UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT
CIVIL ACTION NO.: 05-18-KKC

TINA MICHELLE BLACK, et al., **PLAINTIFFS**

v.

FRANKLIN COUNTY, KENTUCKY, et al., **DEFENDANTS**

MEMORANDUM ORDER

This matter is before the court on five nondispositive motions: 1) plaintiffs' second motion to amend their complaint; 2) defendants' motion to strike the plaintiffs' expert; 3) defendants' motion for discovery sanctions; 4) plaintiffs' motion to extend time to certify this litigation as a class action; and 5) defendants' motion to extend time to produce expert information. A sixth motion, filed by defendants for summary judgment, will be submitted to the presiding district judge.

Background

The presiding district judge previously set forth the factual background of this litigation in a Memorandum Opinion and Order filed on August 16, 2005:

> All of the claims in this original complaint and amended complaint arise from alleged strip searches conducted upon Plaintiffs at the Franklin County Correctional Complex ("FCCC"). Generally, the original and amended complaints allege that personnel at the FCCC strip searched Plaintiffs after Plaintiffs were arrested for various minor, nonviolent offenses. ...
>
> Plaintiffs filed the original complaint in this case on March 28, 2005. On April 6, 2005, Plaintiffs filed a motion to certify class, which Plaintiffs thereafter withdrew via an Agreed Order with Defendants. On May 9, 2005, Plaintiffs then filed an Amended Complaint, adding 24 new Plaintiffs. . ..

DE #35 at pp. 1-2. In its Memorandum Opinion and Order, the district court granted in part defendants' motion to dismiss and supplemental motion to dismiss and dismissed the claims of eleven plaintiffs. The court also dismissed claims against the FCCC, the plaintiffs' Ninth Amendment claims and the Equal Protection claims of all plaintiffs except for plaintiff Black.

As noted by the district court in a subsequent Opinion and Order filed on September 28, 2006, "there are currently 16 Plaintiffs in this action, all of whom assert that the Defendants violated their Fourth, Fifth and Eighth Amendment rights. In addition, Plaintiff Black asserts an Equal Protection claim." DE #72, p. 1.

Analysis

1. Plaintiffs' Motion to Amend their Complaint [DE #76]

On October 2, 2006, the plaintiffs filed a motion to amend their complaint to add 13 new plaintiffs. Defendants oppose plaintiffs' motion, suggesting that this court's prior order granting plaintiffs leave to amend their pleadings contemplated only the addition of new claims rather than additional parties.

Amendment of pleadings is governed by Fed. R. Civ. P. 15(a), which states in relevant part that "[a] party may amend the party's pleading once as a matter of course . . . Otherwise a party may amend the party's pleading only by leave of court . . . and leave shall be freely given when justice requires." The order granting the plaintiffs an extension of time in which to amend their pleadings does not bear the restrictive interpretation ascribed to it by the defendants. In deciding whether to grant a plaintiff's motion to amend their pleadings, "the court should consider the delay in filing, the lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the

opposing party, and futility of amendmentt." *Perkins v. Am. Electric Power Fuel Supply, Inc.*, 246 F.3d 593, 605 (6th Cir. 2001). None of the *Perkins* factors militate against permitting the requested amendment. Plaintiffs' motion falls within the time frame prescribed by the court, and there is no evidence that the plaintiffs have unduly delayed discovery.

Defendants' restrictive interpretation of the court's prior order extending the time to amend is also undermined by the court's order of September 28, 2006. (D.E. #72). In denying the defendants' motion to strike plaintiffs' class allegations in that order, the court noted that plaintiffs' counsel had received numerous communications from third parties complaining of similar treatment at the hands of the defendants. The court extended the discovery period to allow time for plaintiffs to investigate, among other things, new complaints from unknown plaintiffs. Judicial economy is promoted by the joining of all relevant parties. Therefore, plaintiffs' motion to amend the complaint will be granted.

2. Defendants' Motion to Strike Plaintiffs' Expert Witness [DE #79]

The defendants have moved to strike the plaintiffs' expert pursuant to Fed. R. Civ. P 37(c)(1). The defendants claim that the both the initial and amended expert disclosure reports offered by the plaintiffs fail to meet the standards laid out in Fed. R. Civ. P. 26(a)(2)(B) and were filed after the October 1, 2006 deadline. Plaintiffs respond by first arguing that the original report met the requisite standards, given the stage of the discovery completed at that time. Second, plaintiffs assert that any deficiencies in the original report are remedied by the amended report filed in opposition to defendants' motion to strike.

