IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DON LIPPERT,	)	
	)	
Plaintiff,	)	No. 10 C 4603
	)	
v.	)	Honorable Ruben Castillo
	)	Judge Presiding
GODINEZ, et al.	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants SALVADOR GODINEZ, LOUIS SHICKER, QUENTIN TANNER, ANDRIA BACOT in her official capacity, LANEL PALMER, ALPHONSO NORMAN, MARTHA MALDONADO, and the ILLINOIS DEPARTMENT OF CORRECTIONS ("IDOC"), by their attorney LISA MADIGAN, Attorney General of Illinois, in support of their Motion to Dismiss hereby state as follows:

I. BACKGROUND

The Plaintiff has filed a seven-count complaint against fifteen named Defendants. The allegations against the eight moving Defendants are:

> **Count I** - a class action claim under Section 1983 against IDOC Director Godinez and IDOC Medical Director Dr. Shicker alleging they failed to provide the proposed class members with diets that were medically prescribed (Second Amended Complaint, pg. 19-21);
>
> **Count II** - a class action claim under Section 1983 against Defendants Godinez and Shicker alleging they failed to provide the proposed class members with adequate medical treatment (Second Amd Comp., pg. 21-22);
>
> **Count III** - (no claims against the moving Defendants)(Second Amd Comp., pg. 22-24);

Count IV - a class action claim under State law against IDOC on behalf of the proposed class for breach of a contract between IDOC and Wexford to provide medical care at Illinois prisons (Second Amd. Comp., pg. 25-26);

Count V - an individual claim made by Lippert under State law against IDOC Medical Director Dr. Shicker and IDOC for breach of a settlement agreement in a prior lawsuit that Lippert filed and settled (Second Amd Comp., pg. 26-27);

Count VI - an individual claim made by Lippert under Section 1983 against Dr. Shicker and Stateville Food Supervisor Quentin Tanner for failure to provide him his medically prescribed diet (Second Amd Comp., pg. 27-29); and

Count VII - an individual claim made by Lippert under Section 1983 against Defendant Bacot, a Medical Technician at Stateville, and Stateville Correctional Officers Palmer, Norman and Maldonado for failing to provide him adequate medical treatment (Second Amd Comp., pg. 29-31).

The claims against the Defendants should be dismissed because: (1) the mixture of class and individual claims violates the standard set forth in *George v. Smith*, 507 F.3d 605 (7th Cir. 2007), requiring separate lawsuits be brought for separate prisoner claims; (2) Counts I and II fail to adequately allege class action claims; (3) the Court lacks jurisdiction over the State law claims in Counts IV and V under the doctrine of sovereign immunity; and (4) Plaintiff Lippert has failed to plead personal involvement for the Defendants in Count VI.

II. Standard of Review

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12 (b)(6) does not test whether the plaintiff will prevail on the merits but instead whether the claimant has properly stated a claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The Court may dismiss a complaint for failure to state a claim if "it is clear that no relief could be granted under any set of facts that could be provided consistent with the allegations." *Hishon v. King and Spaulding*, 467 U.S. 69, 73 (1984). The Court must accept as true all well-pleaded factual allegations and draw

all reasonable inferences in favor of the plaintiff. *Chancey v. Suburban Bus Div. of Regional Transp. Authority*, 52 F. 3d 623, 626-27 (7th Cir. 1995). However, the Court need not strain to find favorable inferences which are not apparent on the face of the complaint. *Coates v. Illinois State Board of Ed.*, 559 F.2d 445, 447 (7th Cir. 1977). Similarly, the court is not required to accept legal conclusions either alleged or inferred from pleaded facts. *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555, 1559 (7th Cir. 1991), cert. den. 502 U.S. 903 (1991). The complaint must state either direct or inferential allegations concerning all elements necessary for recovery under the chosen legal theory. *Glatt v. City of Chicago Park District*, 847 F. Supp. 101, 103 (N.D. Ill. 1994).

III. ARGUMENT

A. Plaintiff's Second Amended Complaint Contains Unrelated Claims against Unrelated Defendants and should be Dismissed under *George v. Smith*.

