

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING
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STEPHAN HARRIS, CLERK
CASPER

TAYLOR S. BLANCHARD,

Plaintiff,

vs.

WYOMING DEPARTMENT OF
CORRECTIONS DIRECTOR,
WYOMING WOMENS CENTER
WARDEN,

Defendants.

Case No. 17-CV-0124

ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

This matter comes before the Court on Plaintiff's Motion to Certify Class. (ECF No. 12.) Defendants filed an opposition to the motion (ECF No. 17) and Plaintiff has since filed a reply brief (ECF No. 22). Having considered the briefs and evidence, and being otherwise fully advised, the Court finds and concludes Plaintiff's motion for class certification should be denied.

BACKGROUND

This case arises out of an equal protection claim brought by Ms. Blanchard on behalf of herself and other women who were allegedly denied boot camp by the Wyoming Department of Corrections (WDOC) due to their gender. (ECF No. 13 at 2.) Plaintiff seeks class certification pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. (ECF No. 13.)

On July 18, Ms. Blanchard filed a “Complaint for Declaratory and Injunctive Relief” (ECF No. 1) and has since filed an “Amended Complaint for Declaratory and Injunctive Relief” (ECF No. 43). Ms. Blanchard alleges “[b]ecause WDOC does not have a Youthful Offender program for women, the women in the custody of the WDOC are denied... opportunities to rehabilitate and receive an early release [] based entirely on their gender.” (*Id.* at 8.)

Blanchard requests declaratory and injunctive relief pursuant to the Federal Rules of Civil Procedure and 28 USC §§2201, 2202 and 42 USC §1983. (*Id.* at 12.) In particular, “enjoining Defendants...from refusing to give women prisoners the same opportunity to participate in Wyoming’s Youthful Offender or boot camp program as provided to male prisoners in the custody of the WDOC.” (*Id.*) Blanchard requests this Court order Defendants, “among other things, to provide women with the same opportunity to participate in and complete Wyoming’s Youthful Offender program as men prisoners, and to send women to an out-of-state program only if men are sent to out-of-state programs on a comparable and equitable basis, that is, such out-of-state placement should not be based on gender but rather gender-neutral principles.” (*Id.*)

On June 14, 2017, WDOC became aware that Ms. Blanchard had received a boot camp recommendation from her sentencing judge. (ECF No. 16 at 5.) WDOC then began contacting states looking for a female boot camp program. (*Id.*) On August 1, 2017, WDOC sent Blanchard’s “packets” to three states for a final decision of her eligibility. (*Id.*) On August 8, 2017, Florida Department of Corrections responded and accepted

Blanchard's transfer. (*Id.*) Blanchard was transferred to the Florida Department of Corrections to join the upcoming cycle of its boot camp program. (*Id.*)

Due to these factual changes, this Court granted Plaintiff leave to amend her complaint. Defendant's motion to dismiss for want of standing was deemed to be mooted. (ECF No. 40.) Plaintiff is no longer alleging denial of a placement in a boot camp program, but is challenging under equal protection the policy of sending women out of state to an alleged inferior program. (*Id.*)

On August 17, 2017, Plaintiff filed her Motion to Certify Class. As noted above, Plaintiff has since amended her complaint. The Court notes Ms. Blanchard is the first woman who has ever received a judicial recommendation to allow a boot camp placement. (*See* ECF Nos. 16, 17, 22, 24, 32).

LEGAL ANALYSIS

A. Wyoming's Youthful Offender Program - "Boot Camp"

The Youthful Offender Program is governed by Wyoming Statutes §§ 7-13-1001 through 7-13-1003. Wyoming's Youthful Offender Program is commonly referred to by the courts as "boot camp." *See Counts v. State*, 2008 WY 156, 197 P.3d 1280, n. 1 (Wyo. 2008). The boot camp program is designed to provide first time offenders a short term intense incarceration in a disciplined setting. (ECF No. 43 at 7.) The boot camp program includes separation of program participants from the general inmate population and an emphasis on work and physical activity. WYO. STAT. § 7-13-1003(c)(i) and (ii).

