24684

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 24684

CHARLES E. SISNEY,

Plaintiff/Appellant,

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/Appellees.

24684

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Kathleen K. Caldwell, Presiding Judge

APPELLEES' BRIEF

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Jurisdictional Statement

On October 10, 2007, the Honorable Kathleen K. Caldwell dismissed Appellant Charles E. Sisney's (Sisney) complaint pursuant to SDCL § 15-6-12(b)(5) for failure to state a claim upon which relief can be granted. Sisney filed his notice of appeal on October 15, 2007. The Court has jurisdiction over Sisney's appeal pursuant to SDCL § 15-26A-3.

Statement of the Issues

1. **Whether the State of South Dakota, Douglas Weber, and CBM, Inc., are entitled to statutory immunity on Sisney's state law breach of contract claim.**

The circuit court held that the State and Weber are protected by statutory immunity

SDCL § 3-21-8
SDCL § 3-21-9
Hancock v W. S D Juvenile Servs. Ctr, 2002 SD 69, ¶ 15, 647 N.W.2d 722, 725
Webb v Lawrence County, 144 F.3d 1131, 1139-1140 (8th Cir. 1998)

2. **Whether Sisney has standing to assert a breach of contract claim under the governmental contract between CBM, Inc., and the State of South Dakota.**

The circuit court held that Sisney did not have standing to assert a breach of contract claim under a public contract to which he was neither a party nor an express third-party beneficiary.

SDCL § 53-2-6
Kary v. Kary, 318 N.W 2d 334, 336 (S.D. 1982)

Gay v Ga Dep't of Corr., 606 S.E.2d 53, 57-59 (Ga App. 2004)
Clifton v Suburban Cable TV Co , Inc , 642 A.2d 512, 514-515 (Penn.Super 1994)

3. Whether Sisney asserted facts establishing either a 42 U.S.C. § 1981 or 42 U.S.C. § 1985 claim for which relief could be granted.

The circuit court, construing Sisney's complaint liberally, held that Sisney failed to assert facts establishing a claim under 42 U.S C. § 1981 or 42 U.S.C § 1985 for which relief could be granted.

42 U.S.C. § 1981
Lacedra v. Donald W Wyatt Det Facility, 334 F.Supp.2d 114, 135 (D R.I. 2004)
42 U.S.C. § 1985
Andrews v Fowler, 98 F 3d 1069, 1079 (8th Cir. 1996)

4. Whether the circuit court abused its discretion when it did not grant Sisney an opportunity to amend his complaint to overcome its deficiencies.

Sisney did not adequately raise this issue below, so the circuit court did not directly rule on this issue; however, it is clear that no amount of amendment by Sisney would overcome the complaint's deficiencies.

In re T A , 2003 SD 56, ¶ 38, 663 N.W.2d 225, 237
Broughton v Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980)

Statement of the Case

On June 11, 2007, Sisney filed a *pro se* complaint against the State of South Dakota (State), Douglas Weber (Weber), and CBM, Inc. (CBM) (collectively Defendants) in the Second Judicial Circuit. The case was assigned to Circuit Judge Kathleen K. Caldwell Sisney asserted a state law breach of contract claim against the Defendants, arguing that they breached a public contract between the State and CBM. He also sought recovery under 42 U.S C. §§ 1981 and 1985.

The Defendants moved to dismiss Sisney's complaint for failure to state a claim upon which relief can be granted pursuant to SDCL § 15-6-12(b)(5), contending that Sisney's state law breach of contract action was barred by statutory immunity and that Sisney lacked standing to enforce a public contract to which he was not a party. The Defendants also claimed that Sisney had failed to assert sufficient facts to proceed on his federal claims. On October 10, 2007, the circuit court granted the Defendants' motion to dismiss pursuant to SDCL § 15-6-12(b)(5) and dismissed Sisney's complaint in its entirety. Sisney subsequently filed his notice of appeal.

Statement of the Facts

Sisney's rendition of the facts contains no citations to the record as required by SDCL § 15-26A-60 (providing "[e]ach statement of a material fact

shall be accompanied by a reference to the record where such fact appears"). Defendants offer this statement of the facts with appropriate citations to the record.

On July 9, 2002, the State entered into a contract with CBM to provide food services at various State-operated institutions, including the prisons. (Compl , ¶ 6.) Under the contract, CBM was to "furnish and deliver to the State certain food services, commissary services, supplies, equipment and commodities . . . " (*Id.*, Ex. 1.) The contract also provided that "[t]he proposed menu at Correctional Facilities will have an average caloric base of 2700 to 3500 calories per day." (*Id.* ¶ 7, Ex 2) The analysis of the menu items and foods offered were to be calculated as a weekly average. (*Id.* ¶ 9, Ex. 4.) The contract also provided that "[f]ood substitutions must be available to accommodate food avoidances due to religious beliefs/practices/observances . . .." (*Id.* ¶ 8, Ex. 3.)

Sisney is an inmate at the South Dakota State Penitentiary (SDSP) in Sioux Falls, South Dakota. (*Id* ¶ 2.) Sisney is not considered Jewish according to Orthodox standards, yet he practices Jewish traditions and his Jewish religious beliefs are on file with the SDSP. One of Sisney's Jewish practices involves following a kosher diet. On April 23, 2007, CBM began serving a "new" diet to prisoners following a kosher diet. (*Id.* ¶ 10.) Sisney was unhappy with the change, so he filed a grievance through the South Dakota Department of

Corrections administrative remedy process (*Id.*) He claimed that the new kosher meals averaged 400 to 500 fewer calories than the minimum required under the State's food-service contract with CBM. (*Id.* ¶¶ 11-12, Ex. 6.) Sisney based his grievance on his own independent caloric study of the kosher diet (*Id.* ¶ 11, Ex. 5)

Weber received Sisney's grievance and forwarded it to CBM. (*Id* ¶ 14, Ex. 7.) CBM responded that Sisney's caloric study was incomplete and underestimated the actual amount of calories served (*Id*) Weber told Sisney that no action would be taken. (*Id.*)

After receiving Weber' response, Sisney filed this lawsuit (and several others) against the State, CBM, and Weber alleging that they had "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." (*Id.* ¶ 20.) Sisney claimed that he had standing to sue under the contract between the State and CBM "because the contract directly affect[ed] him and his well-being." (*Id* ¶ 21.) He specifically asserted the following claims:

> Count 1: The breach of contract between the State of South Dakota and CBM Inc. in violation of South Dakota [l]aw(s) and [s]tatute(s).
>
> Count 2: The 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.

(*Id.* ¶¶ 23, 24.)

The Defendants filed a motion to dismiss pursuant to SDCL § 15-6-12(b)(5) for failure to state a claim upon which relief can be granted. (Mot. to Dismiss.) The Defendants argued that Sisney's breach of contract claim was barred by statutory immunity and that Sisney lacked standing to assert a breach of contract claim under a public contract between the State and CBM. (*Id.*) They also pointed out that the complaint did not contain factual allegations supporting the federal claims. (*Id.*) After briefing by both parties, and a hearing at which Sisney appeared and participated via closed-circuit television, the circuit court agreed with the Defendants and dismissed the action. (Order.)

The trial court held that Sisney had failed to state a breach of contract claim upon which relief could be granted, explaining that "[e]ven 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." (Letter Decision.) The trial court held, in the alternative, that even "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." (*Id.*) Regarding Sisney's

federal claims, the court held that the "pleadings are bare as to any allegation of discrimination of the sort covered by § 1981. (*Id.*) Thus, Plaintiff's § 1981 claim is hereby dismissed." (*Id.*) "[T]aking into consideration the fact that Plaintiff is pro se, and relaxing the requirements properly pleading a § 1985 claim," the trial court further held that "it cannot be said that Plaintiff has asserted a § 1985 claim upon which relief can be granted." (*Id.*) Because Sisney did not properly present a motion to amend the pleadings, the trial court did not formally address this issue.

Standard of Review

Sisney does not recite the applicable standard of review in his brief. Nonetheless, it is well-established that "'[a]n appeal of a motion to dismiss presents a question of law and [the Court's] standard of review is de novo, with no deference given to the trial court's legal conclusions.'" *Wojewski v. Rapid City Reg'l Hosp., Inc.*, 2007 SD 33, ¶ 11, 730 N.W.2d 626, 631 (quoting *Osloond v. Farrier*, 2003 SD 28, ¶ 4, 659 N.W.2d 20, 22) (additional quotations omitted). Furthermore, the Court's "standard of review of a trial court's grant or denial of a motion to dismiss is the same as [its] review of a motion for summary judgment: is the pleader entitled to judgment as a matter of law." *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 2006 SD 72, ¶ 11, 720 N.W.2d 655, 659 (citing *Jensen Ranch, Inc. v. Marsden*, 440 N.W.2d 762, 764 (S.D. 1989)). A circuit court's decision regarding amendment of the pleadings will not be disturbed on appeal unless there

is a clear abuse of discretion which results in prejudice." *See In re T A* , 2003 SD 56, ¶ 38, 663 N W.2d 225, 237 (citing *Tesch v Tesch*, 399 N.W.2d 880, 882 (S D 1987))

Although the standard of review is *de novo*, if there is any basis in the record supporting the decision of the circuit court, the Court affirms. *Brown Eyes v S D. Dep't of Soc Servs* , 2001 SD 81, ¶ 5, 630 N.W.2d 501, 504 (citations omitted) "[A] trial court may still be upheld if it reached the right result for the wrong reason." *Sommervold v Grevlos*, 518 N.W.2d 733, 740 (S.D. 1994) (citing *Cowell v Leapley*, 458 N.W.2d 514, 519 (S.D. 1990)). It is also fundamental that Sisney, as the appellant, carries the burden of persuading the Court that his lawsuit should not have been dismissed below Sisney ultimately fails to meet this burden, and the Court should affirm the dismissal.

Argument

1. The State of South Dakota, Douglas Weber, and CBM, Inc., are protected by statutory immunity on Sisney's state law breach of contract claim.

Sisney filed a state law breach of contract claim against the State, Weber, and CBM in their official capacities. The circuit court held that, even assuming Sisney could overcome the standing hurdle, Sisney's claim was barred by statutory immunity pursuant to SDCL §§ 3-21-8 and 3-21-9. SDCL § 3-21-8 provides in its entirety:

> 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

SDCL § 3-21-9 provides in relevant part.

> No person, political subdivision, or the state is liable . . . for any injury caused by or resulting from . . (5) Services or programs administered by or on behalf of the prison, jail, or correctional facility

Both state and federal courts agree that these statutes provide correctional officials and parties acting on behalf of the State a complete defense against inmate lawsuits claiming violations of state law. *See Webb v. Lawrence County*, 144 F.3d 1131, 1139-40 (8th Cir. 1998); *Casazza v. State*, 2000 SD 120, 616 N.W.2d 872, 877 The Court has held that the immunity provided to public officials under SDCL §§ 3-21-8 and 3-21-9 is essential to the public decision-making process *Hancock v W S D Juvenile Servs. Ctr* , 2002 SD 69, ¶ 15, 647 N.W.2d 722, 725. "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 " *Id* (citing *Webb*, 144 F.3d at 1140). The same can be said for entities that contract with the State to provide various services The State has an obligation to provide certain services to its inmates and whether it fulfills this duty by hiring its own employees or contracting with a private entity does not affect the applicability of SDCL §§ 3-21-8 and 9.

In addressing the issue of statutory immunity, the Court should focus on the substance of Sisney's allegations As a matter of law, the substance of Sisney's allegations fall within the scope of SDCL §§ 3-21-8 and 3-21-9. The statutes provide immunity for "*any* injury" caused by services administered by or on behalf of the prison and for failure to provide sufficient services. *See* SDCL §§ 3-21-8 and 3-21-9. In this case, Sisney is alleging injury from the food service provided by CBM at SDSP under a State contract. In substance, he complains that CBM is not providing sufficient services. His allegations are precisely the kind to which the statutes afford immunity. For this reason, Sisney's claim against the State, CBM, and Weber was properly dismissed, and the circuit court decision should be summarily affirmed.

Sisney argues that SDCL §§ 3-21-8 and 3-21-9 do not confer statutory immunity to Reisch and Weber for breach of contract claims, and that the statutes only apply to tort claims. (Appellant Br. 17-18.) However, these statutes are not expressly limited to strictly tort claims as Sisney contends, and it is well-established that the Court will not read words into a statute *Scheller v. Faulkton Area Sch Dist. #24-3*, 2007 SD 42, ¶ 9, 731 N.W.2d 914, 916-917 (citing *Petition of Famous Brands, Inc* , 347 N W.2d 882, 885 (S.D. 1984)). SDCL §§ 3-21-8 and 3-21-9 refer generally to liability. The term "liability" is a broad legal term defined generally as "[t]he quality or state of being legally obligated or

accountable." BLACK'S LAW DICTIONARY 925 (7th ed. 1999). "Liability" has also been defined as "an apt word to state an obligation to pay money because of a disregard of the requirements of a contract as well as on account of tortious conduct." *Rose-Derry Corp v Proctor & Schwartz, Inc*, 193 N.E. 50, 52 (Mass. 1934) (internal citations omitted) The Court has previously used the term in reference to "liability" resulting from a breach of contract action. *See Husky Spray Serv, Inc v Patzer*, 471 N.W.2d 146, 154 (S.D. 1991) ("*liability* imposed . . was contractual in nature") (emphasis added); *Van Zee v Witzke*, 445 N.W.2d 34, 36 (S.D. 1989) (person "may be *liable* for breach of contract") (emphasis added), *S. D Bldg Auth v Geiger-Berger Assoc, P.C*, 414 N.W.2d 15, 21 (S D 1987) ("[i]n contract actions, a demand is generally not necessary because the person *liable* is deemed to have knowledge of the breach") (emphasis added). Thus, according to the plain language of SDCL §§ 3-21-8 and 3-21-9, the State, Weber, and CBM are afforded a complete defense as a matter of law for *any* liability, either contractual or tort. *See Webb*, 144 F 3d at 1140.

