

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROSLYN EVERSON, RANDY FOX,
STENNIS GEORGE, BRENDA L.
SEBASTIAN, and RICHARD IDEMUDIA,
and a class of all persons similarly situated,

No. 00-CV-73133-DT

Plaintiffs,

HONORABLE AVERN COHN
MAGISTRATE JUDGE WALLACE CAPEL

v.

MICHIGAN DEPARTMENT OF
CORRECTIONS, and BILL MARTIN,
individually and in his official capacity as
Director of the MDOC,

Defendants,

LINDA NUNN, et. al., and
TRACY NEAL, et. al.

No. 96-CV-71416-DT
No. 96-6986-CZ

Intervening Defendants.

FILED
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CLERK
DISTRICT COURT
EAST DIST MICH.
DETROIT

John R. Runyan (P19763) Elicen Nowikowski (P23405) Attorneys for Plaintiffs Sachs, Waldman, O'Hare, Bogas, & McIntosh, P.C. 1000 Farmer Street Detroit, Michigan 48226 313/965-3464	Mark Matus (P36559) Marie Shamraj (P44481) Attorneys for Defendants Michigan Department of Attorney General Assistant Attorneys General Corrections Division Post Office Box 30217 Lansing, Michigan 48909 517/335-7021	Deborah LaBelle (P31595) Molly Reno (P28997) Richard Soble (20766) Attorneys for Intervening Defendants 221 North Main Street Ann Arbor, Michigan 48104 734/996-5620
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**DEFENDANTS' SECOND MOTION
FOR CLARIFICATION OR MODIFICATION OF
TEMPORARY RESTRAINING ORDER**

NOW COME Defendants, by and through their attorneys, Jennifer M. Granholm,
Attorney General of the State of Michigan, and Mark Matus, Assistant Attorney General, and
move the Court to clarify or modify the September 28, 2000 Temporary Restraining Order on the
following grounds:

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1. This is an action brought in July 2000 by five employees of the Michigan Department of Corrections (MDOC) challenging the decision to assign only female corrections officers to the housing units at correctional facilities housing female prisoners and to assign female officers to transport female prisoners. The Defendants are the MDOC and its Director, Bill Martin. The trial took place between February 13, 2001, and March 7, 2001.

2. By Order dated September 28, 2000, the Court enjoined the MDOC from implementing its plan to assign only female officers to the housing units. The September 28, 2000 Temporary Restraining Order (TRO) and Scheduling Order states in pertinent part:

Defendants, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them be and the same are ENJOINED and RESTRAINED from implementing the plan to make gender-specific assignments and/or to allow only female staff to hold Corrections Officer and Resident Unit Officer positions in work assignments in housing units, segregation units and/or the intake units at the Robert Scott, Western Wayne, and Camp Branch Correctional Facilities and/or otherwise taking any action in furtherance thereof until further order of the Court.

3. On October 18, 2000, after a dispute between the parties over whether Defendants were violating the TRO, the Court entered an Order of Clarification of Temporary Restraining Order and Denying Plaintiff's Motion for Contempt stating in pertinent part:

In addition to the matters set forth in paragraph B of the Temporary Restraining Order, defendants, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them are ENJOINED and RESTRAINED from (1) altering the status quo with respect to the transport of women prisoners which was in effect on September 22, 2000 when this Court issued its bench opinion granting Plaintiffs' Motion for Preliminary Injunction and (2) implementing or in any way giving effect to the following provision contained in section IX (D) of the settlement agreement in *Nunn v. Michigan Dep't. of Corrections*, C.A. No. 96-CV-71416-DT (E.D. Mich. 2000): 'Except when a female officer is not available and immediate transport is deemed

necessary at least one female officer will be assigned to transport a [female] prisoner.'

4. Recently, a union official (of the Michigan Corrections Organization) informed Defendants that the union believed Defendants were violating the Court's injunction by assigning a female officer to transport female prisoners from the Camp Brighton Correctional Facility to medical appointments, court hearings and the like. The corrections officer designated as the transportation officer at Camp Brighton is female, but when she was not on duty, another female officer was chosen to transport the female prisoner. Since the prisoners at the Camp are security Level I prisoners, only one officer makes the transport.

5. The practice of assigning at least one female officer in such situations had been in place at the Scott Correctional Facility before the TRO was entered (and Plaintiffs have not objected to this practice), and since Scott is the parent facility of Camp Brighton, the same practice was being followed at Camp Brighton.

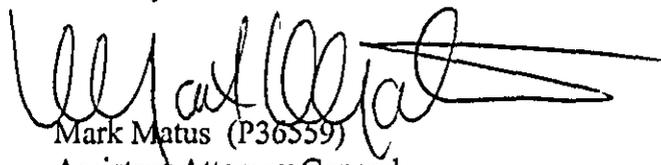
6. The Department does not wish to violate either the letter or the spirit of the Court's Temporary Restraining Order and therefore seeks, for a second time, clarification or modification of the TRO. Defendants' rationale for clarification or modification is:

- A. The TRO should be clarified to allow the Department to assign a female officer to transport female prisoners from Camp Brighton, which is under the administration of the Scott Correctional Facility, because that practice was in place at Scott before the TRO was entered, and
- B. The TRO should be modified to specifically allow the Department the freedom to assign at least one female officer on all transports of female prisoners because the Plaintiffs' evidence at trial plainly failed to support continuing the TRO as it pertains to considering gender in the assignment of transportation officers.

WHEREFORE, Defendants request the TRO be clarified or modified to specifically allow the Department the freedom to (a) assign at least one female officer when a female prisoner is being transported by more than one officer, and (b) assign a female officer only to transport a female prisoner when only one officer makes the transport.

Respectfully submitted,

JENNIFER M. GRANHOLM
Attorney General


Mark Matus (P36559)
Assistant Attorney General
Corrections Division

Dated: February 22, 2002

PROOF OF SERVICE

The undersigned certifies that a copy of the above document(s) was served upon the attorneys of record in the above cause by mailing the same to them at their respective address, with first class postage fully prepaid thereon, on February 22, 2002.



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**BRIEF IN SUPPORT OF DEFENDANTS'
SECOND MOTION FOR CLARIFICATION OR
MODIFICATION OF TEMPORARY RESTRAINING ORDER**

STATEMENT OF FACTS

This is an action brought in July 2000 by five employees of the Michigan Department of Corrections (MDOC) challenging the decision to assign only female corrections officers to the housing units at correctional facilities housing female prisoners and to assign female officers to

transport female prisoners. The Defendants are the MDOC and its Director, Bill Martin. The trial took place between February 13, 2001, and March 7, 2001.

By Order dated September 28, 2000, the Court enjoined the MDOC from implementing its plan to assign only female officers to the housing units. The September 28, 2000 Temporary Restraining Order (TRO) and Scheduling Order states in pertinent part:

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On October 18, 2000, after a dispute between the parties over whether Defendants were violating the TRO, the Court entered an Order of Clarification of Temporary Restraining Order and Denying Plaintiff's Motion for Contempt stating in pertinent part:

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Recently, a union official (of the Michigan Corrections Organization) informed Defendants that the union believed Defendants were violating the Court's injunction by assigning a female officer to transport female prisoners from the Camp Brighton Correctional Facility to medical appointments, court hearings and the like. The corrections officer designated as the transportation officer at Camp Brighton is female, but when she was not on duty, another female

officer was chosen to transport the female prisoner. Since the prisoners at the Camp are security Level I prisoners, only one officer makes the transport.

The practice of assigning at least one female officer in such situations had been in place at the Scott Correctional Facility before the TRO was entered (and Plaintiffs have not objected to this practice), and since Scott is the parent facility of Camp Brighton, the same practice was followed at Camp Brighton.

The Department does not wish to violate either the letter or the spirit of the Court's Temporary Restraining Order and therefore seeks, for a second time, clarification or modification of the TRO.

