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Religious Freedom in Correctional Facilities (II) -- Appearance and Apparel

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Issues of religious freedom for prisoners permeate contemporary correctional life, and arise in a wide variety of contexts. In this, the second of a series of articles in this area, we shall examine decisions by the courts in the specific area of prisoner appearance and apparel.

Appearance & Apparel

A major area in which prison religious freedom claims arise is prisoner appearance and apparel, especially around correctional policies mandating short hair length, or prohibiting the wearing of certain apparel, such as various head coverings.

While the court decisions are clear that prison security is a viable "compelling" governmental interest, it is not sufficient to merely recite the word "security" after the fact as a justification for a restriction. A court held, for instance, that a Rastafarian prisoner's claim that a prison requirement that he cut his hair violated his religious rights was not "frivolous" when there was no evidence in the court record concerning any security concerns which justified the requirement.

Reversing a dismissal of the lawsuit, a federal appeals court noted that it did not disagree with the trial court that "security concerns permit prison officials" to require a prisoner to cut his hair, but there was no evidence in the record of the case, which was still at the initial screening stage, for applying the prior cases allowing such a rule on the basis of security concerns. Cofer v. Schriro, #99-1852, 176 F.3d 1082 (8th Cir. 1999).

When a specific security problem can be identified in connection with hair length or wearing apparel, courts have often either upheld the restriction, or at the

very least, granted qualified immunity from liability to correctional defendants. In a New York case, a court found that a correctional officer was protected by qualified immunity from liability for bringing disciplinary proceeding against a Moslem inmate in retaliation for his wearing "kufi" religious headgear, since a reasonable officer could have concluded that contraband could be concealed under the kufi.

"Here, it is likely that there were legitimate penological interests served by preventing plaintiff from wearing the kufi at his work place. The garment was sufficiently loose to permit concealment of a weapon or contraband. Moreover, the work place was in the Administration Building, not in the close confines of the prison, was considerably less secure than plaintiff's usual quarters, and was occupied in part by civilian employees in addition to correction officers," providing some safety concerns. Nicholas v. Tucker, 2001 U.S. Dist. Lexis 2323 (S.D.N.Y.).

See also Von Staich v. Cal. Dept. of Corrections, No. C-04-2799, 2006 U.S. Dist. Lexis 73110 (N.D. Cal.), ruling that the law was not clearly established, at the time of the prisoner's claim, that enforcement of a prison grooming policy requiring a prisoner to cut his hair would violate his right to religious freedom, entitling a defendant retired prison official to qualified immunity against liability.

Another pitfall may be claims that correctional officials are singling out claims for religious accommodation for such things as hair length, while accommodating other prisoners seeking accommodation of hair length variances for non-religious reasons. In a Texas case, a federal appeals court ruled that a Muslim prisoner could pursue claim that his equal protection rights were violated by a prison allowing inmates with certain medical conditions to wear three-quarter-inch beards while denying his request to wear a one-quarter-inch beard for religious purposes. Taylor v. Johnson, #00-21155, 257 F.2d 470 (5th Cir. 2001).

On the other hand, in a Tennessee case, a requirement that Muslim prisoner be clean shaven, and not allowing him even a 1/4 inch beard, was not a violation of his rights, despite allowance of 3/4 inch beards for inmates with medical conditions aggravated by shaving. The court noted that the number of inmates warranting a medical exemption to the grooming policy "is quite small, but the number of inmates likely to seek qualification for a religious exception would be much greater," and would "place prison administrators in the untenable position of trying to determine which asserted religious beliefs, and even which professed religions, are legitimate." Green v. Polunsky, No. 00-40156, 229 F.3d 486 (5th Cir. 2000).

In the case of a Virginia prison policy mandating short hair, which had no

exception for religious objections, a federal court upheld the policy as "neutral," with only "incidental" impact on religious practices. The court also rejected the claim that different hair length standards for male and female prisoners violated equal protection of law.

The case involved a mandatory grooming policy requiring that all male inmates' hair be not more than 1" in thickness/depth, and which does not permit styles such as braids, plaits, dreadlocks, cornrows, ponytails, buns, mohawks, partially shaved heads, designs cut into the hair, and any style which could conceal contraband. With regard to female inmates, hair length cannot be longer than shoulder length, and one or two braids or ponytails are allowed, but hair must be kept out of the face and eyes, and styles such as mohawks, "tailed" haircuts, shaved or partially shaved heads, more than two braids/plaits/ponytails, dreadlocks, cornrows, designs cut into the hair, and any style which could conceal contraband, are not permitted.

In upholding the policy, the court found that it was implemented to help eliminate contraband, reduce gang activity, identify inmates and maintain order. Any impact on religious practices, the court found, was "incidental", and the rule adopted was "neutral and generally applicable."

The court further found that the distinction between the rules for male and female prisoners was justified by the fact that the defendant correctional officials had experience and data indicating that female inmates "are not as violent as male inmates, and are not as prone to hide weapons in their hair or to escape." DeBlasio v. Johnson, 128 F. Supp. 2d 315 (E.D. Va. 2000).

See also Wyatt v. Terhune, #00-16568, 280 F.3d 1238 (9th Cir. 2002). (Rastafarian prisoner's claim that prison's denial of his request to wear dreadlocks violated his right to religious freedom and constituted sex discrimination was improperly dismissed by trial court without fair notice and opportunity to be heard being provided to prisoner, who was acting as his own lawyer).

