IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SHARON MOYA, LISA MARTINEZ,

Plaintiffs,

vs.

Civil. No. 96-1257 DJS/RLP

CITY OF ALBUQUERQUE, SGT. WILL BELL, LT. SCOTT KERR,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court upon Defendants' motion for judgment as a matter of law made at the close of Plaintiff's evidence and at the close of all evidence in the jury trial held in this matter from October 27, 1997 to October 30, 1997. Defendant sought judgment as a matter of law on Counts I, II, and III of the complaint, arguing the provisions of the Prison Litigation Reform Act, 42 U.S.C. §1997 *et seq.*.

This action is a suit pursuant to 42 U.S.C. §1983 by which Plaintiffs seek damages for alleged violations of their Fourth Amendment right to be free of unreasonable searches, Due Process, and Equal Protection. Plaintiffs also assert claims pursuant to the New Mexico State Tort Claims Act for assault and battery. Plaintiffs allege that on June 14, 1996, they were subjected to strip searches at the Bernalillo County Detention Center (BCDC). Plaintiffs further allege that those searches were observed or conducted by Defendants Scott and Bell, that women jailed at BCDC are subjected to strip searches more frequently than male inmates,

and that their strip searches were conducted in a manner contrary to the written policy of the jail.

Pursuant to Fed.R.Civ.P. 50(a)(1) "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law....".

Defendants motion was initially made at the close of Plaintiff's evidence. The Court granted the motion as to Count I and Count II of the complaint at that time, reserving ruling as to Count III of the complaint. At the close of all evidence, Defendant renewed the motion, which was then granted as to Count III of the complaint.

COUNT I FOURTH AMENDMENT CLAIM

Plaintiffs assert that they were deprived of their Fourth Amendment right to be free from unreasonable searches and seizures because the strip searches were conducted without reasonable suspicion to believe that they were carrying contraband and because the strip searches were done by the male Defendants or in their presence. Plaintiffs presented evidence that the male officers were present or assisted in their strip search.

Prisoners retain a limited right to bodily privacy, particularly as to searches viewed or conducted by members of the opposite sex. Hayes v. Marriott, 70 F.3d 1144, 1145 (10th Cir. 1995)(citations omitted). The test for reasonableness of a prisoner search under the Fourth Amendment "is not capable of precise definition. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it was

conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979). Before the question of whether the searches were reasonable could be reached, the Court granted judgment as a matter of law on the basis that Plaintiffs had not presented evidence that they suffered from a physical injury and were therefore precluded from obtaining relief pursuant to the Prison Litigation Reform Act of 1996.

Plaintiff Sharon Moya testified that, as a result of the strip search, she began to suffer migraine headaches, which she suffers to this day. Moya also testified as to the emotional distress and mental anguish she suffered as a result of the strip search. No medical evidence was presented regarding Moya's headaches, which she testified were self-diagnosed. Moya testified that she suffered no contusions, scrapes, marks, or other injuries during the search.

Evidence was presented that plaintiff Lisa Martinez attempted to commit suicide shortly after she was strip searched. Martinez took a quantity of non-prescription medication in this suicide attempt and was taken to the hospital to have her stomach pumped and for observation. However, no evidence was presented that Lisa Martinez suffered any bruises, marks, scrapes, or other physical injuries in the course of her strip search. Martinez testified that she took the pills because she felt shocked and humiliated.

42 U.S.C. §1997(e)(e) states that "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." No evidence was presented which indicated a physical injury to either Plaintiff which was inflicted by Defendants. A claim of mental anguish does not state a claim for relief pursuant to the

requirement of 42 U.S.C. §1997(e) as amended by the Prison Litigation Reform Act. Young v. Knight, 113 F.3d 1248 (table), 1997 WL 297692 (10th Cir. 1997) (unpublished).

Further, more than a *de minimis* physical injury is required by §1997(e)(e). Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) (Bruised ear lasting 3-4 days an insufficient injury to meet the requirements of the PLRA). Even if the Court were to consider any injury to Lisa Martinez as a result of her attempted suicide as a qualifying physical injury under the statute, a few hours of lassitude and nausea and the discomfort of having her stomach pumped is no more than a *de minimis* physical injury. Similarly, the mere fact that Sharon Moya now suffers headaches which she attributes to the stress of her strip search is not a serious physical injury. Following the guidance of Siglar, such injuries are insufficient to overcome the hurdle posed by §1997(e)(e).

COUNT II, SUBSTANTIVE DUE PROCESS

In Count II of the Complaint, Plaintiffs assert that their strip searches were unreasonable invasions of their privacy under the Fourteenth Amendment due process clause. As part of this cause of action, Plaintiffs assert that the City of Albuquerque created liberty and property interests by means of its written policies regarding strip searches, which policies were violated.

Violation of a police department regulation is insufficient to create liability under §1983. Wilson v. Meeks, 52 F.3d 1547, 1554 (10th Cir. 1995). Further, violations of state law and police procedure do not give rise to a §1983 claim. Romero v. Board of Co. Comm., 60 F.3d 702, 705 (10th Cir. 1995). Also, the fact that police conduct did not comply with regulations or training does not create constitutional liability under §1983. Diaz v. Salazar,

924 F.Supp. 1088, 1097 (D.N.M. 1996). Accordingly, Defendant's failure to follow jail policy does not create liability under §1983.

In the Tenth Circuit "a government official violates an individual's Fourteenth Amendment rights by injuring his or her life, liberty, or property interest with deliberate or reckless intent." Webber v. Mefford, 43 F.3d 1340, 1343 (10th Cir. 1994); see also Medina v. City and County of Denver, 960 F.2d 1493, 1496 (10th Cir. 1992). "An act is reckless when it reflects a wanton or obdurate disregard or complete indifference to risk, for example 'when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death' or grievous bodily injury." Id. at 1496 (quoting Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir.1988) (*en banc*)). Whether the conduct of the jail guards "shocks the conscience" is immaterial to this analysis. See Rowe v. City of Marlowe, Ok., 116 F.3d 1489, 1997 WL 353001 (10th Cir. 1997)(unpublished disposition). Plaintiffs presented no evidence which would show that Defendants acted with deliberate or reckless intent.

Further, the more specific protection provided by the Fourth Amendment, rather than the generalize protection of the Due Process doctrine, supplies the standard which should be used in this case. See Whitley v. Albers, 475 U.S. 312, 327 (1986) (refusing to consider a Fourteenth Amendment due process claim by a prison inmate for excessive force because the Eighth Amendment "serves as the primary source of substantive protection to convicted prisoners" in such cases); see also Albright v. Oliver, 510 U.S. 266, 272 (1994)(Holding that the Fourth Amendment addresses pretrial deprivations of liberty, rather than the generalized

language found it the Due Process clause of the Fourteenth Amendment.) Plaintiffs' claim that they were denied substantive due process fails as a matter of law.

The PLRA provides an additional ground upon which the Court granted Defendants' motion for judgment as a matter of law as to Plaintiffs' due process claim. 42 U.S.C. §1997(e)(a) provides that "No action shall be brought with respect to prison conditions under §1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Defendants provided evidence that a grievance procedure is available and made known to residents of the Bernalillo County Detention Center. That procedure includes not only provisions for bringing a grievance to a grievance board, but the appeal of an unfavorable opinion by the board to the Director of the jail.

Evidence at trial indicated that Plaintiff Sharon Moya made a written statement following the incident and provided the statement to a supervisor at the jail. An investigation of Plaintiffs' allegations was conducted by jail officials. Even if Moya's actions are construed to be an effort to take advantage of available grievance procedures, she did not exhaust available administrative remedies. The Director of BCDC, Michael Sisneros, testified that no appeal of any grievance procedure concerning the strip searches was ever made to him.

Plaintiff Lisa Martinez complained of the strip search to a Psychiatric Services Unit worker. That worker told her that she would make a report regarding the incident. Once again, the formal grievance procedure was not followed. Further, if Martinez's actions are construed as seeking administrative remedies, those remedies were not exhausted because no appeal was taken to Director Sisneros.

Additionally, Plaintiffs each testified that they were not aware of the grievance procedures available at the time of the incidents. Plaintiff Moya's action of providing a written statement to a jail supervisor and Plaintiff Martinez's complaint to the Psychiatric Services Officer cannot reasonably be construed as attempts to exhaust administrative remedies of which Plaintiffs were not, by their own testimony, aware. The fact that Plaintiffs were not aware of jail grievance procedures does not relieve them of the requirement to exhaust those remedies under the terms of the statute. Further, Director Sisneros' testimony that information regarding grievance procedures is made available to all prisoners at BCDC was not controverted.

Plaintiffs argue that they are not bringing a suit involving "prison conditions" under the terms of the statute. However, to the extent that their Due Process claim relies upon the failure to follow the written policy of the jail, that challenge is to a practice within the jail or "prison condition".

Plaintiffs also argue that filing a grievance would be futile, in part because damages are not available under the administrative procedure. However, in an unpublished decision, the Tenth Circuit said:

> "Although (plaintiff) concedes that he did not exhaust his remedies, he contends that it was improper to dismiss his case on such a technicality. The requirement for exhaustion is not just a technicality. It is the law which federal courts are required to follow."

Grimsley v. Rodrequez, 113 F.3d 1246 (table), 1997 WL 235613 (10th Cir. 1997)(unpublished decision). Plaintiffs' arguments are unavailing and judgment as a matter of law is appropriate as to this claim.

COUNT III FOURTEENTH AMENDMENT EQUAL PROTECTION

Plaintiffs assert that female inmates at BCDC are not afforded full protection of the City's written policies on strip searches. Plaintiffs also presented evidence that the City has placed plaques in the pods housing women which inform inmates that they should expect to be strip searched any time they are taken off the level and taken to recreation, court, the library, to dental or to medical examinations. Plaintiffs presented evidence, which was controverted, that male inmates are not provided the same warning or subjected to the same searches.

The Court granted judgment as a matter of law as to this claim on the basis of 42 U.S.C. §1997(e)(a). Plaintiffs presented no evidence that they exhausted available administrative remedies regarding their claim that conditions for female residents at the Bernalillo County Detention Center differ from conditions for male residents. As discussed, *supra*, they are therefore precluded from bringing an action pursuant to 42 U.S.C. §1983 regarding that assertion.

CONSTITUTIONALITY

Plaintiffs argue that the PLRA is unconstitutional. First, they contend that the PLRA violates the separation of powers clause, analogizing to City of Boerne v. P.F.Flores, 117 S.Ct. 2157, 2163 (1997)(striking down the Religious Freedom Restoration Act) and contending that Congress is attempting to interpret the Fourth, Fourteenth, and Eighth Amendments. However, the PLRA does not limit constitutional rights, but rather one's ability to recover damages for those rights under 42 U.S.C. §1983, which ability is a statutory construct. In the absence of §1983, injunctive relief from the Courts to prevent continuing violation of one's constitutional rights would, presumably, be available.

Plaintiffs also argue that the PLRA is unconstitutional because it violates the Equal Protection Clause of the Constitution by making it more difficult for prisoner, as compared to all others seeking redress through the Federal courts, to make a constitutional claim. Plaintiffs' argument is based upon a strict scrutiny analysis. Plaintiffs' Bench Memo, p. 10.

The problem with this argument is that, so far as treating prisoners differently than nonprisoners, Equal Protection claims merit only a rational basis review; that is, whether the classification that results in unequal treatments bears some rational relationship to a legitimate state purpose. See Moran v. U.S., 18 F.3d 412, 413 (7th Cir. 1994); see also United States v. Woods, 888 F.2d 653, 656 (10th Cir. 1989)(pre-sentence residents of halfway houses are not a suspect class in terms of Equal Protection analysis); Moreland v. U.S., 968 F.2d 655, 660 (8th Cir. 1992)(Same); Scher v. Chief Postal Inspector, 973 F.2d 682, 683-4 (8th Cir. 1992)(Prisoners are not similarly situated to nonprisoners, thus postal employees need not handle their complaints like nonprisoner complaints.). The PLRA's restrictions on prisoners' ability to seek damages for claims of constitutional violations is rationally related to the government's interest in reducing the number of frivolous inmate lawsuits. The Court therefore declines Plaintiffs' invitation to declare the Prison Litigation Reform Act of 1996 unconstitutional.

IT IS THEREFORE ORDERED that Defendants oral motion for judgment as a matter of law as to Counts I, II, and III of the complaint is granted.

DON J. SVET
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

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SHARON MOYA, LISA MARTINEZ,

Plaintiffs,

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Civil. No. 96-1257 DJS/RLP

CITY OF ALBUQUERQUE, SGT. WILL BELL, LT. SCOTT KERR,

Defendants.

JUDGMENT

THIS MATTER came before this Court for decision pursuant to Defendants' Motion for Judgment as a Matter of Law made orally during the trial by jury held in this matter from October 27, 1997 to October 30, 1997. The Court granted Defendants' motion on grounds memorialized in a separate Memorandum Opinion and Order as to Count I, Count II, and Count III of the Complaint. Count IV of Plaintiffs' Complaint was submitted to the jury, which was unable to come to a verdict. Judgment as a matter of law is granted in Defendants' favor on Counts I, II, and III of the Complaint. Count IV of the complaint awaits resolution by a second trial.

IT IS THEREFORE ORDERED AND ADJUDGED that Count I, Count II, and Count III of the Complaint be, and hereby are, dismissed with prejudice.

DON J. SVET
UNITED STATES MAGISTRATE JUDGE