IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

NICHOLAS FRAZIER, *et al.* **PLAINTIFFS**

v. **CASE NO. 4:20-CV-00434-KGB-JJV**

WENDY KELLEY, *et al.* **DEFENDANTS**

DEFENDANTS' HEARING BRIEF IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendants have extensively briefed the reasons why this Court should deny Plaintiffs' request for a preliminary injunction, and yesterday's preliminary injunction hearing further underscored the weakness of Plaintiffs' claims. Indeed, as Defendants stressed during their closing argument, Plaintiffs' claims fail as both a matter of law and fact. Consequently, Defendants do not believe it necessary to belabor those points. Instead, Defendants merely wish to highlight a few of the primary reasons Plaintiffs' motion for a preliminary injunction fails.

1. *Plaintiffs cannot get injunctive relief because Defendants failed to act "soon enough."*

The focus of Plaintiffs' proof at yesterday's hearing was Defendants' alleged failure to act quickly enough to respond to COVID-19. Their expert witness, Eldon Vail, testified that the "biggest deficiency" in Defendants' response was that they didn't act "soon enough" and likely failed to do enough "advance planning" for a pandemic. Both through his testimony and Plaintiffs' closing argument, Plaintiffs attempted to show that Defendants had, in Plaintiffs' counsel's words, "failed to harness" the outbreak last month at the Cummins unit by not acting soon enough. *See* Pls. Ex. 69 (DE 46-11) at 8 ¶ 13 ("The level of COVID-19 infection in the

Cummins Unit . . . serves as an example of what happens when a corrections agency is slow to respond to the pandemic.").

Time and time again, however, Vail testified that the measures Defendants were taking *now* were good—he just believed they should have occurred sooner. For example, his chief social-distancing recommendation, given his acknowledgement that ADC prisons weren't built to accommodate six-foot social distancing, was to arrange bunks so that prisoners slept head to foot. *See also* Pls. Ex. 69 (DE 36-9) at 11 (CDC recommendation of head-to-foot sleeping arrangement). When showed Defendants' Exhibit 96, Director Payne's directive to ADC wardens on how to implement head-to-foot sleeping arrangements, Vail said that "this is good; it's just late." Likewise, when shown photographs of social distancing in cafeterias at one unit, which Director Payne later testified was being required in all units, Vail had praise for the social-distancing measures shown there, only faulting them for being implemented too late.

Evidence that Defendants' current measures weren't taken soon enough would be relevant in a damages action for past deliberate indifference. But even if Plaintiffs' claims that Defendants did not act fast enough were valid—and they aren't—they don't help Plaintiffs prove that Defendants are acting with deliberate indifference now. And as such, as a matter of law, they cannot support a claim for forward-looking injunctive relief. Indeed, to state the obvious, Plaintiffs do not need an injunction to compel Defendants to take the measures they're already taking. And as the Fifth Circuit recently emphasized in a bevy of COVID-19 cases, "a federal court lacks jurisdiction to act as a super-state executive by ordering a state entity to comply with its own law." *Marlowe v. LeBlanc*, — F. App'x —, 2020 WL 2043425, at *2 (5th Cir. Apr. 27, 2020); *Valentine v. Collier*, — F.3d —, 2020 WL 1934431, at *4 (5th Cir. Apr. 22, 2020).

2. Plaintiffs cannot get injunctive relief against Defendants because some unit-level correctional officers occasionally fail to follow Defendants' policies.

Plaintiffs' expert also complained of a "disconnect" between Defendants' policies and what inmates claim to have observed, or how a sanitation log did not reflect the amounts of disinfectants being used at a single unit. Plaintiffs' only other witness, Susie Anita Daniel, testified about nothing but the gap—as it has been *described to her* by her grandson—between the Arkansas Division of Community Correction's COVID-19 policies and what her grandson claimed to have seen.

The problem with this evidence is that it doesn't support injunctive relief against the people whom Plaintiffs actually sued—the apex officials in the Department of Corrections and the Directors of its Divisions. As the Eleventh Circuit concluded just this week in a COVID-19 case, absent evidence that "the defendants are ignoring or approving the alleged lapses in enforcement of [their] policies . . . lapses in enforcement do little to establish that the defendants were deliberately indifferent." *Swain v. Junior*, — F.3d —, 2020 WL 2161317, at *5 (11th Cir. May 5, 2020). And Plaintiffs have no evidence that Defendants are deliberately ignoring or approving any enforcement lapse; they merely speculate that such lapses must be the result of a failure to train correctional officers in Defendants' policies. The only evidence they offered that Defendants knew of any enforcement lapse was a single incident where guards failed to wear masks at a hospital when bringing prisoners there for evaluation, *see* Pls. Ex. 80, and when questioned about that incident, Director Payne testified that the guards involved had received corrective counseling.

3. Plaintiffs cannot prove deliberate indifference by faulting Defendants for following medical guidance.

Key parts of Plaintiffs' "proof" at yesterday's hearing consisted of argument that the CDC and Arkansas Department of Health have been giving Defendants bad guidance. In particular, Plaintiffs complain about allowing a small handful of asymptomatic but COVID-19-positive staff to work with the *quarantined* ***COVID-19 positive inmates*** at the Cummins Unit. Of course, as Plaintiffs know, this wasn't Defendants' idea; it was recommended by the Arkansas Department of Health in cases of critical staffing shortages. *See* Defendants' Ex. 19 & 20. But Plaintiffs' correctional expert, who admitted he had no medical or epidemiological expertise, testified that in his view it was unwise, largely because positive staff could theoretically disobey Defendants' policy and run to assist an emergency in the negative inmates' barracks.

Plaintiffs also spent a large part of yesterday's hearing faulting ADC for not using alcohol-based sanitizer. (As Mr. Banks testified, the Division of Community Corrections, given its facilities' different security profile, does dispense alcohol-based sanitizer under staff control.) But as their expert conceded, the CDC only recommends alcohol-based sanitizer "where permissible based on security restrictions." Pls. Ex. 69 at 10. Likewise, the Arkansas Department of Health only recommends alcohol-based sanitizer "when practical from [a] security . . . standpoint." Defendants' Ex. 20 at 1. And Plaintiffs' expert's disagreement is based on little more than his assertion that he just has a "different opinion," DE 46-11 at 18, and thinks alcohol-based sanitizer is of such importance, medically (though he has no expertise in medicine), that its value overrides security concerns. Last, Plaintiffs' expert tentatively opined that Defendants ought to "explore" spreading inmates' bunks to gyms and cafeterias, but the

CDC only recommends distancing bunks "[i]f space allows," and otherwise recommends the head-to-foot arrangement Defendants have taken. DE 36-9 at 11.

It is not deliberate indifference for Defendants to follow the CDC and Arkansas Department of Health's medical opinions and decline to follow Plaintiffs' correctional expert's "different opinion," especially on matters of medicine. *See Roman v. Wolf*, No. 20-55346, 2020 WL 2188048, at *1 (9th Cir. May 5, 2020) (staying every paragraph of a 29-paragraph COVID-19 preliminary injunction except one, "to the extent that [it] requires substantial compliance" with CDC guidance); *Valentine*, 2020 WL 1934431, at *4 ("Plaintiffs have cited no precedent holding that the CDC's recommendations are insufficient to satisfy the Eighth Amendment."). The test for deliberate indifference, ultimately, is whether Defendants "knew that their conduct was inappropriate." *Washington v. Denney*, 900 F.3d 549, 559 (8th Cir. 2018) (emphasis added) (quoting *Krout v. Goemmer*, 583 F.3d 557, 567 (8th Cir. 2009)). Indeed, Plaintiffs cannot plausibly claim that Defendants knew their conduct was inappropriate when it's the precise conduct that state and federal medical experts recommended.

Moreover, the CDC and Arkansas Department of Health's guidelines are far from obviously unreasonable. If positive staff only work with positive inmates and stay out of break rooms and other common areas, as Director Payne testified they do, they cannot infect negative inmates. As for the supposed necessity of access to alcohol-based sanitizer, the CDC only recommends its use as a second-best substitute to soap and water. *See* DE 36-9 (recommending prisoners use alcohol-based sanitizer "[i]f soap and water are not available"). But Plaintiffs have access to soap and water. *See* Defendants' Ex. 1, ¶ 58. Last, the head-to-foot sleeping arrangement Defendants have adopted creates over six feet of distance between prisoners' *heads*,

through which coronavirus is exhaled and inhaled, if not their entire bodies. *See* Defendants' Ex. 96 (illustrating arrangement).

