


IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

JAN 23 2008

JOHN F. CONCOGIAN, CLERK
BY: 
DEPUTY CLERK

LEROY A. LOVELACE,
Plaintiff,

v.

CIVIL ACTION NO.: 7:07-cv-00506

KATHLEEN BASSETT, et al.,
Defendants.

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO DISMISS

Petitioner, Leroy A. Lovelace ("Lovelace"), proceeding pro se, herein submits his response to the defendants' Motion to Dismiss and Brief in support thereof, and states as follows:

1. Virginia Department of Corrections ("VDOC") inmate, Lovelace, proceeds in this action by way of his Amended Complaint filed by this Court on October 29, 2007. The action concerns the nutritional and caloric inadequacy of the meals served to Lovelace when he participated in the Ramadan fast in calendar year 2005. Specifically, Lovelace alleges that during the Islamic month of Ramadan 2005, defendants deprived Lovelace of adequate nutrition and calories in violation of his First Amendment rights to religious expression, his rights accruing under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and his due process rights.

2. Defendants answer that, a) as to Lovelace's RLUIPA claim, "the alleged reduced caloric intake for a period of thirty (30) days while prisoners are restricted in the times during which they might eat meals is not a 'substantial burden,'" and that "[b]ecause the allegations of the Amended Complaint do not meet the substantial

burden test, Lovelace's RLUIPA claim fails," b) as to Lovelace's First Amendment claim, that, "[f]or the same reason just articulated [regarding the RLUIPA claim], Lovelace also has no First Amendment claim for the denial of free exercise," and, c) as to Lovelace's due process claim, "Lovelace in this instance confuses results with process as the process available to him clearly satisfied any due process protections that might be thought needed to challenge the Ramadan meal policy." (Brief, ¶4 & 6, ¶7, and ¶8, respectively).

a1. The Deprivation Of Adequate Calories And Nutrition Constitute A Substantial Burden

3. The Courts have held that inmates are entitled to receive adequate nutrition and calories. See, Shrader, 761 F.2d at 986 (holding that inmates must be provided nutritionally adequate food); see also, Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978).

4. The facts in the instant case are these: Lovelace is an observant Muslim who is required by his religious faith to fast for 30 consecutive days during the Islamic month of Ramadan. (Amended Complaint, ¶13, 20); Lovelace was on the Common Fare diet and continued to receive his Common Fare diet meals during Ramadan 2005. (Amended Complaint, ¶9); The 3 daily Common Fare meals served outside of Ramadan contained approximately 2500 calories and adequate nutrition. (Amended Complaint, ¶9); On each of the 30 days of Ramadan 2005, defendants provided to Lovelace approximately 1200 calories. (Amended Complaint, ¶9); As a result of defendants' having deprived Lovelace of adequate calories and nutrition, Lovelace lost approximately 10 pounds during Ramadan, suffered "unrelieved hunger" and frequent "hunger headaches," and, as a result of Lovelace's disputes with defendants to secure additional food, was deprived

of the very peace he sought to enjoy during Ramadan. (Amended Complaint, ¶25).

5. On these facts alone, a reasonable jury could find that Lovelace, while participating in the fast and receiving only 1200 daily calories, was substantially pressured to break the fast, in violation of Islamic tenets, in order to satisfy his physical hunger. Indeed, this Court has, on substantially identical facts, already held that such caloric deprivation constitutes a substantial burden under RLUIPA. See, Couch v. Jabe, et al., 479 F. Supp. 2d 569 (W.D.Va. 9/22/2006) (finding that, "viewing the facts in the light most favorable to Couch, a reasonable jury could find that inmates participating in the [Ramadan] fast, receiving only 1000 daily calories, were substantially pressured to break the fast, in violation of Islamic tenets in order to satisfy their physical hunger.") Id. That this Court has found, on substantially identical facts as those presented in the instant case, that such caloric and nutritional deprivation constitutes a "substantial burden," belies defendants' contention that Lovelace's allegations do not meet the substantial burden test.

6. Moreover, this Court must construe Lovelace's pro se Amended Complaint liberally, Alvarado v. Litscher, 267 F.3d 656 (7th Cir. 2001), and interpret his briefs and submissions to raise the strongest arguments they suggest. Wright v. C.I.R., 381 F.3d 41 (2nd Cir. 2004). Lovelace submits that he has, even without such liberal construction, alleged facts which constitute a substantial burden under RLUIPA.

b1. Lovelace Has Stated A First Amendment Claim.

7. Defendants cursorily address Lovelace's First Amendment

claim by alleging that defendants' reasoning as to Lovelace's RLUIPA claim shows that "Lovelace also has no First Amendment claim for the denial of free exercise." (Brief, ¶7). Lovelace responds that where, for the reasons articulated, defendants rely upon the erroneous contention that Lovelace has failed to demonstrate a "substantial burden" under RLUIPA, such contention also fails as to Lovelace's First Amendment claim for the denial of free exercise.

c1. Lovelace States A Due Process Claim.

