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.	)	
	)	

MEMORANDUM IN SUPPORT OF
PLAINTIFFS'MOTION FOR SUMMARY JUDGMENT

In this action under the Religious Land Use and Institutionalized Persons Act (RLUIPA), plaintiffs challenge the Virginia Department of Corrections (VDOC) policy regarding inmate grooming. The policy, which prohibits inmates from growing hair longer than one inch or from growing beards, substantially burdens the plaintiffs' free exercise of religion, and is not the least restrictive means to achieve any compelling governmental interest. Because the undisputed facts demonstrate that the policy violates the plaintiffs' rights under RLUIPA, the plaintiffs respectfully request that the Court grant them summary judgment.

PROCEDURAL HISTORY

Plaintiffs filed this action on February 19, 2003. On April 17, 2003, the Court stayed the proceedings while the Fourth Circuit Court of Appeals considered *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003), which called into question the constitutionality of RLUIPA. The Fourth Circuit decided *Madison* on December 8, 2003, holding that RLUIPA does not violate the Establishment Clause, and declining to reach the

Commonwealth's other constitutional arguments. Following the *Madison* ruling, the defendant filed a Motion to Dismiss, urging that RLUIPA exceeded Congressional authority under the Commerce and Spending Clauses, and that it violated the Tenth and Eleventh Amendments and the Establishment Clause. On June 10, 2004, the Court took these claims under advisement, opting to rule on the statutory claims before reaching the issue of RLUIPA's constitutionality.[1]

In October 2004, the case was again stayed while the Supreme Court took up the question of RLUIPA's constitutionality. On May 31, 2005, the Supreme Court held that RLUIPA did not violate the Establishment Clause. *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005). The parties thereupon resumed discovery, and now file cross-motions for summary judgment.

STATEMENT OF UNDISPUTED FACTS

1. The plaintiffs are inmates currently incarcerated in Virginia prisons in the custody of the Virginia Department of Corrections (VDOC). *See* Exhibits 1-5.[2]

2. Plaintiff Allen McRae is a member of the Rastafarian religion, which he has practiced since 1996. Mr. McRae's sincere religious beliefs prohibit the removal of his hair and beard. The growing of his hair and beard is part of his vow to God that he will no longer follow the ways of the world, but will lie upright and follow the way of

[1] These same constitutional arguments were recently rejected by the Western District of Virginia. *See Madison v. Riter*, --- F.Supp.2d ----, 2006 WL 181362 (W.D. Va. 2006) (holding that RLUIPA is authorized under the Spending Clause and does not violate the Tenth or Eleventh Amendments).

[2] Exhibits 1-5 are copies of the Declarations of plaintiffs Allen McRae, Rashid Al-Amin, Patrick Lahens, Dennis Blyden, and David Evick, Jr., respectively. The originals of these declarations were filed on December 29, 2003 and January 7, 2004, in response to defendant's earlier summary judgment motion, which was subsequently withdrawn. The copies attached hereto do not include the attachments to the original declarations – the plaintiffs' grievances and VDOC's responses – because defendant has abandoned its former claim that plaintiffs failed to exhaust their administrative remedies. *See* Motion for Withdrawal of Defendant's Motion for Summary Judgment, Motion for Stay, or in the Alternative, FRCP 24(C) Notice, and Memorandum in Support, filed March 3, 2004.

righteousness and Godliness. This vow, known as the vow of the Nazarite, specifically forbids one to use a razor or any such cutting device upon one's head or beard. Ex. 1, ¶¶ 3, 5.

3. Plaintiff Rashid Al-Amin is a member of the Muslim faith. According to his sincerely held religious beliefs, the Prophet Muhammad commands Muslim men to "sharply trim the mustaches and leave the beards," and to "differ from the mushrikeen (polytheists); save the beards and trim the mustaches." Because Mr. Al-Amin's sincerely held religious beliefs require him to follow Muhammad's directives, refraining from shaving his beard is an important tenet of his faith. Ex. 2 ¶ 5.

4. Plaintiff Patrick Lahens is also a member of Islam. According to Mr. Lahens' sincerely held religious beliefs, he is required to follow the commands of the prophet Muhammad, including the command that he trim his moustache and let his beard grow. To cut the beard is an open act of defiance against Allah (God) and his Messenger, Muhammad. Ex. 3 ¶ 4.

5. Plaintiff Dennis Blyden is a member of the Rastafarian religion, which he has practiced for over twenty-five years. According to Mr. Blyden's sincerely held religious beliefs, he may not cut his dreadlocks or beard. This is a fundamental tenet of his religion. Ex. 4 ¶¶ 3-4.

6. Plaintiff David Evick, Jr., is a member of the Sunni Muslim religion. According to his sincerely held religious beliefs, he is required to follow the ways of the Prophet Muhammad, who commanded that Muslims trim their mustaches and let their beards grow. Ex. 5 ¶¶ 3, 5.

7. Defendant Gene M. Johnson is the Director of VDOC. Exhibit 6 p. 4.

8. VDOC receives funds from the federal government. Exhibit 7, No. 2.

9. In 1999, VDOC enacted a policy pertaining to inmate grooming standards known as DOP 864 (hereinafter, the "grooming policy"). Ex. 6 p. 6; Ex. 8.

10. With respect to male inmates, the grooming policy provides, among other things, that:

- "Hair will not be more than one inch (1") in thickness/depth."
- "Styles such as braids, plaits, dreadlocks, cornrows, ponytails, buns, mohawks . . . are not permitted"
- "No beards or goatees are allowed."

Ex. 8 p.2.

11. In contrast, female inmates are permitted to have shoulder length hair and may wear their hair in ponytails or braids. *Id.*

12. The grooming policy has an exemption for inmates who have a medical condition that is aggravated by shaving. *Id.*

13. However, there is no exemption for inmates whose sincerely held religious beliefs prohibit them from cutting their hair and/or shaving their beards. Ex. 7 No. 4.

14. Inmates who refuse to comply with the grooming policy are placed in segregation. Such inmates may also be reclassified to a higher security level and are subject to a reduction in their ability to earn good conduct allowances. Ex. 8 p. 4.

15. Compliance with the grooming policy violates the sincerely held religious beliefs of the plaintiffs and substantially burdens their free exercise of religion. Ex. 1 ¶¶ 3-9; Ex. 2 ¶¶ 3-7; Ex. 3 ¶¶ 4-7; Ex. 4 ¶¶ 3-6; Ex. 5 ¶¶ 3-6.

16. In accordance with their sincerely held religious beliefs, plaintiffs McRae and Blyden have refused to comply with the grooming policy. As a result, Mr. McRae has been held in segregation since the grooming policy went into effect in December 1999 – over six years. Mr. Blyden has been held in segregation since his incarceration in 2001. Ex. 1 ¶ 9. Ex. 5 ¶ 6.

17. As inmates housed in segregation, plaintiffs Blyden and McRae receive all meals in their cell, have restrictions on personal property and commissary purchases, and may not participate in group educational, treatment or religious programs, including worship services. Ex. 10 No. 7.

18. Plaintiffs Al-Amin, Lahens, and Evick have complied with the grooming policy, but at the expense of their ability to practice their religion. Ex. 2 ¶ 7; Ex. 3 ¶ 7; Ex. 5 ¶6. As Mr. Lahens put it: "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." Ex. 3 ¶ 7.

19. Prior to the enactment of the current grooming policy in 1999, VDOC had a previous grooming policy that at some point was ignored and/or rescinded. Ex. 7 No. 1.

20. Other correctional departments, including the Federal Bureau of Prisons – which operates 104 facilities and manages approximately 174,000 prisoners – do not prohibit the growing of long hair or beards. Ex. 9 p.2.

21. In enacting the grooming policy, VDOC considered reviewed the similar grooming policies of South Carolina and Texas, but did not review the federal policy or any other policies that addressed accommodations for inmates whose religious beliefs prohibit them from cutting their hair or shaving their beards. Ex. 10 No. 8.

22. No less restrictive means were considered or implemented to accommodate the plaintiffs' sincerely held religious convictions prohibiting the cutting of hair and/or beards. Ex. 10 No. 4-5.

23. VDOC has not considered any less restrictive alternative than placing people who do not comply with the grooming policy in segregated housing. Ex. 6 p. 21.

24. People of sincerely and deeply held faith are among the most manageable segment of offender population. They are often cleaner than the average prisoner. They are often more respectful, polite, and courteous toward other prisoners and staff. Ex. 9 p.1.

25. Both the Muslim and Rastafarian religions emphasize the requirement of its practitioners to follow very high standards of hygiene. Ex. 9 p. 2.

26. The possibility of an escape from VDOC is remote, and very few prison escapes occur from VDOC. The possibility of an inmate's changing his appearance to facilitate escape can be minimized in a variety of ways. Simple laminated photos could be required to be worn by those following religious practices, which may be color coded to make it distinctive. Ex. 9 p.2.

27. In any event, hair and beards are not efficient means to identify escaped inmates. If a clean shaven or short haired prisoner escapes, there are many commercial means of disguising one's identity such as a wig, fake beard, or mustache. Ex. 9 p.3.

28. Greater frequency of pat downs, tool control, and the use of metal detectors and x-rays would eliminate or substantially reduce concerns of long-haired or bearded inmates hiding contraband. Ex, 9 p.3.

29. Another technique for accommodating Muslim and Rastafarian inmates is to put them in specially colored clothing to identify them as people who are permitted to keep their hair long for religious reasons. Muslims and Rastafarians could also be placed in the same housing unit so that they could be monitored more easily. Ex. 9 p.3.

ARGUMENT

I. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

Congress enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. § 2000cc-1, *et seq.* (RLUIPA), in 2000 in order to ameliorate the burdens placed on the religious exercise of inmates and other institutionalized persons. "Before enacting [RLUIPA], Congress documented, in hearings spanning three years, that 'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise." *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2119 (2005) (citing See 146 Cong. Rec. S7774, S7775 (July 27, 2000) (joint statement of Senator Hatch and Senator Kennedy on RLUIPA)).

In enacting the statute, Congress recognized that the standard set forth in *Turner v. Safley*, 482 U.S. 78, 89 (1987) – "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests" – is inadequate to protect inmates' free exercise of religion. Accordingly, RLUIPA provides that a governmental entity receiving federal funds may not "impose a substantial burn on the religious exercise of a person residing in or confined to an institution unless the restriction unless *the government demonstrates* that the imposition of the burden *on that person* (1) is in furtherance of a compelling

governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a) (emphasis added). Notably, if the plaintiff demonstrates that a restriction substantially burdens his free exercise of religion, the government bears the burden of showing that the restriction is the least restrictive means of furthering a compelling governmental interest. *See* emphasized language above and 42 U.S.C. § 2000cc-2 (b); *Gartrell v. Ashcroft,* 191 F.Supp.2d 23, 38 (D.D.C. 2002) ("Because plaintiffs have demonstrated that the VDOC grooming policy substantially burdens their sincerely held religious beliefs, the burden shifts to defendants to prove that subjecting plaintiffs to the grooming policy is the least restrictive means of achieving a compelling interest.") Moreover, the statute is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

II. THE VDOC GROOMING POLICY VIOLATES THE PLAINTIFFS' RIGHTS UNDER RLUIPA.

A. The VDOC Grooming Policy Imposes a Substantial Burden on Plaintiffs' Religious Exercise.

Consistent with the statute's broad protections of religious freedom, RLUIPA contains a broad definition of religious exercise as: "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5 (7) (A). It is undisputed that the non-cutting of hair and/or beards is an important commandment of both the Muslim and Rastafarian religions as practiced by the plaintiffs. The grooming policy not only substantially burdens the plaintiffs' conformance with this commandment, it outright prohibits it.

B. The Substantial Burden on Plaintiff's Exercise of Religion is Not the Least Restrictive Means to Further any Compelling Governmental Interest.

As noted above, it is the *defendant*'s burden to demonstrate that the burden on plaintiff's religious exercise is the least restrictive means to further a compelling governmental interest. Moreover, the defendant must meet this burden not only with respect to the grooming policy generally, but the application of the grooming policy to *these plaintiffs*. *See* 42 U.S.C. § 2000cc-1(a) (The government may not impose a substantial burden on the religious exercise of an institutionalized person unless it demonstrates that "the imposition of the burden *on that person* . . . is the least restrictive means of furthering that compelling governmental interest"). The government cannot meet that burden.

1. *The Experiences of VDOC and Other Correctional Departments Demonstrate that the Grooming Policy is Not Necessary to Achieve any Compelling Governmental Interests.*

Before considering the defendant's specific claims as to "compelling governmental interests," it is essential to note that other correctional departments – including the Federal Bureau of Prisons – do not find it necessary to prohibit inmates from growing long hair or beards. Ex. 9 p.2. As at least one court of appeals has noted, this goes a long way to demonstrating that the policy is *not*, in fact, the least restrictive means to address VDOC's concerns:

> Equally problematic for [VDOC] is that other prison systems, including the Federal Bureau of Prisons, do not have such hair length policies or, if they do, provide religious exemptions. Surely these other state and federal prison systems have the same compelling interest in maintaining prison security, ensuring public safety, and protecting inmate health as [VDOC]. Nevertheless, [VDOC] offers no explanation why these prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs.

I*Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005).

VDOC's own experiences also show that the grooming policy is not particularly necessary. Prior to the enactment of the current policy, the department discarded a similar grooming policy. The defendant has explained that "there was a policy in place that for whatever reason had not particularly been enforced consistently or for some time, and as my memory would serve me, at some point someone decided that if you're not going to enforce it you ought to get rid of it. So that's why it was rescinded." Ex. 6 p. 30. Surely, if such a policy were truly needed to address important health, safety, and security concerns, it would have been consistently enforced and would not have been rescinded. That VDOC felt it could afford to ignore such a policy further demonstrate that it is not the least restrictive means to further VDOC's legitimate interests.

2. *Less Restrictive Alternatives Exist to Further VDOC's Legitimate Concerns.*

Again, it is up to the defendant to demonstrate that the grooming policy – and its application to these particular plaintiffs – is the least restrictive means to further their interests. It is not plaintiffs' obligation to prove the existence of less restrictive means. Nonetheless, the report of plaintiffs' expert, James Aiken, demonstrates that such alternatives do exist.

Mr. Aiken is a prison management consultant with over twenty-five years of practical experience. He has served as a director of the prison systems in Indiana and the U.S. Virgin Islands, and has acted as warden in several South Carolina prisons. While working in the U.S. Virginia Island, he developed extensive experience working with Rastafarian inmates. His qualifications are described in detail in his report, Exhibit 9 pp. 4-11. According to Mr. Aiken, VDOC "can accommodate the religious grooming

practices of Muslims, Rastafarians, and other inmates who are forbidden by their religion to cut their hair or shave their facial hair without compromising it's mission and [purpose]. Less restrictive alternatives are available to meet VDOC's concerns relating to health, safety and security." Ex. 9 p. 2.

As. Mr. Aiken points out, people of sincerely and deeply held faith are among the most manageable segment of offender population. They are often cleaner than the average prisoner. They are often more respectful, polite, and courteous toward other prisoners and staff. Ex. 9 p.1. Both the Muslim and Rastafarian religions emphasize the requirement of its practitioners to follow very high standards of hygiene. Ex. 9 p. 2.

The possibility of an escape from VDOC is remote, and very few prison escapes occur from VDOC.[3] The possibility of an inmate's changing his appearance to facilitate escape can be minimized in a variety of ways. Simple laminated photos could be required to be worn by those following religious practices, which may be color coded to make it distinctive. Ex. 9 p.2. In any event, hair and beards are not efficient means to identify escaped inmates. If a clean shaven or short haired prisoner escapes, there are many commercial means of disguising one's identity such as a wig, fake beard, or mustache. Ex. 9 p.3.

Greater frequency of pat downs, tool control, and the use of metal detectors and x-rays would eliminate or substantially reduce concerns of long-haired or bearded inmates hiding contraband. Ex, 9 p.3. Muslim and Rastafarian inmates may also be accommodated by putting them in specially colored clothing to identify them as people who are permitted to keep their hair long for religious reasons. Muslims and Rastafarians

[3] Significantly, VDOC has not provided plaintiffs with evidence of *any* escape in which the escapee disguised his appearance by cutting his hair or shaving his beard.

could also be placed in the same housing unit so that they could be monitored more easily. Ex. 9 p.3.

3. VDOC Has Failed to Consider Less Restrictive Alternatives to Accommodate These Plaintiffs' Religious Practices

Even if the VDOC could demonstrate that the grooming policy generally were the least restrictive means to serve its interests, it cannot show that there is no less restrictive alternative with respect to *these* inmates. The plaintiffs, all of whom are sincere practitioners of their religions, pose no particular concerns with respect to hygiene, contraband, or escape. Indeed, VDOC has refused even to *consider* less restrictive alternatives for the plaintiffs. Ex. 10 No. 4-5. *See Warsoldier*, 418 F.3d at 999 (Correctional department "cannot meet its burden to prove least restrictive means unless it demonstrates that it has *actually considered* and rejected the efficacy of less restrictive measures before adopting the challenged practice").

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request the Court to grant their Motion for Summary Judgment and to issue an order (1) declaring that VDOC's grooming policy, and its application to the plaintiffs, violate plaintiffs rights under the Religious Land Use and Institutionalized Persons Act; (2) enjoining defendant from any further enforcement of the grooming policy against the plaintiffs; (3) awarding reasonable costs and attorney's fees to the plaintiffs; and (4) awarding such other relief as the Court deems appropriate.

Dated: February 6, 2006

Respectfully submitted,
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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th 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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