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**Human Resources and Administrative Investigations
Notification of Curriculum Use
April 2014***

The enclosed Human Resources and Administrative Investigations 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 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 Human Resources and Administrative Investigations curriculum to satisfy specific PREA standards requirements.

It is recommended that the Human Resources and Administrative Investigations 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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*All materials and information provided in this publication (e.g., state laws, civil case law examples, BJA statistics) are accurately represented as of October 2013.

Notice of Federal Funding and Federal Disclaimer – This project was supported by Grant No. 2010-RP-BX-K001 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice nor those of the National Council on Crime and Delinquency (NCCD), which administers the National PREA Resource Center through a cooperative agreement with the Bureau of Justice Assistance.





**Training Curriculum:
Human Resources and Administrative Investigations**

**MODULE 10:
LEGAL LIABILITY**

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

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*The Project on Addressing Prison Rape
American University Washington College of Law
4801 Massachusetts Ave, NW
Washington, DC 20016
202-274-4385
endsilence@wcl.american.edu*

Objectives

- List and describe the civil liability issues
- Identify and describe the applicable laws and the impact these laws have on civil claims
- Identify and describe the constitutional implications
- Describe the forms of liability



Objectives

- Identify and discuss applicable case law from both an HR perspective and investigations perspective and list the potential legal claims
- Identify and describe the legal responsibilities and obligations for cross-gender supervision
- Define the standard for Bona Fide Occupational Qualification (BFOQ)
- Review case law pertaining to employee discipline and identify potential legal claims



Introduction

Civil Liability Major Issues

- Staff Sexual Misconduct
- Inmate-on-inmate Conduct
- Cross-gender Searches
- Title VII Claims
- Employee Discipline



Introduction

Staff Sexual Misconduct & Cross-gender Searches – Important Factors

Who Raises the Issue?

- Male inmate
- Female inmate

Who is the Actor?

- Male staff?
- Female staff?



Introduction

Staff Sexual Misconduct – Important Factors

Agency/Facility History:

- Complaints about misconduct
- Complaints about other institutional concerns
- Community standing

Context in Which the Issue Is Raised:

- Litigation
- Investigation
- Agency oversight



Introduction

Inmate on Inmate – Important Factors

Who Raises the Issue?

- Male inmate
- Female inmate

Nature of the Conduct:

- Forced
- Coerced
- Non-Coerced



Legal Framework

Legal Responsibilities

- Prison Rape Elimination Act
- Civil Rights of Institutionalized Persons Act
- Prison Litigation Reform Act
- Federal Torts Claims Act
- Constitutional Framework
- State Tort Framework



Civil Rights of Institutionalized Persons Act

Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 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
- Facility under a CRIPA investigation can be monitored for a period of months, or even years



Prison Litigation Reform Act

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

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



Federal Torts Claims Act (FTCA)

Federal Torts Claims Act, 28 U.S.C. 1346, et. seq.

In limited circumstances, the FTCA waives sovereign immunity and provides a cause of action against federal agencies for:

- The negligent or wrongful act or omission of any employee of the government.
- Acting within the scope of his or her employment.

Most common claims include:

- Assault and battery.
- Negligent hiring, training, or supervision.
- Negligent or intentional infliction of emotional distress.



Constitutional Framework

Constitutional Claims

- 42 U.S.C. 1983
- Bivens Action
- Eighth Amendment
- Fourteenth Amendment
- Fourth Amendment



Constitutional Framework

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 US Constitution or law of the United States.
- 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.”)



Constitutional Framework

42 U.S. C. § 1983, “Under the Color of State Law”

- 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. *Washington v. City of Shreveport*, 2006 WL 1778756 (W.D. La. 2006).
- Inmate assigned to work in state driver’s license bureau as part of her sentence could sue state driver’s license examiner for sexual misconduct under the eighth amendment. State agency that is delegated the responsibility of the state can be liable under the Eighth Amendment. *Smith v. Cochran*, 339 F.3d 1205 (10th Cir. 2003).



Constitutional Framework

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)

- Bivens action is the federal counterpart to a §1983 action.
 - Bivens held that a constitutional violation by a federal agent acting under color of his authority gives rise to a cause of action for damages.
- Federal officials can be brought into federal court for violating the federal constitution.



Constitutional Framework

Eighth Amendment

- Prohibits cruel and unusual punishment.
- Legal standard is “deliberate indifference,” for which the Supreme Court has created a two-part test. *Farmer v. Brennan*, 511 U.S. 825 (1994).
 - The injury must be **objectively serious**.
 - 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.



Constitutional Framework

Eighth Amendment, “Objectively serious injury”

- Sufficient:
 - Improper touching without a legitimate penological purpose can be sufficient. *Calhoun v. Detalla*, 319 F.3d 936 (7th Cir. 2003).
 - Repeated conduct can be sufficient. *Kahle v. Leonard*, 477 F.3d 544 (8th Cir. 2007).
- Not Sufficient:
 - Single, isolated incidents that do not result in physical harm are generally not sufficient. *Wade v. Cain*, 2011 WL 612732 (M.D. La. 2011).
 - Verbal comments alone are generally not sufficient. *Boddie v. Schneider*, 105 F.3d 857 (2d Cir. 1997).



Eighth Amendment, “Objectively serious injury”

Improper touching without a legitimate penological purpose.

Sufficient

Insufficient

Eighth Amendment, “Objectively serious injury”

Improper touching without a legitimate penological purpose.

Sufficient



Insufficient

Constitutional Framework

Eighth Amendment, “Deliberate indifference”

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/she must draw the inference.



Constitutional Framework

Fourteenth Amendment

- Lower legal standard than Eighth Amendment-- asks whether the individual was deprived of life, liberty, or property without due process of law.
- Applicable to juveniles and pre-trial detainees.



Constitutional Framework

Fourth Amendment

- Whether the individual has a **legitimate expectation of privacy**.
- Whether the search or intrusion was **reasonable**.
- Important implications for cross-gender searches.



State Tort Framework

State Tort Claims

- Assault
- Battery
- Intentional infliction of emotional distress
- Negligent infliction of emotional distress
- Negligent hiring, firing, supervision, training
- States are generally protected from tort suits under sovereign immunity. Some states, however, have passed legislation that allows inmates to bring tort suits against the state



Forms of Liability

Potential Liability

- Municipal
- Official
- Individual
- Personal



Forms of Liability

Municipal Liability – Monell v. Department of Social Services, 436 U.S. 658 (1978)

- Municipality is a person that can be held liable under § 1983.
- Injury must be inflicted due to an officially executed policy or toleration of custom.
 - » Inaction
 - » Failure to train or supervise
 - » Failure to investigate
- Cannot be held responsible under respondeat superior or vicarious liability.
 - » Must make showing that this officer was likely to inflict a particular injury and that agency had facts from which it concludes that it was likely.



Forms of Liability

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?



Forms of Liability

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.



Forms of Liability

Individual Liability – Elements

- Participated directly in the alleged constitutional violation;
- After being informed of the violation through a report or appeal, failed to remedy the wrong;
- Created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom;
- Grossly negligent in supervising subordinates who committed the wrongful acts; or
- Deliberate indifference to others' rights by failing to act on information indicating unconstitutional acts were occurring.



Forms of Liability

Personal Liability

Plaintiff must provide notice that the suit is against the official in his/her personal capacity.

Direct participation not required.

- Actual or constructive notice of unconstitutional practices.
- Demonstrated gross negligence or deliberate indifference by failing to act.



Forms of Liability

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.



Sexual Abuse Cases: HR Perspective



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Case Law – Staff Sexual Misconduct Male Correctional Employee/Female Inmate

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 2007 WL 1732385 (E.D. Va. Jun. 13, 2007)

The Facts:

- Male correctional officer escorted a mentally ill female pre-trial detainee to the shower and stared at her while she was showering in violation of agency policy.
- That same day, he sexually assaulted her in her cell, forcing her to perform oral sex on him.
- Heckenlaible cleaned herself off with a towel, which she kept under the bed, and cried herself to sleep.



Case Law – Staff Sexual Misconduct Male Correctional Employee/Female Inmate

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 2007 WL 1732385 (E.D. Va. Jun. 13, 2007)

The Facts:

- Heckenlaible reported to supervisory staff the next day, and they placed Steele on administrative leave.
- They recovered towel and determined the presence of semen.
- Steele was fired for sex with inmate and refusal to cooperate in investigation.
- Steele was convicted of carnal knowledge of an inmate in 2004—a class 6 felony, and was still locked up at time of the writing of the opinion.



Case Law – Staff Sexual Misconduct Male Correctional Employee/Female Inmate

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 2007 WL 1732385 (E.D. Va. Jun. 13, 2007)

Legal Claims:

- Against jail authority and Steele
 - » Assault and battery
 - » Intentional infliction of emotional distress
 - » Negligent hiring
 - » Negligent retention
 - » Negligence
- Against Steele
 - » 42 U.S. C. §1983: Fourteenth Amendment substantive due process right to bodily integrity.



Case Law – Staff Sexual Misconduct Male Correctional Employee/Female Inmate

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 2007 WL 1732385 (E.D. Va. Jun. 13, 2007)

Court's Ruling:

- Jail liable - distinguishes from cases where acts of employee were incidental to employment
- Motion for Summary Judgment (MSJ) denied
 - » Intentional infliction of emotional distress
 - » Assault and battery
 - » Negligence
 - » Substantive due process claim
- MSJ granted
 - » Negligent hiring
 - » Negligent retention



Case Law – Staff Sexual Misconduct Male Correctional Employee/Female Inmate

Heckenlaible v. Virginia Peninsula Regional Jail Authority, 2007 WL 1732385 (E.D. Va. Jun. 13, 2007)

Court's Analysis:

- Precautionary measures of agency:
 - » Policy prohibiting abuse of inmates.
 - » Policy prohibiting sex with inmates.
 - » Policy prohibiting search of female inmates by male staff unless accompanied by female staff, except in emergency.
- History of agency:
 - » No complaints against Steele.
 - » No complaints of sexual abuse of inmates.



Case Law – Investigations

Male Correctional Employee/Female Inmate

Riley v. Olk-Long, 282 F.3d. 592 (8th Cir. 2002)

The Facts:

- Officer made inappropriate comments to Riley about having sex with her roommate. He entered her room after lockdown, attempted to reach under her shirt, grabbed her from behind, and rubbed up against her.
- Inmate did not report because “she doubted that she would be believed and feared the resulting discipline.”
- Officer later entered her cell and raped her. She performed oral sex so she would not become pregnant.
- The officer was terminated and convicted under state law.



Case Law – Investigations

Male Correctional Employee/Female Inmate

Riley v. Olk-Long, 282 F.3d. 592 (8th Cir. 2002)

Legal Claims:

- Against warden and director of security
 - » 42 U.S.C. § 1983: under Eighth Amendment.

Court's Ruling:

- Warden and director of security were deliberately indifferent to the substantial risk of harm that correctional officer presented to female inmates.
- Held personally liable to inmate in amount of \$20,000 from director and \$25,000 in punitive damages from the warden.



Case Law – Investigations

Male Correctional Employee/Female Inmate

Riley v. Olk-Long, 282 F.3d. 592 (8th Cir. 2002)

Court's Analysis:

- Prior to this incident other female inmates had made complaints.
- Officer had a history of predatory behavior; four prior investigations were closed as inconclusive. A collective bargaining unit precluded permanent reassignment.
- Director suspected the officer was abusive but did not take action and did not terminate the officer when he had the opportunity.
- Warden did not think officer posed a threat.



Case Law – Staff Sexual Misconduct Male Correctional Employee/Female Inmate

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)

The Facts:

- The jail administrator sexually assaulted inmate Teresa Gonzales. Later that day the senior detention officer sexually assaulted another female inmate, Amanda Guel.
- Both women submitted written statements describing the assaults to detention officers who called the sheriff. The sheriff went to the jail but did not see the women until the next day. The sheriff was related to both the senior detention officer (son-in-law) and the jail administrator (nephew by marriage).



Case Law – Staff Sexual Misconduct Male Correctional Employee/Female Inmate

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)

Legal Claims:

- Against County and Sheriff
 - » § 1983: Eighth Amendment: Duty to employ competent law enforcement officers and to supervise.
 - » Negligent supervision.
- Offending Officers
 - » Assault and battery.



Case Law – Staff Sexual Misconduct Male Correctional Employee/Female Inmate

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)

Court's Ruling:

- County Dismissed
 - » No allegation that county or sheriff set the policy which caused the injury.
 - » Otherwise immune from suit under state statute – Colo. Rev. Stat. §30-11-105.



Case Law – Staff Sexual Misconduct Male Correctional Employee/Female Inmate

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)

Court's Ruling:

- 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
 - » Prior incidents established notice.
 - The inmates had access to vodka; drunk inmates sat in control room and knew how to run controls.
 - The senior detention officer had exposed himself to female inmates in past and had asked female inmates to expose their breasts.



Case Law – Staff Sexual Misconduct Male Correctional Employee/Female Inmate

**Ice v. Dixon,
2005 WL 1593899 (N.D. Ohio 2005)**

The Facts:

A bi-polar, manic depressive inmate was sexually assaulted during incarceration at Mahoning County Jail. Defendant Dixon promised to arrange Ice's release from county jail if she performed oral sex and other sex acts on him.

Legal Claims:

- Against County, Sherriff, and Dixon
 - » 42 U.S.C. § 1983: Eighth Amendment.
- Against Dixon
 - » Assault and battery.



Case Law – Staff Sexual Misconduct Male Correctional Employee/Female Inmate

Ice v. Dixon, 2005 WL 1593899 (N.D. Ohio 2005)

Court's Ruling:

- County immune in official capacity.
- Sheriff immune in official and individual capacity.
- Dixon immune in official capacity.
- Dixon **not** immune in individual capacity and on claims of assault and battery.

Court's Analysis:

- Specific policy and staff training.
- 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.



Case Law – Staff Sexual Misconduct Male Correctional Officer/Male Inmate

Doe v. Georgia Dep't of Corrs., 248 F. Appx. 67 (11th Cir. 2007)

The Facts:

- Inmate alleged he was sexually assaulted by a male correctional officer and reported the assault.
- Subsequent to his report, the same correctional officer assaulted a second inmate.

Legal Claim: 42 U.S.C. § 1983: Eighth Amendment

Court's Ruling: No liability.

Court's Analysis:

Facility immediately commenced an investigatory process, and the first claim was unsubstantiated and contested.



Case Law – Inmate on Inmate Male Inmate

Bishop v. Hackel, 636 F.3d 757 (6th Cir. 2011)

The Facts:

- A young, mentally slow inmate was assaulted by his older, larger cellmate.
- Deputy on duty did not stop the attack.

Legal Claims:

- Against sheriff and deputies
 - » 42 U.S.C. § 1983: Eighth Amendment
 - » Negligence



Case Law – Inmate on Inmate Male Inmate

Bishop v. Hackel, 636 F.3d 757 (6th Cir. 2011)

Court's Ruling:

- Negligence claims dismissed.
- Sheriff potentially liable on **failure to train theory**, if the need for training to prevent sexual predators from sexually assaulting other inmates was obvious.
- Individual deputy on duty during attack held liable.
 - » Deputy was aware of the victim's status as vulnerable and the offending inmate's status as predatory.
 - » Possibility the deputy had overheard the sexual assault taking place, which would have put a reasonable prison official on notice of a potential sexual assault.
- Other deputies not held liable, as there was not sufficient contact to identify inmate as vulnerable.



Sexual Abuse Cases: Investigations Perspective



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Case Law – Investigations

Female Correctional Employee/Male Inmate

**Manago v. Williams, No. 2:07–cv–2290, 2013
WL 753448 (E.D. Ca. Feb. 27, 2013)**

The Facts:

- **Male inmate** alleged that a **female officer** was attempting to engage him in sexual activity.
- Internal investigations asked the inmate to go undercover to implicate the female officer in a sexual misconduct charge. Inmate claimed the investigator encouraged him to have sex with the officer, which he did.
- The officer was terminated for overfamiliarity, not for engaging in sexual relations with an inmate, which she denied.
- Inmate alleged he was threatened by other officers as a result of the officer's termination



Case Law – Investigations

Female Correctional Employee/Male Inmate

**Manago v. Williams, No. 2:07–cv–2290, 2013
WL 753448 (E.D. Ca. Feb. 27, 2013)**

Legal Claims:

- First Amendment retaliation
- Eighth Amendment cruel and unusual punishment

Court's Ruling:

- Permitted Eighth Amendment claims
 - Individual officer
 - Mental health professionals
 - Investigators
- Denied First Amendment claims



Case Law – Investigations

Female Correctional Employee/Male Inmate

**Manago v. Williams, No. 2:07–cv–2290, 2013
WL 753448 (E.D. Ca. Feb. 27, 2013)**

Reasoning

- First Amendment claim denied
 - He was not “chilled” from giving testimony regarding the sexual misconduct .
- Eighth Amendment claims permitted
 - Against individual officer: Plaintiff entitled to presumption that any sexual contact was non-consensual.
 - Correctional officer did not meet burden to prove it was consensual.
 - Against investigators: Court found they acted with deliberate indifference to his mental health needs by permitting him to participate in the investigation.



Case Law – Investigations

Male Correctional Employee/Female Inmate

Ware v. Jackson County, Missouri, 150 F.3d 873 (8th Cir. 1998)

Facts

- Male officer sexually assaulted two female inmates, who reported these incidents
- Administrative Assistant to the Manager of Detention advised termination
 - Investigations into the allegations indicated something had occurred between the officer and the inmates
 - A polygraph examination revealed deceptive answers



Case Law – Investigations

Male Correctional Employee/Female Inmate

Ware v. Jackson County, Missouri, 150 F.3d 873 (8th Cir. 1998)

Facts

- Director declined to terminate the officer, instead sending the officer a memo stating that “he (the director) expected exemplary behavior of him”
- A second set of allegations were never investigated
- The officer later sexually assaulted another female inmate



Case Law – Investigations

Male Correctional Employee/Female Inmate

Ware v. Jackson County, Missouri, 150 F.3d 873 (8th Cir. 1998)

Legal Claims:

Eighth Amendment: Deliberate Indifference

Court's Ruling:

The court found there was sufficient evidence to find prison officials were deliberately indifferent, as they knew of widespread allegations of sexual abuse, and failed to terminate the offending officer, or implement any other safety measures to protect Ware and other female inmates





**Cross-Gender
Supervision**

and

**Bona Fide Occupational
Qualifications**



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Cross-Gender Supervision

Legal Responsibilities and Obligations

PREA Standard

- § 115.15: Cross-gender supervision
- *See also* §§ 115.115, 115.215, 115.315

Constitutional Claims (Liable to inmate)

- Fourth Amendment
- Eighth Amendment



Cross-gender Supervision – PREA Standards

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 . . . except in emergency circumstances or when performed by medical practitioners

(b) . . . 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



Cross-gender Supervision – PREA Standards

28 CFR § 115.15: Limits to cross-gender viewing and searches

(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.



Case Law – Cross-Gender Searches Male Correctional Employee/Female Inmate

Colman v. Vasquez, 142 F. Supp. 2d 226 (2d. Cir. 2001)

The Facts:

- Female inmate incarcerated at FCI Danbury in special unit for victims of sexual abuse was subjected to cross-gender searches.
- She filed a complaint to psychiatrist who informed a lieutenant but received no response by administration.

Legal Claims:

- 42 U.S.C. § 1983: Fourth and Eighth Amendment claims regarding constitutionality of cross-gender searches.



Case Law – Cross-Gender Searches Male Correctional Employee/Female Inmate

Colman v. Vasquez, 142 F. Supp. 2d 226 (2d. Cir. 2001)

Court's Ruling:

- Fourth Amendment claim allowed to proceed, in the absence of a legitimate penological purpose for the search.
- Eighth Amendment claim allowed to proceed, due to the special vulnerability of the inmate.
- Court noted that other jurisdictions typically treat cross-gender searches of female inmates more harshly than cross-gender searches of male inmates.



Case Law – Cross-Gender Searches Female Correctional Employee/Male Inmate

Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995)

The Facts:

Male detainee in Cook County Jail was viewed in the nude by **female correctional officers**. Was visible to correctional officers while showering, using the toilet, and undressing.

Legal Claims:

- 42 U.S.C. § 1983
 - » Fourth Amendment—unreasonable search and seizure.
 - » Fourteenth Amendment—due process and cruel and unusual punishment.



