IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

LOUIS HENDERSON, et al., Plaintiffs, v. **KIM THOMAS, Commissioner, Alabama Department of Corrections, et al.,** Defendants.	Civil Case No. 2:11cv224-MHT

PLAINTIFFS' RESPONSE TO THE STATE'S THIRD SUPPLEMENTAL RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

Former Plaintiff Bonita Graham was first deposed on March 14, but Plaintiffs' counsel suspended the deposition after Ms. Graham became emotionally distressed and began crying, due to a combination of the sensitive topics covered in a short span of time and the circumstances surrounding the deposition. Over the course of less than three hours, Ms. Graham testified on such topics as how she contracted HIV at age 14 from a guard at a juvenile detention facility who raped her twice, Transcript at 37, Deposition of Bonita Graham, Mar. 14, 2012; how, after her release from the detention center, her mother kicked her out of the house, *id.* at 38; how she became addicted to crack cocaine after her HIV diagnosis and began prostituting herself at a young age to support her crack habit, *id.* at 38-39; and her sexual molestation at the hands of her grandfather and her cousins, *id.* at 85.[1] During the noon break, Warden Albright (a defendant in this case) yelled at Ms. Graham for leaving the deposition room to use the restroom and take her

[1] Plaintiffs are unable to attach the transcript of Ms. Graham's deposition as an exhibit because it is marked confidential pursuant to the protective orders in this case (Doc. Nos. 73 and 74) and has not yet been redacted pursuant to those orders. If Defendants contest Plaintiffs' representation of what the transcript states, Plaintiffs will file it under seal.

noon medications, and threatened her with a disciplinary citation. When Ms. Graham returned, she was visibly upset and as the deposition continued, she then began to cry. Ms. Graham stated that she felt unable to continue with the deposition at that time. *Id.* at 87. Defendants' counsel insisted that "[t]he deposition has not been traumatic in any way," *id.* at 88, and objected to suspending the deposition.

After Defendants agreed to various accommodations to make the resumed deposition less traumatic, the deposition was scheduled to resume on April 20, 2012. Plaintiffs' counsel met with Ms. Graham and confirmed that the accommodations were acceptable. However, on the morning of the deposition, Ms. Graham arrived in the deposition room in tears because the security officer who shackled her for transport and escorted her to the deposition conducted the shackling in a particularly humiliating manner and then told her that the accommodations were not going to happen. Plaintiffs' counsel attempted to calm her down but were unable to do so. After being informed that Ms. Graham was unable to proceed that morning, Defendants' counsel reached Magistrate Judge Capel at his home telephone. In this telephonic conference, Magistrate Judge Capel ordered Ms. Graham to sit for the deposition as noticed, stated that she could be subject to sanctions if she did not do so, and stated that Plaintiffs' counsel could separately be subject to sanctions as well.

Plaintiffs' counsel conveyed this information to Ms. Graham and urged her to proceed with the deposition. After discussion, Ms. Graham advised her counsel that she was emotionally unable to proceed, and requested instead that she be voluntarily dismissed as a Plaintiff. At the request of Defendants' counsel, Ms. Graham was sworn and asked on the record whether she wished to remain a party to this lawsuit. She responded that she did not. Defendants' counsel then engaged in a five-minute long harangue of Ms. Graham during which he described her

actions as "improper" and expressed his intention to seek sanctions and recovery of costs from "you and/or your attorneys." Transcript at 10, Deposition of Bonita Graham, Apr. 20, 2012. Plaintiffs' counsel filed Ms. Graham's notice of voluntary dismissal that afternoon. (Doc. No. 115.). The withdrawal of Ms. Graham leaves Dana Harley as the sole female Named Plaintiff.

A few weeks after these events, Defendants filed their Third Supplemental Response in Opposition to Plaintiffs' Motion for Class Certification (hereinafter "Def. Third Supp."). In this Third Supplemental Response, Defendants argue that the withdrawal of Bonita Graham from the case warrants the denial of class certification as to the claims concerning the Julia Tutwiler Prison for Women ("Tutwiler"), on the ground that Plaintiff Dana Harley's eligibility for work-release and subsequent transfer to the Montgomery Women's Facility deprives Ms. Harley of standing. *See* Def. Third Supp. (Doc. No. 117). Defendants' arguments are without merit.

ARGUMENT

I. The Transfer of Ms. Harley Does Not Defeat Standing

When Plaintiffs filed the complaint and their motion for class certification, Dana Harley was a prisoner at Tutwiler, segregated in a separate dormitory on the basis of her HIV status pursuant to Defendants' unitary policy of segregating and discriminating against prisoners with HIV. *See* Second Amended Complaint (Doc. No. 61) ¶¶ 32, 67-79. Defendants note that she has recently been eligible for work release and transferred to the Montgomery Women's Facility ("Montgomery"). However, as the Second Amended Complaint sets forth, even at Montgomery she will continue to be subject to Defendants' same overarching policy of HIV discrimination and segregation. *See id.* ¶¶ 81-85. Nor do Defendants even claim that Ms. Harley will not be transferred back to Tutwiler in the future. Indeed, ADOC policies state that if Ms. Harley violates the institutional rules at Montgomery; if she fails to comply with ADOC Office of

Health Services requirements regarding diet, medication compliance, and other issues; or if her HIV lab results exceed certain boundaries, she will be returned to Tutwiler. *See* ADOC Office of Health Services, Information for HIV+ Inmates to be Considered for or Housed at Work Release (ADOC008813) (Ex. 1) (specifying ADOC Office of Health Services requirements regarding behavior and lab results); Alabama Department of Corrections Classification Manual § 4.4.5 (Ex. 2) (noting that an inmate can be removed from a minimum-custody placement due to negative behavior). Additionally, Ms. Harley has already twice been transferred back to Tutwiler from Montgomery during her incarceration—once in 2010 and a second time in 2011. *See* Transcript at 55-57, Deposition of Dana Harley, Mar. 13, 2012.[2]

In any event, whether Ms. Harley's claims are presently moot (and they are not, *see infra*) is irrelevant, because class certification relates back to when the complaint was filed. *See* Plaintiffs' Response to the State's Second Supplemental Opposition to Plaintiffs' Motion for Class Certification and to the State's Supplemental Memorandum in Support of the State's Motion to Dismiss (Doc. 85) (hereinafter "Plaintiffs' Response to the State's Second Supplemental Opposition"). As the U.S. Supreme Court stated in *County of Riverside v. McLaughlin*, "Some claims are so inherently transitory 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. . . . In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (quoting *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 399 (1980) (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)) (internal alterations and quotation marks

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omitted)). *See also Candy H. v. Redemption Ranch, Inc.*, 563 F. Supp. 505, 518 (M.D. Ala. 1983) (Thompson, J.) ("Whenever class certification relates back, the named plaintiff has standing to pursue the issue of certification regardless of the mootness of his or her individual claim."). This is especially the case where, as here, Plaintiffs diligently pursued class certification, filing their certification motion the same day the complaint was filed. *See Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975) ("There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion."). That prisoners like Ms. Harley may be transferred back and forth from Tutwiler to Montgomery further emphasizes the class's fluidity, warranting application of the relation back standard. *See* Plaintiffs' Response to the State's Second Supplemental Opposition (Doc. 85) at 2-3 (citing *McLaughlin*, 500 U.S. at 52; *Geraghty*, 445 U.S. at 399; *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997)). Defendants essentially conceded this point in their reply to Plaintiffs' response. *See* State's Reply to Plaintiffs' Response to the State's Second Supplemental Opposition to Plaintiffs' Motion for Class Certification and to the State's Supplemental Memorandum in Support of the State's Motion to Dismiss (Doc. 91) (hereinafter "Defendants' Reply"). Defendants did not dispute that Plaintiffs' class claims were "inherently transitory," *McLaughlin*, 500 U.S. at 52, nor that Mr. Knox's claims should relate back for class certification purposes. *See* Defendants' Reply (Doc. 91) at 3 ("the relation back principle . . . operates to allow plaintiff Knox to pursue class certification" (citing *Candy H.*, 563 F. Supp. at 518)).[3]

One need only review the docket of this case to observe the fluidity of the class. Since the Complaint was filed, six Plaintiffs—April Stagner, Roosevelt James, Ashley Dotson, John

[3] Defendants instead argued that Mr. Knox's individual, *non-class* claims should be dismissed for mootness. *See* Defendants' Reply (Doc. 91) at 3-4.

Hicks, David Smith, and Albert Knox—have been released from ADOC custody.[4] Defendants themselves state in the opening paragraph of their Third Supplemental Response that "[t]he revolving door of Named Plaintiffs continue even now, less than five (5) months before the trial date." Def. Third Supp. at 2. This statement undercuts their own argument; between now and the trial, other Plaintiffs may well be released from ADOC custody, transferred from prisons to work release, or transferred from work release back to prisons. Such continued fluidity weighs in favor of relation back, not against.

In this latest round of briefing, Defendants have again failed to demonstrate why the same relation-back principles should not apply for class certification purposes as to Ms. Harley. Defendants cite authorities for the uncontroversial proposition that the class representative's standing is a prerequisite to class certification. *See* Def. Third Supp. at 4-6. Their heavy reliance on this general principle is misplaced, however: Ms. Harley *does* have standing for class certification purposes because certification should relate back to the time of the complaint's filing.[5]

In their latest brief, Defendants have once again mischaracterized Plaintiffs' lawsuit, portraying each alleged example of harm as a separate discrete claim. *See* Def. Third Supp. at 6-7. The Complaint, however, makes it amply clear that *all* these alleged harms flow from a

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[4] Of these individuals, all but Albert Knox voluntarily dismissed their claims upon release.

[5] Defendants quote the following passage from a treatise: "[A] plaintiff who has suffered an actual injury but is unlikely to suffer further injury in the future may have standing to bring an individual or class claim for damages but be unable to seek equitable relief even if other class members are likely to suffer future injury." Defendants' Third Supplemental Response (Doc. 117) at 6 (quoting William B. Rubenstein, 1 *Newberg on Class Actions* § 2:7 (5th ed.)). That section of the treatise, however, was simply discussing the concept of standing generally. A separate section of the treatise directly supports Plaintiffs' argument, observing that standing may relate back even if a putative class representative's claim becomes moot, when the claims are "inherently transitory" such that "the court would not be able to rule on a motion for class certification before the named plaintiff's individual claim expires." William B. Rubenstein, 1 *Newberg on Class Actions* § 2:11 (citing *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1139 (10th Cir. 2009)). Here, Ms. Harley's transfer occurred while Plaintiffs' class certification motion, which was filed on the same day as the complaint, was actively being considered by the Court.

unitary policy and practice of discrimination and segregation on the basis of HIV status. For instance, the exclusion of prisoners with HIV from the Tutwiler Faith-Based Honor Dorm, the disparate punishment at Tutwiler of prisoners with HIV, and the exclusion of prisoners with HIV from the residential component of the Tutwiler substance abuse dormitory, *see id.*, all result from Defendants' decision to continue their policy of discrimination and segregation on the basis of HIV status in ADOC facilities. These points have been set forth in Plaintiffs' prior briefings. *See* Plaintiffs' Response to Defendant's Motion to Stay or, in the Alternative, Opposition to Plaintiffs' Motion for Class Certification (Doc. 49), at 8-24; Memorandum of Law in Support of Plaintiffs' Motion for Class Certification (Doc. 3), at 3-10.

II. Ms. Harley's Claim Is Not Moot

Defendants have failed to carry the "heavy burden" of persuading the court that Ms. Harley's claim is moot. *Bourgeois v. Peters*, 387 F.3d 1303, 1309 (11th Cir. 2004). The Second Amended Complaint expressly alleges that prisoners who are transferred out of Tutwiler to the work release program at Montgomery continue to be subject to the same policy and practice of HIV discrimination in place at Tutwiler and throughout ADOC institutions. *See* Second Amended Complaint (Doc. 61) ¶¶ 81-85 (noting, for example, that HIV-positive prisoners at Montgomery are excluded from certain jobs).[6] For this reason alone, Ms. Harley's individual claim against that policy is still live. Defendants have also failed to satisfy their burden of demonstrating that Ms. Harley's transfer back to Tutwiler is not "capable of repetition yet evading review," *Bourgeois*, 387 F.3d at 1309; Defendants do not show how Ms. Harley will not

[6] Ms. Harley also suffers ongoing discrimination to the extent that her potential eligibility for the other work release program was and is being ignored solely because she is HIV-positive. *See* Second Amended Complaint (Doc. 61) ¶ 83 ("Although there are eleven work release centers in Alabama – nine for men, two for women – ADOC permits men with HIV to be assigned only to the center in Decatur and women to be assigned only to the work release center at the Montgomery Women's Facility. . . . Prisoners with HIV are categorically ineligible for lateral transfers to other work-release centers[, which] unnecessarily limits their job opportunities and prevents prisoners with HIV from getting a job near their home and family.").

simply be transferred back to Tutwiler, where she will continue to be subject to Defendants' discriminatory policies.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Class Certification.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2012, I filed a true copy of the foregoing Plaintiffs' Response to the State's Third Supplemental Response in Opposition to Plaintiffs' Motion for Class Certification with the Court using the CM/ECF electronic filing system, which will automatically forward a copy to counsel for the Defendants:

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