- I. **The TRO should be clarified to allow the Department to assign a female officer to transport female prisoners from Camp Brighton, which is under the administration of the Scott Correctional Facility, because that practice was in place at Scott Before the TRO was entered.**

There has been no objection to the transportation practices employed by the Scott Correctional Facility that includes assigning female officers to transport female prisoners. Scott houses female prisoners at security levels I through V. TR. VIII, p. 13. When Camp Brighton became the female camp facility in July 2001, its administration was assigned to Scott, *i.e.*, Warden Joan Yukins. In a logical approach to the situation, Scott applied the same practice for transporting level I prisoners housed at Camp Brighton as it applies to its level I prisoners housed at Scott.¹

Other approaches to the situation are conceivable, but should be rejected. Obviously, in the most literal approach to the situation, one might assert that using gender as a basis for assigning transportation staff is not consistent with maintaining the status quo since Camp

¹ Scott personnel do not conduct all prisoner transports. The transportation cadre assigned to the Western Wayne Correctional Facility handles prisoner transports during the first (day) shift.

Brighton was a male facility in September 2000 when the TRO was entered, and the Department did not assign only female officers to transport the male prisoners housed at the Camp.

However, this approach ignores the important facts that the Camp is no longer a male facility and its administration has been transferred from a male prison to Scott. There is no cause to blindly dismiss these fundamental changes in the Camp's operation.

Another way to address the matter is to argue that the same practices that were in place at the former Camp Branch, should transfer to the new camp program at Camp Brighton. This approach has some logical appeal, but again ignores some critical changes in fact. When the TRO was entered, Camp Branch was under the administration of the Crane Correctional Facility. Unlike Scott, Crane (and consequently Camp Branch) had not implemented gender-based assignments for transporting female prisoners when the TRO was entered. However, Crane and Camp Branch are no longer a part of the equation as their female prisoner population was transferred to the Western Wayne Correctional Facility, Scott and Camp Brighton. It is neither logical nor reasonable to insist that the significantly different practice of these former facilities be binding on Scott and its Camp. Scott was assigning female staff to prisoner transports before and after the TRO was entered and there are no grounds for imposing the practices of closed facilities on Scott or its Camp.

- II. The TRO should be modified to specifically allow the Department the freedom to assign at least one female officer on all transports of female prisoners because the Plaintiffs' evidence at trial plainly failed to support continuing the TRO as it pertains to considering gender in the assignment of transportation officers.**

The evidence presented by Plaintiffs at trial filed to support the continued maintenance of the TRO and did not rebut Defendants' position that gender is a Bona Fide Occupational

Qualification (BFOQ)² for assigning corrections officer to transport female prisoners.³ On the contrary, one of the Plaintiffs' two experts in the field of corrections agreed entirely with Defendants' position, and the other was in partial agreement.

Plaintiffs called two corrections experts during trial – Bridget Gladwin, formerly of the New York Department of Corrections, and Edda Cantor, formerly of the New Hampshire Department of Corrections. Ms. Gladwin agreed that on transports of female prisoners, one officer should be female if more than one officer is required, and in cases where only one officer is required, the officer should be female:

Q. And you talked about transportation, that there should be a woman along. If there's only one transportation officer, that should be a woman as well, correct?

A. Yes, we have that policy. [TR. I, p. 128]

Ms. Cantor specifically agreed that one of the officers on a two-officer transport should be female:

Q. And I think you told me during your deposition that if it was a two-person transport you sent two officers; is that right?

A. When two officers were required to go because of the custody level of the inmate, one would be male, one would be female, if there was a medical appointment where the inmate would be disrobed.

² The BFOQ exemption states: "Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ." 42 U.S.C. § 2000e-2(e). Relevant case law is set forth in Defendants' Proposed Conclusions of Law filed in November 2001.

³ "[A]ny time a female inmate is being transported there needs to be a female officer involved in the transport to conduct any strip searches or other intrusive pat/body searches to preclude contraband." Testimony of defense witness George Sullivan, TR. V, p. 106. See also, TR. VI, p. 32, testimony of MDOC Director Bill Martin.

Q. Didn't you also tell me that one of the reasons you sent a female was because if there was a bathroom break you wanted to be able to send the officer in with that prisoner?

A. That's correct, I'm sorry.

Q. Okay. So it's not strictly for medical appointments. Whenever there was a female prisoner going out and there was a custody level that required two officers, one was a male?

A. Correct. I'm sorry if I wasn't clear. [TR. III, p. 222]

Ms. Cantor did not agree that the officer had to be female in situations where only one officer was required for the transport because she thought the prisoner could go to the bathroom without the officer. TR. III, p. 239. However, New Hampshire did not have a policy against male officers conducting pat down searches of female prisoners (TR. III, p. 238), as Michigan does (Defendant's Exhibit F1, PD 03.03.140 (MM)).

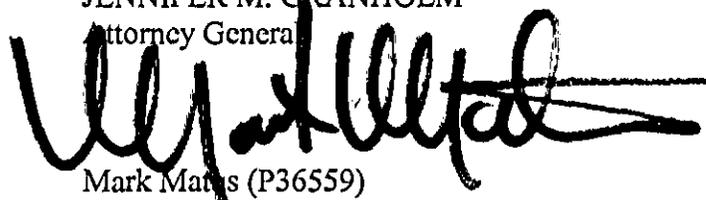
There is clearly no disagreement among the experts on either side that it is reasonably necessary to the normal operation of prisons to assign a woman as one of two or more officers transporting female prisoners. In situations where only one officer makes the transport, such as transports from Camp Brighton, one of the Plaintiffs' own experts supports Defendants' position that the officer should be female. The other expert for Plaintiffs did not agree, but there is an important distinction between the system in which she worked and Michigan's. In Michigan, the male officers are not to conduct pat down searches of female prisoners absent an emergency or reasonable suspicion of the possession of contraband. As noted by Mr. Sullivan (fn. 1, *supra*), searching prisoners being transported is important to security and should only be done by female officers when the prisoner is female. Also, there is no dispute that male officers should not be

present when a female prisoner is required to disrobe, and this could occur during a medical procedure.⁴

Plaintiffs' witnesses did not come close to establishing that there will be irreparable harm if Defendants are allowed to use gender as a factor in assigning officers to transport female prisoners. Moreover, Plaintiffs' evidence does not support a colorable argument that they are likely to succeed on the merits. Under these circumstances where the testimony from one of Plaintiffs' two experts is entirely supportive of Defendants' position, and Ms. Cantor's disagreement regarding one-officer transports is distinguishable from the circumstances here in Michigan, the TRO should be modified to specifically allow the Department the freedom to (a) assign at least one female officer when a female prisoner is being transported by more than one officer, and (b) assign a female officer only to transport a female prisoner when only one officer makes the transport.

Respectfully submitted,

JENNIFER M. GRANHOLM
Attorney General



Mark Matas (P36559)
Assistant Attorney General
Corrections Division

Dated: February 22, 2002

⁴ The *Nunn* Settlement Agreement, Defendants' Exhibit C1, Section IX(D), provides that "On medical runs where it is probable the prisoner will be seen fully or partially nude, no male officer will remain in the examination room absent an emergency or a request from the examining physician." (emphasis added). The Court took judicial notice that it would be inappropriate for male officers to view nude female prisoners during medical examinations, TR V, pp. 85 – 86, but without a female officer present a male officer might be required to view a nude female prisoner in some circumstances.

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NOTICE OF HEARING

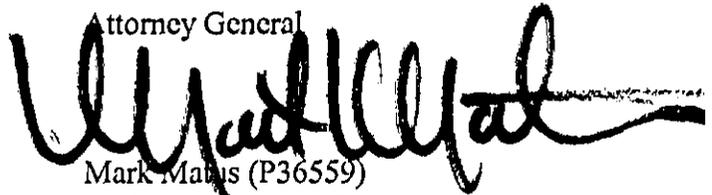
To: Clerk of the Court
John R. Runyan, Esq.
Deborah LaBelle, Esq.

TAKE NOTICE that Defendant's accompanying Second Motion for Clarification or
Modification of Temporary Restraining Order will be heard before the Honorable Avern Cohn in

the Courtroom of said Judge, Theodore Levin United States Courthouse, 213 West Lafayette Boulevard, Detroit, Michigan, on March 5, 2002, at 2:00 p.m.

Respectfully submitted,

JENNIFER M. GRANHOLM
Attorney General



Mark Matus (P36559)
Assistant Attorney General
Corrections Division

Dated: February 22, 2002

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The undersigned certifies that a copy of the above document(s) was served upon the attorneys of record in the above cause by mailing the same to them at their respective address, with first class postage fully prepaid thereon, on February 22, 2002.



Legal Secretary

Matus\2000057115A. Everson (shadow)\Pleadings\Not of Hrg 022202

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