It should be noted that claims concerning appearance and apparel choices claiming a violation of religious rights, while they need not stem from a "mainstream" or commonplace religious belief, must at least be arguably religious. While involving a correctional employee, rather than a prison, the case of Luken v. Brigano, #CA2003-01-007, 797 N.E.2d 1047 (Ohio. App. 12 Dist. 2003), is of interest. The court ruled that the employee's "non-theistic" spiritual belief that he should not cut his hair was not a protected religious belief sufficient to challenge the state correctional department's grooming policy, since it was merely based on his own "personal and philosophical" choices. His desire to "live simply and avoid excessive pride" did not qualify for a possible religious exemption from the

grooming policy.

Frequently, federal prisoners may be held in state facilities for a variety of reasons, and prisoners from one state may be held in facilities operated by another jurisdiction. In Gartrell v. Ashcroft, 191 F. Supp. 2d 23 (D.D.C. 2002), the court found that the Federal Bureau of Prisons' (BOP) action of housing federal prisoners who were Rastafarians or Muslims in Virginia state facilities with a grooming policy prohibiting long hair and beards violated the prisoners' rights under the Religious Freedom Restoration Act, and ordered the BOP to transfer such prisoners to other facilities.

Hair length variances, if they arguably do not actually interfere with security concerns, may be rejected by the courts in some cases. In, Hoevenaar v. Lazaroff, 276 F. Supp. 2d 811 (S.D. Ohio 2003), the Native American inmate was found entitled to injunctive relief against grooming regulation requiring him to cut his hair short, to the extent of allowing him to grow a "kouplock," a two-inch square of hair at the base of the skull. Allowing a prisoner with sincere religious beliefs to grow such a limited area of hair "is not likely to result in the delayed capture of an inmate in the event of an escape," as it "cannot be manipulated to alter the appearance of an inmate's face or his profile."

On the other hand, a federal appeals court, Henderson v. Terhune, #02-17224, 2004 U.S. App. Lexis 16613 (9th Cir. 2004), ruling in a lawsuit brought by a California Native American inmate, upheld a prison regulation which prohibited inmates from wearing long hair as reasonably related to legitimate penological interests such as security, hygiene, prison workplace safety, and prevention of escapes. Accordingly, the regulation did not violate either the First Amendment of a Native American prisoner or a federal statute concerning Native American religious freedom the American Indian Religious Freedom Act of 1978 (AIRFA), 42 U.S.C. § 1996.

(In upholding this result, the court first found that the AIRFA was simply a "policy statement" and did not create any judicially enforceable individual rights on which a lawsuit could be based. The AIRFA is a joint resolution of Congress that establishes the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions . . ., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.").

In a footnote, the appeals court stated that it was expressing no opinion as to whether the regulation violates the Religious Land Use & Institutionalized Persons Act (RLUIPA), which provides that the government may not impose a substantial

burden on an inmate's exercise of religion unless the regulation in question furthers a compelling state interest in the least restrictive manner. 42 U.S.C. § 2000cc-1(a), since the plaintiff did not bring his claim under that statute, but only under the First Amendment, only requiring the showing of a reasonable relationship to a legitimate governmental interest

In Gooden v. Crain, No. 6:04cv127, 405 F. Supp. 2d 714 (E.D. Tex. 2005), the court ruled that a state prison policy prohibiting a Muslim prisoner from having a beard did not violate his right to religious freedom under RLUIPA because of the need for accurate pictures of inmates for security purposes. Additionally, he was not denied equal protection by the fact that inmates with certain skin conditions were allowed to have quarter-inch beards, since the policy prohibiting beards for other reasons was equally applied to all religious groups and was adopted for security purposes.

In a Pennsylvania case, while an inmate's belief that "the Creator Yahweh" mandated that he should not cut his hair was a sincerely held religious belief, a prison policy which limited "Afro style" hair length to four inches was reasonably related to legitimate prison interests in preventing the concealment and transportation of contraband, aiding in the identification of inmates, and improving inmate hygiene. These legitimate interests outweighed any rights the prisoner had to wear his hair in long dreadlocks. Meggett v. Pennsylvania Dept. of Corrections, 892 A.2d 872 (Pa. Cmwlth. 2006).

For an opposite point of view, valuable in terms of understanding and anticipating the arguments against such policies, see Mara R. Schneider, Note, "Splitting Hairs: Why Courts Uphold Prison Grooming Policies and Why They Should Not," 9 Mich. J. Race & L. 503, 507-12 (2004).

See also, Warsoldier v. Woodford, No. 04-55879, 2005 U.S. App. Lexis 15599 (9th Cir.), (Native American inmate was improperly denied an injunction against California hair grooming policy which failed to provide a religious exemption to short hair requirement when correctional officials failed to adequately show that this was the least restrictive means of achieving compelling interests in prison security).

As for restrictions on wearing—or removing—various items of apparel, time and place can be a factor. See, for instance Williams v. Secretary for the Department of Corrections, No. 04-14328, 131 Fed. Appx. 682 (11th Cir. 2005), holding that a facility's policy barring a prisoner from taking off his shoes when entering the chapel was supported by reasonable safety and security objectives, and the prisoner could remove his shoes to pray in his own cell, so that he had an alternative means of satisfying his belief that he should take off his shoes before prayer. See also Boles v. Neet, No. 03CV00557, 402 F. Supp. 2d 1237 (D. Colo.

2005), ruling that a prison warden was not entitled to summary judgment on prisoner's claim that he violated his right to religious freedom by prohibiting him from wearing religious garments as an Orthodox Jew while being transported outside the facility for eye surgery. Factual issues existed as to whether the warden's action was reasonable in light of security requirements.

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