IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY KRETCHMAR,	:	
	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 05-6108
JEFFREY A. BEARD, PH.D.,	:	
SECRETARY, PENNSYLVANIA	:	
DEPARTMENT OF CORRECTIONS;	:	
and MARGARET M. GORDON,	:	
CLINICAL DIETICIAN,	:	
PENNSYLVANIA DEPARTMENT OF	:	
CORRECTIONS	:	

MEMORANDUM AND ORDER

JOYNER, J. **July 18, 2006**

Plaintiff is an inmate at the Pennsylvania State Correctional Institution at Graterford. He has instituted this civil action for violations of 42 U.S.C. § 1983; of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C § 2000cc-1,2; and of the Pennsylvania Constitution and Pennsylvania law, Pa. Cons. Stat. Ann. §§ 1101-1602 and 37 Pa. Code § 93.6. The action is now before the Court for disposition of the Defendants' Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). For the reasons which follow, the motion shall be GRANTED.

Statement of Facts

This case arises out of the conditions of Plaintiff Gary Kretchmar's imprisonment at the Pennsylvania State Correctional Institution at Graterford. Plaintiff, a practicing Reform Jew,

requested a Kosher diet from the Department of Corrections (hereinafter "DOC"), pursuant to DC-ADM 819, by filing an Inmate Religious Accommodation Request Form on June 7, 2004. (Compl. ¶ 15.) His request was granted, and he began receiving meals from the DOC Kosher Diet Bag daily menu in September, 2004. (Compl. ¶ 17.) The Kosher Diet Bag daily menu, prepared by Defendant Margaret M. Gordon, a Clinical Dietician at the DOC, is a non-rotating menu of only cold food items. (Compl. ¶ 17.) During the celebration of Passover in April 2005, and again during the observance of Rosh Hashanah in October 2005, Plaintiff was permitted to purchase, at his own expense from an outside vendor, a pre-plated Kosher chicken dinner that was heated in a microwave pursuant to rabbinical instructions. (Compl. ¶¶ 20, 34.) On April 27, 2005, Plaintiff filed another Inmate Religious Accommodation Request Form requesting permission to purchase Kosher shelf stable commissary food items through the auspices of the DOC. (Compl. ¶ 21.) The request was denied as "not a religious request." (Compl. ¶ 25.)

Plaintiff filed an inmate grievance on June 7, 2005, pursuant to DC-ADM 804, claiming that the Kosher dietary procedures were inadequate. (Comp. ¶ 22.) He requested that the Kosher Diet Bag meal plan be changed to conform with the standards used for the general Master Menu, outlined in DC-ADM

610,[1] specifically requesting two hot Kosher meals per day and a four-week rotating menu of Kosher fish, poultry, and beef. (Compl. ¶ 22.) On June 22, 2005, Plaintiff's grievance was denied, and on June 27, 2005, he appealed to the facility manager, who upheld the denial. (Comp. ¶¶ 23-26.) The facility manager informed Plaintiff that Kosher diets are developed by the Food Service staff at the DOC Central Office, and that he could not modify the diet. (Compl. ¶ 26.) He suggested that Plaintiff submit another Inmate Religious Accommodation request. (Compl. ¶ 26.) Rather than file another request, Plaintiff submitted a petition for final review of the facility manager's decision to the Secretary's Office of Inmate Grievances and Appeals on July 21, 2005. (Compl. ¶ 27.)

On August 15, 2005, before receiving a response on his

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[1]DC-ADM 610 (VI) (A) states:

> "A. Master Menu: Three meals will be made available to all inmates during each 24-hour period. There will be no more than 14 hours between the beginning of the evening meal and the beginning of breakfast. Two of the three meals will be hot meals."

DC-ADM 610 (IV)(D) states:

> "D. Master Menu: The Department's standardized four-week rotating cycle of menus that established nutritionally balanced means that shall be served in any given week according to the Master Menu Operating Guidelines."

