24684

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

DEC 13 2007

Clerk

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* *

CHARLES E. SISNEY, Appellant, v. STATE OF SOUTH DAKOTA, et.al., Appellees.	CIVIL APPEAL # 24684 APPELLANT'S BRIEF

* *

APPEAL FROM THE CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

MINNEHAHA COUNTY, SOUTH DAKOTA

THE HON. KATHLEEN K. CALDWELL, PRESIDING

24684

Attorney for Plaintiff-Appellant:

Charles E. Sisney
Pro Se
P.O. Box 5911
Sioux Falls, S.D. 57117-5911

Attorney for Defendants-Appellees:

Jeffrey L. Bratkiewicz
Woods, Fuller, Shultz & Smith, P.C.
P.O. Box 5027
Sioux Falls, S.D. 57117-5027
(605) 336-3890

THE NOTICE OF APPEAL WAS FILED ON

THE 15th DAY OF OCTOBER, 2007.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SECONDARY AUTHORITIES:

NOTE: The SDDOC Policy 1.3.E.2 Administrative Remedy for Inmates is not included in its entirety. The pertinent section of the Policy is reproduced in the Appendix of this Brief.

JURISDICTIONAL STATEMENT

The action sought to be appealed was dismissed under an SDCL 15-6-12(b) Motion to Dismiss on the 10th day of October, 2007. The Notice of Appeal was filed on the 15th day of October, 2007.

LEGAL ISSUES

1. Does the Plaintiff have standing to bring a breach of contract claim against the Defendants?

   Trial Court: Held in the negative.

2. Do the Defendants - State of South Dakota and Douglas Weber - have immunity from the Plaintiff's breach of contract claim?

   Trial Court: Held in the affirmative.

3. Did the Plaintiff state a 42 U.S.C. 1981 claim for which relief could be granted?

   Trial Court: Held in the negative.

4. Did the Plaintiff state a 42 U.S.C. 1985 claim for which relief could be granted?

Trial Court: Held in the negative.

5. Should the Court have given the Plaintiff opportunity to amend his complaint to overcome any deficiency thereof?

Trial Court: Held in the negative.

STATEMENT OF THE CASE

On the 11th June 2007, the Plaintiff, Charles E. Sisney, filed a civil complaint for breach of contract and conspiracy against the State of South Dakota, Douglas Weber, and CBM Inc. The Defendants filed for dismissal under SDCL 15-6-12(b) Failure to State a Claim on the 9th July 2007, alleging statutory immunity, lack of standing, and failure to allege facts in support of a 1981 and 1985 claim. Briefs in opposition and in reply were filed on the 18th July 2007, and 1st August 2007, respectively. Oral arguments were made on the 13th August 2007.

The Circuit Court issued a memorandum and opinion on

the 15th August 2007 granting the Defendants' Motion to Dismiss. A written order of dismissal was provided to the Plaintiff on the 11th October 2007.

STATEMENT OF THE FACTS

On the 9th July 2002, CBM Inc. entered into contract with the State of South Dakota to provide food and services to several of the State's facilities - one of which is the South Dakota State Penitentiary (hereafter "SDSP"). The contract specified that, "These services must be provided in a manner that will meet the needs and concerns of residents, **inmates** and staff." (emphasis added). The contract also stated that a minimum of 2700 calories per day were to be provided to prisoners.

On the 23rd April 2007, CBM Inc. changed its kosher diet line -- the Plaintiff being Jewish is required to eat kosher -- the result being that the daily average calories received by the Plaintiff was less than 2200 calories. In addition to this reduction of calories, the new kosher diet no longer complied with the dictates of the Plaintiff's religious beliefs (ie. was no longer kosher).

The Plaintiff proceeded to grieve the change in menus/reduction in calories (as allowed by the contract) through the South Dakota Department of Corrections (hereafter

"SDDOC") Administrative Remedy procedure, even providing the caloric amounts for each food item being served as stated by the manufacturer, to prove his calculations. In response, Douglas Weber (who by SDDOC policy is the final policy-maker available to the plaintiff regarding this subject matter) stated that nothing would be done to change or correct the menu. This complicity of Weber's in support of the breach of contract by CBM Inc. is clearly an abuse of discretion and shows conspiracy.

Plaintiff lacked any other recourse and subsequently filed an action for breach of contract and conspiracy against the Defendants.

ARGUMENTS

1. Does the Plaintiff have standing to bring a breach of contract claim against the Defendants?

The Eighth Circuit has discussed Section 302 of the Restatement (Second) of Contracts to determine whether a party is an intended third-party beneficiary of a contract. Dayton Developement Company v. Gilman Financial Services Inc., 419 F.3d 852 (8th Cir. 2005) reads:

> "Subsection one provides: Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:
>
> a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Subparagraph (a) of section 302(1) has been referred to as setting forth a "duty owed" test, that is, " the promisor's performance under the contract must discharge a duty otherwise owed to the third party by the promisee." Cretex Cos. Inc. v. Constr. Leaders Inc., 342 N.W. 2d 135, 138 (Minn. 1984). Subparagraph (b) has been referred to as setting forth an "intent to benefit" test, that is, "the contract must express some intent by the parties to benefit the third party through contractual performance." Id.; Dayton.

The Plaintiff made a proper showing to satisfy both avenues of this test and would qualify for third-party beneficiary status under either prong.

The Plaintiff met the burden of proof regarding the "Duty Owed" test when he showed that the Warden, Douglas

Weber, and the State of South Dakota have a legal obligation to feed him. (see page 4 of Brief in Opposition of Motion to Dismiss). When CBM Inc. agreed to provide food/services to the Plaintiff, they assumed the obligation which the State owed to the Plaintiff as his care-giver. Since there is this benevolent nexus between the promisee and the beneficiary, the primary focus is placed on the subjective intention of the promisee. Kary v. Kary, 318 N.W. 2d 334. This subjective intent is to have CBM Inc. provide food to the Plaintiff, thereby freeing the State of that responsibility.

Regarding the "Intent to Benefit" test -- the Plaintiff also met this burden of proof when he showed that in Section 1.2 of the contract in question states, "These services must be provided in a manner that will meet the needs and concerns of residents, inmates and staff." (see page 5 of Brief in Opposition of Motion to Dismiss). Additionally, Section 5.1.6(c) states, "Commodities received will be used soley for the benefit of those persons in State correctional or institutional facilities."; and Section 5.4 states, "... The menu shall be planned with institutional tested products and recipes for resident and inmate acceptability."

In support of its decision and ruling, the Trial Court uses two cases: Clifton v. Suburban Cable TV Co., 642 A.2d 512 (Pa. 1994) and Gay v. Georgia Dep't of Corrections, 606

S.E.2d 53 (Ga. 2005). Neither of these cases are on point with the facts of the instant case and the Trial Court has misapplied them in its decision and ruling.

The Court quotes Clifton, "Government contracts ... pose unique difficulties in the area of third-party beneficiary rights because, to some extent, every member of the public is directly or indirectly intended to benefit from such a contract." and "to grant all members of the public, including those incarcerated, standing to enforce such government contracts ... would be contrary to the public policy of this Commonwealth. Consequently, the Courts of this Commonwealth must take a more narrow view of a third-party beneficiary status in this context and apply a more stringent test to determine whether a third-party qualifies for beneficiary status." The Trial Court goes on to say, "Specifically, there was no indication or language in the contract expressing an intent to benefit inmates, nor was there any language purporting to grant inmates a right to enforce the contract." While this may be true in Clifton, this is not so with the instant case. In addition to specific references about meeting the needs and concerns of inmates, Section 5.10 of the contract states, "The contractor shall describe the complaint resolution process in place for addressing complaints from residents and inmates." This complaint resolution process is SDDOC

policy 1.3.E.2 Administrative Remedy for Inmates which allows for complaints against the performance and behavior of the Defendants - to include contract employees. Because the Defendants have conferred the right of grievance to the Plaintiff, once he has exhausted all his administrative remedies available, he is then entitled to judicial review (cf. SDCL 1-26-30).

Plaintiff would also direct the Court's attention to a significant difference in regards to the Trial Court's findings and its reliance upon Clifton. In rendering a decision, the court in Clifton pointed out - correctly, the contract in that case specifically stated, "... that only the Commonwealth and Suburban may enforce the terms of the agreement." Clifton at 515. In the instant case, no such provisions are present in the contract between the State and CBM Inc.

The Trial Court's usage of Gay is equally flawed. In Gay, like with Clifton, the terms of the contract at issue were equally unambiguous. The Gay Court, in the pertinent part, cited the clause in the contract which stated, "The [DOC] shall have exclusive right and responsibility ... to direct and supervise inmates with respect to the work to be performed ...." Gay at 58. As in Clifton, the Gay Court noted there was specific language in the contract before the Court. It was that language the Gay Court relied upon when

it rendered its findings.

It was grossly inappropriate for the Trial Court in the case at hand to simply ignore or disregard this obvious and germane difference. The Trial Court extended a protection to the Defendants which does not exist. As a result thereof, said action deprived the Plaintiff of his rights to due process and equal protection of the law.

According to South Dakota Law, "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it ." (SDCL 53-2-6). Where the third-party beneficiary is so described as to be ascertainable, it is not necessary that he be named in the contract in order to recover thereon. Indeed, he may be one of a class of persons, if the class is sufficiently described or designated. 17A Am Jur 2d Contracts § 443. This showing was clearly accomplished through the Plaintiff's complaint and brief -- the Trial Court erred in its discretion by disregarding the facts and terms of the contract at question.

2. Do the Defendants - State of South Dakota and Douglas Weber - have immunity from the Plaintiff's breach of contract claim?

According to the South Dakota Supreme Court, statutory

interpretation requires that the court "find a meaningful understanding of a statute when possible." Bon Homme County Com'n v. AFSCME, 699 N.W.2d 441, 2005 SD 76. "Words and phrases in a statute must be given their plain meaning and effect. When language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." In re Yanni, 697 N.W.2d 394, 2005 SD 59. "The Court cannot enlarge the scope of the statute by an unwarranted interpretation of its language." Yanni quoting Hannon v. Weber, 638 N.W.2d 48, 2001 SD 146. Should construction be necessary, "statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject." Yanni citing Martinmaas v. Engelmann, 612 N.W.2d 600, 2000 SD 85.

When the Trial Court enlarged SDCL 3-21-8 to include immunity from breach of contract claims, it overstepped its judicial discretion by constructing an unwarrented interpretation of the statute. SDCL Chapter 3-21 is in reference to Liability of Public Entities and Public Officials. The statute in question, SDCL 3-21-8 reads:

> "No person, political subdivision, or the state is liable for failure to provide

> a prison, jail, or penal or correctional facility, or if such facility is provided, for failure to provide sufficient equipment, personnel, programs, facilities, or services in a prison or other correctional facility."

As the Trial Court noted in its memorandum and opinion (page 6) "Although this statute has been applied and interpreted multiple times as it applies to tort claims, there is no recorded cases applying it to contract claims." Therefore it stands to reason that some interpretation or construction is needed.

When reviewing this statute, and the entire SDCL Chapter 3-21 as a whole -- it shows that contracts are not included within the statute's intent. SDCL 3-21-2 reads:

> "No action for the recovery of damages for personal injury, property damage, error or omission or death caused by a public entity or its employees may be maintained against the public entity or its employees unless written notice of the time, place, and cause of injury is given to the public entity as provided by this chapter within 180 days after the injury."

In interpretation and construction of this statute, the South Dakota Supreme Court ruled that the notice provisions of this statute did not apply to breach of contract claims. Gakin v. City of Rapid City, 698 N.W.2d 493, 2005 SD 68.

As the Court has already ruled that contract claims do not apply to part of SDCL Chapter 3-21, nor has there been any rulings which would suggest contract claims would apply to SDCL 3-21-8 (see memorandum and opinion page 6), the Plaintiff asserts that by using the "rules" of statute interpretation and construction, SDCL 3-21-8 immunity does not apply to breach of contract claims.

In addition to its overreaching statute interpretation, the Trial Court erred in granting the Defendants immunity because the South Dakota Supreme Court has held that granting immunity to state officials for ministerial duties violates the open courts provision of the South Dakota Constitution. Kyllo v. Panzer, 535 N.W.2d 896, 902. When a contract uses the words "shall", "will" and "must" it manifests a mandatory directive and does not confer any discretion in carrying out the action so directed (cf. SDCL 2-14-2.1). As such, "a state employee who fails to perform a merely ministerial duty is liable for the proximate results of his failure to any person to whom he **owes** performance of such a duty." (emphasis added). Hancock v. Western South Dakota Juvenile Services Center, 647 N.W.2d 722, 2002 SD 69 quoting Nat'l Bank of SD v. Leir, 325 N.W.2d 845, 848.

3. Did the Plaintiff state a 42 U.S.C. 1981 claim for which relief could be granted?

While pro se litigant's pleadings are to be construed liberally and held to less stringent standards than formal pleadings drafted by lawyers, if the court can reasonably read pleadings to state a valid claim on which litigant **could** prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, or litigant's unfamiliarity with pleading requirements. (emphasis added). Boag v. MacDougall, 454 U.S. 364 (1982); Haines v. Kerner, 404 U.S. 519 (1972).

