IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

GENERAL CONFERENCE CORPORATION
OF SEVENTH-DAY ADVENTISTS, *et al.*,

Plaintiffs,

v. No. 1:06-cv-01207-JDB-egb

WALTER MCGILL d/b/a CREATION
SEVENTH DAY ADVENTIST CHURCH,
et al.,

Defendants.

MOTION TO ADD FURTHER SPECIFICS TO THE COURT'S PERMANENT INJUNCTION ENTERED MAY 28, 2009, AS FURTHER DEFINED BY ORDER ENTERED JANUARY 6, 2010

The Plaintiffs move the Court to enter an order with supplementary definition so as to give full effect to the injunction already entered in this case pursuant to Fed. R. Civ. P. 65, and affirmed by the Sixth Circuit Court of Appeals. Grounds for this Motion are as follows:

1. The Plaintiffs have taken numerous steps to enforce the Injunction Order entered May 28, 2009, as was further defined by the Court's Order entered January 6, 2010. The instant Motion is necessary in order to provide further specific detail from the Court such that recipients of the Order will take the action necessary to effectuate the Court's previous orders and prevent the conduct previously enjoined.

2. In the Order entered May 28, 2009 (D.E. No. 98), the Permanent Injunction provided as follows:

> Defendant and his agents, servants and employees, and all those persons in active concert or participation with them, are forever enjoined from using the mark SEVENTH-DAY ADVENTIST, including the use of the words

> SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of, or in combination with any other words, phrases, acronyms or designs, or any mark similar thereto or likely to cause confusion therewith, in the sale, offering for sale, distribution, promotion, provision or advertising of any products and services, and including on the Internet, in any document name, key words, metatags, links, and any other use for the purpose of directing Internet traffic, at any locality in the United States. Subject to the foregoing, Defendant may use these terms in a non-trademark sense, such as oral or written use of the marks to refer to the Plaintiffs, or oral or written use of certain terms in a non-trademark descriptive sense, such as "this Church honors the Sabbath on the 'seventh day,'" or "the members of this church believe in the 'advent' of Christ."
>
> As it pertains to all labels, signs, prints, packages, wrappers, receptacles, and advertisements bearing the SEVENTH-DAY ADVENTIST mark, or bearing the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of, or in combination with any other words, phrases, acronyms or designs, or any mark similar thereto or likely to cause confusion therewith, and all plates, molds, matrices, and other means of making the same (collectively, "Defendant's Infringing Articles"), Defendant shall either: (1) deliver Defendant's Infringing Articles to Plaintiffs' attorney within twenty (20) days after issuance of the Order, to be impounded or permanently disposed of by Plaintiffs; or (2) permanently dispose of Defendant's Infringing Articles himself within twenty (20) days of this Order, and also within twenty (20) days of this Order certify in writing and under oath that he has personally complied with this Order.
>
> Regardless of the manner of disposal of Defendant's Infringing Articles, Defendant shall file with the Clerk of this Court and serve on Plaintiffs, within twenty (20) days after issuance of this Order, a report in writing, under oath, setting forth in detail the manner and form in which Defendant has complied with the foregoing injunction.

3. By Order entered January 6, 2010 (D.E. No. 112), the Court provided further definition by ordering as follows:

> The Court further finds that the following domain names and the websites located at such domain names violate the Injunction Order, and that all persons acting in concert with Defendant – including any website hosting companies and domain name registrars – are hereby ENJOINED from using or enabling the use of such domain names and websites:
>
> www.creationseventhdayadventistchurch.ca
> www.csdadventistchurch.co.cc

www.csdachurch.co.cc/
www.csdachurch.0adz.com
www.creationsdadventistrelief.to
www.csda-adventistchurch.to
www.creationsdadventistrelief.to
www.adventistry.org
www.creationseventhdayadventist.org.rw
www.creationsdarelief.0adz.com
www.seventhdayadventistsda-v-creation7thdayadventistcsda-uslawsuit.net
www.seventhdayadventism.org
www.7thdayadventism.org/
www.whypastorwaltermcgillisnotaffiliatedwithgcsdaadventistchurch.net
www.csdachurch.wordpress.com
www.csda-korea.org
www.creationseventhdayadventistreliefprojectsint.ltd.ug
www.seventhdayadventistchurchfoundwanting.us
www.home.comcast.net/~7thdayadventist
www.home.comcast.net/~csdachurch
www.home.comcast.net/~creationsda
www.home.comcast.net/~creation-adventist
www.binaryangel.net
www.thefourthangel.net
www.home.comcast.net/~creation-sabbath
www.home.comcast.net/~barbara_lim
www.home.comcast.net/~crmin

> The Court further holds that Plaintiffs or their agents should be and are permitted to remove and permanently dispose of Defendant's signs and promotional materials that violate the Injunction Order, with the costs of such removal and disposal to be taxed to Defendant. Defendant's counsel should accompany Plaintiffs or their agent(s) during the removal of any infringing materials, and prior to the removal of any such signs or materials, Plaintiffs' counsel shall notify Defendant and any building managers, property owners, or landlords who may be affected. Finally, the Court ORDERS the Defendant to pay attorneys' fees and costs to the Plaintiffs in the amount of $35,567.00.

4. As a result of developments, advancements, and changes in technology and internet-based communication, for effective enforcement, the Plaintiffs now have need of adding to the language "any website hosting companies and domain name registrars," from the 2010 Order, the following as being additional users, enablers or facilitators who are enjoined –

"domain name registries, domain name hosts, web servers, blog publishing services, search engines, social networks, social media companies and other service providers."

5. The Plaintiffs also have need to add to the language from the 2009 Order "in any document name, key words, metatags, links" and to the language from the 2010 Order "domain names and websites" the following types of published content: "document, file, blog, bulletin board, video, post, tweet, webpage, social media page, social media account, social media post".

6. The Plaintiffs also have need of adding to the language "using or enabling the use of such" from the 2010 Order, the following activities: "facilitating, hosting, linking to, distributing, reproducing, or making available in any other way, whether directly, contributorily, vicariously, actively or passively".

7. The Plaintiffs further request that the Court specifically add the following websites as being enjoined from using, enabling or facilitating the use of such domain names and websites:

www.adventistry.to
www.faithofjesus.to/
www.thetrueadventistchurch.to
www.adventismodelacreacion.org/
www.creation7thdayadventist.to/
www.thearkofnoah.today/
www.angelfire.com/tn/csdachurch
www.angelfire.com/fl/sdaremnant/index.html
edenbrook.tripod.com/
www.blogger.com/profile/13112019061178158534
lexiconofapurefaith.blogspot.com/
sundaylawdilemmatoday.blogspot.com/
adventismoftoday.blogspot.com/
www.blogger.com/profile/14957326305922033094
adventismodelacreacion.blogspot.com/
iglesiaasdhalladafalta.blogspot.com/
juicioinvestigadordeyahshua.blogspot.com/
ladeidadbiblica.blogspot.com/
www.blogger.com/profile/11365397044184427065
lasegundaevaybabilonialagrande.blogspot.com/

libertadyopresioneneladventismo.blogspot.com/
reformasdactual.blogspot.com/
marcadventista.foro.bz/
plus.google.com/110744060513265868164/posts
creation7thdayadventists.blogspot.com/
twitter.com/CSDAChurch
plus.google.com/101624433548400358109/about
www.youtube.com/user/Adventiatria
vimeo.com/user33222441
www.scribd.com/LoudCry-FuerteClamor
www.slideshare.net/AdventismodelaCreacion/presentations
en.wikipedia.org/wiki/Creation_Seventh_Day_Adventist_Church

8. Lastly, the Plaintiffs request that for clarity and ease of delivery, the Court enter all provisions of the Permanent Injunction in one document, that being the proposed Consolidated Permanent Injunction Order, which also deletes and supersedes some outdated, and duplicative verbiage. Submitted herewith as Exhibit A hereto is a redline of the language for the proposed Consolidated Permanent Injunction Order for the Court's review and consideration.

9. The Plaintiffs are unable to conduct a Counsel Consultation and provide the Court with a Certificate of Consultation pursuant to LR 7.2 because the counsel for the defense in this action at the Trial Court level was allowed to withdraw by Order dated March 10, 2011 (Document 176), and a review of the Pacer docket for this action does not indicate that an appearance of other Trial Court counsel has occurred

WHEREFORE, for the grounds set forth hereinabove as well as in the Memorandum in Support of this Motion filed herewith, the Plaintiffs respectfully request that the Court enter the proposed Consolidated Permanent Injunction Order submitted herewith.

Respectfully Submitted,

/s/ Philip M. Kirkpatrick
Philip M. Kirkpatrick (BPR No. 6161)
ADAMS AND REESE LLP
424 Church Street, Suite 2700
Nashville, Tennessee 37219
Phone: 615-259-1485
Fax: 615-259-1470
phil.kirkpatrick@arlaw.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Undersigned counsel for the Plaintiffs hereby certifies that a true and correct copy of the foregoing Motion and the [Proposed] Consolidated Permanent Injunction Order being submitted herewith to the Court, as well as Exhibit A hereto [Proposed] Consolidated Permanent Injunction Order-Redlined have been sent to the Defendant as follows, which addresses were determined from the sources specified below on this the 23rd day of July, 2015.

From the Google+ page of Walter McGill:

Home:
1162 Old Hwy 45
Guys, TN 38339
731.610.7341—Hard copies being sent by regular U.S. First Class Mail

Work:
PO Box 424
Idyllwild, CA 92549—being sent by regular U.S. First Class Mail, and by email electronically to Sda_trademark_lawsuit@yahoo.com

From www.yahourrighteousness.net/flag/index.php/contact – the Cross Country trek "Contact" page for Walter McGill:

Pastor Walter "Chick" McGill
PO Box 424
Idyllwild, CA 92549—being sent by regular U.S. First Class Mail, and by email electronically to Csda_academy@yahoo.com

From the Notice of Compliance filed in this action on March 21, 2011, by attorney Charles L. Holliday (Document 177):

Creation SDA Relief Projects of Uganda
c/o Walter McGill
P.O. Box 51
Kalangala—Uganda

/s/ Philip M. Kirkpatrick

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

GENERAL CONFERENCE CORPORATION
OF SEVENTH-DAY ADVENTISTS, *et al.*,

Plaintiffs,

v. No. 1:06-cv-01207-JDB-egb

WALTER MCGILL d/b/a CREATION
SEVENTH DAY ADVENTIST CHURCH,
et al.,

Defendants.

