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' REPLY IN SUPPORT OF
MOTION TO AMEND JUDGMENT (Doc. 358)

Defendants hereby reply in support of their Motion to Amend Judgment. Defendants' motion should be granted because this Court's nationwide injunction exceeds its statutory authority under the Prison Litigation Reform Act ("PLRA"), is unnecessary to correct the alleged violation of Plaintiff Mark Jordan's First Amendment rights, and improperly grants relief to parties not before the Court.

DISCUSSION

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

Defendants demonstrated in their Motion to Amend Judgment that this Court's injunctive relief should not extend to all inmates in the Bureau of Prisons ("BOP") system. This case was not brought as a class action. Congress in the Prison Litigation Reform Act ("PLRA") explicitly specified the boundaries of relief a prisoner can obtain in a PLRA case, and mandated that

"[p]rospective relief . . . shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A). The nationwide injunctive relief ordered by this Court runs afoul of Section 3626(a)(1)(A) because it is not necessary to correct the alleged violation of Plaintiff's First Amendment rights, nor is it necessary to provide complete relief to Plaintiff. The nationwide injunction also runs afoul of the "non-acquiescence" doctrine, under which the government may normally relitigate issues in multiple circuits. See United States v. Mendoza, 464 U.S. 154 (1984). Finally, the nationwide injunction is improper because in issuing such sweeping relief the Court did not consider the factual situations of any other inmates in other jurisdictions.

A. The Scope of the Relief is Not Appropriate

Plaintiff relies in his opposition brief on a number of non-prisoner cases as showing that the scope of relief awarded by this Court is appropriate. Those cases are not persuasive because they do not take into consideration the limitations Congress placed on federal courts under the PLRA in crafting appropriate injunctive relief.

For example, Plaintiff cites several times in his response brief to Bresgal v. Brock, 843 F.2d 1163, 1169 (9th Cir. 1987), a 20-year-old case from the Ninth Circuit, for the proposition that "there is no general requirement that an injunction affect only the parties in the suit," Opp. at 4, and that "class-wide relief may be appropriate even in an individual action." Id. at 5. Bresgal is inapposite, and supports Defendants' assertion that the Court's nationwide injunction is overbroad.

In Bresgal, migrant agricultural workers sought an injunction requiring the Department of Labor ("DOL") to enforce the Migrant and Seasonal Agricultural Worker Protection Act ("the Act") with regard to forestry workers in order to protect the workers from exploitation at the hands of independent labor contractors who recruit seasonal workers for the forestry industry. The district court found that the Act applied to forestry workers and issued an injunction ordering the DOL to enforce the Act with respect to the forestry industry. The injunction was not limited to the named plaintiffs, nor was the injunction limited in its geographical scope. In its decision upholding the district court, the Ninth Circuit noted the general rule that an injunction is not necessarily overbroad by extending benefits or protection to persons other than prevailing parties "if such breadth is necessary to give prevailing parties the relief to which they are entitled." 843 F.2d at 1170-71. Applying this general rule, the court concluded that a nationwide injunction was necessary due to the migrant nature of the seasonal workers, who traveled to other parts of the country under the supervision of the labor contractors. Therefore, the Ninth Circuit concluded, nationwide enforcement of the Act by the DOL was necessary in order to accord the named plaintiffs the relief to which they are entitled.

Bresgal is distinguishable. Here, a nationwide injunction is not necessary because, as a practical measure, enforcement of the Court's injunction can be limited to Plaintiff. Plaintiff has no opportunity to migrate to other jurisdictions of his own free will; he will not be "traveling to other parts of the country" without the BOP's express knowledge and oversight. Nationwide injunctive relief is not necessary to accord to the Plaintiff the relief to which he is entitled under this Court's ruling.

Plaintiff also cites Evans v. Harnett County Bd. of Educ., 684 F.2d 304 (4th Cir. 1982); and Meyer v. Brown & Root Construction Co., 661 F.2d 369 (5th Cir. 1981). See Opp. at 4. These cases are also inapposite. Harnett County concerned a black educator's allegation that he was discriminated against by the Board of Education in Harnett County, North Carolina, when he was denied an administrator's position in a formerly white school. The district court found that the Board of Education engaged in the unlawful employment practice of choosing whites as principals of formerly white schools and blacks as principals of formerly black schools, but the district court declined the plaintiff's request to enjoin this unlawful employment practice. The Fourth Circuit found that the district court erred in refusing to enjoin the board's unlawful employment practice, because the "primary remedial provision" of Title VII, 42 U.S.C. § 2000e-5(g), provides that "the court may enjoin the respondent from engaging in (an) unlawful employment practice. . . ." Harnett County, 684 F.2d at 306. Brown & Root also involved a claim by an individual plaintiff under Title VII. The district court in that case issued an injunction enjoining discrimination against other individuals and the employer appealed, arguing that the injunction was impermissibly broad. The Fifth Circuit rejected this argument, asserting that it ignored the essential nature of Title VII suits: "The clear purposes of Title VII are to eliminate discrimination and recompense those who have suffered from it." Brown & Root, 61 F.2d at 373. The Fifth Circuit noted that "the language of [Title VII] empowers to the courts to grant a wide variety of relief to combat discriminatory practices." Id.

