

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 02-22760-CIV-MOORE/O'SULLIVAN

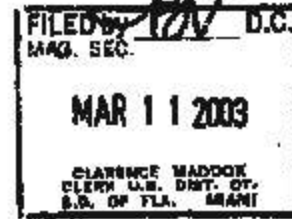
ALAN J. COTTON,

Plaintiff

v.

FLORIDA DEPARTMENT OF
CORRECTIONS, MICHAEL W. MOORE,
and TIMOTHY MINGO,

Defendants.



REPORT AND RECOMMENDATION

This matter came before the Court on the Defendant's Motion to Dismiss Plaintiff's Complaint (DE # 17, 10/17/02). This motion was referred to the undersigned United States Magistrate Judge by the Honorable K. Michael Moore, United States District Court Judge for the Southern District of Florida, pursuant to 28 U.S.C. § 636. Having carefully considered the motion and the opposition thereto, the court file and the applicable law, the undersigned recommends that the motion be GRANTED in part and DENIED in part in accordance with the following Report and Recommendation.

BACKGROUND

The plaintiff, Alan J. Cotton, sued the defendants for declaratory and injunctive relief, requesting that the Florida Department of Corrections ("DOC") provide him and similarly situated Jewish prisoners with nutritionally sufficient kosher meals (DE #1, 9/19/02). In addition to the DOC, the plaintiff sued Michael W. Moore in his official capacity as Secretary of the DOC and Timothy Mingo, the warden of Everglades Correctional

Institution.

The defendants filed the instant motion on October 17, 2002, (DE #17, 10/17/02), and the plaintiff filed a response on November 22, 2002, (DE #22, 11/22/02). On January 31, 2003, the plaintiff filed his notice of supplemental authority in support of his opposition (DE #38, 1/31/03).

ANALYSIS

Standard of Review on a Motion to Dismiss

A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts that would entitle him to relief. Bradberry v. Pinellas County, 789 F. 2d 1513, 1515 (11th Cir. 1986). In ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and take its allegations as true. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984), Quinones v. Durkis, 638 F. Supp. 856 (S.D. Fla. 1986). When a court considers a motion to dismiss at the pleading stage, it must apply the Federal Rules of Civil Procedure. Fed.R.Civ.P. 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Caster v. Hennessey, 781 F. 2d 1569, 1570 (11th Cir. 1986). Courts have interpreted this standard liberally. While the pleading must be sufficient to give the defendant fair notice of what the claim is and the grounds upon which it rests, the pleader is not required to set forth in detail the facts upon which the claim is based. Conley v. Gibson, 355 U.S. 41, 47 (1957); Nezil v. Williams, 543 F. Supp. 899 (M.D. Fla. 1982). Finally, the issue is not whether the plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), *overruled on other grounds by* Davis v. Scherer, 468 U.S. 183 (1984); In re

Asbestos Litigation, 679 F. Supp. 1096, 1098 (S.D. Fla. 1987). In the instant case, as more specifically described below, the plaintiff is entitled to offer evidence in support of his claims.

DISCUSSION

Claims Against Defendant Florida Department of Corrections

The plaintiff's complaint states that he is suing the defendant Florida Department of Corrections ("DOC"), "a legal subdivision of the State of Florida" (DE #1, 9/19/02). The defendants call the Department of Corrections an "agency of the state government of Florida" and claim that as such, DOC is immune from suit in federal court pursuant to the Eleventh Amendment (DE #17, 10/17/02).

In support of their position, the defendants cite Gamble v. Florida Dept. of Health & Rehabilitative Serv., 779 F. 2d 1509 (11th Cir. 1986). In Gamble, an adoptee attempted to sue the Florida Department of Health and Rehabilitative Services ("HRS") for alleged constitutional violations resulting from abuse at the hands of her former foster parents. Gamble at 1511. The Eleventh Circuit held that the State of Florida had not waived its Eleventh Amendment immunity and HRS could not be sued in federal court for damages. *Id.* The court held that absent (1) a legitimate abrogation of immunity by Congress or (2) a waiver of immunity by the state being sued, the Eleventh Amendment is an absolute bar to suit by an individual against a state or its agencies in federal court. Gamble v. Florida Dept. of Health & Rehabilitative Serv., 779 F. 2d 1509, 1511 (citing Edelman v. Jordan, 415 U.S. 651 (1974)) (emphasis added). Both Congressional abrogation and waiver of immunity must be made explicit. Gamble at 1512.

