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United States District Court,
S.D. New York.

Lucy AMADOR, Stacie Calloway, Tonie Coggins, Stephanie Dawson, Latasha Dockery, Tanya Jones, Bobbie Kidd, Bette Jean Mcdonald, Kristina Muehleisen, Jeanette Perez, Laura Pullen, Corilynn Rock, Denise Saffioti, Shantelle Smith, Shenyell Smith, Hope Susoh a/k/a Hope Susoh Brevard, and Nakia Thompson, on behalf of themselves and all others similarly situated,
Plaintiffs,
v.
SUPERINTENDENTS OF THE DEPARTMENT OF CORRECTIONAL SERVICES ("Docs") Anginell Andrews, Roberta Coward, Dennis Crowley, Alexandreena Dixon, Elaine Lord, Ronald Moscicki and Melvin Williams; Docs Deputy Superintendent Donald Wolff; Docs Director of Personnel Terry Baxter; Docs Inspector General Richard Roy; Docs Director of the Sex Crimes Unit of the Inspector General's Office Barbara D. Leon; Docs Director of the Bureau of Labor Relations Peter Brown; Docs Commissioner Glenn S. Goord; Office of Mental Health Commissioner James Stone; Docs Correction Officers Frederick Brenyah, Charles Davis, Michael Evans, Sergeant Michael Galbreath, Officers John E. Gilbert III, Hudson, Rick Larue, Rico Meyers, Mario Pique, Jeffrey Shawver, Robert Smith, Sergeant Smith, Officers Sterling, Delroy Thorpe, and Pete Zawislak,
Defendants

No. 03 Civ. 0650KTDGWG. | Sept. 13, 2005.

Opinion

MEMORANDUM & ORDER

DUFFY, J.

***1** Plaintiffs are seventeen current and former female inmates of the New York State Department of Correctional Services ("DOCS"). Pursuant to 42 U.S.C. § 1983, Plaintiffs have brought suit against two sets of defendants: (1) line officers employed at certain New York state prisons ("Line Officer Defendants") who allegedly sexually abused and/or harassed Plaintiffs; and (2) supervisors of certain New York State prisons and other DOCS officials ("Supervisory Defendants") who allegedly were aware of this abuse yet failed to take the appropriate measures to stop it. Plaintiffs seek monetary damages from the Line Officer Defendants and declaratory and injunctive relief against the Supervisory Defendants .[1]

Both sets of defendants have filed motions to dismiss or for summary judgment and Plaintiffs have filed a motion for class certification and for entry of default judgment.

I. ***BACKGROUND***

Plaintiffs allege that DOCS correctional staff have subjected female prisoners to repeated acts of sexual abuse and harassment.[2] These acts range in severity from verbal harassment to unwanted touching to "coerced" sexual intercourse to forcible rape. Plaintiffs allege that the DOCS Inspector General's Office receives approximately 200 complaints of sexual misconduct per year. Plaintiffs also contend that, between 1996 and 2002, DOCS referred thirty-four case for criminal prosecution. Of these cases, twenty-four officers have been convicted. Since 2002, male members of the correctional staff from Albion, Bayview, and Lakeview Correctional Facilities have been convicted of crimes of sexual misconduct of prisoners. Since late 2003, male members of the correctional staff from Albion, Bedford Hills, Taconic, and Bayview Correctional Facilities have been charged with sexual misconduct.

Against this backdrop, Plaintiffs set forth a litany of allegations of abuse they claim to have suffered at the following DOCS facilities: Albion, Bayview, Bedford Hills, and Taconic, as well as the Willard Drug Treatment Center. The Line Officer Defendants who allegedly committed these acts of sexual misconduct are:

• *Officer Frederick Brenyah:* allegedly sexually harassed and abused Plaintiff Stephanie Dawson at Taconic Correctional Facility. (Am.Compl.¶ 5(a).)

• *Officer Charles Davis:* allegedly sexually harassed and abused Plaintiff Tonie Coggins at Albion Correctional Facility. (Am.Compl.¶ 5(b).)

