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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Charles Edward Byrd, Plaintiff, vs. Joseph Arpaio, et al., Defendants.	No. CV 04-2701-PHX-NVW-ECV **ORDER**

Plaintiff Charles Byrd, a *pro se* inmate, filed a First Amended Complaint pursuant to 42 U.S.C. § 1983, alleging violations of his constitutional rights following a body search at the Durango Jail in Phoenix, Arizona (Doc. # 13 at 4). Before the Court are Defendants' Motion for Summary Judgment (Doc. # 39), Plaintiff's Responses (Doc. # 42, 43, 45), and Defendants' Reply thereto (Doc. # 44). The Court will dismiss Count II of Plaintiff's First Amended Complaint for failure to state a claim and grant in part and deny in part Defendants' motion.

Also before the court are Plaintiff's Motion for Pre-Trail Order (Doc. # 49), which is difficult to understand, but the which is moot in light of the denial of Defendants' Motion for Summary Judgment. Also before the court is Plaintiff's Motion to Allow U.S. District Judge to Rule on this Case and Not a Jury Trial (Doc. # 50). Plaintiff demanded jury trial in his complaint (Doc. # 1). "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." Fed. R. Civ.P. 38(d). Therefore, Plaintiff's

Motion to Allow U.S. District Judge to Rule on this Case and Not a Jury Trial (Doc. # 50) will be denied.

I. Procedural History

Plaintiff filed a First Amended Complaint on June 14, 2005, against Defendants Maricopa County Sheriff Joseph Arpaio, Detention Officer O'Connell, and Captain Peterson (Doc. # 13). Specifically, Plaintiff alleged that during a training session for new officers at the Durango Jail on October 28, 2004, O'Connell frisked Plaintiff, grabbed his genitals twice, and then "ramed [sic] her index finger through the crack" of his buttocks (Doc. # 13 at 4). Plaintiff claimed that he was only wearing boxer shorts at the time of the search and there was no reason for O'Connell to touch him. In addition, Plaintiff claimed there were more than ten male officers present who could have conducted the search rather than O'Connell, a female officer. Plaintiff further alleged more than eighty inmates witnessed the search and, as a result, he suffered psychological trauma, mental anguish, embarrassment, public humiliation, emotional distress, and scarring (Doc. # 13 at 4). Plaintiff specifically presented three claims for relief based on the search—violations of his Fourth, Eighth, and Fourteenth Amendment rights (Doc. # 13 at 4-6).

Plaintiff further claimed that because Arpaio was responsible for the policies and procedures at the jail he was responsible for instituting a policy, practice, or custom that gave rise to the illegal search. And Plaintiff argued that Peterson was responsible because he was O'Connell's superior and observed the incident but failed to intercede (Doc. # 13 at 4-6). Defendants O'Connell, Arpaio, and Peterson filed an Answer to the First Amended Complaint (Doc. # 28).

II. Failure to State a Claim

The Court is required to screen complaints brought by prisoners proceeding *in forma pauperis* or raising claims regarding their conditions of confinement. See 28 U.S.C. § 1915(e)(2); 42 U.S.C. § 1997e(c). The Court must dismiss a complaint or portion thereof at any time if the Plaintiff has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a

defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2); 42 U.S.C. § 1997e(c).

A. Fourteenth Amendment Claim

Equal protection requires that "all persons similarly situated shall be treated alike" Plyler v. Doe, 457 U.S. 202, 216 (1982); Gilbrook v. City of Westminister, 177 F. 3d 839, 871 (9th Cir. 1999) (in order to state an equal protection claim, the plaintiff must allege "unequal treatment of people similarly situated"). A law that does not burden a fundamental right or target a suspect class will be upheld as long as the law is rationally related to a legitimate government interest. Romer v. Evans, 517 U.S. 620 (1996); Coakley v. Murphy, 884 F.2d 1218, 1221-22 (9th Cir. 1989). All that is needed to uphold state action under a rational basis test is a finding that there are "plausible," "arguable," or "conceivable" reasons which may have been the basis for the state's action. Jackson Water Works, 793 F.2d 1090, 1094 (9th Cir. 1986) (quoting Brandwein v. California Board of Osteopathic Examiners, 708 F.2d 1466, 1472 (9th Cir. 1983)).

For purposes of equal protection, prisoners are not a suspect class. Webber v. Crabtree, 158 F.3d 460, 461 (9th Cir. 1998); McQueary v. Blodgett, 924 F.2d 829, 834 (9th Cir. 1991). Further, inmates are not entitled to identical treatment as other inmates merely because they are all inmates. See Norvell v. Illinois, 373 U.S. 420 (1963). When a suspect class is not implicated, the mere demonstration of inequality is not enough to establish a violation of the equal protection clause; the complainant must allege invidious discriminatory intent. McQueary, 924 F.2d at 834-35. In addition, conclusory allegations alone do not establish an equal protection violation absent proof of invidious discriminatory intent. See Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265 (1977). When a suspect class is not implicated, a court must determine whether the alleged discrimination is "patently arbitrary and bears no rational relationship to a legitimate governmental interest." Vermouth v. Corrothers, 827 F.2d 599, 602 (9th Cir. 1987) (internal quotations omitted).

