

Legal Issues in Addressing Prison Rape in Community Corrections

Northeast Council on Crime and Delinquency

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Five Approaches



- PREA
- State statutes prohibiting the abuse of persons in custody
- Laws enacted to Implement PREA
- Constitutional Law
- Human Resources Law

The Prison Rape Elimination Act

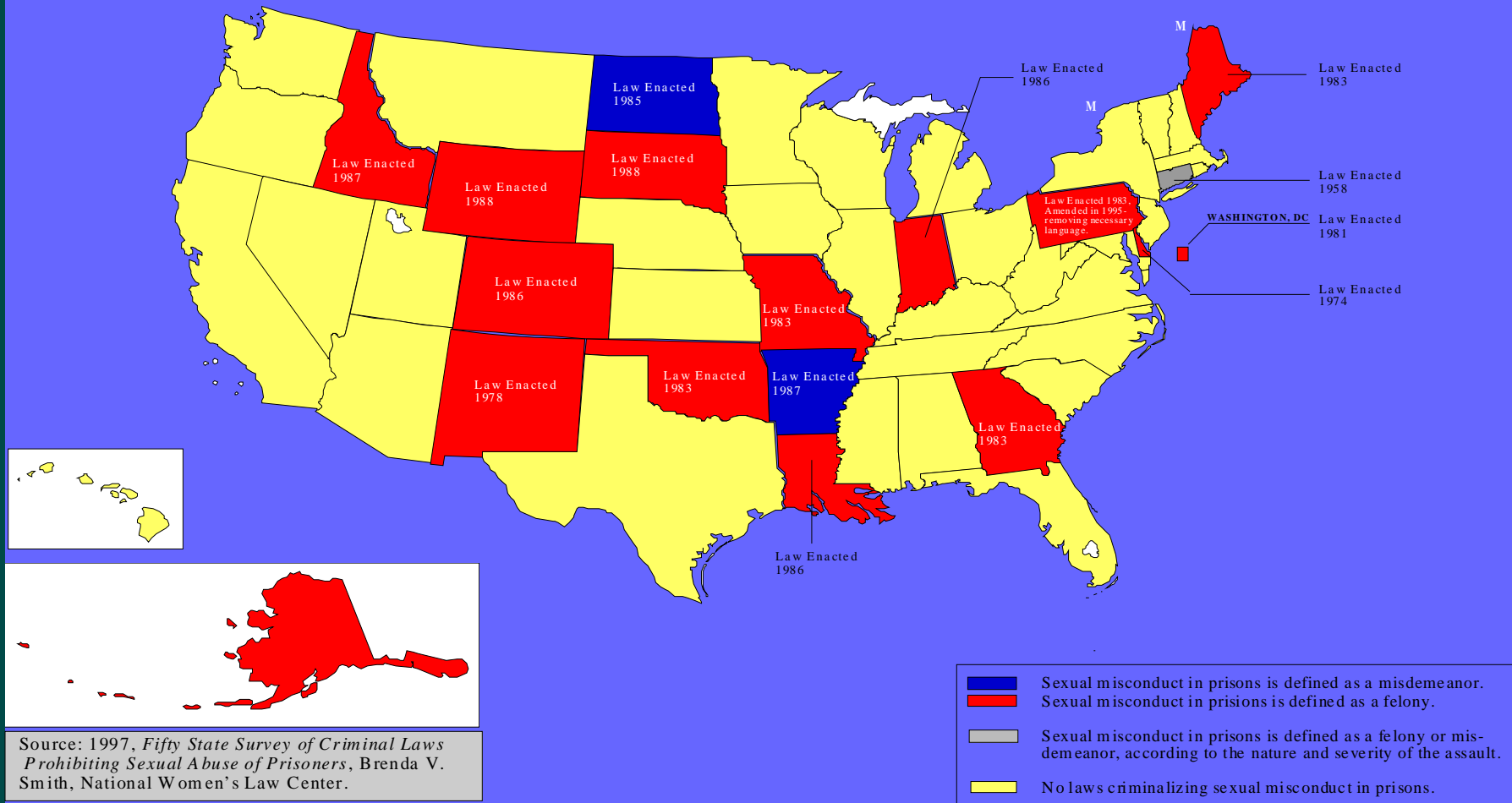
- Covers residential settings
- Data collection by BJS
- Safe Communities Section
- Reporting Issues
- Intent of proponents
- standards