Plaintiff's unwieldy complaint should be dismissed pursuant to *George v. Smith*, 507 F.3d 605 (7th Cir. 2007). FRCP 18(a) states that "a party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime as the party has against an opposing party." Fed.R.Civ.P 18(a). However, in prisoner litigation the Seventh Circuit has held that unrelated claims brought by an inmate against multiple defendants should be brought as separate actions. *George*, at 607. In so holding, the Seventh Circuit reasoned that unrelated claims against different defendants belong in different lawsuits to ensure the inmates pay the required filing fees and to ensure that each claim is reviewed pursuant to 28 U.S.C. 1915(g). *Id*. The Court held that "[w]hen a prisoner does file a multi-claim, multi-defendant suit, the district

court should evaluate each claim for the purpose of § 1915(g)" and that Plaintiff may incur a strike for each frivolous claim. *Id*., at 607-08. As such, each distinct claim in the instant lawsuit should be evaluated to determine whether the claims are properly brought in this one action.

Plaintiff alleges seven (7) claims against fifteen (15) separate Defendants regarding: 1) the failure to receive a medically prescribed diet on behalf of the class; 2) failure to receive adequate medical treatment on behalf of the class; 3) violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act; 4) breach of a contract between Wexford and IDOC on behalf of the class; 5) breach of contract on behalf of Lippert against Defendants Shicker and IDOC; 6) failure to receive a medically prescribed diet on behalf of Lippert; and 7) failure to receive adequate medical treatment on behalf of Lippert. (Second Amd Comp., 19-31). There is no showing that the fifteen named Defendants participated in the same transaction or series of transactions that affected Plaintiff or the potential class members. Similary, there is no question of fact common to all Defendants as required by *George*, at 608. Furthermore, the Second Amended Complaint is devoid of the required showing that each Defendant participated in both the class claims and Plaintiff's individual claims. Outside of the very generalized allegation of "lack of proper medical treatment," there is no consistent transaction, party, or question of fact that would prevent the "mishmash" of claims that the *George* court struck down. *George*, at 607. Thus, Plaintiff's Second Amended Complaint should be dismissed.

B. Counts I and II Fail to State a Claim Which Can Form an Adequate Basis for the Requested Relief Because the Proposed Class Cannot Meet the Requirements of Class Certification.

In Counts I and II of his Complaint, Plaintiff asserts claims on behalf of a proposed class including "[a]ll people who are or will be confined in an Illinois adult correctional center, suffering from a Serious Medical Condition who have not received adequate medical treatment as a result of misconduct" on the part of the Defendants. (Second Amd Comp., ¶¶ 77, 86–96, 97–105).

A plaintiff seeking class certification has the burden of proving that the proposed class meets the requirements of the Federal Rules of Civil Procedure. *George v. Kraft Foods Global, Inc*., 2011 WL 5118815, *3 (N.D. Ill. 2011) (Castillo, J.). In order to obtain class certification, Plaintiff must satisfy all of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Plaintiff's proposed class, however, fails to do so, and he has therefore failed to state sufficient facts to demonstrate that the proposed class is entitled to relief.

1. Plaintiff's Proposed Class Does Not Meet the Implied Definiteness Rule of 23(a).

The Seventh Circuit has recognized an implied "definiteness" requirement in Rule 23(a) in addition to its express requirements. *Alliance to End Repression v. Rochford,* 565 F.2d 975, 977 (7th Cir. 1977). Consequentially, there are "two implied prerequisites to class certification." *Humphrey v. International Paper*, 2003 WL 22111093, *4 (N.D. Ill. 2003) (Schenkier, Magistrate J.). "First, the class must be sufficiently defined so that the class is identifiable." *Guillory v. American Tobacco,* 2001 WL 290603, *2 (N.D. Ill. 2001) (Guzman, J.). "Secondly, the named representatives must fall within the proposed class." *Id.* A sufficiently definite class exists if the court can ascertain the class members by reference to objective criteria. *Fletcher v. ZLB Behring, LLC,* 245 F.R.D. 328, 334–65 (N.D. Ill. 2006) (St. Eve, J.), *citing Wallace v.*

Chicago Housing Auth., 224 F.R.D. 420, 425 (N.D. Ill. 2004) (Castillo, J.). Furthermore, a class definition which requires a threshold finding of liability is inadequate under Rule 23(a). *See, e.g., Alexander v. Q.T.S. Corp.,* 1999 WL 573358, at *4 (N.D. Ill. 1999) (Anderson, J.) (finding "[p]laintiffs' class definition inadequate in that it requires a finding of liability and the calculation of individual damages before class membership can be ascertained").

In this case, class membership is based on subjective criteria, as the class seeks to include those who suffer from indefinitely-defined "serious" medical conditions for which they have not received "adequate" medical treatment. (Second Amd Comp., ¶ 77). Plaintiff's proposed class definition requires a preliminary finding of liability where deprivation of "adequate medical treatment" is "a result of misconduct." *Id.* This proposed class definition is nothing more than a legal conclusion. The only issue to be addressed once an individual has established his membership in Plaintiff's proposed class would be the issue of individual damages. As such, Plaintiff's proposed class is unacceptably indefinite and therefore fails to state a claim upon which relief can be granted to the class in Counts I and II.

2. Plaintiff Has Failed to Demonstrate Either Commonality or Typicality.

In order to meet the commonality and typicality requirements of Rule 23(a), a plaintiff must show that "there are questions of law or fact common to the class" and that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(2)–(3). The facts necessary to satisfy the commonality and typicality requirements for class certification are "closely related." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir.

1992). As such, "a finding of one often results in a finding of the other." *Arenson v. Whitehall Convalescent and Nursing Home, Inc.,* 164 F.R.D. 659, 664 (N.D. Ill. 1996) (Castillo, J.).

Because claims alleging inadequate medical care are "particularly fact specific," they may exhibit neither commonality nor typicality. *Smith v. Sheriff of Cook County,* 2008 WL 1995059, *1 (N.D. Ill. 2008) (Leinenweber, J.) (refusing to certify a proposed class of inmates who had requested, but who had not received, "timely treatment of a dentist"). "While the alleged deficiency of staff may be common to all class members, its effect and its role in causing the injuries alleged will necessarily vary from plaintiff to plaintiff." *Id.* Where such highly individualized showings are necessary, "[e]ach plaintiff's case would necessarily be different," and "while some issues would be common, many would not and no case would be typical." *Id.*; *see also Wrightsell v. Sheriff of Cook County*, 2009 WL 482370 (N.D. Ill. 2010) (Darrah, J.); *Smentek v. Sheriff of Cook County*, 2010 WL 4791509 (N.D. Ill. 2010) (Lefkow, J.).

In this case, Plaintiff claims that "Defendants' policies and practices of failure to provide necessary medical treatment in a timely fashion violate the 8th Amendment." (Second Amd Comp., ¶81). As in *Smith, Wrightsell,* and *Smentek*, his claim would require each plaintiff to show a personal injury which resulted from untimely administration of medications or medical care, facts which would vary from plaintiff to plaintiff. Consequentially, Plaintiff's claim satisfies neither the typicality nor the commonality requirements of Rule 23(a) and thus fails to state a claim upon which relief can be granted to the class in Counts I and II.

3. Plaintiff's Proposed Class Does Not Meet Any Rule 23(b) Requirements for Class Certification.

Rule 23(b) authorizes certification of a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

> the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct of the party opposing the class, or adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Fed. R. Civ. P. 23(b)(1)–(2).

A plaintiff has not met his burden to show that certification is appropriate under Rule 23(b) where he fails to identify the scope of equitable relief sought. *Haynes v. Dart,* 2009 WL 2355393, *9 (N.D. Ill. 2009) (Conlon, J.); *see also* Fed. R. Civ. P. 65(d) (an injunction must "state its terms specifically" and "describe in reasonable detail" the acts restrained or required). If equitable relief is not uniformly applicable to the class, and inquiry into individual circumstances is required, there is little to be gained from proceeding as a class action. *See Gen Tel. Co. of Sw.,* 457 U.S. 147, 155 (1982) (purpose of class actions is to save the resources of both the courts and the parties). A class is not appropriate if relief specifically tailored to each class member would be necessary to correct defendants' allegedly wrongful conduct. *Haynes,* 2009 WL 2355393 at *10.

In this case, Plaintiff seeks to require Defendants "to ensure that the class members receive their medically prescribed diets" and "to ensure that the class members receive their daily medical treatment on a timely basis." The application of this injunction to the circumstances of each individual would of necessity be uniquely tailored to the medical and dietary needs of each inmate. Far from "prevent[ing] the establishment of incompatible standards" that might result

from handling individual lawsuits on a case-by-case basis, broad injunctive relief would render the task of crafting an injunction which would comply with Rule 63(d) "problematic." *Haynes,* 2009 WL 2355393, at * 8, 10. As such, certification under Rule 23(b) is inappropriate.

