

Responding to Sexual Abuse of Inmates in Custody: Addressing the Needs of Men, Women, and Gender Nonconforming Populations
Notification of Curriculum Use
April 2014

The enclosed Responding to Sexual Abuse of Inmates in Custody: Addressing the Needs of Men, Women, and Gender Nonconforming Populations curriculum was developed by the Project on Addressing Prison Rape at American University, Washington College of Law as part of contract deliverables for the National PREA Resource Center (PRC), a cooperative agreement between the National Council on Crime and Delinquency (NCCD) and the Bureau of Justice Assistance (BJA). The Prison Rape Elimination Act (PREA) standards served as the basis for the curriculum's content and development with the goal of the Responding to Sexual Abuse of Inmates in Custody: Addressing the Needs of Men, Women, and Gender Nonconforming Populations curriculum being to satisfy specific PREA standards requirements.

It is recommended that the Responding to Sexual Abuse of Inmates in Custody: Addressing the Needs of Men, Women, and Gender Nonconforming Populations curriculum be reviewed in its entirety before choosing which modules to use. Any alterations to the original materials require either acknowledgement during their presentation or removal of the PRC and Project on Addressing Prison Rape logos.

BJA is currently undergoing a comprehensive review of the enclosed curriculum for official approval, at which point the BJA logo may be added.

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**Training Curriculum:
Responding to Sexual Abuse of Inmates in Custody:
Addressing the Needs of Men, Women and Gender Non-Conforming
Populations**

**Module 13:
Human Resources and the Impact of
Gender**

**The Project on Addressing Prison Rape
February 2014**

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Introduction

In human resources, different legal considerations apply depending on the gender of the staff member:

- Inmate privacy vs. staff employment rights
- Sexual harassment and discrimination
- Off duty conduct/anti-fraternization

Introduction to Legal Liabilities

- Constitutional
 - First Amendment
 - Fourth Amendment
 - Fifth/Fourteenth Amendment
 - Eighth Amendment
- Federal and State Statutes
- Common Law Claims
- PREA Standards

Key Constitutional and Statutory Provisions For Employees

- Constitutional
 - First Amendment Right to Association
 - Fifth/Fourteenth Amendment Equal Protection
 - Fifth/Fourteenth Amendment Due Process
- Statutory
 - Federal – Title VII
 - State Civil Rights Law

Key Constitutional and Statutory Provisions For Inmates/Detainees

- Eighth Amendment: Cruel and Unusual Punishment
- Fifth/Fourteenth Amendment: Due Process
- Fourth Amendment: Privacy
- First Amendment: Religion

Key PREA HR Provisions

115.15: Cross-gender searches

115.17: Hiring and promotion decisions

115.71: Criminal and administrative agency investigations

155.76: Disciplinary sanctions for staff

Inmate Privacy vs. Correctional Officer Employment

Who wins?

Balancing Act

Fourth/Eighth Amendment (Liable to inmate)

Title VII (Liable to employee)

Courts will balance the inmates' interest in freedom from sexual assaults and right to privacy against the employment rights of correctional officers

Inmate Privacy Rights

Limited privacy right in general

Some protection offered against cross-gender searches:

- First Amendment for religious exceptions
- Fourth Amendment for privacy
- Eighth Amendment for cruel and unusual punishment

Inmate Privacy Rights

In general, courts are more willing to find a Fourth Amendment privacy right for female inmates where a male correctional was involved in a strip-search

Courts typically do not find an Eighth Amendment violation where female correctional officers are involved in a strip-search of a male inmate.

Fourth Amendment – Liable to Inmate

***Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981)**

Female nurse removed **female inmate's** undergarments in the presence of male **correctional officers**, after the inmate expressed willingness to remove her underclothing if the male officers left.

The court affirmed the jury verdict for the plaintiff's § 1983 claim, finding that "[m]ost people ... have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating."

Fourth Amendment – Liable to Inmate

***Byrd v. Maricopa Cty. Sheriff's Dept.*, 629 F.3d 1135 (9th Cir. 2011)**

A **female cadet** conducted a pat-down search on a **male detainee**. The court found that the search violated detainee's Fourth Amendment right to be free from unreasonable searches.

The court distinguished this case from other cross-gender pat-down searches that did not violate the Fourth Amendment noting that the officer touched the detainee's penis and scrotum, and that the detainee was essentially unclothed

Eighth Amendment – Liable to Inmate

Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993)

The Washington Corrections Center for Women implemented a policy allowing **male correctional officers** to conduct random pat down searches of **female inmates**.

