THE NATIONAL PRISON PROJECT

Journal

ISSN 1076-769X

American Civil Liberties Union Foundation

Vol. 11 No. 1 Winter 1996

Prisoner Lawsuits

"There are many people in this nation with grievances large and small who need representation, and their grievances are often minimized, and sometimes even ridiculed, by those in positions of authority".
Hon. Jon O. Newman

"Relatively few of the lawsuits have merit. Many lack substance and only waste the courts' time and the taxpayers' money."
Dan Lungren, Attorney General of California

"Dry words on paper cannot adequately capture the senseless suffering and sometimes wretched misery that defendants' unconstitutional practices leave in their wake."
Hon. Thelton E. Henderson, judge in *Madrid v. Gomez*, the Pelican Bay prison case which began with individual *pro se* filings, later consolidated into a class action.

The *Journal* seems to spend more time reporting on legislation than litigation these days and probably will for a while yet. Bills relating to prisons and prisoners are being introduced, and passed, in state legislatures and in Congress at an unprecedented rate. In the last edition of the Journal, we wrote about the Prison Litigation Reform Act (formerly the Stop Turning Out Prisoners Act or STOP). As we print this edition, PLRA/STOP is still in limbo. The Commerce, State and Justice Appropriations Bill to which it is appended was vetoed by the President but that Appropriations Bill is now part of the omnibus "Continuing Resolution" designed to provide money for the so-far unfunded departments and agencies through the end of the fiscal year.

The Appropriations Bill also includes restrictions on the amenities that will be permitted to federal prisoners. So-called "no-frills" bills are being passed in many states too, despite strong objections from corrections staff.

The PLRA restrictions on the filing of pro se lawsuits are also being copied at the state level. For example, New Jersey has just passed a bill that would take away good time from prisoners filing frivolous law suits. In addition, any prisoner who was awarded a money judgement as a result of his suit would have the money taken to pay fines, restitution and penalties.

There has been a great deal of disinformation put out to justify these bills. All suits filed by prisoners, regardless of merit, are referred to as "frivolous" and the costs to the state of defending every case involving prisoners, from state-wide class actions to the smallest pro se suit, are lumped together to give a distorted view of the dollars and resources spent. Attorneys General in several states have compiled their lists of the ten most frivolous lawsuits, many of which distort the facts of the case and their outcomes. For example, the infamous case of "the prisoner who sued because he was given chunky instead of smooth peanut butter" was not in fact about peanut butter at all, but about the prison's failure to refund the prisoner money he was due. The case of "the prisoner who sued over the color of his towels" was not about the color of towels at all but about the uncompensated loss of personal property.

Critics of prisoner litigation cite a "flood" of cases. What do they expect? There is a flood of prisoners.

According to the Federal Bureau of Justice Statistics, total prison population (excluding jails) grew by more than 150% between 1982 and 1994 -- from 413,808 to 1,053,738. Prisoner litigation has shown a much smaller increase. Prisoners' filed 57,940 law suits in federal courts in 1994 -- an increase of less than 98% over the 29,303 suits filed in 1982.

Prisoners are becoming less, not more, litigious.

The other side to the story of prison lawsuits is rarely heard. Scores of inmates have received damages in recent years in cases about guard brutality, medical neglect, and other injurious mistreatment. Then there arethe larger-scale victories, the class actions that have forced the wholesale reform of entire prisons and prison systems, the upgrading of prison medical and mental health care, and the curbing of the physical abuse, racial discrimination, and arbitrary discipline that have characterized much of American prison life. It's fair to say that litigation (or the threat of it) has made almost every aspect of prison life more humane.

Accounts of the burden that these cases put on the courts and on the state attorneys general and municipal and county counsel who must defend them are exaggerated. If a case is genuinely frivolous, the courts will not hesitate to dismiss it before trial if the defense attorney files a motion to dismiss or for summary judgment -- which, in a frivolous case, won't take a competent attorney much time to prepare. Unfortunately, government counsel often do not proceed timely and competently to get these cases dismissed. In cases where prisoners do not have lawyers, the states' practice is often to ignore the case until forced to act, or to file only perfunctory "boilerplate" motions that do not address the specifics of the prisoner's case and are therefore not granted by the court. So when we hear that it took two years of wrangling to dispose of a prisoner's complaint that he received the wrong kind of peanut butter, it's hard to avoid thinking that the case was not defended very efficiently.

Another exaggerated argument is based on the success rate of prisoner cases, which is very low. From this fact the critics infer that most prison cases are frivolous. However, many prisoner cases are unsuccessful because the prisoners cannot get lawyers and can't navigate the technicalities of the court system by themselves. Often, a prisoner whose legal rights have been violated will lose simply because he or she sued the wrong person, or filed in the wrong court, or is not capable of preparing a coherent response to the state's motion to dismiss. In other cases, prisoners with valid claims fail to prove them at trial because they cannot master the mechanics of discovery (obtaining pre-trial disclosure of facts and documents) or getting witnesses subpoenaed to court.