8. Lovelace submits that defendants infringed his due process rights when defendants during Ramadan deprived Lovelace of adequate calories and nutrition. (Amended Complaint, ¶4). Defendants answer that the process available to Lovelace afforded adequate due process protection because Lovelace "not only had the prisoner grievance procedure available to him at any time leading up to Ramadan, but he also had the ear of the Food Service Supervisor as well." (Brief, ¶8). Lovelace responds as follows:

9. First, defendants' answer addresses only Lovelace's procedural due process, while pretermittting the issue of Lovelace's substantive due process rights. As to Lovelace's substantive due process rights, the initial inquiry is whether Lovelace has demonstrated that he was deprived of a protected liberty interest. See, Sandin v. Connor, 515 U.S. 472, 477-78 (1995). When, through the VDOC grievance procedure, Lovelace complained to defendants that defendants had deprived him of adequate calories and nutrition, and that such deprivations caused Lovelace physical harm and fell far below the VDOC recommended daily intake of 2500-2800 calories, defendants replied that, "Investigation reveals, Ramadan is neither a requirement for Common Fare nor a requirement by the Department

of Corrections; which makes it your choice to participate." (Amended Complaint, ¶15-16; Amended Complaint Exhibit - (F): Inmate Grievance Response). However, this Court has held that Ramadan is a requirement for the Virginia Department of Corrections in that Muslim inmates have a "liberty interest in observing the Ramadan fast, derived from [their] constitutional free exercise right." **Lovelace v. Lee, et al.**, Mem. Opinion, p.37 (8/24/2007), The Honorable Jackson L. Kiser.

10. And defendants erroneously contend that because it was Lovelace's "choice to participate" in Ramadan, it cannot be found that Lovelace was deprived of a protected liberty interest by the state. This Court has already determined, in **Couch**, based upon substantially identical facts, that summary judgment (let alone a Rule 12 dismissal) is not appropriate. There, the Court stated:

I find that there is a dispute in a genuine issue of material fact precluding the award of summary judgment in the defendants' favor on this issue. Specifically, the defendants contend that, given the voluntary nature of the fast, it cannot be found that Couch was deprived of a protected liberty interest by the state. The defendants claim that the prison posted all relevant information regarding the Ramadan fast so that inmates could make an informed decision regarding whether to participate therein. Nonetheless, Couch alleges that no information was posted regarding the fact that the inmates' daily caloric intake and nutrition would be so greatly reduced, thereby nullifying the defendants' argument that he voluntarily consented to such reduction in calories and nutrition. For these reasons, I will deny the defendants' motion for summary judgment on this ground.

Couch, id.

11. Similarly, Lovelace has alleged that though he signed a Request stating that he wished to continue receiving his Common Fare meals during Ramadan, "Lovelace at no time signed a waiver, nor did Lovelace expect, to forfeit Lovelace's caloric and nutri-

tional intake during the Ramadan fast." (Amended Complaint, ¶18).

12. Secondly, as to Lovelace's procedural due process rights, defendants are factually wrong in their assertion that Lovelace "had the prisoner grievance procedure available to him at any time leading up to Ramadan." (Brief, ¶8). The fact is, however, that the Inmate Grievance Form specifically provides that, "Grievances are to be filed within 30 calendar days from the date of occurrence/incident...." Thus, Lovelace could not use the grievance procedure, leading up to Ramadan, to complain of deprivations that had not yet occurred. Any attempt by Lovelace to utilize, predeprivation, the grievance procedure would have required, for example, the following complaint:

I, Leroy Lovelace, complain that if I am still an observant Muslim during Ramadan 2005, and if I choose to fast during Ramadan, and if I am still participating in the Common Fare diet, and if I choose to receive the Common Fare meals during Ramadan (rather than receive the NOI meals), I interpret verbal comments by the Food Service Supervisor to suggest that I may then be deprived of adequate calories and nutrition.

Clearly, VDOC policy prohibits the filing of such hypothetical, pre-occurrence grievances. Therefore, Lovelace had no predeprivation access to the inmate grievance procedure.

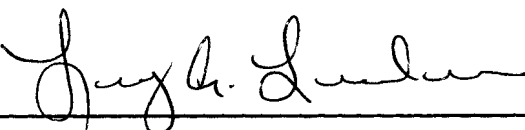
13. And defendants contend that where Lovelace "had the ear of the Food Service Supervisor," such "ear" afforded to Lovelace constitutionally adequate predeprivation due process protection. Defendants are wrong. That a prison kitchen supervisor was willing to listen to Lovelace complain that he soon may be deprived of adequate calories and nutrition, cannot reasonably be construed as constitutionally sufficient due process protection.

14. Finally, perhaps the most persuasive evidence that Lovelace states a viable claim regarding the deprivation of adequate

calories and nutrition is that upon substantially identical facts as presented in this action, this Court issued a preliminary injunction against these very defendants wherein the Court ordered that these defendants, "shall daily provide Couch with food items containing approximately 2,200 calories...."¹ **Couch v. Jabe, et al.**, Case No. 7:05cv00642, Order (Granting Motion for Preliminary Injunction) (W.D. Va. 9/22/2006), The Honorable Pamela Meade Sargent.

15. For all these reasons, this Honorable Court must deny defendants' motion to dismiss.

Respectfully submitted,



Leroy A. Lovelace

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¹ On the eve of the following Ramadan, September 22, 2006, this Court issued its preliminary injunction requiring the defendants to provide increased calories to fast participants. On September 23, 2006, Ramadan began, but defendants provided to Lovelace only approximately 1200 calories. However, in response to the injunction, on September 24, 2006, and for the remainder of Ramadan 2006, defendants provided to Lovelace approximately 2500 calories. Then, during Ramadan 2007, in accord with Couch's settlement agreement, defendants provided to Lovelace approximately 3000 daily calories by giving to Lovelace, between sunset and dawn, 3 Common Fare meals and a fourth bag-meal. Couch's settlement agreement provided that, inter alia, "VDOC Employees agree that the total calories and nutrition provided in the meals to non-fasting inmates will equal or exceed that provided to non-fasting inmates during the same period.")

Couch and Lovelace are, and have been since 2002, cellmates at the Keen Mountain Correctional Center, and have fasted together during Ramadan each year since 2002.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of January, 2008, the undersigned did mail, first-class postage prepaid, a true copy of the foregoing Plaintiff's Response to Defendants' Motion to Dismiss, to counsel for defendants herein, Mark R. Davis, Senior Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219.



Leroy A. Lovelace