

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**MAC HUDSON,
DERRICK TYLER,**

Plaintiffs,

v.

C.A. No. 01-12145-RGS

MICHAEL MALONEY, et al.,

Defendants.

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT**

Defendants submit the following memorandum in support of their Motion for Summary Judgment, pursuant to Mass. R. Civ. P. 56.

INTRODUCTION

Plaintiffs Mac Hudson ("Hudson") and Derrick Tyler ("Tyler") are inmates within the custody of the Massachusetts Department of Correction ("Department"). Both Hudson and Tyler are currently incarcerated at MCI-Cedar Junction in S. Walpole, Massachusetts ("Cedar Junction"). Named as defendants are Michael Maloney, formerly Commissioner of Correction; Peter Allen, formerly Superintendent of Cedar Junction; Peter Pepe, formerly Superintendent of Cedar Junction; Andrea Emodi, formerly Director of Program Services; and Sherry Elliot, Director of Treatment at Cedar Junction ("defendants").

Plaintiffs have brought this action seeking declaratory and injunctive relief and damages for alleged violations of their free exercise of religion. Plaintiffs' complaint raises claims under 42 U.S.C. §1983 and Department of Correction regulation 103 CMR 471.00 et seq. Specifically, plaintiffs allege a violation of their rights under the First and Fourteenth Amendments where the

defendants have: (1) refused to provide plaintiffs with Halal meals; (2) allowed non-Muslim inmate kitchen workers to prepare plaintiffs' meals; (3) required the use of prayer towels instead of prayer rugs; (4) violated the Equal Protection Clause by denying plaintiffs' request for Halal meals, yet providing other inmate religious groups with meals consistent with their religions. On March 29, 2004, the Court (Stearns, D.J.) entered an order denying plaintiffs' request for a preliminary injunction.

STATEMENT OF UNDISPUTED FACTS

1. Plaintiffs Mac Hudson and Derrick Tyler are inmates within the custody of the Massachusetts Department of Correction ("DOC"), currently incarcerated at MCI-Cedar Junction, a maximum security state prison. Complaint, ¶¶ 1, 2; Affidavit of Sherry Elliot, ¶ 2.¹

2. Plaintiffs profess to be members of the Nation of Islam and observe the religious practices of Islam such as the Ramadan fast, annual Eid feasts, praying five (5) times daily, using prayer oil, wearing kufis and prayer beads, reading from the Qur'an, dietary restrictions prohibiting the consumption of pork or pork by-products, non-Halal meats and corn, and attending Friday Jumah services. Complaint, ¶¶ 15-16, 23-34.

3. Plaintiffs are able to observe the religious practices of Islam such as the Ramadan fast, annual Eid feasts, praying five (5) times daily, wearing kufis and prayer beads, reading from the Qur'an, dietary restrictions prohibiting the consumption of pork or pork by-products, non-Halal meats and corn, and attending Friday Jumah services. Elliot Affidavit, ¶¶ 4-10.

4. Plaintiffs have a choice of eating the standard menu that is free from all pork and pork by-products or the vegetarian alternative menu. Hudson and Tyler have been advised that, as followers of Islam, they may chose to eat the vegetarian alternative menu. The vegetarian

¹ Affidavit of Sherry Elliot is attached hereto as Exhibit 1.

alternative menu substitutes the meat items provided to other inmates with vegetarian items made of soy, wheat or other vegetable products. Elliot Affidavit, ¶¶ 4, 6; Affidavit of Peter Szafir, ¶¶ 2, 3.²

5. The Department presently houses over 10,000 inmates who must be fed three (3) meals per day. There are four menus in place at all times: the standard menu, which does not contain pork or pork by products, including lard; the alternative vegetarian menu, which is entirely free of any meat or meat-by-products and is designed to accommodate a variety of religious dietary restrictions; the kosher menu; and the medical diet menu. Inmates who are practicing Muslims, Rastafarians, Buddhists, Hindus, Hare Krishnas, Seventh Day Adventists, and Catholics during Lent, may partake of the Department's alternative vegetarian menu. The alternative vegetarian menu was instituted throughout the prison system on June 4, 2000 and was approved for Muslim inmates in December, 2000. Szafir Aff. ¶ 2.

6. The menus for all inmates meals, including the alternative vegetarian menu, are prepared under the supervision of a registered dietician and meet the Recommended Dietary Allowance (R.D.A.) of the Food and Nutrition Board, National Academy of Sciences, National Resource Council, (revised 1989) and the American Correctional Association. Szafir Aff., ¶ 3.

7. Food preparation within a prison involves cooking very large quantities of food and the kitchen equipment of each prison is specially designed for that purpose. The preparation of specialized meals is very burdensome where the prisons lack kitchen equipment designed to prepare small quantities of food, kitchen staff would have to be diverted from performing normal food preparation duties in order to prepare the small quantities of food, and the difficulty and expense of purchasing and storing a variety of foods for separate meals. Szafir Aff., ¶ 4.

² Affidavit of Peter Szafir is attached as Exhibit 2.

8. The Department's policy of not providing special individualized meals to inmates also helps to prevent conflicts between inmates who feel that some inmates are receiving special treatment from prison staff. Conflicts may arise between groups of inmates where one group feels another group is receiving preferential treatment, this is especially true for food issues since food plays an important role in the daily lives of inmates and inmates in the chow hall can easily observe who is receiving special meals. Some inmates join a religion merely to obtain a different diet, without intending to follow the religion's practices, which creates conflicts with other inmates who have a sincere belief in the religion. Elliot Aff., ¶ 5; Szafer Aff., ¶ 5.

9. The Department does not have the ability to prepare Kosher meals in separate kitchens in any of its facilities, as required under Jewish dietary laws, so the Food Services Division contracts with a vendor to provide a Kosher menu. The Department's three other menus are prepared in the institutions and are not Kosher. Szafer Aff., ¶ 6.

10. Purchasing Halal dinners from an outside vendor would cost the Department nearly three times more money than is allocated for the standard menu and more than twice as much as the Department incurs for the cost of the alternative vegetarian meals. The Department is required to spend a comparable rate per meal for the Kosher meals, however, due to the lack of Kosher kitchen facilities. Because there are significantly more inmates who identify themselves as Muslims than Jews, thus, the cost of providing Halal meals for Muslim inmates would be prohibitive. Also, the Department has determined that it would be very difficult to obtain sufficient numbers of Halal meals on a regular basis since there is not a consistent and reliable supply of Halal meals available. Szafer Aff., ¶ 7.

11. Plaintiffs have access to prayer towels to be used in their cells for daily prayers. Complaint, ¶ 49; Elliot Aff., ¶ 8.

12. The Department's property regulations place strict limits on the type and amount of personal property inmates may keep within their cells. 103 CMR 403.10 (2001). The restrictions on inmate personal property are necessary in order to reduce fire hazards, reduce areas where inmates can secrete contraband, facilitate quicker and more thorough cell searches and reduce sanitation and housekeeping hazards. Muslim inmates are provided with a prayer towel instead of a prayer rug because prayer rugs are much bulkier and heavier than prayer towels. Prayer rugs take up considerably more room in a cell than a prayer towel and present a fire hazard and a housekeeping hazard. The larger size of prayer rugs also make it easier for inmates to hide contraband within the cell and more difficult for staff to search than a prayer towel. A prayer rug has to be unrolled in order to search for contraband and re-rolled after the search, while a prayer towel can often be searched by the staff person quickly running his hands over it. Also, prayer towels present less of a sanitation problem where they can be regularly washed by the inmates. Elliot Aff., ¶ 7.

ARGUMENT

I. Standard Of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "genuine" issue is one "that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A "material" issue is one that "affect[s] the outcome of the suit..." Id. at 248. The burden is on the moving party to aver the lack of a genuine, material factual issue, Finn v. Consolidated Rail Corp., 782 F.2d 13, 15 (1st Cir. 1986).

If a motion for summary judgment is properly supported, the burden shifts to the non-movant to show that a genuine issue exists. Donovan v. Agnew, 712 F.2d 1509, 1516 (1st Cir. 1983). "A party opposing summary judgment must 'present definite, competent evidence to rebut the motion.'" Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994). "Brash conjecture, coupled with earnest hope that something concrete will eventually materialize, is insufficient to block summary judgment." Id. at 581.

