

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons
North Central Region
Office of Regional Counsel

Kansas City, KS 66101

December 5, 1997

MEMORANDUM FOR WALLACE H. CHENEY, ASSISTANT DIRECTOR
GENERAL COUNSEL & REVIEW

FROM: JOHN R. SHAW, Regional Counsel

SUBJECT: ~~MONTHLY REPORT ON LITIGATION~~

LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS

LITIGATION:

inst	num	hc	ftc	biv	oth	ans	pen	cld	h/t	set	awd
	46	25	4	6	11	20	515	34	2	2	0

- NUM - Number of total lawsuits filed in the month (1)
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Total new cases for calendar year 357

ADMINISTRATIVE CLAIMS:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
70	98	95	66	95	*	151	69	62	72	64	

Total for Calendar Year 842
Pending 491

ADMINISTRATIVE REMEDIES

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
176	180	210	196	226	140	164	163	154	229	163	

Total for Calendar Year 1,838

FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS

	FOIA	PRIVACY ACT
ACTUAL ON-HAND	0	49
ACTUAL RECEIVED	0	44
ACTUAL PROCESSED	0	55
ACTUAL BACKLOG	0	10

ADVERSE DECISIONS

Eugene A. Schmitz, Jr. v. Percy Pitzer, District of Minnesota, Case No. 97-C-240-C
Fred Odell Price III v. Bureau of Prisons, District of Minnesota, Case No. 97-563
Timothy S. Egan v. Kathleen M Hawk, District of Minnesota, Case No. 4-96-284
Donovan Matthew Sisneros v. J.W. Booker, District of Minnesota, Case No. 97-Z-651

Three different U.S. District Courts within the North Central Region rendered adverse decisions, ruling that section 9 of Program Statement 6162.02(9), Definition of Term, "Crimes of Violence," is an invalid legislative rule. On November 18, 1997, Judge Barbara Crabb in the Western District of Wisconsin so ruled in Eugene A. Schmitz, Jr. v. Percy Pitzer, case number 97-C-240-C. On November 25, 1997, Judge John R. Tunheim, in the District of Minnesota issued orders voiding section 9 in Fred Odell Price III v. Bureau of Prisons, case number 97-563 and Timothy S. Egan v. Kathleen M Hawk, case number 4-96-284. The next day Judge Zita L Weinshienk, in the District of Colorado, ruled in this same manner in Donovan Matthew Sisneros v. J.W. Booker, case number 97-Z-651. The United States Attorney' Office in the District of Colorado and Western District of Wisconsin are probably not going to recommend appealing to their respective circuits. The United States Attorney's Office for the District of Minnesota is considering an appeal, but may instead motion the Court to stay execution of the order because the validity of section 9 is being evaluated by the Eighth Circuit in a group of cases on December 11, 1997 (See Upcoming Hearing and Trials)

Williams v. Hedrick, S.D. Ill., Case No. 96-862-JPG

The court held that plaintiff's conviction of felon in possession of a firearm was not a per se crime of violence. Instead, the court held that BOP regulations and Seventh Circuit precedent mandated that the BOP use a "case by case" analysis of the circumstances surrounding § 922(g) convictions. As a result of the holding, the court ordered the BOP to reevaluate the petitioner's application for early release. The USP Marion Legal Office has recommended appeal but it appears the U.S. Attorney's Office is against taking any further action in this case.

SETTLEMENTS OR JUDGMENTS

Zeisman v. Tippy, District of Minnesota, Case No. CV97-2086, FCI Waseca

After the petitioner had completed his residential drug treatment he received a level 200 incident report for fighting with another inmate and found guilty by a UDC. As a result of the incident report, the inmate was determined to be ineligible for sentence reduction under 3621(e). After further review of the incident report by NCRO legal it was determined that the incident report did not adequately provide the inmate notice of the charges against him or the evidence relied upon by the UDC. FCI Waseca Warden Jim Tippy agreed to expunge the finding of the UDC and make the petitioner eligible for early release. The court was notified of this action and the petitioner's claim was rendered moot.

Talley v. USA, D.Colorado Case No. 95-B-2639, FCC Florence

FTCA claim for lost property. Records were incomplete. Settled for \$100.00.

