

## LEGAL ISSUES

Gustafson v. Polk County: The Future of Federal Class Action Strip Search Litigation in Wisconsin

—Charles Bohl, Nathan Fishbach and Andrew Jones, Whyte Hirschboeck Dudek S.C.

Strip searches, when conducted with proper justification, remain a legitimate and valuable tool for today's corrections officials. But if used unwisely, strip searches of jail prisoners can generate significant constitutional liability.

Once considered a standard operating procedure in most jails, federal courts of appeals began in the 1980s to sharply criticize jails for strip searching detainees without "particularized justification." The Seventh Circuit Court of Appeals in Chicago, commenting on strip searches in the jail context, held some 20 years ago: "we can think of few exercises of authority by the state that intrude on the citizen's privacy and dignity as severely."<sup>1</sup> While the courts of appeals have been troubled by strip searches, to date there has been no decision from the U.S. Supreme Court describing a bright-line rule for when a strip search of a jail prisoner is impermissible.

Not surprisingly then, the use of strip searches in jails has engendered much constitutional litigation in courts across the country. This litigation has frequently taken the form of federal class action lawsuits seeking multi-million dollar recoveries on behalf of poorly-defined "classes" of prisoners for alleged constitutional violations arising out of strip searches.<sup>2</sup>

Typically, while each individual prisoner's claim has relatively little value on its own, the magnitude of the claims of a plaintiff class, when considered as a whole, has often resulted in settlements or judgments in the millions, with the lawyers for the plaintiff class typically receiving substantial attorneys' fees awards. In a recent strip search case involving St. Croix County filed in the U.S. District Court for the Western District of Wisconsin, Judge Barbara Crabb certified a plaintiff class, and the case ultimately settled for \$7 million.<sup>3</sup> Of that sum, the lawyers for the plaintiff class received roughly \$1.4 million in fees and costs. Other similar strip search class actions also have resulted in large settlements, including \$10 million in a case against Suffolk County, Massachusetts and \$6.25 million in a case against Miami-Dade County, Florida.<sup>4</sup> Obviously, strip search litigation can very quickly lead to results that are catastrophic to counties and their insurers.

The recent case of *Jodi Gustafson v. Polk County*,<sup>5</sup> also before Judge Crabb of the Western District of Wisconsin, is the most recent example of this high stakes constitutional litigation

right here in Wisconsin. However, a decision issued by Judge Crabb on March 30, 2005<sup>6</sup> denying class certification to the plaintiff and her counsel may well make it prohibitively difficult for future plaintiffs to get strip search classes certified in Wisconsin.

The Gustafson Case: Background

The *Gustafson* case was filed in May 2004 by Jodi Ann Gustafson, a 29-year-old Polk County resident who alleged that she had been the victim of an unconstitutional strip search when she was booked into the Polk County Jail.

Ms. Gustafson was arrested by a Polk County sheriff's deputy for outstanding warrants for her failure to pay a fine for fishing without a license and shoplifting.<sup>7</sup> Following her arrest, Ms. Gustafson was transported to the Polk County Jail in Balsam Lake, where, according to the complaint in her lawsuit, she was allegedly strip searched in an open hallway of the jail in the presence of one female and two male deputies. She claimed she was made to strip completely naked and then bend over and "spread" her "butt cheeks."<sup>8</sup> Significantly, Ms. Gustafson was soon released on bail, and she was never put into the jail's general population or changed into a jail uniform.<sup>9</sup>

Ms. Gustafson claimed that the alleged strip search violated her Fourth and 14th Amendment rights under the U.S. Constitution and sought money damages as a result.<sup>10</sup> In addition to seeking damages, Ms. Gustafson sought the certification of a broad plaintiff class consisting of herself and approximately 10,600 other former prisoners in the Polk County Jail who allegedly "were required by officers at the Polk County Jail to remove their clothing and remove or lower their underwear for visual inspection of their genitals, pubic area, buttocks, or breasts" over a six year period.<sup>11</sup> This class would have included both prisoners that were changed into jail uniforms and put into the jail's general population and prisoners like Ms. Gustafson who were quickly released on bail.

However, Polk County emphatically denied that Ms. Gustafson had been strip searched. Polk County also argued to the court that it did not have a policy or practice of strip searching individuals being booked into the Polk County Jail regardless of the nature of the charges against them or the existence of grounds sufficient to warrant a strip search.

### Judge Crabb's Decision Denying Class Certification in Gustafson

After months of aggressive discovery on both sides involving close to 100 depositions,<sup>12</sup> Judge Crabb refused to certify the case as a class action. In reaching this decision, Judge Crabb analyzed the proposed plaintiff class under Rule 23 of the Federal Rules of Civil Procedure, finding that Ms. Gustafson and her counsel failed to satisfy the requirements for class certification.

While the scope of this article does not allow for a detailed account of Judge's Crabb's reasoning under Federal Rule 23, there are two aspects of the decision that make it significant for future class action strip search lawsuits in Wisconsin.

### The Impact of the Decision on the Law of Strip Searches in Wisconsin

Judge Crabb described a clear, bright-line rule for one important principle of federal strip search law in the corrections con-

text. As is discussed below, she held that strip searches of pre-trial detainees being transferred into the general population of a jail are not unconstitutional.

Under Wisconsin law, the use of strip searches in jails is closely regulated by statute.<sup>13</sup> The Wisconsin statute does not allow a strip search simply because a prisoner is being transferred into the general population of a jail. But, state statutes do not define the scope of federal constitutional rights, and the violation of a state statute does not necessarily result in a violation of the U.S. Constitution.<sup>14</sup> This makes sense since the Wisconsin statute could not have been on the minds of the founding fathers when the Constitution was originally drafted.

In *Bell v. Wolfish*, the United States Supreme Court considered the constitutionality of body cavity searches (a more intrusive form of strip search) of pre-trial detainees.<sup>15</sup> Ultimately, the Court found the searches constitutional under the Fourth Amendment in that particular context, describing a rule that

*continues* ➤

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remains the benchmark test for jail strip searches yet today.

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.<sup>16</sup>

The application of this balancing test has led to some agreement among the federal courts that strip searches may be performed on persons being booked into jail on weapons or illegal drug charges, or where “reasonable suspicion” exists that the prisoner in question is concealing such weapons or contraband.<sup>17</sup> But, the *Wolfish* test has led to varying and often inconsistent interpretations throughout the country of when strip searches may otherwise be conducted on pre-trial detainees. One detainee being booked into a jail might be constitutionally strip searched while the next might not, all depending on the circumstances of their arrests, the nature of the criminal charges against them and their prior criminal records, among many other factors.

In the recent *Gustafson* decision, Judge Crabb offered a general, bright-line rule for the constitutionality of strip searches for detainees being transferred into the general population of a jail. Judge Crabb held:

*In this circuit, the law is well-settled that strip searches may be performed on persons taken into custody on a misdemeanor or traffic violation only if the person is going to be housed in the general jail population and not simply detained for release upon completion of the booking process, or if officials have a reasonable suspicion that the arrested person is concealing weapons or contraband.*<sup>18</sup>

On its face, this rule provides at least some clarity and certainty to local corrections officials in seeking to balance the use of a legitimate means of ensuring the safety and security of their facilities against the constitutional rights of detainees in their custody.

It is important to note, however, that even this proposition is not without controversy. Courts from other federal circuits have reached directly contrary results, refusing to permit strip searches of detainees being transferred into the general population of a jail absent some other particularized basis for the search.<sup>19</sup> Even with Judge Crabb’s ruling in *Gustafson*, conservative corrections practice dictates that local jail officials insist on the existence of individualized reasonable suspicion of weapons, illegal drugs or other such contraband before conducting a strip search of a detainee being booked into jail.