State Criminal Statutes Prohibiting the Abuse of Persons in Custody

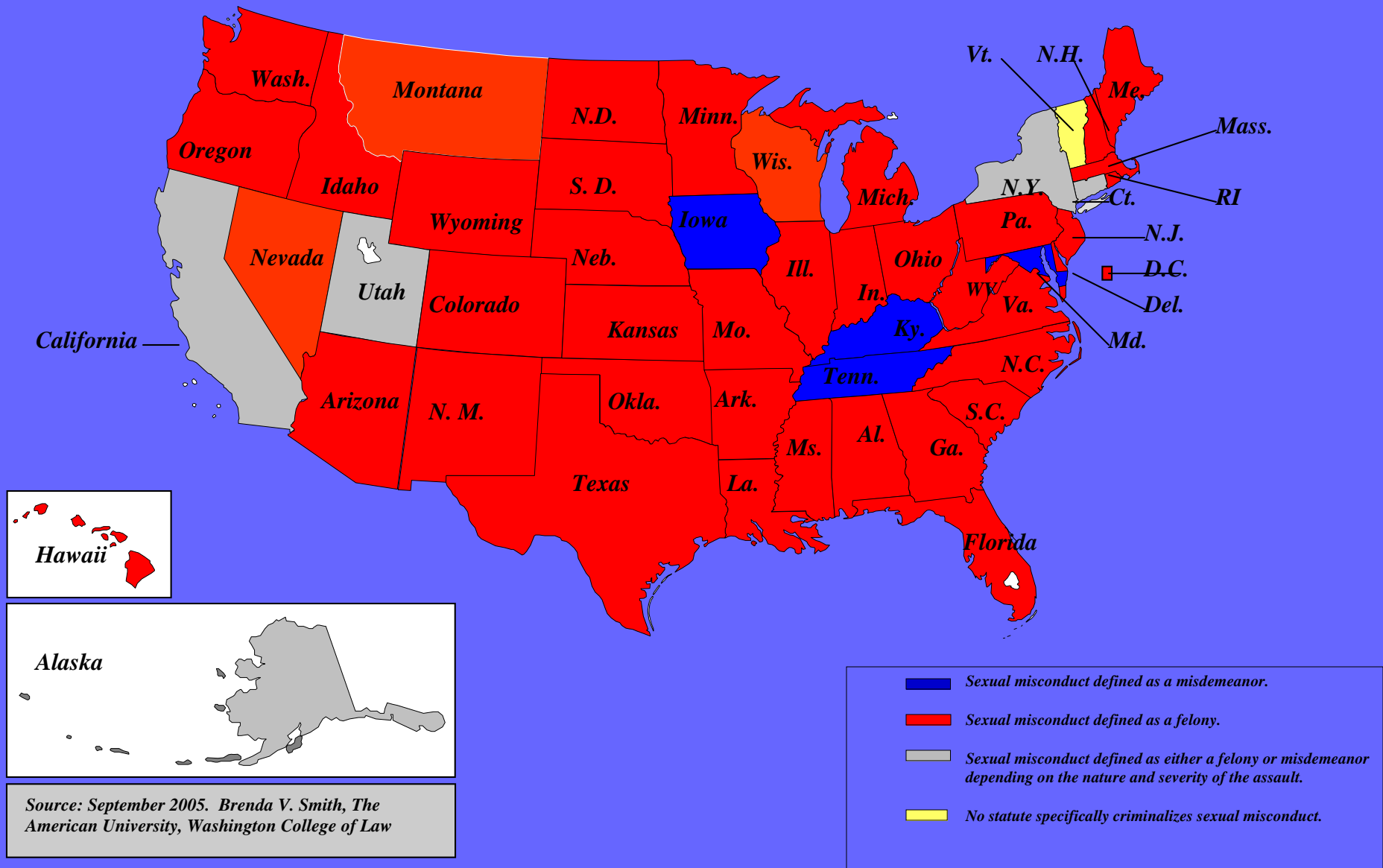
- 49 states, the federal government and DC have laws specifically covering the sexual abuse of persons in custody
- 38 states cover community corrections agencies – include ME, NH, RI, CT, NY, NJ

State Laws Prohibiting the Sexual Abuse of Individuals in Custody - 1990

State Criminal Laws Prohibiting Sexual Misconduct with Offenders in 1990 National Institute of Corrections



State Laws Prohibiting the Sexual Abuse of Individuals in Custody - 2005



State Laws Implementing PREA –California Sexual Abuse in Detention Elimination Act (Chapter 303, 2005 California Statutes)

- Provide inmates and wards with informational handbooks regarding sexual abuse in detention;
- Adopts specified policies, practices, and protocols related to the placement of inmates, physical and mental health care of inmate victims, and investigation of sexual abuse;
- Ensure accurate data collection concerning sexual abuse across all institutions which is accessible to the public; and
- Develop guidelines for the provision of resources and counseling from outside organizations to inmates and wards.
- creates the Office of the Sexual Abuse in Detention Ombudsperson to ensure confidential reporting and impartial resolution of sexual abuse complaints in CDCR facilities.

Constitutional Claims

- Most common legal bases for challenges
 - 42 U.S.C. 1983
 - Eighth Amendment
 - Fourth Amendment
 - Fourteenth Amendment
 - State tort claims

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 constitution or law of U.S.
 - deprivation by a person acting under color of state law
 - Don't forget volunteers and contractors

Eighth Amendment

- Prohibits cruel and unusual punishment
- Legal standard is deliberate indifference
 - established in a prison rape case Farmer v. Brennan
 - two part test
 - the injury must be objectively serious and must have caused an objectively serious injury
 - 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

What the court looks for

- 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 must draw the inference

Smith v. Cochran, 339 F.3d 1205 (10th Cir. OK 2003)

- Smith was inmate at Tulsa Community Correctional Facility
- Required to work
- Worked with Department of Public Safety as part of sentence
- assigned to janitorial duties at state drivers' license bureau
- Claims that supervisor sexually assaulted her from 11/97-8/98

Smith v. Cochran, 339 F.3d 1205 (10th Cir. OK 2003)

- Sex was in exchange for favors
 - Seeing brother at job
 - Taking her to see her family (e'ee admits)
 - Gifts from friends and family
- Reported after she left TCCC –claims she had reported before
- Cochran, the senior license examiner resigned.

Smith v. Cochran, 339 F.3d 1205 (10th Cir. OK 2003)

- No Eighth Amendment violation because he was not a prison guard or official
 - Court says 8th amendment applies because you were delegated responsibilities of the agency

Smith v. Cochran, 339 F.3d 1205 (10th Cir. OK 2003)

- No Eighth Amendment right to be free from sexual abuse at time of incident
 - Court says law clearly established at time and state was on notice

Sepulveda v. Ramirez, 967 F.2d 1413 (9th Cir. 1992)

● Facts

- Parolee with drug history
- Reporting for urine screen
- Female p.o.
- Female not present – supervised by officer on duty – Male, Officer Ludwig
- Alleged that he watched her give specimen and refused to leave

Sepulveda . . .

