

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

BILLY EDWARD JONES, )  
)  
Plaintiff, )  
)  
v. )  
)  
RON WARD, )  
)  
Defendant. )

CIV-03-98-A

Doc

FILED

JUL 17 2003

ROBERT D. DENNIS  
U.S. DIST. COURT, WESTERN DIST OF OKLA  
BY RDennis DEPUTY

CONSOLIDATED WITH:

DENNIS EARL FULBRIGHT, )  
)  
Plaintiff, )  
)  
v. )  
)  
RON WARD, )  
)  
Defendant. )

CIV-03-99-A

#18

CONSOLIDATED WITH:

JON ANDREW COTTRIEL, )  
)  
Plaintiff, )  
)  
v. )  
)  
RON WARD, )  
)  
Defendant. )

CIV-03-125-A

#23

REPORT AND RECOMMENDATION

Plaintiffs, state prisoners appearing *pro se*, bring these consolidated civil rights actions

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pursuant to 42 U.S.C. §1983. The matters have been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636(b)(1)(B). In separate motions filed in each case,<sup>1</sup> Defendant has moved to dismiss the causes of action on the grounds of res judicata and/or collateral estoppel. Plaintiffs Fulbright and Cottriel have responded to the motions. Although advised of his obligations under Fed. R. Civ. P. 12(b) and 56 and LCvR 56.1 in responding to Defendant's Motion to Dismiss, Plaintiff Jones has failed to respond to the motion and the time for filing a response has expired. For the following reasons, it is recommended that Defendant Ward's Motion to Dismiss be granted as to Plaintiff Jones and that this Plaintiff's cause of action against Defendant Ward be dismissed. It is further recommended that Defendant Ward's Motions to Dismiss be denied as to Plaintiffs Fulbright and Cottriel.

1. Plaintiffs' Claims

In substantially identical Complaints, each of the three Plaintiffs alleges that his First Amendment right to freely exercise his Orthodox Judaism religion has been violated by Defendant's refusal to grant his request for a kosher diet. Each Plaintiff seeks only injunctive relief against Defendant Ward in his official capacity as the Director of the Oklahoma Department of Corrections. The injunctive relief sought by Plaintiffs is the provision of a kosher diet consistent with the principles of Orthodox Judaism and that

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<sup>1</sup>On June 6, 2003, United States District Judge Wayne Alley directed that all future filings in these matters be filed in Case No. CIV-03-98-A.

satisfies “the nutritional value standards set by the A.C.A.” at no charge to the prisoners. Complaint, John Cottriel, at 5.

## II. Standard of Review

A complaint should not be dismissed for failure to state a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Hall v. Bellmon, 935 F.2d 1106, 1109(10th Cir. 1991). In reviewing the sufficiency of the complaint, the court presumes all of the plaintiff’s factual allegations to be true and construes them in the light most favorable to the plaintiff. Id. A *pro se* plaintiff’s complaint must be broadly construed under this standard. Haines v. Kerner, 404 U.S. 519, 520(1972). However, the “broad reading” of *pro se* complaints dictated by Haines “does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based.” Hall, 935 F.2d at 1110. The court “will not supply additional factual allegations to round out a plaintiff’s complaint or construct a legal theory on a plaintiff’s behalf.” Whitney v. New Mexico, 113 F.3d 1170, 1173-1174(10th Cir. 1997).

## III. Plaintiff Jones

Defendant Ward has moved to dismiss the cause of action brought against him by Plaintiff Jones on the ground that Plaintiff has failed to state a claim for relief under Fed. R. Civ. P. 12(b)(6). Plaintiff Jones has failed to respond to Defendant Ward’s Motion to Dismiss despite written notice of the Motion to Dismiss and his obligations in responding

to the Motion and a *sua sponte* extension of time to respond.<sup>2</sup> The time for filing the response has expired, and the Motion to Dismiss is deemed confessed under LCvR 7.2(e). Moreover, a review of public records available on the World Wide Web reflects that Plaintiff has been released from custody and is currently on parole or probationary status under the supervision of the Oklahoma Probation and Parole Office in the Northeast District Office located in Muskogee, Oklahoma. <[http://www.doc.state.ok.us/DOCS/offender\\_info.htm](http://www.doc.state.ok.us/DOCS/offender_info.htm)> Plaintiff Jones' release from prison on probation or parole moots his claim for prospective injunctive relief concerning the conditions of his former confinement. McAlpine v. Thompson, 187 F.3d 1213, 1215(10<sup>th</sup> Cir. 1999)(“[W]hen an inmate’s claim for prospective injunctive relief regarding conditions of confinement becomes moot due to the inmate-plaintiff’s release from confinement, the inmate’s parole or supervised release status does not, absent some exceptional showing, bring that claim under the narrow ‘capable of repetition, yet evading review’ exception to the mootness doctrine.”). Thus, although the issue of mootness was not raised by Defendant in Defendant’s Motion to Dismiss, the cause of action brought by Plaintiff Jones is moot as it lacks a justiciable case or controversy. See Cox v. Phelps Dodge Corp., 43 F.3d 1345, 1347 n.1(10<sup>th</sup> Cir. 1994)(“While the question of mootness was not briefed or argued in this case, we must consider this issue *sua sponte* as

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<sup>2</sup>The Order entered by the undersigned on June 17, 2003, granting Plaintiff Jones a *sua sponte* extension of time to respond to Defendant’s Motion to Dismiss was returned to the Court marked “return to sender - out,” indicating that Plaintiff was released from incarceration prior to the date the Order was received at the prison.

it implicates our jurisdiction.”). Accordingly, it is recommended that Defendant Ward’s Motion to Dismiss the cause of action against him by Plaintiff Jones be granted and that the cause of action brought by Plaintiff Jones be dismissed under LCvR 7.2(e) and on the ground of mootness.

#### IV. Plaintiffs Fulbright and Cottriel

Defendant Ward seeks the dismissal of the causes of action brought against him by Plaintiffs Fulbright and Cottriel for failure to state a claim for relief under Fed. R. Civ. P. 12(b)(6). Defendant contends that these causes of action are barred by the doctrines of res judicata and collateral estoppel, and in support of this contention Defendant relies on two decisions. Defendant asserts that these decisions entered by the District Court of Osage County, Oklahoma, and by the United States District Court for the Northern District of Oklahoma address and reject the merits of an identical First Amendment claim by an Oklahoma prisoner.

“Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” Allen v. McCurry, 449 U.S. 90, 94(1980). According to well-established principles of collateral estoppel, “once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” Id. at 94. Additionally, a state court judgment is entitled to “the same preclusive effect as would be given that judgement under the law of the State in which the judgment was rendered.” Migra v. Warren City School Dist. Bd. Of

Educ., 465 U.S. 75, 81(1984). The doctrines of collateral estoppel and res judicata, however, apply only in cases where controlling facts *and* law remain unchanged.” Spradling v. City of Tulsa, 198 F.3d 1219, 1223(10th Cir. 2000)(citing Commissioner v. Sunnen, 333 U.S. 591, 599-600(1948)).

In Beerheide v. Suthers, 286 F.3d 1179(10th Cir. 2002), the Tenth Circuit Court of Appeals affirmed the United States District Court for the District of Colorado’s decision that, consistent with the First Amendment’s Free Exercise Clause, the Colorado Department of Corrections must provide a kosher diet to its Jewish inmates following the dietary restrictions of Orthodox Judaism with no monetary contribution from the inmates. Applying the four-factor test established in Turner v. Safley, 482 U.S. 78(1987), for evaluating the constitutional validity of prison regulations that burden constitutional rights of inmates, the Third and Ninth Circuit Courts of Appeals have reached similar conclusions that a kosher diet must be provided to an inmate that satisfies the inmate’s Orthodox Judaism dietary restrictions. Johnson v. Horn, 150 f.3d 276(3d Cir. 1998); Ashelman v. Wawrzaszek, 111 F.3d 674(9th Cir. 1997). Cf. Holterman v. Helling, 1995 WL 702300(8th Cir. 1995)(given the “few kosher diet requests” received by the Iowa Department of Corrections, the administrative burden and costs of providing kosher food is “not warranted” and prison is not constitutionally required to provide a kosher diet to its Jewish inmates). These decisions reflect a change in the law in this controversial area of prison litigation, and the application of res judicata and/or collateral estoppel under these circumstances is not appropriate. Accordingly, Defendant Ward’s Motion to Dismiss Plaintiffs Fulbright and Cottriel’s actions

should be denied.

RECOMMENDATION

Based on the foregoing reasons, it is recommended that Defendant Ward's Motion to Dismiss (Doc. #8) be GRANTED and the cause of action be dismissed as to Plaintiff Jones. It is further recommended that Defendant Ward's Motion to Dismiss (Doc. #10) be DENIED as to Plaintiff Fulbright and that Defendant Ward's Motion to Dismiss (Doc. #8) be DENIED as to Plaintiff Cottriel.

The parties are advised of their respective right to file an objection to this Report and Recommendation with the Clerk of this Court by August 6, 2003, in accordance with 28 U.S.C. §636 and LCvR 72.1. The parties are further advised that failure to make timely objection to this Report and Recommendation waives their respective right to appellate review of both factual and legal issues contained herein. Moore v. United States of America, 950 F.2d 656(10th Cir. 1991).

This Report and Recommendation partially disposes of the issues referred to the undersigned Magistrate Judge in Case Nos. CIV-03-99-A and CIV-03-125-A and disposes of all of the issues in Case No. CIV-03-98-A.

ENTERED this 17<sup>th</sup> day of July, 2003.

  
GARY M. PURCELL  
UNITED STATES MAGISTRATE JUDGE