

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

MAX MOUSSAZADEH,

Plaintiff,

v.

**TEXAS DEPARTMENT OF CRIMINAL,
JUSTICE, *et al.*,**

Defendants.

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Civil Action No. 3:07-CV-00574

**DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE:

Defendants file their Response in Opposition to Plaintiff's motion for summary judgment. Plaintiff is not entitled to judgment as a matter of law.

I. SUMMARY OF THE ARGUMENT

Defendants assert there are genuine issues of material fact which prevent the granting of summary judgment as a matter of law on behalf of Plaintiff. Defendants further assert that Moussazadeh has failed to exhaust his administrative remedies as to any issue which he seeks summary judgment. This Court should deny Plaintiff's motion for summary judgment in its entirety.

II. ADOPTION AND INCORPORATION OF DEFENDANTS' MSJ AND EVIDENCE

Defendants herein fully adopt and incorporate their Motion for Summary Judgment with Brief in Support, Docket Entry (DE) 198, and the attached summary judgment evidence into this Response in Opposition as if it was set out herein.

III. COMPETENT EVIDENCE IN SUPPORT

Defendants rely on the competent summary judgment evidence attached to their Motion for Summary Judgment as if the exhibits were fully set out herein, in addition to the supplemental exhibits listed below in support of their Response in Opposition:

Exhibit WW: Relevant excerpts from the deposition of Beryl Bailey, TDCJ Food Services Program Supervisor III, dated September 28, 2010;

Exhibit XX: Relevant excerpts from the deposition of Allison Dunbar, TDCJ Office and Budget, dated September 29, 2010; and,

IV. RESPONSE IN OPPOSITION

A. *Failure to Exhaust Administrative Remedies¹ Defeats Summary Judgment*

Moussazadeh is not entitled to judgment as a matter of law on any issue which he has not exhausted his administrative remedies. Under the Prison Litigation Reform Act, (PLRA), 42 U.S.C. § 1997e, inmates are required to exhaust their administrative remedies before filing suit.² Because of the unique posture of this suit, the exhaustion of his administrative remedies regarding his change of circumstances would become required by Moussazadeh after his change in circumstances became known, e.g. shortly after moving to the Stiles Unit on October 13, 2009. Exhibit (Exh) F, p. 6138. In their Motion for Summary Judgment, Defendants presented competent summary judgment evidence that Plaintiff failed to file any grievance regarding a kosher diet, any RLUIPA claim, or the

¹ *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (noting that RLUIPA claims are subject to the exhaustion requirement of § 1997e(a)).

² *Booth v. Churner*, 532 U.S. 731, 736-41 (2001) (holding that “one ‘exhausts’ processes, not forms of relief...”).

accessibility of kosher food after his arrival at the Stiles Unit and failed to complete the administrative remedies process to exhaustion. Exh. K, L, and N.

A plaintiff's failure to plead exhaustion upon filing a complaint is not grounds for dismissal, as the Supreme Court has held that failure to exhaust is an affirmative defense, and a plaintiff is not required to plead and demonstrate exhaustion of remedies in his complaint. *See Jones v. Bock*, 549 U.S. 199, 216 (2007). But while a plaintiff is not required to plead in his complaint that he exhausted his available administrative remedies, at summary judgment he must show that he did indeed exhaust such remedies when faced with a lack of exhaustion defense. *See* DE 8. As the moving party for summary judgment has the burden of proving the lack of a genuine issue as to all the material facts,³ Moussazadeh has the burden of proving that he exhausted his administrative remedies as to an essential element of his case and demonstrating his entitlement to judgment as a matter of law.

The Prison Litigation Reform Act, 42 U.S.C. § 1997e, provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” Exhaustion is mandatory, “irrespective of the forms of relief sought and offered through the administrative avenues.”⁴ This exhaustion requirement applies to “all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”⁵

³*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1221-23 (5th Cir.1985).

⁴*Booth v. Churner*, 532 U.S. 731, 739, 740-41 n.6 (2001).

⁵*Porter v. Nussle*, 534 U.S. 516, 532 (2002).

Plaintiff's 2005 grievance, regarding the lack of kosher food at the Eastham Unit, does not exhaust his administrative remedies as to any complaint he has regarding the Stiles Unit, a Basic Jewish Designated Unit which provides pre-packaged kosher meals in its unit commissary for sale.⁶ Exh. M. Moreover, Plaintiff can not claim that his 2005 grievance addresses an on-going violation as (1) TDCJ has a kosher diet policy and procedures which did not exist in 2005, (2) TDCJ has an operational kosher kitchen at the Stringfellow Unit which did not exist in 2005, and; (3) TDCJ has made a religious accommodation to observant Orthodox Jewish inmates by making shelf stable pre-packaged kosher meals and snacks available in the unit commissaries for sale which did not exist in 2005. Furthermore, Moussazadeh's 2005 grievance does not address an on-going situation as he received a kosher diet supplied by the kosher kitchen at the Stringfellow Unit from May 27, 2007 to October 13, 2009, Exh. D, E generally, as recognized by this Court in its March 26, 2009 Order, DE. 135.

Moussazadeh is not entitled to summary judgment as a matter of law on any matter as he has failed to exhaust his administrative remedies to conclusion. Plaintiff would bear the burden of proof at trial as to his exhaustion of administrative remedies and Plaintiff has failed to put forth any competent summary judgment evidence that he has exhausted his administrative remedies as to his change of circumstances. Genuine issues of material fact remain which preclude the granting of summary judgment in favor of the Plaintiff.

⁶ *Cf. Johnson v. Johnson*, 385 F.3d 503, 521 & n. 13 (5th Cir. 2004)(noting that a grievance filed in response to one particular incident does not automatically exhaust claims that arise from future incidents of the same general type).

B. Comparing Apples to Oranges

In a conclusory fashion, Plaintiff asserts that because the Federal Bureau of Prisons (BOP) and thirty-two other states provide some form of kosher diet that TDCJ should be providing a kosher diet in the same manner systemwide. Setting aside the obvious: (1) that this is not a class action suit, DE 1; (2) Plaintiff has no standing to sue on behalf of other inmates,⁷ and (3) that the PLRA disapproves of systemic relief and injunctive relief which is not narrowly tailored to address the alleged violation, *see* Defendants' Motion for Summary Judgment, DE 198, pp. 41 - 43, Plaintiff's proposition is not required by the plain language of RLUIPA or the Fifth Circuit. RLUIPA does not impose a "lowest common denominator" standard which requires state prison officials to adopt any religious accommodation that is recognized by other institutions.⁸ Although there are other prison systems that provide kosher meals systemwide, there is room within RLUIPA for a particular prison to decline to join the "lowest common denominator" when, in the discretion of its officials, there are better means to provide a particularized accommodation which also addresses the needs and restraints of that prison system.⁹ RLUIPA does not require TDCJ to adopt the religious accommodation proposed by Plaintiff - notwithstanding the fact that other prison systems have elected on their own accord to do so.¹⁰

⁷*Warth v. Seldin*, 422 U.S. 490, 509-510 (1975)(One individual has no standing to litigate the claims of another).

⁸*See Daker v. Georgia*, 469 F. Supp 2d 1231, 1239 (N.D. Ga 2007).

⁹*Id.*, citing *Cutter*, 125 S.Ct. At 2123 (explaining that Congress "anticipated that courts would apply [RLUIPA]'s standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.").

¹⁰*Id.* at 1240.

What is viable for one state is not necessarily viable or necessarily required for another state. Plaintiff is essentially asking this Court to compare apples to oranges and to ignore the Fifth Circuit's and Supreme Court's directives that "context matters" in applying RLUIPA's compelling governmental interest test.¹¹

1. Federal Bureau of Prisons

Plaintiff points to the Common Fare program of the Federal Bureau of Prisons, (BOP), as a model that TDCJ should be following. The BOP Common Fare program is designed to feed the approximately 31 religious groups contained within the BOP system, including kosher, halal and any religious diet requiring a vegetarian or vegan diet.¹² It consists of a cold food bar and salad bar and offers a hot entree only three times a week through the heating of a pre-packaged kosher meal. No other cooking of food is permitted under the Common Fare program.¹³

The BOP is one of the few prison systems that are comparable in size and prison population¹⁴ to TDCJ; however, there are distinguishing factors for which the adoption of a Common Fare program is impracticable for TDCJ. Although the BOP does not post the number of offenders participating in its Common Fare program on its website, the number is expected to be significant considering that the program was designed to feed approximately 31 faith based groups.¹⁵ TDCJ's

¹¹*Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007)(quoting *Cutter*, 544 U.S. at 723)).

¹²*See Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 810 (8th Cir. 2008).

¹³*Id.*

¹⁴The BOP website reports an average daily offender population of 203,490 for all of its facilities for Fiscal Year 2009. *See* www.bop.gov/news/publications.jsp.

