UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

KARI SUNDSTROM,
ANDREA FIELDS,
LINDSEY BLACKWELL,
MATTHEW DAVISON, also known as JESSICA DAVISON,
and VANKEMAH D. MOATON,

Plaintiffs,

v. Case No. 06-C-112

MATTHEW J. FRANK,
WARDEN JUDY P. SMITH,
THOMAS EDWARDS,
JAMES GREER,
ROMAN KAPLAN, MD,
WARDEN ROBERT HUMPHREYS, and
MANAGER SUSAN NYGREN,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (DOC. #35), DENYING PLAINTIFFS' MOTION OR LEAVE TO FILE SECOND AMENDED COMPLAINT (DOC. #37), GRANTING PLAINTIFFS' MOTION FOR LEAVE, *INSTANTER,* TO FILE DOCUMENTS WITH A NONPARTY INMATE'S NAME REDACTED AND TO FILE UNREDACTED DOCUMENTS UNDER SEAL (DOC. #80), and GRANTING PLAINTIFFS' MOTION FOR LEAVE, *INSTANTER,* TO FILE DECLARATIONS WITH NONPARTY INMATES' NAMES REDACTED AND TO FILE UNREDACTED DOCUMENTS UNDER SEAL (DOC. #98)

The plaintiffs, who are Wisconsin prison inmates, bring this civil rights action under 42 U.S.C. § 1983 for declaratory and injunctive relief claiming that the defendants have violated the United States Constitution by enforcing 2005 Wisconsin Act 105, codified as Wis. Stat. § 302.386(5m), and abruptly terminating and depriving them of medical treatment for their serious health condition, Gender Identity Disorder (GID). Further, the plaintiffs assert that the defendants acted without exercising individualized medical judgment and in contrast

to the treatment the defendants provide to similarly situated inmates in Wisconsin Department of Corrections (DOC) facilities. The third amended complaint (complaint) seeks an end to the defendants' actions that violate the plaintiffs' Fourteenth Amendment right to equal protection and Eighth Amendment right to be free from cruel and unusual punishment, as well as a declaration that Wis. Stat. § 302.386(5m)[1] is unconstitutional on its face.

On January 27, 2006, the court granted plaintiffs Sundstrom and Fields' motion for preliminary injunction. Consequently, the defendants are enjoined from withdrawing any hormone therapy which was prescribed to the plaintiffs as of January 11, 2006, and must return the plaintiffs' hormonal therapy to the level in effect prior to the January 12, 2006, reduction. Later, the preliminary injunction was extended to plaintiffs Lindsey Blackwell, Matthew Davison a/k/a Jessica Davison, and Vankemah Moaton, as these plaintiffs were identified as inmates who had been diagnosed with GID or transsexualism and who faced termination of hormone therapy pursuant to Wis. Stat. § 302.386(5m). The preliminary injunction remains in effect with regard to these five plaintiffs until a trial on the merits, as the parties have stipulated to consolidation of the preliminary injunction hearing and the trial on the merits.

PLAINTIFFS' MOTION TO CERTIFY CLASS

The plaintiffs have filed a motion to certify a class action in this case. They seek certification of the following class pursuant to Federal Rule of Civil Procedure 23(b)(2):

> All current or future prisoners or patients as specified in Wis. Stat. 302.386(5m) who are transgender, including those who have

[1] The new law prohibits the use of state funds or "federal funds passing through state treasury to provide or to facilitate the provision of hormonal therapy," for the treatment of transgender prisoners, juvenile detainees, or residents in forensic mental health facilities in Wisconsin. Wis. Stat. § 302.386(5m).

> been diagnosed with Gender Identity Disorder and those who have a strong persistent cross-gender identification and either a persistent discomfort with their sex or a sense of inappropriateness in the gender role of that sex.

(Pls.' Br. in Supp. of Mot. for Class Cert. at 1.) The plaintiffs contend that the proposed class meets the requirements of Rule 23(a) and (b)(2).

The defendants oppose the motion. According to the defendants, the court should deny the plaintiffs' motion because the proposed class is overly broad and members of the proposed class lack standing. Moreover, the defendants contend that the proposed class fails to satisfy the numerosity, typicality, and commonality requirements of Rule 23(a).

Under Federal Rule of Civil Procedure 23(a), "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." In addition, to prosecute a class action, the plaintiffs must show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

1. Commonality and Typicality

"A common nucleus of operative fact is usually enough to satisfy the commonality requirement." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). A common nucleus of operative fact is typically found where the "defendants have engaged in standardized conduct towards members of the proposed class." *Keele v. Wexler*, 149 F.3d

589, 594 (7th Cir. 1998); *see also Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (stating that "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members").

A court's analysis of whether a representative party's claims are typical of the class members' claims is closely related to the court's commonality inquiry. *Keele*, 149 F.3d at 595. The Seventh Circuit has reasoned that "'[a] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other members and his or her claims are based on the same legal theory' . . . even if there are factual distinctions between the claims of the named plaintiffs and those of other class members." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (citations and internal quotations omitted).

The plaintiffs are proceeding on an Eighth Amendment medical care claim and a Fourteenth Amendment equal protection claim based on allegations that the defendants stopped or threatened to stop their hormone therapy medication to comply with Wis. Stat. § 302.386(5m). The pleadings indicated the following: Plaintiff Sundstrom was diagnosed with GID in 1990 at age 25 and has been on hormone therapy since 1990. During all periods of incarceration until January 12, 2006, the defendants have provided Sundstrom with feminizing hormones and testosterone blockers. Plaintiff Fields was diagnosed with GID in 1993 at age 16 and has been on hormone therapy since 1996. During all periods of incarceration until January 12, 2006, the defendants have provided Fields with feminizing hormone therapy. Plaintiff Blackwell was diagnosed as a transsexual in 1998 at age 15, at which time Blackwell was prescribed feminizing hormones and began living full-time as a woman. During all periods of incarceration until January 23, 2006, the defendants have provided Blackwell with

feminizing hormone therapy. Plaintiff Davison was diagnosed as a transsexual in June 2005 and has taken prescribed feminizing hormones continuously since July 2005. Plaintiff Moaton was diagnosed as a transsexual at Dodge Correctional Institution in September 2006. Moaton has taken prescribed feminizing hormones since 2000. At this time, the five plaintiffs are receiving hormone medication pursuant to this court's order.

The principal allegations in this case are that the plaintiffs have been diagnosed with GID or transsexualism and are taking hormone therapy that is in danger of being withdrawn. (*See* Court's Order of January 27, 2006) (discussing the dangerous effects of the withdrawal of hormone therapy). The plaintiffs propose a class which includes all prisoners "who have a strong persistent cross-gender identification and either a persistent discomfort with their sex or a sense of inappropriateness in the gender role of that sex." However, the proposed class would increase the scope of this lawsuit beyond the claims upon which the named plaintiffs are proceedings. Moreover, potential claims of the proposed class members have not been shown to be common or typical to those of the five plaintiffs in this case.

2. Numerosity

To establish numerosity, plaintiffs are not required to provide an exact number of class members. *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989). Generally, a plaintiff can satisfy the numerosity requirement by demonstrating that there are at least forty potential plaintiffs. *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (citing 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.22[3][a] (3d ed. 1999)).

In this case, only six prisoners within the DOC have been identified as threatened with withdrawal of their hormone therapy through enforcement of Wis. Stat. §

302.386(5m).[2] A class of five or six prisoners, five of whom have already been joined in the case, is not sufficient to meet the numerosity requirement of Rule 23(a)(1). *See* 7A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1762 (3d ed. 2005) ("Of course, if there are no members of the class other than the named representatives, then Rule 23(a)(1) obviously has not been satisfied"). For these reasons, the Motion for Class Certification as well as the related Motion for Leave to File Second Amended Complaint to add class allegations must be denied.

ADDITIONAL MATTERS

On August 2, 2006, the plaintiffs filed a motion to file redacted documents which conceal the personal medical information and the identities of nonparty witnesses. This motion goes along with the plaintiffs' motion to compel discovery filed on the same date, which was resolved on December 6, 2006. Moreover, the motion is consistent with the parties' April 6, 2006, Agreed Protective Order and seeks to protect sensitive nonpublic information. For that reason, the motion will be granted.

On January 30, 2007, the plaintiffs filed a motion to seal document and to file declarations with the names of nonparty inmates redacted. This motion was accompanied with the plaintiffs' reply to the class certification motion. Like the August 2 motion, this motion asks the court to approve the filing of documents which protect from public disclosure the identities of nonparty inmates in Department of Corrections facilities along with their medical treatment and diagnosis. In view of this court's decision on the plaintiffs' class certification motion, the privacy interest of the nonparty inmates, and the agreement of the parties,

[2] The six prisoners are the five named plaintiffs in this case and another prisoner who has a separate case before this court.

IT IS ORDERED that the plaintiffs' Motion for Class Certification (Doc. #35) is **DENIED**.

IT IS FURTHER ORDERED that the plaintiffs' Motion for Leave to File Second Amended Complaint (Doc. #37) is **DENIED**.

IT IS FURTHER ORDERED that the plaintiffs' Motion for Leave, *Instanter,* to File Documents with a Nonparty Inmate's Name Redacted and to File Unredacted Documents under Seal (Doc. #80) is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiffs' Motion for Leave, *Instanter,* to File Declarations with Nonparty Inmates' Names Redacted and to File Unredacted Documents under Seal (Doc. #98) is **GRANTED**.

Dated at Milwaukee, Wisconsin, this 16th day of February, 2007.

BY THE COURT

s/ C. N. CLEVERT, JR.
C. N. CLEVERT, JR.
U. S. DISTRICT JUDGE