Addressing Sexual Abuse of Youth in Custody

Module 17: Legal Liability for Sexual Violence in Juvenile Justice Settings

Legal Issues

- PREA
- Laws Implementing PREA
- Criminal Laws
  - Sexual abuse of persons in custody
  - Statutory rape
  - Sexual assault
  - Sex Offender Registration
- Reporting Laws
  - Notification
  - Mandatory Reporting
- Licensing
- Vulnerable Persons Statutes
- Civil Liability*

Civil Liability

- Most common legal issues
  - Prison Litigation Reform Act
  - 42 U.S. C. 1983
  - Eighth Amendment
  - Fourth Amendment
  - Fourteenth Amendment
  - State tort claims

Prison Litigation Reform Act

- Passed in 1995
- Limitation on right to bring constitutional claims in federal court for conditions of confinement
- Limits length of consent decrees
- Limits attorneys fees

Prison Litigation Reform Act

- Has exhaustion and physical injury requirement
- Like PREA – says prisons but applies to juveniles as well
  - "the term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law – PLRA"

PLRA

- Jones v. Bock, (Jan. 23, 2007) Court decides in a case involving Michigan DOC that the total exhaustion rule of 6th Circuit was not required by PLRA
  - http://www.supremecourtus.gov/opinions/06pdf/05-7058.pdf

- Porter v. Nussle, 122 S. Ct. 983, 986 (2002) (exhaustion requirement of PLRA)

PLRA

- Morris v. Eversley, 2002 WL 1313118 (S.D. N.Y. June 13, 2002)
  - (woman challenging sexual assault during incarceration was not required meet PLRA exhaustion requirement once released)
- White v. Haines, 2005 WL 1571203 (S. Ct. App. W.VA) (July 7, 2005)
  - (state can provide for different exhaustion scheme than federal government with regard to complaints of sexual abuse in custody)

PLRA Implications

- Youth have to exhaust even when claim involves rape in custody
- Must have credible procedure for them to do so
- Can’t erect artificial barriers to bringing suit
- Youth aren’t going to report if they fear results

PLRA Implications

- Due to fear, youth may wait until they leave to report
- No duty to exhaust if out of your system
- Go directly to litigation
- Agency is not in position to resolve and only option is settlement or litigation

42 U.S. C. 1983

- Creates a federal cause of action for the vindication of rights found elsewhere

- Key elements
  - deprived of a right secured by the constitution or law of U.S.
  - deprivation by a person acting under color of state law
  - Don’t forget volunteers and contractors

Civil Rights of Institutionalized Persons Act , 42 U.S.C. Section 1997

- Federal Statute
- DOJ Special Litigation enforces
  - Prisons and Jails
  - State and Local Nursing homes
  - Juvenile facilities
  - Facilities for Mentally Ill
  - Facilities for Developmentally Disabled and Mentally retarded
- Must be widespread pattern of abuse

CRIPA Juvenile Settlements

- United States v. State of Texas, Evins Regional Juvenile Center (Compliance Report) (11/05/2008)
- Los Angeles Probation Camps (L.A. Camps) (10/31/2008)
- United States v. State of Oklahoma, L.A. Rader Center (09/09/08)
- United States v. State of Maryland (Second Amended Settlement Agreement Regarding Conditions at Three Juvenile Justice Facilities) (06/23/08)
- United States v. State of Ohio (Ohio Juveniles) (06/24/08)
- Settlement Agreement between the United States Department of Justice and the Marion Superior Court Concerning the Marion Superior Court Juvenile Detention Center (4/09/08) See also, Complaint (4/09/08)
- United States v. State of Texas, Evins Regional Juvenile Center (Order) See also, U.S. v. State of Texas (Evins Complaint) (2/01/08)

S.H. v. Stickrath, 251 F.R.D. 293 (S.D. Ohio 2008)

- Court disallowed union representing 1000 DYS employees to intervene at last minute in long term litigation regarding widespread unconstitutional conditions at ODYS facilities

S.H. v. Stickrath, 251 F.R.D. 293 (S.D. Ohio 2008)-- Facts

- Class action on behalf of all juveniles at ODYS
- Came to forefront b/c of violent sexual abuse at Scioto Juvenile Detention Facility
  - 14 staff indicted – 6 convicted of offenses from sexual battery to dereliction of duty – male and female staff abusing male and female youth

S.H. v. Stickrath, 251 F.R.D. 293 (S.D. Ohio 2008)

- Class action on behalf of girls at Scioto – 12/04
  - Physical abuse
  - Sexual abuse
  - Inadequate mental health care
  - Use of isolation
- Special Lit – CRIPA complaint –3/05
  - Negotiated for 2 years
  - Litigation expanded to include all facilities including those for boys
- Final draft settlement -- April 2008

Eighth Amendment

- Prohibits cruel and unusual punishment
- Legal standard is deliberate indifference
  - established in a prison rape case Farmer v. Brennan
  - 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

Smith v. Wade [461 U.S. 30 (1983)]

- The court found the failure of facility authorities to separate aggressive youth from potential victims could demonstrate callous or reckless indifference, making them liable for the injury of the endangered youth

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

- Does 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

What the Fourth Amendment Stands for

- No expectation of privacy in cell -- Hudson v. Palmer, 468 U.S. 517 (1984)
- Can have same gender searches
- Cross gender searches and supervision for both boys and girls more limited than in adult context

Three Cases

- **Philadelphia v. Penn. Human Relations Comm'n, 300 A.2d 97 (1973)**
  - (holding that gender is a legitimate BFOQ at youth facilities, males to supervise males and females to supervise females)
- **Long v. California State Personnel Board, 41 Cal. App.3d 1000, 116 Cal. Rptr. 562 (1974)**
  - (female excluded from chaplain's job at youth training center for males)
- **In the Matter of Juvenile Detention Officer Union County, 837 A.2d 1101 (N.J. Super. A.D. 2003)**
  - (creation of 8 male juvenile detention officer positions upheld)

What these cases stand for

- Juvenile detainees have greater expectation of privacy than adults
- Younger age of juveniles makes them more vulnerable – both girls and boys
- Views cross gender searches and viewing of juveniles naked by staff of opposite sex as traumatic and likely to cause “permanent irreparable harm”
- May be able to legitimately exclude staff of opposite gender from wide range positions with youth
- BFOQ’s for youth upheld

Fourteenth Amendment – Substantive Due Process

- Can not be deprived of life, liberty or property without due process of law
- Depending on jurisdiction courts apply 14th amendment as opposed to 8th Amendment in analyzing legal claims
- 14th amendment is lower legal standard and easier to prove
- Some have used both 8th and 14th Amendment to analyze claims of abuse of youth in custody.

Major Issues

- Staff Sexual Misconduct
- Youth on Youth Conduct
  - Rape
  - Sexual abuse
  - Voluntary sexual interaction
  - Consensual sex

Staff Sexual Misconduct

- Important Factors
  - who raises the issue
    - boy
    - Girl
  - 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

Youth on Youth Conduct

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

Sixth Circuit Cases

- **Doe v. Patton, 381 F.Supp.2d 595 (E.D. KY 2005)**
  - (county and county official granted immunity in rape of minor doing community service work at courthouse. County official not immune in official capacity)
- **S.J. v. Hamilton County Ohio, 374 F.3d 416 (6th Cir. 2004)**
  - (county not entitled to immunity for failure to investigate and prevent sexual abuse of youth by another youth) (MSJ – 11th amendment case) (youth challenge raised under 14th amendment)

K.M. v. Alabama Department of Youth Services, 360 F. Supp. 2d 1253 (M.D. Al. 2005)

- Facts
  - 4 juvenile girls sued AL DYS, DYS Exec. Dir.; Chalkville Campus Spt.--James Caldwell; Aseme and John Ziegler
  - Allege they were physically and sexually assaulted and harassed by Aseme.
  - Claims
    - 42 U.S.C. 1983
    - 14th Amendment
    - 8th Amendment
    - State Tort law [negligence, outrage, assault and battery]
    - Widespread public allegations of sexual abuse and harassment by e'ees at Chalkville against detainees
    - Plaintiffs raped in laundry room

Legal Posture and Issues

- Motion for Summary Judgment
- 8th Amendment vs. 14th Amendment
  - Juvenile institutions are not correctional facilities
  - Partially correctional, partially educational
  - Meant to discipline as opposed to punish
  - Rehabilitative and educational
  - Juvenile detention is not criminal adjudication
  - Bottom line juveniles entitled to > than protection from wanton and unnecessary pain
  - Even if the conduct violates the 8th amendment
- State tort claims allowed as well

Typical State Tort Claims

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

Taylor v. North Carolina Department of Corrections, 363 S.E.2d 868 (1988)

- Industrial Commission upholds judgment in favor of inmate against NC DOC ($15,000)
- Inmate placed in cell with another inmate who sodomized him
- Liability to agency because
  - Inmate who was placed in cell was friends with other inmates with whom plaintiff had fight
  - Asked for the inmate not to place in cell
  - Inmate forced Plaintiff to drink urine, wash his clothes, lick his anus and then anally sodomized plaintiff
  - No rounds for an hour
  - Plead negligence of officer
  - Assault and battery

Jane Doe 1 v. Swannanoa Youth Development Center, NCDJJ, 592 S.E. 2d 715 (2004)

- Female youth used North Carolina Torts Claims Act
  - Emotional distress
  - Sexual assault by staff and youth
  - Failure to protect, investigate
  - Destruction of evidence
- Agency
  - Challenged request for name, address and custodian for kids in Frye cottage
    - Confidentiality
    - Industrial Commission can't order it to turn over records
  - Ruling in favor of Industrial Commission's authority

Important Themes

- Sex with youth under correctional supervision can be a violation of the Fourteenth Amendment Due Process
- Sex with youth can be a violation of Eighth Amendment
- Special Responsibility for youth in custody – no consent
- Courts look to the practice of the agency in determining liability
- Protect employees and youth who report misconduct

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

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

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

Personal Liability

- Plaintiff must provide notice that the suit is against the official in her personal capacity
- Direct participation not required
- Official participated directly in the alleged constitutional violation
- Failed to remedy the wrong after being informed through a report or an appeal

Personal Liability

- Enforced a policy or custom under which unconstitutional practices occurred or allowed the continuation of such policy or custom
- Was grossly negligent in supervising subordinates who committed the wrongful acts
- Exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring

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 action—deliberate indifference

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

- Driver's license examiner who supervised female prisoner on work release not immune from suit for sexual abuse of inmate. Oklahoma DOC delegated responsibility to agency, so can be liable under 8th amendment.

