UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUNDAY HINTON, on behalf of herself and others similarly situated, Plaintiff, v. DISTRICT OF COLUMBIA, Defendant.	Civil Action No. 1:21-cv-1295-JDB

PLAINTIFF'S MOTION FOR LEAVE UNDER LOCAL RULE 65.1(c) TO FILE SUPPLEMENTAL DECLARATION IN SUPPORT OF MOTIONS FOR CLASS CERTIFICATION AND PRELIMINARY INJUNCTION

Plaintiff Sunday Hinton moves under Local Civil Rule 65.1(c) for leave to file the attached Second Supplemental Declaration of Courtney Phillips demonstrating that—in response to the Court's inquiries and contrary to the representations of Defendant Department of Corrections (DOC) to the Court at the motions hearing on August 24, 2021—DOC has *not* provided a Transgender Housing Committee (THC) hearing to every individual in its custody who has requested one. For the reasons explained below, this fact is highly relevant to the pending motions. Defendant does not consent to this motion.

Courtney Phillips is a transgender woman currently in DOC custody. As explained in her prior declarations in this case, *see* ECF 19-5 & 26-3, since her arrest and transfer to DOC custody in August of 2020, she has always been housed in a men's unit at odds with her gender identity, without ever having been given the option to reside in a women's unit. Furthermore, even after DOC promulgated its new Policy 4020.3H (the "H Policy") in June of 2021, Ms. Phillips was not provided with a THC hearing even though the H Policy requires THC hearings for any transgender

individual who "makes known to DOC staff their Transgender . . . status," H Policy § 10(b), ECF 22-2.

At the August 24 hearing in this matter, Plaintiff argued that DOC's failure to move Ms. Phillips and another putative class member to a women's unit reflected that DOC was not actually serious about its new policy or about treating transgender inmates in a nondiscriminatory manner. The Court inquired as to whether or not Ms. Phillips had requested or been given a THC since the implementation of the H policy, and Defendant responded to the Court that all transgender individuals in DOC custody who requested THC hearings were provided them.

That is not true.

As Ms. Phillips' new declaration reveals, she requested a THC hearing no fewer than three times between when Plaintiff's counsel informed her of the H Policy's existence in July and the August 24 hearing before this Court. *See* Second Supp. Decl. of Courtney Phillips ¶¶ 5-16, 20. Ms. Phillips' requests to go before the THC have gone unanswered, and she remains in a men's unit, *see id*. ¶¶ 3-16, where she has been threatened, demeaned, and assaulted, *see id.* ¶ 12; *accord* ECF 26-3 (Supp. Decl. of Courtney Phillips) ¶¶ 6-7. She has also requested a meeting with Charlene Reid, a member of the THC, since learning of the new policy, but has not seen or heard from Ms. Reid in response. *See* Second Supp. Decl. of Courtney Phillips ¶¶ 10, 16.

Ms. Phillips' new declaration also provides evidence that undercuts DOC's representation at argument that all individuals in DOC custody were informed about their right to a THC hearing under the H Policy. Although the H Policy is, as DOC has previously averred, accessible via tablets provided to some incarcerated individuals, DOC did not clearly notify them of the change in policy. The new policy can be found if a tablet user clicks on an icon labeled "DOC Policies," but unless a user knew that the transgender housing policy had changed—a fact that no one from DOC

ever told Ms. Phillips and that was not announced via notification on the tablets—the user would have no reason to go looking for it. *See id.* ¶¶ 18-19. Ms. Phillips did not know that her tablet allowed her to access the new policy until another resident told her so. *See id.*[1]

The Court should permit the filing of Ms. Phillips' new declaration because it powerfully undercuts DOC's opposition to class certification. Ms. Phillips' experience highlights that DOC's promulgation of the H Policy did not solve a fundamental problem with DOC's approach to housing transgender individuals under its prior Policy 4020.3G (the "G Policy"), as challenged in both the original and amended complaints: DOC denies THC hearings to transgender residents regardless of its written policy. *See* ECF 1 (Compl.), ¶ 25; ECF 32 (Am. Compl.) ¶¶ 27, 53, 54. As Plaintiff argued to the Court at the August 24 hearing, her experience is typical of the class because the discrimination against her was not an isolated housing decision, and the pattern of discrimination of which she complains is a uniform course of conduct, not just two discrete unlawful policies labeled "G" and H." Rather, at every turn, DOC's treatment of transgender individuals in its custody—the anatomy presumption of the G Policy; the suspension of THC hearings for over a year; the coercion of transgender individuals to misrepresent their preferences in response to this litigation; the promulgation of the new H Policy that provides for categorical involuntary protective custody; and now the refusal to grant THC hearings for months under the new policy—reflects DOC's hostility to the basic rights and dignity of transgender individuals. By disproving DOC's assertion that it has granted a THC hearing to anyone who requested one, Ms. Phillips' new declaration dispels any remaining doubt that DOC has embarked on a broad and

[1] In contradicting representations made on behalf of Defendant at the August 24 hearing, Plaintiff does not intend in any way to cast aspersions on the candor or ethics of opposing counsel, whom Plaintiff assumes answered the Court's questions to the best of her knowledge and belief based on the information provided by her client.

consistent course of conduct treating transgender individuals differently, and worse, than cisgender individuals with regard to their housing while in custody, and that Ms. Hinton's experience is typical of the treatment of transgender individuals by DOC.

As Ms. Hinton has argued, typicality, which is "liberally construed by courts" and not destroyed by "[f]actual variations," *Bynum v. District of Columbia*, 214 F.R.D. 27, 34 (D.D.C. 2003), "is ordinarily met if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory." *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) (citation and internal quotation marks omitted); *accord Disability Rts. Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 27 (D.D.C. 2006) (explaining that the purpose of typicality is "to ensure that the class representatives have suffered injuries in the same general fashion as absent class members" (citation and internal quotation marks omitted)). Here, Ms. Hinton and the class have alleged a unitary course of conduct—DOC's consistent use of its housing policies and their implementation (or lack thereof) to disadvantage transgender people—*and* the same legal theories, i.e., discrimination based on sex and gender in violation of Equal Protection and the D.C. Human Rights Act.

This Court and others have made clear that a class representative who has been subjected to discrimination can challenge a broader mosaic of discriminatory practices than the ones the representative has experienced personally where the practices are linked by a single defendant's common hostility to the relevant protected group. *See Hartman v. Duffy*, 158 F.R.D. 525, 546 (D.D.C. 1994) ("The Defendant further argues that Ms. Hartman lacks standing to raise issues concerning either gender-biased evaluations and discriminatory application of subjective criteria, or the alleged discouragement of female applicants, because she was not subjected to these

employment practices. The Court finds, however, that just because Ms. Hartman did not experience each and every manifestation of the alleged policy of discrimination does not mean she lacks standing to represent class members on their individual claims." (citation omitted)), *aff'd in relevant part and remanded in part on other grounds*, 88 F.3d 1232 (D.C. Cir. 1996).[2]

Under these principles, Ms. Phillips' new declaration helps show why typicality is satisfied. What stitches Ms. Hinton's experience together with those of all the putative class members—from Ms. Phillips, who has been housed with men for her entire time in custody and has been repeatedly denied THC hearings, to transgender individuals newly arriving at the Jail and finding themselves shackled, just because they are transgender, when they visit with their lawyers, or see a doctor, or go to a THC hearing—is DOC's uniform course of conduct, including but not limited to the G and H Policies, that deliberately treats transgender people differently than similarly situated cisgender people with regard to their housing while in custody. Put another way, Ms. Hinton's experience is typical of the class because, regardless of which policy DOC applied to her, she experienced the same pattern of pervasive mistreatment of transgender people, as a group,

[2] *See also Chisholm v. U.S. Postal Serv.*, 665 F.2d 482, 488, 494 (4th Cir. 1981) (upholding certification of class of Black employees "who are or have been limited, classified, restricted, discharged, excluded or discriminated against by the defendants with respect to promotions (including all components of the promotion process), details, the use of written tests, discipline, or pay or who have been otherwise deprived of employment opportunities related to said factors because of their race or color," even though named plaintiff "might not have fallen prey to all the ills" the class members faced); *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 827, 830-31 (8th Cir. 1977) (typicality met in challenge to host of discriminatory employment practices, some of which—disparity in management positions and unequal rule enforcement—the lone named plaintiff, a managerial employee herself, did not experience; court found it sufficient that "[a]ppellant's allegations of employment discrimination, while factually differing in detail from those of other employees as reflected in their affidavits, are plainly rooted in the same bias asserted as the source of the discrimination"); *Drayton v. Western Auto Supply Co.*, 203 F.R.D. 520, 522, 527-28 (M.D. Fla. 2000) (typicality met in challenge to host of discriminatory employment practices, some of which—discriminatory denial of work hours and segregation to match the racial make-up of the customer base—plaintiffs did not personally experience), *aff'd in part, rev'd in part on other grounds*, 2002 WL 32508918 (11th Cir. Mar. 11, 2002).

through the combination of DOC's written policies *and* its implementation of, and strategic disregard for, its own rules in order to use housing assignments to discriminate against and harm transgender individuals. And Ms. Phillips' experience exemplifies DOC's determination to discriminate: DOC is—contrary to its representation to the Court—ignoring its own new policy, promulgated two months ago in response to this lawsuit, in order to deny a transgender woman any opportunity to be housed consistent with her gender identity.

Independently, Ms. Phillips' new declaration also supports application of the "voluntary cessation" exception to mootness. The continuation of housing assignments made under the G Policy—months after that policy was rescinded and in the face of a putative class member's repeated requests for a THC hearing so she could be reassigned—shows that DOC has failed to carry its burden to show that "(1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely or irrevocably eradicated the effects of the alleged violation." *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 442 (D.C. Cir. 2020) (citation and internal quotation marks omitted). Indeed, the violation never ended, and effects of the violation continue to this day, as DOC continues to house Ms. Phillips in a men's unit where it placed her under the G Policy on the basis of anatomy, without a THC hearing, and in disregard of her gender identity.

Because the proposed Second Supplemental Declaration of Courtney Phillips undermines an important representation Defendant made to the Court at the August 24 hearing, and consequently shows how the discrimination of which Ms. Hinton originally complained persists against putative class members through DOC's broad pattern of discrimination toward transgender people via its written policies *and* its implementation (or not) of these policies, the Court should grant leave for the attached declaration to be filed. A proposed order is also attached.

August 30, 2021

Respectfully submitted,

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* In accordance with D.D.C. Local Civil Rule 83.2(g), the attorneys whose names are marked with an asterisk above certify that: (i) they are members in good standing of the District of Columbia Bar; (ii) they are representing a petitioner who is indigent within the meaning of Local Rule 83.2(g), at no cost to petitioner; (iii) they have never been subject to disciplinary complaint or sanction by any court or other disciplinary authority; and (iv) they possess a copy of the Local Rules of this District and are familiar with the rules generally and as they pertain to this proceeding.

** Counsel wish to acknowledge the assistance of paralegal Elaine Stamp in the preparation of this filing.