IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF OKLAHOMA

DENNIS EARL FULBRIGHT,

Plaintiff,

vs. No. CIV-03-99-W

RON WARD,

Defendant.

JON ANDREW COTTRIEL,

Plaintiff,

vs. No. CIV-03-125-W

RON WARD,

Defendant.

JERRY HARMON,

Plaintiff,

vs. No. CIV-03-1465-W

RON WARD,

Defendant.

ORDER

On August 25, 2004, United States Magistrate Judge Gary M. Purcell issued a Second Supplemental Report and Recommendation in these three consolidated matters and recommended that the Motions for Preliminary Injunction filed by the plaintiffs, state prisoners Dennis Earl Fulbright, Jon Andrew Cottriel and Jerry Harmon, be granted. The

parties were advised of their right to object, and Ron Ward, who in his official capacity as the Director of the Oklahoma Department of Corrections ("DOC") is the defendant in each of the three cases, filed his Objections.

The first amendment to the United States Constitution, which is incorporated by the fourteenth amendment and thus, applicable to the states, precludes Congress from making any "law . . . prohibiting the free exercise [of religion] . . . ." U.S. Const. amend. I. In the instant cases, the plaintiffs have alleged that their rights guaranteed by the first amendment's free exercise clause have been violated by the DOC's failure to provide them free of cost with kosher meals consistent with their Orthodox Jewish faith. Relief for this alleged constitutional violation is sought under title 42, section 1983 of the United States Code, and upon de novo review of the record, the Court concurs with Magistrate Judge Purcell's recommended disposition of the plaintiffs' requests for a preliminary injunction.

As Magistrate Judge Purcell noted, to obtain this extraordinary remedy, a party must show (1) that there is a substantial likelihood that he will prevail on the merits; (2) that he will suffer irreparable injury unless the preliminary injunction issues; (3) that the threatened harm to him outweighs any injury the opposing party might suffer because the injunction issues; and (4) that the injunction, if issued, would not be adverse to public interest. E.g., Otero Savings and Loan Association v. Federal Reserve Bank, 665 F.2d 275, 278 (10th Cir. 1981).

In this case, where the preliminary injunction would provide mandatory rather than prohibitory relief and/or award the plaintiffs virtually all the relief to which they may be entitled and which they may eventually recover, two historically disfavored categories, the plaintiffs "must 'satisfy an heightened burden.'" O Centro Espirita Beneficiente Uniao do

Vegetal v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004)(en banc)(per curiam); see id. (en banc court "jettison[ed] that part of SCFC ILC[, Inc. v. VISA, Inc., 936 F.2d 1096 (10th Cir. 1991),] which describes the showing the movant must make in such situations as 'heavily and compellingly.'")

In this circuit, prisoners have a constitutional right to a diet conforming to their sincerely held religious beliefs, unless a state's decision to deny inmates access to such a diet "'is reasonably related to legitimate penological interests.'" Beerheide v. Suthers, 286 F.3d 1179, 1184 (10th Cir. 2002)(quoting Turner v. Safley, 482 U.S. 78, 89 (1987)). The instant record reveals each plaintiff testified that he is an adherent to the Orthodox Jewish faith and there is no evidence to substantially refute the plaintiffs' assertions that their religious beliefs are sincerely held in accordance with Orthodox Judaism.

Thus, in deciding whether the plaintiffs have shown a substantial likelihood that they will prevail on the merits of their complaints, the Court must determine whether legitimate penological interests justify the DOC's policy against providing inmates kosher diets free of cost. In so doing, the Court has considered the standard for reviewing prison policies challenged on constitutional grounds set forth by the United States Supreme Court in Turner v. Safley, 482 U.S. 78 (1987).

Under Turner, the Court must ascertain

> "(1) whether a rational connection exists between the prison policy . . . and a legitimate governmental interest advanced as its justification; (2) whether alternative means of exercising the right are available notwithstanding the policy . . . ; (3) what effect accommodating the exercise of the right would have on guards, other prisoners, and prison resources generally; and (4) whether ready, easy-to-implement alternatives exist that would accommodate the prisoner's rights."

286 F.3d at 1185 (citing Turner, 482 U.S. at 89-91)(other citation omitted).

The defendant has advanced two governmental interests to justify its policy: the expense of supplying kosher diets and the burdensome number of requests for religious diets by other prisoners. "Without doubt, prison administrators have a legitimate interest in working within a fixed budget." Id. at 1186. Accordingly, the Court finds the defendant has demonstrated a reasonable connection between the DOC's policy of not providing kosher diets and its budgetary concerns and thus, has made the necessary "minimal showing that a rational relationship exists between its policy and stated goals." Id. Having determined that the defendant has satisfied with this showing the first factor of the Turner four-factor analysis, the Court has not considered the legitimacy of the second governmental interest advanced by the defendant. But see id. at 1186 n.2.

A further review of the record shows that the second Turner factor does not however weigh in the defendant's favor. A comparison of the testimony of Bobby Boone regarding the availability of non-pork and vegetarian diets and the inmates' ability to purchase kosher food at prison canteens and the testimony of Rabbi Ovadia Goldman demonstrates that while these three plaintiffs are not deprived of all forms of observing their religious obligations, they do not have a "'viable alternative for observing the essential tenet of Judaism of eating a kosher diet.'" Id. at 1186 (quoting Beerheide v. Suthers, 82 F. Supp.2d 1190, 1197 (D. Colo. 2000)).

As indicated, the third Turner factor requires an examination of the effect and consequences, if any, that accommodating the prisoners' exercise of their first amendment right to free religious expression would have on guards, other inmates and prison resources. As the Supreme Court has recognized, "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others

or on the use of the prison's limited resources for preserving institutional order." 482 U.S. at 90. The Court is therefore mindful that "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, [it] . . . should be particularly deferential to the informed discretion of corrections officials." Id. (citation omitted).

Based upon that portion of the record that concerns the estimated costs of purchasing kosher meals from kosher food distributors or vendors, the Court finds at this stage of the litigation that supplying a kosher diet at no charge to these three plaintiffs and ultimately, to others who request the same as a result of sincerely held religious beliefs would most certainly impact DOC's budget and result in increased costs. This impact, however, is not so significantly detrimental to require a finding that this factor weighs in the defendant's favor.

Furthermore, in evaluating the effect, if any, of the accommodation of the plaintiffs' right to a kosher diet on guards and other prisoners, the Court again acknowledges that budgetary restraints are a very real and legitimate concern for prison officials, but finds at this stage that the funding necessary to add a kosher diet would not unduly impact the prison staff or the staff's ability to maintain order.[1]

Furthermore, the Court finds that the DOC already has in place an effective special diet policy that is precludes inmate abuse of available special diets (although not religious diets) and that implementation of a policy for likewise screening requests for religious diets

[1]The Court notes that in his Objections, the defendant has reported that plaintiff Cottriel was attacked by another inmate after the hearing on the plaintiffs' Motions for Preliminary Injunction. The DOC's concern over prison security is justified and legitimate; however, the Court finds that this single incident of inmate violence alone does not at this stage preclude accommodation of the plaintiffs' religious practices.

would not be unduly burdensome.

As required by Turner, the Court has also considered "whether ready, easy-to-implement alternatives exist that would accommodate the . . . [plaintiffs'] rights." 286 F.3d at 1185 (citations omitted). The absence of such alternatives evinces the reasonableness of a prison's policy. E.g., 482 U.S. at 90 (citation omitted). Proof of their existence arguably evidences the policy's unreasonableness by showing that it is but "an 'exaggerated response' to prison concerns." Id.

As the United States Court of Appeals for the Tenth Circuit has found in addressing a similar situation faced by the Colorado Department of Corrections and its response to a challenge by Colorado inmates, the provision of "kosher meals free of charge [to inmates] fits well into the category of 'quick, easy alternatives.'" 286 F.3d at 1192. There is no evidence in the record that would require this Court to find otherwise or to find that this fourth Turner factor favors the defendant.

Finally, in reviewing the defendant's Objections, the Court notes that the defendant has complained that at the hearing on the Motions for Preliminary Injunction, he presented arguments based upon that clause of the first amendment to the United States Constitution that prohibits Congress from making any "law respecting an establishment of religion," U.S. Const. amend. I, and that Magistrate Judge Purcell did not address these arguments when he issued his Second Supplemental Report and Recommendation.

To this end, the defendant has argued that the plaintiffs cannot demonstrate a likelihood of success on the merits of their claims under the free exercise clause because the requested injunctive relief would violate the first amendment's establishment clause. At this stage, the Court finds a state prison's practice of providing a kosher diet at no cost

to inmates does not impermissibly advance religion or evince sponsorship or financial support of, or active involvement in, a religious activity by the government. Thus, the Court finds, subject to further argument and authority, that the defendant's reliance on the establishment clause does not preclude the issuance of injunctive relief.

Having found that the plaintiffs have shown a substantial likelihood of success on the merits of their claims, the Court has examined the record to determine whether the plaintiffs have established the three remaining factors, proof of which is required before a preliminary injunction may issue. In so doing, the Court finds that the loss of a first amendment freedom clearly constitutes irreparable harm and that to these three plaintiffs, such loss is actual and not theoretical, that the threatened injury resulting from the denial of these plaintiffs' ability to engage in constitutionally protected activity outweighs at this stage the harm to the DOC if the preliminary injunction issues and that such an injunction would not be adverse to the public's interest in ensuring that free religious expression is not curtailed.

Accordingly, the Court

(1) ADOPTS the Second Supplemental Report and Recommendation issued on August 25, 2004, and in particular, Magistrate Judge Purcell's recommendation that the defendant should be permitted to exercise his professional discretion to determine a reasonably cost-effective method for providing the plaintiffs a kosher diet;

(2) GRANTS

(A) the Motion for Preliminary Injunction filed on October 20, 2003, by Fulbright in Case No. CIV-03-99-W [Doc. 35];

(B) the Motion for Preliminary Injunction filed on October 20, 2003, by Cottriel in Case No. CIV-03-125-W [Doc. 44];

(C) the Motion for Preliminary Injunction filed on November 3, 2003, by Harmon in Case No. 03-1465-W [Doc. 5];

(3) ORDERS the defendant to provide these three plaintiffs a kosher diet at no cost to them until further Order of the Court; and

(4) RE-REFERS this matter to Magistrate Judge Purcell for further proceedings.

ENTERED this 21st day of January, 2005.

LEE R. WEST
UNITED STATES DISTRICT JUDGE