4. The balance of Plaintiffs' attempts to prove deliberate indifference amount to little more than a request that this Court micromanage prison officials.

At yesterday's hearing, Plaintiffs faulted Defendants for a variety of things that are too picayune for the CDC's guidance to correctional institutions to even address. Plaintiffs believe Defendants should be using a different disinfectant because it doesn't appear on *their* list of EPA-approved coronavirus disinfectants, though the disinfectant's manufacturer says oit is EPA-approved (Defendants' Ex. 75). And Plaintiffs' expert, though praising the content of Defendants' COVID-19 posters, thinks that Defendants should be *gathering ADC prisoners*—in seeming violation of social distancing principles—to give them oral guidance on COVID-19 safety measures. This, he claims, would better allow prisoners to ask questions. (Subsequently, Director Payne testified that prisoners are, in fact, able to request an interview with correctional staff to ask about COVID-19 safety measures.)

This is not the stuff of a deliberate-indifference claim. In the case of Citrus Breeze III, Director Payne's testimony established that Defendants sincerely and reasonably believe Citrus Breeze III, given the representations of its manufacturer, is effective to combat coronavirus.[1] As for gathering prisoners in rooms to lecture them on mask-wearing and social distancing, such lectures might, in theory, marginally enhance prisoners' compliance with ADC's written and

[1] Defendants aren't the only ones buying Citrus Breeze III. *See* KATV, *Arkansas-based Razor Chemical sees increase in disinfectant production during pandemic* (May 5, 2020), https://katv.com/news/local/arkansas-based-razor-chemical-sees-increase-in-disinfectant-production-during-pandemic (Citrus Breeze III is sold to "hospitals, the Arkansas Department of Health, prisons, jails, and other commercial businesses," thanks to its "certifi[cation] under the EPA's Emerging Pathogen Policy").

broadcast guidance. But it is absurd to suggest that Defendants are deliberately disregarding the risks of COVID-19 by failing to issue their guidance in oral form.

5. Plaintiffs' proof demonstrated that their class claims are uncertifiable.

At yesterday's hearing, Plaintiffs relied almost entirely on a series of unit-specific criticisms of Defendants' policies and enforcement of them. Their chief complaint again is about Defendants' policy of allowing positive staff to work with the quarantined ***COVID-19 positive inmates*** at Cummins. But even if that policy were problematic—and, again, Plaintiffs offer no reason it is—it has nothing to do with inmates outside of Cummins. They rely on evidence of non-enforcement, whether from Plaintiffs' declarations about conditions at their particular unit (in many instances, the same one, Ouachita River), or from a sanitation log at a single unit, or from Ms. Daniel's testimony about what her grandson told her. But even if Plaintiffs had proven systemic non-enforcement at any particular unit, that would only justify unit-level relief.

Given the unit-level specificity of Plaintiffs' evidence, at worst, any relief would have to be tailored to particular units—if not particular plaintiffs. Plaintiffs, however, seek to represent a class of all ADC inmates, along with subclasses of all disabled or "high-risk" ADC inmates. And as Defendants have previously explained, a Rule 23(b)(2) class can only be certified if its claims are such that "all the class members" are either entitled to the same injunction or no injunction at all. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). Tellingly, though Plaintiffs cite many cases in which district courts have granted prisoners some provisional class-wide relief for COVID-19, the vast majority involve individual prisons with outbreaks. The only decisions of which Defendants are aware granting class-wide relief on COVID-19 claims against a state prison system have been stayed by the Fifth Circuit in *Valentine* and *Marlowe.* Accordingly, Plaintiffs are unlikely to succeed in their bid for class certification.

6. Plaintiffs' habeas claims are uncognizable condition-of-confinement claims.

Plaintiffs' condition-of-confinement claims fail because Eighth Circuit precedent unequivocally bars inmates from bringing such condition-of-confinement claims in habeas. *See Spencer v. Haynes*, 774 F.3d 467, 470 (8th Cir. 2014) ("Spencer's constitutional claim relates to the conditions of his confinement. *Consequently*, a habeas petition is not the proper claim to remedy his alleged injury." (emphasis added) (citation omitted)). Recognizing that, Plaintiffs ask this Court to ignore the Eighth Circuit's decisions in *Spencer* and *Kruger v. Erickson*, 77 F.3d 1071 (8th Cir. 1996), and hold that—under *Willis v. Ciccone*, 506 F.2d 1011, 1014 (8th Cir. 1974)—state condition of confinement claims are cognizable in habeas.

That argument fails for two reasons. *First*, there is no dispute that *Kruger* held that state prisoners' condition-of-confinement claims belong in Section 1983 suits, not in habeas. *See* 77 F.3d at 1073. Nor is there any dispute, that *Spencer* held *Kruger*—and not *Willis*—resolves that question. 774 F.3d at 470. And Plaintiffs do not point to any Eighth Circuit decisions contradicting that holding. As such, Plaintiffs' disagreement about *Spencer*'s conclusion and whether it misapplied the prior-panel rule notwithstanding, that decision binds this Court.

Second, Plaintiffs' argument fails because—as other district courts have concluded—the basis for *Willis*'s holding, the "basic inequity" of allowing state prisoners to sue for deliberate indifference under Section 1983 while federal prisoners lacked a comparable cause of action, *Willis*, 506 F.2d at 1014, was undermined by later decisions allowing federal prisoners to bring *Bivens* damages claims for deliberate indifference. *See Smith v. Warden of Duluth Prison Camp*, No. 18-cv-2555, 2019 WL 3325837, at *3 (D. Minn. Apr. 23, 2019) ("[T]he lynchpin of *Willis*—the supposed disparity between the rights of state prisoners and the rights of federal prisoners—no longer exists."), *report and recommendation adopted*, 2019 WL 332306 (D. Minn. July 24,

2019); *see also Carlson v. Green*, 446 U.S. 14 (1980). Moreover, it would be strange indeed to follow *Willis* over *Spencer* in a habeas case brought by *state* prisoners when *Willis*'s holding was motivated by an inequity suffered by *federal* prisoners that no longer even exists.

7. Plaintiffs' Section 1983 and ADA claims are unexhausted.

Plaintiffs concede they have not—as required by the PRLA—fully exhausted the grievance process. Plaintiffs only response to Defendants' exhaustion defense is that the ADC grievance process was unavailable to them. As Defendants predicted, Plaintiffs rest their entire argument for unavailability—and thus their entire Section 1983 and ADA case—on a passage of dictum in the Seventh Circuit's opinion in *Fletcher v. Menard Correctional Center*, 623 F.3d 1171 (7th Cir. 2010). That passage theorized that, if a prisoner's grievance were that guards were failing to protect him from a threat by "members of the Aryan Brotherhood . . . to kill him within the next *24 hours*," and the grievance process took "*two weeks* to respond," that two-week process could not be deemed an available remedy for a 24-hour death-threat grievance. *Id.* at 1174 (emphasis added).

This case is nothing like that hypothetical. Plaintiffs' grievances aren't about a 24-hour death threat or anything like it. They are about (at most) a *continuing* emergency. Indeed, there is no dispute that ADC is capable of providing some COVID-19 relief because COVID-19 continues to be a health risk. And so long as the "possibility of some relief" exists, *Fletcher*, 623 F.3d at 1173, an exhaustion procedure is available.

Moreover, Plaintiffs haven't shown ADC's three-step grievance process cannot provide speedy relief. To the contrary, the only evidence of supposed unavailability shows that COVID-19 grievances receive extraordinarily prompt responses, within two to three days, at the first two grievance steps and that, for reasons unknown, Plaintiffs refuse to even attempt the process's third and last step. *See* DE 36-40 ¶ 16; DE 46-2 ¶ 15; DE 46-5 ¶ 15; DE 46-7 ¶ 21; DE 46-10

¶ 16. Thus, as was true in *Fletcher*, where a prisoner filed an emergency grievance and—much like Plaintiffs—sued two days later without waiting for a response, there is "no reason to think that the prison's grievance procedure would take longer than judicial procedure." *Fletcher*, 623 F.3d at 1175. And it is that holding, not *Fletcher*'s hypothetical, that mirrors this case.

CONCLUSION

The Court should deny the Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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