

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

PAMELA WALKER and BRENT)
HOUSER, individually and on behalf of)
all others similarly situated,)
Plaintiffs,)

vs.)

4:07-cv-14- SEB-WGH

)
FLOYD COUNTY, INDIANA, DARRELL)
MILLS, individually and in his official)
capacity as Floyd County Sheriff,)
STEVE KNIGHT, individually and in his)
official capacity as Floyd County Jail)
Commander, and JOHN DOE and)
JANE DOES, Nos. 1, 2, and 3,)
individually and in their official)
capacities as medical professionals,)
officers and employees of Floyd County)
Jail,)

Defendants.

ENTRY DENYING CLASS CERTIFICATION

This litigation arises out of a concern for the allegedly preventable or at least controllable spread of a methicillin-resistant staphylococcus aureus (MRSA) at the Floyd County, Indiana, Jail (the "Jail"). MRSA is a bacterial virus resistant to treatment with the typical antibiotics used to treat common staphylococcus infections ("staph"). Plaintiffs, Pamela Walker and Brent Houser, have brought claims on their own behalf and also seek certification of this lawsuit as a class action on behalf of other inmates who have similarly suffered from infections acquired at the Jail. The lawsuit seeks declaratory

and injunctive relief as well as damages against Floyd County, Indiana, and various of its officials and employees who are in charge of the operations at the Jail.

Walker and Houser each suffered from what they represent to have been MRSA infections while incarcerated at the Jail, claiming that the same were acquired at the Jail as a result of overcrowded conditions and the flawed policies and practices of the Defendants. They contend that many others at the Jail have suffered in similar fashion, offering affidavits from current and former inmates in support of that contention. In addition to the problem of overcrowding, Plaintiffs claim that the spread of staph infections to the inmate population is the result of inmates being required to change their own dressings of infected wounds, Jail medical staff ignoring requests for treatment, refusing to educate the Jail population with regard to MRSA, dismissing the symptoms of MRSA as insect bites or boils, refusing to culture all open wounds, refusing to isolate infected inmates and threatening to suspend the privileges of those inmates who continually complain of these circumstances.

On behalf of themselves and other inmates whom Walker and Hauser claim suffered in similar ways, they contend that through the combination of actions, inaction and failure to change policies at the Jail, a pattern of deliberate indifference to their right to be free from cruel and unusual punishment under the federal constitution and their rights under the Indiana

constitution has been established. Their Amended Complaint also asserts Indiana common law claims against Defendants, to wit, that Defendants negligently or intentionally inflicted serious emotional distress upon the entire class of affected inmates and that the actions of Defendants constituted gross negligence, resulting in the named Plaintiffs and the members of the class sustaining compensable damages, such as medical expenses, lost wages, pain, disfigurement and suffering.

In June of 2007, a hearing was held on Plaintiffs' request for a preliminary injunction. Plaintiffs sought an injunction deeming the Jail's policies and actions unconstitutional and requiring the Defendants to take all necessary and appropriate steps to alleviate the conditions and policies which allegedly cause Plaintiffs to be exposed to acquire their infection. We denied the request for preliminary injunctive relief, finding that Plaintiffs had failed to establish that the Defendants were acting with deliberate indifference to a substantial risk of serious harm to the inmates. *See Doc. #50, p.19*. More specifically, after considering the testimony of witnesses for both sides as well as other evidence submitted, the Court concluded that, at that point in the litigation, Plaintiffs had failed to establish that the policies and procedures in place at the Jail had placed Plaintiffs or other inmates "at substantial risk of serious harm, " and that they therefore were not likely to prevail on the merits of their claim that their constitutional rights were being violated.

We have before us now Plaintiffs' Motion For Class Certification. Walker and Houser propose that we certify two classes:

1. A Rule 23(b)(2) class composed of: All present and future inmates in the Floyd County Detention Center; and
2. A Rule 23(b)(1) & (b)(3) class composed of: all persons who, after February 6, 2005, first developed symptoms consistent with staphylococcus aureus or methicillin-resistant staphylococcus aureus after confinement in the Floyd County Jail for a period of more than ten days.

Defendants oppose class certification, claiming that most of the prerequisites to bringing such a class lawsuit have not been satisfied.

Standards for Class Certification

The ground rules governing class actions brought in federal court are set forth in Fed. R. Civ. P. 23. Plaintiffs bear the responsibility of establishing that all four elements in Rule 23(a) - numerosity, commonality, typicality and adequacy of representation - are satisfied. If Plaintiffs are successful in carrying that burden, then they also must demonstrate that the requirements of at least one of the three subsections of Rule 23(b) are met as well. However, before conducting this Rule 23 analysis of Plaintiff's proposed classes, we must determine whether the proposed classes are sufficiently defined so as to allow their membership to be objectively ascertained. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir.2006); *Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981). If the Court were required to conduct individual inquiries amounting to

mini-trials to determine if any particular individual meets a class definition, it becomes administratively infeasible to proceed with a class action and any more substantive analysis is unwarranted. *Adair v. Johnston*, 221 F.R.D. 573 (M.D. Ala. 2004); *Wallace v. Chicago Housing Authority*, 224 F.R.D. 420 (N.D. Ill. 2004).

Here, we discover that there are significant problems with both of the proposed class definitions. First, the breadth of the proposed Rule 23(b)(2) class far exceeds the allegations of the Amended Complaint. Plaintiffs propose a class for 23(b)(2) certification which includes all inmates, whether or not they were ever exposed to, or adversely affected by, the actions of the Defendants or the Jail policies with regard to the treatment of open sores and wounds. In their Amended Complaint, Plaintiffs describe the class of individuals they seek to represent as those “who, while incarcerated at the Jail, have acquired infectious diseases as a consequence of Defendants’ failure to protect such inmates.” *Amended Complaint*, ¶ 6. Plaintiffs’ Amended Complaint does not differentiate between those who might be entitled to injunctive relief and those who might be entitled to an award of damages or both. As pled, Plaintiffs seek an award of damages for all Plaintiffs, alleging that: “As a consequence of Defendant’s wrongful conduct, Plaintiffs and the members of the class have been infected with diseases that will have a substantial and deleterious impact on their health,” *Amended Complaint*, ¶ 31. Further, punitive damages are

sought on behalf of all class member as well. *Amended Complaint*, ¶ 32.

Unlike the allegations of the Amended Complaint, Plaintiffs' certification motion would create a larger group of potential plaintiffs, including inmates who have been infected as well as those who have not, and then carve out a separate class for those who might be seeking money damages.

The inclusion of all present and future inmates in a certified class goes far beyond the "notice" provided by the Plaintiffs' pleadings. Clearly, not every inmate of the Jail has suffered infection(s) while incarcerated. In addition, based on the pleadings, as well as the evidence adduced at the prior hearing for injunctive relief, not all inmates have had identical experiences with regard to infections or open wounds in terms of their own situations and those of inmates with whom they shared facilities. For example, some inmates with infections have been isolated, some not. Some have changed their own wound dressings, some have enlisted other inmates to help, and still others have received assistance of medical professionals. There are inmates who had their wounds cultured, and some who did not. Some inmates apparently claim that they were directly exposed to others with infections and others apparently did not have such contact.

In short, until the filing of their motion for class certification, Plaintiffs have indicated that they sought to represent inmates who have suffered staph-related infections as a result of the actions or inaction of Defendants. Now they

seek to represent all who are, or may in the future be, incarcerated at the Jail, a class so broad as to include literally hundreds, if not thousands of persons who have suffered no damages and whose circumstances were materially distinguishable from those who may have incurred damages.

