

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DONALD BANGO and SCOTT BAILEY,
individually and on behalf of all others
similarly situated;

Plaintiffs,

v.

PIERCE COUNTY, WASHINGTON; BRUCE
DAMMEIER, in his official capacity as Pierce
County Executive; PIERCE COUNTY SHERIFF'S
DEPARTMENT; PAUL A. PASTOR, in his official
capacity as Pierce County Sheriff; PATTI
JACKSON-KIDDER, in her official capacity as
the Pierce County Chief of Corrections; JANET
RHOTON, in her official capacity as the Pierce
County Jail Mental Health Manager, and their
officers, agents, employees, and successors;

Defendants.

NO. 3:17-cv-06002

MOTION FOR CLASS CERTIFICATION

NOTED FOR: JANUARY 5, 2018

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

In 1995 the ACLU, together with two other non-profits, brought an action on behalf of individuals against Pierce County arising out of the operation of its jail. The plaintiffs there moved for class certification as Pierce County's policies and practices affected all

1 the then-current, and future, individuals incarcerated at the jail. Pierce County objected to
2 class certification. This Court granted the plaintiffs' motion for class certification allowing
3 the named plaintiffs to bring the action for all the then-current inmates and all future
4 inmates.

5
6 The current Plaintiffs are seeking declaratory and injunctive relief as did their
7 predecessors 22 years earlier. This action, as did the 1995 action, arises out of
8 Defendants' policies and practices. This action seeks to enjoin Defendants from
9 mistreating people with mental illnesses. These policies and practices are affecting all
10 the current inmates, and will affect all future inmates, of the jail who are mentally ill.
11 These policies and practices include:

- 12 • Failing to screen for mental illness during the booking process and during
13 incarceration;
- 14 • Ignoring signs of mental illness and requests for help;
- 15 • Delaying and refusing to provide needed treatment;
- 16 • Delaying, or in some cases not providing at all, needed psychiatric
17 medications;
- 18 • Punishing those who decompensate because of the lack of medications
19 and treatment by restraining them physically, which in turn causes
20 additional psychological and mental harm to those individuals. These
21 restraints include chaining people with mental illness to "eyebolts" in the
22 floor and confining them in "restraint chairs" for hours on end;
- 23 • Warehousing people with mental illness in solitary confinement despite the
24 clinically proven negative impacts of isolation; and
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26

- Refusing to provide needed psychiatric medications upon release from the jail.

Both named Plaintiffs have mental illnesses and have been mistreated by Defendants. Plaintiffs move this Court to allow them to represent the class of individuals who have mental illnesses and who are now, or will be in the future, incarcerated at the Pierce County Jail. Class certification is appropriate under Rule 23(a) and 23(b)(2).

II. BACKGROUND

A. The prior lawsuit

In 1995 a class action lawsuit was filed in this court against Pierce County for the unconstitutional conditions at the Pierce County Jail. *Herrera v. Pierce County*, Dkt. # 12, First Amended Complaint for Declaratory and Injunctive Relief, No. C95-50525-FDB (W. Wa. Mar. 17, 1995). The class claimed Pierce County was operating its jail in such a manner that it violated the constitution and specifically raised claims of overcrowding, inadequate medical, dental and mental health care claims. *See id.* The class claimed that the medical and mental health care staff levels at the jail were inadequate, that individuals with medical needs were being neglected, that the kite system for requesting medical care was not effective or accessible, and that people suffering from mental illness only received an initial assessment by mental health staff but no follow up care. *See id.*

The *Herrera* litigation was resolved through settlement and a series of stipulated orders in 1995 and 1996. *See* Dkt. #89, Stipulated Order and Final Judgment, No. C95-50525-FDB (W. Wa. Mar. 28, 1996). Pursuant to the orders, Pierce County was required to create a mental health unit, increase health care staffing and adopt medical care standards using the National Commission on Correctional Health Care (NCCHC) and the

American Public Health Association (APHA) standards as guidelines. *See id.* at 5–6; *see also* Dkt. #41, Stipulated Order, No. C95-5025-FDB (W. Wa. Oct. 31, 1995). The Court appointed a court monitor to report to the Court on the progress Pierce County was making to adhere to the terms of the settlement agreement. It took Pierce County 15 years to comply. In 2011 the court monitor found that the health care staff had met the terms of the settlement agreement. However, the court monitor also noted that “this facility still faces challenges.” Dkt. #368. The case was then dismissed with prejudice. *See* Dkt. #372.