It is also claimed that prisoners file lawsuits for entertainment or out of spite. It happens, but it's not common. Pursuing litigation is hard work for most prisoners, who rarely have any legal education and in many cases haven't even made it through high school. It is true that a small number of prisoners cause a large amount of trouble by filing multiple lawsuits with false or repetitive allegations or challenging actions that simply don't violate the law. However, the courts already have ample tools to deal with these cases. Most prisoner seek to proceed "in forma pauperis," without paying the usual filing fee. The courts are permitted to dismiss such cases out of hand, without even asking for a response from the state, if they obviously lack "an arguable basis in law or fact." Prisoners who repeatedly abuse the judicial system can be ordered to cease their abuses, and the orders are enforceable with sanctions including fines.

The fact remains that there are a lot of prisoner cases, they take time to deal with, and most of them are unsuccessful. What can be done to improve the situation?

First, states can create meaningful prison grievance systems. This means putting the final decision in the hands of a body that is independent of the prison bureaucracy and is capable of enforcing its decisions. Prison systems, like police departments, are simply too insular and self-protective to deal fairly with prisoners who buck the system. If states provide grievance systems that are fair and quick, and that provide a full range of remedies, prisoners will use them, and the number of lawsuits will be reduced.

Second, legal assistance programs for prisoners should be maintained and, where necessary, created or expanded. Providing prisoners with legal advice has several benefits. If a lawsuit is necessary, it is more likely to be done right and waste less of everyone's time, including the prisoner's. If there is no basis for a lawsuit, and someone the prisoner trusts explains why, the lawsuit may not be filed. Finally, if the problem is capable of resolution without a lawsuit, an attorney is more likely to get it resolved than the prisoner on his own. Complaints that would be laughed off or ignored when made by prisoners are taken much more seriously when they appear under a lawyer's letterhead.

Finally, everyone concerned should stop viewing prisoner litigation as a problem to be remedied and acknowledge that it is one part of the system of checks an balances of our constitutional order. Meaningful and effective access to our courts is a right guaranteed by the constitution to everyone, including prisoners, and it cannot be abridged for reasons of administrative convenience. Power corrupts, and the power that is exercised behind the walls and locked doors of prisons is no exception. The courts' independent scrutiny is essential to curbing abuses of power and maintaining minimally decent treatment of prisoners.

This review of prisoner lawsuits was adapted from an article by David Leven, Prisoners' Legal Services of New York, and John Boston, Prisoners' Rights Project of the Legal Aid Society.

The National Prison Project is a special project of the ACLU Foundation which seeks to strengthen and protect the rights of adult and juvenile offenders; to improve overall conditions in correctional facilities; and to develop alternatives to incarceration.

The reprinting of *Journal* material is encouraged with the stipulation that the National Prison Project *Journal* be credited as the source of the material, and that a copy of the reprint be sent to the editor.

The *Journal* is published quarterly by The National Prison Project of the American Civil Liberties Foundation Inc.
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Case Law Report – Highlights of Most Important Cases

by John Boston

EQUAL PROTECTION WOMEN'S RIGHTS

A recent Eighth Circuit decision highlights the continuing uncertainty about the standards governing prisoners' claims of unconstitutional gender discrimination. In *Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995), the court vacated and remanded the district court's dismissal of Iowa women prisoners' claim that programs available to them were so unequal to those available to male prisoners as to violate the Equal Protection Clause. It did so in terms clearly intended to limit the application of a 1994 Eighth Circuit decision, *Klinger v. Nebraska Dept. of Correctional Services*, 31 F.3d 727 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1177 (1995), that appeared drastically to curb such claims.

There are only a few decided cases concerning gender equality in prison. Most of them involve claims of unequal program opportunities and were decided at the "heightened" or "intermediate" level of equal protection scrutiny, using a test that emphasizes "parity of treatment." One court described this test as requiring prison officials "to provide women inmates with treatment facilities that are substantially equivalent to those provided for men--i.e., equivalent in substance, if not in form--unless their actions . . . nonetheless bear a fair and substantial relationship to achievement of the State's correctional objectives." *Glover v. Johnson*, 478 F.Supp. 1075, 1079 (E.D.Mich. 1979); accord, *McCoy v. Nevada Dept. of Prisons*, 776 F.Supp. 521, 523 (D.Nev. 1991); *Glover v. Johnson*, 721 F.Supp. 808, 848-49 (E.D.Mich. 1989) (explaining "parity" in more detail), aff'd in part and rev'd in part on other grounds, 934 F.2d 703 (6th Cir. 1991); *Canterino v. Wilson*, 546 F.Supp. 174, 210-12 (W.D.Ky. 1982), vacated and remanded on other grounds, 869 F.2d 948 (6th Cir. 1989); *Dawson v. Kendrick*, 527 F.Supp. 1252, 1317 (S.D.W.Va. 1981); *McMurry v. Phelps,* 533 F.Supp. 742, 767-68 (W.D.La. 1982); see also *Smith v. Bingham,* 914 F.2d 740, 742 (5th Cir. 1990) (upholding separation of sexes in prison as having a "substantial relationship" to important security objectives).

