IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JERRY CHARLES,

Plaintiff,

v.

MATTHEW J. FRANK, JON LITSCHER, and DICK VERHAGAN,

Defendants.

OPINION AND ORDER

02-C-626-C

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This is a civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § § 2000cc-2000cc-5. Plaintiff Jerry Charles, a Wisconsin prisoner and practicing Muslim, is confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. He contends that defendants' implementation of an Internal Management Procedure restricting him from wearing his Muslim prayer beads around his neck and under his shirt violates his rights under both the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act. Jurisdiction is present under 28 U.S.C. §§ 1331 and 1343(a)(3).

In an order dated February 3, 2003, I granted plaintiff leave to proceed in forma

pauperis on these claims. In an order dated August 18, 2003, I denied plaintiff's motion for summary judgment and converted defendants' motion to dismiss into a motion for summary judgment. On August 29, 2003, I denied plaintiff's motion for reconsideration of the August 18, 2003 order. On November 6, 2003, I denied defendants' motion for summary judgment as it related to plaintiff's alleged failure to exhaust his administrative remedies.

In the November 6, 2003 opinion and order, I noted that defendants failed to address the questions whether denying plaintiff's request to wear his beads under procedure § DOC 309 IMP 6A serves a compelling governmental interest, is the least restrictive means of furthering that interest and whether it is reasonably related to a legitimate penological interest. Because these questions are questions of law, I allowed defendant another opportunity to move for summary judgment. Presently before the court is defendants' motion for summary judgment on the issues whether defendants' denial of plaintiff's request to wear his prayer beads under procedure 309 IMP 6A serves a compelling governmental interest, is the least restrictive means of furthering that interest and is reasonably related to a legitimate penological interest.

I conclude that eliminating or restricting gang activity in prisons is a compelling governmental interest. In addition, prohibiting inmates from displaying symbols that could be used to indicate gang affiliation is a legitimate restrictive means in furthering that interest and is reasonably related to a legitimate penological interest. Therefore, I will grant

defendants' motion for summary judgment as it relates to the Religious Land Use and Institutionalized Persons Act and the free exercise clause of the First Amendment.

As an initial matter, I once again draw plaintiff's attention to this court's summary judgment procedures. As I noted in the August 18, 2003 and November 6, 2003 orders, plaintiff is a seasoned litigant in this court and should be familiar with this court's procedures. However, plaintiff failed to support his responses to defendants' proposed facts with admissible evidence as he was instructed. Procedure II(E)(2) states that the court will not consider "any factual propositions made in response to the movant's proposed facts that are not supported properly and sufficiently by admissible evidence." In conformance with the procedure, I have rejected a number of plaintiff's responses to defendants' proposed facts in this opinion. For example, I rejected plaintiff's responses to defendants' proposed facts ¶¶ 23, 26 and 27 because he supported his response by citing his brief, which did not cite any admissible evidence. Plt.'s Response to Dfts.' PFOF, dkt. #67, at 3. If plaintiff thought that these facts were important to consider, he should have supported his response to those facts with admissible evidence, such as an affidavit or other documentary evidence.

Even if plaintiff had supported his responses with admissible evidence, his responses would not have put defendants' facts into dispute. For example, in response to defendants' assertion that his prayer beads are visible outside his t-shirt when worn and that wearing his prayer beads could create a gang identification issue, plaintiff states that the Department of

Corrections keeps records of Muslims who are allowed to possess prayer beads. Plt.'s Resp. to Dfts.' PFOF, dkt. #67, ¶23. Plaintiff's response fails to address defendants' concerns.

From the parties' proposed findings of fact and the record, I find that the following facts are material and undisputed.

UNDISPUTED FACTS

Plaintiff Jerry Charles is an inmate and practicing Muslim at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Defendant Matthew Frank succeeded defendant Jon Litscher as Secretary of the Wisconsin Department of Corrections in January 2002. Defendant Litscher is no longer employed by the state. Defendant Dick Verhagan was Administrator of Adult Institutions at the Wisconsin Department of Corrections. He is currently the warden at Oakhill Correctional Institution in Oregon, Wisconsin.

Department of Corrections internal management procedure 309 IMP 6A allows inmates to possess Islamic prayer beads. Inmates may wear religious emblems around the neck on a single strand necklace underneath an undergarment. The procedure defines "religious emblem" as an object that functions as a religious symbol and is generally recognized by the inmate's religion as having religious significance. Religious emblems must be limited in size to two inches in length by two inches in width by one-eighth inch in depth and in weight to no more than two ounces. In addition, the emblem must be a single unit

that cannot be disassembled, except that it may have a single link to which a necklace can be affixed. The necklace material must not exceed one-eighth inch in diameter. Possession of a religious emblem by an inmate is subject to standard considerations of safety and security.

