UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE SEMELBAUER, et al

Plaintiffs,

vs.

MUSKEGON COUNTY, et al

Defendants.

Case No. 1:14-cv-01245-JTN

HON. JANET T. NEFF

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. Introduction

Plaintiffs, all former female inmates at the Muskegon County Jail (MCJ), filed this action seeking injunctive and monetary relief for unconstitutional conditions of confinement in violation of the Fourth, Eighth and Fourteenth Amendments. In their 44-page First Amended Complaint, Plaintiffs object to numerous physical conditions of the MCJ facility. These grievances also include having to tolerate several hours without sanitary napkins and toilet paper, limited gym time, overcrowding, a three-day delay for shower repairs, and occasionally having to sleep on the floor. Essentially, every single grievance is asserted as a violation of their Eighth and Fourteenth Amendment constitutional rights. Plaintiffs claim male corrections officers routinely observed them while using the toilet or showering. As set forth below, the majority of Plaintiffs' allegations fail to rise to the level of constitutional violations and, therefore, are subject to judgment on the pleadings under Fed. R. Civ. P. 12(c).

II. Statement of Facts

These "facts" are from Plaintiffs' First Amended Complaint. Defendants organized them pursuant to the Counts in the Complaint.[1] All Plaintiffs are "inmates," but there is no designation if they were pre-trial detainees or convicted prisoners at the time of the acts alleged. (See **Dkt. No. 18**, First Amended Complaint, at ¶¶ 29-39)

A. Count I

Count I claims an invasion of privacy for cross-gender viewing by male corrections officers. Plaintiffs assert the following:

[1] Count V relates to Semelbauer's incarceration and is not applicable to the present motion.

- For a time, female inmates were forced to wear a one-piece jumpsuit that would require them to remove the top and expose themselves while using the toilet. This practice was discontinued and female inmates are now provided two-piece uniforms. (***Id***. at ¶¶ 68-69, fn. 2)
- Bosch claims her bra was confiscated. As a result she wore a one-piece jumpsuit and her breasts were exposed while using the toilet. (***Id***. at ¶ 71)
- Vos claims a male corrections officer, Defendant Gutowski, entered her cell to pass medication while she used the toilet naked. Other times, the same officer allegedly removed paper and sheets she used as privacy barriers. (***Id***. at ¶¶ 73-74, 81-83)
- Collins claims she hung a sheet to protect her privacy but it was taken down. (***Id***. at ¶ 78)
- Dorn and Pauley claim they placed paper or sheets over their cell windows, which were removed by corrections officers (CO's). The CO's entered the cells unannounced. (***Id***. at ¶¶ 79-80)
- Dorn, Pauley, and Wickliffe claim male CO's regularly observed them while they changed, showered, or used the toilet. (***Id***. at ¶ 86)

B. Count II

Count II asserts female inmates are deprived of the opportunity to exercise in violation of the Eighth Amendment. Plaintiffs assert the following:

- Semelbauer was not allowed to use the gym during her 30-day incarceration. (***Id***. at ¶ 95)
- Bosch was only allowed to use the gym twice during an alleged 5-month incarceration. (***Id***. at ¶ 93)
- Brown claims she was only allowed to use the gym once during her 3-month incarceration. (***Id***. at ¶ 96) She was allowed to use the gym 3 times during an alleged 5-month incarceration. (***Id.*** at ¶ 98)
- Baker claims she was never allowed to use the gym in either her short incarceration in early 2014, or her subsequent incarceration in November 2014. (***Id***. at ¶ 99)
- Kitchens claims she was never allowed to use the gym during her 8-month incarceration, and had to walk around her cell and the dayroom for exercise. (***Id***. at ¶ 97)
- Collins claims she was allowed to use the gym once. She claims damages of weight gain and muscle mass decline. (***Id***. at ¶¶ 100, 105)
- Vos claims she was only allowed to use the gym twice during an alleged 7.5 month incarceration. (***Id***. at ¶ 94)

- Dorn claims she was allowed to use the gym twice in a 3-month incarceration, and feared a lack of exercise would affect her post-pregnancy health. (***Id***. at ¶ 101, 106)
- Pauley claims she was only allowed to use the gym 3 times in 8 months. (***Id***. at ¶ 102)
- Wickliffe claims she only used the gym twice in 2 months. (***Id***. at ¶ 104)

C. Count III

Count III asserts an Eighth and Fourteenth Amendment violation for alleged denial of access to feminine hygiene products, toilet paper, underwear, and clothing.

1. Feminine Hygiene Products

Plaintiffs assert generally that sanitary napkins are not provided in a timely fashion or sometimes not provided at all. (***Id***. at ¶ 109) Plaintiffs individually assert the following:

- Vos claims she had to wait "several hours" after requesting sanitary napkins. (***Id***. at ¶ 112)
- Kitchens claims she did not receive sanitary napkins "for hours" after she requested them. (***Id***. at ¶ 115)
- Speers claims she begged for sanitary napkins and received them two days later. (***Id***. at ¶ 116)
- Brown claims she requested sanitary napkins and had to wait "approximately eight hours" before they were delivered. (***Id***. at ¶ 117)
- Collins claims she requested sanitary napkins from CO Morris, but did not receive them "for over ten hours" and was unable to receive clean clothing "for several hours." (***Id***. at ¶ 118)
- Wickliffe requested sanitary napkins, and had to wait "almost a day" before receiving them, and "another 24 hours" before she received a clean uniform. (***Id***. at ¶ 119)

2. Toilet Paper

Dorn and Baker "have both been forced to wait hours in order to obtain toilet paper." (***Id***. at ¶ 120)