This approach was taken by the district court in *Klinger*, which held that inequities in pay for prison jobs, educational opportunities, court access arrangements, medical and mental health care, and recreation and exercise opportunities violated the Equal Protection Clause. *Klinger v. Nebraska Dept. of Correctional Services*, 824 F.Supp. 1374 (D.Neb. 1993). On appeal, however, the Eighth Circuit reversed, and did so in a manner that did not address the nature of and justification for the disparities proven at trial. Instead, it simply held that female and male prisoners were not "similarly situated" and therefore there was no viable equal protection claim. The court cited a laundry list of differences between the genders: the women's prison is smaller than the men's prisons, the length of stay for men is longer, the women's prison has a lower security classification than some of the men's prisons, and women prisoners have "special characteristics distinguishing them from male inmates, ranging from the fact that they are more likely to be single parents with primary responsibility for child rearing

to the fact that they are more likely to be sexual or physical abuse victims." *Klinger v. Department of Corrections*, 31 F.3d 727, 731-32(8th Cir. 1994). For these reasons, the court held that the prison programs at issue "reflect separate sets of decisions based on entirely different circumstances" and stated that comparing an "isolated number of selected programs" between the prisons is a "futile exercise." The court's result-oriented agenda then became explicit as it stated that the decision in *Turner v. Safley*, 482 U.S. 78 (1987), counsels against holding that male and female prisoners are similarly situated, because such a conclusion would lead to examination of the day-to-day administrative decisions of prison officials. In this court's view, merely subjecting prison officials' decisions to any scrutiny is an evil to be avoided. *Id.* at 732-33.

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This approach radically repudiates previous case law on gender equality. Simply changing the level of scrutiny from heightened or intermediate scrutiny to the lowest level of equal protection analysis, the reasonable relationship test, would have been a major change--albeit one that could have been rationalized by reference to *Turner v. Safley*, which adopts a reasonable relationship test for other kinds of constitutional claims. *Klinger*, however, frees prison officials from having to meet any standard of scrutiny. Moreover, there is no indication that the factors cited to show that the two genders were not similarly situated actually had any connection with the different treatment of the genders. The question was not addressed, and *Klinger*'s message is that it should not even be asked.

On remand, the district court concluded that the appeals court's ruling had so undermined the factual basis of the plaintiffs' claim under Title IX of the Education Amendments of 1972 as to mandate its dismissal. *Klinger v. Nebraska Dept. of Corrections*, 887 F.Supp. 1281 (D.Neb. 1995).

The perversity of *Klinger*'s approach to equal protection analysis can best be appreciated by applying it to racial discrimination. Using standard statistical sources, one could establish that African-Americans are not similarly situated to white Americans: on average, African-Americans earn less money, have lower educational levels, are more often unemployed or incarcerated, live in more deteriorated and crime-ridden neighborhoods, are less likely to own their own homes, have higher rates of illegitimate births and infant mortality, etc. Under *Klinger*'s logic, this could be the end of the analysis in a claim of racial discrimination by a governmental agency.

The perversity of Klinger*'s approach to equal protection analysis can best be appreciated by applying it to racial discrimination.*

In *Pargo*, the district court followed *Klinger*, dismissing the case after trial on the ground that the genders were not similarly situated. The appeals court held that this was error because the *Pargo* plaintiffs took a different approach from those in *Klinger*: "[t]hey focused on differences in programs available to men and women with the same types of custody classification and sentence length." 49 F.3d at 1356. It also acknowledged the *Turner v. Safley* rational relationship standard and its principle of deference to prison officials, but noted: "Not all reviews of prison policies or practices require judicial deference, however." It cited another circuit's conclusion that heightened scrutiny rather than the *Turner* standard governs "general budgetary and policy choices." *Id.* at 1357, quoting *Pitts v. Thornburgh*, 866

F.2d 1450 (D.C.Cir. 1989). With this gentle hint, it remanded for further factual findings and a determination by the district court of the proper standard.

The practical message of *Pargo* for prisoner advocates is that equal protection claims will have to be pled and proved with much more precise comparisons of male and female prisoners, requiring greater attention to the context in which seemingly unequal treatment of the genders takes place. The broader question of how the courts will treat such claims remains unresolved. On a theoretical level, Pargo distinguishes Klinger and is in harmony with it. But a realistic reading of the opinions is that they are ideologically poles apart. Not surprisingly, the two judges in the *Klinger* majority were appointed by President Reagan. The dissenter in *Klinger* and the unanimous panel in *Pargo* consist of three judges appointed by Democratic Presidents and one from the kinder, gentler Republican era of 1970.

Under this analysis, ... there could never be a successful equal protection claim by women prisoners in ...[a] prison system with only one or a few women's prisons, regardless of the nature of the inequalities.