"To prevail on a claim of discrimination under section 1981, plaintiff must show that he is a member of a protected class; that the defendant had the intent to discriminate on basis of race; and that the discrimination interferred with a protected activity as defined in section 1981." Kelly v. Bank Midwest, N.A., 177 F.Supp.2d 1190 (Ka. 2001), citing Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091, 1101-1103 (10th Cir. 2001). When using the Boag guidelines, Plaintiff met the threshold of the Kelly three-pronged test through his initial Complaint, Brief in Opposition of Motion to Dismiss - attached exhibits, and oral arguments. The Trial Court erred in its disregard of these statements, allegations, and documents.

The Plaintiff met the first threshold showing that he is a member of a protected class when he made the statement (and provided documentation) that he is Jewish. While the

Plaintiff may have mistakenly used the words "because of his religious beliefs" -- the fact remains that it was because he is Jewish (an integral part of Jewish Identity is the religious belief requiring one to eat "kosher") that he was discriminiated against. This Court should reject the argument that Plaintiff alleged **only** religious discrimination as it was done in St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) note 2. Jews are a distinct race for civil rights purposes. Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 618 (1987). Jews are among the peoples considered to be a distinct race **within the protection of § 1981.** (emphasis added). St. Francis College at 612.

The threshold of the second-prong of the Kelly test was met when the Plaintiff alleged facts that (1) CBM Inc. singled out the Kosher/Halal diets to receive less food than general population (to save money); and (2) that when Douglas Weber was provided facts in support of this claim, he refused to do anything to correct the grievance. (See Complaint ¶¶ 11, 14-17, 20). The Supreme Court clearly held that liability for intentional discrimination under section 1981 requires only that decisions be premised on race, not that decisions be motivated by invidious hostility or animus. Kelly citing Goodman v. Lukens Steel Co., 482 U.S. 656. A defendant who acts with no racial animus but

acts, whether **consciously or unconsciously** on the basis of racial stereotypes or preconceived notions... can be held liable for intentional discrimination within the meaning of section 1981. (emphasis added). Kelly citing Ferrill v. Parker Group, Inc., 168 F.3d 468, 472-73 (11th Cir. 1999).

Plaintiff also met the third-prong threshold when he showed the violation of the protected activity to be the refusal to enforce the food service contract which requires a minimum of 2700 calories to be provided to all prisoners within the SDDOC. (Section II. 1.3.1 of the Contract).

Finally, because the Plaintiff had not had the opportunity for discovery to determine whether he had been subjected to the sort of prejudice § 1981 would redress, Plaintiff should have been given the opportunity to prove his case. (cf. St. Francis College at 607).

4. Did the Plaintiff state a 42 U.S.C. 1985 claim for which relief could be granted?

Pursuant to the Supreme Court, to state a claim under the equal protection provisions of the first part of § 1985(3), plaintiff must allege (1) a conspiracy, (2) for the purpose of depriving another of the "equal protection of the laws, or of equal privileges and immunities under the laws;" (3) an act in furtherance

of the conspiracy; and (4) an injury to person or property, or the deprivation of a legal right. Federer v. Gephardt, 363 F.3d 754 (8th Cir. 2004) citing Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971). A claim under this part of the section also requires proof of a class-based animus. Griffin at 102.

According to the Eighth Circuit, "the plaintiff must allege with particularity and specifically demonstrate with material facts that the defendants reached an agreement. Trial Court Memorandum and Opinion quoting City of Omaha Employees Betterment Ass'n v. City of Omaha, 883 F.2d 650, 652 (8th Cir. 1989). This burden can be satisfied by "pointing to at least **some** facts which would suggest that [defendants] 'reached an understanding' to violate [plaintiff's] rights." (emphasis added). Trial Court Memorandum and Opinion quoting Nelson v. City of McGehee, 876 F.2d 56, 59 (8th Cir. 1989).

The Plaintiff accomplished part (1) of the requirements in ¶ 20 of his Complaint. Conspiracy, when alleged, may be pled in general terms. 16 Am Jur. 2d Conspiracy § 67.

Part (2) of the requirements (and an independent federal/constitutional right) was shown by liberal interpretation of Plaintiff's Complaint ¶ 7, 10-11; and page 11, ¶ 2 of his Brief in Opposition of Motion to Dismiss,

along with oral arguments. Said constitutional right being equal protection under the 1st/14th Amendments to the U.S. Constitution. When the State of South Dakota, CBM Inc., and Douglas Weber made a distinction between the Plaintiff and the rest of general population, they discriminated against him. The threshold requirement for an equal protection claim is a showing that the government discriminated among groups. Eagleston v. Guido, 41 F.3d 865 (2nd Cir. 1994): City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

When Plaintiff showed that Douglas Weber (as a final policy-maker) made the decision **not** to act to correct the violation denying the Plaintiff the same amount of calories as general population, he created "policy" and performed an act in furtherance of the conspiracy, thereby reaching the requirement for part (3) of a § 1985(3) claim. Randle v. City of Aurora, 69 F.3d 441, 447 (10th Cir. 1995) stating that an official who possesses final policymaking authority and makes a decision, that decision constitutes policy for § 1983 purposes and will be understood as an act officially sanctioned.

Part (4) of the requirements -- Injury -- has an obvious showing in that the Plaintiff is receiving between 20-25% less calories than general population for the sole reason that he is Jewish and eats a kosher diet. This allegation also accomplishes the need for class-based animus.

Again, because the Plaintiff had not had the opportunity for discovery to determine whether he had been subjected to the sort of prejudice § 1985 would redress Plaintiff should have been given the opportunity to prove his case. (cf. St. Francis College at 607).

5. Should the Court have given the Plaintiff opportunity to amend his complaint to overcome any deficiency thereof?

Allegations of a pro se complaint are to be held to a less stringent standard than formal pleadings drafted by lawyers. Haines at 520-21. A pro se litigant must be given leave to amend his complaint unless it is "absolutely clear that the deficiencies of the complaint could not be cured by amendment." Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980)(Per Curiam). A Motion to Dismiss for failure to state a claim is viewed with disfavor and rarely granted. Elkjer v. City of Rapid City, 2005 SD 45, 6 695 N.W. 2d 235, 239. Shipp v. McMahon, 234 F.3d 907 (5th Cir. 2000). Generally a court errs in dismissing a pro se complaint for failure to state a claim without giving the plaintiff an opportunity to amend. Ingram v. Becher, 3 F.3d 1050 (7th Cir. 1993); Bazrowx V. Scott, 136 F.3d 1053 (5th Cir. 1998). The only time a pro se complaint should be dismissed is if it appears "beyond doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Sufficient facts and information were present in the Plaintiff's complaint, Brief in Opposition of Motion to Dismiss, and Oral Arguments that a prima facie showing was made regarding the issues. As such, it was inappropriate for the Trial Court to dismiss the instant case before other information and facts could be presented in support of the Plaintiff's claims.

CONCLUSION

It is urged that the dismissal of the Plaintiff's complaint be reversed, and if necessary, that the Plaintiff be allowed to amend his complaint to overcome any deficiency thereof.

Respectfully submitted this 10th day December, 2007.

Charles E. Sisney
Plaintiff-Appellant pro se
P.O. Box 5911
Sioux Falls, SD 57117-5911

CERTIFICATE OF SERVICE

I, Charles E. Sisney, certify under penalty of perjury that I sent the indicated number of copies of the Appellant's Brief in Civil Action, Sisney v. State of South Dakota, et.al., Civ.App.# 24684 to the below indicated persons through the South Dakota State Penitentiary's Legal Mail System.

To: Woods, Fuller, Shultz & Smith, P.C., P.O. Box 5027, Sioux Falls, S.D. 57117-5027

Number of Copies: Two (2).

To: South Dakota Supreme Court, Clerk of the Supreme Court, Capitol Building, 500 East Capitol Ave., Pierre, South Dakota, 57501-5070.

Number of Copies: Fifteen (15).

On the 11th day of December, 2007.

Charles E. Sisney
Appellant pro se
P.O. Box 5911
Sioux Falls, SD 57117-5911

APPENDIX

TABLE OF CONTENTS

STATEMENT OF MATERIAL FACTS

1. Douglas Weber is the Director of Prison Operations for the State of South Dakota. Complaint ¶ 5.

2. On or about the 9th July 2002, CBM Inc. entered into contract with the State of South Dakota to provide food and services to several state facilities - one of which is the S.D. State Penitentiary. Complaint ¶ 6.

3. The State/CBM food service contract specified that these services must be provided in a manner that will meet the needs and concerns of inmates. Brief in Opposition of Motion to Dismiss page 5.

4. The State/CBM food service contract specified that prisoners within the Department of Corrections would be provided between 2700 to 3500 calories on a daily average. Complaint ¶ 7.

5. The Plaintiff is Jewish with religious beliefs which require him to eat kosher food. Complaint ¶¶ 10-11, 13; Brief in Opposition of Motion to Dismiss page 10.

6. On the 23rd April 2007, CBM Inc. changed its kosher diet line being provided to the Plaintiff. Complaint ¶ 10.

7. This new "kosher diet" does not fully comply with the Plaintiff's religious beliefs. Complaint ¶¶ 10-11, 13.

8. When calculating the number of calories being provided to the Plaintiff in this "new" kosher diet -- using sources

provided to the prison administration -- it was found that the new kosher diet being provided to the Plaintiff by CBM Inc. was between 400 - 600 calories below the minimum required by contract; even less when taking into account that there are portions of the diet which the Plaintiff is unable to eat. Complaint ¶¶ 11-13.

9. Plaintiff proceeded to grieve the reduction of calories through the SDDOC Administrative Remedy Process as allowed by the contract. Complaint ¶¶ 12-13; Brief in Opposition of Motion to Dismiss page 6.

10. Douglas Weber stated through the administrative remedy process that the Plaintiff's caloric values were correct. Complaint ¶ 14.

11. Plaintiff provided to Douglas Weber twelve (12) independent declarations/affidavits asserting the food and amounts actually being served to the Plaintiff in his kosher diet. Complaint ¶ 15.

12. Douglas Weber refused to intervene in the matter of this reduction of calories below the contract minimum, instead, giving the Plaintiff a Notice of Rejection and stating that this issue has been personally addressed and final. Complaint ¶¶ 16-17.

13. Douglas Weber is the final authority available to the Plaintiff regarding this issue (within the Department of Corrections). SDDOC Policy 1.3.E.2 Section "Appeals to

the Secretary of Corrections".

STATUTES

SDCL § 2.14.2.1 "As used in the South Dakota Codified Laws to direct any action, the term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed."

SDCL § 1-26-30 "A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved... is entitled to judicial review under this chapter.... This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law...."

PLEADINGS AND BRIEFS

Brief in Opposition of Motion to Dismiss page 5.

> "... Section 1.2 of the Contract... states that the services provided must meet the needs and concerns of inmates."

Brief in Opposition of Motion to Dismiss page 6.

> "... Section 5.10 of the contract in question reads, The contractor shall describe the complaint resolution process in place for addressing complaints from residents and inmates."

Brief in Opposition of Motion to Dismiss page 10.

> "... the Plaintiff is Jewish with Chassidic Orthodix (sic) beliefs."

MISCELLANEOUS

South Dakota / CBM Food Service Contract Section II. 1.3.1

"The proposed menu at Correctional Facilities will have an average caloric base of 2700 to 3500 calories per day."

SDDOC Policy 1.3.E.2 Administrative Remedy for Inmates

"Issues That Can Be Addressed Through Administrative Remedy:

E.1 The application of any administrative directive, policy, or unit rule or procedure.
E.2 The lack of any administrative directive, policy unit rule or procedure.
E.3 Any unprofessional behavior or action directed toward an inmate by personnel... or contract employee....
E.4 Any oversight or error affecting an inmate."

SDDOC Policy 1.3.E.2 Administrative Remedy for Inmates

"Appeals to the Secretary of Corrections

A. The Warden's Response to a Request for Administrative Remedy may only be appealed to the Secretary of Corrections if the complaint concerns:

1. A major disciplinary action....
2. A classification action....
3. A decision regarding the restoration of good conduct time....

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o	
CHARLES E. SISNEY, Plaintiff, vs. STATE OF SOUTH DAKOTA, and CBM, INC. and DOUGLAS WEBER - DIRECTOR OF PRISON OPERATIONS FOR SOUTH DAKOTA (in his official and individual capacities), Defendants.	CIV. 07-2325 **ORDER OF DISMISSAL**
o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o	

The matter is before the Court, the Honorable Kathleen K. Caldwell, Circuit Judge, presiding, on the Defendants' Motion to Dismiss. Hearing on the Defendants' Motion to Dismiss occurred on August 13, 2007, at 3:30 o'clock p.m. at the Minnehaha County Courthouse in Sioux Falls, South Dakota. The Defendants appeared personally at the hearing by and through their attorneys, Woods Fuller, Shultz & Smith, PC, and Jeffrey L. Bratkiewicz. The Plaintiff, Charles E. Sisney, proceeding *pro se*, appeared and participated in the hearing telephonically.

The Court has considered the arguments presented by the parties at the hearing and read and fully considered the briefs and written materials submitted by both of the parties prior to the hearing. On August 15, 2007, the Court entered a written Decision granting

the Defendants' Motion to Dismiss. A copy of the Court's August 15, 2007 Decision is attached hereto and incorporated herein by this reference. For the reasons set forth in the attached Decision, it is hereby:

ORDERED that Defendants' Motion to Dismiss is GRANTED in its entirety. The Plaintiff's Complaint in this action is HEREBY DISMISSED. Each of the parties shall bear their own costs and fees.

