



Legal Considerations in Addressing Allegations of Staff Sexual Misconduct: Prison Rape

National Institute of
Corrections/American University,
Washington College of Law

March 6-11, 2005

Thoughts about Litigation

- litigation is last resort
- locks people into positions
- policy and practice developed in crisis
- solutions are about vindicating winner
- not necessarily what is best or practicable
- hard to enforce

Your Role in Litigation

- Prevention –training and policy
- insulate agency from liability – ensure procedures are in place to protect agency and officials
- Act – change policies and procedures even though litigation pending
- Restore confidence in agency
- Defend – if appropriate to do so
- Act – influence legislature
- Identify -- areas of concern
- Improve culture and practice

Major issues

- Staff Sexual Misconduct*
- Cross Gender Supervision of Men
- Cross Gender Supervision of Women
- Gender specific assignments

Staff Sexual Misconduct

- Important Factors
 - who raises the issue
 - male inmate
 - female inmate
 - what has been your history
 - complaints about misconduct
 - complaints about other institutional concerns
 - community standing
 - the context in which the issue is raised
 - Litigation
 - Investigation
 - Agency oversight

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 or 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

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)

- Procedural posture – Motion for summary judgment
- Cochran says he is not acting under color of state law, just a fellow e'ee
 - Court says he was acting under color of state law. ODC had delegated responsibilities to K'or and so k'or stood in shoes of agency

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

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

Important Cases

- Carrigan v. Davis, 70 F. Supp 2d 448 (D.Del. 1999)(sexual intercourse between an inmate and officer is per se 8th amendment violation. Consent is not a defense), but see Phillips v. Bird, 2003 WL 22953175 (D.Del. 2003)
- Women Prisoners v. DC, 877 F. Supp. 634 (D.D.C. 1994)(sexual misconduct violates the 8th amendment of the Constitution)

Important Cases

- Daskalea v. DC, 227 F.3d 433 (D.C. Cir. 2000)(plaintiff awarded \$350,000 in compensatory damages and \$5 million in punitive damages by jury)
 - Abuse began when she entered jail
 - Rumors that she was an FBI agent
 - Two assaults
 - Striptease

Daskalea v. DC, 227 F.3d 433 (D.C. Cir. 2000)

- Municipality's court ordered sexual misconduct policy could not insulate agency even though guard's acts were against policy
 - No training on policy
 - Never gave policy to staff or inmates
 - Policy not posted
 - Municipality was indifferent to violations

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)

Important Themes

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

Code of Silence

Baron V. Hickey, 242 F.Supp.2d
66 (D.Mass. 2003)

- County Corrections officer harassed by co-workers after he reported misconduct
- Reported co-workers playing cards with inmates
- Referred to as “rat”; people dropped cheese in front of him; tires slashed
- Complained on 30 separate occasions
- Claimed that he was forced to resign

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
 - policy or custom must inflict the injury
 - inaction
 - failure to train or supervise
 - Failure to investigate

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

Official Liability

- 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

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

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

● Why?

- Olk-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 in your institution
- Same 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

Elements of Failure to Protect

- Prison official knew that the inmate faced a substantial risk of serious harm
- Disregarded risk by failing to take reasonable steps to abate the risk

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
 - 1st, 4th, and , 8th

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 cross gender supervision could violate 4th amendment
- Limits to motion to dismiss

Colman, cont.d

- Eighth Amendment

- Analyzed cross gender supervision under 8th rather than 4th 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

- Failure to protect and train
 - Warden and Lt failed to investigate her complaints about the defendant
 - Warden and Lt. Failed to discipline officer
 - Warden Harden failed to properly train Lt. Meredith to investigate allegations of sexual misconduct and harassment

Colman result

- Motion to dismiss on basis of qualified immunity denied
 - Inmate informed a staff psychiatrist that officer had forcibly kissed her
 - Informed warden
 - Sham investigation with phony OIG investigator

Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)

● Facts

- Lunn assigned to investigate allegations of sexual misconduct
- Receives information that Ross had sex with Corona
- Ross initially denies
- Ross admits later to sex
- Ross has history of mental illness

Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)

● Facts (cont'd)

- Lunn takes statement
- Lunn corroborates detail with records and review of facility
- Files a felony complaint against Corona
- He is placed on administrative leave without pay
- Correctional officer Corona charged with sexual assault of inmate
- Acquitted after jury trial
- Reinstated with back pay
- Corona files suit for false arrest and malicious prosecution

Claims

- False arrest
 - Defendant intended to confine plaintiff
 - Plaintiff was aware of confinement
 - Plaintiff did not consent to confinement
 - The confinement was not otherwise privileged

Claims

- No false arrest because Lunn had probable cause.
 - Could rely on informant testimony notwithstanding her psychiatric history
 - Corroborated her testimony
 - Was objectively reasonable to believe that probable cause existed
 - Reasonable officers could have disagreed over whether probable cause existed

Claims

● Malicious Prosecution

- Defendant maliciously commenced or continued prosecution against plaintiff in a criminal proceeding that ended in plaintiff's favor
- No probable cause

Result: In this case there was probable cause to arrest. Nothing happened post arrest to negate earlier probable cause.

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 can be held liable for failure to train, supervise, investigate and discipline
- Proactive policies can protect the agency and staff from liability.
- Corrections officials must know the culture of the agency
- Officials' actions and policies must have credibility