The court held the policy violated the inmates' Eighth Amendment rights, as many of the female inmates had been sexually abused, and that the searches by male correctional could cause psychological harm

First Amendment – Liable to Inmate

***Moore v. Carwell*, 168 F.3d 236 (5th Cir. 1999)**

A **male inmate** claimed **female correctional officers** performed repeated cross-gender searches and body cavity searches on him

The court remanded on the inmate's First Amendment claims, as the inmate had stated his Baptist beliefs prevented him from being viewed naked by a female other than his wife

Officer Employment Rights

Title VII:

“[i]t shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, **sex**, or national origin.”

42 U.S.C. § 2000e-2(a) (2012)

Officer Employment Rights Sexual Orientation and Gender Identity

Not currently covered by Title VII

- Gender non-conforming staff *may* receive intermediate scrutiny for equal protection claims. 539 U.S. 558 (2003)
- This area of the law is constantly evolving, and may change this year after the Supreme Court hears the challenge to Proposition 8.

Some state civil rights statutes may provide protection from discrimination for gender non-conforming staff discrimination

- *See, e.g.* Sexual Orientation Non-Discrimination Act, Ch. 2, 2002 N.Y. Laws 46

Officer Employment Rights

BFOQ: Escape clause from Title VII

Dothard v. Rawlinson, 433 U.S. 321 (1977) (eliminating height and weight restrictions for positions within all male institution, while upholding male gender as a BFOQ in Alabama Maximum Security Prison).

Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir. 1980) (holding that male gender cannot be used as a BFOQ to keep women out of contact positions).

BFOQ Defense – Female gender

Everson v. Michigan Dept. of Corrections, 391 F.3d 737 **(6th Cir. 2004)**

In response to sexual assaults of female inmates, the Michigan Department of Corrections designated approximately 250 positions in female housing as "female only." The plaintiffs filed suit under Title VII and Michigan state law.

The court held that gender was a BFOQ for housing positions in female prisons.

BFOQ Defense – Female Gender

***Breiner v. Nevada Dep't of Corr.*, 610 F.3d 1202 (9th Cir. 2010):**

NDOC's Inspector General learned that a female inmate had been impregnated by a male guard, which led to the discovery of a highly sexualized environment in the female facility

After this discovery, NODC created three lieutenant positions that were female only

The court found that Female gender was not a BFOQ for all three lieutenant positions at a women's correctional facility as precluding men was not necessary reduce instances of sexual abuse

PREA Standards

PREA standards can help agencies bridge the gap between inmate privacy and establishing BFOQs

The standards prohibit cross-gender strip and body cavity searches of all inmates, except in exigent circumstances

The standards prohibit pat-searches of female inmates only

The standards also require documentation of all searches

115.15: Limits to cross-gender viewing and searches

(a) The facility **shall not conduct cross-gender strip searches or cross-gender visual body cavity searches** (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) **As of August 20, 2015, or August 20, 2017 for a facility whose rated capacity does not exceed 50 inmates,** the facility shall not permit **cross-gender pat-down searches of female inmates,** absent exigent circumstances. Facilities shall not restrict female inmates' access to regularly available programming or other out-of-cell opportunities in order to comply with this provision.

(c) The facility shall **document** all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates

115.15: Limits to cross-gender viewing and searches

(d) The facility **shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia**, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to **announce** their presence when entering an inmate housing unit.

(e) The facility **shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status**. If the inmate's genital status is unknown, it may be determined during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

(f) The agency **shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates**, in a **professional and respectful** manner, and in the **least intrusive** manner possible, **consistent with security** needs

What's OK?

A male officer performs a strip-search of a male inmate, while female nurses are present?

No

Yes

What's OK?

A male officer performs a strip-search of a male inmate, while female nurses are present?

No



What's OK?

A female officer is present for the strip-search of male inmate ?

No

Yes

What's OK?

A female officer is present for the strip-search of male inmate?

No

Yes



What's OK?

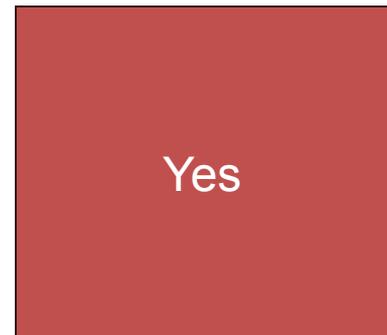
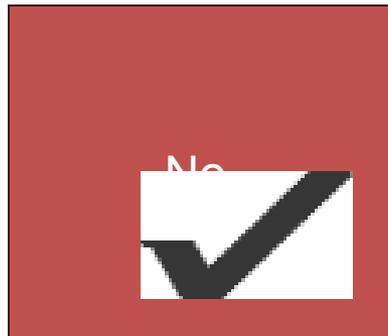
Female officers do not perform pat or strip-searches, but have unlimited access to viewing male inmates while showering or toileting?

