COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1136

GEORGE MACKIE

vs.

COMMISIONER OF DEPARTMENT OF CORRECTION & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, George Mackie, a prisoner, alleged numerous violations of State and Federal law and regulations arising from his being removed from a special dietary list for two days, and subsequently being denied a "regular" meal in lieu of his special diabetic dietary meal. Judgment on the pleadings was granted in favor of the defendants. We affirm.

Background. The plaintiff complains that between March 27 and March 29, 2017, he was removed from the diet sign-in sheet and was therefore unable to receive therapeutic meals for his diabetes during that time. Then, between April 26, 2017, and July 7, 2017, the plaintiff complained that he requested a

[1] Steven Tellier, Jason Patterson, James O'Gara, Jr., Colette Goguen, Stephanie Collins, Karen L. DiNardo, Paul Visconti, and Shane Bergevin, in their official and individual capacities.

regular meal in lieu of his therapeutic meal six times, and these requests were denied each time. Due to purported anxiety over being denied these regular meals, the plaintiff refused to go to the dining hall for his meals an additional six times. As a result of these incidents, the plaintiff submitted and resubmitted at least twelve grievances. Based on the repeated submission of these grievances and in accordance with prison policy, the plaintiff's ability to file nonurgent grievances was subsequently revoked. The plaintiff alleges the defendants deprived him of his State and Federal constitutional rights. His appeal from the entry of judgment dismissing his complaint followed.

Discussion. The plaintiff contends the judge erred in entering judgment on the pleadings because his claims were not grounded in the administrative decision regarding his grievances, but rather in the deprivation of his Federal, State, and constitutional rights. The plaintiff requested numerous forms of relief, including: (1) correcting errors in the administrative actions, (2) declaratory judgment that the defendants' actions violated the State and Federal constitution, the ADA, State statutes, State regulations, and prison policy, (3) declaratory judgment that 103 NCCI 761 was invalid, (4) monetary damages including nominal, punitive, and special damages, (5) an injunction preventing the defendants from

interfering with the plaintiff's ability to manage his health and diabetes, and (6) court costs and attorney's fees. These requests for relief are without merit.

We agree with the judge that the plaintiff's complaint to "correct errors in the administrative actions" can reasonably be construed as a request for review of the administrative decisions. Claims seeking review of administrative agency proceedings based upon the administrative record "whether joined with a claim for declaratory relief . . . , or any other claim, shall be heard in accordance with" the procedures outlined in Superior Court Standing Order 1-96. Superior Court Standing Order 1-96(1). Thus, complying with the appropriate standing order, the judge properly treated the plaintiff's complaint as a request to review the administrative decision.

The plaintiff complained that his name had been removed from the special dietary list and further that he was deprived of the right to manage his own meal selection. However, the plaintiff's name was restored to the list within two days and, further, the defendants amended the 103 NCCI 761 meal plan policy so as to permit prisoners on special diets the option of being served a regular meal upon request. As a result, any claims challenging the constitutionality or legality of the

defendants' former meal plan policy are moot.[2] See Roby v. Superintendent, Mass. Correctional Inst., Concord, 94 Mass. App. Ct. 410, 413 (2018) (deeming controversy moot where challenged regulation had been amended). Likewise, where the policy no longer prevents the plaintiff from opting for a regular meal, his request to enjoin the defendants from interfering with his ability to manage his diabetes is also moot. See Hubrite Informal Frocks, Inc. v. Kramer, 297 Mass. 530, 533-534 (1937) (request for injunctive relief moot where ultimate purpose of seeking injunction had been accomplished).

It appears the plaintiff seeks damages pursuant to his § 1983 claim alleging violations of the Eighth Amendment.[3] It is unclear whether the plaintiff views his removal from the diet list or his inability to choose a regular nontherapeutic meal -- or both -- as interfering with his ability to manage his medical condition. In any event, in order to prevail on such claims the plaintiff must establish a "deliberate indifference to serious medical needs." Johnson v. Summers, 411 Mass. 82, 86 (1991), quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976). On this

[2] Because the issue of validity is moot, the plaintiff's separate argument that the lower court erred in failing to review 103 NCCI 761 also lacks merit.

[3] Any claim for damages based upon regulatory violations also fails, as there is no indication that these regulations create a private cause of action. See Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 546 (1998) ("a private cause of action cannot be inferred solely from an agency regulation").

record, he fails to meet that high burden. That the defendants only provided the plaintiff with foods that were medically approved for his condition and refused, per policy protocol, to supply him foods that had not been approved (and were possibly detrimental to his condition) does not establish a deliberate indifference to his serious medical needs. Just the opposite. Likewise, there is nothing in the record to suggest that the inexplicable removal of the plaintiff from the special diet list for two days was anything more than unintentional.[4] The plaintiff was restored to the list and the error remedied within two days. We will not say that an unexplained meal plan mistake of two days constitutes the defendants' deliberate indifference to his serious medical needs. Cf. White v. Gurnon, 67 Mass. App. Ct. 622, 629 n.15 (2006), quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) ("A premise behind the 'deliberate indifference' concept is that a given board or official made a purposeful decision 'not to remedy the violation'").

[4] The plaintiff alleges that the food service director removed the plaintiff's name from the list. However, there is no suggestion as to why the food service director would have removed the plaintiff from the special dietary list, especially where it appears that only medical staff have the authority to remove an inmate from the special dietary list. And, the health service unit denied removing the plaintiff from the list.

To the extent the plaintiff argues that his request for damages is based on retaliation for the exercise of his constitutional rights, this argument also fails. The defendant submitted repeated grievances about his meals. Pursuant to a written disciplinary policy designed to limit repetitious grievances, the defendants revoked the plaintiff's right to file only nonemergency grievances. Actions taken in accord with prison policy are authorized and are not retaliatory. Cf. Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 337 (1st Cir. 2005) (affirming summary judgment in favor of defendant where "decision to discharge [the plaintiff] was within the bounds of its disciplinary policy and raises no inference of pretext"). Similarly, the defendants' refusal (prior to their policy change) to substitute the plaintiff's dietary meal for a regular meal was also pursuant to a written policy and not a retaliatory measure. See id.

We also find no error in the judge's refusal to enter a default judgment against the defendants. "The decision to enter or remove a default judgment is essentially a matter of the trial judge's discretion." Riley v. Davison Constr. Co., 381 Mass. 432, 441 (1980). Pursuant to Superior Court Standing Order 1-96(2), "[t]he administrative agency whose proceedings are to be judicially reviewed shall, by way of answer, file the original or certified copy of the record of the proceeding under

review (the record) within ninety (90) days after service upon it of the Complaint." Where Standing Order 1-96(2) grants the defendants ninety days to file the record, we cannot conclude that the judge abused his discretion by refusing to enter a default judgment after only twenty days had elapsed.

Likewise, we find no error in the judge's refusal to strike the defendants' answers. We review a judge's denial of a motion to strike for an abuse of discretion. Cf. Commonwealth v. Otsuki, 411 Mass. 218, 234 (1991) (reviewing motion to strike testimony for abuse of discretion). Standing Order 1-96(2) requires the filing of the administrative record by way of an answer. This is precisely what the defendants did. We therefore cannot conclude that the judge abused his discretion in refusing to strike the defendants' answer.[5]

Finally, although the plaintiff argues that the court erred in failing to rule on certain motions -- such as two motions for an extension of time, a motion for production of documents, and a motion for emergency preliminary injunction -- his arguments are unclear and focus largely on the defendants' conduct. The

[5] We similarly agree with the trial court that, because the plaintiff's claims can be properly reviewed by examining the administrative record, and because the hearing for which transcripts were sought involved no live testimony, the transcripts were not "reasonably necessary" for the plaintiff's appeal. Cf. Commonwealth v. Souza, 397 Mass. 236, 242 (1986) (no error in denying motion for transcript where there was no evidence that transcript would be necessary).

plaintiff has made little if any argument and presented no authority as to why the court's failure to rule on these additional motions was erroneous.[6] We therefore decline to consider such arguments on appeal. See Kellogg v. Board of Registration in Med., 461 Mass. 1001, 1003 (2011).

Judgment affirmed.

By the Court (Maldonado, Singh & Englander, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: July 31, 2020.

[6] The sole authority cited stands for the proposition that motions that have not been ruled on are deemed denied and therefore are appealable. See United States v. Lynd, 301 F.2d 818, 822 (5th Cir. 1962).

[7] The panelists are listed in order of seniority.