IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

ALLEN McRAE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 3:03CV164
	)	
GENE M. JOHNSON,	)	
	)	
Defendant.	)	
	)	

RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiffs, by counsel, respond to the defendant's Motion for Summary Judgment as follows:

I. THE FOURTH CIRCUIT HAS PREVIOUSLY HELD THAT GOOMING POLICIES SUCH AS THE ONE AT ISSUE HERE ARE NOT THE LEAST RESTRICTIVE MEANS OF FUTHERING A COMPELLING STATE INTEREST.

The defendant's discussion of Fourth Circuit case law (Def.'s Mem. at 3-6) aptly demonstrates why the plaintiffs should win this case. Specifically, while the Fourth Circuit has upheld prison grooming policies under a rational basis test, it has struck them down under a least restrictive means test. The least restrictive means test is, of course, the appropriate standard under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. § 2000cc-1, *et seq.* (RLUIPA).

In *Gallahan v. Hollyfield*, 670 F.2d 1345 (4th Cir. 1982), the Fourth Circuit invalidated a prison grooming policy similar to the one at issue here. As in this case, the defendant argued that the policy was needed to prevent inmates from changing their appearance, to eliminate a potential hiding place for contraband, and for hygiene reasons.

670 F.2d at 1346. The court found these explanations "either overly broad or lacking in substance," and observed that "[e]ven if the justifications were legitimate, they are not warranted in this case because less restrictive alternatives are available." *Id.* Specifically, the court noted that prison officials could search inmates' hair for contraband and require them to keep their hair neat and clean. *Id.* at 1347. Because less restrictive means were available, the regulation violated the First Amendment.

Several years after the *Gallahan* case, the Supreme Court decided the cases of *Turner v. Safley*, 482 U.S. 78 (1987) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), which held that infringements on inmates' constitutional rights need only be "reasonably related to legitimate penological interests." When the Fourth Circuit decided *Hines v. South Carolina Dept. of Corrections*, 148 F.3d 353 (4th Cir. 1998), it used the "reasonable relationship" standard, which is far more deferential to prison officials. Holding that the grooming policy was indeed reasonably related to legitimate penological interests, the court held that the policy did not violate the First Amendment.

But under RLUIPA, the deferential *Turner/O'Lone* standard is out the window. Instead, the Court is to invalidate any substantial burden on plaintiffs' religious exercise unless it is the least restrictive means to serve a compelling state interest. As *Gallahan* demonstrates, the grooming policy fails this stricter test.

Indeed, prior to the Supreme Court's decisions in *Turner* and *O'Lone*, many other courts, like the Fourth Circuit, invalidated similar grooming policies under some variant of the least restrictive means analysis. *See, e.g., Maguire v. Wilkinson*, 405 F. Supp. 637 (1975) (striking down regulation that prohibited inmates from growing beards if they had not had beards at the time of entering the institution) *Moskowitz v. Wilkinson*, 432 F.

Supp. 947 (D. Conn. 1977) (striking down regulation prohibiting beards because less restrictive means existed); *Dreibelbis v Marks* 675 F2d 579 (3rd Cir.1982) (reversing dismissal of challenge to grooming policy); *Shabazz v Barnauskas*, 598 F2d 345 (5th Cir. 1979) (same); *Teterud v. Burns*, 522 F.2d 357, 362 (8th Cir. 1975) (striking grooming policy because "[t]he proof at trial established that the legitimate institutional needs of the penitentiary can be served by viable, less restrictive means which will not unduly burden the administrator's task"); *Wright v. Raines*, 457 F. Supp. 1082 (D.C. Kan. 978) (striking down no-beard policy as applied to Sikh inmate because less restrictive means were available to meet prison's legitimate security interests).

In sum, although the Fourth Circuit upheld the grooming policy under the First Amendment when it applied a reasonableness test, it struck down the policy when it applied a least restrictive means test. This history indicates that the grooming policy is unlawful under RLUIPA, since RLUIPA requires a least restrictive means analysis.

II. THE DEFENDANT HAS FAILED TO SHOW THAT THE UNDISPUTED FACTS ENTITLE HIM TO SUMMARY JUDGMENT

A. The Undisputed Facts Show that the Grooming Policy Substantially Burdens Plaintiffs' Free Exercise of Religion.

Defendant does not dispute that plaintiffs' sincerely held religious beliefs forbid them to comply with the grooming policy. Instead, defendant argues that the grooming policy does not "substantially burden" the exercise of those beliefs because the plaintiffs have the "option" of keeping their hair long and growing beards – they simply have to remain in segregation while they do so. This argument is specious, both legally and factually.

As a legal matter, it is well established that "A substantial burden on a sincerely held religious belief exists where the government imposes punishment or denies a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Gartrell v. Ashcroft*, 191 F.Supp.2d 23 (D.D.C. 2002). (internal quotation marks and (citation omitted)

The Supreme Court this understanding of a "burden" on religious exercise in *Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 U.S. 136 (1987). There, the Court considered whether someone could be denied state unemployment benefits when she was fired for refusing to work certain hours because her religious beliefs. Finding for the employee, the *Hobbi*e Court relied on *Sherbert* v. *Verner*, 374 U.S. 398 (1963), in which the state

> forced [plaintiff] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.

Hobbie, 480 U.S. at 140 (*quoting Sherbert*, 374 U.S. at 404) (internal quotation marks omitted). The Court further explained the meaning of "burden" with reference to *Thomas* v. *Review Bd. of Indiana Employment Security Div*., 450 U.S. 707 (1981):

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Hobbie, 480 U.S. at 141 (*quoting Thomas*, 450 U.S., at 717-718).

The definition of "substantial burden" in *Hobbie*, *Sherbert*, and *Thomas* is particularly important because it was precisely that standard that Congress sought to restore with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (RFRA),[1] and later with RLUIPA. *See* § 42 U.S.C. 2000bb(b) (Declaring as RFRA's purposes as: "(1) to restore the compelling interest test as set forth in [*Sherbert*] and *Wisconsin v. Yoder,* 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.").

The defendant's reliance on *Goodall v. Stafford County*, 60 F.3d 168 (4th Cir. 1995) is inapposite. *Goodall* acknowledged the definition of "substantial burden" set forth in *Hobbie* and *Thomas* as the denial of a benefit because of conduct mandated by religious belief. *See Goodall* 60 F.3d at 172 (*quoting* the same passage from *Hobbie* and *Thomas* set forth above.) *Goodall* simply holds that a mere financial burden does not suffice. In other words, if all the government does is make it more expensive for one to practice one's religion, it is not imposing a substantial burden.[2]

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[1] As defendant explains (Def.'s Mem. at 2-3), RFRA is the precursor statute to RLUIPA, which was enacted when RFRA was struck down as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Thus, legislative history and case law under RFRA is highly relevant in interpreting RLUIPA.

[2] Defendant's rely on the Seventh Circuit's "characterization" of the Fourth Circuit definition of substantial burden "as one that either compels the religious adherent to engage in conduct that his religion forbids . . . or forbids him to engage in conduct that his religion requires. . . ." *Mack v. O'Leary*, 804 F.3d 1175, 178 (7th Cir. 1996). Even if that could be considered an accurate characterization of the Fourth Circuit's test, it is more than fulfilled here. Defendant's in fact *are* "forbidden" from cutting their hair, as is made clear in the prison policy's purpose statement: "All offenders ***will*** maintain their hair and personal hygiene as required in this operating procedure. Offender grooming standards will be strictly ***enforced***. Failure of offenders to comply may result in ***disciplinary action*** and/or assignment to more restrictive housing." Plf.'s Ex. 8, DOP 864.1 (emphasis added). This is mandatory language. Presumably, then, when defendant says that inmates are not "forced" to shave their hair or beard, he is referring to physical force. But a "substantial burden" does not require physical force; it merely requires the removal of a benefit or the imposition of punishment. *See Hobbie, Sherbert, Thomas, supra.* In any case, the grooming policy actually *does* require physical force. *See* Plf.'s Ex. 8, DOP 864.4 (H) (1) (b) ("If an offender refuses to cooperate, the use of reasonable force or restraints is authorized to the extent to bring the inmate into compliance with grooming standards.")

Here, the state is not merely making it more expensive for the plaintiffs' to practice their religion, but is subjecting them to *punishment* for practicing their religion. Like the plaintiff in *Sherbert*, the plaintiffs here are put to an untenable choice: They can either follow their religious dictates and be punished by assignment to segregation, or they can abandon the precepts of their religion in order to remain out of segregation. Either way, the policy constitutes a substantial burden on their free exercise of religion as the Supreme Court has defined that term.

As a factual matter, it is clear that segregation and other penalties associated with the grooming policies are substantially burdensome. While defendant attempts to minimize the burden, the fact is that inmates in segregation are subjected to significant deprivations compared to inmates in general population. The imposition of segregation is not intended merely to separate noncompliant inmates, but to *punish* them, as the policy makes clear. Inmates who fail to comply are subjected to increasing levels of discipline. For the first offense, they are charged with failure to follow rules. *See* DOP 864.4 (J)(1), Plf.'s Ex. 8. If they continue not to comply, they are charged with disobeying a direct order, and are "given a mandatory *penalty* of five (5) days of isolation." *Id.*, DOP 864.4 (J)(2) (emphasis added). Additional instances of noncompliance results in 10 days isolation, then 15 days. *Id.* Thereafter, "[n]o offender will be released to a general population setting until he/she complies with the grooming standards." *Id.*, DOP 864.4(J)(3).

Segregation is not the only penalty for noncompliance. After three convictions for disobeying a direct order an inmate is "referr[ed] to the Institutional Classification Authority for assignment to segregation, possible reclassification to a higher security

level institution, and a reduction in GCA [Good Conduct Allowance] /ESC [Earned Sentence Credit]." *Id.*, DOP 864(J)(2)(d). Both GCA and ESC are programs that help inmates reduce their length of prison stay. The "levels" refer to the rate at which their sentences will be reduced. In other words, noncompliance with the grooming policy results not only in segregation, but in a higher security institution and an increased time in prison. Thus, the two plaintiffs who have refused to comply with the grooming policy are suffering a severe burden.

The other plaintiffs, who have complied with the grooming policy at the expense of their religious beliefs are also "substantially burdened." There can be nothing more burdensome and spiritually more painful than to choose between prison punishment and exercising one's religion. The choice for the plaintiffs is either to submit to the grooming policy in violation of their religious tenets, or disobey the policy and extend the period of their incarceration while in a restrictive and isolating housing unit. For these plaintiffs, the coercive power of the punishment threatened by the defendant has caused immeasurable burdens on their ability to practice their religion. As but one example, Plaintiff Lahens says: "It pains me greatly to be forced to violate the requirements of my religion, and I worry that I may be punished on the Day of Judgment for this continuous sin of rebellion." Pl.'s Ex. 3 ¶ 7. This is a hefty burden indeed.

B. <u>The Undisputed Facts Fail to Show That the Grooming Policy Is the Least Restrictive Means to Serve a Compelling Governmental Interest</u>.

As noted in Plaintiffs' Memorandum in Support of Summary Judgment, the defendant has the burden of proof to show that the application of the grooming policy to the plaintiffs is the least restrictive means to further a compelling governmental interest. This the defendant has failed to do.

1. *The Defendant Fails to Explain Why Other Jurisdictions Are Able to Meet Their Security Needs Without a Grooming Policy.*

As noted in Plaintiff's initial brief, a large number of correctional systems, including the Federal Bureau of Prisons, are able to manage contraband, hygiene, and escape risk without a grooming policy like that of VDOC. Instead of explaining why Virginia should require a policy that other correctional systems find unnecessary, the defendant simply states that other systems have decided to "accept" a certain "level of risk" by not enacting the grooming policy. As plaintiffs' expert, James Aiken, explains, this is not the case:

> No correctional system wants to accept significant risks that can be easily addressed by the issuance of a grooming policy. Rather, other correctional systems have not adopted a grooming policy like Virginia's because such a policy is, *at best*, tenuously connected to the health, safety, and security of the institutions.

Pl.'s Ex. 11 ¶ 4 (attached). Mr. Aiken points out that prisons have a wide range of systems in place to ensure safety and security, to which the grooming policy adds nothing but a burden on religious exercise. *Id.* Similarly, VDOC's abandonment of a previous grooming policy demonstrates that the policy is unnecessary. "[I]f the policy was actually necessary for security, health and safety reasons," it would not have been rescinded or ignored. "[P]olicies and procedures that are essential to prison security are not simply allowed to fall into disuse." *Id.* ¶ 5.

2. *The Defendant's Assertions Regarding Least Restrictive Means are Rebutted by Plaintiffs' Expert.*

The defendant quotes legislative history indicating that Congress expected courts to show deference to prison administrators' experience and expertise. Just as important, however, is Congress's recognition that "inadequately formulated prison regulations and

policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." 146 Cong. Rec. at S7775 (2000). James Aiken's expert testimony shows that the grooming policy is based on just such rationales. Mr. Aiken's testimony also undermines any argument that deference should be given to defendant's "experience and expertise." Mr. Aiken also has decades of experience and expertise in running prisons and in running correctional systems (*see* Pfl.'s Ex. 9 at 4-11), and his opinions are just as worthy of this Court's respect as those of the defendant. Thus, to the extent that the defendant relies on "deference" to get him over the hump of proving the necessity of the grooming policy, he must fail.

Mr. Aiken's testimony also distinguishes this case from *Jackson v. District of Columbia*, 89 F.Supp.2d 48 (D.D.C. 2000), upon which defendant heavily relies. There, the "[p]laintiffs did not present any evidence regarding the 'least restrictive means' issue, choosing instead to rely on cross examination of defendants' witnesses . . ." 89 F.Supp.2d at 68. Therefore, this court should decline defendant's invitation simply to "adopt the initial *Jackson* decision as conclusively demonstrating why the VDOC Grooming Policy does not violate the RLUIPA least restrictive means test." Def.'s Mem. at 10.[3] That court deferred to prison officials' expertise *in the absence of any rebuttal testimony*. *Id.* This Court is not in the same position; it has before it testimony that thoroughly demonstrates the inadequacy of the defendant's arguments.

The existence of expert rebuttal testimony also distinguishes this case from *Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005), on which defendant also relies.

[3] Additionally, as defendants acknowledge, the *Jackson* decision was vacated because the plaintiffs had not exhausted their administrative remedies, 254 F.3d 262 (D.C. Cir. 2001), and therefore has no precedential value. Moreover, when the case was refilled, the district court actually ordered the Bureau of Prisons to transfer its inmates to other correctional systems rather than subject them to Virginia's grooming policy. *Gartrell*, 191 F. Supp. at 40.

There, again, the court of appeals criticized the district court for failing to give due deference to prison officials *in the absence of rebuttal evidence* "that the officials exaggerated their response to security considerations." *Id.* at 372. The same is true of all of the RFRA cases the defendant cites. *See Diaz v. Collins*, 114 F.3d 69 (5th Cir. 1997); *Harris v. Chapman*, 97 F.3d 499 (8th Cir. 1996); *Hamilton v. Schiro*, 74 F.3d 1545 (8th Cir. 1996).

Based on his decades of experience, Mr. Aiken states that he "do[es] not believe that the VDOC grooming policy is necessary to achieve any compelling governmental interests." *Id.* ¶ 8. He goes on to explain that less restrictive means are available to accommodate inmates whose sincerely held religious beliefs require long hair or beard. Such inmates could be exempted and/or housed separately without compromising VDOC's legitimate security interests. *Id.* ¶ 9. VDOC could prevent the abuse of such an exemption by using objective criteria to evaluate whether the exempted individuals had a sincerely religious belief, a procedure that correctional systems use routinely in determining whether an inmate is eligible for religious meals, group worship, or religious literature. *Id.* ¶¶ 10, 14.

The use of hair and beards to hide contraband is actually not frequent among Rastafarian and Muslim inmates, who may consider such use of their hair to be blasphemous.. *Id.* ¶ 11. Moreover, "[a]ny real concern that religiously exempted inmates might use their hair to hide contraband could be addressed by requiring more frequent head searches of such inmates. Additionally, an inmate could lose his exemption after a single instance of misuse of hair in such a manner." *Id.* Mr. Aiken also notes that there

is no evidence that the plaintiffs, in particular, would abuse the religious accommodation of longer hair or a beard. *Id.* at 12.

Finally, Mr. Aiken observes that "most technical escapes in prison occur with prisoners who are allowed to be off grounds and do not return. The claim that the grooming policy reduces the opportunity of an escaped prisoner from cutting his hair and thus his appearance is as remote as escapes themselves. The solution here, of course, is to not permit prisoners with long hair to be allowed outside jobs." *Id.* ¶ 19.

Thus, the defendant's contentions regarding the necessity of the grooming policy are thoroughly refuted, and there are no undisputed facts indicating that the grooming policy is the least restrictive means to achieve a compelling governmental interest.

CONCLUSION

For the foregoing reasons, the plaintiffs respectfully request that defendant's Motion for Summary Judgment be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2006, I served a true and correct copy of the foregoing document by United States mail, postage pre-paid, addressed as follows:

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