1986 WL 13537
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

William KLEIN, Larry Bradley, Dennis McKiness, Pat Breen, Mike Hollingsworth, Carl Von Koeppen and Jim Taurisano, and all others similarly situated, Plaintiffs,
v.
DUPAGE COUNTY, Edward Lundmark, Richard Doria, Edward Burdett and R.D. Rickett, Defendant.

No. 85 C 3430. | Nov. 19, 1986.

Opinion

MEMORANDUM AND ORDER

MORAN, District Judge.

***1** Seven former inmates of the DuPage County Jail are suing the county, Sheriff Richard Doria, Jail Superintendent Edward Lundmark, Chief Deputy Edward Burdett and one R.D. Rickett, M.D., a Michigan physician. The suit began as a 35–count, 34–page *pro se* complaint filed by Klein, after he had been transferred to the Logan Correctional Center in Lincoln, Illinois. Counsel was acquired and a first amended complaint, trimmed to six counts, was filed adding the current plaintiffs. Judge Leighton dismissed that complaint for failure to state a claim. *Klein v. DuPage County,* No. 85 C 3430 (N.D.Ill. Oct. 11, 1985). Plaintiffs then filed a second amended complaint. All but one defendant moved to dismiss, and the case was reassigned to this court.

The current complaint collects an assortment of grievances which allegedly arose from events at the DuPage County Jail. Counts I through IV are claims under 42 U.S.C. § 1983. Counts V and VI are pendent state law claims. Count I is a putative class action against Doria, Lundmark and Burdett. Plaintiffs allege that the routine strip searches for DuPage inmates before and after each court appearance and each visitation infringe their rights under the Fourth Amendment to the United States Constitution. They seek both damages and injunctive relief. In Count II, the plaintiffs (on behalf of themselves only) repeat the same allegations against the county and seek the same releif.

Plaintiff Klein alone brings counts III, IV and V. In count III he seeks damages from Doria, Lundmark and Burdett for chaining him to a bed in the jail infirmary for some 23 hours a day for seven months while he tried to recover from a gunshot wound in the head. He contends that this conduct constituted cruel and unusual punishment and deliberate indifference to his medical and general health needs. Count IV looks for damages from the county on the same allegations. Count V recasts the same facts into a claim against Doria, Lundmark and Burdett for common law negligence.

Plaintiff Bradley alone brings count VI against the county and Dr. Rickett. Dr. Rickett had prescribed certain drugs for Bradley when the latter was in Michigan. Apparently when Bradley became incarcerated in the DuPage Jail, someone from the jail called Rickett's office to get the proper prescriptions. The caller did not speak directly to Rickett. It seems that either Rickett's office gave the wrong list or the caller misunderstood. In any case, Bradley reacted adversely to the drugs he was given.

DISCUSSION

Defendant Rickett moves to be dismissed on several grounds, of which lack of personal jurisdiction over him is dispositive. Bradley does not dispute that Rickett's only relevant contact with Illinois is the telephone call which someone on the jail staff placed to Rickett's office in Michigan. The "arm" of the Illinois long-arm statute probably does not reach that far. It extends to out-of-state residents who commit a tortious act within Illinois. Ill.Rev.Stat. ch. 110, ¶ 2–209(a)(2). But in most cases, the mere fact that injurious consequences were felt in Illinois has not been enough to satisfy the statute when all the conduct contributing to the injury took place outside Illinois. *See, e.g., Green v. Advance Ross Electronics Corp.,* 86 Ill.2d 431, 439, 427 N.E.2d 1203, 1207, 56 Ill.Dec. 657, 661 (1981); *Knorr Brake Corp. v. Harbil, Inc.,* 550 F.Supp. 476, 479 (N.D.Ill.1982).