On remand, the district court in *Pargo* again ruled for the defendants. It concluded again that women inmates were not similarly situated to men, since women of all classifications were contained in a single institution, unlike male inmates. Under this analysis, it appears that there could never be a successful equal protection claim by women prisoners in the Iowa prison system, or any other system with only one or a few women's prisons, regardless of the nature of the inequalities. (The court also cited differences in length of incarceration and other factors.) *Pargo v. Elliott*, 899 F.Supp. 1243 (S.D.Iowa 1995) *aff'd* 69 F.3d 280 (8th Cir. 1995) *reh'g* denied, *Pargo v. Elliott*, 1996 U.S. Ct. of App. Lexis 474 (8th Circ. 1996). Despite this conclusion, the district court went on to subject all of the challenged practices to equal protection scrutiny under the rational relationship standard. (It found that there was no challenge to "general budgetary and policy choices" and therefore no reason to apply heightened scrutiny.) The court concluded that none of the policies denied equal protection, repeatedly using the phrases "gender neutral in design and application" and "substantially similar" in characterizing them. In substance, it found differences in treatment, but not inequality. The court also surveyed the record for evidence of intentional discrimination, noting that, contrary to *Klinger,* other Eighth Circuit precedent supported such an inquiry even if the genders were not similarly situated. *Id.*

Other Cases Worth Noting

U.S. COURT OF APPEALS

Qualified Immunity/ Clothing/Hygiene

Williams v. Delo, 49 F.3d 442 (8th Cir. 1995). The plaintiff got into an altercation in the visiting room. He was summarily placed into "temporary administrative segregation on limited property status, that is, a strip cell." He was deprived of his clothes and the water to the cell was shut off; there was no mattress. The plaintiff was denied a toothbrush and other hygiene items. These conditions persisted for three or four days and the plaintiff was then returned to general population. The plaintiff was not deprived of the" minimal civilized measure of life's necessities." He got "three meals a day . . . and was sheltered from the elements. While he did not have any

clothing or bedding, we have held there is no absolute Eighth Amendment right not to be put in a cell without clothes or bedding." (445-46) He was not injured and his health was not impaired.

With respect to the subjective element, the plaintiff's requests for water and hygiene items "falls short of a showing that [the defendant] knew of and disregarded an excessive risk to Williams' health and safety." (446) (The court does not address these factors in discussing the objective component.)

This opinion is an example of the way in which the Supreme Court's focus in *Helling* and *Farmer* on health and safety issues has been taken by some lower courts to exclude claims based on conditions that are merely disgusting or humiliating. Actually, this court goes further, dismissing its earlier precedents as "from an earlier era of Eighth Amendment jurisprudence. . . . Whether the conduct of prison officials 'shocks the conscience' of this Court is irrelevant. '[T]he objective standard of culpability is out,' and the 'subjective standard of culpability' is in." (446, citations omitted)

Protection from Inmate Assault/Classification

Hale v. Tallapoosa County, 50 F.3d 1579 (11th Cir. 1995). The plaintiff was held in the 13 by 20 foot "bullpen" of a county jail along with assorted other inmates who were not segregated based on their proclivity for violence or the reasons for their confinement. He was assaulted by other inmates.

Evidence that inmate-inmate violence "occurred regularly when the jail was overcrowded," as had been the case for two years, and that the violence was severe enough to require medical attention and even hospitalization on occasion, was sufficient to establish a "substantial risk of serious harm" (1583) for purposes of summary judgment.

Evidence that the Sheriff knew of the violence and its consequences, including expert testimony that given the conditions "it was plainly foreseeable to a reasonable law enforcement official that a violent act was likely to occur" (1583), sufficiently established the Sheriff's subjective knowledge of the risk.

Evidence of the Sheriff's failure to take reasonable measures to reduce the risk of violence was sufficient to withstand summary judgment. These measures included classifying and segregating the inmates based on likelihood of violence; assigning inmates to cells and bunks rather than letting them choose; adequately training jailers; and adequately supervising and monitoring the inmates. While the Sheriff's efforts to have a new jail built could be considered by a jury, they did not entitle him to summary judgment; liability could be based on the lack of alternative means or interim measures to reduce the risk.

Modification of Judgments/ Mental Health Care

King v. Greenblatt, 52 F.3d 1 (1st Cir. 1995). A consent decree provided that a "Treatment Center for Sexually Dangerous Persons" should be

operated by the Department of Mental Health; a state statute transferred it to the Department of Correction. This change constitutes a significant change in law for purposes of Rufo. The requirement of Department of Mental Health operation would have been "inconceivable" had state law not already provided for it when the decree was entered.

The district court should consider whether the proposed modification is appropriately tailored, giving substantial weight to the views of officials who must implement it, and relying primarily on its jurisdictional oversight to ensure the Department of Correction's compliance with the decree.

Medical Records/ Privacy

Jarvis v. Wellman, 52 F.3d 125 (6th Cir. 1995). The plaintiff's father, who had sexually abused her, obtained access to her medical records through an inmate work program. Her rights were not violated.

There is no general right to privacy from disclosure of personal information. (The Sixth Circuit is in conflict with several other circuits on this point.)

Legal Assistance Programs

Carper v. DeLand, 54 F. 3d 613 (10th Cir. 1995). The Utah prison system provides legal assistance through a contract with local attorneys; there are no law libraries in the prisons and inmates are not allowed assistance from "writ writers." The contract was changed to eliminate general legal assistance in civil matters and to restrict the attorneys' services to initial pleadings, writs of habeas corpus and challenges to conditions of confinement. The district court held that the state was obligated to provide assistance in civil cases that involved "fundamental rights" and entered an injunction.

> The state's program met constitutional requirements. At 616-17:
> . . . . Other than habeas corpus or civil rights actions regarding current confinement, a state has no affirmative constitutional obligation to assist inmates in general civil matters. . . . Further, an inmate's right of access does not require the state to supply legal assistance beyond the preparation of initial pleadings in a civil rights action regarding current confinement or a petition for a writ of habeas corpus.

Protection from Inmate Assault/AIDS/Damages--Assault and Injury/ Pleading/In Forma Pauperis/ Pro Se Litigation

Billman v. Indiana Dept. of Corrections, 56 F.3d 785 (7th Cir. 1995). The plaintiff alleged that prison officials failed to protect him from rape by an HIV-positive cellmate despite their knowledge of his assailant's propensity to rape.

The plaintiff's failure directly to allege the personal responsibility of the defendants was not fatal to his claim.

At 789-90:

> The peculiar perversity of imposing heightened pleading standards in prisoner cases--a course of highly doubtful propriety after Leatherman . . -- is that is far more difficult for a prisoner to write a detailed complaint

than for a free person to do so, and again this is not because the prisoner does not know the law but because he is not able to investigate before filing suit. We think it is the duty of the district court to assist him, within reason, to make the necessary investigation.

This can be done by appointing counsel for the limited purpose of determining whether the complaint can be amended to name proper defendants.

Or the district judge can first direct the plaintiff to make efforts on his own to obtain counsel. At 790: "If his case is both substantial in money terms and has substantial merit, the plaintiff will have a fair shot at obtaining counsel and if he fails this may indicate that the case has no merit after all."

At 788: Although the plaintiff apparently did not contract HIV, "the fear caused by the rape itself, and the additional fear of contracting HIV until that fear was finally dispelled, would be normal items of damages, certainly in a case such as this of actual rather than merely feared exposure."

DISTRICT COURTS

Food/Cruel and Unusual Punishment/Personal Involvement and Supervisory Liability

Williams v. Coughlin, 875 F.Supp. 1004 (W.D.N.Y. 1995). The plaintiff was allegedly denied food for two days (i.e., five meals) because he failed to return his used tray as prison rules required. He subsequently passed out. The court rejects the argument that refusing to return the tray was "deemed" a refusal of the meal, since the plaintiff made it clear to prison officials that he was not refusing food.

A two-day denial of food is sufficiently serious to violate the Eighth Amendment, and there is precedent for finding that "the withholding of food is grossly disproportionate punishment for a prisoner's refusal to comply with a rule requiring the return of food containers to prison guards, when, as in the present case, the prisoner has not engaged in the kind of conduct that the rule was designed to prevent." (1013) However, the matter was not so clear as to support summary judgment for the plaintiff.

The risk of extended deprivation of food is sufficiently obvious to withstand summary judgment as to the defendants' culpable state of mind, with respect to the officer who withheld the food, the Superintendent who promulgated the policy, and the staff members who investigated the prisoner's complaint.

Religion/Religion--Services Within Institution/Publications

Woods v. Evatt, 876 F.Supp. 756 (D.S.C. 1995). The Religious Freedom Restoration Act applies to prisons.

Prison officials did not violate the RFRA or the First Amendment by requiring Jumu'ah services to be conducted in a "multipurpose building" rather than in the visiting room where outsiders could attend, as was the case with Christian services. Jumu'ah services were conducted on Fridays, when the visiting room was in use by visitors and was therefore unavailable; Christian services did not take place at the same time as visiting.

Prison officials did not violate the RFRA or the First Amendment by barring persons not registered as Muslims from attending the Friday services, since Friday is a work day for non-Muslims. Those not prepared to register as Muslims could attend the Muslim study group, held at a different time. The burden was not substantial.

The lack of a part-time Muslim chaplain at one prison did not violate the RFRA or the First Amendment; it was temporary, and the defendants were trying to fill the position.

Differences in support provided to Muslim and Christian activities did not violate the RFRA or the First Amendment since they stemmed either from differences in support received from outside the prison or from differences in the numbers of adherents of each religion.

The application of a "publisher-only" rule to religious publications did not deny the RFRA or the First Amendment where it was applied to everyone.

The failure of prison officials to provide incense does not violate the RFRA or the First Amendment. The court appears to believe that such affirmative assistance to religious activity would run afoul of the Establishment Clause.

Denial of access to congregate worship services to administrative segregation inmates did not violate the RFRA or the First Amendment, since it applied to everyone.

Prisoners were permitted to receive gifts from outside during December. Refusing to permit receipt of gifts to Muslims during Muslim holidays did no violate the RFRA or the First Amendment since receiving gifts would was not "central to the practice of [their] beliefs" and it would result either in giving the Muslims privileges not enjoyed by other groups or in a "bureaucratic nightmare" of allowing different groups to receive gifts at different times.

