**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION**

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| STEPHANIE GASCA, et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. 17-cv-04149-SRB |
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| ANNE PRECYTHE, Director of the Missouri, Department of Corrections, et al., | ) | |
| | ) | |
| Defendants. | ) | |

# ORDER

Before the Court is Plaintiffs' Motion to Certify Class Pursuant to FRCP 23. (Doc. #6). For the following reasons the motion is DENIED without prejudice.

## I. Background

This lawsuit challenges the parole revocation policies and procedures of the Missouri Department of Correction ("MDOC") and its Division of Probation and Parole ("Parole Board"). Plaintiffs allege the revocation policies and procedures violate their rights "under the Due Process Clause of the Fourteenth Amendment by failing to consider whether parolees qualify for the appointment of free counsel as required by *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), failing to appoint counsel to those parolees who so qualify, and otherwise [failing to] provid[e] [] constitutionally adequate parole revocation processes as required by *Morissey v. Brewer*, 408 U.S. 471 (1972) and its progeny."[1] (Doc. #6-1, p. 1). Plaintiffs seek "a wholesale reform of the

[1] The Supreme Court, in *Gagnon*, held that parolees receive appointed counsel when the parolee "makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation," or "(ii) that . . . there are substantial reasons which justified or mitigated the violation . . . and that the reasons are complex or otherwise difficult to develop or present." 411 U.S. at 790. In *Morrisey*, the Supreme Court outlined the minimum requirements of due process in parole revocations:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . .; (e) a 'neutral and

Defendants' unconstitutional policies, practices, and procedures." (Doc. #6-1, p. 2). Plaintiffs request certification of the following class: "all adult parolees in the state of Missouri who currently face, or who in the future will face, parole revocation proceedings." (Doc. #6-1, p. 2).

## II. Legal Standard

Class certification is governed by Federal Rule of Civil Procedure 23 ("Rule 23"). Rule 23 requires that the proposed class satisfy all four prerequisites of Rule 23(a) and at least one of the provisions of Rule 23(b) to be certified. *Comcast Corp. v. Behrend*, 569 U.S. 27, 32 (2013). Rule 23(a) contains four requirements applicable to all proposed classes: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative party are typical of the claims or defenses of the class (typicality); and (4) the representative party will fairly and adequately protect the interests of the absent class members (adequacy). Fed. R. Civ. P. 23(a). These requirements exist to ensure that any class claims are limited "to those fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotations and citations omitted). Rule 23(b)(2), under which Plaintiffs seek certification, requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

"Rule 23 does not set forth a mere pleading standard." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Instead, a plaintiff "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original). "The propriety of

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detached' hearing body such as a traditional parole board . . .; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

408 U.S. at 489.

class action status can seldom be determined on the basis of the pleadings alone." *Walker v. World Tire Corp.*, 563 F.2d 918, 921 (8th Cir. 1977). Instead, "[t]he District Court must have before it sufficient material to determine the nature of the allegations, and rule on compliance with the Rule's requirements." *Id.* (internal citations and quotations omitted). "Where, however, the pleadings themselves do not conclusively show whether the Rule 23 requirements are met, the parties must be afforded the opportunity to discover and present documentary evidence on the issue." *Id.*

The preponderance of the evidence standard applies to evidence proffered to establish the requirements of Rule 23. *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008). A district court must undertake a "rigorous analysis" to ensure that the requirements of Rule 23 are met. *Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011). Although the court's analysis will frequently entail some overlap with the merits of the underlying claims, "[this] cannot be helped." *Dukes*, 564 U.S. at 351.

## III. Discussion

On the current record, Plaintiffs cannot demonstrate the Rule 23 requirements, namely commonality and typicality. Because Plaintiffs cannot affirmatively establish commonality and typicality, this Court need not address the other requirements at this time. Commonality requires a plaintiff to show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Merely advancing a question stated broadly enough to cover all class members is not sufficient under Rule 23(a)(2)." *Id.*; *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014). Instead, commonality requires that "the claims of all class members depend upon a common contention . . . capable of class-wide resolution, meaning that the contention is of such a nature . .

. that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350.

Typicality requires the "claims or defenses of the representatives and the members of the class stem from a single event or [be] based on the same legal or remedial theory." *Chorosevic v. Metlife Choices*, No. 4:05-CV-2394-CAS, 2007 WL 2159475, at *8 (E.D. Mo. July 26, 2007) (citing *Paxton v. Union Natl Bank*, 688 F.2d 552, 561-62 (8th Cir. 1982)). "Typicality requires a demonstration that the members of the class have the same or similar grievances as the named plaintiff." *Id.* (citing *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996)).

Plaintiffs put forth the following evidence to support their motion:

- Correspondence between Plaintiffs' counsel and MDOC requesting documentation from MDOC pursuant to Missouri's Sunshine laws (Docs. ##1-3, 1-4);
- MDOC's "Redbook," which lays out policies governing parole revocation (Doc. #1-18);
- An organizational chart of MDOC's Division of Parole (Doc. #1-1);
- Several public reports (including MDOC's Annual Report 2015 (Doc. #1-2), Department of Justice's 2015 Report on Probation and Parole in the U.S. (Doc. #1-5), a third-party report on Justice Reinvestment (Doc. #1-6), and another MDOC report (Doc. #1-19));
- Several newspaper articles regarding the state of parole in the U.S. and Missouri (Docs. ##1-7, 1-8, 1-9);
- Sample forms used by MDOC in the parole revocation process (Docs. ##1-10, 1-12, 1-15, 1-16);
- Field violation reports (Doc. #1-11), a preliminary hearing waiver (Doc. #1-13), an order of revocation (Doc. #1-17), and correspondence with MDOC (Doc. #1-20) of one named Plaintiff; and
- Communications regarding revocation between MDOC and several named Plaintiffs (Doc. #1-14).

Plaintiffs argue that this evidence, in conjunction with the nearly thirty-six pages of allegations included in their Amended Complaint, are sufficient to establish that the requirements of Rule 23 are met for the proposed class definition. At this point, on this record, the Court disagrees.

Throughout their complaint and briefing on this motion, Plaintiffs allege numerous constitutional violations committed by MDOC. According to their Amended Complaint, Plaintiffs allege:

> As a matter of policy, practice, and custom, the Defendants systematically fail to screen parolees to determine whether they are eligible for counsel, at cost to state, as required under *Gagnon v. Scarpelli*. They fail to appoint counsel to those parolees who do qualify. . . . As a result of the Defendants' policies, practices, and customs, parolees are unable to speak on their own behalf, present evidence, and cross-examine adverse witnesses.

(Doc. #23, ¶ 156-57). In addition, Plaintiffs allege parolees are: given uncertain parole terms (¶¶ 49-51); not properly served with their violations, field reports, or warrants (¶ 52); not informed of their rights during proceedings (i.e. not given the Redbook) (¶ 55); forced to involuntarily waive their right to a preliminary and/or final hearing (¶¶ 59-60); and provided little notice of hearings (¶ 69). (Doc. #23).

As currently defined, the class includes all adult parolees in the state who face, or who in the future will face, parole revocation proceedings. This definition inherently assumes that all adult parolees in the state who face or will face parole revocation proceedings will be subjected to the alleged constitutional violations. It therefore follows that, in order to certify this class under its current definition, Plaintiffs need to affirmatively demonstrate that each member of the class is subject to a policy that may result in such harm. On this record, Plaintiffs have not done so.

Plaintiffs argue the evidence shows "almost no preliminary or final parole hearings are held in this state." (Doc. #6-1, p. 8). However, the evidence does not show that MDOC has a policy to universally deny the right to a preliminary or final parole hearing. Rather, the evidence, as it stands now, shows most parolees waived their right to preliminary or final parole hearings. While Plaintiffs allege that the waiver was involuntary, no evidence is provided to

affirmatively demonstrate that all waivers were involuntary or that the waivers were taken pursuant to a department-wide policy encouraging involuntary waivers.

Plaintiffs also argue that "[t]he vast majority of parolees in the State of Missouri need and are entitled to appointed counsel . . . ," but Defendants fail to screen parolees for a right to counsel due to MDOC's uniform policies. (Doc. #23, ¶ 10). To support their argument, Plaintiffs point to the Redbook, which states that "[g]enerally, any request to have an attorney present [at the preliminary hearing] shall be denied." (Doc. #1-18, p. 6). Again, Plaintiffs, at this stage, do not put forth sufficient evidence to support a finding that all parolees who currently face or will face parole revocation in Missouri are subject to a policy to deny counsel. In fact, the evidence shows that some parolees were represented by counsel. (Doc. #1-3). Even though it is unclear whether this counsel was provided by the state or otherwise, such representation may undermine the claim that Defendants universally fail to screen all Missouri parole violators for a right to counsel. As such, class certification is not appropriate on this record because Plaintiffs have not met their burden to affirmatively establish the existence of a policy or a number of policies that affect all parolees who now, or in the future, will face parole revocation proceedings.

Plaintiffs themselves admit more evidence may exist that is relevant to class certification. (Doc. #1-4, p. 1) ("[I]t is clear that additional responsive materials exist."). Plaintiffs have not yet received "all responsive memos, directives, or other documents relating to processes, procedures[,] and practices," which would likely be relevant to the present issue. (Doc. #1-4, p. 2). As of now, only formal policies were produced by MDOC. As alluded to above, such policies do not indicate a wholesale violation of constitutional standards as may be required to certify this class as currently defined.

With respect to commonality, Plaintiffs argue the common question is "whether Defendants' ongoing policies and practices relating to alleged violations of parole fail to satisfy the constitutional due process mandates of *Gagnon* and *Morissey*." (Doc. #38, p. 6). That question, Plaintiffs argue, gives rise to a "common answer and outcome desired . . .[:] a declaration and injunction establishing a constitutionally-compliant parole revocation system that comports with the dictates of *Morissey* and *Gagnon*." (Doc. #38, p. 8). For the reasons stated above, the current record is not sufficient to support a finding of commonality on these facts.

In an attempt to establish typicality, Plaintiffs argue the same alleged course of conduct binds the named Plaintiffs and the putative class members—"Defendants' failure to comply with dictates of *Morissey* and *Gagnon*." (Doc. #38, p. 11). For the evidentiary deficiencies described above, the named Plaintiffs have not affirmatively established that their claims arise from the same event or course of conduct as the proposed class members.

## IV. Conclusion

Accordingly, Plaintiffs' Motion to Certify Class Pursuant to FRCP 23 (Doc. #6) is DENIED without prejudice.

**IT IS SO ORDERED.**

/s/ Stephen R. Bough
JUDGE STEPHEN R. BOUGH
UNITED STATES DISTRICT COURT

DATED: December 4, 2017