

a period of one month or longer who are claiming defendants have inflicted cruel and unusual punishment by denying them fresh air and outdoor exercise.

They also ask the Court to certify a subclass consisting of:

all female prisoners housed in Housing Unit 2 who are claiming defendants have violated their right to equal protection by denying them fresh air and outdoor exercise.

ANALYSIS

For a class to be certified, the identified group must meet each of the requirements of Federal Rule of Civil Procedure 23(a) and one of the three subsections of Rule 23(b). The Supreme Court described the Rule 23(a) requirements as follows:

Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a ‘class [so large] that joinder of all members is impracticable’); (2) commonality (‘questions of law or fact common to the class’); (3) typicality (named parties’ claims or defenses ‘are typical . . . of the class’); and (4) adequacy of representation (representatives ‘will fairly and adequately protect the interests of the class’).

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997). Rule 23(b) then sets out the type of class actions that can be maintained. In this case the proposed class satisfies the requirements of both Rule 23(a) and Rule 23(b).

I. Rule 23(a) requirements

A. Numerosity

The numerosity requirement is met when “the class is so numerous that

joinder of all parties is impractical.” Fed. R. Civ. P. 23(a)(1). As this Court observed in *Alexander v. JBC Legal Group, P.C.*, 237 F.R.D. 628, 630–31 (D. Mont. 2006):

The Ninth Circuit has vacated certification on numerosity grounds where a class consisted of ten members or less, and it has noted the Supreme Court’s holding in *General Telephone Company v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980), that a class consisting of fifteen members is too small to meet the numerosity requirement. See *Harik v. Cal. Teachers Ass’n*, 326 F.3d 1042, 1051 (9th Cir.2003).

That being said, a small class may still satisfy the numerosity requirement where, as here, the class includes both ascertainable members and a fluid composition of future, unidentified members. See e.g. *McMillon v. Hawaii*, 261 F.R.D. 536, 543 (D. Hawaii 2009) (finding the numerosity requirement satisfied where the proposed class consisted of 10 identifiable members, as well as future, unidentified members). The Southern District of New York explained that, in the prison context: “The fluid composition of a prison population is particularly well-suited for class status, because, although the identity of the individuals involved may change, the nature of the wrong and the basic parameters of the group affected remain constant.” *Dean v. Coughlin*, 107 F.R.D. 331, 332–33 (S.D.N.Y. 1985).

Here, the plaintiffs do not identify a specific number of ascertainable class members, but they surmise that they number at least 27 members. Naturally, this

number changes daily as the Detention Facility receives and releases inmates. As a result, the plaintiffs have included future inmates in their proposed class and subclass definitions. In light of the Detention Facility's "fluid composition" and the likelihood of future, unidentified inmates who meet the class and subclass parameters, the proposed class satisfies the numerosity requirement. *See id.*

B. Commonality

If there are questions of fact and law that are common to the class, the commonality requirement has been met. Fed. R. Civ. P. 23(a)(2). Rule 23(a)(2) is construed permissively and is satisfied even if all questions of fact and law are not identical. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019–20 (9th Cir. 1998). As long as the class members' claims arise from the same source and raise at least some of the same legal issues, the plaintiffs have met the minimal requirements of Rule 23(a)(2). *Id.*

The commonality requirement is met here because the plaintiffs and proposed class have all allegedly suffered the same injury: "deprivation of access to fresh air and outdoor exercise for a period of one month or more." The resolution of their alleged injury will require confronting common questions of fact and law. Fed. R. Civ. P. 23(a)(2).

C. Typicality

Rule 23(a)(3) requires that the “claims or defenses of the representative parties are typical of the claims or defenses of the class.” “Under the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably coextensive with those of absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020. Here, the claims of the named, representative parties are the same as those of the proposed class, so this element is met. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (holding that the typicality requirement is satisfied when class members have similar injuries, the action is based on the same underlying conduct that is not unique to the named plaintiffs, and other class members were injured by the same conduct).

D. Adequacy of representation

Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” There are two issues to consider in determining adequacy of representation:

- (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and
- (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?

Hanlon, 150 F.3d at 1020 (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)).

First, the named plaintiffs here have not identified any conflicts of interest,

and the defendants have not, as noted above, filed a brief identifying any conflicts.

Second, the plaintiffs' counsel are both qualified and experienced attorneys. There is no question that counsel will "prosecute the action vigorously on behalf of the class." *Id.*

II. Rule 23(b) requirements

In addition to the requirements of Rule 23(a), a proposed class must also meet one of the three requirements of Rule 23(b). The plaintiffs argue the proposed class satisfies both Rule 23(b)(1)(A) and Rule 23(b)(2). It is unnecessary to address whether the proposed class satisfies Rule 23(b)(1)(A) because it satisfies Rule 23(b)(2).

Rule 23(b)(2) states:

A class action may be maintained if Rule 23(a) is satisfied and if: . . . 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

Stated differently, certification under Rule 23(b)(2) is appropriate "when a single, indivisible remedy would provide relief to each class member." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011).

In the penal context, Rule 23(b)(2) certification is a common avenue for enabling a class of prisoners to challenge the constitutionality of prison conditions. *See e.g. Riker v. Gibbons*, 2009 WL 910971 at *5 (D. Nev. March 31,

2009) (citing 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1776, at 112 n.18 (3d ed. 2005) (collecting cases where Rule 23(b)(2) class actions were used to challenge prison policies or procedures alleged to violate prisoners' Eighth Amendment right to be free from cruel and unusual punishment)).

The proposed class here satisfies Rule 23(b)(2)'s requirements because "a single, indivisible remedy would provide relief to each class member." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2545. A favorable ruling for the proposed class would mean a remedy for the class and subclass with access to fresh air and outdoor exercise. That single remedy would provide relief to all members of the class.

CONCLUSION

The proposed class and subclass satisfy the four requirements of Rule 23(a), and they meet the requirements of Rule 23(b)(2). The Court therefore certifies the proposed class and subclass.

IT IS ORDERED that the plaintiffs' motion for class certification (doc. 3) is GRANTED. The Court certifies the class consisting of:

all current and future prisoners housed in Housing Unit 2 and the Juvenile Detention Center at the Missoula County Detention Facility for a period of one month or longer who are claiming defendants have inflicted cruel and unusual punishment by denying them fresh air and outdoor exercise.

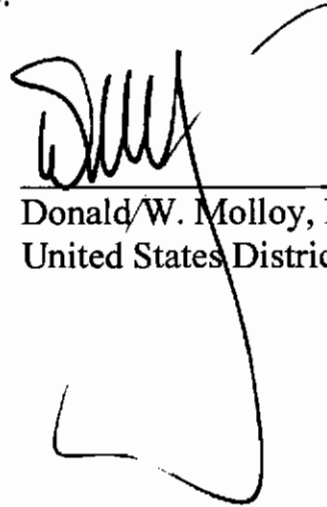
IT IS FURTHER ORDERED that the Court certifies the subclass consisting of:

female prisoners housed in Housing Unit 2 who are claiming defendants

have violated their right to equal protection by denying them fresh air and outdoor exercise.

IT IS FURTHER ORDERED that Anna Conley and Greg Munro are appointed as class counsel. *See* Fed. R. Civ. P. 23(g)(1)(B), (C).

Dated this 17th day of October 2012.

A handwritten signature in black ink, appearing to read 'DMolloy', is written above a horizontal line. A long, sweeping vertical stroke extends downwards from the signature, ending in a hook-like shape.

Donald W. Molloy, District Judge
United States District Court