In the case at hand, the plaintiff has not pointed to any Congressional enactment

or legislation that would work as an abrogation of Florida's immunity. Nor is there any express or explicit language that waives the state's immunity. In fact, the defendants clearly state that Florida has not consented to be sued (DE #17, p. 22, 10/17/02). The DOC is an agency of the state of Florida, and, under Gamble, the Eleventh Amendment bars the suit by the plaintiff against the DOC.¹

The plaintiffs complaint contains two counts, Count II and Count IV, that name the DOC and assert claims under 42 U.S.C. § 1983. Because the plaintiff directly named the DOC, an agency of the state of Florida, and because the state of Florida is cloaked in Eleventh Amendment immunity, the federal courts have no jurisdiction over the §1983 aspect of the action as to the defendant DOC. See Cate v. Oldham, 707 F. 2d 1176, 1182 (11th Cir. 1983).

In accordance with the foregoing, the undersigned recommends that Counts II and IV of the plaintiff's complaint, which make claims under 42 U.S.C. § 1983, be dismissed as to the defendant Florida Department of Corrections.

Remaining Claims Against Defendants Michael W. Moore, Timothy Mingo and the DOC

The undersigned will address the remaining claims in the six counts of the complaint. Aside from Count II and Count IV, which should be dismissed as to the defendant the Florida Department of Corrections, each Count discussed below will be

¹The plaintiff, in his opposition to the defendants' motion to dismiss, claims that there is a long and well-recognized exception to the rule that the Eleventh Amendment proscribes suits against a state or state agency, absent consent. For this proposition the plaintiff cites Florida Ass'n of Rehab. Facilities, Inc. v. State of Fla., 225 F. 3d 1208, 1219 (11th Cir. 2000). The plaintiff quotes only one portion of the relevant language in Florida Ass'n. The decision actually states that "there is a long and well-recognized exception to this rule [Eleventh Amendment immunity] for suits against state officers. . ." Florida Ass'n at 1219 (emphasis added). The Court notes the disingenuous nature of the plaintiff's attempted use of the Florida Ass'n decision.

considered as to all the defendants. The discussion below of Count II and Count IV shall only apply to the defendants Moore and Mingo.

Count I and Count VI

Counts I and VI may be analyzed simultaneously, because they involve basically the same claim, that the defendants have substantially burdened the plaintiffs exercise of religious freedom. The defendants in their motion argue that a government may substantially burden a person's exercise of religion, if the government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

The question of what is the least restrictive means available is a question of fact. In addressing Counts I and VI the defendants raise questions of fact, including whether the plaintiffs beliefs are sincere, and whether the rules and regulations for providing certain foods to inmates further a compelling governmental interest (which the defendants assert is the secure and smooth operation of correctional facilities throughout the state).

In this case, matters outside the complaint have been presented to the court, both in the motion to dismiss and in the opposition thereto, that give rise to certain questions of fact, and that attempt to disprove the plaintiff's claims. The plaintiff is entitled to offer evidence to support his claims. See Scheuer v. Rhodes, 416 U.S. 232, 236, 250 (1974).

Accordingly, the undersigned recommends that the defendants' Motion to Dismiss be denied as to Count I and Count VI.

Count II and Count III

Count II of the plaintiff's complaint alleges that the defendants violated the plaintiff's

First and Fourteenth Amendment rights pursuant to the Constitution of the United States. Count III alleges the same violation of the plaintiff's right to free exercise of religion under the Florida Constitution.

The defendants cite Thornburgh v. Abbott, 490 U.S. 401 (1989), in support of the argument that a reasonableness test must be applied in evaluating a regulation adopted by a correctional facility. The Court in Thornburgh stated that regulations concerning the receipt of incoming subscription publications by prisoners must be analyzed under a reasonableness standard, and that such regulations are valid if they are reasonably related to legitimate penological interests. Thornburgh at 413, quoting Turner v. Safely, 482 U.S. 78 (1987).

In Turner, prison inmates brought a class action to challenge the constitutionality of provisions that regulated their receipt of personal mail, and regulated inmates' ability to marry, permitting inmates to marry only with the permission of the prison superintendent. The Supreme Court held that when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. Turner at 89.