3. Underwear and Other Clothing

Plaintiffs claim when their clothing was dirty, whether through menstrual bleeding or otherwise, they were not provided clean uniforms until the next laundry day, which occurs once a week. (***Id***. at ¶ 110) They claim MCJ does not provide free underwear. (***Id***. at ¶ 125) Plaintiffs assert the following:

- Bosch claims her unapproved bra was confiscated, and her family was required to purchase another one. (***Id***. at ¶¶ 123-124)
- Speers used the same pair of underwear during her entire incarceration. She went while she washed them. (***Id***. at ¶¶ 126-127)
- Plaintiffs generally assert women were forced to wear towels or sheets when washing their uniforms as additional clothing was not provided. (***Id***. at ¶ 129)

D. Count IV

Count IV asserts an Eighth and Fourteenth Amendment violation for "severe overcrowding and other abysmal conditions". Plaintiffs do not specifically identify the factual basis for this claim, but generally state they have been subjected "to severe overcrowding and other inadequate, unsanitary and dangerous conditions, and prolonged stays in the holding tank, as alleged above." (***Id***. at ¶ 279) Defendants have broken these claims down based on the allegations in the fact section of the complaint.

1. Severe Overcrowding

Plaintiffs' allegations of overcrowding appear to be based primarily on alleged violations of state law. (***Id***. at ¶¶ 159-176) They assert the jail is overcrowded in violation of the Michigan County Jail Overcrowding State of Emergency Act, M.C.L. § 801.51 *et seq*, because the jail daily population routinely exceeds its rated design capacity. (***Id***.) Plaintiffs generally allege the Sheriff's actions were insufficient to alleviate overcrowding. Plaintiffs assert inmates were often required to sleep on cots, floors in the large cells, and in the holding cells. (***Id***. at ¶ 177)

2. Prolonged Stays in Holding Tank

Plaintiffs claim they were kept in an overcrowded holding cell for "extended" periods of time -- for 2 to 7 days. Individually, they state the following:[2]

- Semelbauer claims she was in the holding cell for 3-4 days, and was assaulted by another inmate. (***Id***. at ¶¶ 140-141)
- Bosch claims she was in the holding cell for 7 days. (***Id***. at ¶138)
- Brown claims she was in the holding cell for 2 days. (***Id***. at ¶ 139)
- Collins claims she was kept in the holding cell for 4-5 days. (***Id***. at ¶142)
- Speers claims she was in the holding cell for 7 days while suffering opiate withdrawals and not given a mat or bedding. She claims she was not allowed to shower during this time, had to sleep next to a toilet, and had "ants crawling over her and up her nose." (***Id***. at ¶¶ 135-137)
- Pauley claims she was in the holding cell for approximately 3 days. (***Id***. at ¶ 143)
- Baker claims she was in the holding cell for approximately 3 days, during which time the sink was broken and she could only have water with her meals. (***Id***. at ¶ 144)

3. "Other Abysmal Conditions"

Plaintiffs' allegation regarding "other abysmal conditions" is not entirely clear. It seems to be based on general statements pertaining to the poor physical condition of the jail such as mold, insect infestations, and various sewage and plumbing issues. It is asserted the shower stalls did not drain properly and inmates sometimes showered in standing water and blood left by prior inmates. (***Id***. at ¶¶ 145-151) These allegations were delineated by the following claims of the individual Plaintiffs:

- Bosch claims her cell shower did not work for 3 days. (***Id***. at ¶ 152) She was burned by hot water which spilled from a tote she was attempting to store it in, and claims the CO's refused to take her to the medical unit. (***Id***. at ¶154)

[2] While this motion is based on Fed. R. Civ. P. 12(c), and, therefore, the Court should not take into consideration materials outside the pleadings, Defendants assert the alleged time these inmates were kept in the holding cells is directly refuted by the actual records, which clearly demonstrate most, if not all, of the claims are exaggerated, as most of the individuals spent no more than a few hours in the holding cells. (See **Dkt. Nos. 15-16**, **29**, with accompanying inmate log exhibits)

- Brown was allegedly burned by hot water. (***Id***. at ¶ 187)
- Speers asserts she was burned by hot water and provided medicinal shampoo. (***Id***. at ¶ 155)

Plaintiffs also assert MCJ has a "non-functioning" complaint system and made the following allegations regarding the system and medical issues:

- Bosch claims to have filed at least 20 grievances, which included a complaint of an alleged MRSA infection, though she does not allege to have contracted a disease. (***Id***. at ¶ 184)
- Vos claims her medical requests regarding an abscessed tooth were ignored, she was not allowed to see a doctor, and was only provided Tylenol for the pain. (***Id***. at ¶ 185)
- Brown's grievances stated the showers were too hot and she was burned, but these were ignored. (***Id***. at ¶ 187)
- Brown was placed in a suicide smock for an undisclosed period of time, allegedly for writing a grievance. (***Id***. at ¶ 188)
- Speers claims she wrote grievances about excessive detention in the holding cell, "abysmal conditions of the facility," alleged threats by other inmates, and mistreatment by CO's, but received no response. (***Id***. at ¶ 189)
- Speers claims she was placed in an anti-suicide suit for writing grievances. (***Id***. at ¶ 194)
- Collins, Wickliffe, and Pauley claim they filed grievances which were ignored. (***Id***. at ¶¶ 195-197)

III. Standard of Review

Pursuant to Fed. R. Civ. P. 12(c), any party may move for judgment on the pleadings. Judgment on the pleadings should be granted if the moving party clearly establishes it is entitled to judgment as a matter of law based upon the allegations in the Complaint. The standard of review used in determining a motion to dismiss pursuant to 12(b)(6) is also used in determining a motion for judgment on the pleadings under 12(c). ***Ziegler v. IBP Hog Market, Inc.***, 249 F.3d 509, 511-12 (6th Cir. 2001).

"[A] court considering a motion to dismiss under Rule 12(b)(6) must accept all well-pleaded factual allegations of the complaint as true and construe the complaint in

the light most favorable to the plaintiff." ***Benzon v. Morgan Stanley Distribs.***, 420 F.3d 598, 605 (6th Cir. 2005) (internal quotation marks and citations omitted). The court must determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." ***Ashcroft v. Iqbal***, 556 U.S. 662, 678 (2009) (internal quotations omitted). To state a valid claim under 42 U.S.C. § 1983, Plaintiffs must allege the violation of a right secured by the federal Constitution or federal laws, and that the violation was committed by a person acting under color of state law. ***West v. Atkins***, 487 U.S. 42, 48 (1988).

IV. Argument

Counts II-IV, challenging the conditions of confinement, are based on either the Eighth or Fourteenth Amendment, depending on whether the Plaintiffs were convicted prisoners or pre-trial detainees. Count I, based on cross-gender viewing, seems most appropriately considered under the Fourth Amendment. Because the bulk of the claims fall under the Eighth/Fourteenth Amendment, they will be addressed first.

A. Eighth Amendment/Fourteenth Amendment conditions of confinement claims, generally

Plaintiffs raise their claims under the Eighth and Fourteenth Amendments. The Eighth Amendment covers conditions of confinement claims for convicted inmates, while pretrial detainees are protected by the Fourteenth Amendment. ***City of Revere v. Mass. Gen. Hosp.***, 463 U.S. 239, 244 (1983); ***Rhodes v. Chapman***, 452 U.S. 337 (1981); ***Graham v. County of Washtenaw***, 358 F.3d 377 (6th Cir. 2004). However, claims under the Fourteenth Amendment are analogous to those under the Eighth Amendment. The standard applicable to Eighth Amendment claims is used to analyze

both types of claims. See ***Barber v. City of Salem, Ohio***, 953 F.2d 232, 235 (6th Cir. 1992).

Claims brought under the Eighth Amendment have both objective and subjective elements. The objective element requires the deprivation be "sufficiently serious." ***Rhodes***, *supra* at 348–49. A condition of confinement violates the Constitution only if it results in "unquestioned and serious deprivations of basic human needs." ***Id***. at 347. "Only those deprivations denying 'the minimalized measure of life's necessities' may form the basis of an Eighth Amendment violation." ***Gibson v. Foltz***, 963 F.2d 851 (6th Cir. 1992) (quoting ***Wilson v. Seiter***, 501 U.S. 294 (1991)). The Eighth Amendment is only concerned with "deprivations of essential food, medical care, or sanitation" or "other conditions intolerable for prison confinement." ***Rhodes***, *supra* at 348 (citation omitted). That is, complaints of routine discomforts will not state a claim under this test as routine discomfort is accepted as part of the penalty a criminal must pay. ***Id***. at 347. The length of time an inmate is subjected to certain conditions of confinement is relevant in determining whether the confinement meets constitutional standards. See ***Hutto v. Finney***, 437 U.S. 678, 686–87 (1978) ("A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months."); ***Metcalf v. Veita***, 156 F.3d 1231, 1998 WL 476254, at *2 (Table) (6th Cir. 1998) (finding that an eight-day denial of showers, trash removal, cleaning, and laundry did not result in serious pain or offend contemporary standards of decency under the Eighth Amendment).

In addressing this objective component, the Sixth Circuit has made clear that "a plaintiff's Eighth Amendment claim may not be based on the totality of the

circumstances, but rather must identify a specific condition that violates the inmate's right to personal safety." ***Walker v. Mintzes***, 771 F.2d 920, 925 (6th Cir. 1985); see also ***Carver v. Knox County, Tenn.***, 887 F.2d 1287, 1293-94 (6th Cir. 1989) ("This court has rejected a "totality of the circumstances" approach to deciding Eighth Amendment claims of cruel and unusual punishment. That approach is likewise not permitted in dealing with Fourteenth Amendment claims by pretrial detainees.")(internal citations omitted); ***Thompson v. County of Medina***, 29 F.3d 238, 242 (6th Cir. 1994). There is only one narrow exception to this general prohibition against consideration of the totality of circumstances: when certain conditions viewed together have a "mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise." ***Wilson***, *supra* at 304; ***Thompson***, *supra* at 242. That is, "[i]n certain extreme circumstances the totality itself may amount to an eighth amendment violation, but there still must exist a specific condition on which to base the eighth amendment claim." ***Walker***, *supra*. However, "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." ***Wilson***, *supra*; see also, e.g., ***Dean v. Campbell***, 156 F.3d 1229, 1998 WL 466137 (Table) (6th Cir. 1998) ("[Plaintiff's] allegations of cold temperatures in his cell, lack of cold water in his cell, cold meals for a short period of time, lack of a broom, and limited recreation opportunities also fail to allege facts showing that he was subjected to the type of extreme deprivations which are necessary for an Eighth Amendment conditions of confinement claim."). Under this general framework, Defendants will address the objective components of Plaintiffs' claims.

