conformity with Rule 5 of the Federal Rules of Civil Procedure, his Amended Complaint, his Petition for Leave to Amend the Complaint, his "Pursuant to F.R.Civ.P. 12(A) Plaintiff, Fard Muhammad's Answer to Defendants, Edward Sweedney, Nancy Afflerbah, Dale Meisal, Cindy Egizio Sam Claudio's Response to Complaint Via Motion to Dismiss", and all other documents which plaintiff has filed with the court.

Plaintiff has not responded to defendants' motion. To be timely pursuant to Rule 7.1(c) of the Local Rules of Civil Procedure for the Eastern District of Pennsylvania, plaintiff's response would have had to be filed by May 8, 2003. See also Fed.R.Civ.P. 7(e). Because plaintiff has not responded to defendants motion, we will consider all of defendants' factual averments as true.

This matter was initiated on January 11, 2002 when plaintiff filed a motion to proceed in forma pauperis, which was

granted. The civil action commenced on May 17, 2002 when plaintiff filed his Complaint. The case was initially assigned to our late colleague, former United States District Judge Jay C. Waldman. On January 30, 2003 the matter was reassigned to the undersigned.

In his pro se Complaint, plaintiff prisoner alleges that defendants county, prison, and prison officials violated his Constitutional rights to the free exercise of religion and equal protection of law. More particularly, plaintiff claims that his right to the free exercise of religion under the First Amendment through the Fourteenth Amendment of the United States Constitution has been violated. See Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L. Ed. 2d 1213 (1940). He also claims that his right to Equal Protection of law under the Fourteenth Amendment of the United States Constitution has been violated.

Specifically, plaintiff subscribes to the Islamic faith. He alleges that defendants will only permit him to attend the Friday Congregational Prayer, or Jummah, on a bi-weekly basis, as opposed to allowing plaintiff to attend weekly.

All defendants except Sam Iadio responded to plaintiff's Complaint on August 6, 2002 by filing Defendants, Edward Sweeney, Nancy Afflerbach, Dale Meisel, Cindy Egizio, The County of Lehigh Commission and Lehigh County Prison Motion to

Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

On January 22, 2003 Judge Waldman issued three Orders. One Order granted plaintiff's petition to file an Amended Complaint and directed that the Amended Complaint be filed and served. Another Order denied defendants' motion to dismiss as moot, but permitted defendants to refile in light of the Amended Complaint if appropriate. The third Order denied plaintiff's petition to stay the proceedings without prejudice to refile upon a showing that service of the petition had been made upon defendants.

Defendants were surprised by Judge Waldman's Orders because none of plaintiff's pleadings and documents had been served upon them. Despite defendants' surprise, defendants waited to see if plaintiff would abide by Judge Waldman's Orders, particularly in regard to Judge Waldman's directive that proper service of these items be made upon defendants.

Defendants filed the within motion on April 24, 2003 because plaintiff had not yet served the pleadings and documents upon defendants. In their motion, defendants seek dismissal of the Complaint or, in the alternative, an Order directing plaintiff to comply with the Federal Rules of Civil Procedure and Judge Waldman's Orders. For the reasons expressed below, we grant defendants' motion in part and deny it in part.

Sanctions

In determining whether or not to dismiss a complaint because of violations by the plaintiff and the prejudice inflicted upon the defendant, the court must examine the totality of the circumstances. The trial court must balance the following factors:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Poulis v. State Farm Fire and Casualty Company, 747 F.2d 863, 868 (3d Cir. 1984)(emphasis in original).

Defendants argue that the Poulis factors are met because plaintiff's conduct is willful and because defendants have demonstrated a meritorious defense. However, dismissal is the most severe remedy for plaintiff's malfeasance. Despite the severity of the remedy, nevertheless, dismissal is appropriate "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642, 96 S.Ct. 2778, 2781, 49 L. Ed. 2d 747, 751 (1976).

Next we evaluate the Poulis factos in light of the

record in this case. Initially, we consider the first Poulis factor, the extent of the party's personal responsibility. The fact that plaintiff is pro se does not lessen his responsibility. See e.g. Emerson v. Thiel College, 296 F.3d 184 (3d Cir. 2002). Because plaintiff is pro se, he bears sole responsibility for his failures to perfect service of process and obey court Orders. Accordingly, we find the first factor met.

The second Poulis factor is the prejudice to the adversary caused by the failure to meet scheduling Orders and respond to discovery. Defendants are prejudiced by plaintiff's failure to prosecute this action. Plaintiff has failed to provide defendants with the Amended Complaint, the document which lists plaintiff's accusations and alleged grievances. Plaintiff has also failed to provide defendants with other documents and information providing the details of plaintiff's claims. It is fundamentally unfair to permit plaintiff to continue this civil action, exposing defendants to liability and potential loss of esteem in the community, without identifying the specifics of the allegations to which defendants must respond. Accordingly, we find the second Poulis factor met.

The third Poulis factor is a history of dilatoriness. Plaintiff has demonstrated such a history. Judge Waldman dismissed plaintiff's Petition for Stay of Proceedings because plaintiff had failed to serve defendants with the petition.

