IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN AUSTIN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 90-7497
PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al.,	)	
	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT AND ADD DEFENDANT

I. FACTUAL BACKGROUND

The original complaint in this case was filed on November 27, 1990. That complaint asserted that defendants had violated the rights of a class of Pennsylvania prisoners by imposing cruel and unusual punishment, by denying prisoners the equal protection of the laws, by denying prisoners meaningful access to the courts, and by denying handicapped members of the class their federally-protected right to be free from discrimination on the basis of their handicap. Included in the Eighth Amendment challenge were claims that the defendants were deliberately indifferent to the serious medical and mental health needs of members of the class.

When the original complaint was filed, the plaintiff class included prisoners confined at all of the state prisons except the State Correctional Institution at Pittsburgh[1] and the State Correctional Institution at Muncy (SCI-Muncy). At the time of the

[1] SCI-Pittsburgh claims had been addressed in Tillery v. Owens, 719 F.Supp. 1256 (W.D. Pa. 1989), aff'd, 907 F.2d 418 (3d Cir. 1990).

original filing of the complaint, plaintiffs believed that conditions of confinement issues regarding SCI-Muncy had been addressed in Beehler v. Jeffres, 83-1024 (M.D. Pa.).

Beehler was filed in July 1983 on behalf of all women incarcerated at SCI-Muncy.[2] The case comprehensively challenged conditions of confinement at SCI-Muncy, including the medical and psychiatric care provided the class. In 1986, the district court in Beehler dismissed plaintiffs' medical and mental health claims, holding that these claims were precluded by I.C.U. v. Shapp, No. 70-2545, 70-3054, 71-0513, 71-1006 (E.D. Pa.). Beehler v. Jeffres, Order 6/30/86.[3] A number of other conditions of confinement claims were voluntarily dismissed, without prejudice, on November 27, 1989.[4]

Subsequent to the filing of the complaint in this case, it has become apparent that changed circumstances require addressing medical conditions at SCI-Muncy. In particular, since this lawsuit was filed in November, 1990, a recent outbreak of tuberculosis at SCI-Muncy has underlined the urgency of the necessity to amend the complaint.

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[2] SCI-Muncy was at that time, and continues to be, an all-female institution.

[3] For the reasons set forth in plaintiffs' memorandum of law in opposition to defendants' motion to dismiss (6/7/91), plaintiffs are not precluded by I.C.U. v. Shapp from challenging the current deficiencies in medical and mental health care at SCI-Muncy. See also Austin v. DOC, Order, 7/29/91.

[4] On June 30, 1992, the district court dismissed the remaining claims in Beehler.

In late May, 1992, plaintiffs' counsel first learned of an outbreak of tuberculosis at SCI-Muncy from newspaper accounts and from communications from prisoners and their families. See Attachment 1, a newspaper report in The Philadelphia Inquirer, May 27, 1992. The report of tuberculosis at SCI-Muncy was of critical concern to plaintiffs' counsel for several reasons. First, the initial medical inspections by plaintiffs' medical experts in this case demonstrated that there are very serious problems in tuberculosis screening and treatment within the Pennsylvania prison system. One of the staff physicians at Graterford indicated that Graterford had seen nine active cases of tuberculosis. Prisoners entering the system are not consistently receiving prompt and adequate follow-up tests for exposure to tuberculosis. The experts found that test results for exposure to tuberculosis are frequently not recorded. In addition, prisoners who had positive tests are not followed up in a systematic fashion to assure that they do not harbor active, communicable disease and that they are given appropriate prophylactic medical treatment. In particular, the chaotic medical records at SCI-Graterford ensure that a number of prisoners will be transferred to other prisons without an appropriate investigation of a positive test result. There is absolutely no system, or even attempt, to respond to prisoners who convert from a negative test result to a positive test result while in the system. Such a conversion means that the prisoner has been exposed to an active, contagious case of tuberculosis. In a highly crowded institution such as a prison, the discovery of

cases of conversion from negative to positive test results should lead to a systematic search for the active case of tuberculosis. See Attachment 2, declaration of Armond Start, M.D., one of plaintiffs' medical experts.[5]

