

Full Seventh Circuit Hears Debate Over Municipal Liability in Prison Rape

LORRAINE BAILEY December 5, 2019

CHICAGO (CN) – The en banc Seventh Circuit appeared divided at oral arguments Thursday over whether a Wisconsin county can be held liable for failing to supervise a male guard in charge of female inmates, leading him to commit hundreds of sexual assaults over three years.

Darryl Christensen, a former Polk County jailer, was convicted in 2016 of sexually assaulting five female inmates hundreds of times over a three-year period.

Two of his victims, identified as J.K.J. and M.J.J., [sued](#) Christensen and Polk County over the assaults in federal court.

The complaint claimed the county sheriff's department was indifferent to the risk of assault because it allowed one male officer with the ability to prevent the entrance of other jailers to supervise female inmates in areas without cameras. The county also deliberately chose not to accept state training materials regarding sexual assault in jails.



A jury awarded the women \$11.5 million in compensatory and punitive damages, of which the county was responsible for paying \$4 million. Given that Christensen was sentenced to 30 years in prison for his conduct, this figure is the only part of the award the women will ever possibly receive.

But in June, a three-judge panel of the Seventh Circuit [reversed](#) the ruling against the county, holding that it could not be held accountable for the actions of a “rogue guard” who knew that he was violating jail policy, his training and the law.

“Christensen’s assaults, in which he was a lone and surreptitious actor, were not a highly predictable consequence of the county’s sexual assault policies,” U.S. Circuit Judge Michael Brennan said in a now-vacated opinion joined by U.S. Circuit Judge William Bauer. Brennan, a Trump appointee, is the newest member of the Seventh Circuit.

U.S. Circuit Judge Michael Scudder, also a Trump appointee, dissented from the opinion, finding that the jail created a culture that “enabl[ed] the objectification of female inmates by male guards” and that it had previously investigated accusations of sexual assault against another guard, Allen Jorgenson, without taking any measures to shore up protections for inmates.

After a vote, the Seventh Circuit agreed to rehear the case en banc, and both Brennan and Scudder were active participants in oral arguments Thursday morning.

Polk County attorney Paul Cranley of Husch Blackwell repeatedly told the court that “municipal culpability requires notice,” saying the evidence the jury’s award was based on was insufficient to show the county had notice that female inmates were in danger of sexual assault by male guards at the Polk County jail.

Several judges, however, were highly skeptical of this claim.

Chief U.S. Circuit Judge Diane Wood, a Bill Clinton appointee, reminded Cranley that “the jury did find the evidence was strong enough,” and U.S. Circuit Judge David Hamilton, a Barack Obama appointee, cited testimony that there was “an essentially complete failure to provide training regarding sexual assault.”

U.S. Circuit Judge Amy St. Eve, a Trump appointee, hammered on this last point, asking Cranley at least seven times, “What specific testimony indicates guards received training on sexual assault, other than the written policy?”

Each time Cranley cited a specific witness, St. Eve corrected him regarding the evidence in the record until finally she answered her own question: “They received *no* training on sexual assault.”

U.S. Circuit Judge Amy Barrett, another Trump appointee, questioned Cranley regarding a central point of Scudder’s dissent, asking why the guard Jorgenson’s alleged inappropriate touching wasn’t enough to “put the county on notice, in this tinderbox situation where male guards were supervising female inmates.”

Plaintiffs’ attorney Sarah Grady of Loevy and Loevy urged the court to uphold the jury’s verdict, but faced a grilling from Judge Brennan on the issue of causation.

Brennan repeatedly said he could find no testimony that a prior guard’s alleged inappropriate touching of inmates motivated Christensen’s assaults, or otherwise caused Christensen to assault female inmates. U.S. Circuit Judge Diane Sykes, a George W. Bush appointee, indicated that she was not convinced the plaintiffs met the high bar to show the county caused their injuries, rather than was merely negligent.

However, Judge Wood twice interjected to indicate that Brennan was barking up the wrong tree.

“The question is whether the country created an environment that showed deliberate indifference to a substantial risk of harm,” she said.

Scudder restated the major point in his panel dissent, asking Grady, “Isn’t one of the reasons...it was highly predictable an incident would occur is because after *Jorgenson*, *nothing* was done? No meeting called to say we have a zero tolerance policy. No discussion of sexual assault. No meeting with inmates to talk to them about reporting sexual assaults.”

Grady responded, “I think that was a highly reasonable inference and the jury found that.”

The court took the case under advisement and is expected to issue a ruling within three months.

Grady declined to comment on the case after the hearing, and Cranley was unavailable.

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