NATIONAL PREA RESOURCE CENTER

NCCD National Council on Crime & Delinquency

Cross Gender Supervision and Legal Liability

Professor Brenda V. Smith

June 26, 2014

Presented by:
The Project on Addressing Prison Rape



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The mission of the PRC is to assist adult prisons and jails, juvenile facilities, lockups, community corrections and tribal facilities in their efforts to eliminate sexual abuse by increasing their capacity for prevention, detection, monitoring, responses to incidents and services to victims and their families.

This webinar supported by Grant No. 2010-RP-BX-K001 awarded by the Bureau of Justice Assistance. Points of view or opinions in this document are those of the Project on Addressing Prison Rape and its staff and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Welcome and Agenda for Webinar

PRESENTERS:

Prof. Brenda V. Smith, Director
Project on Addressing Prison Rape

AGENDA:

- 2:00 p.m. – 2:15 p.m. Welcome and Conventions
- 2:15 p.m. – 3:15 p.m. PowerPoint and Discussion
- 3:15 p.m. – 3:30 p.m. Questions

Conventions

The conventions for this webinar are:

- Your microphone should be on mute.
- If you are joining us by phone and Internet please be sure the telephone button is checked under the audio section of the webinar tool box.
- If you are joining only by phone you are on mute—you will not be able to ask questions, but if you email your question to jyarussi@wcl.american.edu we can address it.
- If you have a question during the webinar, use the chat box feature to send your question to Jaime Yarussi (listed as WCL Organizer).
- If you have technology issues, send an email message to Jaime Yarussi (jyarussi@wcl.american.edu) or call at 202-274-4385

If your question is not answered during the webinar, we will respond after the session.

We will prioritize pre-submitted questions during the webinar and post them along with the webinar archive.

Introduction: Major Issues

Important Factors for Cross Gender Searches and Supervision

- Context of the issue
  - Supervision of inmates/ residents/ detainees
  - Searches and viewing
  - Staffing and human resources

- Who raises the issue
  - Adult
  - Juvenile
  - Gender
    - Male
    - Female
    - Gender-non-conforming
  - Agency

Introduction: Major Issues

Important Factors for Cross Gender Searches and Supervision

- Agency/facility history:
  - Complaints about misconduct in relation to cross-gender supervision and searches
  - Complaints about other institutional concerns
  - Community standing

- Context in which the issue is raised:
  - Litigation
  - Investigation
  - Agency oversight
  - Collective bargaining
  - Employment decisions

Legal Framework

- Prison Rape Elimination Act
- Civil Rights of Institutionalized Persons Act
- Prison Litigation Reform Act
- Federal Torts Claims Act
- Constitutional Framework
- State Tort Framework

The Prison Rape Elimination Act (PREA)

- Focuses on prevention, detection, response, and monitoring of prison rape
- Provides standards to prisons, jails, lockups, and community confinement facilities to address prison rape
- Federal facilities must comply, while state and local facilities stand to lose funding if non-compliant
- PREA specifically provides protection for the 8th Amendment rights of inmates
- Clarifies exhaustion of administrative remedies
- Clarifies that sexual abuse meets the physical injury requirement

National PREA Standards

Limits cross-gender viewing and searches in the adult context (§ 115.15 / 115.115/115.215)

(a) The facility **shall not conduct cross-gender strip searches or cross-gender visual body cavity searches** (meaning a search of the anal or genital opening) except in **exigent circumstances** or when **performed by medical practitioners**.

(b) As of August 20, 2015, or August 20, 2017 for a facility whose rated capacity does not exceed 50 inmates, **the facility shall not permit cross-gender pat-down searches of female inmates**, absent exigent circumstances. Facilities **shall not restrict female inmates' access** to regularly available programming or other out-of-cell opportunities in order to comply with this provision.

National PREA Standards

Limits to cross-gender viewing and searches in the adult context (§ 115.15 / 115.115/115.215)

(c) The facility shall **document all cross-gender strip searches and cross-gender visual body cavity searches**, and shall **document all cross-gender pat-down searches of female inmates**.

(d) The facility shall implement policies and procedures that **enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing** their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures **shall require staff of the opposite gender to announce their presence when entering an inmate housing unit**.

National PREA Standards

Limits to cross-gender viewing and searches in the adult context (§ 115.15 / 115.115/115.215)

(e) The facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. If the inmate's genital status is unknown, it may be determined **during conversations** with the inmate, **by reviewing medical records**, or, if necessary, by learning that information **as part of a broader medical examination** conducted **in private by a medical practitioner**.

(f) The agency **shall train** security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a **professional and respectful manner**, and in the **least intrusive manner** possible, consistent with security needs.

National PREA Standards

Limits to cross-gender viewing and searches in the juvenile context (§ 115.315)

(a) The facility **shall not conduct** cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) The agency **shall not conduct** cross-gender pat-down searches except in exigent circumstances.

National PREA Standards

Limits to cross-gender viewing and searches in the juvenile context (§ 115.315)

(c) The facility shall **document and justify all cross-gender strip searches, cross-gender visual body cavity searches, and cross-gender pat-down searches**.

(d) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures **shall require staff of the opposite gender to announce their presence when entering a resident housing unit**. In facilities (such as group homes) that do not contain discrete housing units, **staff of the opposite gender shall be required to announce their presence when entering an area where residents are likely to be showering, performing bodily functions, or changing clothing.**

National PREA Standards

Limits to cross-gender viewing and searches in the juvenile context (§ 115.315)

(e) The facility **shall not search or physically examine a transgender or intersex resident for the sole purpose of determining the resident's genital status**. If the resident's genital status is unknown, it may be determined **during conversations with the resident, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.**

(f) The agency shall **train security staff** in how to conduct cross-gender pat-down searches, and searches of transgender and intersex residents, in a **professional and respectful manner, and in the least intrusive manner possible**, consistent with security needs.

National PREA Standards

What cross gender interactions are allowed?

	Viewing (In states of undress)		Searches		Announce	
	Adult	**Juvenile**	**Adult**	**Juvenile**	**Adult**	**Juvenile**
Male	No	No	Yes	No	Yes	Yes
Female	No	No	No	No	Yes	Yes
Trans or Intersex	Depends	Depends*	Depends	Depends*	Depends	Depends

* Male or female youth identifying as gender non-conforming could request staff of opposite biological identity e.g. a male to female transgender youth requesting a search by a female staff person.

Developed by The Project on Addressing Prison Rape (June 2014)

NATIONAL PREA RESOURCE CENTER

Guidance from DOJ: Frequently Asked Questions

- Helpful pieces of guidance from DOJ on cross gender searches and supervision
  - Online at: http://www.prearesourcecenter.org/faq

- Additionally, we will include them on both the PowerPoint that is posted with this webinar and as a handout.
  - Online at: http://www.wcl.american.edu/endsilence/webinars.cfm

Guidance from DOJ: Frequently Asked Questions

Please explain the adult cross-gender viewing and searches standard.

- First, it prohibits all cross-gender strip and body cavity searches except in exigent circumstances and disallows the use of cross-gender pat searches for female inmates in jails, prisons, and community confinement facilities (the juvenile facility standards prohibit cross-gender pat searches of both male and female residents).

- Second, it provides for a "knock and announce" practice when an opposite gender staff member enters a housing unit and, more generally, provides that facilities are to implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks.

- Third, the standard also provides protection from intrusive searches for the purpose of determining gender for transgender or intersex inmates.

Guidance from DOJ: Frequently Asked Questions

What is required by the cross-gender announcement in Standard 115.15(d) (adult prisons and jails; and 115.315(d) (juvenile facilities with discrete housing units)?

- In adult prisons and jails, and in juvenile facilities with discrete housing units, "staff of the opposite gender" are required to "announce their presence when entering an inmate housing unit."

- The announcement is required any time an opposite-gender staff enters a housing unit; however, the Department has determined that the purpose of the Standard may be fully realized by requiring the announcement only when an opposite-gender staff enters a housing unit where there is not already another cross-gender staff present.

- Note, a distinct buzzer, bell, or other noisemaking device may be substituted for a verbal announcement, so long as: (1) the buzzer emits a distinctive sound that is noticeably different from other common noisemakers; (2) inmates are adequately educated on the meaning of the buzzer sound and understand its purpose; and (3) the buzzer is not also used for other events at the facility.

Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997

- Federal Statute
- DOJ Special Litigation enforces:
  - Prisons and jails
  - State and local nursing homes
  - Juvenile facilities
  - Facilities for mentally ill
  - Facilities for developmentally disabled and mentally retarded
- Must be widespread pattern of abuse
- DOJ Special Litigation can intervene in litigation brought by others if the abuse is sufficiently widespread
- Facility under a CRIPA investigation can be monitored for a period of months, or even years

- DOJ Civil Rights Special Litigation unit can be found online at: http://www.justice.gov/crt/about/spl/

Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat 1321 (1995)

- Exhaustion requirement
- Limits on attorney fees
- Limits consent decrees
- Limits on appointment of special masters
- Physical injury requirement
- Limits on proceeding In Forma Pauperis (IFP)

Woodford v. Ngo, 548 U.S. 81 (2006).

FACTS:

- An inmate in a California prison, filed a grievance with California prison officials about his prison conditions, but it was rejected because it was filed beyond the 15 day time period. Mr. Ngo proceeded to federal court where his suit has dismissed by the district court and then reinstated by the 9th Circuit.

CLAIMS:

- 42 U.S.C. § 1983

FINDINGS:

- The court held that proper exhaustion is necessary
- Prisoners must use the grievance process that the agency provides
- Remanded to 9th Circuit

Barkey v. Reinke, WL 3893897 D. Idaho (2010)

- A female inmate was sexually assaulted during a cross-gender pat search
- The inmate had used the PREA hotline to report the incident, and therefore further exhaustion was unnecessary
- The court denied both parties' motions for summary judgment

Violence Against Women Act Amendments 2013

Amended CRIPA Statute to add the following:

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury **or the commission of a sexual act as defined in Section 2246 of title 18, United States Code.**

Amended statute on United States as a Defendant to add the following:

No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

PREA -- Exhaustion

- The National PREA Standards
  - Exhaustion of administrative remedies [115.52/ 115.252/ 115.352]
    - (a) An agency shall be exempt from this standard if it does not have administrative procedures to address inmate grievances regarding sexual abuse.
    - (b)(1) **The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse**.
    - (2) The agency may apply otherwise-applicable time limits to any portion of a grievance that does not allege an incident of sexual abuse.
    - (3) **The agency shall not require an inmate to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse**.
    - (4) Nothing in this section shall restrict the agency's ability to defend against an inmate lawsuit on the ground that the applicable statute of limitations has expired.

Federal Torts Claims Act
28 U.S.C. 1346, et. seq.

- In limited circumstances, the FTCA waives sovereign immunity and provides a cause of action against federal agencies for:
  - The negligent or wrongful act or omission of any employee of the government.
  - Acting within the scope of his or her employment.

- Case law has clarified that correctional officers are federal employees and can bring liability on federal agencies because of their actions.
  - ***Millbrook v. United States***, 133 S.Ct. 1441 (2013) (holding that the Federal Torts Claims Act (FTCA) waives sovereign immunity for correctional officers who commit intentional torts against inmates while acting within the scope of their employment)

- Most common claims include:
  - Assault and battery.
  - Negligent hiring, training, or supervision.
  - Negligent or intentional infliction of emotional distress.

Constitutional Claims

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

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 U.S. Constitution** or **law of the United States**.
- Deprivation by a person **acting under color of state law**. West v. Atkins, 487 U.S. 42 (1988) ("A defendant in a section 1983 suit acts under color of state law when he abuses the position given to him by the state.")

State Law Claims

- Assault
- Battery
- Negligent infliction of emotional distress
- Negligent hiring
- Negligent firing and supervision
- Human Rights Acts

International Legal Claims

- Article 17 of the International Covenant of Civil and Political Rights
- The United Nations Standard Minimum Rules for the Treatment of Prisoners.5 Rule 53(3)
- American Convention on Human Rights

Forms of Liability

- **Municipal**: Municipality is a person that can be held liable under Section 1983.
  - Injury must be inflicted due to an officially executed policy or toleration of custom
  - Inaction
  - Failure to train or supervise
  - Failure to investigate.

- **Official:** 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?

Forms of Liability

- **Individual:** 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.

    - Participated directly in the alleged constitutional violation;
    - After being informed of the violation through a report or appeal, failed to remedy the wrong;
    - Created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom;
    - Grossly negligent in supervising subordinates who committed the wrongful acts; or
    - Deliberate indifference to others' rights by failing to act on information indicating unconstitutional acts were occurring.

Forms of Liability

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

- **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 incident.

Case Law Digest: Issues Raised by Inmates, Residents or Detainees

Themes of 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
Madyun v. Franzen 704 F.2d 954 (7th Cir. 1983)

FACTS:

- Male inmate Madyun refused to submit to a frisk search (clothed pat down) by female guard because his Islamic religion forbade such contact with any female other than his wife or mother.
- Madyun was reported for disobedience and brought this claim on the basis of his 1st Amendment right to free exercise of religion

CLAIMS:

- 42 U.S.C. § 1983
- 1st Amendment

FINDINGS:

- Although search of male prisoner by female guard may be inconsistent with prisoner's religion, it does not violate his First Amendment rights because it was justified by important state interests of providing adequate security and equal opportunity for female guards.
- Cross-gender supervision does not violate religious beliefs.

First Amendment
Forde v. Baird, 720 F. Supp. 2d 170 (D.Conn. 2010)

- A female Muslim inmate was subjected to cross-gender searches, due to a prison policy allowing for non-emergency pat searches of female inmates by male officers

- The female inmate brought suit under the Religious Freedom Restoration Act (RFRA) and the First Amendment. The court allowed the plaintiff's RFRA claim to survive a motion for summary judgment, as the prison's interest in staffing were not sufficiently compelling to justify the burden on the inmate's right of free exercise of religion

- The court did not reach the First Amendment claim, finding it could adequately address her case on the RFRA claim alone.

Fourth Amendment
Hudson v. Palmer, 468 U.S. 517 (1984).

FACTS:
- Prisoner alleged that guard conducted search ("shakedown") of his cell to harass him and destroy his personal property

CLAIMS:
- Fourth Amendment
  - unreasonable search and seizure

FINDINGS:
- Fourth Amendment proscriptions against unreasonable searches does not apply within the confines of the prison cell.
- Inmates have no expectation of privacy in their cells.

Kinard v. Bakos, No. 14-1138, 2014WL 1758903 (3d Cir. May 5, 2014) (citing Hudson v. Palmer)

FACTS:

- Two guards engaged in a contraband search of inmate's cell where they opened and read his mail, marked "legal mail confidential."
- The legal mail the guards opened pertained to another suit brought by the inmate in which one of the guards performing the search was named as a defendant.

CLAIM:

- 42 U.S.C. §1983
- 4th Amendment

FINDINGS:

- The court held that a search of a prisoner's cell was not protected by the 4th Amendment and as a result this particular search was not a violation.

Fourth Amendment/Privacy
Grummett v. Rushen, 779 F.2d 491 (9th Cir. 1985).

FACTS:

- San Quentin Prison had a policy and practice of allowing female guards to view male inmates in states of partial or total nudity while dressing, showering, being strip searched or using toilet facilities.
- The inmates claimed this violated their right to privacy and right to be free from unreasonable searches under the 4th Amendment

CLAIMS:

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

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Fourth Amendment/Privacy
Grummett v. Rushen, 779 F.2d 491 (9th Cir. 1985).

FINDINGS:

- Cross gender supervision violates an inmate's right to be free from unreasonable search and seizures
- Random viewing of male inmates by female guards performing routine duties is okay and does not constitute a 4th Amendment violation so long as the observation is inadvertent, casual and restricted or occurs during an emergency.

Guidance from DOJ: Frequently Asked Questions

Does the standard that requires the facility to enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia apply equally to viewing that is done remotely via recorded or live video camera feed?

Does this standard prohibit opposite-gender staff from viewing inmates in their beds either through direct viewing or remotely by video camera?

How do these prohibitions affect the cross-gender staffing of dormitory settings and the viewing of video cameras in dormitory settings?

Guidance from DOJ: Frequently Asked Questions

- Yes. The intent of PREA Standards 115.15, 115.115, 115.215, and 115.315 (limits to cross-gender viewing and searches), subsection (d) is to provide inmates with the ability to shower, use the toilet, and change their clothes without being viewed by nonmedical staff of the opposite gender.

- The standard also functions to ensure that inmates have the information they need in order to cover up when opposite-gender staff members are working in their housing areas.

- The exception for viewing incidental to routine cell checks acknowledges that opposite-gender staff will work in housing areas and may see an inmate naked in his/her cell while conducting routine cell checks, but this is paired with the requirement that opposite-gender staff announce their presence to enable inmates to cover up during those periods if they do not wish to be viewed.

- Therefore, to the extent that cameras are focused on an area in which inmates are likely to be undressed or toileting, such as showers, bathrooms, and individual cells, the cameras should only be monitored by officers or nonmedical administrators of the same gender as the inmates viewed through the camera.

Guidance from DOJ: Frequently Asked Questions

- With the exception of close-observation or suicide watch cells, cameras generally are not located in single cells. It is reasonable to assume that inmates will change clothes or use the toilet within an individual cell.

- Attempts to provide privacy in instances of close observation or suicide watch, such as digitally obscuring the toilet area or providing a privacy screen for some portion of the cell, would likely negate the officer's ability to properly monitor the individual via camera.

- Therefore, unless exigent circumstances prevent it, cameras focused within single cells should only be monitored by officers or nonmedical administrators of the same gender as the inmates viewed through the camera.

- While same-gender observation is preferable because of the importance of monitoring inmates identified as being at high risk for self-harm or who are actively suicidal, cross-gender camera viewing of inmates in suicide watch cells is permissible if operationally indicated.

Visual Body Cavity Searches

Visual body cavity searches during non-emergency may not be okay

Cookish v. Powell, 945 F.2d 441 (1st Cir. 1991)

- Cross-gender visual body cavity searches during a non-emergency are unreasonable but in this case the prison guards had a reasonable, although mistaken, belief that an emergency situation had arisen.
- This reasonable, but mistaken, belief relieves prison guards from liability

Cornwell v. Dalhberg, 963 F.2d 912 (6th Cir. 1992)

- Allowing a male inmate to raise a 4th Amendment unreasonable search claim after he was subject to an outdoor strip search in front of female guards

But See …….

Wilson v. City of Kalamazoo, 127 F.Supp.2d 855 (W.D. Mich. 2000)

- Fourth amendment privacy rights violated where male plaintiffs where denied all means of shielding their private body parts from viewing by female guards for at least six hours.

Somers v. Thurman, 109 F.3d 614 (9th Cir. 1997)

- Inmates have a right to be free from routine unclothed searches by officials of the opposite sex, but at the time of the alleged conduct, this right was not established in the 9th Circuit. This case also included harassment of inmates by female staff during the visual body cavity searches.

Pat Searches

Pat downs of male inmates that do not include the genital area are okay

Smith v. Fairman, 678 F.2d 52 (7th Cir. 1982):

- Cross gender "frisk type searches" that involve a pat down of inmate's outer clothing and exclude contact with the genital area are not a violation of inmates' constitutional privacy rights.

