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United States District Court,
E.D. Michigan.

Linda NUNN, et al., Plaintiffs,
v.
MICHIGAN DEPARTMENT OF CORRECTIONS, et al., Defendants.

No. 96–CV–71416. | Feb. 4, 1997.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

OMEARA, J.

***1** Before the court is Defendants' September 17, 1996 motion to dismiss. Plaintiffs filed a response October 16; Defendants replied October 24. The court heard oral argument on November 7 and took the matter under advisement. For the reasons expressed in this opinion, the court grants in part and denies in part Defendants' motion to dismiss.

BACKGROUND

Plaintiffs are women prisoners housed at Scott Correctional Facility and Florence Crane Facility. Their complaint alleges constitutional violations by the Michigan Department of Corrections (MDOC) and its staff that are actionable under 42 U.S.C. § 1983. Plaintiffs seek damages and injunctive relief.

Plaintiffs allege that they "have been subjected to various degrees of sexual assault, sexual harassment, violation of their privacy rights, physical threats and assaults on their persons and retaliation by male employees of the MDOC during their incarceration ." Compl. at ¶ 3. Plaintiffs charge that they are subject to a pattern and practice of sexual harassment and abuse that is the result of MDOC's failure to train properly and discipline its staff.

Defendants have moved to dismiss the case pursuant to Rule 12(b)(6). In their motion to dismiss, Defendants argue that Plaintiffs' claims against the MDOC and monetary damage claims against defendant Kenneth McGinnis in his official capacity are barred by the Eleventh Amendment. Because Plaintiffs have conceded this, these claims will not be discussed here. Defendants raise several other issues, however, that will be addressed in turn.

LAW AND ANALYSIS

A. Standard of Review

When considering a motion to dismiss pursuant to Rule 12(b)(6),

> The district court must construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief.

Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1109 (6th Cir.1995) (citations omitted). A complaint sufficiently complies with the Federal Rules of Civil Procedure if it gives "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Lawler v. Marshall,* 898 F.2d 1196, 1199 (6th Cir.1990) (quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Although the standard pursuant to Rule 12(b)(6) is "decidedly liberal," a plaintiff must set forth more than "bare assertion[s] of legal conclusions" in her pleadings. *In re DeLorean Motor Co.,* 991 F.2d 1236, 1240 (6th Cir.1993) (citing *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir.1988)). A complaint must contain "either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Scheid,* 859

F.2d at 436 (quoting *Car Carriers, Inc. v. Ford Motor Co.,* 745 F.2d 1101, 1106 (7th Cir.1984)) (emphasis in original). However, a "complaint may not be dismissed under Fed.R.Civ.P. 12(b)(6) just because it omits factual allegations, but it may be dismissed when the plaintiffs make it clear that they do not plan to prove an essential element of their case." *La Porte County Republican Comm. v. Board of Comm'rs,* 43 F.3d 1126, 1129 (7th Cir.1994) (citation omitted).

B. Exhaustion of Administrative Remedies

***2** Defendants contend that Plaintiffs' complaint should be dismissed because Plaintiffs have failed to exhaust administrative remedies. Under 42 U.S.C. § 1997e, which was amended effective in April 1996 by the Prison Litigation Reform Act (PLRA), prisoners must exhaust administrative remedies before filing lawsuits with respect to prison conditions. The previous version of section 1997e gave district courts discretion to require exhaustion in certain circumstances. At issue in the present case, which was filed one month before the PLRA was enacted, is whether the PLRA or the old version of section 1997e applies.

Before the PLRA amendment, section 1997e provided,

> Subject to the provisions of paragraph (2) [regarding minimum standards for grievance procedures], in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of [sic] not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

42 U.S.C. § 1997e(a)(1) (West 1994). The amended version reads,

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (West Supp. September, 1996).

Generally, "a court is to apply the law in effect at the time it renders its decision." *Bradley v. Richmond School Bd.,* 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). However, "[r]etroactivity is not favored in the law"; and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). The Supreme Court set forth the following framework for courts to use in determining whether newly enacted statutes should apply to pending cases:

> [T]he court's first task is to determine whether Congress has expressly prescribed the statute's proper reach.... When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i .e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Prod., 511 U.S. 244, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994).

No effective date was specified in the PLRA, which was signed into law on April 26, 1996. The new statute also does not indicate whether section 1997e should be applied to cases pending before its enactment. Because Congress did not provide clear direction regarding retroactivity in the PLRA,[1] this court must determine whether the statute would have a "retroactive effect" on Plaintiffs. *See Jensen v. Clarke,* 94 F.3d 1191, 1202 (8th Cir.1996) ("Nothing in [section 803] of the Act expressly prescribes its reach."). As the Court explained in *Landgraf:*

> ***3** A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, ... or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. *Landgraf,* 114 S.Ct. at 1499.

In the instant case, the issue is whether requiring Plaintiffs

to exhaust administrative remedies and dismissing their suit would "impair rights a party possessed when he acted" or "attach new legal consequences to events completed" before the enactment of the PLRA. Implicit in this analytical framework is the concern that parties may be prejudiced by the retroactive application of a new law. *See Bradley,* 416 U.S. at 711 ("[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.").

Defendants have not cited to any authority holding that the PLRA's exhaustion requirement should be applied to pending cases. Recent cases from the Seventh and Eighth Circuits, however, suggest that it should not. *See Jensen,* 94 F.3d at 1202; *Cooper v. Casey,* 97 F.3d 914, 921 (7th Cir.1996) (following *Jensen*). *But see McCray v. Kralik,* 1996 WL 378273 (S.D.N.Y. July 1, 1996) (applying PLRA provision allowing courts to dismiss meritless claims *sua sponte* to case filed prior to enactment).

In *Jensen v. Clarke,* the court declined to apply the PLRA's attorneys' fee provision to a pending case. *Jensen,* 94 F.3d at 1202. Before the PLRA was codified, the attorneys' fee provision was within section 803, the same section that set forth the exhaustion requirement. Section 803, the Eighth Circuit noted, "is silent on retroactive application." *Id.* at 1203. Section 802, however, specifically provides that it "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." The court stated that "Congress saw fit to tell us which part of the Act was to be retroactively applied, Section 802. The exclusion of Section 803 and its fee provisions from that clear statement is inconsistent with the defendant's argument for retroactivity." *Id* . at 1203.

The *Jensen* court did not suggest that this evidence of congressional intent would end the inquiry; the court engaged in a *Landgraf* analysis and emphasized that "the application of the Act in this case would have the retroactive effect of disappointing reasonable reliance on prior law." *Id.* at 1202. The instant case is analogous to *Jensen* in that a dismissal of Plaintiffs' complaint based upon Plaintiffs' failure to exhaust administrative remedies would have "the retroactive effect of disappointing reasonable reliance on prior law," which would not have required dismissal in the present circumstances. *Id.;* 42 U.S.C. § 1997e(a)(1) (West 1994). Because the PLRA "attaches new legal consequences to events completed before its enactment," it operates retroactively and should not be applied in Plaintiffs' case unless Congress has clearly mandated otherwise. *Landgraf,* 114 S.Ct. at 1505. Because Congress has not clearly expressed a desire that the PLRA exhaustion requirement be applied to pending cases, the court will not do so here.

***4** The court will apply the previous version of section 1997e, which was in effect when Plaintiffs filed their complaint. Under that version of section 1997e, courts did not require prisoners to exhaust administrative remedies when they were seeking damages, reasoning that prisoners could not obtain damages through the grievance system. *See, e.g., Prunty v. Branson,* 1993 WL 328037 (6th Cir. Aug.27, 1993). Prisoners seeking injunctive or declaratory relief, however, were often required to exhaust. *See, e.g., Arvie v. Stalder,* 53 F.3d 702, 705 (5th Cir.1995).

In the present case, Plaintiffs are seeking both damages and injunctive relief. The same situation arose in *Pratt v. Hurley,* 79 F.3d 601, 603 (7th Cir.1996), where the court noted that in mixed relief cases it could "entertain the request for damages while requiring exhaustion of the demand for prospective relief; [or] ... stay proceedings on the request for damages while the prisoner pursues administrative relief." *Id.* at 603. Consistent with *Pratt,* this court will entertain Plaintiffs' claims for damages and stay Plaintiff's claims for injunctive relief so that the injunctive claims, to the extent that they are "grievable," may proceed first through administrative channels.[2]

C. Intentional Infliction of Emotional Distress

Defendants argue that Plaintiffs have "failed to state a cause of action for intentional infliction of emotional distress as set forth within the PLRA." Defs.' Br. at 9. Defendants refer to 42 U.S .C. § 1997e(e), which states,

> No 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) (West Supp.1996). The court does not read Plaintiffs' third cause of action to allege an intentional infliction of emotional distress claim, but rather an Eighth Amendment claim. Compl. at ¶ 90. Further, assuming for the sake of argument that this section of the PLRA applies here, the court finds that it does not bar Plaintiffs' Eighth Amendment claim at this stage. Although Defendants contend that Plaintiffs have not pleaded physical injury, Plaintiffs allege that their emotional distress stems in part from rape and sexual assault suffered at the hands of MDOC employees. The court concludes that allegations of rape and sexual assault are latent with the notion of physical injury sufficiently to support Plaintiffs' claim and to survive a Rule 12(b)(6) motion. Defendants have therefore not stated a basis for dismissing Plaintiffs' Eighth Amendment claim.

D. Plaintiff Stacy Barker's Claims

Defendants assert that Plaintiff Stacy Barker's claims are barred by the statute of limitations[3] and the doctrines of release and res judicata. The parties agree that the statute of limitations for claims brought pursuant to 42 U.S.C. § 1983 is three years. *See Wilson v. Garcia,* 471 U.S. 261, 275, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1983); *O'Brien v. City of Grand Rapids,* 783 F.Supp. 1034 (W.D.Mich.1992). Barker claims that she has been subject to retaliation for reporting sexual misconduct by MDOC employees. Compl. at ¶¶ 76–79. Barker filed suit against a corrections officer in 1993, alleging that he had sexually assaulted her between 1989 and 1991. Pls.' Resp. at 7; Defs .' Br. at Ex. A. The case settled in 1995; Barker signed an agreement releasing Defendants from claims relating to:

> ***5** All matters that were raised by [Barker] or could have been raised by Plaintiff in her First Amended Complaint relating to or resulting from sexual misconduct/assault and overfamiliarity by Defendant Corrections Officer Craig Lamar Keahy between October 1989 and June 1991.
> Defs.' Br. at Ex. A.

Plaintiffs assert that Barker's claims in the present case stem from retaliation Barker suffered after the settlement agreement was signed in 1995. Compl. at ¶ 77; Defs.' Br. at Ex. A. Although Plaintiffs' complaint does not provide dates relevant to Barker's current claims, the complaint does state that Barker suffered retaliation "[f]ollowing a settlement and judgment against the Department of Corrections" and that Barker "has been subject to continued and ongoing verbal harassment and threats specifically for her reporting and civil suit against a male officer for sexual assault." Compl. at ¶¶ 77–78.

Plaintiffs' complaint, coupled with the 1995 settlement agreement (which Defendants have attached to their brief), indicates that Barker's claims arose sometime after July 1995 and derive from behavior that is ongoing. Barker's claims are therefore not barred by the three-year statute of limitations.

Barker's claims are likewise not barred by the doctrine of release. The terms of Barker's settlement agreement do not encompass Barker's current claims, which did not arise out of the incidents that prompted her previous suit. Rather, Barker's current claims concern incidents of retaliation that are distinct from "all matters that were raised by [Barker] or could have been raised" by her in her 1993 suit. Because Barker's claims in the instant suit are different from those litigated in her 1993 case and could not have been raised in that case, the doctrine of res judicata also does not apply. *See Bittinger v. Tecumseh Products Co.,* 915 F.Supp. 885, 888–89 (E.D.Mich.1996) (stating the circumstances under which the doctrine of res judicata will bar a claim).

E. Claims against Defendant Robert Salis

Defendants argue that the claims against defendant Robert Salis should be dismissed because Plaintiffs have failed to make specific factual allegations against him. Salis is identified in the complaint as an assistant deputy warden at the Scott Facility who is responsible for supervising investigations of staff misconduct. Compl. at ¶ 15. Plaintiffs claim that Defendants, including Salis, were aware of sexual assaults committed by MDOC employees yet failed to investigate or discipline those employees. Compl. at ¶¶ 36–38. This failure, Plaintiffs assert, "constitutes an official policy, practice or custom of ratification of these wrongful acts in violation of the constitutional rights of Plaintiffs." Compl. at ¶ 47.

Defendants have not demonstrated how Plaintiffs have failed to state a claim against Salis. Plaintiffs have provided "fair notice of what the plaintiff's claim is and the grounds upon which it rests" and have alleged sufficient facts to support such a claim. *See Lawler v. Marshall,* 898 F.2d 1196, 1199 (6th Cir.1990) (quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Further, a dismissal of defendant Salis would be premature, as Plaintiffs have not been afforded an opportunity to conduct discovery and separate the alleged misconduct of Salis from that of the other defendants.

F. Plaintiffs' Ninth Amendment Claim

***6** Defendants argue that Plaintiffs have not stated a claim under the Ninth Amendment because Plaintiffs "can cite no case supporting this claim." Defs.' Br. at 10. Defendants do not cite any authority for the proposition that Plaintiffs must support their claims with case law in order to survive a motion to dismiss pursuant to Rule 12(b)(6). Further, Plaintiffs' claim is not properly characterized as solely a Ninth Amendment claim; in Plaintiffs' first cause of action, Plaintiffs assert that they have been deprived of their "constitutional right to bodily integrity and right to privacy without due process of law in violation of the Fourth, Ninth, and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983." Compl. at ¶ 86.

Contrary to Defendants' assertion, a person's right to bodily integrity and privacy do survive incarceration, although such rights may be limited. *See, e.g., Canedy v. Boardman,* 16 F.3d 183 (7th Cir.1994); *Dawson v. Kendrick,* 527 F.Supp. 1252, 1288 (S.D.W.V.1981). *See also Wolff v. McDonnell,* 418 U.S. 539, 555–56, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this

country."); *Turner v. Safely,* 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Plaintiffs have alleged sufficient facts to support a claim based upon a constitutional privacy right. Whether that claim derives in part from the Ninth Amendment or the Fourteenth Amendment[4] is irrelevant for the purposes of a motion to dismiss under Rule 12(b)(6). "A complaint need not specify the correct legal theory or point to the right statute to survive a motion to dismiss." *Clorox Co. v. Chromium Corp.,* 158 F.R.D. 120, 123 (N.D.Ill.1994) (citations omitted).

G. Plaintiffs' First and Fourth Amendment Claims

Defendants contend that Plaintiffs' First and Fourth Amendment claims should also be dismissed for failure to state a claim upon which relief may be granted. The court fails to understand Defendants' argument regarding Plaintiffs' First Amendment claim; aside from bare assertions, Defendants do not explain why Plaintiffs' have failed to state a claim. Defs.' Br. at 11–13. Defendants cite *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977), apparently for the proposition that prisoners do not retain any rights under the First Amendment. *Jones* does not stand for that proposition, however. As the Supreme Court explained in that case, "In a prison context, an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." ' *Id.* at 129 (citation omitted). Clearly, *Jones* indicates that First Amendment rights do survive incarceration to some degree.

Defendants also allege that "Plaintiffs have failed to demonstrate that prisoners retain a Fourth Amendment right against alleged unreasonable searches and seizures." Defs.' Br. at 13. Defendants cite cases that are distinguishable from the suit at hand. *See Hudson v. Palmer,* 468 U.S. 517, 525–26, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (prisoners have no reasonable expectation of privacy in their cells); *Bell v. Wolfish,* 441 U.S. 520, 558–60, 99 S.Ct. 1861, 60 L.Ed.2d 447 (visual body-cavity searches not unreasonable after prisoners had contact with visitors from outside the prison). In the present case, Plaintiffs allege that Defendants engage in sexually abusive searches of their persons. Compl. at ¶¶ 66–67. Further factual development and legal analysis are essential before the court will determine that Plaintiffs retain absolutely no Fourth Amendment rights in these circumstances.