Participation in the boot camp is a matter of grace and not of right. WYO. STAT. § 7-13-1003(d); *see also United States v. Gaskin*, 145 F.3d 1347 (10th Cir. 1998) (affirming lower court's holding that plaintiff was not 'entitled to placement in a boot camp' even though he was originally placed in a boot camp with the possibility of a sentence reduction upon successful completion). To be eligible for boot camp placement, an individual must meet the eligibility requirements adopted by the WDOC and:

- (i) [be] serving a sentence of imprisonment at a state penal institution for any offense other than a felony punishable by death or life imprisonment;
- (ii) Has not attained the age of twenty-five (25) years;
- (iii) Has not previously served a term of incarceration at any state or federal adult penal institution.

WYO. STAT. § 7-13-1003(b)(i)-(iii).

In compliance with this enabling legislation, the WDOC created a program and adopted eligibility requirements. WDOC Policy and Procedure #4.104 "Youthful Inmates". The WDOC rules outline the requirements for eligibility in the boot camp program:

- (i) The inmate shall be sentenced to a term of imprisonment in a state penal institution for an offense other than a felony punishable by death or life imprisonment;
- (ii) The inmate shall not have attained the age of twenty-five (25) at the time of sentencing;
- (iii) The inmate shall not have previously served a term of incarceration at a state or federal adult penal institution;
- (iv) The inmate shall be recommended to the program by the judge adjudicating his case and the recommendation shall be reflected in writing in the Judgment and Sentence of the court; and
- (v) The inmate shall meet any other condition specified by WDOC for participation in the program.

WDOC Policy and Procedure #4.104(IV)(B)(2).

Both prosecution and defense counsel have the opportunity to recommend boot camp to the sentencing judge. However, even with a recommendation from counsel the judge is not bound to pass along a recommendation for boot camp to the WDOC. *See Duke v. State*, 209 P.3d 563, 567 (Wyo. 2009) (affirming sentencing court's rejection of the state's recommendation the defendant be allowed to participate in the boot camp program). Moreover, even with a recommendation from a sentencing judge, the ultimate decision of a boot camp placement rests with the warden. *See Wilson v. State*, 68 P.3d 1181, 1186 (Wyo. 2003) (asking defendant "do you understand that [the court] can recommend if I wish that you go to the boot camp, but the final decision on that is the warden's at the prison?").

Even when an inmate receives a recommendation from a judge, and is otherwise statutorily eligible for boot camp, they still may not be placed in boot camp. (ECF No. 17-1) (Lindly Aff. ¶ 5.) An inmate may still be denied placement by WDOC due to mental and physical health reasons. (ECF No. 16-4) (Steber Aff. ¶ 16); *see also Ellett v. State*, 883 P.2d 940, 941 (Wyo. 1994) (holding appellant's denial for participation the Youthful Offender Program due to a medical injury did not violate the equal protection clause of the Wyoming and United States Constitutions). Additionally, "[a]pproval of an inmate's participation in the program may be revoked by the department at any time if the inmate fails to comply with program requirements." WYO. STAT. § 7-13-1003(d). Finally, the inmate has no right to appeal the denial of participation in the program. *Id.*

Once an individual has successfully completed boot camp they may request a reduction in their sentence. WYO. STAT. § 7-13-1002(a)(i). Inmates must make an

application to the court within one year from the date he or she began serving a sentence of incarceration at a state penal institution. WYO. STAT. § 7-13-1002(a)(ii). However, inmates who successfully complete boot camp are not statutorily guaranteed a sentence reduction. *See Ellett*, 883 P.2d at 944 (holding the district court has discretion to reduce the inmate's sentence or to decline any sentence reduction). "The Youthful Offender Act is capable of only one interpretation: the sentencing court has discretion to reduce the sentence of an applicant upon completion of boot camp; and that discretion allows a reduction in sentence which could include probation, but could also include a number of other possibilities." *Mendoza v. State*, 368 P.3d 886, 892 (Wyo. 2016). Successful boot camp completion is just one of the factors the court may weigh in favor of sentence reduction. *Id.*

B. Federal Rule of Civil Procedure 23 - Class Certification

Parties seeking class certification must demonstrate:

- (1) the class is so numerous that joinder of all members is impracticable [numerosity];
- (2) there are questions of law or fact common to the class [commonality];
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality]; and
- (4) the representative parties will fairly and adequately protect the interests of the class [adequacy].

Fed.R.Civ.P. 23(a).

