

including both pretrial detainees and sentenced inmates, alleging various constitutional violations as a result of PPS's no-smoking policy. Specifically, plaintiffs complain that the policy violates their rights to freedom of expression under the First Amendment, freedom from cruel and unusual punishment guaranteed by the Eighth Amendment and equal protection and procedural due process under the Fourteenth Amendment.

Defendants have moved to dismiss the complaint. Because the Court has considered matters outside the record, after notice and an opportunity for the parties to make further submissions, the Court converted the motion to one for summary judgment. For the reasons that follow the motion will be granted.² The Court will address each claim seriatim.

I. RIGHT TO SMOKE

Plaintiffs claim that they have a constitutional right

² Summary judgment is appropriate if the moving party can "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Court must accept the non-movant's version of the facts as true, and resolve conflicts in the non-movant's favor. Big Apple BMW, Inc. v. BMW of N. Amer., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993).

The moving party bears the initial burden of demonstrating the absence of genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the movant has done so, however, the non-moving party cannot rest on its pleadings. See Fed. R. Civ. P. 56(e). Rather, the non-movant must then "make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file." Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

to smoke. It is well-settled that there is "no constitutional right to smoke in a jail or prison." Reynolds v. Bucks, 833 F. Supp. 518, 519 (E.D. Pa. 1993)(quoting Doughty v. Bd. of County Comm'rs, 731 F. Supp. 423, 426 (D. Colo. 1989); Grass v. Sargent, 903 F.2d 1206, 1206 (8th Cir. 1990); Alley v. State, No. 95-3010, 1997 WL 695590 (D. Kans. Oct. 15, 1997); Jackson v. Burns, 89 F.3d 850 (table), 1996 WL 362739, at *1 (10th Cir. June 28, 1996).

II. FIRST AMENDMENT CLAIM

Nor does the prohibition against smoking in prison, in this case, implicate the First Amendment's guarantee of freedom of expression. It is true that smoking, while not speech, might be entitled to protection as non-verbal but expressive conduct under certain circumstances. See, e.g., Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968). The Third Circuit, in Troster v. Pennsylvania State Dep't of Corrections, 65 F.3d 1086 (3d Cir. 1995), articulated the applicable test to gauge the expressiveness of conduct under the First Amendment: "[W]hether considering the 'nature of [the] activity, combined with the factual context and environment in which it was undertaken,' [the Court is] led to the conclusion that the 'activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments" Id. (quoting Spence v. Washington, 418 U.S. 405, 409-10 (1974)).

This is a fact-sensitive, context-dependent inquiry. Troster, id. Because plaintiffs have not offered any evidence that smoking in prison is conduct sufficiently expressive to implicate the First Amendment, plaintiffs' First Amendment claim must fail. See, e.g., id.

III. EQUAL PROTECTION CLAIM

Plaintiffs also claim that "[many of the] residents confined within the Philadelphia Prison System are [presentence detainees] and remain confined due to being able to post case bond and therefore retain the same rights as normal citizens."³ Pls.' Compl. at ¶ 1. Plaintiffs do not assert that pretrial detainees are a suspect class, nor that smoking in prison is a fundamental right. Therefore, strict scrutiny is not required. Rather, this claim is subject to rational-basis review. Heller v. Doe, 509 U.S. 312, 319-320 (1993). The reasons given by the Philadelphia Prisons for the policy are as follows:

- a smoke free environment will improve the health and safety of all who work or live in PPS facilities;
- removal of cigarettes, or other tobacco products, lighters, and matches from the PPS facilities will reduce the fire safety hazards, potentially protecting lives, property, and equipment;
- a smoke free environment reduces the threat of complaints and litigation from non-smokers; and

³ The Court notes that the Philadelphia Prisons's smoke free policy applies to "staff, inmates, contract employees, and visitors (including official visitors)." Phila. Prisons, Pol'y No. 4.E.23, at 2.

- compliance with Mayoral Executive Orders 4-88 and 12-93 which require a smoke-free environment for all City buildings/facilities.

Phila. Prisons, Pol'y No. 4.E.23, at 2 (effective Jan. 1, 1998). The smoking policy thus survives rational basis review because it "bear[s] a rational relationship to an independent and legitimate . . . end." Romer v. Evans, 116 S.Ct. 1620, 1627 (1996)(quoted by Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 660 (1st Cir. 1997)). Therefore, the prohibition against smoking in prison, in this case, does not violate the Fourteenth Amendment's guarantee of equal protection.

V. CRUEL AND UNUSUAL PUNISHMENT CLAIM

To the extent plaintiffs assert an Eighth Amendment claim for failure of prison officials to "consider[] . . . the effects or treatment to the sudden withdrawal to the long term use of said [tobacco] products," such a claim is without merit. To succeed on a claim for lack of adequate medical care, "'a prisoner must allege acts or omissions sufficiently harmful to evidence a deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoted by Reynolds, 833 F. Supp at 520). Further "[courts should defer to prison officials in matters affecting the health and safety of inmates." Reynolds, 833 F. Supp. at 521 (citing Bell v. Wolfish, 441 U.S. 520, 546-548 (1979)).

Several courts have considered whether bans on smoking in prisons violate the Eighth Amendment, and have concluded

unanimously that generally they do not. See, e.g., Beauchamp v. Sullivan, 21 F.3d 789, 790 (7th Cir. 1994); Reynolds, 833 F. Supp. 518; Doughty, 731 F. Supp. 423; Austin v. Lehman, 893 F. Supp. 448 (E.D. Pa. 1995); Washington v. Tinsley, 809 F. Supp. 504 (S.D. Tex. 1992).

Moreover, defendants have offered substantial evidence that the no-smoking policy has been implemented with due consideration to the withdrawal-related discomfort of the inmates. PPS's policy states: "The inmate populations will be given notice within reasonable time before the prohibition is implemented The PPS will provide the inmate population with access to community accepted 'smoking cessation' programs." Phila. Prisons, id. Further, defendants offered evidence that has shown that they have been sensitive to plaintiffs' predicament. In an affidavit, Thomas J. Costello, the Commissioner of Prisons for the City and County of Philadelphia, states that: (1) inmates were given advance notice that the total ban would go into effect January 1, 1998; (2) Costello met with block representatives at a "symposium" in the prison and explained the plan to phase-out smoking in the prisons; (3) at the symposium Deputy Health Commissioner for Health Promotion and Disease Prevention Dr. Lawrence Robinson explained the medical reasons for the ban and how inmates could lessen the impact of withdrawal-related symptoms; (4) in meetings held in preparation for the symposium, and at the symposium itself, the block representatives were permitted to comment on the plan and offer

suggestions; (5) PPS offers, inter alia, psychological counseling and educational opportunities, special snacks to satisfy oral cravings, and access to medical care, including making anti-depressants available to those who need them -- all to ease the transition to a non-smoking environment. Costello Aff.

Because plaintiffs offer no evidence to the contrary, the Court concludes that defendants have not exhibited deliberate indifference to plaintiffs' medical needs. Therefore, plaintiffs' Eight Amendment claim must fail.

VI. DUE PROCESS CLAIM

Plaintiffs complain that they are "deprived of due process of law in that no hearing of any nature has been held to give [plaintiffs] the right to exercise their due process rights to contest the abridging of their First Amendment rights." Pls.' Compl. at ¶ 1. Procedural due process rights, however, are only triggered by a deprivation of life, liberty, or property. U.S. Const. amend. XIV; Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-570(1972); see also Lei v. Brown, No. 97-845, 1997 WL 634506, at *5 (E.D. Pa. Oct. 5, 1997).⁴ Because the Court finds that, in this case, plaintiffs have shown no deprivation of life, liberty, or property, the Fourteenth

⁴ Moreover, "[i]nmates 'do not have a constitutionally protected right to a grievance procedure.'" Hoover v. Watson, 886 F. Supp. 410, 418 (D. Del.) (citations omitted), aff'd, 74 F.3d 1226 (3d Cir. 1995).

Amendment's guarantee of due process is not implicated.⁵

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

⁵ Despite the absence of any duty requiring them to do so, it appears that defendants afforded plaintiffs the opportunity to participate in the implementation of the no-smoking policy. See, infra.