H. Plaintiffs' Fourteenth Amendment Claims

***7** Defendants seek dismissal of Plaintiffs' equal protection claim because Plaintiffs have "failed to allege any discriminatory purpose of [sic] effect; nor do they allege that Defendants treated Plaintiffs differently than similarly situated individuals." Defs.' Br. at 13. The court finds that Plaintiffs' allegations of sexual abuse and harassment, and the inferences that can be drawn from those allegations, are sufficient to support an equal protection claim.

Defendants also assert that Plaintiffs' procedural and substantive due process claims are baseless. It is unclear, however, whether Plaintiffs make such claims. Although Plaintiffs mention "due process" in their first and second causes of action, those claims appear to be primarily based on unreasonable searches and seizures and privacy right violations. Compl. at ¶¶ 86, 88.

I. Qualified Immunity

Defendants contend that they are entitled to qualified immunity from civil damage claims. *See Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Defendants are shielded from liability, however, only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. "Clearly established" rights are those that are "sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

Defendants' only argument in favor of immunity is that there are no Supreme Court or Sixth Circuit decisions establishing that supervisory staff are liable for "alleged unlawful conduct in which they did not participate, encourage or were personally involved." Defs.' Br. at 17. On the contrary, a prison staff supervisor may be held liable under 42 U.S.C. § 1983 if the "supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Taylor v. Michigan Dept. of Corrections,* 69 F.3d 76 (6th Cir.1995) (quoting *Bellamy v. Bradley,* 729 F.2d 416, 421 (6th Cir.1984)). Plaintiffs allege that Defendants failed to protect them from continuing sexual abuse and failed to discipline employees who engaged in such behavior, thereby "permitt[ing], encourag[ing] and ratify[ing]" it. Compl. at ¶¶ 32–33, 36–37. In light of the foregoing, Defendants have not demonstrated that they are entitled to qualified immunity.

J. Summary

In sum, Defendants' motion to dismiss is granted with respect to Plaintiffs' claims against the Michigan Department of Corrections and Plaintiffs' monetary

damage claims against defendant McGinnis. The court will entertain Plaintiffs' other damage claims but stay the injunctive relief claims, to the extent that they are "grievable," so that Plaintiffs may proceed first through administrative channels. In all other respects, Defendants' motion to dismiss is denied.

ORDER

***8** IT IS HEREBY ORDERED that Defendants' September 17, 1996 motion to dismiss is GRANTED IN PART with respect to Plaintiffs' claims against the Michigan Department of Corrections and monetary damage claims against Kenneth McGinnis.

It is further ORDERED that Defendants' September 17, 1996 motion to dismiss is DENIED IN PART with respect to Plaintiffs' other claims.

It is further ORDERED that Plaintiffs' "grievable" injunctive relief claims are STAYED so that Plaintiffs may pursue administrative remedies.

Footnotes

1 The legislative history of the PLRA is sparse and unhelpful regarding retroactivity.

2 Plaintiffs contend that some of their claims for injunctive relief involve "non-grievable" issues. "According to the MDOC's own grievance policies, issues which affect the entire prisoner population or significant numbers of prisoners are non-grievable." Pls.' Resp. at 10. The court intends to require exhaustion of administrative remedies only for those claims that are properly "grievable."

3 Defendants also assert that since Plaintiffs have failed to provide dates for the allegations pertaining to Plaintiff Jane Doe and the other unnamed Plaintiffs, their causes of action may also be barred by the statute of limitations. The court observes that paragraphs 81–84 of Plaintiffs' complaint set forth allegations that were occurring at the time the complaint was filed and that are alleged to be ongoing with regard to Jane Doe. The three-year statute of limitations does not bar these claims.

4 *See Griswold v. Connecticut,* 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1967) (recognizing "zones of privacy" created by the First, Third, Fourth, Fifth, and Ninth amendments); *Roe v. Wade,* 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (discussing the right of privacy derived from the Fourteenth Amendment).