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FILED
UNITED STATES DISTRICT COURT
DENVER, COLO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DEC 21 1995

Civil Action No. 92-K-1470
(92-M-1932)

JAMES R. MANSPEAKER
CLERK

STEVEN R. MARQUIZ; FLOZELL J. BEASELY; GREGORY BRADLEY; KEVIN CHILLIS; TRAVIS M. GUYTON, SR.; WILLIE GUYTON; RAY SEPULVEDA; BERNARD HORNE; JAMES HALL; WOODY HARRISON; KEITH HAGGERTY; RANDY KAILEY; THOMAS HOWELL; WALDO MACKEY; DAVE SLUSHER; and STEVEN CLOUSE; individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

ROY ROMER, Governor of the State of Colorado; ARISTEDES ZAVARAS, Executive Director of the Colorado Department of Corrections; ROBERT FURLONG, Warden of the Limon Correctional Facility, Colorado Department of Corrections; LOU HESSE, WARREN DIESSLIN and H.B. "BENNY" JOHNSON, Directors of the Division of Adult Services, Colorado Department of Corrections, all in their official capacities; COLORADO DEPARTMENT OF CORRECTIONS, an Executive Department within the State of Colorado;

Defendants.

MEMORANDUM OPINION AND ORDER

KANE, J.

This prisoner civil rights matter was recently transferred to me as a result of Judge Carrigan's retirement. It is before me on the parties' objections to Magistrate Abram's Recommendation of August 7, 1995 that summary judgment enter on four of Plaintiffs' claims. Plaintiffs, sixteen inmates confined to the Limon Correctional Facility ("Limon" or "LCF"), filed their First Amended Complaint on August 4, 1992 and their Second Amended Complaint (the "Complaint") on July 28, 1994. While Plaintiffs purport to represent a class of similarly situated inmates, there

Wilson v. Romer



PC-CO-003-001

has been no class certification.¹

Plaintiffs allege violations of their rights under the Eighth and Fourteenth Amendments to the United States Constitution, as well as statutory claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. Specifically, they claim Limon is overcrowded, its staffing inadequate, and that inmates of different security classifications are "mixed" together such that they are subjected to an unacceptable level of danger and violence. In addition, Plaintiffs allege they have been regressively transferred or classified without due process and denied access to legal services. Finally, they contend Defendants have violated the ADA by failing to provide adequate accommodations for qualified persons with disabilities.

THE RECOMMENDATION AND OBJECTIONS

The Magistrate Judge recommended summary judgment enter against Plaintiffs on four of their claims: (1) classification/transfer in violation of due process; (2) denial of right to legal access; (3) plaintiff Howell's ADA claim; and (4) plaintiff Mackey's ADA claim. The Plaintiffs object to the first three recommendations. They do not object to the fourth. The Defendants agree with the four recommendations as far as they go, but disagree that Clouse's ADA claim and the Plaintiffs' Eighth Amendment claim should be permitted to go forward.

¹ While Fed. R. Civ. P. 23(c)(1) provides that district courts "shall determine" whether an action shall be maintained as a class action "as soon as practicable after the commencement of an action," no such determination has been made in this case. Given the pendency of trial in July 1995 and the fact that discovery is closed, the practicality and effect of certification at this late date is unclear.

Pursuant to Fed. R. Civ. P. 72(b), I review *de novo* those proposed findings of the Magistrate Judge to which objection is made. After considering the parties' briefs and arguments, the record, and the applicable caselaw, I overrule all but Plaintiffs' objection to the Magistrate's finding that Plaintiffs' legal access claim is moot. The Magistrate's Recommendation is therefore adopted in part and rejected in part.

A. Plaintiffs' Objections

1. Classification Claims -- Due Process

Plaintiffs rely on Colorado Department of Corrections (DOC) Classification Policy AR 600-1 to argue that Colorado has created due process liberty interests in the objective classification and assignment of prison inmates. The policy establishes an inmate classification system that requires the application of nine factors to determine the appropriate assignment for each inmate. See Pls.' Resp. in Opp. to Defs.' Mot. Dismiss & Summ. J., Ex. F at p. 5. Because there are disputed facts as to whether DOC's wholesale "dumping" of inmates from Shadow Mountain Correctional Facility into Limon was rational, let alone objective under the standards set forth in AR 600-1, Plaintiffs contend the Defendants are not entitled to summary judgment on their classification claim. I disagree.