The denial or the right to organize fund raising activities did not violate the RFRA or the First Amendment where the prisoners had not sought approva for these activities through the normal channels.

Women

Women Prisoners of the District of Columbia Dept. of Corrections v. District of Columbia, 877 F.Supp. 634 (D.D.C. 1994) The D.C. jail system gets its head handed to it once more.

Use of Force/Cruel and Unusual Punishment-- Totality of Conditions/Verbal Abuse/ Municipalities

(665-66): A pattern of sexual harassment in the D.C. jails violates the Eighth Amendment. The court refers to rape and other physical touching, and adds (at 665):

> In combination, vulgar sexual remarks of prison officers, the lack of privacy within CTF cells and the refusal of some male guards to announce their presence in the living areas of women prisoners constitute

a violation of the Eighth Amendment since they mutually heighten the psychological injury of women prisoners.

The exposure of prisoners' bodies without justification is also unacceptable. (The court rules on Eighth Amendment rather than privacy grounds.) The defendants had sufficient knowledge of the pattern of harassment to hold them liable under the deliberate indifference standard, and their inadequate responses to complaints (lack of training, policy and procedure, and inadequate investigations) supported the conclusion. (One administrator said that "you cannot take adverse or corrective action against the employee because you believe the inmate over the employee.") The municipality is liable for the "custom" of sexual harassment.

Pregnancy, Childbirth and Abortion/Pendent and Supplemental Claims/Medical Care--Standards of Liability/ Communication of Medical Needs/Medical Privacy/ Access to Outside Care

(667-68): The court adjudicates plaintiffs' claim of inadequate obstetrical and gynecological care under a D.C. statute that "encompasses the common law rule which imposes upon prison authorities and employees, [*sic*] a duty to exercise reasonable care in the protection of prisoners." At 667: In the area of medical care, physicians owe the same standard of care to prison confidential sick call procedure.

Extensive remedial provisions are entered (681-84).

Pregnancy, Childbirth and Abortion/Use of Force--Restraints/Cruel and Unusual Punishment--Proof of Harm

(668-669): Claims concerning shackling of pregnant women prisoners, child visitation, and child placement counselling are adjudicated under *Wilson v. Seiter* rather than *Estelle v. Gamble*. Defendants' manner of shackling women in their third trimester (leg shackles, handcuffs, belly chain and "black box") is unconstitutional; leg shackles provide sufficient security, and these must be removed during labor and shortly thereafter.

Denial of child visiting and lack of child placement counselling together constitute an Eighth Amendment violation "because they have a mutually enforcing risk of trauma for women prisoners who have recently delivered babies. Few events could be more stressful than the forced separation of a parent from his or her child." They "heighten a mother's anxiety to an unreasonable level." Psychological injury is cognizable under the Eight Amendment.

Fire Safety/Injunctive Relief/Negligence, Deliberate Indifference and Intent

(669-70): Dormitory crowding, a high combustible load, lack of compartmentation, locked fire exits, lack of a fire alarm or sprinkler system, and lack of regular fire drills each have "a mutually enforcing effect of exposing residents to an unconstitutionally intolerable risk of injury by fire. . . The Court does not have to wait for the Plaintiffs to be incinerated before it can order the Defendants to raise the level of fire safety. . . ." At 670: "References to litigation costs [in defendants' internal documents proposing improvements] suggest that the Defendants in this instance will respond only to court orders."

(671-72): Fire safety issues at one jail are decided based on a D.C. statute. (670):

The infestation of roaches, torn mattresses, inadequate bathing and toilet facilities, excessive crowding, lack of mechanical ventilation, unclean floors, inadequate drainage, inadequate lighting, and uncovered

dumpsters all have been shown to raise the risk of illness and injury to a constitutionally unacceptable level.

In light of defendants' knowledge of the conditions, their limited remedial efforts on the eve of trial failed to show that they were not deliberately indifferent.

A similar recitation is made at another jail (672), including a malfunctioning heating unit.

Noise/Cruel and Unusual Punishment--Proof of Harm

(671): ". . . [T]he Court is reluctant to find unconstitutional anything which simply increases 'stress' unless it is truly egregious. For this reason the Court does not find that the daytime noise levels significantly threaten the health of women prisoners."

Equal Protection/Education and Training/Work Assignments

(673-78): Title IX of the Education Amendments of 1972 applies to prisons. No discriminatory intent need be shown because the segregation of men and women into separate facilities with unequal program opportunities is not a facially neutral policy. The court compares groups of female and male prisoners that it finds "similarly situated" by virtue of similar custody levels, sentence structures and purposes of incarceration. The court rejects the claim that women's "unique needs and characteristics" render the sexes dissimilar; that approach would prevent men and women from ever being compared.

Educational access and work assignments are unequal in the women's prisons in some respects. The work release program is unequal because of sluggish processing of paperwork, lack of transportation to interviews, etc.

Exercise and Recreation

(677): Recreational opportunities and facilities are unequal in some respects.

Religion

(677-78): Women are provided unequal access to chaplains and religious services.

