UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-cv-01239-MSK-KLM

MARK JORDAN,

Plaintiff,

v.

MICHAEL PUGH, et al.,

Defendants.

DEFENDANTS' MOTION TO AMEND JUDGMENT

Defendants Michael V. Pugh, J. York, R.E. Derr, B. Sellers, and Stanley Rowlett, by their undersigned counsel, hereby move pursuant to Federal Rule of Civil Procedure 59(e) for an order amending the judgment.

Pursuant to D.C.COLO.LCivR 7.1(A), on August 23, 2007, undersigned counsel spoke with Plaintiff's counsel about this motion. Plaintiff opposes this motion.

In the Judgment, the Court declared "that the language of 28 C.F.R. § 540.20(b), 'The inmate may not … publish under a byline,' violates the First Amendment," and enjoined Defendants from "punishing any inmate for violation of 28 C.F.R. § 540.20(b)'s provision that: 'The inmate may not … publish under a byline.'" (Doc. 355) (emphasis added).

I. The Court Should Enter Judgment for Defendants on the "Act as a Reporter" Issue

This Court should enter judgment for Defendants declaring that Plaintiff lacks standing to challenge the language of 28 C.F.R. § 540.20(b) that "The inmate may not act as a reporter." In

the Court's Memorandum Opinion and Order, the Court explicitly found that "Mr. Jordan did not have constitutional standing to challenge the regulation's prohibition on acting as a reporter." (Doc. 354 at 12.) Thus, the Court should enter judgment for Defendants on this finding.

II. The Court Should Amend the Nationwide Injunction to Only Apply to Plaintiff

The Court's injunctive relief clearly provides relief for not only Plaintiff, but all inmates in the Bureau of Prisons ("BOP") system. Defendants submit that this judgement is in error and should be amended to reflect that the nationwide injunction applies only to Plaintiff, Mark Jordan.

A. This Case is Not a Class Action

This case is not a certified class-action. Plaintiff Mark Jordan is the only named plaintiff in this action. He never attempted to certify this action as a class action pursuant to Fed. R. Civ. P. 23. This Court never made a finding that Plaintiff had met his burden of showing the "existence of the four threshold requirements of Rule 23(a)," nor that the action fell within one of the three categories of suits set forth in Rule 23(b). See Shook v. El Paso County, 386 F.3d 963, 971 (10th Cir. 2004). Without a specific finding on each of Rule 23(a)'s threshold requirements and an assessment under Rule 23(b), no class certification can be made. Cf. id. (holding that the district court erred in denying class certification under the PLRA without addressing the 23(a) and 23(b) requirements).

Plaintiff could have sought class certification in the above-captioned action. See, e.g., Thornburgh v. Abbott, 490 U.S. 399, 403 (1989) (class action brought by inmates and certain publishers); Turner v. Safley, 482 U.S. 78, 78 (1987) (class action brought by inmates).

Importantly, as this case was not designated as a class-action, "neither the parties nor this Court has any way of knowing what class would be bound." Romney, 490 F.2d at 1366. Moreover, no discovery was completed pertaining to anyone other than the Plaintiff, Mark Jordan. Such discovery would have been necessary to determine the factual basis for any claims and defenses pertaining to any potential class members other than Plaintiff.

Because no class was certified in this case, this Court should not grant relief beyond the named Plaintiff. See, e.g., Tape Head Co. v. RCA Corp., 452 F.2d 816, 819 (10th Cir. 1971) (holding that where no class had been certified, the "injunction is grossly broad and inclusive, enjoining as it does actions to be commenced against the plaintiffs or any other persons in a class similarly situated".); see also Brown v. Trustees of Boston Univ., 891 F.2d 337, 361 (1st Cir. 1989); Ameron, Inc. v. United States Army Corps of Eng'rs, 787 F.2d 875, 888 (3d Cir. 1986); Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1984); Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974). Plaintiff did not seek or obtain class certification; the relief granted by this Court is therefore limited to Plaintiff. This Court should amend its judgment to reflect that the injunction applies only to Plaintiff. See, e.g., Order Granting Defendants' Motion to Amend Judgment, Fort Peck Housing Authority v. United States Dep't of Hous. & Urban Dev., et.al., No. 05-00018 (D.Colo. June 30, 2006) (Docket No. 39) (attached as Ex. A-1).

