

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

96 JAN 29 PM 4:07

DWIGHT DURAN, et al.,

Plaintiffs,

vs.

Civil Action No. 77-721-JC

Robert M. ...
CLERK-ALBUQUERQUE

GARY JOHNSON, et al.,

Defendants.

Duran v. Apodaca



PC-NM-001-040

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S REQUEST
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

I. THE TEMPORARY RESTRAINING ORDER MUST BE ISSUED TO PRESERVE THE STATUS QUO.

Defendants, as described in the verified Memorandum, have already commenced the transfer of class members in this litigation to Texas County Jail facilities. Plaintiffs have raised serious questions regarding the continuing jurisdiction of the Court over class members shipped to Texas and new class members to be transferred to the PNM Main facility. In order to prevent Plaintiffs from facing a "latches" equitable defense and to effectuate the existing orders in this case, the Court should issue a temporary restraining order necessary to preserve the status quo.

"The purpose of a temporary restraining order is to preserve the status quo until there is an opportunity to hold a hearing on an application for a preliminary injunction." Fulton v. City of Sabeth, 1990 WL 192742 (D.Kan. 1990); Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Dutton 844 F.2d, 726 (10th Cir. 1988).

In order to prevent further damage to the compliance process at the PNM complex and with system-wide issues at all Duran facilities, the Court should preserve the status quo until it has an opportunity to rule on the merits of Plaintiffs' claims.

II. IN ORDER TO PREVENT IRREPARABLE HARM, TO STOP ONGOING VIOLATIONS OF CONSTITUTIONAL RIGHTS AND TO EFFECTUATE THE COURT ORDERS ALREADY ISSUED IN THIS CASE, A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION ARE NECESSARY TO HALT TRANSFERS OF INMATES TO TEXAS AND TO THE PENITENTIARY OF NEW MEXICO MAIN FACILITY.

Equitable relief looks to the future - it is perspective in nature. Judicial power does not cease when injunctive relief is entered or when a settlement between is approved by the Court for that matter. Court orders are to be obeyed and equity provides the means for obtaining obedience. Circumstances will change, but equity retains power to revise its orders "as events may shape the need." U.S. v. Swift & Company, 286 U.S. 106. As the Court in Swift stated:

Inasmuch as an injunctive decree is drafted in light of what a court believes will be the future course of events, a court must continually be willing to redraft the order at the request of the party who obtained equitable relief in order to ensure that the decree accomplishes its intended result. 286 U.S. at 114.

See also, 11 Wright & Miller, Federal Practice & Procedure. §2961 at 600, citing U.S. v. United Shoe Machinery Corporation, 391 U.S. 244 (1968).

When conditions change in an ongoing equity action, the Court should modify a decree so as to achieve the required result with all appropriate expedition. United Shoe, supra, at 252. Thus, further relief is proper if the original purpose of the injunction is not being fulfilled in any material respect. See, also, Crawford v. Janklow, 733 F.2d 5541 (8th

Cir. 1984) ("jurisdiction may extend beyond the initial injunction if necessary to assure complete relief").

All of the Court's orders entered in the Modified Decree were intended to prevent serious harm and injury to class members rights. Plaintiffs have alleged ongoing violations of class members, especially in the area of legal access, which violations cannot be completely remedied through legal remedies. More importantly, where constitutional rights are at risk no further showing of irreparable injury is ordinarily necessary. See, Gilmore v. City of Montgomery, Alabama, 417 U.S. 556 94 S.Ct. 2416 (1974); Allee v. Medrano, 416 U.S. 802; 94 S.Ct. 2191 (1974); Mitchell v. Cuomo, 748 F.2d 804, 806 (2nd Cir. 1984); see also, 11 C. Wright & A. Miller, Federal Practice and Procedure, 2948, at 440 (1973) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary").

III. PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THE MERITS ENTITLE THEM TO THE REQUESTED RELIEF.

The test for likelihood of success does not require certainty of success, only a reasonable probability that Plaintiffs will ultimately be entitle to the relief sought. Crowther v. Seaborg, 415 F.2d 437, 439 (10th Cir. 1969); Atcheson, Topeka & Santa Fe Ry. Company v. Leenen, 640 F.2d 255, 261 (10th Cir. 1981). It will ordinarily be enough that the Plaintiff has raised questions going to the merits so serious, substantially difficult and doubtful as to make them a fair ground for litigation and thus for more deliberative investigation. Continental Oil Company v. Frontier Refining Company, 338 F.2d 780, 782 (10th Cir. 1964).

IV. CONSIDERATIONS OF INJURY TO THE PLAINTIFFS, ANY POSSIBLE INJURY TO THE DEFENDANTS AND THE PUBLIC INTEREST ALL MILITATE STRONGLY IN FAVOR OF GRANTING THE INJUNCTION.

In Crowther v. Seaborg, *supra*, the 10th Circuit established a test for granting a preliminary injunction that includes a balancing of the threatened harm to a plaintiff against whatever damage the proposed injunction may cause the opposing party. In this case, the relief requested to preserve the status quo presents virtually no risk of damage to the Defendants. The Defendants have transferred approximately 200 hundred inmates to Texas. They plan to ship approximately 50 inmates per week out of the plaintiff class into Texas County Jails over the next five or six weeks. Preserving the status quo through halting the transfers of inmates for the next few weeks while this matter is resolved on the merits, while possibly an inconvenience, presents no risk of harm to the Defendants. At the same time, it is extremely important to Plaintiffs, given the probable injuries to their rights as provided under the Modified Decree, the likelihood of harm to be suffered if those protections are stripped from them and the interference with the orderly compliance process which was taking place until Defendants chose to shift class members to Texas, that relief be granted immediately.

Issuing the requested injunctions will in no way be adverse to the public interest. In fact, legislative and public sentiment has been strongly against the completed and proposed transfers. At a hearing on this matter, it is anticipated that the testimony from the Defendants, themselves, as well as from legislative representatives or employees will show that both the House and Senate of the State of New Mexico have indicated they are willing to take all steps necessary to stop such transfers. At the same time, it is clearly in

the public interest to reverse the Defendants' plan of action to see that compliance with the Court's Modified Decree is expedited, that the wind-down process and ultimate vacation of this Court's jurisdiction is completed and that the State of New Mexico and its representative defendants no longer engage in violations of federal law.

V. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request this Court to grant the temporary restraining order and preliminary injunction as described herein and not to require Plaintiffs to post any bond or other security for the granting of such injunction.

Respectfully submitted,

**ROTHSTEIN, DONATELLI, HUGHES,
DAHLSTROM, CRON & SCHOENBURG**

By: 

Mark H. Donatelli
Post Office Box 8180
500 Montezuma Avenue, Suite 101
Santa Fe, New Mexico 87504-8180
(505) 988-8004

STOUT & WINTERBOTTOM

By: 

Richard A. Winterbottom
320 Central Ave., S.W., #30
Albuquerque, NM 87102
(505) 242-0117

Counsel for Plaintiffs