• *Officer Michael Evans:* allegedly sexually harassed and abused Plaintiff Latasha Dockery at Bedford Hills Correctional Facility. (Am.Compl.¶ 5(c).)

• *Sergeant Michael Galbreath:* allegedly sexually harassed and abused Plaintiff Lucy Amador at Albion Correctional Facility. (Am.Compl.¶ 5(d).)

• *Officer John E. Gilbert III:* allegedly sexually harassed and abused Plaintiff Kristina Muehleisen at Albion Correctional Facility; allegedly sexually harassed and

abused Plaintiff Bette Jean McDonald at Albion Correctional Facility; and allegedly sexually abused Plaintiff Corilynn Beth Rock at Albion Correctional Facility. (Am.Compl.¶ 5(e).)

***2** • *Officer James Hudson:* allegedly sexually harassed and abused Plaintiff Shantelle Smith at Bayview Correctional Facility. (Am.Compl.¶ 5(f).)

• *Officer Rick LaRue:* allegedly sexually harassed and abused Plaintiff Laura Pullen at Albion Correctional Facility. (Am.Compl.¶ 5(g).)

• *Officer Rico Meyers:* allegedly sexually harassed and abused Plaintiff Latasha Dockery at Bedford Hills Correctional Facility; allegedly sexually harassed and abused Plaintiff Nakia Thompson at Bedford Hills Correctional Facility. (Am.Compl.¶ 5(h).)

• *Officer Mario Pigue:* allegedly sexually harassed and abused Plaintiff Bette Jean McDonald at Taconic Correctional Facility. (Am.Compl.¶ 5(i).)

• *Officer Jeffrey Shawver:* allegedly sexually harassed and abused Plaintiff Stacie Calloway at Albion Correctional Facility; allegedly sexually harassed and abused Plaintiff Tanya Jones at Albion Correctional Facility; allegedly sexually harassed and abused Plaintiff Hope Susoh at Albion Correctional Facility. (Am.Compl.¶ 5(j).)

• *Officer Robert Smith:* allegedly sexually harassed and abused Plaintiff Lucy Amador at Albion Correctional Facility. (Am.Compl.¶ 5(k).)

• *Sergeant Smith:* allegedly "facilitated" the sexual harassment and abuse of Plaintiff Jeanette Perez at Bayview Correctional Facility. (Am.Compl.¶ 5(l).)

• *Officer Chris Sterling:* allegedly "facilitated" the sexual harassment and abuse of Plaintiff Jeanette Perez at Bayview Correctional Facility. (Am.Compl.¶ 5(m).)

• *Officer Delroy Thorpe:* allegedly sexually harassed and abused Plaintiff Shenyell Smith at Bedford Hills Correctional Facility. (Am.Compl.¶ 5(n).)

• *Officer Pete Zawislak:* allegedly sexually harassed and abused Plaintiff Jeanette Perez at Bayview Correctional Facility. (Am.Compl.¶ 5(o).)

Plaintiffs seek monetary damages from each of these Line Officer Defendants.

Plaintiffs further contend that the Supervisory Defendants are aware of this rampant abuse, yet are deliberately indifferent to it and have failed to take appropriate protective measures. Specifically, Plaintiffs allege that the Supervisory Defendants: (1) fail to properly screen, assign, train, and supervise their staff; (2) employ an inadequate system for reporting and investigating complaints of sexual misconduct; and (3) fail to provide necessary or adequate mental health treatment to female prisoners who claim they were subject to sexual misconduct by DOCS staff. The Supervisory Defendants include:

• *Superintendents of:* Albion, Bayview, Beacon, Bedford Hills, Lakeview, and Taconic Correctional Facilities, and the Willard Drug Treatment Center. They are sued in their official capacity for "their failure to protect women prisoners from sexual harassment and abuse." (Am.Compl.¶ 7.)