In his Recommendation, the Magistrate correctly concluded that Colorado law creates no entitlements concerning inmate transfer or classification. Recomm. at 3-4 (citing Deason v. Kautzky, 786 P.2d 420, 424-25 (Colo. 1990); Milligan v. Colorado

Dep't Corrections, 751 P.2d 75, 76 (Colo. App. 1988)). The decision of how to classify inmates is discretionary, and "[a] prison regulation that provides an inmate with certain procedural guarantees concerning a transfer or reclassification does not create a liberty interest." Klein v. Pyle, 767 F. Supp. 215, 217, 216 (D. Colo. 1991) (citing Milligan and Andretti v. Johnson, 779 P.2d 382, 384 (Colo. 1989)). I recently reached a similar conclusion in Hall v. Griego, 896 F. Supp. 1043, 1050 (D. Colo. 1995), where I determined that DOC Regulation AR 600-2 created no constitutionally protected liberty interest, citing Templeman v. Gunter, et al., 16 F.3d 367, 369 (10th Cir. 1994). These authorities are dispositive.² The Magistrate Judge correctly concluded that AR 600-1 created no due process rights with respect to the transfer of Shadow Mountain inmates to Limon.

Alternatively, Plaintiffs argue their due process claim should be permitted to proceed to trial to the extent it is based on allegations at ¶¶ 41-43 of the Complaint that the transfers to Limon were retaliatory and racially motivated. Objection at 4-5. Such allegations, they maintain, give rise to actionable due process claims as a matter of law. Id. (citing Black v. Lane, 22 F.3d 1395, 1399, 1401-03 (7th Cir. 1994), Wildberger v. Bracknell,

² Plaintiffs' reliance on my decision in Marionaux v. Colorado State Penitentiary, 465 F. Supp. 1245, 1246-47 (D. Colo. 1979), is unavailing. While in Marionaux I found the Colorado State Penitentiary Code of Penal Discipline and Manual created constitutionally protected procedural rights for inmates before they could be regressively transferred, the regulation at issue was considerably different from that at issue here. Further, Marionaux was decided before the Colorado state courts had conclusively determined that, as a matter of state law, prisoner classification decisions are discretionary.

869 F.2d 1467, 1468 (11th Cir. 1989) and Hooks v. Kelly, 463 F.2d 1210, 1211 (5th Cir. 1972)).

I addressed the issue of retaliatory prison transfers in Hall. There, I held that an inmate may, under the Tenth Circuit's ruling in Frazier v. DuBois, 922 F.2d 560, 561-62 (10th Cir. 1990), survive a motion for summary judgment on a claim for retaliatory transfer if (1) the alleged retaliation related to the inmate's exercise of a protected right; and (2) he creates a triable issue that the transfer was punitive. Hall v. Griego, 896 F. Supp. at 1048 (transfer allegedly made in retaliation for conduct protected by First Amendment's free exercise clause). In the present case Plaintiffs do not allege, and have come forward with no evidence to support, that the transfers from Shadow Mountain to Limon were punitive. Nor have they presented evidence that the transfers were motivated by racial animus. Thus even assuming the allegations at ¶¶ 41-43 of their Complaint stated a claim for retaliation, that claim would fail as a matter of law.

2. Plaintiff Howell's ADA Claim

The Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. (the "ADA"), protects qualified individuals with disabilities from being denied, by reason of their disability, the benefits of the services, programs, or activities of a public entity, or from being discriminated against by such entity. Plaintiffs allege Howell is a qualified individual because he has a sleep disorder, and claim Defendants violated the ADA when they failed to modify Limon's rules, policies or practices to accommodate him. See

Compl., ¶¶ 93-95.

Relying on the testimony of Defendants' expert John Fox, M.D., that Howell's sleep disorder was "subjective" and that Howell "should" be able to work, the Magistrate found Howell was not disabled and recommended that summary judgment enter against him on his ADA claim. Recomm. at 11-12. Plaintiffs object, asserting new facts have come to light since the Magistrate's recommendation that establish Howell was, in fact, disabled. Plaintiffs contend that in September 1995, Howell was transferred to the DOC's newly opened mental health treatment center at San Carlos and diagnosed as having bi-polar illness. Objection at 6. This diagnosis, Plaintiffs argue, establishes that Howell was disabled at the time the Complaint was filed and creates a triable issue on the question of whether Defendants violated the ADA in failing to accommodate him.

The question arises as to how Defendants can be held liable under the ADA for failing to accommodate a mental condition that had not yet been diagnosed. Plaintiffs do not allege Defendants were negligent in failing to diagnose Howell earlier, nor would the ADA recognize a cause of action based on such an allegation. Based on the record before me, Howell's ADA claim fails as a matter of law.

3. Right to Legal Access

In their Complaint, Plaintiffs asserted the prisoner phone system at Limon violated the Fourteenth Amendment because it allowed for the unannounced monitoring of phone calls to attorneys

thereby depriving them of their right to meaningful legal access. Compl., ¶¶ 85-91. The Magistrate disagreed, finding Limon's policy for placing unmonitored legal calls "adequately provides for unmonitored telephonic attorney contact in appropriate circumstances." Recomm. at 8. Further, the Magistrate found, Limon's Colorado Inmate Phone System (CIPS) was modified in February 1995 to allow inmates to bypass electronically the monitoring of legal calls. Id. at 8-9. Because inmates were advised of the new system in November 1994, the Magistrate concluded Plaintiffs' legal access claims were moot.