- Male parole officer observing female parolee urinate for urinalysis violates parolee's fourth amendment rights
- *Sepulveda v. Ramirez*, 1994 WL 327061 (N.D.Cal. Jun. 29, 1994) (ruled in parole officer's favor on facts)

PLRA

- Porter v. Nussle, 122 S. Ct. 983, 986 (2002) (exhaustion requirement of PLRA)
- Morris v. Eversley, 2002 WL 1313118 (S.D. N.Y. June 13, 2002) (woman challenging sexual assault during incarceration was not required meet PLRA exhaustion requirement once released)
- White v. Haines, 2005 WL 1571203 (S. Ct. App. W.VA) (July 7, 2005)(state can provide for different exhaustion scheme than federal government with regard to complaints of sexual abuse in custody)

Important Themes



- Sex in prison is a violation of the Eighth Amendment
- Special Responsibility for people in custody – no consent
- Courts look to the practice of the institution in determining liability
- Protect employees and inmates who report misconduct

Liability

A decorative header consisting of six circles in a row. The first circle is solid teal and contains the word 'Liability'. The second circle is an outline. The third circle is solid teal. The fourth circle is an outline. The fifth circle is solid teal. The sixth circle is an outline.

- Municipal
- Official
- Individual
- Personal

Municipal Liability

- Monell v. Department of Social Services, 436 U.S. 658 (1978)
 - municipality is a person who can be held liable under Section 1983
 - Officially executed policy or toleration of custom within municipality must inflict the injury
 - inaction
 - failure to train or supervise
 - Failure to investigate

Municipal Liability

- Can't be held responsible under respondeat superior or vicarious liability for
 - Independent actions of employees
 - Wrongful conduct of single employee
 - Must make showing that this officer was likely to inflict a particular injury

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
- Failure to TRAIN, SUPERVISE, FIRE

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

Personal Liability

- Plaintiff must provide notice that the suit is against the official in her personal capacity
- Direct participation not required
 - Actual or constructive notice of unconstitutional practices
 - Demonstrated gross negligence or deliberate indifference by failing to act

Elements of Claim for Personal Involvement

Morris v. Eversley, 282 F. Supp.2d 196 (S.D. N.Y. 2002)

- Official participated directly in the alleged constitutional violation
- Failed to remedy the wrong after being informed through a report or an appeal
- Enforced a policy or custom under which unconstitutional practices occurred or allowed the continuation of such policy or custom
- Was grossly negligent in supervising subordinates who committed the wrongful acts
- Exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring

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 action—deliberate indifference

Case Example: Riley v. Oik-Long, 282 F.3d. 592 (C.A. 8 (Iowa) 2002)

- Facts: Inmate brought Section 1983 action against prison warden and director of security under 8th amendment. Jury found in favor of inmate. Warden and director of security moved for judgment as matter of law or for a new trial.

Case Example: Riley v. Oik-Long, 282 F.3d 592 (8th Cir. Iowa 2002)

- Result: Prison warden and director of security were deliberately indifferent to the substantial risk of harm that guard presented to female inmates. Held personally liable to inmate in amount of \$20,000 against Sebek and \$25,000 in punitive damages from Oik-Long the warden

Case Example: Riley v. Oik-Long, 282 F.3d 592 (8th Cir. Iowa 2002)

- What happened?
 - Officer made inappropriate comments to inmate Riley about whether she was having sex with her roommate
 - He came into her room after lockdown and attempted to reach under her shirt
 - Grabbed her from behind and rubbed up against her
 - Inmate didn't report above because "she doubted that she would be believed and feared the resulting discipline"
 - Officer entered cell and raped her. She performed oral sex so she wouldn't become pregnant
 - Another inmate witnessed incident and reported it
 - Inmate placed in administrative segregation during investigation.
 - Officer terminated.
 - Convicted under state law

Case Example: Riley v. Oik-Long, 282 F.3d 592 (8th Cir. Iowa 2002)

- Why?

- Prior to this incident other female inmates had complained
- Link had a history of predatory behavior
- Four prior investigations closed as inconclusive
- Collective bargaining unit precluded permanent reassignment
- Sebek suspected but didn't take leadership
- Sebek had opportunity to terminate but didn't

Case Example: Riley v. Oik-Long, 282 F.3d 592 (8th Cir. Iowa 2002)

- Why?

