2006 WL 587345
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United States District Court,
S.D. New York.

Doris CLARKSON,, individually and on behalf of all others similarly situated, Plaintiffs,
v.
Thomas A. COUGHLIN, III, Defendant.

No. 91 Civ. 1792(RWS).
|
March 10, 2006.

MEMORANDUM OPINION

SWEET, J.

***1** Class counsel for the plaintiff class in *Clarkson v. Coughlin* (the "*Clarkson* Class") has moved pursuant to Rule 23(d)(2), Fed.R.Civ.P., to enter an order for notice to the class to provide the *Clarkson* Class with notice of this Court's October 23, 2003 order requiring members of the class to direct complaints about violations of the Consent Decree to the attention of the appointed ombudsperson before filing a motion for contempt with the Court. The Defendants, who are either officials of the New York State Department of Correctional Services ("DOCS") or of State organizations providing corrections-related services, and who are described in this Court's opinion of February 3, 1992 in this action, familiarity with which is assumed, *see Clarkson v. Coughlin,* 783 F.Supp. 789, 792 (S.D.N.Y.1992), oppose the entry of notice proposed by *Clarkson* Class counsel.

For the reasons set forth below, *Clarkson* Class counsel's motion is granted, and the proposed order granting notice to *Clarkson* class members will be entered.

Prior Proceedings

On March 15, 1991, a class action was brought on behalf of all present and future deaf and hard-of-hearing inmates in the New York State correctional system. The class alleged that DOCS violated their rights under the Rehabilitation Act, 29 U.S.C. § 794, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*, the Eighth, Ninth and Fourteenth Amendments to the U.S. Constitution, and 42 U.S.C. § 1983. On February 3, 1992, the *Clarkson* Defendants' motion to dismiss was denied, *see Clarkson v. Coughlin,* 783 F.Supp. 789 (S.D.N.Y.1992), and on January 25, 1993, two plaintiff sub-classes were certified, sub-classes comprised of all present and future deaf and hearing-impaired male and female inmates of the New York State Department of Correctional Services "who have been, are, or will be discriminated against, solely on the basis of their disability, in receiving the rights and privileges accorded to all other inmates." *Clarkson v. Coughlin,* 145 F.R.D. 339, 348 (S.D.N.Y.1993).

On August 3, 1994, the class moved for declaratory judgment, permanent injunctive relief and summary judgment. On June 16, 1995, this Court issued an opinion and order granting in part and denying in part the plaintiffs' motion, and concluding that the *Clarkson* defendants had violated the plaintiffs' statutory and constitutional rights when they failed, *inter alia,* to provide deaf and hearing-impaired inmates with sign language interpreter services and other assistive communication devices during reception, classification, educational, vocational, counseling, medical and mental health encounters and during disciplinary, grievance and parole proceedings. *See Clarkson v. Coughlin,* 898 F.Supp. 1019 (S.D.N.Y.1995).

On June 6, 1996, the parties in *Clarkson v. Coughlin* entered into a consent order and judgment that was ordered by the Court (the "Consent Decree"). The Consent Decree outlines, in considerable detail, the relief to which the class is entitled and provides a mechanism for compliance with the judgment.

***2** By order dated October 23, 2003 and filed October 28, 2003 (the "October 23, 2003 Order") entered in *Clarkson v. Coughlin* and certain related actions, this Court set forth the procedures to be followed by inmates filing motions and other papers seeking monetary relief to enforce the Consent Decree in *Clarkson v. Coughlin.*

Pursuant to the October 2003 Order, "[e]ach prisoner will file a complaint with the Clerk's Office, which will be assigned a separate docket number, and will be designated as a related case to *Clarkson v. Goord."* (October 23, 2003 Order, at 2.) In the third paragraph, the October 23, 2003 Order specifies that " '[i]n an effort to avoid motions for contempt and enforcement,' pursuant to ¶ 52 of the Consent Decree, all prisoners after this date will be required to first submit their complaints for resolution to an ombudsperson appointed by the State. This ombudsperson will determine whether the prisoner is a member of the class covered by the decree and whether a violation occurred." (*Id.*)

On May 18, 2005, *Clarkson* Class counsel moved by letter motion pursuant to Rule 23(d)(2), Fed.R.Civ.P., for entry of an order to give notice to the class regarding the amended procedure set forth in the third paragraph of the October 23, 2003 Order. Defendants filed opposition on June 8, 2005, and the instant motion was marked fully submitted on June 15, 2005.

