

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN

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MICHIGAN PROTECTION & ADVOCACY  
SERVICE, INC., Case

No. 5:05-CV-0128

Plaintiff, Hon.

Richard Alan Enslen

v

PATRICIA L. CARUSO, in her official capacity as  
Director, Michigan Department of Corrections,

Defendant.

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S**  
**MOTION FOR ORDER TO SHOW CAUSE**

**TABLE OF CONTENTS**

|                                                                                                                                                                                                                        | <u>PAGE</u> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| INDEX OF AUTHORITIES .....                                                                                                                                                                                             | iii         |
| INTRODUCTION .....                                                                                                                                                                                                     | 1           |
| PRIOR PROCEEDINGS .....                                                                                                                                                                                                | 1           |
| FACTUAL ALLEGATIONS.....                                                                                                                                                                                               | 2           |
| ARGUMENT                                                                                                                                                                                                               |             |
| I.    Retaliation Against the Plaintiff’s Constituents by the Defendant’s Agents<br>Violates the Constituents Constitutional Rights and Impedes the Plaintiff’s<br>Ability to Litigate this Case on their Behalf. .... | 6           |
| II.   This Court Should Sanction the Defendant for the Violations of the<br>Second Protective Order. ....                                                                                                              | 9           |
| CONCLUSION .....                                                                                                                                                                                                       | 11          |
| INDEX OF EXHIBITS.....                                                                                                                                                                                                 | 12          |

# INDEX OF AUTHORITIES

|                                                                                               | <u>PAGE</u> |
|-----------------------------------------------------------------------------------------------|-------------|
| <br><u>CASES</u>                                                                              |             |
| <u>Bell v. Johnson</u> ,<br>308 F.3d 594 (6 <sup>th</sup> Cir. 2002) .....                    | 7           |
| <u>Berryman v. Rieger</u> ,<br>150 F.3d 561 (6 <sup>th</sup> Cir. 1998) .....                 | 6           |
| <u>Bounds v. Smith</u> ,<br>430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) .....           | 6           |
| <u>Glover v. Johnson</u> ,<br>138 F.3d 229 (6 <sup>th</sup> Cir. 1998) .....                  | 6, 9, 10    |
| <u>Gnesys, Inc v. Greene</u> ,<br>437 F.3d 482 (6 <sup>th</sup> Cir. 2005) .....              | 9           |
| <u>Janis v. Ashcroft</u> ,<br>348 F.3rd 491 (6 <sup>th</sup> Cir. 2003) .....                 | 7           |
| <u>Maggio v. Zeitz</u> ,<br>333 U.S. 56 (1948) .....                                          | 5           |
| <u>NLRB v. Cincinnati Bronze, Inc.</u> ,<br>829 F.2d 585 (6 <sup>th</sup> Cir. 1987) .....    | 9           |
| <u>Rolex Watch U.S.A., Inc. v. Crowley</u> ,<br>74 F.3d 716 (6 <sup>th</sup> Cir. 1996) ..... | 6           |
| <u>Shillitani v. United States</u> ,<br>384 U.S. 364 (1966) .....                             | 5           |
| <u>Spallone v. United States</u> ,<br>493 U.S. 265 (1990) .....                               | 5           |
| <u>Thaddeus-X v. Blatter</u> ,<br>175 F.3d 378 (6 <sup>th</sup> Cir. 1999) .....              | 6, 7, 8     |
| <u>United States v. United Mineworkers</u> ,<br>330 U.S. 258 (1947) .....                     | 10          |

|                                                                                    | <u>PAGE</u> |
|------------------------------------------------------------------------------------|-------------|
| <b><u>CASES</u></b>                                                                |             |
| <u>Westefer v. Snyder</u> ,<br>422 F.3rd 570 (7 <sup>th</sup> Cir. 2005) . . . . . | 8           |
| <u>Wilson v. Silcox</u> ,<br>151 F. Supp.2d 1345 (N.D. Fla. 2001) . . . . .        | 8           |
| <u>Wolff v. McDonnell</u> ,<br>418 U.S. 539, 94 S.Ct. 2963 (1996) . . . . .        | 6           |
| <b><u>STATUTES</u></b>                                                             |             |
| 42 U.S.C. § 1983 . . . . .                                                         | 7           |

### **INTRODUCTION**

Plaintiff, Michigan Protection & Advocacy Service, Inc. ("MPAS") requests this Court to find that Defendant Caruso has violated the Second Protective Order issued by this Court on December 22, 2006. This Order was entered to ensure the MPAS constituents, youth with mental illness in Michigan Department of Corrections ("MDOC") facilities, who are the subject of this litigation remain free from retaliation, harassment, and other mistreatment by employees of the MDOC. Specifically, Plaintiff seeks a finding that the Defendant has violated the Order regarding the handling of legal mail and the prohibition against retaliation and harassment of MPAS constituents by MDOC employees under the direction of Defendant Caruso.

