1989 WL 230918
Only the Westlaw citation is currently available.
United States District Court, D. Nebraska.

Catarino GONZALES, Jr., et al., Plaintiffs,
v.
Mike MORENO, et al., Defendants.
Philip CAMACHO, Plaintiff,
v.
Mike MORENO, et al., Defendants.
Michael GUTIERREZ, Plaintiff,
v.
Mike MORENO, et al., Defendants.

Nos. CV88–L–29, CV88–L–53 and CV88–L–146. | Nov. 1, 1989.

Attorneys and Law Firms

Caterino Gonzales, John Contreras, Victor Shoulders, Charles Cerda, Ramon Rodriguez, Jerry Ybarra, Raymond L. Teske, Jr., pro se.

Hancock & Denton, P.C., James R. Hancock, Scottsbluff, Neb., for defendants.

Phillip Emanuel Camacho, pro se.

Joh Ann Shiffermiller, Scottsbluff, Neb., for Camacho and Gutierrez.

Michael Gutierrez, pro se.

Opinion

MEMORANDUM OPINION

DAVID L. PIESTER, United States Magistrate.

***1** The plaintiffs in these consolidated actions brought pursuant to 42 U.S.C. § 1983 were pretrial detainees at the Scotts Bluff County Jail in Gering, Nebraska during the fall of 1987 and the spring of 1988. Their actions raise claims concerning the conditions of confinement in that jail during the period of their pretrial detention. Pursuant to the consent of the parties under 28 U.S.C. § 636(c) trial was held before the undersigned on September 25 and 26, 1989. The following constitute my findings of fact and conclusions of law pursuant to Rule 52, Fed.R.Civ.P.

The issues as formulated by the parties in the pretrial order and as supplemented by the plaintiffs' statement of claims, filing 56, may be summarized as follows: whether the plaintiffs, or any of them, were deprived of a liberty interest in not being punished without due process of law, by any of the defendants, during the period of their pretrial detention, because of any or all of the following:

1. The conditions of the showers at the Scotts Bluff County Jail;

2. The prohibition against participation in group recreation at the jail for a period of the first twenty-one days of incarceration;

3. The adequacy or inadequacy of the jail's facilities and equipment for exercise;

4. The condition of the ventilation system at the jail; or,

5. Monitoring telephone calls made by or to the plaintiffs, or refusing to permit plaintiffs to speak with their attorneys on the telephone.

Defendant Charles Fairbanks was at all relevant times the duly qualified and acting sheriff of Scotts Bluff County. He was also, commencing in September 1987, the Director of Corrections of Scotts Bluff County, and was in that capacity responsible for the overall management of the jail, its programs, policies, and personnel.

Defendant Mike Moreno was a duly appointed deputy county sheriff of Scotts Bluff County at all relevant times. He was the director of the jail under the sheriff's supervision in 1987 and 1988; his position was changed to shift supervisor in March 1988. His duties at the jail included the supervision of other jailers and the implementation of policies and programs during his shift, 7:00 a.m. to 3:00 p.m. He responded to inmate requests and generally supervised the jail during the period of his presence.

Defendant Ramona Blanco was also a duly appointed deputy county sheriff of Scotts Bluff County during the relevant time period, and acted as an assistant director under Moreno. She was also made a shift supervisor in March 1988. Her duties corresponded with Moreno's during her shift, 3:00 p.m. to 11:00 p.m., although at most times she was in the office which is located on the first floor of the building housing the jail, removed from the cell block at issue in this case, which is on the second floor.

Plaintiff Gonzales was a pretrial detainee in the Scotts Bluff County Jail from December 11, 1987 to March 17, 1988. Plaintiff John Contreras was a pretrial detainee held in the jail from October 9, 1987 to February 26, 1988. Plaintiff Charles Cerda was held in the Scotts Bluff County Jail as a pretrial detainee from February 23, 1987

to March 5, 1987 and also from December 18, 1987 to February 3, 1988. Plaintiff Phillip Camacho was held at the jail as a pretrial detainee from August 4, 1987 to October 4, 1987, and again from January 3, 1988 to June, 1988. Plaintiff Victor Shoulders was held at the jail as a pretrial detainee from October 31, 1987 until February 4, 1988. Plaintiff Raymond Teske was held as a pretrial detainee at the jail from December 24, 1987 until April, 1988. Plaintiff Michael Gutierrez was held at the jail as a pretrial detainee from February 1, 1988 to March 14, 1988.