Hazardous Conditions and Substances

(678-79): A ban on smoking for women at one jail based on its inconsistency with a substance abuse treatment program involving some women at that jail did not deny equal protection.

Injunctive Relief

(679-90): An extensive remedial order is entered simultaneous with the court's liability opinion. An existing special Master is directed to assume certain monitoring tasks, and other forms of monitoring (e.g., environmental health and fire safety inspections) are ordered.

Modification of Judgments/ Judicial Disengagement/ Monitoring and Reporting/ Work Assignments

Hadix v. Johnson, 879 F.Supp. 743 (E.D.Mich. 1995). The defendants moved to modify the Out-of-Cell Activity Plan, which is intended to ensure that over 75% of the prisoners have at least seven house of "meaningful" out-of-cell activity on weekdays and five hours on weekends.

The factual changes cited by defendants, assuming they actually occurred, did not justify modification because they did not in fact make

compliance substantially more onerous. For example, a claimed decrease of interest by prisoners in academic and vocational programs did not support modification given that the defendants were close to compliance and there were waiting lists for the programs.

Changes in public opinion in opposition to education for prisoners do not support relief under Rufo. At 749: "A decree is detrimental to the public interest when there is an increased risk of harm to the public if the decree is enforced."

Changes in the organization of the prison and its activities are not shown to have made compliance more burdensome. At 750: "Furthermore, since the changes were planned and implemented by defendants, they cannot now claim that their own actions create unforeseen circumstances."

Reductions in violence do not justify modifying the decree, since they do not make compliance more onerous or unworkable or detrimental to the public interest. If anything, these changes facilitate compliance with the plan. The fact that the plan was in part intended to alleviate violence doesn't mean it should be modified; "it would be perverse to modify the plan simply because it contributed to improving the very conditions that it was intended to improve." (750)

Certain requirement of the decree are modified based on changes such as the closing of particular cell blocks.

The court addresses "finality" in the same way as in the companion opinion in *Glover v. Johnson*, 879 F.Supp. 752 (E.D.Mich. 1995).

Furnishings/Pest Control/ Heating and Ventilation

Askew v. Fairman, 880 F.Supp. 557 (N.D. Ill. 1995). The plaintiff alleged that he was forced to sleep on the floor at various times, that the jail floor was infested by mice, roaches and other vermin, and that the floor temperature was about 35 degrees during the winter months. These conditions, while unsanitary and uncomfortable, do not violate the Eighth Amendment.

NON-PRISON CASES

Contempt/Consent Judgments

Wilder v. Bernstein, 49 F.3d 69 (2d Cir. 1995). The district court entered an order that it characterized as an interpretation of a consent decree but the defendants said was really an unwarranted modification. If the latter, it was an appealable order. The court must therefore resolve the merits of the appeal to determine whether it has jurisdiction.

The all-inclusive language of the decree concerning foster children is not limited by the fact that a particular category of them was not raised in the complaint since it didn't exist at that time. The relief that can be granted in a consent decree is not necessarily limited to the harms alleged in the complaint; the court gives effect to the decree's broad language. The plaintiffs' long delay in seeking relief does not support the narrow construction pressed by the defendants.

Attorneys' Fees and Costs

Haldeman v. Pennhurst State School & Hospital, 49 F.3d 939 (3d Cir. 1995). Fee awards in contempt proceedings are determined by a more generous formula than under § 1988. At 941: "In that setting, the innocent party is entitled to be made whole for the losses it incurs as the result of the contemnors' violations, including reasonable attorneys' fees and expenses."

Counsel's dealing with the press and other publicity work is not compensable. Escorting non-testifying experts on site visits was not compensable as attorney time; paralegals could do it.

Experts' fees are compensable in a contempt proceeding regardless of contrary law under § 1988. However, neither experts' fees nor attorney time in consulting with non-testifying experts is compensable absent a showing of necessity.

Attorneys' Fees

Kilgour v. City of Pasadena, 53 F. 3d 1007 (9th Cir. 1995). The Supreme Court's Farrar decision does not preclude the recovery of attorneys' fees under the catalyst theory. In this case, it was not necessary to invoke a catalyst theory because the plaintiff obtained an enforceable stipulated judgment. The district court erred in denying fees on the ground that the matter would have been settled just as quickly without a lawsuit.

Use of Force/Damages--Assault and Injury/Attorneys' Fees and Costs

Dunn v. Denk, 54 F. 3d 248 (5th Cir. 1995). Psychological injury may meet the "significant injury" standard formerly used in Fifth Circuit use of force cases. This plaintiff presented evidence of post-traumatic stress syndrome which impaired her recovery from depression (she was out on a weekend pass from a mental hospital).

The Fifth Circuit's rule that injury must have resulted "directly and only" from force that was excessive was intended to distinguish between injuries resulting from excessive force and those resulting from justified force. At 251: "It was not intended to displace the venerable rule that a tortfeasor takes his victim as he finds him or to immunize the exacerbation of a pre-existing condition. . . ." (Footnotes omitted)

The denial of compensatory damages was inconsistent with the finding of liability (the fury also awarded $10,000 in punitive damages). The court remands for a new trial on damages only.