### **PRIOR PROCEEDINGS**

Plaintiff MPAS filed its original Complaint in this matter on September 14, 2005. In response to Defendant Patricia L. Caruso's Motion for More Definite Statement and for Partial Summary Judgment, the Plaintiff filed a Motion to Seal Documents, to allow MPAS to disclose the names of youth in the custody of MDOC who would be identified by number in the Second Amended Complaint in a manner that would ensure the confidentiality of the youth. Defendant Caruso filed a response to the Motion for a Protective Order, and on April 10, 2006, this Court issued its Opinion granting Plaintiff's Motion to Seal Documents. In its Opinion, this Court analogized to the purposes of Western District of Michigan Local Civil Rule 10.7 and held that:

[t]he danger of misuse of the information at issue in this case (personal identifier of minors/young prisoners and their mental health and disability information, the disclosure of which might subject them to targeted abuse in prison) is such that it should be afforded like special protection.

Subsequently, the Court's fears were realized. On August 7, 2006, Plaintiff MPAS was required to seek a Second Protective Order for the youth who had the courage to come forth and complain of their mistreatment or non-treatment at MDOC facilities and were targeted for abuse,

harassment, and retaliation by employees of MDOC. Based on these affidavits and testimony<sup>1</sup> at the November 21 and 22, 2006 hearing the parties agreed to the entry of a Second Protective Order, entered on December 22, 2006. This agreement was designed to ensure that the youth with mental illness now in the custody of MDOC are not subjected to the type of retaliation and harassment that effectively deprives them of access to the courts. That Order specifically prohibits MDOC staff from engaging in any kind of retaliation against any youth who has filed or is pursuing litigation against MDOC. The Order also states that employees of MDOC should not without good reason discuss or question any youth about litigation pursued by the youth. A copy of the Order is attached hereto as Exhibit 1.

Unfortunately, the Order appears to have had almost no impact. The Plaintiff has learned of continuing harassment of its constituents. Before filing this Motion, on January 12, 2007, the Plaintiff notified the Defendant in writing through her counsel of most of the allegations set forth in the affidavits and requested relief. The Defendant has not responded to that notification.

### **FACTUAL ALLEGATIONS**

Prisoners are especially vulnerable to treatment which would deter them from bringing a legal claim against prison officials. They are dependant upon prison officials for food, clothing, shelter, freedom from abuse from prison staff and other inmates, freedom from unnecessary segregation and, ultimately parole the community. They can be subtly, or sometimes not so subtly, subjected to practices which are intended to coerce them into not participating in litigation. Obviously, youth, and, in particular, youth with mental illness, are especially vulnerable to this form of treatment or mistreatment.

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<sup>1</sup> At the hearing the plaintiff presented testimony from six youth. Each youth described the retaliation they have experienced due to their association with MPAS. The hearing was adjourned before MDOC completed testimony from its first witness.

As is demonstrated by the accompanying affidavits, submitted under seal to this Court and to opposing counsel, MPAS constituents who are youth currently in the custody of the MDOC continue to be subjected to retaliation and harassment by MDOC staff, notwithstanding two orders from this Court. The staff identified by the inmates in their affidavits are all employees or agents of Defendant Caruso. The maltreatment identified in these affidavits commenced after these youth began meeting with MPAS and has occurred since the entry of the Second Protective Order. Many of the youth submitting affidavits were identified in the Third Amended Complaint, filed with this Court on November 20, 2006. A summary of some of the facts alleged in the affidavits follows.

Several youth have suffered physical threats and harm in the past two months. MDOC has admitted that Youth 39 was placed in top of bed restraints from November 23, 2006 to November 27, 2006. For extended periods during his restraint, Youth 39 was not given food or water and was not released for regular bathroom breaks. According to his affidavit, while he was in top of bed restraints, several officers came into the room and hit him. At that time the officers were assaulting him, they threatened Youth 39 that if he told MPAS about the assault, they could make his death look suicidal. On December 22, 2006, when Youth 39 was being escorted in full restraints to be moved to Huron Valley, MDOC staff took him to the ground and then dragged him by my feet across cement for about 15-20 feet to the van to take him to Huron Valley. Youth 39 only stayed at Huron Valley for approximately 4 weeks and has since been transferred back to Ionia Max.