***2** There is some indication that plaintiffs Gutierrez and Cerda were also held at the jail during some periods of time as convicted prisoners. Gutierrez was held from February 2, 1988 to March 14, 1988 both as a convicted prisoner and a pretrial detainee on another charge; under this circumstance I treat his status as a pretrial detainee. Cerda's claims herein are limited to his second incarceration, and that was as a pretrial detainee. The evidence is that at all times when they were held in the jail, these plaintiffs were housed in "C–Tank," which is reserved for pretrial detainees. The evidence also discloses that pretrial detainees and convicted prisoners were treated the same by the defendants and by the policies of the jail, with the exception that those convicted prisoners held in "B–Tank," had access to a larger day room than that in "C–Tank."

I

At the close of the plaintiffs' case, the defendants moved for dismissal pursuant to Rule 41(b), Fed.R.Civ.P. I granted the motion as to the plaintiffs' fourth and fifth claims, concerning the jail's ventilation system, and the alleged telephone monitoring. I address those claims more specifically here.

A

Plaintiffs testified that the ventilation in the jail was inadequate. Contreras testified that there was no air flow in the jail, and no duct work to provide an air flow. Cerda testified that he did not think there was any ventilation at all in the jail, as did Camacho. Camacho also indicated that the ducts in the jail were filthy and that no air was coming out or going in through them. Plaintiffs also testified that because the jail was populated with many smokers, the cigarette smoke hung in the air and did not dissipate. There was some indication that complaints had been made to defendant Moreno about the problem, and that he stated that "it ain't my problem." There is no indication as to when such a complaint was made, however. There is also evidence that at times the jailers would open windows or food slots in order to provide more air flow, and at one point put fans in the jail blocks to help ease the situation. Plaintiff Shoulders testified that he caught a cold in the winter months. Plaintiff Teske testified that he had watery eyes and congestion during his incarceration. Plaintiff Camacho testified that he suffered nasal congestion during his detention. Plaintiff Contreras testified that he developed a rash on his face during his detention. The other plaintiffs did not indicate any health problems that they attributed to the lack of adequate ventilation in the jail.

The appropriate test in evaluating the conditions of confinement applied to pretrial detainees is whether the condition amounts to punishment, which may be found either by direct evidence of intent to punish, or upon an inference that the purpose of the condition was punishment, arising from the fact that the condition bore no reasonable relation to a legitimate governmental objective, or exceeded what was necessary for obtaining such an objective. *Johnson v. Houser,* 704 F.2d 1049 (8th Cir.1983). Although the law on ventilation claims brought by prisoners is not well developed, two circuit courts of appeals have recognized the possibility that such conditions could amount to a violation of a convicted prisoner's right not to be subjected to cruel and unusual punishment under the Eighth Amendment. *Gillespie v. Crawford,* 833 F.2d 47 (5th Cir.1987); *Martinez v. Chavez,* 574 F.2d 1043 (10th Cir.1978).

***3** The difficulty with the plaintiffs' evidence in this case is the lack of objective testimony regarding exactly what the conditions of the ventilation system were during the plaintiffs' period of confinement in the jail. There was no testimony concerning the temperature variations (other than plaintiff Shoulders' testimony that it was sometimes too hot and sometimes too cold), and there was no testimony as to causation of the plaintiffs' alleged maladies. While the plaintiffs clearly believed that their problems were caused or exacerbated by the ventilation system, there was no medical testimony indicating what the cause of those problems actually was. Further, the problems described by the plaintiffs in their testimony were not serious, and might well be anticipated in a jail with better ventilation than that of the Scotts Bluff County Jail. Further, the only evidence to the effect that the defendants refused to address the problem of ventilation was to the effect that defendant Moreno said it was not his problem. There is no other testimony even implicating the other two defendants in this claim. To the contrary, there was testimony that the jail was equipped with up to five separate air conditioning/heating units, with at least one such unit serving the area of "C–Tank"; that on occasion jailers opened or left open windows and food slots to increase the air flow in the area; and that fans were placed in the block to increase air flow. I concluded, therefore,

weighing the evidence put forth during the plaintiffs' case-in-chief that plaintiffs had failed to demonstrate by a preponderance of the evidence either that the conditions were "suffocating" (*Martin v. Chavez, supra,* at 1046), or that any of these defendants had acted with either deliberate indifference or with an intent to punish these plaintiffs by imposing an inadequate ventilation system upon them, so as to violate the standard set forth in *Johnson v. Houser, supra.*

B

Plaintiffs testified that they sometimes heard clicks on the telephone which was available for their use at the jail, and that they were told by a jailer, Jean Biernacki, that the telephone lines to the jail were monitored and tape recorded. There was no testimony from any plaintiff to the effect that any of these three defendants listened to or tape recorded any telephone conversation they had while at the jail. Some of the plaintiffs also testified to the effect that defendants Moreno and Blanco prevented them from talking with their attorneys in response to their attorneys' telephone calls to the jail. Both of these defendants testified that attorneys sometimes called the jail on the sheriff's telephone lines—which were monitored and tape recorded, and which had a continuous "beeping" to indicate such—and that when that occurred, their practice was to notify the attorney that the line was tape recorded and if possible, pull the prisoner out of his cell to talk with the attorney. Jean Biernacki testified that her practice was to request the attorney to call back on the jail's unlisted number, and then to take the prisoner to the room which had a telephone available for private conversation. Defendant Moreno testified that when it was not convenient for the jail staff to obtain a prisoner's presence for an incoming phone call from an attorney, he either requested that the attorney call back at a specified time, or offered to give the prisoner a message to telephone the attorney at a specified time. There was no testimony, however, that any of the plaintiffs' attorneys were not permitted to talk to the plaintiffs at particular times, nor of any prejudice that might have arisen in the plaintiffs' pending criminal cases as a result of any such difficulty.

***4** Weighing all of this evidence, I concluded that the plaintiffs had failed to meet their burden of proof to demonstrate either that the defendants monitored their telephone conversations with counsel, or otherwise interfered with their communications with counsel.

II

Trial proceeded on the plaintiffs' three remaining claims regarding the cleanliness of the shower, delayed access to exercise facilities, and inadequate exercise facilities.

A

Plaintiffs' shower claim is to the effect that the condition of the shower in "C–Tank" was such as to constitute a health hazard, causing them to suffer rashes on their feet and other parts of their bodies from mold and peeling paint in the shower. The testimony establishes that at the time of the plaintiffs' incarceration at the jail, the shower serving C–Tank had been painted with several coats of paint, and that paint was peeling, causing chips of paint to fall to the floor of the shower. The evidence also establishes that the floor of the shower and parts of the walls of the shower were discolored with a rust-colored substance and a greenish substance. Although described by the plaintiffs as "mold," there was no testimony establishing what caused the discoloration or what in fact it was. Jean Biernacki testified that every Wednesday she scrubbed the shower and used chemical cleaning agents in the process. Plaintiffs Contreras, Camacho, Shoulders, and Gutierrez all testified that they cleaned or helped to clean the shower at various times during their stay at the jail. They testified also that they never witnessed a jailer or jail trustees cleaning the shower. Biernacki's testimony was, however, to the effect that she cleaned it when the inmates were in the hallway during times when the cell block was being fumigated every Wednesday morning.

The plaintiffs testified that they believed they had suffered medical problems as a result of the filth and mold in the shower.[1] Plaintiff Gonzales testified that he broke out in a rash in his groin area and that it cleared up after he left the jail. Plaintiff Contreras testified that he developed a fungus on his feet and face, for which he received treatment at the Nebraska State Penitentiary after his departure from the Scotts Bluff County Jail. Plaintiff Cerda testified that he developed dry, itchy, scaly feet which condition cleared up a month after he left the jail, and that he also developed an area of dry skin on his wrist. Plaintiff Camacho testified that he developed a skin irritation on his right arm and the back of his neck, for which he, after some delay, received treatment from a dermatologist, arranged by jail personnel. Plaintiff Shoulders testified that he developed a rash on an arm, and athletes foot, the former of which cleared up after he left the jail. Plaintiff Teske testified that he experienced cracking, bleeding, and peeling on his feet which continued until one month after he left the jail. Those plaintiffs who participated in occasionally cleaning the shower testified that their efforts did not alleviate the conditions there to any significant degree.

***5** The plaintiffs all testified to the effect that they believed their problems were caused by the condition in the shower. However, there was no testimony establishing that all of the plaintiffs' difficulties were caused by the same fungus, virus, or bacteria, nor that such agents could be traced to the shower or its floor.[2] Thus, any conclusion that these plaintiffs were injured as a proximate result of the condition of the shower would be speculative.

I credit the testimony of Jean Biernacki that the shower was cleaned weekly with chemical agents. I also credit the testimony of defendants Moreno and Blanco to the effect that it was the inmates' responsibility to clean their living area, including the shower, with the cleaning materials delivered to the cell blocks each morning at 5:30 a.m. Three of these plaintiffs did take their turn in cleaning the shower, at least some of the time. Under these circumstances, although the evidence is clear that the shower was in need of repainting or waterproofing treatment, and that the defendants knew of its condition by virtue of two inspection reports from the Nebraska Jail Standards Board, there is insufficient evidence to conclude that the shower was a health hazard serious enough to constitute a violation of the Fourteenth Amendment.

