Berk et al v. Moore et al Doc. 45

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

OTTO BERK, *et al.*,

Plaintiffs,

vs. **Civil Action 2:10-CV-1082**
Judge Frost
Magistrate Judge King

ERNIE MOORE, DIRECTOR, *et al.*,

Defendants.

OPINION AND ORDER

Plaintiffs Otto Berk, Jeff Blair and Don Hall, inmates at the Marion Correctional Institution ["MCI"] who were convicted of criminal offenses prior to 1996, bring this action for declaratory and injunctive relief under 42 U.S.C. §1983 alleging that the retroactive application to them of Ohio's current parole laws and guidelines violate the due process and *ex post facto* clauses of the United States Constitution as well as the Ohio Constitution. This matter is now before the Court on the motions for leave to intervene filed by three other MCI inmates who were also convicted prior to 1996 and who also wish to challenge the retroactive application of new parole laws and guidelines to them. Doc. Nos. 18, 19, 20, 21. Also before the Court is the motion of an inmate at the Grafton Correctional Facility for permissive joinder as a plaintiff in this action. Doc. No. 38. Although that motion invokes Fed. R. Civ. P. 18, the Court concludes that this motion, too, is appropriately resolved by reference to the standards governing intervention. Defendants oppose the motions. Doc. Nos. 23, 40. Movant Keran has filed a reply in support of his motion for leave to intervene. Doc. No. 27.

INTERVENTION OF RIGHT

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Rule 24(a) of the Federal Rules of Civil Procedure governs intervention of right, providing as follows:

> On timely motion, the Court must permit anyone to intervene who:
>
> *   *   *   *
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).[1] The United States Court of Appeals for the Sixth Circuit requires that a proposed intervenor satisfy four factors before establishing a right to intervene under this provision:

> (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect their interest may be impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor's interest.

Coal. to Defend Affirmative Action v. Granholm, 501 F.3d 775, 779 (6th Cir. 2007). "'The proposed intervenor must prove each of the four factors; failure to meet one of the criteria will require that the motion to intervene be denied.'" *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005) (quoting *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)).

"'[T]he timeliness of a motion to intervene is a threshold issue.'" *Blount-Hill v. Zelman*, No. 09-3952, 2011 U.S. App. LEXIS

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[1]The proposed intervenors do not assert a right to intervention based upon federal statute. Therefore, the Court will not address Fed. R. Civ. P. 24(a)(1).

2932, at *13 (6th Cir. Feb. 16, 2011)(quoting *United States v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 832 (8th Cir. 2010)). In determining whether a motion to intervene is timely, a court should consider "'all relevant circumstances."' *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472-73 (6th Cir. 2000) (quoting *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)). A court must consider the following factors when evaluating the timeliness factor:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Id. at 473 (quoting *Jansen*, 904 F.2d at 340) (internal quotation marks omitted).

In the case presently before the Court, the motions for leave to intervene were filed shortly after the initiation of the action; indeed, defendants do not contend that the motions are untimely. This action is still in the early stages of litigation.

Second, there is no indication that the proposed intervenors should have or could have filed their motion earlier. *Stupak-Thrall*, 226 F.3d at 479 n.15 ("The 'purposes of intervention" prong of the timeliness element normally examines only whether the lack of an earlier motion to intervene should be excused, given the proposed intervenor's purpose - for example, when the proposed intervenor seeks to intervene late in the litigation to ensure an appeal.")

Third, there is no evidence that the proposed intervenors'

failure to file their motions earlier has resulted in prejudice to the current parties. *See Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 592 (6th Cir. 1982) ("The prejudice inquiry is narrow: only that prejudice attributable to a movant's failure to act promptly may be considered. The broader factor of prejudice that may flow from the intervention itself does not weigh in the balance.").

Finally, the Court is unaware of the existence of unusual circumstances militating against or in favor of intervention. Accordingly, under these circumstances, a balancing of the other four factors establishes that the motions to intervene are timely.

Having established that the motions for leave to intervene are timely, the movants must next establish each of the remaining factors required by Rule 24(a) for intervention of right, including proof that their interests may be impaired in the absence of intervention. *See Coal. to Defend Affirmative Action*, 501 F.3d at 779. The denial of the motions for leave to intervene would not, of course, preclude the movants from pursuing their claims in separate litigation. Therefore, the Court is not persuaded that the proposed intervenors' interests will be impaired absent intervention. Because the movants have not established each of the factors required for intervention as of right, the Court concludes that, to the extent that the motions seek leave to intervene as of right pursuant to Rule 24(a), the motions are without merit. *See United States v. Michigan*, 424 F.3d at 443.

PERMISSIVE INTERVENTION

Some or all of the motions specifically refer to permissive intervention. Fed. R. Civ. P. 24(b) provides, in pertinent part:

(1) *In General.* On timely motion, the court may permit

anyone to intervene who:

> (A) is given a conditional right to intervene by a federal statute; or
> (B) has a claim or defense that shares with the main action a common question of law or fact.

Fed. R. Civ. P. 24(b)(1). Whether an applicant will be permitted to intervene under Rule 24(b) lies within the sound discretion of the trial court. *Cf. Coal. to Defend Affirmative Action*, 501 F.3d at 784 ("The denial of permissive intervention should be reversed only for clear abuse of discretion[.]") (internal quotation marks and citations omitted). "To intervene permissively, a proposed intervenor must establish that the motion for intervention is timely and alleges at least one common question of law or fact." *United States v. Michigan*, 424 F.3d 438, 444 (6th Cir. 2005) (citing *Miller*, 103 F.3d at 1248). Once these two requirements are established, the district court must then take into account undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether intervention should be allowed. *Id.* "Moreover, permissive intervention under Rule 24(b) is to be liberally granted, so as to promote the convenient and prompt disposition of all claims in one litigation." *Id.* (citations omitted).

As discussed *supra*, the motions for leave to intervene are timely.

The named plaintiffs do not oppose the motions for leave to intervene. Defendants oppose the motions, however, taking the position that "*Ex Post Facto* claims require highly individualized determinations of law and fact" and that to permit the proposed interventions would unduly delay the litigation and prejudice the

parties. *Defendants' Memorandum in Opposition to Motions to Intervene,* Doc. No. 23, at 2-3.

It is clear to this Court that the proposed intervenors' challenge to the retroactive application of current parole laws and regulations to persons convicted prior to 1996 presents questions of law and fact in common with the claims asserted by the named plaintiffs. *See United States v. Michigan*, 424 F.3d at 444. Moreover, the Court is not convinced that the grant of the motions for leave to intervene will result in undue delay of the litigation and prejudice to the parties. It appears, at this juncture, that the resolution of these claims will be based primarily on issues of law. Certainly, defendants have not explained how the particular *ex post facto* challenge presented by the named plaintiffs or the proposed intervenors would require "highly individualized determinations of law and fact." Under these circumstances, the Court concludes that there is little risk of prejudice to the parties sufficient to warrant denial of leave to intervene.[2]

WHEREUPON, the motions for leave to intervene, Doc. Nos. 18, 19, 20, 21 and 38, are **GRANTED**.

Two of the named plaintiffs have been granted leave to amend or supplement their pleadings, *Order,* Doc. No. 42, and all three of the named plaintiffs have filed yet another motion to amend or supplement the original *Complaint*. Doc. No. 44. That motion is **GRANTED.**

The Court concludes that a single, comprehensive complaint that

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[2]The Court expresses its willingness to revisit this issue should it appear that the joinder of the intervenors' claims results in actual and demonstrable delay in the litigation.

includes all the claims by all the claimants – the three original named plaintiffs and the four intervenors – will most efficiently present their common claims for resolution. To that end, then, the plaintiffs and the intervening plaintiffs are **ORDERED** to file, within thirty (30) days, an amended complaint that includes all the claims to be submitted to the Court for resolution. The plaintiffs and intervenors are reminded that they must each personally sign the anticipated amended complaint.

IT IS SO ORDERED.

s/Norah McCann King
Norah McCann King
United States Magistrate Judge

May 9, 2011