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United States District Court, D. Nebraska.

WILFRED W. NIELSEN, Cross-Appellant,
v.
FRANK GUNTER, et al., Cross-Appellees.

No. CV83–L–682. | June 5, 1986.

Opinion

MEMORANDUM ON APPEAL OF MAGISTRATE'S JUDGMENT

URBOM, District Judge.

***1** The plaintiff has appealed from 'that portion of the magistrate's judgment which allows female guards to view the plaintiff in the nude in his prison cell when he is in a stage of dressing, and which further allows said female guards to view the plaintiff in the nude in said prison cell while plaintiff is engaging in any type of bodily function.'

The plaintiff, an inmate at the Nebraska State Penitentiary, filed suit against the director of the Nebraska Department of Correctional Services, the warden of the Nebraska State Penitentiary, the manager of the housing unit in which the plaintiff lives, and a class of present and future female employees subject to being assigned to the housing units at the Nebraska State Penitentiary. The conflict is over what accommodations, if any, the plaintiff is entitled to have in order to protect his privacy from intrusions by female guards.

The parties agreed to a trial before United States Magistrate David L. Piester under the provisions of 28 U.S.C. § 636(c)(1) and agreed that appeals would be taken only to a judge of the district court in the same manner as on appeal from a judgment of the district court to a court of appeals, pursuant to 28 U.S.C. § 636(c)(4). Following the trial without a jury, judgment was entered on July 15, 1985, filing 79. Both sides sought to have the judgment altered or amended, but the magistrate refused to do so by his order of September 9, 1985, filing 92. The judgment was favorable to the plaintiff to this extent: it directed that the defendants and those acting with them who received actual notice shall 'forthwith adopt policies, practices, and actions which enable the [plaintiff] to protect [his] personal privacy without endangering or jeopardizing in any way [his] eligibility for status or benefits that would otherwise accrue to [him] at the Nebraska State Penitentiary, which actions, policies, or practices shall ensure at the least that the [plaintiff] may, upon request, be given access to showers such that [he is] not visible to female correctional officers at the institution and, further that, upon request, when subjected to a pat down search either on a designated or regular basis or on a random basis, [he] shall, upon request, be subject to search of [his] genital-anal areas only by male correctional officers at the penitentiary.' The plaintiff seeks an enlargement of that judgment. Appeal by the defendants has been dismissed and I, therefore, have no occasion to review the propriety of the judgment as it exists, except to the extent of determining whether it should be enlarged in accordance with the plaintiff's request.

The magistrate's dividing line in his balancing of the interests involved is at the point where the plaintiff is, on the one hand, and is not on the other, reasonably able to protect his own privacy by some simple action, such as covering himself with a towel, robe or other protective covering or turning his back toward the direction of the possible viewer. To this the plaintiff objects, saying:
***2** '. . . [T]he Plaintiff and other male prisoners . . . are viewed in the nude on a regular and frequent basis by the female guards while the prisoners are in their prison cells (rooms) taking care of such personal needs as urinating, defecating, masturbating and dressing. . . .

To permit the female guards to view the Plaintiff in the act of urinating, defecating, or dressing in his prison cell (room) is what the Plaintiff objects to in this appeal. '. . .. These activities are generally done in private, or at least, out of view of uninvited members of the opposite sex and it is the activity itself, not only the incidental exposure of the genital area, that requires privacy.' . . .

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. . . To the Plaintiff, if while sitting on a toilet, it would make little difference in the degree of humiliation or embarrassment in whether or not a female guard were able to view his uncovered genital area, in that, as long as the female is able to observe him in the act of sitting on a toilet the damage to his feelings has been done. . . .

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In sum, the Plaintiff argues there is not logic to the Magistrate's reasoning which determined the male prisoners at the NSP retain privacy rights in the showers against being humiliated and embarrassed by the female guards but yet afforded the prisoners no protection from the females while the prisoners are in their rooms in the act of urinating, defecating, or dressing.'

The plaintiff cites several cases and urges me to consider them carefully. I have done so and I am not convinced by them. The effort in each case has been to find a reasonable accommodation of competing interests. They do not, however, impel me to find that the distinction drawn by the magistrate in fashioning relief is an improper one.

In Whalen v. Roe, 429 U.S. 589 (1977), which is cited by the plaintiff, the court does not talk about embarrassment or humiliation in terms of a right of privacy, which is the proposition for which the plaintiff cites it.

In Cumbey v. Meachum, 684 F.2d 712 (10th Cir. 1982) the court held that it was error to dismiss as frivolous a complaint saying that 'a certain amount of viewing' of the plaintiff and other inmates by female guards while dressing, undressing, using the toilet and showering. The court said that the complaint 'does not necessarily fall short of a cognizable constitutional claim.' Not to be frivolous does not mean the same as to be mandated as a matter of law.

In Forts v. Ward, 471 F.Supp. 1095 (USDC S.D.N.Y. 1979) the trial court entered a judgment forbidding men guards at night and requiring accommodations so that during the day men guards could not see women inmates in the nude or using the toilet. Nobody appealed the daytime ruling, and the appellate court at 621 F.2d 1210 (2nd Cir. 1980) reversed the night ruling forbidding men guards, saying that accommodations could be made for covering the cell windows for short periods of time.

Hudson v. Goodlander, 494 F.Supp. 890 (USDC Md. 1980) held that modifications needed to be made to protect male prisoners who were using the showers or toilet facilities from the scrutiny of female officers and drew no distinction in its injunctive relief between showering and using the toilet.

***3** Bowling v. Enomoto, 514 F.Supp. 201 (USDC N.D. Cal. 1981), similarly, concluded that prison inmates have a limited right to privacy which includes the right to be free from 'the unrestricted observation of their genitals and bodily functions by prison officials of the opposite sex under normal prison conditions.' The relief is not set out in the opinion, because the court instructed the defendants to submit a proposed procedure for accommodating both the plaintiff's privacy interests and the officers' right to equal employment.

The magistrate's insistence upon the plaintiff's exercising his power to protect his own privacy is not unfounded or unreasonable. The magistrate specifically found:
'. . . [T]he possible intrusions on privacy complained of by the plaintiff Nielsen in his motion [to alter or amend the judgment, raising the same issues he raises on this appeal] were not demonstrated by the evidence to occur with any regularity, frequency or be particularly egregious because of the extent or nature of the contact. . . .'

Memorandum and Order on Post-Trial Motions, filing 92, p. 7

In reviewing that finding of fact I am limited by the requirement that I must uphold the magistrate's factual findings if they are not clearly erroneous. That factual finding is not clearly erroneous.

A similar finding was declared in the memorandum of decision, filing 78, by the magistrate, as follows:

> 'With respect to inmate privacy in the rooms, the evidence is clear that there is no prohibition against the use of pajamas or other sleepwear by inmates to protect their privacy while sleeping and there is also no policy against an inmate covering himself while sitting on the toilet where he could be viewed by a correctional officer from the hallway. The inmate's back would be turned toward the window while he stood in front of the toilet to urinate. These measures are sufficient to allow the inmates to protect their own privacy, should they choose to do so, without any changes on the part of the defendants.'

That, too, is not clearly erroneous.

The judgment of the magistrate reasonably requires the defendants to protect the plaintiff's privacy when the plaintiff cannot easily do so and leaves to the plaintiff protection of his own privacy in those situations in which he easily can do so. I am not at all persuaded by the argument that a woman guard's seeing a male inmate in the act of using the toilet is an invasion of his privacy, even though the inmate's private parts are entirely covered by a towel or a robe or other covering. Covering a man's private parts is not difficult and the right of privacy goes to the viewing of those private parts, not to the body's mere position, as when urinating or defecating.

The judgment of the magistrate will be affirmed.

In accordance with the memorandum on appeal of magistrate's judgment,

IT IS ORDERED that the judgment of the magistrate of July 15, 1985, is affirmed.

MEMORANDUM AND ORDER ON MOTION FOR AN ORDER HOLDING THE DEFENDANTS IN CONTEMPT OF COURT

***4** A hearing was held on the motion for an order holding the defendants in contempt of court, filing 91, on June 2, 1986. I am taking into account the evidence received at that hearing, as well as the evidence received at the hearing before the magistrate on September 20, 1985, the latter being contained in three tapes to which I have listened.

