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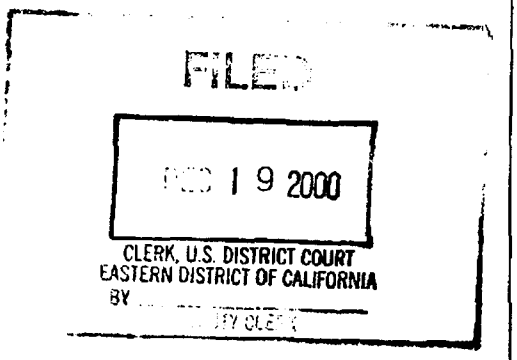

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KARLUK M. MAYWEATHERS; DIETRICH J. PENNINGTON; JESUS JIHAD; TERRANCE MATHEWS; ASWAD JACKSON; ANSAR KEES, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CALVIN TERHUNE; A.C. NEWLAND; BARRY SMITH; BONNIE GARIBAY; N. FRY; M.E. VALDEZ; N. BENNETT; and F.X. CHAVEZ,

Defendants.

/

NO. CIV. S-96-1582 LKK/GGH P

O R D E R

Plaintiffs are a class of Muslim state prisoners housed at California State Prison, Solano seeking relief under 42 U.S.C. § 1983 for alleged violations of their First Amendment right to the free exercise of their religion, as well as their Fourteenth Amendment right to Equal Protection of the law. This matter comes before the court on their motions for leave to file an amended

complaint, for a preliminary injunction, and for an order finding defendants in contempt of the preliminary injunction issued on July 31, 2000. I decide these motions based on the papers and pleadings filed herein and after oral argument.

I.

PROCEDURAL HISTORY

Plaintiffs' remaining claims attack the policies governing beards and Jumu'ah attendance at California State Prison, Solano.[1] On July 31, 2000, the court granted plaintiffs' motion for a preliminary injunction with respect to Jumu'ah attendance and denied their motion with respect to the defendants' prohibition of beards. Specifically, this court held that plaintiffs are allowed "to attend Jumu'ah services during the pendency of this action without receiving disciplinary action or forfeiting good-time credits." Order dated July 31, 2000 at 5:15-17. The preliminary injunction has since expired by operation of law. See 18 U.S.C. § 3626(a)(2) ("Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.")

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[1] The parties have reached a tentative settlement concerning the bulk of plaintiffs' case. Class notice has been published on these matters and the parties anticipate filing a motion for approval of class settlement pursuant to Fed. R. Civ. P. 23(a).

II.

LEAVE TO AMEND

A. STANDARDS

The Federal Rules provide that leave to amend pleadings "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).[2] As the Ninth Circuit has explained, however, demonstrating that justice requires amendment "becomes progressively more difficult . . . as litigation proceeds toward trial." Byrd v. Guess, 137 F.3d 1126, 1131 (9th Cir.), cert. denied, __ U.S. __, 119 S.Ct. 405 (1998). Thus, subsequent to a scheduling order prohibiting further amendment, the moving party must demonstrate "good cause." Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 608 (9th Cir. 1992). Once a final pretrial order has been entered, "modifications are allowed 'only to prevent manifest injustice.'" Byrd, 137 F.2d at 1331-32 (citing Fed. R. Civ. P. 16(e)).

Although the standard becomes progressively more stringent as the litigation proceeds, the Circuit has explained that the same four factors are pertinent to resolution of a motion to amend: (1) the degree of prejudice or surprise to the non-moving party if the order is modified; (2) the ability of the non-moving party to cure any prejudice; (3) the impact of the

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[2] The entire text of the rule reads:

> "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

modification on the orderly and efficient conduct of the case; and (4) any degree of willfulness or bad faith on the part of the party seeking the modification. See Byrd, 137 F.3d at 1132 (citing United States v. First Nat'l Bank of Circle, 652 F.2d 882, 887 (9th Cir. 1981)). The burden is on the moving party to show that consideration of these factors warrants amendment. See id.

Prejudice to the opposing party is the most important factor to consider in determining whether a party should be granted leave to amend. See Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990)(citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 320, 330-31 (1971)). Prejudice may be found where additional discovery would be required because the new claims are based on different legal theories. See Jackson, 902 F.2d at 1387-88 (citing Priddy v. Edelman, 883 F.2d 438, 447 (6th Cir. 1989)).

