UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, CAROL DELP, ARDENE McKEAG and DOROTHY REDD,	)	CIVIL NOS. 4-03-CV-90074 4-02-CV-90447 4-03-CV-90101
Plaintiffs,	)	
vs.	)	**ORDER**
PRISON FELLOWSHIP MINISTRIES, et al.,	)	
Defendants.	)	

Plaintiffs Americans United for Separation of Church and State, Carol Delp, Ardene McKeag and Dorothy Redd have filed a Motion to Compel Additional Depositions (Clerk's No. 73).

In support of this motion, plaintiffs have filed what can only be described as a plethora of supporting documents, including their Memorandum of Points and Authorities (Clerk's No. 74); a massive Declaration by Alex J. Luchenitser, one of plaintiffs' attorneys (Clerk's No. 75); Plaintiffs' Supplemental Exhibit DD in support of the motion (Clerk's No. 76); Plaintiff's Reply in Support of Plaintiffs' Motion to Compel (Clerk's No. 79); Supplemental Declaration of Alex J. Luchenitzser in Support of Plaintiffs' Reply (Clerk's No. 80), and two confidential filings, filed under seal, one containing Exhibits B and CC to the Declaration of Alex J. Luchenitzser, and the other containing Exhibits FF to the Supplemental Declaration of Alex J. Luchenitzser.

Defendants filed a Joint Memorandum in Opposition to the Motion to Compel (Clerk's No. 77), along with a Declaration of Peter A. Gilbert, one of defendants' attorney, in support of the joint memorandum (Clerk's No. 78).

The Court heard oral arguments on plaintiffs' motion on March 25, 2004, at the United States Courthouse in Des Moines, Iowa.

BACKGROUND OF THE CASE

In these three consolidated cases, plaintiffs collectively allege that Prison Fellowship Ministries (PFM) and InnerChange Freedom Initiative (ICFI) have been permitted to operate, conduct and implement "a pervasively religious pre-release program" at the Newton Correctional Facility operated by the Iowa Department of Corrections, an agency of the state of Iowa. It is further alleged that this program immerses certain inmates selected for participation in the program in a "24 hour per day Christ-centered Bible-based program." Plaintiffs also allege that these programs are paid for, at least in part, by state funds, some of which come from revenues generated by charges implemented by the Department of Corrections for telephone calls placed by inmates.

It is also alleged that inmates who participate in these programs receive numerous privileges not afforded other inmates, which include but are not limited to placement in an "honor unit;" access to private bathrooms; additional visits with family members; free telephone calls to family members; access to computers and word processing equipment, as well as a large, projection-screen television. It is also asserted by plaintiffs that only Christian staff members of the Newton facility are employed in the program, and only Christians may serve as volunteers. Plaintiffs allege all this amounts to state sponsorship and financing of these programs in violation of the Establishment Clause of the First Amendment of the United States Constitution and the Bill of Rights of the Iowa Constitution.

In addition to suing the PM and the ICFI, plaintiffs have also named a number of Department of Correction employees, as well as the entire Iowa Board of Corrections as defendants. See

generally, plaintiffs' Second Amended Complaint (Clerk's No. 46); and Order of Court, September 12, 2003 (Clerk's No. 53).

THE ISSUES

A Scheduling Order was filed in this case on June 11, 2003 (Clerk's No. 26). That order set trial for October 12, 2004, and also provided for deadlines to amend pleadings or add parties; to disclose expert witnesses; to complete discovery and to file dispositive motions. The Court amended that order on October 9, 2003 (Clerk's No. 65), pursuant to a stipulation filed by all the parties (Clerk's No. 60), the effect of which was to allow additional time for disclosure of expert witnesses by all parties.

Once again, the Scheduling Order was amended on January 15, 2004 (Clerk's No. 71), pursuant to stipulation, allowing additional time for expert witness disclosure, and granting a one-month extension for completion of discovery to April 18, 2004.

The Scheduling Order was implemented by the Court, pursuant to the provisions of Fed. R. Civ. P. 16 and Fed. R. Civ. P. 26.

While plaintiffs have denominated their motion as one to compel the taking of additional depositions, defendants correctly point out that this motion does not accurately describe the relief sought. In fact, plaintiffs are seeking this Court to amend the ten-deposition limit set in Fed. R. Civ. P. 30. Rule 30(a)(2)(A) provides in pertinent part that

Rule 30. Depositions Upon Oral Examination

(a) When Depositions May be Taken; When Leave Required.

* * *

> (2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties.
>
> > **(A)** a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs ...
>
> * * *

Rule 26(b)(2) permits the Court to alter the ten-deposition limit noted in Rule 30.

Plaintiffs wish to dispose now, pursuant to Court order, Walter Kautzky, a former Director of the Iowa Department of Corrections, John Baldwin, Assistant Director of Administration for the Department of Corrections; Carol Boggess, a business manager at the Newton Correctional Facility; Jerry Van Cleave, a biblical counselor for the ICFI; Ken Burger, a former Assistant Director of Offender Services with the Department of Corrections; and plaintiffs want to be permitted to take a deposition pursuant to Fed. R. Civ. P. 30(b)(6), directed at the ICFI and/or PFM, if the ICFI's National Executive Director, Jerry Wilger cannot answer questions in specific areas as outlined by plaintiffs in their motion.

Incorporated in this motion to compel is a request by the plaintiffs that they be allowed to depose John Mathes, a former Newton Correctional Facility Warden, regarding factual issues pertinent to this lawsuit, and which arose at the Newton Correctional Facility while Mathes was the warden. This has been complicated because the state defendants have identified Mathes as an expert witness.