• *Deputy Superintendent Donald Wolff:* Wolff was Deputy Superintendent for Security at Albion Correctional Facility. He allegedly received multiple complaints about Line Officer Defendants Gilbert and Shawver but did not take sufficient action. This failure purportedly resulted in those Line Officer Defendants abusing Plaintiffs Calloway, Jones, McDonald, Rock, and Susoh. Wolff is sued in his individual capacity for compensatory and punitive damages for "his failure to protect these plaintiffs." (Am.Compl.¶ 6.)

***3** • *Director of Personnel for DOCS (Terry Baxter):* Baxter is sued in his official capacity for the "failure to screen, assign and re-assign staff appropriately to prevent the sexual harassment and abuse of women prisoners." (Am.Compl.¶ 8.)

• *Inspector General of the New York State Department of Correctional Services (Richard Roy) and Director of the Sex Crimes Unit of the DOCS Inspector General's Office (Barbara D. Leon):* Both are sued in their official capacity for "failure appropriately to investigate, refer for discipline and, in conjunction with the Superintendents and other DOCS supervisory defendants, take action in response to complaints of sexual harassment and abuse." (Am.Com pl.¶¶ 9-10.)

• *Director of the Bureau of Labor Relations of DOCS (Peter Brown):* Brown is sued in his official capacity for the "failure to investigate and discipline staff so as to prevent the sexual harassment and abuse of women prisoners." (Am.Compl.¶ 11.)

• *Commissioner of DOCS (Glenn S. Goord):* Goord is sued in his official capacity for "his failure to protect women prisoners from sexual harassment and abuse." (Am.Compl.¶ 12.)

• *Commissioner of the New York State Office of Mental Health (James J. Stone):* Stone is sued in his official capacity for his "failure to provide appropriate and minimally adequate mental health treatment to women prisoners who have complained of sexual harassment and

abuse." (Am.Compl.¶ 13.)[3]

Plaintiffs seek the following relief against the Supervisory Defendants: (1) a declaratory judgment that the policies, practices, actions, and omissions of the Supervisory Defendants violate Plaintiffs' First, Fourth, Eighth, and Fourteenth Amendment rights; and (2) an injunction enjoining the Supervisory Defendants from subjecting women to sexual abuse and ordering them to formulate a plan to end it.

II. ***JOINDER AND SEVERANCE***

Before addressing the various pending motions, I note my doubts concerning whether each Plaintiff's individual claim for damages against specific Line Officer Defendants is properly joined: (1) with Plaintiffs' purported class claims against the Supervisory Defendants for injunctive relief; and (2) with other Plaintiffs' individual claims for damages. Even assuming that these claims are properly joined under Federal Rule of Civil Procedure ("Rule") 20, allowing them to proceed on a consolidated basis, among other things, risks seriously prejudicing the Line Officer Defendants at trial and requiring them to incur additional, unnecessary expenses until such a trial occurs. Accordingly, I would like both parties to address: (1) whether I should sever Plaintiffs' individual damages claims, pursuant to Rules 20(b), 21, and/or 42; and (2) if severance is granted, whether any additional relief is necessary.[4] Both sets of Defendants may file briefs in support of (or in opposition to) severance within twenty days of the date of this order. Plaintiffs will then have fifteen days to file a response. I will allow the Defendants an additional seven days to file a reply.

***4** Because I may order additional relief if severance is granted, I reserve ruling on any motions concerning Plaintiffs' claims for damages (including claims for damages against any Supervisory Defendant).

III. ***SUPERVISORY DEFENDANTS' MOTIONS TO DISMISS***

Turning to the Supervisory Defendants' motions, they move to dismiss Plaintiffs' claims for injunctive relief on the following grounds: (1) lack of standing; (2) improper venue; (3) failure to exhaust; and (4) failure to state a claim. As set forth below, Defendants' motions are granted in part, and denied in part.[5]

A. ***Standing Of Named Plaintiffs***

While the Amended Complaint purports to be filed on behalf of a class, the named Plaintiffs must still establish that they each have standing to seek injunctive relief. *See Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 40 n. 20 (1976) ("That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.").