Dated this 10th day of ~~September~~ Oct., 2007.

BY THE COURT:

Kathleen K. Caldwell

ATTEST:

_____
Clerk

By_____
Deputy

CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
LINCOLN & MINNEHAHA COUNTIES
425 North Dakota Avenue
Sioux Falls, SD 57104-2471

CIRCUIT JUDGES
Glen A Severson, Presiding Judge
William J Srstka, Jr
Kathleen K Caldwell
Peter H Lieberman
C Joseph Neiles
Stuart L Tiede
Bradley G Zell
Patricia C Riepel

COURT ADMINISTRATOR
Karl E Thoennes III

Staff Attorney
Jill Moraine

Telephone. 605-367-5920
Fax 605-367-5979

August 15, 2007

Mr. Jeffrey L. Bratkiewicz
300 South Phillips Avenue, Suite 300
Post Office Box 5027
Sioux Falls, SD 57117-5027

Mr Charles E. Sisney
Post Office Box 5911
Sioux Falls, SD 57117-5911

Re: *Defendants' Motion to Dismiss* (CIV 07-2325)

Gentlemen:

This matter came before the Court on August 13, 2007, regarding Defendants State of South Dakota, CBM, Inc., and Douglas Weber's Motion to Dismiss After reviewing the record, the parties' submissions, and arguments presented at the hearing, the Court issues its decision as follows:

STATEMENT OF FACTS AND PROCEDURE

Charles E. Sisney (Plaintiff) is an inmate at the South Dakota Penitentiary in Sioux Falls, South Dakota. Plaintiff brings this pro se action against the State of South Dakota (State), CBM, Inc. (CBM) and Douglas Weber (Weber), director of prison operations for South Dakota (Defendants, collectively), alleging:

(1) breach of contract between the State of South Dakota and CBM Inc , in violation of South Dakota Law(s) and Statutes(s)

(2) conspiracy by the Defendants to deprive the Plaintiff of the benefits of said contract by breaching and/or allowing said breach of contract in violation of the laws of the United States of America and the State of South Dakota.

Sisney Complaint, ¶¶ 23-24 (hereinafter Complaint).

Plaintiff alleges that on July 9th, 2002, the State entered in to a contract with CBM Inc., "to furnish and deliver to the State certain food services, commissary services, supplies, equipment, and commodities." *Complaint,* ¶ 6. Pursuant to this contract, the average number of calories to be provided through the food supplied was to be between 2700 and 3500 per day. The contract further provides that "[f]ood substitutions must be available to accommodate food avoidances due to religious beliefs/practices/observances[.]" *Id*

Plaintiff asserts that on April 23rd, 2007, CBM, Inc. began serving a "new" religious diet to prisoners following a kosher/halal diet. According to Plaintiff, these meals did not comport with his religious beliefs, but was the only meal of the type available *Id*, ¶ 10 Plaintiff conducted his own "caloric study" of the meals provided, and allegedly determined that the meals fell 400 to 600 calories short of the minimum amount required by the contract between the State and CBM. *Id* ¶ 11. Further, Plaintiff alleges that because is unable to eat certain portions of the meals due to their non-conformance with his religious beliefs, the calories he consumes are even less than that figure. *Id*

Plaintiff filed a grievance through the South Dakota Department of Corrections (SDDOC) administrative remedy process. In response, Defendant Douglas Weber, director of prison operations, explained that, while the caloric values provided by Plaintiff's study were correct, no action would be taken in light of the fact that Plaintiff did not include all food being provided to inmates as part of the kosher/halal meals. *Id* ¶ 14. Plaintiff then filed a subsequent grievance refuting the Weber's claims that the contractual terms with regard to meals were being followed. Defendant Weber rejected this grievance, and indicated that no further action would be taken on the issue.

Plaintiff subsequently attempted to have posted, or in the alternative, to obtain copies of, the proposed kosher/halal menu According to Plaintiff, this request was rejected by Weber and CBM through the administrative remedy process. *Id* ¶ 18.

On June 13, 2007, Plaintiff filed this complaint. In response, on July 9, 2007, Defendants filed a Motion to Dismiss Plaintiff's Complaint on all counts.

STANDARD OF REVIEW

"Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." *Loesch v City of Huron,* 2006 SD 93, ¶ 3, 723 N.W.2d 694, 695 (citing *M S v Dinkytown Day Care Center, Inc.*, 485 N.W 2d 587, 588 (SD 1992)). It is only an appropriate remedy to resolve issues of law when there are no disputed facts. *Id* Both a motion for judgment on the pleadings and a motion for a judgment as a matter of law fall within the realm of SDCL § 15-6-12(b)(5). Inasmuch, a motion under that section "tests the

legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *Steiner v County of Marshall,* 1997 SD 109, ¶ 16, 568 N.W.2d 627, 631 *See also Brooks v Milbank Ins Co*, 2000 SD 16, 605 N.W.2d 173.

DISCUSSION

I. BREACH OF CONTRACT

Plaintiff asserts that Defendants "conspired together to cause, permit, and allow a breach of contract to the detriment of the Plaintiff because of his religious beliefs; and that this breach of contract resulted in financial gain for the Defendants" *Complaint,* ¶ 20. Further, Plaintiff provides that he has standing to enforce this contract "because the contract directly affects him and his well-being." *Id* ¶ 21.

In response to Plaintiff's pleadings, Defendants have filed a Motion to Dismiss. With regard to the breach of contract claim, Defendants' arguments are twofold: (1) Plaintiff lacks standing to enforce the contract between the State and CBM; and (2) Defendants have qualified sovereign immunity from Plaintiff's Breach of Contract suit.

A. Standing: Third-Party Beneficiary Status

In essence, Plaintiff is arguing that he is a third-party beneficiary to the contract formed between the State and CBM According to South Dakota law, "[a] contract made *expressly* for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." SDCL § 53-2-6 (emphasis added). In general, a party must show that it was the promisee's intent or purpose to benefit that party before he can be considered a third-party beneficiary. *Kary v Kary,* 318 N.W.2d 334, 336 (SD 1982). Only then does the party obtain an enforceable interest in the contract. *Id See also Biby v Bd Of Regents of the University of Nebraska at Lincoln,* 419 F 3d 845, 852 (8th Cir. 2005) ("To have an enforceable property right as a third party beneficiary under Nebraska law, the named parties must have contemplated the third party's rights and interests and provided for them."), *Walters v Kautzky,* 680 N.W.2d 1, 5 (Iowa, 2004) ("The primary consideration in deciding whether nonparties to an agreement are third-party beneficiaries thereof is whether the contract manifests an intent to benefit those parties.").

