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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 CV 7294. | April 18, 1997.

**Opinion**

***MEMORANDUM OPINION AND ORDER***

COAR, District Judge.

***1** Michael Sheahan ("Defendant" or "Sheahan") moves to dismiss plaintiffs' complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and for lack of standing. In their three-count complaint (the "Complaint"), plaintiffs Kenya Gary ("Gary") and Tania Hayes ("Hayes") (collectively, the "plaintiffs"), attempt to assert claims under the Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1983 and 1988, and the laws of the State of Illinois 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.

In particular, 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 ("outprocessing"). Plaintiffs seek both monetary and injunctive relief. For the reasons stated in this memorandum opinion. defendant's motion to dismiss plaintiffs' complaint is granted in part and denied in part.

***Legal Standard for Motions to Dismiss***

A motion to dismiss pursuant to Rule 12(b)(6) does not test whether the plaintiff will prevail on the merits but instead whether the claimant has properly stated a claim. *See National Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 256, 114 S.Ct. 798, 803, 127 L.Ed.2d 99 (1994). The court may dismiss a complaint for failure to state a claim under Rule 12(b)(6) only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984). The court must accept as true all well-plead allegations and draw all reasonable inferences in favor of the plaintiff. *Perkins v. Silverstein,* 939 F.2d 463, 466 (7th Cir.1991). However. the court need not strain to find favorable inferences which are not apparent on the face of the complaint. *Coates v. Illinois St. Bd. of Educ.,* 559 F.2d 445, 447 (7th Cir.1977). Similarly, the court is not required to accept legal conclusions either alleged or inferred from pleaded facts. *Nelson v. Monroe Regional Medical Ctr.,* 925 F.2d 1555, 1559 (7th Cir.), *cert. denied,* 502 U.S. 903, 112 S.Ct. 285, 116 L.Ed.2d 236 (1991). Finally, the complaint need not specify the correct legal theory nor point to the right statute to survive a Rule 12(b)(6) motion to dismiss, provided that "relief is possible under any set of facts that could be established consistent with the allegations." *Bartholet v. Reishauer A.G.,* 953 F.2d 1073, 1078 (7th Cir.1992). The complaint must, however, state either direct or inferential allegations concerning all material elements necessary for recovery under the chosen legal theory. *Glatt v. Chicago Park Dist.,* 847 F.Supp. 101, 103 (N.D.Ill.1994).

***Background***

***2** The following allegations are taken from the Complaint:
Michael Sheahan ("Defendant" or "Sheriff"), is the Sheriff of Cook County, an elected county official. (Complaint ("Compl.") at 4). Defendant's duties include implementing and executing policies concerning the operation of the Jail pursuant to 55 ILCS 5/3–15003. (*Id.* at 4). In addition, at all relevant times, defendant, as Sheriff of Cook County, had and continues to have the duty to establish procedures and policies, train deputy sheriffs and Cook County Department of Corrections

("C.C.D.O.C.") employees to prevent unreasonable body searches of individuals who are in his custody, and ensure that inmates are not improperly discriminated against on the basis of gender. (*Id.* at 6). Defendant has failed to fulfill this duty. At all times relevant hereto, defendant acted (or failed to act) under color of law. (*Id.* at 4).

Plaintiffs Gary and Hayes are both U.S. citizens and residents of the State of Illinois. (*Id.* at 2–3). Plaintiff Gary is currently an inmate at the Jail, awaiting trial on a felony charge. Gary has been incarcerated in the Jail since April 1996. (*Id.* at 5). At the time the Complaint was filed, Gary's trial was set for November 18, 1995. Gary believed that she would be released from custody as a result of that proceeding and subjected to an unconstitutional strip search. Consequently, the parties entered into an Agreed Temporary Restraining Order under which Gary would not be strip-searched if she were released from custody as a result of the November 18, 1995 proceeding.[2] Over the past seven months Gary has appeared in court for numerous reasons and, after each court appearance, subjected to the challenged strip procedure described below. (*Id.* at 5).

[2] Gary was not released by the court and remains an inmate at the Jail.

In April 1995 plaintiff Hayes was incarcerated for approximately seven days in the Jail on a possession of controlled substance charge. (*Id.* at 4). On or about April 17, 1995, she was subjected to an unconstitutional strip search after these charges were dismissed and she awaited outprocessing. (*Id.* at 4).

Plaintiffs bring this lawsuit seeking injunctive and monetary relief from defendants' unlawful strip searching of all female inmates who have been or will be subjected to a strip search at the jail following their return to the Jail from court after a judicial determination that there is no longer a basis for their detention, other than outprocessing. The aforementioned class numbers at least eight thousand (8,000) persons. (Compl., at 2).

Pursuant to the existing policy and practice of defendant, plaintiffs have been (or will be) required to submit to the following search procedure: Upon returning to the Jail, the detainee is placed in a bullpen in the receiving room with a other female inmates returning from jail. This group is subsequently moved into a bullpen room in another area of the Jail which has several bullpen rooms. One of the walls of this bullpen room is made of glass and therefore provides no privacy. The glass wall looks out onto a hallway that is frequently traversed by male and female C.C.D.O.C. employees. After entering this bullpen room, the detainees are ordered to spread out in a line at one end of the room. The female inmates are then required to (1) remove all clothing, which consists of prison garb; (2) while naked, move to the opposite side of the room; (3) extend their arms and legs apart; (4) and squat three or four times, coughing during each squat. (*Id.* at 5). The inmates are then allowed to put their clothes back on and permitted to return to a detention cell. (*Id.*).

***3** There is a written directive at the Jail which requires such strip searches be conducted of all female inmates upon their return to the Jail from court. (*Id.* at 2). Inmates are also required by the Sheriff's Office to return to the Jail after receiving judicial determinations ordering their release. (2). The strip searches of the female inmates are conducted without regard to whether it was reasonable to believe that any contraband or weapons may have been concealed on their persons, and thereby constituted unreasonable searches and seizures. At least eight thousand female inmates have been subjected to a strip search over the past two years after a court has determined that there is no longer a legal basis for their detention, other than outprocessing.

Defendant knew or should have known that female inmates are subjected to an unreasonable strip search after a court has determined that they are not required to be held in custody any longer, while male inmates are not subject to the same. (*Id.* at 6). Defendant instituted, sanctioned, and approved the policies, practices, customs, and procedures regarding the strip searching of only female individuals who are in the custody of the C.C.D.O.C. after there has been a judicial determination that there is no longer a basis for their detention other than outprocessing. (*Id.* at 6–7). Moreover, defendant has actual knowledge of the policy, procedure, and practice alleged as a result of being as a defendant in pending lawsuits in which similar allegations were advanced. As a direct and proximate result of defendant's policies, practices, and procedures, the plaintiff class was (or will be) subjected to unreasonable body searches that are demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, and degrading. (*Id.* at 10).

In Count I, plaintiffs allege that the policies, procedures, practices, and acts alleged above violate the rights of the plaintiff class under the Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments because (1) the strip searches were conducted without probable cause or reason to believe that any contraband, or other dangerous materials, would be found, thereby constituting an unreasonable search and seizure; (2) the strip searches constitute gross invasions of plaintiffs' rights to privacy and due process; (3) the strip searches constitute cruel and unusual punishment; (4) defendant's policies, procedures, and practices relating to the strip searches are only applied to female inmates in gross violation of the plaintiff's rights privileges and immunities to due process and equal protection of the laws.

***Discussion***

**I. Justiciability**

Pursuant to Article III of the United States Constitution, the "judicial power" of the United States is limited to the resolution of "cases" and "controversies." *Valley Forge Christian College v. Americans United,* 454 U.S. 464, 471, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Thus, plaintiffs must satisfy the doctrines of standing, mootness, and ripeness in order to pursue a claim in an Article III court.

***4** Defendant argues that plaintiffs lack standing to bring claims for injunctive relief. In an earlier memorandum opinion and order granting plaintiffs' motion for class certification, this court concluded that because plaintiff Hayes was not a pretrial detainee at the time the underlying complaint was filed and there are no allegations that she will become a detainee, she lacks standing to pursue injunctive relief.[3] However, because she has suffered a direct injury, plaintiff Hayes has standing to seek monetary damages on behalf of the class. With respect to plaintiff Gary, this court concluded that plaintiff Gary alleged facts sufficient to establish an immediate threat of injury and thus has adequate standing to pursue both monetary and injunctive relief on behalf of the class.[4]

[3] Memorandum Opinion and Order, April 10, 1997 at 8.

[4] *Id.* at 8–9.

Notwithstanding these findings, defendant challenges plaintiffs' standing to assert claims under the Fourth, Fifth, Eighth, and Ninth Amendments. Specifically, defendant contends that the legal doctrines derived from these provisions do not provide a cause of action for pretrial detainees—persons who are in custody but not yet convicted. In support of his position, defendant cites *Titran v. Ackman,* 893 F.2d 145 (7th Cir.1990). In *Titran,* the Seventh Circuit instructs that the Fourth Amendment applies during the arrest of an individual, the Fourteenth Amendment due process clause applies during pretrial detention, and the Eighth Amendment applies after a conviction has been entered. *Id.* at 147 (citing *Graham v. Connor* 490 U.S. 386, 398 n. 10, 109 S.Ct. 1865, 1871 n. 10, 104 L.Ed.2d 443 (1989); *Whitley v. Albers,* 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986); *Bell v. Wolfish,* 441 U.S. 520, 535–39, 99 S.Ct. 1861, 1871–74, 60 L.Ed.2d 447; *Wilkins v. May,* 872 F.2d 190 (7th Cir.1989)). Here plaintiffs' claims are based upon defendant's conduct toward plaintiffs after their arrest but before their conviction. Thus, defendant maintains that, because plaintiffs are pretrial detainees, their claims are properly analyzed under the Fourteenth Amendment. The court investigates plaintiffs' standing to bring claims under each of the aforementioned constitutional provisions.

**A. *The Fourth Amendment (Unreasonable Search and Seizure)***

While the Supreme Court has expressly refrained from holding that pretrial detainees possess any Fourth Amendment rights, *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the plethora of cases applying the Fourth Amendment to inmate strip searches establishes that the Fourth Amendment is applicable in the instant case. *See, e.g., Johnson v. Phelan,* 69 F.3d 144, 146 (7th Cir.1995), *cert. denied, Johnson v. Sheahan,* 519 U.S. 1006, 117 S.Ct. 506, 136 L.Ed.2d 397 (1996); *Forbes v. Trigg,* 976 F.2d 308, 312 (7th Cir.1992), *cert. denied,* 507 U.S. 950, 113 S.Ct. 1362, 122 L.Ed.2d 741 (1993); *Bruscino v. Carlson,* 854 F.2d 162, 166 (7th Cir.), *cert. denied,* 491 U.S. 907, 109 S.Ct. 3193, 105 L.Ed.2d 701 (1988). Although body searches may violate the Fourth Amendment, *Carroll v. United States,* 267 U.S. 132, 147, 45 S.Ct. 280, 283, 69 L.Ed. 543 (1925), in *Wolfish,* the Supreme Court held that visual body searches of pretrial detainees in contact visit situations are constitutional if the practice satisfies the reasonableness test. 441 U.S. 521, 99 S.Ct. 1864 (1979). Whether the practice is reasonable requires a factual determination of various factors including "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." *Wolfish,* 441 U.S. at 559, 99 S.Ct. at 1884. This determination is generally conducted on a case-by-case basis, with the Court weighing the asserted governmental interests against the particular invasion of privacy and possessory interests demonstrated 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). The court thus resolves that plaintiffs' claim are properly brought under the Fourth Amendment. Moreover, plaintiffs have standing to bring this claim by virtue of their subjection to an allegedly unconstitutional search.

**B. *The Eighth Amendment (Cruel and Unusual Punishment)***

***5** On the other hand, because plaintiffs have not been convicted and sentenced, they lack standing to bring claims under the Eighth Amendment. The protections of the Eighth Amendment do not attach until after conviction

and sentence. *City of Revere v. Massachusetts Gen. Hosp.,* 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983) ("Eighth Amendment scrutiny is appropriate only after the state has secured a formal adjudication of guilt."); *Ingraham v. Wright,* 430 U.S. 651, 671, n. 40, 97 S.Ct. 1401, 1412, n. 40, 51 L.Ed.2d 711 (1977) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."). The relevant constitutional provision to adjudicate claims based on the violation of the rights of pretrial detainees is the Due Process Clause of the Fourteenth Amendment. *Ingraham,* 430 U.S. 651, 671–672, n. 40, 97 S.Ct. 1401, 1412–1413, n. 40, 51 L.Ed.2d 711 (1977) ("Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment."). Accordingly, plaintiffs' claims under the Eighth Amendment are dismissed for lack of standing.

**C.** ***The Fifth Amendment (Due Process Clause)***

The Fifth Amendment raises a different query, however. Its applicability hinges not upon the stage between arrest and conviction at which the challenged conduct occurred but rather upon the identity of the defendant actor. Because the defendants are all state entities and officials, rather than federal officials, the plaintiffs' due process claims arise under the Fourteenth not the Fifth Amendment. *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *Johnson v. Carroll,* 694 F.Supp. 500, 504 (N.D.Ill.1988). Thus, to the extent that plaintiffs' due process claims are alleged under the fifth amendment, they are dismissed.

**D.** ***The Ninth Amendment (Unenumerated Right of Privacy)***

Finally, defendant seeks to dismiss plaintiffs' Ninth Amendment claim on the ground that the Ninth Amendment delineates no specific rights to be protected. The Ninth Amendment was added to the Bill of Rights to ensure that no fundamental right would be denied merely because it was not specifically enumerated in the Constitution. *Gibson v. Matthews,* 926 F.2d 532, 537 (7th Cir.1991). As defendant correctly observes, no specific right is protected by the Ninth Amendment. *Quilici v. Village of Morton Grove,* 695 F.2d 261, 271 (7th Cir.1982), *cert. denied,* 464 U.S. 863, —— S. Ct —— (1983). Moreover, for purposes of pursuing a civil rights claim, the Ninth Amendment has never been recognized as independently securing any constitutional right. *Olzinski v. Maciona,* 714 F.Supp. 401, 410 (E.D.Wis.1989) (citations omitted). Thus, a claim based solely on alleged Ninth Amendment rights must fail because no identifiable constitutional rights manifest in that amendment. *Gibson v. Matthews,* 926 F.2d 532, 537 (7th Cir.1991).

***6** Here plaintiffs attempt to state an independent claim of invasion of privacy under the Ninth Amendment. Although, there is a cognizable right of privacy under the United States Constitution, as well as in state law, it does not derive from the Ninth Amendment. Thus, the court dismisses plaintiffs' complaint to the extent that it attempts to state a claim under the Ninth Amendment exclusively. Hence, for the reasons explained, the Fourth and Fourteenth Amendments, as enforced under section 1983 of the Civil Rights Act, govern this cause of action.

**II. Failure to State a Claim upon which Relief Can Be Granted**

Although defendant concedes that the Fourteenth Amendment controls this action, he contests that plaintiffs have adequately stated a claim upon which relief can be granted. Defendant advances this argument with respect to plaintiffs' due process and equal protection claims and plaintiffs' effort to sue defendant in both his individual and official capacities.

**A.** ***Fourteenth Amendment Due Process Clause***

Due process requires that a pretrial detainee not be punished. *Wolfish,* 441 U.S. at 535, 99 S.Ct. at 1872. Indeed, the distinction between the Eighth and the Fourteenth Amendments is that, under the Eighth Amendment, convicted and incarcerated persons may be subject to punishment so long as such punishment is not "cruel and unusual;" due process under the Fourteenth Amendment requires that pretrial detainees not be subjected to punishment at all. Under neither constitutional provision are a detainee's due process rights absolute; on the contrary, "they are subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution." *Id.* at 554, 441 U.S. 520, 99 S.Ct. 1861, 1882, 60 L.Ed.2d 447.

The Seventh Circuit has held that to prevail on a Fourteenth Amendment claim, a plaintiff must prove that the defendant "acted deliberately or with callous indifference, evidenced by an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights." *Anderson v. Gutschenritter,* 836 F.2d 346, 349 (7th Cir.1988) (citing *Shelby County Jail Inmates v. Westlake,* 798 F.2d 1085, 1094 (7th Cir.1986)). In addition, where, as here, the claimant does not plead an intent to punish, the court must determine whether the challenged practice and policy "constitute punishment in the constitutional sense[,]" that is, "whether they are rationally related to a legitimate nonpunitive governmental purpose and whether

they appear excessive in relation to that purpose." *Wolfish,* 441 U.S. at 561, 99 S.Ct. at 1885–86. In order to survive a motion to dismiss under these circumstances, there must be sufficient facts from which to reasonably infer punishment and conduct performed deliberately or with callous indifference.

In *Wolfish,* the Court held that the practice of visual body-cavity searches of pretrial detainees following contact visits did not violate the Fifth Amendment Due Process Clause. *Id.* at 558–60, 99 S.Ct. at 1884–85. The Court reasoned that, ensuring security and order at the institution is a permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both." *Id.* at 562, 99 S.Ct. at 1886. Moreover, the Court found that the challenged restrictions and practices were reasonable responses by prison officials to genuine security concerns. *Id.*

***7** Defendant argues that the holding in *Wolfish* precludes plaintiffs' Fourteenth Amendment claim. While *Wolfish* has significant precedential value in the instant case, the facts as alleged in the complaint and the reasonable inferences therefrom are sufficient to distinguish *Wolfish* and preserve plaintiffs' Fourteenth Amendment claim. In *Wolfish,* prison inmates were subjected to a visual body-cavity inspection as part of a strip search after every contact visit with someone from outside the institution. *Id.* at 558, 99 S.Ct. at 1884. The defendants argued, and the Court agreed, that the deterrence and prevention of drug, weapon, and other contraband smuggling necessitated such searches. *Id.* By contrast, in the instant case, plaintiffs allege that plaintiff Hayes "was under constant supervision of C.C.D.O.C. employees and *not allowed to have contact with non-employees from the moment she was taken from her division for transport to her hearing up to and including the moment she was returned to the Jail for out-processing.*" (Compl., at 4 (emphasis added)). It is reasonable to infer from this allegation that plaintiff's lack of contact with persons from outside the Jail significantly diminishes defendant's alleged security concerns and distinguished the instant case from *Wolfish.* Moreover, a factfinder could reasonably infer that the challenged policy and practice are not rationally related to a legitimate nonpunitive governmental purpose and are excessive in relation to that purpose. Accordingly, defendant's motion to dismiss plaintiffs' due process claim under the Fourteenth Amendment is denied.

**B. *Fourteenth Amendment Equal Protection Clause***

While gender is a permissible ground for classification when the situations of men and women are different, *Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981), when men and women are similarly situated but disparately treated the challenged policy "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). A policy under which female arrestees are routinely subjected to strip searches while similarly situated males are not establishes a significant disparity in treatment based on gender. *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1273 (1983). Defendant argues that plaintiffs' equal protection claim under the Fourteenth Amendment must fail because plaintiffs' allegations fail to demonstrate that male and female prisoners are similarly situated.

Plaintiffs assert equal protection violations stemming from defendant's strip search of female inmates, and his failure to apply the same policy and procedure to male inmates who are similarly situated. (Compl., at 8–10). Specifically, plaintiffs allege that "all female inmates are subjected to the strip search procedure ..., despite the fact that most male inmates similarly situated are not strip searched." (Compl., at 8–10). Plaintiffs further allege that these searches are conducted without regard to whether it was reasonable to believe that any contraband or weapons may have been concealed on the female inmates. (*Id.* at 8). When read liberally, pursuant to federal notice pleading requirements, this portion of the complaint alleges a sex-based classification which operates to deprive the plaintiff of certain rights, and consequently, states a claim for violation of equal protection rights. *Califano v. Goldfarb,* 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); *Craig,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397.

***8** Nonetheless, defendant contends that, by virtue of their obvious differences, the male and female inmates at the Jail are not similarly situated. By so arguing, defendant urges the court to rule that the male and female populations of the Jail "face markedly different issues in both [sic] housing, medical care, and security" which obviate scrutiny under the Fourteenth Amendment. (Defendant's Reply to the Plaintiff's Response to the Motion to Dismiss the Plaintiff's Complaint at 10). However, *Mary Beth G.* is proof that an independent analysis of the circumstances can reveal unconstitutional treatment in violation of the Fourteenth Amendment despite the obvious differences between males and females.

In *Mary Beth G.,* the court affirmed a judgment in favor of female arrestees challenging disparate search procedures on the ground that the defendant failed to show that the male and female offenders were not similarly situated. That *Mary Beth G.* involves new arrestees as opposed to pretrial detainees charged with serious crimes does not affect the burden of proof articulated in that case with respect to determining the constitutionally of strip search procedures where males and females are treated differently. Moreover, defendant's

argument is more properly advanced on motion for summary judgment. At this stage in the litigation, plaintiffs need only allege that the male and female populations are similarly situated; plaintiffs' duty to prove these allegations must be fulfilled at a later stage. Accordingly, defendant's motion to dismiss plaintiffs' equal protection claim is denied.

**C. *Individual and Official Capacities***

Plaintiffs seek to sue defendant both in his official and individual capacities. Defendants contend, however, that plaintiffs have unsuccessfully pleaded facts to support both of these allegations. In support of his position, defendant argues that no case has yet to establish that the challenged strip search procedure and policy are unconstitutional and thus individual liability cannot attach. Second, defendant argues that plaintiffs' allegations fail to state a cognizable constitutional claim and thus "there can be no showing that the strip search procedures at [the Jail] are the result of an unconstitutional custom, policy or practice." (Def. Reply at 13 (emphasis omitted)). This latter argument is moot in light of this court's conclusion that plaintiffs have successfully stated cognizable claims under the Fourth and Fourteenth Amendments.[5] Defendant's first argument similarly fails.

5 *See supra* Parts I.A. & II.A. & B.

In order to assert a claim under section 1983 against an official in his individual capacity, claimants must allege that (1) the defendant was acting under color of state law, and (2) defendant's conduct deprived them of their federal rights. *See also Procopio v. Johnson,* 994 F.2d 325, 328 (7th Cir.1993). In their complaint, plaintiffs aver that defendant acted in his individual capacity under color of state law by failing to change the challenged strip search policy and procedure after gaining personal knowledge of such. (Compl., at 4, 6, 8, 12). In addition, earlier in this opinion, this court resolved that plaintiffs have properly alleged that defendant's conduct deprived plaintiffs of their federal rights.

***9** Moreover, under *Monell v. Department of Soc. Serv. of the City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1977), a plaintiff asserting an official capacity claim must demonstrate that the challenged policy, custom, or practice was the "moving force" behind the alleged constitutional violation. *Polk County v. Dodson,* 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). Such "official policies" need not be written or receive formal approval to be actionable. *Monell,* 436 U.S. at 691, 98 S.Ct. at 2035. Courts may impose liability based on "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.' " *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127, S.Ct. 915, 926, 99 L.Ed.2d 107 (1988) (quoting *Adickes v. S.H. Kress,* 398 U.S. 144, 167–68, 90 S.Ct. 1598, 1613–14, 26 L.Ed.2d 142 (1970). Plaintiffs allegation that defendant "instituted, sanctioned, and approved the ... policies, practices, and customs," challenged in the complaint, and that such policies were applied to at least 8,000 persons over the past two years clearly satisfies this latter standard.

In addition, plaintiffs complain that the challenged practices are related to deficient training by defendant. (Compl., at 8–9). Specifically, plaintiffs state that defendant failed to "properly train and supervise deputy sheriff and C.C.D.O.C. employees ... to prevent unreasonable body searches and to not improperly conduct body searches on the basis of gender." (*Id.*). In *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the Supreme Court set forth a strict standard for official capacity claims based on failure to adequately train—proof of "deliberate indifference." *Id.* at 382–89, 109 S.Ct. at 1201–06. Citing *Harris,* the Seventh Circuit held that in order to establish section 1983 liability for failure to adequately train, the plaintiff must demonstrate that the defendant was on notice of a pattern of constitutional violations resulting from inadequate training such that defendant's failure to provide further training amounted to "deliberate indifference." *Hirsch v. Burke,* 40 F.3d 900, 904 (7th Cir.1994).

Defendant contends that plaintiff's allegation fails to establish a "nexus" between defendant's alleged failure to train and plaintiffs' alleged constitutional injuries. However, this court finds that, although not artfully stated, when read liberally pursuant to federal notice pleading requirements, plaintiffs' allegations that defendant's alleged failure to adequately train C.C.D.O.C. employees "to prevent" the challenged strip searches establishes a causal nexus between defendant's conduct and plaintiffs' injury. In addition, plaintiffs claim that as a direct and proximate result of defendant's policies, practices, and procedures, the plaintiff class was (or will be) subjected to unreasonable body searches that are demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, and degrading. (Compl., at 10). Furthermore, plaintiffs alleged that defendant was on notice of the alleged constitutional violations by stating that defendant has actual knowledge of the policy, procedure, and practice as a result of pending lawsuits against him stating similar claims. (*Id.* at 9). Hence, the court concludes that plaintiffs' claims are advanced against defendant in both his individual and official capacities.

**III. Qualified Immunity**

***10** To the extent that defendant is implicated in his individual capacity, he claims that he is entitled to qualified immunity against plaintiffs' claims. In light of the Supreme Court's recommendation that qualified immunity claims be resolved as early as possible in the litigation, *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 536, 116 L.Ed.2d 589 (1991), a defendant may raise the defense of qualified immunity in a motion to dismiss. *Kernats v. O'Sullivan,* 35 F.3d 1171, 1175 (7th Cir.1994).

The doctrine of qualified immunity, when applicable, provides government officials performing discretionary functions protection from liability as well as protection from suit for civil damages. *Behrens v. Pelletier,* 516 U.S. 299, ——, 116 S.Ct. 834, 838, 133 L.Ed.2d 773 (1996) (quoting *Harlow,* at 818, 102 S.Ct. at 2738); *see also Erwin v. Daley,* 92 F.3d 521, 523 (7th Cir.1996), *cert. denied,* 519 U.S. 1116, 117 S.Ct. 958, 136 L.Ed.2d 845 (1997). The defendant bears the burden of pleading the defense. *Gomez v. Toledo,* 446 U.S. 635, 640, 100 S.Ct. 1920, 1923–24, 64 L.Ed.2d 572 (1980). The Seventh Circuit, however, has repeatedly held that while public officials asserting the defense have the burden of pleading, the plaintiff bears the burden of demonstrating that the conduct at issue violated a right that was clearly established when the conduct occurred. *See, e.g., Magdziak v. Byrd,* 96 F.3d 1045, 1047 (7th Cir.1996); *Montville v. Lewis,* 87 F.3d 900, 902 (7th Cir.1996), *cert. denied,* 519 U.S. 1117, 117 S.Ct. 961, 136 L.Ed.2d 847 (1997); *Clash v. Beatty,* 77 F.3d 1045, 1047 (7th Cir.1996), *Rakovich v. Wade,* 850 F.2d 1180, 1209 (1987). With respect to the plaintiffs' burden of proof, the Supreme Court set forth the following two-part analysis in *Harlow:* "(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question?" *Wade v. Hegner,* 804 F.2d 67, 70 (7th Cir.1986) (citing *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)); *Lojuk v. Johnson,* 770 F.2d 619, 628 (7th Cir.1984), *cert. denied,* 474 U.S. 1067, 106 S.Ct. 822, 88 L.Ed.2d 795 (1986)).

It has been established several times in this memorandum opinion that plaintiffs have alleged a cognizable constitutional claims. Thus, the decisive question is whether the alleged constitutional rights were clearly established at the time of the challenged conduct. In other words, in order to find that he is entitled to qualified immunity, the court must determine that. at the time of the challenged strip searches, Sheahan would not have been on notice that his behavior was "probably unlawful." *Montville v. Lewis,* 87 F.3d 900, 902–03 (7th Cir.1996) (quoting *Sherman v. Four County Counseling Center,* 987 F.2d 397, 401 (7th Cir.1993)). If the law at that time was not clearly established, Sheahan 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. On the other hand, if the law was clearly established, the immunity defense should fail because a reasonably competent public official is presumed to know the law governing his conduct. *Harlow v. Fitzgerald,* 457 U.S. 800, 818–19, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The strip searches have occurred since at least 1995 and continue through the present. (*See* Compl., at 4, 11). Accordingly, legal developments up to and including this time period will be considered in determining the applicable state of the law.

***11** In order to determine the applicable state of the law, a court should first look to binding precedent. *Cf. Donovan v. City of Milwaukee,* 17 F.3d 944, 952 (7th Cir.1994) (citations omitted) (emphasis added) ("In the absence of controlling authority on point, 'we seek to determine whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.' "). Binding precedent is not, however, "a sine qua non of a finding that a particular right has been clearly established within the meaning of *Harlow.*" *Cleveland–Purdue v. Brutsche,* 881 F.2d 427, 431 (7th Cir.1989), *cert. denied,* 498 U.S. 949, 111 S.Ct. 368, 112 L.Ed.2d 331 (1990) (citations omitted). Where there is no controlling precedent, a court should examine all relevant caselaw in order to determine "whether at the time of the alleged acts a sufficient consensus had been reached indicating that the official's conduct was unlawful." *Id.; see also Doe v. Bobbitt,* 881 F.2d 510, 511 ("In the absence of a binding precedent, we will look to all relevant decisional law to determine whether a right has been clearly established."), *cert. denied,* 495 U.S. 956, 110 S.Ct. 2650 (1990). Put another way, in order to find that a right was clearly established in the absence of controlling precedent, the relevant caselaw should indicate that "recognition of the right by a controlling precedent was merely a question of time." *Cleveland–Purdue,* 881 F.2d at 431. Furthermore, while the constitutional right must be "sufficiently particularized" to put officials on notice of unlawful conduct, *Azeez v. Fairman,* 795 F.2d 1296, 1301 (7th Cir.1986), "cases involving the exact fact pattern at bar are unnecessary." *Lojuk v. Johnson,* 770 F.2d 619, 628 (7th Cir.1985); *see also Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Bakalis v. Golembeski,* 35 F.3d 318, 323 (7th Cir.1994) (quoting *Rakovich,* 850 F.2d at 1211) ("[T]he right should not be defined so intricately that invariably guiding law never can be found.").

Because several of plaintiffs' claims have been dismissed, the court will conduct this analysis with respect to the remaining constitutional claims asserted the Fourth and Fourteenth Amendments, as enforced under section 1983.

**A.** ***Fourth Amendment***

The seminal case addressing the constitutionality of strip searches under the Fourth Amendment is *Bell v. Wolfish. Wolfish* prescribes a balancing test which applies to all strip searches of both pretrial detainees and convicted inmates:

> 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.

***12** 441 U.S. at 559, 99 S.Ct. at 1884. This balancing test does not validate strip searches in detention settings per se. *Tikalsky v. City of Chicago,* 687 F.2d 175, 181–82 & n. 10 (7th Cir.1982); *Bono v. Saxbe,* 620 F.2d 609, 617 (7th Cir.1980).

The purpose of the cavity searches in *Wolfish* was to discover and deter smuggling of weapons and contraband, which was found to be a byproduct of contact visits. 468 U.S. 576, 587–88, 104 S.Ct. 3227, 3233, 82 L.Ed.2d 438. The inmates had contact visits which were not closely supervised by guards. *Id.* The Court held that the "significant and legitimate" security concerns associated with plaintiffs' contact visits with persons from outside the institution outweighed the privacy interests of the inmates to the extent that visual body-cavity searches could be conducted on less than probable cause. *Id.* at 560, 104 S.Ct. at 1885. In reaching this conclusion, the Court relied on the possibility that contraband would be brought into the facility during contact visits.

However, the factual circumstances in the instant case are clearly distinguishable. Here, the strip searches of inmates occurred after non-contact court appearances. Plaintiffs have specifically alleged that, at all relevant times, they were under the constant supervision of C.C.D.O.C. employees and not allowed to have contact with nonemployees. (Compl., at 4). Thus, the rationale in *Wolfish* does not justify strip searches in this context. Indeed, the Seventh Circuit held that the holding in "*Wolfish* should not be extended ... without a showing that there is some risk that contraband will be smuggled into the Jail during non-contact, supervised visits, or that some other risk within the prison will be presented." *Bono,* 620 F.2d at 617. Since it is too early to determine whether such risks exist in this case, the court will not grant qualified immunity on plaintiffs' Fourth Amendment claim.

**B.** ***Fourteenth Amendment***

The law in this Circuit respecting equal protection claims based on gender-classified strip searches appears to be limited to one case that is directly applicable in the instant case.[6] *Mary Beth G.,* held that a policy under which female arrestees are routinely subjected to strip searches while similarly situated males are not establishes a significant disparity in treatment based on gender and is therefore subject to constitutional scrutiny. *Id.* Defendant attempts to distinguish *Mary Beth G.* on the ground that that case involved misdemeanants awaiting release on bond. However, the difference in the seriousness of the offenses with which the detainees were charged and the stage of prosecution of the detainees has no relevance in equal protection analysis. Indeed, the pertinent comparison is not between female felony detainees and misdemeanants, but rather between male felony detainees and female felony detainees who are subjected to disparate search procedures and policies. *Mary Beth G.* clearly establishes that such disparity without constitutionally recognized justification violates equal protection. Hence, Sheahan had sufficient notice in light of *Mary Beth G.* that his alleged conduct was unconstitutional. Accordingly, Sheahan is not entitled to qualified immunity on the equal protection claim.

6 Although there is a seemingly infinite number of equal protection decisions that the court believes would put defendant on notice of the unlawfulness of his conduct, for purposes of simplicity, the court limits its analysis to *Mary Beth G.* which is directly on point.

***13** Similarly, in light of *Wolfish,* it was clearly established at the time in question that policies and procedures regarding the strip searching of pretrial detainees must satisfy the "reasonableness" test. Moreover, a factfinder could reasonably infer that the challenged policy and practice are not rationally related to a legitimate nonpunitive governmental purpose and are excessive in relation to that purpose. Thus, Sheahan is also not entitled to qualified immunity on the due process claim.

***Conclusion***

WHEREFORE, for the reasons stated in this memorandum opinion, defendant's motion to dismiss is hereby granted with prejudice as to plaintiffs' Fifth, Eighth, and Ninth Amendment claims under section 1983

against defendant in both his individual and official capacities.