1. Plaintiffs' denial of exercise allegations fail to state a valid claim

Plaintiffs assert female inmates were denied exercise opportunities. The Courts have recognized that physical exercise is a necessity to maintain good physical and mental health. ***Patterson v. Mintzes***, 717 F.2d 284, 289 (6th Cir. 1983). However, the Sixth Circuit has never set a minimum, constitutionally-required amount of exercise.

> That said, the Sixth Circuit has held that every prisoner is not entitled to the same amount of exercise per day, nor is there an across the board constitutional minimum of daily exercise for prisoners. ***Rodgers*** [***v. Jabe***, 43 F.3d 1082, 1086-88 (6th Cir. 1995)]. In fact, the Sixth Circuit has explained that it has "addressed restrictions on a prisoner's leeway to exercise[,]" but that it has not "set a minimum amount of exercise required in order to avoid violating the Eighth Amendment[.]" ***Id***. at 1086. Moreover, the Sixth Circuit has stated that it has "stopped far short of endorsing [a specific] amount, or indeed any amount, as a constitutional requirement." ***Id***. at 1087.

Koubriti v. Rojo, Case No 05-cv-74343; 2007 WL 2178331 (E.D.Mich. 2007) The Court in ***Koubriti*** found that access to a common area that was approximately 18 feet 6 inches by 9 feet for one hour per day was sufficient to meet the constitutional standard for exercise. This 167 square feet was held sufficient to permit indoor exercise.

In ***Grzelak v. Ballweg***, No. 2:14-31, 2014 WL 5101333 (W.D.Mich. 2014), the plaintiff inmate made a claim similar to the Plaintiffs here. The plaintiff inmate alleged that he was only allowed out-of-cell exercise in the prison yard for six one-hour periods over a twelve-month incarceration. Judge Edgar found this was insufficient to state a valid Eighth Amendment denial-of-exercise claim. Particularly, the Court held the "[p]laintiff fail[ed] to allege facts showing that he was prevented from engaging in other forms of exercise, such as 'running in place, doing push-ups, setups, or other exercises in his jail cell or elsewhere in the jail facility.'" ***Id***. at *4 (quoting ***Deleon v. Hamilton***

Cnty. Sheriff's Dept., 1:12-cv-68, 2012 WL 3116280, at *17 (E.D.Tenn. July 31, 2012)); see also ***Rahman X v. Morgan***, 300 F.3d 970, 974 (8th Cir. 2002) (inability to go outside for three months was not a constitutional violation).

Here, Plaintiffs generally allege they are denied exercise opportunities, but the facts pled in support of this claim are insufficient to state an actual Eighth Amendment violation. These claims are summarized in Section II.B., *supra*. None of the Plaintiffs assert they were completely denied all exercise opportunities. None of the Plaintiffs claim they were unable to engage in any form of exercise in their cells, such as "as 'running in place, doing push-ups, setups, or other exercises". In fact, Kitchens specifically claims she did engage in exercise within her cell, such as walking around the day room. (**Dkt. No. 18**, at ¶ 97) Therefore, they have failed to allege there has been a total or near-total deprivation of the opportunity to exercise.

The real crux of the Plaintiffs' claim is their assertion of a constitutional right to exercise of their choice. That is, they claim it was a violation of their constitutional rights because MCJ staff did not allow them to use the Jail's exercise room more frequently.[3] Only Kitchens, Baker, and Semelbauer assert they were never allowed to use the gym facility. However, as noted above, Kitchens admitted that she was permitted to exercise in the dayroom. Semelbauer was only in the jail for one month. While she claims she was never permitted to use the gym, the duration of her incarceration is less than the two-month per one-hour out-of-cell exercise permitted in ***Grzelak***. Baker does not state the length of time she was in the jail during either of her two 2014 incarcerations, so

[3] Plaintiffs have raised this as an Eighth Amendment denial of exercise claim as to female inmates, but have not asserted an equal protection or gender-based discrimination claim.

based on the pleadings it is impossible to determine how long she claims to have been denied any out-of-cell activity.

As for the remaining inmates, each admits to being permitted out-of-cell exercise in the gym, however, not at the frequency they apparently desired. For example, Brown claims she was allowed to use the gym 4 times over 8 months, Wickliffe twice in 2 months, Pauley 3 times in 8 months, etc. That is, these inmates were averaging one-to-two trips to the Jail's gym every couple months. This is consistent with the allegations in ***Grzelak*** and ***Rahman X***, which both this District and the Eighth Circuit found did not support an Eighth Amendment violation. Plaintiffs here have similarly failed to state a colorable Eighth Amendment denial of exercise claim and judgment on the pleadings is appropriate.

2. Plaintiffs' denial of feminine hygiene products fails to state a valid claim

As noted above, the length of time an inmate is subjected to the alleged condition is important in determining the constitutional question. Courts have held the deprivation must represent an "extreme discomfort" or the complete denial of these items to violate the constitution. See ***Argue v. Hofmeyer***, 80 Fed. Appx. 427, 420 (6th Cir. 2003); ***Carver v. Knox Cnty., Tenn.***, 753 F. Supp. 1370, 1389 (E.D.Tenn. 1989) aff'd in part, rev'd in part, 887 F.2d 1287 (6th Cir. 1989). However, the Courts have consistently held that short-term deprivations of such items fail to raise a colorable constitutional claim. See, e.g., ***Metcalf***, *supra* (8-day denial of showers, trash removal, cleaning, and laundry did not state a claim); ***Gilland v. Owens***, 718 F. Supp. 665, 685 (W.D.Tenn. 1989) ("Short term deprivations of toilet paper, towels, sheets, blankets, mattresses, toothpaste, toothbrushes and the like do not rise to the level of a

constitutional violation."). Further, allegations that only a limited supply of hygiene materials is provided fail to raise constitutional claims. See ***Hunter v. Helton***, No 1:10-cv-21, 2010 WL 2405092 (M.D.Tenn. 2010) (limit of one roll of toilet paper per inmate per week does not state Eighth Amendment violation); ***Redwine v. Rutherford County***, No. 3:15-CV-00244, 2015 WL 2185911, at *3 (M.D.Tenn. 2015) (limited but regular supply of hygiene products does not violate constitution).

The Sixth Circuit and its district courts are consistent with other circuits when considering such short-term deprivations as alleged here. For example, the denial of clean underwear for 20 days was found to not be an unconstitutional condition of confinement in ***Difilippo v. Vaughn***, No. CIV 95-909, 1996 WL 355336 (E.D.Pa. 1996). See also ***Adderly v. Ferrier***, 419 Fed. Appx. 135, 139–40 (3d Cir. 2011) (finding denial of clothing, toiletries, legal mail, mattress and shower for seven days did not constitute Eighth Amendment violation); ***O'Leary v. Iowa State Men's Reformatory***, 79 F.3d 82, 83–84 (8th Cir. 1996) (several days without underwear, blankets, mattress, exercise and visits is not a violation of Eighth Amendment).

Plaintiffs make the general allegation MCJ and Muskegon County have denied feminine hygiene products to female inmates. However, their individual factual assertions undermine this general proposition. That is, none of the Plaintiffs actually assert they were denied feminine hygiene products. Rather, each alleges a single, temporary delayed delivery of sanitary napkins. For example, Plaintiff Vos was incarcerated for approximately 7.5 months, but alleges one time when she waited several hours to receive feminine hygiene products. Similarly, Plaintiff Kitchens was incarcerated for 8 months, but only asserts a single delayed delivery of feminine

hygiene products. Only Speers asserts a delay of more than 24 hours. Some of the Plaintiffs do not even allege a delay in receiving supplies. None of them actually claim they were denied sanitary products. None of the Plaintiffs allege any physical injury, exposure or increased risk of exposure to health hazards as a result of these minor delays. Based on the case law cited above, such short-term deprivations as alleged cannot support a constitutional violation.

3. Plaintiffs' denial of toilet paper fails to state a valid claim

Two inmates, Dorn and Baker, assert they had to "wait hours" before receiving toilet paper. Courts have consistently held that such a claim is insufficient to state a claim. See, e.g., ***Sublett v. White***, No. 5:12CV-P180-R, 2013 WL 2303249, at *1 (W.D.Ky. 2013) (48 hours without toilet paper does not violate the constitution); ***Hunter***, *supra*; ***Harris v. Fleming***, 839 F.2d 1232, 1235–36 (7th Cir. 1988) (no constitutional violation where prison officials failed to provide prisoner with toilet paper for five days, and with soap, toothbrush, and toothpaste for ten days); ***Gilson v. Cox***, 711 F. Supp. 354, 355 (E.D.Mich. 1989) (allegation that individual officer refused to provide toilet paper upon demand of inmate failed to state a constitutional violation). Similarly, Plaintiffs' claims must also fail.

4. Plaintiffs' allegations regarding clean clothing and free undergarments fail to state a valid claim

Included in their claims pertaining to toilet paper and feminine hygiene products, Plaintiffs also allege inadequate laundry and undergarment supplies. Plaintiffs seem to claim it is a constitutional violation for MCJ not to provide additional, free underwear. This Court recently rejected a similar claim in ***Mitchell v. Kalamazoo County Sheriff's Dep't***, No. 1:14-CV-824, 2014 WL 7330974 (W.D.Mich. 2014) (Neff, J.). There, this

Court held "[t]he jail's failure to provide additional free items, such as deodorant, body lotion, wash cloths, underwear and socks does not constitute the denial of the 'minimal civilized measure of life's necessities.'" ***Id***. at *6 (citing ***Rhodes***, *supra* at 347). The same is true here and, therefore, Plaintiffs' claim must be dismissed.

5. Plaintiffs' general overcrowding allegations fail to state a valid claim

It is clearly established overcrowding, in and of itself, is not necessarily unconstitutional. ***Johnson v. Hefron***, 88 F.3d 404, 407 (6th Cir. 1996) (citing ***Rhodes***, *supra*). Further, it is established that violations of state statutes or administrative rules are not constitutional violations, as § 1983 is designed to remedy violations of federal law, only. ***Lugar v. Edmondson Oil Co.***, 457 U.S. 922, 924 (1982); ***Laney v. Farley***, 501 F.3d 577, 581 n.2 (6th Cir. 2007); ***Smith v. Freland***, 954 F.2d 343, 347–48 (6th Cir. 1992). Therefore, to the extent Plaintiffs' complaint asserts a § 1983 claim based on the alleged violation of Michigan's County Jail Overcrowding State of Emergency Act, it must be dismissed.

6. Plaintiffs' allegations regarding sleeping on floors and/or cots and their time in the holding cell fail to state valid claims

Plaintiffs allege the overcrowding at MCJ caused some inmates to sleep on the floor or on cots in the dayrooms, and those kept in the holding cell were forced to sleep on the floor without a mattress. However, inmates do not have a constitutional right to a raised bed. ***Mann v. Smith***, 796 F.2d 79, 85 (5th Cir. 1986); ***Shelton v. Christian County Jail***, No. 5:14-CV-P146-GNS, 2015 WL 236853 (W.D.Ky. 2015) ("Plaintiff's allegations that inmates must eat and sleep on the floor are not deprivations of the minimal civilized measure of life's necessities. Further, Plaintiff's allegations that

overcrowding has caused health problems, inadequate safety, and a hostile environment are entirely conclusory and, therefore, 'insufficient to state a claim.'") (quoting ***Dellis v. Corr. Corp. of Am.***, 257 F.3d 508, 511 (6th Cir. 2001)). Short term deprivations of mattresses do not raise constitutional claims. See ***Grissom v. Davis***, 55 Fed. Appx. 756, 758 (6th Cir. 2003) (7-day deprivation of a mattress and bedding did not violate the Eighth Amendment); ***Jones v. Toombs***, 77 F.3d 482, 1996 WL 67750 (Table) (6th Cir. 1996) (2-week deprivation of a mattress is not a constitutional violation); ***Hubbard v. Taylor***, 538 F.3d 229, 235 (3d Cir. 2008) (forcing pretrial detainees to sleep on a floor mattress for 3 to 7 months due to overcrowding is not a constitutional violation).

Here, none of the individual Plaintiffs allege they were required to sleep on a cot. Rather, the basis of their claims seems to be that during the times they allegedly were kept in the holding cell, they were forced to sleep on the floor without a mattress or bedding. The longest any of the Plaintiffs alleges she was kept in the holding cell was 7 days (Bosch, Speers), while the others allege anywhere from 2 to 5 days. As noted above, such short-term deprivations are insufficient to sustain a valid Eighth Amendment claim.

Plaintiffs also made allegations concerning the conditions of the holding cell during their temporary confinement there. For example, Baker claimed the sink was broken, which meant she and others could only have water during their meals. This does not rise to the level of a constitutional violation. See ***Hartsfield v. Vidor***, 199 F.3d 305, 310 (6th Cir. 1999) ("deprivations of fresh water and access to a toilet for a 20–hour period, while harsh, were not cruel and unusual punishment"). Speers asserts she

was not allowed to shower and was subjected to ants crawling on her while she slept. This, too, is insufficient to state a valid claim. See ***Davis v. Scott***, 157 F.3d 1003, 1006 (5th Cir.1998) (finding that a prisoner's exposure for three days to a filthy cell with "blood on the walls and excretion on the floors" was not cruel and unusual punishment); ***Taylor v. Luttrell***, No. 06-2522, 2008 WL 4065927 (E.D.Tenn. 2008) (finding claims involving improperly-cleaned showers, dirty mattresses, accumulated dust and dirt, and infestations of insects must rise above ordinary discomfort). None of the allegations made by the Plaintiffs concerning their stays in the holding cell rise to the level of a valid constitutional claim.

Also, Semelbauer claimed while she was in the holding cell, she was assaulted by another inmate. None of the other Plaintiffs' made similar allegations of physical altercations or threats to their safety by inmates. To the extent Semelbauer asserted a claim based on this assault, she failed to state facts to support a failure-to-protect claim. See ***Bishop v. Hackell***, 636 F.3d 757, 766 (6th Cir. 2011) (in failure-to-protect claim, plaintiff must show she was "incarcerated under conditions positing a substantial risk of harm," and that jail officials, aware of that substantial risk, disregarded it). Semelbauer has not alleged she was a particularly vulnerable person, or she ever complained her health or welfare had been threatened by another inmate. See ***Id***.; ***Greene v. Bowles***, 361 F.3d 290 (6th Cir. 2004). Therefore, to the extent she made a "failure-to-protect" claim, she failed to plead sufficient facts to support it, and it must be dismissed.

7. Plaintiffs' allegations regarding the plumbing, other temporary water issues, and falling ceiling tiles fail to state a valid claim

Plaintiffs have made allegations concerning the overall state of plumbing at MCJ, with several specific factual allegations. For example, Bosch claimed her shower did

not work for 3 days, the water in her cell was too hot and it burned her. However, an alleged lack of cold water in one's cell does not state an Eighth Amendment claim. ***Dean v. Campbell***, 156 F.3d 1229 (6th Cir. 1998). Similarly, a lack of hot water does not constitute an extreme deprivation. See ***Preston v. Smith***, 750 F.2d 530, 534 (6th Cir. 1984) (finding no constitutional violation for confinement in a segregation cell without mattress or hot water); ***Frazier v. George***, No. 1:12-CV-00128, 2014 WL 4979315 (M.D.Tenn. 2014) (finding no constitutional violation where inmate went two and a half weeks without hot water or ability to shower). The Sixth Circuit has concluded that deprivation of a shower and other personal hygiene items for a "brief span of time ..., i.e., only six days" is not actionable conduct. ***Siller v. Dean***, 205 F.3d 1341, 2000 WL 145167 (Table) (6th Cir. 2000). Therefore, the allegations that inmates may have had to go several days without working showers, or even up to a week without hot or cold water sufficient to shower, fail to state valid constitutional claims.

Plaintiffs also assert there were times excrement overflowed from their toilets, and the showers sometimes did not drain, forcing the inmates to stand in dirty and sometimes bloody water. These allegations are no different than those routinely rejected by Courts throughout this Circuit. See, e.g., ***Anthony v. Bradley Cnty. Justice Ctr.***, No. 1:12-CV-303, 2015 WL 1206620, at *9 (E.D.Tenn. 2015) (finding that claims of frequent toilet backups failed to state a valid claim because "even in the free world, toilets back up and bad odors which cannot be eliminated must be endured" and "while Plaintiffs claim waste from other toilets collects in the toilet in their cell is an everyday occurrence, they have not specified the length of time to which they have been exposed to the sewer backup."); ***Taylor***, *supra*.

With regard to the ceiling tiles, none of the Plaintiffs have alleged they were injured by a ceiling tile, or that the condition of the physical building represents an unreasonable risk of injury. As such, they have failed to establish that some alleged crumbling ceiling tiles constitutes an unconstitutional condition of confinement.

The Prison Litigation Reform Act's requirement of physical injury merits review. The Sixth Circuit held that whether the PLRA's requirements apply to a particular case depends on the status of the plaintiff at the time suit is filed. ***Cox v. Mayer***, 332 F.3d 422, 424–45 (6th Cir. 2013) (holding that an intervening release does not excuse failure to exhaust remedies, since it is the status of the plaintiff at the time the suit was brought that governs). Here, Collins was an inmate when the suit was initially filed and, according to the amended complaint, Wickliffe, Dorn, and Pauley were also inmates at that time. Therefore, those inmates must show they suffered an actual physical injury with regard to each of their claims. None of these Plaintiffs allege a physical injury as a result of any of the conditions of confinement of which they complain and, therefore, the complaint fails to state a claim as to them.

8. Plaintiffs' allegations regarding the grievance system fail to state a valid claim

There is no constitutional or federal right to an effective grievance system. See, e.g., ***Shelton v. Christian Cnty. Jail***, No. 5:14-CV-P146-GNS, 2015 WL 236853, at *1 (W.D.Ky. 2015) (summarizing and collecting cases on point). Plaintiffs have conceded this is not the basis for any of their claims. (See **Dkt. No. 21**, at 8, fn. 6) However, included within their allegations regarding the grievance system, Plaintiffs seem to assert individual deliberate indifference claims concerning medical care.

Similar to the conditions of confinement claims, to succeed on a claim of deliberate indifference to serious medical needs, Plaintiffs must satisfy, at a minimum, two elements: an objective one and a subjective one. ***Comstock v. McCray***, 273 F.3d 693, 702 (6th Cir. 2001). The objective component requires admissible evidence that the medical need is sufficiently serious, and is satisfied "[w]here the seriousness of a prisoner's need[] for medical care is obvious even to a lay person." ***Blackmore v. Kalamazoo County***, 390 F.3d 890, 899 (6th Cir. 2004). The subjective component requires an inmate to show that prison officials have "a sufficiently culpable state of mind in denying medical care." ***Id***. (quoting ***Brown v. Bargery***, 207 F.3d 863, 867 (6th Cir. 2000)).

Bosch alleges she complained about an possible MRSA outbreak in her cell, but does not claim she was infected. Therefore, to the extent she asserts deliberate indifference to a medical need, it fails because she cannot show she suffered an objectively serious medical condition.

Vos claims she complained about an abscessed tooth, but was denied access to a doctor and later was provided Tylenol for pain. She has not identified an individual Defendant who may have been aware of her alleged medical condition and chose to ignore it. Therefore, she has failed to state a claim. Further, she admitted receipt of some medical treatment (Tylenol), but has not asserted medical evidence of a detrimental effect from the delay or alleged inadequacy of the treatment. See ***Westlake***

v. Lucas, 537 F.2d 857, 860 n.5 (6th Cir. 1976); ***Napier v. Madison County, Kentucky***, 238 F.3d 739, 742 (6th Cir. 2001).[4]

Brown claims she wrote a grievance stating she was burned by hot water, but does not assert an actual injury, if an individual Defendant was aware of the alleged medical condition, or a Defendant was aware of the condition and ignored it. Bosch made a similar claim that hot water burned her scalp, but did not indicate which, if any, Defendants were aware of and ignored her medical condition. Therefore, they have also failed to state a valid medical claim.

9. All of Plaintiffs' conditions of confinement claims fail the subjective test

With regard to all claims which pertain to the condition of the jail (i.e., those related to overcrowding, plumbing, water, sanitation, falling ceiling tiles, insects, etc.), Plaintiffs cannot establish the subjective component of their claims. That is, Plaintiffs cannot establish Muskegon County and its individual officials were aware of the complained-of conditions and failed to take constitutionally adequate steps to address those issues.

First, and most importantly, Plaintiffs admit in their complaint Muskegon County is in the process of completing construction of a new jail, which Defendants assert will eliminate the majority, if not all, of Plaintiffs' complained-of activities and conditions. The planning, funding, and construction of the new facility is direct evidence that Muskegon County is not deliberately indifferent to the conditions of its current jail but, rather, is taking direct action to alleviate those conditions.

[4] Speers also asserts her scalp was burned, but admits she received medicinal shampoo as a result. Thus, it does not seem she made an allegation regarding her medical treatment.

With regard to specific allegations, Defendants assert Plaintiffs cannot establish the subjective component, either. As to the feminine hygiene, toilet paper, and laundry claims, none of the Plaintiffs alleged they were denied access, rather, only experienced temporary delays. Plaintiffs have not sufficiently pled an individual Defendant was sufficiently aware that temporary delays could result in violations of the inmates' constitutional rights and, despite that knowledge, still refused to provide the necessary items. Similarly, Plaintiffs have not alleged an individual Defendant was aware Plaintiffs were not given an opportunity for adequate exercise in the large 12-person cells or the dayroom and, despite that knowledge, refused access to the gym. In general, Plaintiffs failed to plead facts sufficient to establish the subjective component to their Eighth or Fourteenth Amendment claims. As such, their claims must be dismissed.

