

FILE *1/18/96*

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**U.S. Department of Justice
Federal Bureau of Prisons
North Central Region**

Kansas City, KS 66101-2492

January 12, 1996

MEMORANDUM FOR WALLACE H. CHENEY, ASSISTANT DIRECTOR
GENERAL COUNSEL & REVIEW

FROM: JOHN R. SHAW, Regional Counsel

SUBJECT: QUARTERLY/MONTHLY REPORT (December 1995)

LITIGATION AND RELATED ISSUES

STATISTICS: Line 1 = New Cases Filed Line 2 = Total New Cases in Year

LITIGATION:

*monthly
quarterly*

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
Line 1	25	15	36	16	12	12	39	28	12	9	7	4
Line 2	40	76	92	104	116	155	183	195	204	211	215	
Pending					849							

*Need
Beechbrook
Make it*

ADMINISTRATIVE CLAIMS:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
Line 1	58	55	57	67	86	67	70	66	96	63	105	115
Line 2	113	170	237	323	390	460	526	622	685	790	905	
Pending					312							

ADMINISTRATIVE REMEDIES:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
Line 1	155	125	143	125	152	150	136	173	162	180	175	203
Line 2	280	423	548	700	850	992	1166	1328	1508	1683	1886	

ADVERSE DECISIONS

Knighton v. Hershberger, 95-3315-CV-S-RSC, W.D. Missouri, Habeas, MCFP Springfield.

Petitioner was convicted of offenses against the United States committed after October 26, 1986, but prior to November 1, 1987. In addition to a term of imprisonment, he was ordered to serve a period of supervised release. Upon revocation of his supervised release term, he was sentenced to an additional 16 months of imprisonment. Per BOP policy, his supervised release violator term was computed using Good Conduct Time pursuant to 18 U.S.C. § 3624.

Petitioner prevailed with his argument on December 12, 1995, that he is entitled to statutory good time under 18 U.S.C. § 4161, et seq. applied against his supervised release term. The ruling moved up petitioner's release date approximately 30 days. There will be no late release.

Institution staff and this office are not recommending appeal for the following reasons: (1) the ruling only applies to petitioner, (2) the opinion is not reported, (3) it is likely petitioner's sentence as calculated using GCT would expire prior to the court of appeals ruling on the issue, (4) an adverse ruling at the court of appeals level could result in a published opinion and necessitate a change to current BOP policy.

William K. Gardner v. Susan Gerlinski, 95-4290, Habeas Corpus, FPC Yankton

Plaintiff was convicted of bank robbery under 18 U.S.C. § 2113(a). The BOP classified the offense as a crime of violence and made the plaintiff ineligible for a year off his sentence under 18 U.S.C. § 3621(e). The District Court for South Dakota held that BOP policy precluded the § 2113(a) conviction from being classified as a crime of violence unless there was a finding of violence made by the sentencing court. In plaintiff's case, there had been no such finding by the sentencing court, so the BOP's classification was improper. While the Court did conclude that the plaintiff was eligible for time off his sentence under the DAP program, it recognized that the BOP retained the discretion to decide whether the plaintiff's sentence would in fact be reduced.

SETTLEMENTS OR JUDGMENTS

McNally v. Fleming, et al., 91-836-JPG, SD Illinois, Bivens, USP Marion.

Petitioner alleged excessive use of force in a force cell move at USP Marion in April of 1984. The matter was tried before a jury on December 12, 1995. On December 13, after deliberating two hours, the jury returned a verdict in favor of

the defendants and against the plaintiff. Paul Pepper assisted the AUSA in the case.

Yu Kikumura v. C.A. Turner, 92-132-WLB, SD Illinois, Bivens, USP Marion.

Plaintiff alleged that defendant, then the Warden at USP Marion, violated his constitutional rights under the First Amendment and the Equal Protection Clause by prohibiting him from receiving mail and publications in Japanese. The Seventh Circuit affirmed the District Court's initial decision in favor of the defendant regarding monetary damages but remanded with respect to plaintiff's claims for injunctive and declaratory relief. Kikumura v. Turner, 28 F.3d 592 (7th Cir. 1994).

During the interim, plaintiff was transferred to ADX Florence and defendant Turner was replaced as Warden at USP Marion. On remand, the District Court granted the Defendant's Motion for Summary Judgment on October 5, 1995, because the remaining claims were moot. The Court also granted Defendant's Motion to Dismiss for Failure to Prosecute the same day.

DECISIONS OF INTEREST

United States v. Thomas, 68 F.3d 392 (10th Cir. 1995)

Defendant was convicted of DUI at Fort Leavenworth, Kansas using the Assimilated Crime Act and Kansas law. As a condition of probation the defendant was ordered to undergo inpatient rehabilitation for chemical dependency. When his probation was revoked, the issue was whether federal or state law was to be followed in determining the appropriate sentence. The Court of Appeals held that the guidelines did not apply to Class B and C misdemeanors or infractions, and hence the federal court was to apply state law in determining the appropriate sentence. The last paragraph of the opinion continued dicta indicating that prior custody credit should be calculated using state law.

