

SEE MOORE V. MAIBUS, 976 F.2J 268, 271-272 (5th Cir. 1992)
CITING WITH APPROVAL HARRIS V. THIOPE
941 F.2J 1495 (11th Cir. 1991)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DAVID D. MOORE, ET AL.

PLAINTIFFS

V.

CIVIL ACTION NO. 4:90CV125-S-D

KIRK FORDICE, ET AL.

DEFENDANTS

MOTION FOR ORDER TO SHOW CAUSE
WHY DEFENDANTS SHOULD NOT BE HELD
IN CONTEMPT, FOR SANCTIONS,
AND FOR OTHER RELIEF

PLAINTIFFS, by and through class counsel, move the Court for Orders:

A. Setting this matter for hearing and directing defendants to show cause, if any they can, why they should not be held in contempt of the orders of this Court in the respects advanced below;

B. Finding defendants in contempt;

C. Allowing defendants 30 days from the date of the contempt order in which fully to purge themselves of contempt, and imposing a sanction of \$10,000 per day for each day thereafter that defendants fail fully to purge their contempt and remain in full compliance;

D. Or, alternatively, and in lieu of the contempt and contempt sanction relief requested above, for an order directing defendants to provide HIV plaintiffs the same access to and participation in all DOC jobs and programs as that afforded all similarly-classified, non-HIV, general-

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population inmates, while continuing to allow the DOC to house HIV class members in truly separate housing units (i.e. not one-half of a Unit as at present in Unit 28) for more efficient/effective medical service/ treatment purposes, *inter alia*.

E. Extending, for an additional five years, the jurisdiction of the Court

"to supervise implementation of the Court's orders, and to grant such modification of or addition to this Order or to the submitted plans as the review standards of fairness and reasonableness may require." JUDGMENT, Paragraph 13 at page 4.

F. Awarding reasonable monitoring-and-enforcement attorneys' fees and costs pursuant to 42 U.S.C. Section 1988 for all post-judgment work on the case to date of order; and

G. Directing defendants to pay all subsequent monitoring and enforcement attorney's fees and costs within 30 days of the submission by plaintiffs' counsel of an itemized, no-more-than-one-a-month, statement, said continuing order also providing that defendants may withhold payment of only such specific portions of any such statement to which, within fifteen days of receipt of plaintiffs' fees and costs statement, defendants file written objection to the Court for proper resolution of, and decision on, the statement items thus disputed;

H. Granting such other good, general, and equitable relief as may reasonably and fairly necessary in the circumstances.

AS GROUNDS AND IN SUPPORT, plaintiffs would show the Court as follows:

1. An AGREED JUDGMENT OF SETTLEMENT (hereinafter "JUDGMENT") was transmitted to the Court for approval by June 23, 1995 letter to Chief Judge Senter from instant plaintiffs' counsel with respect to the pre and post judgment applicability the attorney's fees provisions of the AGREED JUDGMENT. This June 23 letter of agreement understanding on attorney's fees was never subsequently disputed/denied by defendants, and, thus, constitutes an integral, enforceable part of the JUDGMENT subsequently approved by the Court. In presently relevant part, plaintiffs' June 23 transmittal letter states as follows:

"Mr. Vincent has insisted, as a condition of settlement, that I waive attorney's fees under the terms that he has written in the JUDGMENT. And so, viewing the class' interests more important than fees, I have agreed. In agreeing, however, I understand paragraph 13 on page 4 (allowing post-judgment jurisdiction modifications or additions to the JUDGMENT) to allow equitable "modification" to award reasonable fees, post-judgment, if enforcement, modification, and/or contempt action should become necessary on behalf of the class." *Id.* at page 1 (emphasis added).

2. The above JUDGMENT was subsequently entered in this case June 28, 1995, and provided, *inter alia*, for defendants to file plans designed to comply with stated JUDGMENT requirements. A true copy is attached as Exhibit A.

3. Defendants subsequently filed their PROPOSED PLAN AND PHASE-IN TIMETABLE (hereinafter "PLAN") on August 25, 1995. The Court, finding that defendants' said PLAN "provides for a reasonable implementation of the provisions set forth in the Agreed Judgment, and is fully sufficient," accepted the PLAN as "in compliance with the Agreed Order and in settlement of this matter." ORDER filed September 18, 1995. A true copy of said ORDER, followed by a true copy of defendants' PROPOSED PLAN AND PHASE-IN TIMETABLE is attached is attached hereto as Exhibit B.

