IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KELLY PHILLIPS, Plaintiff, v. OTHA BIRD, DEPARTMENT OF CORRECTIONS OF THE STATE OF DELAWARE, and STATE OF DELAWARE, Defendants.	)	Civil Action No. 03-247-KAJ

MEMORANDUM OPINION

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December 1, 2003
Wilmington, Delaware

JORDAN, District Judge

I. INTRODUCTION

The issue here is whether a plaintiff who admits that she agreed to have sexual relations with a prison guard can then recover monetary damages by claiming that the agreed to sexual relations were a violation of her Eighth Amendment right to be free of cruel and unusual punishment. The short answer is no. On February 28, 2003, plaintiff Kelly Phillips filed this action under 42 U.S.C. § 1983 against defendants the Department of Corrections of the State of Delaware and the State of Delaware (collectively, the "State Defendants") and Otha Bird ("Bird"). (Docket Item ["D.I."] 1.) Jurisdiction is proper in this court under 28 U.S.C. §§ 1331 and 1343. Plaintiff asserts violations of her rights under the Eighth Amendment of the United States Constitution and certain claims arising under Delaware state law.[1] (D.I. 1 ¶¶ 11, 17, 19.) Currently before the court is defendant Bird's Motion for Judgment on the Pleadings (D.I. 27). For the reasons that follow, I will grant the motion.[2]

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[1]Though plaintiff does not mention the Eighth Amendment in her complaint, throughout her response to defendants' Motions for Judgment on the Pleadings (D.I. 32), and at oral argument, her counsel represented that plaintiff was in fact relying upon her rights under the Eighth Amendment (D.I. 40 at 9).

[2]The State Defendants also filed a Motion for Judgment on the Pleadings (D.I. 27), arguing that they are immune from suit under the Eleventh Amendment to the United States Constitution and are not persons for purposes of liability under 42 U.S.C. § 1983. (D.I. 27 at 4.) Plaintiff has "no objection" to the State Defendants "being dismissed from the case at bar." (D.I. 32 at 4.) Therefore, the State Defendants' Motion for Judgment on the Pleadings will be granted.

II. BACKGROUND

Plaintiff is a resident of Delaware (D.I. 1 ¶ 2) who, from March 2001 through August 2001, was a prisoner in the Boot Camp Program in Georgetown, Delaware (*id.* ¶ 9). The parties have stipulated to the following facts:

> The parties, by and through their attorneys, hereby agree and stipulate that for the sole purpose of a motion to dismiss for failure to state a legal claim that the plaintiff's claims in the above matter are based solely on four incidents of agreed to sexual activity with the individual defendant [Bird]. During the claimed period of sexual activity, plaintiff was an inmate at the Boot Camp Program at Sussex Correctional Center and the individual defendant was a correctional officer Drill Instructor with authority over the plaintiff.
>
> This stipulation does not preclude plaintiff from contending that agreed to sexual activity may violate her legal rights.

(D.I. 24 at 3; D.I. 28, Exh. B; D.I. 32 at 3.) Plaintiff describes the "four incidents of agreed to sexual activity" in more detail in her complaint. The first sexual contact consisted of kissing, the second contact consisted of sexual intercourse, the third contact consisted of plaintiff performing oral sex on defendant Bird, and the fourth contact also consisted of sexual intercourse. (*Id.* ¶¶ 12-15.)

In addition to alleging violations of her civil rights under 42 U.S.C. § 1983, plaintiff asserts that "defendants [sic] actions constituted assault and battery, unlawful sexual intercourse and contact." (D.I. 1 ¶ 19.) Plaintiff claims that she has suffered damages, including "sexual assault, loss of reputation, emotional harm, embarrassment, and continued incarceration from August 1, 2001 through December 20, 2001." (D.I. 1 ¶ 20.)

On September 5, 2003, State Defendants filed a Motion for Judgment on the Pleadings (D.I. 23), and defendant Bird did the same on September 23, 2003 (D.I. 27).

Plaintiff responded to both Motions on October 7, 2003, and consented to the dismissal of her claims against the State Defendants. *See supra* n.2.

III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(c), when considering a motion for judgment on the pleadings, a court must "accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff." *Turbe v. Gov't of the Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991). The motion can be granted "only if no relief could be granted under any set of facts that could be proved." *Id.; see also Southmark Prime Plus L.P. v. Falzone*, 776 F. Supp. 888, 891 (D. Del. 1991); *Cardio-Medical Assocs., Ltd. v. Crozer-Chester Med. Ctr.,* 536 F. Supp. 1065, 1072 (E.D. Pa. 1982) ("If a complaint contains even the most basic allegations that, when read with great liberality, could justify plaintiff's claim for relief, motions for judgment on the pleadings should be denied.")

An inmate who brings an action under 42 U.S.C. § 1983, alleging sexual assault or related claims, is generally alleging a violation of the conditions of confinement under the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *see also Carrigan v. Davis*, 70 F. Supp. 2d 448, 452 (D. Del. 1999). A prison official violates an inmate's rights under the Eighth Amendment when two requirements are met. First, the official's conduct must be objectively serious or must have caused an objectively serious injury to the plaintiff. *Farmer*, 511 U.S. at 847. Second, the prison official must have acted with deliberate indifference or reckless disregard toward the plaintiff's constitutional rights, health, or safety. *Id.*

A prison official's conduct is "objectively serious" under the Eighth Amendment if it is incompatible with "contemporary standards of decency." *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (citing *Estelle v. Gamble*, 429 U.S. 97, 103-104 (1976)). That a prison official acted with deliberate indifference or reckless disregard to an inmate's constitutional rights, health, or safety is a subjective element that may be established by showing that the prison official acted with a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834.

IV. DISCUSSION

Defendant Bird advances five arguments in support of his Motion for Judgment on the Pleadings. First, he argues that plaintiff cannot establish a violation of her civil rights under 42 U.S.C. § 1983 because defendant Bird was not acting under "color of state law" when the sexual acts occurred. (D.I. 28 at 4, 5.) Second, he argues that the "four discrete agreed to sexual acts" do not, in and of themselves, give rise to a constitutional claim under 42 U.S.C. § 1983. (*Id.* at 7.) Third, defendant Bird argues that plaintiff has no cognizable claim for relief under the Eighth Amendment because the sexual acts did not inflict injury or pain. (*Id.* at 10.) Fourth, he argues that plaintiff has no cognizable claim for relief under the Eighth Amendment because defendant Bird was not indifferent to plaintiff's health or safety when engaging in the sexual acts. (*Id.* at 13.) Finally, defendant Bird argues that plaintiff is a criminal actor herself and cannot claim any violation of her constitutional rights, under the tort principles of *in pari delicto*. (*Id.* at 18.)

Plaintiff argues that defendant Bird violated her civil rights under 42 U.S.C. § 1983 because she was a prisoner and, as a matter of law, could not consent to sexual

activity. (D.I. 32 at 5 (citing *Carrigan*, 70 F. Supp. at 453 n.3).) Plaintiff further argues that, because she cannot legally consent to sexual activity, she is in a "protected class" and is therefore not a criminal actor. (*Id.* at 12.) Finally, plaintiff argues that the sexual activity did occur under "color of state law," since defendant Bird was a state correctional officer at all relevant times. (*Id.* at 13.)

A. Defendant Bird was acting under color of state law when the sexual acts occurred

In order to recover in this action, plaintiff must show that she was deprived of a constitutional right by a person acting under color of state law. *See* 42 U.S.C. § 1983. Defendant Bird argues that "[a]t the time of each ... agreed to sexual act, Bird was simply not cloaked with the coercive authority of the State," and the sexual acts were "purely private activity" unrelated to his performance as a correctional officer. (D.I. 28 at 7.) Therefore, argues Bird, he was not acting under color of state law during the sexual acts in question. (*Id.*)

Bird's argument on this point is wholly unpersuasive. The parties have stipulated to the fact that "[d]uring the claimed period of sexual activity, plaintiff was an inmate at the Boot Camp Program at Sussex Correctional Center and the individual defendant was a correctional officer Drill Instructor with authority over the plaintiff." (D.I. 32, Exh. B.) Defendant Bird was acting under color of state law because, at the time the sexual acts occurred, he was a correctional officer at the institution where plaintiff was incarcerated, and his interactions with her were possible only because of his status as a correctional officer. *See Marvel v. Snyder*, 2001 WL 830309 at *5 (D. Del. July 24, 2001) (citing *Cespedes v. Coughlin*, 956 F. Supp. 454, 465 (S.D.N.Y. 1997) (noting that

it was "undisputed that [the] defendants acted ... pursuant to their authority as prison officials under color of New York state law"). Accordingly, Bird was acting under color of state law for purposes of 42 U.S.C. § 1983.

B. Defendant Bird's conduct did not violate plaintiff's rights under the Eighth Amendment

In order to sustain a claim of cruel and unusual punishment under the Eighth Amendment, plaintiff must prove that (1) defendant Bird's conduct was objectively serious or that it caused plaintiff objectively serious injury and (2) defendant Bird acted with deliberate indifference or reckless disregard toward plaintiff's constitutional rights, health, or safety. *Farmer*, 511 U.S. at 847; *see also Freitas v. Ault*, 109 F.3d 1335, 1338 (8th Cir. 1997) (holding that an inmate must prove "as an objective matter" that "the alleged abuse or harassment caused pain..."). Defendant Bird argues that, since plaintiff agreed to participate in the sexual acts, "no facts exist from which plaintiff can demonstrate that she has suffered a cognizable injury... ." (D.I. 28 at 10, 11.) Plaintiff counters by urging that the reasoning and holding of *Carrigan, supra*, controls. In *Carrigan*, the court concluded "as a matter of law, that an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not, is a per se violation of the Eighth Amendment." (D.I. 32 at 5 (citing *Carrigan*, 70 F. Supp. 2d at 452-53).)

The opinion in *Carrigan* does support the plaintiff's position. In that case, the plaintiff, an inmate at the Women's Correctional Institute ("WCI"), alleged that defendant Davis, a former correctional officer at WCI, engaged in vaginal intercourse with her against her will. *Carrigan*, 70 F. Supp. 2d at 451. Defendant Davis admitted that a

sexual act occurred between him and the plaintiff; however, he claimed that he and plaintiff engaged in an act of oral sex to which plaintiff consented. *Id.* After a jury trial, plaintiff moved for judgment as a matter of law on the issues of liability and the consent defense. *Id.* at 450. The court concluded, as a matter of law, that defendant Davis could not assert plaintiff's alleged consent as a defense. *Id.* at 451.

In reaching its holding, the *Carrigan* court stated that "[a] prison official's conduct is 'objectively serious' under the Eighth Amendment if it is incompatible with 'contemporary standards of decency,'" *id.* at 452, 453 (citing *Helling v. McKinney*, 509 U.S. 25, 32 (1993)), and the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," *id.* (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). The *Carrigan* court then considered the following Delaware statute, concerning the criminal offense of sexual relations in a detention facility:

> A person is guilty of sexual relations in a prison facility when, being a person in custody at a detention facility or being an employee working at a detention facility, the person engaged in sexual intercourse or deviate sexual intercourse on the premises of a detention facility. It shall be no defense that such conduct was consensual. Violation of this section shall be a class G felony.

11 Del. C. § 1259 (2003). On the basis of this statute, the *Carrigan* court concluded that, under Delaware law, "sexual intercourse and/or fellatio between prison inmates and guards, whether consensual or not, is intolerable in Delaware, and thus, at odds with contemporary standards of decency." *Carrigan*, 70 F. Supp. 2d at 453.

To the extent that *Carrigan* stands for the position that any type of sexual intercourse and/or fellatio between prison inmates and guards in a prison setting is

intolerable, there is no sound basis for disputing that holding. *Cf. Fisher v. Goord*, 981 F. Supp. 140, 172 (W.D.N.Y. 1997) ("Sexual interactions between corrections officers and inmates, no matter how voluntary, are totally incompatible with the order and discipline required in a prison setting."). In enacting 11 Del. C. § 1259, the legislature criminalized such conduct precisely because it is intolerable. However, there is no legislative history or case cited in *Carrigan* that supports the conclusion that consensual sex between a prison inmate and a guard, in the prison setting, rises to the level of a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Indeed, the underpinning for the court's decision is at odds with that conclusion.

The *Carrigan* opinion repeatedly cites Delaware's enactment of 11 Del. C. § 1259 as the basis for its conclusion that even consensual sex is a *per se* violation of the Eighth Amendment. *See, e.g., Carrigan*, 70 F. Supp. 2d at 460 ("[T]his Court is guided in its decision that vaginal intercourse and/or fellatio is at odds with contemporary standards of decency under the Eighth Amendment by the Delaware legislature's directing making such conduct a felony.") But the statute does not appear to reflect a judgment about standards of decency. Rather, it appears that the legislative focus was purely on the security issues implicated by sexual conduct in prison. The Delaware legislature enacted 11 Del. C. § 1259 because "sexual relations between inmates and guards and inmates and inmates is a serious threat to security at a correctional facility." 62 Del. Laws, c. 282 § 1 (1980). This conclusion is further borne out by the fact that there is no "victim" under 11 Del. C. § 1259. On the contrary, each willing participant in sexual encounters in prison, guard and inmate alike, is guilty of a felony. Even if the *Carrigan* court were correct, however, and the Delaware legislature did intend the

statute to reflect a contemporary standard of decency or to be a protection for inmates, that alone would not and ought not drive the determination of rights under the United States Constitution. Elevating legal rights to the level of constitutional rights is an exercise fraught with the peril of unintended consequences. The Supreme Court thus wisely counsels that matters should be disposed of on constitutional grounds only when no less sweeping basis is available. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.") (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)) (other citations omitted).

Moreover, what case law there is on the Eighth Amendment and consensual sex in prison runs counter to the conclusion in *Carrigan*, as the *Carrigan* opinion itself seems to recognize. *See Carrigan*, 70 F. Supp. 2d at 460-61 (distinguishing "recent case law on the consent defense"). In *Freitas v. Ault*, *supra*, 109 F.3d 1335, the Eighth Circuit noted that an element of an Eighth Amendment claim is the "unnecessary and wanton infliction of pain," *id.* at 1338 (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1986)) and then held that "[w]ithout deciding at what point unwelcome sexual advances become serious enough to constitute 'pain,'...at the very least, welcome and voluntary sexual interactions, no matter how inappropriate, cannot as a matter of law constitute 'pain' as contemplated by the Eighth Amendment." *Id.* at 1339.

To the same effect is the opinion in *Fisher v. Goord, supra,* 981 F. Supp. 140, in which the court stated that "consensual sexual interactions between a correction officer and an inmate, although unquestionably inappropriate, and in this Court's view despicable, do not constitute cruel and unusual punishment under the Eighth

Amendment." *Id.* at 174; s*ee also Petty v. Venus Correctional Unit*, 2001 WL 360868 at *2 (N.D. Tex. April 10, 2001) (dismissing inmate's § 1983 claim because "plaintiff has not shown the alleged [sexual] harassment to have caused him pain"); *cf. Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997) (holding that severe or repetitive sexual abuse of an inmate by a prison officer can constitute an Eighth Amendment violation). Apart from *Carrigan*, there do not appear to be any decisions from this or other jurisdictions holding that consensual sex between an inmate and a prison guard constitutes a violation of the Eighth Amendment.

At oral argument, plaintiff's counsel took the position that an inmate can never legally consent to having sex in the prison setting, (D.I. 40 at 12, 18), apparently relying upon the *Carrigan* court's conclusion that "[w]here a prison guard engages in vaginal sexual intercourse and/or fellatio with an inmate of the opposite sex, ... the consent defense is unavailable," *Carrigan*, 70 F. Supp. 2d at 453 n.3. In support of this holding, the *Carrigan* court stated that 11 Del. C. § 1259 "emphasizes the custodial relationship between an inmate and a prison guard" and "recognizes the vulnerability of inmates to abuse by those empowered to control the inmate's existence" by eliminating consent as a defense to the crime of having sexual relations in a detention facility. *Id.* at 459. Whether or not these speculations as to the legislative intent behind 11 Del. C. § 1259 are true, plaintiff's position is untenable in this case. She cannot stipulate to the fact that she agreed to engage in certain sexual acts with defendant Bird and then claim that she is legally incapable of consenting to those same sexual acts. Under 11 Del. C. § 1259, plaintiff may be held criminally responsible for her conduct. She cannot then argue that, simply because she is an inmate, she is legally incapable of taking

responsibility in a civil suit over exactly the same conduct. That an inmate cannot assert consent as a defense to the crime articulated in 11 Del. C. § 1259 does not mean that an inmate can avoid the consequences of consent in a civil suit.

In the instant case, the parties stipulated that they engaged in "four discrete agreed to sexual acts." (D.I. 32, Exh. B.) Unlike the facts in *Carrigan*, where plaintiff and defendant Davis offered differing accounts as to how their sexual encounter occurred, there is absolutely no evidence in the record in this case that plaintiff engaged in sexual acts with defendant Bird against her will, or that a coercive *quid pro quo* scheme was in place. In a case such as this, where prison conditions are challenged, the Eighth Amendment "has been interpreted to require ... that the inmates are free from the 'unnecessary and wanton infliction of pain.'" *Hassine v. Jeffes*, 846 F.2d 169, 174 (3d Cir. 1988) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)); *accord Gibbs v. Cross*, 160 F.3d 962, 966 (3d Cir. 1998). On the basis of the stipulated facts, plaintiff cannot prove that defendant Bird's conduct caused her pain. The record is undisputed that she voluntarily and willingly had sex with Bird. Consensual sex between two adults does not constitute cruel and unusual punishment simply because it occurs within the walls of a prison.

On the facts before me, plaintiff cannot meet her burden, under the Eighth Amendment, of proving that defendant Bird's conduct caused objectively serious injury or pain. Therefore, I need not consider the subjective test of whether defendant Bird acted with deliberate indifference to plaintiff's constitutional rights, health, or safety. Because plaintiff has not proven a violation of her constitutional rights under the Eighth Amendment, I also need not consider defendant Bird's remaining arguments, and I

decline to exercise pendent jurisdiction over plaintiff's state law claims. *See Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995). Defendant Bird's Motion for Judgment on the Pleadings will be granted.

V. CONCLUSION

For the reasons set forth herein, State Defendants' Motion for Judgment on the Pleadings (D.I. 23) and defendant Bird's Motion for Judgment on the Pleadings (D.I. 27) will be granted. An appropriate Order will issue.

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ORDER

For the reasons set forth in the Memorandum Opinion issued on this date, it is hereby ORDERED that

1. the State Defendants' Motion for Judgment on the Pleadings (D.I. 23) is GRANTED; and

2. defendant Otha Bird's Motion for Judgment on the Pleadings (D.I. 27) is GRANTED.

IT IS SO ORDERED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

December 1, 2003
Wilmington, Delaware