ZBORALSKI v. MONAHAN

United States District Court, N.D. Illinois
No. 06 C 3772, Aug. 20, 2008.
2008 WL 4087948

JAMES B. MORAN, Senior District Judge.

Plaintiff Geneva Zboralski brought this action against defendants Tom Monahan, Tim Budz, Darrell Sanders, Steve Strock, JoEllen Martin, Diane Franzen, Lori Biermann, and Brenda Wilts (collectively "defendants")[.] The claims arise from a series of searches defendants performed on plaintiff in May and June 2005, when she was visiting her husband, who was civilly committed in an Illinois treatment and detention facility. Defendants now move for summary judgment on plaintiff's claims. They also move to strike certain of plaintiffs responses to defendants' statement of facts, and certain of plaintiff's additional facts. For the following reasons, defendants' motion . . . [for summary judgment is] entered and continued[.]

BACKGROUND

Plaintiff is married to Brad Lieberman, a civilly committed resident of the Illinois Department of Human Services' Treatment and Detention Facility ("TDF") in Joliet, Illinois. Plaintiff regularly visited her husband at the Joliet TDF from 2000 through July 2005. From 2000 until sometime in May 2005, plaintiff was always patted down before being allowed inside the TDF. Searches of visitors are necessary to prevent contraband from being brought inside the facility. TDF personnel were not allowed to strip-search visitors. Each pat-down search was performed by a TDF employee of the same gender as the visitor. Prior to May 2005, plaintiff did not have any problem with being patted down before entering. Plaintiff has never been suspected of bringing contraband into the facility.

[The plaintiff was repeatedly subjected to a pat-down search by a particular guard, Martin. According to the complaint, Martin acted inappropriately in a sexual manner towards the plaintiff during the pat-down searces.] Plaintiff complained about Martin's pat-down searches to defendants Strock and Sanders, both TDF supervisors. Plaintiff complained to defendant Strock that she felt she had been sexually assaulted and that she did not want Martin touching her anymore. She was told that she had the option of either being patted down when she entered the facility or scanned with the TDF's "Rapiscan." A Rapiscan is a machine that uses "back-scatter" X-ray technology to conduct a body scan.

To scan a person with the Rapiscan, the individual stands fully clothed in front of the machine, while a TDF employee presses a button and views an image of the outline of the person on the screen. The individual is then told to turn around and the employee scans the other side of the individual's body. The Rapiscan generally requires two people to operate. This is because the person inspecting the images is not supposed to see the search subject in person or know who is being searched, and the person interacting with

the search subject is not supposed to be viewing the images. Rapiscan operators are advised to set up the machine in such a way as to provide this level of privacy for the search subject. The Rapiscan is capable of displaying images with varying degrees of accuracy, from images that look like black-and -white photos of a subject's body to images that include wrinkles and skin-folds. Any person viewing the displayed images can manually enhance them by adjusting the contrast, brightness, or by choosing other enhancement features. The Rapiscan has an attached printer that can produce printed copies of the scanned images of search subjects.

The Rapiscan at the TDF was used as a substitute for manual strip searches of residents. TDF employees were never searched using the Rapiscan, nor was any other visitor ever searched with the Rapiscan. Sanders made the offer to scan plaintiff without consulting his superiors, researching Rapiscan protocols, or other deliberation.

Officer Strock explained to plaintiff that the Rapiscan would show an outline of her body, and plaintiff agreed to be scanned. The parties dispute whether plaintiff agreed to be given the choice between a pat-down or a body scan each time she entered the facility, or if she agreed permanently to the body scan in lieu of the pat-down. When plaintiff returned to the TDF later that same day, defendant Franzen told her she had to be searched with the Rapiscan in order to enter the facility. When plaintiff explained that she was to be given the option, Franzen disavowed any knowledge of such an option and told plaintiff she had to be scanned or she could not enter. While plaintiff was being scanned, several other TDF employees asked her why she was being searched with the Rapiscan and told her that they would never submit to such a search. In addition to the employees, other TDF visitors saw plaintiff being searched and asked her why she was being scanned with the Rapiscan. At no time was plaintiff asked to remove her clothing.

After being scanned, plaintiff researched the Rapiscan on the internet and learned that it emitted radiation. She then decided that she did not want to be scanned again. She was upset by the information she read on the Internet regarding the Rapiscan and was upset by other people watching her being scanned. She felt that she was being seen naked by whoever was operating the Rapiscan, and that she was being made a spectacle in front of other TDF employees and visitors. She left messages for Strock and Sanders, stating that she did not want to be scanned again. Strock called plaintiff and apologized for the confusion, stating that she could be patted down. Eventually the TDF staff stopped scanning plaintiff, but because of confusion in the ranks it took some time for the message to be relayed down the chain of command. As a result, for approximately three weeks plaintiff was scanned each time she entered the facility.

Plaintiff believed only three women scanned her, defendants Franzen, Wilts and Biermann. Franzen scanned plaintiff twice, and was alone when she viewed plaintiff's image on the screen. Biermann was instructed by Franzen to scan plaintiff. She told plaintiff where to stand and when to turn for the scan, while Wilts viewed the image in a separate room. Biermann never saw nor printed plaintiff's image. Wilts also never printed plaintiff's image nor showed it to anyone else, always deleting plaintiff's image after she reviewed it. Plaintiff never saw her image either on the screen or in print, though she

heard a rumor that her image was printed. Plaintiff's husband, Brad Liebcrman, told defendant Strock that plaintiff's image was being left on the Rapiscan display and being viewed by male TDF employees.

Defendants Monahan and Budz had no involvement in the decision to permit plaintiff to be scanned and were not involved in the decision to allow her to again submit to pat-down searches. Budz was only told about the situation by Sanders, after the fact.

Plaintiff filed suit against defendants Monahan, Budz, Sanders, Strock, Franzen, Biermann and Wilts in their individual and official capacities, alleging violation of her Fourth and Fourteenth Amendment rights and sought relief pursuant to 42 U.S.C. § 1983. She also claimed invasion of privacy, alleging that the defendants saved and printed her image for other officers to view. Plaintiff further sued defendant Martin in her individual and official capacity, alleging assault and battery arising from the touching of her vaginal area during patdowns. Plaintiff moved to proceed *in forma pauperis,* a motion we granted, though we dismissed the claims against all defendants in their official capacities. Defendants now move for summary judgment on all counts.

DISCUSSION

Plaintiff alleges that defendants Strock, Sanders, Franzen, Biermann and Wilts conducted an illegal search in violation of the Fourth Amendment, when they subjected her to the Rapiscan several times without her consent. Plaintiff seeks damages as permitted by 42 U.S.C. § 1983. Defendants argue that they are entitled to qualified immunity. Qualified immunity protects public officials in those situations where the law is not sufficiently clear for a reasonable official to have known that her actions were illegal. *Phelan v. Vill. of Lyons,* 2008 U.S.App. LEXIS 13571 (7th Cir. June 27, 2008). We engage in a two-part test to determine if immunity exists. First, we consider whether, taken in the light most favorable to plaintiff, the facts alleged amount to a constitutional violation. *Saucier v. Kat[z],* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Second, we ask whether the right was clearly established at the time of the alleged violation. *Id.* time lower courts remain bound by the decision. *Phelan,* 2008 U.S.App. LEXIS 13571.

The Fourth Amendment protects the right of persons not to be subjected to unreasonable searches or seizures. Reasonableness "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish,* 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). A detention facility is a "unique place fraught with serious security dangers," and in such places the Fourth Amendment does not apply with full force. However, courts have held that visitors to such facilities do not lose all of their constitutional rights upon entry, *Burgess v. Lowery,* 201 F.3d 942 (7th Cir.2000). The question is whether the Rapiscan search of plaintiff was reasonable under the circumstances.

Reasonableness

This is a case of first impression. No other court, state or federal, has yet addressed this issue. We therefore draw from analogous case law relating to other types of searches of prison visitors and border entrants.

Neither the Supreme Court nor the Seventh Circuit has addressed whether any suspicion is necessary for a pat-down of a prison visitor. The Sixth Circuit has held that patdown searches of prison visitors require no suspicion. *Spear v. Sowders,* 71 F.3d 626, 630 (6th Cir.1995). Other district courts have cited *Spear* for this proposition. *Beckta v. Maloney,* 2001 U.S. Dist. LEXIS 18328(D. Mass. Oct 17, 2001); *Jordan v. Taylor,* 2001 U.S. Dist LEXIS 24865 (E.D.Ark. Nov. 13, 2001). In a similar setting, regarding airline travelers, the Seventh Circuit has held that a pat-down requires "some level of suspicion"-more than none, but less than reasonable suspicion, *Dorsey,* 641 F.2d at 1219. It is unclear how this holding would translate, if at all, to the pat-down of prison visitors. Regardless, plaintiff does not argue that pat-down searches of prison visitors without suspicion is unreasonable. Therefore, for the purposes of this case, we will deem reasonable suspicionless pat-down searches of prison visitors.

The Seventh Circuit has held that strip searches of prison visitors are invasive and require, at the very least, reasonable suspicion that the particular visitor in question is hiding contraband. *Burgess,* 201 F.3d at 945. This is consistent with all other circuits that have addressed the issue. *See Blackburn v. Snow,* 771 F.2d 556 (1st Cir.1985); *United States v. Johnson,* 1994 U.S.App. LEXIS 14701 (4th Cir. June 15, 1994); *Thorne v. Jones,* 765 F.2d 1270 (5th Cir.1985); *Daugherty v. Campbell,* 935 F.2d 780 (6th Cir.1991); *Hunter v. Auger,* 672 F.2d 668 (8th Cir.1982); *Kirkpatrick v. Los Angeles,* 803 F.2d 485, 489 (9th Cir.1986); *Boren v. Deland,* 958 F.2d 987, 988 (10th Cir.1992).

To determine whether a body scan is akin to a pat-down or a strip search, "the key factor ... is the level of embarrassment and intrusion that the person searched feels.' " *Adrow v. Johnson,* 623 F.Supp. 1085 (N.D.Ill.1985) citing *United States v. Dorsey,* 641 F.2d 1213, 1217 (7th Cir.1981).

On the one hand, a body scan is not as intrusive as an actual strip search because the visitor is not forced to disrobe, nor is she touched. Stephen Vina, *Comment: Virtual Strip Search at Airports; Are Border Searches Seeing Through the Fourth Amendment?,* 8 Tex. Wesleyan L.Rev. 417 (Spring, 2002). Some would argue that a body scan is actually *less* intrusive than a pat-down, because no contact is made with the subject's body. *Id.* Further, a body scan essentially covers the scope of a pat-down, revealing only what is under the clothes but above the skin. *Id.*

On the other hand, some would argue that a body scan visually reveals as much as a strip search-it can include fat folds and genitalia. *Id.* But that depends on the level of detail of the subject's image. As stated above, the Rapiscan is capable of producing an image that appears like an outline of a person's body, with very little detail. It is also capable of producing a highly-detailed image, which includes genitalia and fat folds.

The fact that the image is produced through the use of X-rays must also be taken into account. In this way, a body scan is similar to an internal X-ray-the person is not required to disrobe, yet intimate parts of the body are revealed. *Id.* Neither the Supreme Court nor the Seventh Circuit has identified what level of suspicion is sufficient to justify an X-ray search of either a prison visitor or a border entrant, though the Fifth, Eighth and Eleventh Circuits concur that a reasonable suspicion that a person is an alimentary canal smuggler may justify an involuntary X-ray examination. See *United States v. Oyekan*, 786 F.2d 832, 837 (8th Cir.1986); *United States v. Vega-Barvo*, 729 F.2d 1341, 1348-49 (11th Cir.1984); and *United States v. Mejia*, 720 F.2d 1378, 1381-82 (5th Cir.1983). On one hand, medical X-rays are intrusive in ways that a body scan is not, in that exposure to those X-rays poses serious medical risks. Vina, *supra* at 432. Because body scan technology only emits extremely low doses of X-rays and because those X-rays do not penetrate the body but bounce off, it poses fewer risks than internal X-rays. *Id.* At the same time, there is a question as to what is considered more intimate, a person's inner organs or their outer genitalia. *See* Lauren Bercuson, *Comment: Picture Perfect? X-Ray Searches at the United States Border Require Guidance*, 35 U. MIAMI INTER-AM L.REV. 577, 596 (Summer, 2004) (arguing that the level of modesty surrounding one's internal organs is comparatively lower than that surrounding genitalia).

In addition, we look at how the Rapiscan is currently being used. At the TDF, the Rapiscan was purchased exclusively as a substitute for strip searches of residents, not for searches of visitors or employees. Similarly, regulations designated by United States Customs for the use of body scan technology at the border state that customs official may only subject person to a body scan with "good reason," a standard similar to reasonable suspicion. Press Release, United States Customs and Border Patrol, Body Imaging Systems (Jan. 27, 2000), http://www.cbp.gov/hot-new/pressrel/2000/0127-00.htm. While this press release was issued before the events of September 11, 2001, it appears the policy remains the same. *See* Paul Giblin and Eric Lipton, *New Airport X-Rays Scan Bodies, Not Just Bags,* N.Y. TIMES, Feb. 24, 2007, at A1.

While the foregoing gives us some basis upon which to rule regarding reasonableness, we do not believe that it is enough, given the fact that this issue has never before been addressed. Several important questions remain that cannot be answered on this record. For instance, we have very little evidence of how the Rapiscan actually works and the quality of images it produces. Examples and experts in the field would be helpful to better understand body scan technology. We would also appreciate testimony on how reasonable persons would feel being subjected to such a scan. Is it psychologically similar to, or even less intrusive than a pat-down because the person cannot view his or her own image and no touching is involved? Or is the thought that another person might be viewing a detailed naked image enough to make a person feel as violated as they would during a manual strip search? Finally, we are unsure whether the level of detail affects whether or not the search is closer to a pat-down or a strip search. Will every body scan search need to comport with the same standard of reasonableness regardless of the level of detail in the image? Or will factual determinations need to be made in each case depending on how the machine was calibrated at the time of the search? How was the

machine calibrated in this case? We do not have that evidence. Because we do not believe the record is sufficiently developed to allow us to rule on this issue of first impression, we request that a hearing be held and the parties confer so that we may discuss the logistics of such a hearing.

Consent

Defendants argue that we need not reach the question of constitutionality because there is no genuine issue that plaintiff consented to the searches. We disagree. Initially, there is a question of fact as to whether plaintiff actually agreed to a Rapiscan search each and every time she entered the facility, or whether she agreed to decide each time she entered whether to be patted-down or scanned. There is no question of fact that plaintiff did not consent to the actual Rapiscan searches performed on her. It is undisputed that when plaintiff arrived at the TDF she was informed by defendant Franzen that she would have to undergo a Rapiscan search in order to enter the facility. Defendants admit that plaintiff repeatedly told Franzen that she was to have the choice, but Franzen stated that plaintiff's only choice was to submit to a scan or not visit her husband. This amounts to an "unconstitutional condition." *Burgess,* 201 F.3d at 945-47. Plaintiff may have no constitutional right to visit her husband in the TDF, (*Mayo v. Lane,* 867 F.2d 374 (7th Cir.1989)), but this does not mean that in order to visit him she must consent to an unconstitutional search. *Burgess,* 201 F.3d at 945-47. In *Burgess,* the Seventh Circuit held that a policy requiring the strip search of all visitors of death row inmates was "manifestly unreasonable," and thus the visitor's consent to such searches could not immunize defendants from liability for the unconstitutionality of the search. *Id.* In order for consent to be a defense, the search must be reasonable, a question which at this juncture we cannot answer for the reasons set forth above. *See also Blackburn,* 771 F.2d at 569; *Cochrane v. Quattrocchi,* 949 F.2d 11 (1st Cir.1991); *Spear,* 71 F.3d at 632. Therefore, we cannot yet say whether plaintiff's consent was valid as a matter of law.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is . . . entered and continued as to defendants Strock, Sanders, Franzen, Biermann and Wilts.