Case Law – Cross-Gender Searches Female Correctional Employee/Male Inmate

Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995)

Court's Ruling:

- Monitoring of naked detainees by correctional officer was reasonable under Fourth Amendment.
 - » “Good use of staff.”
 - » “Cross-sex monitoring reduces the need for prisons to make sex a criterion of employment, and therefore reduces the potential for conflict with Title VII and the equal protection clause.”
- Monitoring of naked detainee did not violate his due process rights, nor was cruel and unusual punishment.



Case Law – Cross Gender Searches Female Correctional Employee/Male Inmate

Evolving Jurisprudence in Cross-Gender Searches

- *Byrd v. Maricopa County Sheriff's Dept.*, 629 F.3d 1135 (9th Cir. 2011): A female cadet conducted a pat-down search on a male detainee in front of at least 10 – 15 people, including male cadets. The court found that the search violated the detainee's Fourth Amendment rights, distinguishing this case from others by noting that the officer touched the detainee's penis and scrotum, and that he was essentially unclothed.
- *Wilson v. City of Kalamazoo*, 127 F. Supp. 2d 855 (W.D. Mich. 2000): Male arrestees detained in a city jail without any clothing or covering for between 6 and 18 hours, exposed to viewing by members of the opposite sex. The court found they adequately stated a Fourth Amendment claims for violation of their right of privacy, even if they were deprived of clothing as a suicide prevention measure.



Bona Fide Occupational Qualification

Legal Responsibilities and Obligations

- Title VII (Liable to employee)
- State Civil Rights Laws (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



Bona Fide Occupational Qualification

Legal Responsibilities and Obligations

Standard: Gender-based job qualification must be related to the central function of the facility, and reasonably necessary to the normal operations of the facility.

- ***Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977)**: exclusion of females in contact positions in violent male maximum security prisons may be a BFOQ
- ***Breiner v. Nevada Dep't of Corr.*, 610 F.3d 1201 (9th Cir. 2010)**: Female gender was not a BFOQ for all three lieutenant positions at a women's correctional facility as precluding men was not necessary to reduce instances of sexual abuse
- ***Henry v. Milwaukee County*, 539 F.3d 573 (7th Cir. 2008)**: No BFOQ for females supervising male juveniles.



Bona Fide Occupational Qualification – Federal Law

Title VII Claim

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.



Employee Discipline



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Case Law – Employee Discipline

Washington v. California City Correction Center 871 F. Supp. 2d 1010 (E.D. Cal. 2012)

The Facts:

- Plaintiff was a female sergeant in a corrections center. Her direct supervisor allegedly told Plaintiff he did not like her because of her race, and that he did not like black women.
- The supervisor demoted Plaintiff to Corrections Officer
- After complaining about her demotion, Plaintiff was terminated subsequent to an investigation into rumors Plaintiff had engaged in an inappropriate relationship with an inmate.

Legal Claims:

- Wrongful termination (one of many claims in the case)
 - Claimed these allegations had been motivated by racial discrimination and retaliation



Case Law – Employee Discipline

Washington v. California City Correction Center 871 F. Supp. 2d 1010 (E.D. Cal. 2012)

Court's Ruling:

- To prove wrongful termination, plaintiff had to show:
 - (1) an employer-employee relationship,
 - (2) the defendant subjected the plaintiff to an adverse employment action,
 - (3) the adverse employment action violated public policy and
 - (4) caused the plaintiff harm
- The government conducted a thorough, independent investigation and found the accusations meritorious.
- Terminated was warranted because there was a reasonable belief that she had entered into an inappropriate relationship with an inmate and gave something of value to him.
- **“Whether Plaintiff did these things is irrelevant so long as Defendant reasonably believed she did.”**



Summary

- Corrections officials can be held liable in their official, individual, and personal capacities for sexual violence against inmates by either staff or other inmates.
- 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.
- Enacting and enforcing strong policies and procedures can help to limit agency liability.



Summary

- Conducting and documenting training of all staff, volunteers, and contractors can help to protect people in custody and limit agency liability.
- A robust policy of reference and background checks can help limit agency liability.
- Credible investigations allow agencies to terminate problematic employees and withstand challenges to the terminations.

