IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Roanoke Division

KELVIN E. BROWN, #207902,

Plaintiff,

v. Civil Action No. 7:09cv00180

TRACY S. RAY, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT

COME NOW Defendants Tracy S. Ray, Warden, L. Fleming, Major, and T. Pease, Mailroom Supervisor, (hereinafter collectively referred to as "Correctional Defendants"), by counsel and in support of their motion for summary judgment on claim # 1 submit the following.

Plaintiff Kelvin E. Brown, #207902 ("Brown"), an inmate with the Virginia Department of Corrections, has filed this action pursuant to 42 U.S.C. § 1983 alleging violation of his constitutional rights under the First Amendment, the Religious Freedom Restoration Act of 1993 (RIFRA) and the Religious Land Use and Institutionalized Person Act of 2000 (RLUIPA). Specifically he alleges:

Claim # 1: Plaintiff is being denied his religious newspaper "The Final Call" based on race and religious discrimination.[1]

He requests relief in the form of the permission to receive the "religious and cultural material" and monetary damages of One Thousand Dollars ($ 1,000.00).

[1] Claims # 2-6 were the subject of a summary judgment motion filed on September 17, 2009.

The Defendants enclose and incorporate by reference an affidavit of Benjamin A. Wright, Chairman of the Publication Review Committee for the Virginia Department of Corrections[2] ("Wright Affidavit"). Defendants respectfully request that this Court consider this exhibit (in addition to the previously submitted affidavits) as evidence in support of Defendants' motion.

Claim 1

Plaintiff complains that he is being denied his religious publication "The Final Call" based on racial and religious discrimination.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Plaintiff brings his complaint as a violation of the First Amendment, RFFRA and RLUIPA. Generally, to prevail on a violation of the First Amendment, the prisoner must show that a prison action or regulation is not reasonably related to penological interests. *Turner v. Safley*, 482 U.S. 78, 89-90, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). *See Freeman v. Arpaio*, 125 F.3d 732, 736 (9th Cir. 1997). 89. Factors relevant in determining the reasonableness of a prison act or regulation include (1) the connection between the act or regulation and a legitimate, neutral government purpose, (2) the existence of alternative means of exercising the right, (3) the impact accommodation of the right would have on guards, other inmates, and prison resources, and (4) the absence of ready alternatives to the act or regulation. *Turner*, 482 U.S. at 89-91.

Pursuant to VDOC Operating Procedure 803.2 all incoming publications, books and tapes are subject to review. A subscription to a publication does not automatically

[2] The Wright Affidavit encloses a copy of the "The Final Call" the publication in question. Given the security issues which are at the heart of this case, defendants are requesting the attachment be received under seal and not published to plaintiff.

mean that every issue of the publication will be received. Ray Affidavit[3] ¶ 4. Where a publication has material that should not be approved based on the criteria in the Operating Procedure, the entire issue is to be disapproved. The Operating Procedure does not provide for redaction of the offending content. Ray Affidavit ¶ 4.

At Red Onion, there is a process in place for the review of publications. Major Fleming conducts the initial review of the publication. If after his review, he believes that there are portions which meet the criteria for disapproval, he notifies the inmate of the publication and the reasons for the disapproval, logs the disapproved portion of the publication and forwards it to the Publication Review Committee for a final determination. The inmate has the option of declining to have the Publication Review Committee review and make its determination. Ray Affidavit ¶ 5. Unless the inmate declines the review by the Publication Review Committee, the committee will review the publication, make a determination, and notify Major Fleming. Major Fleming must then notify the inmate with the final decision (if the publication is not to be provided to the inmate) or if the publication has been deemed to be in compliance with the standards of the Operating Procedure, the publication will be provided to the inmate. Ray Affidavit ¶ 5.

