IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES E. DAMRON, *et al.*,	:	
Plaintiffs,	:	Civil Action 2:09-cv-50
v.	:	Judge Marbley
GARY SIMS,	:	Magistrate Judge Abel
Defendant	:	

ORDER

On November 2, 2009, Plaintiff James E. Damron, a prisoner proceeding *pro se*, filed a motion to have this case certified as a class action (Doc. 53). On February 9, 2010, the Magistrate Judge issued a report and recommendation, recommending that the motion be denied (Doc. 105). On February 19, 2010, Plaintiff Damron filed objections to the report and recommendation. This matter is now before the Court for *de novo* review pursuant to 28 U.S.C. §636(b)(1).

The Magistrate Judge found that Fed. R. Civ. Pro. 23(a) requires, *inter alia*, that plaintiffs seeking certification as a class action show that there are questions of law or fact common to the class. He determined that, in this case, the positions of the prisoner plaintiffs, who all allege various forms of religious discrimination on the part of prison administration, were so disparate as to render it difficult to determine what persons would comprise the members of the class. Plaintiff

Damron, in his objections, argues that the commonality requirement is satisfied because each prisoner plaintiff has been discriminated against by the same Religious Services Administrator on the basis of his Christian Separatist faith.

There is, however, a simpler reason to deny Plaintiff's motion: Rule 23(a)(4), Fed. R. Civ. P. requires the plaintiff to demonstrate that he "will fairly and adequately protect the interests of the class." The ability of both the plaintiff and his attorney to adequately represent the class is the most important discretionary decision a court must make in its ruling on the motion to certify. *See, Harriss v. Pan American Airways,* 74 F.R.D. 24, 42 (N.D. Calif. 1974). The experience and ability of counsel must be carefully considered. *See, Cross v. National Trust Life Insurance,* 553 F.2d 1026, 1031 (6th Cir. 1977).

The law is well settled that non-attorney, *pro se* litigants cannot fairly and adequately represent and protect the interests of class members. *McGoldrick v. Werholtz,* 185 Fed. Appx. 741, 744, 2006 WL 1704463, **2 (10th Cir. June 22, 2006); *Fymbo v. State Farm Fire and Casualty Co.,* 213 F.3d 1320, 1321 (10th Cir. 2000); *Phillips v. Tobin,* 548 F.2d 408, 413-15 (2d Cir. 1976); *Oxendine v. Williams,* 509 F.2d 1405, 1407 (4th Cir. 1975). Consequently, claims brought by prison-ers who are not represented by counsel cannot be maintained as class actions. *Martin v. Middendorf,* 420 F. Supp. 779, 780-81 (D. D.C. 1976); *Carlisle v. Sierlaff,* 62 F.R.D. 441, 442 (E.D. Ill. 1974); *Jeffrey v. Malcolm,* 353 F. Supp. 395, 397 (S.D. N.Y. 1973).

The Report and Recommendation of the Magistrate Judge (Doc. 105) is accordingly **ADOPTED**, and the motion of Plaintiff James E. Damron to certify this case as a class action (Doc. 53) is **DENIED**.

s/Algenon L. Marbley
United States District Judge