"In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir.1982) (quotation omitted); *see also Eisen v. Carlisle & Jacquelin*, 94

S. Ct. 2140, 40 L.Ed.2d 732 (1974) (“[N]othing in either the language or history of Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”).

Additionally, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Under Rule 23(b)(2) class treatment is allowed when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” The Supreme Court held the key to a (b)(2) class is “the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557, 180 L. Ed. 2d 374 (2011) (citing Nagareda, 84 N.Y.U.L.Rev., at 132). “In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2557.

The party seeking to certify a class bears the burden of proving each of the requirements of Rule 23 are met. *See Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988). The district court must engage in its own “rigorous analysis” of whether “the prerequisites of Rule 23(a) have been satisfied.” *Shook v. El Paso Cty.*, 386 F.3d 963, 968 (10th Cir. 2004) (citing *Gen. Tel. Co. of the S.W. v. Falcon*, 102 S. Ct. 2364, 72 L.Ed.2d 740 (1982)). Class certification will be denied, upon the failure of the class representative to meet any one of the prerequisites of the rule. *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982).

DISCUSSION

Plaintiff seeks to invoke a class action consisting of “all present and future female prisoners under the age of twenty-five and in the custody of the Wyoming Department of Corrections and/or the Wyoming Women’s Center who are or will be otherwise eligible to participate in Wyoming’s boot camp program, but who have been or will be denied participation due to their gender, or not considered by WDOC due to their gender.” (ECF No. 13 at 2-3.)

A party seeking class action certification must demonstrate, under a strict burden of proof, that all of the requirements of 23(a) are clearly met. *Rex v. Owens ex rel. State of Okl.*, 585 F.2d 432, 435 (10th Cir. 1978) (citing *Albertson's Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459 (10th Cir. 1974)). Plaintiff has failed to meet this burden.

A. Numerosity

Plaintiff argues the numerosity requirement under Fed. R. Civ. P (23)(a)(1) is met for two reasons. First, Plaintiff alleges “there are at least fifty women at WWC who are members of the class, that is, they were under 25 at the time of sentencing and were denied access to a boot camp program solely due to their gender.” (ECF No 13 at 5.) Second, Plaintiff alleges “numerosity is satisfied in this case because the class includes persons who will become members in the future.” (*Id.* at 6.) However, under Tenth Circuit precedent the issue considered under the numerosity component is not a question of numbers, but whether the nature of the action, size of the individual claims, and the location of the members of the class are such that it would make joinder impracticable.

See Colorado Cross Disability Coalition v. Abercrombie & Fitch Co., 765 F.3d 1205, 1214-15 (10th Cir. 2014). In this case it does not.

“The burden is on the plaintiffs seeking to represent a class to establish that the class is so numerous as to make joinder impracticable.” *Peterson v. Okla City Housing Auth.*, 545 F.2d 1270, 1273 (10th Cir. 1976). Plaintiff alleges at least fifty women at WWC qualify as class members, arguing that number is more than adequate to satisfy numerosity and citing to cases with a presumption of numerosity. Plaintiff cites multiple cases outside of the Tenth Circuit where the court has “presumed” numerosity at a specific number. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (“numerosity is presumed at a level of forty members”); *Jones v. Diamond*, 519 F.2d 1090, 1100 n.18 (5th Cir. 1975), *aff’d en banc*, 636 F.2d 1364 (5th Cir. 1981) (approving class of forty-eight jail inmates).

However, Plaintiff’s reliance on decisions from the Fifth and Second Circuit is misplaced. The Tenth Circuit has never adopted a specific number to support a presumption that joinder is impracticable. *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006). To the contrary, the Tenth Circuit has held “the numerosity requirement is not “a question of numbers.”” *Colorado Cross Disability Coalition, supra* at 1215. There is “no set formula to determine if the class is so numerous that it should be so certified.” *Rex*, 585 F.2d at 436. The Tenth Circuit continues to hold numerosity is a fact-specific inquiry, and grants district courts wide latitude in making such determinations. *See Vallario v. Vandehey*, 554 F.3d 1259, 1264 (10th Cir. 2009). Additionally, the Tenth Circuit case cited by Plaintiff did not create a presumption of numerosity but left the

conclusion of numerosity to the sound discretion of the trial court. *Milonas*, 691 F.2d at 938 (citing *Rex*, 585 F.2d at 436) (“[t]his determination, however, is a matter within the sound discretion of the trial court and the trial court's conclusions as to whether the class representative has demonstrated that the numerosity, commonality, typicality, and adequacy of representation requirements have been met ‘will not be disturbed absent a showing of abuse of that discretion.’”).