### The Impact of the Decision on Strip Search Class Actions in Wisconsin

As the Seventh Circuit has observed in the past, class certification can turn a small case involving relatively minor sums of money into a “bet-the-company” lawsuit that often induces a substantial settlement even if the merits of the underlying claims are weak or even totally nonexistent.<sup>20</sup> This is true because the stakes become so high after class certification that the defendant simply cannot afford the risk of trial, regardless of the evidence or the merits of the claim. This has certainly been true in constitutional litigation involving strip searches, where plaintiffs have received substantial settlements by successfully obtaining certification of a class of strip search victims.<sup>21</sup> As noted above, in the recent case of *Brecher v. St. Croix County*, a Wisconsin county and its insurer paid some \$7 million to settle class claims.<sup>22</sup>

Adding to the risk is the fact that certification of plaintiff classes in strip search lawsuits has occurred with some frequency in recent years.<sup>23</sup> In *Brecher v. St. Croix County*, Judge Crabb certified a plaintiff class of some 3,000 former detainees in the St. Croix County jail who were alleging they had been the victims of unconstitutional strip searches.<sup>24</sup> Significantly, the class certified in the *Brecher* case did not exclude prisoners going into the jail’s general population.<sup>25</sup>

In reaching her decision to deny class certification in the *Gustafson* case, Judge Crabb may have signaled a return to a more rigorous application of the requirements of Federal Rule 23 for class certification. This may in turn make it more difficult for plaintiffs to turn individual disputes over jail strip searches into wide-ranging class action lawsuits involving thousands upon thousands of plaintiffs.

In her decision, Judge Crabb concluded that Ms. Gustafson and the proposed class had failed to meet the well-known numerosity, commonality and typicality requirements of Federal Rule 23(a), Federal Rule 23(b)(3)’s requirement that common issues predominate over individual ones and the implicit class action requirement that a class definition be “precise, objective, and presently ascertainable.”<sup>26</sup> In reaching these conclusions, Judge Crabb examined the proposed class with exacting scrutiny.

One example of this rigorous examination of the proposed class by Judge Crabb is the very first element under Federal Rule 23(a)—the requirement of numerosity. Seeking to establish numerosity, Ms. Gustafson and her counsel stated simply that some 10,600 bookings occurred at the Polk County Jail in the 6-year class period.<sup>27</sup> But, Polk County showed the court that Ms. Gustafson’s argument failed to account for the fact that, among

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### *LITIGATION,* *continued from page 20*

the 10,600 bookings, there were a great many prisoners (about 70 percent) who were transferred into the jail's general population. Since the court held that all of these prisoners would have to be excluded from the class, the resulting group of potential plaintiffs would have been a much smaller class and also would have been difficult to identify given jail records. Judge Crabb said: "I hold that it would not be appropriate [to certify the class] because, in general, it is constitutional to strip search arrestees destined to join a jail's general population."<sup>28</sup>

Polk County also argued that the proposed class was inappropriate because it failed to distinguish six other groups of prisoners; (1)prisoners who were booked multiple times; (2)prisoners who were charged with felony offenses; (3)prisoners who were charged with weapons or drug

offenses; (4)prisoners who were booked into the jail to serve a sentence as the result of a conviction; (5)prisoners who entered into the jail on probation holds or revocations; and (6)prisoners who were incarcerated under circumstances that would have provided a legal justification for a strip search.

In considering this element of the class certification standard, Judge Crabb agreed with Polk County, noting that despite having placed advertisements in local newspapers seeking "witnesses," Ms. Gustafson and her counsel had only identified twelve individuals in their class motion who would testify that they had been strip searched at the Polk County Jail. In addition, Judge Crabb observed that ten of those twelve had been strip searched in advance of being placed into the general population of the jail; nine of those ten were drunk at the time of their bookings; and eight of the ten testified that they had not been strip searched on

other occasions when they had been booked into the Polk County Jail during the class period.<sup>29</sup>

With these facts in mind, Judge Crabb held that it would be reasonable to conclude that "a substantial fraction of the 10,600 bookings [into the Polk County Jail] either did not involve a strip search at all or involved a strip search that was legal."<sup>30</sup> Commenting on the failure by Ms. Gustafson and her counsel to specify more concretely who and how many of the 10,600 individuals booked into the Polk County Jail in the class period were actually strip searched illegally, Judge Crabb observed:

*[Plaintiff] has had more than seven months to gather more specific evidence about the number of potential class members. Instead of arriving at a good-faith estimate of the number of class members, plaintiff relied simply on the total number of bookings during the relevant time period. Plaintiff*



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asks the court to assume that a vast number of those bookings would fall into the proposed ... definition but she does not provide enough evidence to enable the court to make a common sense estimate in good faith.<sup>31</sup>

Importantly, Judge Crabb carried this rigorous examination of the proposed class forward into her review of the remaining class certification requirements of Federal Rule 23.<sup>32</sup>

### Conclusion

Within weeks of Judge Crabb's decision to deny class certification in *Gustafson*, the plaintiff and her counsel voluntarily withdrew her claims, bringing a successful close to the litigation for Polk County and its insurer. With Judge Crabb offering an unambiguous rule regarding the constitutionality of certain strip searches in jails and setting an unmistakably high bar in her application of the statutory requirements for class certification, there is renewed hope for other municipalities in Wisconsin that liability, and even settlement, can be avoided in similar litigation involving claims of unlawful strip searches.

### Notes:

1 *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1984). See also *Tinetti v. Witke*, 479 F. Supp. 486, 491 (E.D. Wis. 1979) (quoting from an unpublished decision describing strip searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission"), *aff'd*, 620 F.2d 160 (7th Cir. 1980).

2 See, e.g., *Eddleman v. Jefferson County*, No. 95-5394, 1996 WL 495013 (6th Cir. Aug. 29, 1996); *Maneely v. City of Newburgh*, 208 F.R.D. 69 (S.D.N.Y. 2002); *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000); *Gary v. Sheehan*, No. 96-C-7294, 1999 WL 281347 (N.D. Ill. Mar. 31, 1999); *Klein v. DuPage County*, 119 F.R.D. 29 (N.D. Ill. 1988); *Smith v. Montgomery County, Md.*, 573 F. Supp. 604 (D. Md. 1983).

3 *Brecher v. St. Croix County*, No. 02-C-450-C, 2005 WL 1055735 (W.D. Wis.).

4 See *Mack v. Suffolk County*, No. 98-11346-NG, 2002 WL 31187225 (D. Mass. May 29, 2002) (\$10 million settlement); *Haney v. Miami-Dade County*, No. 04-CV-20516, 2004 WL 2203481 (S.D. Fla. Aug. 24, 2004) (\$6.25 million settlement).

5 *Jodi Ann Gustafson v. Polk County, Wisconsin and Ann Hraychuck*, No. 04-C-268-C (W.D. Wis.).

6 *Gustafson v. Polk County*, 226 F.R.D. 601 (W.D. Wis.).

7 226 F.R.D. at 603.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* at 604.

12 In addition to formal discovery, Polk County undertook a vigorous investigation of events in its own jail and the allegations of Ms. Gustafson. First, the defense team interviewed all personnel – past and present – of the Polk County Jail to confirm its understanding of the strip search practices in the jail. In this respect, the defense team was assisted by former federal criminal investigators who were familiar with law enforcement practices and had credibility within the law enforcement community. In addition, using these same investigators, the defense critically analyzed the series of events leading to the plaintiff's alleged strip

search. Preparing a detailed time line of Mr. Gustafson's arrest and booking, the defense was able to highlight important inconsistencies in her version of events.

13 Wis. Stat. § 968.255 (2003-04).

14 See, e.g., *Kratshaar v. Flanigan*, 45 F.3d 1040, 1047 (7th Cir. 1995); *Doe v. Burnham*, 6 F.3d 476, 480 (7th Cir. 1993). For this reason, a municipal defendant such as Polk County cannot simply rely on its compliance with the provisions of Wis. Stat. § 968.255 as a defense in constitutional strip search litigation.

15 *Bell v. Wolfish*, 441 U.S. 520 (1979).

16 441 U.S. at 559. See also *Mary Beth G.*, 723 F.2d at 1271-73.

17 See, e.g., *Mary Beth G.*, 723 F.2d at 1273.

18 226 F.R.D. at 604 (citations and internal quotations omitted). In reaching this conclusion, Judge Crabb cited to her own decision in a prior case, *Liston v. Steffer*, 300 F. Supp. 2d 742 (W.D. Wis. 2002), and the Seventh Circuit's decision in *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003).

19 See, e.g., *Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001); *Roberts v. Rhode Island*, 239 F.3d 107, 111 (1st Cir. 2001); *Kelly v. Foti*, 77 F.3d 819, 822 (5th Cir. 1996).

20 See, e.g., *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (noting that, in the case before it, the district court's decision to certify the plaintiff class turned a \$200,000 dispute into a \$200 million dispute); see also *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002);



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