Under general principles of contract law, a claimant must show that he is in privity of contract with the defendant in order to have the ability to enforce the contract. *See Gold'n Plump Poultry, Inc v Simmons Engineering Co*, 805 F.2d 1312, 1318 (8th Cir. 1986). However, an exception to this general rule applies to parties obtaining the status of a third-party beneficiary. Inasmuch, *intended* third-party beneficiaries are entitled to enforce a contract of which they are not a party "If no intent to benefit is shown, a beneficiary is no more than an incidental beneficiary and cannot enforce the contract." *Id* According to the Restatement of

Law Second of Contracts[1], there are particular circumstances in which a party is considered an intended third party beneficiary According to the Restatement,

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance

RESTATEMENT OF LAW SECOND OF CONTRACTS, § 302(1). Subsection (b) of the Restatement has been deemed the "intent to benefit" prong of the test, as it requires that the contract itself contain language expressing some intent to benefit a third-party through performance of the contract. *Dayton Devel Co v Gilman Financial Services, Inc.*, 419 F.3d 852, 856 (8th Cir. 2005). "In most cases, 'when there is no reference to the third party in the contract, there is no intent to benefit the third party.'" *Id* (citing *Norwest Fin Leasing, Inc v Morgan Whitney, Inc.*, 787 F.Supp 895, 898 (D Minn. 1992)) It should be noted that the "intent to benefit" element is exactly what is at issue in the instant case.

In the present case, Defendants are urging this Court to dismiss the breach of contract claim on the grounds that Plaintiff has no standing to enforce the contract, as he is not a third-party beneficiary. Specifically, Defendants argue that there have been no allegations in Plaintiff's Complaint that he was a party to the contract, or that the contract provided inmates with the right to enforce the contract. *See* Defendant's Brief in Support of Motion to Dismiss, at 6

In response, Plaintiff argues that Weber and the State are charged with the responsibility of caring for him, due to his status as an inmate at the South Dakota State Penitentiary *See* Plaintiff's Brief in Opposition of Motion to Dismiss, at 4. Moreover, Plaintiff asserts that because he is dependent upon Defendants, he is a third-party beneficiary of contracts providing him food and services. *Id* Moreover, Plaintiff makes an argument based upon the contractual concept of the delegation of duties. Specifically, Plaintiff argues that "when CBM agreed to provide food/services . . . to the Plaintiff, they assumed the obligation which the State owed to the Plaintiff as a care-giver." *Id*

Numerous jurisdictions have confronted the issue of an inmate's standing as a third-party beneficiary to government contracts. "Government contracts . . . pose unique difficulties in the area of third-party beneficiary rights because, to some extent, every member of the public is directly or indirectly intended to benefit from such a contract." *Clifton v Suburban Cable TV*

---

[1] The South Dakota Supreme Court, in *First Dakota Nat'l Bank v Performance Engineering and Manufacturing, Inc*, discussed the Restatement Second's provision as it relates to ascertaining whether a party is a third-party beneficiary 2004 SD 26, ¶5, 676 N W 2d 395, 399

Co.; 642 A 2d. 512, 515 (1994). The court in *Clifton,* in determining whether an inmate had third-party beneficiary status to enforce a contract between a cable television company and the state prison, provided:

> [t]o grant all members of the public, *including those incarcerated,* standing to enforce such government contracts . . . would be contrary to the public policy of this Commonwealth Consequently, the Courts of this Commonwealth must take a more narrow view of a third-party beneficiary status in this context and apply a more stringent test to determine whether a third party qualifies for beneficiary status.

Id (emphasis added). In addition to the policy implications resulting from granting standing to inmates in order to enforce the state's contracts, the *Clifton* court relied upon the language of the contract between the state and the private entity providing services to the state prison. Specifically, there was no indication or language in the contract expressing an intent to benefit inmates, nor was there any language purporting to grant inmates a right to enforce the contract. *Id.*

In a Georgia case, an inmate brought a breach of contract action against the Department of Corrections and a private entity with which it had contracted, for work that was conducted by inmates under a work-detail program. *Gay v Georgia Dep't of Corrections;* 606 S E 2d 53 (Ga 2005). According to the court, "[t]he mere fact that [the third party] would benefit from performance of the agreement is not alone sufficient" to render that party a third-party beneficiary. *Id* at 57 (referring to the contractual provisions requiring the private company to provide safety gear and protective clothing to the inmates while they were working) Because the contract was not meant to benefit the inmates, and there were no *express* terms providing for such a beneficiary-status, the inmates lacked standing to enforce the contract. *Id* The court went on to acknowledge that, although the contract did arguably benefit the inmates assigned to work under the contract, such a benefit is merely *incidental* to the contract, as no contractual terms referred to such a benefit. *Id* at 58.

Applying the relevant case law to the facts of this case, it is clear that in order to enforce a contract as a third-party beneficiary, the contracting parties must have *intended* to benefit the third party through performance of the contract Specifically, the terms of the contract must clearly and expressly indicate an intent to benefit the third party In the instant case, there are no such terms in the contract between the State and CBM. Instead, the contract simply provides that the purpose of the contract was "to furnish and deliver to the State certain food services, commissary services, supplies, equipment, and commodities." *Complaint,* ¶ 6. Even the terms of the contract providing for alterations to the prison menu in order to accommodate religious beliefs does not suffice to manifest an intention of the State and CBM to render Plaintiff an *intended* third party beneficiary. As in *Gay,* there is certainly a valid argument that the Plaintiff is an *incidental* beneficiary of the agreement between the State and CBM. Nonetheless, Plaintiff's breach of contract claim falls short of rendering him an *intended* third-party beneficiary, as this the law of South Dakota requires that a contract be made "*expressly* for the

benefit of a third person" in order for that third person to have standing to enforce that contract *See* SDCL § 53-2-6 (emphasis added).

As a result of the foregoing discussion, Plaintiff's breach of contract claim is dismissed pursuant to SDCL § 15-6-12(b), as Plaintiff has failed to state a claim upon which relief may be granted. Even assuming as true all of Plaintiff's factual allegations contained in the Complaint, it cannot be said that he has standing to assert a breach of contract claim for a contract which he was not a party, and was not a third-party beneficiary. This is particularly true in light of the fact that there are no allegations in the Complaint that the contract contains provisions which make inmates parties to the contract, or which grant inmates the ability to enforce the contract. *See Ponchik v King,* 957 F.2d 608 (8th Cir. 1992).

Defendants' Motion to Dismiss is granted, with regard to Plaintiff's breach of contract claims.

B. Sovereign Immunity

As previously discussed, Plaintiff does not have standing to assert a breach of contract action against Defendants. Thus, it is unnecessary to reach the issue of sovereign immunity as a defense to that claim. Nonetheless, a brief discussion of applicable law is appropriate in order to fully address the parties' arguments.