B. Congress has Enacted a Statutory Provision Limiting the Court's Ability to Grant Relief to Non-Plaintiffs

The Prison Litigation Reform Act ("PLRA") "contains a variety of provisions designed to bring [prisoner] litigation under control." Woodford v. Ngo, --- U.S. ----, 126 S.Ct. 2378, 2382

(2006). Among these provisions, the "PLRA establishes standards for the entry and termination of prospective relief in civil actions challenging conditions at prison facilities." Miller v. French, 530 U.S. 327, 333 (2000). Specifically, 18 U.S.C. § 3626(a)(1)(A) provides:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A) (2005) (emphasis added). Thus, Congress has specified the boundaries of relief a particular plaintiff can obtain in a PLRA case.[1] Congress' enactment of a statute dictating the permissible scope of relief available to plaintiffs in PLRA cases is necessarily controlling; this Court should amend its judgment to reflect that the injunction applies only to Plaintiff. An injunction preventing the BOP from punishing Plaintiff Mark Jordan would satisfy the narrow mandate of 18 U.S.C. §3626(a)(1)(A) while allowing Plaintiff to publish under a byline without fear of being disciplined.[2]

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[1] Nothing in the PLRA limits a plaintiff's ability to obtain class certification. Shook, 386 F.3d at 971 ("Congress did not intend the PLRA to alter class certification requirements under Rule 23.").

[2] Because Plaintiff's claims are against each of the named Defendants in their official capacities, Plaintiff's action is treated as an action against the BOP and the Court's order serves to enjoin the BOP. See Kentucky v. Graham, 473 U.S. 159, 165 (1985).

C. The Court's Nationwide Injunction Improperly Extends Into Other Judicial Jurisdictions

The Court's nationwide injunction applying to all inmates in the BOP system contravenes the basic rule that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). Applying the Court's relief to Plaintiff alone will provide Plaintiff full relief. See Va. Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 393-94 (4th Cir. 2001) (holding that the district court erred in issuing nationwide injunction); Zepeda, 753 F.2d at 727-38 (holding that the district court erred in issuing nationwide injunction).

The broad scope of the injunction issued in this case inappropriately extends into other jurisdictions because it has the effect of precluding other districts and circuits from ruling on the constitutionality of the regulation. See Va. Soc'y, 263 F.3d at 393. This is in violation of the settled principle that a court's decisions "'bind' only within a vertical hierarchy." United States v. Glaser, 14 F.3d 1213, 1216 (7th Cir. 1994); see also Veitch v. England, 471 F.3d 124, 130 (D.C. Cir. 2006) ("[A] single district court decision …is not binding precedent for any other court."); Doe v. Delie, 257 F.3d 309, 321 ("We have held that district court decisions do not establish the law of the circuit, and are not even binding on other district courts within the district."); United States v. Carson, 793 F.2d 1141, 1147 (10th Cir. 1986) ("It is well settled that the decisions of one circuit court of appeals are not binding upon another circuit."). Also, prohibiting BOP from applying its regulation to any inmate nationwide is contrary to the rule that a decision as to an agency in one jurisdiction is not binding on the agency in other jurisdictions. See Va. Soc'y, 263

F.3d at 393-94 (noting that a nationwide injunction by a district court against the FEC violated this rule).

This Court benefitted from these principles here: the Court's order and judgment is in conflict with the Northern District of California's decision about the same regulation. See Martin v. Rison, 741 F. Supp. 1406 (N.D. Cal. 1990), vacated as moot, 962 F.2d 959 (9th Cir. 1992), cert. denied, 507 U.S. 984 (1993). The development of differing opinions between courts is presumed and is in fact taken into consideration by the Supreme Court when considering petitions for certiorari. See Sup. Ct. R. 10(a). Indeed, the ability of different courts to reach different decisions is one of the reasons there is no nonmutual collateral estoppel against the government, i.e., another inmate could not cite this Jordan decision as precedential authority for his case. See United States v. Mendoza, 464 U.S. 154, 161 (1984). "A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." Id. The Court's nationwide injunction here in effect prevents the development of an important question of law, and should be modified to reflect that the injunction applies only to Plaintiff.

D. The Court's Analysis of Other Inmates Does Not Affect the Relief the Court May Grant

The fact that the Court looked to evidence regarding other inmates does not show that the Court had authority to extend relief to those other inmates.