Findings of Fact

Judgment was entered by the magistrate on July 15, 1985, filing 79. It directed that:

> 'The defendants . . . and their successors . . . and those persons acting in concert or participation with them who receive actual notice of this judgment shall forthwith adopt policies, practices, and actions which . . . shall ensure at the least that the plaintiffs may, upon request, be given access to showers such that they are not visible to female correctional officers at the institution, and further that, upon request, when subjected to a pat down search either on a designated or regular basis or on a random basis, they shall, upon request, be subject to search of their genital-anal areas only by male correctional officers at the penitentiary.'

On July 18, 1985, the defendants Frank Gunter, who was and is Director of the Nebraska Department of Correctional Services, and Gary Grammer, who was and is Warden of the Nebraska State Penitentiary, met with staff members and three legal advisers to discuss options available for complying with the magistrate's judgment. They were advised—they and their counsel now acknowledge that the advice was erroneous—that they had 30 days in which to comply with the judgment and on about August 12 they decided to comply by issuing notice of a change of policy. The policy statement, contained in plaintiff's Exhibit I and defendant's Exhibit 201, states: 'Effective August 19, 1985, we will adhere to the following:

1) Only male Correctional Officers are to be assigned to work in the Control Centers in the Housing Units on Second Shift. Legal offenders wishing to shower and not be observed by a female officer are to shower at said time.

2) Female Officers are not to pat search legal offenders excepting in cases of emergencies.

3) Female officers are not to be assigned to posts requiring the routine pat searches of legal offenders.'

The plaintiff Nielsen claims that the policy, or the magistrate's judgment or both, were violated in certain specific ways:

1. No implementation of the magistrate's judgment was made between July 15, 1985, and August 19, 1985. The plaintiff is accurate in this assertion. There was no policy, practice, or action adopted by the defendants which enabled the plaintiffs to be given access to showers, upon request, such that they were not visible to female correctional officers or to be subject, upon request, to search of their genital-anal areas only by male correctional officers at the penitentiary. There is no evidence that any female correctional officers saw the plaintiff when he had access to a shower or that any female correctional officer pat searched the plaintiff of his genital-anal area.

***5** 2. On July 25, 1985, Sergeant Ringer, a female, was in Unit 3, where the plaintiff Nielsen lived, at the Control Center just prior to the time Nielsen took his shower at shortly before 6:00 p.m. There is no evidence that she saw Nielsen in the shower area. There is evidence that she was in Unit 3 on two or three other occasions. The second shift was and is from 2:00 p.m. to 10:00 p.m.

3. During the first week of August, 1985, Guard Freeman, a female, was in Unit 3 at a time when Nielsen took a shower. There is conflict in the testimony as to whether she saw him showering, but I find that the greater weight of the evidence is that she did not do so.

4. In early August, 1985, Guard Freeman conducted a pat search of Nielsen, including his genital area. It was done after she offered Nielsen an opportunity to be searched by a male guard if Nielsen would wait shortly, and Nielsen thereafter assented to her searching him rather than waiting for a male guard.

5. In mid-August, 1985, Officer Landreau, a female, was in Unit 3 in the Control Center sometime before 2:00 p.m., when Nielsen wanted to take a shower. Nielsen delayed taking a shower, but could have taken one without being in any danger of being seen by her between 2:00 and 10:00 p.m., but chose not to do so.

6. Tammie Scholtz, a female, during the week of March 3, 1986, worked during hours which included 2:00 p.m. to

4:30 p.m. in Unit 3. She was a trainee-employee and was working at a number of different posts, never without supervision of an experienced employee and always with a male officer in the Control Center of Unit 3. There is no evidence that she saw Nielsen shower or that she patted him down.

7. About the first week in May, 1986, Guard Pat Bohnart, a female, was in Housing Unit 3 while Nielsen was showering. There is no evidence that she saw him shower, and no notice to the defendants that her presence was thought to be a violation of the judgment was given prior to the hearing on the motion to hold the defendants in contempt.