II. Defendants Are Entitled To Judgment On The § 1893 Claim.

A. No Violation of First Amendment Rights

It is well established that prisoners do not give up all constitutional protections upon their incarceration, Bell v. Wolfish, 441 U.S. 520, 545 (1979), including the free exercise of religion guaranteed under the First Amendment. Cruz v. Beto, 405 U.S. 319 (1972). However, the "free exercise" right is necessarily limited by the fact of incarceration, and may be curtailed in order to achieve legitimate correctional goals or to maintain prison security." O'Lone v. Shabazz, 482 U.S. 342, 348 (1987). The O'Lone Court stated that prisoners' constitutional rights are subject to restrictions based on "valid penological objectives, including deterrence of crime, rehabilitation of prisoners and institutional security." The O'Lone Court adopted the standard of review set out in Turner v. Safley, 482 U.S. 78, 89 (1987), stating that,

To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.

O'Lone, 482 U.S. at 349. In Turner v. Safley, 482 U.S. at 89, the Supreme Court held that "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." The Turner Court set out four factors to be considered in determining when a regulation is reasonably related to legitimate penological

interests. First, there must be a “valid rational connection between the prison regulation and the legitimate government interest put forward to justify it.” Id. at 89. Second, courts must consider whether there are “alternative means of exercising the right that remain open to prison inmates.” Id. Third, what is the “impact of accommodation of the asserted right on guards and other inmates, and on the allocation of prison resources generally.” Id. Fourth, courts must ascertain whether there are “ready alternatives” available to the regulation. The “existence of obvious, easy alternatives may be evidence the regulation is not reasonable.” Id.

1. Religious Diet

Plaintiffs alleges that the failure to provide them with a Halal diet violates their rights under the First Amendment. However, there is no requirement under Islam that Muslims may only eat meat that has been ritually slaughtered, known as Halal. Nor does Islam require its adherents to eat meat. Affidavit of Ibrahim Rahim, ¶¶ 5, 6.³ Plaintiffs are unable to show that eating the alternative vegetarian diet conflicts with Islamic laws. See Rashad v. Maloney, 16 Mass. L. Rptr. 162, 2003 WL 1906778 *4 (Mass. Super. Ct.) (failure to provide Muslim inmate with Halal meat does not violate First Amendment).⁴ Providing plaintiffs with a choice of a pork-free menu or an alternative vegetarian menu does not violate their First Amendment rights.

Assuming, arguendo, that the failure to provide plaintiffs with a menu that includes Halal meat infringes upon their religious rights, it is clear that the prison policy does not violate the First Amendment under Turner, supra. It is well established that prison policies placing limitations on inmate religious diets are rationally related to a prison’s interests in reducing costs and operational burdens by keeping its food service as simple as possible and not providing inmates with a vast array of religious menus. See e.g., Johnson v. Horn, 150 F.3d 276, 282 (3rd

³ Affidavit of Ibrahim Rahim is attached as Exhibit 3.

⁴ A copy of this decision is attached for the court’s convenience as Attachment A.

Cir. 1998) (“prison has legitimate interest in keeping its food service system as simple as possible.”); Ward v. Walsh, 1 F.3d 873, 877 (9th Cir. 1993) (denial of request for kosher diet was reasonable in light of goal of avoiding complicated food service); Denson v. Marshall, 59 F. Supp. 156, 158-59 (D. Mass. 1999) (denial of inmate’s request for a special feeding routine upheld where prison officials have a “legitimate interest in operating an efficient and cost-effective food program”), aff’d 230 F.3d 1347 (1st Cir. 2000) (per curiam); Abdullah v. Fard, 974 F. Supp. 1112, 1118 (N.D. Ohio 1997) (prison’s decision not to provide Muslim inmates with Halal meats upheld as reasonable); Benjamin v. Coughlin, 708 F. Supp. 570, 575-76 (S.D.N.Y. 1989) (Cost and administrative burdens justified denial of Rastafarian religious diet), aff’d, 905 F.2d 571, 579-80 (2nd Cir. 1990), cert. denied, 498 U.S. 951; Muslim v. Frame, 854 F. Supp. 1215, 1224 (E.D. Pa. 1994) (defendants were granted summary judgment where Muslim inmates were provided a pork-free diet); Kahey v. Jones, 836 F.2d 948, 951 (5th Cir. 1988) (Muslim inmate not entitled to specialized diet where the expense and diversion of resources from other penological goals could be considerable); Dehart v. Horn, 277 F.3d 47, 53 (3rd Cir. 2000) (prison’s interest in an efficient food system is a legitimate penological concern under Turner); Martinelli v. Dugger, 817 F.2d 1499, 1507 (11th Cir. 1987) (prison’s restrictions on religious diets “rationally related to goal of avoiding excessive administrative expense”); Abdul-Malik v. Goord, 1997 WL 83402, * 3-6 (S.D.N.Y. February 27, 1997) (denial of Halal diet did not violate the First Amendment where Muslim inmates had a choice of a pork-free diet or a religious alternative menu, a meatless diet designed to meet dietary requirements of Islam and other religions);⁵ Muhammad v. Warithu-Deen Umar, 98 F. Supp.2d 337 (W.D. N.Y. 2000) (access to religious alternative diet did not violate First Amendment); Salaam v. Collins, 830 F. Supp. 853, 857 (D. Md. 1993); Allah v. Stachelek, 1998 WL 281930 at * 9 (E.D. Pa. May 29, 1998)

⁵ A copy of the decision is attached as Attachment B.

(Muslim inmates entitled to a pork-free diet);⁶ Collins v. Rhode Island Department of Corrections, 1994 WL 115968 (D.R.I.) (substituting pork products with turkey products for Muslim inmates permissible where it allowed the prison to provide all inmates with balanced uniform meals);⁷ Rashad v. Maloney, supra at *4-5 (lack of Halal diet did not violate the First Amendment where it was not shown that vegetarian menu violated Islamic dietary laws)

Further, courts have held that prisons may limit available menus based on concerns of creating conflicts between inmates where perception of preferential treatment for some inmates may result in morale issues and possible disruptions. See Dehart, 277 F.3d at 53 (prison's interest in avoiding inmate jealousy over special diets is a legitimate penological concern); Benjamin, 708 F. Supp. at 575 ("other prisoners understandably resent special treatment that is given to any group, and the possibility of tension and confrontation is particularly troublesome at mealtime, which is often the only time the entire prison is together"); Denson, 59 F. Supp.2d at 158 (concern that inmates react negatively when they perceive that other inmates are receiving special privileges and may result in "a flood of new requests from inmates, or worse, that they might act out against" other inmates is a legitimate government interest); Ward, 1 F.3d at 878; Ashelman v. Wawrzasek, 111 F.3d 674, 677 (9th Cir. 1997) (court "accepted warden's contention that other prisoners who are not accommodated might perceive [plaintiff] as being favored"); Kahey, 836 F.2d at 951 (perception of favoritism will have adverse impact upon prison morale).

Here, defendants have an interest in providing inmates with meals that meet national dietary standards and avoiding excessive operational costs and increased burdens on staff. See 103 DOC 760.01.⁸ Providing inmates with an array of religious diets would severely hamper the prison's ability to provide meals for the entire inmate population in an efficient and cost effective

⁶ A copy of the decision is attached as Attachment C.

⁷ A copy of the decision is attached as Attachment D.

⁸ A copy of the DOC Food Services policy, 103 DOC 760.00 et seq. is attached as Exhibit 4.

manner. Szafir Aff., ¶¶ 4, 5. In addition, there are serious problems in obtaining sufficient supplies of Halal meals. *Id.* at ¶ 7. By providing inmates with an alternative vegetarian diet, the DOC can meet the religious dietary requirements of a number of religions, including Rastafarians, Hindus, Buddhists, Muslims, and Hare Krishnas, thus making food services more efficient and economical. *Id.* at ¶¶ 2, 4, 7. Also, providing specialized religious diets may result in a flood of inmate requests for individualized special diets or prompt other inmates to demand to have the existing diets altered to meet individual preferences, thus increasing the financial and administrative burdens on defendants. Szafir Aff., ¶ 5; Elliot Aff., ¶ 5.