Furthermore, the claims of the two named plaintiffs, who allege that they suffer from MRSA related infections, are not typical of a class so broadly constituted that the majority of its members will not have experienced any health consequences as a result of Defendants' actions or inaction nor suffered cognizable damages. A class with a membership exceeding the potential class members identified in the pleadings should not be certified nor should it be represented by named plaintiffs whose claims are significantly different from the majority of those in the class and whose exposure to relevant circumstances may differ significantly from most other class members.¹ See

¹For example, Plaintiff Brent Hauser testified at the preliminary injunction hearing that he contracted cellulitis (an infection beneath the skin often caused by staph bacteria) shortly after he started working in the Jail laundry. He claimed the person who held the laundry job prior to him had also acquired the same condition. This differs significantly from the scenario surrounding the complaint of Pamela Walker, the other named Plaintiff, who testified that she acquired several open sores under her arm and on each thigh after she was incarcerated at the Jail in 2006. At the Jail, she was housed with an individual who was recovering from similar open sores, leading Walker to attribute her infection to exposure to her cell-mate. However, the evidence revealed that she had also been incarcerated at the Clark County jail immediately prior to being incarcerated in Floyd County and could not connect the onset of her symptoms in time to more than a week or a week and a half after she was incarcerated in Floyd County. Not only are the scenarios of the named Plaintiffs significantly different from each other, more importantly, they both would be atypical of the numerous inmates who would be a part of the requested 23(b)(2) class, who never acquired any infection or suffered any staph related medical symptoms.

Blaz v. Galen Hosp. Illinois, Inc., 168 F.R.D. 621, 624-25 (N.D. Ill. 1996).

The second class which Plaintiffs seek to represent are those inmates who actually suffered symptoms of a staph or MRSA infection. These are the individuals whom Plaintiffs argue would have incurred compensable damages. Almost immediately, however, we are faced with a need to conduct significant factual inquiry into the merits of their respective damages claim to determine if any putative plaintiff satisfies the class definition.

Plaintiffs have tendered affidavits of forty-eight current or former inmates, nearly all of whom testify in varying degrees of specificity to having acquired some type of infection or sore while incarcerated at the Jail, which they reported to Jail officials. Jail records do not substantiate many of these attestations and no other medical records were proffered along with the affidavits. Thus, key factual issues will necessarily dictate entitlement to inclusion in the class. Four inmates, for example, attest to having been diagnosed with MRSA, while most others do not offer any testimony or evidence regarding the specific medical condition, if any, they were experiencing. Whether an individual has “developed symptoms consistent with staphylococcus aureus or methicillin-resistant staphylococcus aureus after confinement in the Floyd County Jail for a period of more than ten days” is not a readily ascertainable fact; such a determination requires an individual inquiry into the subjective gravamen of each individual’s damages claim. *See*

Kenro, Inc. v. Fax Daily, Inc., 962 F.Supp. 1162, 1169 (S.D. Ind. 1997)(class certification denied because it would require court to inquire into the merits of the individual claims); *Indiana State Emp. Ass'n v. Indiana State Highway Commission*, 78 F.R.D. 724, 725 (S.D. Ind. 1978)(class definition required court to essentially ascertain ultimate liability in order to determine if an individual was a member).

Even if we were to accept at face value the self-serving attestations of the forty-eight current and former inmates without attempting to resolve or balance the contradictory evidence offered by the Defendants, we still face the prospect of multiple, complex factual differences between and among the individual circumstances which will necessarily affect both the liability and damage issues. As to each putative class member, the Court would be required to analyze his/her medical history and determine whether he/she participated in any other community that might be deemed a possible source of infection from staph bacteria, such as hospitals, other jails, dormitories or other high density living facilities. Then we would have to know whether they were exposed to others who may or may not have reported their medical conditions and whether each class member promptly reported his/her own relevant medical conditions to Jail personnel and, if so, whether medical recommendations and basic cleanliness conventions were followed. These are but a few of the many, complex, relevant factual issues which must be resolved on an individual basis

in order to make a fair and appropriate and accurate assessment of Defendants' liability. Such an approach is inconsistent with certification standard under Rule 23(b)(1). Clearly, in such a circumstance as this, it can not be said that questions of fact and law common to all class members predominate over questions affecting only individuals. Consequently, certification under 23(b)(3) would be inappropriate as well.

In support of their argument that the dangers associated with MRSA infections along with the prevailing circumstances at the Jail warrant certification of this lawsuit as a class action, Plaintiffs rely heavily on an unreported case from the Eastern District of Pennsylvania, *Inmates of Buck County Correctional Facility v. County of Bucks*, 2004 WL 2958427 (E.D. Pa. Dec. 20, 2004). In a fashion similar to the allegations in the case at bar, the inmate Plaintiffs in *County of Bucks* claimed that the conditions at the correctional facility where they were housed were such that the inmates were continuously exposed to serious infectious diseases. In support of their claim, they offered evidence that ninety-five inmates had necessitated isolation because of their having contracted MRSA infections, which amounted to the infliction of cruel and unusual punishment at the facility. *Id.* at *1. The court found that Plaintiffs had successfully established the four prerequisites of 23(a) (numerosity, commonality, typicality and adequacy of representation) and also found that Bucks County was acting or refusing to act in a fashion generally

applicable to the class, thereby making declaratory or injunctive relief appropriate with respect to the class as a whole, as required for certification under 23(b)(2). *Id.* at *5. A class consisting of all female inmates similarly situated at the correctional facility was thus certified by the court based on a relatively brief discussion. *Id.*

However, there was only one class certified in *County of Bucks* and it was considerably more limited than the 23(b)(2) class defined by Plaintiffs here. Despite Plaintiffs' assertion that many current and former inmates at the Jail have exhibited MRSA or staph symptoms, there is no medical confirmation of such a significant number. In addition, Plaintiffs' proffered summary chart of the forty-eight inmate affidavits discloses that only four have allegedly been affirmatively diagnosed with MRSA. Further, while there is no indication that the Plaintiffs in the *County of Bucks* case sought to recover money damages, in this case much of what the named Plaintiffs and those comprising the proposed second class of inmates seek is damages.

After careful reflection, we find ourselves in agreement with the court in the Eastern District of Kentucky, where current counsel for Plaintiffs also represent another inmate confined in that county's correctional facility and for which they have sought class certification, in fact, for two classes of plaintiffs. In *Napier v. Laurel County, Ky.*, 2008 WL 544468 (E.D. Ky. Feb. 26, 2008), the first class for which certification was sought was a Rule 23(b)(2) class,

consisting of all persons who have or will be confined to the county jail; the second class was to be the MRSA damages class consisting of all inmates who had exhibited staph symptoms. *Id.* As in the case at bar, Plaintiff's counsel cited the *County of Bucks* case as authority in support of certification. But, in declining to certify the class, the district court stated:

This Court is not persuaded by the analysis and conclusion regarding class certification in the *Bucks County* case. Unlike the summary analysis presented by that court, this Court believes that it is required to engage in a "rigorous analysis" of the requirements of Rule 23 Notably, a class should not be certified where extensive factual inquiries are required to determine whether individuals are members of a proposed class, and where a plaintiff could prove his own claim, but, in doing so, "not necessarily have proved anybody else's claim." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007)(citing *Sprague v. GMC*, 133 F.3d 388, 399 (6th Cir. 1998)); *Snow v. Atofina Chemicals, Inc.*, 2006 WL 1008002, at *8-9 (E.D. Mich. March 31, 2006).

Id. at *6. We share these same basic concerns with regard to the case before us.


Conclusion

The abundance of factual issues surrounding the symptoms and health of each of the proposed class members, when considered in light of the breadth of the proposed class definitions, would require us to undertake complex fact-finding with respect to each putative member of the second proposed class in

order to determine whether they are entitled to inclusion. Even if the classes were more narrowly drawn, individual issues of exposure, degree of infection and damages would predominate over those of the classes. In contrast, we perceive no risk of prejudice that arising from individual determinations of liability. Accordingly, Plaintiffs' Motion For Class Certification (Dkt. #76) is DENIED.

IT IS SO ORDERED

Date: 11/26/2008



SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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