UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE SEMELBAUER, et al,

Plaintiffs,

Case No. 1:14-cv-01245-JTN

vs.

HON. JANET T. NEFF

MUSKEGON COUNTY, et al

Defendants.

DEFENDANTS' REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Defendants rely on the arguments set forth in the brief in support of their Motion for Summary Judgment. In addition, Defendants state the following in reply to Plaintiff's Response to their Motion for Summary Judgment:

1. Plaintiffs Improperly Aggregate Conditions to Assert a "Totality of the Circumstances" Claim with Regard to Sanitation, Safety, and Hygiene

Plaintiffs request this Court consider the totality of circumstances throughout the entire jail to support their claims they have been subjected to violations of their Eight and Fourteenth Amendment rights. That is, Plaintiffs request this Court to aggregate the conditions of the various sections of the jail, or events which involved individual Plaintiffs, to establish that the cumulative effect of all the alleged conditions amounts to the denial of the basic necessities guaranteed by the Eighth and Fourteenth Amendments. This argument ignores the Sixth Circuit's clear mandate that conditions-of-confinement claims cannot be based on a "totality of the circumstances" approach. Essentially, Plaintiffs' argument is: (1) some inmates spent up to seven days in the holding tank where they were denied showers and had to sleep on the floor; (2) some

inmates in general population cells have had to wait up to three days for their showers to be repaired; (3) some showers had water that was too hot; (4) some women had to wait several hours to receive sanitary napkins[1]; (5) some general population showers did not drain properly; (6) one inmate had to wait a few hours to receive toilet paper; (7) inmates are only allowed to do laundry once a week, even if their clothes are dirty; and (8) some toilets in the dayroom cells, where women do not have to sleep on the floor, back up and leak sewage on the floors if the inmates do not work in tandem to flush them. Therefore, all inmates are denied their right to basic hygiene.

With regard to Plaintiffs' denial of basic hygiene claims,[2] they want this Court to aggregate their allegations from the various sections of the jail into one, overall-conditions-of- confinement claim. Plaintiffs would have this Court consider the alleged conditions in the holding tank, which they admit they were exposed to for only a couple

[1] In Footnote 9, page 15, Plaintiffs cite an article by Chandra Bozelko in support of their claim regarding denial of hygiene as it relates to feminine hygiene products. Ms. Beozelko, convicted of forgery, identity theft, and larceny, among other charges, see ***State v. Bozelko***, 154 Conn. App. 750, 752, 108 A.3d 262 (2015), is also the author of statements like this: "Courts see prisoners as subhuman and perpetual threats to the safety of prison employees, so they sanction abuse. Even in the most egregious examples of maltreatment in a correctional facility, no government employee will be held responsible. It's just a reality." Bozelko, *10 Things 'Orange is the New Black' Gets Wrong About Prison (According to an inmate)*, Listverse (Sept. 29, 2014), http://listverse.com/2014/09/29/10-things-orange-is-the-new-black-gets-wrong-about-prison-according-to-an-inmate/.

[2] Plaintiffs' arguments are made all the more difficult based on the actual claims made in the complaint. Plaintiffs are essentially asking the Court to blend together Count III, which asserts a "denial of access to feminine hygiene products, toilet paper, and adequate underwear and other clothing," with their vague Count IV, which simply asserts an Eighth Amendment violation for "severe overcrowding and other inadequate, unsanitary and dangerous conditions, and prolonged stays in the holding tank, as alleged above." (**Dkt. No. 18**, at ¶ 279)

days and at most a week[3], when determining whether the inmates in the large general population cells or the dayroom cells are denied adequate access to hygiene. In other words, their claim is if the Court were to consider the conditions facing inmates kept in the holding cells in conjunction with the conditions facing inmates in the general population, it is clear that *all* inmates are denied adequate access to hygiene. However, Plaintiffs cannot "stack" the allegations of what occurs in the holding cell and apply it to the overall conditions faced by inmates in the other cells or different sections of the jail.

The conditions in the holding cells are, by Plaintiffs' allegations, unpleasant, but as addressed in Defendants' original brief, they are short-term, temporary deprivations that the Courts from the U.S. Supreme Court on down have held are insufficient to state a claim under the Eighth Amendment. See ***Hutto v. Finney***, 437 U.S. 678, 686–87 (1978); ***Ziegler v. Michigan***, 59 F. App'x 622, 624 (6th Cir. 2003) (finding that allegations of overcrowded cells and denials of daily showers and out-of-cell exercise did not rise to constitutional magnitude, where the prisoner was subjected to the purportedly wrongful conditions for two periods of six- straight days and nine-straight days); ***Keeling v. Louisville Metro Corr. Dep't***, No. 314-CV-P697-DJH, 2015 WL 3457847, at *2 (W.D. Ky. 2015) (finding 3 week deprivation of cleaning supplies and a cold cell failed to state a claim); see also ***Harris v. Fleming***, 839 F.2d 1232, 1235–36 (7th Cir. 1988) (finding that a five-day stay in a filthy, roach-infested cell was not unconstitutional); ***McNatt v. Unit Manager Parker***, No. 3:99CV 1397A HN, 2000 WL 307000, (D. Conn. 2000) (finding the totality of conditions in the restrictive housing unit to which plaintiffs were subjected, including: stained, smelly mattresses; unclean cell; no

[3] And which the records will establish is usually only a few hours, if this Court allows this claim to proceed. See, generally, **Dkt. No. 16**, at 2-6, and accompanying exhibits.

bedding for six days; no cleaning supplies for six days; no toilet paper for one day; no toiletries or clothing for six days; no shower shoes; dirty showers; cold water that did not function properly; and smaller food portions, while not pleasant, did not rise to the level of an Eighth Amendment violation). Plaintiffs cannot use the temporary confinement under these conditions to support their claims regarding the conditions in the other sections of the jail.

Plaintiffs also allege inmates are sometimes required to sleep on floors in the large 12-person cells and on cots in the dayroom. They would have this Court consider this in conjunction with their allegation the toilets routinely back up and spill sewage and feces on the floor. However, their allegations regarding the backed up toilets relates to the small cells connected to the large dayroom. There is no allegation inmates are forced to sleep on floors in cells where sewage has spilled. Their own factual allegations differentiate their claims from the cases they claim are in support. See, e.g., ***McCord v. Maggio***, 927 F.2d 844 (5th Cir. 1991) (inmate made to lie on floor with sewage for months at a time). Therefore, these allegations cannot be aggregated to establish an Eighth Amendment violation.

Plaintiffs cite ***Spencer v. Bouchard***, 449 F.3d 721 (6th Cir. 2006), for the proposition that inmates must be provided adequate sleeping conditions. However, this case actually cuts against Plaintiffs' "totality" argument. There, the inmate was forced to sleep on a mattress on the floor of a cell from September through February, where the cell was cold; the inmate was not provided anything more than normal prison uniform, and the floor in the cell constantly flooded due to rain and snow. The combined effect of those conditions, happening simultaneously over the course of several months to the

individual plaintiff and his cellmates, deprived the inmate of his right to adequate shelter. There are no similar allegations here. First, none of the individual Plaintiffs assert they were forced to sleep on the floor, other than during their brief time in the holding cell. While these inmates assert they were subjected to sleeping on the floor in the allegedly filthy holding cell, this was only a temporary deprivation insufficient to state a claim. Further, even in their general allegations about the conditions affecting the population as a whole, they do not assert the inmates forced to sleep on mattresses on the floor of the 12-person cells were subjected to the flooding of cell floors that allegedly occurs in the small cells connected to the dayroom. None of the inmates in the cells off the dayroom are asserting they have to sleep on the floors. In sum, their allegations about the sleeping conditions do not support an Eighth or Fourteenth Amendment claim, and cannot be used to support their alleged denial of hygiene claim.

Plaintiffs rely heavily on ***Brown v. Plata***, __ U.S. __; 131 S. Ct. 1910 (2011), for the general proposition that overcrowding in itself can be the primary cause of constitutional violations. However, in that case, the allegations and evidence showed the California penal system at issue was continually at 200% of its rated capacity, which resulted in a systemic denial of adequate medical care, particularly where the medical staffing was below adequate levels even to deal with its rated 100% capacity. The Court upheld a ruling that the penal system must reduce its capacity to 137.5% of its rated level to comply with the Eighth Amendment.

Here, according to the complaint, Plaintiffs assert only one day where the MCJ exceeded its rated design capacity by approximately 30%; most days the MCJ was about 10% over capacity, and on a handful of days it was actually below capacity. (See

Dkt. No. 18, at ¶¶ 170-172) Plaintiffs provide nothing but conclusory statements that the conditions at the MCJ were caused or exacerbated by overcrowding. Conclusory allegations are insufficient to support a claim that overcrowding was the cause of the alleged Eighth Amendment violations. See ***Shelton v. Christian County Jail***, No. 5:14-CV-P146-GNS, 2015 WL 236853 (W.D.Ky. 2015) ("Plaintiff's allegations that overcrowding has caused health problems, inadequate safety, and a hostile environment are entirely conclusory and, therefore, 'insufficient to state a claim.'") (quoting ***Dellis v. Corr. Corp. of Am.***, 257 F.3d 508, 511 (6th Cir. 2001)). Therefore, the comparatively minor overcrowding here (approximately 10% as compared to 100% in ***Brown***) is insufficient to support an Eighth or Fourteenth Amendment Claim.

2. Plaintiffs' Denial of Exercise Claims

Plaintiffs' claim regarding the denial of exercise fails based on their allegations. The cases relied on by Plaintiffs in support of their argument are easily distinguishable. For example, in ***Pierce v. Cnty. of Orange***, 526 F.3d 1190 (9th Cir. 2008), the inmate plaintiffs were housed in long-term administrative segregation and were only allowed out of their small, segregation cells for 90 minutes of exercise per week. Here, the plaintiff inmates in cells connected to the day room have not alleged they are denied daily access to that dayroom, and at least one has even alleged she takes advantage of the size of the dayroom to engage in exercise. While Plaintiffs make the vague allegation that they are "routinely locked down in their tiny cells and cannot leave those cells for extended periods of time", (**Dkt. No. 18**, at ¶ 92), they fail to provide sufficient facts which would demonstrate the total amount of out-of-cell time they are allowed in the dayroom on either a daily or weekly basis is constitutionally deficient.

In ***Antonelli v. Sheahan***, 81 F.3d 1422, 1432 (7th Cir. 1996), the plaintiff inmate was housed in what was described as a "'small house trailer with at least 37 other prisoners,' in which '[t]here is no room to recreate.'" Here, however, the Plaintiffs were either housed in larger 12-person cells or small cells connected to the dayroom. They have not alleged facts which show the size of the cells they were in or the dayroom they had access to were insufficient to engage in other forms of exercise. See ***Grzelak v. Ballweg***, No. 2:14-31, 2014 WL 5101333, at *4 (W.D.Mich. 2014) ("Plaintiff fails to allege facts showing that he was prevented from engaging in other forms of exercise, such as 'running in place, doing push-ups, setups, or other exercises in his jail cell or elsewhere in the jail facility.'").

WHEREFORE, for the reasons stated above and contained in Defendants Brief in Support of their Motion for Summary Judgment, Defendants request this Honorable Court grant partial summary judgment and dismiss Plaintiffs' claims accordingly.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

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Dated: July 1, 2015