

Module 15: Legal Liability

Investigating Allegations of Staff Sexual Misconduct with Offenders

Major issues

- Staff Sexual Misconduct
- Inmate on Inmate Conduct
- Pitfalls in doing investigations

Staff Sexual Misconduct

- Important Factors

- who raises the issue
 - male inmate
 - female inmate
- what has been your history
 - complaints about misconduct
 - complaints about other institutional concerns
 - community standing
- the context in which the issue is raised
 - Litigation
 - Investigation
 - Agency oversight

Inmate on Inmate Conduct

- Who raises the issue
 - Male
 - Female
- Nature of the conduct
 - Forced
 - Coerced
 - Consensual

Your Role in Litigation

- Prevention – training and policy
- Insulate-- agency from liability – ensure procedures are in place to protect agency and officials
- Act – change policies and procedures even though litigation pending

Your Role in Litigation

- Restore -- confidence in agency
- Defend – if appropriate to do so
- Propose – influence legislature
- Identify -- areas of concern
- Improve -- culture and practice

Legal Framework

- Prison Rape Elimination Act
- Prison Litigation Reform Act
- Constitutional Framework
- State Tort Framework

PREA

- Focus on preventing, reducing and sanctioning prison rape
- Focus on appropriate services to victims of prison rape
- Investigations will have an impact on data collection – most visible PREA outcome at present

Prison Litigation Reform Act --Pub. L. No. 104-134, 110 Stat 1321 (1995)

- Exhaustion requirement
- Limits on attorneys fees
- Limits consent decrees
- Limits on appointment of special masters
- Physical injury requirement
- Limits on proceeding IFP

PLRA

- Porter v. Nussle, 122 S. Ct. 983, 986 (2002) (exhaustion requirement of PLRA)
- Morris v. Eversley, 282 F.Supp. 2d 196 (S.D. N.Y. 2002)(woman challenging sexual assault during incarceration was not required meet PLRA exhaustion requirement once released)
- White v. Haines, 217 W.Va. 414, 618 S.E.2d. 423 (W.Va., 2005)(state can provide for different exhaustion scheme than federal government with regard to complaints of sexual abuse in custody)

PLRA

- *Amador v. Superintendents of DOCS, 2007 WL 4326747*
 - District court denied class certification concluding that no named plaintiff had properly exhausted administrative remedies within the meaning of PLRA.
 - In fact, all named plaintiffs had reported to the Inspector General's Office (IG), which was a means of reporting sanctioned by New York Department of Correctional Services (DOCS) policy.

Civil Liability -- Constitutional Claims

- Most common legal bases for challenges
 - 42 U.S. C. 1983
 - Eighth Amendment
 - Fourth Amendment
 - Fourteenth Amendment
 - State tort claims

42 U.S. C. 1983

- Creates a federal cause of action for the vindication of rights found elsewhere
- Key elements
 - Deprived or a right secured by the constitution or law of U.S.
 - Deprivation by a person acting under color of state law

West v. Atkins, 487 U.S. 42 (1988)

- “ A defendant in a section 1983 suit acts under color of state law when he abuses the position given to him by the state.”

Washington v. City of Shreveport, 2006 WL 1778756 (W.D. La.)

- City employee who supervised jail inmates working with the City Public Works Department was “acting under color of state law” and could be sued under 42 U.S.C. §1983 for violating constitutional and or state laws.

See also, *Smith v. Cochran*,
339 F.3d 1205 (10th Cir. 2003)

Inmate who was assigned to work in state driver's license bureau as part of her sentence, able to sue state driver's license examiner for sexual misconduct under 8th amendment. State agency that is delegated the responsibility of the state can be liable under 8th amendment.

- But see, *Smith v. Cochran*, 182 F. Appx 854 (10th Cir. 2006)(driver's license examiner wins at trial on credibility issues of inmate)

Eighth Amendment

- Prohibits cruel and unusual punishment
- Legal standard is deliberate indifference
 - Established in a prison rape case *Farmer v. Brennan*, 511 U.S. 825 (1994)
 - Two part test
 - the injury must be objectively serious and must have caused an objectively serious injury
 - the official must have a sufficiently culpable state of mind and have acted with deliberate indifference or reckless disregard for the inmate's constitutional rights

What the Court Looks For

- Deliberate indifference to inmate vulnerability -- safety or health
 - Official knew of and disregarded an excessive risk to inmate safety or health
 - Official must be aware of facts from which an inference could be drawn that a substantial risk of harm exists and he must draw the inference