While delay alone is insufficient to deny amendment, undue delay is a factor to be considered. See Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)(affirming district court's denial of motion for leave to amend to add new claims made two years into litigation). Pertinent to consideration of this factor is whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading. See Jackson, 902 F.2d at 1388 (citing E.E.O.C. v. Boeing Co., 843 F.2d 1213, 1222 (9th Cir.), cert. denied, 488 U.S. 889 (1988)).

Amendment may also be denied when it is futile. See Kiser v. General Electric Corp., 831 F.2d 423, 428 (3d Cir. 1987), cert. denied, 485 U.S. 906 (1988). The test for futility "is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988)(citing Baker v. Pacific Far East Lines, Inc., 451 F. Supp. 84, 89 (N.D. Cal. 1978)). Accordingly, "a proposed amendment is futile only if no set of facts can be proved under the amendment to the pleading that would constitute a valid and sufficient claim or defense." Id.

B. PLAINTIFFS' MOTION

Plaintiffs move for leave to amend their complaint challenging the defendants' rules concerning Jumu'ah attendance and grooming to add a claim under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), codified as 42 U.S.C. § 2000cc et seq.[3] Defendants respond that the amendment is futile because plaintiffs' failure to exhaust the administrative remedies on their RLUIPA claim deprives this court of subject matter jurisdiction. See 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions

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[3] The Act provides, inter alia, that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person . . . is in furtherance of a compelling governmental interest . . . [and] . . . is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1)-(2).

under section 1983 . . . until such administrative remedies as are available are exhausted.") Two questions are tendered by defendants' opposition: first, whether plaintiffs' exhaustion is jurisdictional; second, even if not jurisdictional should plaintiffs be required to exhaust. As I now explain, the answer to both questions is no.

A statute requiring exhaustion of administrative remedies may be jurisdictional if it is "more than a codified requirement of administrative exhaustion" and contains "sweeping and direct" statutory language that goes beyond a requirement that only exhausted action be brought. Weinberger v. Salfi, 422 U.S. 749, 757 (1975). It is established that § 1997e(a) is not jurisdictional, but rather expresses a prudential consideration that governs the timing of federal-court decision making. See Rumbles v. Hill, 182 F.3d 1064, 1067 (9th Cir. 1999); Lacey v. CSP Solano Medical Staff, 990 F. Supp. 1199 (E.D. Cal. 1997) (same). Given that the issue of exhaustion is not jurisdictional, the court now turns to a consideration of whether plaintiffs should, nevertheless, be required to exhaust administrative remedies prior to seeking relief in federal court.[4]

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[4] "[E]xhaustion is 'a rule of judicial administration,' . . . and unless Congress directs otherwise, rightfully subject to crafting by judges." Patsy v. Board of Regents of Florida, 457 U.S. 496, 518 (1982), quoted in McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

Exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." McCarthy, 503 U.S. at 145. The first of these purposes reflects Congressional delegation of authority to coordinate branches of government and the notion that agencies have primary responsibility for programs that Congress has charged them to administer. See id. This same purpose is served by allowing an agency to apply its special expertise in an area and by allowing the agency "to correct its own mistakes with respect to the program it administers" before subjecting it to litigation. Id.[5] The second purpose, that of judicial efficiency, is served by an administrative process that will correct agency mistakes, focus the dispute, and produce a useful record for subsequent judicial consideration in those cases not rendered moot by the administrative process. See id.