See also……. Timm v. Gunter, 917 F.2d 1093 (9th Cir. 1990)

- The court held that a Nebraska prison's policy of allowing female officers to perform pat down searches was not a violation of prisoner's right to privacy. Per the prison's policy, when performing pat down searches that include the genital area, female officers were required to ask inmates whether they would prefer a male officer. The court held that the prison was not required to give inmates this choice, but that the prison could accommodate the prisoner's concerns regarding cross-gender pat down searches including the genital area.

Eighth Amendment

- Prohibits cruel and unusual punishment.
- Legal standard is "deliberate indifference," for which the Supreme Court has created a two-part test. Farmer v. Brennan, 511 U.S. 825 (1994).
  - The injury must be **objectively serious.**
  - 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.

Byrd v. Maricopa County Sheriff's Dept., 629 F.3d 1135 (9th Cir. 2011)

FACTS

- A female cadet conducted a strip search on a male detainee in front of at least 10–15 people, including male cadets.

CLAIMS:

- § 1983
- Fourth Amendment
- Fourteenth Amendment (because the inmate was a pre-trial detainee)

FINDINGS:

- The prison policies did not violate Fourteenth Amendment equal protection rights.
- The strip search by the female cadet did not violate Byrd's Fourteenth Amendment due process rights
- The cross-gender strip search was an unreasonable search under the Fourth Amendment because it was not a clothed pat-down search and it involved intimate contact with the inmate's body.

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?
- Is there an alternative means for inmates to exercise constitutional right?
- What is the impact of accommodation of constitutional rights on other inmates and staff and on allocation of prison resources?
- Does the absence of ready alternatives evidence reasonableness of regulation?

Turner Cases

Tharp v. Iowa DOC, 68 F.3d 223 (8th Cir. 1995)

- Male guards sued under Title VII due to their exclusion from posts in female housing unit.
- No violation of Title VII

Torres v. Wisconsin Dep't of Health and Social Services, 859 F.2d 1523 (7th Cir. 1988)

- Male guards at maximum security women's prison challenged their exclusion from posts in the living units under Title VII, alleging sex discrimination.
- Upheld prison's decision, no Title VII violation

Jordan v. Gardner, 986 F.d 1521 (9th Cir. 1993).

FACTS:

- Female inmates at the Washington Corrections Center for Women challenged new prison policy that allowed male guards to perform random, non-emergency, suspicion-less clothed body searches on the female prisoners.

CLAIMS:

- 42 U.S.C. § 1983
- Fourth Amendment
- Eight Amendment

FINDINGS:

- The prison policy constituted cruel and unusual punishment and violated the inmates' Eighth Amendment right.
- The court did not reach the Fourth Amendment unreasonable search claim because it decided the case on the Eighth Amendment claim.

Peddle v. Sawyer, 64 F.Supp. 2d 12 (D.Conn. 1997).

FACTS:

- Plaintiff, an inmate at FCI Danbury, alleged that a guard sexually abused her during his shift, singled her out for pat searches, and threatened to transfer her to a facility farther away from her children if she refused to submit to his or abuse or reported it.

CLAIMS:

- Fourth Amendment
- Fifth Amendment
- Eighth Amendment
- The Violence Against Women Act

FINDINGS:

- The court granted the defendant's motion to dismiss on the Fifth Amendment claim, but denied the motion to dismiss on the Violence Against Women Act and Eighth Amendment claims.

Colman v. Vasquez, 142 F. Supp. 2d 226 (D. Conn. 2001)

FACTS:

- Female inmate incarcerated at FCI Danbury in special unit for victims of sexual abuse was subjected to cross-gender searches.
- She filed a complaint to psychiatrist who informed a lieutenant but received no response by administration.

CLAIMS:

- 42 U.S.C. § 1983
- Fourth Amendment
- Eighth Amendment

Colman v. Vasquez, 142 F. Supp. 2d 226 (D. Conn. 2001)

FINDING:

- Fourth Amendment claim allowed to proceed, in the absence of a legitimate penological purpose for the search.
- Eighth Amendment claim allowed to proceed, due to the special vulnerability of the inmate.
- Court noted that other jurisdictions typically treat cross-gender searches of female inmates more favorably than cross-gender searches of male inmates because of women's special vulnerability.

Lee v. Wilkinson No. 1:09-cv-00722, 2010 WL 653807 at *1 (E.D. Cal. Feb. 17, 2010).

FACTS:

- Homosexual male inmate at Pleasant Valley State Prison alleged harassment and discrimination due to his homosexuality.
- He alleged that the staff harassed him after learning he was gay and that he was subjected to a full body search in front of two female cooks by two male guards.

CLAIMS:

- § 1983
- First Amendment
  - retaliation claim and a freedom of expression/association claim
- Fourth Amendment
- Eighth Amendment
- Fourteenth Amendment

Lee v. Wilkinson No. 1:09-cv-00722, 2010 WL 653807 at *1 (E.D. Cal. Feb. 17, 2010).

FINDINGS:

- The inmate's claims were dismissed for failure to amend his claims because it was unclear whether his complaint was about being searched in front of male personnel or being searched in front of female personnel.

Konitzer v. Frank, 711 F. Supp. 2d 874 (E.D. Wis. 2010).

FACTS:

- A biological male who identifies as a transsexual and suffers from Gender Identity Disorder, attempted to cut off the blood flow to his genitals and prior to being transferred to a hospital for treatment
- Plaintiff was strip searched by female guards at the time

CLAIMS:

- 42 U.S.C. § 1983
- Eighth Amendment
- Injunctions to receive proper medical treatment
- Wants to be searched by female guards only

FINDINGS:

- Denied summary judgment on the claims regarding the inmate's medical treatment
- Granted summary judgment with regard to the strip search
- Holding that prison officials were not required to ensure that strip searches of the inmate be performed by female guards only

Shaw v. District of Columbia, 944 F. Supp. 2d 43 (D.D.C. 2013).

FACTS

- Post-operational transgender formal pretrial detainee brought charges against the US Marshals Service, District of Columbia, and DC Police for the way she was treated during three separate arrests and subsequent detentions.
- While in the Superior Court cellblock, the plaintiff alleged that though the guards knew she was legally a female, they treated her as a male.
- Each time she was transferred to the Superior Court cellblock, she was strip searched by male guards, even when female guards were available.

CLAIMS

- 42 U.S.C. §1983
- 4th Amendment
- 5th Amendment
- Violation of the DC Human Rights Act

Shaw v. District of Columbia, 944 F. Supp. 2d 43 (D.D.C. 2013).

FINDINGS:

- Motion to dismiss denied
- The plaintiff alleged a violation of clearly established 4th Amendment rights because cross gender searches that involve intimate bodily contact in a non-emergency situation is an unreasonable search under the 4th Amendment.
- The guards' argument that the law is not settled on transgender arrestees failed because the plaintiff was legally female. "The absence of transgender cases is not dispositive."
- The plaintiff alleged a violation of clearly established Fifth Amendment rights based on the conditions of her confinement.

Guidance from DOJ: Frequently Asked Questions

Can you please clarify the parameters of conducting a search of a transgender or intersex inmate/resident?

An agency cannot search or physically examine transgender or intersex inmates/residents/detainees for the sole purpose of determining their genital status.

Operationally, three options are in current practice for searches of transgender or intersex inmates/residents/detainees: 1) searches conducted only by medical staff; 2) searches conducted by female staff only, especially given there is no prohibition on the pat-searches female staff can perform (except in juvenile facilities); and 3) asking inmates/residents/detainees to identify the gender of staff with whom they would feel most comfortable conducting the search.

The Impact of Cross Gender Supervision and Searches on Youthful Inmates

- Sight and sound separation and staffing

- In some jurisdictions youthful inmates would be considered an adult for the purposes of criminal jurisdiction BUT still considered a youth for other purposes
    - Mandatory reporting of victimization
    - Supervision and searches in custodial settings

- Youthful inmates who are also gender non-conforming

Case Law Digest: Employment

Typical Parties

- Male Staff
- Female Staff
- Union
- Agency
- Employment Board
- State

Title VII

"[i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."42 U.S.C. § 2000e-2(a) (2012) .

Exception to Title VII: the "bona fide occupational qualification"(BFOQ)

- Permits employers to discriminate in hiring or firing decisions.
- Specifically permits an otherwise discriminatory hiring practice when it is "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (2012).

Dothard v. Rawlinson, 433 U.S. 321 (1977)

Gender found to be a Bona Fide Occupational Qualification (BFOQ) for direct supervision positions in Alabama maximum security prison, but struck down height, weight and strength requirements

Cases Interpreting Dothard

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 recognizing women's right to work in male institutions

City of Philadelphia v. Pennsylvania Human Relations Comm'n, 300 A. 2d 97 (Pa. Commw. 1973).

FACTS:

- The City of Philadelphia, in operating its Youth Study Center has traditionally restricted the supervision of juveniles to those who were of the same gender.
- The City of Philadelphia requested the Pennsylvania Human Relations Commission to grant it a BFOQ, for the supervisors.

CLAIMS:

- The Commission did not approve the BFOQ and the City appealed this decision under § 5 of the Human Relations Act

FINDINGS:

- The court ordered the granting of a BFOQ to the City of Philadelphia, holding that this was clearly a situation in which the sexual characteristics of the employee were crucial to the successful performance of the job.
- The court's decision turned partly on the potential for cross-gender searches of juveniles.

Women In Corrections

- 2001: women made up 24.5 % of the correctional workforce in male custodial facilities.
- 2007: female workers made-up 40% of all correctional staff in adult facilities.
- 2008: women comprised 42% of juvenile facility staff.
- In many urban areas women are the majority of the correctional staff.