DECISIONS OF INTEREST

United States v. S.A., 8th Cir., Case No., FMC Rochester

Juvenile offender committed to the custody of the Attorney General pursuant JADA was deemed to be mentally ill and dangerous if released. FMC Rochester staff initiated a 18 USC 4246 petition for continued hospitalization after date of expiration of sentence. Offender objected, arguing juvenile offenders were not covered by the mental health statutes, 18 USC 4241-4247. After a Magistrate Judge agreed with the offender and held the court lacked jurisdiction, objections were filed which the court sustained. The offender appealed and the Court of Appeals affirmed, holding the mental health statutes were part of a comprehensive system enacted by Congress to promote public safety. FMC Attorney Jeff Toenges provided the U.S. Attorney's Office with extensive assistance.

Moore v. USA, 10th Cir., Case No. 97-3006, FCI Milan

Inmate had lost personal property at FCI Milan in 1988. Following two dismissals and two reversals by the 10th Circuit, the district court held a trial in 1995 and awarded the inmate \$500. The inmate appealed alleging that several valuable legal documents valued at over \$8000.00 had been lost. In addition, Moore argued he should be reimbursed, at minimum wage, for the time spent on litigation. The court of appeals rejected both arguments.

PENDING CASES OF INTEREST

Rahman v. Keohane and Kane, W.D. MO. Case No. 97-3270-CV-S-RGC, MCFP Springfield

Inmate alleges various conditions of confinement violate his constitutional rights and RFRA. Plaintiff is represented by former U.S. Attorney General Ramsey Clark. The DOJ has approved outside counsel for the defendants. Outside counsel, David Baker, filed a responsive pleading on or about September 24, 1997 on behalf of Warden Keohane. Outside Counsel noted that former Regional Director Patrick Kane had not been served and suggested, pursuant to F.R.Civ.P. 25 (a)(1), that Mr. Kane was deceased.

Evans v. United States, District of Kansas, Case No. 97-2502, USP Leavenworth

Current BOP employee alleges that former USP Warden discriminated against him when he assisted another employee by filing a grievance with the U.S. Department of Housing and Urban Development. The case is being referred to the Labor Law Branch.

Johnson v. United States, N.D.Ill., Case No. 96-C-5798, MCC Chicago

The administrator of a dead inmate's estate has sued the United States under the FTCA claiming staff allowed the inmate to hang himself in his cell. MCC legal staff is currently assisting the United States Attorney's Office with several depositions.

Gordon v. Cooksey, S.D.Ill., Case No. 97-CV-513, USP Marion

The plaintiff in this case is a former federal inmate now serving time in with the State of Pennsylvania. The plaintiff alleges that he was beaten by staff at USP Marion and denied adequate medical care. These same allegations were the subject of a FTCA claim and it appears that there is some merit to the plaintiff's claims as there was a finding of misconduct by OIA. The case looks to be very problematic since numerous staff members witnessed the incident but took no affirmative steps to stop a single staff member from slapping and hitting the inmate while he was cuffed. NCRO legal has contacted BOP/OIA to determine if there is any involvement by the DOJ Civil Rights Divisions. NCRO legal is evaluating the merits of settling this matter administratively and the plaintiff was recently contacted but would not provide a specific sum of money for which he would dismiss his claim.

Harrison v. Unger, C.D. Ill., Case No. 96-1132, FCI Pekin

The inmate-plaintiff motion for reconsideration based on newly discovered evidence was denied even though a former BOP employee came forward to support the plaintiff's allegations of retaliation by a staff member. According to the former BOP employee, the plaintiff was written erroneous incident reports after he filed several administrative remedies. The former BOP employee left the agency after being accused of improper relations with inmates.

