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United States District Court, N.D. Illinois, Eastern Division.

Kenya GARY and Tania Hayes, individually and on behalf of a class, Plaintiffs,
v.
Michael SHEAHAN, Sheriff of Cook County, in his individual and official capacity, Defendant.

No. 96 C 7294. | March 31, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

COAR, District J.

***1** Before this court is defendant Michael Sheahan's ("defendant" or "Sheahan") motion to decertify the plaintiff class with respect to damages against plaintiffs Kenya Gary and Tania Hayes on the behalf of a class ("plaintiffs" or "class"). For the following reasons, defendant's motion is DENIED.

Background

The plaintiffs Kenya Gary and Tania Hayes brought this case against Michael Sheahan under 42 U.S.C. § 1983 on behalf of the following certified class:

> All female inmates who have been or will be subjected to a strip search at the Cook County Department of Corrections (Jail) upon returning to the Jail from court after there is a judicial determination that there is no longer a basis for their detention, other than to be processed for release.

This court certified this class under Fed.R.Civ.P. 23(b)(2) and 23(b)(3) in its Memorandum Opinion and Order dated April 10, 1997. Soon after, plaintiffs filed for summary judgment against the defendant, which this court granted on August 19, 1998.[1] Now the defendant has filed a motion to decertify the plaintiff class as to damages.

[1] For a more detailed discussion of the facts of this case, see the Memorandum Opinion and Order dated August 19, 1998.

Standard for Class Certification

Fed.R.Civ.P. Rule 23 is the guideline for certification of a class action suit. In order for a class to be certified, the members must meet the four requirements of Rule 23(a) and one of the parts of Rule 23(b). Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1759 (1986). Rule 23(a) is satisfied only if 1) the class is so numerous that the joinder of all members is impracticable; 2) there are common questions of law or fact; 3) the claims of the representative parties are typical of the claims of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a). To satisfy Rule 23(b), the action must be such that 1) the prosecution of separate actions by or against individual members of the class would create a risk of incompatible or varying adjudications with respect to the individual member or adjudications which would necessarily implicate the rights of other members not party to the action; 2) the opposing party has acted or refused to act on grounds generally applicable to the class as a whole; or 3) the court finds that the questions of law or fact common to the members o the class as a whole predominate over any questions affecting only individual members and that a class action is the most efficacious method of adjudication. Fed.R.Civ.P. 23(b).

Class certification under Rule 23(b)(2) is appropriate when the class is seeking "final injunctive relief or corresponding declaratory relief." Fed.R.Civ.P. 23(b)(2). In contrast, Rule 23(b)(3) is appropriate when there are common questions of law and fact and the determination is superior to other available methods of resolution for fairness and efficiency. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1776; see also *Bennett v. Gravelle,* 323 F.Supp. 203, 218 (D.C.Md.1971).

Analysis

***2** The defendant's argument for decertification is threefold. First, he argues that class certification for damages under Rule 23(b)(3) is inappropriate for strip and search cases because of the individualized damages. (Dft's Motion, p. 3). Second, the class should be decertified because the plaintiffs do not have actual proof of injury for each member of the class. (Dft's Motion, p.

9). Finally, the plaintiffs sought injunctive relief under 23(b)(2), so only nominal damages can be awarded. (Dft's Motion, p. 12). Each of these arguments will be addressed in turn.

A. Individualized Damages

The defendant argues that 23(b)(3) class certification for damages in an inmate case is inappropriate because of the particularized and fact-specific inquiries. (Dft's Motion, p. 4). The defendant relies strongly on *Klein v. DuPage County,* a Northern District of Illinois case where the district court found that 23(b)(3) class treatment for damages in an inmate strip search case was inappropriate. 119 F.R.D. 29 (N.D.Ill.1988) (J. Moran). The court pointed to several factors that differentiated the damages between plaintiffs, such as whether plaintiffs were forced through more than one search; whether plaintiffs were viewed by members of the opposite sex; whether searches were manual or visual. *Id.* at 31. To support their reasoning, the court also recognized that the jail had "special institutional safety concerns" for "each plaintiff may have been arrested for different reasons, may have had full or no contact with those outside the prison, may pose little or great threats to prison safety, and may have been search in a variety of ways at numerous different times..." *Id.,* at 31.

In response, the plaintiffs cite *Eddleman v. Jefferson County, Kentucky,* which involved a strip search policy of all female inmates. The Sixth Circuit found a class certification under 23(b)(3), even though damages may be different between plaintiffs, for "[v]arying damages levels rarely prohibit a class action if the class members' claims possess factual and legal commonality." 1996 WL 495013, * *6 (6th Cir.(Ky.)). The Sixth Circuit differentiates the case from *Klein,* for *Eddleman,* like *Mary Beth G. v. City of Chicago,* 723 F.2d 1273 (7th Cir.1983), concerned a blanket policy of strip searching with no differentiation in application to the various plaintiffs. *Eddleman,* 1996 WL 495013 at * *6.

Both parties have weaknesses in their arguments. Plaintiffs are correct in asserting that the present case can be distinguished from *Klein.* While the court in *Klein* insinuates that the various plaintiffs were strip searched under a variety of circumstances, 119 F.R.D. at 30, in the present case the circumstances under which the searches occurred and the resulting injuries are not so different between plaintiffs to warrant decertification under 23(b)(3). Each of the plaintiffs was subject to a strip search at the same location, in the same manner, at the same time in the process (returning to the Jail after a court appearance to await discharge). (Mem. Opinion dated August 18, 1998, p. 3). The defendants conceded in the summary judgment motion that the strip search procedure was the same for all the female inmates. (Mem. Opinion dated August 18, 1998, p. 3). The plaintiffs present evidence that plaintiffs suffered similar injuries from the searches as well, seen in the study conducted by psychologist Dr. Joan Leska. (Pl's Resp., p. 3; Pl's Ex. A). While the study only demonstrated trends in responses among various plaintiffs, the responses show a similarity in the type and severity of injury as a result of the trauma caused by the searches. (Pl's Ex. A).[2] The Seventh Circuit has found that it is common for Rule 23(b)(3) class actions to involve differing levels of injury and damages for different class members; however, that does not mean that certifying the class under Rule 23(b)(3) is incorrect. *De La Fuente v. Stokely–Van Camp, Inc.,* 713 F.2d 225, 233 (7th Cir.1983), citing Wright & Miller, Federal Practice and Procedure: Civil 2d § 1784 (1972).

[2] The defendant argues that plaintiffs "sidestep" the issue of individualized damages by citing this study, for the study only takes a sample of the 12,000 class members and thus does not represent an analysis of typical claims among typical class members. (Dft's Reply, pp. 9–10). While the plaintiffs' study may have some selection bias in that survey responses were voluntary, the randomly selected sample of over one percent of the class should be enough to correct for bias and find a statistically significant response.

***3** In defendants favor, plaintiffs' reliance on *Eddleman* is incorrect. First, *Eddleman* is an unpublished opinion and citation is disfavored by the Sixth Circuit. 1996 WL 495013 at * *1 (6th Cir.1996). Second, *Eddleman* distinguishes *Klein* by referring to the finding of *Mary Beth G.,* where the court found that the class could be certified under 23(b)(3) on the constitutional claim, but individual trials were held on damages. *Id.,* at * *6. However, this court is not required to follow the reasoning of *Klein,* and while *Eddleman* does not have precedential value, this court agrees with the *Eddleman* court's reliance on *Mayer v. Mylod,* 988 F.2d 635, 640 (6th Cir.1993) (granting class certification on damages on common question of liability, regardless of level of damages), and *Sterling v. Velsicol Chemical Corporation,* 855 F.2d 1188, 1197 (6th Cir.1988) (granting class certification on class-wide liability that arose from a single course of conduct, even though damages were disparate) that varying levels of damages do not prohibit class certification under 23(b)(3). *Eddleman,* 1996 WL 495013 at * *6 (6th Cir.1996).

B. Proof of Actual Harm

Relying on *Madison County Jail Inmates v. Thompson,* the defendant argues that compensable damages may not be awarded on a class-wide basis in the absence of proof of actual harm. (Dft's Motion, p. 9, citing *Madison*

County Jail Inmates v. Thompson, 773 F.2d 834, 844 (7th Cir.1985)). When plaintiffs fail to present evidence which would support a finding of consequential injury to the whole class, then damages cannot be awarded. *Madison County,* 773 F.2d at 840, 844.

The present case can be distinguished from *Madison County.* First, in *Madison County,* the only damages alleged by plaintiffs for all the members of the class was increased stress. *Madison County,* 773 F.2d at 839. However, in the present case, common injuries such as trauma, fear, anxiety, and depression are alleged. (Pl's Resp., p. 4). The study presented by plaintiffs also shows that there is evidence of actual harm to these plaintiffs. (Pl's Ex. A).

C. Injunctive Relief

The defendant's final argument is that plaintiffs originally sought certification under 23(b)(2) for injunctive relief. Since the plaintiffs did not argue for certification under 23(b)(3) until their reply to their motion for certification, they should only be allowed to certify for damages under 23(b)(2) and thus only receive nominal damages. (Dft's Motion, pp. 12–13). The defendant relies upon the holding in *Hunter v. Auger* that even plaintiffs who are in fact subjected to unconstitutional strip searches are not entitled to an award of more than nominal damages where plaintiffs' rights are fully vindicated by a grant of declaratory and injunctive relief. 672 F.2d 668 (8th Cir.1982). The response to this argument is twofold.

First, this court certified this case under both 23(b)(2) and 23(b)(3). (Mem. Opinion dated April 10, 1997). Second, even if this court found this to be a 23(b)(2) action, damages could still be sought, for courts have allowed damages in (b)(2) cases when the primary relief sought was an injunction. *Parker v. Local Union No. 1466,* 642 F.2d 104, 107 (5th Cir.1981) ("class certification under 23(b)(2) does not automatically preclude an award of monetary damages when the primary relief sought is injunction or declaratory. The rule pointedly refers to injunctive or declaratory relief but does not, in terms, preclude monetary relief."); Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1775. Therefore, decertification will not be granted on these grounds.

Conclusion

***4** For the foregoing reasons, defendant Michael Sheahan's motion to decertify the plaintiff class with respect to damages is DENIED.