B

The evidence is uncontroverted that it is the policy of the Scotts Bluff County Jail to prohibit all inmates from engaging in exercise activities in the recreation room until they have been incarcerated for twenty-one days. Plaintiffs claim that this policy deprives of them of their right to be free from punishment, in violation of the due process clause of the Fourteenth Amendment. In *Campbell v. Cauthron,* 623 F.2d 503 (8th Cir.1980), the Court of Appeals held that pretrial detainees are ordinarily entitled to one hour of exercise outside their cells each day, if they spend more than sixteen hours in the cells. All of the plaintiffs testified that during the first twenty-one days of their incarceration at the Scotts Bluff County Jail, they were in their cells for at least twenty-three hours per day, being permitted to leave only for about five or ten minutes per day to go to the library and select a book and return to the cell.[3]

The testimony indicated that the parties have differing opinions as to what the "cell" is. The plaintiffs were housed in "C–Tank," which consists of three four-man cells, each with a door to a "day room." There was no testimony concerning the dimensions of the cells or the day room, but defendant Moreno testified that there were two upper and two lower bunks in each cell with about two or two and one-half feet between the bunks on each level. The space at the end of this area, between bunks, was occupied by the toilet and sink in each cell.[4] He testified that it would be very difficult to do any exercising in the cells themselves.

The "day room," is a larger area in which there is a picnic table, a television set[5], and, at one end, a shower, sink, and toilet. Defendant Blanco testified that the day room is larger than a cell and the area not occupied by the picnic table or the shower area was large enough that four bunk-sized mattresses could be placed on the floor there. The day room area was not furnished with any exercise equipment or exercise mats. Sometimes inmates placed their mattresses on the floor for purposes of watching television. Defendant Moreno testified that although these inmates did not, some inmates on occasion had engaged in calisthenics or running in place in the day room area, and that it is large enough for "two or three" inmates to do so simultaneously.

***6** After the first twenty-one days of incarceration inmates are permitted to go to the "recreation room" to engage in exercise one hour per day. There is no outdoor recreation area. No testimony established the exact dimensions of the recreation room; however, defendant Blanco estimated the size, from her familiarity with it and the slides in evidence, at twenty feet by fourteen feet. The only pieces of exercise equipment in the room were a "D P Weight Machine" which could be used by one inmate at a time; a "mini-tramp," which could be used by one inmate at a time; and, for a brief period, a Ping–Pong table, which was removed at sometime while plaintiffs were incarcerated. Recreation was offered to those inmates who had been at the jail longer than twenty-one days, for one hour per day, commencing at approximately 7:30 a.m., immediately following breakfast. At that time all inmates who were eligible or who chose to go to recreation were placed in the recreation room together. Usually this was between fifteen and twenty inmates. No guard was stationed in the recreation room during this period, but occasionally a guard would look into the room through the door or a window in the door. These plaintiffs testified that only Phillip Camacho and John Contreras used the weight machine and that each of them used it for approximately half the hour of recreation time available. Camacho, whose appearance makes it clear that he is no stranger to weight lifting, testified that a reasonable workout on such a machine would take at least thirty minutes. Victor Shoulders testified that he played Ping–Pong for a time, but injured his shoulder when he hit it on a bookshelf near the Ping–Pong table during play. The other inmates testified that occasionally one of them would use the "mini-tramp" but otherwise most of the inmates in the recreation room would watch Camacho and Contreras on the weight machine or stand around and talk. Although each of the plaintiffs testified that, prior to their incarceration, they engaged in various forms of recreation and exercise, none of them testified that they had engaged or were engaging in any regular, disciplined exercise

program. Each of them also testified that as a result of not being permitted to engage in regular exercise, he suffered increased tension, stress, or muscle cramps; however, there was no evidence corroborating this testimony.

From these facts the plaintiffs raise two claims: first, that the defendants' policy and practice of prohibiting the plaintiffs from going to the "recreation room" during the first twenty-one days of incarceration violated their right not to be punished without due process of law; and second, that the circumstances of offering recreation only to a group of inmates simultaneously, in an inside room, with only these pieces of equipment, deprived the plaintiffs of their right not to be punished without due process of law.

Although there are a number of cases discussing the rights of inmates to exercise, the Eighth Circuit Court of Appeals has spoken on this issue only four times. In *Campbell v. Cauthron, supra,* in discussing claims arising from an overcrowded Arkansas County Jail, the Court made the following holding:

***7** Furthermore, to prevent enforced idleness from resulting in the type of physical degeneration described in the record, each inmate that is confined to his cell for more than sixteen hours per day shall ordinarily be given the opportunity to exercise for at least one hour per day outside the cell.[4] The determination of the type of exercise equipment and facilities available for this purpose shall be within the discretion of jail officials, subject to the approval of the district court. They must, however, provide a meaningful opportunity for exercise. Merely allowing the inmates to walk around in the narrow corridor between cells does not provide adequate exercise.

> [4] Jail officials may provide exercise opportunities within the cell for those inmates who would jeopardize security if released from their cells.

623 F.2d at 507. In that case up to eight pretrial detainees were kept in cells measuring up to thirteen feet by eleven feet, twenty-four hours per day, being released only three times per week for fifteen to thirty minutes for showers and exercise, unless court appearances required their attendance. In the most crowded cells the detainees had less than seventeen square feet of space per inmate, including the space occupied by bunks, wash basins, and toilets. *Id.* at 505–6.

In *Leonard v. Norris,* 797 F.2d 683 (8th Cir.1986) the court considered the claims of convicted prisoners who had been confined in disciplinary confinement as a result of an incident in the Cummins Unit of the Arkansas prison system. Specifically, inmates in punitive isolation were given no out-of-cell exercise for the first fifteen days of punitive confinement. Referring to the passage quoted above, the court distinguished *Campbell* by stating:

The plaintiff in *Campbell,* however, was a pre-trial detainee, not a convicted prisoner in disciplinary confinement. The word "ordinarily" in the passage just quoted clearly indicates that *Campbell* does not lay down a *per se* rule that all inmates must always be given one hour per day exercise outside their cells no matter what their status or the other circumstances of the case. The exercise policy at issue here, though severe, perhaps even harsh, is not cruel or barbaric. It has a purpose: to discourage disruptive behavior that makes an inmate unfit to circulate among the prison's general population.

797 F.2d at 685. Thus, the court directed that such claims be evaluated depending upon the "status" of the plaintiffs and the "circumstances" of the case.

In *Rust v. Grammer,* 858 F.2d 411, 414 (8th Cir.1988) the Court of Appeals upheld this court's determination that denial of yard privileges during a "lockdown" at the Nebraska State Penitentiary was not violative of the Eighth Amendment. The fourth case is *Knight v. Armontrout,* 878 F.2d 1043 (8th Cir.1989), in which the court held that depriving convicted prisoners in administrative segregation of recreational activity for thirteen days was not cruel and unusual punishment proscribed by the Eighth Amendment. The court employed the "obduracy and wantonness" test of *Whitley v. Albers,* 475 U.S. 312, 319 (1986).

***8** This court in *Moore v. Janing,* 427 F.Supp. 567 (D.Neb.1976), found that the absence of a recreation program and a place for exercise available to female pretrial detainees in Omaha violated their rights not to be punished without due process, where the only available space for exercise was a "day room" which had been converted from a cell (approximately eight by ten feet), and a narrow corridor available for walking, to serve a population averaging between twelve and eighteen women. In that case Judge Denney held that a pretrial detainee "may not be confined in conditions which are harsher in fact than convicted prisoners experience." *Id.* at 571. He compared the facilities available for the pretrial detainees to facilities available for convicted prisoners in Omaha and in Lincoln (presumably the Nebraska Penal and Correctional Complex). While that test has been superseded by *Bell v. Wolfish,* 441 U.S. 520 (1979), and by *Johnson v. Houser, supra,* Judge Denney's quotation from Judge Urbom in *Bell v. Wolff,* CV72–L–227 (D.Neb.1973) remains a viable formulation of the present test:

[I]t must be stressed that the determinative principle against which all treatment of a pretrial detainee is to be assessed is that he is not to be subjected to any hardship,

except those necessary to ensure his secure confinement and, hence, his appearance at trial. Considerations of necessary security aside, pretrial detainees have all the rights of ordinary citizens because, not having been adjudged guilty of anything, they are ordinary citizens. (Citations omitted.)

Id. at 570. Judge Denney proceeded to cite with approval *Rhem v. Malcolm,* 396 F.Supp. 1195 (S.D.N.Y.1975), *aff'd,* 527 F.2d 1041 (2d Cir.1975), in which the court required the defendant jail officers to employ a system affording every detainee one hour of outdoor exercise five days per week except in inclement weather, on the basis of the conclusion that "the right of a prisoner to reasonable physical exercise is fundamental." 427 F.Supp. at 575.

Other courts addressing the issue of prisoners' claims regarding deprivations of exercise opportunities, both under the Fourteenth Amendment for pretrial detainees and under the Eighth Amendment for convicted prisoners, have recognized generally that in the absence of overriding penological concerns, exercise opportunities should be afforded. In *Patterson v. Mintes,* 717 F.2d 284 (6th Cir.1983) the court concluded,

[A] total or near-total deprivation of exercise or recreational opportunity, without penological justification, violates Eighth Amendment guarantees. Inmates require regular exercise to maintain reasonably good physical and psychological health."

Id. at 289. (Citations omitted.) In *Davenport v. DeRobertis,* 844 F.2d 1310 (7th Cir.1988), the court concluded that convicted prisoners were entitled to a minimum of five hours per week exercise opportunities outside the cell. *See also Spain v. Procunier,* 600 F.2d 189, 199 (9th Cir.1979) (complete denial of exercise violated the Eighth Amendment; court required one hour per day, five days per week for convicted prisoners in disciplinary confinement); *McGruder v. Phelps,* 608 F.2d 1023, 1025 (5th Cir.1979) (confinement in cell twenty-three and one-half hours per day with no exercise opportunities recognized as stating a claim under 42 U.S.C. § 1983); *Smith v. Sullivan,* 553 F.2d 373 (5th Cir.1977) (affirming district court's order requiring a jail to comply with the state's statutory rules requiring regular exercise opportunities). In *French v. Owens,* 777 F.2d 1250 (7th Cir.1985), *cert. den.* —— U.S. ——, 107 S.Ct. 77 (1986), the Seventh Circuit found that the district court's order requiring ninety minutes per day of "meaningful recreation" went too far in a case brought under the Eighth Amendment, and added that it was no Eighth Amendment violation to require exercise in "cramped quarters." *Id.* at 1256. Finally, in a case perhaps closer to the facts of this one, the Fifth Circuit, in *Green v. Ferrell,* 801 F.2d 765 (5th Cir.1986), *reh. den.* 807 F.2d 995 and 808 F.2d 56, found that the Eighth Amendment had not been violated when convicted prisoners were housed in single cells of sixty-three square feet and each inmate had access to a day room for five hours per day. There was no outdoor recreation area because the jail was located in a downtown area; pretrial detainees' average stay was ten days in the jail; and a physician testified that "no medical deficiency" resulted from lack of exercise during that average stay.

***9** The parties have not cited cases applying the "outside the cell" teaching of *Campbell v. Cauthron, supra,* to the circumstance of a "day room" connected to a cell, nor have I found any such case. The Court of Appeals' comment in *Leonard,* however, directs me to consider all the circumstances. Some of those circumstances in this case, however, are less than clear. I have no evidence regarding the exact size of the day room. It is said to be "larger than a cell" by defendant Blanco in her testimony, and it includes a picnic table, a shower, a sink, and a toilet. If her characterization of it is correct, (to the effect that four bunk mattresses could be placed in an area for television watching), presumably some space would be available for exercising, should inmates choose to do that. However, without any equipment, exercise mats, or scheduled exercise period, it appears that in order to use the open space for exercise activities, an inmate would have to convince or force other inmates to give up their television watching. While that may be possible, in light of the fact that there was very little else available for inmates to occupy their time, such a confrontation would likely breed conflict as to the respective inmates' "rights" to use that area. I do not see such a plan as reasonable.

In light of Judge Denney's findings in *Moore, supra,* that an area of eighty square feet was insufficient to provide adequate exercise space for twelve to eighteen women, it is clear that the day room area available for exercise—which I infer from defendant Blanco's testimony to be approximately six by ten feet, or sixty square feet—is also insufficient to provide any real opportunity for exercise, particularly in light of the potential for conflict generated thereby. I therefore conclude that the "outside the cell" requirement of *Campbell,* is not met by the factual circumstances here during the first three weeks of a detainee's confinement.

The testimony of defendants Moreno and Blanco established that the reason the detainees were not permitted to go to the recreation room for exercise during the first twenty-one days of confinement was that the state's Jail Standards allowed that restriction. Exhibit 53 is an inspection report to defendant Fairbanks from Kent Griffith, the Senior Field Representative who conducted an evaluation of the Scotts Bluff County Jail on May 25, 1988 to determine its compliance with the Nebraska Minimum Jail Standards. That standard states:

003 Exercise and Recreation Period. All inmates housed

in detention facilities shall have opportunities for physical exercise and recreation.

003.01 After the twentieth (20) consecutive day each inmate shall be provided opportunities for moderate physical exercise at least five (5) days weekly for a period of one (1) hour during those hours set by the facility administrator. Moderate physical exercise may be accomplished by either adaptation of staff programming or by adequate physical space for exercise outside the cell.[6]

***10** No source for the jail standard is apparent, and none was identified in the evidence, nor in the briefs submitted by counsel. In *Leonard v. Norris, supra,* which was in a context of convicted prisoners in disciplinary confinement, the fifteen-day prohibition on recreation was justified for a legitimate penological purpose of making disciplinary confinement unpleasant. In *Rust* and *Knight,* disciplinary considerations were also present. Such a justification is not applicable to these pretrial detainees. The three-week preclusion from exercise, therefore, violates *Campbell,* unless some legitimate penological justification excuses its imposition.
Sheriff Fairbanks testified that one reason for the preclusion was to allow jail authorities to observe the inmates and classify them as to whether any were security risks if permitted to participate in the group recreation in the recreation room. I discredit this testimony for several reasons. First, there is no evidence before me to indicate that any of these plaintiffs were in fact classified in any manner upon their initial arrival at the jail. There was no testimony concerning any evaluation of a detainee's criminal history, family background, propensities toward violence, reasons for arrest, or any other factors which might be considered in performing such a classification evaluation, either for these plaintiffs or for any other detainees at the jail. Second, there was no evidence of the need for three weeks to perform such an evaluation; in fact, the evidence establishes that the three-week preclusion is uniformly applied to all inmates, even those well known to jail personnel (as was the case with some of the plaintiffs here). Third, if in fact some "classification" were necessary to enable inmates to leave the cell area, it is extremely difficult to understand how it is that all inmates are required to leave the cell areas together on Wednesday mornings for the weekly "defogging" and to spend several hours together in a hallway. Likewise, there was no mention of new inmates being precluded from other group activities such as the Friday night movies, or church services. Finally, Sheriff Fairbanks testified that after the three week period had elapsed, all males, presumably without regard to classification, are given the opportunity to go to the recreation room together. These factors persuade me that the "classification" justification for the three-week preclusion from visiting the recreation room is illusory.

From the above discussion, I conclude that the plaintiffs are entitled to relief concerning the denial of the opportunity to go to the recreation room for exercise during the first twenty-one days of their confinement at the Scotts Bluff County Jail.

This leaves the question, then, of whether the exercise opportunities available to these plaintiffs after the first three weeks of their confinement were such as to comply with the requirements of the Fourteenth Amendment prohibiting punishment.

The testimony established that all male inmates were taken to the recreation room at once, and that this number fluctuated between fifteen and twenty inmates. No supervision by guards was available, and in most cases only two inmates used the available weight machine, with the remainder standing around or sitting around the room or visiting the library next door. Although the "mini tramp" was occasionally used, a low ceiling limited its usefulness. In *Campbell,* the Court of Appeals required that the exercise equipment and facilities available must "provide a meaningful opportunity for exercise. Merely allowing the inmates to walk around in the narrow corridor between cells does not provide adequate exercise." 623 F.2d at 507. Similarly, simply removing inmates from a cell so that they can sit or stand in another area without any real opportunity to engage in physical exercise is not a "meaningful opportunity" as required by the language above. The Eighth Circuit has not required that pretrial detainees be given outside exercise opportunities, and I need not decide that question here, since it is clear that the inside exercise opportunities available at the jail are insufficient to provide any "meaningful opportunity for exercise." Therefore, I conclude that the lack of meaningful opportunities for exercise given these plaintiffs[7] during the period of their pretrial detention was punitive, and a violation of the Fourteenth Amendment.

***11** The defendants argue that the available staff and resources precluded them from offering recreation in shifts, or from making available any larger area or additional equipment for exercise purposes. These arguments have been repeatedly rejected by the courts. As stated in *Campbell, supra,*

As we have previously made clear, if states or counties operate detention facilities, they must meet constitutional standards. [Citations omitted.] We cannot permit unconstitutional conditions to exist simply because prison officials cannot or will not spend the money necessary to fulfill constitutional requirements. We note, moreover, that increasing the budget is not the only means to guarantee compliance with the Constitution. Overcrowding, for instance, may be eliminated by prudent changes in bail or sentencing policies.

623 F.2d at 508. Moreover, in response to the defendants' evidence on these points, it was brought out that considerable remodeling took place in the sheriff's office, quartered in the same building as the jail, and that some new corrections officers were hired between January and August, 1987. I thus do not accept the defendants' argument that lack or under-utilization of resources excused the constitutional violations found here.

Defendants Fairbanks and Moreno were both in positions to evaluate the exercise facilities and availability, and thus, to ameliorate these conditions. Moreno was in charge of the overall operation of the jail until September 1987, when Fairbanks took over those responsibilities. He was directly involved in causing the deprivation of exercise to these plaintiffs. *Wilson v. City of North Little Rock,* 801 F.2d 316 (8th Cir.1986). Fairbanks testified that upon his arrival and assumption of responsibilities for the jail in September 1987, he decided to continue the past policies regarding exercise. He, too, is properly liable on the plaintiffs' claims. Defendant Blanco, however, was not involved either in the making or enforcement of the three-week preclusion policy, nor in the scheduling of the exercise periods. Although she testified that she participated in a "planning commission" which is responsible for developing a building plan for jail facilities, there was no evidence that the commission had the authority or duty to address the lack of exercise facilities in the jail. Her job duties kept her away from the inmates most of the time, and the evidence established that she did not take them to recreation; the fact that, in response to questions, she informed plaintiffs of the preclusion policy, does not establish liability on her part. I therefore conclude that only defendants Fairbanks and Moreno are liable on the plaintiffs' claims.

Each of the plaintiffs testified that they suffered an increase in tension and stress levels, and some muscle stiffness as a result of the lack of physical exercise during their stay at the Scotts Bluff County Jail. The plaintiffs' credibility was effectively and successfully challenged, however, with respect to these and other statements. For example, the plaintiffs' interview requests, which are legion in number, do not mention any complaints regarding tension or muscle tightness or cramping. I conclude that the plaintiffs suffered no physical injury as a result of these conditions.

***12** I further find that the psychological injury from increased stress or tension was minor. None of the plaintiffs amplified his comments about tension and stress so as to establish any significant, cognizable psychological injury or harm which was actually visited upon him as a proximate result of these conditions. I therefore conclude that nominal damages will adequately compensate the plaintiffs for these constitutional violations. *Memphis Community School District v. Stachura,* 474 U.S. 918 (1986); *Carey v. Piphus,* 435 U.S. 247 (1978).

Although the plaintiffs have sought punitive damages, there is no evidence of wanton or reckless disregard of the plaintiffs' known constitutional rights which would justify an award of punitive damages. *Cunningham v. City of Overland,* 804 F.2d 1066 (8th Cir.1986). Judgment will be entered, following the determination of attorney fees, for all plaintiffs on the preclusion claim, and against defendants Fairbanks and Moreno, for nominal damages of one dollar each. Judgment will be entered for plaintiffs Cerda, Teske, Shoulders, Gutierrez, and Gonzales, against defendants Fairbanks and Moreno, for one dollar each, on the facilities claim. Judgment will be entered for defendants on the remaining claims. The entry of judgment will be delayed pending resolution of the matter of attorneys fees under 42 U.S.C. § 1988.

IT THEREFORE HEREBY IS ORDERED, plaintiffs' counsel are hereby given twenty days from the date of this order in which to file an application for attorneys fees pursuant to 42 U.S.C. § 1988, Local Rule 34, and the guidelines promulgated thereunder, together with such affidavits or other materials counsel wish the court to consider, and supported by a brief. Defendants are hereby given twenty days thereafter in which to file any opposing evidentiary materials and submit a brief in response, whereupon that matter will be deemed submitted.

Footnotes

1 Plaintiff Cerda also testified that he slipped and fell in the shower area on one occasion, causing injury to his foot and leg. No separate claim is asserted on the basis of this incident.

2 In fact, the plaintiffs acknowledged on cross-examination that they had some of these difficulties before their incarceration in the Scotts Bluff County Jail. In addition, complaints about rashes and athletes foot are largely absent from the voluminous "Inmate Request Forms" submitted by these plaintiffs for other problems, including medical care, with the exception of those submitted by plaintiff Camacho regarding his skin rash, for which he received numerous consultations with nurses and doctors, including a dermatologist. Raymond Teske submitted two requests for treatment of athletes foot; John Contreras requested one nurse visit for a face rash, which the nurse concluded was ordinary pimples; Victor Shoulders submitted two requests for treatment of a rash or for salve for his arm.

[3] In fact, the inmates were released from the cell area for other activities as well, including the weekly Wednesday morning "defogging," church services, and movies every other Friday night. However, they were not permitted to go to the exercise room in the jail.

[4] From this testimony it is possible to infer that the cells were no larger than seven and one-half feet by ten feet.

[5] A black and white television set was donated to the jail by inmate John Contreras at the end of January 1988; prior to that time, no television set was available.

[6] Although the standard refers to twenty consecutive days, the testimony established that the plaintiffs were deprived of all recreation for the first twenty-one days of incarceration.

[7] With the exception of plaintiffs Camacho and Contreras, who, according to the evidence, did have the opportunity to use the weight machine daily, and did use it, to the exclusion of the other plaintiffs.