Judge Waldman further directed plaintiff to serve the Amended Complaint upon defendants, which plaintiff also failed to do.

Plaintiff acknowledged this failure in a letter to defense counsel in which plaintiff apologized for not serving the defendants and promised to serve the defendant. Plaintiff has yet to make good on that promise. Accordingly, we find the third Poulis factor satisfied.

The fourth Poulis factor is whether the conduct of the party was willful or in bad faith. While there is scant evidence that plaintiff's failure to perfect service is motivated by bad faith, the record reflects that plaintiff's actions may be the result of a conscious decision. Plaintiff's filings reflect his understandable initial unfamiliarity with the Federal Rules of Civil Procedure. However, subsequently plaintiff has had the benefit of observing how defendant serves papers upon plaintiff, as well as a letter from defense counsel explaining the necessity of service of process, and court Orders directing service. Accordingly, we conclude that the fourth Poulis factor is satisfied.

The fifth Poulis factor is the effectiveness of sanctions other than dismissal. The effectiveness of alternative sanctions is yet to be tested, although the options are limited. Plaintiff lacks significant financial means. Therefore, financial penalties are not likely to have an impact. In fact,

there appears to be little except the prospect of dismissal, or the actual dismissal of plaintiff's Complaint, as a potential sanction for plaintiff's wrongdoing. Accordingly, the fifth Poulis factor has not been satisfied.

The sixth and final Poulis factor is the meritoriousness of the claim or defense. Defendants claim that they have established a meritorious defense to plaintiff's claims which would warrant dismissal of plaintiff's Complaint regardless of plaintiff's misconduct. Defendants contend that the prison rule limiting plaintiff to bi-weekly attendance at the Friday Jummah falls within a statutory exception which permits the government to "substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(b).

Defendants argue that this exception is applicable because the prison rule furthers a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(1). However, defendants do not specify what this compelling governmental interest is. Without these details, we cannot access whether or not defendants have a meritorious defense.

Moreover, defendants do not address the second requirement of the statutory exception upon which they rely. The statute provides that the government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the 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. § 2000bb-1(b) (emphasis added).

Not only do defendants not identify the compelling government interest, but they do not indicate why limiting plaintiff to one religious service every two weeks is the least restrictive means of furthering that governmental interest. To the extent that plaintiff's averments in the Complaint or the Amended Complaint have any merit, it may be found in this second requirement of 42 U.S.C. § 2000bb-1(b). Therefore, because plaintiff has a facially meritorious claim, the final Poulis factor is not met.

"Not all of [the Poulis] factors need be met for a district court to find dismissal is warranted." Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988). Nevertheless, we believe that the interests of justice would be best served by permitting plaintiff one last opportunity to conform his behavior to the Federal Rules of Civil Procedure and this court's Orders. To that end, we give the plaintiff a date certain, October 31, 2003, by which he shall serve defendants with his pleadings and other documents or risk dismissal.

Conclusion

For all the foregoing reasons we grant in part and deny

in part defendants' motion to dismiss. Plaintiff is directed to serve upon defendants by October 31, 2003 his Amended Complaint, his Petition for Leave to Amend the Complaint, his "Pursuant to F.R.Civ.P. 12(A) Plaintiff, Fard Muhammad's Answer to Defendants, Edward Sweedney, Nancy Afflerbah, Dale Meisal, Cindy Egizio Sam Claudio's Response to Complaint Via Motion to Dismiss", and all other documents which plaintiff has filed with the court. Finally, plaintiff is directed to comply with Rule 5 of the Federal Rules of Civil Procedure regarding service and filing or pleadings and other papers and with this court's Orders.

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CINDY EGIZIO, DEPUTY WARDEN OF INMATE SER, and	)	
	)	
SAM IADIO,	)	
	)	
Defendants	)	

ORDER

NOW, this 29th day of September, 2003, upon consideration of Defendants' Motion to Dismiss for Failure to Follow the Court's Order of January 22, 2003, which motion was filed April 24, 2003 on behalf of all defendants except Sam Iadio; it appearing that plaintiff has not responded to defendants' motion; upon consideration of the memorandum of law in support of defendants' motion; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that the motion is granted in part and denied in part.

IT IS FURTHER ORDERED that on or before October 31,

2003, plaintiff shall file and serve upon defendants his Amended Complaint, his Petition for Leave to Amend the Complaint, his "Pursuant to F.R.Civ.P. 12(A) Plaintiff, Fard Muhammad's Answer to Defendants, Edward Sweedney, Nancy Afflerbah, Dale Meisal, Cindy Egizio Sam Claudio's Response to Complaint Via Motion to Dismiss", and all other documents which plaintiff has filed with the court.

IT IS FURTHER ORDERED that failure of plaintiff to serve the documents by October 31, 2003 may result in dismissal of this civil action.

IT IS FURTHER ORDERED that plaintiff shall comply with Rule 5 of the Federal Rules of Civil Procedure regarding service and filing of pleadings and other papers.[1]

BY THE COURT:

_____
James Knoll Gardner
United States District Judge

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[1] Rule 5 provides in pertinent part:

> Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.