The Turner Court outlined four factors that it deemed relevant in determining the reasonableness of the regulation at issue. Id. First, the Court said, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify the regulation. Second, there must be a determination of whether there are alternative means of exercising the right that remain open to prison inmates. Third, the court should consider what impact accommodating the asserted constitutional right will have upon guards, other inmates, and the allocation of prison resources. Finally,

the absence of ready alternatives is evidence of the reasonableness of a prison regulation. *Turner v. Safely*, 482 U.S. 78, 89-90.

To apply the four-part test outlined in Turner and adopted in Thornburgh to the case at hand would require a fact-sensitive inquiry into the specifics of the case. For instance, the defendants raise several questions of fact in their motion including: whether the plaintiff would have alternative means of exercising his rights in light of the DOC's regulations; and whether the defendants' reason for failing to offer a kosher diet remains the same as it was in 1987.

Accordingly the undersigned recommends that the defendants' Motion to Dismiss Count II as to the defendants Moore and Mingo be denied and the defendants' Motion to Dismiss Count III be denied.

Count IV and Count V

Count IV of the plaintiff's complaint alleges violations of the equal protection clause of the Fourteenth Amendment. The Count is brought under 42 U.S.C. § 1983, a federal statute. Count V alleges a violation of the equal protection clause of the Florida constitution.

The defendants argue that in order to bring such claims, the plaintiff must establish that he is similarly situated to another inmate who has received the desired treatment, i.e., a special religious diet, and that he has been discriminated against. The defendants maintain that the plaintiff cannot establish this. They argue that while the complaint alleges that the DOC accommodates inmates of other religions with special diets, the "other meal options were not designed *entirely* to accommodate another religion" (DE #17, p. 12, 10/17/02) (emphasis in original). This statement clearly implicates two questions of fact:

whether the DOC does make such accommodations, and for what purposes such other accommodations are made, if not entirely for religious purposes.

Moreover, the complaint at ¶20 alleges that some prisoners are provided with specialized religious diets, but that the DOC refuses to provide kosher meals for Jewish prisoners (DE # 1, 9/19/02). An allegation that describes different treatment of classes of inmates will sufficiently support an equal protection claim such that the equal protection claim will not be dismissed upon a motion to dismiss. See Patel v. United States, No. 97-1083, 1997 WL 764570, at *3 (10th Cir. Dec. 4, 1997).

The Federal and Florida Constitutions require that persons similarly situated be treated similarly. Duncan v. Moore, 754 So. 2d 708, 712 (Fla. 2000) (citing City of Cleburne c. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985)). However, equal protection only demands that a distinction that results in unequal treatment bear some rational relationship to a legitimate state purpose. Id. (citations omitted). An alleged violation of the equal protection clause of the Florida Constitution must be evaluated under a “rational basis test.” Id. In this case, the rational basis test would be employed to determine whether the alleged unequal treatment by the DOC of Jewish and non-Jewish prisoners bore some rational relationship to a legitimate state purpose. For instance, the defendants argue that the DOC's policies were implemented due to “cost and availability of product, as well as logistical concerns,” (DE #17, p. 13, 10/17/02). A factual question arises whether these concerns are rationally related to a legitimate state purpose; this question cannot be disposed of on a motion to dismiss.

In accordance with the foregoing, the undersigned recommends that the defendants' Motion to Dismiss Count IV as to Mingo and Moore and the defendants'

Motion to Dismiss Count V be denied.

RECOMMENDATION

After weighing the above factors, the Court finds that the Defendants' Motion to Dismiss Plaintiffs Complaint (DE # 17, 10/17/02) should be **GRANTED** in part and **DENIED** in part. The Department of Corrections should be dismissed from Counts II and IV. All other aspects of the Motion to Dismiss should be denied.

The parties have ten (10) days from the date of receipt of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable K. Michael Moore, United States District Court Judge. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F. 2d 745 (11th Cir. 1988), cert. denied, 488 U.S. 958, 109 S.Ct. 397 (1988); RTC v. Hallmark Builders. Inc., 996 F. 2d 1144, 1149 (11th Cir. 1993).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this _____ day of _____, 2003.

JOHN J. O'SULLIVAN
UNITED STATES MAGISTRATE JUDGE

Copies provided to:
The Honorable K. Michael Moore
All Counsel of Record

