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The National PREA Standards: Implications for Human Resource Practices in Correctional Settings

Prof. Brenda V. Smith
Prof. Susan Carle
May 30, 2013

This Webinar is presented by:
The Project on Addressing Prison Rape *in collaboration with* the PREA Resource Center

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Welcome and Agenda for Webinar

PRESENTERS:

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

Professor Susan Carle, American University, Washington College of Law

AGENDA:

- 2:00 p.m. – 2:10 p.m. Welcome and Conventions
- 2:10 p.m. – 3:15 p.m. Presentation
- 3:15 p.m. – 3:30 p.m. Questions



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Welcome and Agenda for Webinar

We use cases to illustrate particular points. We are not rendering a legal opinion. The information that we put on slides is drawn directly from the cases. We appreciate any corrections or additional information about cases we use as there may be further proceedings related to them.



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The National PREA Resource Center (PRC)

PRC was established through a cooperative agreement between the Bureau of Justice Assistance and NCCD.

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.

* * The information provided in the webinar is the viewpoint of The Project on Addressing Prison Rape, and does not represent the views of the Bureau of Justice Assistance, the Department of Justice, or the PREA Resource Center.



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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 Caleb Bess (cbess@wcl.american.edu) or call at 202-274-4403.

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.



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Introduction

Human Resources – Major Issues

- Screening and hiring
- Reference checks and waivers
- Criminal background checks
- Promotion
- Investigations
- Termination and resignation
- Cross-gender searches
- Bona fide occupational qualifications
- Anti-fraternization policies/Off-duty conduct



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Introduction

Context

Different legal considerations apply depending on whether you are:

Public or private

- Public (government) employer
- Private facility or private sub-contractor

Union or non-union

- Union environments lessen employer flexibility, but there are ways to work *with* unions on these issues



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Introduction

Obligations and Liabilities

PREA Standards

Constitutional

- First Amendment
- Fourth Amendment
- Fifth/Fourteenth Amendment
- Eighth Amendment

Federal and State Statutes

Common Law Claims



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Introduction

History of the Prison Rape Elimination Act

- Focuses on prevention, detection, response, and monitoring of prison rape.
- Provides standards to prisons, jails, lock-ups, and community confinement facilities to address prison rape.
- Federal facilities must comply, while state and local facilities stand to lose funding if non-compliant.



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Introduction

History of the Prison Rape Elimination Act

- 2003: PREA legislation passes
- 2004: First meeting of the National Prison Rape Elimination Commission (NPREC)
- 2004-2009: Information gathering and hearings held by the NPREC
- June 2009: Report and draft standards published by NPREC
- 2009-2012: Establishment and Convening of PREA Work Group



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Introduction

History of the Prison Rape Elimination Act

May 2012:	Final DOJ standards released
June 20, 2012:	Final standards published in the Federal Register
August 20, 2012:	Standards applicable to BOP
2013-2014:	First audit cycle



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Introduction

Key PREA HR Provisions

115.15: Cross-gender searches

115.17: Hiring and promotion decisions

115.71: Criminal and administrative agency investigations

115.76: Disciplinary sanctions for staff



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Introduction

Key Constitutional and Statutory Provisions For Employees

Public

- First Amendment Right to Association
- Fourth Amendment Privacy Rights
- Fifth/Fourteenth Amendment Equal Protection
- Fifth/Fourteenth Amendment Due Process

Private and Public

- *Garrity* warnings
- Federal and State Civil Rights Law

Union

- Federal and State Law
 - Right to representation
 - Bargaining



Introduction

Key Constitutional and Statutory Provisions For Inmates/Detainees

- Eighth Amendment: Cruel and Unusual Punishment
- Fifth/Fourteenth Amendment: Due Process
- Fourth Amendment: Privacy



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Introduction

Topic	Relevant PREA Standards	Constitutional	Statute/ Common Law
Screening and hiring	115.17, 115.117, 115.217, 115.317	8 th /14 th (Inmate)	Negligent Hiring
Reference checks	115.17, 115.117, 115.217, 115.317	8 th /14 th (Inmate)	Negligent Hiring
Criminal Background Checks	115.17, 115.117, 115.217, 115.317	8 th /14 th (Inmate)	Negligent Hiring
Promotion	115.17, 115.117, 115.217, 115.317	5 th /14 th (Employee)	Civil Rights Statutes
Investigation	115.71, 115.171, 115.271, 115.371 115.72, 115.172, 115.272, 115.372	5 th /14 th (Employee) 4 th (Employee) 8 th /14 th (Inmate)	Representation (Union)