Further, plaintiffs are provided with access to alternative ways to practice their religious beliefs, including access to weekly Jumah services, the ability to pray daily, ability to possess a prayer towel, access to limited amounts of prayer oil, a kufi, prayer beads or a medal, and ability to possess religious books, including the Qur'an. Elliot Aff., ¶ 10. Providing plaintiffs with access to the alternative vegetarian menu is an "obvious, easy alternative" since the menu does not violate plaintiffs' First Amendment rights and allows defendants to meet the dietary requests of many other religions in cost efficient manner.

2. Food Preparation

Plaintiffs allege that their food must be blessed and handled only by other Muslims. Complaint, ¶¶ 17, 30. However, plaintiffs offer no support for their contention that their religion requires their meals to be blessed and prepared by other Muslims. Defendants have submitted the affidavit of Ibrahim Rahim, who has worked for the Department of Correction as a Muslim Chaplain and as the Program Services Coordinator. Mr. Rahim, who is a graduate of the University of Medina, Saudi Arabia, with a concentration in Islamic Law and Arabic, states that

there is no requirement that only Muslims prepare food for other Muslims. To the contrary, he states that the Qu'ran specifically addresses this point:

This day are (all) things good and pure made lawful unto you. The food of the People of the Book is lawful unto you and yours is lawful unto them.

Chapter 5 of the Holy Qu'ran, (Al-Maidah) Verse 5. (Exhibit 3, ¶ 9).

Mr. Rahim goes on to explain that the term "People of the Book" refers to individuals of the Jewish and Christian faiths and the term "book" refers to the Bible. *Id.* at ¶ 10. Thus, according to the Qu'ran, food prepared by non-Muslims is lawful for Muslims to consume and does not violate a basic tenet of plaintiffs' religion. *Id.* at ¶ 11.

In addition to the fact that having only Muslim inmates prepare and serve other Muslims is not required by Islam, such a practice would be extremely disruptive and complicated to implement and could expose the Department to claims of discrimination by non-Muslim inmates. Elliot Aff., ¶ 11. Pursuant to policy, when making determinations as to what inmates may fill a particular job, the policy specifically states that "Inmate skills, abilities and work histories should be the criteria employed in matching inmates with institution work assignments." 103 DOC 450.01(1).⁹ Inmates must also be approved medically for clearance as food handlers. 103 DOC 450.01(f). The Department also must screen for potential enemy situations and must view an inmate's disciplinary history when considering certain types of jobs. Selecting inmates for kitchen positions based upon their religious affiliation would undermine this policy and create great disruption and resentment. Elliot Aff., ¶ 11. *See Benjamin*, 708 F. Supp. at 575 ("other prisoners understandably resent special treatment that is given to any group and the possibility of tension and confrontation is particularly troublesome at mealtime, which is often the only time the entire prison is together."); *Denson*, 59 F. Supp.2d at 158 (concern that inmates react

⁹ The Institution Work Assignments Policy, 103 DOC 450.00 *et seq.*, is attached as Exhibit 5.

negatively when they perceive that other inmates are receiving special privileges and may result in “a flood of new requests from inmates, or worse, that they might act out against” other inmates is a legitimate government interest.). The policy of allowing non-Muslim inmate kitchen workers to prepare meals eaten by Muslim inmates is rationally related to legitimate correctional interests.

3. Prayer Rug

The policy providing plaintiffs with a prayer towel for use in their cells in lieu of a prayer rug is reasonably related to legitimate security concerns. See Turner v. Safley, supra. Prayer rugs pose specific security concerns where they are much bulkier and heavier than prayer towels and take up considerably more room in a cell than a prayer towel, thus, presenting a greater fire and housekeeping hazard. *Elliot Aff.*, ¶ 7. The larger size of a prayer rug also makes it easier for inmates to hide contraband within the cell and more difficult for staff to search than a prayer towel, since a prayer rug has to be unrolled in order to search for contraband and re-rolled after the search, while a prayer towel can often be searched by the staff person quickly running his hands over it. *Id.* Prayer towels present less of a sanitation problem where they can be regularly laundered by inmates. *Id.* There are also concerns that providing some inmates with a prayer rug for their cells may create jealousies where some inmates may feel that others are receiving preferential treatment and conflicts between inmates may occur as a result. *Id.* Providing inmates with a prayer towel for use in their cells does not violate the First Amendment.

