

# Legal Issues in Addressing Rape in Juvenile Justice Settings

Addressing Staff Sexual Misconduct with Youthful  
Offenders

Kentucky Department of Juvenile Justice

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# Objectives

- Understand legal issues inherent in addressing staff sexual misconduct with youth
- Understand the special legal issues juvenile justice agencies face
- Understand human resources issues and their impact on agency efforts to address sexual misconduct with youth

# Six Considerations

- PREA
- State statutes prohibiting the abuse of persons in custody
- Laws enacted to Implement PREA
- Other Legal Issues Specific to Juvenile Agencies
- Constitutional Law
- Human Resources Law

# The Prison Rape Elimination Act

- Explicitly covers residential settings
- Implicitly covers juvenile probation and parole
- Data collection by BJS
- Safe Communities Section
- Reporting Issues
- Intent of proponents
- Standards

# Emerging Issues in PREA related to juveniles

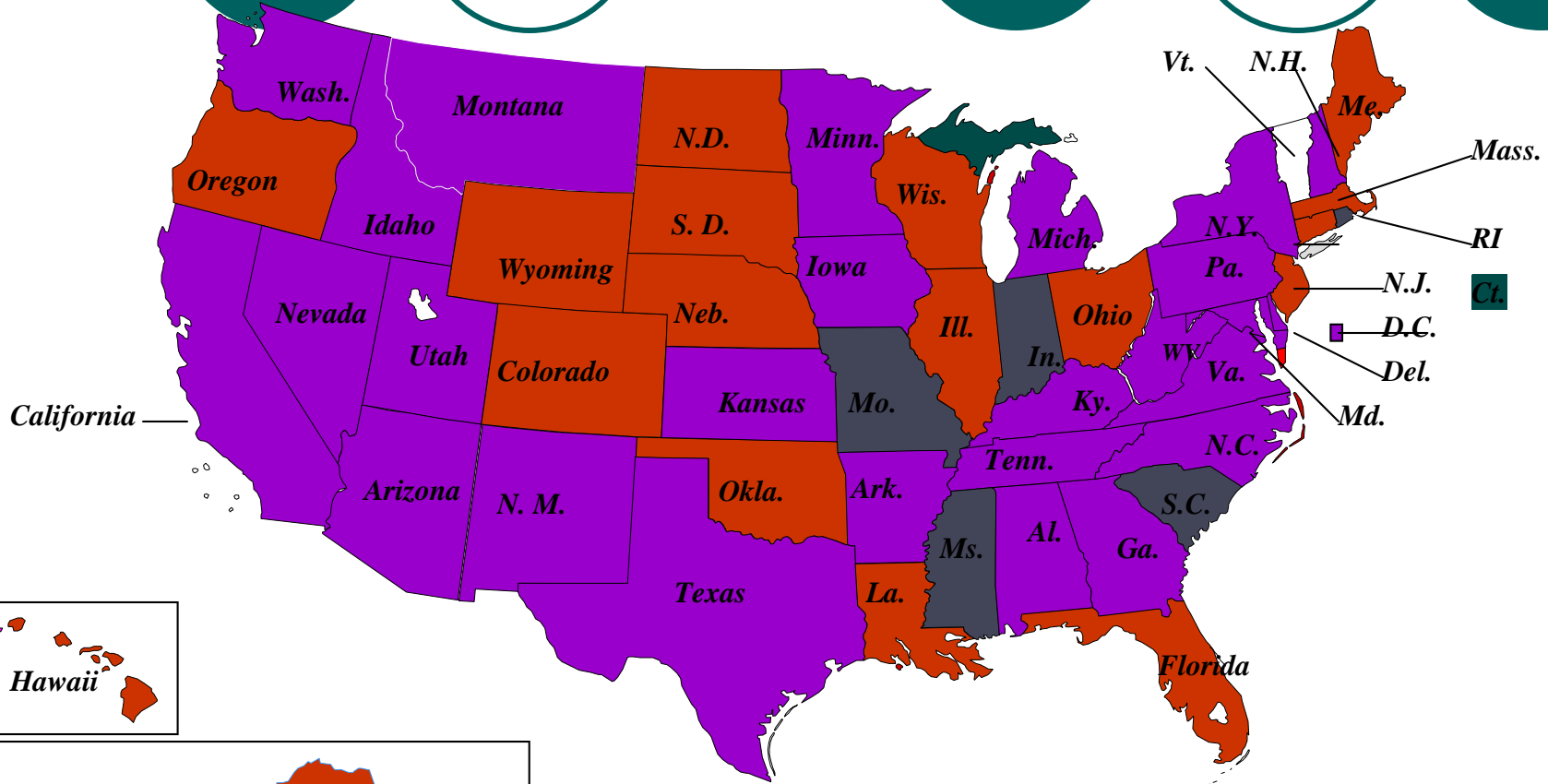
- Whether BJS has to report sexual abuse it finds in conducting its survey




# 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
- 26 states specifically cover juvenile justice agencies --  
KY– coverage only for youth under age 14
- 18 states cover juveniles by implication
- 5 do not cover juveniles at all
- One has no law

# State Criminal Laws Prohibiting Sexual Abuse of Juveniles Under Correctional Supervision

National Institute of Corrections/American University, Washington College of Law September 2005



	Juvenile Justice agencies explicitly covered by the law
	Juvenile Justice agencies covered by implication
	Juvenile Justice agencies not covered under the law

Source: September 2005. Brenda V. Smith, The American University, Washington College of Law

## 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.

# Other Legal Issues for Juvenile Justice Agencies

- Mandatory Reporting
- Guardianship
- Statutory Rape
- Sex Offender Registration

# Mandatory Reporting

- All 50 States have mandatory reporting statutes concerning abuse against youth
- The fact that all 50 states have child-abuse reporting statutes indicates the importance that the legislatures place on the welfare and safety of children
- The individuals required implicitly and explicitly to report such conduct vary according to state
- In every state individuals with custodial or supervisory authority of youth are mandatory reporters
- Reporting to appropriate authorities is a consistent problem that can result in civil and criminal liability

# Williams v. Mckeithan, 121 F. Supp. 2d 943 (D.C. M.D. La 2000)

- State ordered to do acknowledgement training with all mandatory reporters at facility
- Each had to acknowledge responsibility to report under state law
- State had to tell them office and phone # to report suspected child abuse
- State required to insure that allegation has been or is being investigated

# Guardianship Issues

- Who is the child's guardian?
- Who must be notified of the injury to the child
  - Child's parent
  - GAL
  - Youth Services Administration
  - Department of Social Service
  - Court

# Statutory Rape

- Statutory rape takes place when and individual regardless of age has sex with an individual who is not old enough to legally consent
- All states have statutory rape laws/w variations
  - Age of consent
  - Label
  - punishment

# Some Statutory Rape Stats

- 1 to 3 ratio between statutory rape and forcible rape of juvenile victims
- 90% statutory rape victims have only one offender
- 85% happened at a residence
- 15% [hotel, street, parking lot, school

# Statutory Rape Offenders

- 29% girlfriend/boyfriend
- 62% acquaintance
- 2% stranger
- 7% family

# Statutory Rape Victims

- 5% male victims
- 95% female victims
- 60% are 14-15 years old
- Another 17% are 13

# Male Statutory Rape Victims

- 12% were juveniles
- 70% were 21 or older
- 45% older than 24
- 6% of offenders were male

# Female Statutory rape victims

- 18% of offenders were juveniles
- 45% were 21 or older
- 25% older than 24
- 99% of offenders were male

# Sex Offender Registration

- All 50 states have sex offender registration schemes
- Each state decides which offenses are eligible for registration and what registration means
- Investigate whether staff on youth rape is subject to registration
- Investigate whether youth on youth rape is subject to registration

# Sex Offender Registration and Notification – S1086

- Would create a national registration and notification system for sex offenders
- Passed Senate Judiciary Committee
- Juveniles convicted of sex offense and adjudicated in juvenile offense not subject to registration and notification on national database
- Juveniles convicted in criminal court subject to registration and notification

# Constitutional Law

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

# Prison Litigation Reform Act

- Passed in 1995
- Limitation on right to bring constitutional claims in federal court for conditions of confinement
- Limits length of consent decrees
- Limits attorneys fees
- Has exhaustion and physical injury requirement
- Like PREA – says prisons but applies to juveniles as well
  - “the term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law – PLRA”

# PLRA

- Porter v. Nussle, 122 S. Ct. 983, 986 (2002) (exhaustion requirement of PLRA applies to sexual abuse)
- 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)

# 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

# Fourth Amendment -- Bell v. Wolfish, 441 U.S. 520 (1979)

- Does the individual have a legitimate expectation of privacy
  - The scope of the intrusion
  - The manner in which it was conducted
  - The justification for the intrusion
  - The place in which it is conducted

# What the Fourth Amendment Stands for

- No expectation of privacy in cell --  
Hudson v. Palmer, 468 U.S. 517 (1984)
- Can have same gender searches
- Cross Gender searches and supervision for both boys and girls more limited than in adult context

# Three Cases

- Philadelphia v. Penn. Human Relations Comm'n, 300 A.2d 97 (1973) (holding that gender is a legitimate BFOQ at youth facilities, males to supervise males and females to supervise females)
- Long v. California State Personnel Board, 41 Cal. App.3d 1000, 116 Cal. Rptr. 562 (1974) (female excluded from chaplain's job at youth training center for males)
- In the Matter of Juvenile Detention Officer Union County, 837 A.2d 1101 (N.J. Super. A.D. 2003) (creation of 8 male juvenile detention officer positions upheld)

# What these cases stand for

- Juvenile detainees have greater expectation of privacy than adults
- Younger age of juveniles makes them more vulnerable – both girls and boys
- Views cross gender searches and viewing of juveniles naked by staff of opposite sex as traumatic and likely to cause “permanent irreparable harm”
- May be able to legitimately exclude staff of opposite gender from wide range positions with youth
- BFOQ’s for youth upheld

# Fourteenth Amendment – Substantive Due Process

- Can not be deprived of life, liberty or property without due process of law
- Depending on jurisdiction courts apply 14<sup>th</sup> amendment as opposed to 8<sup>th</sup> Amendment in analyzing legal claims
- KY is in 6<sup>th</sup> Circuit and has used both 8<sup>th</sup> and 14<sup>th</sup> Amendment to analyze claims of abuse of youth in custody.

# Sixth Circuit Cases

- Doe v. Patton, 381 F.Supp.2d 595 (E.D. KY 2005) (county and county official granted immunity in rape of minor doing community service work at courthouse. County official not immune in official capacity)
- S.J. v. Hamilton County Ohio, 374 F.3d 416 (6<sup>th</sup> Cir. 2004)(county not entitled to immunity for failure to investigate and prevent sexual abuse of youth by another youth) (MSJ – 11<sup>th</sup> amendment case) (youth challenge raised under 14<sup>th</sup> amendment)

# K.M. v. Alabama Department of Youth Services, 360 F. Supp. 2d 1253 (M.D. Al. 2005)

## ● Facts

- 4 juvenile girls sued AL DYS, DYS Exec. Dir.; Chalkville Campus Spt.--James Caldwell; Aseme and John Ziegler
- Allege they were physically and sexually assaulted and harassed by Aseme.

## ○ Claims

- 42 U.S.C. 1983
- 14<sup>th</sup> Amendment
- 8<sup>th</sup> Amendment
- State Tort law [negligence, outrage, assault and battery]
- Public widespread allegations of sexual abuse and harassment by e'ees at Chalkville against detainees
- Plaintiffs raped in laundry room

# Legal Posture and Issues

- Motion for Summary Judgment
- 8<sup>th</sup> Amendment vs 14<sup>th</sup> Amendment
  - Juvenile institutions are not correctional facilities
  - Partially correctional, partially educational
  - Meant to discipline as opposed to punish
  - Rehabilitative and educational
  - Juvenile detention is not criminal adjudication
  - Bottom line juveniles entitled to > than protection from wanton and unnecessary pain
  - Even if 8<sup>th</sup> conduct violates the 8<sup>th</sup> amendment
- State tort claims allowed as well

# Important Themes

- Sex with youth under correctional supervision can be a violation of the Fourteenth Amendment Due Process
- Sex with youth can be a violation of Eighth Amendment
- Special Responsibility for youth in custody – no consent
- Courts look to the practice of the agency in determining liability
- Protect employees and youth who report misconduct

# Liability



- 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 respondent 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

# So in K.M. v. Alabama Department of Youth Services

- Alabama Department of Youth Services – municipal liability
- DYS Executive Director – official liability
- Superintendent – official liability, individual liability
- Peter Aseme, John Ziegler (perpetrators) – individual and personal 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 action—deliberate indifference

# Personal Liability -- 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 8<sup>th</sup> amendment. Jury found in favor of inmate. Warden and director of security moved for judgment as matter of law or for a new trial.
- 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

# Riley v. Olk-Long

282 F.3d. 592 (C.A. 8 (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
- 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
- Same employee/officer accused many times
- Immaculate conception – youth pregnancy
- Compromised grievance procedures
- Fear of Evilene [Don't bring me no bad news]
- History of inconclusive findings

# 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

- 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

# Other Preventive Steps in juvenile context

- Criminal Background Checks
- Appropriate classification of youth
- Medical and mental health services for youth
- Training to staff and youth
- Proportional staff to youth gender ratios
- Proximity of staff to youth
- Prohibitions on relationships between staff and youth
- Strong grievance process
- Aggressive and credible investigation

# Follow the ACA Standards

- Facilities should perform criminal background checks for staff with direct supervision of youth
- Continuous training of staff is necessary
- Offer youth same-sex contact person with whom they may feel comfortable reporting to
- A care worker should be within hearing distance of juveniles to ensure the full protection of a youth in emergency settings

# ACA Standards on Juvenile Classification

- Age
  - Separation of juveniles from adult offenders decreases the likelihood of sexual victimization
- Gender
  - Facilities should consider the gender of youth when determining sleeping and programming arrangements
- Offense
  - The ACA encourages evaluation of a youth's escape history and assault behavior and the identification of potential sexual predators and potential victims
- Behavioral Assessment

# Smith v. Wade [461 U.S. 30 (1983)]

- The court found the failure of facility authorities to separate aggressive youth from potential victims could demonstrate callous or reckless indifference, making them liable for the injury of the endangered youth

# ACA -- Procedures

- Staff should report all known abuse and neglect of juveniles
- Youth should be provided with information about sexual assault and abuse- including prevention/ intervention, self-protection, reporting sexual abuse, treatment and counseling- upon their arrival to the facility
- Recommendations for abuse investigation include automatic and mandatory investigations into any allegation of actual or threatened sexual abuse and that reporting procedures allow for the juvenile to report to a designated staff member other than the point-of-contact staff person

# Procedure Consent Decrees

- Clarence M. Yakima Co., [No. C-78166,3; VI (E.D. Wash. 1982)]
  - Staff members who have been accused of physically abusing juveniles should be removed from direct contact with juveniles pending the final resolution of the complaint once the responsible investigation official finds probable cause.
- T.Y v. Board of Co. Comm'rs, [Case No.94-4079-DES, 26;XV (d) (D. Kan. 1995)]
  - Staff members accused of physically abusing a juvenile should be removed from direct contact with the juvenile pending resolution of an investigation regarding the complaint

# Human Resources Issues

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

# Public Employer

- Constitutional protections
  - First Amendment – Freedom of Association
  - 4<sup>th</sup> Amendment Privacy Surveillance
  - 5<sup>th</sup> and 14<sup>th</sup> 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

# Duplicitous 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



- 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



- 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.
- Agency officials must know the culture of the agency
- Officials' actions and policies must have credibility