In his affidavit, Youth 46 reports being assaulted by MDOC staff. In January 2007, Youth 46 was pushed into a door while he was being escorted in full restraints. Youth 46 also

has been placed in two different cells where the walls and floor are covered with feces, urine, sperm and blood, and he has been exposed to gas which aggravates his asthma.

Other youth named in MPAS' Complaint also report feeling unsafe. Youth 6, who testified at the November 21, 2006 hearing, still reports that he does not feel safe at his facility. Youth 66 reports that since he began meeting with and writing letters to MPAS, MDOC staff have been saying to him that he will be in segregation or "better yet, dead" in the next few weeks. Youth 20 has requested to be placed in protective custody because of threats from staff, but that request has been refused. Youth 20 was one of the youth who submitted an affidavit in support of MPAS' motion requesting the Second Protective Order.

Youth named in the Third Amended Complaint are also receiving unsubstantiated tickets since the issuance of the Second Protective Order. For example, Youth 20 was placed in segregation after two corrections officers sent another inmate to fight with him because he would not sign off the MPAS law suit against MDOC. Youth 46 has similarly been placed in segregation based on his observation of a fight between two other inmates.

Youth named in the complaint have also had their property destroyed. After Youth 20 was sent to segregation, MDOC staff threw away most of his property and they will not bring him his legal work, including documents from MPAS. Youth 46 also reports that MDOC staff have refused to give him back his legal documents related to MPAS' litigation against MDOC.

Youth are also denied assistance of MDOC staff based on their association with MPAS. For example, Youth 17 has discovered that in late November 2006, MDOC failed to submit his filing fee for his appeal of a MDOC misconduct ticket to Circuit Court. This meant that his appeal was not filed with the Court before the deadline. His grievance was substantiated, and he

was told by Marquette staff he could resubmit his paperwork to the Court, but only if he signs off on the grievance. Youth 17 testified at this Court's November 21, 2006 hearing on retaliation.

Other youth have experienced similar treatment. Youth 90 reports that when he has a problem with a corrections officer, the officer's superiors refuse to address the problem because of his association with MPAS. Youth 48 was told, when asking about seeing a mental health staff, that as long as he was dealing with MPAS, "you won't have shit coming." Youth 70 has had officers refuse to process his legal mail in a timely manner, and has had two unsubstantiated tickets issued in connection with his sending and receipt of legal mail. Youth 46 has been refused his meal trays and snack bags.

One youth, who is not even named in the Third Amended Complaint but was visited by MPAS, reports that shortly after he was visited by MPAS staff, mental health staff at Marquette found out that he had met with MPAS and discontinued his psychotropic medication. In contrast, MPAS has learned that, Youth 2, who declined to testify at the November 20, 2006 hearing and subsequently contacted the Defendant's counsel to say that he was no longer associated with MPAS, has recently been removed from administrative segregation.

### **ARGUMENT**

Courts have the inherent power to enforce compliance with their own orders through civil contempt. Spallone v. United States, 493 U.S. 265, 276 (1990)(quoting Shillitani v. United States, 384 U.S. 364, 370 (1966)). In enforcing compliance, the Court does not reconsider the legal or factual basis for the order to be enforced. Maggio v. Zeitz, 333 U.S. 56, 69 (1948).

Civil contempt is appropriate where a party shows by clear and convincing evidence that the opposing party violated a definite and specific order of the Court. After the moving party makes a *prima facie* showing of a violation of the Court's Order, the opposing party has the

burden to prove an inability to comply with the order. Glover v. Johnson, 138 F.3d 229, 244 (6<sup>th</sup> Cir. 1998). The Glover Court stated in an earlier opinion that contempt is established if a party has failed to take all reasonable steps within their power to comply with the Court's Order. 934 F.2d 703, 708 (6<sup>th</sup> Cir. 1991). The Defendant has the burden of proving impossibility of complying with the Court's Order. Id. Neither lack of good faith nor willfulness need be established to show contempt. Id. See also, Rolex Watch U.S.A., Inc. v. Crowley, 74 F.3d 716, 720-21 (6<sup>th</sup> Cir. 1996).

**I. Retaliation Against the Plaintiff's Constituents by the Defendant's Agents Violates the Constituents Constitutional Rights and Impedes the Plaintiff's Ability to Litigate this Case on their Behalf.**

Defendant's agents and employees actions are having the effect of depriving Plaintiff's constituents their fundamental constitutional right to access to the courts. Bounds v. Smith, 430 U.S. 817, 822, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); Berryman v. Rieger, 150 F.3d 561, 567 (6<sup>th</sup> Cir. 1998). This right extends to prisoner assistance in civil rights actions. Wolff v. McDonnell, 418 U.S. 539, 577-80, 94 S.Ct. 2963 (1996). The exercise of this fundamental right is obviously dependant upon freedom from harassment, retaliation, and abuse at the hands of MDOC officials. Collectively, these affidavits establish that there is a pattern and practice of harassment and retaliation by prison officials against the inmates who have had the courage to step forward to participate in this litigation at the challenged conditions of their confinement in MDOC. Consequently, the Plaintiff is severely hampered in its efforts to litigate this action on their behalf.

The Sixth Circuit Court of Appeals has been especially mindful of the potential for retaliation against inmates by prison officials when those inmates have exercised their constitutional rights of access to the courts. In Thaddeus-X v. Blatter, 175 F.3d 378 (6<sup>th</sup> Cir.

1999), the Court set forth the elements for retaliation claim brought by a prisoner under 42 U.S.C. § 1983. Those elements are: "(1) The plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two - that is, the adverse action was motivated in at least in part by the plaintiff's protected conduct." Id. at 394.

In Bell v. Johnson, 308 F.3d 594 (6<sup>th</sup> Cir. 2002), the Sixth Circuit was faced with a claim by an inmate that had been subjected to retaliatory action for filing a civil rights lawsuit. The Court held that he had met his burden of presenting sufficient evidence of adverse action, stating:

The fact that defendants repeatedly stole plaintiff's legal papers certainly had the potential to directly impede his pursuit of his claim, and may have caused others to believe that any efforts they might expend in preparing legal claims would be wasted since any materials they prepared could easily be destroyed or confiscated. In addition, a jury could infer that deliberately depriving a prisoner of dietary supplements designed to ameliorate the weight-loss effects of a deadly disease like AIDS could deter a person of ordinary firmness from pursuing his or her legal claims. 308 F.3d at 605.

The type of harassment visited upon Plaintiff in Bell v. Johnson is similar to the retaliation experienced by the youth identified in this matter and interviewed by Plaintiff MPAS, as set forth in the affidavits as described above. Legal mail has been confiscated. Youth have been placed in segregation for extended periods of time. Comments have been made about the participation of inmates in the instant litigation.

Similarly, in Janis v. Ashcroft, 348 F.3d 491 (6<sup>th</sup> Cir. 2003), the Court found that the implementation of new telephone policies by prison officials in alleged retaliation for inmates pursuing litigation stated a cognizable claim under 42 U.S.C. § 1983. Certainly the implementation of telephone restrictions as a form of harassment falls far short of the harassment experienced by the Plaintiffs in this suit.

Other courts have been equally diligent in protecting the free access to the courts by inmates. As an example, in Wilson v. Silcox, 151 F. Supp.2d 1345 (N.D. Fla. 2001), the District Court denied a Motion for Summary Judgment for the defense when an inmate alleged retaliation in the form of threatening statements made by a guard. Similarly, in Westefer v. Snyder, 422 F.3d 570 (7<sup>th</sup> Cir. 2005), a Section 1983 claim was found to be cognizable where the allegation was that the inmates had been transferred to a particular prison as retaliation for their responses to certain interrogatories.

As shown by the decision in Thaddeus-X, *supra*, the Sixth Circuit Court of Appeals has been especially protective of the rights of inmates who seek access to the courts. That Court recognized that harassment and retaliation comes in many forms, and recognized as cognizable claims allegations that are far less severe than those raised by the inmates in this matter. 175 F.3d at 387-92.

This case is brought on behalf of youth with mental illness in MDOC facilities, by MPAS as an organizational Plaintiff. In all respects, the Plaintiff stands in the place of its constituents in the exercise of the protection of their rights. The retaliation and associated actions taken by the Defendant's employees and agents negatively impact the ability MPAS to exercise and protect the legal of its constituents. The response of Youth 2 to the retaliation he suffered – opting to cease his association with MPAS – demonstrates the effect of this treatment on MPAS' ability to litigate this action. Continuation of such harassment and retaliation cannot help but make other youth at MDOC facilities reluctant to meet with MPAS staff, and has made them fearful of continuing to provide information in support of this litigation.

