UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

David McGee,
Plaintiff,

and

Frederick R. Reed, Leroy W. Hughes, Alfonso Garcia, James Anderson, Daniel Muir, Donald Cross, Mark D. Dunbar, Christopher Alan Smith,
Intervenor-Plaintiffs,

v.

Steven Gold, Keith Tallon, Celeste Girrell,
Defendants.

File No. 1:04-CV-335

ORDER
(Papers 7, 40, 43, 55, 57-61, 63-82, 84-86, 88-89)

Plaintiff David McGee, proceeding *pro se*, brings this case claiming that the 24-hour lighting in Vermont prisons is unconstitutional. The Court has allowed several Vermont inmates to intervene in the case as plaintiffs, and 30 additional motions to intervene are currently before the Court. Also pending are motions for appointment of counsel (Papers 7, 40 and 43) and class certification (Paper 43), as well as the defendants' request for reconsideration of the Court's decision allowing McGee to amend his complaint (Paper 55). For

the reasons set forth below, the motions to intervene are GRANTED and the motions for appointment of counsel and class certification are DENIED. The defendants' motion to reconsider is GRANTED and the Court's prior ruling on the motion to amend is AFFIRMED.

I. Motions to Intervene

The Court has previously allowed eight of McGee's fellow inmates to intervene in this action. In the last ten days, 30 other inmates have also moved to intervene. Their motions, all of which are identical with the exception of the movant's name, each show that their claims "and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). Furthermore, the Court finds that addition of these parties will not unduly delay or prejudice the adjudication of the rights of the original party. Id. The motions to intervene are, therefore, GRANTED.

II. Appointment of Counsel

When considering a motion for appointment of counsel, a Court must assess whether the plaintiff's claims are likely to be of substance. See Hendricks v. Coughlin, 114 F.3d 390, 392 (2d Cir. 1997); Cooper v. A.

Sargent Co., 877 F.2d 170, 172 (2d Cir. 1986). If the Court finds sufficient merit in the plaintiff's claims, it must also consider (1) his ability to investigate the crucial facts; (2) whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder; (3) the plaintiff's ability to present the case; (4) the complexity of the legal issues; and (5) any other special reason in the case why appointment of counsel would be more likely to lead to a just determination. Hendricks, 114 F.3d at 392. Courts must consider the issue of appointment carefully because "every assignment of a volunteer lawyer to an undeserving client deprives society of a volunteer lawyer available for a deserving cause." Cooper v. A. Sargenti Co., 877 F.2d 170, 172 (2d Cir. 1989). Accordingly, "even though a claim may not be characterized as frivolous, counsel should not be appointed in a case where the merits of the ... claim are thin and his chances of prevailing are therefore poor." Carmona v. United States Bureau of Prisons, 243 F.3d 629, 632 (2d Cir. 2001) (denying counsel on appeal where petitioner's appeal was not frivolous but nevertheless

appeared to have little merit).

Here, the merits of the plaintiffs' claims in this case are not clear. As the defendants noted in a recent filing (Paper 87 at 2-3), there is case law supporting the general proposition that 24-hour lighting *may* be unconstitutional. In the cited case, the plaintiff claimed that the lighting was so bright that night and day were indistinguishable. Id. (citing Keenan v. Hall, 83 F.3d 1083, 1090-91 (9th Cir. 1996)). Here, McGee alleges that in addition to a main light, each cell contains a 5-7 watt security light. Only the security light remains lit 24 hours a day. While McGee claims that the security lights are "extremely bright" (Paper 6 at 8), the defendants argue that the lights serve legitimate safety interests (Paper 87 at 2). Several courts have considered similar claims, with "mixed results. The reason for such mixed results on 'constant illumination' claims . . . is that such cases are fact-driven." Shepherd v. Ault, 982 F. Supp. 643, 645 (N.D. Iowa 1997).

Even assuming, *arguendo*, that this case is likely to have merit, the facts of the case should not require

extensive investigation. The parties appear to agree on the wattage of the lighting and the fact that the security lights are on constantly in certain Vermont facilities. Reviewing the effects of constant lighting on each plaintiff may prove to be a large task, but not a task of particular complexity. The legal issues appear to be similarly straightforward. Indeed, McGee has shown an ability to present the facts and legal issues in a clear and organized fashion, and he will no doubt continue to proceed in this manner. The requests for appointment of counsel (Papers 7, 40 and 43) are, therefore, DENIED.

III. Class Certification

As this Court has explained previously, a plaintiff cannot represent a class unless he satisfies the requirements of Rule 23(a)(4) of the Federal Rules of Civil Procedure by being able to "fairly and adequately protect the interests of the class." "It is well settled in this circuit" that *pro se* plaintiffs, being untrained in the law, are unable to meet this requirement, and that "that *pro se* plaintiffs [therefore] cannot act as class representatives." McLeod v. Crosson, 1989 WL 28416, at

*1 (S.D.N.Y. Mar. 21, 1989); see also Phillips v. Tobin, 548 F.2d 408, 412- 15 (2d Cir. 1976). Graham v. Perez, 121 F. Supp. 2d 317, 321 (S.D.N.Y. 2000). Accordingly, neither McGee nor any of the intervenor-plaintiffs, all of whom are proceeding *pro se*, may bring an action on behalf of their fellow prisoners.

Furthermore, as the Court has also stated previously, there is no evidence indicating that all of the members of the purported class have suffered injury as a result of constant illumination in Vermont prisons. Without such a showing, the Court is unable to determine whether "the class is so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a). The motion for class certification (Paper 43) is, therefore, DENIED.

IV. Reconsideration of Motion to Amend

The defendants have moved the Court to reconsider its decision allowing McGee to amend his complaint. (Paper 55). The Court dismissed McGee's initial claims, in part, because his transfer out of Vermont rendered his claims for injunctive relief moot. McGee subsequently moved to amend his complaint to seek damages, and the

Court allowed the amendment. (Paper 54).

In support of their motion, the defendants argue that when the Court adopted my Report and Recommendation dismissing McGee's injunctive relief claims, the Court's Order included dismissal of McGee's motion to amend. Because McGee's motion to amend was filed after the Report and Recommendation, the Report and Recommendation did not include a ruling on that motion. Consequently, adoption of the Report and Recommendation also excluded the motion to amend.

The defendants also argue that the Court's ruling on McGee's motion for reconsideration just four days after the filing of that motion must have been mis-docketed given "the short time between this filing and issuing of the Order," and that the Order must, instead, have been a ruling on McGee's motion to amend. This argument is without merit. The Court granted McGee's motion for reconsideration in a text Order, and in that same Order affirmed its prior ruling. (Paper 53). The Court would not "affirm" a motion to amend, or any other motion upon which it had not ruled previously. Consequently, the motion to amend was still pending at the time it was

granted. (Paper 54).

The defendants do not argue that McGee's motion to amend should be barred under Rule 15. Because Rule 15 states that leave to amend shall be given freely, and in light of the general practice in this Circuit allowing at least one amended complaint, the Court's ruling on the motion to amend stands. See Frasier v. General Electric Co., 930 F.2d 1004, 1007 (2d Cir. 1991) (citations omitted) (court should not dismiss without granting leave to amend at least once when the complaint gives "any indication" that a valid claim may be stated). The defendants' motion to reconsider (Paper 55) is GRANTED, and the Court's prior ruling (Paper 54) granting the motion to amend (Paper 49) is AFFIRMED.

Conclusion

For the reasons set forth above, the motions to intervene (Papers 57-61, 63-82, 84-86, 88 and 89) are GRANTED. The motions for appointment of counsel and class certification (Papers 7, 40 and 43) are DENIED. Finally, the defendants' motion to reconsider (Paper 55) is GRANTED and the Court's prior ruling (Paper 54) is AFFIRMED.

Dated at Burlington, in the District of Vermont, this 26th day of September, 2005.

/s/ Jerome J. Niedermeier
Jerome J. Niedermeier
United States Magistrate Judge