According to SDCL § 3-21-8, "[n]o person, political subdivision, or the state is liable for failure to provide a prison, jail, or penal or correctional facility, or if such facility is provided, for failure to provide sufficient equipment, personnel, programs, facilities, or services in a prison or other correctional facility." SDCL § 3-21-8. Although this statute has been applied and interpreted multiple times as it applies to *tort* claims, there are no recorded cases applying it to *contract* claims. Nonetheless, from a pure statutory-interpretation standpoint, it seems as though the legislature did not intend to limit the application of governmental immunity solely to claims sounding in tort.

According to the South Dakota Supreme Court, statutory interpretation requires that the court "find a meaningful understanding of a statute when possible." *Bon Homme County Com'n AFSCME,* 2005 SD 76, ¶ 22, 699 N.W.2d 441, 452. Thus, the first step is to look to the plain meaning of the statute. *Fair v Nash Finch Co*, 2007 SD 16, ¶ 7, 728 N.W 2d 623, 628. "Words and phrases in a statute must be given their plain meaning and effect When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *In re Yanni,* 2005 SD 59, ¶ 8, 697 N.W.2d 394, 397.

Applying these concepts to the SDCL § 3-21-8, the language in the statute indicates a legislative intent to provide sovereign immunity to the state and its officials, regardless of whether the potential liability will derive from tort or contract. This same analysis can be applied to SDCL § 3-21-9, upon which Defendants also rely to provide them with immunity from Plaintiff's breach of contract claim.[2]

[2] South Dakota Codified Laws § 3-12-9 provides

Considering this broad application of §§ 3-21-8 and 9, the State would therefore be immune from Plaintiff's breach of contract claim under the present facts. This result is evident based on the strong public policy of this state that "statutory immunity . . . is essential to protect the public decision-making process." *Hancock v Western South Dakota Juvenile,* 2002 SD 69, ¶ 15, 647 N.W.2d 722, 725. *See also Webb v Lawrence County,* 144 F.3d 1131, 1140 (8th Cir 1998) ("Immunity is critical to the state's evident public policy of allowing those in charge of jails to make discretionary decisions about prison administration without fear of tort liability). Therefore, assuming Plaintiff had been able to overcome the standing hurdle (and had been able to assert a claim for breach of contract against Defendants), his claim against the State would nonetheless fail, due to the protection provided by governmental immunity.

With regard to Defendant Weber, it is necessary to determine whether the State's sovereign immunity extends to a government employees. According to applicable precedent,

> [a]s an outgrowth of sovereign immunity, a public officer may also be immune from suit when acting within the scope of his authority. In some instances, a suit, although nominally against a public officer in an individual capacity, actually is a suit against the state where the state is the real party against which relief is sought In these instances, the suit is barred by sovereign immunity.

Nat'l Bank of South Dakota v. Leir, 325 N.W.2d 845, 847 (SD 1982) (internal citation omitted). If a decision in favor of the claimant would only subject the employee to liability, and not the state, then it cannot be said that the state is the real party against whom relief is sought, and immunity will not extend to that official. *Id* 847-88 Moreover, immunity will extend to an official or employee who, acting within the scope of his employment, exercises a discretionary function *See Sioux Falls Const Co v City of Sioux Falls*, 297 N.W.2d 454, 458 (SD 1980).

In the instant case, there have been no allegations by Plaintiff that it was Weber who, on behalf of the State, entered into the contract with CBM Further, Weber's name does not appear on the contract itself. In addition, the Complaint is devoid of any assertions that Weber, in any way, acted outside the scope of his official responsibilities with regard to the contract with CBM Thus, there have been no allegations supporting a conclusion that Defendant Weber would be outside the protections of the statutory immunity provided by §§ 3-21-8 and 9, rendering him unassailable by Plaintiff's breach of contract claim.

Lastly, it is necessary to consider whether statutory immunity would attach to CBM, as a private entity doing business with the State. In *Brown v Youth Services Int'l of South Dakota,*

No person, political subdivision, or the state is liable for any injury resulting from the parole or release of a prisoner or from the terms and conditions of his parole or release or from the revocation of his parole or release, or for any injury caused by or resulting from

(5) Services or programs administered by or on behalf of the prison, jail, or correctional facility

Inc; the federal district court for South Dakota, in predicting the South Dakota Supreme Court's probable outcome on the issue, held that SDCL § 3-21-8 would *not* confer immunity to a private corporation. 89 F.Supp 2d 1095, 1101 (D.S.D. 2000) In that case, the plaintiff had sued a private corporation which ran a treatment facility for "troubled children and young adults." *Id* at 1099. According to the court, "[t]he context of § 3-21-8 . . . makes clear that it was written to protect *public* entities and employees." *Id* at 1101 (emphasis added). Inasmuch, the court went on to provide that it would be "unreasonable" to find that the Legislature intended to provide immunity to a private entity, without the Legislature having indicated such an intent. *Id*

This precedent indicates that CBM, as a private corporation merely doing business with the State, would not be afforded the statutory immunity conferred by § 3-21-8.

II. FEDERAL CLAIMS

Along with his state law breach of contract claims, Plaintiff is claiming Defendants violated two federal statutes. (1) 42 U S C. § 1981, and (2) § 42 U.S.C. § 1985.

A. § 1981 Claim

Section 1981 of the United States Code is a civil rights statute which grants causes of action to persons who, due to their race, are denied the right to make and perform contracts. *Sinclair v Hawke,* 314 F.3d 934, 943 (8th Cir 2003). The Civil Rights Act of 1866 is the framework from which 42 U.S.C. § 1981[3] was derived. The legislative history of the Civil Rights Act indicates that Congress intended to protect a limited category of rights—those relating to *racial* equality. *State of Georgia v Rachel,* 384 U.S. 780, 792 (1966). Therefore, in order for a claimant to base a claim upon § 1981, he must first show that he was deprived a right

---

[3] The language of 42 U S.C § 1981 provides

> a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law

which, under similar circumstances, would have been accorded a person of a different race. *Schetter v Heim,* 300 F.Supp 1070, 1073 (E D.Wis. 1969). Further, liability under §1981 requires a claimant to show *purposeful* discrimination, not merely a disparate impact through neutral practices by the defendant. *Price v M&H Valve Co*, 177 Fed. Appx. 1 (11th Cir. 2006)