**II. This Court Should Sanction the Defendant for the Violations of the Second Protective Order.**

Plaintiff asks the Court to find Defendant's employees in civil contempt of the Court's Second Protective Order. This Court should sanction the Defendant as a remedy for the harassment described here, which has violated the Second Protective Order. Plaintiff MPAS has met its burden of demonstrating a *prima facie* violation of the Court's order by showing evidence in the accompanying affidavits that Defendant's staff continue to violate the Court's Second Protective Order.

This Court, as noted in its April 2006 Order, was aware of the abuse that inmates may be subjected to should personal information about them be disclosed to prison officials. Unfortunately, prison officials have become aware of those youth who have offered their names and stories to Plaintiff and have thereby supported this litigation, and they have proceeded to make these youth fearful for their safety.

This Court should find Defendant Caruso, who has been made aware through her counsel of the actions of her agents and employees, to be in contempt of the Second Protective Order. Any party may be found in contempt based on the violation of a "definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with the knowledge of the court's order." *Gnesys, Inc v. Greene* \_\_\_\_\_, 437 F.3d 482, 493 (6<sup>th</sup> Cir. 2005)(quoting *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 591 (6<sup>th</sup> Cir. 1987)). Contempt has occurred if a party failed to take all reasonable steps to comply with an order, including "marshall[ing] their own resources, assert[ing] their high authority, and demand[ing] the results needed from subordinate persons and agencies in order to effectuate the course of action required." *Glover v. Johnson* \_\_\_, 934 F.2d 703, 708 (6<sup>th</sup> Cir. 1991). A party can be held in contempt to coerce future compliance with the Court's Order, or to compensate for the injuries

which have resulted from the noncompliance. Glover v. Johnson, 199 F.3d 310, 313 (6<sup>th</sup> Cir. 1999). The Glover Court upheld sanctions of \$5,000 against MDOC based on its denial of vocational training for female inmates. Id.

The affidavits submitted in support of this Motion demonstrate that Defendant Caruso has failed to use her authority and her resources to prevent further retaliation against MPAS constituents. Youth named in the Third Amended Complaint as well as other MPAS constituents have been subjected to physical abuse and verbal threats, unsubstantiated discipline, and denial of access to basic services. MDOC staff have made no attempt to hide the connection between this treatment and the youths' association with MPAS and this litigation. As the result of this treatment, one youth has already ceased his association with MPAS and many others fear for their safety.

Because MDOC staff are continuing to harass MPAS constituents after the entry of the Second Protective Order, more specific relief is requested in this matter. The magnitude of the sanctions imposed should consider the harm already caused by the noncompliance, and the probable effectiveness of the sanctions in bringing about the result desired. Glover, 199 F.3d at 312 (quoting United States v. United Mineworkers, 330 U.S. 258, 304 (1947)). This Court should order that Defendant Caruso pay a fine to this Court based on her failure to ensure compliance with the Court's Order. MPAS constituents should be compensated for the injuries they have incurred from the physical and verbal assaults by Defendant Caruso's staff. Additionally, any tickets they have received due to retaliation should be removed from their record, and their points adjusted accordingly.

To protect these youth from future harm, in consultation with and approval of undersigned counsel, these constituents should be moved to another facility where retaliation has

not occurred but where they can continue to receive the mental health and education services they require. In addition, MPAS should be reimbursed its attorney fees and expenses which have been incurred in its efforts to ensure compliance with the Second Protective Order. This relief is necessary to protect youth with mental illness in the custody of MDOC from retaliation and harassment. By reacting to this prohibited activity by the corrections staff, sanctions will enhance the operation of the facilities as well as protect the young inmates from illegal harassment and allow the Plaintiff to pursue the protection of their rights.

### **CONCLUSION**

For the reasons set forth above, Plaintiff Michigan Protection & Advocacy Service, Inc. prays this Court to find the Defendant in civil contempt of the Second Protective Order which enjoined Defendant Caruso and her employees and agents from retaliating against constituents of Michigan Protection & Advocacy Service, Inc.

Date: February 1, 2007

Respectfully submitted:

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**INDEX OF EXHIBITS**

Exhibit 1: Second Protective Order, dated December 22, 2006

\*Remaining exhibits filed under seal with the Court.