¹⁵*Patel*, 515 F.3d at 810.

program is concerned with only one faith group,¹⁶ and then only that segment of that faith group which maintains the strict dietary restrictions of *kashrut*. TDCJ has approximately 50 observant Orthodox Jewish inmates who are participating in Jewish programming statewide. *See* Fn 21, DE 198. The sheer numbers of 31 faith based groups would understandably call for a systemwide religious food program. Fifty inmates within a system of 96 prisons and a prison population of 136,995 that TDCJ directly feeds, does not justify a systemwide kosher food program nor the building of kosher kitchens at each of its prisons. *See* DE 198, pp. 36-39, (regarding the costs associated with feeding a kosher diet and with building free standing kosher kitchens).

In addition to the lack of numbers and the high cost of building kosher kitchens, Beryl Bailey testified in his deposition that there were differences between the BOP and TDCJ which prevented TDCJ from modeling its kosher food program after the federal system; (1) BOP's larger budget per capita, (2) the BOP's kitchen equipment, (3) the BOP's process for access and delivery of food goods directly to the units from the vendor, unlike TDCJ's system of central warehousing where the units order their supplies from the regional warehouse. Exh. WW, pp. 270, L. 14 - 273, L. 12.

Representative members of TDCJ toured the BOP's Federal Correctional Institution in Beaumont, Texas. Exh. WW, p. 271, L. 5 - p. 278, L. 2. Based on their tour and the information they received, the TDCJ representatives determined that the BOP's "common fare" was cost prohibitive as it consists mostly of fresh fruits and vegetables and a salad bar which is more costly than the canned vegetables and fruits usually served by TDCJ. Exh. YY, p. 112, L. 7 -13, p. 115, L. 24 - p. 116, L. 17, Exh. AA, pp. 13, 22. Because of the bid/bulk purchasing system required by

¹⁶The program was and is specifically for the offender who is recognized as Jewish by Jewish law. Exh. B, pp. 6030, 6039-6042.

the State of Texas and managed by the Texas Comptroller's Office,¹⁷ TDCJ is required to order food in bulk on a yearly basis. Exh. AA, p. 12, L. 16-20. The short shelf life of fresh fruits and vegetables makes their purchase impractical and costly, resulting in increased food waste, under this type of bid/bulk purchasing system.¹⁸

The Plaintiff also points to the California Department of Corrections (CDC) as having a systemwide Common Fare program. The same discussion regarding the BOP also applies to the CDC. Furthermore, it is well known from various media venues that the State of California is bankrupt for all practical purposes. Unlike California, the State of Texas is required by its State Constitution to have a balanced budget. Exh. XX, p. 25, L. 19-23. In other words, Texas can't spend money on programs and services, it doesn't have.

Plaintiff also points to Colorado, Arizona and Maryland as models for TDCJ. However these prison systems are not comparable to Texas in number of inmates and number of prisons. According to the Colorado Department of Corrections' Statistical Report: Fiscal Year 2009, Colorado had approximately 34,979 offenders in custody in 27 prisons; 22 of which were operated directly by the state prison system. See www.doc.state.co.us/sites/default/files/opa/StatRprt_FY09.pdf. As of January 4, 2011, the Arizona Department of Corrections had 34,666 inmates in custody in 15 facilities. See www.azcorrections.gov/adc/pdf/count/04042011.countsheet.pdf. The Maryland Division of Corrections has 9,535 inmates in 24 prisons and pre-release centers. See www.dpscs.state.md.us/publicinfo/publications/pdfs/DOC2010AnnualRpt.pdf. Plaintiff failed to provide any competent summary judgment evidence as to the average daily cost of these prison

¹⁷See www.cpa.state.tx.us/procurement/prog/purchasing-operations-and-customer-service/.

¹⁸TDCJ does not have the option to opt out of the state mandated purchasing program.

systems to manage a kosher food program or the number of observant Orthodox Jewish inmates that participate in their programs. Such a lack of evidence, makes it impossible for any comparison to be made between these systems and the program that TDCJ has established.

Plaintiff also recommends the system followed by the Florida Department of Corrections. TDCJ Food Services representatives spoke to their Florida counterparts regarding their new kosher program. The Florida DOC offers kosher food at *one* prison which serves only *eight* Jewish inmates. Exh. WW, p. 297, L. 3 - p. 298, L. 24. [emphasis added].

Plaintiff has not put forth any issue or competent summary judgment evidence which demonstrates that TDCJ has violated RLUIPA by not following the “lowest common denominator.” Plaintiff is not entitled to summary judgment on this issue.

2. Pre-Packaged Meals

Plaintiff argues that pre-packaged meals are another viable way for TDCJ to provide kosher food systemwide. In its summary judgment motion, TDCJ explained the issues with pre-packaged kosher meals (1) cost, (2) nutritional value, Exh. WW, p. 170, L. 17 - p. 171, L. 18, p. 172, L. 13-18, (3) kosher-specific food preparation requirements, Exh. WW, p. 171, L. 19 -p. 172, L. 12. (4) and feeding the inmates in the kosher program as close to the menus of the non-kosher inmates to reduce resentment and envy, Exh. WW, p. 170, L. 12-16, which make pre-packaged meals not a viable option. *See* DE 198, pp. 29-31 and pp. 40-41 for the full discussion.

What Plaintiff fails to recognize with pre-packaged meals is that they still necessitate a kosher kitchen for heating in order to maintain the kosher pureness of the food. Furthermore, pre-packaged kosher meals can not be supplemented with food from the regular food line to cure their

nutritional deficiencies as the food from the regular food line is not kosher. To do so, would defeat the purpose of a kosher program.

Plaintiff also attempts to make an argument that pre-packaged kosher meals can be bought more cheaply in the free market than the price at which TDCJ's commissaries do. Plaintiff fails to comprehend the nature of the State of Texas purchasing process.¹⁹ See <http://www.cpa.state.tx.us/procurement/prog/purchasing-operations-and-customer-service>. Before a company can be awarded a state contract to supply food, it first must qualify and register as a vendor. My Own Meal has never been a contract vendor with the State of Texas, see <http://www.window.state.tx.us/procurement/cmb/cmbhub.html>. Alle Processing is the current vendor which supplies pre-packaged kosher meals to the State of Texas. Exh. MM, p. 5102. Although Alle Processing offers pre-packaged kosher meals for \$2.05 per meal on the internet, Alle Processing charges TDCJ's Commissary Department \$3.67 approximately per package as its winning low bid contract price. Exh. MM, p. 5103. It doesn't appear that Alle Processing submits its internet price when bidding on government contracts.

Plaintiff also makes an assertion that pre-packaged kosher meals bought from the unit commissaries counts against an inmate's commissary spending limits. Besides being an incorrect statement, this issue is not ripe for suit as Plaintiff did not file any grievance to completion which complains that he was prohibited from purchasing a pre-packaged kosher meal from the commissary because of commissary spend limits. See Exh. K, L, and N.

Plaintiff's confusion is understandable as during Mrs. Dunbar's deposition, she testified that she thought that the pre-packaged kosher meals did count against the commissary spend limits for

¹⁹Similar to the federal government's bid/purchasing process.

an inmate; however she could be wrong. Mrs. Dunbar stated several times during the deposition that she was not certain of her answer. After her deposition, Mrs. Dunbar obtained the correct information from the TDCJ Commissary Department and corrected the statements on her deposition errata sheet which was presented to Plaintiff. Exh. XX, Errata Sheet. In Defendants' summary judgment motion, Defendants attached the affidavit of Suzanne Vaughn, Exh. R, p. 7593, which stated that pre-packaged kosher meals do not apply to the commissary spend limits.

There is no issue regarding pre-packaged kosher meals to which Plaintiff has shown that he is entitled to judgment as a matter of law. As Plaintiff did not exhaust any issue regarding pre-packaged kosher meals, genuine issues of material fact remain which precludes summary judgment for Plaintiff.

3. Stringfellow Unit Kosher Kitchen

Plaintiff makes the argument that the Stringfellow Unit Kosher Kitchen should be used to prepare and distribute kosher food statewide. However the Stringfellow Unit Kosher Kitchen does not have the capacity to provide kosher meals to other units. Exh. WW, p. 303, L. 24 - p. 304, L. 20. Moreover, it does not alleviate the problem that when the prepared kosher meal arrives at its destination unit, that there are no kosher areas to heat the food. *See* DE 198, pp. 26-28. From their study of "keeping kosher," TDCJ Food Service officials learned that even if they were to serve pre-packaged kosher meals, a kosher kitchen would still be required to heat the meals. "If you open that can in a non-kosher environment, it is no longer considered kosher. It has to be opened, heated up, prepared, and served in a kosher environment." Exh. WW, p. 172, L. 2 - 5. While the heating of a pre-packaged meal in a microwave in a corner of some unit kitchen may seem like an insignificant

matter, the process would render the meal no longer kosherly pure if done in a non-kosher environment. Plaintiff is not entitled to summary judgment on this issue.