Discussion

In paragraph three of its October 23, 2003 Order, this Court established a procedure by which *Clarkson* compliance issues were to be addressed to prison officials before class members could file motions to enforce the Consent Decree. (*See* October 23, 2003 Order at ¶ 3.) Specifically, all prisoners filing a motion for contempt or enforcement of the Consent Decree after the date of the October 23, 2003 Order are required "to first submit their complaints for resolution to an ombudsperson appointed by the State. This ombudsperson will determine whether the prisoner is a member of the class covered by the decree and whether a violation occurred." (*Id.*)

Clarkson Class counsel contends that this language created an additional requirement that individual class members must first go to the appointed ombudsperson before filing a motion to enforce the Consent Decree in court and therefore class members must be notified of the amended procedure. Plaintiff class counsel further contends that the administrative exhaustion requirement of the Prisoner Litigation Reform Act, 42 U.S.C. § 1997e (the "PLRA"), does not apply to motions to enforce the *Clarkson* Consent Decree, as the *Clarkson* suit was pending prior to the enactment of the PLRA and as the Consent Decree itself does not require exhaustion before class members are permitted to bring enforcement motions.

Defendants argue that the PLRA exhaustion requirement does apply and that Plaintiff class counsel cannot circumvent the PLRA's exhaustion requirements by notifying class members that the appointed ombudsperson will hear class members' complaints about DOCS non-compliance with the Consent Decree.

The PLRA Does Not Apply To Enforcement Motions of the Consent Decree

***3** The exhaustion requirement of the PLRA does not apply to motions that exclusively seek the enforcement of the terms of the Consent Decree. It is undisputed that independent claims under 42 U.S.C. §§ 1983 and 1985, the ADA, the Rehabilitation Act, and other such statutes must be exhausted via the grievance procedure established under the PLRA. Hybrid actions, in which a plaintiff class member files an independent action asserting claims under the ADA, the Rehabilitation Act, the PLRA, and 42 U.S.C. §§ 1983 and 1985, as well as a *Clarkson* contempt claim, also must exhaust according to PLRA requirements. *See Degrafinreid v. Ricks*, 2004 WL 2793168, at *11 (S.D.N.Y.2004) (asserting that, in connection with PLRA exhaustion, nothing in the *Clarkson* Consent Decree abrogates an inmate's obligation to exhaust). However, the proposed order submitted by *Clarkson* Class counsel in the instant matter is directed purely at motions for contempt or enforcement of the Consent Decree, thus not implicating this Court's prior holding in *Degrafinreid, id.*, and the PLRA does not apply to such motions.

Clarkson was filed in 1991 before the enactment of the PLRA, and the Second Circuit has held that § 1997e(a) does not apply retroactively to such pre-enactment cases. *See Scott v. Coughlin*, 344 F.3d 282, 290-91 (2d Cir.2003) ("The new compulsory exhaustion requirement contained in the PLRA cannot be applied retroactively to an action pending when the PLRA was signed into law."); *Salahuddin v. Mead*, 174 F.3d 271, 274 (2d Cir.1999). The pertinent provision of the PLRA instructs that "[n]o action shall be brought" without prior exhaustion. 42 U.S.C. § 1997e(a) (2000). However, motions to enforce a judgment in a pre-PLRA case are not separate "actions" subject to § 1997e(a); they remain motions arising out of the pre-PLRA action and thus are not subject to PRLA

exhaustion requirements applicable to new or separate actions. *See Salahuddin,* 174 F.3d at 274 ("Significantly, the amended § 1997e(a) does not declare that no action 'shall be maintained' unless administrative remedies have been exhausted, nor does it otherwise address the circumstances in which a 'pending' matter may be dismissed. Thus, '[a] plain reading of the section makes it clear that it applies only to actions that have yet to be brought-not to ones that have already been filed.' *Bishop v. Lewis,* 155 F.3d 1094, 1095 (9th Cir.1998).")

The Clarkson Consent Decree Does Not Require Exhaustion

Prior to the enactment of the PLRA, exhaustion of administrative remedies could have been required at the discretion of the judge, but only if the available remedies were expedient and satisfied certain conditions. *See* 42 U.S.C. § 1997e(a) (1994); *Porter v. Nussle,* 534 U.S. 516, 523-24, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). Applying the older form of 42 U.S.C. § 1997e, which was in effect at the time *Clarkson* was filed, this Court could have elected to apply the exhaustion requirement after making a finding about the adequacy of the available remedies. *See Scott,* 344 F.3d at 291. No such findings were made in this case.

***4** Instead, the parties agreed to the Consent Decree, which established both a grievance procedure and a non-compliance procedure. (*See* Consent Decree at ¶¶ 9 and 52.) Specifically, the Consent Decree mandated a simplified procedure to assist members of the *Clarkson* Class in requesting reasonable accommodations from DOCS. (*See* Consent Decree at ¶¶ 5-10.) The Consent Decree advises deaf and hearing impaired inmates, who comprise the *Clarkson* Class, as to what accommodations are available, the mode of requesting such accommodations and, in paragraph 9, the process of grieving a denial of such a request. (*See* Consent Decree at ¶ 9.) Subsequently in paragraph 52, under the section heading of "Compliance," the Consent Decree directs that an ombudsperson be identified to handle such complaints made "by plaintiff class members through class counsel." (Consent Decree at ¶ 52.) Nowhere in the Consent Decree are *Clarkson* Class members instructed to exhaust administrative remedies before filing a motion for contempt or enforcement.

Notice Of The October 23, 2003 Order Is Warranted

The October 23, 2003 Order amended the procedure set forth in paragraph 52 of the Consent Decree by which plaintiff class members were to file motions for contempt or enforcement, inserting one new requirement. Pursuant to the October 23, 2003 Order, all prisoners thereafter had to submit their complaints to a State appointed ombudsperson who would assess whether the prisoner was a member of the *Clarkson* Class and whether a violation of the Consent Decree had occurred before such prisoner could file a motion for contempt or enforcement. (*See* October 23, 2003 Order at ¶ 3.) The intent behind this order emanated from the Court's concern that prisoners were filing motions for contempt or enforcement of the Consent Decree without first addressing the issue with prison authorities.[1] The October 23, 2003 Order established the additional requirement in order to create an opportunity for resolution of prisoner complaints and thereby "avoid motions for contempt and enforcement." (*Id.*)

Furthermore, the grievance procedure set forth in paragraph 9 of the Consent Decree was not affected by the October 23, 2003 Order; instead the October 23, 2003 Order simply added a step for prisoners to meet before motions for contempt or enforcement could be brought in court under paragraph 52-the "Compliance" section-of the Consent Decree.

Rule 23(d)(2), Fed.R.Civ.P., sets forth in pertinent part:

> the court may make appropriate orders ... requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action.

Since the October 23, 2003 Order altered the procedure for filing a motion for contempt or enforcement as it had been established originally in paragraph 52 of the Consent Decree, notice of the amended procedure may be provided to prisoners under Rule 23(d)(2), Fed.R.Civ.P.

***5** The proposed order, including the accompanying "Notice to the Class," submitted by *Clarkson* Class counsel satisfies the requirements of Rule 23(d)(2), Fed.R.Civ.P., and is consistent with the intent of the October 23, 2003 Order.

Conclusion

For the foregoing reasons, *Clarkson* Class counsel's motion is granted, and the proposed order granting notice to *Clarkson* class members pursuant to Rule 23(d)(2), Fed.R.Civ.P., will be entered.

It is so ordered.

All Citations

Not Reported in F.Supp.2d, 2006 WL 587345

Footnotes

1 It is only because of the inapplicability of the PLRA exhaustion requirement and the lack of any requirement in the Consent Decree mandating the use of the grievance procedure that the Court had any need to require prisoners to go to the appointed ombudsperson in order to apprise prison officials of prisoner complaints-and potentially resolve those complaints-as set forth in the October 23, 2003 Order. Had such requirements already been in place, there would have been no need for the Court's October 23, 2003 Order.

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