Fourth Amendment – Bell v. Wolfish, 441 U.S. 520 (1979)

- Did the individual have a legitimate expectation of privacy?
 - The scope of the intrusion
 - The manner in which it was conducted
 - The justification for the intrusion
 - The place in which it is conducted

Fourteenth Amendment : Substantive Due Process

- Was the individual deprived of a life, liberty or property without due process of law?
- Lower legal standard than 8th Amendment
- Depending on situation – 14th Amendment may apply – juveniles and pre-trial detainees in particular

State Tort Law Claims

- Assault
- Battery
- Intentional infliction of emotional distress
- Negligent infliction of emotional distress
- Negligent hiring, firing, supervision, training

Liability

- Municipal
- Official
- Individual
- Personal

Municipal Liability

- Monell v. Department of Social Services, 436 U.S. 658 (1978)
 - Municipality is a person who can be held liable under Section 1983
 - Officially executed policy or toleration of custom within municipality must inflict the injury
 - Inaction
 - Failure to train or supervise
 - Failure to investigate

Municipal Liability

- Can't be held responsible under respondeat superior or vicarious liability for:
 - Independent actions of employees
 - Wrongful conduct of single employee
 - Must make showing that this officer was likely to inflict a particular injury and that agency had facts from which it conclude that it was likely

Municipal Liability

- Likely Defendants
 - County, city, state, agency
 - Corrections officials
 - Sued in official, individual and personal capacity
 - Individual Staff
 - Sued in official, individual and personal

Official Liability

- Will cause liability to municipality
- Did it happen on your watch
- Were you responsible for promulgating and enforcing policy
- Did you fail to act or ignore information presented to you
- Failure to TRAIN, SUPERVISE, FIRE, and TAKE ACTION

Individual Liability

- Officials sued in individual capacity may be protected from damages if the alleged wrongful conduct was committed while they performed a function protected by qualified immunity

Elements of Individual Liability –

- (1) participated directly in the alleged constitutional violation;
- (2) after being informed of the violation through a report or appeal, failed to remedy the wrong;
- (3) created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom;

Elements of Individual Liability

- (4) grossly negligent in supervising subordinates who committed the wrongful acts; or
- (5) deliberate indifference to others' rights by failing to act on information indicating that unconstitutional acts were occurring.

Personal Liability

- Plaintiff must provide notice that the suit is against the official in her personal capacity
- Direct participation not required
 - Actual or constructive notice of unconstitutional practices
 - Demonstrated gross negligence or deliberate indifference by failing to act

Qualified Immunity

- No violation of federal law -- constitutional or otherwise
- Rights and law not clearly established at the time of the incident
- Official's action was objectively legally reasonable in light of clearly established legal rules at time of the incident

Riley v. Olk-Long 282 F.3d. 592 (C.A. 8 (Iowa)) 2002)

- Facts:
 - Inmate brought Section 1983 action against prison warden and director of security under 8th amendment. Jury found in favor of inmate.
 - Warden and director of security moved for judgment as matter of law or for a new trial.

Riley v. Olk-Long 282 F.3d. 592 (C.A. 8 (Iowa)) 2002)

- **Result:**
 - Prison warden and director of security were deliberately indifferent to the substantial risk of harm that guard presented to female inmates.
 - Held personally liable to inmate in amount of \$20,000 against Sebek and \$25,000 in punitive damages from Olk-Long the warden

Riley v. Olk-Long 282 F.3d. 592 (C.A. 8 (Iowa)) 2002)

- What happened?
 - Officer made inappropriate comments to inmate Riley about whether she was having sex with her roommate
 - He came into her room after lockdown and attempted to reach under her shirt
 - Grabbed her from behind and rubbed up against her

Riley v. Oik-Long

282 F.3d. 592 (C.A. 8 (Iowa)) 2002)

- What happened?
 - Inmate didn't report above because "she doubted that she would be believed and feared the resulting discipline"
 - Officer entered cell and raped her. She performed oral sex so she wouldn't become pregnant
 - Another inmate witnessed incident and reported it
 - Inmate placed in administrative segregation during investigation.
 - Officer terminated.
 - Convicted under state law

Riley v. Oik-Long

282 F.3d. 592 (C.A. 8 (Iowa)) 2002)

- Why?
 - Prior to this incident other female inmates had complained
 - Link had a history of predatory behavior
 - Four prior investigations closed as inconclusive
 - Collective bargaining unit precluded permanent reassignment
 - Sebek suspected but didn't take leadership
 - Sebek had opportunity to terminate but didn't