The specific criteria for disapproval of publications is set forth in the Operating Procedure 803.2 L (see Ray Affidavit, Enclosure A, page 5 and 6 of 8). The criteria for disapproval is based on security concerns and includes a variety of categories such as explicit sexual content, instructions for the making of explosives, information pertaining to the manufacture of weapons, information pertaining to the ability to maim or kill

[3] This affidavit was previously submitted with the Memorandum in support of the Motion for Summary Judgment with regards to claims # 2-6

another and technical specifications that could be used to defeat communication methods or electronic security devices. One such disapproval criteria is 803.2(L) (7) "Material that promotes or advocates violence, disorder....against individuals, groups, organizations, the government, or of any of its institutions." Ray Affidavit, Enclosure A, page 6 of 8. Likewise, 803.2 (L) (12) disapproves of "material whose content could be detrimental to the security, good order, discipline of the facility, or offender rehabilitative efforts or the safety of or health of offenders, staff, or others."

Brown complains that his intended religious publication "The Final Call" has been denied him as the result of racial and religious discrimination. This is incorrect. The Final Call was being received by Brown and others for quite some time. (See Complaint, Claim # 5: "Petitioner states, he has received such material and newspaper for over fourteen and a half years, never having one issue denied"). Recently, the paper has added a section outlining certain ideas in such a way as would incite racial hatred between blacks and whites. Wright Affidavit ¶ 4. Material that incites racial hatred or violence is clearly "detrimental to the security, good order, discipline of the facility, or offender rehabilitative efforts or the safety of or health of offenders, staff, or others" and therefore is material that meets the criteria for disapproval. See Ray Affidavit, Enclosure A, OP 803.2 (L) (12). Furthermore, material that incites racial hatred is to be disapproved in that it "promotes or advocates violence or disorder against individuals, groups, organizations, the government or any of its institutions." See Ray Affidavit, Enclosure A, OP 803.2 (L) (7).

Reviewing all incoming publications is necessary to maintain security. Security for the safety of inmates, staff and the public at large is one of the primary functions of

prison administration. "[P]rison security is a compelling state interest." *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005). The prohibition of incoming publications that contain material likely to cause security breaches does not interfere with the exercise of religion. Disapproval of religious material would only be incidental since it would have to be in conjunction with material that constitutes a breach of security. The Supreme Court has recognized that the government has a "compelling interest in not facilitating inflammatory racist activity that could imperil prison security and order." *Cutter v. Wilkinson*, 544 U.S. at 723. Accordingly, VDOC Operating Procedure 803.2 and the prohibition of the issues of The Final Call in question[4] are reasonable and appropriate under *Turner v. Saffley* and therefore there is no violation of plaintiff's First Amendment rights.

Plaintiff has also raised the same claim under RLUIPA and its predecessor act RFRA.[5] Notwithstanding the higher standard, under RLUIPA, the policy and the Defendants acts in conformity with the policy, are constitutionally justified. Under RLUIPA, a plaintiff must first prove that his right to freely exercise his religion has been substantially burdened. A substantial burden is "one that put[s] 'substantial pressure on an adherent to modify his behavior and to violate his beliefs' or one that forces a person to 'choose between following the precepts of her religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'" *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (*quoting Thomas v. Review Bd. Of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981) and *Sherbert v.*

[4] An excerpt from the The Final Call with some of the offending language is the attachment being filed under seal.

[5] RFRA has been held not to apply to States and their subdivisions. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Verner, 374 U.S. 398 (1963)). Only then must the Government demonstrate that the substantial burden on the inmate's religious exercise furthers a "compelling governmental interest" and does so by "the least restrictive means." *See* 42 U.S.C. § 2000cc-1(a); *see also Lovelace*, 472 F.3d at 187. Courts are required to give "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *See Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005).

Plaintiff has not demonstrated that the disapproval of the issues of The Final Call constitute a substantial burden. Not having every issue of a periodic religious newspaper does not place any pressure (much less "substantial") on plaintiff to modify his behavior and violate his beliefs. Thus plaintiff is not being forced to choose between following his religion and obtaining government benefits. *See Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006).

Even if plaintiff were to prove a substantial burden, the denial of the issues in question of The Final Call serves a compelling governmental interest. The issues in question have added a section which encourages a racial division based in hate and mistrust. Contemporaneous to the filing of this memorandum, Correctional Defendants are filing a motion to file under seal[6] an example of The Final Call for this Court to review. A reading of this document will reveal the inflammatory nature of the language and ideas specifically pertaining to dividing the races. The government has a "compelling interest in not facilitating inflammatory racist activity that could imperil

[6] For the same reasons that plaintiff has not been furnished with this document by VDOC, counsel is moving this Court to accept the document for filing under seal and the document is not being furnished to plaintiff with the motion.

prison security and order." *Cutter v. Wilkinson*, 544 U.S. at 723. VDOC must examine all material—letters, packages, tapes and cd discs—to maintain security. There is no less restrictive means practically available to VDOC given the volume of material received by the prisons. Accordingly, the withholding of the issues in question of "The Final Call" do not constitute a violation of RLUIPA.

Without a violation of the First Amendment or RLUIPA, plaintiff is not entitled to any relief, injunctive or monetary.

DAMAGES AND IMMUNITIES

To the extent that plaintiff is attempting to bring a suit under § 1983 against any of the defendants in their official capacity for monetary damages, this is not cognizable in § 1983. Neither a state nor its officials acting in their official capacities are persons for purposes of § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Therefore, to the extent that plaintiff is suing the defendants in their official capacity, they are immune from suit in this matter. Id.

To the extent plaintiff is attempting to sue the Correctional Defendants in their official capacities for monetary damages, this is not cognizable under RLUIPA. *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006). To the extent plaintiff is attempting to sue the Correctional Defendants in their individual capacities for monetary damages, this is not cognizable under RLUIPA. *Rendleman v Rouse*, 569 F.3d 182 (4th Cir. June 25, 2009).

QUALIFIED IMMUNITY

Furthermore, to the extent that plaintiff is requesting damages, all defendants are entitled to the defense of qualified immunity, there being no allegations of conduct which

violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified immunity involves a two step inquiry: whether a constitutional or statutory right would have been violated on the alleged facts; and whether the right was clearly established. *Saucier v. Katz*, 533 U.S. 194 (2001). The court has the discretion to proceed directly to the second step of the Saucier analysis after assuming without deciding that a constitutional violation occurred. *Pearson v. Callahan*, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

Plaintiff does not raise any allegations that he is prevented from exercising his religious practices, such as praying, fasting, or dieting pursuant to his religious dictates. For security purposes, VDOC must review every item that enters the prisons for contraband, explicit sexual content, or content that incites or encourages violence. VDOC, has through its policy, identified a list of criteria so as to guide the reviewing person or committee as to what is permissible and what must be screened out. The publication in question has been found by the initial reviewer and subsequently by a review committee to be racially divisive and inflammatory. The Supreme Court has recognized the government's compelling interest in avoiding inflammatory racist activity. *Cutter v Wilkinson, supra.* The Court has also recognized that RLUIPA must be applied with deference to the experience and expertise of the prison officials in establishing procedures to maintain security and discipline, consistent with consideration of limited resources. *Cutter v Wilkinson, supra.* The Correctional Defendants acted within the scope of the stated policy and disapproved the publication because of its inflammatory racist content. This is entirely consistent with the First Amendment and RLUIPA and therefore Correctional Defendants should be afforded qualified immunity in any event.

Respectfully Submitted,

TRACY S. RAY,
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By_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 2009, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following: N/A

And I hereby certify that I will mail the document by U.S. mail to the following non-filing user:

Kelvin E. Brown, #207902
Red Onion State Prison
Post Office Box 1900
Pound, Virginia 24279

_____/s/_____
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