To establish standing, "a plaintiff must demonstrate an injury in fact, causation of that injury, and a likelihood that the requested relief will redress that injury." *Maneely v. City of Newburgh,* 208 F.R.D. 69, 72 (S.D.N.Y.2002). Where, as here, a plaintiff seeks injunctive relief, he must also "show a likelihood that he or she will be injured in the future." *Deshawn E. v. Safir,* 156 F.3d 340, 344 (2d Cir.1998). This likelihood must be "real and immediate," not merely "[a]bstract," "conjectural" or "hypothetical." *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974) (citation and internal quotation omitted).

Thus, in the seminal case of *City of Los Angeles v. Lyons,* 461 U.S. 95, 105-06 (1983), the Supreme Court held that a plaintiff who had once been placed in a chokehold by the Los Angeles police lacked standing to seek injunctive relief against the police department. The Court reasoned that the plaintiff "would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion that either ... all police officers ... always choke any citizen ... [or] that the City ordered or authorized police officers to act in such manner ." Relying on *Lyons* and its progeny, Supervisory Defendants challenge the standing of those Plaintiffs who either: (1) were released from DOCS' custody before the Amended Complaint was filed; or (2) were transferred (before the Amended Complaint was filed) to a different facility than the one where their alleged abuse occurred .[6]

i. ***Standing Of Plaintiffs Who Were Released From Prison At The Time the Amended Complaint Was Filed***

Applying the logic of *Lyons,* I agree that a plaintiff who has been released from prison lacks standing to bring a subsequent suit against that prison for injunctive relief. *See Hallett v. New York State Dept. of Correctional Services,* 109 F.Supp.2d 190, 196 (S.D.N.Y.2000). Accordingly, since Plaintiffs Amador, McDonald, Perez, Pullen, and Rock were released from prison before joining the Amended Complaint (*see* Am Compl. ¶ 4), they lack standing to pursue the class claims for declaratory and injunctive relief.

ii. ***Standing Of Plaintiffs Who Were Transferred To***

Different Prisons At The Time The Amended Complaint Was Filed

***5** Supervisory Defendants also point out that certain of the remaining Plaintiffs were, before the filing of the Amended Complaint, transferred from the facility at which their alleged abuse occurred.[7] Supervisory Defendants argue that these Plaintiff lack standing to seek injunctive relief against the supervisors of the prisons at which these Plaintiffs were first incarcerated (as those claims are moot) and where they were incarcerated at the time of the Amended Complaint (since they presumably have not suffered any injury there).

Generally speaking, once a prisoner is transferred from a prison, his claims relating to conditions at that prison will become moot. *See Nelson v. Heiss,* 271 F.3d 891, 897 (9th Cir.2001). In this case, however, Plaintiffs' claims are not limited to the conditions of a specific prison. Rather, Plaintiffs claim that, as a whole, DOCS failed to take appropriate corrective measures in response to rampant sexual abuse of female prisoners. Plaintiffs contend that they were transferred to prisons that employed the same policies and practices that caused their earlier abuse. I believe that these allegations are sufficient, at the pleading stage of this case, to spell out standing for these Plaintiffs' claims against the relevant superintendents. *Cf. Lehn v. Holmes,* 364 F.3d 862, 871-72 (7th Cir.2004) (allowing plaintiff to proceed with claim challenging statewide prisons' smoking policy, despite his transfer from prison where he initially suffered injury); *Osterback v. Moore,* No. 4:01 CV 76-WS, 2001 WL 1770092, at *2 (N.D.Fla. Nov. 6, 2001) (noting that plaintiff challenging state prison policies "can expect to be affected by these rules and policies at any institution where he may be housed as the rules are apparently applied on a state-wide basis").[8]

I do not believe, however, that any Plaintiff has standing to sue the Superintendents of the Beacon or Lakeview facilities for injunctive relief. No Plaintiff claims to have suffered sexual abuse at either facility and no Plaintiff was incarcerated there at the time the Amended Complaint was filed. Accordingly, the claims against Defendants Crowley and Mosciki (Superintendents of the Beacon and Lakeview facilities) are dismissed from this action.

