

Washington v. Reno

United States District Court for the Eastern District of Kentucky, Lexington Division
February 11, 1997, Decided ; February 11, 1997, Filed
CIVIL ACTION NOS. 93-217 & 93-290

Reporter: 1997 U.S. Dist. LEXIS 23892

CONCHITA WASHINGTON, ET AL., PLAINTIFFS VS:
JANET RENO, ET AL., DEFENDANTS

M. Garvey, Kathleen E. Moriarty, U.S. Department of Justice,
Washington, DC.

Disposition: [*1] Petitioner's claim dismissed without
prejudice.

PATRICIA M. DARKS, movant, Pro se, Fort Worth, TX.

MELVIN P. DEUTSCH, movant, Pro se, Otisville, NY.

Counsel: For GLORIA BATTON ROBINSON,
ANTOINETTE M. FRINK, CONCHITA WASHINGTON,
PATRICIA M. DARKS, NORMA FAY COOK, MARTHA
MARIE PRESTON, LOVEN L. LEWIS, LORI SAUNDERS,
RESHAWN RICHARDSON, plaintiffs: Douglas L.
McSwain, Sturgill, Turner, Barker & Maloney, PLLC,
Lexington, KY.

JAMES A. MCKINES, movant, Pro se, Lompoc, CA.

JIMMY G. NIXON, SR., movant, Pro se, Texarkana, TX.

BILLY RAY HASTINGS, movant, Pro se, Marianna, FL.

CONCHITA WASHINGTON, plaintiff, Pro se, Ft. Worth,
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JAMERS A. MCKINES, movant, Pro se, Lompac, CA.

WILLIE BUD REED, JR., movant, Pro se, Miami, FL.

OZIE B. COLLINS, plaintiff, Pro se, Florence, CO.

MICHAEL JOSEPH KEARNS, movant, Pro se, Texarkana,
TX.

For JANE DOE(S), JOHN HOE, JANE ROE, JANE POE,
JANE MOE, JANE TOE, JANE ZOE, intervenor plaintiffs:
Douglas L. McSwain, Sturgill, Turner, Barker & Maloney,
PLLC, Lexington, KY.

GEORGE D. FARQUHAR, movant, Pro se, Texarkana, TX.

Judges: HENRY R. WILHOIT, JR., JUDGE.

For KATHLEEN HAWK, JANET RENO, FEDERAL
BUREAU OF PRISONS, DAVID WOODY, MICHAEL A.
ATWOOD, USA, ARTHUR F. BEELER, defendants: David
L. Bunning, U.S. Attorney's Office, Covington, KY.

Opinion by: HENRY R. WILHOIT, JR.

Opinion

For KATHLEEN HAWK, FEDERAL BUREAU OF
PRISONS, DAVID WOODY, MICHAEL A. ATWOOD,
defendants: Vincent M. Garvey, Kathleen E. Moriarty, U.S.
Department of Justice, Washington, DC.

ORDER

This matter is before the Court for consideration of a "Petition to Revoke the Settlement" filed by Michael Henry Smith. Smith contends that the defendants in this action have failed to comply with Section VI, subsection A, of the Settlement Agreement in this action. [*3] Smith asserts that he is a member of the class protected by this Settlement Agreement. As relief, the petitioner seeks for this Court to revoke the Settlement Agreement. The petitioner sets forth the following:

For JANET RENO, defendant: Vincent M. Garvey, Kathleen E. Moriarty, Raphael O. Gomez, U.S. Department of Justice, Washington, DC.

What I am looking for is for this Honorable Court to monitor the actions so far and to take action against the defendants and to grant whatever relief is deemed necessary. *Petition* at p. 5.

For USA, defendant: Vincent M. Garvey, Kathleen E. Moriarty, Jeff Clair, U.S. [*2] Department of Justice, Washington, DC.

*SETTLEMENT AGREEMENT SECTION VI AND
SUBSECTION A*

For JANET RENO, KATHLEEN HAWK, USA, BUREAU
OF PRISONS, ARTHUR F. BEELER, intervenor defendants:
David L. Bunning, U.S. Attorney's Office, Covington, KY.

For JANET RENO, KATHLEEN HAWK, USA, BUREAU
OF PRISONS, intervenor defendants: Vincent

Section VI of the Settlement Agreement deals with "Resolving Inmate Disputes Concerning the Telephone." Subsection A of Section VI is set forth as follows:

The Bureau of Prisons shall permit inmates to use the Administrative Remedy process, which is presently described in 28 C.F.R., part 542, or its successor, to resolve disputes concerning their telephone privileges, access, accounts, and service. *Settlement Agreement*, at p. 13.

FACTUAL ALLEGATIONS

The following is a summation and/or construction of the factual allegations underlying the petitioner's claim.

At some unspecified time, the petitioner allegedly made an unspecified number of phone calls to an unspecified number. The petitioner [*4] asserts that those phone calls were technically completed to a connection but a mechanical noise was the response. He asserts that he was charged a 25 cent connection fee, presumably for each of those calls, although the noise made him unable to communicate. The petitioner began an effort to retrieve the 25 cent connection fees he had been charged for those calls. First, on or about October 29, 1996, he personally submitted a BP-9 to Mr. Ford. Ford allegedly submitted it in the petitioner's presence to the CMS staff to have the phone system checked for mechanical flaws. Allegedly, Mr. Ford never responded to that BP-9.