Having failed to demonstrate that his proposed class is acceptably definite or satisfies the commonality and typicality requirements of Rule 23(a), and that the requested injunctive relief satisfies the requirements of Rule 23(b), Plaintiff's claims on behalf of his proposed class of prisoners in Counts I and II should be dismissed.

C. The Doctrine of Sovereign Immunity Removes Jurisdiction Over IDOT for the State Law Breach of Contract Claims in Counts IV and V.

The court lacks subject matter jurisdiction over the State law claims for breach of contract in Counts IV and V. Count IV alleges (on behalf of the proposed class) that the IDOC breached a contract to which it was a party with Wexford, while Count V alleges that Defendants Shicker and IDOC breached a settlement agreement with Plaintiff Lippert which settled a prior lawsuit filed by Lippert. (Second Amd Comp., pg. 25-27).

Though the doctrine of sovereign immunity is a creature of state law, "state rules of immunity are binding in federal court with respect to state causes of action." *Omosegbon v. Wells*, 335 F.3d 668, 673 (7th Cir. 2003). In Illinois law, the doctrine of sovereign immunity mandates that a department of the State cannot be a defendant in an action brought directly in the trial courts. *President Lincoln Hotel Venture, et al. v. Bank One, et al.*, 271 Ill. App. 3d 1048, 1054 (1st Dist. 1994). Except where the State has expressly consented to be sued, the doctrine of sovereign immunity applies and "the State of Illinois shall not be made a defendant or party in any court." *Management Assoc. of Ill., Inc. v. Bd. of Regents of N. Ill. Univ., et al.*, 348 Ill. App.

3d 599, 607 (1st Dist. 1993). The courts lack jurisdiction over claims that an agency of the State of Illinois breached a contract to which the State is a party. *Foley v. AFSCME*, 199 Ill. App. 3d 6, 12 (1st Dist. 1990).

The Illinois Supreme Court has held that "the prohibition against making the State of Illinois a party to a suit cannot be evaded by making an action nominally one against the servant or agent of the State when the real claim is against the State of Illinois itself and when the State of Illinois is the party vitally interested." *Healy v. Vaupel,* 133 Ill.2d 295, 308 (1990). The Illinois Supreme Court also found that whether an action is truly against the State does not depend on the formal identification of the parties, but rather on the issues presented and the relief sought. *Id.,* at 308.

An action against a State employee is considered one against the State when: (1) there are no allegations that an employee or agent of the State acted beyond the scope of his authority; (2) the duty alleged to have been breached was not owed by the employee independently of his State employment; and (3) the complained-of actions involve matters ordinarily within that employee's normal and official functions. *Brandon v. Bonell*, 368 Ill. App. 3d 492, 505 (2nd Dist. 2006).

In the case at bar, the Plaintiff's breach of contract claim in Count IV is brought by a proposed class of inmates directly against the IDOC. The IDOC is a department of the State of Illinois. 20 ILCS 5/5-15. Therefore, the claim in Count IV against the IDOC should be dismissed because the Court lacks subject matter jurisdiction. In addition, as argued above in Section 3(B), the Plaintiff has failed to identify a proposed class of inmates that meets the applicable legal standards. Therefore, the same deficiencies that require the dismissal of Counts I and II are fatal to Count IV as well, and Count IV should also be dismissed.

In Count V, the Plaintiff brings another breach of contract claim directly against the IDOC. Again, as IDOC is a department of the State, the claim against IDOC in Count V should be dismissed for lack of jurisdiction.

Additionally, the Plaintiff alleges in Count V a claim against Defendant Shicker. The Plaintiff pleads that "Elyea, his successors [*i.e.*, Dr. Shicker], and IDOC have a continuing obligation" to the Plaintiff. (Second Amd Comp., ¶126). The Plaintiff is making a claim against Defendant Shicker as a successor IDOC Medical Director solely because he is the current IDOC Medical Director. In other words, this claim arises solely because Defendant Shicker is a State employee, not because he breached a duty owed outside of his employment with the State of Illinois. Therefore, sovereign immunity applies to the claim against Defendant Shicker, and Count V should be dismissed for lack of subject matter jurisdiction.

