

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING
2018 FEB 20 PM 1:04
STEPHAN HARRIS, CLERK
CASPER

TAYLOR S. BLANCHARD,

Plaintiff,

vs.

Case No. 1:17-CV-0124-SWS

Robert Lampert, WYOMING
DEPARTMENT OF CORRECTIONS
DIRECTOR, in his official capacity, and
Rick Catron, WYOMING WOMEN'S
CENTER WARDEN, in his official
capacity,

Defendants.

**ORDER GRANTING MOTION TO DISMISS FIRST AMENDED COMPLAINT
AND DENYING PLAINTIFF'S MOTION TO RECONSIDER**

This matter comes before the Court on *Defendants' Motion to Dismiss Plaintiff's First Amended Complaint as Moot* (ECF No. 62) and *Plaintiff's Motion to Reconsider* (ECF No. 70). Plaintiff has brought an equal protection challenge to Wyoming's youthful offender program ("boot camp" program), asserting that the Florida program in which she was ultimately placed is inferior to the boot camp available to male inmates in Newcastle, Wyoming, and that the transport to that out-of-state program was traumatic. (First Am. Compl. ("FAC") at 2-3) (ECF No. 43). Plaintiff seeks an injunction ordering that she be "granted the opportunity to participate in an in-state boot camp program comparable to the men's program at Newcastle, or in an out-of-state program provided that placement is gender-neutral[.]" *Id.* at 13.

BACKGROUND

Plaintiff graduated from Florida's boot camp program on January 19, 2018. (Voigtsberger Aff. Ex. A-2) (ECF No. 63-1). On December 21, 2017, the Florida Department of Corrections had recommended Plaintiff for probation upon her, at that time expected, successful completion of the program, and the Wyoming Department of Corrections concurred. *Id.* Exs. A-2, A-3. With the aid of Plaintiff's counsel here, a sentence modification request was submitted to her sentencing judge. *Id.* Exs. A-1, A-2, A-3. On January 5, 2018, Plaintiff's sentencing judge entered an order modifying her sentence, ordering that Plaintiff be released to probation upon her successful completion of the Florida boot camp program. (Lindly Aff. Ex. A-2) (ECF No. 69-1). Accordingly, Plaintiff has been placed on supervised probation for a period of five years. *Id.* at 14.

In support of their motion to dismiss, Defendants argue Plaintiff's action is moot because this Court does not have the power to grant her any effectual relief regardless of the merits of her claim. Plaintiff does not really contest that her claim has become moot, instead arguing that the mootness of her action is cured by her motion to amend her complaint to add new plaintiffs, which was filed after Defendants filed the present motion to dismiss and is now pending before the Magistrate Judge. (*See* Mot. for Leave to File Sec. Am. Compl.) (ECF No. 67). Plaintiff wants to name additional plaintiffs who will seek the identical remedy sought by Plaintiff: the opportunity to participate in Wyoming's boot camp program on the same basis as men, and an order preventing Defendants from sending them out of state unless men and women are sent out of state on a gender-neutral basis. (Pl.'s Opp'n Br. at 5-6) (ECF No. 65).

Plaintiff also requests the Court reconsider its Order denying her earlier motion for class certification. (*See* ECF No. 58.) In support, Plaintiff does not assert the Court erred in denying class certification; rather, Plaintiff contends actions by defense counsel unfairly frustrated her ability to timely identify any additional women for joinder in this lawsuit prior to Ms. Blanchard's claim becoming moot. In response, Defendants argue reconsideration is unwarranted because: first, there was no wrongdoing on the part of defense counsel; and second, reconsidering class certification would not result in the new inmates' joinder as their claims are distinct from Ms. Blanchard's and no injustice will occur by requiring them to file their own lawsuit.