1. Analysis of Other Inmates In Plaintiff's Facial Challenge to the Regulation Does Not Extend the Court's Ability to Extend Relief Nationwide

The fundamental characteristics of a facial overbreadth challenge are that it is a challenge by a party not yet affected by the statute, based upon a contention that the statute will violate others' rights. See Colo. Christian Univ. v. Baker, Civil Action No. 04-cv-02512-MSK-BNB, 2007 WL 1489801, *3 (D. Colo. May 18, 2007) (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression")). "This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 129 (1992) (citations omitted).

Thus, in determining whether a party has standing to assert a First Amendment overbreadth challenge, courts can consider the effects on others similarly situated even if the plaintiff's right of free expression was not violated. But when a statute has actually been applied to a party, the need for an anticipatory and derivative facial challenge evaporates. Colo. Christian Univ., 2007 WL 1489801, *3. See also Faustin v. City & County of Denver, 268 F.3d 942, 948 (10th Cir. 2001) ("The overbreadth doctrine does not apply where there is no significant difference between the claim that the ordinance is invalid because of overbreadth and the claim

that it is unconstitutional when applied to the plaintiff's own activities.") (citing Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 802 (1984)).

Here, the byline portion of the regulation, 28 C.F.R. § 540.20(b), had actually been applied to Plaintiff. The Court did consider the effect of the regulation on others, for standing purposes, but that consideration of others does not mean that the Court can extend *relief* beyond the normal jurisdictional limitations – including, in particular, the clear limitation Congress enacted in 18 U.S.C. § 3626(a)(1)(A). The ability to look to the evidence of others similarly situated does not mean that the Court has authority to grant relief to those others. For example, in an individual plaintiff's Title VII case, it is common to consider evidence of discrimination against others similarly situated. In Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987), for instance, the Tenth Circuit held that incidents of sexual harassment directed at employees other than the plaintiff can be used as proof of the plaintiff's claim of a hostile work environment. See also Hirase-Doi v. U.S. West Commc'ns, Inc., 61 F.3d 777, 782 (10th Cir. 1995) (relying on Hicks in holding that an employee "may rely on [her supervisor's] harassment of others"). The court's relief in those instances, however, is limited to the Title VII plaintiff.

2. The Court Did Not Purport to Consider the Factual Situation of All Other Inmates

Plaintiff did not introduce at trial any evidence as to the situation of all other inmates to which this Court's Order appears to extend. Indeed, he did not introduce the situations of any other inmates but for inmates Thomas Silverstein and Theodore Kaczynski, who are both also housed at the U.S. Penitentiary, Administrative Maximum ("ADX"), in Florence, Colorado,

where Plaintiff is also housed. The evidence at trial showed that the ADX is subject to certain BOP Institutional Supplements interpreting and implementing the October 20, 2006 Kenney Memorandum. Thus, Silverstein and Kaczynski are governed by the same Institution Supplements as Plaintiff. The specific administrative interpretations of the regulation in other institutions' Institutional Supplements may be different that the interpretation set forth in the ADX's Institution supplement. No evidence was introduced at trial, however, regarding any other institution's interpretation and implementation of the Kenney Memorandum.

It is Plaintiff's burden to show evidence of other situations, but he failed to make such a showing. See New York State Club Ass'n., Inc. v. City of New York, 487 U.S. 1, 14 (1988) (where the plaintiff fails to make a record regarding other situations in which the law cannot be applied constitutionally, "we cannot conclude that the law [at issue] threatens to undermine the [constitutional rights] of any [other group], let alone a substantial number of them."); see also Virginia v. Hicks, 539 U.S. 113, 122, (2003) ("The overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists.") (quoting New York State Club Ass'n., 487 U.S. at 14)). Given that the Court did not consider the position of all inmates, it should not extend relief as to them.

For these reasons, BOP respectfully requests that the Court modify the judgment to include judgment for Defendants on the "act as a reporter issue" and to make clear that its injunction applies only to BOP's treatment of the Plaintiff, Mark Jordan.

Respectfully submitted this 23rd day of August, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2007, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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I also hereby certify that on this 23rd day of August, 2007, I mailed or served the foregoing document to the following non-CM/ECF participant(s) in the manner (mail, E-mail, etc.) indicated by the nonparticipant's name:

None

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