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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STRIDER ROGNIRHAR,

 Plaintiff,

 vs.

D. FOSTON, et al.,

 Defendants.

NO. CV-08-892-LRS

ORDER DISMISSING FIRST AMENDED
COMPLAINT WITH PREJUDICE FOR
FAILURE TO STATE A CLAIM UPON
WHICH RELIEF MAY BE GRANTED

BEFORE THE COURT is Defendant D. Foston and D. Van Leer's Motion to Dismiss, **ECF No. 3**, filed on July 8, 2013, which motion Defendant Cate joined by Notice of Joinder (ECF No. 40) on August 9, 2013. Plaintiff has opposed the motion to dismiss (ECF No. 37) filed on July 31, 2013.

I. Plaintiff's Allegations and Relief Requested

Plaintiff makes the following allegations in his first amended complaint ("FAC"):

1. On or around December 16, 2006, Plaintiff was returned to CDCR from Nebraska and was subjected to grooming standards previously set forth at 15 CCR 3062. (FAC at ¶ 12)

2. Plaintiff is an adherent of the Heidinn faith commonly referred to as Asatru or Odinism. A central part of Plaintiff's religious belief is that he maintains a beard uncut and not cut the

1 hair on his head. There is no central authority in Plaintiff's
2 religion. (FAC at ¶ 12)

3 3. In 2006, Plaintiff filed a 602 Appeal requesting exemption
4 from the grooming regulation on religious grounds and the appeal was
5 denied. (FAC at ¶¶ 14 and 15)

6 4. Plaintiff made requests for religious exemptions while housed
7 at Salinas Valley State Prison (SVSP), Sierra Conservation Center
8 (SCC) and Correctional Training Facility (CTF) and all were denied.
9 (FAC at ¶ 16)

10 5. Plaintiff discovered that other inmates were receiving the
11 exemption he had requested and that he was being treated dissimilar to
12 other inmates similarly situated. (FAC at ¶ 17)

13 6. Between December 21, 2006 and June 8, 2011, Plaintiff was
14 denied an exemption even though Jewish and Muslim inmates received an
15 exemption. (FAC at ¶ 18)

16 7. On December 8, 2010, Defendants Foston and Vanleer denied
17 Plaintiff's request for an exemption. (FAC at ¶ 19)

18 8. On May 5, 2011, Plaintiff's grievance was rejected and he was
19 forced to alter his religious practices under threat of progressive
20 discipline pursuant to 15 CCR § 3062. (FAC at ¶¶
21 24 and 25)

22 Plaintiff requested the following relief: (1) declaratory
23 judgment that Defendants' actions violate RLUIPA, the Equal Protection
24 Clause of the U.S. Constitution, and the rights protected by Cal. P.C.
25 § 2600; (2) declaratory judgment that Defendants' actions constitute
26 "course of conduct" as defined by 15 CCR § 3000 which purpose was to
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1 deprive Plaintiff of equal treatment on the basis of his religious
2 beliefs and that Defendants knew or reasonably should have known of
3 the illegality of their behavior; and (3) nominal damages in the
4 amount of \$5.00/day for each day that the violations occurred.

5 **II. Brief Procedural Background**

6 Pursuant to the Mandate of the Ninth Circuit entered January 18,
7 2012 (ECF No. 16), this court entered an Order Directing Amendment of
8 the Complaint pursuant to the Mandate (ECF No. 17), specifically
9 directing Plaintiff to amend his complaint and, should he do so, to
10 explain why his RLUIPA claims are not moot given the amendment to §
11 3062, Cal. Code Regs. Tit 15. On May 11, 2012, Plaintiff filed his
12 first amended complaint (ECF No. 18) but failed to provide any
13 explanation as to why his RLUIPA claims are not moot. Instead, he
14 amended his complaint to add Defendants Foston and Vanleer, who acted
15 on Plaintiff's most recent request for a religious exemption from the
16 prohibition against growing a long beard set forth in § 3062.

17 **III. Defendants' Motion to Dismiss**

18 Defendants request the Court to dismiss all claims asserted
19 against them based on the following grounds: (1) § 3062(h) of Title 15
20 was amended rendering Plaintiff's claims based on that regulation
21 moot; (2) Plaintiff is not entitled to declaratory relief; (3) there
22 is no individual capacity liability under RLUIPA; (4) there is no
23 right to monetary damages under RLUIPA; and (5) Defendants are
24 entitled to qualified immunity.
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1 **A. Legal Standard**

2 A complaint, or portion thereof, should only be dismissed for
3 failure to state a claim upon which relief may be granted if it
4 appears beyond doubt that plaintiff can prove no set of facts in
5 support of the claim or claims that would entitle him to relief.
6 *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citations omitted);
7 *Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1294 (9th
8 Cir. 1981). In reviewing a complaint under this standard, the court
9 must accept as true the allegations of the complaint in question.
10 *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740 (1976).

11 **B. Plaintiff's Claims Are Moot**

12 Defendants begin by noting that the Ninth Circuit expressly
13 mandated that should California promulgate proposed amendments to §
14 3062(h), upon remand the district court will determine whether the new
15 provision, does, in fact, moot Plaintiff's case. In this case,
16 Defendants argue, it is clear that the new version of 15 CCR § 3062
17 does not subject Plaintiff to a limitation on the length of his beard
18 and, consequently, Plaintiff will not be subjected to a rules
19 violation for growing a long beard. The amended grooming regulation
20 for facial hair provides as follows:

21 (e) An inmate's hair or facial hair or may be any
22 length but the inmate's hair shall not extend over
23 the eyebrows or cover the inmate's face. The hair
24 and/or facial hair shall not pose a health and
25 safety risk. If hair or facial hair is long, it
26 shall be worn in a neat, plain style, which does
27 not draw undue attention to the inmate.

