UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ADRIENNE GILANIAN,	)	
Plaintiff,	)	
	)	
v.	)	**Civil No. 01-11580-NG**
	)	
CITY OF BOSTON, SUFFOLK COUNTY, RICHARD J. ROUSE, MARY POE, JANE DOE,	)	
Defendants.	)	

GERTNER, D.J.:

MEMORANDUM AND ORDER RE: SECOND MOTION FOR SUMMARY JUDGMENT
August 30, 2005

I. INTRODUCTION

On September 14, 2001, Adrienne Gilanian ("Gilanian") filed a complaint against the City of Boston, Suffolk County, Suffolk County Sheriff Richard Rouse ("Rouse"), and two unidentified Suffolk County corrections officers, alleging that she was unconstitutionally strip-searched twice while in pre-trial detention at the Nashua Street Jail in March 2000. In light of the Court's rulings to date, only Gilanian's § 1983 claims against Suffolk County and Rouse (in his official capacity) remain pending.[1] Moreover, only the second of two

[1] In her complaint, Gilanian sought damages under both 42 U.S.C. § 1983 and the Massachusetts Civil Rights Act ("MCRA"), Mass. Gen. Laws ch. 12, § 11(I). On April 30, 2002, the Court dismissed all claims against the City of Boston because it had no role in promulgating or implementing the customs or policies at Nashua, and because a city cannot be sued under the MCRA. On May 20, 2002, the Court dismissed the MCRA claims against Suffolk County and Rouse because a municipality cannot be sued under the MCRA and a claim against Rouse in his official capacity would constitute a claim against the County. In addition, the Court barred a claim against Rouse in his individual capacity because Gilanian had not alleged that he had personally engaged in any unlawful acts against her. Finally, in the Memorandum and Order of June 3, 2004, the Court dismissed all claims against the two unidentified Suffolk County corrections officers because, nearly two years into the suit, plaintiff

searches specified in Gilanian's complaint remains at issue, as this Court granted defendants' motion for summary judgment on the first search, but invited further discovery on the second search, in the Memorandum and Order of June 3, 2004.

Defendants Suffolk County and Rouse have since filed their second motion for summary judgment on the constitutionality of the second strip-search, arguing that Suffolk County's policy of strip-searching all detainees being transported to court is necessary to institutional security and that therefore the second search of Gilanian was constitutional [docket entry # 33]. In addition, even if the second search is found to be unconstitutional, Rouse seeks qualified immunity. Plaintiff Gilanian has filed an opposition, as well as a cross-motion for summary judgment, contending that defendants lacked the reasonable suspicion necessary to make the second strip-search constitutional [docket entry # 37].

I **DENY** defendants' motion for summary judgment on liability for the second strip-search, but **GRANT** it as to Rouse's request for qualified immunity [docket entry # 33]. I also **DENY** plaintiff's cross-motion for summary judgment [docket entry # 37], pending additional briefing on whether defendants' new policy of segregating inmates like Gilanian from the general

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had not identified (and therefore not served) them.

population can be used as evidence that this was a feasible alternative to strip-searching.

II. FACTS

A. Plaintiff's Arrest and Strip-Searches[2]

On March 14, 2000, Gilanian's mother, Christina Jourdon, went to the Brookline courthouse to report that she was in fear of her daughter, who had threatened to kill her and her husband. Plaintiff was arrested in her home that day, and spent the night at the Brookline Police Station.

The following morning, March 15, 2000, Gilanian was transported to the Brookline District Court to answer to a warrant that she had defaulted on in July 1994. The warrant charged her with assault and battery in an incident also involving her mother.[3] After Gilanian was arraigned on the warrant, the judge ordered her detained in jail overnight and turned over to the West Roxbury District Court the following day to answer to yet another outstanding warrant. This second warrant was issued by West Roxbury when, on May 21, 1992,

[2] The relevant facts are generally restated from this Court's Memorandum and Order of June 3, 2004.

[3] Plaintiff alleges this incident arose out of an argument with her mother in their apartment; their downstairs neighbors called the police.

plaintiff allegedly failed to appear to answer to a charge of assault with a dangerous weapon.[4]

Gilanian alleges that police officers transported her from the Brookline District Court to Suffolk County's Nashua Street Jail in handcuffs.[5] After being processed, plaintiff was taken to a small room by corrections officer Mary Poe ("Poe"). Poe ordered plaintiff to strip and then to bend over, spread her legs, and raise her arms, while Poe visually inspected her body and body cavities. In a Memorandum and Order dated June 3, 2004, the Court granted defendants summary judgment on this first search, holding that it was supported by reasonable suspicion, as Gilanian was in a class of detainees that could have had access to contraband, and that it was conducted in a reasonable fashion.[6]

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[4] Plaintiff alleges that this incident arose out of a disagreement with her landlord. Her landlord "went to [her] apartment late one evening with liquor on his breath demanding the rent money. . . . The plaintiff opened the door to him, then regretted it, and he called the police, alleging that the plaintiff had tried to hurt him." Pl.'s Opp'n to Def.'s [First] Mot. Summ. J. at 3 n.5 [docket entry # 22].

However, according to plaintiff, the charge was effectively disposed of when, on March 11, 1992, it was placed on file at the request of all parties. Inexplicably, a summons issued on April 11, 1992, with no return of service for the plaintiff, and a warrant issued on May 21, 1992.

[5] The Nashua Street Jail is classified as a maximum-security facility, as it houses detainees awaiting trial for all crimes, including capital offenses.

[6] I found that Gilanian could have had access to contraband because she was arrested after allegedly threatening her parents' lives, and spent 24 hours in a local jail (where she was not strip-searched) and a full day in the Brookline courthouse lock-up and courtroom. Moreover, the search was reasonably conducted because it entailed only a visual inspection, and was conducted by a female corrections officer in a private room.

After plaintiff's first strip-search and body cavity inspection, she was given a jumper to put on, and a male officer escorted her to her own cell, where she spent the night of March 15, 2000. Defendants contend that Gilanian was booked into a general population housing unit with other female detainees. Plaintiff disagrees, further alleging that she at no time commingled with the general prison population. In her deposition, however, Gilanian described other women watching television upon her arrival to her unit in the jail, which suggests that she could have had contact with other inmates in the unit.

The following morning, on March 16, 2000, Gilanian showered alone, had breakfast with one other female detainee, and then took an elevator to a holding cell where she remained for four or five hours with only that one detainee. Subsequently, she returned to the small room where she had been strip-searched the night before.

In this room, plaintiff was subjected to the second search now at issue. Again, she was ordered to strip and was visually inspected by corrections officer Jane Doe. Only this time, plaintiff alleges that there were more than four women present, including another female detainee and additional jail employees. Defendants concede that, "[g]iven the number of persons going to court each day, the number of officers assigned to transport

them, and time constraints required to have detainees in court by 9:00 a.m. it is sometimes necessary to search more than one inmate at a time." Sumpter Aff. ¶ 18. More specifically, since the jail logbook does not indicate who conducted plaintiff's search or who was present in the room during the search, defendants admit that "[p]laintiff may have been searched in the presence of another inmate." Id. ¶ 21.

B. Suffolk County Search Policy

Defendants admit that, at the time of the incident at issue, they strip-searched all inmates before transporting them to court. They contend that such searches were called for by the Code of Massachusetts Regulations, the Massachusetts Department of Correction policy, and the Suffolk County Sheriff's Department Policy S530.

The Code of Massachusetts Regulations states that strip-searches may be employed when inmates are transported "to and from court/medical trips/visits." Mass. Regs. Code tit. 103, § 924.06(2)(b) (West 2005); see also Massachusetts Department of Correction, No. 103 DOC 506.04.1. (2004) ("strip searches may be employed . . . before and after court . . . ."). These searches are to be conducted "in relative privacy with as much dignity as possible and by two security personnel of the same sex as the inmate, except in an emergency." Id. § 924.06(2); see also Massachusetts Department of Correction, No. 103 DOC 506.04.2.A.

("Strip searches of individual inmates should be conducted in relative privacy usually by two security personnel, rendering as much dignity to the situation as possible.").

The Suffolk County Sheriff's Department Policy states that "[i]nmates being transported from a Department facility will undergo a complete strip search, including visual inspection of body cavities. Searches will be conducted by transporting officers of the same gender as the inmate." Suffolk County Department Policy, S530, § II.G.

III. LEGAL ANALYSIS

A. Summary Judgment Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Material" facts are those that "might affect the outcome of the suit under the governing law . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Disputes about material facts are "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

In construing the evidence, the Court must draw all reasonable inferences in favor of the non-moving party. Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53 (1st Cir. 2000). However,

summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

B. Constitutionality of the Second Search

1. Reasonable Search Standards under the Fourth Amendment

Convicted prisoners and pretrial detainees retain basic Fourth Amendment rights against *unreasonable* searches and seizures. Roberts v. Rhode Island, 239 F.3d 107, 109 (1st Cir. 2001) (citation omitted); see also Ford v. City of Boston, 154 F. Supp. 2d 131 (D. Mass. 2001) (establishing unconstitutionality of Suffolk County's policy of strip-searching all jail admittees, no matter what their crime or circumstances, without reasonable suspicion). The Supreme Court in Bell v. Wolfish, 441 U.S. 520, 559 (1979), held that "[t]he test of reasonableness under the Fourth Amendment . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." Id. In weighing these interests, courts are to consider "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating

it, and the place in which it is conducted."[7] Id. (citations omitted).

The class action plaintiffs in Bell (pretrial detainees and sentenced prisoners at a short-term custodial facility in New York City) challenged, inter alia, the Bureau of Prison's requirement that all inmates undergo a strip-search involving exposure of their body cavities for visual inspection after every contact visit with a person from outside the institution. 441 U.S. at 558. Admitting that "this practice instinctively gives [it] the most pause[,]" id., the Court nonetheless upheld such searches after contact visits, as long as they are not done in an abusive or otherwise unreasonable fashion, see id. at 560. In Arruda v. Fair, 710 F.2d 886, 886-88 (1st Cir. 1983), the First Circuit followed suit, upholding a blanket policy of strip-searching all inmates confined to a special maximum security unit within MCI-Walpole when they enter or leave the unit to go to the law library and infirmary, and after they receive visitors in the unit's visiting rooms.[8]

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[7] The scope and place of the intrusion are clear here, and would be acceptable, if the strip-search had been properly justified and conducted. The crux of the subsequent analysis rests on the justification prong. See infra Part III.B.2.

[8] In reaching its conclusion, the Arruda court reasoned that the prison was a maximum-security one, the inmate in question was confined to a special area for particularly dangerous inmates, and the record contained a lengthy history of prison contraband problems, including eight instances of guards themselves smuggling contraband. 710 F.2d at 887-88. The circumstances at hand are entirely distinct with respect to the second factor. Moreover, "[c]ourts have given prisons far more leeway in conducting searches of inmates with outside contact than in searching everyone, simply because such visits

Years later, in Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997), the First Circuit found that an arrestee had been unreasonably subjected to a strip-search and visual body cavity inspection while being held in a cell at a police station. The court noted that all courts considering the issue, including the First Circuit, have recognized "'the severe if not gross interference with a person's privacy that occurs when guards conduct a visual inspection of body cavities.'" Swain, 117 F.3d at 6 (citing Arruda v. Fair, 710 F.2d 886, 887 (1st Cir. 1983). At the same time, it acknowledged that decisions such as Bell have found "[i]nstitutional security . . . to be a compelling reason for conducting warrantless strip and visual body cavity searches." Id. at 7 (citing Bell, 441 U.S. at 559). Balancing these interests, the First Circuit concluded that, "to be reasonable under Bell, strip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons."[9] Id.

In Roberts, the First Circuit recognized the divide between Swain, where reasonableness rested on particularized suspicion,

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often allow smuggling of contraband." Roberts, 239 F.3d at 111. Meanwhile, as discussed below, the evidence of the history of contraband problems at the Nashua Street Jail does not speak directly to the need for a blanket search of all pre-transportation detainees. See infra Part III.B.2.

[9] The court found that an objective officer would not have had a reasonable suspicion that Swain was concealing drugs or contraband on her person. See Swain 117 F.3d at 8-9. Moreover, the court concluded that the institutional security justification was absent because "[t]here was no risk that [Swain] would come into contact with other prisoners, or be able to smuggle contraband or weapons into a secure environment." Id.

and Bell and Arruda, where the Supreme Court and the First Circuit, respectively, allowed blanket searches in certain situations, even without suspicion that an individual inmate had received contraband. See Roberts v. Rhode Island, 239 F.3d 107, 111 (2001). The court reconciled these cases to mean that a strong institutional security "justification for initiating" a search obviates the need for a finding of reasonable suspicion of individual wrongdoing. See Roberts, 239 F.3d at 110-11.

In particular, the Roberts court found "[t]he institutional security concerns in play [to] fall somewhere between those exhibited in Swain, which were insufficient to support a search, and those in Arruda and Bell, which made broad-based searches without individual suspicion reasonable." Id. However, it determined the Rhode Island policies at issue, providing that all males committed to the state prison be subject to a strip and visual body cavity search upon incarceration as a matter of routine procedure, to "fall on the Swain side of the constitutional line." Id.; see also Savard v. Rhode Island, 338 F.3d 23, 27 (1st Cir. 2003) ("The Roberts decisions . . . hold unequivocally that the ACI's policy of strip-searching persons arrested for non-violent, non-drug-related misdemeanors, in the absence of particularized suspicion, violated the Constitution."); Ford, 154 F. Supp. 2d 131.

2. Justification for Initiating Gilanian's Second Search: Institutional Security?

The parties' positions in this case reflect the Swain/Bell divide. Defendants Suffolk County and Rouse admit to a blanket strip-search policy, and therefore seek to justify the second search of Gilanian with evidence of general institutional security concerns, rather than with individualized suspicion about Gilanian as a threat to security. Gilanian retorts that individualized suspicion was necessary to make her second search reasonable. Since Gilanian's circumstances do not fall precisely into the categories of blanket searches upheld in Arruda and Bell, this Court must conduct a specific inquiry to determine whether the institutional security interest was strong enough to obviate the need for individual suspicion or whether individual suspicion was necessary to justify the search under these facts. If the latter is true, then summary judgment must be granted to the plaintiff, as defendants were openly unconcerned with individual suspicion.

In the Memorandum and Order of June 3, 2004, I noted that, while the First Circuit has suggested that the "reasonable suspicion standard may be met simply by the fact that the inmate was charged with a violent felony,"[10] Roberts, 239 F.3d at 112, I did not need to reach this issue because the reasonableness of the second search was complicated by the fact that plaintiff had

[10] As indicated in Part II.A., Gilanian faced an outstanding warrant on a violent felony.

already been searched less than 24 hours before and the institutional security concerns present at that point were unclear. Mem. and Order at 10-11. Accordingly, I invited further discovery to shed light on the magnitude of Suffolk County's institutional security concerns.[11] On the basis of this information, I deny summary judgment on liability to both parties at this point.

In response to my inquiry, defendants have asserted that strip-searches of all inmates were conducted prior to transportation to court as a security precaution to prevent escape and injury to staff, inmates,[12] court personnel and the general public. In particular, they note that "[t]he safe and efficient running of a court session requires that individuals in custody who appear before the Court are not in a position to harm anyone or disrupt the proceedings" (i.e., through possession of a weapon). Defs.' Mem. in Support of Mot. for Summ. J. [hereinafter "Defs.' Mem."] at 7.

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[11] I posed the following questions to defendants: 1) What is the likelihood that a detainee, who is strip-searched late at night upon arrival to jail, will acquire contraband before being transported to court less than 24-hours later? 2) Have there been instances where pretrial detainees like Gilanian have harmed a corrections officer or attempted escape during transport from the jail? 3) Was there a history of contraband, attempted escapes, or other particular security concerns at the Nashua Street Jail during the time in question? 4) If yes, what portion of these problems have been attributed to pretrial detainees? 5) Would it have been possible to segregate plaintiff from the general population?

I also sought additional information about the nature of the search: Who was in the room when plaintiff was searched for the second time?

[12] Detainees are transported to court in groups (as many as 14 detainees may travel together in one van). Sumpter Aff. ¶ 15.

Defendants present the availability of contraband within the jail as one potential security threat. In his affidavit, Eugene S. Sumpter, Jr., the Superintendent of the Nashua Street Jail, indicates that contraband can be introduced into the jail "through inmates . . . , via the mail, through visits, deliveries, and by staff and volunteers, either intentionally or unintentionally." Sumpter Aff. ¶ 6. It has been found in common areas of the jail, including the unit television area, the eating area, and the shower area. Id. ¶ 9. Specifically, homemade weapons or "shanks" and drugs have been discovered in the kitchenette area, multi-purpose rooms, and storage closets. Id. ¶ 10.

Defendants compiled disciplinary reports alleging inmates' possession of contraband during the two years preceding Gilanian's incarceration (1998 & 1999) and reviewed them alongside corresponding disciplinary hearing results and inmate statements. Cawley Aff. ¶ 3. They purportedly eliminated all reports pertaining to "nuisance" contraband and tobacco. Id. ¶ 4. On the basis of the remaining reports, defendants created a list of approximately one hundred items of contraband discovered from December 27, 1997, through October 7, 1999, ranging from drugs to weapons. See id. ¶ 5. Over the two-year period, "some" contraband was left concealed by the previous occupants of

cells,[13] and universal handcuff keys were discovered twice (in the possession of an inmate and attached to the underside of a cell). See id. ¶¶ 6-7.

Defendants further contend that, while it is impossible to predict with any accuracy the likelihood that plaintiff could have acquired contraband in the time between the first and second strip-searches, the opportunity was present. When Gilanian was brought to her cell, other inmates were out on the unit watching television. Gilanian Dep. at 46-47. She had breakfast with another detainee after showering in the unit. Id. at 48. According to John Barnes, a Jail Officer at the Nashua Street Jail, contraband has been discovered on inmates committed less than 24 hours. Barnes Aff. ¶ 8. Although other inmates would have been searched prior to incarceration with the general population, as noted above, contraband has been abandoned in cells and can be found in common areas. Under the circumstances, defendants believe that their response was not exaggerated, particularly given the criminal charges pending against plaintiff (which they cite only in retrospect).

Plaintiff contends that, even assuming defendants' security concerns to be legitimate, she was kept apart from the general jail population and thus had no opportunity to acquire contraband

[13] The list provided explicitly refers to three instances of contraband - a handcuff key, a homemade pipe, and razor blades - concealed in cells by prior inmates.

between the first and second searches. If this were true, it might well diminish defendants' security interest to the point of warranting summary judgment against them. However, defendants maintain that all detainees were integrated into the general population when plaintiff was in custody. And, in her deposition, Gilanian indicates at least some exposure to other inmates. See supra Part II.A. Thus, evaluating the evidence in the light most favorable to defendants, summary judgment cannot be granted in plaintiff's favor under the theory that she was separated from the general population during her detention.

Nonetheless, Gilanian makes a second, more meritorious point - that defendants do not demonstrate a history of security issues of the magnitude or type warranting the second strip-search. She notes that there were a total of 1,821 disciplinary reports filed in the two-year time period examined, capturing events ranging from abusive language to failure to obey an officer. Pl.'s Opp'n to Defs.' Mot. for Summ. J. [hereinafter "Pl.'s Opp'n"] at 6. From these reports, she gleaned 160 incidents of contraband confiscation (including nuisance contraband). She suggests that not only are contraband confiscations a small percentage of the total documented incidents, but also that, "[w]hen compared to the total number of strip searches conducted, for which there is no documentation, the contraband confiscations likely become even more de minimis." Pl.'s Opp'n at 6 n.6.

Additionally, out of the total set of reports, plaintiff identified only three escape attempts and seventy assaults on corrections officers. Defendants admit that none of the assaults or escapes were perpetrated through the use of weapons against jail officers, suggesting that, for the most part, strip-searches would not have prevented these incidents.[14] Moreover, only 14 of the 1,821 reported incidents were alleged to have occurred while a detainee was in transit, and the records fail to reflect the particular nature of these incidents. Id. Even if all three escape attempts occurred in transit, Sumpter's affidavit suggests that a body cavity inspection might not have prevented them.[15] Accordingly, plaintiff concludes that the vast majority of security issues at the Nashua Street Jail were not the same issues - risk of escape, and injury to inmates, staff, court personnel - cited by defendants to justify her strip-search.

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[14] Defendants state that, in 1998 and 1999, there were numerous instances of violence against jail officers, though none occurred during escape attempts, and none involved weapons or foreign objects. Cawley Aff. ¶ 8. Defendants were not able to ascertain the commitment date of inmates involved in assaults on staff. Id. ¶ 9.