(Def.'s Mot. Dismiss, Ex. D1.)

appeal for final review, Plaintiff filed a Petition for Review in the Commonwealth Court of Pennsylvania, requesting a writ of mandamus to compel the DOC to improve the Kosher diet. (Compl. ¶ 29.) On September 27, 2005, Plaintiff still had no response from the Secretary's Office of Grievances and Appeals, and the Commonwealth Court dismissed his petition for failure to exhaust administrative remedies. (Compl. ¶¶ 31-33.) On October 26, 2005, the Commonwealth Court denied his application for reconsideration. (Compl. ¶ 35.) Plaintiff did not receive a response from the Secretary's Office until February 22, 2006, at which time the denials of his grievance were upheld. (Pl.'s Mot. for Leave to Amend Compl. ¶ 8.)

Plaintiff initiated this action on December 16, 2005, by filing, *pro se*, a complaint asserting that the Defendants, DOC Secretary of Corrections Jeffrey A. Beard and DOC Clinical Dietician Margaret M. Gordon, violated his rights under both federal and state law by providing a cold, non-rotating Kosher diet. Count I alleges that Defendants violated his Free Exercise and Due Process rights under the First and Fourteenth Amendments, pursuant to 42 U.S.C. § 1983, and violated his rights under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1,2 (hereinafter "RLUIPA"). (Compl. ¶¶ 36-42.) Count II alleges that Defendants also violated his rights under Article I, § 3 of the Pennsylvania Constitution, and relevant

Pennsylvania law, 45 Pa. Cons. Stat. Ann. §§ 1101-1602 and 37 Pa. Code § 93.6(a). (Compl. ¶¶ 43-46.) Plaintiff requests injunctive and declaratory relief to compel the DOC to provide him with an appropriate Kosher diet including two hot meals per day and to order the DOC to promulgate a policy statement allowing inmates reasonable dietary accommodations for the observance of Kashrut, pursuant to 37 Pa. Code. § 93.6. (Compl. ¶ 42.) Defendants now move to dismiss Plaintiff's state law claims in Count II for lack of subject matter jurisdiction pursuant for Fed. R. Civ. P. 12(b)(1) and to dismiss Plaintiff's federal law claims in Count I, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to exhaust administrative remedies and for failure to state a valid claim under RLUIPA and § 1983.

Discussion

I. Subject Matter Jurisdiction and the Eleventh Amendment

A. Legal Standard

A Rule 12(b)(1) motion for lack of subject matter jurisdiction may be treated as either a facial or factual challenge to the court's subject matter jurisdiction. Gould Elecs. Inc. v. U.S., 220 F.3d 169, 176 (3d Cir. 2000). Defendants' motion is a facial attack, which challenges jurisdiction based only on the plaintiff's facts before the defendant files an answer. In re Kaiser Group Int'l Inc., 399 F.3d 558, 561 (3d Cir. 2005). In reviewing a facial attack, the

court may consider only the allegations of the plaintiff's complaint, in the light most favorable to the plaintiff. Id. A Rule 12(b)(1) motion is the proper tool for a party to raise the issue of Eleventh Amendment immunity because the Eleventh Amendment "is a jurisdictional bar which deprives federal courts of subject matter jurisdiction." Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 694 n. 2 (3d Cir. 1996).

B. Discussion

Plaintiff's state law claims in Count II are barred by the Eleventh Amendment, and thus must be dismissed for lack of subject matter jurisdiction. Absent a state's consent, the Eleventh Amendment bars suits against a state in federal court by private parties.[2] Laskaris v. Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981). Pennsylvania has explicitly withheld consent to suit in federal court. Id.; see 42 Pa. Cons. Stat. Ann. § 8521(b). The states' Eleventh Amendment immunity extends to suits against departments or agencies of the state and to state officials acting in their official capacities. Laskaris, 661 F.2d at 25

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[2]The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

U.S. Const. amend. XI.

(citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977)). The Pennsylvania DOC is an administrative department of the Commonwealth of Pennsylvania. 71 Pa. Cons. Stat. Ann. § 61. Thus, under the Eleventh Amendment, the DOC is immune from suit in federal court by private parties, and the Defendants, to the extent that they are sued in their official capacities, are also entitled to Eleventh Amendment immunity.