I. Non-HIV Inmates Remain Housed
In One-Half of Unit 28

4. At June 1995 JUDGMENT, 1/2 of Unit 28 (a maximum of 96 inmates in A and B Zones) was occupied by non-HIV, disabled prisoners, all of whom were afforded general population privileges, programs, education, jobs, etc., denied to HIV inmates living in the same unit (a maximum of 96 inmates in C and D Zones).

5. The June 1995 JUDGMENT, Par. 4 at page 2, required defendants to follow a "phase-in timetable" for moving the non-HIV (disabled) inmates out of and for moving HIV class members into A and B Zones so that "only" HIV class members would be housed in Unit 28 (A, B, C, and D Zones).

6. Defendants' PLAN, as approved, stated only that "(w)hen there are enough HIV inmates to fill Unit-28, the unit will be designated as the HIV Unit". PLAN, Sec. I.

7. Unit 28 housing of non-HIV inmates has continuously remained, and presently remains unchanged since the June 1995 JUDGMENT: one-half (A and B Zones) is still occupied by non-HIV, "disabled" inmates, and one-half (C and D Zones) is occupied by HIV class members.

8. From soon after the approval of defendants' Plan in August 1995 to present, there have continuously been enough HIV inmate class members in the Department of Corrections reasonably/fairly to "fill" Unit-28 with "only" HIV class members by moving out the non-HIV, disabled inmates in A and B Zones as promised and ordered.

9. Defendants' failure to move the non-HIV, disabled inmates from A and B Zones in Unit 28 has caused a back-up of HIV inmates in MSP Unit 32 who have been classified/assigned to Unit 28 but not moved due to lack of space in Unit 28's C and D Zones.

10. Defendants' failure to move the non-HIV, disabled inmates from A and B Zones in Unit 28 has also, on information and belief, caused a back-up of HIV inmates in Central Mississippi Correctional Facility (DOC's new inmate entry/reception facility) who have been identified as HIV positive and/or classified/assigned to Unit 28 but not moved from CMCF due to defendants failure to move non-HIV,

disabled inmates in A and B Zones and the lack of space in Unit 28's C and D Zones.

II. Jobs For HIV Inmates Plan
Have Not Been Provided

11. The June 1995 JUDGMENT required "a plan and phase-in timetable to provide more jobs and more frequent outdoor exercise and sports competition by increased "yard-calls" at the unit, *inter alia*.." Defendants' August 1995 PLAN, as approved, stated:

"Unit-28 support jobs will be available to HIV inmates: yard crew; kitchen workers; clerks; canteen operator; pants/laundry man; janitors; and short line. Phase-in will begin when the elderly, disabled inmates are moved from the unit." PLAN, Sec. II (emphasis added)

12. The elderly, disabled inmates have never been moved from Unit 28 as stated above and, thus, defendants' promised/ordered "phase-in increase of jobs, etc. for HIV class members has never taken place: the Unit support jobs assignments for HIV inmates (clerk and janitor) in Unit 28 remain unchanged since the entry of the JUDGMENT and PLAN, and non-HIV, disabled inmates in Unit 28 hold most of the inmate support jobs.

13. One new, post-PLAN job assignment was the now long-term assignment of one, Unit 28 HIV class member to a general inmate population, inmate writwriter job at Unit 30 Law Library. See, *infra*, Parag. 32, 34, and H.

III. Exercise And Sports Plan
For Unit 28
Has Not Been Provided

14. Defendants' August 1995 PLAN, as approved, stated:

"Each yard call period will be increased by fifteen (15) minutes (morning, afternoon and evening), if there are no conflicts. Checkers, chess, dominoes and unit games may be available. Weights, volleyball equipment, basketball equipment, horse shoes and softball equipment may be issued.

Basketball, volleyball, weight lifting and ping pong may be available.

In the Spring, Summer and Fall, as weather permits, class members may have a softball league one afternoon a week. They may also spectate at other inmate games, concerts and other activities if security can be maintained."

15. Since the entry of the JUDGMENT and PLAN to date, Defendants have not increased yard call fifteen minutes for class members as stated for the morning and afternoon yard calls (then and now: 10-11 AM and 2-3:30 PM), and, defendants have not provided class members any "evening" yard call whatsoever.

16. Many, if not most, of the items of sports equipment defendants' PLAN states "may be available" have, in fact, never been made "available" to class members in Unit 28, and class members have never been allowed to "spectate" at other inmate activities as stated.

