UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JOHN LINDH, et al.,	)	
Plaintiffs,	)	
	)	
vs.	)	2:09-cv-0215-JMS-WGH
	)	
WARDEN, Federal Correctional Institution, Terre Haute, Indiana,	)	
Defendant.	)	

ORDER DENYING PLAINTIFFS' MOTION TO CERTIFY CLASS

Presently before the Court is Plaintiffs' Motion to Certify Class.[1] [Dkt. 45.] Plaintiffs seek class certification on their claim against the Federal Correctional Institution in Terre Haute ("FCI") for allegedly violating the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(c), by not allowing Muslim inmates in the Communications Management Unit ("CMU") to participate in group prayer five times per day.

BACKGROUND

Plaintiffs are Muslim inmates housed in the CMU of the FCI. [Dkts. 40 at 1 ¶ 1; 47 at 1 ¶ 1.] The CMU is a self-contained general population unit established to house inmates who "require increased monitoring of communication between inmates and persons in the community in order to protect the safety, security, and orderly operation of Bureau facilities, and to protect the public." [Dkt. 18-1 at 3 ¶ 5.] The inmates are allowed out of their cells from 6:00 a.m. until 3:45 p.m. and then again from 4:30 p.m. until 9:15 p.m. [Dkt. 46-1 at 7.] During these times, they are

[1] Enaam Arnaout and John Lindh were the named plaintiffs in the Amended Complaint. [Dkt. 40.] In September 2010, Mr. Arnaout was dismissed from the case, [dkt. 63], and a separate action filed by Brian Carr (initially docketed as 2:10-cv-0175) was consolidated with this action, [dkt. 61]. Mr. Lindh and Mr. Carr are currently the named plaintiffs in this litigation.

free to stay in their cells or go to the law library, food service area, exercise room, or outside recreation area, individually or in groups. [Dkt. 46-1 at 8-11, 12-13.]

In December 2009, there were forty-one inmates assigned to the CMU, and twenty-four of them identified themselves as Muslim. [Dkt. 18-1 at 3 ¶ 6.] Plaintiffs assert that even though their religion "commands them to pray five times daily, and group prayer is deemed to be either mandatory or theologically superior to individual prayer, congregate prayer is only allowed for one hour a week." [Dkts. 40 at 1 ¶ 1; *see also* 46-6 at 2 ¶¶ 2-3 (Carr affidavit attesting that "congregate prayer is a communal obligation").] Plaintiffs allege that preventing them from participating in group prayer five times per day imposes a substantial burden on their religious exercise, does not further a compelling government interest, and is not the least restrictive alternative to furthering any interest, all in violation of the RFRA. [Dkt. 40 at 6 ¶ 40.] They seek declaratory and injunctive relief. [Dkt. 40 at 6-7.]

Plaintiffs ask the Court to certify the following class: "all Muslim prisoners currently and in the future who are confined to the Communications Management Unit at the Federal Correctional Institution in Terre Haute, Indiana." [Dkt. 40 at 2 ¶ 10; 45 at 1 ¶ 2.] Plaintiffs estimate that the putative class, if certified, would currently contain twenty-five Muslim inmates housed in the CMU. [Dkts. 46 at 3.] Because Plaintiffs seek to include future Muslim prisoners who will be confined to the CMU, they argue that the putative class will expand because of inevitable turnover in the prison population.

DISCUSSION

I. Standards for Class Certification

It is Plaintiffs' burden to prove that an identifiable class exists that merits certification under Federal Rule of Civil Procedure 23(a). *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). The primary question when ruling on class certification is "whether plaintiff is as-

serting a claim which, assuming its merit, will satisfy the requirements of Rule 23." *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). The four prerequisites of Rule 23(a) are numerosity, commonality, typicality, and adequacy of representation. *Siegel v. Shell Oil Co.*, 612 F.3d 932, 935 (7th Cir. 2010). In addition to these four requirements, Plaintiffs must satisfy one of the criteria set forth in Rule 23(b). *Oshana*, 472 F.3d at 513. A class may be certified under Rule 23(b)(2), the section Plaintiffs rely upon here, only if the party opposing the class acted or refused to act on grounds that apply generally to the class. *Rahman v. Chertoff*, 530 F.3d 622, 627 (7th Cir. 2008). When deciding whether to certify a class, the Court may not blithely accept as true the allegations of the complaint but, instead, must "make whatever factual and legal inquiries are necessary under Rule 23" to resolve contested issues. *Szabo*, 249 F.3d at 676.

II. Evaluating Plaintiffs' Proposed Class

The parties agree that the FCI does not allow Muslim prisoners in the CMU to engage in congregate prayer, except for the Jumu'ah prayer that occurs each Friday. [Dkts. 40 at 1 ¶ 1; 57 at 4; 46-1 at 18.] They also agree that between 22 and 25 prisoners in the CMU have identified themselves as Muslim. [Dkts. 46 at 6 (Plaintiffs allege 25); 57 at 5 (FCI alleges 22).] The FCI emphasizes, however, that various sects within the Muslim faith have different interpretations of the requirements of group prayer, [dkt. 18-2 at 3], and that Plaintiffs have only offered evidence that five Muslim inmates in the CMU also share the belief that their faith requires group prayer five times per day, [dkt. 57 at 5]. Plaintiffs respond that differences between the sects do not matter because "whether or not a Muslim prisoner in the CMU believes that daily congregate prayer is required, or only preferred, is completely irrelevant to the prisoners' claim that denial of the congregate prayer opportunity violates the [RFRA]." [Dkt. 60 at 3.]

A. Existence of an Identifiable Class

The FCI argues that Plaintiffs have failed to sufficiently define the class and that their proposed definition, which includes all Muslims housed in the CMU, "sweeps too broadly . . . and cannot be sufficiently defined by objective criteria." [Dkt. 57 at 7.]