Here, Plaintiff has failed to allege that he is a member of a suspect class. Moreover, Plaintiff has neither alleged nor demonstrated that Defendants' conduct was the result of purposeful or invidious discrimination, or that the conduct bore no rational relationship to a legitimate governmental interest. Accordingly, the claim will be dismissed without prejudice.

III. Summary Judgment

Defendants moved for summary judgment on January 18, 2007 (Doc. # 39). Defendants argued that they are entitled to summary judgment because (1) Plaintiff failed to establish that the suffered a physical injury as required by 42 U.S.C. § 1997e(e) and (2) frisk, body, or pat-down searches are legitimate means of securing penal institutions (Doc. # 39 at 3-4).

A. Standard

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). When considering a summary judgment motion, the evidence of the non-movant is "to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). These inferences are limited, however, "to those upon which a reasonable jury might return a verdict." Triton Energy Corp. v. Square D. Co. 68 F.3d 1216, 1220 (9th Cir. 1995).

Rule 56(c) mandates the entry of summary judgment against a party who, after adequate time for discovery, fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. Celotex, 477 U.S. at 322-23. Rule 56(e) compels the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial" and not to "rest upon the mere allegations or denials of [the party's] pleading." The nonmoving party must do more than "simply show that there is some metaphysical doubt as to the material facts." Matsushita

Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party. Anderson, 477 U.S. at 249. Summary judgment is warranted if the evidence is "merely colorable" or "not significantly probative." Id. at 249-50.

B. Physical Injury

Defendants first contend that Plaintiff's action for damages must be dismissed because he has not suffered the requisite physical injury required under 42 U.S.C. § 1997e(e) (Doc. # 39 at 3). Defendants argue that because "Plaintiff has neither alleged nor established any physical injury [Plaintiff's action] should be dismissed as a matter of law" (id. at 4).

Under §1997e(e), "[n]o 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." 42 U.S.C. § 1997e(e). The physical injury "need not be significant but must be more than *de minimis*." Oliver v. Keller, 289 F.3d 623, 627 (9th Cir. 2002). The physical injury requirement applies *only* to claims for mental or emotional injuries and does not bar claims for compensatory, nominal or punitive damages. Id. at 630.

In Oliver, the Ninth Circuit found that back and leg pain, a painful canker sore, and undefined injuries from an assault by another prisoner were not more than *de minimis*. Id. Here, Plaintiff has not alleged any physical injury. He thus fails to satisfy the requirement under § 1997e(e) and therefore is not entitled to damages for emotional injury. See Id. at 627-29.

This conclusion, however, does not bar Plaintiff's claims for compensatory, nominal, and punitive damages that are not premised on emotional injury. In Oliver, plaintiff sought punitive damages, which the court construed as "consistent with a claim for nominal damages." Id. at 630. It determined that even absent physical injury, a prisoner was entitled to seek compensatory, nominal and punitive damages premised on violations of his Fourteenth Amendment rights. Id. at 629-30. In his First Amended Complaint, Plaintiff alleged a violation of his constitutional rights and specifically sought declarative,

compensatory, and punitive damages in his request for relief (Doc. # 13 at 7). Thus, to the extent that Plaintiff has actionable claims for compensatory, nominal, and punitive damages based on violations of his Fourth and Eighth Amendment rights, his claims are not barred by § 1997e(e). As a result, Defendants' motion will be granted in part and denied in part on this basis.

C. Fourth Amendment Claim

Count III of Plaintiff's First Amended Complaint alleges that his Fourth Amendment rights were violated by the allegedly unreasonable search conducted by O'Connell. Specifically, Plaintiff averred that O'Connell grabbed his genitals twice and humiliated him in front of ten other detention officers and eighty inmates.

The Fourth Amendment guarantees the right of the people to be secure against unreasonable searches, and its protections are not extinguished upon incarceration. Michenfelder v. Sumner, 860 F.2d 328, 322-33 (9th Cir. 1988). A right of prisoners under the Fourth Amendment not to be subjected to cross-gender, clothed, pat-down searches has not been recognized by the Ninth Circuit. See Jordan v. Gardner, 986 F.2d 1521, 1524-25 (9th Cir. 1993) (en banc); Grummett v. Rushen, 779 F.2d 491, 495 (9th Cir. 1985). *Strip* searches that are "excessive, vindictive, harassing, or unrelated to any legitimate penological interest," however, *may* be unconstitutional. See Michenfelder, 860 F.2d at 332.

Defendants primarily argue that because Plaintiff was clothed in boxer shorts and his body cavities were not searched the search was merely a "frisk search" that did not violate his constitutional rights. Additionally, Defendants argue the search was constitutional because it was conducted (1) to demonstrate to other detention officers how to properly search inmates and (2) in accordance with Maricopa County Sheriff's Office policy DH-3[1].

[1] Policy DH-3 defines a Frisk (Body) Search as "[c]arefully examining an inmate by inspecting his clothing, and feeling the contours of his clothed body. The inmate's shoes and socks may be removed during this process. An inmate's ears, nose, hair and throat may be visually checked during this search" (Doc. # 39 at 5; Doc. # 40, Ex. F).

Even if the subject search was a "frisk search," that does not, *ipso facto*, render it constitutional.[2] Searches "must be otherwise justified by security needs." Grummett, 779 F.2d at 495. While searches are obviously necessary to secure the safety of a jail, there is no evidence that the search of Plaintiff was necessary to security. Defendants merely state the search was "appropriate to maintain a secure correctional facility" (Doc. # 40 at ¶ 6). But the record is wholly devoid of evidence or even discussion, to support the contention that this search was necessary to security or that it furthered a legitimate penological interest. While it is undisputed that the search was conducted during a training exercise for Academy detention officers,[3] Defendants make absolutely no effort to show that the search, conducted as a training exercise, was "justified by security needs." Moreover, there is no evidence to show that Plaintiff was a security risk and that he was singled out as the subject of this search.

Defendants have not proffered any evidence or argument to support the conclusion that the search was reasonable. Consequently, summary judgment on that basis will be denied.

D. Eighth Amendment Claim

Plaintiff claims that O'Connell caused him "wanton and unnecessary" pain when she frisked him, grabbed his genitals twice, and "rame[sic] her index finger through the crack of his buttocks" (Doc. # 13 at 4) in front of more than ten other detention officers and eighty inmates, in violation of his Eighth Amendment rights. "'After incarceration, only the "unnecessary and wanton infliction of pain" . . . constitutes cruel and unusual punishment

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[2] Plaintiff characterizes the search as a body cavity search (Doc. # 13 at 4-6). Defendants have proffered evidence that this was not a body cavity search, but a frisk search over Plaintiff's boxer shorts. But even if Plaintiff mischaracterized the *type* of search to which he was subjected, it does not alter the conclusion that any search is subject to constitutional scrutiny.

[3] Defendants presented evidence to demonstrate that Academy detention officers were at the Durango Jail on the day in question to observe "cell searches." But Defendants also make no effort to explain how a training exercise on cell searches equates to a frisk search on Plaintiff.

forbidden by the Eighth Amendment.'" Whitley v. Albers, 475 U.S. 312, 319 (1986). Plaintiff claims that as a result of the search he suffered public humiliation, mental anguish, psychological trauma, and emotional distress. Defendants have presented no evidence, or discussion, regarding Plaintiff's Eighth Amendment claim.

Plaintiff alleged that he suffered "public humiliation" and "psychological trauma" as a result of the search in his verified First Amended Complaint.[4] Further, in his Response to Defendants' Motion, Plaintiff cites Jordan v. Gardner, 986 F.2d 1521, 1524-25 (9th Cir. 1993) (en banc), which recognized that cross-gender clothed body searches can constitute cruel and unusual punishment (Doc. # 45 at 2). While Jordan dealt with female inmates who were searched by male detention officers, the Ninth Circuit based its ruling primarily on the evidence of great emotional pain and suffering the searches caused the female inmates. Similarly here, Plaintiff has alleged significant emotional distress as a result of the "frisk search," which Plaintiff contends included grabbing his genitals twice and forcibly inserting her finger into the cleft of Plaintiff's buttocks. Defendants fail to address Plaintiff's Eighth Amendment argument. Consequently, summary judgment on that claim will be denied.

IV. Conclusion

Plaintiff has failed to state a claim in Count II of his First Amended Complaint. As a result, that claim will be dismissed. Defendants have, however, demonstrated that Plaintiff is not entitled to damages under 42 U.S.C. § 1997e(e) for mental or emotional injury. Defendants have failed to present evidence to warrant summary judgment as to Counts I and III of Plaintiff's First Amended Complaint. As a result, Defendants' motion will be granted in part and denied in part.

IT IS ORDERED:

(1) Count II of Plaintiff's First Amended Complaint is **dismissed** for failure to state a claim.

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[4]A verified complaint may be used as an affidavit opposing summary judgment if it is based on personal knowledge and sets forth specific facts admissible in evidence. Schroeder v. McDonald, 55 F.3d 454, 460 (9th Cir. 1995).

(2) Defendants' Motion for Summary Judgment (Doc. # 39) is **granted in part and denied in part**.

(3) The motion is **granted** to the extent that Plaintiff is not entitled to damages under 42 U.S.C. § 1997e(e) for mental or emotional injury.

(4) The motion is otherwise **denied**. Plaintiff may proceed as to his claims for compensatory, nominal, and punitive damages based on violations of his Fourth and Eighth Amendment rights.

(5) Plaintiff's Motion for Pre-Trial Order (Doc. # 49) is denied.

(6) Plaintiff's Motion to Allow U.S. District Judge to Rule on this Case and Not a Jury Trial (Doc. # 50) is denied.

DATED this 29th day of May 2007.

Neil V. Wake
United States District Judge