- Oik-Long didn't think that officer posed a threat
- Collective bargaining agreement was no defense to failure to protect inmate safety

Lessons Learned

- Examine patterns
- Same employee/officer accused many times
- Immaculate conception – inmate pregnancy
- Compromised grievance procedures
- Fear of Evilene [Don't bring me no bad news]
- History of inconclusive findings

Case Example: Ice v. Dixon, 2005 WL 1593899 (July 6, 2005)

- Facts

- Inmate sexually assaulted during incarcerated at Mahoning County Jail
- Bi-Polar Manic Depressive
- Defendant Dixon promised to arrange Ice's release from County Jail if she performed oral sex and other sex acts on him

Case Example: Ice v. Dixon, 2005 WL 1593899 (July 6, 2005)

- On motion for summary judgment
 - Mahoning County immune in official capacity
 - Defendant Wellington, Sheriff immune in official capacity and individual capacity
 - Defendant Dixon, perpetrator immune in official capacity
 - Dixon not immune in individual capacity and on claims of assault and battery against Ice

Why this result

- Specific Policy
- Training to staff
- w/in 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

Moreland v. Miami Dade County, 255 F. Supp.2d 1304 (S.D. Fla. 2002)

- Sherry Moreland, African American woman was a CO 1 in Miami Dade County Correction Department
- Began dating an inmate at jail and allowed him to move in with her when he came home on parole
- 4 months into cohabitation found out he was still hustling and reported him to PO

Moreland v. Miami Dade County, 255 F. Supp.2d 1304 (S.D. Fla. 2002)

- P.O. put her in contact with detective
- She went undercover and got Strickland sentenced to another 20 years
- Promoted to sworn corporal officer a year later
- Someone dined on Moreland and internal affairs got involved

Moreland v. Miami Dade County, 255 F. Supp.2d 1304 (S.D. Fla. 2002)

- Investigated her and charged her with
 - Cooperation with other agencies
 - Revealing official department documents
 - Employee association with inmates, ex-inmates or a criminal element

Moreland v. Miami Dade County, 255 F. Supp.2d 1304 (S.D. Fla. 2002)

- She was fired and appealed
- Hearing examiner found a violation for failing to cooperate with other agencies and involvement with an inmate
- Hearing officer recommended time served – she had been fired for 2 years
- County Manager offered to demote her to a CO 1 rather than let her come back as sworn peace officer – she appealed again claiming race bias

Moreland v. Miami Dade County, 255 F. Supp.2d 1304 (S.D. Fla. 2002)

- Court found that
 - Moreland had failed to make case for disparate treatment
 - That the county offered a legitimate, non-discriminatory reason for the demotion which Moreland couldn't rebut
 - No due process violation
 - No policy, custom, or practice

Conclusions

- Corrections officials can and are held personally liable for staff sexual misconduct with offenders
- Corrections agencies and officials can be held liable for failure to train, supervise, investigate and discipline in their official capacity

Human Resources Issues

- Public Employer
- Private Employer
- Unionize e'ee's
- Non-unionized

Public Employer

- Constitutional protections
 - First Amendment – Freedom of Association
 - 4th Amendment Privacy Surveillance
 - 5th and 14th Amendment Due Process, Equal Protection
- *Balancing test – weighing intrusion on employee's constitutional rights against weight of employer's interest*

Freedom of Association

- *No contact policies*
 - *Courts of appeals have generally upheld such policies in light of security interests involved*
 - *There are a couple of contrary, “outlier” trial court decisions*

Employer Interest Supporting No Contact Policies

- *Interests in on-the-job performance*
- *Interests in off-the-job conduct that implicates officer's fitness for duty*
- *Interests in public reputation of correctional institution or probation office*

Is this Okay?

