UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 02-cv-01239-MSK-KLM

MARK JORDAN,

Plaintiff,

-v-

MICHAEL V. PUGH; J. YORK;
R.E. DERR; B SELLERS; and
STANLEY ROWLETT,

Defendants.

PLAINTIFF'S REPLY TO
DEFENDANTS' RESPONSE IN OPPOSITION TO
MOTION FOR FINDING PURSUANT TO 18 U.S.C. 3626(b)(1) (Docket 357)

Contrary to Defendants' contention in their response that "plaintiff does not present any argument or evidence as to why the Court should grant his 59(e) motion, ...", Docket 364, at 2. Plaintiff cites to the requirement of 18 U.S.C. § 3626(a)(1) in support of his motion. Courts have recognized that a citation to the requirement of a statute is citation to authority. *See, e.g., D.C.Colo.L.CivR 7.1(D) ("Every citation in a motion, response or rely shall include … statutory subsection to which reference is made."); Bridge Capital Investors, II v. Susquehanna Radio Corp.*, 458 F.3d 1212, 1221 (11th Cir. 2006) ("that the absence of citation to statutory authority and precedent or the inartful wording of a brief necessarily will require us to conclude that a party has waived an argument." (citation omitted)). Further, Courts, like parties, are required to follow the specific mandates a statute, and Plaintiff's request that this Court recite the findings required in 18

U.S.C. 3525(a)(1) constitutes the presentation of a legal argument. A Court's failure to make findings required by statute is justification to request Rule 59(e) relief. *See United States v. Widgery*, 778 F.2d 325, 329 (7th Cir. 1985) (Easterbrook, J.) ("The supervisory power is part of the common law, and no court has a common law power to disregard a rule or statute that was within the authority of Congress to enact.").

Defendants have also argued that Plaintiff in the five years that this matter had been litigated failed to request a 3626(a)(1) finding. Docket 364, at 3. This argument is meritless. The statute requires that the "court" must make this finding. The statute does not place any burden on the Plaintiff or the Defendant to request 3626(a)(1) findings in their pleadings or at trial.

The Prison Litigation Reform Act of 1995(Act) imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, "[a] court shall give substantial weight to any adverse impact on ... the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1); accord, § 3626(a)(2); *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (emphasis added). *See also Miller v. French*, 530 U.S. 327, 333 (2000) (the judge shall make such findings). There is no requirement that a prisoner-plaintiff offer proof as to the level of an injunction that a court may grant to ensure that it complies with 3626(a)(1). Nor could there be. The only way that counsel for a prisoner-plaintiff would know to raise this issue with the Court prior to its ruling would be to somehow require the Court to provide a draft of its proposed order to the parties before issuing it, so that the parties could bring to the Court's attention any potential omissions of recitations of the § 3626(a)(1) findings. This is, of course, not the practice of this Court, nor does Plaintiff suggest it should be. Defendants' assertion that Plaintiff should have somehow divined not only the result but also the specific language of the Court's

Memorandum Opinion and Order prior to its being issued and then taken some unspecified action to request recitation of the 3626(a)(1) findings is preposterous.

Plaintiff's burden at trial was to establish that his constitutional rights were violated and that the only means to correct this is by issuing an injunction. Plaintiff met that burden. The statute, 18 U.S.C. § 3626(a)(1), places the duty on the federal court to make the findings required by 3626(a)(1). *See Handberry v. Thompson*, 436 F.3d 52, 64 (2nd Cir. 2006) ("The district court acknowledged that it was required to make 'need-narrowness-intrusiveness' findings under the PLRA. *See Handberry II*, 219 F.Supp.2d at 533."); *Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir. 2001) (upholding injunction where "the district court specifically made the findings required by the PLRA"). In an unpublished decision, the Tenth Circuit requires the district court to make the findings required by § 3626(a)(1).

> The district court in the present case discussed the traditional factors used for evaluating motions for preliminary injunction and made specific findings regarding those factors, but it made no specific findings concerning the additional requirements found in § 3626 of the PLRA. Because it lacks an explicit reference to the statutory findings, or any other language which could reasonably be said to address those findings, the order leaves us to doubt whether the district court considered any of the PLRA's additional factors when crafting the preliminary injunction. Accordingly, because the order granting the preliminary injunction did not contain the particular findings required by § 3626, that injunction expired automatically after ninety days.

Alloway v. Hodge, 72 Fed.Appx. 812, 816-17, 2003 WL 21922143,**5 (10th Cir. 2003), see attached Exhibit 1.

Plaintiff's Rule 59(e) motion asserts that while the Court's findings of fact and analysis implicitly include the information required by 3626(a)(1), the omission of the particular language of the 3626(a)(1) findings constitutes a manifest error of law. Defendants' citation to *Oto v. Metro.*

Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000), supports Plaintiff's position that this Court has the authority to grant his Rule 59(e) motion when the Court has "misappli[ed], or fail[ed] to recognize controlling precedent." (Internal quotations omitted.) It would be ludicrous for Defendants to argue that this Court can ignore what is required by § 3626(a)(1) when issuing an injunction, particularly given Defendants' own Rule 59(e) motion in which they make a similar argument. (Doc. 358 at 4.)

Finally, Defendants claim that no manifest injustice will result if Plaintiff's motion is denied. Motion at 4. This is wrong. Pursuant to18 U.S.C. § 3626, the injunction issued by this Court will automatically expire if the findings requested by Plaintiff are not made by this Court. *Alloway v. Hodge*, 72 Fed.Appx. at 816-17, 2003 WL 21922143,**5 ("Accordingly, because the order granting the preliminary injunction did not contain the particular findings required by § 3626, that injunction expired automatically after ninety days."). It is difficult to see how such a result would not constitute manifest injustice, and it is disingenuous for Defendants to claim otherwise.

WHEREFORE, for the reasons stated above and in their motion, Plaintiff respectfully requests that this Court grant the Rule 59(e) motion and modify its August 9, 2007, *Memorandum Opinion and Order* to include the findings required by 18 U.S.C. § 3626(a)(1).

Respectfully submitted,

STUDENT LAW OFFICE

/s/ Daniel E. Manville

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on September 27, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will serve a copy of the foregoing on the following: Marcy Elizabeth Cook and Michael Johnson, Attorneys for the Defendants, United States Attorney's Office, 1225 Seventeenth St., Ste. 700, Denver, Colorado 80202.

/s/ Daniel E. Manville

Daniel E. Manville