

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

DAVID MCGEE, JACOB SEXTON, RICHARD)
PAHL, JOSE TORRES, KEVIN KIMBER,)
DANIEL MUIR, and JAMES ANDERSON,)

Plaintiffs,)

v.)

Case No. 1:04-cv-335-gwc

ANDREW PALLITO, Commissioner, Vermont)
Department of Corrections, ROBERT HOFMAN,)
KEITH TALLON, CELESTE GIRRELL, JOHN)
GORCZYK, KATHLEEN LANMAN, MICHAEL)
O'MALLEY, ANITA CARBONNEL, STUART)
GLADDING, DANIEL FLORENTINE,)
RAYMOND FLUM, and CAROL CALLEA,)

Defendants.)

SETTLEMENT AGREEMENT

The parties enter into this Settlement Agreement (the "Agreement") to address and settle Plaintiffs' claims for injunctive and declaratory relief regarding the Vermont Department of Correction's ("VT-DOC") use of twenty-four hour security lights in some of its cells.

I. BACKGROUND AND PROCEDURAL POSTURE

1. Named Plaintiffs in this matter are David McGee, Jacob Sexton, Richard Pahl, Jose Torres, Kevin Kimber, Daniel Muir, and James Anderson ("Plaintiffs"). James Anderson is the only class representative that remains in the custody of the VT-DOC.

2. Defendants are Andrew Pallito, Robert Hoffman, Keith Tallon, Celeste Girell, John Gorczyk, Kathleen Lanman, Michael O'Malley, Anita Carbonnel, Stuart Gladding, Daniel Florentine, Raymond Flum, and Carol Callea ("Defendants").

3. This action was originally filed on December 9, 2004, as a *pro se* civil rights suit by Plaintiff David McGee. (ECF No. 6). An Amended Complaint was filed on October 3, 2005. (ECF No. 99). The District Court of Vermont appointed the Prisoner's Rights Office to represent the Plaintiffs on February 10, 2006. (ECF No. 167).

4. On July 11, 2006, Plaintiffs, having been appointed counsel, moved for class certification. (ECF No. 181). The Court granted the motion and certified a class consisting of inmates who have been subjected, are currently being subjected, or will be subjected to the 24-hour security lights. (ECF No. 189).

5. On April 16, 2007, the Plaintiffs filed the Second Amended Complaint. (ECF No. 195). The Second Amended Complaint alleges that VT-DOC's 24-hour security lights violate Plaintiffs' right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. It further alleged a violation of Chapter 1, Article 18 of the Vermont Constitution. The Second Amended Complaint seeks declaratory and injunctive relief to address the alleged constitutional violations.

6. Defendants answered the Second Amended Complaint on May 11, 2007. (ECF No. 196).

7. On April 30, 2009, Defendants moved for summary judgment. (ECF No. 238). The Court granted Defendants' motion for summary judgment and dismissed Plaintiffs' Eighth Amendment class claim for declaratory and injunctive relief with prejudice. The state law class claim was also dismissed, although without prejudice. (ECF No. 288).

8. Plaintiff Kevin Kimber appealed the summary judgment order to the Second Circuit. (ECF No. 303). The Second Circuit appointed Phillips Lytle LLP ("Phillips

Lytle”) as appellate counsel. (2d Cir. ECF No 59). After considering Plaintiffs procedural and substantive arguments, the Second Circuit vacated the summary judgment order and remanded the case for further proceedings. (ECF No. 321).

9. Upon remand, the District Court appointed Phillips Lytle as class counsel for Plaintiffs. (ECF No. 325). After Phillips Lytle’s appointment, the parties engaged in extensive discovery. As part of discovery, the parties produced numerous documents, answered interrogatories, and conducted inspections of Chittenden Regional Correctional Facility and Northwest State Regional Correctional Facility. During the inspections, Plaintiffs’ experts measured the intensity and wavelength of the 24-hour security lights.

10. On June 12, 2015, Defendants moved to decertify the class. In opposition to that motion, Plaintiffs submitted an affidavit from Steven W. Lockley, Ph.D. In that affidavit, Dr. Lockley opined that “the specific 24-hour illumination used in Vermont correctional facilities subjects exposed prisoners to a universal and substantial risk of serious future harm.”

11. In late 2015, prior to Plaintiffs’ expert inspections, the State installed bulbs in the 24-hour security fixtures that emit no more than 230 Lumens and are at or below 2700 on the Kelvin scale. In other words, the bulbs emit a warm, white light that is theoretically less disruptive to sleep and has less effect on melatonin production than the previously installed bulbs. These bulbs replaced the bulbs upon which Dr. Lockley based his opinion.

12. The parties have conducted extensive negotiations over several months to resolve Plaintiffs’ demands that VT-DOC revise the practice of using 24-hour security lights. These negotiations were mediated by Richard Cassidy, Esq. The negotiations have been undertaken at arm’s length and in good faith between Plaintiffs’ counsel and high-ranking

VT-DOC officials and their counsel. The parties have reached an agreement on VT-DOC's practices to settle Plaintiffs' claims. For settlement purposes only, and without admission of a violation of any federal civil right, the parties agree that this Agreement meets the requirements of 18 U.S.C. § 3626(a)(1).

13. The parties agree that, after notice and an opportunity to object is provided to members of the class previously certified by the Court, the Court may enter an order finding this Agreement to be fair and reasonable to all class members.

14. All parties and their counsel recognize that, in the absence of an approved settlement, they face lengthy and substantial litigation, including trial and potential appellate proceedings, all of which will consume time and resources and present the parties with ongoing litigation risks and uncertainties. The parties wish to avoid these risks, uncertainties, and consumption of time and resources through settlement under the terms and conditions of this Agreement.

ACCORDINGLY, without any admission or concession by Defendants of any current or ongoing violations of a federal right, all claims for declaratory and injunctive relief asserted in the Second Amended Complaint shall be finally and fully settled and released, subject to the terms and conditions of this Agreement, which the parties enter into freely, voluntarily, knowingly, and with the advice of counsel.

II. JURISDICTION AND VENUE

15. The Court has jurisdiction of this matter under 28 U.S.C. §§ 1331 and 1343. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to Plaintiffs' claims occurred in the District of Vermont.

III. TERMS AND CONDITIONS

A. Limitations on Intensity and Wavelength of 24-Hour Lights

16. The light bulbs installed in the 24-hour security light fixtures shall emit 230 lumens or less and fall at or below 2700K on the Kelvin scale.

17. The State shall immediately replace any 24-hour security lights which emit more than 230 lumens or exceed 2700K with light bulbs which meet the specifications in Paragraph 15.

B. Availability of Sleep Masks

18. VT-DOC shall make sleep masks available for purchase through a vendor at a price determined by the vendor.

19. For indigent inmates (as defined by VT-DOC policy), VT-DOC will provide sleep masks without charge.

C. Implementation

20. VT-DOC will, in the normal course of updating its policies, add sleep masks to the list of allowable personal property in its personal property policy. The VT-DOC retains discretion to determine whether sleep masks will be permitted in all units with 24-hour security lights.

21. VT-DOC will immediately send notice to all correctional staff informing them that sleep masks are allowable personal property and their use must only be restricted due to security needs.

D. Attorney-Client Communications

22. Plaintiffs' counsel shall be entitled to meet and speak with all inmates covered by this Agreement who object to the proposed settlement or request to speak with counsel about the proposed settlement. Institutional staff shall facilitate Plaintiffs' counsel's requests

for reasonable access to these individuals without undue delay, whether by telephone, mail, or personal visit.

IV. RELEASE

23. It is the intention of the parties in signing this Agreement that upon completion of its terms it shall be effective as a full and final release from all claims for relief asserted in the Second Amended Complaint.

V. JOINT MOTION AND STAY OF PROCEEDINGS

24. The parties will jointly request that the Court preliminarily approve this Agreement, require that notice of the proposed settlement be sent to the class, provide for an objection period, and schedule a fairness hearing. Prior to or concurrent with the joint motion for preliminary approval, the parties will jointly request that the Court stay all other proceedings in this case pending resolution of the fairness hearing. Following the close of the objection period, the parties will jointly request that the Court enter a final order approving this Agreement and retain jurisdiction to enforce it.

25. If this Agreement is not approved by the Court, the parties shall be restored to their respective positions in the action as of the date on which this Agreement was executed by the parties, the terms and provisions of this Agreement shall have no force and effect, and shall not be used in this action or in any proceeding for any purpose, and the litigation of this action would resume as if there had been no settlement.

VI. ATTORNEY'S FEES

26. Defendants agree to pay Plaintiffs' counsel, Phillips Lytle LLP, attorneys' fees and costs for work reasonably performed on this case in an amount of \$50,000.00.

27. The notice to the class members shall explain that Phillips Lytle will receive \$50,000.00 for work reasonably performed on this case.

VII. CLASS NOTICE

28. Plaintiffs' counsel shall draft the notice to distribute to all inmates currently incarcerated by VT-DOC informing them of the proposed settlement regarding the use of 24-hour security lights in cells.

29. VT-DOC shall be responsible for distributing the notice to all inmates currently incarcerated by VT-DOC.

VIII. CONSTRUCTION OF THE AGREEMENT

30. This Agreement reflects the entire agreement of the parties and supersedes any prior written or oral agreements between them. Any modification to the terms of this Agreement must be in writing and signed by a VT-DOC representative and attorneys for Plaintiffs and Defendants to be effective or enforceable.

31. This Agreement shall be governed and construed according to Vermont law.

32. The parties waive any common-law or statutory rule of construction that ambiguity should be construed against the drafter of this Agreement, and agree that the language in all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning.

33. This Agreement shall be valid and binding on, and faithfully kept, observed, performed, and be enforceable by and against the parties, their successors and assigns.

34. The waiver by one party of any provision or breach of this Agreement shall not be deemed a waiver of any other provision or breach of this Agreement.

Dated: Buffalo, New York
July 11, 2017

PHILLIPS LYTTLE LLP

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July 11, 2017

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