

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS

ROBERT WESTEFER, *et al.*,

Plaintiffs,

v.

DONALD SNYDER, *et al.*,

Defendants.

No. 00-162-GPM

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION TO CERTIFY THE PLAINTIFF CLASS**

INTRODUCTION

Plaintiffs, individually and on behalf of all others who are similarly situated (“plaintiffs”), are prisoners who were transferred to Tamms Correctional Center. They allege that they were punished by being sent to Tamms in retaliation for their exercise of their right to file litigation or otherwise engage in litigation activities, in violation of the First Amendment (Count One) and that they were punished by being transferred to Tamms in violation of the due process clause of the Fourteenth Amendment (Count Three).

In their First Amended Complaint (cited as "Comp."), the named plaintiffs seek to represent a class defined as (Comp. ¶ 97), "All inmates who have been transferred to Tamms since March 7, 1998." Following the Seventh Circuit's determination that plaintiffs had properly stated a claim for violation of their due process rights, plaintiffs now move to certify a class pursuant to Rules 23(b)(1) and 23(b)(2), as to their procedural due process claim only. Plaintiffs do not seek certification for their First Amendment claims as, in the judgment of counsel, individual questions of fact are likely to outweigh any common questions. Plaintiffs also do not seek certification pursuant to Rule 23(b)(3), as proof of damages for any violation of procedural due process requires

not only proof that plaintiffs were denied a proper hearing, but also proof that plaintiffs would have prevailed had they been granted a proper hearing. *Carey v. Phipus*, 435 U.S. 247, 263 (1977). This determination would necessarily involve proof of detailed facts unique to each plaintiff, and would thus be difficult to resolve within the confines of a class action.

Plaintiffs submit this memorandum in support of their motion seeking to maintain this case as a class action as to the procedural due process claims asserted by plaintiffs, pursuant to Rule 23 of the Federal Rules of Civil Procedure.

I.
The Case Meets the Threshold
Requirements of Rule 23 and the
Enumerated Requirements of Rule 23(a)

This case, which challenges the procedures by which defendants determined which prisoners were to be punished by being sent to Tamms, represents a “prototypical candidate” for class certification. *Robert E. v. Lane*, 530 F.Supp. 930, 944 (N.D. Ill. 1980). To maintain the case as a class action, plaintiffs have the burden of showing that all the requirements of class certification are met. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). For purposes of deciding whether a class will be certified, allegations made in support of certification are taken as true, and the merits of the case are not examined. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-178 (1974).

The Amended Complaint meets the requirements of Rule 23. First, plaintiffs have alleged the existence of a readily identifiable class. *Simpson v. Miller*, 93 F.R.D. 540, 545 n. 11 (N.D. Ill. 1982). The Amended Complaint (¶ 97) identifies the class as “all inmates who have been transferred to Tamms Correctional Center since March 7, 1998 [the date Tamms received its first

prisoner].” This class is readily identifiable, and several courts have certified similar classes, including, most relevantly, *Wilkinson v. Austin*, 125 S.Ct. 2384 (2005).

Second, the Amended Complaint meets the requirement that each representative plaintiff be part of the proposed class, that is, that he possesses “the same interest and suffer the same injury shared by all members of the class he represents.” *Keele v. Wexler*, 149 F.3d 589, 592-3 (7th Cir. 1998) (internal citation omitted). The Amended Complaint (¶s 29-94) alleges that each of the named plaintiffs was transferred to Tamms, and each alleges (Comp. ¶s 123-126) that he was transferred to Tamms without being given an opportunity for a meaningful hearing. Therefore, each representative plaintiff suffers “the same injury that all members of the class share.”

In addition to meeting these threshold requirements, the Amended Complaint fulfills all four requirements of section (a) of Rule 23 and the requirements of at least one of the categories of section (b) of that Rule, as required for class certification.

Under section (a), the four requirements are (A) numerosity (the number of injured persons must be large enough to justify treatment as a class); (B) commonality (there must be questions of law or fact common to all members of the class); (C) typicality (the claims or defenses of the named plaintiffs must be typical of the claims or defenses of the class); and (D) adequacy of representation (the named plaintiffs, and consequently their counsel, must be capable of fairly and adequately prosecuting the action). In this case, the Amended Complaint meets the requirements of Rule 23(a).

