

# Cross Gender Supervision Law and Liability

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# Cross Gender Supervision Claims

- Challenges arise in a variety of ways
  - male inmates
  - female inmates
  - male staff to gender specific posts
  - female staff to gender specific posts
  - union challenges to management practice

# Legal Bases

- 42 U.S. C. 1983
- First Amendment
- Fourth Amendment
- Fourteenth Amendment
- Eighth Amendment
- Title VII

# Themes of the Cases

- Very fact specific
- Who is doing the search or supervision
- Who is being searched or supervised
- What is the nature of the search
- What is the nature of the supervision

# First Amendment

- Cross gender supervision does not violate religious beliefs
  - Madyun v. Franzen 704 F.2d 954 (7th Cir. 1983)
  - Thompson v. Stansberry, 2002 WL 1362453 (Tex. App. 2002) (finding that cross gender strip search did not violate male inmate's First Amendment rights)

# Fourth Amendment Standard

- Bell v. Wolfish, 441 U.S. 520 (1979)  
[visual body cavity searches of pretrial detainees by staff of the same gender permissible]
  - The scope of the intrusion
  - The manner in which it was conducted
  - The justification for the intrusion
  - The place in which it is conducted

# Fourth Amendment

- Inmates have no expectation of privacy in their cells. *Hudson v. Palmer*, 468 U.S. 517 (1984)

# Fourth Amendment/Privacy

- Cross gender supervision violates right to be free from unreasonable search and seizures
  - random viewing of male inmates by female staff performing routine duties okay if observation is inadvertent, casual and restricted or emergency (1st, 4th, 6th, 7th, 9th)
    - See *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994); *Smith v. Fairman*, 678 F.2d 1982 (7th Cir. 1982); *Canell v. Armenifkis*, 840 F. Supp. 783 (9th Cir. -OR 1993); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985)

# But. . . .

- Visual body cavity searches during non-emergency may not be okay
  - *Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991)
  - *Cromwell v. Dalhberg*, 963 F.2d 912 (6th Cir. 1992)

# But See .....

- *Wilson v. City of Kalamazoo*, 127 F.Supp.2d 855 (W.D. Mich. 2000) (Fourth amendment privacy rights violated where plaintiffs were denied all means of shielding their private body parts from viewing of others for at least six hours)
- *Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997) (harassment by female staff)
- *Sterling v. Cupp*, 290 Or. 611 P.2d 123 (1981) (equal employment opportunity does not create blanket necessity)
- *Hudson v. Goodlander*, 494 F.Supp.890 (D.C. MD. 1980)

# And.....

- Pat downs that do not include the genital area are okay
  - Smith v. Fairman (7th Cir. 1982)
  - but see Timm v. Gunter 917 F.2d 1093 (9th Cir. 1990)

# Balancing Test

- **Turner v. Safley, 482 U.S. 78 (1987)**
  - Is the prison policy related to some legitimate penological necessity?
    - Is there a valid rational connection between prison policy and the legitimate governmental interest asserted to justify it
    - existence of alternative means for inmates to exercise constitutional right
    - impact of accommodation of constitutional rights on other inmates and staff and on allocation of prison resources
    - absence of ready alternatives evidence reasonableness of regulation

# Eighth Amendment

- Men generally lose

# Equal Protection

- You don't permit cross gender searches and supervision of women but you do of men
  - Oliver v. Scott, 276 F.3d 736 (5th Cir. 2002); Timm v. Gunter 917 F.2d 1093 (9th Cir. 1990)
    - Men and women not similarly situated with regard to differences in security concerns, number and age of prisoners, kinds of crimes committed, frequency of incidents involving violence and contraband

# Cross Gender Supervision Challenges by Women In

- Far more successful by and large than with men
  - societal norms
  - able to articulate harm
  - documented (?) past histories of physical and sexual abuse
  - view of male correctional staff

# Legal Bases

- First Amendment
- Fourth Amendment
- Eighth Amendment
- Privacy

# Important Cases

- **Forts v. Ward, 621 F.2d 1210 (2nd Cir. 1980)**
  - balanced employment rights of male staff and female inmates by allowing men on nighttime shifts but required prison to provide appropriate clothing for women
    - important consideration was impact on female staff members who would have been bumped from daytime shifts in order to accommodate policy
    - came via union challenge related to implementation of new policy

# Important Cases cont'd . . .

- **Jordan v. Gardner, 986 F.d 1521 (9th Cir. 1993)**
  - change in policy occasioned by grievance filed by female staff who did not want to do routine suspicionless searches
  - new tough warden who wanted random searches and more of them
  - scared that female staff would sue, went to gender neutral policy

# Jordan cont'd

- Received warning from psychologists on staff prior to instituting policy
- Told that because of women's history of past physical and sexual abuse would cause harm
- Implemented policy 7/5/89
- Intrusive search involving kneading and squeezing

# Jordan cont'd . . . .

- Legal challenges
  - First Amendment
  - Fourth Amendment
  - Eighth Amendment

# What the Court did

- Ignored First Amendment
- Ignored Fourth Amendment
- Based decision on 8th amendment

# What Jordan Stands for. . .

- In certain circumstances cross-gender supervision can violate Eighth Amendment
- Must lay sufficient factual predicate for finding of emotional harm
- Limited to situation in particular Washington state facility

# But See,

- Rice v. King County, 234 F.3d 549 (9<sup>th</sup> Cir. 2000)
- Male inmate
- Female staff did rough search of genital area
- Alleged past history of sexual trauma
- No 8<sup>th</sup> amendment violation
- Prison had no reason to know of history

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

- Facts

- Female inmate
- Incarcerated at FCI Danbury
- In special unit for victims of sexual abuse -- the Bridge Program
- Random pat searches by male staff
- Sexual advances by staff member
- Complaint to psychiatrist who informed a Lt.
- No response by administration
- Sexual assault in 1997

# Colman, cont'd.

- Procedural Posture
  - Motion to dismiss on basis of qualified immunity
- Standard of Review
  - Whether taking plaintiff's allegations to be true, plaintiff has stated a cause of action
- Legal Claims
  - 1<sup>st</sup>, 4<sup>th</sup>, and , 8<sup>th</sup>

# Colman, cont.d

- Eighth Amendment
  - Analyze under 8<sup>th</sup> rather than 4<sup>th</sup> because of allegation of extreme emotional distress, *Jordan v. Gardner*
  - Sees case as like *Jordan* because of previous knowledge of institution about trauma history of inmate

# Colman, cont.d

- Fourth Amendment
  - Recognizes split in judicial opinions on privacy rights of male and female inmates
  - Gives weight to factual situation – female inmate in sexual abuse trauma unit
  - Must look at nature of search, circumstances of inmate and penological justification for policy at issue
  - Left open that supervision could violate 4<sup>th</sup> amendment
  - Limits to motion to dismiss

# Community Corrections Case

- Sepulveda v. Ramirez, 967 F.2d 1413 (9th Cir. 1992) (male parole officer observing female parolee urinate for urinalysis violates parolee's fourth amendment rights, distinguishes Grummett)

# Prison Officials Attempts at Same Gender Supervision

- Relevant Considerations
  - Employee Rights
  - Inmate Privacy
  - Institutional Security
  - Inmate Rehabilitation
  - Institutional Interests

# Two Different Lines of Analysis

- Turner v. Safley
- Dothard v. Rawlinson, 433 U.S. 321 (1977) (gender found to be BFOQ for direct supervision positions in Alabama maximum security prison, but struck down height, weight and strength requirements)

# Standard

- Factual basis for believing that all or substantially all women or men would be unable to perform safely and efficiently the duties of the job involved.

# Turner Cases

- Tharp v. Iowa DOC, 68 F.3d 223 (8th Cir. 1995) (male employees sued for their exclusion from posts in female housing unit. No violation of Title VII)
- Torres v. Wisconsin DOC, 859 F.2d 1523 (7th Cir. 1986) (male correctional officers at maximum security women's prison challenged their exclusion from posts in the living units. Upheld prison's decision)

# Dothard cases

- *Gunther v. Iowa State Men's Reformatory*, 462 F.Supp. 952 (8th Cir. 1979) (gender is not BFOQ for positions in men's reformatory beyond a certain position)
- See also, *Harden v. Dayton Human Rehabilitation Center*, 520 F. Supp. 769 (S.D. Ohio 1981); *Griffin v. Michigan DOC*, 654 F.Supp.690 (E.D. Mich. 1982) (all cases recognizing women's right to work in male institutions)

# Other Important Cases

- Johnson v. Phelan, 69 F.3d 144 (7<sup>th</sup> Cir. 1995)
- Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694 (7<sup>th</sup> Cir. 1998)
- Everson v. State of Michigan Department of Corrections, Case No. 00-73133 (E.D. Michigan)

# Jail Case

- Rucker v. City of Kettering, Ohio, 84 F.Supp.2d 917 (S.D. Ohio 2000)
  - gender was not BFOQ to work in male jail facility
  - But Ohio law was bar to Ms. Rucker's employment [same gender supervision]
  - City five-day holding facility
  - "civilian jailer"
  - small facility, five employees