

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

PHILIP WORKMAN)
)
v.) NO. 3:07-0490
) JUDGE CAMPBELL
GOVERNOR PHIL BREDESEN, et al.)

TEMPORARY RESTRAINING ORDER

Pending before the Court is a Motion For A Temporary Restraining Order filed today by the Plaintiff (Docket Nos. 1 and 7). Plaintiff asks this Court to issue a Temporary Restraining Order (“TRO”) enjoining Defendants from executing Plaintiff on May 9, 2007, pursuant to the new execution protocol disclosed by Defendants on April 30, 2007.

On February 1, 2007, Defendant Governor Bredesen issued Executive Order No. 43, revoking Tennessee’s execution protocol and directed the Tennessee Department of Corrections to draw up new protocols no later than May 2, 2007. On April 30, 2007, the State of Tennessee adopted a newly promulgated execution protocol. Plaintiff has filed a grievance challenging the constitutionality of that protocol administratively, pursuant to the Prison Litigation Reform Act, within the Tennessee Department of Corrections. Plaintiff seeks to maintain the status quo until he can challenge the constitutionality of the new execution protocol in this Court.

The Court held a hearing on the Motion on May 4, 2007, at 1:30 p.m., which was attended by counsel for all parties. At the hearing, the parties represented to the Court that, after this case was filed today, the Commissioner of Corrections notified the Plaintiff that his grievance has now been denied. Plaintiff, therefore, has now exhausted his administrative remedies. Plaintiff further

represented that a Complaint will be filed promptly in this Court alleging the constitutional violations asserted in the pending pleadings. The Complaint has now been filed (Docket No. 6).

For the reasons described below, the Motion is GRANTED on the terms and conditions stated herein.

In determining whether to issue a TRO pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court is to consider: (1) whether the movant has shown a strong or substantial likelihood of success on the merits; (2) whether irreparable harm will result without an injunction; (3) whether issuance of a preliminary injunction will result in substantial harm to others; and (4) whether the public interest is advanced by the injunction. Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1249 (6th Cir. 1997).

Based on the Motion, affidavits, briefs, representations of counsel and the entire record, the Court finds:

(1) Plaintiff has demonstrated a strong or substantial likelihood of success on the merits of his constitutional claims. Plaintiff argues that the new execution protocol exposes him to a foreseeable and likely unnecessary risk of unconstitutional pain and suffering in violation of the Eighth Amendment. Plaintiff cites the Declaration of Dr. Mark Heath who opines that the new lethal injection protocol “does little to nothing to assure [the State] will reliably achieve humane executions.” (Declaration of Mark Heath, at ¶ 69 (Exhibit 2 to Motion For Temporary Restraining Order)). According to Dr. Heath, the new protocol creates a substantial risk of unnecessary suffering “given the apparent absence of a central role for a properly trained professional in TDOC’s execution procedure, the characteristics of the drugs or chemicals used, the failure to understand how the drugs in question act in the body, the failure to properly account for foreseeable risks, [and]

the design of a drug delivery system that exacerbates rather than ameliorates the risk.” (Id.) The Defendant offers nothing in rebuttal to this evidence.

In addition, Plaintiff points out that federal district courts in California and Missouri, which use a similar lethal injunction protocol, have issued stays of executions. See Morales v. Hickman, 415 F.Supp.2d 1037 (N.D. Cal. Feb. 14, 2006) and Taylor v. Crawford, 2006 U.S. Dist. LEXIS 74896 (October 16, 2006).

In response, the Defendants argued that the Court should deny the TRO because a complaint has not yet been filed in this case. Defendants indicate that they will respond to the merits of Plaintiff’s claims once they are set out in the complaint.

The evidence in the record at this stage of the proceeding indicates that Plaintiff has a probability of success on the merits of the claim that the lethal injunction protocol creates a foreseeable and likely unnecessary risk that the Plaintiff will incur constitutionally excessive pain and suffering when he is executed, especially given that there is no procedure for monitoring the Plaintiff’s level of consciousness during the process.

(2) Plaintiff has demonstrated that he will suffer immediate and irreparable harm if injunctive relief is not granted pending a preliminary injunction hearing. Specifically, the Court finds that the Plaintiff is scheduled to be executed by lethal injection on May 9, 2007, if injunctive relief is not granted.

(3) The balance of relative harms among the parties weighs in favor of Plaintiff against Defendants. The irreparable harm to Plaintiff is undisputed. The relative harm to Defendants of postponing the execution until a full review of the new execution protocol can be completed does not outweigh Plaintiff’s interest. Defendants have no interest in proceeding with an execution protocol which may ultimately be found to be unconstitutional. Plaintiff is essentially asking that

the review of Tennessee's execution protocol, begun by Governor Bredesen on February 1, 2007, be completed, through review by the Court, prior to its being used to end his life.

(4) The public interest will not be harmed by injunctive relief pending a preliminary injunction hearing. The public has an interest, as evidenced by Defendant Bredesen's decision to review the execution protocol, in assuring that the lethal injection protocol for Tennessee is constitutional. That process cannot be completed by the parties and the Court prior to May 9, 2007.

It is, therefore, ordered, pursuant to the All Writs Act, 28 U.S.C. § 1651, Federal Rule of Civil Procedure 65, and the inherent powers of the Court, that Defendants, their officers, agents, employees, servants, attorneys, and all persons in active concert or participation with them are hereby restrained and enjoined from executing Philip Workman pursuant to the new execution protocol, pending a preliminary injunction hearing. The Temporary Restraining Order is issued in aid of the jurisdiction of the Court and to preserve its ability to adjudicate the constitutional claims asserted on their merits before Plaintiff is executed.

Under the circumstances of this case, no bond is required.

This Temporary Restraining Order shall expire on May 14, 2007. The hearing on a motion for preliminary injunction will be held on May 14, 2007, at 8:00 a.m.

This Temporary Restraining Order is effective upon its issuance on May 4, 2007, at 4:15 p.m.

It is so ORDERED.


TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE