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United States District Court, N.D. Illinois.

Kenya GARY and Tania Hayes, individually and on behalf of a class, Plaintiffs,
v.
Michael SHEAHAN, Sheriff of Cook County, in his individual and official capacity, Defendant.

No. 96 C 7294. | May 4, 1998.

Opinion

MEMORANDUM OPINION AND ORDER

COAR, J.

***1** Presently before the court is the defendant Sheriff of Cook County Michael Sheahan's ("defendant" or "Sheahan") motion for a protective order to bar his deposition.

I. BACKGROUND

The instant action involves a class action brought by plaintiffs Kenya Gary ("Gary") and Tania Hayes ("Hayes") (collectively, the "plaintiffs") who represent a class of all female inmates who have been or will be subjected to a strip search at the Cook County Department of Corrections (Jail) upon returning to the Jail from court after there is a judicial determination that there is no longer a basis for their detention, other than to be processed for release.[1] As the factual allegations in this case were reviewed in detail in this court's earlier opinion, it is not necessary to review them here. *See Gary v. Sheahan,* 1997 WL 201590, at *2–3 (April 18, 1997) (Coar, J.).

[1] This class was certified pursuant to this court's April 10, 1997 Memorandum Opinion and Order.

On April 18, 1997, this court granted in part and denied in part the defendant's motion to dismiss. *Id.* In that opinion, the court explored the defendant's argument that, to the extent that he is sued as an individual by the plaintiffs, he is entitled to qualified immunity. *Id.* at *10. In ruling on the defendant's motion to dismiss, *Id.* at *1, this court denied defendant Sheahan's claim of qualified immunity on the plaintiffs' Fourth Amendment and Fourteenth Amendment claims, *Id.* at *12–13.

At a hearing before this court on December 11, 1997, the issue of a qualified immunity was again raised in the context of the defendant's motion for a protective order to bar the deposition of Sheahan. The court ordered the parties to brief the issue of qualified immunity with respect to the defendant's motion for a protective order. It is that issue that is presently before the court.

II. DISCUSSION

Qualified immunity protects public officials from individual liability if their conduct did not violate "clearly established ... constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *see also Doe v. Bobbitt,* 881 F.2d 510, 511 (7th Cir.1989), *cert. denied,* 495 U.S. 956, 110 S.Ct. 2560, 109 L.Ed.2d 742 (1990). It is the plaintiff's burden to demonstrate the existence of a clearly established constitutional right. *Id. See also Magdziak v. Byrd,* 96 F.3d 1045, 1047 (7th Cir.1997). The doctrine of qualified immunity is "designed to shield from civil immunity 'all but the plainly incompetent or those who knowingly violate the law.' " *Kernats v. O'Sullivan,* 35 F.3d 1171, 1177 (7th Cir.1994) (citing *Donovan v. City of Milwaukee,* 17 F.3d 944, 952 (7th Cir.1994)).

When presented with a claim of qualified immunity, a court must consider two questions: (1) whether the plaintiff has asserted a violation of the constitutional right; and, (2) whether the defendant's actions were objectively reasonable in light of prevailing standards. *See Siegert v. Gilley,* 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991); *Donovan,* 17 F.3d at 947. "A negative answer to either of these questions requires a determination that the officer is immune from a suit for damages." *Chan v. Wodnicki,* 123 F.3d 1005, 1008 (7th Cir.1997), *cert. denied,* 522 U.S. 1117, 118 S.Ct. 1054, 140 L.Ed.2d 117 (1998). This court has already determined that the plaintiffs in this case have asserted a violation of the Fourth and Fourteenth Amendments. *See Gary,* 1997 WL 201590 at *10 ("[T]he decisive question is whether the alleged constitutional rights were clearly established at the time of the challenged conduct.") Therefore, whether or not the defendant may assert qualified immunity in this case turns on whether or not the defendant's actions were objectively reasonable.

***2** In order to establish that the defendant's actions were not reasonable, the plaintiff has the burden of establishing that the law was so "clearly established" that "a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635,

640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). In order to show a clearly established law, "the plaintiff must show either a reasonably analogous case that has both articulated the right at issue and applied it to a factual circumstance similar to the one at hand or that the violation was so obvious that a reasonable person necessarily would have recognized it as a violation of the law." *Chan,* 123 F.3d at 1008 (citing *Erwin v. Daley,* 92 F.3d 521, 525 (7th Cir.1996), *cert. denied,* 519 U.S. 1116, 117 S.Ct. 958, 136 L.Ed.2d 845 (1997)). However, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson,* 483 U.S. at 640, 107 S.Ct. at 3039.

The defendant argues in his motion that he is entitled to qualified immunity "because the facts adduced to date, together with the case law in existence at the time of the conduct in question, demonstrate that it was not 'clearly established' that the ... strip search policy violated the United States Constitution." (Def.'s Mot. for Protective Order at 1.) However, the only form of evidence provided by the defendant that was not reviewed by this court's April 17, 1997 decision is an affidavit from Sergeant Denise DeLaurentis of the Court Services Department of the Cook County Sheriff's Office (hereinafter "DeLaurentis Aff."). DeLaurentis' affidavit alleges that there are three differences between the male and female detainees: (1) members of the general public have "greater access" to female detainees that are attending court, (DeLaurentis Aff. ¶ 12); (2) in some Cook County courthouses female detainees use rest rooms that are outside of the holding cells, (DeLaurentis Aff. ¶ 13); (3) many courtrooms do not have separate secure holding cells for female detainees adjacent to each courtroom and as a result female detainees are often handcuffed to chairs, hallways, jury/witness rooms, etc. (DeLaurentis Aff. ¶¶ 10, 11). Thus, DeLaurentis concludes, "it is easier to pass contraband to female detainees than to male detainees." (DeLaurentis Aff. ¶ 15.)

As the plaintiffs point out, however, the same affidavit also reconfirms that both "[m]ale and female detainees who are attending court in Cook County are often left unsupervised in secured areas for 15–minute intervals" (DeLaurentis Aff. ¶ 7); "[b]oth male and female detainees attending court have unsupervised contact visits with attorneys" (DeLaurentis Aff. ¶ 9); and, both "male and female detainees may be commingled with individuals who are newly received from local police departments" (DeLaurentis Aff. ¶ 8). This court finds that, although there may be some differences in the treatment of the female and the male detainees, the evidence of such differences presented in the DeLaurentis affidavit are not sufficient to support a finding that the strip search policy was not clearly unconstitutional under the Forth and Fourteenth Amendment. Indeed, the affidavit actually supports the plaintiffs' assertion that both male and female detainees are often left unsupervised, and have unsupervised contacts, yet only the women are subject to a strip search.[2] Furthermore, even if it is true that the female detainees are more likely to receive contraband, this fact does not make it reasonable to strip searching female inmates after there is a judicial determination that there is no longer a basis for their detention, other than to be processed for release. *See Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1273 (7th Cir.1983) (finding that the strip search of female misdemeanor offenders to maintain jail security is unreasonable under the Fourth Amendment).

2 The defendant further undermines his own argument in his reply brief when he argues that there "is clearly a justification for strip searching both male and female detainees." (Reply at 4.) If it is true that there is a clear justification to strip search both men and women, why then are only the women subject to such a search?

***3** The defendant also argues that Federal Rule of Civil Procedure 26(c) precludes the deposition of Sheahan because his deposition is "unnecessary and unduly burdensome." (Def.'s Mot. for Protective Order at 11.) In support of this argument, the defendant points to testimony of Ernesto Velasco, Executive Director of the Cook County Detention Center, who testified that "I don't ask guidance from the sheriff. I run the jail." (Def.'s Mot. for Protective Order at 12.) Such an argument defies reason and ignores the law. As the plaintiff's correctly point out, the deposition of Sheahan is necessary to respond to defendant's assertion that he was without knowledge of his strip search policy at the jail. Whether or not Velasco believes he "runs the jail" does not obviate the necessity to depose Sheahan in order to discover whether he was deliberately indifferent or acted in reckless disregard of the plaintiffs' constitutional rights.[3]

3 In a third, and rather confusing, argument, the defendant contends that this court's preliminary injunction order of March 17, 1997 "establishes that the strip search policy at issue was not clearly unconstitutional." (Def.'s Mot. for Protective Order at 9.) In support of their position, the defendant quotes the court's statement that conducting strip searches for security reasons before introducing an inmate to the general population is a legitimate concern. *Id.* However, contrary to the defendant's contention, this court has never ruled that Sheahan is entitled to qualified immunity nor that the treatment alleged by the plaintiffs is not a violation of their constitutional rights. *See Gary,* 1997 WL 201590, at *10–13. The fact that there may be a legitimate security concern for searching *both male and female* inmates does not justify strip searching the women and not strip searching the men. To the extent that the defendant strip searches only women, the court may reconsider whether the

articulated reasons for the searches are, indeed, legitimate.

III. CONCLUSION

For the above stated reasons, this court concludes that the defendant's motion for a protective order barring his deposition [Doc. 138] is DENIED. Accordingly, the defendant's motion for ruling on legal question of qualified immunity [Doc. 149] is DENIED as moot and the plaintiffs' motion to compel the deposition of Sheahan [Docs. 135 and 148] are GRANTED.