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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. | Aug. 20, 1998.

Opinion

MEMORANDUM OPINION AND ORDER

COAR, District Court J.

***1** For the reasons stated in this Memorandum Opinion and Order, the plaintiffs' motion for summary judgment against the defendant in his official capacity is GRANTED.

I. BACKGROUND

Plaintiffs Kenya Gary and Tania Hayes (collectively "the plaintiffs") bring the instant suit on behalf of the following certified class:

> 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]

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

Very few of the relevant facts in the instant case are in dispute. Michael Sheahan ("Defendant" or "Sheriff") has been the Sheriff of Cook County since 1990. (Pls.' 12(M) Stmt. ¶ 1.) Ernesto Velasco ("Velasco") is the Executive Director of the Cook County Department of Corrections (the "jail" or "CCDOC"). (Pls.' 12(M) Stmt. ¶ 2.) John Maul is Assistant Executive Director of the CCDOC. (Pls.' 12(M) Stmt. ¶ 4.)

On average, 80 to 100 female inmates have court dates each week. (Pls.' 12(M) Stmt. ¶ 24.) Of those, approximately 8 to 10 female inmates are discharged from the jail following court rulings. (Pls.' 12(M) Stmt. ¶ 23.) Every inmate returning to the jail is given a court order called a mittimus, which is a written direction by a judge to the Department of Corrections which indicates if the disposition of a criminal case. (Pls.' 12(M) Stmt. ¶¶ 25, 26.) All inmates, including those discharged following court rulings, are required to return back to their Division. According to Velasco and Maul, the only reason why female court returns with ordered discharges are required to go back into their Division is to pick up their personal property. (Pls.' 12(M) Stmt. ¶ 40.) Prior to the entry of a preliminary injunction by this court on March 13, 1997, they also had to return to their Division to wait while their records were checked for pending charges. Subsequent to the preliminary injunction, however, female inmates returning from court whose case had been discharged were given the option of waiting in the holding cell while a computer check of their records was made. (Transcript of Preliminary Injunction Hearing, March 13, 1997, at 257, hereinafter "Tr.".) If it is determined that there is no longer a reason to hold them, the women are given the option of having their clothes brought to them in the holding cell and are therefore not subjected to a strip search.[2] (Tr. at 257.)

[2] The defendant states that since the entry of the preliminary injunction, approximately 90 percent of the female releases have opted to return to the Jail's general population to pick up their personal property and be strip searched rather than to remain in the Jail's Receiving Area and forego the strip search. (Def.'s 12(N)(3) Stmt. ¶ 45.)

Pursuant to the practice and policy of the Jail, all female inmates—including those discharged—are subjected to a strip search before returning to their Division. The parties agree that the policy and practice for searching female inmates in the receiving room is as follows:

> (1) Female inmates are directed to remove all of their clothing;
>
> (2) After removing all their clothing, they are required to open their mouths, and to run their hands through their hair;
>
> ***2** (3) While naked, they are required to squat or bend over several times.

(Pls.12(M) Stmt. ¶ 21.)

On April 17, 1995,[3] plaintiff Tania Hayes appeared in court for a hearing on a criminal charge and the judge entered an order dismissing all criminal charges. (Pls.' 12(M) Stmt. ¶ 6.) After the hearing, Hayes was taken into custody by the Sheriff's Office and transported back to the Receiving Room at the Jail. (Pls.' 12(M) ¶ 7.) Hayes was placed in a bullpen with other female inmates who had returned from court. (Pls.' 12(M) ¶ 8.) Next, Hayes was moved into a second bullpen. (Pls.' 12(M) ¶ 9.) Hayes and three other female inmates were ordered by three female corrections officers to spread out in a line. (Pls.' 12(M) ¶ 10.) The plaintiff was then required to submit to the following search, pursuant to the policy and practice of strip searching female inmates: (1) remove all clothing; (2) open mouth and run hands through hair; (3) while naked, squat three times and cough. (Pls.' 12(M) Stmt. ¶¶ 10, 21 .) Plaintiff Kenya Gary was a pretrial detainee who was subjected to strip searches at the Jail. (Pls.' 12(M) Stmt. ¶ 13.)

3 The defendant contends that Hayes appeared in court on April 18, 1995. (Def.'s 12(N)(3) Stmt. ¶ 6.)

There is a written directive at the Jail which requires such strip searches be conducted of all inmates (male and female) upon their return to the Jail from court. General Order 13.1 states, in part, that "[o]nce all the court return inmates are accounted for on each transportation run, the inmates are given their court return passes, strip searched and taken to the holding area of the receiving room." (Pls.' 12(M) Stmt. ¶ 47.) Maul states that a General Order is a guideline that each divisional superintendent is supposed to follow, and use as authority for a written policy for each division. The General Order sets forth minimum standards. (Tr. at 170.) Velasco and Maul state that General Order 13.1 requires all court returns (male and female) to be strip searched. (Pls.' 12(M) Stmt. ¶ 48.)

In a preliminary injunction hearing conducted by this court on March 13, 1997, Lieutenant Margaret Washington testified that there is a policy for female inmates that requires the strip searching of all female inmates returning from court. (Tr. at 96.) However, according to Washington, male inmates returning from court are not strip searched in the receiving room. (Tr. at 95–6; 114.) Assistant Executive Director Maul also testified that all women coming back from court are strip searched in the receiving room. (Tr. at 140–41.) Maul further explained that males have not been strip searched in the receiving room for years and admitted that the requirement of strip searching in the receiving room in General Order 13.1 is not applied to the male inmates. (Tr. at 150.) Superintendent James Edwards also testified that males are not strip searched in the receiving room, explaining that the fact that the male prison population has doubled in size "makes it just about impossible with the space available and the amount of people that are coming in and out of there on a daily basis to conduct [strip searches] in the receiving room." (Tr. at 210.) Edwards stated that the decision not to strip search male inmates in the receiving area was an "oral decision" that was never memorialized into a written policy. (Tr. at 212–13.) Executive Director Velasco also admitted that male inmates are not searched in the receiving room pursuant to General Order 13.1. (Tr. at 232.) The defendant Sheahan states that, "since the late 1980's, male detainees could no longer be properly strip searched in the Jail's Receiving Area due to a tremendous increase in the male population of the Jail." (Def.'s 12(N)(3) Stmt. ¶ 50.)

***3** Two individual officers testified that they strip searched male court returns. Officer Darrell Runyon testified that "All court returns are strip searched when they return from court." (Tr. at 203). Officer Michael Crowley testified that he has always strip searched male court returns. (Tr. at 194–95.) However, the plaintiffs presented the testimony from several male inmates—Irving Hunter, Edward Blanks, Dan Hanton, Jason Browne, Loron Person, John Warren, John Boyd—that they were neither strip searched in the Receiving Room nor strip searched later when returning to their Division. (Pls.' 12(M) Stmt. ¶¶ 63–80.) No evidence has been presented by the defendant to refute such testimony. In fact, the defendant does not dispute the plaintiffs' evidence that males are not regularly strip searched. (Def.'s 12(N)(3) Stmt. ¶¶ 63–80.) Furthermore, the defendant has not presented any evidence indicating that the standard practice is to strip search all male court returns.

Following the preliminary injunction hearing, this court found that it was clear that for a period dating back to at least 1991, female inmates of the Cook County Department of Corrections returning from court have been routinely strip searched. (Tr. at 254 .) The court further found that it is clear that there has been no such uniform strip searching of returning male inmates, despite a written policy requiring all inmates to be strip searched. (Tr. at 254.) This court ordered that female inmates who have been discharged (and for whom there was no longer any apparent reason to hold) must be given the option to have their clothing brought to them in the holding cell and thus not be subjected to the strip search. (Tr. at 257.) The defendant states, however, that since the entry of the preliminary injunction in this lawsuit, 90 percent of female releases have opted to return to the Jail's general population and pick up their personal property rather than remain in the Jail's Receiving Area and forego the strip search. (Def.'s 12(N)(3) Stmt. ¶ 41.)

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if 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); *Cox v. Acme Health Serv., Inc.,* 55 F.3d 1304, 1308 (7th Cir.1995). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the nonmoving party, a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Hedberg v. Indiana Bell Tel., Co.,* 47 F.3d 928, 931 (7th Cir.1995). The movant has the burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). If the movant satisfies this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553.

***4** Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Id.* at 322, 106 S.Ct. at 2552–53; *Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 920 (7th Cir.1994). A scintilla of evidence in support of the non-moving party's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson,* 477 U.S. at 250, 106 S.Ct. at 2511.

III. THE PLAINTIFFS' CLAIMS

The plaintiffs bring their claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, ("Section 1983"). Section 1983 provides a cause of action against any official who deprives a person of his or her constitutional or civil rights while acting under color of state law.

The plaintiffs' Section 1983 claims are based on allegations that the defendant violated the Fourth Amendment (unreasonable search and seizure) and Fourteenth Amendment (Due Process Clause[4] and Equal Protection Clause) to the United States Constitution and Title 42 U.S.C. § 1983.[5] Specifically, the plaintiffs contend that, pursuant to defendant's existing policy and practice, all female inmates are strip-searched in violation of their constitutional rights upon returning to the Jail after a judicial determination that there is no longer a basis for their detention, other than to be processed for release. The plaintiffs seek summary judgment on the issue of liability, an order permanently enjoining the defendant from strip searching female inmates returning from court after being discharged, and an award of costs and attorneys' fees.

4 The plaintiffs' claim under the Due Process clause of the Fourteenth Amendment survived summary judgment, *see Gary v. Sheahan,* No. 96 C 7294, 1997 WL 201590, at * 6–7 (N.D. Ill. April 18, 1997); however, the plaintiffs do not present any argument regarding this claim in their motion for summary judgment. Accordingly, this court does not address the Due Process argument here.

5 The plaintiffs' original complaint also alleged violations of the Fifth, Eighth and Ninth Amendments; however, these claims were dismissed in this court's earlier Memorandum Opinion and Order. *See Sheahan,* No. 96 C 7294, 1997 WL 201590, at *5–6.

A. Official Policy or Custom

Plaintiffs move for summary judgment on their Section 1983 claim against Sheahan in his official capacity. A suit against a governmental officer "in his official capacity" is the same as a suit " 'against [the] entity of which [the] officer is an agent." ' *Kentucky v. Graham,* 473 U.S. 159, 165, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985) (quoting *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 2035–2036 n. 55, 56 L.Ed.2d 611 (1978)).

A municipality may be subject to suit under Section 1983 only if a municipal policy or custom is the source of the constitutional deprivation. *Monell,* 436 U.S. at 694, 98 S.Ct. at 2027; *McTigue v. City of Chicago,* 60 F.3d 381, 382 (7th Cir.1995); *Powe v. City of Chicago,* 664 F.2d 639, 643 (7th Cir.1981). As established by the Supreme Court in *Monell,* 436 U.S. at 690–91, 98 S.Ct. at 2035–36, a plaintiff asserting an official capacity claim must demonstrate that the alleged constitutional violation is caused by the government body's official policy, practice, or custom. "[W]hen execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury ... the government as an entity is responsible under § 1983." *Id.* at 694, 98 S.Ct. at 2037–38.

***5** Courts have identified three general ways in which a municipality could be held liable for violating the civil rights of an individual:

> (1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or

> express municipal policy, is so permanent and well-settled as to constitute a custom or usage with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority.

Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 735 (7th Cir.1994) (internal quotations and citations omitted). The plaintiffs in the instant case proceed under the second method of liability, that of a widespread practice that is so well-settled so as to constitute a custom. The Supreme Court has found that a policy need not be a written policy in order to satisfy the standard of a custom or usage with the force of law: "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials .... Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Monell,* 436 U.S. at 690, 98 S.Ct. at 2036 (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 167–168, 90 S.Ct. 1598, 1613, 26 L.Ed.2d 142 (1970)). "The word 'custom' generally implies a habitual practice or a course of action that characteristically is repeated under like circumstances." *Sims v. Mulachy,* 902 F.2d 524, 542 (7th Cir.1990), *cert. denied,* 498 U.S. 897, 111 S.Ct. 249, 112 L.Ed.2d 207 (1990) (citing *Jones v. City of Chicago,* 787 F.2d 200, 204 (7th Cir.1986)). As the Supreme Court recently stated in *County Commissioners of Byran County, Oklahoma v. Brown,* 520 U.S. 397, ––––, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997), "an act performed pursuant to a 'custom' that has not been formally approved by an appropriate, decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." (internal quotations and citations omitted). "The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Id.* at ––––, 117 S.Ct. at 1388.

With respect to the plaintiffs' Fourteenth Amendment Equal Protection claim, the defendant argues that any alleged disparity between the between the strip search practices of males and females is not reflective of CCDOC policy. The defendant cites the General Order 13.1 which requires all court returns to be strip searched in the Receiving Area and argues that this Order is the Jail's official policy. However, the evidence is uncontradicted that female inmates are always strip searched upon returning from court, whereas the male inmates are generally not subjected to a strip search. (Tr. at 95–6; 114; 140–41; 210–13.) Assistant Executive Director of the CCDOC admitted that the requirement of strip searching in the Receiving Room in General Order 13.1 has not been applied to male inmates for years. (Tr. at 150.) The defendant Sheahan admits in his response to the plaintiffs' 12(M) statement that "since the late 1980's, male detainees could no longer be properly strip searched in the Jail's Receiving Area due to a tremendous increase in the male population of the Jail." (Def.'s 12(N)(3) Stmt. ¶ 50.)

***6** As to whether males are strip searched after they are returned to their Division, the defendant highlights testimony by two individual officers that they, in their own experience, strip search male court returns back in the Division. (Tr. 194–95; 203.) However, the fact that two individual officers may employ such a practice is not sufficient to create a material issue of fact regarding the fact that a policy exists that requires strip searching of the females, whereas males are generally not subjected to such searches. The defendant has offered no evidence to support a finding that males are always strip searched as a general policy or that females are at times not strip searched. The plaintiffs have presented uncontested evidence of several male inmates that they were never strip searched upon returning to their Division. (Pls.' 12(M) Stmt. ¶¶ 63–80.) At best, a reasonable person could conclude that women detainees are always strip searched upon returning from court and male detainees are sometimes searched.

Therefore, this court finds that there is no issue of material fact regarding whether a municipal policy existed that required the routine strip searching of women while men were not routinely subjected to such a strip search in the receiving room upon returning from court. The fact that such a policy is not a written policy or, indeed conflicts with a written statement of policy, does not defeat the plaintiffs' claim that such a policy existed. This court finds that the practice under review was so widespread so as to constitute a de facto policy. *See Monell,* 436 U.S. at 690–691, 98 S.Ct. at 2036 (finding that municipal liability may be based upon "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels ."); *Doe v. Calumet City, Illinois,* 754 F.Supp. 1211, 1121 (N.D.Ill.1990) (finding that an absence of a formal action requiring strip searches is not fatal to plaintiffs' § 1983 claim against the city where there was an effective, though unwritten, practice that consistently called for and imposed strip searches).

Finally, this court finds that there is a clear causal link between this municipal policy and the plaintiffs' alleged constitutional violations. *See City of Canton v. Harris,* 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989) ("[O]ur first inquiry in any case alleging municipal liability under § 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation.").

As to the plaintiffs' second claim under review—their Fourth Amendment claim—this court finds that any constitutional deprivation that the plaintiffs may have suffered is a result of the defendant's policy of strip searching all female court returns. *See Monell,* 436 U.S. at 694, 98 S.Ct. at 2027. In fact, the defendant does not attempt to argue that strip searching of all female court returns, including those who have been ordered to proceed for release, is not reflective of Jail policy. The defendant's policy of strip searching all court returns in the holding area of the receiving area has been clearly memorialized in the Jail's General Order 13.1. (Pls.' 12(M) Stmt. ¶ 47.)

B. Equal Protection

***7** This court will first address the plaintiffs' Equal Protection claim under the Fourteenth Amendment. The plaintiffs' Equal Protection claim is based on the different treatment of male and female detainees at the Jail after a judicial determination that there is no longer a basis for their detention. As this court stated in its earlier opinion, disparate treatment of men and women is unconstitutional unless such treatment serves important governmental objectives and is substantially related to achievement of those objectives. *Gary v. Sheahan,* No. 96 C 7294, 1997 WL 201590, at *7 (N.D. Ill. April 18, 1997) (citing *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)).

The Seventh Circuit examined the issue of disparate treatment of men and women in strip searching in *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1273 (7th Cir.1983). *Mary Beth G.* involved a policy that "required a strip search and a visual inspection of the body cavities of all women arrested and detained in the City lockups, regardless of the charges against the women and without regard to whether the arresting officers or detention aides had reason to believe that the women were concealing weapons or contraband on their persons." *Id.* at 1266. The policy under review did not apply to men, who were only subjected to a hand search, unless there was reason to believe that the detainee was concealing weapons or contraband. *Id.* The Seventh Circuit found that such a policy is violative of constitutional standards, where no substantial relation between the disparity of treatment and an important state purpose is shown. *Id.* at 1274.

The defendant argues that, in order to prevail on the Equal Protection claim, the plaintiffs must first provide proof that the male and female populations are similarly situated. In support of this argument, the defendant cites two Eighth Circuit cases: *Timm v. Gunter,* 917 F.2d 1093 (8th Cir.1990), *cert denied,* 501 U.S. 1209, 111 S.Ct. 2807, 115 L.Ed.2d 979 (1991) and *Klinger v. Department of Corrections,* 31 F.3d 727, 732 (8th Cir.1994), *cert. denied,* 513 U.S. 1185, 115 S.Ct. 1177, 130 L.Ed.2d 1130 (1995). Both of these cases were decided on the basis that the plaintiff class of female inmates failed to satisfy the threshold requirement of Equal Protection analysis of proving that they were similarly situated to the male inmates. In *Timm,* male inmates alleged that their Equal Protection rights were violated by a policy that allowed males to be subjected to hand searches by female guards, whereas female inmates were not subjected to searches by male guards. The Eighth Circuit affirmed the decision of the district court finding that the plaintiffs did not have an Equal Protection claim because they were not similarly situated. The factors relied upon in finding that the male and female inmates were not similarly situated include differences in security concerns at the two facilities "reflecting differences in the number and age of the inmates, the kinds of crimes committed by them, the length of sentences, and the frequency of incidents involving violence, escapes, or contraband." *Timm,* 917 F.2d at 1103. The court found that these differences justified the differences in the security measures taken in the two prisons. *Id.*

***8** In the second case cited by the defendant, *Klinger,* the Eighth Circuit found that inmates at women's prison and inmates at penitentiary that housed only men were not similarly situated for purposes of prison programs and services, and, therefore, female inmates had not suffered Equal Protection violation, even if their programs in 12 areas were inferior to those that male inmates received at penitentiary. Prison officials "must balance many considerations, ranging from the characteristics of the inmates at that prison to the size of the institution, to determine the optimal mix of programs and services. Program priorities thus differ from prison to prison, depending on innumerable variables that officials must take into account." *Klinger,* 31 F.3d at 731 (citation omitted).

Attempting to analogize to these two cases, the defendant contends that the male and female detainees at the CCDOC are not similarly situated. In particular, the defendant argues that there are not separate secure lock-up facilities for female detainees adjacent to each courtroom like there are for the males. As a result, the defendant contends, members of the general public have greater access to female detainees when they are attending court than they do with male detainees who are kept in holding cells. (Def .'s Mem. at 14.) The defendant's only support for this argument is an affidavit by Denise DeLaurentis, a Sergeant at the Cook County Sheriff's Office. (Def.'s Ex. B; Def.'s 12(N) ¶¶ 10–15.) DeLaurentis states that there are three major 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 this court stated in a previous order, although the DeLaurentis affidavit highlights differences between the male and female population, it also highlights many significant similarities. *See Gary v. Sheahan,* No. 96 C 7294, 1998 WL 249225, at *2 (N.D.Ill. May 4, 1998) (denying Sheahan's motion for a protective order to bar his deposition). 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).

***9** Thus, while it is true, as the *Timm* and *Klinger* courts teach, that males and females who are not similarly situated may be subjected to different treatment, this is not such a case. The argument that the males and females at the prison are not similarly situated because it is easier to pass contraband to the women is directly undermined by the very affidavit that they use to support their argument. As both sexes are left unsupervised and both sexes have contact visits with the general population, both sexes run the risk of smuggling contraband into the Jail. Therefore, this court determines that, for purposes of the plaintiffs' Equal Protection claim, the males and females at the Jail are similarly situated.

This court's analysis therefore turns to whether the defendant has carried its "burden of showing an 'exceedingly persuasive justification' for the differing treatment." *Mary Beth G.,* 723 F.2d at 1273 (citing *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982)). Accordingly, the defendant must show that his differential treatment of the women serves important governmental objectives, and that the policy is substantially related to those objectives. *Id.* at 1273–74.

Remarkably, the defendant does not even attempt to argue that such a policy is related to any important governmental objectives. (*See* Def.'s Mem. at 13–15.) Instead, the defendant tries to convince this court that there is no disparity in the treatment of the male and females. The women are strip searched, the defendant contends, pursuant to the defendant's standard operating procedure that all detainees returning from court, both male and female, are to be strip searched. Although such a written policy does exist, the evidence has clearly shown that the actual practice in the Jail has not reflected this policy for nearly a decade. And, as this court has already stated, *see supra* Part III.A, the defendant offers no documentation to support a claim that the actual practice at the Jail is one of equal strip searching of the men and women court returns.

The defendant argues that the plaintiffs have provided no documentation for their claim other than the attestations of two females that they were strip searched while several males were not. This argument is patently false. The plaintiffs presented testimony from several male inmates—Irving Hunter, Edward Blanks, Dan Hanton, Jason Browne, Loron Person, John Warren, John Boyd—who all testified that upon returning to the Jail they were neither strip searched in the Receiving Room nor strip searched later when returning to their Division. (Def.'s 12(N)(3) Stmt. ¶¶ 63–80.) Furthermore, testimony of various Jail officials clearly supports the plaintiffs' claim that the females are routinely subjected to strip searches, while the men are not. The defendant has failed to contradict the plaintiff's overwhelming evidence supporting a finding that the male inmates are not strip searched on an equal basis with the women.

***10** In conclusion, this court finds that there is no issue of material fact remaining on the question of whether the defendant deprived the plaintiffs of their constitutional right to Equal Protection. In analyzing possible remedies for this violation, this court finds that the defendant could proceed in one of two directions. The first option would be to require the strip searching of *all* male court returns prior to returning them to their Division. In the alternative, the Jail could cease to require the strip searching of female court returns. This court therefore orders the defendant to submit to this court, within 15 days of the issuance of this Memorandum Opinion and Order, indicating which of these two alternatives he will adopt and a proposed plan for implementing the chosen remedy.

C. Fourth Amendment (Unreasonable Search and Seizure)

As stated earlier, it is clearly established that a policy of strip searching all female court returns exists in the Jail. The plaintiffs, a class of female inmates for whom there is no longer a basis for detention, has challenged this policy as being violative of their Fourth Amendment rights. It is important to note at the outset that the survival of this claim depends, in part, on the remedy for the Equal Protection violation discussed in the previous section of this Memorandum Opinion and Order. Of course, if the remedy of the Equal Protection violation is to eliminate

strip searches of all court returns—male and female—then no Fourth Amendment violation will continue to be present. However, if the remedy is instead to implement a standard strip search policy for both male and female court returns, then analysis of the Fourth Amendment claim is necessary to determine whether the plaintiff class has successfully proven a constitutional violation as to the class of women who have been released after a court appearance. Therefore, at this stage, the court will analyze the plaintiffs' Fourth Amendment claim without regard to the disparate treatment of male and female court returns that currently exists.[6]

6 Even the preliminary injunction currently in force does not fully remedy the Equal Protection violation, as it only applies to female court returns who have been released. The plaintiffs, however, have demonstrated that an Equal Protection violation exists as to *all* female inmates, including those who are not released following their court appearance.

This court found in its earlier opinion that the Fourth Amendment is applicable to the instant case. *See Sheahan,* No. 96 C 7294, 1997 WL 201590, at * 4. The Fourth Amendment confers upon citizens a constitutional right to protection against unreasonable search and seizure. *See Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The Supreme Court has held that a reasonable expectation of privacy is necessary to invoke Fourth Amendment protection. *See id* . "The Fourth Amendment 'reasonableness' determination is generally conducted on a case-by-case basis, with the Court weighing the asserted governmental interests against the particular invasion of the individual's privacy and possessory interests as established by the facts of the case." *Hudson v. Palmer,* 468 U.S. 517, 537–38, 104 S.Ct. 3194, 3206, 82 L.Ed.2d 393 (1984) (O'Connor, J., concurring) (citing *Terry v. Ohio,* 392 U.S. 1, 17–18 n. 15, 88 S.Ct. 1868, 1877–1878 n. 15, 20 L.Ed.2d 889 (1968)).

***11** The defendant makes various arguments against plaintiffs' Fourth Amendment claim. First, the defendant actually argues that the Supreme Court held in *Wolfish* that "[a] strip search in a correctional setting does not rise to the level of a constitutional violation absent a specific intent to punish." (Def.'s Mem. at 4.) The defendant does provide a jump cite for this extremely generalized proposition that appears to apply to all constitutional violations. This court's review of the discussion of the Fourth Amendment right to be protected from unreasonable search and seizure in *Wolfish,* 441 U.S. at 558–60, 99 S.Ct. 1884–85, does not reveal any requirement of intent to punish in order to demonstrate a violation of the Fourth Amendment. *See,* discussion, *infra.*

The defendant also cites *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), for the following proposition: "[e]ssentially, *Hudson* held that detainees lack any reasonable expectation of privacy under the Fourth Amendment." (Def.'s Mem. at 5.) Although it is true that the Court in *Hudson* found no expectation of privacy existed under the particular circumstances of that case, *Hudson* did not deal generally with the rights of "detainees" as the defendant claims, but rather dealt specifically with the privacy rights of prisoners in their individual prison cells. *Id.* at 526, 99 S.Ct. at 3200. Furthermore, *Hudson* did not involve strip searches, which arguably would have entitled the plaintiffs to a greater level of privacy protection. *See Wolfish,* 441 U.S. at 558, 99 S.Ct. at 1844 (finding that a visual inspection strip search "instinctively gives us the most pause."). Finally, *Hudson* clearly does not require a finding that prisoners have no Fourth Amendment privacy rights as the defendant would have us believe. *See Canedy v. Boardman,* 16 F.3d 183, 185 (7th Cir.1994) (finding that a prisoner retains some privacy interests in his naked body); *Peckham v. Wisconsin Department of Corrections,* 141 F.3d 694, 697 & n. 2 (7th Cir.1998) (joining the 2nd, 6th, 9th, and 11th circuits in finding that a prison inmate does enjoy some protections under the Fourth Amendment against unreasonable searches and seizures).

Next, the defendant informs the court that the Nineth Circuit has held that "the Fourth amendment does not apply in relation to the privacy rights of prisoners absent an allegation of purposeful misconduct." (Def.'s Mem. at 5.) Mysteriously, the defendant does not reveal the name of this Nineth Circuit case. Therefore, this court is unable to consider such argument.

Presumably in support of his argument, the defendant cites *Roscom v. City of Chicago,* 570 F.Supp. 1259, 1262 (N.D.Ill.1983), although the defendant fails to explain why *Roscom* helps to prove his case. In *Roscom,* the district court found that a visual strip search of female pretrial detainees by same-sex personal did not violate the Fourth Amendment given the county's legitimate interest in the security of its Jail. *Roscom* did not hold, however, that all strip searches are valid as a matter of law. *Id.* Furthermore, *Roscom* is distinguishable from the case at bar: While the plaintiff in *Roscom* was a pretrial detainee who was unable to post bond, the plaintiffs in the instant case are individuals who have been released from custody following a hearing.

***12** In the defendant's final argument against summary judgment, he contends that the Seventh Circuit's holding in *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir.1983), does not apply because the plaintiffs in *Mary Beth G.* were new arrestees detained on misdemeanor and traffic charges while awaiting the posting of bond. Instead, the plaintiffs in the instant case are more properly analogized to the plaintiffs in *Wolfish,* who were "pretrial

detainees awaiting trial on serious charges as opposed to minor offenders who were briefly detained while they awaited bond." (Def.'s Mem. at 7.) The defendant alleges that the plaintiff class under review is comprised of "pretrial detainees detained on offenses ranging from narcotics possession to first degree murder." (Def.'s Mem. at 7.) This characterization of the plaintiff class totally misstates (or miscomprehends) the factual setting. The class is made up of women who, after being arrested and confined at the Jail, have gone to court. The court has then determined the charges on which they were brought before it have been resolved. Each of the class members then received a mittimus that said, in effect, that there was no further reason to hold her on the particular charge(s) giving rise to the court appearance. Upon the arrival of each class member back at the Jail, and at the point of the strip search, the defendant does not know whether there are any further charges or holds pending against the class members. Thus, to distinguish the plaintiffs here from the plaintiffs in *Mary Beth G.* on the basis of the "seriousness of the pending charges" makes no sense. At that point, the defendant does not know whether there are *any* pending charges, let alone "serious" charges.

The Supreme Court has held that visual body searches of pretrial detainees in contact visit situations are constitutional if the practice satisfies the reasonableness test. *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). In *Wolfish,* inmates were required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution. The Supreme Court found that such searches did not violate the Fourth Amendment because they were not unreasonable. *Id.* at 558, 99 S.Ct. at 1884 (citing *Carroll v. United States,* 267 U.S. 132, 147, 45 S.Ct. 280, 283, 69 L.Ed. 543 (1925)). In reaching this decision, the Court set out a now-famous standard for determining the reasonableness of a search under the Fourth Amendment:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must 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.

***13** *Id.* at 559, 99 S.Ct. at 1884 (citations omitted). The Court concluded that the searches at issue were reasonable precautions against smuggling drugs and other contraband into prison. Thus, balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, visual body-cavity inspections can be conducted on less than probable cause. The *Wolfish* court did not, however, validate all strip searches in prisons as a matter of law. *See, e.g., Tikalsky v. City of Chicago,* 687 F.2d 175, 181–82 n. 10 (7th Cir.1982); *Roscom,* 570 F.Supp. at 1262.

Therefore, the question currently under review is whether the searches conducted on female detainees after they had been ordered released from custody by a judge is unreasonable under the circumstances. In order to determine reasonableness, the court must balance the prison's need for security with the privacy interests of the plaintiffs. A court in this district has explained the balancing test as follows:

> [I]f jail security is to justify the search the detainee must present some threat to jail security. The facts in the cases where searches have been upheld suggest some reasonable cause on the part of the authorities to suspect that the detainees might be trying to smuggle weapons or contraband into the jail.... A person detained for a violent crime may presumptively be suspected of carrying a weapon. However, when an arrestee is being detained briefly awaiting the posting of bond on a traffic or misdemeanor offense, generally a strip-search can be made only on reasonable suspicion that the attestee is carrying or concealing a weapon or contraband, unless authorities can demonstrate that misdemeanants regularly pose a threat to jail security.

Simenc v. Sheriff of DuPage County, No. 82 C 4778, 1985 WL 4896, at * 3 (N.D.Ill.Dec.9, 1985) (Moran, J.) (citations omitted). Pursuant to this test, variety of courts have found that strip searches in the prison context may be unconstitutional. For example, in *Doe v. Calumet City, Il.,* 754 F.Supp. 1211, 1218 (N.D.Ill.1990) (Shadur, J.), the court found that the Constitution prohibits blanket strip search policies that do not distinguish between arrestees. Similarly, in *Tinetti v. Wittke,* 479 F.Supp. 486, 491 (E.D.Wis.1979), *aff'd,* 620 F.2d at 160 (7th Cir.1980), the court concluded that strip searches of detainees for nonmisdemeanor traffic violations are unconstitutional absent probable cause to believe the offender is concealing contraband or weapons.

This court's analysis of the case law leads to the conclusion that the defendant must—at the least—have a reasonable suspicion that the plaintiff class member is carrying or concealing a weapon or contraband. The plaintiffs, as women for whom there is no longer any basis for their detention, clearly have a privacy interest in their body parts which is as great, if not greater, than that of pretrial detainees. *See Tinetti, Mary Beth G., supra.* As such, the defendant's blanket policy of strip searching all court returns—including those who may proceed for release—is constitutionally suspect. *See Doe, supra.*

***14** This court has always accepted at face value defendant's assertion that any inmate returning to Division from outside the Jail poses security concerns sufficient to justify strip searches even though the current practice of only occasionally strip searching male returnees substantially diminishes the force of that statement. Even assuming, though, that women class members may have posed a security risk if they returned to Division, this court finds the defendant's position untenable. As the plaintiffs accurately point out, the only reason why the defendant strip searched the plaintiffs is because they were required to return to the Division in order to pick up their personal property, (Pls.' 12(M) Stmt. ¶¶ 40, 41), or to await checks to see whether there were additional charges or holds. A simple change in the processing of individuals in the plaintiff class would eliminate this problem. Executive Director Velasco testified that the Sheriff has the ability to review, in a very short period of time, the six or eight females that are going to be discharged on a daily basis to make a determination whether there are other charges or holds pending. (Pls .' 12(M) Stmt. ¶ 35.) Furthermore, Assistant Director Maul testified that it is feasible to discharge females from the Receiving Room if they agreed to waive picking up their property in their cells, and instead have their property brought to them. (Pls.' 12(M) Stmt. ¶ 45.) *See Doe,* 754 F.Supp. at 1219 n. 20 ("An indiscriminate strip search policy routinely applied to detainees ... cannot be constitutionally justified simply on the basis of administrative ease in attending to security concerns.") (citing *Logan v. Shealy,* 660 F.2d 1007, 1013 (4th Cir.1981), *cert. denied,* 455 U.S. 942, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982)). Balancing the invasiveness of the strip search versus the need to perform it, it is clear that at least as to those returnees who have no pending charges or holds, there is no *need* to return them to Division and therefore no need to perform a strip search. If a records check uncovers additional charges or holds requiring that they be returned to their cells in the Division, they may be strip searched before-hand. If no charges or holds are found, they must be released from the Receiving Room or given the option to return to their cells to retrieve personal property.

In conclusion, this court finds that the defendant's blanket policy of strip searching all female court returns violates the Fourth Amendment rights of the plaintiff class. This court hereby orders the defendant to submit to this court, within 15 days of the issuance of this Memorandum Opinion and Order, a detailed proposed for determining whether members of the plaintiff class are to be held on further charges or holds. That plan should include specific written directions to jail staff and limits on the length of time it takes to ascertain whether detainees returning from court must wait while their records are checked in order to determine whether they can be released.

IV. CONCLUSION

***15** As stated in this Memorandum Opinion and Order, the plaintiffs' motion for summary judgment against the defendant in his official capacity is GRANTED as to the plaintiffs' Fourteenth Amendment Equal Protection claim and Fourth Amendment search and seizure claim. The plaintiffs are further GRANTED reasonable attorneys' fees and costs. This court will not presume non-compliance with its orders, therefore the plaintiffs' motion to appoint a special master is DENIED.