A. Numerosity.

There is no magic number at which the numerosity requirement is satisfied. Nevertheless, “a class of more than 40 members is generally believed to be sufficiently numerous

for Rule 23 purposes.” Toney v. Rosewood Care Center, 1999 WL 199249, *6 (N.D. Ill.). See also Chandler v. Southwest Jeep-Eagle, Inc., 162 F.R.D. 302, 307 (N.D. Ill. 1995), citing H. Newberg, Class Actions § 305 (1992), and Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 262 (S.D. Cal. 1988). Moreover, the exact number or identify of class members need not be pleaded to establish numerosity. In re VMS Securities Litigation, 136 F.R.D. 466, 473 (N.D. Ill. 1991).

The population of Tamms has been between 225 and 300 since it opened. According to the Department of Corrections, on January 5, 2006, there were 233 prisoners housed at Tamms¹. Plaintiffs do not know how many prisoners have been transferred in and out of Tamms since it opened, but the total class would clearly be greater than 300, and those who may be transferred to Tamms in the future would further increase the number of class members. In sum, the class is probably larger than 300, and certainly larger than the 40 class members generally required to meet the numerosity requirement.

B. Commonality.

The commonality requirement of Rule 23(a) requires that the members of the proposed class have questions of law or fact in common. Rule 23(a), Fed. R. Civ. Pro. This requirement may be satisfied even if there are factual discrepancies between members of the class. In re Workers’ Compensation, 130 F.R.D. 99 (D. Minn. 1990). Courts have routinely recognized that the commonality requirement is “not high,” Taylor v. Flagstar Bank, 181 F.R.D. 509, 516 (M.D. Ala. 1998), and that a “common nucleus of operative fact” is usually enough to

¹ All population figures are limited to the Closed Maximum Security Unit (commonly referred to as the Supermax). Tamms includes a minimum security unit as well, the residents of which are not included in the definition of the class.

satisfy it. Small v. Sullivan, 820 F.Supp. 1098, 1109 (S.D. Ill. 1992) (citation omitted).

Because plaintiffs' procedural due process claim is a “structural” claim in which plaintiffs argue that the entire system of choosing which prisoners will be punished by being sent to Tamms is constitutionally deficient,” the claims of the class members “necessarily embody common fact questions.” Robert E., 530 F.Supp. at 942.

There also are numerous common factual and legal questions, such as whether conditions of confinement at Tamms impose restrictions which are "atypical and significant" compared to conditions in other prisons, what "baseline" should be used to answer that question, and (assuming due process is triggered), what type of process is required, including the security concerns, and all of the other factors governing that determination. *Wilkinson v. Austin*, 125 S.Ct. 2384, 2396 (2005). Because these questions of law and fact “refer[] to a standardized conduct of the defendants toward members of the proposed class,” the commonality requirement is met. Vickery v. Jones, 856 F.Supp. 1313, 1328 (S.D. Ill. 1994), aff’d. 100 F.3d 1334 (7th Cir. 1996) (quoting Franklin v. City of Chicago, 102 F.R.D. 944, 949 (N.D. Ill. 1984)).

C. Typicality.

Rule 23(a) requires that the claims or defenses of the representative parties be typical of the claims of the class. A plaintiff’s claim is typical if it arises out of “the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.” De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983) (citations and internal quotation omitted). The typicality requirement may be satisfied despite factual distinctions between the claims of the named plaintiffs and those of other class members. Thus, “similarity of legal theory may control even in the face of differences of

fact.” 713 F.2d at 232 (citations omitted).

The named plaintiffs’ claims arise from the same practice and course of conduct as those of the class at large, since the named plaintiffs were chosen for transfer to Tamms using the same process as was used for all prisoners who were transferred to Tamms. The claims of the named plaintiffs are based on the same legal theories as those of the class at large. Therefore, the requirement of typicality has been met.

D. Adequacy.

Rule 23(a) requires that the representative parties will adequately and fairly protect the interests of the class. The adequacy inquiry involves two questions: first, whether the plaintiffs’ counsel are qualified, experienced, and generally able to conduct the proposed litigation and, second, whether the named plaintiffs have interests antagonistic to those of the class. Small, 820 F.Supp. at 1110-1111 (citations omitted).

Plaintiffs’ counsel are experienced litigators, as is demonstrated by the conduct of this case to date. Counsel is personally experienced in civil rights litigation involving prisoners’ rights. The named plaintiffs, for their part, have no conflicting interests with the class they represent. All of the named plaintiffs share the class's interest in halting the defendants’ practice of punishing prisoners by transferring them to Tamms without providing them with notice or an opportunity to be heard. Plaintiffs therefore meet the requirements of Rule 23(a)(4) concerning adequacy of representation.