B. Plaintiffs Are Not Denied Equal Protection With Regard To Their Diet.

Plaintiffs allege that providing Jewish inmates with a Kosher diet, but denying plaintiffs a “halal diet” violates their rights under the Equal Protection Clause. In order to succeed on an equal protection claim, plaintiffs must show that a discriminatory purpose was the motivating factor in the defendants’ decision not to provide them with a Halal diet. See Washington v.

Harper, 426 U.S. 229 (1976); Smith v. Stratus Computer, Inc., 40 F.3d 11, 17 (1st Cir. 1994), cert denied, 514 U.S. 1108 (1995) (to prove equal protection violation, plaintiff must demonstrate that action taken with discriminatory intent.).

The differences in diets available to Jewish inmates is not the result of a discriminatory purpose. Case law has established that providing Muslim inmates with a pork-free diet is appropriate. Further, plaintiffs have had access to the vegetarian/alternative diet, which is available to Seventh Day Adventists and other religions, since December, 2000. Jewish inmates are provided with Kosher diets because Kosher food must be prepared in a Kosher kitchen, served on Kosher plates and consumed with Kosher utensils. The Department of Correction does not have the facility space or staffing necessary to prepare Kosher diets. Szafir Aff., ¶ 6. There is no requirement in Islam that meals be prepared in separate kitchens with separate utensils, therefore, there is no need to utilize more expensive frozen meals. Rahim Aff., ¶ 9. Defendants' policy is based on legitimate correctional concerns and does not violate a clearly established right of the plaintiffs. See Abdul-Malik, supra at *7-9 (prison policy providing Jewish inmates with a Kosher diet but denying Muslim inmates a diet with Halal meat did not violate the Equal Protection Clause); Abdullah, supra at 1119 (failure to provide Muslim inmates with Halal meat while providing Jewish inmates with Kosher meals did not violate the Equal Protection Clause in the absence of evidence of discriminatory intent); Johnson, supra at 281-85 (no Equal Protection Clause violation where differences between the diets of Muslim and Jewish inmates were rationally related to legitimate penological interests); DeHart, supra at 61; Muhammad v. Warithu-Deen Umar, supra at 344-45; Rashad, supra at *5 (no equal protection violation where Muslim inmates are denied a Halal menu but Jewish inmates have Kosher menu). Where the

differences between the menus available to Jewish and Muslim inmates are based operational and financial concerns, defendants are entitled to summary judgment.

C. Defendants Are Entitled To Immunity In Their Official Capacities.

Plaintiffs' civil rights claims against defendants, in their official capacities, must fail because it is well-settled that a state, or in this case, a state agency, is not a "person" within the meaning of 42 U.S.C. §1983. As the Supreme Court has ruled: "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants against a State for alleged deprivations of civil liberties." Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989); Hafer v. Melo, 502 U.S. 21 (1991). Defendants, in their official capacities, are immune from suit under §1983.

D. Defendants Are Entitled To Qualified Immunity.

1. Standard of Review

The doctrine of qualified immunity seeks to protect government officials from the burdens of vindictive and harassing lawsuits which may inhibit them from properly exercising their powers, while, at the same time, protecting private citizens from oppressive or malicious government action. Knight v. Mills, 836 F.2d 659, 665 (1st Cir. 1987) (citing Scheuer v. Rhodes, 416 U.S. 232, 238 (1974)). The Supreme Court has held that government officials performing discretionary functions are shielded with a qualified immunity "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987); Davis v. Scherer, 468 U.S. 182, 195 (1984) ("officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages"); Harlow v. Fitzgerald, 457 U.S. 810 (1982); Mitchell v. Forsyth, 472 U.S. 511 (1985).

