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United States District Court, S.D. Indiana, New Albany Division.

NOON, Valerie L, Middleton, Leah D, Clark, Christine F, Harmon, Celina A, Wilson, Kimberly, Chism, William % 6/29/99 Granted Mot to Intervene as Pltf, Darnall, Christi Lynn % 6/29/99 Granted Leave as Intervening Pltf, Kingery, Brian % 6/29/99 Granted as Intervening Pltf, Mins, Eva R % 6/29/99 Granted Leave as Intervening Pltf, Mc Claim, Sharon % 6/29/99 Granted as Intervening Pltf\ , Greenwell, William % 6/29/99 Granted as Intevening Pltf, Plaintiffs,
v.
SAILOR, Sheriff Clyde R, Individually & as Former Sheriff of Harrison County, Carver, William, Individually and as the Sheriff of Harrison County, Defendants.
Valerie L. NOON, et al., Plaintiffs,
v.
Sheriff Clyde R. SAILOR, individually) and as former Sheriff of Harrison County, and William Carver, individually and a Sheriff of Harrison County, Defendants.

No. NA99-0056-C-H/G. | March 14, 2000.

Opinion

ENTRY ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

HAMILTON, J.

***1** Valerie L. Noon and 102 other named plaintiffs have sued the current and former sheriffs of Harrison County, Indiana, for violating their federal constitutional rights. Plaintiffs have sued former Sheriff Clyde R. Sailor and current Sheriff William Carver in both their individual and official capacities for subjecting them to strip searches when they were detained in the Harrison County Jail. In their Second Amended Complaint, plaintiffs seek damages for the alleged violations.

Plaintiffs seek certification of a plaintiff class under Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs originally requested certification under both Rule 23(b)(2) and 23(b)(3), but in their reply brief abandoned the request under Rule 23(b)(2). Plaintiffs propose a class defined as follows:

> All persons arrested for offenses not greater than a misdemeanor, with the exclusion of offenses involving misdemeanor possession of controlled substances, and with the inclusion of the offense of Operating While Intoxicated, as a class D Felony, between April 7th, 1997 to April 7th, 1999 and that were required by the Harrison County Jail to remove their clothing for visual inspection of all or part of their exposed bodies, unless [there] existed reasonable cause to believe they were carrying concealed weapons or contraband.

Plaintiffs propose that the issue of liability be determined on a class-wide basis, with individual damages determinations left to bifurcated proceedings after the issue of liability is decided. Defendants have opposed the motion to certify a class. For the reasons explained below, the court denies plaintiffs' motion for class certification.

To obtain certification of a plaintiff class under Rule 23, a plaintiff must satisfy the four criteria of Rule 23(a)-numerosity, commonality, typicality, and adequacy-and the criteria of at least one subparagraph under Rule 23(b). See, *e.g., Retired Chicago Police Ass'n v. City of Chicago,* 7 F.3d 584, 596 (7th Cir.1993). Defendants argue that plaintiffs have not satisfied the Rule 23(a) elements of numerosity, commonality and typicality.[1]

Numerosity is not a serious problem here. With their reply brief, plaintiffs have provided evidence that more than 1000 people fall within the proposed class definition (although the evidence does not explain how the issue of reasonable suspicion of contraband has been addressed). In any event, there is little reason to doubt that plaintiffs' proposed class definition is large enough to include at least several hundred people, up to a thousand or so. That is enough for a class.

Commonality does not require that all questions of fact and law be common. See generally 7A Wright & Miller, Federal Practice & Procedure 2d § 1763 (1986). In this case there are common questions of fact concerning the policies and general practices with respect to strip-searches of inmates at the Harrison County Jail: What were those policies, why were they adopted, how consistently were they followed, etc.? Assuming plaintiffs can show there was a generally applicable policy or practice of strip-searching all or nearly all arrestees at the Harrison County Jail, the reasonableness of that policy or practice as applied to some recurring factual patterns

would also present common questions of law.

***2** Typicality depends on whether the named representatives' claims have "the same essential characteristics as the claims of the class at large," which may be the case where the named plaintiffs' claims arise from the same event or practice or course of conduct that gives rise to all class members' claims. *Retired Chicago Police Ass'n,* 7 F.3d at 596-97, quoting *De La Fuente v. Stokely-Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir.1983). The court gives plaintiffs the benefit of the doubt on the issue of typicality. Plaintiffs assert that all of their claims and all claims of other class members arise from application of an alleged general policy or practice in the Harrison County Jail. There are likely to be some important factual differences and inquiry into individual circumstances will be necessary, but the effects of those circumstances are addressed with respect to the criteria under Rule 23(b)(3).