Additionally, the Legislature is clearly competent to limit a statute's applicability to actions sounding in tort, and has previously limited statutes in such a manner For instance, in SDCL § 3-21-2 the legislature provided:

> No action for the recovery of damages for personal injury, property damage, error, or omission 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 the

injury is given to the public entity as provided by this chapter within one hundred eighty days after the injury.

In this statute, the legislature limited application of the statute to causes of action sounding in tort. *See Wolff v. Sec'y of S. D. Game, Fish and Parks Dep't*, 1996 SD 23, ¶ 20, 544 N W.2d 531, 535 (citing *Finck v. City of Tea*, 443 N.W 2d 632, 632 (S.D. 1989)). Thus, if the legislature intended to limit SDCL §§ 3-21-8 and 3-21-9 to damages arising from a tort action, it could have, and presumably would have done so. Its decision not to limit the statutes in such a manner evidences its intent to provide statutory immunity for any liability against state actors, including both tort and contractual liability

Construing SDCL §§ 3-21-8 and 9 as encompassing both tort and contract claims is also consistent with the public policy underlying the statutes. Otherwise, litigants could avoid statutory immunity by simply labeling or casting their claims as breach of contract claims. Substance, rather than form, should determine whether statutory immunity applies. The substance of Sisney's claim is that he is being denied a kosher diet, which is a claim properly pursued under 42 U.S.C. § 1983, and more in the nature of a tort than a contract claim.[1] *See Brown-El v.*

[1] Interestingly, Sisney admitted in his pending federal lawsuit that he is receiving a nutritionally adequate kosher diet. *See Sisney v Reisch et al*, Civ. 03-4260 (D.S.D.), Doc. 218, ¶¶ 99-100; Doc. 248, ¶¶ 99-100. The Court may take judicial notice of Sisney's filings in his pending federal lawsuit under SDCL §§ 19-10-2 and 19-10-4.

Harris, 26 F 3d 68, 69 (8th Cir. 1994). Common sense and public policy dictate that the statutory immunity provided in SDCL §§ 3-21-8 and 3-21-9 does not and should not bar only tort actions.

Sisney argues that the State, Weber, and CBM are not entitled to statutory immunity because their performance under the contract were ministerial acts. (Appellant Br. 18) (citing *Kyllo v Panzer*, 535 N.W.2d 896, 902 (S.D. 1995)). This argument fails for two reasons. First, the *Kyllo* ministerial and discretionary distinction is only relevant to sovereign immunity, not the statutory immunity provided by SDCL §§ 3-21-8 and 3-21-9. *See Kyllo*, 535 N.W.2d at 903 (holding "SDCL 21-32-17 and 21-32A-2 are unconstitutional so far as they extend *sovereign* immunity to state employees performing ministerial functions") (emphasis added); *see also Clay v Weber*, 2007 SD 45, ¶ 7, n.5, 733 N W 2d 278, 282, n.5 ("[b]ecause the ministerial/discretionary distinction is not within the text of SDCL 3-21-8 and SDCL 3-21-9, that distinction is not relevant to . . . this statutory immunity. The distinction is only relevant under *sovereign* immunity") (emphasis in original) (citing *Wulf v Senst*, 2003 SD 105, ¶ 20, 669 N.W.2d 135, 142). Therefore, whether performance under the contract between the State and CBM is classified as a "ministerial" act is irrelevant. Second, whether CBM and the State amend the contract between them to provide for a different kosher diet menu is a discretionary act. Accordingly, the circuit court properly dismissed

Sisney's breach of contract claim pursuant to SDCL §§ 3-21-8 and 3-21-9. For this reason, the Court should summarily affirm the circuit court's decision

2. Sisney does not have standing to assert a breach of contract claim under a public state contract between CBM, Inc., and the State of South Dakota.

Because Sisney's breach of contract claim was properly barred by statutory immunity, the Court does not need to reach the issue of whether Sisney alleged sufficient facts to support his breach of contract claim. However, even if the Court addresses Sisney's breach of contract claim, dismissal was still appropriate as a matter of law. Sisney brought a breach of contract action against CBM, the State, and Weber to enforce the public state contract between CBM and the State relating to the food service provided at various State-operated institutions. However, Sisney does not have standing to enforce a governmental contract between CBM and the State to which he is neither a party nor an intended third-party beneficiary.

A prerequisite for asserting a breach of contract claim is the existence of a contractual relationship between the parties. *See E.E.O.C. v Waffle House, Inc.*, 534 U S 279, 294 (2002) ("[i]t goes without saying that a contract cannot bind a nonparty"); *Krause v Reyelts*, 2002 SD 64, ¶ 27, 646 N.W.2d 732, 736 ("[i]n general, one who is not a party to a contract is not bound by the contract . . . .") (internal quotation and citation omitted). Sisney does not allege that he was a

party to the contract between CBM and the State. Absent such allegations, he lacks standing to pursue recovery.

Sisney argues that he has standing to sue on the governmental contract as a third-party beneficiary. This is not the first time Sisney has tried to sue CBM under a breach of contract theory Sisney has filed several lawsuits against State correctional officials (and other individuals or entities) in both state and federal court under various legal theories. In his federal action (which is still pending and is currently at the summary-judgment stage), Sisney moved to amend the pleadings to add a state law breach of contract claim against CBM. *See Sisney v Reisch, et al.*, 4 03-cv-04260-LLP, Report and Recommendation (Doc. 58) (D.S.D. November 23, 2004) (App 14-20) and Order adopting the same (Doc 81) (D.S.D. February 22, 2005) (App 21-22).[2] Sisney alleged that CBM had breached its contract with the State to provide appropriate meal substitutions when required by an inmate's religion. *Id.* The State resisted amendment, arguing that CBM was protected by statutory immunity and that Sisney was not a party to the contract *Id.* Sisney's motion to add CBM as a party to the federal action was denied. *Id* Although Sisney alleged that he was a beneficiary of the State's food-service contract and the provisions requiring CBM to make religious dietary

[2] The Court may take judicial notice of Sisney's filings under SDCL §§ 19-10-2, 19-10-4, and/or 19-8-1.

accommodations, the federal district court ruled that Sisney lacked standing to pursue a claim for breach of contract. *Id.* According to the federal district court, Sisney failed to state a claim against CBM because he did not allege he was a party to the agreement and the contract did not expressly grant inmates a right of enforcement. *Id.*

The contract Sisney is trying to sue on in this action is the very same contract that the federal district court ruled he lacked standing to enforce. Under principles of comity, the Court should defer to the federal district court's ruling that Sisney lacks standing to sue on the State's food-service contract *See State v. Daly*, 454 N.W.2d 342, 344 (S.D. 1990). The federal district court's decision should also be followed and deferred to because it is consistent with general principles of South Dakota contract law, as discussed in this brief.

Sisney argues that he has standing to sue on the governmental contract as a third-party beneficiary. For Sisney to have standing to pursue recovery under a third-party beneficiary theory he must prove that the contract in question was made "expressly" for his benefit. *See* SDCL § 53-2-6.[3] No such factual allegations appeared in the complaint, nor do they appear in Sisney's appeal brief. Sisney alleged that he should be allowed to enforce the food-service contract

[3] SDCL § 53-2-6 provides in its entirety. "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." (emphasis added).

because the agreement "directly affect[ed] him and his well-being" (Compl., ¶ 21.) This, however, does not qualify him as a third-party beneficiary Rather, in order for Sisney to sue on the food-service contract as a third-party beneficiary, Sisney must have alleged, and ultimately proven at trial, that, *at the time the contract was executed*, it was CBM's and the State's intent and/or purpose to benefit Sisney. *See Trouten v. Heritage Mut Ins. Co.*, 2001 SD 106, ¶ 13, 632 N W.2d 856, 858; *Kary v Kary*, 318 N.W.2d 334, 336 (S D. 1982), *Fry v Ausman*, 135 N.W 708, 710 (S.D 1912). Without this showing, Sisney cannot achieve the status of a third-party beneficiary with an enforceable interest in the contract. *See id.* (citations omitted). Sisney's complaint contained no factual allegations suggesting such an intention *ever* existed, let alone an intention at the time the State's food service contract was entered.

The Court previously construed the language of SDCL § 53-2-6 and explained:

> The statute is not applicable to every contract made by one person with another from the performance of which a third person will derive a benefit; the intent to make the contract inure to the benefit of a third party must be clearly manifested. In the language of the statute, the contract must be one "made expressly for the benefit of a third person."

Thompson Yards v. Van Nice, 239 N.W. 753, 755 (S.D. 1931).

Other states construing similar statutes have also determined that "the mention of one's name in an agreement does not give rise to a right to sue for

enforcement of the agreement where that person is only incidentally benefitted " *First Fed Sav. & Loan Assoc of Bismarck v Compass Invs , Inc* , 342 N.W.2d 214, 218 (N.D. 1983) (citations omitted). Moreover, "one claiming [third-party] status must show that the contract was entered into by the parties *directly* and *primarily* for his benefit. The benefit must be more than merely incidental to the agreement." *Mercado v. Mitchell*, 264 N.W.2d 532, 538 (Wis. 1978) (citations omitted) (emphasis added). Also,

> The right of a third party benefited by a contract to sue thereon rests upon the liability of the *promisor*, which must affirmatively appear from the language of the instrument when properly interpreted or construed; and the liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability.

Haakinson & Beaty Co v Inland Ins Co., 344 N.W.2d 454, 458 (Neb. 1984) (citation omitted) (emphasis added). Nowhere in the contract between CBM and the State does it even remotely indicate that CBM provided all the inmates of South Dakota's prison system the right to sue on the contract between itself and the State.

Additionally, Sisney is asserting that he is a third-party beneficiary to a public governmental contract Special rules and presumptions apply in this case because Sisney is trying to sue as a third-party beneficiary to a government contract. As a general rule, when public contracts are involved, private citizens are presumed *not* to be third-party beneficiaries. *See Drummond v Univ. of Pa.*,

651 A.2d 572, 578-79 (Penn 1994); *Hodges v. Public Bldg. Com'n of Chicago*, 864 F.Supp. 1493, 1509 (N.D Ill 1994) (holding third-party beneficiaries of government contract are assumed to be merely incidental beneficiaries). "There must be language evincing an intent that the party contracting with the government will be held liable to third parties in the event of nonperformance." *Drummond*, 651 A.2d at 579 (emphasis and citations omitted). Sisney never set forth any terms of the contract that even create an inference of an intent on the part of CBM to be held liable to third parties in the event of a breach.

Furthermore, several other states have specifically held that inmates lack standing to enforce public contracts. *See McKinnie v Corr. Corp. of Am* , 2001 WL 721086 at 5 (Tenn.Ct.App. 2001); *Clifton v Suburban Cable TV Co , Inc.*, 642 A.2d 512, 514-15 (Penn.Super. 1994); *Gay v. Ga. Dep't of Corr.*, 606 S.E.2d 53, 57-59 (Ga.App 2004). The rationale underlying these decisions is that public contracts are intended to benefit *everyone*, and a private third-party right of enforcement is not properly inferred because of the potential burden that expanded liability would impose. *See id.* The right of enforcement in public contracts can only arise from the plain and clear language of the agreement. *See id.* As a general rule, a private party who contracts with a public governmental entity does not open itself to liability at the hands of the public. RESTATEMENT, SECOND, CONTRACTS § 312. Thus, it is presumed that private citizens are not third-party

beneficiaries of state contracts unless the contract expressly states to the contrary. *See Drummond*, 651 A.2d at 578-79 (holding that individual citizens are merely incidental beneficiaries of public contracts).

Applying general principles of contract law, the Court should affirm the circuit court's holding that Sisney lacks standing to bring an action based on the alleged breach of the State's food-service contract Sisney does not allege there is language in the contract specifically identifying him as an intended beneficiary of the agreement or granting inmates a right of enforcement More importantly, Sisney does not allege facts that, even if accepted as true, would support such an *inference* considering a public contract is involved. As a matter of law, Sisney lacks standing to bring a private action for breach of the State's food-service contract. For this reason, the circuit court properly dismissed Sisney's complaint.