Riley v. Olk-Long 282 F.3d. 592 (C.A. 8 (Iowa)) 2002)

- Why?
 - Olk-Long didn't think that officer posed a threat
 - Collective bargaining agreement was no defense to failure to protect inmate safety

Gonzales v. Huerfano County, 403 F.3d 1179 (10th Cir. 2005) cert. den. Salazar v. Gonzales, 546 U.S. 1003, 126 S.Ct. (U.S. Nov 07, 2005)

- On 10/13/1998, the Jail Administrator sexually assaulted Teresa Gonzales.
- Later that day the Senior detention officer sexually assaulted another female inmate, Amanda Guel.
- Teresa Gonzales files suit under §1983.

Gonzales v. Huerfano County, 403 F.3d 1179 (10th Cir. 2005) cert. den. Salazar v. Gonzales, 546 U.S. 1003, 126 S.Ct. (U.S. Nov 07, 2005)

- Both women handed in written statements describing assault to detention officers who called the Sheriff.
- The Sheriff went to jail but didn't see the women until the next day.
- The Sheriff was related to both the senior detention officer and the jail administrator – son in law and nephew by marriage.

Gonzales v. Huerfano County, 403 F.3d 1179 (10th Cir. 2005) cert. den. Salazar v. Gonzales, 546 U.S. 1003, 126 S.Ct. (U.S. Nov 07, 2005)

- **Procedural posture**
 - In the 10th Circuit Court of Appeals because District Court granted summary judgment for county, sheriff and jail employees.
 - Plaintiff appealed.

Gonzales v. Huerfano County, 403 F.3d 1179
(10th Cir. 2005) cert. den. Salazar v. Gonzales,
546 U.S. 1003, 126 S.Ct. (U.S. Nov 07, 2005)

- Defendants and Claims by Plaintiff:
 - County
 - Duty to employ competent law enforcement officers and to supervise Sheriff and Jail Administrator [8th Amendment]
 - Negligent supervision
 - Sheriff (individual and personal capacity)
 - 8th Amendment
 - Negligent supervision
 - Martinez and Dominick Gonzales
 - Assault and battery

Gonzales v. Huerfano County, 403 F.3d 1179 (10th Cir. 2005) cert. den. Salazar v. Gonzales, 546 U.S. 1003, 126 S.Ct. (U.S. Nov 07, 2005)

- **County dismissed**
 - Not sued in correct name
 - No allegation that county set the policy which caused injury
 - No showing that Sheriff set the “official policy” for the county
 - Otherwise immune from suit under state statute – Colo. Rev. Stat. §30-11-105

Gonzales v. Huerfano County, 403 F.3d 1179 (10th Cir. 2005) cert. den. Salazar v. Gonzales, 546 U.S. 1003, 126 S.Ct. (U.S. Nov 07, 2005)

- **Sheriff not dismissed**
 - “Knew of and disregarded ‘an excessive risk to inmate health and safety’”
 - No employee evaluations since 1994
 - Only occasionally visited the jail
 - Left investigations of all problems at jail to designee

Gonzales v. Huerfano County, 403 F.3d 1179 (10th Cir. 2005) cert. den. Salazar v. Gonzales, 546 U.S. 1003, 126 S.Ct. (U.S. Nov 07, 2005)

- **Sheriff not dismissed**
- **Prior incidents established notice**
 - Inmate access to vodka
 - Drunk inmates sitting in control room and knew how to run controls
 - Dominick Gonzales exposed himself to female inmates in past
 - Dominick Gonzales asked female inmates to expose their breasts
 - Dominick Gonzales arrested at bar for harassing female dancers but still working at jail

Gonzales v. Huerfano County, 403 F.3d 1179 (10th Cir. 2005) cert. den. Salazar v. Gonzales, 546 U.S. 1003, 126 S.Ct. (U.S. Nov 07, 2005)

- **Sheriff not dismissed**

- Didn't know about incidents because of his "lackadaisical attitude toward his responsibility to run the institution"
 - Jail Administrator did not want to investigate allegations of problems at jail and that was okay with sheriff
 - Ignored inmate complaints
- The Farmer case doesn't require that Sheriff knew that specific employee posed substantial risk of harm
- Harm can come from specific source or multiple sources as long as facts available to draw conclusion that risk exists

Gonzales v. Huerfano County, 403 F.3d 1179
(10th Cir. 2005) cert. den. Salazar v. Gonzales,
546 U.S. 1003, 126 S.Ct. (U.S. Nov 07, 2005)

- Deputies dismissed but back in because Sheriff is back in on appeal

Campos v. Nueces County, 162 S.W. 3d 778 (Tex. App. 2005)

- Female prisoners in county substance abuse treatment facility sued guards and county under civil rights act and Texas Tort Claims Act for non-operating and improperly placed security cameras, doors, rooms and enclosures when those defects resulted in their sexual abuse and harassment.

Campos v. Nueces County, 162 S.W. 3d 778 (Tex. App. 2005)

- Conclusion

- Female prisoners could sue county and guards
- County waived sovereign immunity generally granted for premises defects and inmates had alleged that their injury was caused by defective premises
- Intentional torts and negligence of individual correctional officers did not defeat the waiver of immunity

Cash v. County of Erie, 2007 WL 2027844 (W.D. N.Y. July 11, 2007)

- Vickie Cash sexually assaulted by correctional officer in 2002 while in segregation in Erie County holding center
- Officer Hamilton hired in 1989
- Working alone on unit
- Suspended w/o pay 1/2003
- Pleads to 3rd degree rape

Cash v. County of Erie, 2007 WL 2027844 (W.D. N.Y. July 11, 2007)

- Sues
 - former sheriff in official and individual capacity
 - County
 - Sheriff Department
 - Offending officer
- Posture – cross motions for summary judgment

Cash v. County of Erie, 2007 WL 2027844 (W.D. N.Y. July 11, 2007)

- **Result**

- Sheriff Department out as admin arm of county
- County still in
- Sheriff still in
- Officer still in

Cash v. County of Erie, 2007 WL 2027844 (W.D. N.Y. July 11, 2007)

- Reasoning

- Deputy was working alone in the Alpha segregation area of the Holding Center, where the female inmates were housed
- No female deputies or matrons on duty
- No policy in place to prevent male deputies from walking in on female inmates unannounced, at any
- Undersheriff and Superintendent of the Holding Center, when deposed, said that it was appropriate for male deputies to observe women inmates in various stages of undress, or using the toilet

Cash v. County of Erie, 2007 WL 2027844 (W.D. N.Y. July 11, 2007)

- Reasoning

- Sheriff testified that he was aware of complaints made by other female inmates about sexual abuse of assault
- Could not recall taking steps to address it
- Range of assaults less than 1000 not more than 20

Cash v. County of Erie, 2007 WL 2027844 (W.D. N.Y. July 11, 2007)

- Reasoning

- reasonable jury could find
 - County had policy and practice that allowed male officers to have access to female inmates w/o presence of female staff and other inmates
 - Prison officials, including sheriff had knowledge of practice
 - Prison officials knew of past complaints and took no corrective action

Cash v. County of Erie, 2007 WL
2027844 (W.D. N.Y. July 11, 2007)

- Cash's cross motion for summary judgment denied
 - No indication if other sexual harassment complaints made prior to 12/2002 when incident occurred
 - No indication whether other incidents were investigated

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- Mentally ill inmate sues former jailer and jail authority
- MSJ denied in part and granted in part

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- **Facts about Officer**
 - Hired in 2001
 - Passed criminal background check
 - Nothing to suggest that he posed a risk

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- **Facts about Inmate**
 - Pre-trial detainee
 - Under influence of drugs and alcohol at time of arrest
 - Epileptic
 - Past history of self harm
 - Infected with lice
 - Placed in medical unit – for lice

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- Operational issue
 - Steele supervised the medical unit where Heckenlaible was housed – ALONE
 - Two spot checks during beginning of 12 hour shift
 - Inmates encouraged to shower by medical
 - Steele supervised Heckenlaible in the shower
 - Heckenlaible noticed him watching her while she showered

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- **Convergence**
 - Steele did cell search later that night
 - Forced Heckenlaible to have oral sex with him
 - Heckenlaible cleaned herself off with a towel which she kept under the bed
 - Heckenlaible cried herself to sleep

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- Investigation and Prosecution
 - Heckenlaible reports to Jail Authority supervisory staff the next day
 - They place Steele on administrative leave
 - They recover towel – determine that there is semen
 - Steele is fired for sex with inmate and refusal to cooperate in investigation

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- Investigation and Prosecution
 - Steele convicted of carnal knowledge of an inmate in 2004—a class 6 felony
 - Still locked up at time of the writing of the opinion

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- **Precautionary measures of agency**
 - Policy prohibiting abuse of inmates
 - Policy prohibiting sex with inmates
 - Policy that prohibited search of female inmate by male staff unless accompanied by female staff, except in emergency

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- **History of agency**
 - No complaints against Steele
 - No complaints of sexual abuse of inmates

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- **Claims against Jail Authority and Steele**
 - Assault and battery
 - Intentional infliction of emotional distress
 - Negligent hiring
 - Negligent retention
 - Negligence in having Steele be only one supervising women

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- **Claims against Steele**
 - 42 U.S. C. §1983
 - 14th Amendment substantive due process
right to bodily integrity

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- **Court's ruling**
 - Jail Authority could be liable under theory of respondeat superior for Steele's actions

Heckenlaible v. Virginia Peninsula
Regional Jail Authority, 491 F. Supp
2d 544 (2007)

- Distinguishes from cases where acts of employee were incidental to employment
- In this case
 - “employee's wrongful conduct is ‘related to the nature of the employment’”

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp 2d 544 (2007)

- MSJ denied
 - Intentional infliction of emotional distress
 - Assault and battery
 - Negligence
 - Substantive due process claim
- MSJ granted
 - Negligent hiring
 - Negligent retention

Fernandez v. Morris, 2008 WL 2775638 (S.D.Cal. Jul. 16, 2008)

- Fernandez was arrested and held at Imperial County Jail for importing marijuana into U.S.
- Jail held inmates for U.S. Marshal service
- Coerced and pressured for sex by deputy into sex
- Infected with syphilis by deputy
- Officer convicted of sex with ward and admits to “consensual” sex with Fernandez and two other inmates

Fernandez v. Morris, 2008 WL 2775638 (S.D.Cal. Jul. 16, 2008)

- Sues county
- Sues Jail
- Sues Sheriff Carter [individual and official]
- Sues Sheriff Loera [individual and official]
- Motion to dismiss 12(b)(6)

Fernandez v. Morris, 2008 WL 2775638 (S.D.Cal. Jul. 16, 2008)

- **Claims**

- 42 U.S. C. § 1983
- Assault & battery
- Negligent hiring, supervision, training and control
- Negligence
- Intentional infliction of emotional distress
- State civil rights claims

Fernandez v. Morris, 2008 WL 2775638 (S.D.Cal. Jul. 16, 2008)

- Defendants lose on exhaustion b/c unable to demonstrate effective grievance policy and inmate while in segregation had to request form from c/o
- Additionally asked for counsel during interview regarding incident but was refused

Fernandez v. Morris, 2008 WL 2775638 (S.D.Cal. Jul. 16, 2008)

- County remains in on federal claims
- Jail remains in on federal claims
- County and jail dismissed on state law claims on immunity grounds
- Carter and Loera remain in on state and federal claims except intentional infliction of emotional distress
- Carter and Loera out on state civil rights claims

Ice v. Dixon, 2005 WL 1593899 (Ohio Dec.)

- **Facts**

- Inmate sexually assaulted during incarceration at Mahoning County Jail
- Bi-Polar Manic Depressive
- Defendant Dixon promised to arrange Ice's release from County Jail if she performed oral sex and other sex acts on him

Ice v. Dixon, 2005 WL 1593899 (Ohio Dec.)

- On motion for summary judgment
 - Mahoning County immune in official capacity
 - Defendant Wellington, Sheriff, immune in official capacity and individual capacity
 - Defendant Dixon, perpetrator, immune in official capacity
 - Dixon not immune in individual capacity and on claims of assault and battery against Ice

Ice v Dixon: Why This Result?

- Specific Policy
- Training to staff
- Within 48 hours of incident videotaped plaintiff in interview
- Took plaintiff to hospital for rape kit
- Called Ohio Bureau of Criminal Investigation
- Suspended Dixon
- Internal Affairs involved
- Sent to Mahoning County Prosecutor's Office

Brown v. Scott,
329 F.Supp.2d 905 (E.D. Mich. 2004)

- Inmate sued unit manager for not changing his cell assignment upon request
 - Told unit manager that cell mate was predatory homosexual rapist
 - Had been warned by other inmate
 - Unit manager says did he proposition you
 - 3 days later forcibly raped

Brown v. Scott,
329 F.Supp.2d 905 (E.D. Mich. 2004)

- Unit managers defense
 - No record of cellmate as homosexual predator
 - Inmate only referred to rumor
 - Didn't ask for protection
 - Would have moved if he had asked
- Allowed suit to proceed

