

In the United States Court of Appeals
For The Eighth Circuit **FILED**

DEC 26 2012

MICHAEL GANS
CLERK OF COURT

Gregory Holt #129616
(Abdul Maalik Muhammad)

Appellant

vs.

Case No. 12-3185

Ray Hobbs, et al.

Appellees

An Appeal from the United
States District Court for
the Eastern District of Arkansas

Honorable Brian S. Miller
United States District Judge

Reply Brief of the Appellant

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DEC 26 2012

U.S. COURT OF APPEALS
EIGHTH CIRCUIT

Respectfully submitted,

Gregory Holt #129616
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In the United States Court of Appeals
For The Eighth Circuit

Gregory Holt #129616
(Abdul Maalik Muhammad) Appellant

vs. Case No. 12-3185

Ray Hobbs, et al. Appellees

Reply To Appellees Response To
Opening Brief

Comes now the Appellant, and for his
Reply states:

(1) Appellant urges reversal of the
district court and believes that
the Appellees argument is fallacious
for the following reasons:

[A] Appellees make repeated references
in their brief to long hair. Appellant
has stated over and over again

that he is not arguing about the hair policy. Long hair is unquestionably a security concern. Even though Appellant believes that this policy is oppressive as well and that inmates should be allowed to grow their hair long, he is not advancing that argument in this case. This is about the beard grooming policy and whether inmates should be allowed to grow $\frac{1}{2}$ inch beards. Appellees argument on this point is without merit and unavailing.

[B] Appellant did not file a 1983 claim, so the Turner standard does not apply here.

The test that Appellees rely on, the "legitimate penological interest" test has been replaced with the "compelling governmental interest" and "least restrictive means" test codified at 42 U.S.C. Section 2000cc-1(a). The Appellees made no effort in Fegans to show that they had considered alternatives to the policy and they failed to do so here. The Appellees advance the argument by inference that Appellant is free to exercise his religion, just to a certain point. In other words, the grooming policy is not a substantial burden because Appellant may exercise his religion-he will just be punished for doing so in an effort to compel him to acquiesce with the grooming policy in contravention of his religious beliefs. Such punishment for practicing those

beliefs could conceivably provoke the "reaction" that the Appellees purport to fear should an inmate be allowed to walk in population with a beard, because many Muslims will not abide the prolonged practice of oppressive means for practicing their beliefs and they should not tolerate such oppression. In addition, it is not on Appellant to disprove anything under the Religious Land Use and Institutionalized Persons Act (RLUIPA) once he has established that a violation has occurred. It is on the Appellees. The Appellees have not answered this argument and have failed to show that a $\frac{1}{2}$ inch beard would compromise a "compelling governmental interest." A $\frac{1}{4}$ inch beard for medical reasons does not compromise anything, and neither would a $\frac{1}{2}$ inch beard. Appellant would state that a $\frac{1}{4}$ inch beard medical exemption that currently exists "would satisfy his religious beliefs." (Fegans, 537 F.3d 906)

[C] As to Appellees concerns about escapes, a $\frac{1}{2}$ inch beard would not sufficiently hide "the contours of the face." (Mayweathers vs. Terhune, 328 F.Supp.2d 1086, 2004) In fact,

Judge Karlton in Mayweathers stated, rather comically, that not all beards are created equal. The Appellees could not state that any escapes in recent memory were as the result of a beard. Appellant would point out that the escapes involved (1) inmates walking out of the Cummins Unit disguised as correctional officers who incidentally have an identical grooming policy to the inmate population; (2) inmates at the Tucker Unit escaping by hiding in a truck; and (3) an inmate escaping yet again from the Cummins Unit by hiding in a stop wagon. All of this occurred while a grooming policy was in place. Appellant would think that law enforcement would need age, weight, and grooming enhanced photos in order to facilitate capture. Without these, how would they or the public know what an inmate with a beard would look like? Just as the argument goes regarding beardless inmates, conversely it could be said that an inmate could grow a beard after escaping. If the institution of incarceration had two (2) photographs - one clean shaven, one with a $\frac{1}{2}$ inch beard - they could disseminate these to the public to help locate the escapee. In addition, with the fact that the Appellees allow the growing of thick head hair and Afros, this should be a security concern as well.

However, Appellees are silent on this point. Head hair can be shaven upon escape and it is well known that there are major differences when someone with even a modest hair growth shaves it in that it significantly alters their appearance. It is ludicrous to object to one and not the other.

[1] Appellant has shown how the issue of a $\frac{1}{2}$ inch beard or even $\frac{1}{4}$ inch growth can be inspected reasonably without confrontation in both his objections to the proposed recommendations of the magistrate and in his opening brief.

[2] Appellant has shown how the issue of determining beard length could be satisfied in his proposed alternatives in both his objections to the proposed recommendations of the magistrate and in his opening brief. Additionally, most barber shops have clippers that are self service in nature where an inmate with a medical exemption can shave themselves. Further, a barber can use common sense in knowing what a $\frac{1}{2}$ inch beard is, and if he can't, then he can be replaced. Appellees reference an incident in which Appellant had a verbal confrontation with an inmate barber who shaved Appellant's beard nearly off. What Appellees fail to apprise the

Court of is that Appellant advised the barber no less than three (3) times that he had a court order allowing him to maintain a 1/2 inch beard. The barber, who had ties to white supremacists, shaved Appellant down to the skin of his face after finding out Appellant was a Muslim. Neither Appellant nor his cellmate, also a Muslim, could physically intervene due to being handcuffed. To their credit, Appellees Lay, Robertson, and Tate took appropriate action against the barber. The only reason this incident occurred in the first place was that the attendant personnel took no action when they became aware of a conflict erupting, and because the barber was attempting to incite a war between his group and the Muslim community, Appellant was considered a race traitor by a large majority of the white inmates at Cummins.

[3] Appellant may have been able to practice many aspects of his religion but the Appellees miss the point that when the Prophet (saws) spoke and said that something was to be done or practiced a certain way, there was no disputing it, do it if you feel like it, or don't do it if the Kaafir tells you not to. Those are not options. Appellant is a Salafi, which means

that he follows the Salaf or way of the righteous predecessors and the Ahlus Sunnah wal jemaat or people of the jemaat. The Prophet (saws) stated that after him would come 73 different sects of Islam and all would be in the fire, except what "me and my companions are on" which is the ahlus sunnah. As part of the Salaf and sunnah, Appellant believes in the imposition of Sharia or Islamic law wherever the community (ummah) of believers may be, including a correctional institution and the baia (oath of fealty) to the Islamic Emirate wherever the Muslim may feel he should pledge it to. Appellant pledges to the Islamic Emirate of Dagestan and Ingushetia and to Shaykh Doku Umarov. This area encompasses the Russian Federation, Chechnya, and Bosnia. The Prophet (saws) plainly stated that "whoever does not govern by what me and my sahaba (companions) have sent down is not of us" [Sahih Al-Bukhari] Appellant further believes that Islamic law trumps Western laws, including ADC policy, and any Western law that contradicts

the Shari'a is to be disobeyed, forcefully if necessary. As part of the Salaf, certain hygienic laws have been passed down. Some of these include: Clipping the nails, shaving the pubic and underarm areas, and "clipping the mustaches short and leaving the beard as it is" [emphasis mine] [Sahih Al-Bulhari, Hadith 7/5893] While it is true that a Muslim receives "credit" for intending to do good and not doing it, this does not apply to those things clearly laid out. The wearing of a beard is commanded! It is not optional. Failure to obey is a sin, and constitutes major shirk (disbelief). A Muslim can be forgiven for it, but if he continues in that sin and persists in it, he will be in the Hellfire, and no man made policy can change that. This applies even if your life or wellbeing is jeopardized because a Muslim who dies as the result of practicing his deen immediately becomes a shaheed (martyr) and goes to Firdous Jannah (highest level of Paradise). Even the ADC Islamic Coordinator advised the Appellees prior to the January 4 hearing that the beard "was a major issue."

That is why they abandoned this line of argument both at the hearing and in their brief to this Court. Additionally, the Appellant is not allowed to practice other aspects of his religion that the Appellees reference, here at the Supermax, Appellant is not allowed to possess a sajadah (prayer rug), participate in the Eid feasts individually (which Appellant is about to subject to legal attack), visit with a spiritual adviser (Appellant has gone months without seeing a religious, Islamic adviser and was forced to file a grievance in order to secure compliance with Religious Services Policy #505) and due to the Supermax's stringent book policy cannot order Islamic books due to possessing 2 religious texts already and due to the fact that Appellant has legal books in the cell that he needs for this and other legal challenges, including federal habeas review. Appellant needs an alternative means of practicing his religion and expressing his beliefs.

