

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FEB 5 1991

ROBERT L. HOECKER
Clerk

BEN CURLISS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 90-6172
	)	(D.C. No. CIV-90-264-R)
STEVE HARGETT,	)	(W.D. Oklahoma)
	)	
Defendant-Appellee.	)	

ORDER AND JUDGMENT*

Before **ANDERSON, TACHA, and BRORBY**, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Curliss appeals, pro se, the dismissal of his civil rights complaint.

Mr. Curliss requests permission to proceed in forma pauperis and we grant this request.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Mr. Curliss is confined as an inmate in the Oklahoma State Reformatory. He filed a civil action, pro se, against the Warden of the penitentiary in the Warden's official capacity. The action was grounded upon 28 U.S.C. § 1983 and alleged: (1) that he was being subjected to cruel and unusual punishment in that he was denied the right to practice his Jewish faith by growing a beard; (2) that he was denied due process and equal protection as the Warden refused to provide Mr. Curliss with religious exemption forms; and (3) that he is being retaliated against for filing an unrelated civil rights suit under 42 U.S.C. § 1983. Mr. Curliss requested \$500,000 damages and asked for injunctive relief by being given an "exemption from shaving." The Warden answered raising several defenses including immunity, failure to state a claim, and that the grooming code was reasonably related to a legitimate penological objective.

The district court, in a ten-page Opinion and Order entered April 25, 1990, dismissed the action after concluding: (1) that immunity from damages existed; (2) that the regulation prohibiting beards was a valid exercise of the prison official's authority; and (3) the retaliation claim was vague, unsupported by specific facts and contained only conclusions.

Mr. Curliss appeals raising essentially the same issues. He cites no cases, let alone any cases that would conflict with the case authority cited by the district court. He argues that his prison ID card shows him in a beard, which picture was made upon

his arrival at the penitentiary, that his appearance has always been good, and generally argues the facts to us.

In reviewing a case such as this, we must assume the facts well pleaded to be true. We must decide whether, assuming the facts to be true, Mr. Curliss would be entitled to recover damages from the Warden or whether he would be entitled to injunctive relief against the Warden. It is clear that under the facts set forth by Mr. Curliss he would be entitled to neither.

We have reviewed the record on appeal and carefully considered the brief and arguments of Mr. Curliss. We **AFFIRM** the judgment of the district court for substantially the same reasons set forth in the Opinion and Order dated April 25, 1990, a copy of which is attached.

The mandate shall issue forthwith.

Entered for the Court:

WADE BRORBY
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF OKLAHOMA

FILED

APR 25 1990

U.S. DISTRICT COURT
Nancy Estep
CLERK

BEN CURLISS,

Plaintiff,

v.

STEVE HARGETT,

Defendant.

CIV-90-264-R

OPINION AND ORDER

Plaintiff, an Oklahoma prisoner incarcerated at the Oklahoma State Reformatory, Granite, Oklahoma, has been permitted to proceed *in forma pauperis* in this 42 U.S.C. §1983 action. Plaintiff alleges in Count I of his complaint that he is "being subjected to cruel and unusual punishment in violation of the 8th amendment of the United States constitution by being denied the right to practice my Jewish faith by growing facial hair." In Count II, Plaintiff alleges that he is "being denied due process and equal protection of OP-070309-01 and the 14th amendment of the United States constitution by the refusal of Mr. Hargett to provide [religious] exemption forms." In conjunction with these claims, Plaintiff alleges that he is the subject of retaliatory measures, including harassment and the filing of institutional disciplinary charges, as the result of his filing of another civil rights complaint in this Court in Curliss v. Leistner, CIV-90-180-W.

Respondent Warden has filed an answer to the complaint and a memorandum brief addressing the allegations in the complaint, and Plaintiff has filed pleadings denoted "Plaintiffs (sic) Response to Defendants (sic) Memorandum Brief" and "Plaintiff's Response to Defendant's Answer."

Plaintiff sues Defendant Hargett in his official capacity as the Warden at Oklahoma State Reformatory. The Supreme Court has addressed §1983 suits against state officials and concluded in Will v. Michigan Department of State Police, 491 U.S. ___, 57 U.S.L.W. 4677 (U.S. June 15, 1989), that a state official acting in his official capacity is not a "person" within the meaning of 42 U.S.C. §1983. Id. at 4680. Further, a suit against such a state official is a suit against the entity the official represents, and states are immune from suit under §1983 by operation of the Eleventh Amendment, unless the state has effectively waived its immunity. Id. at 4679-4680; Kentucky v. Graham, 473 U.S. 159, 165-167, n. 14 (1985). Oklahoma has not waived its Eleventh Amendment immunity. 51 O.S. Supp. 1985, §152.1. Accordingly, Plaintiff cannot sue Defendant Hargett for monetary damages for Defendant's official capacity actions.

Nevertheless, Plaintiff's claim for injunctive relief "until this matter religious (sic) right to grow facial hair. . . is adjudicated. . ." requires that this Court review Plaintiff's claims on their merits to determine the constitutionality of the policy at issue. Kentucky v. Graham, supra at 167 n. 14; Ex parte Young, 209 U.S. 123, 159-160 (1908). See Will v. Michigan Department of State Police, supra at 4680 n. 10 ("Of course a state official

in his or her official capacity, when sued for injunctive relief, would be a person under §1983. . .").

Under the Oklahoma Department of Corrections' established policy, beards at maximum and medium security facilities are prohibited. Oklahoma Department of Corrections Policy and Operations Manual, Policy Statement No. OP-090126 (effective 3/18/89)(hereinafter "Inmate Grooming Code"). However, the Inmate Grooming Code provides that "[e]ach facility shall establish procedures for recommending exemption to the hair length policy for religious reasons. Facilities shall verify that the inmate is a sincere adherent to a recognized religion in which the cutting of hair is prohibited." At the Oklahoma State Reformatory, the medium security facility where Plaintiff is incarcerated, inmates may request an exemption for religious reasons from the Inmate Grooming Code. The inmate requesting a religious exemption at this facility is required to show the following:

- (1) That your religion is a recognized religion.
- (2) That you are a sincere adherent of the religion, verified by a reputable non-family member who is not under the custody of the Oklahoma Department of Corrections.
- (3) That the practice inhibited by the institutions (sic) regulation is a fundamental tenet of the religion.

Oklahoma State Reformatory Policy Statement No. OSR-070309-01 (effective November 1, 1988).

The free exercise of religion is protected from governmental interference by the First Amendment, made applicable to the states through the Fourteenth Amendment.

Cruz v. Beto, 405 U.S. 319, 322 (1972)(per curiam). Incarceration, however, "brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285 (1948). Nevertheless, a prisoner "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974). Prisoners must be given "reasonable opportunities" to exercise the religious freedom guaranteed by the First and Fourteenth Amendments "without fear of penalty." Cruz v. Beto, supra at 322 n.2. When a prison restriction is challenged as inhibiting First Amendment guarantees, the regulation "must be analyzed in terms of the legitimate policies and goals of the corrections system" incarcerating the inmate. Pell v. Procunier, supra. If the regulation is reasonably related to legitimate penological interests, e.g., deterrence of crime, rehabilitation of prisoners, and institutional security, it is valid. O'Lone v. Shabazz, 482 U.S. 342, 348-349 (1987); Turner v. Safley, 482 U.S. 78, 89 (1987).

The Supreme Court in Turner v. Safley, supra, identified four factors as relevant to the inquiry regarding the reasonableness of prison regulations that impinge on constitutional freedoms. Accord, O'Lone v. Shabazz, supra at 350-352. First, the Court in Turner recognized that "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to identify it." Id. at 89, quoting Block v. Rutherford, 468 U.S. 576, 586 (1984). In the First Amendment

context, the Court noted it was important to inquire whether the regulation operates "in a neutral fashion, without regard to the content of the expression." Turner v. Safley, supra at 90. A second factor recognized by the Court is "whether there are alternative means of exercising the rights that remain open to prison inmates." Id. A third factor is "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." Id. Fourth, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." Id.

In the determination whether the prison regulation at issue is reasonable, this Court is mindful of the "measure of judicial deference owed to corrections officials. . . in gauging the validity of the regulation." Pell v. Procunier, supra at 827. Penological considerations, including the measures needed to assure institutional security, are "peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in these matters." Id.

The Inmate Grooming Code applicable to all Oklahoma prisoners states that the regulation must be "maintained, as it affects the sanitary conditions of the living quarters and the safety, health, and welfare of the inmates." In Pollock v. Marshall, 845 F.2d 656, 658-659 (6th Cir.), cert. denied, 109 S.Ct. 239 (1988), prison officials identified 14

reasons for a prison hair length policy in the face of a free exercise of religion challenge, including: The growing of hair hinders the ability to make quick identification, and quick identification is needed in a prison setting to identify inmates involved in institutional misconduct in order to ensure discipline and to facilitate recapture of escaped inmates; longer hair has a greater tendency to clog sinks and showers creating a sanitation problem; and longer hair is also more conducive to the carrying of lice creating a sanitation problem. The Sixth Circuit found the interests identified by prison officials to be both legitimate and reasonably related to the prison's regulation limiting inmate hair length. *Id.* at 659. In similar challenges on free exercise grounds, other courts have found prison regulations limiting hair length and limiting or prohibiting facial hair to be logically connected to legitimate institutional interests in security and order. See Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988); Fromer v. Scully, 874 F.2d 69 (2nd Cir. 1989); Brightly v. Wainwright, 814 F.2d 612 (11th Cir.), cert. denied sub nom. Watts v. Dugger, 484 U.S. 944 (1987); Hill v. Blackwell, 774 F.2d 338 (8th Cir. 1985); Wilson v. Schillinger, 761 F.2d 921 (3rd Cir. 1985), cert. denied, 475 U.S. 1096 (1986).

This Court also finds the Oklahoma Department of Corrections' policy prohibiting facial hair to be legitimate and reasonably related to the interests of the institution in promoting institutional security, including aiding in the quick identification of inmates

necessary in a variety of exigent circumstances, maintaining the facility, and safeguarding the health and welfare of the inmates.

The regulation prohibiting facial hair is neutrally written, and the associate director or designated official at each facility is given discretion to exempt an inmate from the policy only when the inmate shows he or she is a sincere believer in a recognized religion espousing a conflicting doctrine.

Plaintiff alleges only that he is an Orthodox Jew and that he is being required to follow the policy prohibiting facial hair. Plaintiff has not provided any evidence that his particular faith requires him not to shave. Plaintiff also does not allege and the record fails to show that Plaintiff has requested a religious exemption from the policy, although the record shows Plaintiff has been instructed by the Warden concerning the requirements for obtaining an exemption. Thus, whether or not the Plaintiff meets the requirements for the exemption is as yet undetermined. Nevertheless, the policies of the Department of Corrections and the Oklahoma State Reformatory provide an alternative in the form of the religious exemption. The alternative is reasonable, and prison officials may rationally require the Plaintiff to obtain the approval of prison officials before Plaintiff is allowed an exemption from the policy.

Moreover, Plaintiff has been provided other "reasonable opportunities" to exercise his religious beliefs. Inmates at Oklahoma State Reformatory may receive a visiting minister for religious instruction, and religious services and programs may be scheduled.

Plaintiff may possess religious objects essential to his faith. Inmate Grooming Code, No. OP-090112; Oklahoma State Reformatory Policy Statement Nos. OSR-090301-01 and OSR-090302-01. Modified diets may be requested for religious reasons. Oklahoma Department of Corrections Policy and Operations Manual, No. OP-070202 (effective 1/10/90).

Given the opportunities available to Plaintiff to exercise his religious beliefs, and the existence of a reasonable religious exemption procedure open to all inmates, the Court finds the regulation at issue is a valid exercise of the prison officials' authority. Therefore, the Court will defer to the judgment of the Oklahoma correctional officials that the regulation is necessary to achieve the stated purposes, and Plaintiff has not shown that the officials' response to legitimate penological considerations is exaggerated. Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977), which Plaintiff relies on, does not support his claim. In affirming the District Court's findings in prior proceedings that Oklahoma prisons violated the Eighth Amendment as a result of overcrowding, the Tenth Circuit held that an inmate "is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well being." Id. at 403. The Tenth Circuit has since found that the conditions in the Oklahoma prison system are constitutional. Battle v. Anderson, 708 F.2d 1533, 1537 (10th Cir. 1983)(per curiam), cert. denied 465 U.S. 1014 (1984); Battle v. Anderson, 788 F.2d 1421, 1427 (10th Cir. 1986).

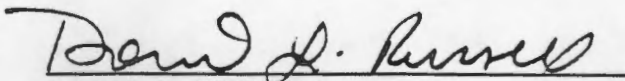
Plaintiff's claim in Count II of his complaint is that he is being denied due process and equal protection due to Defendant Warden's "refusal. . .to provide exemption forms." However, the record shows Plaintiff has received explicit directions from Warden Hargett regarding the procedure for obtaining a religious exemption to the Inmate Grooming Code, and there is no evidence of a discriminatory intent or suspect classification necessary to invoke review under equal protection standards.

Finally, Plaintiff asserts that he is being retaliated against by prison officials for the filing of a federal civil rights suit. Plaintiff has attached as Exhibits 8 and 9 to "Plaintiff's Response to Defendant's Answer" two offense reports, dated February 8, 1990, both charging Plaintiff with Disobedience to Orders and Failure to Obey Verbal and/or Written Order of Staff Member. The charges are based on Plaintiff's alleged failure to comply with orders to shave his beard and get a hair cut. Plaintiff filed a 42 U.S.C. §1983 complaint, Curliss v. Leistner, CIV-90-180-W, on February 1, 1990. However, there is no relationship between the issues presented in the civil case and the disciplinary charges. Plaintiff's allegations of retaliation are unsupported by any specific evidence of retaliatory motives or actions, and the Court finds Plaintiff's conclusory allegations of retaliation are without merit.

Accordingly, judgment will issue denying Plaintiff's demand for monetary and injunctive relief and dismissing the cause of action. Based on the foregoing reasons for

dismissal and because an appeal from this decision would not be well taken, leave to proceed on appeal *in forma pauperis* is denied.

Entered this 25th day of April, 1990.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE