

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

MARLENE TAPIA

Plaintiff,

v.

No. _____

**BLANCA ZAPATER, a Bernalillo
County, New Mexico Corrections
Officer in her individual capacity,**

Defendant.

JURY TRIAL DEMANDED

**COMPLAINT FOR FEDERAL CIVIL RIGHTS VIOLATIONS
AND VIOLATIONS OF THE NEW MEXICO TORT CLAIMS ACT**

Plaintiff Marlene Tapia brings this Complaint for violation of her civil rights under the Fourteenth Amendment to the United States Constitution or, in the alternative, the Eighth and Fourteenth Amendments pursuant to 42 U.S.C §§ 1983 and 1988 and for violations of the New Mexico Tort Claims Act (“TCA”). As grounds for this Complaint, Plaintiff alleges the following:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. § 1343.
2. Venue is proper in this district as Defendant Blanca Zapater and Plaintiff Marlene Tapia are residents of New Mexico.
3. All acts complained of occurred in Bernalillo County.

PARTIES

4. Plaintiff Marlene Tapia is a resident of the State of New Mexico.

5. Defendant Blanca Zapater was, at all relevant times herein, a corrections officer at the Metropolitan Detention Center, an agency of Bernalillo County, New Mexico. Defendant Zapater is a law enforcement officer for purposes of the TCA.

6. At all times material to this complaint, Defendant Blanca Zapater was acting within the scope of her employment and under color of state law.

FACTUAL ALLEGATIONS

7. On November 22, 2011, Plaintiff Marlene Tapia was brought to the Metropolitan Detention Center for a probation violation by a probation transport officer.

8. Ms. Tapia's probation violation had not yet been adjudicated when the incident forming the basis for this Complaint occurred.

9. Corrections officers Jennifer Stepp and Defendant Blanca Zapater took Ms. Tapia to the shower area to conduct a strip search.

10. The strip search was authorized by Sargeant Angela Sena.

11. Ms. Tapia was ordered to bend over at the waist while fully nude so the corrections officers could see her genital area.

12. The corrections officers observed a plastic baggie protruding from Ms. Tapia's vagina.

13. Defendant Blanca Zapater then sprayed a chemical agent directly on Ms. Tapia's genitals twice.

14. Sargeant Sena told Defendant Zapater twice to stop spraying Ms. Tapia and ultimately took the chemical agent away from Defendant Zapater.

15. Ms. Tapia was not using or attempting to use any force against the corrections officers.

16. Ms. Tapia offered no physical resistance to the corrections officers.

17. Spraying Ms. Tapia on the genitals served no purpose other than to punish Ms. Tapia.

18. Spraying Ms. Tapia on the genitals would not cause the baggie to become dislodged.

19. Defendant Zapater's conduct violated the Metropolitan Detention Center's policy regarding strip searches. That policy states: "If evidence shows that an item is in the body cavity of an inmate he/she will be referred to the Contract Medical Provider for treatment."

20. Instead of referring Ms. Tapia to the medical provider, Defendant Zapater used chemical agents against Ms. Tapia.

21. After Defendant Zapater sprayed Ms. Tapia with chemical agents twice on her naked genitals, she was taken to the medical unit for examination for her exposure to the chemical agents.

22. The chemical agents caused Ms. Tapia to suffer severe pain that lasted for several weeks including burning, swollen genitals, painful urination, and pain and burning on Ms. Tapia's face.

23. Defendant Zapater was disciplined as a result of her actions.

CONSTITUTIONAL CLAIM PURSUANT TO 42 U.S.C. § 1983

Claim for Relief – Cruel and Unusual Punishment in Violation of the Due Process Clause of the Eighth and Fourteenth Amendment to the United States Constitution

24. The Plaintiff incorporates by reference the preceding paragraphs as though they were stated fully herein.

25. The constitutional protection against cruel and unusual punishment for use of force against pretrial detainees applies through the due process clause of the Fourteenth Amendment.

26. The constitutional protection against cruel and unusual punishment for use of force against people who have been convicted of crimes applies through the Eighth Amendment and applies to the states via the Fourteenth Amendment.

27. If the Court determines that Plaintiff was a pre-trial detainee at the time of the incident, then her Fourteenth Amendment right was violated by Defendant when she sprayed Plaintiff's naked genitals twice with chemical agent. Alternatively, if the Court determines that Plaintiff had been convicted of a crime at the time of the incident, then her Eighth Amendment right was violated by Defendant when she sprayed Plaintiff's naked genitals twice with chemical agent.

28. Spraying Plaintiff's genitals with chemical agent constituted excessive force for the need presented.

29. Plaintiff presented no threat to Defendant, and Plaintiff was not acting violently.

30. Defendant's use of chemical agents against Plaintiff was used maliciously and wantonly with the purpose of causing harm to Plaintiff.

31. Defendant's motive was to punish Plaintiff, not to accomplish any legitimate goal.

32. Defendant acted maliciously and in callous disregard of, or deliberate indifference to, Plaintiff's rights.

STATE LAW TORT CLAIMS

Claim for Relief – Battery

33. The Plaintiff incorporates by reference the preceding paragraphs as though they were stated fully herein.

34. In undertaking the actions described above, Defendant intended to cause a harmful and offensive contact with Plaintiff.

35. In undertaking the actions described above, Defendant caused an offensive contact with Plaintiff to occur.

36. Plaintiff suffered pain and injuries as a result of Defendant's actions.

37. The Defendant's actions, as described in the preceding paragraphs, constitute a battery under New Mexico law for which immunity has been waived by NMSA 1978, § 41-4-12 (1977).

PRAYER FOR RELIEF

WHEREFORE Plaintiff Marlene Tapia respectfully requests that the Court enter judgment in her favor including:

1. Awarding damages in an amount a jury deems sufficient to compensate Ms. Tapia for Defendants' unlawful conduct;
2. Damages for the nature, extent, and duration of Ms. Tapia's injuries;
3. Punitive damages in an amount a jury deems sufficient to deter Defendant and other corrections officers from acting in reckless and callous disregard of, or indifference to, the rights and safety of Ms. Tapia and others;
4. Awarding reasonable costs and attorneys' fees incurred in bringing this action pursuant to 42 U.S.C. § 1988;
5. For an award of pre- and post-judgment interest; and
6. For such other and further relief as the Court deems just.

JURY DEMAND

Plaintiff respectfully demands a jury on all issues so triable. This demand is proper pursuant to Fed. R. Civ. Proc. 38 and the Seventh Amendment of the United States Constitution

Respectfully Submitted,

/s/ Alexandra Freedman Smith
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JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
 Marlene Tapia

(b) County of Residence of First Listed Plaintiff Sandoval
 (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
 Alexandra Freedman Smith, ACLU-NM; P.O. Box 566, Albuquerque, NM 87103; (505) 266-5915/ Matthew L. Garcia, Garcia Ives Nowara; 201 Third Street NW, Suite 480, Albuquerque, NM 87102; (505) 889-1030

DEFENDANTS
 Blanca Zapater

County of Residence of First Listed Defendant Bernalillo
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habens Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. § 1983

Brief description of cause:
Cruel and Unusual Punishment in Violation of the Due Process Clause of the Eighth and Fourteenth Amendment

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 11/20/13 SIGNATURE OF ATTORNEY OF RECORD Alejo A Smith

FOR OFFICE USE ONLY RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____