Plaintiffs argue that they substantially fulfilled this goal when they exhausted their claims for Jumu'ah attendance and grooming restrictions, albeit without reference to RLUIPA. Although that record does not address all of the considerations under the less deferential RLUIPA standard, it does provide the court with a substantial record. Insofar as the defendants

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[5] This principle appears to have little relevance here. In enacting the PLRA, Congress did not establish a grievance procedure or an administrative agency charged with authority in the area. Indeed, Congress has provided that a State's failure "to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action" under § 1997e. 42 U.S.C. § 1997e(b).

anticipate challenging the constitutionality of RLUIPA, the administrative record will not necessarily make the process more efficient.[6]

Moreover, there is good reason not to require the plaintiffs to exhaust their administrative remedies. Specifically, administrative exhaustion is not required where "a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim . . . ." McCarthy, 503 U.S. at 147 (citations omitted). In the matter at bar, the administrative process is lengthy and there is a congressional bias towards speedy disposition of this class of cases. Moreover, the restriction on the duration of preliminary injunctions causes a burden on the ability of the court to efficiently protect the plaintiffs' constitutional rights pending the administrative proceeding. Each of the above considerations counsel against requiring exhaustion. Accordingly, I conclude that exhaustion should not be required.

The defendants also argue that they will be prejudiced because of the additional discovery the RLUIPA claim will require. Additional discovery is the most important factor to be considered in determining whether the defendant is unduly prejudiced. See Jackson, 902 F.2d at 1387. Despite the fact that the RLUIPA presents the court with a different standard of

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[6] Pending appropriate motion practice, the court expresses no opinion on defendants' suggestion that RLUIPA is unconstitutional.

review over the plaintiffs' claims, the substance of their claims remains the same. Indeed, it is not clear to the court what additional discovery (other than perhaps contention interrogatories) the introduction of a new legal standard would require on the part of the defense. Thus, the degree of prejudice, if any, is not great enough to deny plaintiffs the opportunity to amend their complaint. See Byrd, 137 F.3d at 1132 (citing United States v. First Nat'l Bank of Circle, 652 F.2d 882, 887 (9th Cir. 1981)).[7]

III.

PRELIMINARY INJUNCTION

Plaintiffs move for a preliminary injunction identical to the one previously entered by this court. They argue that the court may reenter a preliminary injunction based upon the principles of issue and claim preclusion. I conclude below that, although plaintiffs' motion does not implicate the doctrines of issue and claim preclusion, disposition is guided by the doctrine of law of the case.

Obviously, this court can take judicial notice of its prior decision as well as the basis for that decision. See United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). Nonetheless, plaintiffs' two grounds cannot support a new

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[7] Nor do the final two considerations outlined in Byrd, 137 F.3d 1126, persuade the court that plaintiffs' request to amend should be denied. Although plaintiffs' modification will ultimately delay trial, the RLUIPA is a new law and thus plaintiffs are seeking the amendment in good faith.

injunction.

Res judicata, or claim preclusion, applies only to a final judgment, see G & C Merriam Co. v. Saalfield, 241 U.S. 22, 28 (1916), which is defined as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Coopers & Librand v. Livesay 437 U.S. 463, 467 (1978). Collateral estoppel or issue preclusion similarly requires a final judgment, see SEC v. Ridenour, 913 F.2d 515, 518 (8th Cir. 1993), and applies to decisions in prior litigation. See Schiro v. Farley, 510 U.S. 222, 232 (1994). Because the court's grant of a preliminary injunction arose in the instant litigation and was not a final decision, it does not implicate either of these doctrines.

The law of the case doctrine, on the other hand, requires that when a court decides on a rule, it should ordinarily follow that rule during the pendency of the case. See Arizona v. California, 460 U.S. 605 (1983). It is, of course, merely a prudential doctrine; nonetheless, the doctrine guides the court's discretion on issues such as the one at bar. See Slotkin v. Citizens Cas. Co., 614 F.2d 301, 312 (1979) (The law of the case "does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided.") "The rule of practice promotes finality and efficiency of the judicial process by 'protecting against the agitation of settled issues . . . .'" Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988).

Grounds justifying departure from the law of the case include substantially different evidence, a change in controlling authority or the need to correct a clearly erroneous decision which would work a manifest injustice. See White v. Murtha, 377 F.2d 428, 431-432 (5th Cir. 1967).

Several of the defendants' arguments were previously argued and rejected when the court granted plaintiffs' first preliminary injunction. For a second time, defendants argue that plaintiffs lack standing and that the preliminary injunction violates the First Amendment's Establishment Clause. The court affirms its prior rejection of these contentions because the defendants have failed to identify substantially different evidence, a change in the controlling legal authority, or any error in the court's prior decision. See id.