Accordingly, the court does not deny class certification for any failure to meet the criteria of Rule 23(a).

Plaintiffs must also show their proposed class meets the criteria of at least one of the subparagraphs under Rule 23(b). Plaintiffs have dropped their earlier reliance on Rule 23(b)(2) because injunctive relief and declaratory relief are not substantially at issue in this case. Plaintiffs now rely on Rule 23(b)(3), which authorizes certification of an "opt-out" class (typically suitable for damages claims) if:

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Plaintiffs' theory of the case is that the Harrison County Sheriff had a standard policy of strip-searching all persons detained in the jail, and that the policy was unconstitutional as applied to detainees who were arrested for misdemeanors (or operating while intoxicated even if charged as a felony because of prior convictions), provided that the detainees were not arrested for controlled substance offenses, and provided there was not reasonable suspicion for believing the detainee had concealed controlled substances, weapons, or other contraband in clothing and/or body cavities.

Defendants contend that a class would be unmanageable because the court would need to consider the specific facts of each arrestee first to determine whether the person is a member of the class and second, if liability is found, to decide on damages for each person.

***3** In considering the factors specifically identified in Rule 23(b)(3), the court finds that members of the class do not have a powerful interest in individually controlling the prosecution of separate actions. Individual damages are likely to be relatively modest, and the case does not present powerful reasons for individual control, as might be true in cases involving significant personal injuries. See, *e.g., In re Dalkon Shield IUD Product Liability Litigation.,* 693 F.2d 847, 856 (9th Cir.1982) (persons pursuing personal injury claims have substantial interest in controlling litigation and in being represented by counsel of their own choosing); *Martin v. American Medical Systems, Inc.,* 1995 WL 680630,*8 (S.D.Ind. Oct. 25, 1995) (denying class certification in product liability case related to medical devices). Also, the parties have not called the court's attention to other pending litigation involving this controversy about the Harrison County Jail.

With respect to the desirability or undesirability of concentrating the litigation of the claims in the particular forum, this is not a case where the economics of plaintiffs' claims require a class action. Cf. *Deposit Guaranty Nat'l Bank v. Roper,* 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device ."); *In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1299 (7th Cir.1995) ("In most class actions-and those the ones in which the rationale for the procedure is most compelling-individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation."). The combination of the prospect of attorney fee awards under 42 U.S.C. § 1988, the joinder of claims of 103 plaintiffs, and possible offensive collateral estoppel provides a practical alternative to the proposed class action.

The decisive factor, however, is the difficulty likely to be encountered in managing a class action in this case. This difficulty stems from the nature of plaintiffs' claims.

In *Bell v. Wolfish,* 441 U.S. 520, 558-60 (1979), the

Supreme Court considered whether visual body cavity and strip searches violated the Fourth Amendment rights of prison inmates. The Court stated that whether such searches were reasonable, and thus constitutional, depended on "a balancing of the need for the particular search against the invasion of personal rights that the search entails." 441 U.S. at 559. In determining whether a search is reasonable the Court instructed other courts to "consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* In holding that the searches at issue in *Bell* were reasonable, the Court noted the unique security dangers presented by detention facilities and the potential for smuggling of weapons and contraband. In *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1272-73 (7th Cir.1983), the Seventh Circuit applied the reasoning of *Bell* and found that a city's broad policy of strip-searches and body cavity searches of all women arrested (but not men) was unconstitutional as applied to women arrested for traffic offenses where there was no reasonable suspicion of hidden contraband.

***4** Under *Bell* and *Mary Beth G.,* the claims of any individual arrestee subjected to a strip search must be evaluated by looking at the individual circumstances of the arrestee and the search. In addition, if an arrestee can show his or her Fourth and/or Fourteenth Amendment rights were violated by the search, any consideration of damages would be individualized. See *Klein v. DuPage County,* 119 F.R.D. 29, 31-32 (N.D.Ill.1988) (denying class certification under Rule 23(b)(3) in similar case).

