United States District Court,D. Maryland.
Daniel BRASHEAR
v.
Stewart D. SIMMS, et al.
No. CIV S 01-1031.

April 12, 2001.

State inmate brought action challenging policies banning smoking and sales of tobacco products and possession of tobacco by inmates in state prisons, asserting that policies violated his rights to equal protection and to be free from discrimination under Americans with Disabilities Act (ADA).The District Court, Smalkin, J., held that: (1) action was frivolous; (2) ban on use or possession of tobacco in state prisons did not violate equal protection; and (3) smoking was not disability under ADA.

Dismissed.

West Headnotes

[1] Civil Rights 78 1395(7)

78 Civil Rights
78III Federal Remedies in General
78k1392 Pleading
78k1395 Particular Causes of Action
78k1395(7) k. Prisons and Jails; Probation and Parole. Most Cited Cases
(Formerly 78k235(7))
Action in which state inmate who smoked challenged prison policies prohibiting use or possession of tobacco in prisons under Equal Protection Clause and Americans with Disabilities Act (ADA) was frivolous, warranting dismissal without service of process. U.S.C.A. Const.Amend. 14; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[2] Constitutional Law 92 3823

92 Constitutional Law
92XXVI Equal Protection
92XXVI(F) Criminal Law
92k3822 Prisons
92k3823 k. In General. Most Cited Cases
(Formerly 92k250.3(2))

Prisons 310 13(4)

310 Prisons
310k13 Custody and Control of Prisoners
310k13(4) k. Particular Violations, Punishments, and Deprivations; Use of Force. Most Cited Cases
Prohibitions on use or possession of tobacco in state's prisons did not violate equal protection rights of inmate who smoked; ban was rational way of addressing state's legitimate interest in protecting health of non-smokers forced to be its guests in correctional facilities. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 3722

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)14 Environment and Health
92k3722 k. Smoking and Tobacco Regulation. Most Cited Cases
(Formerly 92k213.1(2))
Act of smoking tobacco is entitled to only a minimal level of protection under the Equal Protection Clause, as it is not a fundamental right, nor is the classification between smokers and non-smokers a

suspect one; thus, only rational basis standard of scrutiny applies to regulations restricting smoking. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92  **3053**

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3053 k. In General. Most Cited Cases
(Formerly 92k213.1(2))
Under rational basis standard of scrutiny, the question raised by equal protection challenge is simply whether regulation at issue serves a legitimate state interest and whether the challenged regulation is rationally related to that interest. U.S.C.A. Const.Amend. 14.

[5] Civil Rights 78  **1019(3)**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1019 Who Is Disabled; What Is Disability
78k1019(3) k. Particular Conditions, Limitations, and Impairments. Most Cited Cases
(Formerly 78k107(1))

Civil Rights 78  **1022**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1022 k. Alcohol or Drug Use. Most Cited Cases
(Formerly 78k107(3))
Whether denominated as "nicotine addiction" or not, tobacco smoking is not "disability" within meaning of Americans with Disabilities Act (ADA). Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

***693** Daniel Brashear, Westover, MD, Pro se.

MEMORANDUM OPINION

SMALKIN, District Judge.
This is an action in which a Maryland prisoner who smokes tobacco seeks injunctive relief pursuant to 42 U.S.C. section 1983, claiming that his constitutional right to equal protection of the laws and his federal statutory right to be free from discrimination under the Americans With Disabilities Act, 42 U.S.C. section 12101 *et seq.* (ADA), are being violated by newly-***694** adopted policies of the Maryland Department of Public Safety and Correctional Services that effectively prohibit smoking within Maryland prisons, to include banning sales of tobacco products in prisons effective May 1, 2001, and prohibiting possession of tobacco by inmates as of June 1, 2001.

In short, now that Maryland has prohibited use or possession of tobacco in prisons, the plaintiff, a smoker, has decided to sue the State, just as non-smokers have, in the past, sued over prison policies that permitted smoking. *See, e.g., Johnson v. Laham,* 9 F.3d 1543, 1993 WL 469160 (4th Cir.1993) (table). This proves, one supposes, that States-no less than individuals-can sometimes be damned if they do and damned if they don't.

[1] Because this suit is frivolous as a matter of law, it will be dismissed without service of process. *See Neitzke v. Williams,* 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

[2] It should be perfectly obvious to any rational person that the State of Maryland, in view of the well-known harmful effects of secondhand smoke, has a legitimate interest in protecting the health of non-smokers forced to be its guests in correctional facilities. In fact, the Supreme Court has held that state actors could face liability under section 1983 if they do not protect non-smokers from smokers' secondhand smoke. *Helling v. McKinney,* 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993).

[3][4] It should come as no surprise, then, that the

decided cases have repeatedly rejected claims that prison anti-smoking policies violate the Equal Protection Clause, and for good reason. The reason, of course, is that the act of smoking is entitled to only a minimal level of protection under the Equal Protection Clause, as it is obviously not a fundamental right, nor is the classification between smokers and non-smokers a suspect one. *See, e.g., McGinnis v. Royster,* 410 U.S. 263, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973). In that neither smoking nor possession of tobacco in a prison implicates any fundamental right, nor is any suspect classification involved, only a "rational basis" standard of scrutiny applies. *McGinnis, supra. See also Washington v. Harper,* 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). The question is simply whether the regulation serves a legitimate state interest and whether the challenged regulation is rationally related to it. *Moss v. Clark,* 886 F.2d 686 (4th Cir.1989). See *also McGinnis,* 410 U.S. at 270, 93 S.Ct. 1055.

Obviously, given the Supreme Court's holding in *Helling, supra,* the State of Maryland has a legitimate interest in eliminating non-smokers' exposure to secondhand smoke in its prisons, and a rational way of accomplishing the State's goal in that regard is to prohibit sale or possession of tobacco products in prisons. Indeed, given the close confinement situation in prisons, it is probably the only rational way. Thus, there is no viable equal protection claim stated. For cases that have reached the same result, *see, e.g., Hills v. Stewart,* 199 F.3d 1332, 1999 WL 970804 (9th Cir.1999), *Johnson v. Saffle,* 166 F.3d 1221, 1998 WL 792071 (10th Cir.1998), *Webber v. Crabtree,* 158 F.3d 460 (9th Cir.1998), and *Harvey v. Foote,* 92 F.3d 1192, 1996 WL 441776 (9th Cir.1996) (affirming dismissal for legal frivolity). There are more cases, but it would be pointless to cite them, for they speak with one voice in rejecting claims such as the plaintiff's equal protection claim in this case.

[5] Although the ADA might or might not apply in prisons, *see Roary v. Freeman,* 243 F.3d 540, 2001 WL 123661 (4th Cir.2001), even assuming that the ADA ***695** fully applies in this case, common sense compels the conclusion that smoking, whether denominated as "nicotine addiction" or not, is not a "disability" within the meaning of the ADA. Congress could not possibly have intended the absurd result of including smoking within the definition of "disability," which would render somewhere between 25% and 30% of the American public disabled under federal law because they smoke. In any event, both smoking and "nicotine addiction" are readily remediable, either by quitting smoking outright through an act of willpower (albeit easier for some than others), or by the use of such items as nicotine patches or nicotine chewing gum. If the smokers' nicotine addiction is thus remediable, neither such addiction nor smoking itself qualifies as a disability within the coverage of the ADA, under well-settled Supreme Court precedent. *Sutton v. United Airlines, Inc.,* 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999).

For the reasons stated, because the complaint fails to state any non-frivolous claim for relief, an Order will be entered separately, summarily dismissing it pursuant to 28 U.S.C. § 1915A(b)(1).

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is, this 12th day of April, 2001, by the Court, ORDERED:

1. That this case BE, and it hereby IS, SUMMARILY DISMISSED, as legally frivolous, pursuant to 28 U.S.C. § 1915A(b)(1); and

2. That the Clerk mail copies hereof and of the said Opinion to plaintiff and to the Attorney General of Maryland.

D.Md.,2001.
Brashear v. Simms
138 F.Supp.2d 693, 20 NDLR P 181

END OF DOCUMENT