iii. ***Standing Of Remaining Plaintiffs***

The Supervisory Defendants recently informed me by letter that seven additional Plaintiffs were released from prison after the Amended Complaint was filed. The Supervisory Defendants argue that these Plaintiffs therefore now lack standing to sue for injunctive relief. I offer the Supervisory Defendants the opportunity to further brief this issue in conjunction with their submission relating to joinder. In addition, I would like the Supervisory Defendants to address whether the "relation back" doctrine, *see Sosna v. Iowa,* 419 U.S. 393 (1975) and its progeny, allows the recently released Plaintiffs to continue as potential class representatives, even if their individual claims for injunctive relief are technically moot. Plaintiffs may file a response in accordance with the schedule outlined above in the context of joinder.

B. ***Venue***

***6** Pursuant to Rule 12(b)(3), Supervisory Defendants move for dismissal of the claims of the remaining Plaintiffs Calloway, Coggins, Jones, Muehleisen, Saffioti, and Susoh. The Defendants note that these Plaintiffs alleged they were abused at the Albion Correctional Facility or at the Willard Drug Treatment Facility-both of which are located in the Western District of New York (the "Western District"). Accordingly, the Defendants argue their claims are improperly venued.

Where, as here, a case is not founded solely on diversity, it is properly venued in: (1) a district where any defendant resides if all defendants reside in the same state; (2) a district where a substantial part of the events giving rise to the claim took place; or (3) a district where any defendant may be found, if there is no other district where the case may be brought. *See* 28 U.S.C. § 1391(b). Plaintiffs maintain that they have established venue under both subsections (1) and (2). I agree.

For venue purposes, "state officials against whom actions are brought for their official acts reside in the district where they perform their official duties." *Baker v. Coughlin,* No. 93 Civ. 1084(RWS), 1993 WL 356852, at *2 (S.D.N.Y. Sept. 9, 1993). All of the defendants in this case are current or former New York state officials or agents, who are sued for actions taken in the course of their employment. Thus, for venue purposes, these defendants are deemed to reside in New York state. *See id.* at *2 (noting that "for purposes of venue, the Correctional Officer Defendants reside in the Western District of New York [where they work], while the Official Defendants, whose headquarters are in Albany, New York, reside in the Northern District of New York"); *see also Sharif v. Goord,* No. 03 Civ. 7664(DAB), 2005 WL 2087840, at *7 (S.D.N.Y. Aug. 26, 2005); *Bailey v. Hardy,* No. 94 Civ. 2805(LMM), 1994 WL 440929, at *1 (Aug. 11, 1994). Since all defendants reside in the same state and since some reside in this District, venue in this District is appropriate.

Plaintiffs have also established venue with respect to the Supervisory Defendants under subsection (2). This subsection is satisfied because approximately one half of the alleged sexual abuse occurred in correctional facilities located in the Southern District of New York and because

Plaintiffs purport to challenge uniform DOCS policies and practices that are enforced statewide. *See Leucadia Nat. Corp. v. FPL Group Capital, Inc.,* No. 93 Civ. 2908(LAP), 1993 WL 464691, at *6 (S.D.N.Y. Nov. 9, 1993) (noting that, with respect to comparable venue provision, "[t]his standard does not require venue in the district with the *most* substantial contacts to the dispute; rather it is sufficient that *a* substantial part of the events occurred there, even if a greater part of the events occurred elsewhere.") (emphasis in original). Accordingly, Supervisory Defendants' motion to dismiss for improper venue is denied.

***7** I reserve ruling, however, on Supervisory Defendants' alternate motion to transfer venue, pending my consideration of joinder and related issues.

C. *Failure To Exhaust:*

The Supervisory Defendants also move to dismiss the Amended Complaint on the grounds that Plaintiffs failed to exhaust their administrative remedies. The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 ... or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility *until ... administrative remedies as available are exhausted."* (emphasis added).

Exhaustion is an affirmative defense, rather than a jurisdictional requirement. *See Richardson v. Goord,* 347 F.3d 431, 434 (2d. Cir.2003). Thus, a complaint may only be dismissed under Rule 12(b)(6) for failure to exhaust "if nonexhaustion is clear from the face of the complaint." *McCoy v. Goord,* 255 F.Supp.2d 233, 251 (S.D.N.Y.2003). If not, "a defendant's motion to dismiss should be converted to one for summary judgment pursuant to Rule 12(b) for the narrow purpose of determining whether the plaintiff exhausted his administrative remedies." *Page v. Breslin,* No. 02-CV-6030 (SJF) (LB), 2004 WL 2713266, at *2 (E.D.N.Y. Nov. 29, 2004).

In arguing for dismissal, the Supervisory Defendants rely on materials outside the Amended Complaint. Most notable of these documents is a declaration from Thomas Coughlin (Director of the New York Statement of Correctional Services), to which are purportedly attached copies of all grievances made by Plaintiffs before January 28, 2003 (the date of the original Complaint). The Supervisory Defendants contend that each of these grievances addresses only isolated instances of sexual misconduct committed by correctional officers. The Supervisory Defendants maintain that no Plaintiff filed or made grievances with respect to any of their claims for injunctive relief.

Plaintiffs characterize this argument as imposing "a novel hurdle to the exhaustion requirement." (Pl. Mem. in Opp'n. at 10.) Specifically, Plaintiffs take issue with the notion that "before filing a lawsuit seeking institutional reform, the plaintiffs must grieve not only individual sexual abuse, but also the policies and procedures regarding prison officials' response to sexual abuse." (*Id.*) Plaintiffs appear to argue that merely grieving individual instances of sexual abuse automatically exhausts any complaints concerning any policies or practices that might somehow contribute to that abuse. Plaintiffs also contend that any possible non-exhaustion should be excused on a variety of grounds, including estoppel and special circumstances.

The Second Circuit has emphasized that "inmates must provide enough information about the conduct of which they complain to allow prison officials to take appropriate responsive measures." *Johnson v. Testaman,* 380 F.3d 691, 697 (2d Cir.2004). Drawing off this principle, cours have denied prisoners' claims where their administrative grievances failed to put prison officials on sufficient notice of their subsequent claims. *See, e.g., Degrafinreid v. Ricks,* No. 03 Civ. 6645(RWS), 2004 WL 2793168, at *13 (S.D.N.Y. Dec. 6, 2004) (dismissing claim because plaintiff's "[g]rievance did not give notice of the alleged conduct underlying his assault and emotional distress claims, among other claims in the complaint"). Accordingly, "the mere fact that plaintiff filed *some* grievance, and fully appealed all the decisions on that grievance, does not automatically mean that he can now sue anyone who was in any way connected with the events giving rise to that grievance." *Turner v. Goord,* 376 F.Supp.2d 321, 324 (W.D.N.Y.2005) (emphasis in original). Rather, a court must consider whether a plaintiff's grievance put a defendant on sufficient notice of the plaintiff's subsequent civil claim.

***8** I therefore believe that it would be inappropriate to decide the Supervisory Defendants' motion to dismiss without considering the content of Plaintiffs' grievances and Plaintiffs' proffered excuses. *See Turner,* 376 F.Supp.2d at 324. Such an inquiry is appropriate on a motion for summary judgment, rather than on a motion to dismiss. *See* Fed. R. Civ. Pro. 12(b)(6) (stating that if matters outside the pleadings are referred to on a motion to dismiss then "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56").

Accordingly, I convert the Supervisory Defendants' motion to dismiss to one for summary judgment, on the limited issue of whether Plaintiffs' claims for injunctive and declaratory relief are barred by failure to exhaust their administrative remedies before filing suit. *See Scott v. Gardner,* 287 F.Supp.2d 477, 485 (S.D.N.Y.2003). As the

parties have now had ample time for discovery, and keeping in mind that in converting such motions "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56," Fed.R.Civ.P. 12(b)(6), the Supervisory Defendants have twenty days (from the date of this order) to supplement the record on this narrow issue. Plaintiffs will then have fifteen days to respond. The Supervisory Defendants will have an additional seven days within which to reply.[9]

D. ***Failure To State A Claim:***
The Supervisory Defendants also argue that Plaintiffs' following claims should be dismissed pursuant to Rule 12(b)(6): (1) medical indifference claim; (2) Fourth and Fourteenth Amendment claims; (3) First Amendment claim; and (4) Equal Protection claim. These motions may become moot after I decide the exhaustion issue. Accordingly, I reserve ruling on them.

IV. ***PLAINTIFFS' MOTIONS:***
Plaintiffs have moved for class certification of their claims against the Supervisory Defendants and for default judgment against Line Officer Defendant Rick LaRue

A. ***Motion For Class Certification:***
Plaintiffs move for class certification of their claims for injunctive relief against the Supervisory Defendants. To be certified as a class action, Plaintiffs must show that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(a)(1)-(4). Plaintiffs bear the burden of proving these factors. *See Caridad v. Metro-North Commuter Railroad,* 191 F .3d 283, 291 (2d Cir.1999).

The Supervisory Defendants challenge Plaintiffs' motion on a variety of grounds, including that Plaintiffs are subject to the "unique defense" of administrative exhaustion. It is well settled that "class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Gary Pastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 903 F.2d 176, 180 (2d Cir.1990). This stems from the "danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Id.* Thus, in analogous situations, courts have denied class certification where the named plaintiffs were subject to exhaustion defenses. *See, e.g., Scott v. New York City Dist. Council of Carpenters Pension Plan,* 224 F.R.D. 353, 355 (S.D.N.Y.2004) ("[D]etermining whether Scott has exhausted his administrative remedies would require an individualized assessment of the facts and circumstances surrounding his claim for benefits. Such an assessment constitutes a defense unique to Scott that threatens to become the focus of the litigation ."); *Carlstrom v. Decisionone Corp.,* 217 F.R.D. 514, 516 (D.Mont.2003) ("[F]ailure to exhaust raises a defense unique to [plaintiff], which also defeats the typicality requirement.").

***9** Although these cases did not involve prisoner litigation, I find the holdings persuasive. As indicated *supra,* administrative exhaustion has *already* become the focus of this litigation. Resolving this issue will entail an individualized inquiry into the content of Plaintiffs' specific grievances. Also, allowing Plaintiffs' claim to proceed as a class, at this time, could prejudice those class members who did in fact exhaust their administrative remedies.[10]

Accordingly, I reserve ruling on Plaintiffs' motion for class certification until I determine whether any of the Plaintiffs have exhausted any, or all, of their claims for injunctive relief. *See Doe v. Cook County,* No. 99 C 3945, 1999 WL 1069244, at *5 (N.D.Ill. Nov. 22, 1999) (noting that "if the exhaustion hurdle is not cleared, the class certification issue is moot").

B. ***Application For Default Judgment:***
Pursuant to Rule 55 plaintiffs apply for an entry of default against Line Officer Defendant Rick LaRue. For reasons discussed *supra,* in the context of joinder, I reserve ruling on this application until the joinder issue is resolved.

V. ***CONCLUSION:***
As set forth in greater detail above, both parties are instructed to address whether Plaintiffs' individual claims for damages are properly joined with one another and with their class claims for injunctive relief. Accordingly, I reserve ruling on any pending motions pertaining to Plaintiffs' individual claims for damages.

Regarding Plaintiffs' claims for injunctive relief, I grant in part and deny in part the Supervisory Defendants' motion to dismiss based on Plaintiffs' lack of standing. I deny the Supervisory Defendants' motion to dismiss for

improper venue and reserve ruling on their motion to transfer venue. I convert Supervisory Defendants' motion to dismiss Plaintiffs' claims for injunctive relief on exhaustion grounds to one for summary judgment. I reserve ruling on the Supervisory Defendants' motions to dismiss for failure to state a claim. I also reserve ruling on Plaintiffs' motion for class certification.