The analysis of a state actor's claim of qualified immunity requires a court to utilize a three-part test. Saucier v. Katz, 533 U.S. 194 (2001); Hope v. Pelzer, 536 U.S. 730 (2002); Suboh v. District Attorney Office of Suffolk District, 298 F.3d 81, 89-90 (1st Cir. 2002). The initial inquiry is whether the plaintiff's allegations, if true, establish a constitutional violation. The second prong concerns whether the right was clearly established at the time of the alleged violation. The third prong is whether a reasonable actor, similarly situated, would have understood that his conduct violated that clearly established right. See Saucier, 533 U.S. at 201; Hope, 536 U.S. at 740; Wilson v. Layne, 526 U.S. 609 (1999); Suboh, 298 F.3d at 89-90; Hatch v. Department of Children, Youth & Their Families, 274 F.3d 12, 20 (1st Cir. 2001). If plaintiff's allegations establish a constitutional violation, it must then be determined whether the constitutional right was clearly established at the time of the defendant's actions to ensure that the state actor had "fair warning" that the alleged action was unconstitutional. Hope, 536 U.S. at 740 (officers sued in a civil action for damages have the same right to fair notice as do defendants charged with a criminal offense); Saucier, 533 U.S. at 202 ("The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."); Suboh, 298 F.3d at 90. The Supreme Court has determined that the inquiry into whether the constitutional right was clearly established must take into consideration the particular circumstances at issue in the case. Saucier, 533 U.S. at 201 ("this inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition"); Suboh, 298 F.3d at 93. Next, if plaintiff shows that the constitutional right at issue was clearly established, the qualified immunity inquiry focuses on whether an objectively reasonable official in defendant's position would have understood that the alleged action violated plaintiff's rights. Saucier, 533 U.S. at

208 (“The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.”). Qualified immunity is available to a state actor who violates a clearly established right if he acted under the mistaken but reasonable belief that his actions were lawful. See Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity leaves “ample room for mistaken judgments” and protects “all but the plainly incompetent or those who knowingly violate the law”); Suboh, 298 F.3d at 95; Fletcher v. Town of Clinton, 196 F.3d 41, 50-51 (1st Cir. 1999); Berthiaume v. Caron, 142 F.3d 12, 15 (1st Cir. 1998) (qualified immunity may exist even though in hindsight a court might determine that the action of the official violated the Constitution). This is consistent with the purpose of qualified immunity to avoid chilling official action by exposing officials to personal liability for good faith judgments. Harlow, 457 U.S. at 814-815.

2. Discretionary Function

In defining what conduct constitutes discretionary acts under § 1983, the Supreme Court has held that a “law that fails to specify the precise action that the official must take in each instance creates only discretionary authority.” Davis, 468 U.S. at 196-97 n. 14; Horta v. Sullivan, 4 F.3d 2, 12 (1st Cir. 1993); Foster v. McGrail, 844 F. Supp. 16, 23 (D. Mass. 1994).

In the instant case, the Department officials, Commissioner Maloney, Superintendent Allen, Superintendent Pepe, Director Emodi and Director Elliot are alleged to have established and implemented policies which infringed upon plaintiffs’ free exercise of religion. However, establishing and carrying out such policies are clearly within the defendants’ discretionary functions. There are no statutes or regulations that state precisely what actions must be taken by the defendants in establishing policies regarding religious menus, the religious beliefs of inmate kitchen employees, whether prayer rugs must be provided, or limitations on attending Jumah

services. State statute provides the Commissioner of Correction with wide discretion in establishing policies, rules and regulations regarding inmate religious programs. See G. L. C. 124, § 1(q). See also G. L. c. 124, § 2 (“Duties of commissioner and deputies”); G. L. c. 125, § 14 (“Powers and duties of superintendent”). Pursuant to his statutory duties, the Commissioner promulgated regulations pertaining to inmate religious programs, entitled Religious Programs and Services, 103 CMR 471.00 et seq.¹⁰ Nowhere in the regulations is the Commissioner’s discretion or the discretion of his administrative staff limited with regard to the issues raised in the complaint. 103 CMR 471.07. While the regulations provide that “[i]nmates whose religion places restrictions on diets will be permitted access to a special diet,” the regulations do not specify the exact nature of the special diet or whether the special diet has to meet every requirement of each religion and denomination or whether the purpose of the special diet is simply not to burden an inmate’s religious dietary requirements. CMR 471.09(5). Importantly, the regulations provide that while “[n]o inmate will be denied the free exercise of his/her religious belief and the liberty of worship according to the dictates of his/her conscience,” staff may limit religious programs, practices or services based on concerns for security or well being of the institution, its visitors, inmates or staff. 103 CMR 471.07(1)-(3).