[PROPOSED] CONSOLIDATED PERMANENT INJUNCTION ORDER - REDLINED

Pending before the Court is the Plaintiff's Motion to Add Further Specifics to the Court's Permanent Injunction Entered May 28, 2009 (D.E. No. 98), As Further Defined by Order Entered January 6, 2010. (D.E. No. 112). The Court has reviewed and considered that Motion, as well as the entire record in this civil action, and is of the opinion that the Motion is well taken and should be granted. Accordingly, the revised permanent injunction in this action is as follows, and those persons, firms and entities as referenced hereinafter are ordered to fully comply with the terms hereof.

> Defendant and his agents, servants and employees, and all those persons in active concert or participation with them, are forever enjoined from using the mark SEVENTH-DAY ADVENTIST, including the use of the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of, or in combination with any other words, phrases, acronyms or designs, or any mark similar thereto or likely to cause confusion therewith, in the sale, offering for sale, distribution, promotion, provision or advertising of any products and services, and including on the Internet, in any document name, key words, metatags, links, document, file, blog, bulletin board, video, post, tweet, domain name, webpage, website, social media page, social media account, social media post, and

any other use for the purpose of directing Internet traffic, at any locality in the United States. Subject to the foregoing, Defendant may use these terms in a non-trademark sense, such as oral or written use of the marks to refer to the Plaintiffs, or oral or written use of certain terms in a non-trademark descriptive sense, such as "this Church honors the Sabbath on the 'seventh day,'" or "the members of this church believe in the 'advent' of Christ."

~~As it pertains to all labels, signs, prints, packages, wrappers, receptacles, and advertisements bearing the SEVENTH-DAY ADVENTIST mark, or bearing the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of, or in combination with any other words, phrases, acronyms or designs, or any mark similar thereto or likely to cause confusion therewith, and all plates, molds, matrices, and other means of making the same (collectively, "Defendant's Infringing Articles"), Defendant shall either: (1) deliver Defendant's Infringing Articles to Plaintiffs' attorney within twenty (20) days after issuance of the Order, to be impounded or permanently disposed of by Plaintiffs; or (2) permanently dispose of Defendant's Infringing Articles himself within twenty (20) days of this Order, and also within twenty (20) days of this Order certify in writing and under oath that he has personally complied with this Order.~~

~~Regardless of the manner of disposal of Defendant's Infringing Articles, Defendant shall file with the Clerk of this Court and serve on Plaintiffs, within twenty (20) days after issuance of this Order, a report in writing, under oath, setting forth in detail the manner and form in which Defendant has complied with the foregoing injunction.~~

The Court further finds that the following domain names and the websites located at such domain names violate the Injunction Order, and that all persons acting in concert with Defendant – including any website hosting companies, ~~and~~ domain name registrars, any and all service providers, domain registries, domain name registrars, domain name hosts, web servers, web hosts, blog publishing service, search engines, and social network or social media companies who receive notice of this Order – are hereby ENJOINED from using, ~~or~~ enabling, facilitating, hosting, linking to, distributing, reproducing, or making available in any other way, whether directly, contributorily, vicariously, actively or passively the use of such domain names, ~~and~~ websites, document name, key words, metatags, links, document, file, blog, bulletin board, video, post, tweet, webpage, social media page, social media account, social media post:

www.adventistry.to
www.faithofjesus.to/
www.thetrueadventistchurch.to

www.adventismodelacreacion.org/
www.creation7thdayadventist.to/
www.thearkofnoah.today/
www.angelfire.com/tn/csdachurch
www.angelfire.com/fl/sdaremnant/index.html
edenbrook.tripod.com/
www.blogger.com/profile/13112019061178158534
lexiconofapurefaith.blogspot.com/
sundaylawdilemmatoday.blogspot.com/
adventismoftoday.blogspot.com/
www.blogger.com/profile/14957326305922033094
adventismodelacreacion.blogspot.com/
iglesiaasdhalladafalta.blogspot.com/
juicioinvestigadordeyahshua.blogspot.com/
ladeidadbiblica.blogspot.com/
www.blogger.com/profile/11365397044184427065
lasegundaevaybabilonialagrande.blogspot.com/
libertadyopresioneneladventismo.blogspot.com/
reformasdactual.blogspot.com/
marcadventista.foro.bz/
plus.google.com/110744060513265868164/posts
creation7thdayadventists.blogspot.com/
twitter.com/CSDAChurch
plus.google.com/101624433548400358109/about
www.youtube.com/user/Adventiatria
vimeo.com/user33222441
www.scribd.com/LoudCry-FuerteClamor
www.slideshare.net/AdventismodelaCreacion/presentations
en.wikipedia.org/wiki/Creation_Seventh_Day_Adventist_Church
~~www.creationseventhdayadventistchurch.ca~~
~~www.csdadventistchurch.co.cc~~
~~www.csdachurch.co.cc/~~
~~www.csdachurch.0adz.com~~
~~www.creationsdadventistrelief.to~~
~~www.csda-adventistchurch.to~~
~~www.creationsdadventistrelief.to~~
~~www.adventistry.org~~
~~www.creationseventhdayadventist.org.rw~~
~~www.creationsdarelief.0adz.com~~
~~www.seventhdayadventistsda-v-creation7thdayadventistcsda-uslawsuit.net~~
~~www.seventhdayadventism.org~~
~~www.7thdayadventism.org/~~
~~www.whypastorwaltermcgillisnotaffiliatedwithgcsdaadventistchurch.net~~
~~www.csdachurch.wordpress.com~~
~~www.csda-korea.org~~
~~www.creationseventhdayadventistreliefprojectsint.ltd.ug~~

~~www.seventhdayadventistchurchfoundwanting.us~~
~~www.home.comcast.net/~7thdayadventist~~
~~www.home.comcast.net/~csdachurch~~
~~www.home.comcast.net/~creationsda~~
~~www.home.comcast.net/~creation-adventist~~
~~www.binaryangel.net~~
~~www.thefourthangel.net~~
~~www.home.comcast.net/~creation-sabbath~~
~~www.home.comcast.net/~barbara_lim~~
~~www.home.comcast.net/~crmin~~

The Court further holds that Plaintiffs or their agents should be and are permitted to remove and permanently dispose of Defendant's labels, signs, prints, packages, wrappers, receptacles, and advertisements bearing the SEVENTH-DAY ADVENTIST mark, or bearing the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of, or in combination with any other words, phrases, acronyms or designs, or any mark similar thereto or likely to cause confusion therewith, and all plates, molds, matrices, and other means of making the same (collectively, "Defendant's Infringing Articles"),~~signs and promotional materials that violate the Injunction Order~~, with the costs of such removal and disposal to be taxed to Defendant. Defendant's counsel should accompany Plaintiffs or their agent(s) during the removal of any infringing materials, and prior to the removal of any such signs or materials, Plaintiffs' counsel shall notify Defendant and any building managers, property owners, or landlords who may be affected. ~~Finally, the Court ORDERS the Defendant to pay attorneys' fees and costs to the Plaintiffs in the amount of $35,567.00.~~

IT IS SO ORDERED this ____ day of _____, 2015.

_____
UNITED STATES DISTRICT JUDGE or
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

GENERAL CONFERENCE CORPORATION
OF SEVENTH-DAY ADVENTISTS, *et al.*,

Plaintiffs,

v. No. 1:06-cv-01207-JDB-egb

WALTER MCGILL d/b/a CREATION
SEVENTH DAY ADVENTIST CHURCH,
et al.,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO ADD FURTHER SPECIFICS TO THE COURT'S PERMANENT INJUNCTION ENTERED MAY 28, 2009, AS FURTHER DEFINED BY ORDER ENTERED JANUARY 6, 2010

Pursuant to LR 7.2 the Plaintiffs file this Memorandum in support of their Motion to the Court to enter an order with supplementary definition so as to give full effect to the injunction already entered in this case, and affirmed by the Sixth Circuit Court of Appeals.

FACTS MATERIAL TO THE MOTION

The Plaintiffs have taken numerous steps to enforce the Injunction Order entered May 28, 2009, as was further defined by the Court's Order entered January 6, 2010. The instant Motion is necessary in order to provide further specific detail from the Court such that recipients of the Order will take the action necessary to effectuate the Court's previous orders and prevent the conduct previously enjoined.

As a result of developments, advancements, and changes in technology and internet-based communication, for effective enforcement, the Plaintiffs now have need of adding to the language "any website hosting companies and domain name registrars," from the 2010 Order,

the following as being additional users, enablers or facilitators who are enjoined – "domain name registries, domain name hosts, web servers, blog publishing services, search engines, social networks, social media companies and other service providers."

The Plaintiffs also have need to add to the language from the 2009 Order "in any document name, key words, metatags, links" and to the language from the 2010 Order "domain names and websites" the following types of published content: "document, file, blog, bulletin board, video, post, tweet, webpage, social media page, social media account, social media post".

The Plaintiffs also have need of adding to the language "using or enabling the use of such" from the 2010 Order, the following activities: "facilitating, hosting, linking to, distributing, reproducing, or making available in any other way, whether directly, contributorily, vicariously, actively or passively".

The Plaintiffs further request that the Court specifically add the following websites as being enjoined from using, enabling or facilitating the use of such domain names and websites:

www.adventistry.to
www.faithofjesus.to/
www.thetrueadventistchurch.to
www.adventismodelacreacion.org/
www.creation7thdayadventist.to/
www.thearkofnoah.today/
www.angelfire.com/tn/csdachurch
www.angelfire.com/fl/sdaremnant/index.html
edenbrook.tripod.com/
www.blogger.com/profile/13112019061178158534
lexiconofapurefaith.blogspot.com/
sundaylawdilemmatoday.blogspot.com/
adventismoftoday.blogspot.com/
www.blogger.com/profile/14957326305922033094
adventismodelacreacion.blogspot.com/
iglesiaasdhalladafalta.blogspot.com/
juicioinvestigadordeyahshua.blogspot.com/
ladeidadbiblica.blogspot.com/
www.blogger.com/profile/11365397044184427065
lasegundaevaybabilonialagrande.blogspot.com/

libertadyopresioneneladventismo.blogspot.com/
reformasdactual.blogspot.com/
marcadventista.foro.bz/
plus.google.com/110744060513265868164/posts
creation7thdayadventists.blogspot.com/
twitter.com/CSDAChurch
plus.google.com/101624433548400358109/about
www.youtube.com/user/Adventiatria
vimeo.com/user33222441
www.scribd.com/LoudCry-FuerteClamor
www.slideshare.net/AdventismodelaCreacion/presentations
en.wikipedia.org/wiki/Creation_Seventh_Day_Adventist_Church

Lastly, the Plaintiffs request that for clarity and ease of delivery, the Court enter all provisions of the Permanent Injunction in one document, that being the proposed Consolidated Permanent Injunction Order, which also deletes and supersedes some outdated, and duplicative verbiage. Submitted with the Motion as Exhibit A thereto is a redline of the language for the proposed Consolidated Permanent Injunction Order for the Court's review and consideration.

