

Responding to Sexual Abuse of Youth in Custody: Addressing the Needs of Boys, Girls, and Gender Nonconforming Youth Notification of Curriculum Use
April 2014

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

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

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

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**Training Curriculum:
Responding to Sexual Abuse of Youth in Custody:
Addressing the Needs of Boys, Girls and Gender Non-Conforming Youth**

Module 13: Human Resources and the Impact of Gender

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

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Introduction

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

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



Introduction to Legal Liabilities

Constitutional

- First Amendment
- Fourth Amendment
- Fifth/Fourteenth Amendment

Federal and State Statutes

Common Law Claims

PREA Standards



Key Constitutional and Statutory Provisions For Employees

Constitutional

- First Amendment Right to Association
- Fifth/Fourteenth Amendment Equal Protection
- Fifth/Fourteenth Amendment Due Process

Statutory

- Federal – Title VII
- State Civil Rights Law



Key Constitutional and Statutory Provisions For Youth

- Fifth/Fourteenth Amendment: Due Process
- Fourth Amendment: Privacy
- First Amendment: Religion



Key PREA HR Provisions

- 115.315: Cross-gender searches
- 115.317: Hiring and promotion decisions
- 115.371: Criminal and administrative agency investigations
- 155.376: Disciplinary sanctions for staff



Balancing Act

- Fourth/Fourteenth Amendment (Liable to youth)
- Title VII (Liable to employee)
- Courts will balance youths' interest in freedom from sexual abuse and right to privacy against the employment rights of correctional officers



Youth Privacy Rights

Limited privacy right in general; higher privacy consideration in youth context than adult

Some protection offered against cross-gender searches:

- First Amendment for religious exceptions
- Fourth Amendment for privacy
- Fourteenth Amendment for due process



Youth Privacy Rights

In general, courts are more willing to find a Fourth Amendment privacy right for female inmates or youth where a male officer was involved in the search

Courts less likely to find an Eighth Amendment violation where female officers are involved in searches of male inmate or youth



Fourth Amendment – Liable to Youth

Walnut Grove Youth Correctional Facility in Walnut Grove, Mississippi

- United States Department of Justice, Special Litigation Section
- Recommendation that facility redesign shower stalls so that only male officers will have viewing capabilities of male youth, as a means of reducing staff sexual misconduct



Fourth Amendment – Liable to Inmate

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

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

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



Fourth Amendment – Liable to Inmate

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

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

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



First Amendment – Liable to Inmate

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

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

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



Officer Employment Rights

Title VII:

“[i]t shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, **sex**, or national origin.”⁴²
U.S.C. § 2000e-2(a) (2012).



Officer Employment Rights Sexual Orientation and Gender Identity

Not currently covered by Title VII

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

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

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



Officer Employment Rights

BFOQ: Escape clause from Title VII

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

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



BFOQ Defense – Male Gender

In re Juvenile Det. Officer Union County, 364 N.J. Super. 608, 837 A.2d 1101 (App. Div. 2003):

County developed eight male only positions, that oversaw male detainees while showering, changing clothing and using the toilet

The court held that the county was entitled to eight bona fide occupational qualification designations for **male-only juvenile detention officer positions was not arbitrary, capricious, or unreasonable.**



BFOQ Defense – Female Gender

Henry v. Milwaukee County, 539 F.3d 573, 580 (7th Cir. 2008):

Policy requiring at least one officer of the same sex to be housed at juvenile facility at all times **reduced the number of shifts available for women** was not necessary to protect the safety and privacy interests of juveniles. Gender was not a BFOQ.



PREA Standards

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

The standards prohibit cross-gender strip, body cavity, **and pat down searches** of **all youth**, except in exigent circumstances

The standards also require documentation of all searches, and training for all staff in how to do a professional and respectful cross gender search.



115.315: Limits to cross-gender viewing and searches

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

(b) The agency **shall not conduct cross-gender pat-down searches except in exigent circumstances.**

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



115.315: Limits to cross-gender viewing and searches

(d) The facility shall implement policies and procedures that enable residents to **shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia**, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to **announce** their presence when entering a resident housing unit. In facilities (such as group homes) that do not contain discrete housing units, staff of the opposite gender shall be required to announce their presence when entering an area where residents are likely to be showering, performing bodily functions, or changing clothing.

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

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



Sexual Harassment and Discrimination Claims by Staff



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Federal and State Civil Rights Statutes

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

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



Sexual Harassment Claims

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

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

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



Discrimination Claims

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

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

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



Discrimination Claims

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

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

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



Anti-Fraternization Policies



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Legal Responsibilities and Obligations

First Amendment (Liable to employee)

Employer interests that support anti-fraternization policies

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

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



First Amendment

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

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

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



First Amendment

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

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

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



What's OK?

Termination of a correctional officer who maintained a close friendship with a detainee arrested on misdemeanor simple assault disorderly conduct, spent forty-eight hours in prison, and received twenty-one months of probation?

No

Yes

What's OK?

Termination of a correctional officer who maintained a close friendship with a detainee arrested on misdemeanor simple assault disorderly conduct, spent forty-eight hours in prison, and received twenty-one months of probation?

No

Yes



What's OK?

Thirty-day suspension of a correctional officer who testified on behalf of a criminal defendant?

No

Yes



What's OK?

Thirty-day suspension of a correctional officer who testified on behalf of a criminal defendant?

No

Yes ✓

What's OK?

Termination of a correctional officer who married an inmate, where the couple had dated and had a child together before his incarceration?

No

Yes



What's OK?

Termination of a correctional officer who married an inmate, where the couple had dated and had a child together before his incarceration?

No

Yes



What's OK?

Bottom line:

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



Summary

Current case law supports limitations for cross-gender searches

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

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

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

