IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Genise Hart, Carmen Feliciano, Ann Francis Gelco, Helen Koss Caprice Morales and Michelle Gandy, individually and and on behalf of a class,	)	
Plaintiffs	)	No. 03 C 1768
vs.	)	JUDGE: James Zagel MAGISTRATE: Ashman
MICHAEL SHEAHAN, SHERIFF OF COOK COUNTY, in his official capacity,	)	
Defendant	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Now come the Plaintiffs, Genise Hart, Carmen Feliciano, Ann Francis Gelco, Helen Koss, Caprice Morales and Michelle Grandy, by and through their attorneys, Thomas G. Morrissey, Ltd., and Robert H. Farley, Jr. Ltd., and file the following response to defendant's Motion to Dismiss.

I. INTRODUCTION

The plaintiffs in this case are current or former pretrial detainees at the Cook County Department of Corrections ("Jail"). As pretrial detainees at the Jail, the plaintiffs are subject to weekend lock downs each month and are confined to their cells starting at 1:30 p.m. on Friday afternoons through late on Sunday afternoons. During the lock downs, correctional officers

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search the tiers and cells of the housing unit, looking for contraband. It takes anywhere from twenty to forty minutes for a team of correctional officers to search a tier. (2nd Amended Comp. par. 17). Plaintiffs contend that the prolonged length of the lock downs serve no legitimate administrative purpose, are harsh and abusive and amount to punishment of pre-trial detainees.

On June 3, 2003, the plaintiffs presented a Motion to File a Second Amended Complaint and the Court set a briefing schedule. In setting a briefing schedule for defendant's current motion to dismiss on September 11, 2003, the Court stated that the plaintiffs are permitted to rely on their Second Amended Complaint in responding to defendant's motion to dismiss.

II. PLAINTIFFS' HAVE STATED A CLAIM UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT USING THE *BELL* STANDARD

The Supreme Court and the Seventh Circuit have drawn a distinction between challenges made by pretrial detainees to the "general practices, rules, and restrictions of pretrial confinement," (the *Bell* standard) and individual challenges made by pretrial detainees to the denial of their "basic human necessities" (the deliberate indifference standard). *Tesch v. County of Green Lake,* 157 F.3d 465, 474 (7th Cir. 1998) . Although the defendant agrees that the plaintiffs have stated a claim under the Due Process Clause, he argues that in reality there is very little difference between a claim brought by a pretrial detainee under the Fourteenth Amendment and the Eighth Amendment when the actions of the Jail are analyzed under a deliberate indifference standard.. (Def. Memo. P.2). In *Bell v. Wolfish,* 441 U.S. 520 (1979) a pretrial detainee may be detained "to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment or otherwise violate the Constitution." *Bell at 536-537.* "[U]nder

the due process clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." (fn. 16-*Bell).*

The issue whether a Fourteenth Amendment claim by a pretrial detainee should be governed under *Bell* or under the deliberate indifference standard turns on whether the claim challenges the general practices, rules and restrictions of pretrial confinement or whether it is asserting a claim involving an isolated instance, for example, where there has been a denial of medical care, risk of suicide or risk of harm from other inmates. *Tesch v. County of Green Lake,* 157 F.3d 465, 474 (7th Cir. 1998) . In *Tesh,* the Seventh Circuit stated that:

> The *Bell* test works well to assess constitutional attacks on general practices, rules, and restrictions of pretrial confinement when the jail official's state of mind is not a disputed issue. See *Hare v. City of Cornith,* 74 F.3d 633, 644 (5th Cir. 1996) (en banc). When the State imposes a general practice, rule, or restriction of pretrial confinement, it manifests its intent to subject all pretrial detainees to that practice, rule, or restriction. Similarly, even in situations in which the State does not mean to deny basic human necessities, we infer the State's intent when the restriction and its effect on pretrial detainees are known and the State imposes the restriction on pretrial detainees anyway. See *id,;* see generally *Shobe*, 93 F.3d at 421; *Wilson,* 83 F.3d at 875. Thus, an appropriate *Bell* test case 'starts with the assumption that the State intended to cause the pretrial detainees's alleged constitutional deprivation." *Hare,* 74 F.3d at 644-45.[1]
>
> *Tesch* at 474-476.

As previously stated, the plaintiffs' lawsuit challenges the constitutionality of the general practice and conditions of confinement during weekend lockdowns and therefore should be considered under the *Bell* standard.

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[1] "When , by contrast, a pretrial detainee's claim of failure to provide medical care or protection from violence does not challenge a condition, practice, or restriction, but rather attacks the episodic acts or omissions of a state jail official, the question is whether that official breached his constitutional duty to tend to the basic human needs of persons in his charge. With episodic acts or omissions, intentionality is no longer a given, and *Bell* offers an ill-fitting test." *Hare v. City of Cornith,* 74 F.3d 633, 645 (5th Cir. 1996).