On November 29, 1996, the petitioner then submitted a second BP-9 in which he alleges that roughly ten days after his original telephone difficulties on phone # 31, he had the same problem on phone # 32. He alleges that both phones # 31 and # 32 malfunctioned while he was dialing 334-666-0779. The petitioner suggested that the problem was the fault of a malfunctioning monitor on phones # 31 and # 32. The petitioner further set forth that he made two unsuccessful "back to back" attempts, then changed phones and got through. In the margin of this request the petitioner [*5] suggests that on December 1, 1996, he experienced an additional alleged malfunctioning of the telephones. The petitioner sought credit for all of his allegedly unsuccessfully connected phone calls which resulted from an allegedly malfunctioning phone system.

A response dated December 6, 1996, was submitted, which sets forth:

This is the only request that I have received concerning this matter. I have checked your call records and I find nothing unusual. Please

give me more information about the problem which you encountered; therefore, I might ascertain if it is a refundable issue or not. The response is signed by Mr. Marvin Orange.

On December 19, 1996, the petitioner submitted a second BP-9 to Mr. Orange. In that matter the petitioner set forth his petition as follows:

I have been having a sporadic problem with the phones in D-2 and that problem is that the phone rings on the other end and I hear it ringing but when the other party answers they cannot hear me and I cannot hear them. All either party hears is a clicking sound. I can switch phones and call back and contact the party. the [sic] calls will show up on my phone account as completed but less [*6] than one minute and then redialed shortly there-after for a full conversation. They should be very easy to detect because they will all be less than one minute and the reconnection will be shortly there-after on another phone or that phone. The logic being that I didn't contact them and then hang up just to redial them later on another phone. If you need confirmation that there was no conversation, just have the Lt.s [sic] office send you the tapes for those calls. I believe that the problem is in the monitoring system.

Originally I gave the first cop out to Mr. Ford since you were not here that day. He gave the cop out to the CMS to investigate the problem and they never returned the cop out to me or Mr. Ford. I sent the second one to Mr. Ford since I had not heard back on the first one and this was a continuation of a problem that he was already aware of.

Last night on phone # 32 I had the same problem twice calling (205) 459-2800 and (334) 473-1981. This mess has cost me several dollars lately. Not every time I can get to another phone and then not every time will a redial fix the problem.

Please go through my phone account and credit me for all of those calls that [*7] are less than one minute where I did not get a connection with the party. *Exhibit* attached to petition.

On January 6, 1997, Marvin Orange responded to the petitioner's BP-9 by saying that the calls made on

December 18, 1996, would be researched; that to do so would take several days; and that he would try to have an answer by Friday, January 10, 1997. Additionally, Mr. Orange explained to the petitioner:

You must provide specific times and dates for any other calls that you experienced a problem with. We cannot research the calls without that information. *Petition* at attached exhibit.

On January 10, 1997, the petitioner was charged with an incident report, allegedly for "Lying to a Staff Member." In the section for description of incident, the incident report reads:

On January 10, 1997, at approximately 12:45 p.m., the Trust Fund Supervisor concluded an investigation into an Inmate Request to Staff Member written by Michael Smith, 04325-003. In the request Smith asked for a refund for several telephone calls. He stated that there was a problem with the Inmate Telephone System (ITS). He described the problem as an inability to hear, by himself[*8] and the party which he called. Research into his claim reveals Smith reached an answering machine, as verified by ITS staff listening to a recording of calls to the numbers which Smith identified as problematic. While listening, ITS staff heard Smith responding as if he knew that it was a recording that he had reached. He responded as if to leave a message on the recipient's answering machine. In the past, Smith has requested refunds for reaching an answering machine, as evidenced by the attached Inmate Request to Staff Member dated July 15, 1996. In the response, also attached, Smith was made aware that the ITS will not issue a refund when an inmate reaches an answering machine. Smith, aware that refunds would not be made for reaching a recording, told a lie about having a problem with the system. His lying is an attempt to get money from the government that the government does not owe him. *Petition* at attached exhibit.

The reporting employee is Marvin Orange. The disciplinary hearing officers, S. Gibson and Helene Vivian, found that

Smith committed the prohibited act and sanctioned Smith with 20 hours of extra duty.

Smith complains that all action on his October, November [*9] and December BP-9's has ceased. The petitioner asserts that the BP-9's he submitted were sufficiently specific to provide the information necessary to trace the calls, that the incident report is specious, that there was no answering machine he was speaking to, and that the incident report was wholly unwarranted and the conclusions wholly unsupported by the evidence.

Additionally, Smith complains that his sanction will be immediately imposed and effectuated prior to such time as he can appeal it through the administrative remedy procedure.

Finally, the petitioner complains that he will have to forego pursuing his administrative remedies regarding the alleged phone malfunctions and inappropriate connection charges if he seeks to appeal his allegedly specious incident report because he is permitted only one administrative remedy issue at a time.

ANALYSIS

To the extent the petitioner relies on Section VI, Subsection A, of the Settlement Agreement to challenge an incident report, it is clear that the scope of the Settlement Agreement does not envision this court resolving allegations of due process violations with regard to disciplinary matters involving the veracity or credibility [*10] of an inmate's claim that he is owed refunds for alleged malfunctioning connections regarding specific calls. Clearly, the provisions of the Settlement Agreement are designed for this court to entertain general matters regarding privileges, access, accounts and service. The provision of the Settlement Agreement relied upon was not drafted so as to permit this court to usurp jurisdiction over any matter remotely connected to telephone use. Consequently, as the petitioner's claim does not fall within the scope of the Settlement Agreement, the petitioner's claim should be dismissed without prejudice to his right to bring it as a separate *Bivens* action in the court having appropriate jurisdiction.

This the 11 day of February, 1997.

HENRY R. WILHOIT, JR., JUDGE