Williams v. Caruso,
2005 WL 2261602 (W.D. Mich. Sep. 17, 2005)

- Inmate classified as homosexual predator sued about classification and lost
 - Had a major misconduct for sexual assault
 - Found involved
 - Shipped
 - Convicted for the assault
 - Procedural claim that at disciplinary he was not classified as homosexual predator and should not have been shipped and placed on current restrictions
- State prevails

Johnson v. Johnson,
385 F.3d 503 (5th Cir. 2004)

- Failure to protect claim allowed to proceed against Texas Department of Criminal Justice
 - Plaintiff ultimately lost at trial

Sutton v. Washington,
2008 WL 696887 (W.D. Wash. Feb.13, 2008)

- **Facts**

- Young homosexual inmate
- History of relationships with older inmates in exchange for goods
- Treatment plan from psychiatrist and classification counselor call for working in kitchen to make money
- Works in kitchen but is pressured for sex from other inmates

Sutton v. Washington, 2008 WL 696887 (W.D. Wash. Feb.13, 2008)

- Facts

- Contacts counselor with the following complaint
- I need to be removed from my work program in Food-Service (Kitchen duty). I am being pressured to perform sexual act(s) on another inmate in the kitchen. I request a Private-meeting with you, in order to get away from the man who is doing this to me. Please help me, and please see me soon.
- Counselor and custody supervisor give him the following options
 - Just say no
 - Provide information on assailant
 - Report to work
 - Don't report to work and get an infraction

Sutton v. Washington, 2008 WL 696887 (W.D. Wash. Feb.13, 2008)

- Inmate reports to work
 - Caught on camera having sex with an inmate
 - Officers watch b/c it appears to be consensual – say it only lasts 30 seconds
 - Call kitchen and apprehend both
- Disciplinary for plaintiff and other inmate
 - At hearing Sutton talks about having complained and being told he has to go to work

Sutton v. Washington, 2008 WL 696887 (W.D. Wash. Feb.13, 2008)

- **Result**

- State of Washington and Washington DOC dismissed
- Kitchen supervisors dismissed
- Hearing office and psychologist dismissed
- Nagy, who watched tape is dismissed
- Caught on camera having sex with an inmate
- Heaward, custody unit supervisor and Olsen counselors remain in
- Set for trial by magistrate but overturned in part by district court judge, 2008 WL 704217 (W.D.Wash. Mar 13, 2008)

Croom v. Wagner, 2006 WL 2619794 (E.D. Pa 2006)

- Plaintiff and cellmate were involved in a violent altercation, as well as consensual sex [sex not challenged in suit]
- Court upholds administrative discipline of inmates for consensual sex with cellmate – including denial of final parole

Bennett v. Correctional Medical Services,
2008 WL 2064202 (D.N.J.)

- Inmates challenges exposure to Hepatitis C as a result of sexual victimization in custody
 - Specifically refer to iv drug use, sex, tattooing etc. in prison
 - Court refuses to certify class, but allows two plaintiffs to proceed individually

Davis v. High Desert State Prison, 2008 WL 2397613 (D.Nev.)

- Leave granted for inmate to amend complaint
 - Inmate claims that he was sexually assaulted another inmate who used a razor
 - Placed in admin. segregation without shoes, clothes or underwear
 - Claims retaliation for filing the claim

Thomas v. Werholtz, 272 Fed Appx. 687 (2008)

- Inmate challenges being classified as sexual predator after shakedown reveals letters of sexually explicit nature in his cell
 - Other inmates complain he is pressuring for sex
 - Moved to higher security
 - Loses high paying job
- Court upholds

Conclusions

- Corrections officials can be held liable in their official, individual and personal capacities for sexual violence against inmates by either staff or other offenders
- Courts will permit agencies to take disciplinary actions against offenders who engage in sexual abuse of other inmates

Conclusions

- Municipalities can be held liable for sexual violence against inmates if the violence is a result of a policy or custom of the county or agency or if it follows official policy set by the agency head.

Other Investigative Issues

- False arrest
- Malicious prosecution
- Retaliation
- Aggressive investigative techniques

False Arrest

- Defendant intended to confine plaintiff
- Plaintiff was aware of confinement
- Plaintiff did not consent to confinement
- The confinement was not otherwise privileged

Malicious Prosecution

- Defendant maliciously commenced or continued prosecution against plaintiff in a criminal proceeding that ended in plaintiff's favor
- No probable cause

Strategies

- Good investigations
- Based on credible evidence
 - Inmate testimony
 - Surveillance
 - Logs and records
 - Staff testimony
- Consistent investigative policies and practices
- Probable cause

Robinson v. Arapahoe County Sheriff
Greyson Robinson, et. al., 2006 WL
726296 (D. Colo.)

- **Facts:**

- Plaintiff James Robinson, a deputy sheriff, resigned his position during an investigation into alleged sexual relations with female inmates at the detention center. The information obtained during the investigation was turned over to the Arapahoe County D.A. Plaintiff claimed that exculpatory information was not turned over to the D.A.

Robinson v. Arapahoe County Sheriff
Greyson Robinson, et. al., 2006 WL
726296 (D. Colo.)

- Legal Claims
 - 14th Amendment Due Process
 - State law claims
 - Abuse of process
 - Malicious prosecution
 - Outrageous conduct
 - Defamation

Robinson v. Arapahoe County Sheriff
Greyson Robinson, et. al., 2006 WL
726296 (D. Colo.)

- Findings

- No 14th amendment violation –
 - no custom or policy and;
 - no property right to job given that there was no contractual right to the job

False arrest and Malicious Prosecution -- Corona v. Lunn, 56 Fed. Appx. 20, 2003

- **Facts**

- Lunn assigned to investigate allegations of sexual misconduct
- Receives information that Ross had sex with Corona
- Inmate Ross initially denies and later admits to sex
- Ross has history of mental illness

Corona v. Lunn, 56 Fed. Appx. 20, 2003

- Facts

- Lunn takes statement
- Lunn corroborates detail with records and review of facility
- Files a felony complaint against Corona
- Corona is placed on administrative leave without pay
- Corona charged with sexual assault of inmate
- Acquitted after jury trial
- Reinstated with back pay
- Corona files suit for false arrest and malicious prosecution

Corona v. Lunn, 56 Fed. Appx. 20, 2003

- **Result**

- No false arrest because Lunn had probable cause
- Could rely on informant testimony notwithstanding her psychiatric history
- Corroborated her testimony
- Was objectively reasonable to believe that probable cause existed
- Reasonable officers could have disagreed over whether probable cause existed
- No malicious prosecution because probable cause existed

Retaliation -- Austin v. Terhune 367 F. 3d 1167 C.A.9 (Cal.), 2004

- Correctional officer exposed his genitalia to male prisoner.
- Prisoner tried to file a grievance but was prevented from doing so by other officers
- The exposing officer apologized later and told him not to complain
- Inmate refused and officer filed a false disciplinary on inmate
- Inmate placed in segregation for six weeks and continued to file grievances
- Officials eventually investigated
- Officer suspended w/o pay for 30 days
- Court allowed inmate to proceed in law suit for the retaliation

Aggressive Investigative Techniques: Sanchez-Luna v. U.S. 545 U.S. 1134, 125 S.Ct. 2951 -- Facts

- Female inmate, Sanchez-Luna, at FCI Danbury sexually abused by Officer Vasquez
- OIG sets up sting operation on 3/20/2002. OIG agents positioned in closet with video camera
- Sanchez-Luna alleges that oral sex with Sanchez occurs that evening while OIG agents are recording in closet
- No effort is made to stop the oral sex
- Vasquez eventually pleads guilty

Sanchez-Luna v. U.S. 545 U.S. 1134, 125 S.Ct. 2951 -- Claims

- 8th Amendment
- 5th Amendment
- FTCA
 - Assault and Battery
 - Negligent Failure to Prevent Assault and Battery
 - Negligent infliction of emotional distress
 - Intentional infliction of emotional distress
- Case was settled on behalf of offender

Sanchez-Luna v. U.S. 545 U.S. 1134, 125 S.Ct. 2951 – Lesson Learned

- When conducting undercover operations, must ensure that you are in a position to prevent or stop additional sexual conduct from occurring

But see, *Edge v. Ferrell*, 2008 WL 942038 (S.D.Ala. Apr. 7, 2008)

- Inmate struck deal to help in investigation to set up allegedly homosexual staff in exchange for being able to see former nurse employee who he married after she divorced her husband
- Investigators allowed inmate to have sex 2 times with staff and taped it
- No constitutional violation
- What not to do

Foley-Clark v. U.S. No. C- 00-4056 (PJH) (N.D. Cal. 2002)

- Inmate reports misconduct of staff.
- Post-apprehension, locked in hole and given option of being in segregation or moved to more restrictive setting
- Chose to remain in general population at FCI Dublin
- Harassed and threatened by other officers and inmates
- After her release, OIG attempted to give inmate reward \$, which she characterized as “hush money”