SO ORDERED

Footnotes

1 The Complaint in this action was filed on January 28, 2003. With the consent of the Supervisory Defendants, Plaintiffs filed an Amended Complaint on or about October 14, 2003. The Amended Complaint added: (1) Plaintiffs Dawson and Shantelle Smith; (2) a retaliation claim by Plaintiff Coggins; (3) four defendants; (4) an Equal Protection Claim; and (5) additional factual allegations relating to sexual abuse and exhaustion.

2 For purposes of these motions, Plaintiffs' allegations are accepted as true.

3 I have been informed that Stone has been replaced since the filing of the Amended Complaint. Accordingly, I hereby substitute the current Commissioner of the New York State Office of Mental Health as a defendant in this action.

4 I note that three Line Officer Defendants have already made a motion to sever, to which Plaintiffs briefly responded. I offer both parties the opportunity to supplement the record.

5 Before undertaking this analysis I dismiss from this action the claims of Plaintiff Kidd, who was allegedly raped by Officer D.A. Schmidt (Am.Compl.¶ 47.) Because Plaintiff Kidd filed a separate action against Officer Schmidt in the Western District of New York, she did not include him as a defendant in this action. Plaintiffs' counsel has informed me that Judge Larimer of the Western District enjoined Plaintiff Kidd from participating in this action, pursuant to the "first filed rule." *See Motion Picture Lab. Technicians Loc. 780 v. McGregor & Werner, Inc.,* 804 F.2d 16, 19 (2d Cir.1986) ("Where there are two competing lawsuits, the first suit should have priority, absent the showing of balance of convenience ... or ... special circumstances ... giving priority to the second.") (internal quotation omitted). Accordingly, I dismiss all of Plaintiff Kidd's claims from this action.

6 As discussed *infra,* the Supervisory Defendants also recently informed me by letter that seven additional Plaintiffs were released from prison after the Amended Complaint was filed.

7 These Plaintiffs include Tonie Coggins, Stephanie Dawson, Tanya Jones, Denise Saffioti, and Shantelle Smith.

8 Importantly, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (citation and internal quotation omitted).
"In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial." *Id.* at 561.

9 The Supervisory Defendants emphasize that the claims of Plaintiffs Dawson and Shantelle Smith and the retaliation claim of Plaintiff Coggins can automatically be dismissed since they arose after the filing of the original Complaint and could not have been exhausted beforehand. I disagree. Plaintiffs Dawson and Smith did not join the original Complaint because their sexual abuse occurred *after* it was filed. These Plaintiffs subsequently exhausted their administrative remedies and, without objection from the Supervisory Defendants, joined the Amended Complaint. Accordingly, I do not believe the PLRA mandates their dismissal. *Cf. Rahim v. Sheahan,* No. 99 C 0395, 2001 WL 1263493, at *6 (N.D.Ill. Oct. 19, 2001) ("Since [certain plaintiffs] were not 'prisoners' at the time they *joined* the Fourth Amended Complaint, the exhaustion requirement does not apply to them.") (emphasis added). While Plaintiff Coggins joined the original Complaint, her retaliation claim also arose after it was filed. In fact, she contends that she was retaliated against *for filing* the original Complaint. She also purports to have exhausted her available remedies before joining the Amended Complaint. I believe these facts distinguish this case from the one relied on by the Supervisory Defendants, *Neal v. Goord,* 267 F.3d 116, 121 (2d Cir.2001), *overruled in part on other grounds by Porter v. Nussle,* 534 U.S. 516 (2001). Both parties should thus address these Plaintiffs' grievances on summary judgment.

10 Plaintiffs' counsel have provided me with no information concerning whether other putative class members not named as class representatives exhausted their administrative remedies. As Plaintiffs bear the burden of establishing class certification, this further weighs against their claim for typicality. *Cf. Walker v. Asea Brown Boveri, Inc.,* 214 F.R.D. 58, 66 (D.Conn.2003) (denying motion for class certification because, *inter alia,* "the court is unaware of how many of the putative class members signed releases or whether they differed from the releases signed by the named plaintiffs").