No

Yes

What's OK?

Female officers do not perform pat or strip-searches, but have unlimited access to viewing male inmates while showering or toileting?



Sexual Harassment and Discrimination Claims by Staff

Federal and State Civil Rights Statutes

The Supreme Court has held that Title VII also covers sexual harassment claims. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 75 (1986).

Terminated employees can claim sexual discrimination under Title VII or state civil rights law.

Sexual Harassment Claims

***Adams v. City of New York*, No. 07-CV-2325, 2011 WL 4434226, at *1 (E.D.N.Y. Sept. 22, 2011)**

A male supervisor made sexually aggressive advances towards a female correctional officer over a period of eight months. On one occasion, he disrobed in front of the officer, and touched her and made sexual comments on many other occasions.

The court found these allegations “were sufficiently severe and pervasive,” and permitted the officer to proceed on her Title VII sexual harassment claim.

Discrimination Claims

***English v. Colo. Dep't of Corr.*, 248 F.3d 1002 (10th Cir. 2001)**

Corrections agency fired a male African American supervisor following an investigation into allegations of sexual misconduct.

The court held that the agency had a legitimate conflict-of-interest reasons for replacing the investigating officer, the dismissal of criminal charges had no bearing on the evidentiary results of the internal investigation, and the case of the white officer whom the agency had not terminated involved a factually dissimilar situation.

Discrimination Claims

Konah v. District of Columbia, 2013 WL 38981 **(D.D.C. Jan. 3, 2013).**

A female nurse in the DC jail complained of constant sexual harassment from inmates. On one occasions, she was locked in a vestibule with a male inmate, who made threatening advances toward here. She was eventually terminated from her position.

The court denied the District of Columbia's motion for summary judgment on equal protection grounds, as the facility did not ensure “nurses were not subjected to constant gender-based lewd and nasty catcalls or acts by the inmates.”

Anti-Fraternization Policies

Legal Responsibilities and Obligations

First Amendment (Liable to employee)

Employer interests that support anti-fraternization policies

- On-the-job performance
- Off-the-job conduct that implicates officer's fitness for duty
- Public reputation of correctional institution

Many court cases involving police and corrections officers uphold policies regulating off-duty conduct

First Amendment

***Reuter v. Skipper*, 832 F. Supp. 1420 (D. Or. 1993)**

A female corrections officer was placed on administrative leave due to her intimate association with an ex-felon. She brought a claim alleging violation of her First Amendment rights.

The court granted her motion for summary judgment, relying upon the fact that the parties had developed an intimate relationship which *predated* the enactment or implementation of the sheriff's rules that made association with a person who was convicted of a felony within the past ten years a "presumptive conflict of interest."

First Amendment

***Poirier v. Massachusetts Dept. of Correction,* 558 F.3d 92 (1st Cir. 2009)**

Female corrections officer developed a relationship with male inmate and continued the relationship. She requested permission for the inmate to reside with her and was fired for unauthorized contact. Poirier claims that the DOC and its commissioner violated her First Amendment right, specifically the right to intimate association, and her Fourteenth Amendment right.

The court found the officer's rights were not violated and dismissed her complaint.

What's OK?

Termination of a state corrections officer who was married to a man who was previously incarcerated in the state prison system for a felony.

No

Yes

What's OK?

Termination of a state corrections officer who was married to a man who was previously incarcerated in the state prison system for a felony.

No



What's OK?

Termination of probation officer for buying a car at a dealership where probationer under her supervision worked though he was not involved in the sale.

No

Yes

What's OK?

Termination of probation officer for buying a car at a dealership where probationer under her supervision worked though he was not involved in the sale.

No

Yes



What's OK?

Termination of probation officer who exchanged letters with a man she had previously dated who was serving life sentence in prison outside her jurisdiction.

No

Yes

What's OK?

Termination of probation officer who exchanged letters with a man she had previously dated who was serving life sentence in prison outside her jurisdiction.

No

Yes



What's OK?

Bottom line:

Female correctional officers are most often implicated in anti-fraternization cases.

Summary

Current case law supports limitations for searches of female inmates, as well as intrusive male searches.

Agencies may institute BFOQs, however, they must be narrowly tailored and specific to a particular position. PREA standards may relieve agencies from use of BFOQs.

Agencies can be held liable for both sexual harassment and sexual discrimination.

Agencies can institute anti-fraternization policies, and should be mindful these policies may have a greater impact on female staff than male staff.