This case involves the PLRA and, unlike the provisions of Title VII, Congress has not asserted that the PLRA has the remedial purpose of preventing the Bureau of Prisons from

engaging in unconstitutional conduct. Nor has Congress asserted in the PLRA that the district courts should be encouraged to enjoin BOP from such conduct. To the contrary, Congress in the PLRA has barred district courts from issuing far-ranging prospective relief in prison cases. Congress has provided that prospective relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A) (2005). Plaintiff has not cited in his opposition brief to any case in which a court has issued, under the PLRA, broad-ranging injunctive relief such as the relief afforded in this case, nor are Defendants aware of any case in which such relief has been issued (outside of the class action context).

Plaintiff argues that the particular nature of his First Amendment challenge to the regulation makes nationwide relief especially necessary. Opp. at 5-7. His argument, boiled down, is that because his claim is grounded in overbreadth, he has standing to represent third parties, such as other inmates and the press, and that the Court's nationwide injunction is therefore proper. He fails to cite any cases, however, for this proposition. The Supreme Court has recognized, in an overbreadth case, that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). In any event, the PLRA makes no exception for cases involving the First Amendment and Plaintiff cites no cases creating such an exception to the PLRA.

B. The Nationwide Scope of the Injunction Is More Burdensome Than Necessary

Plaintiff argues that the nationwide scope of the injunction is no more burdensome that necessary to give him the relief to which he is entitled. Opp. at 7-11. First, he contends that the Court's injunctive relief is consistent with the PRLA. Id. at 7-10. Second, he argues that the injunction does not improperly intrude into other jurisdictions. Neither argument is correct.

1. The injunction is not consistent with the PRLA

The injunction is not consistent with the PRLA, as Defendants demonstrated in their motion, because it goes further than necessary to correct the violation of Plaintiff's rights. Plaintiff's First Amendment rights (and even the related First Amendment rights of the press to publish Plaintiff's works) will be protected through an injunction narrowly tailored to apply only to Plaintiff.

Plaintiff relies on Handberry v. Thompson, 436 F.3d 52 (2d Cir. 2006); and Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001), but both cases are inapposite. They were both class actions, and in neither case did the court order the type of broad, nationwide injunctive relief ordered in this case. Handberry was a class action solely against New York City officials regarding educational services in the New York City jail system, Handberry, 436 F.3d at 56; and Armstrong was a class action against California state officials alleging violations of the Americans With Disabilities Act and the Rehabilitation Act with respect to parole and parole revocation proceedings. Armstrong, 275 F.3d at 854.

Plaintiff also argues in a footnote that to hold that the Court's order does extend further than necessary "would be to conclude that, in enacting 18 U.S.C. § 3626(a)(1), Congress stripped the courts of their Article III grant of power to decide First Amendment overbreadth challenges involving third party standing when such challenges are brought by prisoners." Opp. at 9, n.6. This argument is meritless. Nothing in the PLRA suggests that Congress has stripped Article III judges of their power to decide cases. Section 3626(a)(1)(A) only requires that prospective relief extend no further than necessary to correct the violation of a particular plaintiff's federal right.

Finally, Plaintiff contends that the Court's nationwide relief satisfies the requirements of Section 3626(a)(1)(A). Opp. at 10. As Defendants have demonstrated in their motion and in their opposition to Plaintiff's Rule 59(e) motion, see Doc. 364, the injunction violates this section of the PLRA to the extent the injunction applies to anyone other than Plaintiff. The award of nationwide relief goes beyond correcting the violation of Plaintiff's First Amendment rights, and therefore the relief is not narrowly drawn, goes further than necessary, and is not the least intrusive means to correct the violation of Plaintiff's rights.

2. The injunction improperly intrudes into other jurisdictions

Defendants demonstrated in their motion that the Court's nationwide injunction inappropriately extends into other jurisdictions, in violation of the settled principle that a court's decisions "'bind' only within a vertical hierarchy." Doc. 358 at 5 (citing cases). As Defendants showed in their motion, 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. Id. at 5-6 (citing Va. Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 393-94 (4th Cir. 2001)).

Plaintiff asserts that this argument was rejected in Earth Island Inst. v. Ruthenbeck, 459 F.3d 954, 966 (9th Cir. 2006), but nowhere in Earth Island did the Ninth Circuit address this particular argument or set forth any reasons for rejecting it. Plaintiff also asserts that "nothing about the injunction in this case would prevent another court in any other circuit or district from entertaining a similar suit and reaching a different or contrary result as to other parties." Doc. 365 at 11. Plaintiff conveniently ignores the fact that as long as this Court's nationwide injunction remains in effect, no other such lawsuit would ever need to be brought by a prisoner making the arguments Plaintiff made.

II. Defendants Withdraw Their Argument That the Court Should Enter Judgment for Defendants on the "Act as a Reporter" Issue

Defendants hereby withdraw their argument, at pages 1-2 of their motion, that this Court should enter judgment for Defendants based on the Court's finding that Plaintiff did not have constitutional standing to challenge the regulation's prohibition on "acting as a reporter." See Doc. 358 at 1-2.

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CONCLUSION

For the above reasons, those in Defendants' Motion to Amend Judgment, and any that may be presented at a hearing on this matter, the Court should modify the judgment to make clear that its injunction applies only to BOP's treatment of the Plaintiff, Mark Jordan.

Respectfully submitted this 27th day of September, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 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:

Laura Rovner, Esq.
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I also hereby certify that on this 27th day of September, 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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