DISCUSSION

"The doctrine of mootness is grounded in Article III's limitation on the jurisdiction of federal courts to 'cases and controversies.'" *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015) (citing U.S. Const. art. III, § 2, cl. 1). To demonstrate standing under Article III, a plaintiff must show: "(1) an injury in fact; (2) a causal connection between the injury and the challenged action; and (3) *a likelihood that a favorable decision will redress the injury.*" *Id.* (emphasis in *Ind*) (internal quotation marks and citation omitted). The jurisdictional requirement of a live case or controversy exists at all stages of federal proceedings. "[I]t is therefore not enough that the dispute was alive when the suit was filed; the parties must continue to have a personal stake in the outcome." *Id.* A case becomes moot, then, "when a plaintiff no longer suffers actual injury that can be redressed by a favorable judicial decision." *Id.* (internal quotation marks and citations omitted).

Plaintiff's First Amended Complaint seeks injunctive relief ordering Defendants to provide her with the opportunity to participate in *Wyoming's* boot camp program. (FAC at 12-13; Pl.'s Opp'n Br. at 3.) However, Wyoming's boot camp program is for inmates who "ha[ve] not previously served a term of incarceration at any state or federal adult penal institution." WYO. STAT. § 7-13-1003(b)(iii). Plaintiff is no longer a first-time offender and is therefore no longer eligible to participate in the boot camp program. Plaintiff's amended complaint does not seek redress for her allegations regarding out-of-state placement or placement into an "inferior" boot camp program. Accordingly, this Court can no longer grant effective relief, so Plaintiff's case has become moot. *See Brown v. Buhman*, 822 F.3d 1151, 1165 (10th Cir. 2016) ("If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot.") (quoting *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016)).

Plaintiff argues Defendants' motion to dismiss based on mootness was premature because it was filed before she actually graduated from Florida's boot camp program and, even if the Court rules on the motion after her graduation, Defendants' motion should be denied because "anticipatory motions are not supported by precedent and should not be encouraged." (Pl.'s Opp'n Br. at 4.) Neither is Plaintiff's proposition supported by precedent – or at least Plaintiff fails to cite any such authority in her brief. Defendants' motion to dismiss was filed one week *after* the Florida Department of Corrections recommended Plaintiff be placed on probation upon her expected completion of the program. Regardless, Plaintiff will have "served a term of incarceration" whether she

graduated from Florida's program or not. Had she failed to successfully complete the program in those final few weeks, she would not have been eligible for re-entry to Wyoming's boot camp program. (*See Lindly Aff.* ¶ 5.) Thus, the timing of Defendants' motion to dismiss does not require its denial.

Plaintiff also argues that the filing of her second amended complaint, adding additional plaintiffs, will prevent the case from becoming moot. Plaintiff asserts "a motion for leave to amend a complaint must always be adjudicated *before* a motion to dismiss whenever the amended complaint could cure the grounds on which dismissal is sought." (Pl.'s Opp'n Br. at 7.) The lone case Plaintiff cites as authority for this point, however, did not involve the jurisdictional issue of mootness. *See Childers v. Independent Sch. Dist. No. 1 of Bryan Cty.*, 676 F.2d 1338 (10th Cir. 1982). Instead, *Childers* addressed a plaintiff's request to add a claim on behalf of the same plaintiff, not to add a party, and the subject matter of the proposed amendment was already alleged in the original complaint. *Id.* at 1343. The appellate court held that, because the motion to dismiss was granted upon grounds that would have been eliminated by the proposed amendment, the denial of leave to amend was an abuse of discretion. *Id.* But once a live controversy ceases to exist, as here, the court lacks subject matter jurisdiction to entertain the lawsuit. *See Ind.*, 801 F.3d at 1213 ("Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction."); *Fox v. Bd. of Trustees of State Univ. of New York*, 42 F.3d 135, 144 (2nd Cir. 1994) (plaintiffs may not "avoid dismissal by amending their complaint to add

additional [] plaintiffs” since “once a case is moot, it is no longer justiciable in federal court and must be dismissed”).

