

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

FILED

OCT 10 2012

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

DENNIS EARL FULBRIGHT,)
)
Plaintiff,)

vs.)

JUSTIN JONES, Director,)
)
Defendant.)

No. CIV-03-99-W

JON ANDREW COTTRIEL,)
)
Plaintiff,)

vs.)

JUSTIN JONES, Director,)
)
Defendant.)

No. CIV-03-125-W

JERRY HARMON,)
)
Plaintiff,)

vs.)

JUSTIN JONES, Director,)
)
Defendant.)

No. CIV-03-1465-W

ORDER

On August 13, 2012, United States Magistrate Judge Gary M. Purcell issued a Fourth Supplemental Report and Recommendation¹ in these consolidated matters. Non-

¹For purposes of Case No. CIV-03-1465-W, Magistrate Judge Purcell's findings and recommendations should be entitled "Fifth Supplemental Report and Recommendation." See id. Doc. 153.

party Fred Smith was advised of his right to object, and the matter came before the Court on Smith's Objection to Report and Recommendation.

The three plaintiffs, Dennis Earl Fulbright, Jon Andrew Cottriel and Jerry Harmon, who are or were state inmates, had each alleged that his right under the free exercise clause of the first amendment to the United States Constitution to freely exercise his Orthodox Judaism religion was violated by the defendant's refusal to grant his request for a kosher diet. Each plaintiff had sought injunctive relief against defendant Ron Ward, then in his official capacity as Director of the Oklahoma Department of Corrections ("DOC"), to obtain, at no cost to the plaintiffs, a kosher diet that was consistent with the principles of Orthodox Judaism and that satisfied the nutritional value standards set by the American Correctional Association.

Adopting Magistrate Judge Purcell's findings and recommendations, the Court granted a preliminary injunction and ordered Ward "to provide these three plaintiffs a kosher diet at no cost to them until further Order of the Court." Case No. CIV-03-99-W, Doc 70 at 8; Case No. CIV-03-125-W, Doc. 79 at 8; Case No. CIV-03- 1465-W, Doc. 44 at 8.

Thereafter, on February 8, 2006, the Court entered a Judgment for Permanent Prospective Injunctive Relief ("Judgment") in favor of the three plaintiffs, after finding that a permanent injunction was "necessary to remedy a violation of these plaintiffs' right to freely exercise their Orthodox Jewish religion" Case No. CIV-03-99-W, Doc. 134 at 2; Case No. CIV-03-125-W, Doc. 145 at 2; Case No. CIV-03-1465-W, Doc. 106 at 2. Justin Jones, who had been substituted in his official capacity as DOC Director as the defendant pursuant to Rule 25(d)(1), F.R.Civ.P., was ordered "to immediately provide to

the plaintiffs kosher diets at no cost." Case No. CIV-03-99-W, Doc. 134 at 2; Case No. CIV-03-125-W, Doc. 145 at 2; Case No. CIV-03-1465-W, Doc. 106 at 2. The Court further ordered that the "diets [provided these three plaintiffs] shall comply with all nutritional requirements and standards currently applicable to the diets served to all other inmates in . . . [DOC] custody" Case No. CIV-03-99-W, Doc. 134 at 2; Case No. CIV-03-125-W, Doc. 145 at 2; Case No. CIV-03-1465-W, Doc. 106 at 2.

In the instant challenge, Smith had advised that he too follows the dietary mandates of Orthodox Judaism and that he was therefore "an intended third party beneficiary of this Court's [J]udgment" ² Case No. CIV-03-99, Doc. 166 at 1; Case No. CIV-03-125-W, Doc. 177 at 1; Case No. CIV-03-1465-W, Doc. 160 at 1. Smith is currently incarcerated at Davis Correctional Facility ("DCF"), a private prison owned and operated by Corrections Corporation of America, Inc. ("CCA"). He stated that DCF had been providing kosher meals for several years that complied with DOC's kosher meal policy, OP-070202, Attachment A, but as of June 6, 2012, DCF was no longer adhering to DOC policy.

Smith complained that CCA had instituted a new policy at its prisons that altered the content and preparation of kosher meals and that the meals at these facilities, including DCF, were prepared with non-kosher kitchen tools. Smith further asserted that the new kosher menu lacks meats and fresh vegetables and neither satisfies the calorie requirements of the American Dietetic Association for adult males, nor is comparable to the daily caloric portions served to those DCF inmates who do not follow the dietary regimen of Orthodox Judaism and who are not receiving kosher meals. Smith urged the

²Smith did not seek to intervene in these consolidated matters pursuant to Rule 24, F.R.Civ.P.