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Introduction

Topic	Relevant PREA Standards	Constitutional	Statute/ Common Law
Termination & Resignation	115.71, 115.171, 115.271, 115.371 115.76, 115.176, 115.276, 115.376	5 th /14 th (Employee)	Defamation, Civil Rights Statutes, Bargaining (Union)
Cross-gender Searches	115.15, 115.115, 115.215, 115.315	4 th /8 th /14 th (Inmate)	None
Bona fide Occupational Qualification	None	None	Civil Rights Statutes
Anti-fraternization	None	1 st (Employee)	None



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Screening and Hiring



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Screening and Hiring

Legal Responsibilities and Obligations

PREA Standard

- § 115.17: Hiring and promotion decisions
- *See also* §§ 115.117, 115.217, 115.317

Constitutional Claims (Liable to Inmate)

- Eighth/Fourteenth Amendment

Tort Claims (Liable to Inmate)

- Negligent Hiring



Screening and Hiring – PREA Standards

28 CFR § 115.17: Hiring and promotion decisions

(a) The agency shall not hire . . . anyone who may have contact with inmates, and shall not enlist the services of any contractor who may have contact with inmates, who –

(1) **Has engaged in sexual abuse** in a prison, jail, lockup, community confinement facility, juvenile facility or other institution;

(2) **Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse;**

(3) **Has been civilly or administratively adjudicated to have engaged** in the activity described in paragraph (a)(2) of this section.



Screening and Hiring – PREA Standards

28 CFR § 115.17: Hiring and promotion decisions

(b) The agency shall consider any incidents of sexual harassment in determining whether to hire . . . anyone, or to enlist the services of any contractor, who may have contact with inmates.

(f) The agency shall ask all applicants and employees who may have contact with inmates directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring.



Screening and Hiring – Constitution

Eighth Amendment: Deliberate Indifference

- Facility **will not be liable for “less than careful scrutiny of applicant resulting in generalized risk of harm.”**
- Facility **will be liable for “strong connection between background of particular applicant and specific constitutional violation alleged.”**
- *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998): County was not liable to inmates who were sexually assaulted by jailer, as sheriff could not have concluded jailer was highly likely to sexually assault inmates. The background investigation revealed only **underage possession of alcohol and speeding tickets, and jailer completed state-certified basic training program denied to those convicted of unlawful sexual conduct.**



Screening and Hiring – Common Law

Tort Claim: Negligent Hiring

- Facility can be held liable when an employer fails to exercise reasonable care in hiring an individual with known propensities for sexual assault, or propensities that should have been discovered by reasonable investigation.
- *Heckenlaible v. Virginia Peninsula Regional Jail Authority*, 2007 WL 1732385 (E.D. Va. Jun. 13, 2007): Plaintiff could not show that the Jail Authority knew of or should have known of correctional officer's propensity to commit sexual assault, and therefore court dismissed her negligent hiring claim, although she was able to sustain other claims against the Jail.



Reference Checks and Waivers



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Reference Checks and Waivers

Legal Responsibilities and Obligations

PREA Standard

- § 115.17: Hiring and promotion decisions
- *See also* §§ 115.117, 115.217, 115.317

Constitutional Claims (Liable to Inmate)

- Eighth/Fourteenth Amendment

Tort Law (Liable to Inmate)

- Negligent hiring



Reference Checks and Waivers – PREA Standards

28 CFR § 115.17: Hiring and promotion decisions

(c) **Before hiring new employees who may have contact with inmates**, the agency shall:

(2) Consistent with Federal, State, and local law, **make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.**



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Criminal Background Checks



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Criminal Background Checks

Legal Responsibilities and Obligations

PREA Standard

- § 115.17: Hiring and promotion decisions
- *See also* §§ 115.117, 115.217, 115.317

Constitutional Claims (Liable to Inmate)

- Eighth/Fourteenth Amendment

Tort Law (Liable to Inmate)

- Negligent Hiring



Criminal Background Checks – PREA Standards

28 CFR § 115.17: Hiring and promotion decisions

(c) Before hiring new employees who may have contact with inmates, the agency shall:

(1) Perform a **criminal background records check**

(d) The agency shall also **perform a criminal background records check before enlisting the services of any contractor** who may have contact with inmates.

(e) The agency shall either conduct **criminal background records checks at least every five years of current employees and contractors** who may have contact with inmates or **have in place a system for otherwise capturing such information for current employees.**



Criminal Background Checks – Constitution

Eighth Amendment

***Tafoya v. Salazar*, 516 F.3d 912 (10th Cir. 2008)**

Female inmate in a county jail was sexually assaulted by a male correctional officer, Ruiz.

The court found the sheriff was aware of conditions that were substantially likely to result in sexual assault, as he knowingly continued to employ detention officers with criminal records. The background check showed a DWAI conviction, a conviction for assault, and an arrest for resistance, destruction of city property, disturbance, and assault. After hiring, Ruiz was arrested for domestic violence and DWAI.

The court accepted the expert's explanation that "periodic evaluations including criminal background checks could have identified staff members that posed a particular threat to inmates."



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Promotion



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Promotion

Legal Responsibilities and Obligations

PREA Standard

- § 115.17: Hiring and promotion decisions
- *See also* §§ 115.117, 115.217, 115.317

Constitutional Claims (Liable to Employee)

- Fifth/Fourteenth Amendment
 - Due Process
 - Equal Protection

Federal and State Civil Rights Statutes (Liable to Employee)



Promotion – PREA Standards

28 CFR § 115.17: Hiring and promotion decisions

(a) The agency **shall not . . . Promote anyone who may have contact with inmates, and shall not enlist the services of any contractor who may have contact with inmates, who**

(1) Has **engaged in sexual abuse** in a prison, jail, lockup, community confinement facility, juvenile facility or other institution;

(2) Has **been convicted of engaging or attempting to engage in sexual activity in the community** facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse;

(3) Has **been civilly or administratively adjudicated** to have engaged in the activity described in paragraph (a)(2) of this section.



Promotion – PREA Standards

28 CFR § 115.17: Hiring and promotion decisions

(b) The agency **shall consider any incidents of sexual harassment in determining whether to . . . promote anyone, or to enlist the services of any contractor,** who may have contact with inmates.

(f) The agency **shall ask all applicants and employees who may have contact with inmates directly about previous misconduct** described in paragraph (a) of this section . . . for . . . promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency **shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.**



Investigation



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Investigation

Legal Responsibilities and Obligations

PREA Standard

- § 115.71: Criminal & administrative investigations
- *See also* §§ 115.171, 115.271, 115.371
- § 115.72: Evidentiary standard
- *See also* §§ 115.172, 115.272, 115.372

Constitutional Claims (Liable to Employee)

- Fifth/Fourteenth Amendment Due Process
- Fourth Amendment Privacy Rights

Federal and State Law

- Right to Representation (Union Employees)

Constitutional Claims (Liable to Inmate)

- Eighth/Fourteenth Amendment



Investigation – PREA Standards

28 CFR § 115.71: Criminal and administrative agency investigations

(a) When the agency **conducts its own investigations** into allegations of sexual abuse and sexual harassment, **it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.**

(b) Where sexual abuse is alleged, the **agency shall use investigators who have received special training** in sexual abuse investigations pursuant to §115.34.



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Investigation – PREA Standards

28 CFR § 115.71: Criminal and administrative agency investigations

(c) Investigators shall **gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence; any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.**

(d) When the quality of evidence appears to support criminal prosecution, the agency **shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for criminal prosecution.**



Investigation – PREA Standards

28 CFR § 115.71: Criminal and administrative agency investigations

(e) **The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as inmate or staff.**

(f) Administrative investigations:

(1) Shall include an effort to determine whether staff actions or failures to act contributed to the abuse



Investigation – PREA Standards

28 CFR § 115.71: Criminal and administrative agency investigations

(h) **Substantiated allegations** of conduct that appear to be criminal shall be **referred for prosecution**

(j) The **departure of the alleged abused or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation**



Investigation – PREA Standards

28 CFR § 115.72: Evidentiary standard for administrative investigations

The agency shall impose no standard higher than a **preponderance of the evidence** in determining whether allegations of sexual abuse or sexual harassment are substantiated.



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Investigation – Constitution

Garrity v. New Jersey, 385 U.S. 493 (1967)

Government cannot use information obtained from a public employee who has been threatened with negative job consequences for failure to cooperate in an investigation in a subsequent criminal proceeding.

Corrections staff can be required to answer questions in an administrative investigation and can be fired for refusing to answer or based on the answers they give, if the government does not use these answers in a criminal proceeding.

Therefore, agency must decide between criminal OR administrative investigations.



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Investigation – Constitution

Fifth/Fourteenth Amendment Due Process – Right to a Hearing

Public employees retain a property interest in their employment, and are entitled to some type of notice and hearing, either prior to, or after termination.

The court will consider:

- The employee's interest that the public employer's action will affect;
- The risk of an error affecting the employee's protected interests through the procedures the employer uses; and
- The public employer's interest in resolving the situation quickly.