Moreover, granting Sisney standing to bring suit would have a profoundly negative impact on all public contracts. Sisney asks the Court to declare, as a matter of law, that a party receiving services under a State contract obtains third-party beneficiary status merely by accepting those services. If the Court adopts Sisney's argument, there would be tens of thousands of third-party beneficiaries to the State's food-service contract, and each would have an individual right of enforcement. Common sense dictates that the State and CBM had no intention of opening themselves up to virtually boundless liability when they entered into their

agreement. In addition, under general contract principles, parties to a contract under certain circumstances cannot alter, modify, or rescind their duties and obligations when third party beneficiaries are receiving benefits under an agreement without the third party's approval. *See Bridgman v. Curry*, 398 N.W.2d 167, 172 (Iowa 1986) (citing RESTATEMENT, SECOND, CONTRACTS § 311). A finding that Sisney is a third-party beneficiary to the food-service contract would imply, if not require, that the State and CBM could not agree to change the terms and conditions of their contract without Sisney's permission as well as the permission and approval of every other inmate and person being provided meals at public expense. The State could not have intended to give prisoners the power to veto contract modifications or changes. Public policy and common sense preclude a finding that Sisney has standing to bring an action to enforce the State's food-service contract.

Finally, Sisney may argue that his claim against Weber should be allowed to proceed because he is alleging that Weber interfered with the contract in question, rather than breached the contract itself. This distinction, even if accepted by the Court, makes no difference to the outcome of this case. In addition to Weber being protected by statutory immunity, Sisney does not allege that he has satisfied the statutory notice requirements governing tort claims against public entities and their employees with respect to his claim against Weber. An

individual asserting a state law tort claim against the State of South Dakota or one of its employees must, as a prerequisite to filing suit, satisfy the notice requirements under Chapter 3-21 *See Finck*, 443 N.W.2d at 635. Chapter 3-21 requires notice of injury for all causes of action sounding in tort arising under South Dakota law *See Wolff*, 544 N.W.2d at 534; *Chilson v Kimball Sch. Dist No 7-2* , 2003 SD 53, ¶ 16, 663 N.W.2d 667, 671. Failure to satisfy the statutory notice requirement requires the dismissal of the lawsuit. *See Olson v. Equitable Life Assur Co.*, 2004 SD 71, ¶ 32, 681 N W.2d 471, 478. Therefore, even if Sisney tries to disguise his breach of contract claim against Weber as one sounding in tort, dismissal is required based on his failure to comply with the statutory notice requirement.

3. Sisney's federal claims were properly dismissed because his allegations, even if accepted as true, fail to state a claim upon which relief can be granted.

Sisney alleges that the Defendants' actions violated 42 U.S.C. §§ 1981 and 1985 His allegations, however, come nowhere close to stating a claim under either of these statutes, thus dismissal was appropriate. The circuit court properly dismissed Sisney's claim under § 1981 for three reasons: (1) the statute only addresses racial discrimination, which Sisney did not allege; (2) Sisney did not establish a protected contractual relationship or interest, and (3) Sisney did not allege and cannot prove that he was denied the right to enter or enforce a contract

because of his race. His claim under § 1985 failed because he did not allege facts establishing an underlying constitutional violation, nor did he satisfy the elements required to proceed on a civil rights conspiracy claim.

The purpose of 42 U.S.C. § 1981 is to prohibit discrimination in the making or enforcement of contracts on the basis of *race.*[4] *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-296 (1976); *Ga v Rachel*, 384 U.S 780, 791 (1966) (holding section 1981 is intended to protect only a limited category of rights, specifically defined in terms of *racial* equality) (emphasis added); *Green v. Dillard's, Inc.*, 483 F.3d 533, 538 (8th Cir. 2007). In this case, Sisney did not allege racial discrimination in his complaint. Although he has accused the Defendants in other lawsuits of discriminating against him based on his alleged Jewish religion, even these claims are not actionable under § 1981. In *Saint Francis Coll v Al-Khazraji*, 481 U.S. 604 (1987), the United States Supreme Court explained that allegations of discrimination based solely on religion or national origin are not actionable under § 1981. *Id.* at 605. As a matter of law, § 1981 prohibits only *racial* discrimination. *Id* Allegations of discrimination based

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[4] 42 U.S.C. § 1981(a) provides in full: "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."

exclusively on gender, *religion*, or national origin are *not* actionable under the statute. *See Lacedra v. Donald W. Wyatt Det Facility*, 334 F.Supp.2d 114, 135 (D R.I. 2004) (dismissing *pro se* inmate's § 1981 claim because he did not allege racial discrimination and, instead, alleged discrimination based only on his Catholic religion) Because Sisney fails to allege racial discrimination, his 42 U.S.C. § 1981 claim fails as a matter of law.

Additionally, under section 1981, "plaintiffs must show they had a protected contractual relationship or interest." *Green*, 483 F.3d at 538. In this case, Sisney does not have standing under the contract he alleges he was prevented from enforcing Without standing, Sisney does not possess the requisite contractual relationship or interest necessary to assert a 42 U.S.C. § 1981 claim.

Finally, section 1981 prohibits interference with a person's right to "make and enforce contracts . . ." *on account of his or her race*. *See* 42 U.S.C. § 1981. Even if the Court determines that Sisney's Jewish religion is a racial quality under section 1981, Sisney was not denied the right to either make or enforce a contract because he was Jewish. Rather, Sisney was denied the right to enforce the contract between the State and CBM because he lacked standing and the necessary privity of contract. In fact, if any other inmate, including non-Jewish inmates, attempted to enforce the contract in issue, they too would be denied the right of enforcement on the basis of lack of privity or standing More important than the

fact that Sisney was not denied enforcement on account of his "race," is that Sisney never alleged that race was the basis for the Defendants' decision to deny him the right of enforcement For instance, Sisney never alleged that other non-Jewish inmates had enforced the contract between the State and CBM. For all these reasons, Sisney failed, as a matter of law, to allege facts sufficient to proceed with a claim under 42 U.S.C. § 1981, and the circuit court's decision dismissing his claim should be summarily affirmed

Section 1985 creates a private right 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) (1994) In order to proceed with a claim under § 1985(3), Sisney must have alleged: (1) a conspiracy between the Defendants; (2) that the purpose of the conspiracy was to deprive a person or class of persons of equal protection of the laws or privileges and immunities; (3) that the Defendants acted in furtherance of the conspiracy; (4) and that the Defendants' actions caused Sisney injury or harm. *See Andrews v Fowler*, 98 F.3d 1069, 1079 (8th Cir. 1996). Above all else, however, Sisney must have alleged and ultimately proven that the alleged conspiracy was fueled by "'class-based invidiously discriminatory animus.'" *Id.* (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993)).

Sisney's allegations of conspiracy were far too vague to allow his claim to proceed, thus the claim was properly dismissed. Notwithstanding the liberal construction afforded to *pro se* pleadings, "[s]uch pleadings must nonetheless not be conclusory and must set forth the claim in a manner which, taking the pleaded facts as true, states a claim as a matter of law." *Nickens v. White*, 536 F 2d 802, 803 (8th Cir 1976) (citation omitted). Sisney alleged in his complaint that the Defendants "conspired 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." (Compl., ¶ 20.) Sisney's conclusory allegations do not support a claim under § 1985, and the circuit court properly concluded that Sisney failed to allege facts supporting the elements necessary to state a claim for relief.

First, Sisney did not sufficiently allege the presence of a conspiracy. Sisney alleged in his complaint that the Defendants "conspired" but he failed to allege facts stating what this agreement consisted of, when it was reached, or who was involved. Sisney's mere allegations that a conspiracy existed is insufficient for his claim to proceed. *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988) (ruling that mere allegations of conspiracy without factual specificity are insufficient to state a claim upon which relief can be granted).

Second, Sisney did not allege that the purpose of the conspiracy fell within the ambit of § 1985 Section 1985 provides a recourse for conspiracies to violate federal law. Sisney, however, contended that the purpose of the Defendants' agreement was to breach a contract, which he claimed violated *state* law (*See* Compl., ¶ 20.) The only federal violation Sisney alleged is that the Defendants' actions violated § 1981. (*See gen.* Compl.) As explained previously, however, Sisney failed to state a claim under § 1981. Because Sisney did not state a claim under § 1981, his claim under § 1985 necessarily failed. *See Dossett v First State Bank*, 399 F.3d 940, 951 (8th Cir. 2005) (explaining that an inmate alleging conspiracy must independently allege and prove a violation of his constitutional rights in order to proceed on his claim).

Although Sisney alleged that the Defendants' conspiracy was fueled by his religion, nowhere in his complaint did he clearly state what his religion was. According to Sisney's complaint, the diet he received was provided to several different religious groups at the SDSP. Sisney did not allege facts indicating that inmates belonging to other religious groups, or those receiving regular meals, were treated differently. Thus, Sisney failed to allege facts suggesting class-based discriminatory animus.

Third, Sisney did not allege facts that, even accepted as true, would establish that the Defendants acted in furtherance of the conspiracy. Nowhere in

his complaint did Sisney allege actions by specific CBM or State representatives in furtherance of the alleged conspiracy. Nor did he allege facts explaining what Weber's role was in the alleged conspiracy. Because the complaint is devoid of factual allegations that would establish the named Defendants acted in furtherance of the conspiracy, dismissal was appropriate.

Finally, Sisney did not establish injury or harm. Sisney complained about the number of calories he was receiving, but he did not allege that his health had been adversely affected. The substance of Sisney's conspiracy claim was that he was being denied adequate nutrition. While inmates have a constitutional right to receive a nutritionally adequate diet, *Wishon v Gammon*, 978 F 2d 446, 449 (8th Cir 1992), Sisney did not allege facts stating a claim of constitutional magnitude. A claim of inadequate diet arises under the Eighth Amendment. *Id* For Sisney to successfully challenge his diet under the Eighth Amendment, however, his subjective opinion that the meals lack enough calories is not enough for his claim to proceed. *See id* Instead, Sisney carried the burden of coming forward with verifying medical or scientific evidence that: (1) the meals he was served were nutritionally inadequate and (2) that he was injured as a result. *See id.*, *see also Berry v Brady*, 192 F.3d 504, 508 (5th Cir. 1999); *Lopez v. Robinson*, 914 F.2d 486, 490 (4th Cir. 1990); *Gibson v Weber*, 433 F.3d 642, 646 (8th Cir. 2006). No such allegations appeared in the complaint, nor do they appear in his appeal brief.

Sisney's failure to allege facts suggesting injury or harm confirms that his claims were improperly presented under § 1985, and that the circuit court properly dismissed Sisney's claim on the merits

4. The circuit court did not abuse its discretion when it did not grant Sisney an opportunity to amend his complaint to overcome its deficiencies.

On appeal, Sisney argues that he should "be allowed to amend his complaint to overcome any deficiency thereof." (App Br. p. 25) Sisney claims that the circuit court abused its discretion when it did not grant him an opportunity to amend his complaint to overcome the above-stated deficiencies relating to statutory immunity and lack of standing However, a circuit court's decision regarding amendment of the pleadings will not be disturbed on appeal unless there is a clear abuse of discretion which results in prejudice." *See In re T.A.*, 2003 SD 56, ¶ 38, 663 N.W.2d at 237 (citing *Tesch*, 399 N.W.2d at 882). As Sisney notes, the circuit court is not required to give leave to amend a complaint when 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). No additional facts or allegations asserted by Sisney would cure the deficiencies of statutory immunity and lack of standing. Moreover, Sisney only generally raised the issue of amendment in his brief resisting dismissal. He did not, however, file a motion asking to amend his complaint, nor did he explain

what specific factual allegations he would have added if permitted to amend the pleadings. On appeal, Sisney claims he should have been allowed to amend his complaint, but he still does not specify how he would overcome the defects requiring dismissal, specifically statutory immunity and, alternatively, lack of standing. For these reasons, the circuit court did not abuse its discretion when it did not allow Sisney to amend his pleadings.

Conclusion

Sisney's state law breach of contract claim is barred by statutory immunity pursuant to SDCL §§ 3-21-8 and 3-21-9. Sisney also lacks standing to assert his breach of contract claim to enforce the governmental contract between the State and CBM Thus, the circuit court properly dismissed Sisney's state law claim. Sisney improperly and inadequately attempted to sue the State, CBM, and Weber under federal law. He failed to assert facts establishing a claim under either 42 U.S.C. § 1981 or 42 U.S.C. § 1985. Regarding 42 U.S.C § 1981, Sisney did not allege facts suggesting racial discrimination, he did not establish a protected contractual relationship or interest, and he did not allege that he was denied a right to enter or enforce a contract *because of his race* For his 42 U.S.C. § 1985 claim, Sisney did not allege facts establishing an underlying constitutional violation, nor did he satisfy the elements required to proceed on a civil rights conspiracy claim. Because Sisney did not properly raise his motion to amend, and because no

amount of amendment would cure the defects in Sisney's complaint, the circuit court did not abuse its discretion by not allowing Sisney to amend his complaint. The Defendants respectfully request that the circuit court's order dismissing Sisney's lawsuit be affirmed

Dated this 22nd day of January, 2008.

WOODS, FULLER, SHULTZ & SMITH P.C.

By: _____

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Waiver of Oral Argument

To the extent Sisney presents properly-reviewable legal issues, these issues can be disposed of by relying upon well-settled principles of law Accordingly, the Defendants respectfully submit that oral argument would not be helpful.

Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using WordPerfect 9, and contains 7059 words, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare the certificate.

Dated this 22nd day of January, 2008.

Michele Mar
One of the Attorneys for Appellees

Certificate of Service

I hereby certify that on the 22nd day of January, 2008, I sent to Charles E. Sisney, No. 32556, South Dakota State Penitentiary, Post Office Box 5911, Sioux Falls, SD 57117-5911, by United States mail, postage prepaid, two copies of the foregoing Appellees' Brief.

Michele Mar
One of the Attorneys for Defendants/Appellees

Appendix

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0		
		CIV. 07-2325
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.	:	**ORDER OF DISMISSAL**
0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0		

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:

CHARLES M. FECHNER
Clerk

By BETTY FOKKEN
Deputy

FILED
OCT 10 2007
Minnehaha County, S.D.
Clerk Circuit Court

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
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August 15, 2007

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Mr. Charles E. Sisney
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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*

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[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

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[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

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CHARLES E. SISNEY, Plaintiff, vs TIM REISCH, Secretary of Corrections for South Dakota, DOUGLAS L. WEBER, Chief Warden for the Department of Corrections of South Dakota; DENNIS BLOCK, Associate Warden for the South Dakota State Penitentiary; JENNIFER WAGNER a/k/a Jennifer Lane, Cultural Activities Coordinator for the South Dakota State Penitentiary; DOUG LOEN, Policy Analyst for the South Dakota State Penitentiary; JOHN/JANE DOE STAFF MEMBERS, AGENTS, EMPLOYEES AND/OR OFFICERS OF THE SOUTH DAKOTA STATE PENITENTIARY AND/OR SOUTH DAKOTA DEPARTMENT OF CORRECTIONS; all Defendants sued in both their individual and official capacities, Defendants.	CIV. 03-4260 REPORT AND RECOMMENDATIONS RE MOTIONS TO AMEND, FOR PRELIMINARY INJUNCTION, AND TO DISPENSE WITH SECURITY

Pending are three motions filed by plaintiff and a letter which the parties construe as a motion.

Motion to Amend/Correct (Doc. 53);

Motion for Preliminary Injunction (Doc. 40);

Motion to Dispense with the Requirement of Security (Doc. 38); and

Letter dated September 24, 2004.

SUMMARY

Portions of the motion to amend (Doc 53), together with a previous motion to amend (Doc. 26), have been GRANTED in a separate ORDER. A motion to amend to allege a new cause of action for breach of contract against proposed additional defendants (designated in this Report and Recommendation as the CBM defendants) is RECOMMENDED for DENIAL. (This is a Report and Recommendation rather than an order from the magistrate judge because there are proposed new causes of actions against proposed new defendants, which render a denial a dispositive order.) Plaintiff's motion to amend against defendant Wagner to allege additional facts (as distinguished from causes of action) has been DENIED in a separate ORDER. (The denial is not dispositive of the case, or any part of it, against Wagner.) Plaintiff's motions for preliminary injunction and to dispense with security are RECOMMENDED for DENIAL.

BACKGROUND

Document 53 was filed on September 24, 2004. Plaintiff seeks to add four additional defendants. One is the food service company which prepares the food at the South Dakota State Penitentiary. The other three are employees of the company, i e., the president, and two kitchen supervisors Plaintiff also seeks to allege two new causes of action against defendant Wagner, i.e , one for deliberate indifference toward plaintiff's kosher observance in violation of the First, Eighth, and Fourteenth Amendments, and another for her retaliation against plaintiff for filing suit against her. Plaintiff also seeks to allege causes action against the new defendants for deliberate indifference toward plaintiff's religious freedom in violation of the First and Fourteenth Amendments to the U S. Constitution and for their breach of contract for failing to provide plaintiff with kosher food.

Document 40 was filed July 8, 2004. Plaintiff seeks a preliminary injunction from the court freezing "all federal funding provided to the defendants in their official capacities" until they comply with the Religious Land Use and Institutionalized Persons Act (RLUIPA, 42 U. S. C 2000cc-1) " by removing the substantial burdens placed upon the plaintiff's religious freedoms "

Document 38 is associated with his motion for a preliminary injunction It is the Motion to Dispense with the Requirement of Security and was filed on July 8, 2004. Plaintiff asserts security should not be required because he has been granted in forma pauperis status, among other reasons.

Finally, plaintiff filed a **letter dated September 20, 2004**, which the parties construe as another motion for preliminary injunction. (Doc. 52) His Request for Administrative Remedy, attached to his reply brief, reveals the apparent subjects of this motion for preliminary injunction (Doc. 56): (1) for all food service employees to go through sensitivity training regarding his religious beliefs and dietary needs; (2) for all food service employees to undergo training to receive kosher certification to properly do their jobs; (3) to suspend Jennifer Wagner from her job until this lawsuit is resolved; (4) to implement the federal Bureau of Prisons kosher menu; (5) for a donation of money to the Jewish group; and (6) for copies of all information regarding this matter to be given to him for future reference

Defendant resists all the motions

ANALYSIS

A Motions to Amend Plaintiff in his motion, filed September 24, 2004, (Doc. 53) asserts his proposed factual allegations have arisen after the initial complaint was filed. As new defendants he moves to add CBM Correctional Food Service; Marlin Sejnoha Jr., president of CBM; Mrs. Wriggs, kitchen supervisor for CBM, and Angie Albertson, kitchen supervisor for CBM. He

proposes to sue the CBM defendants for deliberate indifference of his religious freedoms (Doc. 53, ¶ 26) and for breach of contract for failing to provide plaintiff with kosher food (Doc 53, ¶ 27)

As new causes of action he moves to add deliberate indifference against defendant Wagner to his kosher observance claim (Doc. 53, ¶ 24) and to add retaliation against defendant Wagner for suing her (Doc. 53, ¶ 25).

For relief plaintiff requests (1) declare that plaintiff's constitutional rights have been violated, (2) a preliminary injunction ordering defendants to cease retaliation against plaintiff, to suspend defendant Wagner until this lawsuit has been resolved; to implement the federal Bureau of Prisons certified kosher menu, to provide all foods according to strict kosher dietary guidelines, and to pay costs and attorney fees; (3) nominal and compensatory damages, (4) punitive damages; and (5) advise state and federal prosecutors of charges that may be warranted by defendants' actions (Doc. 53, Prayer for Relief).

Defendants resist the motion to amend because plaintiff has not exhausted his administrative remedies, because the amended complaint fails to state claims against CBM and its employees and against Wagner upon which relief can be granted, and because plaintiff did not support the motion to amend with a brief as is required by local rule. (Doc. 55)

Plaintiff alleges he has exhausted administrative remedies. (Doc. 53, ¶ 2) Defendants assert plaintiff has not exhausted his administrative remedies. Exhaustion, therefore, cannot be determined on the this record alone.

The conclusory causes of action alleged against the CBM defendants in the proposed amended complaint fail to state claims upon which relief can be granted. There is no allegation that plaintiff has a contract with CBM, or any of its defendant employees. Plaintiff alleges the contract

is between the state and CBM, and that he is a third party beneficiary to the contract. In the sense that plaintiff eats the food which CBM provides to inmates pursuant to the contract between CBM and the state, he benefits from the contract between the state and CBM There is no allegation, however, that the contract contains provisions which make inmates parties to the contract, or which assign to inmates the right to enforce the contract. Ponchik v King , 957 F 2d 608 (8th Cir. 1992) Absent a contract with plaintiff, plaintiff cannot recover from the CBM defendants for breach of contract Additionally, even if there were such provisions in the contract between CBM and the state, there is no allegation the individual defendants are parties to any contract. They are merely employees of the company which is the contracting party with the state Plaintiff's motion to amend to allege breach of contract, therefore, should be DENIED.

Regarding plaintiff's proposed claim against the CBM defendants for deliberate indifference of his constitutional right to practice his religion, the proposed allegations describe incidents on September 16 and 17 when he "noticed some of the food was not kosher " (Doc. 53, ¶'s 18 and 20) Plaintiff does not allege he has been denied food sufficient to maintain his good health which satisfies the dietary laws of his religion. Kind v Frank, 329 f.3d 979 (8th Cir. 2003). "It is well settled that jail and prison inmates 'have the right to be provided with food sufficient to sustain them in good health [and] that satisfies the dietary laws of their religion.'" Kind at 981. His September 24, 2004, motion to amend (Doc. 53) to add the CBM defendants should be DENIED as futile. His proposed allegations fail to state a claim upon which relief could be granted because he has failed to allege that he has been denied food sufficient to sustain him in good health and which satisfies the dietary laws of his religion.

In ¶ 13 of the proposed amended complaint (Doc. 53) it is alleged "Past food has consisted of moldy/slimey (sic) vegetables, hard and/or crushed bread, and rotten/wormy fruit." He has failed to allege the food he was served was nutritionally inadequate or prepared in a manner presenting an immediate danger to his health, or that his health suffered as a result of the food Wishon v Gammon, 978 F.2d 446 (8th Cir. 1992). Absent those allegations, granting his Doc. 53 motion to amend would be futile because he has failed to state a claim upon which relief can be granted His motion to amend as stated in ¶ 13 should be DENIED.

B. Motions for Preliminary Injunction and to Dispense with Security

Plaintiff has not alleged facts, nor supported the allegations in his motion for preliminary injunction, which satisfy any of the four Dataphase factors. Dataphase Systems, Inc v. D L Systems, Inc., 640 F.2d 109, 113, 114 (8th Cir. 1981). He has not identified expected irreparable harm. He has not shown the threat of harm outweighs any injury or damage the party or parties to be enjoined might suffer. His chance of securing a permanent injunction (succeeding on the merits) is so much less than remote it would be overstatement to call his chance of success remote. It is beyond comprehension in this case that it is in the best interests of the public to "freeze all public funding provided to the defendants in their official capacities." Not to mention that his complaint does not seek a permanent injunction in the same or similar form as the relief sought in his motion for preliminary injunction. Additionally, he has failed to allege what federal funding is received by which defendants. So, his pleadings do not reveal what federal funding payable to whom he wants to be frozen His motion for preliminary injunction is RECOMMENDED for DENIAL

Given the recommendation for denial of the motion for preliminary injunction, his motion to dispense with security should also be DENIED

RECOMMENDATION

For the reasons more fully explained above, it is respectfully recommended to the District Court that

1. Plaintiff's Motion to Amend/Correct (Doc. 53) be DENIED, except for the claim of retaliation against Defendant Wagner (see Order filed November 23, 2004).
2. Plaintiff's Motion for Preliminary Injunction (Doc. 40) be DENIED.
3. Plaintiff's Motion to Dispense with Security Requirement (Doc. 38) be DENIED.
4. Plaintiff's request for preliminary injunction contained in his letter of September 24, 2004 be DENIED.

NOTICE TO PARTIES

The parties have ten (10) days after service of this Report and Recommendation to file written objections pursuant to 28 U S C. § 636(b)(1), unless an extension of time for good cause is obtained Failure to file timely objections will result in the waiver of the right to appeal questions of fact Objections must be timely and specific in order to require de novo review by the District Court.

Thompson v. Nix, 897 F.2d 356 (8th Cir 1990)
Nash v Black, 781 F.2d 665 (8th Cir. 1986).

Dated this 23rd day of November, 2004.

BY THE COURT:

John Simko
John E Simko
United States Magistrate Judge

ATTEST:
JOSEPH HAAS, CLERK

By: Wendy Marquardt, Deputy

(SEAL)

FILED
FEB 2 2 2005

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CHARLES E. SISNEY, Plaintiff. vs TIM REISCH, Secretary of Corrections for South Dakota, DOUGLAS L WEBER, Chief Warden for the Department of Corrections of South Dakota; DENNIS BLOCK, Associate Warden for the South Dakota State Penitentiary, JENNIFER WAGNER a/k/a Jennifer Lane, Cultural Activities Coordinator for the South Dakota State Penitentiary, DOUG LOEN, Policy Analyst for the South Dakota State Penitentiary; JOHN/JANE DOE STAFF MEMBERS, AGENTS, EMPLOYEES AND/OR OFFICERS OF THE SOUTH DAKOTA STATE PENITENTIARY AND/OR SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, all Defendants sued in both their individual and official capacities, Defendants.	*	CIV 03-4260 ORDER

The Magistrate Judge issued a Report and Recommendation on November 23, 2004, recommending that various motions filed by Plaintiff be denied. Plaintiff has filed objections to the Report and Recommendation.

After conducting an independent review of the record, the Court agrees with the Magistrate Judge. Accordingly, it is hereby

ORDERED that

1 Plaintiff's objections are OVERRULED and the Report and Recommendation is ADOPTED

2. Plaintiff's Motion to Amend/Correct (Doc. 53) is DENIED, except for the claim of retaliation against Defendant Wagner as explained in the November 23, 2004 Order

3. Plaintiff's Motion for Preliminary Injunction (Doc. 40) is DENIED The court finds as to the probability of success on the merits as one of the four Dataphase tests, that the Plaintiff's likelihood of success on the merits is low

4. Plaintiff's Motion to Dispense with Security Requirements (Doc 38) is DENIED.

5 Plaintiff's request for preliminary injunction contained in his letter dated September 24, 2004 is DENIED

Dated this 22nd day of February, 2005

BY THE COURT

Lawrence L. Piersol
Chief Judge

ATTEST.
JOSEPH HAAS, CLERK

By _____, Deputy
(SEAL)