In their Objection, Plaintiffs assert CIPS does not function in the manner described by Defendants, citing the affidavit of Plaintiff Marquiz and certain of its attachments. Objection at 7-8. They seek leave to file additional affidavits to show, *inter alia*, that inmates continue to be deprived of meaningful access to the courts through the imposition of unreasonable limits on library research time, use of the mails, and access to written materials. Because Defendants "have not and cannot meet [their] burden" of establishing (1) previously documented violations have been corrected and (2) "there is no reasonable expectation" they will recur, Plaintiffs deny their legal access claim is moot and ask that they be permitted to submit it to the jury.

The factual nature of the dispute over the efficacy of the CIPS bypass option does not lend itself to resolution on a motion for summary judgment. I therefore sustain Plaintiffs'

objection and decline to adopt the Magistrate's recommendation that summary judgment enter against Plaintiffs on their legal access claim.

B. Defendants' Objections

1. Eighth Amendment Claim

Defendants argue Plaintiffs' Eighth Amendment claim fails as a matter of law and object to the Magistrate's recommendation that the claim be permitted to go forward. In support, Defendants cite Plaintiffs' purported failure to demonstrate a "nexus between certain conditions and cruel and unusual punishment," and incorporate by reference the arguments presented to Magistrate Abram on their motion for summary judgment. Defs.' Objection at 4.

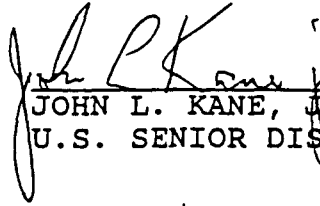
The Magistrate's analysis of Plaintiffs' claim and the Defendants' arguments against it at pages 4-7 of his Recommendation is sound. I accept and adopt for the reasons stated therein the Magistrate's recommendation that Defendants' motion for summary judgment as to Plaintiffs' Eighth Amendment claim be denied.

2. Clouse's ADA Claim

While the Magistrate recommended the ADA claims of Plaintiffs Howell and Mackey be dismissed, he recommended the ADA claim of Plaintiff Clouse be permitted to go forward. Clouse is a paraplegic confined to a wheelchair. Defendants object to the Magistrate's recommendation, arguing they have done "more than is necessary" to make a "reasonable accommodation" for Clouse. They argue the "bald allegations" in Clouse's affidavit are inadequate to survive a Rule 56 motion. The Magistrate disagreed, finding the

affidavit sufficient to create a genuine issue of material fact as to the reasonability of Defendants' conduct. I agree with the Magistrate Judge. Accordingly, the Magistrate's recommendation that Defendants' motion for summary judgment be denied as to Clouse's ADA claim is accepted and adopted.

Dated this 21 day of December, 1995, at Denver, Colorado.



JOHN L. KANE, JR.
U.S. SENIOR DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JAMES R. MANSPEAKER, CLERK
U. S. Courthouse
1929 Stout Street, Rm. C-145
Denver, CO 80294
(303) 844-3433

Date: December 22, 1995

Case No. 92-K-1470 (92-M-1932) - Marquiz, et al. v. Romer, et al.

The undersigned hereby certifies that on the above date a true and correct copy of the preceding MEMORANDUM OPINION AND ORDER signed by Judge John L. Kane, Jr., on December 21, 1995, was mailed to the following:

Magistrate Judge Abram

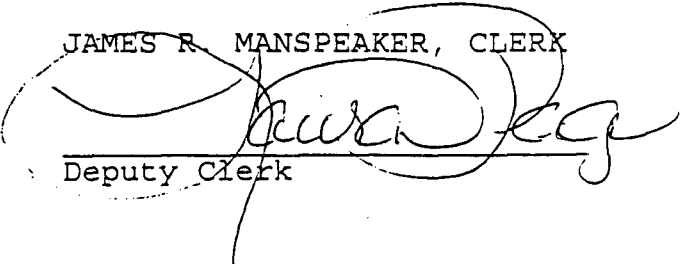
David H. Miller, Esq.
A.C.L.U. of Colorado
400 Corona Street
Denver, CO 80218

Steven W. Black, Esq.
Holland & Hart
555 - 17th Street, #2900
Denver, CO 80202
D.C. Box # 6

Thomas S. Parchman, Esq.
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
D.C. Box # 20

December 22, 1995

JAMES R. MANSPEAKER, CLERK


Deputy Clerk