28 (h) Facial hair, including beards, mustaches and
sideburns are permitted for male inmates and shall
be maintained in a manner as defined in this
section. Title 15 CCR §§ 3062(e) and (h) (2013).

1 The court agrees with Defendants. There is no longer any need
2 for Plaintiff to obtain an exemption from the grooming standard in
3 order to practice his religion. Accordingly, Plaintiff's claim in this
4 regard is moot.

5 **C. Declaratory Relief**

6 Plaintiff seeks declaratory judgment that Defendants' actions
7 violate RLUIPA, the Equal Protection Clause of the U.S. Constitution,
8 and the rights protected by Cal. P.C. § 2600, as well as a declaration
9 that Defendants' actions constitute "course of conduct" as defined by
10 15 CCR § 3000 which purpose was to deprive Plaintiff of equal
11 treatment on the basis of his religious beliefs and that Defendants
12 knew or reasonably should have known of the illegality of their
13 behavior. Defendants assert that given the amendment of 15 CCR §
14 3062(h), declaratory relief as to the enforcement of the earlier
15 version of the regulation will serve no useful purpose by clarifying
16 and settling the parties' legal relations in issue. This court
17 agrees.

18 **D. RLUIPLA Liability and Money Damages**

19 Defendants argue that Plaintiff cannot maintain a cause of action
20 against prison officials in their individual capacities under RLUIPA.
21 While the Ninth Circuit has not yet ruled on that issue, the Supreme
22 Court has declined to review the Fifth Circuit's ruling that there is
23 no individual-capacity liability under RLUIPA. *Sossamon v. Texas*, 560
24 F.3d 316, 329-31 (5th Cir. 2009), *cert. granted in part*, 130 S. Ct.
25 3319 (2010) (reasoning that, as an exercise of Congress's
26 spending-clause authority, RLUIPA cannot authorize damage actions
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1 against private individuals who are not themselves recipients of
2 federal funding.). Other circuits have held similarly. See, e.g.,
3 *Nelson v. Miller*, 570 F.3d 868, 885-89 (7th Cir. 2009); and *Smith v.*
4 *Allen*, 502 F.3d 1255, 1272-73 (11th Cir. 2007).

5 Plaintiff seeks money damages against the Defendants for alleged
6 violation of RLUIPA. Defendants assert that RLUIPA does not provide
7 for money damages against prison officials, whether sued in their
8 official capacity or individual capacity. *Holley v. Cal. Dep't of*
9 *Corr.*, 599 F.3d 1108, 1114 (9th Cir.2010). The court hereby dismisses
10 Plaintiff's RLUIPA claim for damages against Defendants in their
11 individual capacities for the foregoing reasons.

12 **E. Qualified Immunity**

13 Defendants assert they are entitled to qualified immunity because
14 even if they violated a constitutional right, the law did not put
15 Defendants on notice that their conduct would be clearly unlawful. The
16 undisputed facts show that Defendants were reasonably following the
17 prior version of Title 15 CCR § 3062 (h) in denying Plaintiff the
18 right to grow a long beard. Under the two-step test in *Saucier v.*
19 *Katz*, 533 U.S. 194, 202 (2001), Defendants in this action are immune
20 from liability because the law did not put them on notice that their
21 actions would be clearly unlawful. Defendants argue they acted in
22 accordance with a clearly established regulation. The court finds that
23 qualified immunity is applicable to the Defendants in the particular
24 case at hand. Further, Defendants are entitled to qualified immunity
25 based on the fact that they acted in accordance with a regulation that
26 was in force and had not yet been amended or determined to be a
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1 potential infringement of an inmate's ability to practice his
2 religion.

3 **F. Exhaustion of Administrative Remedies**

4 The claims at issue in this litigation are directed at the
5 superseded grooming regulation. Plaintiff shaved his beard to comply
6 with the grooming regulation and thereby allegedly violated the
7 tenants of his religion. Plaintiff filed a grievance based on the old
8 grooming standard, the enforcement of which allegedly interfered with
9 Plaintiff's free exercise of his religion. Plaintiff has not presented
10 any evidence of a grievance following the enforcement of the new
11 grooming regulation. Defendants argue that without a 602 grievance
12 against the enforcement of the new regulation, Plaintiff has not
13 exhausted his administrative remedies and may not pursue this lawsuit
14 based on a violation of the new regulation.

15 **G. Conclusion**

16 The court finds that Plaintiff's first amended complaint fails to
17 state a claim for which relief may be granted. Contrary to
18 Plaintiff's assertions, there is no evidence that Plaintiff has been
19 precluded from growing a long beard. Plaintiff merely speculates that
20 Defendants will violate his right to practice his religion, which is
21 an allegation that is not before the court as it was not part of his
22 initial administrative appeal. Additionally, Plaintiff's claims under
23 RLUIPA are dismissed. Plaintiff has not provided any authority to
24 convince this court individual capacity liability exists under RLUIPA
25 or that monetary damages are available under RLUIPA.

26 Accordingly, **IT IS ORDERED** that Defendant D. Foston and D. Van
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1 Leer's Motion to Dismiss, **ECF No. 3**, filed on July 8, 2013, is
2 **GRANTED**. Plaintiff's first amended complaint is **DISMISSED with**
3 **prejudice as against all Defendants**, based on the Joinder of Defendant
4 Cate (ECF No. 40).

5 **IT IS SO ORDERED**. The District Court Executive is directed to
6 enter this Order, forward a copy to Plaintiff at his last known
7 address, enter judgment, and close the file.

8 **DATED** this 19th day of August, 2013.

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10 ***s/Lonny R. Suko***

11 _____
LONNY R. SUKO