B. Defendants’ current policies and practices result in the mistreatment of inmates with mental illnesses.

Defendants’ mistreatment of people with mental illnesses begins at booking. Defendants do not conduct adequate mental health assessments. Defendants do not properly document mental health history. Defendants’ policies and practices result in people not receiving necessary mental health treatment, including access to mental health providers, psychiatric medications, and counseling. Those with mental health illnesses are subject to improper and unnecessary physical restraints that lead to further deterioration of their mental health condition. Those with mental health illnesses are subject to being improperly and unnecessarily held in solitary confinement. Upon release, Defendants have a policy and practice of not providing needed medications to the inmates.

III. ARGUMENT

A. Because Defendants are acting, or refusing to act, on grounds generally applicable to all inmates with mental health illness at the Pierce County Jail, declaratory and injunctive relief are appropriate for the proposed class as a whole. Accordingly, Plaintiffs request the Court to certify the following individuals as a class pursuant to Rule 23(b)(2): all qualified individuals who have mental illnesses that are disabilities as defined in 42 U.S.C. §12102 and 29 U.S.C. §705(9)(B),

1 and who are now, or will be in the future, incarcerated at the Pierce County Jail.
 2 Plaintiffs satisfy the requirements for class certification under Rule 23(a).

3 The decision to grant class certification is within the trial court's discretion.
 4 *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010). In ruling on
 5 a motion for class certification the trial court must determine whether Rule 23(a)
 6 requirements are met and that the class falls within one of the three categories of Rule
 7 23(b). *Unthaksinkun v. Porter*, C11-0588JLR, 2011 WL 4502050, at *6 (W.D. Wash.
 8 Sept. 28, 2011) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)).

9 There are four prerequisites to class certification: numerosity, commonality,
 10 typicality, and adequacy of representation. *Rodriguez v. Hayes*, 591 F.3d 1105, 1122
 11 (9th Cir. 2009).

12 1. Numerosity

13 Rule 23(a) requires that the proposed class is so numerous that joinder of all
 14 members is impracticable. Impracticability does not require the moving party to
 15 demonstrate that it is impossible to join all the proposed class members; instead, the
 16 moving party only need demonstrate that it would be difficult or inconvenient to join all
 17 the members of the proposed class. *Harris v. Palm Springs Alpine Est., Inc.*, 329 F.2d
 18 913-14 (9th Cir. 1964). The moving party is not required to identify the precise number
 19 of potential class members. *Garrison v. Asotin Cty.*, 251 F.R.D. 566, 569 (E.D. Wash.
 20 2008). Instead, numerosity is presumptively satisfied when a proposed class comprises
 21 forty or more members. *See McCluskey v. Trustees of Red Dot Corp. Emp. Stock*
 22 *Ownership Plan & Trust*, 268 F.R.D. 670, 673-74 (W.D. Wash. 2010).

24 Numerosity may also be established when class members may be difficult to
 25 locate or where the class is likely to contain future unknown members. *See Jordan v. Los*
 26 *Angeles Cty*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S.

1 810 (1982) (joinder of unknown members is impracticable); *Ali v. Ashcroft*, 213 F.R.D.
2 390, 408–409 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on*
3 *other grounds*, 421 F.3d 795 (9th Cir. 2005) (where class includes unnamed, unknown
4 future members, joinder of those individuals is impracticable and numerosity requirement
5 is met regardless of class size).
6

7 Here, joinder of potential class members is both impracticable and indeed
8 impossible.

9 Joinder is impracticable because of the large number of inmates in the Pierce
10 County Jail who have mental illnesses. As of Friday, November 30, 2017 there were
11 approximately 1,102 individuals incarcerated in the Pierce County Jail. According to the
12 Federal Bureau of Justice Statistics, approximately 64 percent of those incarcerated in
13 jail have a mental health issue. This means approximately 700 inmates at the Pierce
14 County Jail are potentially class members. See U.S. Dep't of Justice, Bureau of Justice
15 Statistics, Special Report: Mental Health Problems of Prison and Jail Inmates, (revised
16 December 14, 2006). Approximately 25 percent of the inmates at the Pierce County Jail
17 are on psychiatric medications. See League of Women Voters of Tacoma-Pierce County,
18 Study of Mental Health in Pierce County 35 (Feb. 2016).
19

