

LITIGATION - 1992 FIRST QUARTER REPORT

LOC	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
MXR	32	14	2	8	8	26	*	23	1	2	\$82,500
NER	36	10	8	13	8	25	249	63	4	1	0
SER	33	17	4	9	3	33	*	34	3	1	\$ 397
NCR	66	25	8	26	7	*	448	48	0	0	0
SCR	50	17	4	18	11	27	201	24	0	0	0
WXR	29	18	2	7	2	*	443	29	18	1	*
CO	19	2	2	8	7	8	97	8	5	0	0
TOT	265	103	30	89	43	119	1438	229	31	5	\$82,897

DEFINITIONS

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NUM - NUMBER OF TOTAL LAWSUITS FILED IN QUARTER

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GOVERNMENT ACTION AND DATE OF ACTION - (INCLUDE IN NARRATIVE)

LITIGATION OF INTEREST

MID-ATLANTIC REGION

SETTLEMENTS

Shouse v. DOJ, Southern District of Indiana. A settlement of \$32,500 was reached due to the suggestion of the Magistrate. A former black correctional officer filed an EEO suit alleging she was harassed due to her race and sex at USP, Terre Haute. Several other women correctional officers supported her allegations so settlement was deemed appropriate.

Hazime v. Sauvey, Eastern District of Michigan. A settlement of \$50,000 was reached in this medical malpractice case. This joint FTCA and Bivens case arose from allegations that the doctor had a "hit list" of patients who were not to be seen on sick call without her approval. In this case, the plaintiff suffered a serious ear infection which was not treated over several weeks. In addition, the plaintiff alleged the doctor placed a caustic substance in his ear while the doctor alleged she was burned by the patient. Settlement of this case appeared appropriate since most of the monies paid went toward attorneys fees and offset of the prisoner's fine. Settlement also avoid publicly airing the medical problems at Milan at the time.

TRIALS

Parker v UNICOR, Southern District of Indiana. Trial held on December 16, 1991. This personal liability case involved a work related injury that the prisoner claimed was caused by assignment to a job against his medical restrictions. The defendants were the work supervisor and two unit staff. The magistrate has not issued a ruling though one was expected by the end of January.

SIGNIFICANT CASES WON

Lester v. Thornburg, Eastern District of Michigan. The Court upheld our policy regarding not providing Muslim prisoner a diet similar to the Kosher diet. In addition, the Court ruled common fare was also sufficient to meet constitution requirements in the area of religious diets.

Fleschig v. U.S., Eastern District of Kentucky. The Court ruled that a correctional officer who took a prisoner to his home and raped her was not acting within the scope of his employment for purposes of the Federal Tort Claims Act. In addition, the Court held, where there was no indication that the officer would commit such an act, the government was not responsible for his actions. The Court denied a motion to reconsider and we expect an appeal to be filed.

NEW CASES OF INTEREST

Nazelrod v. DOJ, Eastern District of Kentucky. The plaintiff is requesting the BOP stop using an investigative technique which was used on her during an investigation of a theft at FCI, Ashland. The plaintiff confessed to taking the monies during the interview and she is alleging the technique harasses women since she was touched on the arm and leg during the interview. The technique is still being used but is the same for both men and women.

NORTHEAST REGION

TRIALS

Michael Walker v. United States, et al., Southern District of New York. This was a Bivens complaint against four staff members in which the inmate alleged excessive use of force in October 1983. Inmate was being taken to the Special Housing Unit at FCI Otisville and refused to remove his clothes for a visual search. Inmate was aware of search requirement since he had been in Special Housing on numerous occasions prior to this incident. Inmate pushed staff member who was trying to convince inmate to cooperate. Other staff then used force to take inmate down and allowed him up when he agreed to cooperate with search. Trial held before Judge Knapp on December 3 and 4, 1991. Judge ruled from bench in favor of all defendants. The court determined that use of force was justified by refusal of inmate to submit to search and that the medical evidence did not support inmate's assertion of use of excessive force.

Georgakis v. United States, District of Connecticut. FTCA case in which former inmate at FPC Allenwood alleged medical malpractice. Inmate served a four month term from November 28, 1988 to March 14, 1989. Inmate was a medical doctor before his conviction. Inmate alleges that improper medical treatment worsened a pre-existing foot problem resulting in surgery after release from custody. Inmate also alleged that he was not permitted to retain his orthopedic shoes. Trial held before Judge Daly on December 16 and 17, 1991. Inmate only asked once for medical assistance for his foot despite seeing medical staff for other problems. Inmate and his wife testified that inmate's feet were bleeding on the day of his release. Inmate then waited until May 10, 1989 (almost three months after release) to see his specialist. Judge Daly granted our motion for directed verdict at the end of Plaintiff's case. The Judge found that the inmate was more than 50% negligent and his cause of action was barred under Pennsylvania law of comparative negligence.

indicated possible ischemia (shortness of blood to heart). PA administered nitroglycerin for possible angina, to no relief. At 10:05 pm, PA contacted by phone Dr. Moore (CHP) who advised inmate should be given stadol (an analgesic which probably masked the pain and discomfort). At 11:20 pm, PA reported to Dr. Moore by phone that inmate was resting quietly. Dr. Moore advised PA to have inmate returned to quarters and to have inmate go to sick call in the morning. Next morning, inmate was taken via ambulance to Altoona Hospital, whose staff diagnosed a massive myocardial infarction which commenced 12 hours prior. On January 18, 1988, inmate suffered an embolic event and on January 22, 1988, inmate suffered cardiac arrest. Inmate transferred to Springfield and mandatorily released in May 1988. Armed Forces Institute of Pathology has opined that the failure to move inmate to hospital on night of January 11, 1988 was outside acceptable medical practice. In addition through questioning of PA and Dr. Moore, AUSA has uncovered additional problems. PA did not know what ischemia meant, no additional EKG was done before inmate sent back to quarters, and Dr. Moore expressed that he thought inmate might have been suffering a heart attack when PA called, but he just ruled it out for no apparent reason. Settlement conference with the Judge on January 15, 1992 was not productive. Plaintiff is demanding as settlement \$1.4 million. AUSA is working with economist and medical expert on realistic prospect of settlement. No figure has been reached at this time, although a range of \$250,000 - \$500,000 is expected. Permanent damage is probable, but inmate has no work history. Recommendation for settlement authority will be forwarded after AUSA completes evaluation. AUSA does not think Plaintiff will accept anything less than \$1 million, which is too high. If case is not settled, trial is tentatively scheduled for April 13, 1992. We may decide not to contest liability and limit the trial to damages.

Perez v. United States, Eastern District of Pennsylvania. FTCA case out of FCI Loretto. On June 1, 1989, Inmate Luis Perez, 36944-066, was sent for sinus surgery to outside doctor. Doctor purposely left a Tefla pad in nose following surgery with written instructions for inmate to return on Monday (June 5, 1989). Inmate complained on June 2 and 6, 1989 of pain and soreness. On July 12, 1989, Inmate complained of smell of dead rat in his nose. He was seen four additional times before further evaluation discovered pad in nose on July 29, 1989, which was surgically removed that day. There is an entry in the medical record from Dr. Moore (CHP) that it was his fault that inmate was not returned for removal of pad. The only possible defense is that the injury was work related. There is some evidence that a chemical spill on inmate's face in August 1988 caused the sinusitis which required the surgery. This is a factual issue since inmate had some history of sinusitis prior to accident and since complaints of sinus problems did not occur until months after the accident. (Immediate problem from accident was injury to eyes.) Case received in this office on January 2, 1992. AUSA is preparing recommendation of settlement not to exceed

\$30,000. Plaintiff has requested \$500,000 in complaint. It appears no permanent injury caused by delay in removal of pad. Damages limited to pain and suffering. The recommendation from the AUSA and the NERO will be forwarded to the OGC as soon as possible.

Forte v. United States, et al., Eastern District of Pennsylvania. Combination FTCA and Bivens case arising out of FCI Danbury and medical care afforded by USMCFP Springfield. Inmate Daniel Forte, 10367-016, alleged that FCI Danbury work supervisor improperly ordered him to lift a heavy pot knowing that he had a medical restriction against lifting. Inmate transferred to Springfield where he had neck surgery (diskectomy) by outside consultant on September 7, 1988. On November 7, 1988, the inmate suffered a near collapse of the right lung, requiring insertion of chest tube to expand the lung. On November 13, 1988, lung was fully expanded. AUSA advises that her medical expert has opined that the post operative care by Springfield was not consistent with accepted medical practice. Inmate was not immobilized after surgery and was not placed in an elevated position. Lying in a flat position following the surgery was the proximate cause of the lung injury. Attorneys for Plaintiff and AUSA have tentatively agreed to try to settle for \$50,000. AUSA is forwarding her recommendation. If case does settle, \$25,000 of proceeds will be attached by United States to pay inmate's criminal fine. Recommendation will be forwarded after review of AUSA's memo.

SOUTHEAST REGION

TRIALS

Walter A. Halaburda v. Richard Thornburg, Northern District of Georgia. This is a case where a former employee of the Bureau of Prisons alleged that he was discharged in retaliation for assisting an employee in filing an EEO complaint. The case had a possibility of undue publicity and a possible impact upon staff moral. The case was recommended for dismissal on August 12, 1991 after a trial on the merits by the special master assigned. The plaintiff has filed objections to the report.

SOUTH CENTRAL REGION

NEW CASES OF INTEREST

Apostolo v. Ortiz, Western District of Texas. An FTCA action initially filed in Texas State Court wherein an individual who had been selected by a local college to teach a course at FCI, Bastrop was not allowed to do so, alleges he is the victim of tortious damage. The case has been moved to federal court. Apparently former Warden Ortiz determined the plaintiff to be a dishonest individual, and informed Blinn College officials that Mr. Apostolo would not be allowed to teach the course. Torts Branch has informed the Bureau that they are interested in

handling this action.