Fed. R. Civ. P. 26(a)(2)(B) explains the disclosure requirements for experts:

> Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert

> testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition with the preceding four years.

Sanctions for failure to provide disclosure of experts under Rule 26 is governed by Fed. R. Civ. P. 37(c)(1), which states:

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the sanctions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

Plaintiffs' initial expert disclosure clearly does not comply with the strict requirements of Rule 26(a)(2)(B). The report provides only the most general and conclusory information, stating that "Mr. Rosazza will testify that there are various violations of not only the Franklin County Jail policy and procedure, federal and state law, including basic civil rights," and that "Mr. Rosazza will include a comprehensive statement of the case as well as specific opinions and the basis for his opinions." The deficiencies of the report are substantial.

First, the report fails to explain how the expert reached his conclusion that violations of law have occurred. Second, none of the parties are identified in the report. It is difficult to understand how such a report could in any way inform the course of the defendants' subsequent

deposition of the expert. Finally, the report expressly states that a comprehensive statement of the case will be forthcoming. However, the place for such a statement lies in the report itself. While Rule 26 permits supplementation of initial disclosures, such disclosures are intended to correct or complete an already satisfactory report, not bolster a facially deficient one. For these reasons, plaintiffs' initial expert disclosure report is unsatisfactory.

The plaintiffs filed a supplemental report on November 9, 2006 as an attachment to their response to defendants' motion to strike. In a reply in support of the motion to strike, the defendants complain that the supplemental report is both untimely and fails to comply with Rule 26(a)(2)(B). With respect to timeliness, the court's order of September 8, 2006 granted plaintiffs an extension of their deadline to submit expert disclosures until October 2, 2006, but warned that absent a strong showing by affidavit, no further extensions would be granted.

Noting the court's admonition that further extensions of discovery deadlines would be denied absent a strong showing of good cause, defendants argue that the supplemental report is untimely because plaintiffs failed to seek an extension or to provide good cause to extend the October deadline. Therefore, defendants urge this court to strike plaintiffs' expert.

Although the court concurs with defendants' assessment of plaintiffs' supplemental report as deficient under Rule 26(a)(2), I decline to strike plaintiffs' expert as untimely. Plaintiffs' original report was timely, despite its serious deficiencies. In this case the court will construe the supplemental report as relating back to the timely submitted original report.

The supplemental report indicates that the plaintiffs' expert has been "provided with a number of . . . allegations of illegal strip and/or body cavity searches which on their face would not meet the requirements of the FCJ policy, would be a violation of commonly accepted

standards and practices in the industry, and would be violations of constitutional standards." However, the report fails to explain what those standards are, or to relate them to any specific allegations. Nevertheless, the supplemental report exhibits at least a good faith effort to comply with the requirements of Rule 26 such that striking the plaintiffs' expert would be an unduly harsh penalty.

None of the authorities cited by defendants require the imposition of the requested penalty as a sanction under Rule 37.[1] For example, in *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005), the trial court struck the testimony of an expert medical witness for failing disclose *ex parte* communications with the decedent's relative regarding his condition and symptoms. *Id.* at 516. The Sixth Circuit affirmed on appeal, noting that "Rule 37 authorizes—indeed, directs—exclusion of the witness as a sanction for a Rule 26 violation." *Id.* at 517. Although the defendants make much of the word "directs" in this context, closer reading of the opinion clarifies the Sixth Circuit's affirmation of the lower court's discretion to "impose less stringent sanction than mandatory preclusion." This view is bolstered by the appellate court's citation to other cases emphasizing that "'because the district court is in the best position to determine whether a party has complied with discovery orders, its discretion is especially broad.'" *Id.* (*quoting Ames v. Van Dyne*, 100 F.3d 956 (Table), 1996 WL 662899 at *4 (6th Cir. 1996)); *see also Roberts ex. rel. Johnson v. Galen of Va., Inc.*, 325 F.3d 776 (6th Cir. 2002)(no abuse of discretion for failing to exclude expert who failed to file report).

Although a greater sanction would be warranted if the failure to disclose were discovered

[1] In addition to the cases discussed, the defendants cited *Smith v. State Farm Fire & Casualty Co.*, 164 F.R.D. 49 (S.D.W.V. 1995). While the *Smith* court found certain expert disclosures to be inadequate, the court merely granted the opposing party's motion to compel.

on the eve of trial, in this case the harsh sanction of exclusion is not appropriate. Instead, the court will direct plaintiffs to further supplement their report, and impose a small monetary sanction.

3. Defendants' Motion for Sanctions [DE #80]

Defendants have also moved for sanctions pursuant to Fed R. Civ. P. 37(b) based upon the alleged failure of certain plaintiffs to comply with this court's order of September 8, 2006. In that order, the court granted defendants' prior motion to compel discovery, directing plaintiffs to serve their responses by October 1, 2006. Plaintiffs were explicitly warned that a failure to timely submit the discovery responses could result in sanctions under Fed. R. Civ. P 37. The defendants now seek dismissal of the claims asserted by eleven plaintiffs. Plaintiffs offer several explanations for their non-compliance.

Plaintiffs' counsel state that they have been unable to reach Mr. Curtis, Ms. Nesselrode, Ms. Baker, Mr. Farler, Mr. Bixler, and Ms. Cornn, despite repeated attempts. Each owes responses to the defendants' written interrogatories and requests for document production. No explanation has been provided for their failure to respond other than an apparent breakdown in communication between plaintiffs and their attorneys.

As to Ms. Creech, Ms. McClease, Mr. McClease, and Mr. Hockensmith, plaintiffs' counsel contends that they cannot produce documents which are not in their possession. However, plaintiffs have failed to respond to the requests with any information concerning their possession or non-possession of the requested documents. Defendants further assert that these plaintiffs have failed to answer certain written interrogatories.

Unlike other plaintiffs, Ms. Cooper has responded to defendants' discovery requests.

Defendants' only complaint is that her signature does not appear on her answers to interrogatories. Plaintiffs' counsel represents that Ms. Cooper is currently incarcerated and that she will sign and verify her responses at the earliest possible time. Likewise, Ms. Black, Ms. Hockensmith, and Ms. Epling have all complied with the defendants' discovery requests.

In considering the appropriate sanctions for failure to provide responses to discovery requests under court order, the Court is guided by Fed. R. Civ. P. 37(b)(2), which provides in relevant part:

> If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among other the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance the claim of the party obtaining the order;
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> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party form introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> . . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to the pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

A district court has broad discretion in determining the appropriate sanction for a party who has violated the court's discovery order. *See Phillips v. Cohen*, 400 F.3d 388, 402 (6th Cir. 2005) ("The choice of what sanction to impose is vested in the court's discretion."); 8A Charles

Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 2284 (2006) ("The district court may, within reason, use as many and as varied sanctions as are necessary to hold the scales of justice even.").

No just reason has been provided for the failure of the first group of plaintiffs to adhere to the court's discovery order. Although the extreme sanction of dismissal is not warranted at this time, the court will award defendants their reasonable attorney's fees in making the motion as a sanction for plaintiffs' past non-compliance. Should plaintiffs fail again to comply with this order, the court will consider additional sanctions including but not limited to dismissal.

The court will direct the second group of plaintiffs to more fully respond to the outstanding discovery requests without imposing sanctions at this time. Similarly, the court will direct Ms. Cooper to sign and verify her responses as soon as possible, on a date not to exceed sixty (60) days from the date of this order. Any future failure to comply with this order by the second group of plaintiffs or by Ms. Cooper will almost certainly result in sanctions.

4. Plaintiffs' Motion to Extend Time To Certify Class [DE #90]

The amended complaint contains allegations which relate to plaintiffs' intent to seek class certification. Early in this litigation plaintiffs agreed to withdraw a motion to certify a class pending an initial period of discovery. Now, some twenty-one months after the initiation of this litigation, plaintiffs have yet to re-file a motion to certify a class. The court's September 28, 2006 Opinion denied defendants' motion to strike all class action allegations from plaintiffs' complaint, but directed plaintiffs to file a motion to certify promptly or face the striking of their class allegations.

> Because the Court is unable to determine whether this action meets the requirements of Rule 23 on the existing record, the Court will permit discovery to proceed before striking the class allegations from the Complaint. ....
>
> The Court will, however, require that any Motion for Class Certification be file within 60 days of the entry date of this Opinion and Order. Failure to file any such motion will result in the striking of the class allegations from the complaint.

DE #72 at p. 4.

On the date they were required to file their motion, plaintiffs instead moved for an extension of time in which to file their motion to certify a class. Plaintiffs seek an additional sixty days in which to file their motion "due to the state of discovery" including the overall discovery deadline of February 28, 2007. Plaintiffs argue specifically that they need further discovery "to show what point the searches have occurred in the process of booking/arraignments, etc.," and "on the application by the jail personnel of their own policies." However, plaintiffs have been aware of the sixty-day deadline in which to gather any necessary discovery since September 28. In addition, the order extending the overall discovery deadline to February was set prior to the court's September 28 order directing plaintiffs to file their class certification motion within sixty days. Clearly, the court intended for plaintiffs to complete any discovery necessary to file the class certification motion at the outset of the discovery period. However, defendants point out that the only deposition requested by plaintiff in the last sixty days has been a Rule 30(b)(6) deposition of a representative most knowledgeable on the FCCC's policies and procedures, which deposition was recently cancelled by plaintiff due to a conflict. The only outstanding paper discovery referenced by plaintiffs was the subject of a motion to compel which was *denied* by this court in its September 28 order.

Rule 23 requires that class certification "shall" be decided "as soon as practicable" after the commencement of an action, Fed. R. Civ. P. 23(c)(1), a fact recognized by the court in setting the prior deadline. As stated, this litigation is now more than 21 months old.

Plaintiffs argue that it would be inappropriate to rule on class certification before additional plaintiffs are added by the proposed second amended complaint. However, if a class is certified, an unknown number of plaintiffs may be added. The addition of plaintiffs in the second amended complaint as potential class representatives does not preclude a decision on the propriety of a class under Rule 23.

Finally, plaintiffs' counsel represents that the sheer volume of material in this litigation "has prompted the undersigned counsel to consider whether our office is equipped to handle class action litigation, with appropriate notification to class members, etc." Counsel also seeks additional time "to consult possible substitute counsel for that purpose." Again, the court can only note that plaintiffs' counsel have had more than twenty-one months - presumably including prior to the filing of the complaint - to determine whether counsel is equipped to handle class action litigation. Counsel have not demonstrated good cause for a further extension.

Despite the lack of good cause shown, the court will in the interest of justice permit plaintiffs a brief extension of time in which to file their motion for class certification before imposing the harsh penalty of striking plaintiffs' allegations. Although only the briefest extensions is warranted, due to the briefing schedule of the plaintiffs' motion itself as well as the timing of the entry of this order, the extension will result in plaintiffs having a full sixty days beyond the expiration of their original November 27 deadline.

5. Defendants' Motion to Extend Time To Produce Expert Information [DE #91]

Defendants seek to extend time to produce expert information on the new plaintiffs added in the second amended complaint. The extension is limited to the disclosure of Rule 26 information pertaining to the newly proposed plaintiffs. No opposition being heard and for good cause shown, it will be granted.

Conclusion

The Court having reviewed the pending motions, **IT IS ORDERED:**

1. Plaintiffs' motion to amend their complaint [D.E. #76] is **granted**, the court having already received plaintiffs' second amended complaint, and the amended complaint shall be filed of record;

2. Defendants' motion to strike the plaintiffs' expert [D.E. #79] is **denied**;

3. Plaintiffs shall within fifteen (15) days from the date of entry of this order provide a revised expert disclosure report that more fully complies with Fed. R. Civ. P. 26(a)(2)(B) as discussed in this order. Failure to do so may subject plaintiffs to additional sanctions under Fed. R. Civ. P. 37(c)(1), including precluding the expert witness from testifying at trial;

4. Upon motion, defendants may extend the deadline for disclosure of their own expert witness(es) until sixty (60) days after final submission of the plaintiffs' expert report.

5. The defendants' motion for sanctions [DE #80] is **granted in part and denied in part** as follows:

a. Plaintiffs shall pay to defendants the sum of $500.00 as a monetary sanction based upon the fees expended by defendants in filing the motion to strike plaintiffs' deficient expert report, and defendants' motion for discovery sanctions.

b. Within ten (10) days of the date of this order, all plaintiffs shall fully comply with this court's September 8, 2006 order as more fully detailed in the body of this Memorandum Order. Any plaintiff who fails to fully comply with this order may be subject to dismissal, the court having twice directed plaintiffs to respond to discovery and having imposed in this order a lesser monetary sanction for their prior noncompliance.

6. Plaintiffs' motion to extend time to certify a class [DE #90] is **granted in part**. Plaintiffs shall file any such motion **not later than January 26, 2007.** NO FURTHER EXTENSIONS WILL BE GRANTED. A failure to timely file a motion to certify will result in the class allegations being stricken from the complaint;

7. Defendants' motion for an extension of time in which to identify experts on the newly added plaintiffs [DE #91] is **granted**.

This 29th day of December, 2006.

Signed By:
J. Gregory Wehrman
United States Magistrate Judge