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. Olk-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. Olk-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

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

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

- 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

Ice v. Dixon
2005 WL 1593899 (July 6, 2005)

- Facts
  - Inmate sexually assaulted during incarcerated 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 (July 6, 2005)

- 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

Why This Result

- Specific Policy
- Training to staff
- W/in 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

Punishing Consensual Sex of Inmates

- State sodomy law constitutional as applied to sex in prison. Diminished expectation of privacy.
  - U.S. v. Brewer, 363 F.Supp. 606 (M.D. Pa. 1973);
  - People v. Frazier, 64 Cal.Rptr. 447 (Cal. Ct. App. 1967);
  - People v. Coulter, 288 N.W.2d 448 (Mich. Ct. App. 1980)

Prison Regulations Prohibiting Consensual Sex ARE Constitutional

- George v. Lane, 1987 U.S. Dist. Lexis 3659 (N.D. Ill 1987)

Conclusions

- Corrections officials can and are held personally liable for staff sexual misconduct with offenders
- Corrections agencies and officials can be held liable for failure to train, supervise, investigate and discipline in their official capacity

Emerging Issues--Code of Silence
Baron V. Hickey, 242 F.Supp.2d 66 (D.Mass. 2003)

- County Corrections officer harassed by co-workers after he reported misconduct
- Reported co-workers playing cards with inmates
- Referred to as “rat”; people dropped cheese in front of him; tires slashed
- Complained on 30 separate occasions
- Claimed that he was forced to resign

Emerging Issues--Code of Silence
Baron V. Hickey, 242 F.Supp.2d 66 (D.Mass. 2003)

- Jury awards Baron $500,000 for severe harassment
- Affirmed 402 F.3d 225 (1st Cir.(Mass.))

Emerging Issues: Cases Involving Sexual Minorities

- **Fields v. Smith, 2010 WL 1929819, E.D.Wis., May 13, 2010**
  - Recognizing gender identity disorder as a serious medical need for purposes of the 8th Amendment and finding unconstitutional Wisconsin law prohibiting the use of state funds for hormone therapy and gender reassignment surgery
- **Farmer v. Hawk-Sawyer, 69 F.Supp.2d 120 D.D.C. 1999**
  - Upholding state law requiring documentation of hormone administration prior to incarceration before administering hormones to prisoners.
- **R.G. v. Koller, 415 F.Supp. 11129 (D.Hawaii 2006)**
  - Granting preliminary injunction against State of Hawaii for violating the due process rights of LGBT youth by failing to protect them from verbal, physical and sexual assault by other youth and staff and excessive use of isolation.

Emerging Issues: PREA and Civil Case Law

- Woodford v. Ngo, 548 U.S. 81, 117-124 2006
  - Dissenting opinion by Stevens citing PREA and prison rape as rationale for not finding PLRA's procedural exhaustion requirements a bar to challenging unconstitutional conduct by states
- Clinton v. California Dept. of Corrections, 264 F.R.D. 635 E.D.Cal.,2010.
  - Referencing PREA's data collection requirements in claims that agency falsified his rape complaint
- Jones v. Schofield, Slip Copy, 2009 WL 902154, M.D.Ga.,2009.
  - Finding that PREA creates no private right of action

Emerging Issues: PREA and Civil Case Law

- Giraldo v. California Department of Corrections and Rehabilitation, 168 Cal.App.4th 231 (2008)
  - Citing PREA in finding a special relationship exists between a jailer and prisoner that creates a duty of care
- Lowry v. Honeycutt, 2005 WL 1993460 D.Kan.,2005
  - Citing PREA and upholding Kansas policy requiring rape kit in instance of alleged rape over objection of inmate victim
- Hosea v. Sheffield (CIVIL ACTION NO. 9:06cv219 2007 U.S. Dist. LEXIS 3298)
  - Finding that PREA creates no cause of action for male Muslim inmate challenging strip search by female officer

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 Steele
  - 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 Heckenlaible
  - 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)

- Convergence
  - 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)

- Act is within the scope of the employment if
  - (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and
  - (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, "and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account."

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

- Act is within the scope of the employment if
  - (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, "and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account."

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
- MSJ graned
  - Negligent hiring
  - Negligent retention

What Does This Mean

- You can do a lot of things right and still end up in court
- Must push ahead on those areas of vulnerability
- Cross Gender supervision is clearly an area of vulnerability

What Do You Do to Prevent Liability?

- Policy – Clear policies concerning inappropriate conduct
- Training – Cross Gender Supervision
- Don’t punt on the hard stuff
- Investigations (protect from retaliation)
- Sanctions
- Remedies
- Youth and Staff Grievance system with integrity