In May, 1985, the door to the shower utilized by the plaintiff Nielsen in his housing unit was removed for sanitation reasons unrelated to the issue of female guards' being able to observe inmates in the shower area.

Factors taken into consideration by the defendants in deciding upon their response to the judgment included the fact that a collective bargaining agreement between the Department of Correctional Services and its employees required certain notice to be given before any changes were made in assignment of personnel and that the process of obtaining accreditation for the penitentiary required certain actions.

Conclusions of Law

The plaintiff, Wilfred W. Nielsen, has filed the motion under various civil and criminal provisions. He asserts 18 U.S.C. § 401, which is a part of the criminal code and authorizes punishment by fine or imprisonment. He also cites 28 U.S.C. §§ 1651(a) and 2201–2202. Section 1651 authorizes the court to issue 'all writs necessary or appropriate in aid of their respective jurisdictions' and §§ 2201 and 2202 authorize declaratory relief. He cites Rule 43(a) of the Federal Rules of Civil Procedure, which provides testimony of witnesses shall be taken orally in open court unless otherwise provided by an act of Congress or rules of law, Rule 60(b) which allows the relieving of a party from a final judgment or order and Rule 65(d) which prescribes the form and scope of an injunction. He has not cited 28 U.S.C. § 636(e), which is the applicable one because it provides the means for contempt proceedings involving a magistrate's judgment. It provides that:

> ***6** '. . . A judge of the district court shall . . . in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.'

That provision authorizes either punishment—criminal contempt—or steps to obtain compliance—civil contempt—as needed. Punishment is to be 'in the same manner and to the same extent as for a contempt committed before a judge of the court' and in that regard it is probably true that punishment for criminal contempt requires 'both a contemptuous act and a willful, contumacious or reckless state of mind.' U.S. v. Hilburn, 625 F.2d 1177, 1180 (5th Cir. 1980). A deliberate and repeated refusal to obey a standing court order to clear the hall was held in U.S. v. Trudell, 563 F.2d 889 (8th Cir. 1977) to show the requisite intent to support a conviction for contempt.

What is more, it is apparently true that the trial judge must make clear on the record, before he or she imposes a criminal sanction, that there has been consideration of and rejection of the civil contempt alternative. U.S. v. Dimauro, 441 F.2d 428 (8th Cir. 1971).

In any event, it appears to me that there here was no willful, contumacious or reckless state of mind accompanying the violation of the magistrate's judgment. The defendants believed in good faith because of advice of counsel that they were not required to comply with the judgment for 30 days or so after its entry. There is not the requisite mental intent that will justify criminal sanctions. I do not credit in this regard any evidence of a collective bargaining agreement or of the accreditation process. Constitutional rights and obligations to comply with court judgments do not take a back seat to bargaining rights or accreditation.

As to civil sanctions, the purpose must be, not to punish, but to assure compliance with the judgment. Thyssen, Inc. v. S/S Chuen On, 693 F.2d 1171, 1173–1174 (5th Cir. 1982). Here, the evidence is that there was noncompliance with the judgment for a period of a month. Counsel erroneously advised the defendants that they did not need to comply during that time and they, therefore, were technically in contempt of the magistrate's judgment. But none of the incidents relied upon by the plaintiff Nielsen since that time show a failure to comply with the judgment, knowingly or otherwise. The judgment did not require the defendants to keep all female employees out of Unit 3. It required the defendants and those acting with them who received actual notice of the judgment to 'adopt policies, practices, and actions' to enable Nielsen to have access, upon request, to showers so that they are not

visible to female correctional officers and to be subject, upon request, to searches of their genital-anal areas only by male correctional officers. This the defendants have done, even though not with the error-free certainty or in the manner desired by Nielsen. The conduct complained of does not warrant criminal sanction and I find no purpose would be served in my now taking some kind of civil contempt action against the defendants to assure future compliance with the judgment. Fine or imprisonment for past doings is not an authorized remedy under civil contempt to assure future conduct. If the defendants were failing now to comply with the judgment, I could fine them or imprison them, but only until they complied. They are not now failing to comply with the judgment.

***7** IT THEREFORE HEREBY IS ORDERED that the motion for an order holding the defendants in contempt of court, filing 91, is denied.