C. *Not a Substantial Burden on Plaintiff's Religion*

Plaintiff asserts that TDCJ has imposed a substantial burden on his religion by not providing a kosher meal from a kosher kitchen at the Stiles Unit. Besides failing to exhaust his administrative remedies as to this issue, TDCJ further asserts that they have provided a religious accommodation to Plaintiff by providing pre-packaged kosher meals and snacks for sale in the unit commissaries which Plaintiff does not avail himself. *See* DE 198, pp. 13-22. Moreover, there is a question as to Plaintiff's sincerity of belief. *See* DE 198, pp. 22-25. Furthermore, if Plaintiff will follow prison rules and regulations, Plaintiff could be returned to the Stringfellow Unit. Genuine issues of material fact exist which preclude summary judgment on behalf of Plaintiff regarding this issue.

D. *Costs*

Although the Plaintiff relies on district court decisions from other circuits to say that costs should not be a consideration in the RLUIPA analysis, the Supreme Court and the Fifth Circuit disagree. In *Cutter*,²⁰ the Supreme Court explained that Congress "anticipated that courts would apply [RLUIPA]'s standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, *consistent with consideration of costs and limited resources.*" [emphasis added]. In *Baranowski*, the Fifth Circuit recognized that costs were a compelling state interest which would permit a prison system to have restrictions in place that although placed a significant burden on the free exercise of religion were excused because the compelling state interest was so great.

²⁰125 S.Ct. at 2123.

Defendants' summary judgment motion pointed to more than just cost alone as a reason why kosher kitchens can't be built at every TDCJ prison. More importantly, it is the significant impact on other inmates because of the higher costs associated with kosher food and the higher costs to remodel or build kosher kitchens. As discussed in Defendants' summary judgment motion, if pre-packaged kosher meals were given for free to inmates from the unit commissaries, that will impact various services and benefits to the overall inmate population that are paid through the Commissary Department. *See* DE 198, p.40-41. If money is taken from TDCJ's General Fund or bond funds, without other revenue sources available, to build free standing kitchens, then roofs, fencing and other repairs to TDCJ's prisons will not be made which logically affects security at each TDCJ unit, and aging, mechanically unsound equipment will not be replaced, like washers and dryers, which affects the entire inmate population. *See* DE 198, p. 39.

Defendants deny Plaintiff's assertion that kosher food costs are minimal. The costs associated with the serving of kosher food is substantial; \$7.98 per day per inmate for kosher food versus \$3.67 per day per inmate for regular food options. *See* DE 198, pp. 35 -41. Genuine issues of material fact exist which precludes judgment for Plaintiff.

E. Medical Diets

Plaintiff makes the specious argument that since TDCJ can afford to feed certain inmates medical and therapeutic diets that TDCJ can afford the cost of providing kosher meals statewide. For medical and therapeutic diets, TDCJ uses the same menus and the same store of goods to fix regular food trays and medical trays. The difference is that medical trays will lack seasoning and margarine because it is a bland diet. Exh. WW, p. 306, L. 24 - p. 308, L. 4. Furthermore, medical diets do not require separate, specialized kitchens, pots, pans and utensils and foods like kosher food does. *See*

DE 198, pp. 26-28. Medical diets do not require a specialized food preparers or supervisors, i.e. *mashgiach*. The cost of a medical tray is essentially the same as a regular food tray because they utilize the same food items. Exh. XX, p. 61, L. 4 - 22.

V. CONCLUSION

Defendants respectfully pray that this Honorable Court deny Moussazadeh's summary judgment motion and deny any and all relief requested by Plaintiff.

Respectfully submitted,

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NOTICE OF ELECTRONIC FILING

I, CELAMAINE CUNNIFF, Assistant General of Texas, do hereby certify that I have electronically submitted for filing, a true and correct copy of the above and foregoing **Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment** in accordance with the Electronic Case Files System of the Southern District of Texas, on the 18th day of January, 2011.

/s/ CELAMAINE CUNNIFF
CELAMAINE CUNNIFF
Assistant Attorney General

CERTIFICATE OF SERVICE

I, CELAMAINE CUNNIFF, Assistant Attorney General of Texas, certify that a copy of **Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment** was served by electronic filing notice on the 18th day of January, 2011, to the following:

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