To solve these problems of individualized consideration as to both liability and damages, which weigh against use of a 23(b)(3) class action for damages, plaintiffs propose (1) to define the class to include only members for whom a strip search would have been unreasonable, and (2) to bifurcate damages decisions for separate trials on each class member's claim. The plaintiffs have limited the proposed class to persons strip searched who were (a) arrested for misdemeanors (plus operating while intoxicated when charged as a felony), but (b) excluding arrests for controlled substance offenses, and (c) excluding persons for whom jail personnel had a reasonable suspicion of hidden contraband. In essence, plaintiffs seek to avoid most of the problems of highly individualized consideration on the merits of hundreds of class members' claims by defining the class so as to exclude from the class any person for whom a strip search would have been reasonable under *Bell* and *Mary Beth G.*

The problem with this proposed class definition is that the court could not determine whether any individual was a member of the class without hearing evidence on what would amount to the merits of each person's claim. Where that type of inquiry is needed to determine whether a person is a member of a class, the proposed class action is unmanageable virtually by definition. See *Kenro, Inc. v. Fax Daily, Inc.,* 962 F.Supp. 1162, 1169 (S.D.Ind.1997) (denying class certification where determining class membership would require individualized determination on the merits of the claim); *Indiana State Employees Ass'n v. Indiana State Highway Comm'n,* 78 F.R.D. 724, 725 (S.D.Ind.1978) (denying class certification where "it would be impossible for the Court to ascertain whether or not a given person is a member of the class until a determination of ultimate liability as to that person is made"); *Dafforn v. Rousseau Associates, Inc.,* 1976-2 Trade Cas. P61,219 (N.D.Ind.1976) (denying certification of proposed "fail-safe" class defined as all persons who paid illegally fixed brokerage fees); see also *Adashunas v. Negley,* 626 F.2d 600, 604 (7th Cir.1980) (affirming denial of class certification where class was unmanageable; determining whether any individual child was a member of proposed class would require extensive battery of educational and psychological tests); *Newton v. Southern Wood Piedmont Co.,* 163 F.R.D. 625, 632 (S.D.Ga.1995) (denying to certify class of all persons exposed to chemicals from wood treatment plant and "who have specifically evidenced a keratosis" because individualized inquiry into medical condition and exposure to chemical would be needed to determine whether any person was a member), *aff'd mem.,* 95 F.3d 59 (11th Cir.1996); 7A Wright & Miller, Federal Practice & Procedure 2d § 1760 at 121 (class must be defined in way that it is administratively feasible for court to determine whether particular individual is a member).

***5** The plaintiffs' proposed class definition would require an individualized inquiry in each person's case as to whether there was reasonable suspicion that the person had some hidden weapon, drugs, or other contraband at the time of the search. That determination could not be made without hearing evidence on the circumstances of each person's arrest and detention-essentially, a trial on the merits. Cf. *O'Connor v. Boeing North American, Inc.,* 184 F.R.D. 311, 327-28 (C.D.Cal.1998) (granting class certification where person's answers to simple questionnaire on medical history would be sufficient to determine class membership). In addition, as Judge Moran explained in *Klein v. DuPage County,* an individualized determination as to damages would be needed in the event that plaintiffs prevail on the issue of liability. 119 F.R.D. at 31-32.

Because highly individualized inquiries would be needed both to determine whether a person is a member of the proposed class and to determine damages, the court finds that a class action is not superior to other methods of resolving the matters in controversy. The court has considered plaintiffs' argument that many individuals may have been the victims of an unconstitutional practice without knowing their rights were violated or that a remedy is available. That may be so, but Rule 23 still requires a manageable class, and plaintiffs have not proposed a manageable class in this case.

The court is also aware that many individual plaintiffs have joined in this case. As a result of this last feature, this case will bear many characteristics of a class action. However, the court need not magnify the difficulties by adding the claims of at least several hundred other individuals as members of an unmanageable class.

Accordingly, plaintiffs' motion for class certification is hereby DENIED. The court will set a pretrial conference in the near future to consider how best to proceed toward resolution of the claims of all named plaintiffs.

So ordered.

Footnotes

1 The defense has not challenged the named plaintiffs' and their attorney's ability to represent the proposed class adequately. Although the court has an independent obligation to consider the question, the court sees no reasons to doubt the adequacy of the named plaintiffs or their attorney.