

1998 WL 34113236

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United States District Court,
E.D. Michigan.

Linda NUNN, et. al., Plaintiffs,
v.

MICHIGAN DEPARTMENT OF CORRECTIONS,
et. al., Defendants.

No. 96-CV-71416-DT. | April 8, 1998.

Attorneys and Law Firms

Richard A. Soble, Soble & Rowe, Deborah A. LaBelle,
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Thom, Wanda M. Stokes, Michigan Department of
Attorney General, Lansing, MI, J. Richard Colbeck,
Colbeck, McAlhany, Coldwater, MI, Michael A. Rataj,
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Ann Arbor, MI, for Defendants.

Opinion

MEMORANDUM OPINION AND ORDER

GOLDMAN, Magistrate J.

I. INTRODUCTION

*1 Defendant Fullmer filed this motion for a protective order to stay discovery in this civil matter pending the conclusion of criminal proceedings arising against him, in part, out of the same transaction. Both the civil and criminal proceedings are based on the following facts. Fullmer was employed at the Scott Correctional Facility in April, 1997, when Plaintiff Nicole Morrison, an inmate, accused Fullmer of sexually assaulting her in her cell. Following an investigation, Fullmer was charged with fourth degree criminal sexual conduct. His criminal trial is scheduled to take place in the Wayne County Circuit Court, possibly during the summer of 1998.

Plaintiffs, including Nicole Morrison, filed a civil complaint against the Michigan Department of Corrections and others, including Fullmer, alleging constitutional violations arising out of numerous sexual assaults, a failure to adequately train, supervise, discipline

and investigate allegations of sexual assault, violations of privacy, and retaliatory actions against women prisoners. As part of the discovery process, Plaintiffs seek to depose Fullmer.

Fullmer filed this motion to stay his deposition pending the resolution of his criminal trial, based on his Fifth Amendment privilege against self-incrimination. He contends that compelled deposition testimony regarding the civil matter could be used against him at his upcoming criminal trial. Plaintiffs filed a response arguing that the Fifth Amendment cannot be used to avoid the deposition entirely but instead should be asserted on a question-by-question basis. Both parties filed supplemental briefs focussing on the sole issue before this court, which is whether a court may stay a deposition based on a blanket Fifth Amendment assertion pending the conclusion of a related criminal proceeding.

II. ANALYSIS

A witness may refuse to answer questions in a civil proceeding if the answer would in itself support a criminal conviction or would provide a link in a chain of evidence sufficient to connect the witness with a crime. *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973); *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951). The risk of criminal prosecution must be real and not merely imaginary, remote or speculative. *United States v. Apfelbaum*, 445 U.S. 115, 128, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980). For that reason, courts typically require a witness to face questioning, assert the privilege as to each question and, where necessary, provide evidence showing the risk of criminal prosecution. *In re Morganroth*, 718 F.2d 161, 167 (6th Cir.1983); *National Life Ins. Co. v. Hartford Accident & Indem. Co.*, 615 F.2d 595, 600 (3d Cir.1980); *United States v. Carroll*, 567 F.2d 955, 957 (10th Cir.1977); *United States v. Awerkamp*, 497 F.2d 832, 836 (7th Cir.1974); *Capitol Prods. Corp. v. Hernon*, 457 F.2d 541, 542-43 (8th Cir.1972). By requiring the witness to assert the privilege as to each question, the court can develop a record upon which to review the validity of the assertion of privilege. *United States v. Arnott*, 704 F.2d 322, 324-25 (6th Cir.1983); *Awerkamp*, 497 F.2d at 836. It is for the court to determine whether a witness has validly asserted the privilege. *Morganroth*, 718 F.2d at 167.

*2 Despite the support for a question-by-question assertion of the privilege, the United States Court of Appeals for the Sixth Circuit has held that a court may forgo the question-by-question inquiry into the legitimacy or scope of the Fifth Amendment privilege where the witness faced a "specter of further state prosecution [that]

was real.” *United States v. Medina*, 992 F.2d 573, 586 (6th Cir.1993). The court noted that “a particularized inquiry by the court would have been futile.” *Id.* at 587.

The chance of a criminal prosecution arising from Fullmer’s deposition testimony is not only real, it is already pending. He currently faces prosecution based on a set of facts that is parallel to the facts underlying the civil proceeding. It is clear that his assertion of the privilege would be valid for questions concerning his interactions with the alleged assault victim. Therefore, there is no need for a record of Fullmer’s assertion of the privilege for each question on this issue because this court would likely rule that each assertion is valid. In other words, review of a question-by-question assertion of the privilege would be futile.

Although Fullmer need not face questions concerning his interactions with the alleged assault victim, he nevertheless may be subject to questions on other issues that do not relate to his potential criminal liability. In their briefs, Plaintiffs identify several subject areas on which Fullmer could testify without the risk of self-incrimination. These areas include the failure to adequately train, supervise, discipline and investigate allegations of sexual assault by prison guards, violations of privacy, and retaliatory actions against women prisoners. Therefore, a deposition directed to these issues may proceed without violating Fullmer’s Fifth Amendment rights. However, during the deposition, no question may be posed to Fullmer regarding his interactions with the alleged victim in the criminal case. Similarly, he may not be questioned about any alleged similar conduct. The parties shall coordinate the timing of Fullmer’s deposition with me to insure my availability. Should a dispute arise during the deposition concerning

UNITED STATES OF AMERICA)

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EASTERN DISTRICT OF MICHIGAN)

*3 I, the undersigned, hereby certify that I have on the 8th day of APRIL 1998, mailed copies of the *Memorandum Opinion and Order granting in part motion for protective order* to the following parties:

Deborah LaBelle

the scope of a question, I will be available to review the question and the assertion of the privilege.

III. CONCLUSION

For the reasons stated above, I find that Defendant Fullmer’s motion for protective order should be granted in part and denied in part. Plaintiffs may take Fullmer’s deposition, but may not make any inquiry into the events giving rise to the criminal prosecution or any alleged similar conduct.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1), the parties are hereby notified that within ten days after being served with a copy of this recommendation they may serve and file specific, written objections to the proposed findings and recommendations. Further, either party may respond to another party’s objections within ten days after being served with a copy thereof. The parties are further informed that failure to timely file objections may constitute a waiver of any further right of appeal to the United States Court of Appeals. *United States v. Walters*, 638 F.2d 947 (6th Cir.1981).

CERTIFICATION OF SERVICE

DEMERS, Magistrate J.

SS CASE NO.: 96-CV-71416-DT

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