II. Plaintiffs Satisfy the Requirements for Maintaining a Class Action Under Rules 23(b)(1) and 23(b)(2)

In addition to fulfilling the requirements of Rule 23(a), class certification requires

complying with the standards established by either Rule 23(b)(1) or Rule 23(b)(2). The proposed class in the instant case satisfies both requirements.

A. Rule 23(b)(1)

Under Rule 23(b)(1) a class action may be maintained (subject to the prerequisites of section (a)) if the prosecution of separate actions by individual members of the class would create a risk of either (A) inconsistent or varying adjudications which would establish incompatible standards for the defendants; or (B) adjudications with respect to individual members of the class which would be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Certification under Rule 23(b)(1) should be confined to those cases where there are no, or few, individual questions.

Hylaszek v. Aetna Life Insurance Co., 1998 WL 381064, 1998 U.S. Dist. LEXIS 10209 (N.D. Ill. 1998).

In this case, individual adjudications of the class members' claims adjudicating the issue of what process is due before prisoners can be punished by being sent to Tamms would have the potential to establish inconsistent standards for the defendants or decisions that would dispose of the interests of other class members. Such cases could be brought in a variety of forums-- including this Court, the Circuit Court for Alexander County where Tamms is located, and in both the federal and circuit courts located in the counties from which any prisoner is transferred, as well as both federal and Circuit Courts covering Springfield, where the final transfer decisions appear to be made. Clearly, the risk of inconsistent decisions in such a wide variety of forums is real. In contrast, resolution of the due process issue for all class members in the instant case would be efficient, because on the due process issue, plaintiffs primarily seek declaratory and

injunctive relief addressing system-wide regulations and practices, not individual situations, and because their claim for damages is secondary to their claim for injunctive relief. In this case, certification of the class under Rule 23(b)(1) is appropriate because it would minimize the risk of inconsistent adjudications for individual lawsuits.

B. Rule 23(b)(2).

Under Rule 23(b)(2), a class action may be maintained if the requirements of Rule 23(a) are met and “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Courts have recognized that “certification under Rule 23(b)(2) is particularly appropriate in class actions brought to vindicate the plaintiffs’ civil or constitutional rights.” Johnson v. Brelje, 482 F.Supp. 121, 125 (N.D. Ill 1979), citing Fujishma v. Board of Education, 460 F.2d 1355, 1360 (7th Cir. 1972).

Plaintiffs allege that defendants have violated the due process clause of the Fourteenth Amendment by failing to provide them with a hearing which complies with the minimum requirements of the due process clause. The procedures for transfer to Tamms are set forth in regulations which are applicable statewide, and presumably apply to all transfers to Tamms. See, for example, 20 Ill. Admin. Code §505.40, *et seq.*

The appropriateness of the class-wide injunctive and declaratory relief that plaintiffs seek cannot seriously be doubted. Presumably prisoners either are or are not entitled to due process before they are transferred to Tamms. It is inconceivable that this right depends on detailed facts relating to each individual prisoner, resulting in some prisoners having a right to due process, and

others not. There is certainly nothing in the opinion of the Seventh Circuit in this case, or in the Supreme Court's decision in *Wilkinson v. Austin*, 125 S.Ct. 2384 (2005) which suggests that this sort of individual by individual determination is appropriate, rather than system-wide rules applicable to broad classes of prisoners.

Rule 23(b)(2) promotes fairness and judicial economy in this type of case and has been regularly used to adjudicate due process issues, most tellingly in *Wilkinson* itself. Maintaining this suit as a class action is necessary to assure that the rights of prisoners other than those of the named plaintiffs are protected, without the necessity of a multiplicity of individual actions scattered across Illinois.

CONCLUSION

Plaintiffs meet the requirements of class certification under Rules 23(b)(1) or 23(b)(2). Allowing this case to be adjudicated as a class action will provide the fairest resolution for all class members and will provide the most efficient resolution of the controversy. Plaintiffs' motion to certify the plaintiff class should be granted.

Respectfully submitted,

s/Alan Mills

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2006, I electronically filed **Memorandum of Law In Support of Motion to Certify Class** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

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Respectfully submitted,

s/Alan Mills
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