The United States Supreme Court has provided that, in enacting § 1981, Congress's intent was to protect from discrimination those individuals subjected to disparate treatment due to their ancestry or ethnic characteristics. *Saint Francis College v Al-Khazraji,* 481 U.S. 604 (1987). *See also Runyon v McCrary,* 427 U.S 160 (1976), *Jones v. Alfred H Mayer Co*, 392 U.S. 409 (1968); *Coleman v. Domino's Pizza, Inc*, 728 F.Supp. 1528 (S D. Ala. 1990); *McKnight v Gingras,* 966 F.Supp. 801 (E D. Wis. 1997). Therefore, discrimination based upon sex, age, or *religion* does not furnish a basis for a cause of action under § 1981. *See Ruynon v McCrary,* 427 U.S. 160 (1976); *McKnight v Gingras,* 966 F.Supp. 801 (E.D.Wis 1997); *Masal v Industrial Com'n of Illinois,* 541 F.Supp. 342 N.D. Ill 1982)

In the instant case, Plaintiff attempts to assert a claim under § 1981. However, the Complaint's sole factual allegation which could possibly pertain to a claim under § 1981 provides that "Defendants . . conspired together to cause, permit, and allow a breach of contract to the detriment of the Plaintiff because of his religious beliefs and that this breach of contract resulted in financial gain for Defendants." *Complaint,* ¶ 20 As discussed, substantial precedent in the field of § 1981 claims indicates an authoritative determination that discrimination based on religious beliefs is not covered by § 1981. Moreover, § 1981 pertains to claims by individuals that, due to *racial* discrimination, were denied the ability to make or perform a contract, and as previously discussed, Plaintiff has no standing to enforce the contract between the State and CBM. *See Sinclair,* 314 F.3d at 943

Construing Plaintiff's Complaint liberally, as is proper for pro se pleadings, it cannot be said that he has stated a § 1981 claim for which relief can be granted. *See generally Nickens v White,* 536 F 2d 802, 803 (8th Cir. 1976). The pleadings are bare as to any allegation of discrimination of the sort covered by § 1981. Thus, Plaintiff's § 1981 claim be hereby dismissed.

B. § 1985 Claim

Through Section 1985, Congress has provided a private cause of action against persons who conspire "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U S.C § 1985(3). According to the Eighth Circuit Court of Appeals, to prove the existence of a civil rights conspiracy under § 1985(3)—which is the portion of the statute at issue in this case—a claimant must prove:

> (1) that the defendants did "conspire,"
>
> (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or equal privileges and immunities under the laws,"

(3) that one or more of the conspirators did, or caused to be done, "any act in furtherance of the object of the conspiracy," and

(4) that another person was "injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States "

Larson v Miller, 76 F.3d 1446, 1454 (8th Cir. 1996). *See also Andrews v Fowler,* 98 F.3d 1069, 1079 (8th Cir. 1996).

In asserting a § 1985 claim, the Plaintiff must allege he was the victim of a conspiracy motivated by a specific, class-based, invidiously discriminatory animus. *Bell v Fowler,* 99 F.3d 262, 270 (8th Cir. 1996); *Lewis v Bd Of Education of Talbot County,* 262 F.Supp 2d 608 (D. Md. 2003) (citing *United Brotherhood of Carpenters v Scott,* 463 U.S. 825, 828-29 (1983)). "To meet the requirements of a class-based discriminatory animus, the class must possess the discrete, insular, and immutable characteristics comparable to those characterizing classes such as race, national origin, and sex." *Id* (declining to extend § 1985(3) to include individuals opposed to gun control laws).

Especially pertinent to current case is the requirement that actions brought under § 1985 must *plead with specificity* facts supporting such a claim. *Holdiness v Stroud,* 808 F.2d 417 (5th Cir. 1987). Thus, a complaint containing only broad and conclusory statements, unsupported by factual allegations, is not sufficient to support a cause of action under § 1985. *Perry v. Gold & Laine, P C ,* 371 F.Supp.2d 622 (D N J 2005)(holding that conclusory and unsupported allegations in a pro se litigant's complaint, regarding alleged conspiracy between defendant law firm, attorneys, and other parties to "fix" cases, were insufficient to state a claim under § 1985). *See also Conway v Garvey,* 2003 WL 22510384 (S.D N Y. 2003) (providing that § 1985 claims that are vague and provide no factual basis must be dismissed); *MacArthur v San Juan County,* 416 F.Supp.2d 1098 (D.Utah 2005) (determining that there was not a valid claim asserted under § 1985 when there were no allegations of racial or class-based discrimination made by the claimant).

According to the Eighth Circuit, "the plaintiff must allege with particularity and specifically demonstrate with material facts that the defendants reached an agreement." *City of Omaha Employees Betterment Ass'n v City of Omaha,* 883 F.2d 650, 652 (8th Cir. 1989). This burden can be satisfied by "pointing to at least some facts which would suggest that [defendants] 'reached an understanding' to violate [plaintiff's] rights." *Nelson v City of McGehee,* 876 F.2d 56, 59 (8th Cir. 1989) (quoting *Myers v Morris,* 810 F 2d 1437, 1454 (8th Cir 1987)). In addition, a § 1985 plaintiff must assert that an independent federal right has been violated. In other words, § 1985 "is a statute which provides a remedy, but it grants no substantive stand-alone rights. The source of the right or laws violated must be found elsewhere." *Federer v Gephardt,* 363 F.3d 745, 758 (8th Cir. 2004).

Again, Plaintiff's sole contention in his complaint, with regard to a conspiracy falling under § 1985, provides that Defendants "conspired together to cause, permit, and allow a breach

of contract to the detriment of the Plaintiff because of his religious beliefs[.]" *Complaint,* ¶ 20 The Complaint does not contain any contentions otherwise providing any factual assertions of a conspiracy between the State, CBM, and Weber, to deprive him of his kosher meals In addition, the Complaint contains no factual allegations pertaining to any "independent federal right" that has been allegedly violated by the purported conspiracy. *See generally Federer,* 363 F 3d. at 758.

The cases pertaining to § 1985 claims, both in the Eight Circuit Court of Appeals and otherwise, are clear—a claimant asserting such a claim must plead with particularity the material facts relating to the alleged conspiracy. Again, taking into consideration the fact that Plaintiff is pro se, and relaxing the requirements properly pleading a § 1985 claim, it cannot be said that Plaintiff has asserted a § 1985 claim upon which relief can be granted. *See Nickens,* 536 F.2d at 803

Therefore, upon reviewing relevant case law with regard to § 1985 claims, Defendants' Motion to Dismiss is hereby granted with regard to Plalintiff's § 1985 claim.

CONCLUSION

Upon reviewing the parties' pleadings and briefs, and considering the applicable statutes and case law, the Court has found that Plaintiff has failed to state any claim for which relief could appropriately be granted. Pursuant to SDCL § 15-6-12(b), Defendants' Motion to Dismiss should is hereby granted in its entirety.

Sincerely,

Kathleen K Caldwell
Circuit Court Judge

Cc: Clerk's file