

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

Drexell A. Greene, Larry D.	:	Case No. 1:12-cv-144
Lambert, Troy J. Busta, John	:	
Pasturzak, and William L.	:	(Related Case:
Ridenour,	:	No. 1:03-cv-704)
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
Gary C. Mohr, Director of Ohio	:	
Department of Rehabilitation and	:	
Correction, et al,	:	
	:	
Defendants.	:	

**ORDER**

Before the Court are motions to dismiss filed by Defendant Mohr and unidentified Doe defendants (Doc. 10), and by John R. Kasich, Governor of the State of Ohio (Doc. 11). Defendant Mohr's motion contends that the Court lacks jurisdiction over Plaintiffs' claims alleging system-wide constitutional deficiencies in the Ohio prison system's provision of medical and dental care. The motion also contends that Plaintiffs' claims are barred by res judicata. Governor Kasich contends that the complaint alleges respondeat superior liability against him at best, which is not a basis for alleging his liability under 42 U.S.C. §1983.

Plaintiffs have responded to both motions and raised essentially the same arguments in each response. (See Docs. 13

and 14). Defendants have filed reply briefs (Docs. 15 and 16), and Plaintiffs then filed two motions to supplement the record with materials concerning their administrative appeals. (Docs. 19 and 21) The motions to supplement the record are granted. Plaintiffs also filed a motion to strike Governor Kasich's reply brief (Doc. 16), claiming it is untimely. That motion is denied, because the reply brief was timely filed and it is clear that Plaintiffs received a copy of it.

#### **FACTUAL BACKGROUND**

Plaintiffs are inmates at the Chillicothe Correctional Institution, proceeding pro se. Their complaint seeks an order convening a three-judge court to decide, pursuant to the Prison Litigation Reform Act of 1996 ("PLRA"), whether a prison population reduction order should be entered. Plaintiffs allege that various policies and political decisions have resulted in a dramatic over-crowding of Ohio's prison facilities, and that the state has not followed recommendations for reducing prison population. They allege that this severe overcrowding has resulted in a failure to provide constitutionally adequate dental and medical health care, and that the medical care system has been "woefully and constitutionally inadequate" for more than two decades. (Compl. at ¶¶4, 6) They allege that they have been denied even a minimal level of care, with consequences resulting in some inmates' death. They identify several purported system-

wide deficiencies in the medical system, such as inadequate screening of incoming inmates, delays in providing care, untimely responses to emergencies, interference with medical care by the custodial staff, inadequate and incompetent medical personnel, and an inadequate prison grievance system. Plaintiffs further contend that the "primary cause" of the unconstitutionally inadequate medical and dental care services being provided to them is "system-wide overcrowding in Ohio's prisons" because Ohio is operating its prisons at 170% of original design capacity.

(Compl. ¶¶11, 12)

Plaintiffs allege jurisdiction arising under 28 U.S.C. §2284 and 18 U.S.C. §3626, the Prison Litigation Reform Act, and that venue is appropriate in the Eastern Division of this Court, where this case was originally filed. (Compl ¶¶ 14-15) Defendants Kasich and Mohr are sued in their official capacities for acting under color of state law to allegedly violate Plaintiffs' Eighth and Fourteenth Amendment rights. They further allege that exhaustion of administrative remedies is not required, because they are not basing their claims on any specific deficiency in medical or dental care rendered to any of them.

In Paragraph 36 of their complaint, Plaintiffs admit that they are members of the mandatory class certified by this Court in Fussell v. Wilkinson, Case No. 1:03-cv-704 (S.D. Ohio), an action filed in this Court in 2003. Plaintiffs admit that the

Fussell class was represented by attorneys Alphonse Gerhardstein and David Singleton. They admit that the Fussell case was resolved on November 22, 2005, when the Court approved a settlement agreement and entered an Order granting injunctive relief to the Plaintiffs. The State of Ohio agreed to undertake broad reforms in the provision of medical and dental services to all Ohio inmates. The original agreement and consent decree was scheduled to terminate in November 2010, but Plaintiffs' complaint does not acknowledge the fact that its term has been extended to June 2012.

Plaintiffs further allege that the State has failed to perform the terms of the Fussell decree. They contend that conditions have worsened since 2005, and that the state has "all but abandoned" efforts to improve medical care because of the severe overcrowding in Ohio's prisons. They assert that their complaint satisfies the requirements of 18 U.S.C. §3626(a)(3)(A), which requires a finding that a previously-entered court order for less intrusive relief has failed to remedy the alleged constitutional deprivations. They therefore seek an order appointing a three-judge court to consider their complaints of systemic deficiencies in medical services and to enter a prison population reduction order.

After briefing on Defendants' motions to dismiss was complete, this matter was transferred by the Eastern Division

judge to the docket of this Court, because this Court has presided over Fussell since it was filed. (Doc. 20). The transferring court found that this case is related to Fussell under Local Rule 3.1(b). The Order notes that a failure to reassign this matter to this Court "could subject the consent decree to interpretation by different courts," which would be inefficient and possibly disruptive of the laudatory goals of the consent decree.

#### **ANALYSIS**

Both of the pending motions rely upon Fed. R. Civ. Proc. 12(b)(1) (lack of subject matter jurisdiction) and (b)(6) (failure to state a claim) in seeking dismissal of Plaintiffs' complaint. The ODRC Defendants in particular argue that the Fussell court has exclusive jurisdiction over claims for equitable or injunctive relief concerning the systemic delivery of medical and dental services. They contend that claim preclusion bars Plaintiffs from re-litigating the adequacy of dental services, because the Fussell stipulation with respect to those services has been terminated by agreement of the parties.

Plaintiffs have not directly responded to Defendants' arguments. Instead, they present their own views of the propriety of federal jurisdiction over their claims, and cite statutes they believe support their right to proceed. With respect to Fussell, Plaintiffs merely repeat the allegations of

their complaint that overcrowding in Ohio prisons has caused the Defendants to "abandon" all attempts to adhere to the Fussell decree or to provide adequate medical and dental services.

Plaintiffs also rely on (and borrow liberally from) an order entered in ongoing California litigation challenging that state's medical and mental health services for prisoners. A three-judge court was appointed by the Ninth Circuit in two consolidated district court cases. That three-judge court eventually entered a prison population reduction order, concluding that clear and convincing evidence established that it was the only available remedy to cure long-standing deficiencies that the state had not remedied despite prior court orders and decrees. See Coleman v. Schwarzenegger, Plata v. Schwarzenegger, 2009 U.S. Dist. LEXIS 67943 (E.D. Cal., August 4, 2009). As described in that order, two federal lawsuits had resulted in a series of remedial orders entered by two district courts. However,

... as the state time and again failed to meet its own remedial targets -- let alone to achieve constitutional compliance -- both courts were forced to adopt increasingly drastic remedies, culminating in the Plata court's 2005 appointment of a receiver to manage the prison medical system. Ultimately, by late 2006 it became apparent that the overcrowding in California's prisons rendered the efforts of the courts, the Coleman Special Master, and the Plata Receiver utterly insufficient. At the request of the Plata and Coleman courts, the Chief Judge of the United States Court of Appeals for the Ninth Circuit convened this three-judge court to consider the plaintiffs'

request for a court-ordered reduction in the California prison population. During the pendency of this proceeding, the outlook for California's prisons has only grown dimmer. The state is now in the throes of a fiscal crisis that renders it unable or unwilling to commit the necessary resources to fix the problems in its prisons.

Id. at \*\*41-42.

The Fussell consent decree remains in effect in Ohio. On November 2, 2010, this Court approved a stipulation reached by the parties to extend the effective term of the decree and the Independent Monitor's medical oversight duties for a period of 18 months, through June 22, 2012. The parties also agreed to extend the term of the decree with respect to dental services to June 30, 2011, with reduced independent oversight continuing to that date for quality assurance and self-monitoring by the state. This Court continues to receive regular reports from the Independent Monitor, Dr. Fred Cohen, and he often assists the Court with investigating individual inmate complaints, as does Plaintiffs' counsel.

Moreover, Plaintiffs have ignored the express provisions of the Fussell decree addressing dispute resolution procedures. Paragraph 140 provides that if a dispute arises over whether the State has failed to comply with the terms of the stipulation, counsel for the parties will make a good faith effort to resolve the dispute, using the services of the Independent Monitor if needed. If counsel are unable to resolve the matter, Plaintiffs'

counsel may then bring the situation to the attention of the Court or may agree that the Monitor may render a final and binding decision. This Court has not received any notice from counsel for the parties or from Dr. Cohen that the state has utterly failed to comply with the terms of the decree as Plaintiffs allege. And this Court has not been asked to make any findings that the consent decree has failed to remedy the systemic deficiencies in the medical care system that the Fussell class initially identified. Such a finding is a necessary precondition to the appointment of a three-judge panel under 18 U.S.C. §3626(a) (3) (A).

The Fussell decree also provides, at Paragraph 141, that complaints by inmates objecting to any of the provisions of the decree must be brought through the institutional grievance procedures, and that exhaustion of those remedies is a precondition to any legal action by an inmate. While Plaintiffs have attached copies of decisions by the Chief Inspector concerning grievances filed by Plaintiffs Greene, Lambert, and Ridenour, their complaint expressly disavows any individual claim based upon deficient care provided to any of them on any specific occasion. Plaintiffs instead repeatedly allege system-wide deficiencies, and they expressly seek only equitable and injunctive relief and the appointment of a three-judge panel to consider their request for a population reduction order.



Finally, Paragraph 142 of the Fussell decree clearly provides:

No legal action seeking equitable relief relating to the issues resolved herein, including a motion to enforce the terms of this stipulation, shall be filed on behalf of the Plaintiff class or by a member of the Plaintiff class without first resorting to the dispute resolution mechanisms set out in this Stipulation advising the Defendants of the issue and making a good faith effort to resolve said issue extrajudicially.

While Plaintiffs admit they are members of the Fussell class, they do not allege any facts demonstrating that any of them have even attempted to comply with this provision. In this regard, counsel for the ODRC Defendants notes in the reply brief that he visited Plaintiffs "in a good faith effort to discuss any concerns they have with their dental and medical care. However, Plaintiffs refused to discuss any medical issues and instead demanded that their sentences be commuted or they would publish the complaint with the press." (Doc. 15 at 3, n.2.) Even when offered the opportunity to seek an extrajudicial remedy, as the Fussell stipulation expressly provides, Plaintiffs apparently rejected it.

The Court concludes that Plaintiffs' complaint must be dismissed, because Plaintiffs have violated the terms of the Fussell decree in the manner discussed above. If Plaintiffs have a legitimate complaint about systemic deficiencies in the state's medical care system, they must avail themselves of the remedies

and procedures outlined in the Fussell decree prior to instituting any legal action of their own. Out of an abundance of caution, the Court will dismiss this case without prejudice, to permit Plaintiffs to pursue those remedies and procedures should they choose to do so.

**CONCLUSION**

For all of the foregoing reasons, the Court grants the Defendants' motions to dismiss. (Docs. 10 and 11) The motions to supplement the record (Docs. 19, 21) are granted. Plaintiffs' motion to strike the reply brief (Doc. 17) is denied. Plaintiffs' motion for service of process through the CM/ECF system (Doc. 22) is denied as moot. A copy of this Order shall be docketed in the Fussell case.

Plaintiffs' complaint is dismissed without prejudice. Costs are awarded to Defendants pursuant to 28 U.S.C. §1915(f).

SO ORDERED.

THIS CASE IS CLOSED.

DATED: April 11, 2012

s/Sandra S. Beckwith  
Sandra S. Beckwith  
Senior United States District Judge