All this is before the Court because plaintiffs have already taken nine depositions. Those deposed include Pam Haney, a correctional officer at Newton; Scott Foster, a Newton inmate; Larry Lipscomb, a Newton employee; Kristine Weitzell, Newton Deputy Warden; Terry Stevens, a chaplain at

Newton; Lowell Brandt, an assistant director at the Department of Corrections; Patricia Shade, an office administrator for the ICFI; Sam Dye, a local director for the ICFI; and Chris Geil, a program manager for ICFI. The tenth witness to be deposed is Wilger.

At the time of the Rule 16 scheduling conference, none of the parties brought to the attention of this magistrate judge any perceived issues regarding the ten-deposition limit established by Rule 30. Subsequent to the entry of the Scheduling Order, and at the time it was amended twice by Court order through stipulation, none of the parties brought to the Court's attention the fact that the ten-deposition limit was going to be a problem in this case.

Plaintiffs argue that this is "highly complex litigation." Implicit in these assertions are the allegations that there are numerous issues subject to discovery, including but not limited to the manner in which the programs are funded, and how inmates are chosen, or perhaps excluded, from participation in these programs, as well as how the programs operate in detail.

Defendants strenuously resist plaintiffs' motion, regardless of how it is styled or considered. They are argue that plaintiffs have simply "spent their capital" in taking depositions that they cannot justify, and that they have already obtained the information they seek, either through the depositions taken to date, and/or the defendants' collective discovery responses to interrogatories and requests for production of documents. Of course, at this juncture the Court is not in a position to gauge the quality, volume or extent of any written discovery responses, and is not inviting an opportunity to do so. That is ultimately the role of the trier of fact.

Troubling to the Court is that plaintiffs' motion, and defendants' resistance, puts the Court in a position of having to second-guess the litigation strategy employed by plaintiffs' counsel. This

magistrate judge finds it very strange that none of the named individual defendants have yet to be deposed. Certainly those individuals, if they are worthy of being a named party in this litigation, must have pertinent crucial information relevant to plaintiffs' allegations.

Notwithstanding the Court's concerns, it has some comfort in the fact that the last of the ten allowed depositions pursuant to Rule 30 will be that of the Executive Director of the ICFI. Of course, that deposition is somewhat fraught with concern because if plaintiffs' attorneys are not satisfied with the results of that deposition, and that would certainly be a subjective determination on their part, they want this Court, in advance to permit them to proceed with a Rule 30(b)(6) deposition directed at the ICFI.

This Court is not in the habit or the practice of micromanaging litigation. It is reluctant to delve into the issues presented here because of the potential for prejudice if a party is denied rights to discovery. In this regard, the Court is ever mindful of the dictates of Rule 26(b)(1), providing that the parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim, including the existence, description, nature, custody, condition and location to any books, documents or other tangible things, and the identity and location of persons having knowledge of any discoverable matter.

Also in the context of the claims by plaintiffs that this is a highly complex litigation, and the retort by defendants that plaintiffs really cannot even justify the deposition discovery they have already taken, is the recognition of the fact that this is a consolidation of three separate cases. Had their been no consolidation, the parties, in aggregate, could have taken 30 depositions on behalf of plaintiffs, and 30 depositions on behalf of defendants. Thus, while certainly relevant for the defendants to point to the fact that they are concerned about additional costs, and even duplication, the fact remains that this Court finds

no justification at this time to deny plaintiffs the right to take the depositions sought, noting that they are subject to the limitations, including time, as prescribed by Rule 30.

In arriving at this conclusion, the Court is not stating, and is not giving authority, to plaintiffs to notice 30 depositions. The Court will allow plaintiffs to take depositions from those persons identified in their motion to compel. The Court is treating the motion to compel as a motion for relief from the limitations in Rule 30(a)(2)(A), and as permitted by Rule 26(b)(2).

To the extent that the taking of these depositions generate the need for defendants to take additional depositions, the Court would strongly urge the parties to resolve that matter by stipulation. The Court will not deny defendants the right to take more than ten depositions if there is a cogent reason to do so.

The Court is quite concerned with the issue surrounding John Mathes. It is, of course, impossible at this point in time to know what information Mathes has regarding plaintiffs' allegations in general, and it would appear that plaintiffs are not in a position to offer any insight on that subject matter either. The fact that the state defendants have named Mathes as an expert witness, and then apparently refused to permit him to be deposed on issues other than those upon which he may have given opinions, raises a red flag. The Court is not in agreement with the practice of any party shielding fact witnesses from testimony by designating them as expert witnesses. Plaintiffs will be permitted to depose Mathes regarding his knowledge and information as to the operations of the Newton Correctional Facility while he was warden, and regarding operation of ICFI and PFM programs. Whether he remains a viable expert witness is an issue for later determination, if necessary.

Mindful of the impact of this order upon the current discovery deadline, which has expired prior to the filing of this order, the Court extends discovery in this case to May 21, 2004. The Court is not, however, extending the deadline for filing dispositive motions, and is not in any way compromising the current trial date of October 12, 2004.

The Court notes emphatically that it is not inclined to extend the dispositive motion deadline of June 12, 2004, and is absolutely opposed to continuing the trial date. Implicit in this cautionary comment is the reminder to all parties that, while they may view the filing of a dispositive motion as some mandatory right, the filing of such motion upon a schedule requested by the parties, without due concern for the ability of the Court to read the motions, briefs, exhibits and schedule oral arguments efficiently in advance of trial to allow for a fair comprehensive review of the motions and resistances, is unworkable.

For the foregoing reasons, plaintiffs' motion to compel, as considered by the Court in the context of Rule 30(a)(2)(A) and Rule 26(b)(2), shall be and is granted.

IT IS SO ORDERED.

Dated this 23rd day of April, 2004.

THOMAS J. SHIELDS
UNITED STATES MAGISTRATE JUDGE