Cruse v. Lt. Rupert, Western District of Tennessee. Case where inmate alleges a BOP staff member stood by and allowed a U.S. Marshal to severely beat the inmate. Discussions with the staff member indicate that there may be some merit to the allegations raised. We will be following this case very closely.

Lamb v. Barr, Western District of Texas. An EEO complaint wherein an individual alleges race and sex discrimination (the employee is African-American, and female). She alleges that of all of the promotions at FCI, La Tuna in 1991, none have gone to African-American females. It is interesting to note that the Warden at FCI, La Tuna at the time in question was J.D. Williams.

WESTERN REGION

9TH CIRCUIT ISSUES

Brown v. Rison / Chalker Cases:

(The Brown holding: Credit for pretrial CTC time for pre-guidelines cases. The Chalker holding: Both the BOP and sentencing Judge have authority to grant CTS in guidelines cases.)

These unique 9th Circuit holdings continue to confound and amaze and create splits, not just between circuits, but within districts and even divisions of districts, especially in the area of Brown v. Rison credit for guideline cases sentenced in other than the 9th Circuit. The Bureau's position, that Brown does not apply to guidelines cases, carries little weight to judges who view Chalker as the ultimate holding for sentencing credit. Several Wardens have expressed concern that they will be called into Court by an angry judge for non-compliance with a J & C we consider illegal.

HEARINGS

U.S. v. Lail, Northern District of California. Motion to Enforce/Withdraw a Plea Agreement: Inmate argued successfully that BOP DHO action constituted "charges" barred by terms of plea agreement. BOP ordered to restore all DHO sanctions (697 days GT and 30 days in seg.)

U.S. v. Sanchez, Northern District of California. Federal Public Defender argued female defendant entitled to benefit of ICC and lack of female facility constituted a violation of equal protection. Matter still under submission, surrender date extension granted.

U.S. v Espinosa, District of Arizona. Inmates argument for application of Brown v. Rison CTC credit to guidelines case was not successful. District court held that Brown was not applicable to guidelines cases since the term "official detention" was delineated in 18 U.S.C. 3585 and the Bail Reform Act, U.S.C. 3142-3156, whereas "in custody" under 18 U.S.C. 3568 had never

been defined by Congress.

U.S. v. Cruz, District of Southern California. Defense motion to return inmate to MCC for trial preparation and complaint regarding segregation conditions at USP Lompoc (Cruz on trial for staff hostage incident). Judge Rhodes. Motion granted in part, Conditions of return to MCC negotiated with MCC.

U.S. v Kaiserman, Central District of California. Multiple hearings relating to housing, conditions and location for this post-conviction female. (Also the subject in an excessive force torts case.)

SETTLEMENTS

Bobby Joe Floyd v. Meese, et al., Central District of California. 11/12/91 Stipulated Settlement - \$10,000. Inmate at USP, Lompoc was assaulted with a pipe by another inmate, however, he claimed that he slipped in the shower. He was examined by a Physicians Assistant and then housed in Administrative Detention without seeing a physician for about 20 days. He was treated in Administrative Detention by Physicians Assistants for headaches and black eyes. Finally, he was diagnosed by physician as suffering from a skull fracture. The Physicians Assistant who did not immediately report the case to a physician was subsequently disciplined.

NORTH CENTRAL REGION

TRIALS

Castaneda v. Miller, Southern District of Illinois. Trial scheduled January 29, 1992. In this case the plaintiff alleges he was assaulted by USP Marion staff after transfer from general population to the Administrative Detention Unit. Facts surrounding this case reveal that on the date in question, the plaintiff was involved in a fight with several other inmates as reflected in wounds consistent with fighting. Plaintiff was forcibly separated from other inmates and removed to the hospital//Administrative Detention. Staff maintain that only the minimal force necessary to restore order to the cell house was utilized.

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NARRATIVE ANALYSIS

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LITIGATION - 1991 FOURTH QUARTER REPORT

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MXR	41	15	4	21	1	36	*	20	1	0	1
NER	25	10	4	6	4	29	278	15	2	1	0
SER	43	22	5	11	5	43	*	25	1	0	0
NCR	54	25	5	14	8	*	354	32	1	1	0
SCR	55	28	9	10	8	26	29	47	0	0	0
WXR	29	14	4	11	*	*	*	*	*	*	*
CO	6	0	2	5	2	7	86	9	3	2	0
TOT	253	114	33	78	28	141	747	148	8	4	1

**NARRATIVE ANALYSIS
LITIGATION
1ST QUARTER 1992**

There was not a noticeable change in the number of lawsuits filed, with 253 filed in the 4th quarter, 1991 and 265 filed in the 1st quarter, 1992. There was an increase in the number of hearings and trials with 8 reported in the 4th quarter and 31 reported in the 1st quarter. We will watch this trend. The other categories did not change significantly.