

1999 WL 258501

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United States District Court, N.D. Illinois, Eastern
Division.

Sharon ANDERSON, et al., Plaintiffs,
v.
Mario CORNEJO, individually and in his official
capacity, et al., Defendants.

No. 97 C 7556.

|
April 21, 1999.

MEMORANDUM OPINION AND ORDER

HART, District J.

*1 Plaintiffs in this action are 47 African-American women¹ who allege they were improperly searched when going through customs at O'Hare International Airport in Chicago, Illinois. Named as defendants are 38 employees of the United States Customs Service and two physicians who allegedly assisted in body cavity searches of two plaintiffs. Plaintiffs claim they were subjected to non-routine pat-down searches, strip searches, and/or body cavity searches. Following a prior ruling on defendants' motion to dismiss, *see Anderson v. Cornejo*, 1999 WL 35307 (N.D.Ill. Jan. 11, 1999) ("*Cornejo I*"), the following claims remain: (1) Count I equal protection claim that plaintiffs were treated less favorably than similarly situated persons who were not African-American women; (2) Count II claim that the searches and seizures were unconstitutional because not supported by reasonable suspicion; (3) Count III procedural due process claim that plaintiffs were not informed of their rights and were kept "incommunicado;" (4) Count V claim alleging the two physician-assisted body cavity searches violated Fourth Amendment protections; and (5) Count VI claim for declaratory and

injunctive relief based on the allegations in the other counts. Presently pending are two motions to dismiss. In one motion, defendants contend Count VI should be dismissed because plaintiffs lack standing to seek such relief. In the other motion, defendants move to dismiss the claims of certain plaintiffs on statute of limitations grounds.

Persons who are subjected to unlawful treatment by law enforcement officers often cannot seek prospective relief after the conduct ends because they cannot reasonably expect to again be subjected to such treatment. *See generally City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The question in the present case is whether any plaintiffs can reasonably be expected to again be subjected to the allegedly illegal pat-down, strip, or body cavity searches.² In response to defendants' motion, plaintiffs provide the declarations of four plaintiffs. Each of these plaintiffs indicates that she regularly takes international flights into O'Hare and, as of the date of the declarations, each had a plan to take such a flight in a specified month of 1999.³ The four declarants were subjected to the type of searches alleged in the complaint with the following frequency: (a) 5 times in 2 years; (b) 4 times in 4 years; (c) 4 times in 5 years; and (d) 10 times in 3 years.

In *Lyons*, the plaintiff claimed he had been subjected to an allegedly illegal chokehold when arrested. The Supreme Court indicated that it could not be assumed that plaintiff would again engage in illegal (or other) conduct that would result in his being arrested. 461 U.S. at 103 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)). But even assuming he would again be arrested, it would also have to be assumed that application of improper chokeholds was a sufficiently frequent event to make its reoccurrence likely. *See Lyons*, 461 U.S. at 105-06. The Supreme Court also indicated that past encounters may be evidence that the same conduct will occur again, but are generally not sufficient by themselves to show a likelihood of reoccurrence. *See id.* at 102-03 (quoting *O'Shea*, 414 U.S. at 495-97).

*2 It is true that the federal courts are "generally ... unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *Honig v. Doe*, 484 U.S. 305, 320, 108 S.Ct. 592, 602 (1988) (collecting cases). Thus, in *Lyons*, the Supreme Court

refused to assume that the plaintiff would again violate the traffic laws, prompting the police to stop him. However, the Supreme Court has held that such reluctance is not warranted when, for reasons beyond the plaintiff's control, he or she is unable to avoid repeating the conduct that led to the original injury at the hands of the defendant. *Id.*, 108 S.Ct. at 602.

Church v. City of Huntsville, 30 F.3d 1332, 1337–38 (11th Cir.1994).

The present case is distinguishable from *Lyons*. Here, plaintiffs do not have to engage in illegal conduct to be subjected to searches. Every person returning on an international flight is potentially subject to being searched by the Customs Service. Four of the plaintiffs establish that they are regular international travelers at O'Hare airport and that they will continue to be in the near future. Even if three of the declarants have already returned on the flights mentioned in their declarations, it has been shown that they will continue to engage in regular international travel. They also show that they have been regularly subjected to the type of searches complained of in the present action. The searches were not isolated instances, at least for the four declarants. It can reasonably be expected that one or more of the 46 plaintiffs in this case will be subjected to pat-down, strip, and body cavity searches in the future. Plaintiffs have standing to seek injunctive and declaratory relief.⁴ *Cf. Church*, 30 F.3d at 1337–39 (class of homeless plaintiffs had standing to seek injunction against harassing, detaining, and removing them from defendant City); *Thomas v. County of Los Angeles*, 978 F.2d 504, 507–08 (9th Cir.1992) (residents of a six or seven block area who were subjected to numerous and repeated instances of police misconduct had standing to seek injunction); *Community for Creative Non-Violence v. Unknown Agents of United States Marshals Service*, 797 F.Supp. 7, 16–18 (D.C.1992) (three prior raids on homeless shelter and indication of willingness to conduct more raids established standing to seek injunction against U.S. marshals).

On statute of limitations grounds, defendants move to dismiss the claims of plaintiffs Karla Waugh and Gina Phillips.⁵ Plaintiffs' more definite statement alleges that the Waugh search occurred on June 22, 1996 and that the defendants known to have been involved in Waugh's search are L. Zayner, R. Zaczek, and S. Papa. Phillips's search is alleged to have occurred on July 10, 1996 with the defendants known to have been involved being J.

Usleber, W. Desmond, and L. Zayner. In moving to dismiss on the affirmative defense of the statute of limitations, defendants rely only on the facts alleged in the complaint and the procedural history of this litigation, recent events subject to judicial notice. *See Scholes v. Lehman*, 56 F.3d 750, 762 (7th Cir.), *cert. denied*, 516 U.S. 1028 (1995), *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983). Because defendants do not rely on any facts outside plaintiffs' pleadings and plaintiffs do not invoke any doctrines that require consideration of facts outside the pleadings, this statute of limitations issue can be resolved on a motion to dismiss. *Tregenza v. Great American Communications Co.*, 12 F.3d 717, 718 (7th Cir.1993), *cert. denied*, 511 U.S. 1085 (1994); *Early v. Bankers Life & Casualty Co.*, 959 F.2d 75, 79 (7th Cir.1992); *United States ex rel. Bidani v. Lewis*, 1999 WL 163053 *4 (N.D.Ill. March 12, 1999); *Lyles v. Board of Commissioners of Cook County*, 1991 WL 101633 *1 (N.D.Ill. May 29, 1991).

^{*3} The pertinent procedural history of this litigation is as follows. Case 97 C 7556 ("*Anderson* ") was filed on October 27, 1997 with Sharon Anderson as the only plaintiff and no class allegations. Case 98 C 2829 ("*Chalk* ") was filed on May 7, 1998 and included class allegations. Phillips was a named plaintiff in *Chalk* and Usleber was a named defendant in both *Anderson* and *Chalk*. Anderson fell within the putative class alleged in *Chalk* and defendants moved to reassign *Chalk* to the same bench as *Anderson*. *See* N.D. Ill. Loc. Gen. R. 2.31 (reassignment based on relatedness). Plaintiffs expressed opposition to that motion and briefs were taken on the issue. On July 7, 1998, the motion to reassign was granted.

On July 9, 1998, the following order was entered in *Anderson*.

Status hearing held. Plaintiff's oral motion to voluntarily dismiss case is granted. Case is dismissed without prejudice. Plaintiff's counsel orally informs the court that he will file an amended complaint in related case # 98 C 2829 adding plaintiff Sharon Anderson as an additional party plaintiff. Terminating case.

On July 23, 1998, however, plaintiffs filed their Third Amended Complaint in *Anderson* instead of *Chalk*. The new *Anderson* complaint added the named plaintiffs from *Chalk* (including Phillips) and additional named plaintiffs (including Waugh). The Third Amended Complaint also added class allegations and, for the first time, named Zayner, Zaczek, and Desmond as defendants. Following a status hearing on July 30, 1998, an order was issued striking the July 9 *Anderson* order and reopening *Anderson*. Also on July 30, an order was issued in *Chalk* stating: "Order cause dismissed. This case has been consolidated in its entirety in lead case # 97 C 7556. Status hearing held. Terminating case." This order was entered on the docket on August 4, 1998. On September 17, 1998, a Fourth Amended Complaint was filed in *Anderson* and, for the first time, Papa was named as a defendant.

In neither *Anderson* nor *Chalk*, did plaintiffs move for class certification. *Cornejo I*, 1999 WL 35307 at *1, denies class certification and dismisses the claims of the putative class on the ground that plaintiffs had not promptly pursued class certification. *Cornejo I* was issued on January 8, 1999 and entered on the docket on January 11.

Although no specific motion has been filed, in their answer brief, plaintiffs argue that the dismissal of *Chalk* should be vacated pursuant to Fed.R.Civ.P. 60(b). The parties devote significant portions of their briefs to the question of whether the dismissal of *Chalk* should be vacated and the effect that such an order may or may not have. However, from May 7, 1998 through August 4, 1998, putative class allegations were pending in *Chalk*. From July 23, 1998 through January 11, 1999, putative class allegations were pending in *Anderson* and *Chalk* was consolidated into *Anderson*. Thus, from May 7, 1998 through January 11, 1999 there was always a pending putative class action.

*4 The running of the statute of limitations is tolled during the pendency of a putative class action. See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). This rule applies to both named class members and unnamed class members. *Crown, Cork, supra*. Defendants argue that such tolling applies to only the first class action and therefore ended when *Chalk* was dismissed. Defendants ignore that the cases they rely upon were ones in which class certification was actually

denied in the first case and a second case was subsequently filed; not a situation like the present one where two cases were simultaneously pending and one case was voluntarily dismissed in order to consolidate the cases into a single action. See *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir.), cert. denied, 119 S.Ct. 165 (1998); *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir.1988); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir.1987); *Korwek v. Hunt*, 827 F.2d 874, 876 (2d Cir.1987); *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334, 1350 (5th Cir.1985), cert. denied, 475 U.S. 1035 (1986). See also *Crown, Cork*, 462 U.S. at 354 ("[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied"). It is doubted that the rule cited by defendants applies to the present situation. But even if tolling is limited to the time putative class allegations were pending in *Chalk*, the result is the same.

Chalk was still pending at the time the Third Amended Complaint was filed. Therefore, tolling by class allegations in *Anderson* is not needed to further extend the limitation period. The only defendant that was added after the dismissal of *Chalk*, was Papa, who was added on September 17, 1998. Waugh had until June 22, 1998 to file her action. When *Chalk* was filed on May 7, 1998, Waugh had 46 more days to bring an action. The tolling of *Chalk* ended on August 4, 1998. 46 days thereafter would have been Saturday, September 19. Even assuming no tolling by the class allegations in *Anderson*, Waugh had until Monday, September 21 to file her individual action. Papa was added to this lawsuit on September 17.

Clearly, Phillips's claims against Usleber are timely because Phillips was a named plaintiff and Usleber a named defendant when *Chalk* was filed on May 7, 1998, less than two years after the search of Phillips. Also, Phillips's claims against Usleber were already pending in *Anderson* before *Chalk* was dismissed.

Phillips's two other identified defendants and all three of Waugh's identified defendants were not named as defendants until more than two years after each plaintiff's respective search. Unless it is a case involving a class of defendants, see *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 609-10 (7th Cir.1980), cert. denied, 451 U.S. 976 (1981), the tolling rule of *Crown, Cork* does not apply to persons who were not previously named as defendants in a plaintiff class action. *Arneil v. Ramsey*, 550 F.2d 774, 782 n. 10 (5th Cir.1985); *Mott v.*

R.G. Dickinson & Co., 1993 WL 63445 *5 (D.Kan. Feb. 24, 1993); *In re Clinton Oil Co. Securities Litigation*, 1977 WL 1009 *16 (D.Kan. March 18, 1977). Therefore, plaintiffs must rely upon the relation back doctrine. *See* Fed.R.Civ.P. 15(c).

*5 Again, it need not be considered whether the shifting of the class allegations from one case to the other had any effect on the application of the relation back doctrine since Seventh Circuit case law is clear that relation back does not otherwise apply to the present situation. The requirements for applying Rule 15(c)(3) include that the new party “knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.” Fed.R.Civ.P. 15(c)(3)(B). Seventh Circuit case law is clear that, even if a new defendant knew or should have known that he or she was the proper defendant, the mistake of identity requirement must also be satisfied. Lack of knowledge of the identity of the defendant does not satisfy the mistake of identity requirement. *Baskin v. City of Des Plaines*, 138 F.3d 701, 704 (7th Cir.1998); *Donald v. Cook County Sheriff's Department*, 95 F.3d 548, 560 (7th Cir.1996); *Worthington v. Wilson*, 8 F.3d 1253, 1256–57 (7th Cir.1993). Here, there is no contention that Phillips and Waugh (or the class) misidentified the defendants involved in their searches, only a contention that the identities of the defendants were initially unknown. Therefore, relation back cannot apply.

Plaintiffs make reference to equitable tolling and equitable estoppel, but only as grounds for reinstating the *Chalk* case. As previously discussed, reinstating the *Chalk* case does not affect the timeliness of the claims so the equity issues need not be considered.⁶

Phillips's claims will be dismissed as against Desmond and Zayner, but remain pending as against Usleber. Waugh's claims will be dismissed in their entirety.⁷

IT IS THEREFORE ORDERED that federal defendants' motion to dismiss Count VI of the complaint [57–1] is granted in part and denied in part. As to the gynecological examinations and as against defendants Plokin and Dorfman, Count VI is dismissed without prejudice for lack of standing. Federal defendants' motion to dismiss plaintiffs Waugh, Phillips, and Dukes for failure to comply with the statute of limitations [71] is granted in part and denied in part. The claims of Waugh are dismissed and Waugh is dismissed from this action. Phillips's claims against Desmond and Zayner are dismissed, but her claims against Usleber remain pending.

All Citations

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Footnotes

- ¹ Each plaintiff is individually named and joined in this action. The class allegations have previously been dismissed. *See Anderson v. Cornejo*, 1999 WL 35307 *1 (N.D.Ill. Jan. 11, 1999).
- ² There is no contention that any plaintiff can reasonably be expected to be subjected to another physician-assisted body cavity (gynecological) search. Therefore, no injunctive or declaratory relief would be appropriate regarding the gynecological examinations or as against the physician defendants.
- ³ Three of the declarants had travel plans for March and April. The specified travel may have already occurred at the time this opinion is issued.
- ⁴ Defendants do not dispute that, assuming standing is satisfied, plaintiffs' official capacity claims are not barred by sovereign immunity. *See Cornejo I*, 1999 WL 35307 at *1 n. 1.
- ⁵ The motion also argued that the claims of Gina Dukes should be dismissed. In their reply, defendants concede that, assuming Dukes is a minor as is represented by plaintiffs in the complaint and their response, the claims of Dukes are timely.

- ⁶ There is no contention by plaintiffs that equitable tolling applies because, acting with reasonable diligence and because of no fault of their own, the additional defendants could not have been identified within the two-year limitation period. *See Donald*, 95 F.3d at 561–62.
- ⁷ There is no contention that further discovery may still reveal that additional defendants were involved in the searches of Phillips and Waugh. To the extent discovery discloses additional defendants and they were defendants who were named in the *Chalk* suit and therefore the claims potentially are timely, plaintiffs would have to move to reinstate such claims.
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