IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DENNIS E. JONES 'EL, MICHA'EL JOHNSON, DE'ONDRE CONQUEST, LUIS NIEVES, SCOTT SEAL, ALEX FIGUEROA, ROBERT SALLIE, CHAD GOETSCH, EDWARD PISCITELLO, QUINTIN L'MINGGIO, LORENZO BALLI, DONALD BROWN, CHRISTOPHER SCARVER, BENJAMIN BIESE, LASHAWN LOGAN, JASON PAGLIARINI, and ANDREW COLLETTE, and all others similarly situated,

Plaintiffs,

v.

GERALD BERGE and MATTHEW FRANK,

Defendants.

ORDER

00-C-421-C

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On October 10, 2003, plaintiffs moved to enforce various provisions of the settlement agreement that the parties entered into and this court approved in 2002. One of the provisions at issue was article 13.12, which states: "The goal for cell temperatures in the summer shall be 80-84 degrees. DOC will investigate and implement as practical a means

of cooling the cells during summer heat waves." Plaintiffs argued that defendants were not in compliance with this provision because they still had done nothing to lower summer cell temperatures. In their response, defendants devoted one paragraph of their brief to rebutting plaintiff's claim. Defendants wrote that they had "investigated and considered" a number of ways to cool the cells, but ultimately concluded that these options were not feasible. Although they acknowledged that air conditioning was an option, they rejected this possibility "for policy reasons." Dfts.' Br., dkt. #388, at 2.

At the hearing on plaintiffs' motion, defendants did not elaborate on the "policy reasons" that motivated their opposition to air conditioning the cells. Instead, counsel stated: "[W]e are in compliance with the agreement. The agreement did not say that we would air condition Boscobel. The conditions said a goal and we have been straightforward in our analysis of trying to reach that goal." Hearing Tr., dkt. #400, at 8. However, in response to the court's question whether there were other ways that defendants could meet the goal besides air conditioning, counsel responded, "That is the only way that would be within the codes of the Wisconsin Building Code." Id. Because reducing cell temperatures was one of the provisions to which defendants had agreed and because they had conceded that there was no other way to reduce cell temperatures in the prison apart from air conditioning, I ordered defendants to install air conditioning in the Secure Program Facility before the first heat wave of 2004.

Defendants filed a notice of appeal of this order on December 23, 2003. Now before the court is defendants' motion to stay the order pending appeal. As the parties recognize, this court has jurisdiction to stay injunctions even after a party has filed a notice of appeal. Fed. R. Civ. P. 62(c). Of the four factors that courts are to consider in deciding a motion under Rule 62(c), defendants focus almost exclusively on one: whether they have made a "strong showing" that they are likely to succeed on appeal. Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (other factors are "(2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies").

In arguing that they are likely to prevail on appeal, defendants point to the Prisoner Litigation Reform Act, which prohibits a court from approving a consent decree unless the court finds that the relief ordered in the decree is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A) and (c)(1). However, as defendants are well aware, I have already concluded that the settlement agreement meets the criteria of § 3626. March 8, 2002 Order, dkt. # 207, at 8. Defendants do not challenge that conclusion now. This would be a difficult argument for defendants to make in the face of their concession in the settlement agreement that "based on the entire record . . . the relief granted by this Agreement is narrowly drawn, extends no further than

necessary to correct alleged violations of plaintiffs' federal rights, and is the least intrusive means necessary to correct the alleged violations of plaintiffs' federal rights." Dkt. #190, at 11, art. 15.2. If defendants no longer hold this view, the proper response is a motion for termination or modification of relief under § 3626(b)(4), not a motion to stay an injunction pending appeal. (Of course, such a motion could be problematic under article 15.3 of the settlement agreement, in which the parties agree not to challenge the agreement or any order approving or implementing the agreement for at least five years. Because I am denying defendants' motion for a stay on other grounds, I need not consider whether article 15.3 applies to defendants' challenge of the November 26, 2003 order or whether that provision is judicially enforceable.)

Because I have concluded and the parties agree that the settlement agreement complies with the Prison Litigation Reform Act, the only question is whether the November 26 order represents a correct interpretation of the agreement. In arguing that it does not, defendants focus on two words contained in article 13.12: "goal" and "practical."

Defendants are of course correct that the agreement calls for a "goal" of 80-84 degrees; it does not necessarily require that this goal be achieved at all times. But this observation does not support defendants' argument that I misinterpreted the agreement. The settlement agreement identifies a "goal" for the exact temperature to be achieved; it does not say that finding a way to reduce cell temperatures is only a goal. Rather, defendants

agreed to "implement" a "means of cooling the cells during summer heat waves." Thus, defendants would not be in violation of the agreement if they found a means to reduce cell temperatures in a way that did not guarantee cell temperatures below 84 degrees at all times. However, they are in violation of the agreement if they fail to implement any means of cooling the cells.

Defendants are also correct when they observe that the settlement agreement does not require the installation of air conditioning to the exclusion of other possible solutions. It does, however, require defendants to reduce cell temperatures in *some way*. Defendants were free to implement ways to cool the cells that did not involve air conditioning. However, after two years of "investigating and considering" other options, defendants have conceded that there is *no* other way to reduce cell temperatures. Defendants argue that they are entitled to deference in implementing the agreement, but they do not explain how this deference is to be applied in light of their concession. They suggest that they have complied with the agreement by taking measures such as providing ice chips to inmates during hot weather and allowing inmates to wear shorts instead of pants. However, the agreement is unambiguous: it directs defendants to implement "a means of cooling the cells." The accommodations suggested by defendants would not satisfy this requirement. To the extent defendants suggest that deference requires allowing them to violate or unilaterally change provisions of the settlement agreement, I cannot agree. Settlement agreements would have

no value to plaintiffs in a prisoner civil rights case if defendants had the freedom to choose which provisions they wish to follow. If defendants believed that they could satisfy the requirements of the Eighth Amendment by providing ice chips, they should not have agreed to cool the cells.