B. Plaintiffs' cross-gender viewing claim

The Fourth Amendment protects the privacy rights of female inmates, and restricts the government's right to unreasonable or unnecessary cross-gender viewing. ***Everson v. Dep't of Corrs.***, 391 F.3d 737 (6th Cir. 2004). The Sixth Circuit "has recognized that 'a convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners.'" ***Id***. at 757 (quoting ***Cornwell v. Dahlberg***, 963 F.2d 912, 916 (6th Cir. 1992)). Where there is a specific textual source of constitutional protection, the Court should follow it rather than apply the more generalized Fourteenth Amendment substantive due process claim. ***Walker v. Norris***, 917 F.2d 1449 (6th Cir. 1990). Since Plaintiffs' claims with regard to cross-gender viewing are based on alleged

violations of their right to privacy, they should be reviewed under the Fourth Amendment's framework. As such, to the extent their claims are brought under the Eight and Fourteenth Amendments, they must be dismissed. (**Dkt. No. 18**, at ¶¶ 263-264, 266-267)

The Sixth Circuit stated occasional, restricted and distant cross gender viewing of a naked inmate by a guard of the opposite sex does not offend the Constitution. See ***Kent v. Johnson***, 821 F.2d 1220 (6th Cir. 1987). Further, accidental cross-gender viewing does not offend the constitution. ***Mills v. City of Barbourville***, 389 F.3d 568, 578-579 (6th Cir. 2004). The Constitution does not demand the jail *only* allow female corrections officers to patrol and observe the female population, as common sense and typical scheduling restrictions necessitate a common sense approach.

Here, however, Plaintiffs allege not just accidental cross-gender viewing. Rather, they assert routine and unrestricted cross-gender viewing of nude female inmates. The Middle District of Tennessee recently summarized:

> "'Our circuit's law respects an incarcerated prisoner's right to bodily privacy, but has found that assigned positions of female guards that require only infrequent and casual observations, or observation at a distance, and that are reasonably related to prison needs are no[t] so degrading as to warrant court interference .'" ***Hunter v. Helton***, No. 1:10–cv–00021, 2010 WL 2405092, at *7 (M.D.Tenn. 2010) (citations omitted) (emphasis added); see also ***Ashann–Ra v. Virginia***, 112 F.Supp.2d 559, 565 (W.D.Va. 2000) (holding that "a male inmate's constitutional rights are not violated when a female guard is permitted to view his genitals on a limited basis," and citing ***Timm v. Gunter***, 917 F.2d 1093, 1101–02 (8th Cir. 1990)). "On the other hand, the Sixth Circuit has 'recognized that a prison policy forcing prisoners ... to be exposed to regular surveillance by officers of the opposite sex while naked—for example while in the shower or using a toilet in a cell—would provide the basis of a claim on which relief could be granted.'" ***Id***. (citing ***Mills v.***

> ***City of Barbourville***, 389 F.3d 568, 579 (6th Cir. 2004)); see also ***Kent v. Johnson***, 821 F.2d 1220, 1226 (6th Cir. 1987); see generally ***Cornwell v. Dahlberg***, 963 F.2d 912, 917 (6th Cir. 1992);

Sumpter-Bey v. Weatherford, No. 3:10-1021, 2012 WL 1078919, at *6 (M.D. Tenn. 2012). The relevant consideration is the number of actual viewings, not necessarily the potential for such observation. ***Id***. (quoting ***Hickman v. Jackson***, No 2:03-cv-363, 2005 WL 1862425 (E.D.Va. 2005); see also ***Corr. Officers Benevolent Assoc. v. Kralik***, No. 040cv-2199, 2011 WL 1236135, at *11 (S.D.N.Y. 2011) (noting "[m]ore recent cases in [the 2nd] Circuit and elsewhere ... suggest that occasional, indirect, or brief viewing of naked prisoner by a guard of the opposite sex may be permissible, but that 'regular and close viewing' is prohibited," and "[a]s a general rule, courts have found a violation only in those cases in which guards regularly watch inmates of the opposite sex who are engaged in personal activities, such as undressing, using toilet facilities or showering." (footnote omitted)).

Defendants believe the facts will support summary judgment in their favor on this claim, as their officers do not actually have unrestricted and consistent viewing of female inmates. Female officers primarily guard the female population. The male officers announce their presence. Any cross-gender nude viewing is incidental or for a valid penalogical purpose. Defendants must concede, though, that some of the allegations sufficiently state a Fourth Amendment claim. However, certain parts of the claim are subject to dismissal.

First, given their own admission that Defendants now supply a two-piece uniform to all inmates, a claim for prospective relief regarding the uniform must be dismissed, regardless whether Plaintiffs could establish standing.

Vos asserted that Defendant Gutoswki may have observed her naked on the toilet while he was passing medication to occupants of her cell. She does not state he actually saw her naked and admits that his presence was for a valid penalogical purpose. This single instance cannot support a valid Fourth Amendment invasion of privacy claim.

V. Conclusion

For the reasons stated, Defendants respectfully request this Honorable Court dismiss the following claims: (1) all Eighth and Fourteenth Amendment conditions of confinement claims for denial of exercise, extended stays in the holding cell, denial of feminine hygiene/toilet supplies and free extra clothing, deliberate indifference to medical needs, lack of grievance system, general overcrowding, and physical conditions of the jail; (2) Eighth and Fourteenth Amendment claims regarding cross-gender viewing; (3) Fourth Amendment claims regarding cross-gender viewing requesting prospective relief to the extent related to the former use of a single-piece uniform; and (4) Fourth Amendment claims by Plaintiff Vos regarding Defendant Gustowski.

Respectfully submitted,

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