If an inmate wants to request a new religious practice or activity that affects his physical appearance, he must fill out Department of Corrections form 2075, "Request for New Religious Practice," as required by Wis. Admin. Code § DOC 309.61(2). Inmates may request form 2075 from the chaplain. Plaintiff has not filled out this form.

Gang creation is made possible by wearing of recognizable gang insignia. The possibility that religious items could be used for gang insignia was one of the reasons for creating procedure 309 IMP 6A. The procedure insures that emblems cannot be seen when worn under a t-shirt. Prayer beads that would meet the size and construction requirements (natural wood or black plastic) for emblems and that would not be readily seen when worn under a t-shirt are potentially available from commercial sources.

Plaintiff's prayer beads are a single strand of round beads with three larger beads dangling from one end of the strand. Plaintiff's beads would be visible outside the collar of his t-shirt and therefore do not meet the procedure's requirements for a religious emblem. Plaintiff is allowed to carry his prayer beads in his pocket at all times.

OPINION

The Religious Land Use and Institutionalized Persons Act prohibits governmental imposition of a "substantial burden on the religious exercise" of a prisoner, unless the defendant can show that the burden "(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. Like plaintiffs asserting claims under the Religious Land Use and Institutionalized Persons Act, those bringing free exercise claims under the Constitution must show that the exercise of their religion has been substantially burdened. Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). When a prison regulation impinges on an inmate's constitutional right to exercise religious freedom, the regulation must be reasonably related to a legitimate penological interest. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)). The Court of Appeals for the Seventh Circuit has identified several factors that can be used in applying the "reasonableness" standard:

> 1. whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule;
> 2. whether there are alternative means of exercising the right in question that remain available to prisoners;
> 3. the impact accommodation of the asserted constitutional right would have on guards and other inmates and on the allocation of prison resources; and
> 4. although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable.

Al-Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991) (quoting Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988)) (additional quotation marks omitted).

Because defendants have a heavier burden under the act, I will consider plaintiff's statutory claims first. If defendants meet their burden under the act, they will meet the less stringent burden of showing that their conduct was reasonably related to a legitimate penological interest under the First Amendment.

In the November 6, 2003 opinion and order, I concluded that § DOC 309 IMP 6A imposed a substantial burden on plaintiff's religious exercise of wearing prayer beads around his neck under the First Amendment and the Religious Land Use and Institutionalized Persons Act. I noted that defendants could not deny plaintiff the ability to wear his prayer beads around his neck on the ground that wearing such beads is not a recognized religious practice. In their second summary judgment motion, defendants have submitted evidence that their denial of plaintiff's request to wear his prayer beads serves a compelling governmental interest. Defendants focus on the physical dimensions of plaintiff's prayer beads as the reason plaintiff is unable to wear his beads under IMP 6A. Defendants contend that plaintiff's beads could be considered gang insignia because they would be visible outside his shirt. I agree with defendants that a prison's need to contain and eliminate gang activity is a compelling governmental interest. Rios v. Lane, 812 F.2d 1032, 1037 (7th Cir. 1987) (central tenet of prison administration requires security, order and discipline be maintained

in volatile and potentially dangerous environment).

It is undisputed that plaintiff's beads do not meet the physical restrictions for religious emblems under the procedure and would be visible if worn under plaintiff's t-shirt. It is undisputed also that gang creation is made possible by the wearing of recognizable gang insignia and that one reason for creating IMP 6A was to address the problem of inmate use of religious items for gang insignia. Thus, defendants' denial of plaintiff's request to wear his prayer beads under his shirt in order to contain or eliminate gang activity in prisons serves a compelling governmental interest under the act.

The question is whether defendants are employing the least restrictive means in furthering that interest, an important question for the Religious Land Use and Institutionalized Persons Act but not for the First Amendment. See O'Lone, 482 U.S. at 350 (noting that under First Amendment, it is wrong to place separate burden on prison officials to prove that no reasonable method exists by which prisoners' religious rights can be accommodated without creating bona fide security problems); but see Al-Alamin, 926 F.2d at 685 (although regulation need not satisfy least restrictive alternative test, existence of obvious, easy alternatives may be evidence that regulation not reasonable). The plain language of the Religious Land Use and Institutionalized Persons Act seems to require defendants to demonstrate that denying plaintiff's request to wear prayer beads is the least restrictive means of furthering their interest in reducing gang activity. However, in United

States v. Israel, 317 F.3d 768, 772 (7th Cir. 2003), the Court of Appeals for the Seventh Circuit interpreted similar language in the Religious Freedom Restoration Act less strictly. The Religious Freedom Restoration Act prohibits the federal government from imposing a substantial burden on a person's exercise of religion unless the government demonstrates that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," id. (language that is identical to RLUIPA). In Israel, a practicing Rastafarian argued that the government substantially burdened his religion by prohibiting him from using marijuana. Id. at 771. The court found that the government imposed a substantial burden, but that the government had a compelling interest in preventing drug abuse and that requiring plaintiff to abstain from marijuana use was a "legitimately restrictive means" in furthering that interest. Id. at 772 (demanding convicted felon on parole to abstain from marijuana use is *legitimately* restrictive means for safeguarding this interest) (emphasis added). The court did not explore alternative means that might balance the interest in preventing drug abuse with plaintiff's religious practice. Id.

Similar to the argument presented in Israel, defendants' argument is that denying plaintiff's request to wear his prayer beads because they do not meet the physical requirements outlined in IMP 6A is the least restrictive means of furthering their interest in prison security. I agree. As with the decision in Israel, 317 F.3d at 772, forbidding plaintiff

from wearing his prayer beads because they would be visible outside the collar of his t-shirt is a legitimately restrictive means for containing or eliminating gang activity. Id. ("Any judicial attempt to carve out a religious exemption [to the rule forbidding the use of marijuana] would lead to significant administrative problems for the probation office and open the door to a weed-like proliferation of claims for religious exemptions."). Because there are no reasonable alternatives to meeting defendants' security concerns, one can conclude that denying plaintiff's request to wear his prayer beads is reasonably related to a legitimate penological interest under the First Amendment. Al-Alamin, 926 F.2d at 685 ("The Court adopted a reasonableness standard, as opposed to a heightened scrutiny, to permit prison administrators 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration' and thereby prevent unnecessary federal court involvement in the administration of prisons."); see also Young v. Lane, 922 F.2d 370, 375 (7th Cir. 1991) ("The standard set out in Turner is not demanding . . . and is driven by a wide-ranging deference to prison officials, especially state prison officials."). (In his brief, plaintiff has offered an alternative to allow him to wear his beads. Plt.'s Br., dkt. #66, exh. A. He suggests that persons considering Islam as their religion should declare their faith by signing a form. They would be required to participate in regular Islamic functions and Shu'ra council members would remove those declarants of the Islamic faith who involve themselves with gang activities. Although I appreciate plaintiff's effort at

proposing a solution, his proposal is unworkable. First, it would not prevent gang activity; rather it is a reactive solution to the problem. Second, plaintiff assumes that the council members would be aware of the gang activity and that removal from the Islamic faith would provide adequate incentive to deter declarants from participating in gang activity. Finally, plaintiff would create an exception for the Islamic religion but he fails to consider how the prison should accommodate similar requests from other religious groups.) Because I have found that quelling gang activity is a compelling governmental interest, defendants' denial of plaintiff's request to wear his beads around his neck is a legitimate restrictive means of furthering that interest.

I note that defendants state that had plaintiff filled out a form 2075, defendants might have been able to accommodate plaintiff's request by finding prayer beads that meet the physical requirements of IMP 6A. Defendants allege that plaintiff refuses to fill out form 2075 and until he does, they are unable to accommodate his request.

However, plaintiff avers that he requested form 2075 and that the chaplain denied his request. Plt.'s Aff., dkt. #50, exh. #6, ¶11. According to plaintiff, the chaplain announced to prisoners that she was not going to approve the wearing of prayer beads. (Plaintiff contends also that form 2075 applies to requests for "umbrella religious services" and "umbrella study groups" only. It is undisputed that form 2075 applies to requests that affect the physical appearance of prisoners, which would encompass plaintiff's request to

wear prayer beads around his neck.) Plaintiff's argument is of no consequence. Plaintiff maintains that alternate beads are not acceptable. Plt.'s Resp. to Dfts.' PFOF, dkt. #67, ¶27. At issue is whether defendants may prohibit plaintiff from wearing *his* beads without violating the Constitution or the act. I have concluded that they may. Because defendants have shown that denying plaintiff's request to wear his beads serves a compelling governmental interest and that such a denial is a legitimate restrictive means in furthering that interest, I will grant defendants' motion as it relates to plaintiff's claims under the act and the free exercise clause of the First Amendment.

ORDER

IT IS ORDERED that

1. The motion for summary judgment by defendants Matthew Frank, Jon Litscher and Dick Verhagan is GRANTED with respect to plaintiff's claims under the Religious Land Use and Institutionalized Persons Act and the free exercise clause of the First Amendment; and

2. The clerk of court is directed to enter judgment in favor of the defendants and close this case.

Entered this 26th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge