UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHELE NILSEN, on behalf of herself and on behalf of others similarly situated,	)	
Plaintiffs	)	
vs.	)	Civil Action No. 02-212-P-H
YORK COUNTY,	)	
Defendant	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S OBJECTION TO RECOMMENDED DECISION ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Defendant has previously objected to both Plaintiffs' Motion for Class Certification and to the Magistrate's Recommended Decision on that motion. This filing is strictly limited to responding to portions of Plaintiffs' own objection to the Magistrate's Recommended Decision on the Motion for Class Certification. This filing assumes, of necessity, that the court will accept the Magistrate's Recommended Decision over the Defendant's objections, and is offered for the purpose of supporting so much of the Recommended Decision as finds that certification under F.R.Civ.P. 23(b)(2) would be improper.[1] The Defendant maintains its prior objections to both the Motion for Certification and so much of the Recommended Decision as urges granting of parts of that motion.

[1] The Recommended Decision, in defining the scope of the proposed class, deleted references to visual body cavity searches. While the Defendant agrees that any class should not include within its description a reference to visual body cavity searches, no additional argument is offered here as Plaintiffs have not objected to that portion of the Recommended Decision.

Plaintiffs challenge two discrete portions of the Recommended Decision: (1) that which recommends denying certification under F.R.Civ.P. 23(b)(2), and (2) that which suggests that nominal Plaintiff Nilsen be stricken as a class representative.

A. THE RECOMMENDED DECISION CORRECTLY CONCLUDED THAT CERTIFICATION UNDER F.R.CIV.P 23(b)(2) WOULD BE IMPROPER BECAUSE THE MONETARY DAMAGES SOUGHT IN THIS CASE FORM THE PRIMARY REMEDY SOUGHT, AND ARE NOT MERELY INCIDENTAL TO EQUITABLE RELIEF.

The Defendant originally objected to the certification under F.R.Civ.P. (23)(b)(2) on the basis that the class representatives were not appropriate representatives of the class, that they lacked standing to seek the relief available under that portion of the rule, and that the primary relief sought by the operative Complaint was monetary. *Recommended Decision* at p.5 (hereafter "Rec.Dec., p.___"); *Objection to Motion for Certification*, pp. 14-22. The Magistrate made his recommendation based exclusively on the latter argument. *Rec.Dec.* at p.5. Notwithstanding the focused analysis of the Recommended Decision in this particular, Plaintiffs attempt to blur the focus by imbricating legal arguments on issues that (1) were not dispositive of the Recommended Decision, and (2) have been previously argued. Specifically, Plaintiffs contend variously that (1) the Defendant has acted on grounds generally applicable to the class, *Plaintiffs' Objection to Recommended Decision on Plaintiffs' Motion for Class Certification,* p.3 (hereafter "Plaintiffs' Objection, p.___"), (2) that declaratory and injunctive relief is necessary because the alleged policy or custom continues in existence, *id.,* (3) that the Plaintiffs have standing to seek equitable relief, *Plaintiffs' Objection*, p. 4, and finally, (4) that the claim for monetary damages does not preclude certification under F.R.Civ.P. 23(b)(2). *Plaintiffs' Objection*, p. 7. Because the Recommended Decision did not turn on

the first three objections raised by Plaintiffs, there is no occasion to address those in this response.[2]

The Magistrate determined that the primary relief sought by plaintiffs is monetary damages, that such damages are individual to each plaintiff, and that the only injunctive relief sought is to enjoin the defendant from continuing an alleged unconstitutional policy, and therefore concluded that the monetary damages were not merely incidental to the claim for equitable relief, but rather were the primary driving force behind the action and were the predominant relief sought. Based upon those determinations and conclusions, and based upon this Court's decision in *Ramirez v. DeCoster*, 194 F.R.D. 348 (D.Me. 2000), the Magistrate recommended denial of plaintiff's motion for certification under F.R.Civ.P. 23(b)(2).

Plaintiffs concede, by failing to submit argument to the contrary, that the primary damages sought in this action are monetary. Apparently acknowledging that certification under F.R.Civ.P. 23(b)(2) is improper where monetary damages predominate, see *Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 415 (5th Cir. 1998), Plaintiffs seek to circumvent that rule by arguing that notice to proposed class members under the 23(b)(3) certification removes the obstacle to 23(b)(2) certification. *Plaintiffs' Objection*, pp. 7-8. Plaintiffs invite the court to reconsider its recent ruling in *DeCoster*, which followed the standard established by the Firth Circuit in *Allison*. Plaintiffs argue that the majority of courts have rejected the Fifth Circuit's position. *Plaintiffs' Objection*, p. 7. In addition to

[2] The Magistrate's Recommended Decision did correctly note, in passing, that it was "unlikely that [plaintiffs] will ever be arrested and detained again in the York County Jail." *Rec.Dec.*, pp. 5-6. To the extent that this correct observation lends itself to the standing argument, the Defendant will briefly reiterate its position on that issue. *See, infra* at 5.

ignoring the fact that monetary damages predominate in this case, the Plaintiffs' argument also fails on its own merits.

In those circuits which have considered the issue, there is virtual unanimity that certification under 23(b)(2) is inappropriate where monetary damages predominate. The Third, Seventh, Tenth and Eleventh Circuits have all adopted the Firth Circuit's approach as enunciated in *Allison*. The *Allison* inquiry requires a determination as to whether the damages flow directly from liability to the class as a whole (in which case they are incidental and do not create a bar to certification under 23(b)(2), or whether they require hearing to resolve the disparate merits of individual cases (in which case the predominate and do create a bar to certification under 23(b)(2). See generally, *Polin v. Sears Roebuck Co.*, 231 F.3d 970, 975-76 (5th Circuit).

Because assessment of the individual damage claims in this case will require introduction of evidence, and individual fact finding, with respect to the merits of each of those claims[3], monetary damages predominate, and therefore preclude certification under Rule 23(b)(2).

In addition to the five circuits which utilize the *Allison* analytical framework, at least two other circuits have employed a different analytical paradigm, but one which nevertheless dictates the same result in this case. Both the Second and Ninth Circuits employ an "ad hoc" analysis to determine whether the predominate remedy sought in a class action lawsuit is equitable or monetary. In *Robertson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2nd Cir. 2001), *cert denied*, 122 S.Ct. 1349 (2002), the court

[3] This analysis will be necessary not only to determine the extent of those damages for purposes of affixing monetary damages, but also preliminarily as a threshold matter for the purpose of determining whether those damages rise to a level sufficient to allow an award of damages that is more than nominal. See generally, *Carey v. Piphus*, 430 U.S. 964 (1977).

inquired as to whether a reasonable plaintiff, in the absence of monetary relief, would still seek to enforce the action to obtain equitable relief. Under that analysis, it seems unlikely that reasonable plaintiffs would seek to maintain this action in the absence of monetary relief. Those members of the class would only stand to potentially benefit from the maintenance of this action under Rule 23(b)(2) if they were again arrested, again incarcerated in the York County Jail, and again admitted into the general population of the jail (as opposed to being bailed or otherwise released from holding/booking).

Whether the analytical paradigm offered by the Fifth Circuit is followed, or whether that of the Second Circuit is followed, the result that obtains is the same: the primary relief sought by Plaintiffs is monetary, and certification under Rule 23(b)(2 is therefore precluded.

In the absence of some convincing argument by Plaintiffs that the primary action sought in this case is equitable and that any monetary damages obtained are merely incidental, the Magistrate's Recommended Decision correctly concludes that certification under Rule 23(b)(2) is improper.

B. MEMBERS OF THE PROPOSED CLASS DO NOT HAVE STANDING TO SEEK EQUITABLE RELIEF BECAUSE IT IS NOT REASONABLY LIKELY THAT THEY WILL AGAIN BE INCARCERATED IN THE GENERAL POPULATION OF THE YORK COUNTY JAIL.