Stewart v. United States, S.D. Ill., Case No. 97-353, FCI Greenville

The plaintiff alleges that he was forced to have sex with a female cook supervisor. As a result, the plaintiff alleges he suffered emotional distress and seeks compensation under both the Eighth Amendment and the FTCA. The U.S. Attorney's Office is prepared to file a motion to dismiss on the grounds that the employee acted outside of her scope of employment and thus the United States is not liable under the FTCA. The employee, who resigned while being investigated, has not requested

RELIGIOUS FREEDOM RESTORATION ACT CASES

Houston v. Brooks, District of Minnesota, Case No. 97-2081

The plaintiff claims that he was transferred from FCI Sandstone to FCI Lompoc in retaliation for expressing the beliefs of the Nation of Islam. After the inmate gave a sermon containing racially inflammatory statements, he was placed in administrative detention and eventually transferred to California. The plaintiff has sued several employees in their individual capacity under the First Amendment and RFRA. A response in this case is due in early January 1998.

ENSIGN AMENDMENT LITIGATION

No new cases filed.

CRIMINAL MATTERS

United States v. Turner, District of Colorado, Case No. , USP Florence

Inmate assaulted two staff members at USP Florence in 1996. During discovery it became evident that the victims were under investigation by DOJ Civil Rights Division. Counsel for inmates is now seeking copies of the reports.

In the matter of Ellis Lard, District of Colorado, Case No. 97-X-0068, USP Florence

Inmate Lard became involved in an altercation with three staff members at the USP. As a result of injuries suffered during the altercation (bite wounds), it was possible that the staff members could have become infected with HIV. Florence legal staff motioned the District of Colorado for authority to use force to draw the inmate's blood for HIV testing.

ADMINISTRATIVE CLAIMS AND OTHER MATTERS OF INTEREST

We are still waiting for input from the Central Office concerning whether staff who receive a uniform allowance must establish exhaustion of the allowance before reimbursement for lost or damaged clothing is authorized.

TRIALS OR HEARINGS

Urbana Cabrero Aleejo v. Heller, SD Ill. Case No. 94-682-JPG, USP Marion

Status conference and hearing on plaintiff's motion to take the deposition of staff. Motion granted.

United States v. Jones, SD Ill. October Disturbance case, FCI Greenville

Inmate sentenced to 151 months consecutive to current sentence for rioting, mutiny and two counts of assault.

UPCOMING HEARINGS OR TRIALS

DAP Cases Consolidated Before Eighth Circuit Court of Appeals :

Martin v. Gerlinski, District of South Dakota, Case No. 96-4266

Barton v. Gerlinski, District of South Dakota, Case No. 97-4039

Gibbons v. Gerlinski, District of South Dakota, Case No. 97-4150

Luther v. Tippy, District of Minnesota, Case No. 97-17

Braun v. Tippy, District of Minnesota, Case No. 96-327

The Eighth Circuit Court has decided to consolidate three cases from the District of South Dakota with two cases from the District of Minnesota. In each of these cases, the District Courts held the Bureau of Prisons' utilization of sentence enhancements to find a crime violent was valid. The cases from the District of South Dakota are Martin v. Gerlinski, case number 96-4266, Barton v. Gerlinski, case number 97-4039, and Gibbons v. Gerlinski, case number 97-4150. The cases from the District of Minnesota are Luther v. Tippy, case number 97-17 and Braun v. Tippy, case number 4-96-327. FMC Rochester Attorney Jeff Toenges is providing assistance to the Assistant United States Attorney and will be attending the oral argument on December 11, 1997.

Bernal v. Black & Lewis, C.D. Ill., Case No. 96-1209, FCI Pekin

Inmate alleges various staff changed his job and filed an incident report against him in retaliation for filing grievances. The district court has granted summary judgment to all defendants but two. Defendants Black and Lewis were Bernal's work supervisors. Bernal alleges he was retaliated against because he filed grievances about working conditions at the commissary. Final pre-trial conference is scheduled for December 4, 1997.

PERSONNEL ISSUES

Tim Roberts, Supervisory Attorney-Advisor at USP Leavenworth, assumed similar duties at FCC Allenwood. Mary Ellen Doucette-Lunstrum, Attorney-Advisor, FCI Oxford, will succeed Tim.