The BOP initially declined to grant 28 days jail credit for the time the defendant spent in inpatient treatment. The defendant filed a writ of habeas corpus alleging illegal detention. Upon review of all proceedings, it was determined that the district court has initially believed that under Kansas law, the defendant would be entitled to the credit. The attorneys for the government, without input from the BOP, acquiesced. In light of the government's position becoming the law of the case and because the government's position was the position viewed by the 10th Circuit, credit was given and the individual was released on January 12, 1996. The U. S. Attorney's Office and the Chief USPO for the district have been advised of the BOP's position if this issue arises again.

PENDING CASES OF INTEREST

Lozano v. Reno, 95-S-2661, FCI Englewood, District of Colorado

The plaintiff alleges that he was forced to work in a racially hostile environment, retaliated against for opposing such conduct, and eventually unlawfully discharged as a result. He is represented by counsel and appears to have exhausted his administrative remedies through EEO. He seeks an undetermined amount of damages which includes back pay, reinstatement, post-judgment interest, attorney's fees and costs.

Pedersen v. Reno, 5-95-304, FPC Duluth, District of Minnesota

This cause of action is based upon Title VII, the Fair Standards Act, and the Equal Pay Act. The plaintiff, represented and a current BOP employee, claims she was denied a salary and grade level comparable to males performing the same functions at the FPC. She is represented by counsel and seeks \$300,000 in compensation for emotional distress, back pay, interest, attorney's fees, and injunctive relief.

Kalka v. United States, 91-Z-753, FCI Englewood, District of Colorado

This action seeks equitable relief concerning conditions of confinement at FCI Englewood. The court concluded that issues related to ventilation and lighting could not be resolved on summary judgment and ordered that the government pay for expert assessment of conditions at the FCI. The plaintiff's expert has recommended several changes to FCI operations including installation of lavatory fans and installation of a ventilation system in the housing units. The recommendation is premised on air flow measurements which do not meet industry standards. Because the government's own expert made similar findings and recommendations, institution facilities are calculating the cost of making the recommended modifications.

Former inmate Darrell Prows was originally a plaintiff in this case, but has been dismissed due to his release from prison.

Howard v. United States, 92-N-1515, FCI Englewood, District of Colorado

This case deals with plaintiff's desire to conduct Satanic rituals at FCI Englewood. Following a grant of a preliminary injunction, the government sought reconsideration and filed a protective order of appeal. The motion for reconsideration has been pending since October, 1994. The Clerk of the Tenth

Circuit Court of Appeals recently advised Judge Nottingham that no action can be taken by the court of appeals until until the motion for reconsideration is ruled on.

RELIGIOUS FREEDOM RESTORATION ACT CASES

Keith v. Wooten, 94-N-2844, FCI Florence, District of Colorado

The plaintiff in this case claims to be a member of the "Christian Identity Movement" (CIM) and is suing the former Warden of FCI Florence for injunctive relief. He and other CIM inmates were prohibited from meeting after the Central Office's Religious Issues Committee decided that such meetings could negatively impact the security of FCI Florence. Initially, NCRO legal proceeded with an eye towards litigation and recruited an expert witness with experience testifying in cases involving hate groups such as the Ku Klux Klan, the Order, the Posse Comitatus, and the Skinheads. The expert provided the Court a report summarizing that CIM taught it's members that violence against Blacks, Jew, Catholics, and Homosexuals had Biblical justification. Additionally, during plaintiff's deposition, he did not express whether "non-Aryan" inmates would be allowed to attend CIM services.

Unfortunately, NCRO legal discovered that the current Warden of FCI Florence does not see CIM meetings as a threat. Furthermore, the member of the Religious Issues Committee have either changed their position on the issue or are reluctant to testify. FBI headquarters was contacted and that agency does not take the position that the CIM is a terrorist and/or threat group. In light of these developments and the demanding standards imposed under RFRA, I will be contacting Assistant Director Carlson to determine if we should continue to litigate this matter or explore settlement.

CRIMINAL MATTERS

None reported.

ADMINISTRATIVE CLAIMS OF INTEREST

None reported.

STAFF TRAVEL AND LEAVE

John	None Scheduled (OGC Meeting cancelled)
Daryl	None Scheduled
Dan	None Scheduled
Gwen	None Scheduled

Gary

None Scheduled

Janet

Annual Leave 1-12-96

Rick

None Scheduled

FTCA backup disk mailed to Mary Rose Hagan on January 5, 1996.