Court to find Jones in contempt and to issue an appropriate supplemental order, such that he (Smith) would be provided with a kosher diet that was nutritionally adequate and properly prepared.³

Upon de novo review, the Court concurred with Magistrate Purcell's findings and his suggested disposition of Smith's Motion for Finding of Contempt or for a Supplementary Order. Accordingly, the Court on September 26, 2012, adopted the Fourth Supplemental Report and Recommendation⁴ and found that the Judgment entered in this matter on February 8, 2006, pertained only to the claims pursued by Fulbright, Cottriel and Harmon against Jones.⁵ The Court further found that the Judgment contained no language that permitted it to be enforced by all DOC inmates. The Court denied Smith's Motion for

³The Court found that Smith's Motion for Finding of Contempt or for a Supplementary Order was triggered by a memo issued on June 6, 2006, by DCF "Chaplain, Brian Wideman, . . . to all facility kosher recipients, telling them of a major change in the kosher menu effective [June 19,] 2012." Case No. CIV-03-99, Doc. 166 at 2; Case No. CIV-03-125, Doc. 177 at 2; Case No. CIV-03-1465, Doc. 160 at 2. The "major change" was CCA's decision to no longer adhere to DOC's kosher meal policy, OP-070202, Attachment A, and to implement instead a kosher meal policy that mirrored the policies promulgated by the Bureau of Prisons and Immigrations and Customs Enforcement.

The Court found that the issues surrounding, and prompting, CCA's decision were not the subject of, and did not give rise to, the Judgment, and in light of Smith's concession that he was not "seeking to enforce any particular DOC policy," Case No. CIV-03-99-W, Doc. 180 at 3; Case No. CIV-03-125-W, Doc. 190 at 3; Case No. CIV-03-1465-W, Doc. 174 at 3, against the named defendants, but rather was seeking to litigate his claim that the kosher menu crafted by CCA, a nonparty, violated DOC policy, see CIV-03-99-W, Doc. 180 at 3; Case No. CIV-03-125-W, Doc. 190 at 3; Case No. CIV-03-1465-W, Doc. 174 at 3, the Court further found that relief under, and/or reliance on, Rule 71, F.R.Civ.P., was not appropriate.

⁴See Case No. CIV-03-99-W, Doc. 176; Case No. CIV-03-125-W, Doc. 185; Case No. CIV-03-1465-W, Doc. 167.

⁵See Case No. CIV-03-99-W, Doc. 181; Case No. CIV-03-125-W, Doc. 191; Case No. CIV-03-1465-W, Doc. 175.

Finding of Contempt or for a Supplementary Order⁶ and further declined his request to "transform[] this . . . proceeding into something similar to a class action" Case No. CIV-03-99, Doc. 180 at 5; Case No. CIV-03-125-W, Doc. 190 at 5; Case No. CIV-03-1465-W, Doc. 174 at 5.

The matter now comes before the Court on Smith's Motion to Reconsider filed pursuant to Rule 60(b), F.R.Civ.P. Smith has repeated certain arguments and grounds advanced in his initial paper, and he has also warned that the Court's Order of September 26, 2012, "could very well emboldened DOC to totally stop providing any Jewish inmates other than Fulbright, Cottriel and Harmon with kosher meals." Case No. CIV-03-99-W, Doc. 183 at 2; Case No. 03-125-W, Doc. 192 at 2; Case No. Civ-03-1465-W, Doc. 179 at 2.

The Court is not convinced that revisitation of the issues raised by Smith in his Motion for Finding of Contempt or for a Supplementary Order is warranted. The Court finds that Smith has made no showing that the Court either misapprehended Smith's position, the facts or the law or that reconsideration is required to prevent manifest injustice.

Accordingly, the Court

(1) DENIES Smith's Motion to Reconsider filed on October 5, 2012;⁷ and

⁶See Case No. CIV-03-99-W, Doc. 166; Case No. CIV-03-125-W, Doc. 177; Case No. CIV-03-1465-W, Doc. 160.

⁷See Case No. CIV-03-99-W, Doc. 183; Case No. 03-125-W, Doc. 192; Case No. Civ-03-1465-W, Doc. 179.

(2) DIRECTS the Clerk of the Court to mail a copy of this Order to Fred Smith, #218694, CCA Davis Correctional Facility, 6888 East 133rd Road DS-147, Holdenville, OK 74848 and show proof of the same in the records.

ENTERED this 10th day of October, 2012.



LEE R. WEST
UNITED STATES DISTRICT JUDGE