STAFF TRAVEL AND LEAVE

John	Dec. 18 - Jan. 5	Annual leave
Daryl	Dec. 1 - 4	Legal Review, FCI Milan
	Dec. 29	Annual leave
Dan	Dec. 24	Annual leave
Vincent	Dec. 24, Jan. 2	Annual leave
Gwen	Dec. 29 - Jan. 5	Annual leave
Janet	Dec. 15, Dec. 22 - 26	Annual leave
Gary	None	
Bill	Dec. 24, Dec. 29 - Jan. 5	Annual leave
LeeAnn	Dec. 1 - 12	Paralegal Training, MSTC

Claims database WAN to Mary Rose Hagan on November 30, 1997.

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January 15, 1998

MEMORANDUM FOR WALLACE H. CHENEY, ASSISTANT DIRECTOR
 GENERAL COUNSEL & REVIEW

FROM: JOHN R. SHAW, Regional Counsel

SUBJECT: MONTHLY REPORT (December, 1997)
 (First Quarter Report: 10/1/97 - 12/31/97)

LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS

LITIGATION:

inst	num	hc	ftc	biv	oth	ans	pen	cld	h/t	set	awd
	47	23	3	15	7	15	621	25	4	0	0

- NUM - Number of total lawsuits filed in the month (1)
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Total new cases for calendar year 357

ADMINISTRATIVE CLAIMS:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
70	98	95	66	95	*	151	69	62	72	64	71

Total for Calendar Year 913
Pending 499

ADMINISTRATIVE REMEDIES

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
176	180	210	196	226	140	164	163	154	229	163	

Total for Calendar Year 1,838

FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS

	FOIA	PRIVACY ACT
ACTUAL ON-HAND	0	20
ACTUAL RECEIVED	0	50
ACTUAL PROCESSED	0	48
ACTUAL BACKLOG	0	5

ADVERSE DECISIONS

Martin v. Gerlinski, Eighth Circuit, Case No. 97-2232SD, 1998 WL 7258 (January 13, 1998), FPC Yankton

The Court of Appeals had consolidated the appeals of five denials of habeas corpus relief (three from South Dakota, two from Minnesota) for one year off under the provisions of 18 USC 3621(e). All five offenders had received a two point enhancement of their sentences and were subsequently denied the one year off. In an order dated December 19, 1997, the Court of Appeals reversed the dismissals and remanded the matters to the district courts.

Patel v. Wooten, et al, Tenth Circuit, Case No. 97-1083, D. Colorado Case No. 96-M-286, FCC Florence. (1997 WL 764570)

The Court of Appeals reversed and remanded the dismissal of this Bivens action against BOP staff. Patel is a Hindu who complained that the Common Fare Program at FCI Florence violated his religious rights under the First Amendment and RFRA. In addition, the failure to provide pork substitutes to Jews and Moslems and not meat substitutes for Hindus violated equal protection. The Court of Appeals found that RFRA was declared unconstitutional and did not address the RFRA claims. The court concluded that Patel's right to a religious diet was clearly established in 1994 and the defendants were not entitled to qualified immunity. The matter is under consideration of appointment of private counsel and reconsideration by the panel.

Sisneros v. Booker, D. Col., Case No. 97-Z-0651, FCI Florence

District Court held that the BOP's use of sentence enhancements was contrary to plain-language of 18 U.S.C. 3621. Furthermore, the BOP was estopped from denying the inmate a sentence reduction since it had made several representations to the inmate that he was eligible for early release.

SETTLEMENTS OR JUDGMENTS

Sellers v. United States, SD Ill., Case No. 84-CV-4357, USP Marion

FTCA case for lost or misplaced legal books tried to Magistrate Judge following two different reversals at the appellate level. Judgment in favor of the inmate entered for \$1,633.75.

DECISIONS OF INTEREST

Bush v. Pitzer, Seventh Circuit, Case No. 97-3024, FCI Oxford

The Seventh Circuit affirmed the decision of the district court which denied an inmate early release under 18 U.S.C. 3621. While the court sided with the district court and found that the inmate's crime of selling numerous weapons to gang-members was a crime of violence, it objected to the BOP's use of sentence enhancements in making this determination.