Moreover, because prisoners are transferred throughout the system, an outbreak at one institution can easily lead to outbreaks at others. In order to protect the women at SCI-Waynesburg, members of the class of plaintiffs in this case, there must be an appropriate tuberculosis screening and treatment program at Muncy.[6]

Moreover, the threat from tuberculosis, which has long been more prevalent in prison than in the general population, has qualitatively changed since the filing of the first complaint. In large part because of the prevalence of AIDS and HIV infection, the number of tuberculosis cases has dramatically increased.[7] Even more ominous is the changing character of tuberculosis. Some strains of the disease have developed resistance to many or all of the standard drugs used to treat the infection. For those

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[5] The first declaration signed by Dr. Start has apparently been lost in the mail. Plaintiffs therefore attach an unsigned copy of the declaration which will be replaced when a signed copy of the declaration from Dr. Start is available.

[6] Indeed, named plaintiff Debra Speakes was confined at Waynesburg when the complaint was originally filed, but is currently housed at SCI-Muncy, where she is exposed to the tuberculosis outbreak. Her situation illustrates the degree to which prisoners move between different facilities in the system, providing a vector to spread infectious diseases to additional facilities.

[7] Persons with AIDS or HIV infection are particularly vulnerable to infection with tuberculosis. The fact that they have been infected with tuberculosis can also be much harder to detect, because their weakened immune system may not respond to the test.

outbreaks of tuberculosis that are resistant to all current drugs, patients who develop active disease have death rates of 50%, as well as a 25% chance that the patient will become chronically infectious and therefore require isolation for the rest of his or her life. See Attachment 3, Alan Bloch, M.D., "Preventing TB Outbreaks in Your Correctional Facility," delivered at the 1991 National Conference on Correctional Health Care.

Finally, because overcrowded prisons, with large percentages of HIV-positive persons and frequently inadequate medical systems, provide ideal conditions for the outbreak of tuberculosis, it is not surprising that they have also been the site for major outbreaks of multi-drug resistant tuberculosis. Until now, the most serious outbreak of multi-drug resistant tuberculosis occurred in the neighboring State of New York, in which over a short period of time thirteen prisoners and one staff member died at two facilities from one outbreak of tuberculosis. See Attachment 4. In addition, the neighboring Maryland prison system has also experienced an outbreak of multi-drug resistant tuberculosis, infecting at least 176 prisoners and staff at the Roxbury Correctional Institution in Hagerstown, Maryland. See Attachment 5, a Washington Post news report, dated May 30, 1992.[8]

Under these circumstances, it is critical that plaintiffs be given an opportunity to protect the health of prisoners at SCI-

[8] The Maryland institution has contract health care services provided by Correctional Medical Systems (CMS), one of the contract medical providers utilized in the Pennsylvania system. CMS uses the same infection control policies in all of its operations in this region.

Muncy, as well as prisoners at SCI-Waynesburg, who are subject to transfer to Muncy or housing with prisoners transferred from Muncy. The prompt institution of an appropriate screening and treatment program for tuberculosis at Muncy, as well as in the rest of the system, is literally a matter of life or death.[9]

The problem of tuberculosis screening and treatment, of course, cannot be separated from the more general failures of the medical system. In SCI-Graterford, for example, it was apparent that the lack of a working system of screening and treatment for tuberculosis would require addressing the chaotic medical records system, the medical referral system, medications, staffing issues, and other related areas.

In turn, these issues cannot be disentangled from the overlapping issues of mental health care. Mental health care is considered part of health care in the Pennsylvania Department of Corrections. (See Attachment 6 -- Management Review Checklist for Correctional Health Care Services, SCI-Muncy, May 30 and 31, 1990). This is appropriate, because both "general" medical care and mental health care involve medical records, the prescription and distribution of medication, referral of patients to specialists, and the hiring and deployment of physicians, nurses, and other health care staff. Thus, a prison's health care system cannot be

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[9] Although plaintiffs assume that none of the cases of active tuberculosis at Muncy involve drug-resistant strains, it is only a matter of time before the prison system reports drug-resistant cases. Because of the intrinsic characteristics of a prison system in a large urban state in the Northeast, the spread of drug-resistant tuberculosis into the Pennsylvania prison system is entirely predictable. See Attachment 3, supra.

meaningfully challenged or evaluated without including the facility's mental health care system.[10]

For that reason, plaintiffs believe that the discovery of an outbreak of tuberculosis of SCI-Muncy demonstrates the need to address comprehensively the adequacy of health care at the institution and thus supports allowing plaintiffs to amend the complaint to add these claims.

Because plaintiffs' counsel learned of the outbreak of tuberculosis at the end of May, 1992, plaintiffs' counsel have moved expeditiously to amend the complaint once the relevant facts were known. In addition, the plaintiffs' request will neither delay the trial nor prejudice the defendants. Under the amended scheduling order of April 8, 1992, plaintiffs are not required to submit expert witness reports on the issues of medical and mental health care until October 30, 1992. If the Court permits the proposed amendment, the plaintiffs can meet this deadline without requiring an extension from the Court. The defendants' corresponding reports are not due until December 30, 1992. In view of the fact that the parties are simply adding two related claims at a fourteenth institution to the thirteen institutions already

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[10] In an extreme scenario, if general medical care were challenged in a lawsuit but mental health care were not, prison officials could simply shift staff and other resources from the latter to the former, ameliorating the challenged conditions at the expense of mental health care. Thus, it is not surprising that injunctive challenges to prison medical care virtually always include mental health care. See, e.g., Wellman v. Faulkner, 715 F.2d 269, 272-273 (7th Cir. 1983). Tillery v. Owens, 719 F.Supp. 1256, 1284 (W.D. Pa. 1989), aff'd, 907 F.2d 418 (3d Cir. 1990); Inmates of Occoquan v. Barry, 717 F.Supp. 854, 863 (D.D.C. 1989); U.S. v. Michigan, 680 F.Supp. 928, 989 (W.D. Mich. 1987).

under litigation on a much larger number of issues, the incremental change in the size of the litigation is not so significant that either party or the Court will be unable to keep to the established trial schedule.

II. ARGUMENT - 3rd Circuit case

Fed.R.Civ.P. 15(a) sets forth the standard for determining whether to grant a motion to allow the amendment of a pleading. Rule 15(a) provides, in pertinent part, as follows:

> [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court applied Rule 15(a) in a case in which the plaintiff requested leave to amend the complaint after a motion to dismiss had been granted. The district court subsequently denied leave to amend. The court of appeals affirmed the judgment of the district court.

The Supreme Court reversed, and set forth the classic summary of the principles that govern motions under Rule 15:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), ¶¶15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be

> "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and is inconsistent with the spirit of the Federal Rules.

Id. at 182.

For the reasons given in the previous section, none of the possible grounds for refusing leave to amend apply to this case. The proposed amendment is not offered to cure a deficiency in the existing complaint. There is no dilatory motive or bad faith on the part of plaintiffs because plaintiffs represent to the Court that allowance of the proposed amendment will not delay trial in this case.

Moreover, Foman speaks of "undue" delay as a possible reason for denying leave to amend.[11] The Third Circuit has made clear that "undue" delay occurs only if the opposing party would suffer prejudice if the amendment were allowed:

> Delay alone, however, is an insufficient ground upon which to deny a motion to amend. Cornell and Co., Inc., v. Occupational Safety and Health Review Commission, 573 F.2d 830 (3d Cir. 1978). Rather, the touchstone is whether the non-moving party will be prejudiced if the amendment is allowed. Id. at 823.

Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984).

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[11] For the reasons noted in the previous section, plaintiffs have acted quite expeditiously after learning of the tuberculosis outbreak at SCI-Muncy. There is certainly no undue delay in the sense that plaintiffs failed to act promptly after discovering the need for amendment.

In Howze, the plaintiff had filed her complaint in November, 1982. After she obtained an attorney, her attorney attempted to amend the complaint in March, 1983, but the trial court denied the motion. The court of appeals, following the entry of summary judgment against the plaintiff, held that the district court's denial of leave to amend was an abuse of discretion.

The defendants argued that the grant of leave to amend would have been improper because the amendment involved a claim that had never been presented to the EEOC, and that under the law it should not have been required to meet claims not within the scope of the EEOC investigation. The court of appeals held, however, that the new claim was within the general parameters of the original claim, so that the defendant was not prejudiced. Id.

Similarly, in this case, the delay has not resulted in prejudice to the defendants. Adding medical and mental health claims at one additional facility to the thirteen facilities already under suit on a much broader range of issues will not significantly change the size of the lawsuit. The plaintiffs intend to keep to the existing schedule; since all deadlines for defendants are at the same time as, or later than, the deadlines for plaintiffs, defendants are not hindered in their preparation for trial. They already have employed their medical and mental health experts. A number of the prisons have yet to be inspected by plaintiffs' medical experts, so granting the motion will not require reopening the medical inspections.

Of course, allowing the amendment will require the defendants to meet plaintiffs' contention that medical care at SCI-Muncy is so deficient that it violates the Eighth Amendment. But the mere fact that an amendment requires a party to meet additional claims does not constitute prejudice under the Rule. See Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir. 1989), holding that the party opposing amendment must show that it was unfairly disadvantaged or deprived of the opportunity to present evidence. In Bechtel, the court of appeals noted that the opposing party could not have been unfairly deprived of the right to present evidence because the parties were still engaged in discovery and allowing the amendment would not delay bringing the case to trial. Id. at 653.[12]

Moreover, the length of the time from the original complaint to the proposed amendment does not preclude the amendment. In Heyl & Patterson International, Inc. v. F.D. Rich Housing, 663 F.2d 419 (3d Cir. 1981), the court of appeals approved the district court's grant of a motion to amend to add an affirmative defense, even though the motion was made three years after the filing of the initial complaint. Moreover, the district court subsequently treated the defendants' opening statement as a further amendment of the pleadings. Id. at 424-425. Nonetheless, the court of

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[12] Plaintiffs note, however, that even if the grant of a motion for leave to amend the complaint would have the effect of requiring a continuance, that fact by itself would not require the denial of the proposed amendment. See generally Wright, Miller & Kane, Federal Practice and Procedure §1488 (1990) (discussing the allowance of amendments of pleadings at various stages of the litigation). In any event, this issue need not be addressed in the circumstances of this case.

appeals, applying the principles of Rule 15(a), affirmed the district court, holding that the plaintiff had not met its burden to show that it had been deprived of a fair opportunity to meet the evidence. Id. at 426-427.[13]

Similarly, in Boileau v. Bethlehem Steel Corp., 730 F.2d 929 (3d Cir. 1984), the court of appeals considered whether the district court should have granted an amendment of a 1978 complaint requested in 1982.[14] The district court refused to permit the amendment, and the court of appeals reversed, noting that the commentaries on Rule 15 "support not only a liberal interpretation of this rule, but specifically address the liberal use of Rule 15 to amend complaints so as to state additional causes of action." Id. at 938, citing Wright & Miller, Federal Practice & Procedure §1474 (1975) and Martin v. Virgin Islands National Bank, 455 F.2d 985 (3d Cir. 1972) (affirming the allowance of an amendment to the complaint at the close of plaintiff's evidence at trial). Finally, the court of appeals noted that "[p]articularly where the underlying claim involves the deprivation of fundamental constitutional rights, discretionary procedural measures should be

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[13] See also Kiser v. General Electric Corp., 831 F.2d 423, 427-428 (3d Cir. 1987), reversing a district court's refusal to allow the filing of an amended complaint, and stating that the party opposing the amendment has the burden of showing prejudice resulting from delay in seeking the amendment.

[14] For much of the period, the federal action was stayed pending resolution of a related state court proceeding. The stay apparently existed between October, 1978 and the time the plaintiff sought leave to amend. Id. at 933-934.

cautiously employed when denying a litigant her day in court." Id. at 939.

The fundamental constitutional rights at stake in this matter for the prisoners at SCI-Muncy involve protection from exposure to potentially fatal communicable disease. The strong preference for decision of cases on their merits embodied in the Federal Rules, including Rule 15(a), supports granting the women at Muncy the opportunity to demonstrate to the Court the threat to their lives and health.

CONCLUSION

For the above reasons, plaintiffs urge that the Court grant them leave to amend the complaint.

Respectfully submitted,

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