D. The Claims in Count VI Against Dr. Shicker and Food Supervisor Tanner Fail to Plead Sufficient Personal Involvement To Hold Defendants Liable For Any Alleged Constitutional Violations.

Plaintiff cannot show that Defendants Dr. Shicker and Quentin Tanner were personally involved in the alleged deprivation of medical care and therefore cannot establish liability under the Eighth Amendment. An individual cannot be held liable under 42 U.S.C. sec. 1983 unless he or she is personally responsible for an alleged constitutional deprivation. *Duncan v. Duckworth,* 644 F.2d 653, 655 (7th Cir. 1981). "In essence, this standard requires proof of *causation, i.e* that the individual defendant actually caused the Plaintiff's injury through his own conduct." *Volk v. Coler,* 638 F.Supp. 1540, 1547. (C.D. Ill. 1986). The complaint in each case must sufficiently allege the Defendant's personal involvement in order to state a constitutional claim. *Crowder v. Lash,* 687 F.2d 996, 1005 (7th Cir. 1983). A Section 1983 action cannot support a claim of

respondeat superior, *Polk County v. Dodson,* 454 U.S. 312, 325 (1981), otherwise the actions of a subordinate could be attributed to the government. *Soderback v. Burnett County,* 752 F.2d 285, 293 (7th Cir. 1985).

In *Crowder*, the Seventh Circuit held that the Commissioner of Corrections could not be held personally liable under Section 1983 for the conditions of a prison segregation unit simply because the prisoner informed the Commissioner of the conditions both personally and by letter. *Crowder*, at 1006. The court found that such a broad theory of liability would be "inconsistent with the personal responsibility requirements for assessing damages against public officials in a section 1983 action." *Id*., at 1006 (citation omitted), *see also Johnson v. Lane*, 596 F. Supp. 408, 409 (N.D. Ill. 1984) (Court held that plaintiff failed to allege sufficient personal involvement on the part of the prison Warden by simply claiming that the Warden was apprised of the matter but failed to intervene.) *Id.* Supervisory prison officials cannot be expected to be involved in every one of the daily events in the lives of thousands of prisoners. *Volk*, at 1549, *aff'd* 845 F.3d 1422 (7th Cir. 1988)(letters are insufficient to create personal involvement.)

> For the purposes of a motion to dismiss, a warden cannot be assumed to be directly involved in the prison's day-to-day operations. *See* Duncan v. Duckworth, 644 F.2d 653, 656 (7th Cir.1981). This principle does not impose a substantive limitation on a warden's liability beyond the established one against vicarious liability. Nor does it raise the bar for the pleadings of a class of civil rights plaintiffs. It is simply the uniform application of a rule of construction: an inference that a warden is directly involved in a prison's daily operations is not reasonable. [...] The prison might be very small, the title "warden" might be used in an unusual way, or a warden might have temporarily taken on direct management of some aspects of the prison due to special circumstances. Nothing of that sort is alleged here.

Steidl v. Gramley, 151 F.3d 739, 741-42 (7th Cir. 1998).

In Count VI of this case, Plaintiff alleges that Defendants Shicker and Tanner's ongoing

deliberate indifference to Plaintiff's medical needs have violated his Eighth Amendment right to be free from cruel and unusual punishment. Second Amd Comp., ¶141, 146. Plaintiff fails to set forth any factual allegations concerning how the Defendants were personally involved in the violation of his constitutional rights. Plaintiff alleges only that Defendants Shicker and Tanner were on notice of Plaintiff's dietary needs. Second Amd Comp., ¶133-135. Plaintiff fails to provide any factual allegations regarding how these prison officials were personally involved in impeding Plaintiff from receiving his dietary needs. Therefore, the claims against Defendants Shicker and Tanner in Count VI should be dismissed.

WHEREFORE, for the foregoing reasons, and the reasons stated in the Defendants' Motion to Dismiss, the claims against Defendants Salvador Godinez, Louis Shicker, Quentin Tanner, Andria Bacot in her official capacity, Lanel Palmer, Alphonso Norman, Martha Maldonado, and the IDOC should be dismissed.

Respectfully Submitted,

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