PENDING CASES OF INTEREST

Rahman v. Keohane and Kane, W.D. MO. Case No. 97-3270-CV-S-RGC, MCFP Springfield

Inmate alleges various conditions of confinement violate his constitutional rights and RFRA. Plaintiff is represented by former U.S. Attorney General Ramsey Clark. The DOJ has approved outside counsel for the defendants. Outside counsel, David Baker, filed a responsive pleading on or about September 24, 1997 on behalf of Warden Keohane. Outside Counsel noted that former Regional Director Patrick Kane had not been served and suggested, pursuant to F.R.Civ.P. 25 (a)(1) that Mr. Kane was deceased.

Johnson v. USA, ND Ill Case No. 96-C-5708, MCC Chicago

Wrongful death action for inmate suicide continues. Depositions have been completed, except for plaintiff's expert.

Bickford, Inc. v. Federal Correctional Institution, Juneau County, Wisconsin Circuit Court Case NO. 97-C-623

Former federal contractor alleges FCI failed to return \$1,800.00 in lighting ballasts. Matter is in the process of being removed to federal court.

Evans v. United States, District of Kansas, Case No. 97-2502, USP Leavenworth

Current BOP employee alleges that former USP Warden discriminated against him when he assisted another employee by filing a grievance with the U.S. Department of Housing and Urban Development. The case is being referred to the Labor Law Branch.

Johnson v. United States, N.D.Ill., Case No. 96-C-5798, MCC Chicago

The administrator of a dead inmate's estate has sued the United States under the FTCA claiming staff allowed the inmate to hang himself in his cell. MCC legal staff is currently assisting the United States Attorney's Office with several depositions.

Harrison v. Unger, C.D. Ill., Case No. 96-1132, FCI Pekin

The inmate-plaintiff motion for reconsideration based on newly discovered evidence was denied even though a former BOP employee came forward to support the plaintiff's allegations of retaliation by a staff member. According to the former BOP employee, the plaintiff was written erroneous incident reports after he filed several administrative remedies. The former BOP employee left the agency after being accused of improper relations with inmates.

RELIGIOUS FREEDOM RESTORATION ACT CASES

Patel v. Wooten, et al, see above.

Houston v. Brooks, D. Minn, Case No. 97-2081, FCI Sandstone

The plaintiff alleges the BOP retaliated against him for giving a sermon which was racially inflammatory. The inmate has sued under both RFRA and the First Amendment.

ENSIGN AMENDMENT LITIGATION

No new cases filed.

ADMINISTRATIVE CLAIMS AND OTHER MATTERS OF INTEREST

We are still waiting for input from the Central Office concerning whether staff who receive a uniform allowance must establish exhaustion of the allowance before reimbursement for lost or damaged clothing is authorized.

UPCOMING HEARINGS OR TRIALS

United States v. Mills, D. Col., Case No. , Florence Complex

This case involves civil rights violations by a former staff member and is set for trial on January 12, 1998. While staff were trying to use force to restrain an inmate, Mr. Mills allegedly struck the inmate. After the inmate was fully restrained, Mr. Mills allegedly continued to strike the inmate. Mr. Mills then grabbed the video camera that was documenting the use of force and erased the tape.

Lozano v. Reno, D. Col., Case No. 95-WM-2661, FCI Englewood

The plaintiff in this case is a former probationary employee who was removed from his position for not disclosing pertinent information on his preemployment forms. The case is scheduled for a bench trial on February 9, 1998. The plaintiff cannot seek any damages except for back-pay since he was terminated prior to the enactment of the 1991 Civil Rights Act.

PERSONNEL ISSUES

STAFF TRAVEL AND LEAVE

John	Jan 1 - Jan. 5 Jan 14 - 20	Annual leave Annual Leave
Daryl	None Scheduled	
Dan	None Scheduled	
Vincent	Jan. 12 - 16	TDY to USP Leavenworth
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Claims database WAN to Mary Rose Hagan on December , 1997.

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The plaintiff in this case is a former probationary employee who was removed from his position for not disclosing pertinent information on his preemployment forms. The case is scheduled for

a bench trial on February 9, 1998. The plaintiff cannot seek any damages except for back-pay since he was terminated prior to the enactment of the 1991 Civil Rights Act.

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Gary	None Scheduled	
Bill	None Scheduled	
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