Finally, in response to Defendants’ motion to dismiss, Plaintiff argues her amendment to add parties should be granted to protect her claim from mootness because her claim is “capable of repetition, yet evading review;” in other words, Plaintiff’s equal protection claim was “destined to expire upon her graduation from boot camp, a period far too short for that claim to be fully adjudicated in the district court and on appeal.” (Pl.’s Opp’n Br. at 6.) To be sure, a court should not dismiss a case as moot under certain circumstances, one being where “the issue is deemed a wrong capable of repetition yet evading review.” *Ind*, 801 F.3d at 1213. However, “[t]hat exception applies only in exceptional situations, where (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that *the same complaining party* [will] be subject to the same action again.” *Kingdomware Technologies, Inc. v. U.S.*, 136 S. Ct. 1969, 1976 (2016) (internal quotations marks omitted) (emphasis added). As explained above, Ms. Blanchard is ineligible to participate in Wyoming’s boot camp in the future, so this exception does not apply to save her claim.

In a last ditch effort to save her claim from the mootness doctrine, Plaintiff asks the Court to reconsider its earlier denial of class certification. “As a general rule, a suit brought as a class action must be dismissed for mootness when the personal claims of the named plaintiffs are satisfied and no class has been properly certified.” *Reed v. Heckler*, 756 F.2d 779, 785 (10th Cir. 1985). “Nonetheless, the Supreme Court has applied the

mootness doctrine less strictly in the class action context.” *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1138 (10th Cir. 2009). Citing a law review article, the Tenth Circuit has noted the Supreme Court has “repeatedly treated personal stake mootness as a discretionary doctrine, under which courts can dismiss or not as they deem appropriate in view of certain prudential considerations.” *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011) (quoting Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 608 (2009)) (internal quotation marks omitted).

Circumstances where courts have recognized exceptions to the mootness doctrine in the class action context include: the mootness of a named plaintiff’s claim *after* class certification; the mootness of the named plaintiff’s claim during the pendency of an appeal challenging the district court’s improper denial of class certification; and a defendant’s offer to fully settle the named plaintiff’s claim, over the plaintiff’s objection, after the district court denies class certification. *See Clark*, 590 F.3d at 1138.

The Supreme Court has also suggested two situations in which a class may be certified despite the mootness of the named plaintiff’s claim *prior* to the district court’s certification decision: (1) when the plaintiff’s claim is “‘capable of repetition, yet evading review,’ ” and (2) when the plaintiff’s claim is “inherently transitory [such] that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative’s individual interest expires.” *Geraghty*, 445 U.S. at 398–400, 100 S. Ct. 1202 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11, 95 S. Ct. 854, 43 L.Ed.2d 54 (1975)).

Clark, 590 F.3d at 1139 (emphasis in original). Additionally, some courts have recognized an exception where “the defendant makes a full offer of judgment – thereby mootness the named plaintiff’s claims – at so early a point in the litigation that the named

plaintiff could not have been expected to file a class certification motion.” *Id.* (citing *Weiss v. Regal Collections*, 385 F.3d 337 (3rd Cir. 2004)). *See also Lucero*, 639 F.3d at 1250 (“[W]e hold that a named plaintiff in a proposed class action for monetary relief may proceed to seek timely class certification where an unaccepted offer of judgment is tendered in satisfaction of the plaintiff’s individual claim before the court can reasonably be expected to rule on the class certification motion.”). “But where the plaintiff has had ample time to file the class certification motion, district courts adhere to the general rule that the mootness of a named plaintiff’s claim prior to class certification moots the entire case.” *Clark*, 590 F.3d at 1139.