An award of $17,500 in attorneys' fees was appropriate despite the fact that the plaintiff received only $10,000 in damages compared to the $200,000 sought in the complaint. At 252: "This method of weighting the value of legal services fails to take cognizance of the degree of success obtained." (Footnote omitted).

John Boston, Director, Prisoners' Rights Project of The Legal Aid Society of New York.

Note to prison litigators

In preparation for legal challenges to the Prison Litigation Reform Act, the NPP is coordinating the development of memoranda and model briefs. If you would like copies, please contact Jenni Gainsborough at the Project by mail, phone, fax or e-mail (see page 3).

News and Events

A Vision Beyond Survival: A Resource Guide for Incarcerated Women.

The National Women's Law Center Women in Prison Project has recently published a compilation of the information gathered and disseminated by the Women in Prison Project over five years working with women prisoners in the District of Columbia. The *Resource Guide* provides women with information, resources and strategies necessary to negotiate the prison system, stay healthy, maintain family ties, and thrive in the community once they are released. The *Resource Guide* provides critical information for women prisoners and advocates on a wide range of subjects, including sentencing, parole, sexual harassment, child custody, medical care, HIV/AIDS, drug treatment, public benefits, housing and job training. While the Resource Guide identifies resources serving low income women in the Washing DC area, it also contains information vital to prisoners' advocates and correctional administrators across the nation. The guide costs $40 plus 6.5% sales tax for DC residents ($25 for non-profit organizations), prepaid and is available from the National Women's Law Center, 11 Dupont Circle, Suite 800, Washington DC 20036. Phone (202) 588-5180, fax (202) 588-5185.

Prison Suicide: An Overview and Guide to Prevention

The National Center on Institutions and Alternatives has released a 108-page monograph on prison suicide developed by their assistant director Lindsay Hayes and funded by a grant from the National Institute of Corrections. The *Overview and Guide* provides a thorough discussion of the literature, a review of national and state standards for prison suicide prevention, national data on the incidence and rate of prison suicide, effective prison suicide prevention programs, and a discussion of liability issues. The publication is available free from the National Institute of Corrections' Information Center, 1860 Longmont Circle, Suite A, Longmont, CO 80501. The NCIA also publishes a quarterly newsletter, *Jail Suicide/Mental Health Update* devoted to various areas of jail suicide prevention, including research training, litigation and technical assistance. The newsletter is available at no charge from NCIA, 40 Lantern Lane, Mansfield, MA 02048, phone (508) 337-8806, fax (508) 337-3038.

Prison conference in Maryland

The 1996 National Convocation of Jail and Prison Ministry will be held May 18-22, 1996, at the National 4-H Center, 7100 Connecticut Avenue, Chevy Chase, Maryland. The theme of this year's gathering is "Fear and Violence in America: Building Bridges in a Prison Society." Keynote speakers, panelists, and workshop presenters will address the multiple injustices of the criminal justice system. There will be a demonstration against the death penalty at the Supreme Court and congress will be lobbied on issues that negatively impact victims and offenders. For further information or registration forms, write or phone the National Convocation of Jail and Prison Ministry, 1357 East Capitol Street, SE, Washington, DC 20003. (202) 547-1715.

Note to Journal subscribers

The latest edition of the *Annual Status Report on State Prisons and the Courts* will be sent to all *Journal* subscribers under separate cover. A summary of the report will appear in next quarter's *Journal.*

Highlights -- National Prison Project Litigation

The following are major developments in the National Prison Project's litigation program since October 1995. Further details of any of the listed cases may be obtained by writing the Project.

Lewis v. Casey

On November 29, oral argument was heard in the Supreme Court on the trial court's ruling that the Arizona Department of Corrections' policies unconstitutionally restrict prisoners' access to the courts. The trial court's ruling was made in November 1992 and upheld by the Ninth Circuit Court of Appeals, in a unanimous decision in November 1994. A number of *amicus* briefs were also filed, including an *amicus* by the Solicitor General supporting the prisoners. The Court's opinion is awaited.

Onishea v. Herring

In this case challenging the Alabama Department of Corrections' policy of segregating HIV+ prisoners, the Eleventh Circuit remanded for retrial plaintiffs' claim that their exclusion from programs and activities violated the Rehabilitation Act, as well as plaintiffs' legal access claim. In a decision issued in December, the trial court rejected all of the plaintiffs' remaining claims. The judge found that the exclusion of HIV-positive prisoners from all programs and activities is justified by the threat of HIV transmission as well as by the potential violent reactions of other prisoners. He also found that the legal access provided to the HIV-positive prisoners was constitutionally adequate. The NPP will appeal the ruling.

Goldsmith v. Dean

In August, the NPP filed a motion for preliminary injunction to end physical and sexual abuse of prisoners in Vermont's sex offender behavior modification program. Affidavits filed by several prisoners allege that a treatment provider forces prisoners onto all fours and physically restrains them, simulates raping them anally, and screams obscenities at them during "role plays" in which prisoners in the program are required to relive the traumatic sexual experiences of their childhood. The hearing began in November and a ruling is awaited.

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