- Termination of state corrections officer married to man subsequently incarcerated in state prison system for felony
- Termination of probation officer for buying car at a dealership where probationer under her supervision worked (though was not involved in the sale)
- Termination of probation officer who exchanged letters with a man she had previously dated who was serving life sentence in prison outside her jurisdiction
- Denial of probation officer's request to attend baptism of child of longstanding friend whose older son had been placed on probation

Nod to Employers in each case

- But, standards of analysis differ (e.g., rational basis, intermediate scrutiny)
- Still unsettled, evolving area of law; strong trend is to uphold no contact policies

Privacy



- *Reasonable expectation of privacy*
- *Reasonable expectations change with employment context*
- *Correctional officers in secure institutional settings vs. community corrections*

Surveillance

- *Notice*
- *Methods*
- *Random vs. targeted*
 - *Level of suspicion*
 - *none, individualized or reasonable suspicion, probable cause*
- *Objective decisionmaking*
- *Balance between intrusiveness and employer need*

Most cases involve contraband – correctional settings

- Search of employee lockers, cars
employees choose to park in lots, pat
down searches as employees enter
institution, all okay
- Body cavity searches require at least
reasonable suspicion

Proactive Steps



- *Provide general notice about employee surveillance methods*
- *Restrict surveillance methods to those reasonably necessary*
- *Use even-handed procedures for selecting surveillance targets*

Discipline



- *Grievance and arbitration*
- *Due process rights under state law*

Labor Context: Arbitration

- *Both sides have right to legal representation and to present evidence*
- *Employer may not interfere with right of employees to testify at arbitration hearing*
- *Arbitrator is not required to follow finding of misconduct in another forum, even a criminal court*

Duplicitious Staff

- at an arbitration hearing on the termination of a corrections officer for having sexual relations with an offender, a fellow officer testifies that he never saw any evidence that his colleague engaged in improper conduct on his shift
- Based on all the evidence, you believe the fellow officer is lying to cover up for his friend
- What should you do?

Hindsight is 20/20

- You operate under a collective bargaining agreement that does not mention staff sexual misconduct as grounds for first-time termination
- You want to include sexual misconduct as grounds for termination
- How do you deal with your union on this issue?

Proactive Steps in a Union Context

- *Run training sessions, which include clear statement of disciplinary rules*
- *Give union policy statement on disciplinary procedures for staff sexual misconduct*
- *Review collective bargaining agreement for inconsistent terms; request modifications if necessary*

Termination and Resignation

- *Employee References*
- *Defamation*
- *Allegations of Discrimination*

Exposure

The slide features a dark teal background. At the top, there are six circles arranged in two groups of three. The first group on the left has one solid teal circle and two hollow teal circles. The second group on the right has one solid teal circle, one hollow teal circle, and one solid teal circle.

- Defamation
- Discrimination

Defamation

- *“Qualified privilege” protects representatives of employers who give out allegedly defamatory information for legitimate business purpose*
- *Applies to former employee reference checks, provided that employer can show*
 - Lack of malice
 - Good faith
 - Belief in truth of statement made

Strategies



- *Establish and adhere to policy limiting dissemination of information about employee discipline*
- *Limit dissemination to “Need to Know” basis*
- *Implement policies protecting employee personnel files*
- *Implement consistent policy on reference checks*

Discrimination

- *Requires showing employee was treated differently than others similarly situated*
- *Pretext: is the employer's reason the REAL reason?*

Strategies

The slide features a dark teal background with five decorative circles at the top. The first circle is solid teal and partially overlaps the word 'Strategies'. The second circle is a thin teal outline. The third circle is solid teal. The fourth circle is a thin teal outline. The fifth circle is solid teal.

- *Training supervisors*
- *Minimizing managerial discretion*
- *Treat like cases alike*
- *Consistently enforce disciplinary rules*
- *Maintain up-to-date personnel files*
- *Keep contemporaneous documentation of all infractions, even minor ones*
- *Protect employment information from general discussion*

Conclusions

- Proactive policies can protect the agency and staff from liability.
- Community corrections officials must know the culture of the agency
- Officials' actions and policies must have credibility