UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOWELL EDWARD JACKSON, Plaintiff-Appellant, v. EDDIE CLIMMER; et al., Defendants-Appellees.	No. 18-35235 D.C. No. 3:17-cv-01062-SB District of Oregon, Portland ORDER

Before: SCHROEDER, SILVERMAN, and M. SMITH, Circuit Judges.

Upon a review of the record and the response to the court's May 10, 2018 order, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 3), *see* 28 U.S.C. § 1915(a), and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

All other pending motions are denied as moot.

DISMISSED.

SMR/MOATT

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LOWELL EDWARD JACKSON, Plaintiff-Appellant, v. EDDIE CLIMMER; et al., Defendants-Appellees.	No. 18-35235 D.C. No. 3:17-cv-01062-SB District of Oregon, Portland ORDER

Before: SCHROEDER, SILVERMAN, and M. SMITH, Circuit Judges.

We have received the petition for panel rehearing, dated August 28, 2018 (Docket Entry No. 15). We decline to reconsider our August 22, 2018 order or to recall the mandate.

This case remains closed.

AT/MOATT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LOWELL EDWARD JACKSON,

Plaintiff,

v.

EDDIE CLIMMER, BILL BRADY, and ARAMARK FOOD SERVICE,

Defendants.

Case No. 3:17-cv-01062-SB

FINDINGS AND RECOMMENDATION

BECKERMAN, Magistrate Judge.

Lowell Edward Jackson ("Plaintiff") is an inmate in the custody of the Oregon Department of Corrections ("ODOC"). He filed this civil rights action against Eddie Climer,[1] Bill Brady, and Aramark Food Service (collectively, "Defendants"), alleging negligence and violations of Plaintiff's rights under the First, Eighth, and Fourteenth Amendments to the United States Constitution. (Am. Compl.) Defendants move for summary judgment, pursuant to Federal Rule of Civil Procedure 56. (ECF No. 10.)

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[1] Defendants' motion for summary judgment provided the correct spelling for Defendant Climer's surname. (ECF No. 10 at 1.)

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1367. For the reasons that follow, the Court recommends that the district judge grant Defendants' motion for summary judgment.

BACKGROUND

Plaintiff is allergic to pork. (Am. Compl. at 2.) He documented that allergy with the staff at Multnomah County's Inverness Jail. (*Id.*) He requested, and was denied, a halal diet. (*Id.*) Plaintiff alleges that Inverness Jail served meals containing pork on May 19 and May 20, 2017. (*Id.*) He did not consume the alleged pork products, but, instead, "rec[e]ived v[e]ggie tray both times." (*Id.*)

Plaintiff filed two Service Request Forms relating to his diet. (*Id.* at 7-8.) Both predate the alleged incidents. In a March 16, 2017, service request, Plaintiff asked for a pork-free diet "according to [his] religion" and stated that the beans served that day contained pieces of pork. (*Id.* at 8.) Inverness staff responded the following day, explaining that the jail is a pork-free facility and that any meat present in the meal was poultry. (*Id.*)

In a second service request, dated May 15, 2017, Plaintiff stated that he was writing "concerning the 'Allerg[e]n to Pork' slips" from food service. (*Id.* at 7.) A staff member replied, "Yes, I saw the 2 slips where you were given a veg[gie] meal instead of the reg meal. You can go on a veg[gie] diet if you like." (*Id.*) Plaintiff does not allege that he filed any food-related complaints through the institution's administrative grievance process.

Plaintiff claims that Defendants committed negligence by serving food containing pork despite knowledge of Plaintiff's allergy. (*Id.* at 2.) He also claims that Defendants violated his Fourteenth Amendment right to equal protection because they serve kosher meals to Jewish inmates, but do not serve halal meals to Muslim inmates. (*Id.* at 3.) Plaintiff cites to the First and

Eighth Amendments in his list of causes of action, but provides no specific allegations in support of those citations. (Am. Compl.)

Defendants now move for summary judgment. (ECF No. 10.) In support of that motion, Defendants submitted a declaration from Lewis Kyle, chaplain at Inverness Jail. Chaplain Kyle states that Inverness Jail has been a pork-free facility for over 17 years. (Kyle Decl. at ¶ 6.) Also, the jail discontinued both kosher and halal meals in 2013, in consultation with the facility's rabbi and imam. (*Id.* at ¶ 5.) Instead, Inverness Jail serves vegetarian and vegan meal options to meet both religions' dietary requirements. (*Id.* at ¶¶ 4-5.)

In a separate declaration, Defendant Eddie Climer, the Food Service Director at Inverness Jail, reaffirms that the jail has been pork-free for 17 years. (Climer Decl. at ¶ 7.) He provides copies of the jail's food service menus for March 16, 2017, and May 19, 2017. (*Id.*, Exs. 2, 3.) Defendant Climer explains that the "T Ham Navy Beans" and "Breakfast Sausage" served at Inverness Jail contain poultry meat, not pork. (Climer Decl. at ¶¶ 3-6; *see also id.* at Ex. 4 (ingredient list for breakfast patties).)

In response to these factual assertions, Plaintiff responds that dextrose, an ingredient in the breakfast patties served at Inverness Jail, is made from pork skin or pork fat. (Resp. to Mot. for Summ. J.) He provides no supporting evidence, only a reference to an "'in camera exhibit' piece of [pork] at the Multnomah County Court Clerk Office." (*Id.*)

Defendants also filed the declaration of Commander Raimond Adgers, Commander of Multnomah County's Corrections Division. Commander Adgers reviewed the institution's inmate grievance database and attests that Plaintiff did not file a grievance relating to his current claims. (Adgers Decl. at ¶ 4.) Plaintiff does not dispute this fact.

ANALYSIS

I. STANDARD OF REVIEW

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The initial burden for a motion for summary judgment is on the moving party to identify the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once that burden is satisfied, the burden shifts to the non-moving party to produce evidence showing that there remains a "genuine issue for trial." *Celotex*, 477 U.S. at 324.

The non-moving party may not rely upon the pleading allegations, *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995), or "unsupported conjecture or conclusory statements." *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). On a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in favor of that party. *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir. 2005) (citations omitted).

II. DISCUSSION

Plaintiff alleges that Defendants served food containing pork, putting Plaintiff at risk of harm due to his known food allergy, and violating his Constitutional rights as a Muslim. Plaintiff failed to exhaust his administrative remedies for these claims. Even if the Court could excuse the exhaustion requirement, Plaintiff has not submitted evidence sufficient to create a genuine issue with regard to the material facts that Inverness Jail does not serve pork products to inmates and that it serves vegetarian and vegan options that meet halal dietary requirements.

A. Exhaustion of Administrative Remedies

The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), requires that an inmate exhaust all available remedies before filing a federal law claim. *Porter v. Nussle*, 534

U.S. 516, 524 (2002). To exhaust administrative remedies under the PLRA, an inmate must complete the administrative review process in accordance with the applicable procedural rules. *Woodford v. Ngo*, 548 U.S. 81, 88 (2006).

Exhaustion, under the PLRA, is an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 216 (2007). A defendant has the burden of proving a plaintiff's failure to exhaust. *Albino v. Baca*, 697 F.3d 1023, 1031 (9th Cir. 2012). To meet that burden, a defendant "need only show the existence of remedies that the plaintiff did not use." *Id.* Once that showing is made, the burden shifts to the plaintiff to show that the grievance process was unavailable. *Id.* at 1032.

The Multnomah County Sheriff's Office inmate grievance policy states that "[t]he grievance process shall be used by inmates as a means of receiving, processing, and resolving complaints including, but not limited to, those involving policies, procedures, practices, regulations, conditions and staff conduct. . . ." (Adgers Decl., Ex. 1 at 2.) According to the Sheriff's Office inmate manual, Service Request Forms are not an accepted grievance form. (*Id.* at Ex. 2.)

Plaintiff did not file a grievance relating to his current claims. (Adgers Decl. at ¶ 4.) Plaintiff does not dispute this, but rather asserts: "Grievance system is 'inadequate' at Inverness, why? on this issue Aramark is 'third party' not state run entity." (Jackson Aff.)[2] Nothing in the plain text of the grievance policy excludes grievances against third party contractors operating within the institution. (Adgers Decl., Ex. 1.) Plaintiff's mistaken belief that he could not file a grievance regarding food service does not excuse his failure to exhaust. *See Ross v. Blake*, 136 S.

[2] Plaintiff filed an affidavit six days prior to filing his response brief. (ECF No. 17.) Given that Plaintiff is proceeding pro se, this Court will consider the affidavit in conjunction with the response.

Ct. 1850, 1858 (2016) (recognizing that an inmate's reasonable misunderstanding of a prison's grievance procedure does not render the process "unavailable" for exhaustion purposes).

A court may not consider unexhausted claims. *Jones*, 549 U.S. at 219-20. Accordingly, the district judge should grant Defendants' motion for summary judgment based on Plaintiff's failure to exhaust administrative remedies.

B. No Reasonable Dispute as to Critical Facts

Even if the district judge proceeds to the merits of Defendants' motion, it should enter summary judgment because there is no reasonable dispute that Inverness Jail is a pork-free facility, or that it serves halal-compliant meals.

Defendants support their motion for summary judgment with declarations from Inverness Jail's Chaplain and its Food Service Director. Both attest that the jail has not served pork to inmates in the past 17 years. (Kyle Decl. at ¶ 6; Climer Decl. at ¶ 7.) Plaintiff identified two food products that he suspected contained pork—"ham" and beans and the noodles served on May 19, 2017. (Am. Compl. at 2.) Defendant Climer explained that the jail serves "T Ham Navy Beans," and that the dish is made with turkey, not ham. (Climer Decl. at ¶ 3; *see also id.* at Ex. 1 (menu containing item).) He also provided the menu for May 19, 2017, which lists "Poultry MS & Noodles Brown Sauce," as the only noodle dish served that day. (*Id.* at Ex. 3.) Although not specifically identified by Plaintiff as a suspect food, Defendant Climer also submitted the ingredient list for the breakfast sausages served at the facility, showing that they, too, contain poultry and not pork. (*Id.* at Ex. 4.)

In response to this evidence, Plaintiff filed a statement that dextrose, one of the sausage ingredients, is a pork product. (Resp. to Mot. for Summ. J.) It is not. *See Corn Prod. Ref. Co. v. Fed. Trade Comm'n*, 324 U.S. 726, 743 (1945) (identifying dextrose as "corn sugar"). Plaintiff's conjecture is insufficient to create an issue of material fact. Because Plaintiff's negligence claim

hinges on the unsupported allegation that the jail serves pork, the district court should grant Defendants' motion for summary judgment as to that claim.

Likewise, Plaintiff's equal protection claim hinges on the allegation that the jail serves kosher, but not halal meals. Plaintiff offered no evidence to dispute Defendants' declarations stating that Inverness Jail discontinued both kosher and halal meals in 2013, and serves vegetarian and vegan meals to meet religious dietary requirements. (Climer Decl. at ¶¶ 4-5.) In fact, Plaintiff's own evidence supports the fact that Inverness Jail made vegetarian meal options available to him. (Am. Compl. at 2; *id.* at 7.) Absent any dispute that Inverness Jail treats Jewish and Muslim dietary needs alike, Plaintiff's equal protection claim fails and the district judge should grant Defendants' motion for summary judgment.[3]

CONCLUSION

For the reasons stated, the district judge should grant Defendants' motion for summary judgment. (ECF No. 10.)

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[3] To the extent that Plaintiff's citation to the First Amendment could be construed as a claim that the jail's meal service violated his right to free exercise of his religion, that claim must be dismissed as well. In addition, Plaintiff did not provide any allegations, or evidence, to support an Eighth Amendment claim for cruel and unusual punishment.

SCHEDULING ORDER

The Court will refer its Findings and Recommendation to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 22nd day of November, 2017.

Stacie F. Beckerman

STACIE F. BECKERMAN
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LOWELL EDWARD JACKSON, Plaintiff, v. **EDDIE CLIMMER, BILL BRADY, and ARAMARK FOOD SERVICE,** Defendants.	Case No. 3:17-cv-01062-SB **ORDER**

Michael H. Simon, District Judge.

United States Magistrate Judge Stacie F. Beckerman issued Findings and Recommendation in this case on November 22, 2107. ECF 24. Judge Beckerman recommended that Defendants' motion for summary judgment be granted.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require

a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Magistrates Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate's recommendations for "clear error on the face of the record."

Plaintiff timely filed an objection. ECF 27. Plaintiff's objection, however, does not actually relate to any analysis or specific recommendation contained in the Findings and Recommendation. The Findings and Recommendation recommends that the claims against Defendants relating to the prison food (for negligence, equal protection violations, First Amendment violations, and Eighth Amendment violations) be dismissed for failure to exhaust and that, if the Court were inclined to reach the merits, the claims be dismissed because there are no genuine dispute on any material fact. Plaintiff objects that the Findings and Recommendation failed to address Plaintiff's claim for copyright infringement in his purported copyright in his name and that the magistrate judge failed to rule on Plaintiff's motion for money judgment. Accordingly, the Court follows the recommendation of the Advisory Committee and reviews the Findings and Recommendation for clear error on the face of the record. No such error is apparent.

Regarding Plaintiff's purported claim for copyright infringement, no such claim was raised in Plaintiff's amended complaint. Instead, Plaintiff filed a document titled "Copyright Violation Against Defendants: Tort Claim" (ECF 18) in response to Defendants' Motion for

Summary Judgment. This document claims copyright ownership in the name "Lowell Edward Jackson" by virtue of Plaintiff's birth certificate and states that their "appears to be" infringement of that copyright against nonparty Cosgrave, Vergeer, Kester, LLP ("Cosgrave"). Plaintiff then filed a document titled "Copyright Infringement Tort Claim Against Defendants. Rule 56(g)." ECF 19. This document reiterates that there "appears to be" a copyright infringement claim against nonparty Cosgrave for infringing Plaintiff's copyright in his name "secured thru [sic] copyright of the numbers in top corner of my strawman birth certificate." *Id.*

There are several problems with Plaintiff's attempt to raise a copyright claim. First, Plaintiff did not seek to amend his complaint and this this claim is not validly before the Court. Second, a response to summary judgment is not the time to amend pleadings or raise new claims. *See, e.g.*, *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (finding that when allegations are not in the complaint, "raising such claim in a summary judgment motion is insufficient to present the claim to the district court"); *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("'Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings.'") (quoting *Fleming v. LindWaldock & Co.*, 922 F.2d 20, 24 (1st Cir.1990)); *Pickern v. Pier I Imports (U.S.), Inc.*, 457 F.3d 963, 968-69 (9th Cir. 2006) (new issues raised in response to summary judgment were not appropriate for consideration). Third, Cosgrave is not a party to this action and therefore is not under the jurisdiction of the Court and thus purported claims against Cosgrave are not properly before the Court in this case.

Finally, even if the Court were to consider Plaintiff's purported copyright claim on the merits (in the interests of judicial efficiency and because Plaintiff is proceeding *pro se*), the Court would dismiss the claims *sua sponte*. Under the Copyright Act, a copyright owner cannot

bring an action for infringement of a copyright until either the copyright is registered in accordance with the relevant provisions of the Copyright Act or the Copyright Office has refused to register the copyright. 17 U.S.C. § 411(a). Plaintiff does not assert that he has registered the copyright or tried to register it and been refused. Plaintiff's only assertion of copyright ownership is through his birth certificate. This is insufficient to give Plaintiff standing to sue for copyright infringement under the Copyright Act. *See Jennette v. United States*, 77 Fed. Cl. 126, 131-32 (2007) ("If the court construes plaintiff's Complaint as asserting copyright infringement of his name by the government, plaintiff must establish that the copyright is registered in accordance with the relevant provisions of the Copyright Act or the Copyright Office has refused to register the copyright. 17 U.S.C. § 411(a). Plaintiff has proffered no evidence of copyright registration nor the denial of copyright registration; plaintiff has not even asserted that he sought copyright registration in his Complaint or the attached documentation. Thus, this court lacks jurisdiction over any claims plaintiff might be asserting pursuant to 28 U.S.C. § 1498(b).").

With respect to Plaintiff's motion for money damages (ECF 22), this relates to Plaintiff's copyright claim. Accordingly, this motion is denied.

CONCLUSION

The Court **ADOPTS** Judge Beckerman's Findings and Recommendation, ECF 24. Defendants' Motion for Summary Judgment (ECF 10) is GRANTED. Plaintiff's motion for money judgment (ECF 22) is DENIED. This case is dismissed with prejudice.

IT IS SO ORDERED.

DATED this 16th day of January, 2018.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LOWELL EDWARD JACKSON,

Plaintiff,

v.

EDDIE CLIMMER, BILL BRADY, and ARAMARK FOOD SERVICE,

Defendants.

Case No. 3:17-cv-01062-SB

JUDGMENT

Michael H. Simon, District Judge.

Based on the Court's ORDER,

IT IS ADJUDGED that this case is DISMISSED with prejudice.

DATED this 16th day of January, 2018.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge