

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DERRICK PHIPPS, et al.,

Plaintiffs,

v.

SHERIFF OF COOK COUNTY and COOK
COUNTY, ILLINOIS,

Defendants.

No. 07 C 3889

Judge Elaine Bucklo

**DEFENDANTS' REPLY TO PLAINTIFFS'
MEMORANDUM IN OPPOSITON TO
DECERTIFICATION**

Plaintiffs, four individuals who are paraplegics or partially-paralyzed individuals, were pre-trial detainees housed at the Cook County Department of Corrections ("CCDC") between 2006 and 2007.

Plaintiffs' in this matter concede that this case should proceed to a determination of liability followed by individual damage determinations for each Plaintiff. That is not the proper basis for class certification. The class representatives must show that one of the requirements of Rule 23(b) is met: "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and that a class action suit is the superior method "for fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23 (b)(3).

The predominance requirement of Fed.R. Civ. P. 23(b)(3) is more stringent than Rule 23(a)'s commonality requirement that the class members have a shared experience.

Plaintiffs assert that the Seventh Circuit's, *Harper v. Sheriff of Cook County* 581 F.3d 511 (7th Cir. 2009) does not bear any relationship to the case at bar. That is clearly not the case. The issue, whether each plaintiff qualifies under the ADA, is an individualized issue, the determination of which cannot be taken based on Plaintiffs' unsupported conclusions.

Each class member's situation is markedly different. Plaintiffs' arguments are at odds with this as they concede that this case should proceed to liability followed by individualized damage determination. (See Docket N. 272 pg 6-10)

The evidence of alleged "present injury" would necessarily differ according to each plaintiff's testimony and would require examination of the individual's medical records to establish that injury does indeed exist if they first qualified as being wheelchair bound.

Plaintiffs ignore that three different standards apply to the three different areas of the Jail which are the subject of this litigation. The court is aware that Cermak is being represented by the States Attorney's office while the remaining portions of the jail are being represented by Special States Attorneys. Cermak was built subsequent to the ADA while the RTU division was built prior to ADA and Division 2 was modified in 2008 where another standard would be applied. A blanket allegation, namely that the detainees were subjected to inappropriate facilities, does not create a fact common to the class. There is no common nucleus of operative facts sufficient to satisfy the commonality and predominance requirements of Rules 23(a)(2) and 23(b)(3).

Indeed, Plaintiffs admit that each member suffered damages unique to them and, after a determination of liability; a trial for each class member will be needed for damages. Proof of causation would raise additional individual issues. The proposed class, though this Court allowed plaintiff over three years to do so, has not been defined. The testimony offered to prove damages would be redundant to that which would be given to establish liability. The plaintiff's have indicated their intentions to conduct separate damage claims as to each class member. Additional variables include how many days each person was incarcerated, and whether they were housed in Cermak or RTU. While Plaintiffs do address this in their response, the allocation of liability under the various comparative fault rules would nevertheless involve analysis as to the knowledge of each plaintiff and would also involve an examination as to whether or not each individual volunteered to remain in the CCDC but waived their opportunity to be released by invoking their rights under the speedy trial act. This individualized factual inquiry is not proper for class actions and the alleged the injury is not a question of law or fact common to the members of the class. *Lewis v. O'Grady*, 853 F.2d 1366, 1370 (7th Cir. 1988). Therefore, in determining causation and present injury for each member of the proposed class the decision would turn on each plaintiff's individualized facts. Thus, common issues do not predominate over individual issues, making this case inappropriate for class disposition. Fed. R.Civ.P. 23(b)(3).

CONCLUSION

This is not an appropriate case for class disposition. The diversity of physical handicaps, injuries complained of, and lengths of stay demonstrate individual issues predominate.

WHEREFORE, the Defendants respectfully request the Court decertify the class. Defendants further request any additional relief that the Court deems just.

Respectfully Submitted,

Cook County Sheriff

By: /s/ Daniel Gallagher

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