Men in Corrections

According to the last correctional census in 2005, male employees outnumbered female employees by a ratio of 2 to 1, while men in direct contact positions outnumbered women by a ratio of 3 to 1.

Breakdown

- Federal Facilities: 87% men/13% women
- Private Facilities: 52% men/48% women
- State operated Facilities:74% men/26% women

Gender Non-conforming Staff in Corrections

- Difficult to quantify at this time due to lack of data and because that is not information that individuals are required to provide

- According to Supreme Court, discrimination based sexual orientation or gender identity receives intermediate scrutiny. *See* Craig v. Boren, 429 U.S. 190 (1976); US v. Virginia, 518 U.S. 515 (1996) (holding that intermediate scrutiny is the proper standard of review for gender based distinctions). *See also* Lawrence v. Texas, 539 U.S. 558 (2003) (suggesting that intermediate scrutiny or a "heightened scrutiny" is the appropriate standard of review for sexual orientation based distinctions).

- Title VII does not offer protection for sexual orientation or gender identity, but state civil rights statutes may. *See e.g.*, Sexual Orientation Non-Discrimination Act, Ch. 2, 2002 N.Y. Laws 46

EEOC Guidance: Gender Non-conforming Staff in Corrections

- In April 2012, the EEOC issued a landmark ruling concerning the protections of transgender employees under Title VII.
- In an appeal filed by a transgender woman who was denied a job at a federal agency, the EEOC ruled that complaints of discrimination based on gender identity, change of sex, and/or transgender status are cognizable under Title VII.
- This ruling was significant because it marked the first time that the EEOC provided direct guidance on transgender protection.

Guidance from DOJ: Frequently Asked Questions

What gender should transgender staff be considered for the purposes of complying with cross-gender viewing and search prohibitions established in § 115.15?

Facilities should verify whether there are any specific legal authorities, statutes, or personnel policies that may be relevant to this determination. Absent any specific authorities, facilities should make an individualized determination based on the identified gender of the staff member, and not solely on the basis of the biological gender. This decision should be made at the request of, and in conjunction with, the transgender staff member. The determination may also change during the course of employment, as part of an on-going adjustment process, or as the staff member gains real-life experience living as a person of the identified gender.

Daniels v. California Dep't of Corr. 121 Fair Empl. Prac. Cas. 404 (E.D. Cal. 2013).

FACTS:

- Female guards sued for sexual harassment because of the sexually graphic material displayed by inmates
- The material was not banned, but inmates were not allowed to display it and almost all complied when staff asked them to remove it

CLAIMS:

- The plaintiff brought a Title VII hostile work environment claim

FINDINGS:

- Male inmates' display of sexually suggestive materials wasn't severe or pervasive enough to create hostile working environment
- The plaintiff has no Title VII claim even if she is occasionally exposed to such materials because the Department of Corrections supports supports its guards' enforcement of rules regarding inmates' display of sexual materials

Breiner v. Nevada Dep't of Corr. 610 F.3d 202 (9th Cir. 2010).

FACTS:

- Male guards brought suit challenging a Nevada Department of Corrections employment policy of hiring only female correctional lieutenants at a women's prison.

- This policy was implemented after a female inmate was impregnated by a male guard as well as the discovery that there were multiple staff-inmate sexual relationships in the women's prison

CLAIMS:

- The male guards filed Title VII claim alleging sex discrimination in employment.

Breiner v. Nevada Dep't of Corr. 610 F.3d 202 (9th Cir. 2010).

FINDINGS:

- The court upheld hiring of female staff in housing units and direct contact with female inmates
- NDOC's exclusion of men from supervisory positions where they had little direct contact with female inmates violated Title VII violation because it restricted male employees opportunities for promotion.
- Because the policy was enacted to counter the potential harmful behavior of the staff, rather than behavior of the inmates, *Dothard* does not apply.
- The employment policy was not reasonably necessary to normal operation of the women's prison.

Henry v. Milwaukee Cnty. 539 F.3d 573 (7th Cir. 2008).

FACTS:

- The Milwaukee County Juvenile Detention Center instituted a policy that required each unit (pod) of the facility to be staffed at all times by at least one officer of the same sex as the detainees housed on that unit.
- Female guards alleged discrimination in the workplace when they were denied certain shifts because of their sex.

CLAIMS:

- The female guards brought a claim for sex discrimination and retaliation under Title VII.

FINDINGS:

- The sex based classification which reduced the number of shifts available to female guards was not a bona-fide occupational qualification because it was not reasonably necessary to have same sex guards on duty in each pod at all times, as long as there was at least one male and one female working at all times in the detention center (to perform searches).

Neal v. Dep't of Corr., 2009 WL 187813 (Mich. App. 2009).

FACTS:

- Female inmates alleged a pattern of sexual harassment by male guards

- Plaintiffs' complaints alleged that the Michigan Department of Corrections
    - assigns male officers to female facilities without providing cross-gender supervision training
    - women were forced to dress and perform basic hygiene and body functions in front of male officers
    - male guards performed pat down searches that included contact with their genital areas
    - male guards routinely asked female inmates for sexual acts in exchange for good-time credits and educational program opportunities

Neal v. Dep't of Corr., 2009 WL 187813 (Mich. App. 2009).

Claims:

- Michigan Civil Rights Act

Findings:

- Jury reached separate verdicts for each plaintiff, with damages totaling $15,545,000.
- The defendants appealed
- The court upheld the outcome of the trial and jury verdict

Everson v. Michigan Dep't of Corr. 391 F.3d 737 (6th Cir. 2004).

FACTS:

- Michigan DOC instituted a policy of barring male guards from working in certain positions at its female prisons in response to several lawsuits by female prisoners in Michigan which alleged sexual abuse of female prisoners.
- Guards filed a class action suit alleging gender discrimination.

CLAIMS:

- The staff filed a Title VII gender discrimination claim as well as a violation of Michigan's Civil Rights Act.

FINDINGS:

- The court held that in this case, because of the rampant sexual abuse in Michigan's female prisons, the employment policy barring male guards from working in certain positions constitutes a BFOQ and was reasonably necessary to the normal operation of its female prisons.

Ambat v. City of San Francisco, No. C 07–03622 SI, 2010 WL 3340549 (N.D. Cal. Aug. 25, 2010).

FACTS:

- The San Francisco Sherriff's Department made positions in female housing units female only as a BFOQ (bona-fide occupational qualification
- Both female and male guards brought action

CLAIMS:

- The guards sued under Title VII and the California Fair Employment and Housing Act
- After the lower court's dismissal, *Breiner* was decided and the plaintiffs asked for a rehearing in light of that decision

FINDINGS:

- The designation of female only positions in female housing units was a BFOQ because unlike *Breiner*, the facility was able to identify specific evidence that supported male presence being a potential threat to the safety of female inmates and an ongoing sexual harassment and assault problem within the facility.

Teamsters Local Union No. 117 v. Washington Human Rights Comm'n 235 P.3d 858 (Wash. Ct. App. 2010).

FACTS:

- WA women's prison officials designated several positions as female only as a BFOQ.
- The prison justified these changes by stating it would help reduce sexual misconduct since they were positions that including pat down searches and observing the shower area.
- DOC employee union disputes that the positions in minimum, medium, and maximum security were properly designated female-only as a BFOQs.

CLAIMS:

- The union appealed the WA Human Rights Commission's opinion letter to the WA DOC that the female only designation was a BFOQ.

Teamsters Local Union No. 117 v. Washington Human Rights Comm'n 235 P.3d 858 (Wash. Ct. App. 2010).

FINDINGS:

- Because the Union could not demonstrate actual injury, the court gave deference to the prison officials' determinations, and found that the positions were allowed to remain female-only as a BFOQ.
- The Court noted that state law prevented cross-gender pat-downs and searches of female inmates which supported the need to have female guards consistently present.

CONCLUSIONS: The Current State of the Law

- Law is clearly established that cross gender searches and viewing of female inmates while they are in states of undress is prohibited except in very narrow exigencies
- Cross gender pat searches of men are still permitted but have to be careful of the genital area
- Cross gender searches and viewing of juveniles while unclothed is prohibited

CONCLUSIONS: The Current State of the Law

- Law is developing on how to address searches of transgender and intersex inmates
- Increasing religious diversity of the inmate population means that claims may not just be constitutional but come from other areas like Religious Freedom Restoration Act
- Changes in our society about gender expectations and norms is changing applications of Title VII especially with regard to male privacy and treatment of LGBTI staff

Other Resources

- **YOUR AGENCY'S GENERAL COUNSEL**

- **WEBINAR: The National PREA Standards: Implications for Human Resource Practices in Correctional Settings (May 2013)**
  http://www.wcl.american.edu/endsilence/webinars.cfm

- **Cross-gender Searches: A Case Law Survey**
  By: Brenda V. Smith and Melissa C. Loomis
  February 1, 2013
  Found at:
  http://www.wcl.american.edu/endsilence/documents/CrossGenderCases_PRC.pdf

- **"Watching You Watching Me." Yale Journal of Law and Feminism**
  Brenda V. Smith
  Volume 15 Number 2, 2003
  Found at:
  http://www.wcl.american.edu/endsilence/documents/WatchingYouWatchingMe.pdf

- **American Bar Association**
  Public Comment for the Draft PREA Standards Letter to DOJ (April 4, 2011)

Your Questions Answered……..

For More Information

For more information about the **National PREA Resource Center**, visit www.prearesourcecenter.org. Direct questions to info@prearesourcecenter.org

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Developed by The Project on Addressing Prison Rape (June 2014)

NATIONAL PREA RESOURCE CENTER