IV. Educational Activities/Courses
Have Never Been Implemented

17. The JUDGMENT required defendants to submit a plan by which

"segregated class members will be provided with reasonable educational activities/courses, and job assignments as an alternative to those educational opporunities/courses and job assignments available to the population at large. The plan shall contain a timetable providing for substantial implementation as soon as possible and complete implementation on or before January 15, 1996." *Id.* Par. 6, at page 3.

18. The entire "Educational Activities/Courses" portion of Defendants' August 1995 PLAN, as approved, stated:

"The equipment for the Unit-28 Learn, Earn, and Prosper (LEAP) program has arrived. The Equipment is being installed as of this date. The first classes are scheduled to begin by October 1, 1995. This program has been contracted through the University of Mississippi."

19. Defendants have never, in fact, implemented the stated LEAP program/classes or any other "reasonable educational activities/courses, and job assignments as an alternative to those educational opporunities/courses and job assignments available to the population at large" JUDGMENT, *id.*, for class members in Unit 28, beyond those which existed at the time of JUDGMENT and PLAN (G.E.D. and religious).

V. Medical Diet Plan Requirement
Of "Double Portions"
For Certain, Defined Class Members
Has Never Been Provided/Implemented;

20. The JUDGMENT required defendants to submit a plan for providing medically appropriate diets for class members. Par. 9 at page 3.

21. Defendants' PLAN, as approved, states: "The attached policy ("DIET POLICY FOR HIV+ PATIENTS") has been implemented." *Id.*, Sec. VI. (*emphasis added*). The said DIET POLICY states, *inter alia*, that class members with "CD-4 counts between 200 and 500 shall be given caloric supplements (double portions)" (*emphasis added*).

22. Class members with CD-4 counts between 200 and 500 have not been given double portions for the caloric supplement required in the approved plan.

23. In place of the "double portions" required, *supra*, defendants have substituted/provided a "snack bag" (one-slice cheese sandwich, orange or apple, and milk) supplement to regular meals.

24. Even though the Court specifically retained jurisdiction of the case, JUDGMENT Par. 13, at page 4, defendants did not seek or obtain modification of the Court's Order or of their own PLAN prior to making said snack bag substitution for the required "double portions".

VI. The Good Faith Efforts
Of Plaintiffs' Counsel
Informally To Obtain
Defendants' Voluntary Compliance
Have Failed

25. As reported to United States Magistrate Judge Davis, "Report To The Court" of July 11, 1996, plaintiffs' counsel discovered "apparent violations of the Final Judgment orders of this Court in this case to which defendants agreed," *Id.* Par. 2 and planned follow-up efforts to determine "whether or not said violations presently continue, and, if so, whether formal contempt litigation with the Court will be necessary to achieve compliance." *Id.* Par. 3.

26. Well prior to said "Report To The Court," plaintiffs' counsel met by chance and spoke orally with Hon. Leonard Vincent, Counsel for defendants, about the HIV order violations Counsel for plaintiffs had found, and, in particular, discussed with Mr. Vincent defendants' complete, total, and continuing failure to implement the promised and ordered LEAP educational program at Unit 28.

26. In apparent sole response to said "Report To The Court", however, Mr. Vincent wrote plaintiffs' counsel a letter, dated July 16, 1996, copied to U.S. Magistrate Judge Davis in which Mr. Vincent either disavowed and/or did not remember the earlier oral, "notice" discussion initiated by plaintiffs' counsel and described above in Paragraph 26.

"I have had no notice of any specific violations of the order, and I am requesting that you furnish me with those allegations so that I might conduct an investigation and response accordingly." *Id.*

But See, THIS COURT'S CASE RECORDS/FILES: Court's mailing to Mr. Vincent copies of same court referral orders and pro se HIV inmate complaints forwarded to instant plaintiffs' counsel for present investigation.

28. Subsequent to counsel for defendants' July 16, 1996 letter, *supra*, plaintiffs' counsel once again met, by chance, and spoke with Mr. Vincent. At this meeting, plaintiffs' counsel expressed his disagreement with Mr. Vincent's "no notice" letter statements, and reminded Mr. Vincent of the pre-Report "notice" discussions of order violations in this case with plaintiffs' counsel.

29. Once again, at this post-July 16, 1996 meeting in the office of Special Asst. Attorney General Joe Goff, plaintiffs' counsel advised Mr. Vincent, *inter alia*, of defendants' complete/total failure to implement the LEAP educational program at Unit 28 as promised and ordered, a failure that was orally acknowledged/admitted by Mr. Vincent at that time.