Defendants point to the qualification in the provision that requires them to implement "as practical" a means of cooling the cells. They argue that it would not be practical to implement a means of cooling the cells that could have a "de-stabilizing effect on inmates in non-air-conditioned prisons." Dfts.' Br., dkt. # 404, at 6. Although I agree with defendants that they are entitled to consider security issues when implementing the agreement, defendants did not point to this reason in their brief in opposition to plaintiff's motion to enforce the agreement or at the November 24 hearing before this court. Further, the only evidence in the record that defendants point to now in support of this concern is a June 2002 letter from Kevin Potter, the chief legal counsel of the Wisconsin Department of Corrections. In the letter, Potter writes that unidentified "security personnel have voiced concerns that some inmates would consider assaulting staff or other inmates in order to get transferred to a facility with air conditioning." Given the overall conditions at the Secure Program Facility and the efforts inmates make to gain transfer away from the institution and to resist transfer to it, I find this proposition dubious in the extreme. Defendants themselves have not testified that this a realistic fear.

It is highly unlikely that prisoners in other institutions would engage in assaultive behavior so that they could be transferred to a prison in which they would be confined to a windowless cell for all but five hours each week and have almost no human contact. Further, the settlement agreement identifies a temperature goal that is tolerable, not luxurious. Defendants have not explained why inmates at other institutions would find a temperature of 84 degrees so enticing that they would be willing to give up all the benefits they receive at other prisons in exchange for this cell temperature. Defendants point to no evidence that other prisons in the state are significantly warmer than 84 degrees during the summer or that inmates at other institutions are as restricted as inmates at the Secure Program Facility in finding ways to protect themselves from the heat.

The only other factor identified by defendants that makes air conditioning "impractical" is that there is a concern about how members of the public will respond to learning that "their tax dollars" are being spent to cool the Secure Program Facility. Of course this is a possibility, but it is also likely true that many taxpayers are upset that public funds were used to build a prison such as the Secure Program Facility. In any event, defendants have not explained how the word "practical" may be stretched to mean "popular." Any time there are efforts to improve prison conditions, even those as severe as those at the Secure Program Facility, there is a possibility that some members of the public will protest. If I were to accept defendants' suggestion that potential public opposition

justifies a violation of the settlement agreement, there would be few provisions by which defendants would have to abide.

Because defendants' arguments about the proper interpretation of the settlement agreement are not supported by the plain language of the agreement, I cannot conclude that defendants have made a "strong showing" that they will prevail on appeal. To the extent that it is necessary to consider the balance of interests at stake in this case, I have no difficulty in finding that they favor plaintiffs. Defendants have not argued that it would be unduly burdensome to install a cooling system. Although a denial of a stay may mean that defendants will have to expend resources that cannot be recovered, it would be difficult to argue that this concern outweighs the threat to plaintiffs' health. The record shows that inmates subjected to excessively hot temperatures face potentially severe health consequences. Further, it does not take an expert to know that prolonged exposure to extreme temperatures is highly dangerous. See Craig Smith, "World Briefing: France," New York Times, at A6 (Aug. 30. 2003) (citing French Ministry of Health, which blamed more than 11,000 deaths on heat wave that lasted two weeks). Unlike non-prisoners without air conditioning, plaintiffs are not free to open a window, turn on a fan, or take refuge at a local air-conditioned shopping center or movie theater.

Defendants argue that there is no evidence that there have been any heat-related deaths or serious injuries at the prison, but the Supreme Court has emphasized that "a

remedy for unsafe conditions need not await a tragic event." Helling v. McKinney, 509 U.S. 25, 33 (1993). As I noted in Freeman v. Berge, 03-C-21-C, 2003 WL 23272395 (W.D. Wis. Dec. 17, 2003), the parties have benefited from the fortuity that recent summers in Wisconsin have not been as hot as they could have been. I do not believe that plaintiffs should have to rely on the capriciousness of Mother Nature to determine whether they will make it through the summer alive.

Defendants have had two years to discover a way to implement article 13.12 of the agreement. During this time, the agreement has insulated defendants from new lawsuits related to cell temperatures as well as numerous other issues that are included in the agreement. E.g., Freeman v. Berge, No. 03-C-21-C, Feb. 12, 2003 Order (limiting plaintiff's claims regarding cell temperatures, lack of access to outdoors and constant illumination to conditions that existed before settlement agreement was approved); Horton v. Berge, 02-C-470-C, March 12, 2003 Order (limiting constant illumination claim); Irby v. Thompson, 03-C-346-C, Sept. 2 Order (limiting claim for social isolation and sensory deprivation); Tiggs v. Berge, 01-C-171-C, Nov. 14 Op. and Order (limiting social isolation and sensory deprivation claim). It is long past time for defendants to uphold their side of the bargain.

ORDER

IT IS ORDERED that the motion filed by defendants Matthew Frank and Gerald

Berge to stay the November 26, 2003 order pending appeal is DENIED.

Entered this 26th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge