

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

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

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

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

Note: Use of the enclosed curriculum, either in part or whole, does not guarantee that an auditor will find that a facility "meets standards." Rather, an auditor will take into consideration the curriculum used as part of their overall determination of compliance.

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

**Module 14:
Legal Liability and Gender**

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

***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.*

NATIONAL
PREA
RESOURCE
CENTER

Copyright © 2014 American University Washington College of Law

All rights reserved. The Bureau of Justice Assistance retains a license to reproduce, publish, or otherwise use, and to allow others to use, this material for federal purposes. Otherwise, no part of this publication may be produced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage or retrieval system, without permission in writing from the Project on Addressing Prison Rape.

Requests for permission to make copies of any part of this publication can be made to:

*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*

Introduction

Civil Liability Major Issues

Staff Sexual Misconduct

Inmate-on-Inmate Conduct

Introduction

Staff Sexual Misconduct – Important Factors

Who Raises the Issue?

- Male inmate
- Female inmate

Who Was the Perpetrator?

- 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, 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

Civil Rights of Institutionalized Persons Act

King County Correctional Facility, Seattle, Washington

- 2007: CRIPA begins investigation, and finds that: “inmates confined at KCCF are not adequately protected from harm, including physical harm and custodial sexual misconduct.”
- 2009: DOJ files official complaint against KCCF, citing Eighth Amendment violations
- 2009: Parties reach settlement agreement, wherein KCCF stipulates to structural and personnel changes to remedy constitutional violations
- Still covered by settlement agreement

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

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.

Federal Torts Claims Act

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

- The Supreme Court has recently granted certiorari to decide whether correctional officers can be held liable under the FTCA for abuse of inmates.
- The Court heard arguments in the case, *Millbrook v. United States*, in 2013.
- Issue: Whether the correctional officers were acting in an investigatory or law enforcement capacity?
 - Can only sue when the law enforcement officer is acting in an investigatory or law enforcement capacity.

Constitutional Framework

Constitutional Claims

- 42 U.S.C. 1983
- Bivens Actions
- 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

***Doe v. Neveleff*, 2013 WL 489442 (W.D. Tex. Feb. 8., 2013)**

- Several female detainees in an immigration facility were sexually assaulted by a male driver assigned to transport them away from the facility
- Federal government had contracted with county and a private agency to run the immigration facility
- Magistrate judge held that federal government can be sued under Bivens when they have contracted out responsibility
 - However, there must be direct action involved
 - Contractor who was not on site, and could not exert direct control, was not responsible for sexual assaults of female detainees.

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).

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, asking 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 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 Section 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.

Case Law Digest

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
- 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

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 over familiarity, 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

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

The Facts:

- **Male officer** made inappropriate comments to **female inmate**, which she did not report because “she doubted that she would be believed and feared the resulting discipline.”
- Officer later entered her cell and attempted to rape 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.

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:

- **Male jail administrator** sexually assaulted **female inmate**. Later that day the senior detention officer sexually assaulted another **female inmate**.
- 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:

- **Male 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 – Staff Sexual Misconduct Female Correctional Employee/Male Inmate

Wood v. Beauclair, 692 F.3d 1041 (9th Cir. 2012)

The Facts:

Female correctional officer entered into romantic relationship with a **male inmate**.

- Personal conversations.
- Hugging, kissing, and touching.
- On one occasion she attempted to touch him sexually.
- Inmate heard rumor that officer was married and attempted to end the relationship. After he attempted to end it, she began to be abusive toward him, conducting unnecessary searches.
- On a second occasion she touched his penis during a search.

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

Wood v. Beauclair, 692 F.3d 1041 (9th Cir. 2012)

Legal Claims:

- 42 U.S.C. § 1983
 - » Eighth Amendment – sexual harassment
 - » Eighth Amendment – failure to protect
 - » Fourth Amendment – repeated searches
 - » First Amendment – retaliation

Court's Ruling:

- Sexual harassment claims could proceed.
 - » Lack of ability to consent at the forefront.
- Failure to protect claims were foreclosed.
 - » No evidence the officer's supervisors were aware of the conduct.
- Court dismissed First Amendment claim.
- Jury found no Fourth Amendment violation.

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

Smith v. Beck, 2011 WL 65962 (M.D.N.C. 2011)

The Facts:

- A **male inmate** was sexually abused by a **female assistant superintendent** several times a week over the course of nine months.
- The assistant superintendent was charged and convicted of sexual activity by a custodian.

Legal Claims:

- Against prison superintendent and officials at North Carolina Department of Corrections
 - » 42 U.S.C. § 1983: Eighth Amendment
- Assistant Superintendent
 - » 42 U.S.C. § 1983: Eighth Amendment
 - » Intentional Infliction of Emotional Distress

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

Smith v. Beck, 2011 WL 65962 (M.D.N.C. 2011)

Court's Ruling:

- Prison officials could not be held liable.
 - » No evidence that they were aware of a pattern or practice of similarly high-ranking prison officials engaging in sexual abuse of prisoners.
- Assistant superintendent could be held liable on both the Eighth Amendment and state tort law claim.

Case Law – Inmate on Inmate

Male Inmate

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

The Facts:

- A young, mentally slow **male 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.

Case Law – Inmate on Inmate Male Inmate

Brown v. Harris County, 409 F. Appx. 728 (5th Cir. 2010)

The Facts:

A **male pre-trial detainee** was assaulted by fellow inmates.

Legal Claims:

- 42 U.S.C. § 1983: Fourteenth Amendment

Court's Ruling: No liability

- County jail officials were not deliberately indifferent to his safety, although the inmate had expressed his fear of sexual assault due to his medium build and white skin color.
- The officer responsible for supervising the area had failed to notify her replacement of the possibility of a sexual assault on the inmate, but the court found this failure to notify was merely negligence, not deliberate indifference.

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.

Case Law – Investigations

Male Correctional Employee/Female Inmate

Peddle v. Sawyer, 64 F. Supp. 2d 12 (D. Conn. 1999)

The Facts:

- Peddle was a **female inmate** with a serious history of physical and sexual abuse, incarcerated at FCI Danbury.
- Officer Cephas had history of sexual misconduct complaints, including incident outside of the prison in which he exposed himself to a woman.
- 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 and targeted her for sexual coercion and abuse.
- Cephas and another correctional officer tell Peddle not to tell about the abuse.

Case Law – Investigations

Male Correctional Employee/Female Inmate

Peddle v. Sawyer, 64 F. Supp. 2d 12 (D. Conn. 1999)

OIG Investigation:

- OIG set up sting to try to catch Cephas in act.
- Peddle's cellmate was to notify OIG investigators when Peddle had left cell in middle of the night.
- Investigators waited for cellmate's call at local police station.
- Cellmate failed to call.
- OIG agents confronted Peddle and Cephus early the next morning.
- Peddle admitted to contact and produced towel containing Cephas' semen.
- Cephas convicted of sexual abuse of a ward.

Case Law – Investigations

Male Correctional Employee/Female Inmate

Peddle v. Sawyer, 64 F. Supp. 2d 12 (D. Conn. 1999)

Legal Claims:

- 42 U.S.C. § 1983
 - » Fourth Amendment
 - » Fifth Amendment
 - » Eighth Amendment

Outcome:

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

LGBTI Inmates

Why PREA Standards are Good Practice

Eighth Amendment Liability

Farmer v. Brennan, 511 U.S. 825 (1994)

Facts:

- A male-to-female transgender woman was moved to the general population in a federal penitentiary, where she was beaten and raped by another inmate

LGBTI Inmates

Why PREA Standards are Good Practice

Eighth Amendment Liability

Farmer v. Brennan, 511 U.S. 825 (1994)

Legal Claims:

- Bivens Action: Eighth Amendment

“[R]espondents either transferred petitioner to USP–Terre Haute or placed petitioner in its general population despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that petitioner, as a transsexual who ‘projects feminine characteristics,’ would be particularly vulnerable to sexual attack”

LGBTI Inmates

Why PREA Standards are Good Practice

Eighth Amendment Liability

Farmer v. Brennan, 511 U.S. 825 (1994)

Legal Claims:

- Defendants
 - Warden of USP–Terre Haute (official capacity)
 - Director of the Bureau of Prisons (official capacities)
 - Warden of FCI–Oxford (personal and official capacities)
 - Director of the Bureau of Prisons North Central Region Office (personal and official capacities)

Eighth Amendment Liability

Farmer v. Brennan, 511 U.S. 825 (1994)

Holding:

- Court creates the deliberate indifference test
 - “official knows of and disregards an excessive risk to inmate health or safety”
 - “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference”

LGBTI Inmates

Why PREA Standards are Good Practice

Eighth Amendment Liability

Farmer v. Brennan, 511 U.S. 825 (1994)

Holding:

- Court remands the case for further findings whether the officials were deliberately indifferent

LGBTI Inmates

Why PREA Standards are Good Practice

Eighth Amendment Liability

Greene v. Bowles, 361 F.3d 290 (6th Cir. 2004)

Facts:

- Pre-operative male-to-female transsexual inmate at Warren Correctional Institution was placed in protective custody to guard against attacks from other inmates, due to her feminine characteristics
- A maximum security inmate who was a known predator was placed in the protective custody unit and attacked Greene
- Beat her with a mop handle and struck her with a fifty-pound fire extinguisher.

Eighth Amendment Liability

Greene v. Bowles, 361 F.3d 290 (6th Cir. 2004)

Legal Claims:

- 42 USC § 1983
 - Eighth Amendment
 - Fourteenth Amendment

Holding:

- Triable issue of fact as to whether the warden was deliberately indifferent, based on knowledge of:
 - Greene's status as a vulnerable offender
 - Attacker's status as a predatory inmate

LGBTI Inmates

Why PREA Standards are Good Practice

Eighth Amendment Liability – Transgender Care

De'lonta v. Johnson, --- F.3d ----, 2013 WL 310350 (4th Cir. 2013).

- Male-to-female transgender inmate requested surgical reassignment surgery from the Virginia Department of corrections.
 - Inmate had previously attempted self-castration
- The District Court denied his claim, stating she was not entitled to the care of her choosing
- The Fourth Circuit has reversed and remanded, and the case is expected to go to trial.
 - Found triable issue of fact of deliberate indifference to a serious medical need

LGBTI Inmates

Why PREA Standards are Good Practice

Bureau of Prisons Changes Transgender Policy

- In May of 2011, the Bureau of Prisons released a statement rejecting the “freeze frame” approach to treating Gender Identity Disorder and Gender Dysphoria
- Directed all BOP facilities to conduct an individualized assessment of the inmate’s needs and provide adequate treatment, including:
 - Real life experience
 - Hormone therapy
 - Surgical intervention
 - Counseling

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.

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.

The respective genders of the staff member and the inmate can have a dramatic effect on liability.

Conducting and documenting training of all staff, volunteers, and contractors can help to protect people in custody and limit agency liability.

Robust policy of reference & background checks can limit agency liability.