***2** Admittedly, those cases involved economic loss and may be distinguishable from situations where, as here, the plaintiff actually suffered some physical injury. *See Young v. Colgate-Palmolive Co.,* 790 F.2d 567, 570 (7th Cir.1986); *Gray v. American Radiator & Standard Sanitary Corp.,* 22 Ill.2d 432, 176 N.E.2d 761 (1961). But even if the statute would permit jurisdiction, due process concerns would not. Due process requires a focus on the defendant's conduct. The Constitution does not allow the assertion of personal jurisdiction unless the defendant's contact with the forum is in some way purposeful. *Hanson v. Denckla,* 357 U.S. 235, 253 (1958). Thus jurisdiction over a party "may not be manufactured by the conduct of others." *Chung v. NANA Development Corp.,*

783 F.2d 1124, 1127 (4th Cir.1986); *see World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297–298 (1980). A mere "gesture of accommodation," *Chung,* 783 F.2d at 1129, is not the kind of purposeful contact due process requires. Thus in *McBreen v. Beech Aircraft Corp.,* 543 F.2d 26 (7th Cir.1976), the Seventh Circuit held that a Kansas resident who merely answered a long distance call from Illinois and responded to the caller's questions had not subjected himself to jurisdiction in Illinois. *McBreen* controls the outcome here. This court has no jurisdiction over Rickett and he is dismissed.

DuPage County has also moved to dismiss counts II and IV for failure to state a claim against it. It is settled law that § 1983 does not impose liability on a municipal corporation through *respondeat superior. Monell v. Department of Social Services,* 436 U.S. 658 (1978). Plaintiffs attempt to evade that doctrine by alleging that the strip searches of which they complain were pursuant to County custom or policy. However, this court has previously held that under Illinois law the county does not and cannot set policy for the operation of the county jail; only the sheriff does. *Simenc v. County of DuPage,* No. 82 C 4778, slip op. at 3–4 (N.D.Ill. Apr. 12, 1983); *see also Thomas v. Talesky,* 554 F.Supp. 1377 (N.D.Ill.1983). Counts II and IV must be dismissed.

The county then properly notes that we have no independent basis for federal jurisdiction over it in the only remaining count to which it is a party. Arguably, Count VI, Bradley's state law claim for administering the wrong drugs, lacks a common nucleus of operative fact with either of the surviving federal claims: count I on strip searches, or Klein's count III on being chained to his bed. *Cf. United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725 (1966). But even if we have pendent jurisdiction over the claim, we have none over the party. The instant case is on all fours with *Aldinger v. Howard,* 427 U.S. 1 (1976). There, as here, a plaintiff brought a § 1983 action and pendent state claims against county employees and a county. The county was dismissed from the federal claims for lack of a basis for its liability. The Supreme Court held that absent an independent basis for federal jurisdiction, the county should be dropped from the pendent state law claims as well. 427 U.S. at 5, 14; *see also Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 123 n. 33 (1984). DuPage County must be dismissed from count VI, and since that leaves no defendants in it, the entire count is dismissed.

***3** We turn then to the motions by the individual county defendants. Burdett has made no motion. A footnote to the brief filed by Doria and Lundmark says tersely that he was not served. Plaintiffs point out that the footnote seems inconsistent with the record, since an attorney filed an appearance for Burdett and Burdett joined in Doria's and Lundmark's first motion to dismiss. Under those circumstances this court assumes that Burdett is in the suit, and a mere footnote does not suffice to change that assumption.

Doria's motion raises the most perplexing issue: whether plaintiffs, who are not now inmates of the jail, have standing to seek an injunction against the strip search practices in the jail. To have standing to ask for injunctive relief, a plaintiff ordinarily needs to show that he faces at least "a credible threat" of injury from the practice he wishes to enjoin. *Kolender v. Lawson,* 461 U.S. 352, 355 n. 3 (1983). Otherwise, his claim is moot. Plaintiffs are not currently in the DuPage Jail. Thus they face no immediate threat of being strip-searched there. Doria contends, therefore, that they lack standing to bring the portion of count I which requests injunctive relief.

In appropriate situations, however, a plaintiff may fairly raise the rights of others as part of his argument for standing. *See, e.g., Craig v. Boren,* 429 U.S. 190 (1976); *Griswold v. Connecticut,* 381 U.S. 479 (1965). In certain circumstances, a plaintiff bringing a class action may acquire standing vicariously as the representative of a class, because class actions offer an exception to the usual mootness doctrines. *See Franks v. Bowman Transportation Co.,* 424 U.S. 747, 753–755 (1976). A plaintiff who has standing when he files his complaint, and successfully wins the certification of a class, may continue as class representative even though his individual claim becomes moot. *See, e.g., Foster v. Center Township,* 798 F.2d 237, 245 (7th Cir.1986). If the claim is of a highly transitory nature, so that it becomes moot before a motion for class certification could be ruled on or even made, a further exception allows the motion for certification to relate back to the filing of the complaint for purposes of standing, on the principle of "capable of repetition, yet evading review." *Id.; see United States Parole Commission v. Geraghty,* 445 U.S. 388, 398–399 (1980).

At least as far as injunctive relief is concerned, strict application of mootness principles could permit an unconstitutional jail practice to be long repeated and yet escape review. To avoid that outcome, this court has previously certified a class of prisoners in which the named plaintiffs were no longer incarcerated, even though the complaint sought injunctive relief. *Kissane v. Brown,* No. 80 C 1727 (N.D.Ill. Aug. 11, 1981). Class actions are recognized as an important tool for the vindication of legal rights through which a class representative becomes a kind of "private attorney general" for persons who might not otherwise be able to pursue their claims. *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 338 (1980). In *Kissane,* we focused on the fluid nature of the prison population and, to borrow a phrase from the Supreme Court, "the constant existence of a class of persons suffering the deprivation." *Gerstein v. Pugh,* 420 U.S. 103, 111 n. 11 (1975).

***4** Our decision in *Kissane,* however, came before the Supreme Court decided *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983). Police had used a chokehold on the plaintiff in that case during a routine stop for a traffic violation. He sought not only damages but also an injunction restricting the use of chokeholds, alleging that the department regularly used chokeholds in such situations. The Supreme Court held that his claim for damages could stand, but that he lacked standing to seek an injunction. Without a real and immediate threat that he would suffer personally from a police chokehold again, there was no present case or controversy as to him. 461 U.S. at 105–106. *Lyons* says in effect that a citizen does not acquire standing to enjoin a government practice merely because his government continues it. While *Lyons* was not a class action, its holding would appear to undercut the type of suit this court allowed in *Kissane.* A class action is not ordinarily a device by which a plaintiff who, at the time he filed, lacked an injury which could confer standing can adopt the injuries of others. *See Warth v. Seldin,* 422 U.S. 490, 502 (1975); *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974); *Foster,* 798 F.2d at 245. Plaintiffs do not allege that they were DuPage inmates at the time of filing. Thus they did not have a live case or controversy even when the complaint was filed.

Since *Lyons,* authority in this district is split as to whether former inmates who as class representatives seek to enjoin an unconstitutional practice which injured them during their incarceration, and continues to injure others, may be a special case. In Illinois, at least, prisoners are deemed under a legal disability for purposes of statutes of limitations and notice provisions. They are not expected to be able to file suit while incarcerated. Ill.Rev.Stat. ch. 110, ¶ 13–211. *See Thompson v. Uldrych,* 632 F.Supp. 279 (N.D.Ill.1986); *Hurst v. Hederman,* 451 F.Supp. 1354 (N.D.Ill.1978). Judge Marshall has relied on *Geraghty* and *Gerstein* in holding that the differences in the application of mootness doctrines to class actions, as opposed to individual actions, mean that some former inmates' class claims survive *Lyons. Lewis v. Tully,* 99 F.R.D. 632 (N.D.Ill.1983); *see also La Duke v. Nelson,* 762 F.2d 1318, 1326 (9th Cir.1985) (*citing Lewis* with approval). On the other hand, Judge Aspen, relying on *O'Shea,* has severely criticized *Lewis* in holding the opposite. *Williams v. City of Chicago,* 609 F.Supp. 1017, 1019–1020 (N.D.Ill.1985); *see also Strandell v. Jackson County,* 634 F.Supp. 824, 836 (S.D.Ill.1986) (*citing Williams* with approval).

We need not make our own attempt to resolve this controversy now, however. Plaintiffs have not made allegations which would suffice even to bring them within the more generous approach of *Lewis.* In *Lewis,* Judge Marshall was faced with a claim so transitory that a plaintiff could not reasonably be expected to file a complaint while he still had standing for an injunction. The plaintiff in that case alleged that jail personnel refused to release him for several hours after a court dismissed the case against him and that such delayed release was a regular jail policy. 99 F.R.D. at 634. The complaint stated a constitutional claim; plaintiff had suffered the injury of which he complained, and strict enforcement of standing rules would mean that no one could ever hope to enjoin the practice. Judge Marshall concluded that the complaint fell within the scope of "capable of repetition, yet evading review." 99 F.R.D. at 639. Moreover, the class had already been certified before defendants had articulated their objection, which meant that the class itself acquired a legal interest. 99 F.R.D. at 640, 645; *see Sosna v. Iowa,* 419 U.S. 393, 399 (1975).

***5** Here, by contrast, plaintiffs have not alleged anything that would suggest that they could not have filed a complaint while still in jail. They also have yet to move for class certification. It may be that their stays in the DuPage jail are quite short, though one suspects they involve more than the few hours present in *Lewis.* Their complaint, however, tells us nothing about the duration of their incarceration. There may be other factors which are relevant. For example, they may have feared retaliation by jail personnel if they filed while still incarcerated. They may have an argument based on the Illinois statute which tolls limitations for prisoners. However, the complaint does not assert the statute, nor does it say anything about the speed with which the complaint was filed after they left DuPage. In short, even if *Lewis* represents an exception to the principles of standing for injunctive relief, plaintiffs have not alleged anything that would bring them within the exception. The request for injunctive relief is stricken from count I. Plaintiffs have leave to amend their complaint again if facts exist which would give them a better basis for standing for that request.

As to the claims for damages in counts I and III, Doria contends that the factual allegations are still inadequate. On the strip search allegations, he notes that courts have upheld regular strip searches as a matter of policy when prisoners go to see visitors, *Bell v. Wolfish,* 441 U.S. 520, 559 (1979), or have court appearances, *Dougherty v. Harris,* 476 F.2d 292 (10th Cir.), *cert. denied,* 414 U.S. 872 (1973). Plaintiffs here complain of only such instances, which means to Doria that they complain of nothing unlawful. However, what the Supreme Court held in *Bell* was that the particular strip search policy in that particular facility was not unreasonable. The test for a search is reasonableness, and the reasonableness of a strip search in a detention facility depends not only on when it is conducted, but on the scope of the intrusion, the justification for it, and the manner and place in which it was conducted. 441 U.S. at 559. The inquiry is fact-dependent and not likely to be determined on a motion to dismiss.

For example, a search is only justified when there is a

need for it. The facility in *Bell* had demonstrated a problem with importation of drugs, fairly traceable to meetings with visitors. 441 U.S. at 560. Without evidence that the event triggering a search in fact is causing problems for jail security, for example through smuggling contraband or weapons into the institution, an identical search at an identical time can be unconstitutional. *See Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1272–1273 (7th Cir.1983). Plaintiffs here allege that their court appearances and visits provided no meaningful opportunity to pass contraband or weapons since they were always handcuffed and guarded and had no physical contact with persons from outside the prison. Moreover, a strip search can be unreasonable if done in a place which does not ensure privacy for the person being searched. *Jones v. Edwards,* 770 F.2d 739, 742 (8th Cir.1985); *Iskander v. Village of Forest Park,* 690 F.2d 126, 129 (7th Cir.1982). Plaintiffs allege that they were regularly searched in full view of other prisoners. Count I states a claim for damages.

***6** Doria also contends that count III is inadequate because a constitutional claim for medical mistreatment in prison arises only on "a refusal to provide essential medical care after a prisoner brings his medical complaint to the attention of the incarcerating authority" (county defendants mem. at 9). We are a bit perplexed by the contention. If Doria means that the prisoner must bring his complaint to the attention of someone in a supervisory position, it is not quite clear to us how a prisoner chained to a bed can do that.

In any case, Doria misreads Klein's claim and misstates the law. Klein complains not only of inadequate medical treatment, but of the shackling itself and the effect of being chained: lack of exercise, atrophy of muscles, overall deterioration of health. Shackling prisoners to their beds, without some strong justification for it, for example the prisoner's own mental condition, is cruel and unusual punishment. *French v. Owens,* 777 F.2d 1250, 1253 (7th Cir.1985), *cert. denied,* —— U.S. ——, 107 S.Ct. 77 (1986); *Stewart v. Rhodes,* 473 F.Supp. 1185, 1193 (S.D.Ohio 1979), *aff'd mem.* 785 F.2d 310 (6th Cir.1986). Lack of exercise, standing alone, can be an Eighth Amendment violation. *Caldwell v. Miller,* 790 F.2d 589, 600 (7th Cir.1986); *French,* 777 F.2d at 1255. A claim for medical mistreatment lies when a pattern of conduct over time allows an inference of deliberate indifference to prisoner's medical needs. *French,* 777 F.2d at 1254. Klein alleges that he repeatedly asked to see a physician and for physical therapy, and was repeatedly denied. Count III states a claim.

Finally, Jail Superintendent Lundmark asks to be dismissed from counts I and III because in his opinion the complaint does not allege his personal involvement in the injuries of which plaintiffs complain. He cannot be liable as an individual without direct causal responsibility for the constitutional deprivation, *Wolf-Lillie v. Sonquist,* 699 F.2d 864, 869 (7th Cir.1983), and he cannot be liable as an official unless he expressly set or tacitly encouraged a policy, custom or pattern of official conduct which caused the deprivation. *Id.* at 870. Since plaintiffs do not claim that he personally strip-searched them or attached the shackles, and he denies that he set policy for the jail, he argues that he cannot be liable.

This court, however, does not find the complaint so deficient that Lundmark's lack of liability can be determined on a motion to dismiss. It is true that he is not automatically liable as the superior of the jail personnel who did the searching and shackling. *See, e.g., Ustrak v. Fairman,* 781 F.2d 573, 575 (7th Cir.), *cert. denied,* —— U.S. ——, 107 S.Ct. 95 (1986). But we do not deal here with a distant official such as the commissioner of corrections for an entire state. *See Crowder v. Lash,* 687 F.2d 996, 1006 (7th Cir.1982). Lundmark is the jail superintendent. He could be liable as an individual if he was directly involved in administering a system which caused the plaintiffs' injuries. *Ustrak,* 781 F.2d at 577; *Crowder,* 687 F.2d at 1006. He could be liable as a policymaker if he knowingly, willfully or recklessly, through his actions or failure to act, set up a system in which their injuries would be expected to occur. *Rascon v. Hardiman,* 803 F.2d 269, ——, ——, No. 85–1589, slip op. at 7, 10–11 (7th Cir. Sept. 26, 1986); *Wolf-Lillie,* 699 F.2d at 870. Plaintiffs allege in count I that Lundmark ordered, authorized, permitted, ratified, was deliberately indifferent to or deliberately ignored the strip searches. Klein alleges that Lundmark recklessly disregarded or was consciously indifferent to his situation. Given Lundmark's position there is nothing inherently unreasonable about those allegations. Whether they are true or not is not a matter to be determined from pleadings. Lundmark remains as a party.

CONCLUSION

***7** The motions to be dismissed as parties of defendant Rickett and defendant County of DuPage are granted; counts II, IV and VI of plaintiffs' complaint are dismissed. The request for equitable relief in count I is stricken. The motions to dismiss of defendants Doria and Lundmark are otherwise denied.