Defendants also advance several new arguments. First, defendants contend that the court lacks jurisdiction to grant a preliminary injunction. Next, they argue that the Prison Litigation Reform Act bars the court from issuing a preliminary injunction. I address their arguments seriatim.

Defendants argue that their pending appeal of the July 31 preliminary injunction leaves this court without jurisdiction to consider plaintiffs' current motion for a preliminary injunction. Setting aside whether the expiration of the injunction noted above renders their appeal moot, the argument does not lie.

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Although it is true that the "filing of an appeal generally divests the district court of jurisdiction over the matters appealed[,]" Davis v. United States, 667 F.2d 822, 824 (9th Cir. 1982), "[w]hen an appeal is taken from an interlocutory . . . judgment granting . . . an injunction, the court in its discretion may . . . grant an injunction during the pendency of the appeal . . . ." Fed. R. Civ. P. 62(c).[8]

Defendants also argue that 18 U.S.C. § 3626(a)(2) prohibits this court from issuing a preliminary injunction. Although that statute places a limitation on the duration of an order granting preliminary injunctive relief, nothing in its terms prohibits a plaintiff from seeking a successive order.

Finally, defendants indicate that they wish to present the affidavit of several witnesses in an endeavor to defeat plaintiffs' motion for a preliminary injunction. In light of the irreparable harm attendant to denial of the right to free exercise of religion and the defendants' failure to present any colorable arguments raising doubt about the plaintiffs' ability to prevail at trial, the court declines to hold the plaintiffs' motion in abeyance pending the presentation of affidavits. The defendants can move this court to dissolve the preliminary

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[8] Defendants are under the mistaken impression that an injunction is only warranted under Fed. R. Civ. P. 62(c) in order to protect the defendants' rights. The plain language of the rule provides, inter alia, that the court can grant an injunction "upon such terms . . . as it considers proper for the security of the adverse party." Thus, the security of the adverse party merely amounts to a consideration when issuing an injunction.

injunction and present their evidence at that time. See L.R. 65-231(f).

IV.

CONTEMPT

Plaintiffs initially moved for an order holding defendants in contempt for violating the court's preliminary injunction. In their motion, plaintiffs argued that defendant Newland's memorandum of August 28, 2000, see Pls.' Motion for Contempt exh. A, was in violation of the court's injunction by ordering that an inmate's time away from work/training assignment to attend Jumu'ah shall be listed as "A" time, an unexcused absence, and that inmates assigned to certain workstations would not be allowed to return to work after attending Jumu'ah. Although the plaintiffs subsequently withdrew that motion, the defendant's directive gives the court some pause.

By considering Jumu'ah services an unexcused absence and by limiting the ability of those attending Jumu'ah services to return to work, the defendant's actions have the effect of forcing plaintiffs to forego good-time credits in exchange for observing their faith.[9] Defendants may be correct that the command of the court's injunction, barring defendants from denying good-time credits to plaintiffs, did not give sufficient

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[9] Inmates who are eligible to earn Penal Code § 2933 worktime credits "shall be awarded . . . one day of credit for each day of qualifying performance[,]" 15 Cal. Code Reg. § 3044(b)(1), which is defined as a workday of, "not . . . less than six hours . . . ." Id.

warning that their compelling plaintiffs to forego good-time credits amounted to a violation of the injunction. Nonetheless, defendant's action in light of this court's earlier ruling in Fenelon v. Riddle, No. CIV. S-95-954 LKK/JFM, may require an expansion of the injunction. See Sharp v. Weston, __ F.3d __, 2000 WL 1753068, at *5 (9th Cir. November 30, 2000) (failure to comply with injunction justified entry of a "comprehensive order to insure against the risk of inadequate compliance.") (quoting Hutto v. Finney, 437 U.S. 678 (1978) (internal quotation marks omitted).

Congress has mandated that in prison condition cases "[p]reliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). Following this command, the court issued its original injunction in general terms in an effort to avoid intrusion into the management of the prison. Defendant's actions, however, have demonstrated that a more intrusive injunction may be necessary in order to correct the harm caused by the defendants' policies.