[4] Appellees offered only conclusory statements regarding preferential

treatment of inmates, Appellant is not seeking to be allowed to grow a $\frac{1}{2}$ inch beard to the exclusion of everybody else. Embedded in the original complaint is an attack on the policy as a whole, so the entire inmate population would be affected. If AD98-04 were modified, it would allow the 15,000 inmates in the ADC to grow a $\frac{1}{2}$ inch beard, and by extension, the Appellant and other Muslims could then practice their beliefs fully and safely. The Appellees did not establish that inmates in the ADC would resent another inmate who was allowed to practice his religion by growing a beard or would look to that inmate as a leader. That reasoning was rejected in Fromer vs. Scully, 874 F.2d 69. The court in that case opined that those who practiced their beliefs sincerely, that included beard growth, were actually respected for that practice by the inmate population. In fact, when Assistant Director Harris was cross-examined about this, he stated that he had not received any complaints about the Appellant in the time that Appellant was in general population at Cummins with a beard. Further, should any inmate wish to get an injunction to be allowed to

wear a beard, they could file the same paperwork as Appellant. The issue of more time being spent on personal interaction with inmates who wear beards is frivolous in that the same amount of time spent patting down inmates outside the chow hall and housing units would negate that argument. Appellant has offered alternatives to beard searches which would allow the inmate to run his hands through his own beard upon request, thereby limiting "intrusive" searches.

[5] As to the concerns of hiding weapons, contraband, or cell phone parts in the beard, testimony was elicited from Appellee Lay that contraband flow increased at the Cummins Unit from 2006-2012, all the while a grooming policy was in place. As to officers being injured by hidden blades, again Appellant points to the alternatives he has proffered and further, Appellant again asserts that it would be extremely difficult to hide a weapon or a SIM card in a $\frac{1}{2}$ inch beard or even a $\frac{1}{4}$ inch should the Court allow that, and such contraband could just as easily be hidden in the head hair. The first choice of transport would not be a $\frac{1}{2}$ inch beard, $\frac{1}{4}$ inch beard, or the face. Appellant would also remind the Court that the overwhelming purveyors of cell phones are correctional officers, another fact elicited from Appellee Lay and

Assistant Director Harris. Otherwise, how could inmates get their hands on these "pieces"? Visitors are scanned, and the ADC has equipment to detect the presence of incoming phone "pieces" and signals.

[6] Appellant has not raised his proposed alternatives for the first time in his brief. Appellant raised them in his second Objections To Proposed Findings and Recommendations, in response to information gleaned after the January 4 hearing. They are properly preserved for this Court's review and are unrebutted.

[7] Appellees routinely rephotograph inmates at the Cummins Unit. Appellant was rephotographed no less than five (5) times in two (2) years at Cummins. Appellant would reiterate that the photos would be a one-time thing. If Appellees can re-photograph inmates for sundry other purposes, it is not too burdensome to do so for this.

[8] Appellant is not asking for the Court to disregard Fegans. It should differentiate between the two (2) because there are major differences. Appellant is not asking for uncut beards or long hair. Appellant offered reasonable alternatives that Fegans never did. This Court can allow

Some modifications to permit the 1/2 inch beard or even the 1/4 inch beard, and Appellant moves that the Court do so at this time. The 8th Circuit has already ruled that a 2 inch beard could satisfy security concerns and legitimate governmental objectives. (Dunavant vs. Moore, 907 F.2d 77, 8th Cir. 1990) It should be noted that the Ninth Circuit in Mayweathers made short shrift of the arguments made by the California Department of Corrections that were identical to the ones made by the Appellees. It characterized them as frivolous, and other circuits have done the same. This court can look to out of circuit cases for analytical reasons to show how they dealt with the arguments presented here. It is a basic premise in legal research that other circuits rulings on matters such as these constitute "persuasive law." The Appellees have not shown how Mayweathers is not persuasive, given that the grooming policies were identical, the sanctions were identical for non-compliance. This is definitely persuasive law. The Appellees have not shown that they considered and rejected the efficacy of less restrictive measures before

adopting the challenged practice. (United States vs. Playboy Entertainment Group, Inc., 529 U.S. 803, 824, 2000) Also, the failure of the

Appellees to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the Appellees were using the least restrictive means (Cheemaus, Thompson, 67 F.3d 883, 1995)

Because Appellant's religious beliefs forbid him from being clean shaven, the current grooming policy and its continual oppressive punishment of Appellant's noncompliance with that policy forces Appellant and others like him to choose between following their religious beliefs and suffering continual

punishment and abandoning their beliefs to avoid such punishment. Such choices could lead to the confrontation between Muslims and ADC administration that the Appellees claim to fear from beard searches. It is unfair to force physical confrontations in order to rectify something that the Court could alleviate by allowing $\frac{1}{4}$ to $\frac{1}{2}$ inch beards,

[9] Appellant did not fail to state a claim in that he pleaded enough facts to nudge his claim "across the line from conceivable to plausible" (Bell Atlantic Corp. vs. Twombly, 550 U.S. 544, 2007). In keeping with Rule 8(a), a complaint should only be

dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming that the claims no longer appear plausible. The Supreme Court recently said that the Federal Rules do not require "heightened pleading" except where the Rules spell out such a requirement (Swierkiewicz vs. Sorema, 534 U.S. 506, 2002); (Leatherman vs. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 1993) also Erickson vs. Pardus, 551 U.S. 89, 2007 (per curiam). Courts have acknowledged the special problems in writing detailed complaints that are caused by incarceration (Billman vs. Indiana Department of Corrections, 56 F.3d 785, 7th Cir. 1995). The issue to be decided is whether a court dismisses for failure to state a claim is not whether the Appellant will ultimately prevail on his claims, but only whether he should be entitled to offer evidence in support of those claims. (Scheuer vs. Rhodes, 416 U.S. 232) The Scheuer Court went on to say that "indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." The court in this case made that very finding in dismissing Appellant's complaint, stating that the "likelihood of success on the merits precluded Appellant's claim." The facts and claims are neither implausible or frivolous. The Appellant has shown that a 1/2 inch or 1/4

inch beard is not a security threat, has offered reasonable alternatives to the concerns voiced by Appellees, and has shown that contraband could be hidden in the head hair or any number of places on the body. The claims are therefore not implausible and the relief requested clearly not frivolous. The facts as alleged show that the choices offered Appellant and others like him are constitutionally impermissible and force Appellant to choose between religious belief and practice or the risk of punishment for practicing that belief and the further risk of a physical showdown in opposition to that punishment. For these reasons, the district court should be reversed and this matter remanded for a jury trial.

(D) Appellant properly preserved his retaliation claim in the district court.

(1) On June 21, Appellant filed in the district court a Motion For Review and Application For Permission To File Brief in response to the Appellees transferring Appellant to the Vanner Supermax after an incident with his cellmate. Appellant was attempting to show retaliatory behavior on the part of the Appellees in response to the district court granting Appellant a second injunction in this case, on April 19.

(2) On August 17, Appellant filed a Motion For

Relief after Appellant's cell in the Supermax was shaken down and all of his Islamic books were taken. This had occurred after Appellant and Deputy Warden Meinzer had a verbal confrontation at a Classification Committee hearing over Warden Meinzer and other Committee members making snide comments about the district court's injunction. Less than 24 hours later, Appellant's cell was ransacked. An action for harassment may lie for the wrongful confiscation of an inmate's property if the confiscation is part of a plan to harass the inmate (Carter vs. Estelle, 519 F.2d 1136, 1137, 5th Cir. 1975) and cases cited. Also, (Jackson vs. Hogan, 446 N.E.2d 692, 1983). Further, the clerk of the district court filed an NOA Supplement on September 14 to cover these Motions. This issue is being addressed in this Court in Case No. 12-3556.

(3) This matter is properly before this Court.

Conclusion

For the foregoing reasons, this Court should reverse and remand this matter to the district court for a jury trial.

Respectfully submitted,
Gregory Holt

Gregory Holt #129616
(Abdul Malik Muhammad)

Certificate of Service

I certify that I have served a copy of the foregoing to Christine Cryer, Assistant Attorney General, by U.S. Mail this 21st day of December, 2012.

Gregory Holt
Gregory Holt #129616
(Abdul Maalik Muhammad)

Eighth Circuit Court of Appeals

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The following was filed on 12/26/2012

Case Name: Gregory Holt v. Ray Hobbs, et al

Case Number: 12-3185

Docket Text:

BRIEF FILED - APPELLANT REPLY BRIEF filed by Mr. Gregory Houston Holt. w/service 12/21/2012; 5 copies by USCA-8. , Length: 19 pages.
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