Eleventh Amendment immunity does not, however, bar suits against individual state officials for prospective injunctive and declaratory relief to end an ongoing violation of federal law. Ex parte Young, 209 U.S. 128, 160 (1908). In Young, the Supreme Court reasoned that any actions of state officials according to an unconstitutional state enactment could not be regarded as "official or representative" because the underlying state authority for them would be void under the Constitution. Id. Accordingly, a suit against a state official to end an ongoing violation of federal law is not considered a suit against the state, and therefore is not barred by the Eleventh Amendment. Will v. Mich. Dept. of State Police, 491 U.S. 58, 71 n. 10 (1989). To the extent that Plaintiff brings this action for violations of federal law, pursuant to § 1983 and RLUIPA, his suit against Defendants for injunctive and declaratory relief is permitted by the Young exception to Eleventh Amendment immunity.

Plaintiff's claims for violations of state law, however, do

not fall under the exception of Young, and cannot be brought in federal court. The applicability of Young has been narrowly tailored to apply only in "specific situations in which it is necessary to permit federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." Blanciak, 77 F.3d at 697 (citing Pennhurst v. Halderman, 465 U.S. 89, 105 (1984)). This basis for Young disappears when a state official is sued for a violation of state law. Pennhurst, 465 U.S. at 106. In Pennhurst, the Supreme Court held that the Young exception does not apply to suits against state officials for violations of state law and that such claims in federal court are strictly barred by the Eleventh Amendment, reasoning that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." Id. That jurisdiction exists over other claims in the case is inconsequential, and claims for violation of state law cannot be brought in federal court under pendent jurisdiction. Id. at 121. Therefore, although Plaintiff can bring this suit for violation of federal law under the Young exception, his pendant state law claims in Count II are barred by the Eleventh Amendment and this court is precluded from considering them. Accordingly, the Defendants' motion to dismiss Plaintiff's Pennsylvania state law claims under Count II is

granted.

II. Failure to State a Claim

A. Legal Standard

A Rule 12(b)(6) motion for failure to state a claim may be granted where the allegations fail to state any claim upon which relief can be granted under any set of facts that the plaintiff could prove. Evanch v. Fisher, 423 F.3d 347, 351 (3d Cir. 2005). When considering the motion, the court takes all well-pleaded factual allegations in the complaint as true and construes all reasonable inferences that can be drawn therefrom in the light most favorable to the plaintiff. Id. at 350. This Court can consider all undisputably authentic documents and exhibits attached to both the complaint and the motion to dismiss which are mentioned in the complaint and form the basis of the plaintiff's claim. Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 559-560 (3d Cir. 2000). The court will read a pro se plaintiff's allegations liberally and apply a less stringent standard than it would to a complaint drafted by counsel. Haines v. Kerner, 404 U.S. 519, 520-521 (1972).

B. Discussion

1. Exhaustion of Remedies

Plaintiff has satisfactorily exhausted his available administrative remedies before bringing this suit, and his case will not be dismissed for failure to exhaust. Before a prisoner

can bring a claim under § 1983 or under RLUIPA, he or she must first exhaust available administrative remedies. See 42 U.S.C. § 1997e(a) (stating that no action with respect to prison conditions may be brought pursuant to § 1983 or any other federal law until available administrative remedies are exhausted); Cutter v. Wilkinson, 544 U.S. 709, 723 n. 12 (2005) ("a prisoner may not sue under RLUIPA without first exhausting all administrative remedies"). Although failure to exhaust is an affirmative defense, which the inmate need not plead or prove, it may be raised in appropriate cases as the basis for a motion to dismiss by defendants, who carry the burden of proving such failure. Brown v. Croak, 312 F.3d 109, 111 (3d Cir. 2002). If failure to exhaust is adequately proven by the defendants, the inmate's case is considered procedurally defective and must be dismissed. Booth v. Churner, 206 F.3d 289, 300 (3d Cir. 2000).