None of the foregoing circumstances exist in this case. Plaintiff’s claim became moot *after* this Court’s *denial* of class certification. Plaintiff had “ample time to file” her class certification motion, and this Court had “enough time to rule” on the motion before Plaintiff’s claim became moot. *See id.*; *see also K.C. v. Townsend*, No. 6:09-CV-012-C, at 7 (N.D. Tex. Sept. 29, 2009) (*Order*) (“Even the broadest possible readings of the class action exceptions are limited to providing a plaintiff a reasonable opportunity to pursue class certification, an opportunity that [plaintiff] has had ample opportunity to explore.”). Indeed, Plaintiff acknowledges the Court’s decision to deny class certification is “well-reasoned” and she offers no legal basis to reconsider it. Nor does this case involve a defendant’s offer to fully settle a claim for monetary relief.¹

¹ Plaintiff cites four cases wherein district courts purportedly granted class certification “to avoid precisely the predicament Ms. Blanchard now faces in her case.” (Mot. to Reconsider at 8.) However, each of these cases is, in actuality, either not on point or distinguishable from Ms. Blanchard’s. *See U.S. ex rel. Green v. Peters*, 153 F.R.D. 615 (N.D. Ill. 1994) (granting class certification, but no indication mootness doctrine an issue); *Andre H. by Lula H. v. Ambach*, 104 F.R.D. 606, 613 n.11 (S.D.N.Y. 1985) (class certification granted *prior to* named plaintiff’s claim

In *K.C. v. Townsend*, a case similar to Ms. Blanchard's, the Texas federal district court likewise denied class certification in an action challenging certain correctional practices and procedures used in a youth prison exclusively for females. *Id.* at 2-3. Subsequent to the court's denial of the third motion to certify a class, the named plaintiff filed a motion for leave to amend her complaint adding two persons who were still confined in the prison facility, attaching the proposed amended complaint along with another proposed motion to certify a class. *Id.* at 3. The next day, that named plaintiff was released from custody, and defendants then filed a motion to dismiss based on mootness of the named plaintiff's claims. *Id.* While recognizing the existence of exceptions to the mootness doctrine in the class action context, the court determined none of them applied in that case because the named plaintiff had more than a reasonable opportunity to certify a class. *Id.* at 4-7. The court further determined that the plaintiff was "precluded from arguing her motion to amend unless there is an exception to the mootness doctrine that is applicable to [her] personally. . . . [Plaintiff] has failed to prove that her claims, as opposed to the claims of the class in general, are actually capable of repetition[.]" *Id.* at 12-13. This Court finds, as did the Texas district court, that absent the applicability of an exception to the mootness doctrine, Plaintiff is precluded from arguing the merits of her motion to amend because her claims are moot. Even more problematic here, Plaintiff filed her motion to amend *after* her claim had effectively become moot. *See Fox*, 42 F.3d at 144 ("district court did not abuse its discretion in

becoming moot); *Arthur v. Starrett City Assocs.*, 98 F.R.D. 500, 508 (E.D.N.Y. 1983) (class certification granted *prior to* named plaintiffs' claims becoming moot); *McKenzie v. Crotty*, 738 F. Supp. 1287, 1290 (D.S.D. 1990) (granting class certification dating back to the date the complaint was filed in jail litigation where the claim of the named plaintiff became moot *before court could reasonably have ruled on the certification issue*).

denying [p]laintiffs permission to amend their complaint [to add additional plaintiffs] after the case had become moot”); *Lans v. Gateway 2000, Inc.*, 84 F. Supp. 2d 112, 117 (D.D.C. 1999) (denying leave to file an amended complaint to add new plaintiffs where the court lacked subject matter jurisdiction over original plaintiff’s action, and where the new plaintiff remained free to bring a new suit).