Foley-Clark v. U.S. , No. C- 00-4056 (PJH) (N.D. Cal. 2002) – Legal Claims

- Fifth Amendment
- 8th Amendment
- Negligent hiring, training, retaining and supervision
- Assault
- Battery
- False Imprisonment
- Intentional infliction of emotional distress

Foley-Clark v. U.S. , No. C- 00-4056 (PJH) (N.D. Cal. 2002) – Result

- Claims for assault, battery, false imprisonment and intentional infliction of emotional distress as to government allowed to proceed to trial.
- Issue was voluntariness of inmate's consent.
- Case settled on the eve of trial.

Foley-Clark v. U.S. , No. C- 00-4056 (PJH) (N.D. Cal. 2002) – Lessons Learned

- Must check the background of cooperating individuals for particular vulnerabilities
 - Mental health issue
 - Past history of sexual and physical abuse
- Even if inmates claims to consent, have to be very mindful of perceived pressure to agree
- Courts routinely assume lack of ability to consent in penal setting
- Must protect cooperating individual before, during and after the incident

Cane v. Lappin, 3:04 CV 00912 (SRU) (U.S. D.C. Conn.) -- Facts

- Inmate Cane was incarcerated at FCI Danbury
- CO Johnson subject to multiple investigations prior to incident September 2001
- Assigned to posts with unsupervised contact with women inmates
- Cane reported sexual abuse to drug counselor
- Didn't want to report incident to investigative authorities
because she didn't want to lose drug treatment spot

Cane v. Lappin, 3:04 CV 00912 (SRU) (U.S. D.C. Conn.) – Result

- Staff told her
 - not to report
 - no confidentiality
 - Not surprised by assailant
- Investigator told they had a thick file on Johnson
- Alleges retaliation from drug treatment counselor after report **Case settled.**

Cane v. Lappin, 3:04 CV 00912 (SRU) (U.S. D.C. Conn.) – Lessons Learned

- Major problems with the case
 - long track record of the perpetrator
 - Perpetrator had been the subject of numerous, previous investigations by both OIG and BOP.
 - Investigations had been unsubstantiated
 - prosecution declined several times
 - when all of the previous allegations were aggregated, did not look good for the government.
- Lesson
 - make every effort to get offenders, particularly repeat offenders, out of the system at earliest possible point
 - If can't make criminal case look for an administrative avenue.

Peddle v. Sawyer, No. 3:98cv2364 (WWE)(U.S. D.C. Conn. 1999)

- Peddle incarcerated at FCI Danbury
- Inmate had serious history of physical and sexual abuse
- Officer Cephas had history of complaints for sexual misconduct, including incident outside of the prison in which he had exposed himself to a woman
- Cephas was a senior officer who chose nighttime posting in Bridge Unit that housed vulnerable inmates like Peddle
- Cephas obtained personal information about Peddle and her family and used it to coerce her into sex with him
- Singled Peddle out for pat searches, targeted her for sexual coercion and abuse
- Inmate told by Cephas and another officer not to tell about abuse
- Alleges that other staff knew about abuse and covered for Cephas

Peddle cont'd -- facts

- Peddle had repeatedly denied sexual contact with Cephas
- OIG set up sting to try to catch Cephas in act
- Relied on Peddle's cell mate to notify OIG investigators that Peddle had left cell in middle of the night
- Investigators waiting for cell mate's call at local police station
- Cell mate fails to call
- OIG agents confront Peddle and Cephus early the next morning
- Peddle admits to contact and produces towel containing Cephas' semen
- Cephas convicted of sexual abuse of a ward.

Peddle v. Sawyer, No. 3:98cv2364 (WWE)(U.S. D.C. Conn. 1999) Result

- Case settled
- Primary vulnerabilities from government perspective were Cephas' history and failure of the sting operation

Peddle v. Sawyer – Lessons Learned

- When devising sting operations be aware of possible failures and vulnerabilities and try to plan around them

Areas of Vulnerability

- Targets with multiple complaints
- Targets with a number of inconclusive investigations
- Targets allowed to continue working with likely victims
- Victim denials and unwillingness to cooperate
 - Fear of retaliation
 - Fear of loss of programming/longer sentences
 - History of abuse
- Getting strong evidence in these very intimate interactions

Bottom Line

- Investigators can be held liable
- Investigators can insulate agency from liability by their actions
- Investigations are critical to agency efforts to address sexual abuse in custody