[15] During his tenure with the Sheriff's Department, since 1989, Sumpter recalls at least four instances of escape or attempted escape during transportation: 1) "[o]ne detainee kicked out the window of a cruiser and escaped through [the] broken window"; 2) "inmates were able to somehow unscrew the metal grate in the transportation van and escape through the window"; 3) "two inmates were able to slip their handcuffs and escape from the van"; and 4) "a detainee escaped from the courthouse . . . after slipping off his handcuffs." Sumpter Aff. ¶ 11. Unfortunately, it is impossible to tell from Sumpter's description whether the detainees who slipped off their handcuffs or unscrewed the metal gate did so with the aid of some sort of contraband. As a result, it is impossible to determine whether strip-searches are important to preventing such incidents. Moreover, Sumpter mentions very few such incidents over the course of his long tenure.

Defendants admit that "the record does not indicate a plethora of escape attempts or assaults on correctional staff during transportation" and "that little contraband has been discovered as a result of the visual rectal search." Defs.' Mem. at 7. However, they argue that this "is as much a testimony to [the practice's] effectiveness as a deterrent as [to] its ineffectiveness as a discovery tool." Id. Their rationale echoes that of the Supreme Court in Bell:

> A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record, and in other cases. That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.

Bell, 441 U.S. at 559 (citations omitted).

However, the First Circuit's interpretation of contraband evidence in Roberts is more akin to Gilanian's position. Recognizing both that "a policy of searching all inmates is more reasonable when the record indicates a 'lengthy history of contraband problems,'" and that "the record [in Roberts] does indicate a lengthy history of contraband problems," the court nonetheless found that "[t]he lack of specific instances where a

body cavity search was necessary to discover contraband supports a finding that the policy of searching all inmates is an unreasonable one." Roberts, 239 F.3d at 112. In the case at bar, not only do defendants lack such specific evidence, but they also fail to produce evidence that body cavity searches would address the types of security problems that have arisen during the transportation of detainees.[16]

Still, it would be disingenuous to quote Roberts without acknowledging the fact that, without evidence on this record that the security conditions at the Nashua Street Jail did not call for body cavity searches *before* they were routinely conducted, it is impossible to definitively discount defendants' theory that their policy of searching all pre-transportation detainees is the reason for few security incidents during transportation. With

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[16] In finding blanket strip-searches of arrestees to be unreasonable, the Roberts court also relied on the following factors: 1) unlike in Bell or Arruda, Rhode Island did not limit its searches to prisoners who had contact with outside visitors, and though arrestees have the opportunity to introduce contraband into prison, this is far less likely subsequent to an arrest than during a contact visit; 2) although the Intake facility at issue in Roberts was maximum security, prison officials made no effort to identify the most dangerous inmates and ensure that they not have access to weapons or contraband; rather, Rhode Island policy severely infringed on the privacy of far less dangerous inmates (like Roberts, who was arrested for his failure to appear in family court); and 3) though the reasonable suspicion standard may be met simply by the fact that the inmate was charged with a violent felony, no evidence was adduced to indicate that Roberts' offense was the type normally associated with weapons or contraband. 239 F.3d at 111-12.

Similarly, defendants did not limit their searches to contact visits or to the most dangerous inmates. Though, relative to Roberts, Gilanian might have been considered a dangerous inmate, defendants do not purport to have had a reasonable suspicion on the basis of her charge. Moreover, they potentially had at their disposal a simpler, less invasive way of ensuring that she not pose a security risk, given that she had already been searched once before her short stay at the jail. See infra.

that said, it would be impracticable to require defendants to produce scientifically rigorous evidence of the efficacy of their policies. But, it would also be unfair to allow them to rest on a generalized record of security troubles, like the one at hand, that in no way dictates a blanket pre-transportation search policy.

Given the challenges of interpreting the evidence at hand, the resolution of this case at summary judgment may hinge more soundly on a "less-restrictive alternative" argument. At the time of plaintiff's incarceration, all inmates committed to the Nashua Street Jail by a court (like Gilanian) were transferred to the general population. Defendants rely heavily on this fact to justify their second search of Gilanian. Assuming that Gilanian did in fact intermingle with the general population, she argues that defendants had the option of avoiding a second strip-search by simply keeping her segregated from the general population until her trip to court. If segregation was feasible at the time, in opting against it, defendants violated Gilanian's Fourth Amendment rights.

In Roberts, the First Circuit rejected appellants' argument that all arrestees had to be strip-searched for security reasons because they intermingled with the general population in a maximum security facility. Roberts, 239 F.3d at 112. "To place so much weight on one (potentially alterable) characteristic of

the state prison system would gut the balancing approach endorsed by the Supreme Court in Bell and applied by this Court in Swain and Arruda." Id. at 113. The court found that, on the record, "less invasive (and less constitutionally problematic) searches would have been equally as effective in revealing contraband."[17] Id. at 112; cf. Bell, 441 U.S. at 559 n.40 (Supreme Court was concerned that "'[t]he logic of [] elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers[,]'" 441 U.S. at 559 n.40 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 556-57 n.12 (1976)), and that, "assuming that the existence of less intrusive alternatives is relevant to the determination of the reasonableness of the particular search method at issue, the alternative suggested . . . simply would not be as effective as the visual inspection procedure.").

On this record, I need not go so far as to recommend any alternative search techniques to defendants, much less "elaborate" ones. Gilanian had already been strip-searched once upon her arrival to the Nashua Street Jail (a reasonable response given the violent nature of her charge, among other factors). To the extent the record suggests that Gilanian could have acquired

[17] The court so concluded despite its acknowledgment that the Bell analysis is a "deferential one, giving due regard to the 'professional expertise of corrections officials,' . . . and the limited role of the judiciary in operating and supervising correctional facilities . . . ." Roberts, 239 F.3d at 110.

contraband in the general population before being transported to court, it appears defendants could have entirely eliminated the risk, and therefore the need for a second search, by keeping her in a section of the jail where access to contraband would not have been a viable possibility. It was unreasonable for defendants to choose the more invasive route, if segregation was in fact possible.

Defendants concede that, after Roberts, which was decided less than a year after Gilanian's search, they began keeping all detainees held over on default warrants (like Gilanian) in the booking room overnight. Defs.' Mem. at 9 n.4. Plaintiff contends that these individuals are not strip-searched during their detention. Pl.'s Opp'n at 10. Accordingly, she argues that "clearly there existed a far less intrusive and easily implemented manner of providing for the safety of those in transit . . . ." Id. Defendants make the following retort:

> Theoretically, any specific detainee could be segregated from the general population. However, various factors, including staffing, available space, and the population count would necessarily need to be considered.
>
> It is difficult to determine four years after the fact whether Plaintiff could have been segregated.

Defs' Mem. at 8-9.

It is hard to believe that defendants' resources changed significantly during the short period of time between Gilanian's

second strip-search and their policy change. However, I am reluctant to rely on defendants' policy change without additional briefing from the parties about the implications of Fed. R. Evid. 407 in a civil rights context. See Fed. R. Evid. 407 (precluding the use of "evidence of subsequent [remedial] measures . . . to prove negligence, [or] culpable conduct," but allowing such evidence "when offered for another purpose, such as . . . feasibility of precautionary measures, if controverted").

Accordingly, I **DENY** both defendants' and plaintiff's motions for summary judgment on liability, pending additional briefing on whether I can appropriately rely on defendants' policy change to conclude that segregation was, at the time of Gilanian's second strip-search, a feasible less-restrictive means of addressing institutional security, or whether a trial must be held on the issue of feasibility.[18]

C. Defendants' Liability

1. Suffolk County's Liability

[18] Plaintiff also makes some suggestion that the manner of her search (namely, the presence of at least one other inmate and one officer besides the one inspecting her) compromised her dignity. Defendants respond that, even if plaintiff was searched in the presence of another female inmate, courts have held that this would not make the search constitutionally defective. However, they cite only Elliott v. Lynn, 38 F.3d 188 (5th Cir. 1994), which held that defendant was fully justified in searching inmates collectively during an emergency situation where a Louisiana State Penitentiary was plagued with increasing numbers of prison murders, suicides, stabbings, and cuttings. 38 F.3d at 191. Obviously, the circumstances of Gilanian's search are not nearly analogous. Under these facts, then, there is even some question as to the appropriateness of the search conditions.

To hold a local government entity liable under 42 U.S.C. § 1983 for civil rights violations committed by its employees, a plaintiff must establish that the violations resulted from implementation or execution of a policy or custom of the entity. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-91 (1978). Here, there is no question that, at the time of Gilanian's second search, Suffolk County had an explicit policy of strip-searching all inmates pre-transportation, regardless of their individual characteristics. In fact, defendants attempt to support the constitutionality of plaintiff's strip-search by citing this policy.[19] See supra Part II.B. Thus, if Gilanian's second search, a direct result of this policy, is found to be unconstitutional, the County will be liable under Monell and a trial will have to be conducted to determine the particular money damages owed Gilanian under 42 U.S.C. § 1983.

2. Sheriff Rouse's Liability

I concluded in Ford that the Sheriff of Suffolk County "'has final policymaking authority for establishing policies for conducting searches of prisoners at the Nashua Street Jail.'" 154 F. Supp. 2d at 146. Accordingly, if this Court determines that Gilanian's second strip-search is unconstitutional, Rouse

[19] Mere reliance on regulations does not circumvent Fourth Amendment scrutiny; courts commonly find Fourth Amendment violations despite the existence of regulations. See, e.g., Ford, 154 F. Supp. 2d 131.

will bear responsibility because he was Sheriff at the time of the incident.

Nonetheless, his liability in damages for the second search would depend on whether he is entitled to qualified immunity. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). If the law at the time of the violation was not clearly established, "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Id.

In Ford, where I examined a Suffolk County policy that subjected all jail admittees to strip and visual body cavity searches, I determined that Rouse was entitled to qualified immunity for all unconstitutional searches conducted prior to - but not after - the decision in Swain. See Ford, 154 F. Supp. 2d at 147. I reasoned that Swain signified the First Circuit's shift away from the plain authorization of visual body cavity inspections. See id. The same rationale could be used to deny Rouse qualified immunity here, since the second search of Gilanian occurred several years after Swain was decided.

However, the ruling in this case will turn on evidence of the history of security concerns and the concept of less-restrictive alternatives clarified significantly in Roberts, rather than on the reasonable suspicion requirement introduced in Swain. Before Roberts, the First Circuit's application of Bell to these issues was unclear. Accordingly, since Roberts was decided nearly a year after Gilanian was strip-searched, I hereby **GRANT** Rouse qualified immunity.

IV. CONCLUSION

For the reasons stated above, I **DENY** defendants' motion for summary judgment with respect to liability for the second strip-search of Gilanian, but **GRANT** it as to Rouse's request for qualified immunity because the resolution of this case will hinge on facets of the law that were unclear at the time of the search (i.e., before Roberts). I **DENY** plaintiff's motion for summary judgment on liability, pending additional briefing on whether I can appropriately rely on defendants' policy change (requiring segregation of inmates in Gilanian's position) to conclude that, at the time of Gilanian's second strip-search, segregation was a feasible less-restrictive means of addressing institutional security, or whether a trial must be held on the feasibility issue. Plaintiff's brief is due by **September 15, 2005**. Defendants' reply brief is due by **September 31, 2005**.

SO ORDERED.

Date: August 30, 2005 **/s/NANCY GERTNER, U.S.D.J.**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ADRIENNE GILANIAN,	)	
Plaintiff,	)	
	)	
v.	)	**Civil No. 01-11580-NG**
	)	
CITY OF BOSTON, SUFFOLK COUNTY, RICHARD J. ROUSE, MARY POE, JANE DOE	)	
Defendants.	)	

GERTNER, D.J.:

ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

For the reasons set forth in the accompanying Memorandum and Order, defendants' motion for summary judgment [docket entry # 33] is **DENIED** with respect to liability for the second strip-search of Gilanian, but **GRANTED** as to Rouse's request for qualified immunity. Plaintiff's cross-motion for summary judgment [docket entry # 37] is **DENIED**, pending additional briefing on whether I can appropriately rely on defendants' policy change (requiring segregation of inmates in Gilanian's position) to conclude that, at the time of Gilanian's second strip-search, segregation was a feasible less-restrictive means of addressing institutional security, or whether a trial must be held on the feasibility issue. Plaintiff's brief is due by **September 15, 2005**. Defendants' reply brief is due by **September 31, 2005**.

SO ORDERED.

Date: August 30, 2005 **/s/NANCY GERTNER, U.S.D.J.**