Although a putative class of fifty members would not be insignificant, it is not such “an overwhelming number as to be prohibitive of joinder.” *Trevizo*, 455 F.3d at 1162 (holding the district court did not error in concluding 84 class members were not prohibitive of joinder). Furthermore, the numerosity requirement is not “a question of numbers.” *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir.1977). The Tenth Circuit identified several factors underlying the impracticability issue, including the nature of the action, the size of the individual claims, and the location of the members of the class or the property that is the subject matter of the dispute. *Colorado Cross Disability Coalition*, supra at 1215 (citing 7A Charles Alan Wright, Arthur R. Miller & Marry Kay Kane, *Federal Practice and Procedure* § 1762, at 206–07 (3d ed.2005) (footnote omitted)). In the *Colorado Cross Disability Coalition* case, the Tenth Circuit upheld the district court’s finding of numerosity in a class action against Hollister stores. *Colorado Cross Disability Coalition*, supra at 1215. It was undisputed that porches were present at nearly 250 Hollister stores spanning 40 states, and potentially affecting millions of Americans having a disability. *Id.* Joining all of these

people into one suit, who shop at one of the 250 stores across 40 states, would be impracticable. *Id.*

However, that is not the case before this Court. The potential class members are not strewn about the country or even the state and are easily identifiable and reside at or may reside at WWC. Thus, Plaintiff should have no problem locating the remaining individuals for joinder. Potential class members will be easily discernable in discovery and locatable since they have all received sentencing in a Wyoming state court and would be serving time at Wyoming's only women's correctional facility.

Plaintiff's second argument alleges future class members may exist which results in the class being fluid. Although the Court agrees that future class members may exist, this fact is not dispositive of the issue. In *Decoteau v. Raemisch*, the Colorado district court was determining whether the denial of access to outdoor exercise for plaintiffs in administrative segregation constituted an Eighth Amendment Violation. *See Decoteau v. Raemisch*, 304 F.R.D. 683 (D. Colo. 2014). To establish numerosity for class certification, the plaintiffs submitted evidence showing at least 500 inmates were in administrative segregation. *Id.* at 687. Additionally, plaintiffs alleged the class definition was fluid because it called for the addition of new inmates transferred to CSP. *Id.* The district court found the fluid nature of the class further demonstrated the impracticability of joinder. *Id.*

At first blush this case appears similar; it is a prisoner case seeking class certification for a constitutional violation. However, in this case the initial class size is alleged to be only 50. Additionally, not all females transferring or incoming to the WWC

would qualify to participate in the boot camp program under state law. The only additional members of the class would need to be first time women offenders, under the age of 25, who have not committed a crime punishable by death or life imprisonment, have received a judicial recommendation, and are otherwise deemed fit to participate in the program. When looking at the factual allegations from both parties, it is clear the number of any additional women to join would be small, easily identifiable and reachable. When considering the relatively small number of women Plaintiff has initially alleged are part of the class, the Court does not find the small number of additional parties would render joinder impracticable, particularly given the ease of identification and their central location. Plaintiff has not alleged any additional reasons why joinder would be impracticable in this case.

After conducting rigorous analysis of Rule 23 requirements, it is clear Plaintiff cannot meet her burden to establish the numerosity requirement for class certification and her motion must be denied. *See Trevizo*, 455 F.3d at 1163. A Plaintiff is required to prove that each of the elements of class certification are satisfied. *Shook*, 386 F.3d at 968. Having found that Plaintiff has failed to satisfy the numerosity requirement this Court need not address the additional elements.

CONCLUSION

Plaintiff has failed to show that joinder would be impracticable and thus failed to satisfy the numerosity requirement. Since the absence of any single element bars class certification, the Court declines to address the remaining elements. It is hereby

ORDERED Plaintiff's *Motion to Certify Class* (ECF No. 12) is Denied.

Dated this 13th day of November, 2017.



Scott W. Skavdahl
United States District Judge