The administrative remedies available to prisoners in the Pennsylvania DOC are set out in the Consolidated Inmate Grievance Review System, DC-ADM 804. Booth, 206 F.3d at 293 n. 2. The system provides for three levels of administrative review of inmate grievances: (1) the initial grievance filed with the Facility Grievance Coordinator, (2) an intermediate level of appeal to the facility manager, and (3) a final level of appeal with the Secretary's Office of Inmate Grievances and Appeals. Id.; see Pl.'s Answer to Def.'s Mot. Dismiss, 4, Inmate Grievance

System, DC-ADM 804. It is apparent from Plaintiff's Amended Complaint, and Defendants concede, that Plaintiff has exhausted all three levels of the Grievance Review System.[3] Defendants assert, however, that because Plaintiff pursued his claim as a grievance without first filing an additional Request for Religious Accommodation, requesting modification of the Kosher diet as was suggested by the facility manager, he has failed to exhaust an available avenue of administrative remedy. Id.

Even if Defendants are correct in their assertion that Plaintiff should have begun by submitting a Request for Religious Accommodation, their argument fails because they have effectively waived the failure to exhaust defense. When the merits of a prisoner's claim have been fully examined and ruled upon by the ultimate administrative authority, prison officials can no longer assert the defense of failure to exhaust, even if the inmate did not follow proper administrative procedure. See Camp v. Brennan, 219 F.3d 279, 281 (3d Cir. 2000) (rejecting failure to exhaust defense when prisoner had received a final decision on the merits from the highest level of authority even though he failed to file an initial grievance). In such a situation, the inmate will be found to have satisfied the exhaustion requirement and will be

[3]Plaintiff fully exhausted the Grievance Review System as of February 22, 2006, when he received notice from the Secretary's Office of Inmate Grievances and Appeals that his request for final review had been granted and that the decisions below would be affirmed.

entitled to judicial consideration of his claim without being forced to "jump through any further administrative hoops to get the same answer." Id. Here, Plaintiff has received a final decision from the Secretary's Office of Inmate Grievances and Appeals denying his request on the merits of the claim without mention of Plaintiff's alleged procedural mistake. (Pl.'s Mot. for Leave to Amend Compl. ¶ 8, App.) In issuing the final decision, the prison officials effectively waived the ability to later raise that error in a failure to exhaust defense, and Plaintiff therefore has satisfied the exhaustion requirements necessary to bring this action. Thus, Defendants' motion to dismiss, to the extent that it is based on Plaintiff's failure to exhaust administrative remedies, is denied.[4]

2. Violations of 42 U.S.C. § 1983 and RLUIPA

Plaintiff's complaint fails to plead a prima facie case for

[4]This Court notes that in Plaintiff's appeal to the Secretary's Office of Inmate Grievances and Appeals he appears to be asserting that he has suffered adverse health affects as a result of consuming the cold Kosher diet. (Compl. App. A.) The Secretary's Office did not consider this claim in issuing its final decision because it was not raised in the initial grievance filed by Plaintiff. (Pl.'s Mot. for Leave to Amend Compl. App.) Even construing Plaintiff's complaint liberally, it does not seem that he is raising such a claim based on the nutritional value of the Kosher diet before this Court because there is no other mention of it. To any extent that he may be attempting to challenge the cold Kosher diet on nutritional grounds, his claim would be properly dismissed for failure to exhaust administrative remedies because he has not received a final decision on the merits of that argument and prison officials have not had the opportunity to consider his claim on those grounds.

violations of the RLUIPA and § 1983, and must be dismissed for failure to state a claim. Under the RLUIPA, the government cannot "impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the government establishes that the burden furthers "a compelling governmental interest" and does so by the "least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2). Therefore, in order to establish a prima facie case for violation of the RLUIPA, a plaintiff must demonstrate that a substantial burden has been placed on his or her exercise of religious beliefs. Id.; Warsoldier v. Woodford, 418 F.3d 989, 994 (9th Cir.) (2005); see U.S. v. Forchion, No. 04-949, 2005 WL 2989604, at *3 (E.D. Pa. 2005) (identifying prima facie case for violations of RFRA, RLUIPA's predecessor statute which applied an identical standard). The government will be found to substantially burden the free exercise of religion when it puts substantial pressure on the adherent to modify his behavior and to violate his beliefs. Forchion, 2005 WL 2989604 at *3 (citing Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981)).

Plaintiff fails to establish a valid claim under RLUIPA because he has not met his burden of demonstrating the placement of a substantial burden on the exercise of his religious beliefs. Plaintiff alleges that the Defendants have placed a substantial

burden on his ability to practice his religion by not providing him with a Kosher diet that consists of two hot meals a day and a rotating menu. While a repetitive and cold Kosher diet may not be as enjoyable as the one that Plaintiff requests, it does not rise to the level of imposing a substantial burden on the exercise of his Jewish beliefs. In fact, the Third Circuit Court of Appeals answered this exact question in Johnson v. Horn, holding that an identical Kosher diet did not constitute a substantial burden because prison officials are only required to provide a Kosher diet which is sufficient to sustain the inmates in good health. 150 F.3d 278, 283 (1998), overruled on other grounds, DeHart v. Horn, 390 F.3d 262, 266 (2004).[5] Plaintiff does not allege that the diet being provided to him is not Kosher or that the diet fails to meet his nutritional needs. See supra n. 4. Therefore, the Kosher diet being provided to Plaintiff

[5]The grounds on which Johnson was overruled do not affect the validity of its holding that a non-rotating Kosher diet does not constitute a substantial burden on the free exercise of religion. In Johnson, the court of appeals held that, when considering whether a prison policy places a substantial burden on a prisoners' free exercise of his religion, the ability of the prisoner to exercise his religious beliefs through alternative means should not be considered when the practice being burdened is a "religious commandment" rather than a "positive expression of belief." 150 F.3d at 282. In DeHart, the court reversed that holding and ruled that even when the practice is part of a "religious commandment," the prisoners' ability to practice his beliefs through other means should be considered. 390 F.3d at 266. Therefore, had the DeHart analysis been applied in Johnson, it would only have favored the defendants and would not have affected the outcome.

does not place a substantial burden on the exercise of his religious beliefs, and he does not state a valid claim under the RLUIPA. Because the RLUIPA applies a stricter standard on prison officials than that which applies to § 1983 claims for First Amendment Free Exercise violations, Williams v. Bitner, 285 F.Supp.2d 593, 605 (M.D. Pa 2003), Plaintiff's constitutional claims must also fail. Accordingly, Defendants' motion to dismiss the federal law and constitutional claims in Count II is granted.

Conclusion

For the foregoing reasons, Plaintiff's complaint must be dismissed. This Court lacks jurisdiction over Plaintiff's state law claims in Count II because they are barred by the Eleventh Amendment, and as such Defendants' motion to dismiss those claims pursuant to Rule 12(b)(1) is granted. While Plaintiff's federal law and constitutional claims in Count I are not dismissed for failure to exhaust administrative remedies, they are dismissed for failure to state a claim under the RLUIPA and 42 U.S.C. § 1983 because Plaintiff has failed to meet his burden of showing that a substantial burden has been placed on the free exercise of his religion. Thus, Defendants' motion to dismiss the claims in Count I is also granted.

An appropriate Order follows.

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DEPARTMENT OF CORRECTIONS;	:	
and MARGARET M. GORDON,	:	
CLINICAL DIETICIAN,	:	
PENNSYLVANIA DEPARTMENT OF	:	
CORRECTIONS	:	

ORDER

AND NOW, this 18th day of July, 2006, upon consideration of Defendants' Motion to Dismiss Plaintiff's Complaint for Lack of Subject Matter Jurisdiction and for Failure to State a Claim (Doc. No. 11), and all responses thereto (Docs. No. 12, 15, 16, 18, 19), it is hereby ORDERED that the Motion is GRANTED.

BY THE COURT:

s/J. Curtis Joyner

J. CURTIS JOYNER, J.

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ORDER

AND NOW, this 18th day of July, 2006, upon consideration of Plaintiff's Motion to Obtain Discovery (Docs. No. 14, 17), and all responses thereto (Doc. No. 13), it is hereby ORDERED that the Motion is DENIED as MOOT and it appears to the Court that the Amended Complaint has been dismissed.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.