

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

DENNIS EARL FULBRIGHT, et al.,)	
)	
Plaintiffs,)	
)	
)	CIV-03-99-W
v.)	consolidated with
)	CIV-03-125-W
RON WARD, Director,)	consolidated with
)	CIV-03-1465-W
Defendant.)	

SECOND SUPPLEMENTAL REPORT AND RECOMMENDATION¹

Plaintiffs, who are three state prisoners appearing with court-appointed counsel, Mr. Rand Eddy, each filed a Motion for Preliminary Injunction in these 42 U.S.C. §1983 civil rights actions, to which Defendant Director of the Oklahoma Department of Corrections has responded. Plaintiffs seek a preliminary injunction ordering the Oklahoma Department of Corrections (“DOC”) to provide them with kosher meals free of cost to them. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636(b)(1)(B). On July 8, 2004, an evidentiary hearing was conducted before the undersigned concerning Plaintiffs’ Motions for Preliminary Injunction, at which the parties appeared personally and through counsel, testimony was taken, documentary evidence was

¹A Report and Recommendation was previously entered in Case No. CIV-03-99-W and Case No. CIV-03-125-W. A Supplemental Report and Recommendation was previously entered in Case No. CIV-03-125-W. However, no previous Report and Recommendation has been entered in Case No. CIV-03-1465-W. Although not technically accurate in all three cases, but for the sake of clarity, this recommendation is labeled a Second Supplemental Report and Recommendation.

admitted, and the matter was taken under advisement. For the following reasons, it is recommended that Plaintiffs' Motions for Preliminary Injunction be GRANTED.

I. Procedural Background

In their Complaints filed separately in each of the above-described cases and consolidated by Order of United States District Judge Wayne Alley, each Plaintiff seeks injunctive relief under 42 U.S.C. §1983. As the factual basis for their cause of action, Plaintiffs allege that Defendant Director of the Oklahoma DOC has violated their rights under the First Amendment's Free Exercise Clause by failing to provide them with kosher diets consistent with their Orthodox Jewish religious faith. Following the filing of the Complaints, Plaintiffs filed their *pro se* Motions for Preliminary Injunction, to which Defendant responded. Counsel was appointed to represent Plaintiffs, and an evidentiary hearing on the Motions for Preliminary Injunction has been conducted. Thus, the Motions for Preliminary Injunction are at issue.

II. Standard of Review

To obtain a preliminary injunction under Fed. R. Civ. P. 65, the movant must show (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened harm to the movant outweighs the injury that the proposed injunction may inflict upon the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest. Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001); Chemical Weapons Working Group, Inc. v. United States Dep't of the Army, 111 F.3d 1485, 1489 (10th Cir. 1997); Lundgrin v. Claytor, 619 F.2d 61,

63 (10th Cir. 1980). A “preliminary injunction is an extraordinary remedy,” and, as such, “the right to relief must be clear and unequivocal.” SCFC ILC, Inc. V. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991). With respect to a request for a preliminary injunction that would either (1) disturb the *status quo*; (2) provide mandatory as opposed to prohibitory relief; or (3) provide the movant with virtually all of the relief the movant may recover after a trial on the merits, the movant has an “even heavier burden of showing that the four factors listed above weigh heavily and compellingly in movant’s favor before such an injunction may be issued.” Id. at 1098-1099. In this case, the Plaintiffs’ requested preliminary injunction would provide the Plaintiffs with substantially all of the relief they could obtain after a trial on the merits, and therefore the heightened burden of proof applies to their Motions for Preliminary Injunction.

