

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

MOHAMED A. EL-TABECH,	)	
	)	4:04CV3231
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
HAROLD W. CLARKE, et al.,	)	
	)	
Defendants.	)	
_____	)	

This matter is before the court on the plaintiff's motion for contempt, Filing No. [205](#). The court heard oral argument on the motion on February 19, 2009.

Pursuant to earlier orders, defendants were required to implement a "Kosher Equipment and Meal Preparation Process," to develop and implement protocols to ensure that the plaintiff is provided nutritionally-sufficient kosher meals, and to post prayer schedules. See Filing No. [179](#), Memorandum and Order; Filing No. [190](#), Order; Filing No. [187](#), Stipulation. The plaintiff has presented evidence that the defendants have failed to comply with the court's order and that, on several occasions, he has found nonkosher foreign materials, including excrement, in his food. See Filing Nos. [206](#), [207](#), & [208](#), Indices of Evidence, Exs. 1-10. He has also shown that the prayer schedule has been posted late or torn down and that his prayers have been interrupted. *Id.*, Ex. 1-D.

In response, defendants have shown that they have made efforts to remedy the problems by implementing an additional protocol that requires the preparation of the meal to be observed and the meal to be personally delivered to El-Tabech. Filing No. [216](#), Index of Evid., Exs. 1-4. El-Tabech, however, has shown that the defendants' efforts have been less than successful and that he continues to experience problems with the kosher meals.

See Filing No. [224](#), Index of Evidence, Exs. 11, and attached Exs. A - C. The defendants have not disciplined any employees for violations of the protocol. See Filing No. [216](#), Index of Evidence, Exs. 1-4. Further, the parties acknowledged at oral argument that during the interim between the filing of this motion for contempt and the implementation of the revised kosher protocol, the defendants provided the plaintiff with prepackaged kosher meals and prepackaged kosher food that was satisfactory. At oral argument, the defendants also acknowledged the difficulty of consistent compliance with the court's order in light of the prospect that "rogue employees" would not follow the protocol.

El-Tabech proposes that this court order the defendants to provide him with prepackaged kosher meals or prepackaged kosher foods available from the kitchen and to compensate him in the amount of \$644.39 for kosher food purchases he has made from the canteen since the implementation of the plan. He also seeks an award of reasonable attorney fees and costs for bringing this motion. Defendants contend that the provision of prepackaged kosher meals adds considerable expense, but they have not provided any evidence that quantifies that cost. Also, defendants acknowledge that, at present, El-Tabech is the only inmate who is provided kosher meals.

A party seeking civil contempt bears the initial burden of proving, by clear and convincing evidence, that the alleged contemnors violated a court order. [\*Chicago Truck Drivers v. Brotherhood Labor Leasing\*, 207 F.3d 500, 505 \(8th Cir. 2000\)](#). At that point, the burden shifts to the contemnor to show an inability to comply. *Id.* "To show that compliance is presently impossible, the defendant must demonstrate: '(1) that they were unable to comply, explaining why categorically and in detail, (2) that their inability to comply was not self-induced, and (3) that they made in good faith all reasonable efforts to

comply.'" [United States v. Santee Sioux Tribe of Nebraska, 254 F.3d 728, 736 \(8th Cir. 2001\)](#).

This court has "the power to punish by fine or imprisonment the disobedience or resistance to its lawful orders." [18 U.S.C. § 401\(3\)](#). Thus, the court can impose two kinds of civil contempt penalties. See, e.g., [Klett v. Pim, 965 F.2d 587, 590 \(8th Cir. 1992\)](#). "The first is a coercive penalty, such as a fine or jailing, designed to force the offending party to comply with the court's order—the offending party has the power to end the sanction by purging themselves of contempt, i.e., complying with the order." *Id.* The second is compensatory: the non-offending party is compensated for the damage they incur as a result of the offending party's contempt. *Id.* "In this circuit, '[a]lthough willfulness is not necessarily a prerequisite to an award of fees, it may properly be considered in deciding whether to tax costs and attorney's fees in an action to enforce compliance with an injunction.'" [Jakes, Ltd., Inc. v. City of Coates, 356 F.3d 896, 900 \(8th Cir. 2004\)](#) (quoting [Hartman v. Lyng, 884 F.2d 1103, 1107 \(8th Cir. 1989\)](#) (citation omitted)). An award of reasonable attorney's fees and expenses incurred by a party in seeking to enforce a decree is a form of compensatory relief that is well within a district court's remedial discretion in civil contempt proceedings. *Id.*

With respect to the posting of the prayer schedule and interruption of prayer, the court finds the defendants have shown reasonable, good faith efforts to comply and have shown that it is not possible to always avoid interruption of El-Tabech's prayers. With respect to the issue of providing kosher food, although the evidence does not show contumacious or malicious conduct by the defendants, and there is evidence that defendants made some remedial efforts, the court finds that the defendants have not

shown that they have made all reasonable good-faith efforts to comply with court's order. Accordingly, the court finds that plaintiff's contempt motion should be granted.

In adjudging the defendants in contempt, the court does not find that the defendants' actions were contumacious or malicious. The defendants' failure to consistently adhere to the court's orders was willful only in the sense that it cannot be characterized as accidental or involuntary. Accordingly, the court finds sanctions in the nature of a fine for noncompliance and compensation for plaintiff's expenditures are not warranted.

The court finds the plaintiff's proposed remedy is a reasonable means to ensure compliance with the court's order, especially in light of the fact that El-Tabech is the only inmate receiving a kosher meal at the present time. Defendants have not shown that the proposal, as applied to only one inmate, would be excessively costly. If additional inmates should require kosher meals, the defendants may move to modify the order. In addition, the court finds it appropriate to compensate the plaintiff for costs he incurred as a result of the defendants' conduct and to award him reasonable attorney fees in connection with the motion. Accordingly,

IT IS ORDERED:

1. Plaintiff's motion for contempt (Filing No. [205](#)) is granted.
2. Defendants are adjudged to be in contempt of court.
3. The court's previous order for injunctive relief on stipulation of the parties (Filing No. [190](#)) is modified as follows: Defendants shall supply the plaintiff Mohamed A. El-Tabech with a nutritionally-sufficient kosher diet that consists of either prepackaged

kosher meals or prepackaged kosher foods available in the Tecumseh State Correctional Institution kitchen.

4. The plaintiff is awarded reasonable attorney fees in an amount to be later determined by the court.

5. The plaintiff shall file an application for fees within 14 days of the date of this order; defendants shall have 7 days thereafter in which to respond to the application.

DATED this 4<sup>th</sup> day of March, 2009.

BY THE COURT:

s/ Joseph F. Bataillon  
\_\_\_\_\_  
Chief District Judge