In prior litigation between an inmate at the California Medical Facility and Cal Terhune, the Director of the California Department of Corrections, and the current warden of the CMF, Ana Olivarez-Palmara, this court determined that defendants' denial of plaintiff's request to use ETO (Excused Time Off), see

Cal. Code Reg. tit 15, § 3045.2(e),[10] to attend Jumu'ah violated

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[10] Section 3045.2 provides in pertinent part:

(e) Authorized uses of ETO. Excused time off may be approved by work/training supervisors only for the below stated reasons. A proposal to use ETO for any other reason requires approval by the director.

(1) Family visiting. An inmate scheduled for a family visit may be permitted to visit in the visiting room (regular visit) on the first day of a family visit while awaiting processing, and on the last day of the family visit.

(2) Regular visiting under extraordinary circumstances. Following are extraordinary circumstances for which use of ETO is authorized:

(A) Out-of-state visitors. Upon substantiation that the visitor(s) resides out-of-state and is in California for a temporary stay of 30 days or less, and the visitor(s) has not visited with the particular inmate for four months. No more than two such visits shall be permitted for each such occurrence.

(B) Excessive distance. When a visitor must travel a distance of 250 miles or more, and has not visited the inmate within the last 30 days.

(C) Weddings. When an inmate marries, the inmate may, with five working days prior approval, use ETO for a visit on the wedding day.

(D) Handicapped. When a visitor is handicapped as defined by California law and must rely on special transportation to the institution. Approval is required five working days prior to the visit.

(E) Family emergencies. When death, serious illness or injury occurs to an inmate's immediate family member, clergymen, family members or close friends may visit the inmate to offer condolences or inform the inmate of the occurrence.

(F) Infrequent visits. When an inmate normally receives infrequent visits and a visitor unexpectedly arrives. Infrequent means not more than one visit each six months.

(G) Visiting during authorized absence. An inmate shall be permitted to visit using ETO during approved periods away from assignment involving circumstances beyond the inmate's control. (Refer to section 3045.1(a). of these regulations.)

the First Amendment. See Fenelon v. Riddle et al., No. CIV S-95-954, slip op. (E.D. Cal. May 1, 2000). At first blush, it appears to the undersigned that the court's decision in Fenelon binds the defendant Cal Terhune in the current action, see Peck v. Commissioner, 904 F.2d 525, 527 (9th Cir. 1990) (issue actually litigated and necessarily determined is conclusive on subsequent suits based on different causes of action involving party or privy in to prior litigation), but does not necessarily bind the other defendants who were not parties to the prior action. See Whitley v. Seibel, 676 F.2d 245, 248 n.1 (7th Cir. 1982).

In light of these consideration, the court requests the parties to brief the issue of whether the injunction heretofore granted should be expanded to include a further order prohibiting defendants from depriving the plaintiff class of an opportunity to earn work time credits by virtue of attending Jumu'ah.

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(3) Temporary community leave.

(4) Special religious functions, other than routine services.

(5) Non-routine recreation and entertainment activities.

(6) Emergency telephone access.

Cal. Code Reg. tit. 15, § 3045.2(e).

V.

CONCLUSION

Accordingly, the court hereby makes the following ORDERS:

1. Plaintiffs' motion for leave to amend is GRANTED;

2. Plaintiffs' lodged sixth amended complaint is ordered FILED;

3. Plaintiffs' motion for a preliminary injunction is GRANTED, to wit plaintiffs are allowed to attend Jumu'ah services during the pendency of this action without receiving disciplinary action or forfeiting good-time credits; and

4. Plaintiffs shall FILE a brief addressing the expansion of the preliminary injunction within fifteen (15) days from the effective date of this order; defendants shall RESPOND within fifteen (15) days thereafter; plaintiffs shall CLOSE seven (7) days thereafter; the matter is SET for oral arguments on February 12, 2001 at the regularly-scheduled law and motion calendar at 10:00 a.m. in Courtroom No. 4.

IT IS SO ORDERED.

DATED: December 15, 2000.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

ndd

United States District Court
for the
Eastern District of California
December 19, 2000

* * CERTIFICATE OF SERVICE * *

2:96-cv-01582

Mayweathers

v.

Sutton

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 19, 2000, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

by: Deputy Clerk