III. Facts

The three Plaintiffs each testified that they are adherents to the Orthodox Jewish faith. Plaintiff Cottriel testified that he has been incarcerated in the custody of the Oklahoma DOC for eleven years, that both of his parents are Jewish, and that he has been practicing Orthodox Judaism since 1996 or 1997 to the best of his ability. Cottriel testified that at the time of the hearing he was purchasing kosher meals through the prison canteen at Lexington Correctional Center (“LCC”), that he had previously participated in the “common fare” diet provided at the Joseph Harp Correctional Center (“JHCC”) but that the “common fare” diet did not meet all of the requirements for a kosher diet, that the “common fare” diet was terminated in April 2002, that he is the only practicing Orthodox Jew at LCC, that he

submitted an administrative request for a kosher diet approximately two years ago and the request was denied, and that the Oklahoma DOC offers other special diets, including a non-pork diet, a vegetarian diet, and a “healthy heart” diet.

Plaintiff Harmon testified that he has been incarcerated in the custody of the Oklahoma DOC since November 1996, that he began investigating Judaism in 1997 while in custody at JHCC, that he has not converted to Judaism but desires to do so, that he attends regular Jewish meetings and participates in Jewish holidays and events to the best of his ability, that at the time of the hearing he was receiving the prison’s vegetarian diet but that the vegetarian diet does not comply with kosher dietary law because the food is not prepared or stored in the appropriate manner, and that he is the inmate in charge of keeping the books for the Jewish inmate community at JHCC.

Plaintiff Fulbright testified that he has been incarcerated in the Oklahoma DOC custody for six years and that he is currently housed at the John Lilley Correctional Center (“JLCC”) but was previously housed at JHCC for approximately 5½ years, that he has been a practicing Orthodox Jew for 3½ years to the best of his ability, and that he has Jewish heritage through his mother. Plaintiff Fulbright further testified that he participated in the “common fare” diet at JHCC before it was terminated even though the diet did not follow strict kosher dietary laws because the meat was not kosher and the inmates prepared the food in a manner that did not comply with strict kosher dietary laws. Plaintiff Fulbright testified that he currently participates in the vegetarian diet offered at JLCC even though the preparation of the food does not comply with kosher dietary laws, that only one other

practicing Jew is housed at JLCC, and that he believes the failure to follow strict kosher dietary laws causes spiritual harm to him as an Orthodox Jew.

Rabbi Ovadia Goldman testified concerning the dietary laws of Orthodox Judaism. Rabbi Goldman testified that in order to “keep kosher” in accordance with the Torah an Orthodox Jew must never mix dairy and meat in one meal (specifically, meat and dairy cannot be baked at the same time, and utensils and cooking equipment used for meat cannot be used for dairy or used for non-kosher foods), food cannot be contaminated by coming into contact with non-kosher food, only fish with fins and scales can be eaten, only animals which chew their cud and have cloven hooves may be eaten, only certain parts of kosher animals may be eaten, and meat must have been slaughtered in accordance with Jewish law before it can be eaten. Rabbi Goldman further testified that keeping kosher has spiritual meaning to an Orthodox Jew, that keeping kosher is considered an opportunity to strengthen the Orthodox Jew’s relationship with God, and that not keeping kosher will weaken the individual’s relationship with God. Rabbi Goldman stated that there are many pre-packaged kosher foods available from distributors, that a decent dinner can be made of these pre-packaged foods for a cost of \$6.50 to \$7.00 in Oklahoma, and that kosher foods can be prepared in an oven or microwave that is also used to prepare non-kosher food as long as the kosher food is baked alone and is double-wrapped. Rabbi Goldman further testified that no special storage area is required if the kosher food is kept in its original packaging, that a basic kosher kitchen would require a secure area where there is sufficient area for food preparation, that plastic utensils, pots and pans, and knives can be used as long as the eating implements

and equipment do not become cross-contaminated, and that the food ingredients used in the kosher kitchen must also be kosher. Rabbi Goldman testified that an individual who is in the process of converting to Orthodox Judaism will want to follow Jewish law to the best of his or her ability, including following strict kosher dietary laws.

Ron Boone, DOC Deputy Director for the Eastern District of Oklahoma, testified that the cost associated with providing special religious diets to inmates would be detrimental to the Oklahoma DOC. Mr. Boone estimated that the provision of a kosher diet will add \$10.00 per day to the average daily cost of feeding an inmate who requests a kosher diet, assuming that the cheapest method of providing a kosher diet is to purchase pre-packaged frozen kosher dinners because he has been advised by the deputy director of the Colorado DOC that such a meal costs the Colorado DOC \$5.00 per meal. Although Mr. Boone testified he had no knowledge concerning the annual food budget for the Oklahoma DOC, Mr. Boone testified that \$2.56 per day is the amount used by him to figure the budget for feeding inmates in his district. Mr. Boone further testified that 52 of the inmates in the current Oklahoma DOC inmate population claimed to be Jewish when they entered the Oklahoma DOC system. Mr. Boone further testified that his "educated guess" is 6% of the Oklahoma DOC inmate population would request a special religious diet, if the Oklahoma DOC was ordered to provide one, based on the number of religions represented in the Oklahoma DOC (96) and the number of those religions (20) which require special diets. Mr. Boone further testified that the provision of a kosher diet would cause security problems because the Oklahoma DOC currently has a 20% staff vacancy rate statewide, and the additional costs

for providing a kosher diet would have to be subtracted from the budget for personnel, resulting in greater security risks for inmates, staff members, and the public. Mr. Boone stated that in his district inmates may request either a regular diet or a non-pork diet and that the non-pork diet has not resulted in a severe security problem, even though Mr. Boone conceded that the non-pork diet is related to the Muslim faith. Mr. Boone estimated that the Oklahoma DOC will expend more than three million dollars annually for special religious diets for inmates should Plaintiffs be successful in this case. Mr. Boone further testified that the response of inmates in the Oklahoma DOC prison system to the grant of an injunction in this case would result in massive requests for accommodation of special religious diets, analogous to the response by inmates that followed the decision in Mosier v. Maynard, 937 F.2d 1521 (10th Cir. 1991), and other similar cases. These decisions, commonly known as the “haircut cases,” involved restrictions placed upon the length of inmates’ hair under then-current Oklahoma DOC policy in which the circuit court found that such restrictions could violate the inmates’ sincerely-held religious beliefs and their rights under the Free Exercise Clause of the First Amendment to the United States Constitution. Finally, Mr. Boone testified that the Oklahoma DOC had not devised any acceptable method for determining the sincerity of an inmate’s religious beliefs.

IV. Sincerity of Religious Beliefs

Defendant did not challenge the sincerity of the Plaintiffs’ religious beliefs in Defendant’s response to Plaintiffs’ Motions for a Preliminary Injunction. At the evidentiary hearing, Defendant cross-examined each of the three Plaintiffs concerning the sincerity of

their religious beliefs but did not provide evidence rebutting their assertion that they were sincere believers in the Orthodox Jewish faith. The testimony of the Plaintiffs at the hearing, as summarized above, is sufficient to show that the Plaintiffs' religious beliefs are sincerely held in accordance with Orthodox Judaism.

V. Analysis under Turner

There is judicial precedent in this and other circuits supporting Plaintiffs' assertion of a First Amendment right to receive a kosher diet consistent with their sincere religious beliefs. Three Colorado inmates sought a preliminary injunction in 1996 in the United States District Court for the District of Colorado alleging a constitutional and statutory right to receive a kosher diet. In Beerheide v. Zavaras, 997 F.Supp. 1405, 1413 (D.Colo. 1998)(Beerheide I), the district court entered a preliminary injunction directing the Colorado DOC to provide kosher food to the inmate-plaintiffs in accordance with Orthodox Jewish law. Following the entry of the preliminary injunction, the Colorado DOC instituted a kosher diet program and proposed to the court that the inmate-plaintiffs be required to make a co-payment of no more than 25% of the additional cost of the kosher meals. A trial was subsequently conducted in the district court on the issue of the sincerity of the religious beliefs of two of the inmate-plaintiffs and on the constitutionality of the Colorado DOC's proposed program of cost-sharing for inmates desiring a kosher diet. Beerheide v. Suthers, 82 F.Supp.2d 1190 (D.Colo. 2000)(Beerheide II). In Beerheide II, the district court found that the inmates were sufficiently sincere in their religious beliefs. Further, the district court reviewed the Colorado DOC's proposed co-payment program in light of the requisite Turner