20 Conservatively, approximately 275 individuals have mental health illnesses at the
21 jail and, if general statistics hold true, approximately 700 individuals at the jail have
22 mental illnesses. This conservative number, by itself, is sufficient to fulfill the
23 requirement of numerosity.

24 Moreover, joinder is impossible because this action involves not only current
25 inmates of the Pierce County Jail but also future inmates who have mental illnesses.
26 Joinder of those potential class members is indeed impossible.

1 The numerosity requirement is met.

2 **2. Common questions of law and fact**

3 Rule 23(a) requires that the class share common questions of law or fact. It is
4 not, however, necessary that members of the proposed class share every fact in common
5 or have completely identical legal issues. *Rodriguez v. West Publ. Corp.*, 563 F.3d 948,
6 1122 (9th Cir. 2009). The shared facts can be different if they result in shared legal
7 issues as long as there is a common core of salient facts. *Hamlon v. Chrysler Corp.*, 150
8 F.3d 1011, 1019 (9th Cir. 1998); *see also Doe v. Los Angeles Unified Sch. Dist.*, 48 F.
9 Supp.2d 1233, 1241 (C.D. Cal. 1999) (commonality exists if plaintiffs share a common
10 harm even if the individualized facts supporting the harm diverge).

11 The commonality requirement is liberally applied when the moving party is
12 challenging a government policy that deprives a large number of individuals of their
13 constitutional rights. *See Parsons v. Ryan*, 754 F.3d 657, 678, 681 (9th Cir. 2014), *reh'g*
14 *en ban denied*, 784 F.3d 571 (2015) (affirming certification of class of prisoners seeking
15 injunctive and declaratory relief and noting that “numerous courts have concluded that
16 the commonality requirement can be satisfied by proof of the existence of systemic
17 policies and practices that allegedly expose inmates to a substantial risk of harm”).
18

19 Here, there are both common questions of fact and of law.

20 The common question of fact is how Pierce County treats its inmates who have
21 mental illnesses. All individuals incarcerated at the jail are subject to the same policies
22 and practices. As held in *Parsons*, the commonality requirement can be satisfied by the
23 existence of systemic policies and practices that expose inmates to a substantial risk of
24 harm. That is exactly the scenario here.
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1 The common question of law is Defendants' violation of the Eighth and Fourteenth
2 amendments of the U.S. Constitution, Title II of the American with Disabilities Act, and the
3 Rehabilitation Act (29 U.S.C. § 794).

4 The commonality requirement is met.

5 **3. Typicality**

6 Rule 23(a) requires that the Plaintiffs' claims are typical of the claims for the
7 class. The purpose of this requirement is to ensure that the interests of the named
8 plaintiffs align with the interests of the class. *Hanon v. Dataproducts Corp.*, 976 F.2d
9 497, 508 (9th Cir. 1992). However, it isn't necessary that the class representatives'
10 injuries are identical to the class members' injuries. Instead, all that is required is that
11 the unnamed class members have injuries similar to those of the class representatives
12 and that those injuries result from the same conduct. *Unthaksinkun*, 2011 WL 4502050,
13 at *13.

14 The Plaintiffs' claims are typical of the claims of the proposed class. All of the
15 claims arise out of the policies and practices of Pierce County in its treatment of people
16 with mental illnesses. The relief being sought will apply to all current and future inmates
17 at the jail who have mental illnesses. The relief sought is declaratory and injunctive relief.

18 The third requirement is met.

19 **4. Adequacy of representation**

20 Rule 23(a)(4) requires that the representative parties fairly and adequately protect
21 the interests of the class. The named Plaintiffs and their counsel will fairly and
22 adequately protect the interest of the class. In reaching this conclusion courts must
23 decide (1) whether the named plaintiffs and their counsel have any conflicts of interest
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1 with other class members and (2) whether they will prosecute this action vigorously on
2 behalf of the class. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011).

3 In determining whether class counsel is adequate, courts consider the class
4 counsel's ability to adequately represent the class and absent class members. *Radcliffe*
5 *v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1165–69 (9th Cir. 2013). In making this
6 determination, courts consider the work counsel has done to investigate the claims of the
7 proposed class, counsel's experience in handling complex cases, counsel's knowledge of
8 applicable law, and the resources counsel will commit to representing the class. *See* Fed.
9 R. Civ. P. 23(g)(1)(A).
10

11 Here, none of the named plaintiffs have any interests that conflict with the
12 interests of the class. Instead, they all share the common interest in addressing
13 Defendants' policies and practices in its mistreatment of those with mental illnesses.
14 The named plaintiffs have all been injured by Defendants' mistreatment because of their
15 mental illnesses.
16

17 Regarding class counsel, Plaintiffs are represented by the American Civil Liberties
18 Union of Washington Foundation (ACLU-WA), an organization with extensive experience in
19 civil rights and class action litigation. The ACLU-WA has been appointed as class counsel
20 in numerous actions and has successfully litigated cases in both state and federal courts,
21 often on behalf of hundreds of thousands of individuals. *See* Declaration of Emily Chiang.
22 Plaintiffs are also represented by the law firm of Gordon Thomas Honeywell ("GTH"). GTH
23 has extensive experience in litigation including class actions lawsuits. *See* Declaration of
24 Salvador A. Mungia. Salvador A. Mungia was one of the lead attorneys in the prior
25 *Herrera* lawsuit and will be the lead attorney here.
26

1 Plaintiffs' counsel has extensively investigated this claim, is dedicated to
 2 prosecuting the class claims, and has the resources to carry out this task. Plaintiffs'
 3 counsel will vigorously represent both the named and the absent class members.
 4

5 The fourth requirement is met.

6 **B. This action satisfies Rule 23(b)(2)**

7 In order to obtain class certification, the moving party must not only satisfy the
 8 four requirements of Rule 23(a) but must also satisfy one of Rule 23(b)'s conditions.
 9 *Rodriguez*, 591 F.3d at 1122.

10 The Plaintiffs satisfy Rule 23(b)(2)'s requirement that the primary relief is
 11 declaratory or injunctive. Rule 23(b)(2) is appropriate for cases challenging a common
 12 course of conduct. *See* Fed. R. Civ. P. 23, advisory committee's note to 1966
 13 Amendment, Subdivision (b)(2) (noting "various actions in the civil-rights field" are
 14 appropriate for (b)(2) certification). Rule 23(b)(2) applies when a single injunction or
 15 declaratory judgment would provide relief to each member of the class. *Unthaksinkun*,
 16 2011 WL 4502050, at *15.

17 The Plaintiffs here are seeking only declaratory and injunctive relief. They are not
 18 seeking damages. The relief sought will apply to the entire class as the relief is based
 19 upon the unlawful nature of Defendants' policies and practices.
 20

21 **IV. CONCLUSION**

22 The 1995 *Herrera* action addressed Pierce County's policies and practices in its
 23 operation of its jail. That too was a class action lawsuit and involved not only the then-
 24 current inmates but future inmates as well. That lawsuit involved claims based upon how
 25 individuals with mental illness were being mistreated by Pierce County.
 26

Pierce County is once again mistreating the inmates at its jail who are mentally ill. The Plaintiffs are seeking declaratory and injunctive relief. The relief will be for the benefit of all current, and future, individuals incarcerated in the jail who are mentally ill. Class certification, as it was in 1995, is once again appropriate.

Plaintiffs request this Court to grant their motion for class certification appointing Donald Bango and Scott Bailey as class representatives, appointing the ACLU-WA and GTH as class counsel, and defining the class as the following:

All qualified individuals who have mental illnesses that are disabilities as defined in 42 U.S.C. §12102 and 29 U.S.C. §705(9)(B), and who are now, or will be in the future, incarcerated at the Pierce County Jail.

Respectfully submitted this 6th day of December, 2017.

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