3. Religious Diet

Defendants are entitled to qualified immunity where it has not been clearly established that providing Muslim or Nation of Islam inmates with the choice of a pork-free menu or a vegetarian menu constitutes a violation of the First Amendment. The cases pertaining to the dietary needs of Muslim inmates have uniformly held that providing a Muslim inmate with a pork-free or vegetarian menu meets the requirements of the First Amendment. Recently, in

¹⁰ A copy of the Religious Programs and Services policy, 103 CMR 471.00 et seq., is attached as Exhibit 6.

Rashad v. Maloney, supra at *4-5, a Massachusetts Superior Court held that failure to provide a Muslim inmate with Halal meat did not violate the First Amendment where it was not shown that alternative vegetarian menu violated Islamic dietary laws. Other courts have reached the same decision. See Abdul-Malik v. Goord, supra; Muhammad v. Warithu-Deen Umar, supra; Denson v. Marshall, supra; Abdullah v. Fard, supra; Collins v. Rhode Island Department of Corrections, supra at *4; Allah v. Stachelek, supra; Salaam v. Collins, supra (prohibitive cost of Halal meats found sufficient under Turner to justify prison's decision to deny inmates' request); Kahey v. Jones, supra. It has not been clearly established that the failure to provide Muslim inmates with a Halal diet violates the First Amendment and the defendants are qualifiedly immune.

2. Food Preparation

Defendants are entitled to qualified immunity where it is not clearly established that providing plaintiffs with Ramadan meals or other meals prepared by non-Muslims violates the First Amendment so as to ensure that defendants had "fair warning" that the policy is unconstitutional. See Saucier, supra at 202. Plaintiffs are unable to demonstrate that the policy violates clearly established constitutional rights. Defendants are unaware of any decisions which hold that preparing meals for Muslims by non-Muslims violates the First Amendment.

3. Prayer Towel

Defendants are entitled to qualified immunity where it was not clearly established that providing plaintiffs with a prayer towel instead of a prayer rug violated the First Amendment so as to ensure that defendants had "fair warning" that the alleged action was unconstitutional. See Saucier, supra at 202. Plaintiffs have not demonstrated that the policy of using prayer towels violates clearly established constitutional rights and defendants are qualifiedly immune.

IV. DAMAGES NOT AVAILABLE UNDER STATE REGULATIONS.

Nor can plaintiffs obtain damages for alleged violations of Religious Services regulations, 103 CMR 471.00 et seq. The enabling statute, G.L. c. 124, §§ 1(c) and 1(q), is without reference to the possibility of a private action in equity, much less a private damages action, therefore, the regulations do not create a private right of action which would confer standing to seek declaratory, injunctive or monetary relief. Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 546-47 (1998) (no private cause of action under regulation in absence of clear legislative intent to create a private cause of action for person injured by a regulation violation). Massachusetts courts, have consistently found it improbable that the Legislature, in granting a state agency the authority to promulgate regulations, was also empowering the agency to create possible civil liability. Martino v. Hogan, 37 Mass. App. Ct. 710, 720-21 (1994).

CONCLUSION

For the foregoing reasons, defendants request that summary judgment be entered in their favor, pursuant to Fed. R. Civ. P. 56(c).

Dated: May 12, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THIS DAY A TRUE COPY OF THE ABOVE DOCUMENT WAS SERVED UPON EACH PLAINTIFF APPEARING ~~PRO SE/THE ATTORNEY OF~~ RECORD FOR EACH PARTY BY MAIL/BY HAND.

DATE

5/12/04

