

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DION MATHEWS and  
MUSTAFA-EL K.A. AJALA,  
formerly known as Dennis E. Jones-El,

Plaintiffs,

v.

RICK RAEMISCH, GARY BOUGHTON,  
JANET GREER, DAVID BURNETT,  
CYNTHIA THORPE, LT. HANFELD,  
MARY MILLER, KAMMY JONES and  
WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendants.

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Plaintiffs Dion Mathews and Mustafa-el K.A. Ajala have filed a motion for reconsideration related to the order dated December 17, 2010, in which I screened plaintiffs' complaint under 28 U.S.C. §§ 1915 and 1915A. (Plaintiffs have filed a second motion for reconsideration regarding the denial of their motion for a preliminary injunction, but the clerk of court returned plaintiffs' brief to them because it was not signed by both of them as required by Fed. R. Civ. P. 11. I will address that motion when plaintiffs provide a signed brief.)

ORDER

10-cv-742-bbc

In the screening order, I allowed plaintiffs to proceed on claims that defendants were violating their federal rights by refusing to provide shoes with adequate support and by subjecting them to 24-hour lighting. In addition, I allowed plaintiff Ajala to proceed on a claim that defendants were violating his Eighth Amendment rights by refusing to authorize a root canal for two of his teeth. However, I dismissed plaintiffs' claims under the Eighth Amendment and Fourth Amendment that defendants are subjecting them to video monitoring in their cells and their claims that defendants are violating their rights under the equal protection clause by refusing to provide the special shoes and subjecting them to 24-hour lighting.

In their motion for reconsideration, plaintiffs seek to revive each of the claims I dismissed. In addition, they say that I overlooked their claims that defendants' video monitoring violates their equal protection rights and that defendants' dental policy is "per se unconstitutional." Plaintiffs do not explain why they waited five months to file their motion for reconsideration, but even if I treat the motion as timely, plaintiffs have not shown that they are entitled to proceed on any additional claims. However, I clarify that it was not my intent to limit plaintiff Ajala's challenge to the dental policy to an "as applied" challenge.

With respect to plaintiffs' claim regarding video monitoring, I concluded in the screening order that plaintiffs had failed to state a claim under the Fourth Amendment

because the Court of Appeals for the Seventh Circuit has held that prisoners “do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of life,” even when the prisoners are not clothed. Johnson v. Phelan, 69 F.3d 144, 146 (7th Cir. 1995) (prisoner had no right under Fourth Amendment to prohibit guard, whether male or female, from viewing him naked).

Plaintiffs cite Blihovde v. St. Croix County, Wisconsin, 219 F.R.D. 607, 615 (W.D. Wis. 2003), for the proposition that Johnson does not foreclose their claim. Although plaintiffs are correct that I discussed possible limitations of Johnson in Blihovde, that case does not help plaintiffs for three reasons. First, the alleged Fourth Amendment violations in Blihovde were strip searches, not video monitoring. (Plaintiffs describe their video monitoring claim as involving “strip searches,” but they do not include any allegations suggesting that any of the defendants have touched them or forced them to undress. Accordingly, I understand plaintiffs to be using the word “strip search” as a characterization of how they view monitoring of their cells when they are undressed.) Second, the plaintiffs in Blihovde were not prisoners, but pretrial detainees, who have greater privacy rights under the Constitution. Kraushaar v. Flanigan, 45 F.3d 1040, 1045 (7th Cir. 1995) (reasonable suspicion required to strip search person arrested for driving under influence). Third, the opinion plaintiffs cite is limited to the question of class certification; I did not resolve the merits of the plaintiffs’ claims because the parties settled after I certified the class.

Accordingly, I adhere to my conclusion that Johnson bars any claim under the Fourth Amendment for video monitoring of prisoners.

With respect to plaintiffs' claim under the Eighth Amendment, I noted that the court of appeals has held that a strip search may be cruel and unusual punishment if it is "conducted in a harassing manner intended to humiliate and inflict psychological pain." Calhoun v. Detella, 319 F.3d 936, 939 (7th Cir. 2003). Even if I assumed that this limitation on strip searches applies to video monitoring as well, at best, plaintiffs' allegations suggested that defendants monitored certain cells *at random*, without suspicion of any wrongdoing by the prisoners in that cell or particular reason for heightened concern. That is not enough to state an Eighth Amendment claim. Peckham v. Wisconsin Dept. of Corrections, 114 F.3d 694, 697 (7th Cir. 1998) (strip searches of prisoners conducted without reasonable suspicion do not violate Fourth or Eighth Amendments).

In their motion for reconsideration, plaintiffs cite Lewis v. Lane, 816 F.2d 1165, 1171 (7th Cir. 1987), in which the court concluded that "bar-banging" by guards could implicate the Eighth Amendment if it was done "in a manner designed to harass prisoners." To the extent Lewis has any application to video monitoring, it simply reaffirms the view that it is not unconstitutional unless it is done for the purpose of harassment. Because plaintiffs do not include any allegations in the complaint suggesting that any of the defendants had a malicious motive, this claim fails.

With respect to their equal protection claims, plaintiffs repeat arguments that defendants had no rational basis for treating them differently from other prisoners, but I adhere to my conclusion that plaintiffs' allegations are not sufficient "to overcome the presumption of rationality that applies to government classifications." St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 639 (7th Cir. 2007) (internal quotations omitted). This applies as well to plaintiffs' claim about video monitoring. In any event, it is unlikely that the equal protection clause applies to the decisions plaintiffs are challenging. Plaintiffs do not allege that they are being singled out because of their race or because they are members of a particular group. Rather, they seem to believe that the alleged discrimination they suffer is completely arbitrary. In Engquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008), the Supreme Court held that plaintiffs' theory of discrimination does not state a claim under the equal protection clause under certain circumstances involving discretionary decision making. See also Abcarian v. McDonald, 617 F.3d 931, 939 (7th Cir. 2010) ("[I]nherently subjective discretionary governmental decisions may be immune from class-of-one claims."); United States v. Moore, 543 F.3d 891, 898-901 (7th Cir. 2008) (no class of one claim for discrimination in decisions to prosecute). All the decisions plaintiffs are challenging "by their nature involve discretionary decision-making based on a vast array of subjective, individualized assessments," Engquist, 553 U.S. at 603, suggesting strongly that plaintiffs could not prevail on their equal protection claim even if

they could show that there was no rational basis for the differential treatment. Dawson v. Norwood, 2010 WL 2232355, \*2 (W.D. Mich. 2010) (“The class-of-one equal protection theory has no place in the prison context where a prisoner challenges discretionary decisions regarding security classifications and prisoner placement.”). See also Alexander v. Lopac, 2011 WL 832248, \*2 (N.D. Ill. 2011) (applying Engquist in the prison context); Russell v. City of Philadelphia, 2010 WL 2011593, at \* 9 (E.D. Pa. 2010) (same); Dunlea v. Federal Bureau of Prisons, 2010 WL 1727838, at \* 4 (D. Conn. 2010) (same).

This leaves plaintiffs’ claim that defendants’ dental policy is “per se unconstitutional” because it requires prison dentists in each instance to pull a problem tooth rather than perform a root canal. Presumably, plaintiffs mean to challenge the policy on its face rather than simply as applied. It was not my intent to limit the scope of plaintiff Ajala’s claim in the screening order. (Plaintiff Mathews does not have standing to challenge the policy because he does not allege that any of his teeth were pulled under the policy in the past or that he is in danger of having teeth pulled in the foreseeable future. Schirmer v. Nagode, 621 F.3d 581, 585 (7th Cir. 2010) (no standing unless plaintiff alleges that he is “under threat of an actual or imminent injury in fact”). However, to the extent that plaintiff Ajala wishes to challenge the policy on its face, he will have to show that the policy violates the Eighth Amendment under most circumstances, if not all of them. United States v. Stevens, 130 S. Ct. 1577, 1587 (2010); Washington State Grange v. Washington State Republican

Party, 552 U.S. 442, 449 (2008); Gonzales v. Carhart, 550 U.S. 124 (2007).

ORDER

IT IS ORDERED that the motion for reconsideration filed by plaintiffs Dion Mathews and Mustafa-el K.A. Ajala, dkt. #57, is DENIED except to the extent that plaintiffs seek clarification of plaintiff Ajala's challenge to the dental policy. He may assert a facial challenge to that policy.

Entered this 27th day of May, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge