

Commonwealth of Massachusetts Superior Court. MIDDLESEX, SS.

# JACKSON v. DEPARTMENT OF CORRECTION

03-4431 (Mass. Cmmw. 2006)

Decided August 15th, 2006

MEMORANDUM AND ORDER ON DEFENDANT  
DEPARTMENT OF CORRECTION MOTION FOR  
SUMMARY JUDGMENT AND CROSS-MOTION  
OF THE PLAINTIFFS FOR PARTIAL SUMMARY  
JUDGMENT

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THAYER FREMONT-SMITH

Consideration of the briefs and oral argument, the court rules as follows on each of the legal contentions of the defendant.

1. Mass. G.L. c. 127, § 32.

This statute requires the superintendent of an institution such as a prison to "treat the prisoners with kindness which their obedience, industry and good conduct merit." The questions raised are whether the pat-frisking of Muslim inmates by female guards or the provision of only bi-weekly religious services for Muslims violates this statute.

In Blaney v. Commissioner of Correction, [374 Mass. 337](#) (1978), prisoners who were in protective custody were confined to their cells at least twenty-three hours a day, had very limited exercise facilities, no work program, restricted bathing opportunities, and no substantial opportunity to mingle or take meals with other prisoners. The court held that this was a violation of the statute where the Department of Correction (D.O.C.) had not shown it was unable to fulfill the mandate of the statute within the available fiscal appropriation provided to the department. The court found that it was not shown that the legislature had

provided inadequate funds to permit the defendant to fulfill its statutory duty. On the other hand, in Hastings v. Commissioner of Correction, [424 Mass. 46](#) (1997), where D.O.C. had ordered that all inmates serving life sentences for second degree murder and who had been denied parole two or more times would be reclassified and placed in more secure facilities, the Court held that the D.O.C.'s exercise of its discretionary powers did not violate the statute.

Here, although the alleged violations on their face are nowhere near as "unkind" as those in Blaney, *supra*, an evidentiary record should be developed with regard to the degree of psychological pain which may be caused to the inmates by either of the alleged violations, and as to whether D.O.C. can show it has adequate funds to permit it to hire additional clerical personnel to conduct weekly religious services or to have male personnel perform the pat-frisks.

Accordingly, with regard to G.L. c. 127, § 32, the motion is denied. Article 26 of the Massachusetts Declaration of Rights.

This prohibits cruel or unusual punishment. In Libby v. Commissioner of Correction, [385 Mass. 421](#) (1982), the Court determined that Article 26 is meant to bar punishment repugnant to contemporary standards of decency, and held that solitary confinement behind solid steel doors was not cruel or unusual.

By no stretch, can the provision of only bi-weekly religious services or pat-frisks by female security guards be deemed "cruel or unusual" under contemporary moral standards, where, as here, there is no allegation

that either of these are being done maliciously in order to cause pain or humiliation. See Greg v. Georgia, [428 U.S. 153, 173](#) (1976).

Accordingly, with regard to Art. 26 of the Declaration of Rights, the defendant's motion is allowed. Article 46 of the Massachusetts Constitution.

This guarantees to all citizens the freedom to exercise religion. This cause of action was not alleged in the complaint and no amendment has been allowed. The general allegations of the complaint do not constitute "notice pleading" for this legal theory. Moreover, this claim is redundant in any event, since the legal test is identical to that for [42 U.S.C. § 2000cc](#), the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Accordingly, the defendant's motion for this cause of action is isallowed. [42 U.S.C. § 1983](#).

Parties agreed that money damages are not permitted against the state under this section, and that the individual defendants in this action have previously been dismissed. Accordingly, the only question is whether injunctive relief may be awarded to the plaintiffs against the Commonwealth under this section.

Here it is claimed the plaintiffs suffered disparate treatment from the defendant and which violated their right to equal protection.

In Rasheed v. Commissioner of Correction, [446 Mass. 463](#) (2006), the claims by a Muslim prisoner that prayer times had been interrupted by having to stand for count, that his ihrim cloth was confiscated, and he was denied special meals during holidays were held not to establish that the prisoner was subject to disparate treatment for [42 U.S.C. § 1983](#) purposes, in the absence of discriminatory intent. See Matthews v. Ocean Spray Cranberries, [426 Mass. 122](#) (1997), where the Court held in an employment discrimination case in which disparate treatment was alleged, that although summary judgment is often disfavored for disparate treatment cases, where (as is also true in this case) there was no evidence of discriminatory in-

tent, motive or state of mind resolution by summary judgment was appropriate. Here, although it is alleged that other denominations do have weekly services, it is asserted without contradiction that there are some other religious groups that do not have weekly religious services. There is no contention that the bi-weekly services or pat-frisking is motivated by discriminatory intent, motive or state of mind (but rather that it is motivated by an alleged shortage of clergy and an alleged attempt to treat male and female guards the same). Accordingly, summary judgment on this legal claim is allowed. [42 U.C.C. § 2000cc](#), the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

This statute prohibits governments from placing a substantial burden on the free exercise of religion by persons confined in a government institution unless the government demonstrates that the imposition is in furtherance of a "compelling government interest" and is "the least restrictive means" of furthering that compelling interest.

In this case, there are disputed facts with regard to whether the complained-practices (provisions of only bi-weekly religious services and pat-frisks by female security guards), impose a substantial burden on the Muslim prisoners' exercise of religion and whether the Commonwealth has shown a compelling governmental justification for the complained-of acts, and, if so, whether there are less restrictive alternatives.

With respect to the defendant's allegations of sovereign immunity, the defendant contends it cannot be sued in a state court under Alden v. Maine, [527 U.S. 706](#) (1999), where it was held that Congress cannot abrogate the Eleventh Amendment right of sovereign immunity, unless the state consents. However, in South Dakota v. Dole, [483 U.S. 203](#) (1987), the Supreme Court held that Congressional legislation may place a condition on the payment of federal funds to a state, so that a state's acceptance of such federal funds effectively waives its sovereign immunity rights

under that statute. Here, it is not disputed that Massachusetts does accept substantial federal funds for its prisons, so that, under the reasoning of South Dakota v. Dole, it has waived its objection to being sued under that statute. Accordingly, summary judgment on this count of the complaint is denied. Mass. G.L. c. 231A (declaratory relief).

G.L. c. 231A § 2 provides that chapter 231 does not apply to federal claims. However, plaintiffs do raise claims that the defendant's practices violate chapter 127, § 32 and also contravene D.O.C.'s "religious programs and services" regulations set forth in 103 C.M.R. 471. Accordingly, summary judgment with regard to chapter 231A is denied.

## **SUMMARY**

In summary, the Court denies summary judgment with respect to G.L. c. 127, § 32 (lack of kindness), [42 U.S.C. § 2000cc](#) ("RLUIPA"), and G.L. c. 231A, § 2 (declaratory relief).

It allows summary judgment with respect to Art. 26 of the Massachusetts Declaration of Rights, with respect to Art. 46 of the Massachusetts Constitution, and with respect to [42 U.S.C. § 1983](#).

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