III. ADMINISTRATIVE GRIEVANCE EXHAUSTION

The Sheriff's Memorandum of Law in Support of his Motion to Dismiss is focused primarily on the issue of whether plaintiff Helen Kos failed to exhaust her administrative grievance. (Def. Memo. p. 3-10) On December 16, 2002, plaintiff Kos filed a grievance stating that " I would like to know what can be done about lock down weekends. I feel it is unconstitutional and unfair." (2nd. Amend. Comp. par. 26.) The parties agree that the Jail never responded to her grievance concerning weekend lock downs. Defendant contends that the plaintiff then had an obligation to Appeal to the Grievance Appeal Panel when she received no response to her grievance. (Def. Memo. p. 7). The John Howard association serves as the monitor of the grievance process at the Jail. According to the Director of the John Howard Association, Charles A. Fasano, the Grievance Appeals Panel did not exist during the year 2002 and therefore was not available to Ms. Kos. (2nd Amend Comp. par. 28). Even assuming Mr. Fasano, as the Court appointed monitor for the grievance process, was mistaken in regards to the existence of the Grievance Appeals Panel at the time plaintiff Kos's grievance was filed, Plaintiff Kos, a seventeen year old inmate at the Jail, should not be faulted for not being aware of the possible existence of the Grievance Appeal Panel.

In addition, the plaintiffs' allege in their Second Amended Complaint that caseworkers at the Jail initially review the written grievances submitted by inmates, and reclassify certain types of grievances as request. (2nd Amend. Comp. par. 24). If a written grievance is reclassified as a request, it is not administratively treated as a grievance, and therefore falls outside the grievance procedures at the Jail. (2nd Amend Comp. par. 24.)

Plaintiffs allege that written grievances challenging weekend lock downs are routinely

reclassified as request and not as grievances. In one instant, Carol Merriweather, an inmate at the Jail filed a written grievance concerning lock down weekends, which was reclassified as a request by a caseworker. The reclassification was then approved by Superintendent Harrison from Division Four (2nd Amend Comp. par. 25). Plaintiffs' Second Amended Complaint has pled sufficient facts to as to the nonexistence of the grievance process for challenging the weekend lock downs .

Under the Prison Litigation Reform Act, inmates need to exhaust only available administrative remedies. *Lewis v. Washington,* 300 F.3d 829, 833 (7th Cir. 2002); *Brown v. Croak,* 312 F.3d 109, 112-13 (3d Cir. 2002); *Miller v. Norris,* 247 F.3d 736, 740 (8th Cir. 2001) See *Davis v. Milwaukee County,* 225 F.Supp.2d 967, 976 (E.D. Wisc. 2002) ("even if plaintiff had known about the PLRA, the absence of materials at the jail about the grievance procedure itself would have prevented him from knowing how to fully exhaust."); *Hall v. Sheahan,* 2001 U.S. Dist. LEXIS 1194 at *3-4 (N.D. Ill. 2002) ("An institution cannot keep inmates in ignorance of the grievance procedure and then fault them for not using it. A grievance procedure that is not made known to inmates is not an 'available' administrative remedy.")

Helen Koss filed a grievance and was not required to file an appeal of the unanswered grievance. Helen Koss exhausted the available administrative remedies. See *Whitmore v. Hurley,* 2002 U.S. Dist. LEXIS 16352 (N.D. Ill. 2002) (Zagel, J.) (rejecting Jail's argument that a pretrial detainee who filed a grievance which went unanswered must file an appeal to exhaust all available administrative remedies under the PLRA).

IV. PROLONG WEEKEND LOCK DOWNS SERVE NO LEGITIMATE PENOLOGICAL OBJECTIVE AND AMOUNT TO PUNISHMENT

The crux of defendant's argument that plaintiffs' have no basis to challenge the constitutionality of the weekend lock down searches is based upon the Jail's legitimate interest in searching the tiers inside the housing units for weapons and contraband. (Def. Memo. p. 2 & 12). This simplistic rationale for week end lock downs demonstrates either an error in comprehending or unwillingness to accept the nature of plaintiffs' claims. The plaintiffs clearly are not challenging the Jail officials right to conduct searches of the living quarters of the Jail. (2nd Amend. Comp. par. 2). The plaintiffs are challenging the arbitrary and purposeless practice of confining pretrial detainees for up to 50 hours in their cells, when it takes less than forty minutes to conduct a search of a tier.[2] Furthermore, the women remain on lock down after their tiers are searched even though it is impossible to either enter or leave a tier without passing through a set of interlock doors. (2nd Amend Comp. par.14, 17, 18). The harshness of the excessive lock down detentions is exasperated not only by the fact that normally three women are confined to a cell which was designed for only two inmates but also due to the fact that many of the women detained in Division Three are suffering from physical and/or psychological conditions. Over the course of a prolonged weekend lock down, it is common for some of these women to become a danger to themselves or to the other detainees in the cell. (2nd Amend Comp. par.8, 19, 39).

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[2] Defendant's citations to *Smith v. Shettle,* 946 F.2d 1250, 1252 (7th Cir. 1991) and *Caldwell v. Miller*, 790 F.2d 589, 604-05 (7th Cir. 1986) which affirm the right of prison officials to hold convicted prisoners under lock down conditions is inapplicable to the arbitrary and purposeless lock downs of the pretrial detainees in the instant case. "Even assuming that the lock down restrictions are permanent, it cannot be said that they brought about conditions of confinement that are qualitatively different from the punishment characteristically suffered by a convict." *Id.* at 604.

In *Zarnes v. Rhodes,* 64 F.3d 285, 291 (7th Cir. 1995), a case filed by an inmate under the Fourteenth Amendment, the Circuit Court stated:

> The government lawfully can incarcerate persons awaiting trial on criminal charges but cannot punish them, *Bell,* 441 U.S. at 534-35, so courts must determine whether the conditions of confinement are imposed with an intent to punish or only pursuant to a legitimate administrative purpose. *Id.* at 538. "If a restriction is not reasonably related to a legitimate goal- -if it is arbitrary or purposeless- -a court permissibly may infer that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees." *Id.* at 539.

In *May v. Sheahan,* 226 F. 3d 876, 884 (7th Cir. 2000), the plaintiff , a pretrial detainee at Cook County Jail was transferred to Cook County Hospital for treatment for AIDS . While at the hospital, pursuant to the Sheriff's policy of shackling hospital detainees, the plaintiff was shackled to his bed despite being guarded 24 hour a day. The plaintiff alleged under the due process clause of the Fourteenth Amendment that the use of bodily restraints amounted to punishment of a pretrial detainee. In response to the Sheriff's argument that shackling hospital detainees is rationally related to legitimate security interest, the Seventh Circuit stated:

> Certainly, shackling all hospital detainees reduces the risk of a breach of security and thus furthers a legitimate non-punitive government purpose. But it is hard to see how shackling an AIDS patient to his or her bed around the clock, despite the continuous presence of a guard, is an appropriate policy for carrying out this purpose. Such a policy is plainly excessive in the absence of any indication that the detainee poses a security risk. *Id.* at 884.

During prolonged weekend lock downs, the inmates are confined to their cells for a time period greater than if they were being punished and placed in solitary confinement. During solitary confinement the inmates are released from their cell for one hour during the day and allowed to shower and use the phone. (2nd Amend. Comp. par. 19-20). During the weekend

lock downs, inmates remain in their cells for excess of 50 hours. The prolong weekend lock down at the Jail is similar to the harsh response condemned by the Supreme Court in *Bell v. Wolfish,* 441 U.S. 539, n.20 where the Court stated:

> Loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

The current prolonged weekend lock down procedures at the Jail amounts to punishment of the pretrial detainees and violates their Fourth and Fourteenth Amendment rights.[3]

In the instant case, the Defendant's harsh and purposeless practice of confining all pretrial detainees in their cells from Friday afternoons trough Sunday evenings despite the fact that it takes at most forty minutes to search a tier, serves no legitimate administrative purpose and amounts to punishment of the pre-trial detainees. Even the court appointed monitor of the Jail, Mr. Fasano, acknowledged in his deposition that are no legitimate penological interests being served by the current prolong weekend lock down procedures at the Jail. (2nd Amend Comp. par. 30).

V. DEFENDANT'S "ATYPICAL AND SIGNIFICANT HARDSHIP" STANDARD APPLIES TO CONVICTED PRISONERS AND NOT PRETRIAL DETAINEES

[3] The defendant's reliance on *Antonelli v. Sheahan,* 81 F. 3d 1422 (7th Cir. 1995), is misplaced as *Antonelli* simply challenged per se lock downs as being arbitrary and capricious without more. The plaintiffs in this case do not challenge the right of the defendant to conduct lock downs but challenge the reasonableness of prolonged weekend lock downs which serve no justifiable administrative purpose at the Jail and amount to punishment of the pre-trial detainees.

Defendant's argument that in order to state a due process claim under the Fourthteenth Amendment, "plaintiff's must demonstrate that the random weekend lock down imposes an "atypical and significant hardship" on them which is significantly different from the ordinary incidence of life in county jail" is wrong. (Def. Memo p.14-15). Defendant's reliance on *Thielman v. Leen*, 282 F. 3d 478 (7th Cir. 2002) is misplaced. The Seventh Circuit in *Thielman* stated that under the Fourteenth Amendment, liberty interests can be based under the Federal Constitution or in limited circumstances it may derive from a procedural claim under state law. *Id.* at 480-484. The statue under which Thielman was claiming a liberty interest permitted the use of restraints while transporting involuntarily committed sexual offenders under Wisconsin law. The Court found that Theilman's incremental complaints of the security measures used while he was transported were not "atypical and significant hardships" in relation to his confinement as a sexually violent person and therefore he did not have a state created liberty interest. Id. 484. The Court's holding in *Theilman* did not involve pretrial detainees substantive due process right not to be subjected to any form of punishment for the crime in which they are being held. *Id.* at p. 484, fn.3.

The defendant attempts to blur the distinction between convicted prisoners and pretrial detainees when he argues that his weekend lockdowns do not constitute "an atypical or significant hardship in relation to the ordinary incident of prison Life." See *Sandin v. Connor,* 515 U.S. 472. 484 (1994). Pretrial detainees may not be placed in punitive lockdowns as a condition of their confinement of being charged with a crime. *Buck v. Lake County Sheriff, 2003 U.S. Dist. Lexis 16048,* (Gottscall, J.). The Seventh Circuit clarified the distinction between convicted prisoners and pretrial detainees in *Rapier v. Harris*, 172 F. 3d 999, 1004 (7th Cir.

1999), as follows:

> Unlike sentenced prisoners for whom much institutional punishment can be considered to be within the parameters of the imposed sentence of confinement, see *Sandin v. Connor*, 515 U.S. 472, 484 132 L. Ed. 2d 418, 115 S.Ct. 2293 (1995), pretrial detainees, serving no sentence and being held only to answer an accusation at trial, have no expectation that simply by virtue of their status as pretrial detainees, they will be subjected to punishment. Indeed, in *Sandin*, the Supreme Court explicitly stated that "*Bell* correctly noted that a detainee "may not be punished prior to an adjudication of guilt in accordance with due process of law" *Sandin*, 515 U.S. at 484 (quoting *Bell*, 441 U.S. 520 at 535)

The defendant may not impose weekend lockdowns on the plaintiffs which are excessive in relation to the limited amount of time required to search a tier, simply as a condition of their confinement because pretrial detainees by the nature of their status are not serving sentences. *Id.* at 1004.

VI. THE CONDITIONS RESULTING FROM THE LOCKDOWNS AMOUNT TO PUNISHMENT

The plaintiffs allege that the conditions under which they are confined during lockdown weekends are much harsher and more severe than the conditions imposed on inmates that are placed in solitary confinement as a result of disciplinary segregation. For instance, pretrial detainees placed in disciplinary segregation are permitted each day to shower, to use the day room for one hour, to exercise and are provided access to the telephone. (2nd Amend Comp. par. 20). Defendant cites a series of cases brought by convicted prisoners for the proposition that the deprivation of certain cultural amenities for convict prisoners such as access to showers, phones, and exercise do not arise to constitutional violations. (Def. Memo. p 15-16). Defendant fails to cite any case which would support the facts here where pretrial detainees are punished by being subjected to conditions more severe than detainees placed in disciplinary segregation.

VII. PLAINTIFFS HAVE STATED A CLAIM FOR DAMAGES AGAINST THE SHERIFF

The Prison Litigation Reform Act applies only to individuals who are incarcerated at the time a case is filed. Plaintiffs Hart, Gelso, Morales and Gandy were not in custody at the time this litigation was filed and therefore the PLRA does not prevent them from pursing damage claims for emotional as well as physical injuries suffered as a consequence of the weekend lockdowns. *Kerr v. Puckett,* 138 F.3d 321, 323 (7th Cir. 1998). As previously stated herein, the Defendant's position that the plaintiffs have failed to assert that the Sheriff has an unconstitutional practice and/or policy which cause the deprivation of the plaintiffs rights is without merit. (Def. Memo. p. 18.) Plaintiffs have alleged that the Sheriff has instituted, sanctioned and approved the weekend lockdown practice and policy and was deliberately indifferent to the rights of the plaintiffs. (2nd Amend Comp. par 52-53). Finally, the plaintiffs have alleged that as a proximate cause of the weekend lockdown practice and policy, they have suffered physical and emotional damages.

Wherefore, the Plaintiffs request that this Court deny the Defendant's Motion to Dismiss the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert H. Farley, Jr., Attorney for the Plaintiffs, deposes and states that he served a copy of the foregoing **Plaintiffs Response To Defendant's Motion To Dismiss** by mailing and faxing a copy to the persons listed below on October 2, 2003.

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