Still, Plaintiff urges the Court to grant her equitable relief because she “did everything in her power to avoid a dismissal of her case on grounds of mootness,” but was allegedly thwarted by the “extreme lengths” to which defense counsel went to frustrate her ability to join women in a timely manner. (Pl.’s Mot. to Reconsider at 3, 9.) However, Plaintiff’s characterization of defense counsel’s actions is misleading and disingenuous. Approximately one month after filing her complaint and prior to the answer due date, Plaintiff filed a motion for expedited discovery. (ECF No. 7.) One of the proposed interrogatories asked Defendants to identify all of the women at WWC who were otherwise eligible to participate in Wyoming’s boot camp program. (ECF No. 8-1 at 4, Interrog. No. 10.) Defendants raised timely and legitimate objections to the request for expedited discovery. (ECF No. 14.) During a hearing held before the Court on October 18, 2017, the undersigned judge denied without prejudice the motion for expedited discovery and, contrary to Plaintiff’s assertion that “the Court indicated [] the parties should begin discovery,” the case was referred to the magistrate judge for an initial pretrial conference. (See ECF No. 41.) During the initial pretrial conference held on November 7, 2017, the magistrate judge ordered discovery to proceed. (ECF No. 54.) Plaintiff served written discovery on Defendants that same day (Berkness Decl. Ex. A-1)

(ECF No. 77-1 at 6), and Defendants timely responded to the discovery requests within 30 days, per Court rules. *See* FED. R. CIV. P. 33(b)(2).

Plaintiff's discovery asked Defendants to identify inmates who met certain criteria for prospective joinder. In response, Defendants provided the names of all 260 women incarcerated at WWC and advised Plaintiff the inmates could be researched using DOC's publicly available Offender Locator to help determine which inmates to select for possible joinder. Plaintiff suggests Defendants' response was designed to cause delay and required "days of investigation" by Plaintiff's counsel to identify 35 women who appeared to be eligible to participate in Wyoming's boot camp program. However, defense counsel's reasoning for simply providing the names of all 260 women incarcerated at WWC is not without merit: none of the women had received the required recommendation from a sentencing judge, and defense counsel "wanted to avoid supplanting its own judgment for Plaintiff's regarding the viability of certain inmates as potential plaintiffs." (Opp'n to Mot. for Reconsideration at 4.)

Plaintiff further complains Defendants improperly frustrated her efforts to have face-to-face meetings with the 35 women she identified for potential joinder to her case. The Court disagrees. Defense counsel's concerns regarding Plaintiff's desire to meet with the 35 inmates at the prison were justified, as such a meeting appears at odds with the Rule of Professional Conduct 7.3, which prohibits in-person solicitation. The defense relayed its position and concerns to Plaintiff's counsel (Berkness Decl. Ex. A-3), who in response cited *In re Primus*, 436 U.S. 412 (1978), as exempting ACLU attorneys from anti-solicitation rules (Berkness Decl. Ex. A-4).

Plaintiff's counsel followed up with another email on December 1, 2017, purporting to cite a case "directly on point" regarding Plaintiff's counsel's desire to meet with the 35 inmates. (*Id.* Ex. A-5.) The case cited is *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983). In his email, Plaintiff's counsel quoted the following passage from the *Jean* case:

More particularly we sustain plaintiff HRC's purely legal claim of a right to solicit clients in detention. . . . [I]f *Button* and *Primus* mean anything they permit legal counsel to inform individuals of their legal rights when counsel does so as an exercise of political speech unaccompanied by expectation of remuneration.

Id. at 1508-09 (phrase omitted by Plaintiff's counsel). Plaintiff's counsel insisted "organizations like the ACLU have a First Amendment right to meet with prisoners." (Berkness Decl. Ex. A-5.) However, troubling to defense counsel at the time, and now the Court, is that Plaintiff's counsel omitted a key phrase from the *Jean* passage: "*Although this solicitation may not permit individual face-to-face encounter*, if *Button* and *Primus* mean anything" *Jean*, 711 F.2d at 1508 (emphasis added). Thus, defense counsel was rightfully unconvinced the case law allowed Plaintiff's counsel to engage in a face-to-face meeting with the 35 inmates.

Plaintiff also asserts Defendants improperly required her counsel to follow particular procedures not previously or otherwise required for visitation with prisoners before arranging the requested meeting with the 35 inmates. However, Plaintiff fails to recognize the distinction here – Plaintiff's counsel was attempting to meet with prisoners with whom he had no existing attorney-client relationship. Defense counsel repeatedly advised Plaintiff's counsel the DOC would allow visitation per its normal policies and

that the visitation policy they were attempting to invoke only applied if they had an attorney/client relationship with the inmates with whom they wanted to meet. (Berkness Decl. ¶¶ 7-8 & Ex. A-6.) Because Plaintiff's counsel was not attempting to visit existing clients, and instead attempting to solicit new clients through face-to-face meetings, there was nothing improper about Defendants requiring counsel to follow the normal visitation policies and ultimately directing all communications with DOC through defense counsel.² Defense counsel's concern regarding Plaintiff's counsel's attempts to engage in face-to-face solicitation of potential plaintiffs was justifiable.

The Court sees no basis to reconsider its denial of class certification. If the 15 inmates constitute all those who met the statutory requirements for boot camp at the time of their sentencings, joinder has proven to be practicable, and a class of 15 is too low to warrant certification. Further, Blanchard's claims differ from the other inmates' claims because Blanchard claims that, unlike male offenders recommended for boot camp, she was sent out of state to Florida's inferior program. The new inmates, by contrast, would claim alleged constitutional violations prevented them from seeking boot-camp recommendations in the first place. (Pl.'s Proposed Sec. Am. Compl. at 3-7) (ECF No. 67-1). Moreover, Ms. Blanchard's mootness has ended her ability to request class certification for these other inmates. *See Clark, supra* at 1139 ("the mootness of a named plaintiff's claim prior to class certification moots the entire case"); *D.R. v. Mitchell*, 645 F.2d 852, 854 (10th Cir. 1981) ("Because the class was never properly identified by the

² Plaintiff's counsel ultimately sent written communication to the women at WWC, including a Retainer Agreement, which presumably resulted in identification of the fifteen women Plaintiff seeks to add as plaintiffs. *See* Pevar Decl. ¶ 5 (ECF No. 72).

district judge, there is no party before this court who can maintain the remaining constitutional challenge.”). And finally, there is minimal prejudice in requiring the proposed plaintiffs to file a new lawsuit, and those inmates may even be in a better position by not being burdened with Plaintiff having exhausted the allowable interrogatories and half of the allotted depositions.

CONCLUSION

The Court is not in the business of engineering cases or controversies, or of certifying a class action for the convenience of counsel. Because Plaintiff’s claim is now moot, this Court lacks subject matter jurisdiction and the case must be dismissed. Plaintiff has failed to show the applicability of any exception to the mootness doctrine or the general rule that the mootness of a named plaintiff’s claim in the absence of, or prior to, class certification moots the entire case. To the extent this Court may have discretion to reconsider and certify a class relating back to the filing of Plaintiff’s complaint, it declines to do so and finds no other basis to reconsider the denial of class certification.³ THEREFORE, it is hereby

ORDERED that *Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint as Moot* (ECF No. 62) is GRANTED; it is further

ORDERED that *Plaintiff’s Motion to Reconsider* (ECF No. 70) is DENIED, and *Plaintiff’s Motion for Leave to File Second Amended Complaint* (ECF No. 67) is DENIED; and it is further

³ The Court recognizes that briefing is not complete with respect to Plaintiff’s motion for leave to file a second amended complaint and Plaintiff’s motion to reconsider the denial of class certification, in that Plaintiff’s reply briefs have not yet been filed. However, in light of the Court’s reasons for dismissal of this action as explained herein, any further briefing by Plaintiff would be immaterial to the Court’s decision.

ORDERED that this action is DISMISSED.

Dated this 20th day of February, 2018.

A handwritten signature in blue ink, appearing to read "Scott W. Skavdahl", is written over a horizontal line.

Scott W. Skavdahl
United States District Judge