v. Safley, 482 U.S. 78 (1978), factors to determine the constitutionality of the proposed program. The court determined that the Colorado “DOC’s proposed co-pay program is an unnecessary burden” on the inmate-plaintiffs’ free exercise of their religion in violation of the First Amendment and that under the Turner analysis the inmates were entitled to a kosher diet provided by the Colorado DOC free-of-cost to them. Consequently, the district court granted a permanent injunction requiring the provision of a kosher diet to the inmate-plaintiffs. Beerheide II, 82 F.Supp.2d at 1200.

Colorado DOC officials appealed the district court’s decision. In April 2002, the Tenth Circuit Court of Appeals issued a decision affirming the district court’s decision. Beerheide v. Suthers, 286 F.3d 1179 (10th Cir. 2002). The circuit court reviewed the Turner factors relevant to the alleged denial of the inmates’ constitutional rights and found that the inmates were constitutionally entitled to a kosher diet, that the Colorado DOC had not presented reliable evidence that the cost of providing a kosher diet would be more than *de minimis*, that the Colorado DOC already had in place a well-established system which served to screen out prisoners who sought to participate in the kosher diet program without a legitimate reason, that the Colorado DOC presented only a “specious argument” that the provision of kosher meals would cause a “floodgate” of litigation from other inmates seeking religious meals, and that the provision of kosher meals to inmates free-of-charge while using a selective screening method unrelated to money was an easy, available alternative with a *de minimis* impact on the Colorado DOC’s annual food service budget. Beerheide, 286 F.3d at 1185-1192. The circuit court concluded that the Colorado DOC’s proposed co-payment plan

was not rationally related to the legitimate penological concerns put forth by the officials of cost and abuse, and the court affirmed the lower court's grant of a permanent injunction.

Turning to the Plaintiffs' case, it is clearly-established in this circuit that prisoners have a constitutional right to a diet conforming to their sincerely held religious beliefs, unless denying the diet is "reasonably related to legitimate penological interests." *Id.* at 1184-1185. In order to determine whether Defendant has unconstitutionally infringed upon Plaintiffs' right to receive a kosher diet consistent with their Orthodox Jewish faith, the court must determine: "(1) whether a rational connection exists between the prison policy regulation and a legitimate governmental interest advanced as its justification; (2) whether alternative means of exercising the right are available notwithstanding the policy or regulation; (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." *Id.* at 1185 (citing *Turner*, 482 U.S. at 89-91). See *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)(requiring the application of the *Turner* analysis to prisons' claims involving the First Amendment's Free Exercise Clause).

A. Rational Relationship Between Prison Policy and Legitimate Governmental Interest

Defendant contends that the Oklahoma DOC is not constitutionally required to provide a kosher diet to the Plaintiffs. At the evidentiary hearing, Defendant presented two penological interests as justification for the Oklahoma DOC's policy against providing kosher diets. Defendant proffered that the provision of kosher diets would be prohibitively

expensive and that the provision of kosher diets would result in a burdensome number of requests by other prisoners for a religious diet. “To satisfy this first prong of the [Turner analysis], the prison administration is required to make a minimal showing that a rational relationship exists between its policy and stated goals.” Beerheide, 286 F.3d at 1186. As the Tenth Circuit Court of Appeals found in Beerheide, “[w]ithout doubt, prison administrators have a legitimate interest in working within a fixed budget.” Id. However, as to the second penological interest put forth by Defendant, a similar assertion by the Colorado DOC in the Beerheide case was rejected by the district court and the Tenth Circuit Court of Appeals. Id. at 1186 n. 2. The Tenth Circuit Court of Appeals’ reasoning in Beerheide is equally applicable here. The circuit court stated that “[d]enying protection of a constitutional right in order to prevent other inmates from seeking recognition and enforcement of their constitutional rights is contrary to the most basic principles of our system of government.” Id. Nevertheless, because Defendant has presented at least a “minimal showing” of a rational relationship between the Oklahoma DOC’s budgetary concern and its policy of not providing a kosher diet, the first Turner factor weighs in favor of the Defendant.