30. After this second meeting/discussion with Mr. Vincent, *supra*, plaintiffs counsel made a follow-up, return visit to MSP Units 28 and 32 on Wednesday, August 28,

1996, and found no changes whatsoever in the continuing, non-compliance with and violations of the Court's orders complained of above.

31. Plaintiffs have, thus, fully discharged their obligation, if any, under Paragraph 12 at page 4 of the Judgment, to seek a good faith informal resolution to the long-term, continuing violations of the orders of the Court complained of herein, and have determined that litigation of the present, formal contempt and formal entry of contempt sanctions and/or alternative relief from the Court is necessary for full compliance with the Court's orders (incorporating defendants' own plans) ever to be achieved and/or for plaintiffs to be afforded full and complete, fair and reasonable, equitable relief to which they are entitled in the circumstances.

VII. Plaintiffs Are Entitled To Alternative,
Enforcement Injunctive Relief
Mandating Their Access To
General Population Jobs And Programs

32. The year-long success of the one, Unit 28, HIV inmate, bussed to and from a general inmate population job assignment which brings him into daily personal contact with inmates from all MSP housing Units served by Unit 30 Law Library, see Paragraph 13, supra at page 6, is a clear, voluntary breach/modification of defendants' thus-outdated, written HIV segregation policy.

33. Other, post-judgment, voluntary breaches/
modifications of the DOC's written HIV segregation policy,
IN ADDITION TO UNIT 28 ITSELF (in which HIV inmates of Zones
C and D have daily, personal contact with non-HIV inmates of
Zones A and B) include bus transportation (where HIV inmates
ride with and have free on-board personal contact with MSP
general population inmates) and in hospital visits for
services, *inter alia*.

34. All of the above, post-judgment, voluntary,
successful breaches/modification of defendants' written HIV
segregation policy, support plaintiffs' alternative relief
request that the Court direct defendants to provide
plaintiffs the same access to and participation in all DOC
jobs and programs as that afforded all similarly-classified,
non-HIV general population inmates, while continuing to
allow the DOC to house HIV class members in truly separate
(*i.e.* not one-half of a Unit as at present in Unit 28)
housing units for more efficient/effective medical
service/treatment purposes, *inter alia*.

WHEREFORE, plaintiffs pray the Court issue Orders:

A. Setting this matter for hearing and directing
defendants to show cause, if any they can, why they should
not be held in contempt of the orders of this Court in the
respects advanced above;

B. Finding defendants in contempt;

C. Allowing defendants 30 days from the date of the
contempt order in which fully to purge themselves of

contempt, and imposing a sanction of \$10,000 per day for each day thereafter that defendants fail fully to purge their contempt and remain in full compliance;

D. Or, alternatively, and in lieu of the contempt and contempt sanction relief requested above, for an order directing defendants to provide HIV plaintiffs the same access to and participation in all DOC jobs and programs as that afforded all similarly-classified, non-HIV general population inmates, while continuing to allow the DOC to house HIV class members in truly separate housing units (i.e. not one-half of a Unit as at present in Unit 28) for more efficient/effective medical service/ treatment purposes, *inter alia*.

E. Extending, for an additional five years, the jurisdiction of the Court

"to supervise implementation of the Court's orders, and to grant such modification of or addition to this Order or to the submitted plans as the review standards of fairness and reasonableness may require." JUDGMENT, Paragraph 13 at page 4.

F. Awarding reasonable monitoring-and-enforcement attorneys' fees and costs pursuant to 42 U.S.C. Section 1988 for all post-judgment work on the case to date of order; and

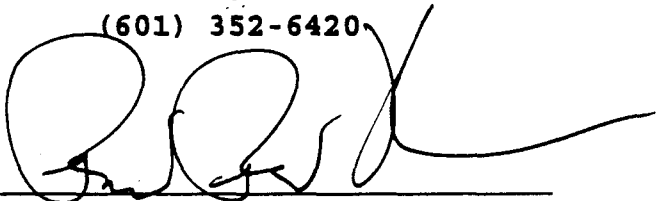
G. Directing defendants to pay all subsequent monitoring and enforcement attorney's fees and costs within 30 days of the submission by plaintiffs' counsel of an itemized, no-more-than-one-a-month, statement, said

continuing order also providing that defendants may withhold payment of only such specific portions of any such statement to which, within fifteen days of receipt of plaintiffs' fees and costs statement, defendants file written objection to the Court for proper resolution of, and decision on, the statement items thus disputed;

H. Granting such other good, general, and equitable relief as may reasonably and fairly be required in the circumstances.

Respectfully submitted,
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