Although not addressed in the Recommended Decision, Plaintiffs re-argue their position with respect to standing to obtain equitable relief. Because the Magistrate's Recommended Decision made passing reference to the unlikelihood that members of the class will again be incarcerated in the York County Jail, Defendant offers a brief response to Plaintiffs' argument, in addition to that which is contained in its Objection to the Motion for Certification.

Plaintiffs premise their entire standing argument on the following predicates: (1) people with criminal records are more vulnerable to arrest and more likely to be detained than people without criminal histories, (2) that if an individual is arrested in York County they will be strip searched, and (3) that the court can take judicial notice that a significant number of people who are arrested are repeat offenders likely to be arrested again and, if arrested and held in York County, likely to be strip searched. *Plaintiffs' Objection*, pp. 4, 5. The facts upon which Plaintiffs' standing argument are based are not supported by the record.

First, Plaintiffs offer no evidence, statistical, empirical, or otherwise, to support the proposition that people with criminal records are more vulnerable to arrest and are more likely to be detained than those without criminal histories. Plaintiffs cite, as their sole authority for that proposition, a case from Massachusetts. Plaintiffs offer no articulation of the facts of that case in an attempt to analogize them to the facts of this case. Without such articulation, the parallel which Plaintiffs seek to draw is unsupported.

Second, simply because someone is arrested in York County does not mean that they are going to be brought to the York County Jail and does not mean that they are going to be searched. Plaintiffs again fail to offer any evidence of any sort demonstrating what percentage of people *arrested* in York County are actually detained at the York County Jail. Plaintiffs do not offer any sort of authority for this proposition.

Third, Plaintiffs misconstrue the circumstances under which a court may take judicial notice of a fact. "Judicial notice" is a construct of the rules of evidence, and does not exist in the abstract. Specifically, F.R.Evid. 201 governs circumstances under which

a court may take judicial notice of an adjudicative fact. Specifically, "[a] judicially noticed fact must be one *not* subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *F.R.Evid.* 201 (emphasis added).

Once again, Plaintiffs offer no evidence and point to no sources to support the "fact" which they ask the court to take judicial notice of. It is respectfully submitted that it would not even be within the court's discretion to take judicial notice that a "significant" number of people who are arrested are repeat offenders, are likely to be arrested again, are likely to be held in York County, and are likely to be strip searched.

Plaintiffs have not offered any persuasive reasoning as to why certification under 23(b)(2) would be proper in view of the fact that they concede that the primary damages sought are monetary. To the extent that the Court certifies a class in this action, it should not do so under Rule 23(b)(2).

C. <u>THE MAGISTRATE'S REFERENCE TO STRIKING MICHELE NILSEN AS A REPRESENTATIVE OF THE CLASS WAS NOT A SPECIFIC RECOMMENDATION AND THE PLAINTIFFS' OBJECTION THERETO IS NOT RIPE AT THIS JUNCTURE</u>.

In a footnote, the Magistrate suggested that striking Michele Nilsen as a representative of the class would be an appropriate manner in which to resolve the conflict regarding the specific factual circumstances of her claims. The Magistrate did not specifically recommend that the Court do so. Although the Defendant may file a motion to strike Ms. Nilsen as a representative of the class in the future, it has not presently filed such a motion and the issue is not before the court *vis a vis* the Recommended Decision. Given that there are two other representatives of the proposed

class, striking Ms. Nilsen would appear to be more of a housekeeping function than a determination that would affect the merits of the overall case.

For all of the foregoing reasons, to the extent that the Court determines that it is going to certify this action as recommended by the Magistrate, its certification should be consistent with the Magistrate's Recommended Decision, and should be limited to certification under Rule 23(b)(3).

Dated: October 14, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2003, I electronically filed Defendant's Objection to Recommended Decision on Plaintiffs' Motion for Class Certification with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to the following:

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