B. Alternative Means of Exercising Constitutional Right

Defendant posited at the hearing through the testimony of Mr. Boone that inmates in Oklahoma correctional facilities may partake of either a non-pork diet or a vegetarian diet and that the inmates may purchase kosher food from prison canteens. However, Rabbi Goldman testified concerning the requirements for maintaining the Jewish kosher dietary

laws, and it is obvious that neither the non-pork or the vegetarian diet provided by the Oklahoma DOC satisfies these strict requirements for the preparation, consumption, or storage of food. Additionally, only one of the Plaintiffs testified that he was financially able to purchase kosher food from the prison canteen. Mr. Boone also testified that the inmates are allowed to practice their Orthodox Jewish religion by attending services, participating in Jewish holidays, and possessing articles of importance to the practice of the Orthodox Jewish faith such as the yarmulke, a small cloth skull-cap. However, Rabbi Goldman testified that an individual who desires to convert to Orthodox Judaism would want to follow the strict kosher dietary laws of the faith and that observing the kosher dietary laws of Orthodox Judaism is considered an opportunity to have a closer relationship with God. Other courts have recognized that “Orthodox Jews consider a kosher diet a religious law.” Ward v. Hatcher, No. 97-16390, 1999 WL 109669 (9th Cir. Mar. 1, 1999). Thus, as the court found in Beerheide, the undersigned finds that the Plaintiffs “do not have a viable alternative to observing the essential tenet of Judaism of eating a kosher diet,” and this factor weighs in favor of Plaintiffs. Beerheide, 286 F.3d at 1197.

C. Effect of Accommodating the Exercise of the Right on Guards, Other Inmates, and Prison Resources

The Court in Turner recognized that “[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.” Turner, 482 U.S.

at 90. There is no dispute that the cost of providing kosher meals to the Plaintiffs and to other Oklahoma DOC inmates practicing the Orthodox Jewish faith would be greater than the cost of the non-kosher diet available to the general inmate population. However, the evidence presented at the evidentiary hearing varied greatly concerning the cost estimates for providing kosher meals. Plaintiffs presented evidence that frozen kosher meals were readily available from numerous distributors and that the frozen kosher meals could be purchased by the Oklahoma DOC at costs ranging from \$2.35 to \$3.44 per meal. Plaintiffs' Ex. 2. Rabbi Goldman testified that a separate oven or microwave was not needed for the cooking of the frozen kosher meals, as long as no other food is being cooked at the same time as the kosher food and as long as the frozen kosher dinners remain "double-wrapped" in their original packaging. Rabbi Goldman testified that kosher meal preparation would require a secure area for food preparation, plastic utensils for eating and preparation, pots and pans and knives for the separate preparation of meats and dairy foods, paper plates, and the food ingredients such as the frozen kosher dinners.

In Beerheide II, which provides relevant findings concerning the requirements for providing a kosher diet for inmates, the district court found that after the entry of the preliminary injunction in that case the Colorado DOC "set up a modified kosher kitchen within the regular prison kitchen" in which the Colorado DOC provided inmates a place to prepare kosher food trays "in a special locked and caged area set aside" for kosher food preparation and provided "a microwave oven, preparation table, two cutting boards, two nondisposable knives, one pot, one pan, plastic tubs, plastic storage drawers, plastic wear and

trays, butcher paper, and aluminum foil for exclusive use in the preparation of the kosher meals.” Beerheide II, 82 F.Supp.2d at 1193.

In this case, Defendant presented the testimony at the evidentiary hearing of Mr. Boone, who testified that he had not investigated the cost of providing frozen kosher meals from any kosher distributor or other food vendor, but that he had spoken with a Colorado DOC official who advised him that the Colorado DOC paid approximately \$5.00 per meal to provide kosher meals to Orthodox Jewish inmates. Mr. Boone testified he had no knowledge of the total amount of the annual budget for the Oklahoma DOC food services but that \$2.56 per day is the amount used to figure his food budget for each inmate in his district. Mr. Boone testified that only 52 inmates in the Oklahoma DOC custody claimed to be Jewish upon their entry into the correctional system and he did not know how many inmates might request a kosher diet, should one be available to them.

The testimony presented by the Defendant that in Mr. Boone’s opinion it would cost an estimated three million dollars to provide special religious diets, should Plaintiffs be successful in this cause of action, is purely speculative and is not credible evidence sufficient to support the Oklahoma DOC’s stated penological goal. See Beeheide, 286 F.3d at 1189 (“[W]hile Turner requires us to defer to the expertise of prison officials, that deference is not absolute. In order to warrant deference, prison officials *must present credible evidence* to support their stated penological goals.”)(emphasis in original). In light of the evidence presented by Plaintiffs concerning the estimated costs of purchasing kosher meals from a kosher food distributor, the evidence presented by Plaintiffs through Rabbi Goldman

concerning the work area and the modest equipment needs for maintaining a kosher diet, and the evidence tending to show that no more than a relatively small number of Oklahoma DOC inmates would request a kosher diet, it cannot be said that the costs of providing a kosher diet would more than minimally impact the budget of the Oklahoma DOC.

Turning to the impact of the exercise of Plaintiffs' right to a kosher diet upon guards and other inmates, the Court in Turner cautioned that "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." Turner, 482 U.S. at 90. However, "prison officials cannot simply point to *any* impact to win their case" because any institutional changes are expected to have some effect on other inmates or on the prison's resources. Beerheide, 286 F.3d at 1190.

Defendant presented the testimony of Mr. Boone at the hearing, who testified that the funds needed to accommodate Plaintiffs' exercise of their right to receive a kosher diet would impact the guards and other inmates because the Oklahoma DOC is under-funded and has a 20% staff vacancy rate statewide. Mr. Boone testified that the additional costs of providing a kosher diet would have to be taken from the Oklahoma DOC's personnel budget, leading to an increased security risk for inmates, staff, and the public. The Oklahoma DOC's strained budget is a legitimate area of concern for prison officials. However, as found previously, Defendant has not presented credible evidence that the provision of kosher diets would more than minimally impact the prison system's budget. Thus, the Defendant has not shown that the funding needed to make the change to add a kosher diet would greatly impact

the Oklahoma DOC's prison staff or other inmates.

Mr. Boone testified that the result of the grant of a preliminary injunction in this case would be similar to those circumstances which followed the haircut policy cases. This testimony is speculative. Mr. Boone testified that a large portion of Oklahoma DOC inmates requested an exemption to the haircut policy then in existence after the courts recognized the exemption could negatively affect an inmate's sincerely-held religious beliefs, that the Oklahoma DOC could not devise an acceptable policy for determining the sincerity of religious beliefs connected to hair length, and that the Oklahoma DOC therefore revised its policy to allow all inmates to grow their hair. However, with respect to special diets already being provided by the Oklahoma DOC, Mr. Boone testified that inmates must request a non-pork diet, that inmates may either choose a vegetarian diet or receive a clearance for a vegetarian diet through the prison's medical unit, that inmates receiving special diets are monitored, that prison staff is notified if an inmate eats in the wrong serving line, and that the inmate can be verbally reprimanded or charged with a misconduct for not complying with the inmate's special diet request. Although Mr. Boone testified that the provision of a kosher diet will cause security problems between guards and inmates and between inmates and other inmates, there is no credible evidence to support this assertion in light of the fact that the Oklahoma DOC already monitors the special diets of inmates and that Mr. Boone testified the provision of a non-pork diet has caused no security problems, even though he admitted the non-pork diet is related to the Muslim religious faith.

In Beerheide, the court recognized that as a result of the lower court decisions

granting injunctive relief the Colorado DOC “already has in place a well-established system that serves as a screen to keep out prisoners who seek to participate in the kosher meal program without a legitimate reason,” that under this policy an inmate must request a religious diet and document his or her religion’s dietary laws, and that inmates are only allowed to change religious affiliation once a year. Beerheide, 286 F.3d at 1191. The Colorado DOC also had an established policy for prisoners who wished to maintain their kosher diet privilege. Id. at 1192 n. 8. The U.S. Bureau of Prisons has established a similar policy for providing religious diets to its inmates. See 28 C.F.R. §548.20.

Although the Oklahoma DOC’s special diet policy does not, at this time, cover the provision of religious diets, evidence presented at the evidentiary hearing reflects the special diet policy is effective to preclude inmate abuse of the special diets offered in the prison system. Moreover, the Oklahoma DOC could easily implement a policy similar to the Colorado DOC’s policy which was recognized in Beerheide as an effective method for screening inmates’ requests for religious diets and monitoring those inmates who are receiving religious diets.

With respect to the Defendant’s assertion, through the testimony of Mr. Boone, that the provision of kosher diets would impact other inmates because the prison system would be deluged with requests for special religious diets, the court in Beerheide rejected the same argument, finding that this argument posited by the Colorado DOC was “specious.” Beerheide, 286 F.3d at 1191. Because the Defendant has failed to show that accommodation of Plaintiffs’ exercise of their right to a kosher diet would more than minimally impact the

Oklahoma DOC's budget, its staff, or other inmates, this Turner factor weighs in favor of the Plaintiffs.

D. Existence of Ready, Easy-to-Implement Alternatives Accommodating the Prisoners' Rights

“[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation.” Turner, 482 U.S. at 90. On the other hand, “the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.” Id. With regard to this fourth factor of the Turner analysis, “Turner does not impose a least-restrictive-alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal.” Overton v. Bazzetta, 539 U.S. 126, 136 (2003). The only alternative at issue here is the provision of kosher diets, which Plaintiffs contend can be accommodated at a modest cost with the use of frozen kosher meals purchased from a kosher food distributor. The fact that Colorado and the U.S. Bureau of Prisons afford Orthodox Jewish inmates the opportunity to observe kosher dietary laws indicates that the accommodation of this First Amendment right is not inconsistent with legitimate penological goals. There is no persuasive evidence presented by Defendant that the cost of providing kosher meals to the Plaintiffs and other Orthodox Jewish inmates would entail more than a minimal increase in the Oklahoma DOC's annual food budget. In Beerheide, the circuit court found that the provision of kosher meals

free of charge to inmates in the custody of the Colorado DOC “fits well into the category of ‘quick, easy alternatives.’” Beerheide, 286 F.3d at 1192. Defendant has provided no evidence distinguishing this case from the holding in Beerheide.

The Plaintiffs have shown a substantial likelihood of success concerning their claim that the Oklahoma DOC’s policy of not providing kosher diets to them violates their First Amendment right to freely exercise their Orthodox Jewish religion. Plaintiffs have also shown that the three remaining factors for the issuance of a preliminary injunction weigh heavily in their favor. Accordingly, Plaintiffs’ Motions for Preliminary Injunction should be granted, and an injunction should issue requiring Defendant to provide Plaintiffs with kosher meals free of charge to them, although Defendant should be allowed to exercise his professional discretion to determine a reasonably cost-effective method for providing Plaintiffs with a kosher diet.

RECOMMENDATION

Based on the foregoing findings, it is recommended that Plaintiffs’ Motions for Preliminary Injunction (Doc. #44 in Case No. CIV-03-125-W; Doc. #35 in Case No. CIV-03-99-W; Doc. #5 in Case No. CIV-03-1465-W) be GRANTED and that a preliminary injunction issue as set out herein. The parties are advised of their respective right to file an objection to this Second Supplemental Report and Recommendation with the Clerk of this Court by September 14th, 2004, 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 Second Supplemental 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 Second Supplemental Report and Recommendation partially disposes of the issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 25th day of August, 2004.


GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE