IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF OKLAHOMA

DENNIS EARL FULBRIGHT, Plaintiff, vs. JUSTIN JONES, Defendant.	)	No. CIV-03-99-W
JON ANDREW COTTRIEL, Plaintiff, vs. JUSTIN JONES, Defendant.	)	No. CIV-03-125-W
JERRY HARMON, Plaintiff, vs. JUSTIN JONES, Defendant.	)	No. CIV-03-1465-W

ORDER

Plaintiffs Dennis Earl Fulbright, Jon Andrew Cottriel and Jerry Harmon brought these now consolidated actions seeking preliminary and permanent prospective injunctive relief under title 42, section 1983 of the United States Code for the alleged deprivation of their right under the first amendment to the United States Constitution to exercise freely their Orthodox Jewish religion. The controversy in each case centered on the refusal of the Oklahoma Department of Corrections ("DOC") to provide a Kosher diet. On January 21,

2005, a preliminary injunction was granted and the DOC was ordered to provide these three plaintiffs a Kosher diet at no cost. The cases were then re-referred to United States Magistrate Judge Gary M. Purcell for further proceedings, including a determination whether permanent injunctive relief was warranted.

The matter now comes before the Court on Magistrate Judge Purcell's Third Supplemental Report and Recommendation and on the Motion to Dismiss filed by Justin Jones, in his official capacity as DOC Director. The plaintiffs have responded in opposition[1] to the Motion to Dismiss, and Jones has filed a reply. The deadline for filing objections to Magistrate Judge Purcell's Third Supplemental Report and Recommendation was extended pending resolution of Jones' request for dismissal.

Ron Ward in his official capacity as DOC Director was the original defendant. Upon Ward's retirement, Edward L. Evans, DOC Deputy Director of Administration, was appointed DOC Interim Director, and Evans was substituted as party defendant pursuant to Rule 25(d)(1), F.R.Civ.P. Jones, upon his appointment as DOC Director, was likewise automatically substituted as party defendant for Evans pursuant to Rule 25(d)(1), supra.

The Advisory Committee Notes to Rule 25(d)(1) provide that

> "[a]utomatic substitution . . . , being merely a procedural device for substituting a successor for a past officeholder as a party, is distinct from and does not affect any substantive issues which may be involved in the action. . . .
>
> "Where the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after

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[1]To the extent the allegations in the plaintiff's response that the Kosher diets being provided do not meet American Correctional Association nutritional standards, that water is the only Kosher beverage being provided and that Fulbright has "experienced a hostile attitude from kitchen staff" have not been previously pled and have not been exhausted as required by 42 U.S.C. § 1997e(a), the Court has disregarded the same.

substitution, . . . to seek to have the action dismissed as moot . . . ." Advisory Committee Notes, 1961 Amendment (citations omitted).

"If the successor in fact does disavow the policy of his predecessor, he can make that showing and if this does make the suit moot, tested by usual standards, it should be dismissed as such." C. Wright, A. Miller & M. Kane, 7C Federal Practice and Procedure § 1960, at 578 (2d ed. 1986). As a general rule, "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services, 532 U.S. 598, 609 (2001)(quoting Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 189 (2000)). "[T]he '"heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness,'" Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 222 (2000)(quoting Friends of the Earth, 528 U.S. at 189 (quoting United States v. Concentrated Phosphate Export Association, Inc., 393 U.S. 199, 203 (1968)))(emphasis deleted), which in this case is Jones.

In this connection, Jones testified at his deposition that Fulbright, Cottriel and Harmon are constitutionally entitled to Kosher meals, see Deposition of Justin Jones (November 21, 2005) at 15, 23 (hereafter "Deposition"), and the plaintiffs themselves have admitted that DOC "began attempting to provide . . . Kosher diets that satisfied the nutritional value standards of the [American Correctional Association] in approximately March . . . 2005 . . . ." Plaintiffs' Objection and Response (November 28, 2005) at 2.

Jones has relied upon these undisputed facts to contend that these cases should therefore be dismissed as moot.

Although Jones has admitted that these three plaintiffs are entitled to a Kosher diet, he has likewise admitted that a successor DOC director would not be obligated to continue current DOC policies. Deposition at 49. Despite the fact Jones himself did not continue the conduct which gave rise to these lawsuits,[2] the Court finds in light of former DOC policy coupled with DOC's vigorous resistance and opposition to providing Kosher diets to these inmates that there is no absolute assurance that the alleged first amendment violation will not occur in the future, e.g., 528 U.S. at 189 (events must make it absolutely clear that allegedly wrongful behavior could not reasonably be expected to recur), or absolute assurance that these three plaintiffs will not be disadvantaged in the same fundamental way.

"[T]he standard . . . for determining whether a case has been mooted by the defendant's voluntary conduct is stringent," Friends of the Earth, 528 U.S. at 189, and the Court finds Jones has not met his "heavy burden of persuasion." Concentrated Phosphate Association, 393 U.S. at 203. Accordingly, dismissal on the grounds of mootness is not warranted, and the Court therefore

(1) DENIES the Motion to Dismiss filed by Jones in each of these three cases on September 27, 2005;

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[2]At this stage of the litigation, it appears that injunctive relief may not needed to "correct[] behavior by the one . . . having official status and power, rather than [the behavior by] one who has lost that status and power through ceasing to hold office." Advisory Committee Notes, 1961 Amendment (citations omitted). However, circumstances do not afford the absolute assurance that the initial harm may not recur.

(2) under the unique circumstances of this case, DIRECTS the parties to confer within seven (7) days in a good faith effort to agree upon a proposed order outlining the injunctive relief requested in this lawsuit and recommended by Magistrate Judge Purcell and to submit such an order to the Court for approval and execution; and

(3) should the parties be unable to agree upon such an order and instead, desire to file objections[3] to Magistrate Judge Purcell's Third Supplemental Report and Recommendation, EXTENDS the deadline for doing so to ten (10) days from this date.

ENTERED this 6th day of January, 2006.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

[3]In resolving the Motion to Dismiss, the Court addressed only Jones' argument that the instant litigation was moot. In his objections, if any, Jones is not precluded from raising any other arguments now set forth in his Motion, including his contentions under the Prison Litigation Reform Act, 18 U.S.C. § 3626.