LAW AND ARGUMENT

The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible. *Brown v. Plata*, 131 S. Ct. 1910 (2011). District courts may modify permanent injunctions to more accurately reflect the court's original findings. *See Bristol Technology, Inc. v. Microsoft Corp*., 127 F. Supp. 2d 61 (D. Conn. 2000).

Upon a showing of changed conditions, permanent injunctions may be reviewed, opened, vacated or modified. *See Smith v. O'Neill*, 813 S.W.2d 501 (Tex. 1991); *State ex rel. Bosch v. Denny's Place*, 98 Ohio App. 351, 57 Ohio Op. 385, 129 N.E.2d 532 (1st Dist. Butler County 1954); *Coalition of Black Leadership v. Cianci*, 570 F.2d 12, 24 Fed. R. Serv. 2d 1182 (1st Cir. 1978); *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 710 F.2d 69, 32 Fair Empl. Prac. Cas. (BNA) 20, 32 Empl. Prac. Dec. (CCH) P 33686 (2d Cir. 1983).[1]

[1] Copies of cases are submitted along with this Memorandum in Support.

As is set forth in the Plaintiffs' Motion, as a result of developments, advancements, and changes in technology and internet-based communication, for effective enforcement of the Court's Permanent Injunction, the Plaintiffs now have need of adding the further specifics requested in the Motion.

Respectfully Submitted,

/s/ Philip M. Kirkpatrick
Philip M. Kirkpatrick (BPR No. 6161)
ADAMS AND REESE LLP
424 Church Street, Suite 2700
Nashville, Tennessee 37219
Phone: 615-259-1485
Fax: 615-259-1470
phil.kirkpatrick@arlaw.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Undersigned counsel for the Plaintiffs hereby certifies that a true and correct copy of the foregoing Memorandum in Support of Plaintiffs' Motion and the [Proposed] Consolidated Permanent Injunction Order being submitted herewith to the Court, as well as Exhibit A hereto [Proposed] Consolidated Permanent Injunction Order-Redlined have been sent to the Defendant as follows, which addresses were determined from the sources specified below on this the 23rd day of July, 2015.

From the Google+ page of Walter McGill:

Home:
1162 Old Hwy 45
Guys, TN 38339
731.610.7341—Hard copies being sent by regular U.S. First Class Mail

Work:
PO Box 424
Idyllwild, CA 92549—being sent by regular U.S. First Class Mail, and by email electronically to Sda_trademark_lawsuit@yahoo.com

From www.yahourrighteousness.net/flag/index.php/contact – the Cross Country trek "Contact" page for Walter McGill:

Pastor Walter "Chick" McGill
PO Box 424
Idyllwild, CA 92549—being sent by regular U.S. First Class Mail, and by email electronically to Csda_academy@yahoo.com

From the Notice of Compliance filed in this action on March 21, 2011, by attorney Charles L. Holliday (Document 177):

Creation SDA Relief Projects of Uganda
c/o Walter McGill
P.O. Box 51
Kalangala—Uganda

/s/ Philip M. Kirkpatrick

710 F.2d 69
United States Court of Appeals,
Second Circuit.

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., et al., Plaintiffs-Appellees,
v.
CITY OF BRIDGEPORT, et al., Defendants-Appellees,
and
Bridgeport Firefighters for Merit Employment, Inc., et al., Intervenors-Defendants-Appellants.

No. 1092, Docket 83–7042. | Argued March 31, 1983. | Decided June 13, 1983.

Class action was brought on behalf of blacks and Hispanics attacking civil service employment examination for city fire department as violative of Title VII of the Civil Rights Act of 1964. The United States District Court for the District of Connecticut, T.F. Gilroy Daly, Chief Judge, 454 F.Supp. 758, held the examination invalid, enjoined use of the test, and ordered affirmative relief, and defendants appealed and plaintiffs cross appealed. The Court of Appeals, Feinberg, Circuit Judge, 594 F.2d 306, vacated the District Court's order and remanded the case for further consideration. The District Court, 479 F.Supp. 101, reaffirmed its original determination that the city was liable under Title VII, determined that the city was also liable under Title VI and the Revenue Sharing Act and modified in some respects the relief order, and appeal and cross appeal were again taken. The Court of Appeals, 647 F.2d 256, affirmed in part, vacated in part, and remanded. On remand, the United States District Court for the District of Connecticut, T.F. Gilroy Daly, Chief Judge, modified injunction previously entered as remedy for violations by defendants of Title VII of the Civil Rights Act of 1964 and the antidiscrimination provision of the State and Local Fiscal Assistance Act in the hiring of fire fighters. Appeal was taken by organization representing incumbent nonminority fire fighters. The Court of Appeals, Kearse, Circuit Judge, held that: (1) mere fact that organization representing incumbent nonminority fire fighters had been permitted to intervene in action and to participate in prior appeals did not confer upon it standing to challenge modification of remedial order with respect to back pay and offering of vacancies to minorities, and (2) with respect to injunctive remedial relief ordered and essentially approved on appeal, modification of that relief on remand to create separate, defined back pay and offeree lists was proper, given that the District Court had power to modify its injunction to adapt remedies ordered to change in circumstances, changed circumstances justified modification, and modification was consistent with mandate of the Court of Appeals.

Affirmed.

Attorneys and Law Firms

***70** David N. Rosen, New Haven, Conn. (Michael P. Koskoff, New Haven, Conn., on the brief), for plaintiffs-appellees.

Thomas K. Jackson, Bridgeport, Conn., for defendants-appellees.

William B. Barnes, Milford, Conn. (J. Daniel Sagarin, Hurwitz & Sagarin, P.C., Milford, Conn., on the brief), for intervenors-defendants-appellants.

Before KEARSE, PIERCE and PRATT, Circuit Judges.

Opinion

KEARSE, Circuit Judge:

Intervening defendants Bridgeport Firefighters for Merit Employment, Inc., *et al.* ("BFME"), appeal from an order of the United States District Court for the District of Connecticut, T.F. Gilroy Daly, then *Judge*, now *Chief Judge*, modifying an injunction previously entered by the court with the approval of this Court as a remedy for violations by defendants City of Bridgeport, *et al.* (the "City"), of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e–17 (1976 & Supp.V 1981), and the antidiscrimination provision of the State and Local Fiscal Assistance Act ("Revenue Sharing Act"), 31 U.S.C. § 1242(a) (1976), in the hiring of firefighters. BFME contends that the district court's modification violates this Court's rulings in the two previous appeals in this matter. We disagree and affirm the order of the district court.

BACKGROUND

The history of this action is described in detail in two prior opinions of this Court, *see Association Against Discrimination in Employment v. City of Bridgeport*, 594 F.2d 306 (2d Cir.1979) ("*ADE I* "); *Association Against*

Discrimination in Employment v. City of Bridgeport, 647 F.2d 256 (2d Cir.1981) ("*ADE II* "), *aff'g in part* 479 F.Supp. 101 (D.Conn.1979), *cert. denied*, 455 U.S. 988, 102 S.Ct. 1611, 71 L.Ed.2d 847 (1982), familiarity with which is assumed. The principal focus of the present appeal is the mandate of this Court in *ADE II*, which largely affirmed the district court's order, whose principal thrust was that, in order to remedy the City's violations of antidiscrimination laws, the City would be required to offer firefighter positions and to pay backpay to minority victims of the City's past discrimination.

In *ADE II* we upheld findings of the district court that the City had "engaged in a continuous policy of discrimination" against black and hispanic candidates in the hiring of firefighters, 647 F.2d at 274, as evidenced by many discriminatory acts, "includ[ing] the giving of the 1975 exam that was not job related and had discriminatory impact, and the individual acts of discrimination against several minority candidates who sought to take that exam in 1975," *id.* at 275. We also upheld findings

> that, in addition to administering discriminatory exams, the City had purposely failed to recruit minority applicants, had actively deterred interested minority applicants, and had discriminated against several individual minority candidates, and that the City's failure to recruit and ***71** its discriminatory treatment of minority individuals were not in good faith.

Id. at 284 (footnote omitted).

In light of the district court's factual findings, we also upheld the remedial provisions fashioned by the court, [1] based upon its considered judgment "that merely ordering nondiscriminatory hiring in the future, even coupled with the requirement that the City actively recruit minority candidates, would be inadequate either to remedy past discrimination or to 'assure prospective minority candidates that applying is no longer futile.' " 479 F.Supp. at 113 (citation omitted). The remedial order, as set out in *id.* at 115–19 and in *ADE II*, 647 F.2d at 267–69, and as quantitatively modified in *ADE II*, *see* note 1 *supra*, provided in pertinent part (1) that the City must prepare a list of 73 victims of the City's discrimination to be offered positions as firefighters, consisting principally of

> (a) The black and hispanic persons who filed applications for either the 1971 or 1975 test, who have not been offered but still seek employment with the Fire Department, and who pass both the agility test and medical examination to be administered by the City,

479 F.Supp. at 115–16; 647 F.2d at 267, and (2) that the City must prepare a list of up to 73 discriminatees to receive backpay. Most pertinently for purposes of the present appeal, preference for inclusion in the backpay list was given to persons on the list of discriminatees to be offered firefighter positions.

Events following our decision in *ADE II* have proceeded largely in accordance with the remedial plan structured by the district court, with one major exception. At some point it was discovered that some discriminatees who would be eligible to be placed on the list of 73 persons to be offered firefighter positions, if they still sought such positions, would represent that they were still interested when in fact they were not, simply in order to receive the backpay to be awarded offerees. [2] The result would be that a number of persons would have themselves placed on the offeree list and go through training programs with no genuine intention of becoming full-fledged firefighters. The City would then have expended substantial sums in training persons who would perform no firefighting services; and the number of minority firefighters in the Bridgeport Fire Department would be lower than it would be if only still-interested discriminatees were placed on the list of those to be offered positions.

In order to avert this potentially unproductive and wasteful turn of events, plaintiffs and the City agreed to request the district court to modify the remedial scheme in one respect. In order to eliminate the incentive for those not still desiring to be firefighters to misrepresent their intentions, it was agreed that the backpay list should simply be divorced from the offeree list. Thus, up to 73 persons [3] who could prove they were victims of the City's discrimination could be awarded backpay without the need to commit themselves to becoming firefighters; 73 discriminatees still interested in becoming firefighters would be placed on the offeree list, but not all of them would receive backpay since only a maximum of 73 backpay awards are to be made.

In an order dated December 13, 1982 ("December 1982 Order"), the district court ***72** approved this proposal, stating in part as follows:

> The City of Bridgeport, the deterred minorities, and the minority applicants have reached an agreement to eliminate the incentive for any minority applicant to misrepresent a present interest in a firefighter position for purposes of securing a backpay award. The City is obligated to pay its backpay liability to all persons who are placed on the backpay list. The number of persons for which the City has a potential liability in the form of backpay is [73], and this number is neither increased nor decreased by the agreement with the plaintiffs. The City will merely consider a backpay list of [73] persons, some of whom would not have been entitled to be on the list, in exchange for an offeree list with bona fide candidates, saving city training resources and helping department morale. On the other hand, the deterred minorities want to be considered for places on the offeree list, which can only occur if places on the offeree list are not taken by persons not properly there, that is minority applicants without a present interest in and qualifications for a firefighter position. In exchange for these places on the offeree list being available to deterred minorities, these deterred minorities who actually are placed on the offeree list relinquish their right to be placed on the backpay list, that occurrence having been automatic for them under the court order. The dozen or so minority applicants who would be tempted to represent that they are presently interested in the position in order to be placed on the offeree list and therefore automatically on the backpay list, will honestly state that they are no longer interested in the position in exchange for the City agreeing to place them on the backpay list and for the deterred minorities agreeing to give up their rights to be on the backpay list.
>
> This court has no difficulty with the substance of the solution arrived at by the plaintiffs and the City of Bridgeport. Each of the parties is bargaining to achieve a desired result as a mature, intelligent person. In essence, the plaintiffs and the City have agreed to alter the composition of the backpay list to ensure that the offeree list has only qualified minority persons genuinely interested in pursuing a firefighter career in the Bridgeport Fire Department. As noted above, this court and the Court of Appeals clearly intended that the offeree list include only minority persons of this character.

December 1982 Order at 5–6.

BFME is a nonprofit organization representing non-minority firefighters within the Bridgeport Fire Department. It had been permitted to intervene in the action in 1976 to seek relief from any injury that might be done to nonminority firefighters by the City as a result of any modification of the City's hiring or promotional practices. *ADE II*, 647 F.2d at 261. BFME opposed the motion to modify the injunction principally on the grounds that the modification would increase the number of minority candidates hired by the City and would constitute a quota. These objections were overruled by the district court, which observed that

> [a]s the intervening defendants are neither paying nor receiving backpay under the court order, they have no complaint as to who is or is not awarded backpay. That this altered backpay list would make the offeree list more likely to be the list envisioned by this court and by the Court of Appeals, provides to the BFME no basis for complaint.

December 1982 Order at 6–7. The court rejected BFME's contention that the modification transformed the court's earlier remedial order into a quota system:

> The fact that the alteration of the backpay list may better ensure a proper offeree list seems to provide no legitimate basis for concern to the BFME or its members. The BFME will not be heard to complain that the agreed upon actions of other parties in affairs not involving the BFME, increase the likelihood that the court order will be more properly implemented. Further, to the extent, if any, that the offeree list is already established ***73** and contains names of persons not properly includable, that is persons who have misrepresented a present interest in a firefighter position in an effort to get on the backpay list, the list does not comport with the order of this court as affirmed by the Court of Appeals. Any such persons not properly on the list shall be removed and replaced by persons with the requisite present interest in a firefighter position.
>
> The BFME complains at length that the alteration agreed by the plaintiffs and the City transforms the court's order for a goal to a quota. As discussed above, all changes in the backpay list are matters concerning the plaintiffs and the City and not the BFME, and do not transform the offeree list [from] a goal into a quota with respect to minority hiring.

Id. at 7–8.

This appeal followed.

DISCUSSION

At the outset we note that BFME's claim of standing to challenge the December 1982 Order is tenuous at best. We have nevertheless considered all of BFME's attacks on that order and we find them entirely meritless.

A. *Standing*

[1] It is elementary that a litigant is not entitled to have the court decide the merits of an issue he raises unless he can show some basis for arguing that the challenged action has caused him a cognizable injury. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41 n. 22, 96 S.Ct. 1917, 1926 n. 22, 48 L.Ed.2d 450 (1976); *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 152, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970); *Flast v. Cohen,* 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968). BFME argues that its satisfaction of this requirement is demonstrated by the fact that it was allowed to intervene in the present action and to participate in prior appeals. This argument is wide of the mark, for

> [a]n appealable order may not ... be challenged by ... every party to the suit in which it is entered. To have standing a party must be aggrieved by the judicial action from which it appeals.

United States v. City of Miami, 664 F.2d 435, 445 (5th Cir.1981) (en banc) (plurality opinion); *see id.* at 462 (opinion of F. Johnson, J., concurring in part); *Boston Tow Boat Co. v. United States,* 321 U.S. 632, 64 S.Ct. 776, 88 L.Ed. 975 (1944); *Cerro Metal Products v. Marshall,* 620 F.2d 964, 969 & n. 8 (3d Cir.1980); 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1923, at 632–33 (1972). It seems likely that BFME cannot meet this test.

[2] Plaintiffs and the City argue that BFME lacks standing because the December 1982 Order changed only the qualifications for receiving backpay, and BFME's members were never to receive or make any backpay awards. If the December 1982 Order had relevance only to backpay we would readily agree that BFME lacks standing to challenge it; but the very purpose of that order's modification of the injunction was to affect the hiring remedy. Thus if BFME could point to any respect in which the modification's effect on hiring could be said to injure persons represented by BFME, we would think BFME's standing clear.

BFME has made no such showing, however, and the nature of the modification causes us to doubt that it could do so. BFME represents incumbent nonminority firefighters. Incumbents have no cognizable interest in whether vacancies are filled by minority or nonminority candidates. Nor does the modification appear to have any impact on the seniority rights of the incumbents. Under the original injunction any person who received backpay was expected to become a firefighter and would have received retroactive seniority. If some of these persons shortly left the Fire Department, it is possible that the seniority of present incumbents might thereby be enhanced. Thus, it might be argued that substitution of persons who have no intention of quickly leaving the Department ***74** would adversely impact the incumbents' seniority rights. Leaving aside the merits of such a claim, however, we note that it appears to lack any factual basis. As we read the December 1982 Order, a minority candidate who is added to the offeree list in place of a now-disinterested discriminatee—the latter to receive only backpay and not the offer of a firefighter position—is not to be given retroactive seniority. *See* December 1982 Order at 9–10.

Hence we are unable to fathom any cognizable interest of BFME that is affected by the December 1982 Order, and BFME's standing to appeal from that order is suspect.

B. *The Merits*

[3] Even if BFME has standing to appeal from the December 1982 Order, we find its arguments meritless. The court had the power to modify its injunction to adapt the remedies ordered to changes in circumstances; the changed circumstances justified the modification; and the modification was consistent with the mandate of this Court in *ADE II.*

The power of a district court to modify its past injunctive decrees in order to accommodate changed circumstances is well established. *See, e.g., United States v. United Shoe Machinery Corp.,* 391 U.S. 244, 248–49, 251, 88 S.Ct. 1496, 1499–1500, 1501, 20 L.Ed.2d 562 (1968); *System Federation No. 91, Railway Employes' Department v. Wright,* 364 U.S. 642, 646–48, 81 S.Ct. 368, 370–72, 5 L.Ed.2d 349 (1961) (“a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances,

whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen"); *United States v. Swift & Co.*, 286 U.S. 106, 114, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932) ("continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need"); *New York State Ass'n for Retarded Children v. Parisi*, 706 F.2d 956, 967–71 (2d Cir.1983). Further, "[w]hile changes in fact or in law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes." *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 418 F.2d 31, 35 (2d Cir.1969). "It is well recognized that in institutional reform litigation ... judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves [and] to improvement when a better understanding of the problem emerges ...." *New York State Ass'n for Retarded Children v. Parisi*, *supra*, at 969.

[4] The record before us reveals that the circumstances entirely justified the district court's modification of the injunction. A principal purpose of the remedial scheme was to alleviate the effects of the City's past discrimination against minority candidates. *ADE II*, 647 F.2d at 282. To this end a hiring goal was established, designed to increase the number of minority firefighters in the department by requiring the City to make offers to those who met the pertinent qualifications and were still interested in becoming firefighters. The experience of plaintiffs and the City in attempting to construct the list of persons to be offered positions clearly provided a better appreciation that the structure of the decree, linking backpay entitlement to an expression of continued interest, would disserve the goal of increasing the number of minority firefighters. It was well within the district court's discretion to seek to correct this unforeseen impediment to the achievement of the injunction's remedial goals.

The district court's modification of the injunction in order to take account of the experience of the parties in seeking to carry out the remedial order was in no way inconsistent with either the explicit or the implicit mandate of this Court in the prior appeals in this case. No issue had been raised in those appeals as to the propriety of linking the backpay list to the offeree list, and we did not address that question. Hence there is no basis for suggesting that the ***75** divorce of the two lists violates an express mandate of this Court. BFME attempts to construct a basis for arguing that the modification violated directions that were implicit, by arguing that we expressed the view in *ADE II* that fewer than 73 minority discriminatees would be hired, whereas the modification guarantees that 73 discriminatees will be hired. BFME has misread our opinion. In *ADE II* we approved the district court's goals of remedying the effects of the City's past discrimination in the hiring of firefighters, *id.* at 282; we accordingly approved the concept that persons to be placed on the list of those to receive offers should be discriminatees who "still seek" positions AS FIREFIGHTERS, *ID.;* AND WE APPROVED THE NUMBER "73," *SEE* NOTE 1 *SUPRA.* our observation that the offers might be accepted by fewer than 73 discriminatees did not alter the approved premise that only those still interested should be placed on the list; rather we simply hypothesized, on the basis of the City's representation that it would be unable to train all of the offerees at the same time, that there might be an interval of 1–2 years between the formulation of the list and the eventual offers, and we speculated that some of those on the offeree list might lose interest during this interval. [4]

In fact what has occurred is that the compilation of the list of 73 discriminatees to be given offers was not completed as swiftly as we had hypothesized it might be; the interval between placement of the last names on the list and the actual making of the offers will be short; and the likelihood is thus lessened that in the actual interval persons on the list will lose interest. These events were not foreclosed by *ADE II*, and the December 1982 Order's attempt to ensure that only persons still interested in becoming firefighters are included on the offeree list is precisely within the mandate of this Court.

Finally, we reject BFME's contention that the December 1982 Order somehow transforms the injunction into the imposition of a quota. In discussing the original order in *ADE II*, we stated that

> the order does not impose a quota. The affirmative requirement as to hiring does not permanently intrude into the City's hiring process. There are 121 vacancies in the fire department. The order requires the City to make its next [73] offers to the minority candidates whose names are placed on the list to be compiled. Thereafter no numerical requirements whatever are imposed on the City, either as to the remaining vacancies or future vacancies: the City

> is required actively to recruit minority candidates to compete for vacancies in the fire department; and it is required to hire on a nondiscriminatory basis; but no permanent numerical requirements are established.

647 F.2d at 282–83 (footnote omitted). This description is equally applicable to the present modification. No quota has been established.

The December 1982 Order of the district court is affirmed.

All Citations

710 F.2d 69, 32 Fair Empl.Prac.Cas. (BNA) 20, 32 Empl. Prac. Dec. P 33,686

Footnotes

1 We did, however, lower the numerical goals set by the district court because we had reversed its ruling of liability under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d–6 (1976 & Supp. V 1981), and that reversal shortened the period during which the City was liable for discriminatory acts. Our ruling led us to reduce from 102 to 73 the number of minority persons to be offered firefighter positions or awarded backpay.

2 The periods covered by the backpay awards date back to 1976 and 1977, and hence substantial sums may be involved.

3 By the time of the motion, 20 minority candidates had been hired pursuant to interim hiring orders and the number yet to receive offers and backpay was 53. For the sake of convenience we continue to refer to the number 73, which was the originally approved goal. *See* note 1 *supra.*

4 The passage of *ADE II* relied on by BFME states that

> we note that the court's order is properly viewed as setting hiring "goals" because it may well be that not all of the 102 minority candidates to be offered positions will actually accept the City's offers. The City has represented that it cannot train new firefighters at a rate faster than 20 every three to six months. If the list contained as many as 102 names, a period of more than two years could elapse before the last candidates on the list received offers. If as few as 73 names are placed on the list, it appears that at least a year would elapse before the last persons on the list received offers. It is entirely possible that some of the candidates whose names are not near the top of the list will eventually decline to accept appointment to the fire department *because of a change in interest or in circumstances during the one to two year interim period.* Thus, although the order requires that the next [73] offers be made to minority candidates, it does not mean that minority candidates will be the next [73] persons hired.

647 F.2d at 283 (footnote omitted; emphasis added).

127 F.Supp.2d 61
United States District Court,
D. Connecticut.

BRISTOL TECHNOLOGY, INC., Plaintiff,
v.
MICROSOFT CORPORATION, Defendant.

No. CIV.A. 3:98–CV–1657. | Nov. 2, 2000.

Licensee of computer server operating system (OS) source code brought action against licensor under Connecticut Unfair Trade Practices Act (CUTPA). Following grant of permanent injunction, 114 F.Supp.2d 59, licensor moved for reconsideration. The District Court, Hall, J., held that modification of the injunction order was warranted to more accurately reflect the court's original findings.

Motion granted.

Attorneys and Law Firms

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RULING ON MOTION FOR RECONSIDERATION [DKT. NO. 481]

HALL, District Judge.

On August 31, 2000, the court issued a ruling on motions for a permanent injunction [Dkt. No. 431] and for an award of punitive damages [Dkt. No. 433]. *See Bristol Technology, Inc. v. Microsoft Corp.*, 114 F.Supp.2d 59 (D.Conn.2000).[1] In that Ruling, the court ordered, *inter alia*, that, upon entry of judgment in this action, Microsoft will be permanently enjoined in accordance with an order providing:

> 1. It is hereby ORDERED that Microsoft, its directors, officers, agents and employees, are enjoined from publishing, distributing or circulating the "WISE Mission Statement" (PX 1), and the portions thereof concerning "Confidence," "Compatibility" or "Consistency" in any format (*e.g.*, the MSDN or Visual C÷÷), or from making any statement that states, represents or implies: a) that it has licensed under the WISE Program all of the source code of one or more of its current Windows NT or 2000 operating systems; b) that it has licensed use under the WISE Program of its source code to create a cross-platform product for server use; or c) that it intends to do either a) or b) (unless it decides to and takes steps to do so); and,
>
> 2. It is further ORDERED that any description of the WISE Program (whether so-called or renamed) by Microsoft, its directors, officers, agents and employees disclose: a) that the current licenses cover only a limited subset of source code for Windows NT 5 (including as renamed Windows 2000); b) that the current licenses do not include a license for server use; and c) that no assurance can be given that Microsoft will in the future license (i) source code to subsequent operating systems or (ii) future product or version releases of the current operating systems that will support any currently licensed technologies.

Id., at 98–99. Microsoft now moves for reconsideration of the requirement that it include in any further descriptions of the WISE Program the statement called for in paragraph 2(b) above, "that the current licenses do not include a license for server use." Dkt. No. 481 at 1–2. For the reasons stated herein, Microsoft's Motion for Reconsideration [Dkt. No. 481] is GRANTED.

[1] **[2]** The Second Circuit has held that "[t]he standard for granting [a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995) (citations omitted). Moreover, "[a] motion for reconsideration should not serve as a vehicle for relitigating issues already decided," *Metropolitan Entertainment Co. v. Koplik*, 25

F.Supp.2d 367, 368 (D.Conn.1998) (citations omitted), nor may such a motion "be used to plug gaps in an original argument or to argue in the alternative once a decision has been made." *Philbrick v. Univ. of Conn.*, 51 F.Supp.2d 164, 165 (D.Conn.1999) (quoting *Horsehead Res. Dev. Co. v. B.U.S. Envtl. Services, Inc.*, 928 F.Supp. 287, 289 (S.D.N.Y.1996)). Thus, the movant must demonstrate that newly discovered facts exist that require reconsideration, that there has been an intervening change in the law, or that the court has overlooked and thus failed to ***63** consider an aspect of the law presented by the defendant which, if left unredressed, would result in clear error or cause manifest injustice. *Metropolitan Entertainment Co.*, 25 F.Supp.2d at 368 (citing *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.1992)).

[3] Microsoft argues that requiring that " 'any description of the WISE Program' must include a statement 'that the current licenses do not include a license for server use' ... would require Microsoft to make a statement that is untrue." Microsoft's Memo. in Support of its Motion for Reconsideration (Dkt. No. 482) at 1. This is because, Microsoft argues, "[t]here is no restriction anywhere in the 1998 MainSoft WISE agreement or the 1999 Bristol WISE agreement ... prohibiting the use of the licensed code on servers or in products that are used on servers." *Id.* Bristol responds that, "[t]aking the other license terms literally and ignoring both context and the omissions from the list of included technologies, this may be true." Bristol's Response to Microsoft's Motion for Reconsideration (Dkt. No. 483) at 1.

The court's Ruling on injunctive relief made clear that "[t]he 1998 MainSoft and 1999 Bristol WISE agreements do not state outright that the NT 4 and NT 5 server technologies will not be provided under the agreements, but simply do not include the source code necessary for porting NT 4 and NT 5 server technologies." *Bristol Technology*, 114 F.Supp.2d 59, 74. Elsewhere the court observed that, "[b]y October 1997, Microsoft had decided to restrict the NT 4.x source code provided to MainSoft under a new WISE Agreement to a limited subset that would not include much of the server technologies." *Id.*, at 73. The court further found that "by at least the summer of 1997, it was clear that Microsoft would neither continue to provide WISE contractors with all of the latest NT source code nor enter into new WISE contracts that provided all of the code, including the NT 4 and NT 5 server technologies." *Id.*, at 81. Specifically in ruling upon Bristol's motion for injunctive relief, the court held that it "accepts the jury's finding that Microsoft engaged in a deceptive act or practice and finds that it did so some time after the institution of the WISE Program, when it determined not to license all source code for NT 5 and not to license WISE for server use." *Id.*, at 97.

However, as Microsoft asserts, "the absence of certain licensed 'server technologies' does not mean that the MainSoft and Bristol agreements 'do not include a license for server use.' " Microsoft's Memo. in Support of its Motion for Reconsideration (Dkt. No. 482) at 3. The technologies excluded by Microsoft in its license, however, make many server uses difficult, if not impossible, for its licensees to port.

Accordingly, the court will adjust the language of the ordered permanent injunction to enter in this case to the following language to more accurately reflect its original findings:

> 1. It is hereby ORDERED that Microsoft, its directors, officers, agents and employees, are enjoined from publishing, distributing or circulating the "WISE Mission Statement" (PX 1), and the portions thereof concerning "Confidence," "Compatibility" or "Consistency" in any format (*e.g.*, the MSDN or Visual C÷÷), or from making any statement that states, represents or implies: a) that it has licensed under the WISE Program all of the source code of one or more of its current Windows NT or 2000 operating systems; b) that it has licensed use under the WISE Program of its source code to create a cross-platform product for server use; or c) that it intends to do either a) or b) (unless it decides to and takes steps to do so); and,
>
> 2. It is further ORDERED that any description of the WISE Program (whether so-called or renamed) by Microsoft, its directors, officers, agents and employees disclose: a) that the current licenses cover only a limited subset of ***64** source code for Windows NT 5 (including as renamed Windows 2000); b) that the source code under the WISE program does not include all of the Windows NT 4 and NT 5 technologies likely to be required by many server applications and that a complete list of the technologies covered by the current WISE licenses will be provided upon request; and c) that no assurance can be given that Microsoft will in the future license (i) source code to subsequent operating systems or (ii) future product or version releases of the current operating systems that will support any currently licensed technologies.

For the reasons discussed above, the court finds it appropriate to **modify** the language of the **permanent injunction** ordered in the court's Ruling on Bristol **Technology's**

Motion for Punitive Damages and Motion for **Permanent Injunction** [Dkt. No. 477], reported at *Bristol* ***Technology***, *Inc. v. Microsoft Corp.*, 114 F.Supp.2d 59 (D.Conn.2000). Accordingly, the court grants Microsoft's Motion for Reconsideration [Dkt. No. 481], and the judgment in this case will include the above-clarified order of injunctive relief.

SO ORDERED.

All Citations

127 F.Supp.2d 61

Footnotes

1 The court assumes familiarity with that Ruling for purposes of the instant ruling.

570 F.2d 12
United States Court of Appeals,
First Circuit.

The COALITION OF BLACK LEADERSHIP, etc., et al., Plaintiffs, Appellees,
v.
Vincent A. CIANCI, Jr., etc., et al., Defendants, Appellees,
Providence Lodge No. 3, Fraternal Order of Police, Defendant, Appellant.

No. 77-1381. | Argued Nov. 8, 1977. | Decided Jan. 27, 1978.

In 1971 a class action suit was filed on behalf of the black residents of the city of Providence alleging various violations of the civil rights of plaintiff class by police officers and public officials of Providence. A consent decree was entered into and filed in March of 1973. Following the enactment in 1976 of a Rhode Island statute entitled "Law Enforcement Officers' Bill of Rights", city police officers filed a motion for relief from the consent decree. The United States District Court for the District of Rhode Island, Raymond G. Pettine, Chief Judge, denied the motion, and an appeal was taken. The Court of Appeals, Coffin, Chief Judge, held that: (1) while there was obvious subject matter overlap between the consent decree, which at least in part was designed to protect the rights of those citizens who felt themselves aggrieved by unconstitutional police misconduct, and the 1976 statute, whose purpose was to protect police officers from any impairment of their rights when their conduct is questioned, it was also obvious that neither was developed to meet these dual and partially inconsistent purposes, and the Court of Appeals could not accept as an abstract proposition that the additional incremental requirements imposed by the consent decree but not mandated by the new state legislation were so onerous as to amount to unfair hardship inflicted on police officers and yet were so marginal that they provided no additional protection to civilian complainants, and (2) since the district court unquestionably had general subject matter jurisdiction of the enforcement of the Civil Rights Acts and had in personam jurisdiction over the parties in the 1971 class action suit, the court's conduct was not a clear usurpation of power and as such could not be reviewed through a motion to vacate filed years after the consent decree had been filed; thus, the original consent decree could not now be held to have been void at its origin.

Affirmed.

Attorneys and Law Firms

***13** Joseph F. Penza, Jr., Providence, R. I., for defendant, appellant.

David F. Reilly, Providence, R. I., with whom Alden C. Harrington, Providence, R. I., was on brief, for Coalition of Black Leadership, etc., et al., plaintiffs, appellees.

Vincent J. Piccirilli, Providence, R. I., on brief for Vincent A. Cianci, Jr., defendant, appellee.

Before COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.

Opinion

COFFIN, Chief Judge.

In 1971 a class action suit was filed in the district court of Rhode Island on behalf of the black residents of the city of Providence alleging various violations of the civil rights of the plaintiff class by the defendants, various police officers and public officials of Providence. After trial a consent decree was entered into and filed in March, 1973. The decree provided for a procedure through which civilians' complaints against police officers could be filed, investigated, and resolved. In 1976 the Rhode Island Legislature enacted a law, the "Law Enforcement Officers' Bill of Rights" which required certain procedures to be followed in the processing of civilian complaints against police officers. This law conflicted in part with the terms of the consent decree. The city of Providence, apparently finding itself bound by inconsistent legal requirements, moved for relief from judgment. Plaintiffs and defendant, the Fraternal Order of Police of the City of Providence (hereinafter F.O.P.), filed memoranda with the district court. The court construed defendant's memorandum as a motion to vacate the consent decree, denied the motion, and ordered both parties to work out modifications in the decree so that the protection of policemen's rights mandated by state law and the right of plaintiffs to be free from "racially discriminatory police conduct" could to the extent possible, both be achieved. Defendant appeals that order.

Defendant raises two arguments in urging that the consent decree be vacated in its entirety. First, they maintain that the relevant facts of the case have changed so much since the entering of the consent decree that principles of equity and

fairness require that the decree be vacated. Second, ***14** they argue that according to the holding of Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1975), the district court did not have sufficient jurisdiction over the original case to enter a consent decree and that this jurisdictional failure can be raised by the parties at any time to vacate a consent decree. We shall examine each contention in turn.

[1] **[2]** There is little dispute that a sufficient change in circumstances is a meritorious reason for a court to modify an injunctive or consent decree. Defendant's position appears to be that the procedures required by the new state law make the provisions of the consent decree unnecessary and that the continued application of the decree would result in unfairness since Providence police officers would be subject to different regulations than would the police officers in other parts of Rhode Island. We do not agree with defendant's analysis. The consent decree at least in part was designed to protect the rights of those citizens who felt themselves to be aggrieved by unconstitutional police misconduct. The purpose of the new state legislation was to protect police officers from any impairments of their rights when their conduct is questioned. While there is obvious subject matter overlap between the decree and the legislation, it is also obvious that neither was developed to meet these dual and partially inconsistent purposes. We do not see how we can accept as an abstract proposition and defendants have supplied us with no actual evidence to bolster their position that the additional incremental requirements imposed by the consent decree but not mandated by the new state legislation are so onerous that they amount to unfair hardships inflicted on police officers and yet are so marginal that they provide no additional protection to civilian complainants.

[3] Moreover, the fact that the new legislation might accomplish much of what a consent decree was designed to achieve cannot be viewed as justification for vacating the decree. In United States v. Swift & Company, 189 F.Supp. 885, 906 (N.D.Ill.1960), aff'd mem., 367 U.S. 909, 81 S.Ct. 1918, 6 L.Ed.2d 1249 (1961), the court dispensed with a similar argument attacking the continued validity of an antitrust consent decree by explaining, "It is of no avail to argue . . . that the antitrust laws, including revised Section 7 of the Clayton Act, 15 U.S.C.A. s 18, concerning mergers, and the Robinson-Patman Act, 15 U.S.C.A. ss 13-13b, 21a concerning predatory price-cutting, now provide ample remedies for future violations. The public now enjoys the specific protections of a decree."

Finally, the district court clearly pointed out in its order of July 18, 1977 that it would make every effort to see to it that policemen in Providence received all the protection provided for by the Law Enforcement Officers' Bill of Rights consistent with an effective civilian complaint system. [1] Given the lower court's flexibility we fail to see how defendant can maintain that it will suffer undue hardship or that any difficulty it experiences would not be necessitated by the same initial needs which provoked the original lawsuit and eventually the consent decree.

Defendant's second argument is that at this late stage it should have the consent decree vacated because under the holding of Rizzo v. Goode, supra, the district court did not have jurisdiction to enter any form of decree in this case. While defendant asserts that it wishes only to prevent the prospective application of the decree, its argument would seem to suggest either that the consent decree was void at its ***15** origin because of lack of jurisdiction or that Rizzo v. Goode changed the law in this area so that jurisdiction which was proper in 1973 would not exist if the suit were brought today. We admit to a certain degree of confusion as to the actual holding of Rizzo. The Supreme Court explained that it had serious doubts "whether on the facts as found there was made out the requisite Art. III case or controversy between the individually named respondents and petitioners", and that "insofar as the individual respondents were concerned, we think they lacked the requisite 'personal stake in the outcome' . . . i. e. the order overhauling police disciplinary procedures." Id. 423 U.S. at 371-73, 96 S.Ct. at 604. However, the Court noted that the case did not arise on the pleadings, that the district court's interpretation of s 1983 had somehow bridged the gap between the facts established and the relief sought, and that therefore the Court's conclusion as to whether or not there was a case or controversy did not end the matter. The Court then spent the bulk of its opinion refuting the district court's view of the scope of s 1983 jurisdiction.

We are inclined to understand this analysis as suggesting that whether or not there was a case or controversy in Rizzo depended on whether s 1983 established a statutory nexus between the class of plaintiffs and the named defendants in terms of the conduct allegedly perpetrated in violation of the plaintiffs' constitutional rights. [2] Fortunately, the decision of the case before us does not require us to conclusively determine the sweep of Rizzo's holding. The Supreme Court has stated specifically that errors in deciding whether or not a suit presents a case or controversy are not open to attack by a motion to vacate after a consent decree has been entered. In

Swift and Co. v. United States, 276 U.S. 311, 326, 48 S.Ct. 311, 72 L.Ed. 587 (1927), defendant had urged the lower court to vacate a consent decree on the grounds that when the decree was entered there was no case or controversy "within the meaning of s 2 of Article III of the Constitution." The Supreme Court affirmed the denial of the motion stating, "the objection is one which is not open on a motion to vacate. The court had jurisdiction both of the general subject-matter enforcement of the Anti-Trust Act and of the parties. If it erred in deciding that there was a case or controversy, the error is one which could have been corrected only by an appeal or by a bill of review. . . . On a motion to vacate, the determination by the Supreme Court of the District that a case or controversy existed is not open to attack." See also Walling v. Miller, 138 F.2d 629 (8th Cir. 1943).

This doctrine is consistent with the recent law of our circuit. In Lubben v. Selective Service System Local Bd. No. 27, 453 F.2d 645, 649 (1st Cir. 1972), we stated, "In the interest of finality, the concept of void judgments is narrowly construed. While absence of subject matter jurisdiction may make a judgment void, such total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction. A court has the power to determine its own jurisdiction, and an error in that determination will not render the judgment void. Only in the rare instance of a clear usurpation of power will a judgment be rendered void. . . . (Such a) determination could have been attacked in an appeal, but, . . . (if) it was not a clear usurpation ***16** of power, it is now res judicata and immune from collateral attack."

[4] There is no question that the district court in the present case had general subject matter jurisdiction of the enforcement of the Civil Rights Acts and that it had in personam jurisdiction over the parties. Its conduct was not a clear usurpation of power and as such may not be reviewed through a motion to vacate filed years after the consent decree was filed. Thus the original consent decree may not now be held to have been void at its origin.

Defendant refers in its brief to Rule 60(b)(5) of the Federal Rules of Civil Procedure which permits relief from a final judgment if "a prior judgment upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment should have prospective application."[3] It also cites Theriault v. Smith, 523 F.2d 601 (1st Cir. 1975), in which we applied Rule 60(b)(5) in affirming the district court's order vacating a consent decree when the decree was based on first circuit decisional law subsequently vacated and contradicted by the Supreme Court. However, defendant is mistaken if it assumes that the holding in Theriault implied that Rule 60(b) (5) should be applied broadly. The exact opposite is the case. As we stated in Lubben v. Selective Service System Local Bd. No. 27, supra, 453 F.2d at 650, "For a decision to be 'based on' a prior judgment within the meaning of Rule 60(b)(5), the prior judgment must be a necessary element of the decision, giving rise, for example, to the cause of action or a successful defense. . . . It is not sufficient that the prior judgment provides only precedent for the decision. 'It should be noted that while 60(b)(5) authorizes relief from a judgment on the ground that the prior judgment upon which it is based has been reversed or otherwise vacated, it does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding.' 7 Moore's Federal Practice P 60.26(3) at 325." The key to the holding in Theriault is the extremely close nexus between the consent decree and a particular statutory interpretation that was directly overruled.

[5] Here, defendant does not inform us of any prior authority forming the basis of the 1973 consent decree which was overruled by Rizzo v. Goode. This is understandable since the decision in Rizzo may be totally consistent with prior case law. The Court emphasized that the lower court's interpretation of s 1983 was "unprecedented", id. 423 U.S. at 373, 96 S.Ct. 598. Moreover, it specifically approved prior case law such as Allee v. Medrano, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974); Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939); and Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966), but distinguished them from the facts of Rizzo. We are totally unwilling to permit Rule 60(b)(5) to be invoked to vacate a consent decree allegedly based on unspecified prior law which has not been directly overruled. If defendant believed that the facts in plaintiffs' complaint were not sufficient to state a cause of action under s 1983 or to create a case or controversy, a question we do not pass judgment on in this opinion, it should not have agreed to a consent decree and should have appealed the decision of the district court if it held against them. Instead it decided to accept a consent decree. There has not been the kind of change in the law since that time to require us to relieve the defendant of the consequences of its decision.

Finally, we reject defendant's contention that general principles of equity should ***17** move us to reverse the district court's decision. The district court, as we noted previously, is seeking to modify the decree to do justice to all the parties involved. It has given no indication that it views the consent decree as a rigid formalistic legal edifice immune

from alteration. The only requirement it has suggested is that the modified decree must continue to protect the rights of the plaintiff class. We fail to see the lack of equity in such a resolution to this case.

Affirmed.

All Citations

570 F.2d 12, 24 Fed.R.Serv.2d 1182

Footnotes

1 We take particular note of the district court's statements that “(T)he Court is inclined to look with deference upon the alternate procedural means embodied in the 1976 Act . . .” and that “If the Rhode Island legislature has determined that the rights of police officers are in need of protection and that this protection can best be achieved by adoption of certain procedural protections, the Court is not prepared to question this judgment or to stand in the way of its implementation in the absence of any showing that the 1976 Act will hamper the effective presentation of civilian complaints which the consent decree has apparently accomplished.”

2 The Court appeared to be saying that the fact that some small percentage of a large class of citizens suffered deprivations of federal rights inflicted by a small number of police subordinates (not named as parties in the suit) did not create a case or controversy between the plaintiff class as a whole and the named defendants, the highest ranking city and police officials. The theory that the creation of appropriate police disciplinary procedures by the named defendants might somehow reduce the number of incidents perpetrated by police subordinates on members of the plaintiff class was considered too attenuated to support federal jurisdiction over the suit unless s 1983 could be interpreted to hold officials liable for their failure to correct the actions of a small percentage of their subordinates over which they had no direct and immediate responsibility. The Court ultimately concluded that s 1983 could not be so interpreted.

3 Defendant cites Rule 60(b)(5) in its first argument that a change in factual circumstances requires vacating the consent decree and does not specifically argue that the rule should be applied because of the alleged change in the law embodied in Rizzo v. Goode, supra. However, defendant does discuss Theriault v. Smith, supra, at length. We interpret that discussion to raise the additional argument that the allegedly new interpretation of s 1983 and the requirements of presenting a case or controversy as explained in Rizzo v. Goode should permit the invocation of Rule 60(b)(5) to support vacating the consent decree.

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813 S.W.2d 501
Supreme Court of Texas.

Jeff F. SMITH, Relator,
v.
The Honorable Michael J. O'NEILL, Respondent.

No. D–0953. | June 19, 1991.
| Rehearing Overruled Sept. 11, 1991.

State Bar filed disciplinary action against attorney for professional misconduct. State Bar and attorney entered into agreed judgment in which they agreed attorney had committed numerous acts of professional misconduct, that attorney was suspended from practice of law, and subsequently, upon State Bar's motion to revoke probation, trial judge found that attorney violated material term of probation and ordered that entire six years of suspension should be served. Attorney filed motion to reinstate probation and to dissolve injunction. The District Court No. 193, Dallas County, Michael J. O'Neill, J., sustained State Bar's plea to jurisdiction and held that it was without jurisdiction to consider attorney's motion to reinstate probation and to dissolve injunction. On appeal, the Dallas Court of Appeals, Fifth Judicial District, John Ovard, J., attorney sought writ of mandamus directing trial judge to hear evidence and rule upon attorney's first amended motion. The Supreme Court held that trial court abused its discretion when it sustained State Bar's plea to jurisdiction and refused to hear evidence and rule upon attorney's first amended motion to reinstate probation and to dissolve injunction.

Writ conditionally granted.

Attorneys and Law Firms

***501** Timothy W. Sorenson, Dallas, for relator.

Linda A. Acevedo, Sheila R. McIlnay, Dawn M. Miller, Austin, for respondent.

Opinion

PER CURIAM.

In this original proceeding, Relator Jeff F. Smith ("Smith") seeks a writ of mandamus directing the trial judge to hear evidence and rule upon Smith's First Amended Motion to Reinstate Probation and to Dissolve Injunction. Pursuant to Rule 122 of the Texas Rules of Appellate Procedure, without hearing oral argument, a majority of the court conditionally grants the writ of mandamus.

In 1987, the State Bar of Texas ("State Bar") filed a disciplinary action against Smith for professional misconduct. In May 1988, Smith and the State Bar entered into an Agreed Judgment in which they agreed that Smith had committed numerous acts of professional misconduct, that Smith was suspended from the practice of law for six (6) years for each act of professional misconduct and that the suspension was probated partially conditioned upon the payment of restitution. Subsequently, in September 1988, upon the State Bar's motion to revoke probation, the trial judge found that Smith violated a material term of his probation (i.e., the failure to pay restitution) and ordered that the entire six (6) ***502** years of suspension should be served. [1] No appeal was perfected from either the Agreed Judgment or the Order Revoking Probation.

In November 1990, Smith filed his First Amended Motion to Reinstate Probation and to Dissolve Injunction in which he asserted that his prior acts of misconduct were due to cocaine addiction, that he has been free of all "mind changing chemicals" including cocaine and alcohol since August 1988 and that he has and is receiving treatment for his addiction, constituting a change of circumstances since the revocation of his probation. Smith further admitted that he has not made full restitution to his former client (or to the State Bar Client Security Fund which has made full payment to his former client). In December 1990, the State Bar filed a Plea to the Jurisdiction asserting that the Agreed Judgment and Order Revoking Probation were final and that the trial court lacked jurisdiction to hear any motion seeking to alter, amend or vacate the final judgment and order. The trial judge sustained the State Bar's Plea to the Jurisdiction and held that it was without jurisdiction to consider Smith's Motion to Reinstate Probation and to Dissolve Injunction.

Smith argues that the trial judge abused his discretion when he sustained the State Bar's Plea to the Jurisdiction and refused to hear evidence and rule upon Smith's First Amended Motion to Reinstate Probation and to Dissolve Injunction. We agree.

[1] Whether the trial judge had a duty to hear evidence and rule upon Smith's First Amended Motion to Reinstate Probation and to Dissolve Injunction involves the nature of the Agreed Judgment and Order Revoking Probation. If they are decrees of injunction, they may be reviewed,

opened, vacated or modified by the trial court upon a showing of changed conditions. *See City of Tyler v. St. Louis Southwestern Ry.*, 405 S.W.2d 330, 332 (Tex.1966) "Trial courts undoubtedly have jurisdiction to modify or vacate their judgments granting permanent injunctions because of changed conditions. Their judgments doing so or refusing to do so are, of course, reviewable on appeal; but their original jurisdiction to make the decision is exclusive." *Id.* at 332 (citations omitted).

[2] **[3]** Although the Agreed Judgment and Order Revoking Probation include other relief, the order of suspension would be unenforceable and meaningless without the injunctive relief enjoining Smith from practicing law in Texas. In other words, the operative portion of the Agreed Judgment and Order Revoking Probation is the injunctive relief enjoining Smith from practicing law in Texas. Since the Agreed Judgment and Order Revoking Probation are decrees of injunction, they may be reviewed, opened, vacated or modified by the trial court upon a showing of changed circumstances. As a result, the trial judge abused his discretion when he sustained the State Bar's Plea to the Jurisdiction and ***503** refused to hear evidence and rule upon Smith's First Amended Motion to Reinstate Probation and to Dissolve Injunction.

Smith further argues that the six (6) year suspension from the practice of law prescribed in the Agreed Judgment and Order Revoking Probation is void because the trial judge exceeded the statutory authority for suspension. More specifically, Smith argues that the State Bar Rules [2] limit the amount of time for which an attorney may be suspended for professional misconduct to three (3) years. However, as a result of the disposition of the previous issue, it is not necessary to consider whether the six (6) year suspension from the practice of law in this case is void. Thus, we express no opinion on this issue.

Pursuant to Rule 122 of the Texas Rules of Appellate Procedure, without hearing oral argument, a majority of the court conditionally grants the writ of mandamus. The writ will issue only if the trial judge refuses to act in accordance with this opinion.

All Citations

813 S.W.2d 501

Footnotes

1 The Agreed Judgment provided in pertinent part:

> During the period of any active suspension that may be imposed upon Respondent by the Court by reason of Respondent's failure to adhere to the terms of this Judgment, it is ORDERED that Respondent is enjoined from practicing law in Texas, holding himself out as an attorney at law, performing any legal services for others, accepting any fee directly or indirectly for legal services, appearing as counsel in any representative capacity in any proceeding in any Texas court or before any Texas administrative body, or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney at law," "counselor at law," or "lawyer."

The Order Revoking Probation provided in pertinent part:

> It is further ORDERED, ADJUDGED and DECREED that the Respondent, Jeff F. Smith, during said suspension is hereby enjoined from practicing law in Texas, holding himself out as an attorney at law, performing any legal services for others, accepting any fee directly or indirectly for legal services, appearing as counsel or in any representative capacity in any proceeding in any Texas court or before any Texas administrative body, or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney at law," "counselor at law," or "lawyer."

2 SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, §§ 8(2), 23(A) (1988).

98 Ohio App. 351
Court of Appeals of Ohio, First District, Butler County.

The STATE ex rel. BOSCH, Appellees,
v.
DENNY'S PLACE et al., Appellants.

May 21, 1954.

Contempt proceedings for violation of injunction restraining defendants from selling intoxicating liquors on premises which had been declared a nuisance. The Court of Appeals of Butler County entered a judgment holding defendants in contempt, and they appealed. The Court of Appeals, Matthews, P. J., held that where court, in action to abate nuisance had entered decree that owners of premises were permanently enjoined from selling beverages at the premises, or in any place in county, without permit or in violation of law, provision against sale of liquor on premises was entirely separate and distinct from provision against sale elsewhere in county, and invalidity of latter provision would not affect validity of former provision.

Judgment affirmed.

****533** *Syllabus by the Court.*

***351** 1. Injunction lies to abate a nuisance although maintaining the nuisance involves a crime, where there is proof of what the law denominates nuisance as distinguished from mere crime.

2. Under Section 13195–1, General Code, any place where intoxicating liquor is sold in violation of law is declared to be a common nuisance.

***352** 3. Where a court is petitioned to abate a nuisance under Section 13195–1 et seq., General Code, and finds that a common nuisance exists in the operation of premises wherein intoxicating liquor is sold illegally, and decrees that the owner of such premises be permanently enjoined and restrained 'from selling or dealing in or serving beer or intoxicating liquor or beverages * * * at the premises * * * or in any place' in such county without a permit or in violation of law, the injunction against the sale of intoxicating liquor on the premises is entirely separate and distinct from the general provision against sales elsewhere in the county, and the invalidity of the latter provision does not affect the validity of the former.

4. An action to abate a nuisance under Section 13195–1, General Code, is an equity action.

5. Section 13195–1, General Code, expressly recognizes that such injunction might be permanent and the provision in such statute authorizing the court to entirely exclude such person from the premises for one year does not limit the equity power of a court where such injunction is against the use of the premises in unlawfully selling intoxicating liquor thereon.

Attorneys and Law Firms

Hopkins & Curran and Lee J. Hereth, Cincinnati, for appellants.

Jackson Bosch, Hamilton, for appellee.

Opinion

MATTHEWS, Presiding Judge.

On October 21, 1952, the plaintiff filed its petition to abate a nuisance on certain described premises known as Denny's Place in Butler County, under favor of Section 13195–1 et seq., General Code, Section 4301.73 et seq., Revised Code. The plaintiff alleged that the defendant for years had conducted the business of selling intoxicating liquor on the premises in violation ****534** of law, thereby creating and maintaining a nuisance, as defined in the aforesaid section. The character of the nuisance and its harmful effects upon the public were described in great detail, ***353** but for the purposes of this appeal it is not deemed necessary to set forth those allegations.

The prayer of the petition was: 'That said nuisance be abated and that said dependent and his agents, servants and employees, and all persons interested directly or indirectly in the operation of said premises herein described or on said real estate be perpetually enjoined from the use and occupancy of said premises and from maintaining the said nuisance on said premises, and from further maintenance thereof, together with such other, further and different relief as the court deems advisable in the premises.'

On October 28, 1952, the cause came on for final hearing upon agreement of the parties and, thereupon, the court found that the premises had been used as alleged in the petition,

in that the illegal sale of intoxicating liquor had taken place thereon on many occasions, that the defendant-owner had managed and operated said business on the premises, and that a common nuisance existed thereon.

On this finding, the court decreed 'that a permanent injunction be and the same is hereby ordered as prayed for in the plaintiff's petition against the defendant Dennis M. Robinette and he is herewith permanently enjoined and restrained from selling or dealing in or serving beer or intoxicating liquors or beverages, either personally or through his agents or servants, at the premises hereinbefore described or in any place in Butler County, Ohio, without a permit from the Department of Liquor Control of the State of Ohio or in violation of law.' This was followed provisions for abating the nuisance, excluding defendant from the use of the premises for one year, and appointing a receiver to take charge of the property.

On February 10, 1954, the plaintiff filed a motion for a citation for contempt and affidavit in support thereof, ***354** charging the defendant with violating the injunction. The motion charged the defendant in general terms with violation of the injunction, but the affidavit averred that the violation consisted in the resumption of the business of selling liquor at Denny's Place, which was the site of the common nuisance alleged in the petition and decree.

On the hearing of this contempt charge, the court found the defendant guilty and sentenced him to six months imprisonment and a fine of $500. It is from that sentence that this appeal was taken.

Appellant's counsel point out that by this decree the court in terms purports to enjoin the defendant from violating the laws relating to the selling, dealing in, or serving of intoxicating liquor contrary to law, 'in any place in Butler County, Ohio.' It is suggested that this is an attempt to substitute the injunctive process for the safeguards of the criminal code. A similar provision was contained in an injunction reviewed in the case of State v. Brush, 318 Ill. 307, 149 N.E. 262. The defendant was charged with violating that provision. In finding for the defendant, the court, 318 Ill. at page 311, 149 N.E. at page 264, said:

'The decree of the county court of Christian county, so far as it purported to enjoin the plaintiff in error from manufacturing, selling, or keeping intoxicating liquor on any premises in the state of Illinois, is void. It merely enjoins the plaintiff in error, generally, from the commission of a certain class of crimes, and it is not within the general powers of a court of equity, and is not authorized by the statute. Since the decree was void, the plaintiff in error was not guilty of contempt of court if he disregarded it.'

The court, 318 Ill. at page 310, 149 N.E. at page 263, said that the Prohibition Act had no conferred any such power upon the court, and that the power of the Legisture ****535** to confer such power 'may be doubted.'

***355** In Sullivan v. State, 191 Ark. 180, 83 S.W.2d 824, similar provisions in an injunction were reviewed in a contempt proceeding. The provision violated, however, was that enjoining the sale, etc., of intoxicating liquor on the premises (Old Heidelburg Inn) on which the common nuisance had been maintained. The court, 191 Ark. at page 184, 83 S.W.2d at page 825, said:

'It must be conceded that a proceeding of this kind is to abate a nuisance conducted at a particular place. If it be conceded that to the extent that the court enjoined W. E. Sullivan from the sale of liquor 'elsewhere in Pulaski County' was in excess of power, that in no particular impairs the validity of the restraint in so far as it related to Old Heidelburg Inn.'

See, also, 48 C.J.S., Intoxicating Liquors, § 424 et seq., p. 703; and Watkins v. Wilkerson, 141 Ga. 163, 80 S.E. 718, Ann.Cas.1915C, 1124.

[1] **[2]** We assume that a decree which in general terms purports to enjoin a defendant from committing a crime in the future, no matter where, within the jurisdiction of the court, would be beyond the power of the court on constitutional grounds. We agree, however, that the incorporation of such a provision does not invalidate other distinct provisions in the decree that are within the jurisdiction of the court. It should be noted that this portion of the decree does not respond to any prayer unless it should be found to come within the general prayer for relief. In the case at bar, the injunction against the sale of intoxicating liquor at Denny's Place is entirely separate and distinct from the general provision against sales elsewhere in Butler County, and the invalidity of the latter provision does not affect the former.

A more troublesome question is presented by the defendant's contention that the injunction expired at the end of the year of its issuance by operation of law. ***356** This contention is based on the following provision of Section 13195–1, General Code:

'And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, place, boat, or vehicle, shall not be occupied or used

for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $1000 nor more than $5000, payable to the state of Ohio, and conditioned that beer or intoxicating liquor will not thereafter be manufactured, sold, bartered, possessed, kept, stored, transported, or otherwise disposed of therein, thereat or thereon, in violation of law, and that he will pay all fines, costs and damages that may be assessed for any violation of the law of Ohio upon said property. For closing the premises and keeping them closed as provided herein, a reasonable sum shall be allowed the officer by the court.'

In the first paragraph of that section any place where intoxicating liquor is sold, etc., is declared to be a common nuisance. In the next paragraph is found provision for its abatement by action for injunction, and in the following paragraph that action is expressly described as one in equity 'brought in any court having jurisdiction to hear and determine equity cases.'

By Section 13195–3, General Code, it is provided that: 'In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of section 13195–1 of the General Code, the court, or in vacation a judge thereof, may summarily try and punish the defendant.'

The plaintiff prayed for a perpetual injunction against the maintaining of a nuisance on the described ***357** premises and, as is seen, the injunction responds to that prayer by awarding a permanent injunction.

****536** It will be observed that this portion of the decree limits the permanent injunction to acts of the same character committed on the same premises as were found to have been a public nuisance. It is clear that the purpose in making the injunction permanent was to secure the public against the unlawful use of the premises by the defendant in such a way as to cause a reversion to the same kind of nuisance that had been abated.

[3] **[4]** **[5]** That courts of equity are accustomed to granting permanent or perpetual injunctions in cases of recurring wrongs or threats, such as continuing trespasses, need hardly be stated. Equity intervenes in a variety of circumstances where otherwise a multiplicity of actions at law would result. It is also a familiar principle of equity that the court granting a permanent injunction has power to vacate or modify it at any time on proof of a change of conditions.

[6] **[7]** We are not advised from the record of the evidence upon which the court found that the premises were a common nuisance. We must assume that it was sufficient for that purpose. To be sufficient, it must have disclosed that the premises were being so used as to harm the civil rights of the citizens in public places or interfere with the transacting of public business. Having found the existence of a common nuisance, the duration of the injunction would rest in the sound discretion of the chancellor in the absence of any enabling statute. But the statute here being construed expressly recognizes that the injunction might be permanent.

[8] We can see no intent to limit the equity power of the court to grant an injunction, temporary or permanent, in the provision authorizing the court to entirely exclude the defendant from the premises for one year. ***358** The injunction is only against the use of the premises in unlawfully selling intoxicating liquor thereon.

[9] That the lack of jurisdiction of courts of equity to enjoin crimes as such is no more clear than its jurisdiction to enjoin common nuisances and that the facts calling for equitable intervention are also denounced as criminal is of no significance. This is clearly pointed out in State ex rel. Stewart v. District Court, 77 Mont. 361 at page 376, 251 P. 137, 141, 49 A.L.R. 627, where the court said:

'This much may certainly be said: In practical operation the statute might easily result in substituting contempt proceedings for jury trials. Of the truth of this the case before us offers an apt illustration.

'No such result follows from the pronouncement of a given act as a public nuisance, punishing the perpetrator for committing the same, and enjoining him from repeating it. State v. Ehrlick, 65 W. Va. 700, 65 S.E. 935, 23 L.R.A., N.S., 691; Ex parte Allison, 48 Tex.Cr.R. 634, 90 S.W. 492, 13 Ann.Cas. 684, 3 L.R.A.,N.S., 622; Campbell v. Peacock, Tex.Civ.App., 176 S.W. 774.

'Injunction lies to abate a nuisance, although maintaining the nuisance involves a crime. To that extent the strong arm of equity aids in preventing crime. In that case, however, there must be proof of what the law denominates nuisance as distinguished from mere crime. The general rule is that an injunction will not lie to prevent or punish the commission of a crime. It is not any part of the intention of the law that constitutional provisions shall be evaded by substitution a

civil for a criminal procedure, or a single judge for a jury. State ex rel. Alton v. Salley, Mo., 215 S.W. 241.'

The cases cited fully support the court's contention.

***359** We find that the issuance of the injunction was within the jurisdiction of the court, that it was still operative, and that defendant was in contempt for violating it.

For these reasons, the judgment is affirmed.

Judgment affirmed.

ROSS and HILDEBRANT, JJ., concur.

All Citations

98 Ohio App. 351, 129 N.E.2d 532, 57 O.O. 385