Plaintiffs must prove that the class is identifiable, and the class definition must be definite enough that the class can be ascertained. *Oshana*, 472 F.3d at 513. A class is sufficiently defined "if the proposed class members are ascertainable by reference to objective criteria." *McGarry v. Becher*, 2010 U.S. Dist. LEXIS 28246 *5 (S.D. Ind. Mar. 24, 2010). Conversely, a class is not sufficiently defined if highly individualized inquiries must be made to determine whether a person is a member of the proposed class. *Id.*

The Court agrees that the proposed class definition is overbroad because it encompasses all Muslims housed in the CMU, despite evidence that not all sects agree with Plaintiffs' belief that group prayer is required five times per day. [*See* dkt. 18-2 at 3 ¶¶ 4-9 (detailing differences between the Sunni, Shia, Sufism, Nation of Islam, and Moorish Science Temple sects regarding views on requirement of group prayer).] Although Plaintiffs argue that this distinction is irrelevant, in fact, it goes directly to the heart of this case. To succeed on their RFRA claim, Plaintiffs must prove that the government action at issue substantially burdens a sincerely held religious belief. *United States v. Jefferson*, 175 F. Supp. 2d 1123, 1127 (N.D. Ind. 2001). Plaintiffs assert that the FCI violated the RFRA by denying them the ability to exercise their sincerely held belief that group prayer is required five times per day. [Dkt. 40 at 6 ¶ 40.] If the Court were to certify a class that included prisoners who did not sincerely hold the religious belief at issue, the class would improperly include members who could not prove an element of the asserted claim. *See*

Oshana, 472 F.3d at 513-14 (affirming district court's decision not to certify class because some members of proposed class would be unable to prove elements of claim).

Even if the Court were to limit the class definition to only include Muslim prisoners in the CMU who, like Plaintiffs, possess a sincerely held religious belief that they are required to participate in group prayer five times per day, that narrow definition still fails because there is no evidence in the record that class members would be ascertainable by reference to objective criteria. *McGarry*, 2010 U.S. Dist. LEXIS 28246 at *5. For example, there is no evidence in the record that CMU prisoners ever specifically disclose to the facility their position as to whether their understanding of Islam requires group prayer five times per day. Because Plaintiffs have not sufficiently defined a class, their Motion to Certify must be denied.

B. Numerosity

Even if Plaintiffs had sufficiently defined a class, their Motion still fails because they do not meet the numerosity requirement of Rule 23(a)(1). The Court can only certify a class that "is so numerous that joinder of all members is impracticable." Fed. R. Civ. Pro. 23(a)(1). "Although there is no 'bright line' test for numerosity, a class of forty is generally sufficient to satisfy Rule 23(a)(1)." *McCabe v. Crawford & Co.*, 210 F.R.D. 631, 644 (N.D. Ill. 2002) (collecting cases).

There are fifty regular cells in the CMU and five segregation cells. [Dkt. 46-1 at 5-6.] Because each cell only houses one inmate, [*id.*], at most there could be fifty five identifiable inmates in the CMU. There were forty-one inmates in the CMU in December 2009, and twenty-four of them identified themselves as Muslim. [Dkt. 18-1 at 3 ¶ 6.] Plaintiffs concede that even under their proposed class definition, which the Court has already found to be overbroad, the putative class is "admittedly a relatively small class. . . ." [Dkt. 46 at 6.] And narrowing the class

to Muslim prisoners in the CMU who hold Plaintiffs' belief that group prayer is required five times per day shrinks the putative class to seven identifiable individuals (the two named plaintiffs and five additional inmates).[2] [Dkts. 46-3 to 46-8.] Seven individuals do not make joinder impracticable under these circumstances.

Plaintiffs argue that they can meet the numerosity requirement by including future Muslim prisoners who will be housed in the CMU because those individuals "will be subjected to the exact same unlawful policy." [Dkt. 60 at 5.] While the Court acknowledges that considering future class members may be appropriate in certain cases, this is not one of them. As discussed above, there is no evidence in the record that objective criteria exists to limit the class to members who possess Plaintiffs' specific religious belief, and this problem also applies to future members. *Cf. Willis v. Comm'r Ind. Dep't of Corr.*, 1:09-cv-0815-JMS-LJM, [dkt. 47 at 3] (S.D. Ind. 2009) (holding that plaintiff established numerosity with 122 identifiable class members and future class members who could be ascertained by objective criteria).

In sum, the evidence in the record identifies seven Muslim prisoners confined to the CMU—two of whom have filed suit—who believe that group prayer is required five times per day. Future inmates cannot be ascertained by objective criteria. Because joinder of the class members is not impracticable, Plaintiffs have failed to establish the numerosity requirement of Rule 23(a)(1). The Court need not address the other requirements for establishing class certification because Plaintiffs have failed to establish numerosity. *McGarry*, 2010 U.S. Dist. LEXIS 28246 at *8.

[2] At the time Plaintiffs moved to certify the class, Mr. Arnaout was a named plaintiff and submitted an affidavit in support of Plaintiffs' motion. [Dkt. 46-2.] Since that time, however, Mr. Arnaout has been released from prison and dismissed from this case. [Dkts. 62; 63.] Consequently, the Court will not consider Mr. Arnaout's affidavit.

CONCLUSION

Because Plaintiffs have not sufficiently defined a class and have failed to establish numerosity, their Motion to Certify the Class, [dkt. 45], is **DENIED**. Plaintiffs have until **December 3, 2010** to move to join the additional inmates whose affidavits were submitted as evidence for class certification if those individuals seek to be named plaintiffs in this case.

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