Investigation – Constitution

Fifth/Fourteenth Amendment Due Process – Right to a Hearing

***Virgili v. Allegheny County*, 132 F. Appx. 947 (3d Cir. 2005)**

A corrections officer was suspended without pay after he was accused of providing marijuana to an inmate. Although the officer had a property interest in his position, protected by notice and hearing requirements, the court held that these protections do not always require pre-termination procedures.

***Macklin v. Huffman*, 976 F. Supp. 1090 (W.D. Mich. 1997)**

Prison food service employee was accused of sexual misconduct, and suspended without pay for two weeks pending investigation. The court held that the employee did not have a right to a hearing prior to his suspension, balancing the minimal intrusion on the employee against the prison's substantial interest in the investigation and its safety concerns.



Investigation – Constitution

Fourth Amendment – Privacy Rights

“Reasonable expectation of privacy”

Balancing test – courts will weigh intrusion on employee’s constitutional rights against weight of employer’s interest

Key issues under balancing test is “reasonableness”:

- Notice
- Methods
- Random vs. targeted
- Objective cause
- Balance between intrusiveness and employer need



Investigation – Constitution

Fourth Amendment – Privacy Rights

Depends heavily on work context

- Corrections officers working in secured areas have low expectations of privacy
- Probation officers and others working in the community may have higher expectations of privacy
 - E.g., Personal or apparently “personal” cars
- Extremely intrusive searches such as body cavity searches need more justification
 - Urine drug tests okay



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Investigation – Constitution

Fourth Amendment – Privacy Rights

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



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Investigation – Federal and State Law

Union Employees: Right to Representation

Under federal labor laws both private and public sector bargaining unit members **do** have rights to have a union representative present in interviews

- *Weingarten* Rights
- Federal Service Labor-Management Relations Statute

In some states, state labor laws covering public employees grant rights to union representation in interviews



Investigation – Federal and State Law

NLRB v. Weingarten, Inc., 420 U.S. 251 (1975)

Investigatory interviews:

- management questions an employee to obtain information which it could use as a basis for discipline;
- the employee has a reasonable belief that discipline or other adverse consequences may result.

Once the employee requests union representation, the employer may:

- grant the request;
- discontinue the interview; or
- offer the employee the choice of continuing the interview without the representative or having no interview at all.

The employee must specifically request the representation in order to invoke *Weingarten* protection



Investigation – Constitution

Legal Obligations to Inmates

- Facilities must remember that there is also an obligation to inmates to conduct investigations of staff and handle complaints appropriately
- Inmates can sustain Eighth and Fourteenth Amendment claims against agencies that do not properly investigate or terminate employees after allegations of sexual abuse



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Investigation – Constitution

Legal Obligations to Inmates

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

Officer sexual assaulted a female inmate. Warden and director of security were deliberately indifferent to the substantial risk of harm that correctional officer presented to female inmates, and held personally liable to inmate in amount of \$20,000 from director and \$25,000 in punitive damages from the warden.

- Officer had a history of predatory behavior; four prior investigations were closed as inconclusive
- A collective bargaining unit precluded permanent reassignment
- Director suspected the officer was abusive but did not take action and did not terminate the officer when she had the opportunity.
- Warden did not think officer posed a threat.



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Termination and Resignation



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Termination and Resignation

Legal Responsibilities and Obligations

PREA Standard

- § 115.17: Hiring and promotion decisions
- *See also* §§ 115.117, 115.217, 115.317
- § 115.76: Disciplinary sanctions
- *See also* §§ 115.176, 115.276, 115.376

Constitutional Claims (Liable to Employee)

- Fifth/Fourteenth Amendment

Tort Law (Liable to Employee)

- Defamation

Federal and State

- Civil Rights Laws (Liable to Employee)
- Bargaining Rights (Union)



Termination and Resignation – PREA Standards

28 CFR § 115.17: Hiring and promotion decisions

(g) Material omission regarding such misconduct, or the provision of materially false information, shall be grounds for termination



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Termination and Resignation – PREA Standards

28 CFR § 115.76: Disciplinary sanctions for staff

(a) Staff shall be **subject to disciplinary sanctions up to and including termination** for violating agency sexual abuse or sexual harassment policies

(b) **Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.**

(c) **Disciplinary sanctions for violations of agency policies** relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be **commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.**



Termination and Resignation – PREA Standards

28 CFR § 115.76: Disciplinary sanctions for staff

(d) **All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing body.**



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Termination and Resignation – PREA Standards

28 CFR § 115.77: Corrective action for contractors and volunteers

(a) Any contractor or volunteer who engages in sexual abuse shall be prohibited from contact with inmates and shall be reported to law enforcement agencies unless the activity was clearly not criminal, and to relevant licensing bodies

(b) The facility **shall take appropriate remedial measures, and shall consider whether to prohibit further contact with inmate**, in the case of any other violation of agency sexual abuse or sexual harassment policies by a contractor or volunteer.



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Termination and Resignation – Constitution

Fifth/Fourteenth Amendment Due Process

- Private sector, non-union: employers may fire at will except for reason based on illegal discrimination (race, gender, religion, national origin, age).
- Public sector, non-union: right to notice and hearing.
- Public and private sectors, union: bargaining unit members have the right to use the grievance and arbitration process defined in their collective bargaining agreement.



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Termination and Resignation – Common Law

State Law Claim: Defamation

- “Act of harming the reputation of another by making a false statement to a third person.”
BLACK’S LAW DICTIONARY 448 (8th ed. 2004).
- Official Statements Privilege
- Qualified Privilege for Employer Communications



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Termination and Resignation – Federal and State Law

Federal and State Civil Rights: Discrimination

Terminated employees can claim discrimination under civil rights law:

- Title VII
- State civil rights statutes

***English v. Colo. Dep't of Corr.*, 248 F.3d 1002 (10th Cir. 2001)**

Corrections agency fired a male African American supervisor following an investigation into allegations of sexual misconduct.

The court held that the agency had a legitimate conflict-of-interest reasons for replacing the investigating officer, the dismissal of criminal charges had no bearing on the evidentiary results of the internal investigation, and the case of the white officer whom the agency had not terminated involved a factually dissimilar situation.



Termination and Resignation – Federal and State Law

Federal and State Civil Rights: Discrimination

Hooks v. Ga. Dep't of Corr., 311 F.Appx. 295 (11th Cir. 2009)
African American female probation officer alleged that her employer discriminated against her on the basis of race and gender when it terminated her for failing to cooperate with her supervisors' attempts to train her and evaluate her performance.

The Eleventh Circuit held that the employee failed to show that her employer had retained similarly situated employees outside of the employee's protected class who had engaged in conduct similar to that for which her employer had terminated her.



Cross-Gender Supervision



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Cross-Gender Supervision

Legal Responsibilities and Obligations

PREA Standard

- § 115.15: Cross-gender supervision
- *See also* §§ 115.115, 115.215, 115.315

Constitutional Claims (Liable to inmate)

- Fourth Amendment
- Eighth Amendment



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Cross-gender Supervision – PREA Standards

28 CFR § 115.15: Limits to cross-gender viewing and searches

(a) The facility **shall not conduct cross-gender strip searches or cross-gender visual body cavity searches . . . except in emergency circumstances or when performed by medical practitioners**

(b) . . . 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

(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**



Cross-gender Supervision – PREA Standards

28 CFR § 115.15: Limits to cross-gender viewing and searches

(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.



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Cross-gender Supervision – Constitution

Constitutional Claims – Liable to Inmate

- Fourth Amendment

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

A female cadet conducted a pat-down search on a male detainee. The court found that the search violated detainee's Fourth Amendment right to be free from unreasonable searches.

The court distinguished this case from other cross-gender pat-down searches that did not violate the Fourth Amendment noting that the officer touched the detainee's penis and scrotum, and that the detainee was essentially unclothed.



Cross-gender Supervision – Constitution

Constitutional Claims – Liable to Inmate

- Eighth Amendment

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

Female inmate in a special unit for victims of sexual abuse filed § 1983 action against prison officials claiming Fourth and Eighth Amendment violations inherent in the prison's practice of permitting male officers to conduct pat searches of female inmates.

The court denied the motion to dismiss the Eighth Amendment claim, due to the special vulnerability of the inmate. Did not reach the Fourth Amendment claim.



Bona Fide Occupational Qualification (BFOQ)



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Bona Fide Occupational Qualification

Legal Responsibilities and Obligations

- Title VII (Liable to employee)
- State Civil Rights Laws (Liable to employee)
- Courts will balance the inmates' interest in freedom from sexual assaults and right to privacy against the employment rights of correctional officers



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Bona Fide Occupational Qualification

Legal Responsibilities and Obligations

Standard: Gender-based job qualification must be related to the central function of the facility, and reasonably necessary to the normal operations of the facility.

- ***Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977):** exclusion of females in contact positions in violent male maximum security prisons may be a BFOQ
- ***Breiner v. Nevada Dep't of Corr.*, 610 F.3d 1201 (9th Cir. 2010):** Female gender was not a BFOQ for all three lieutenant positions at a women's correctional facility as precluding men was not necessary reduce instances of sexual abuse
- ***Henry v. Milwaukee County*, 539 F.3d 573 (7th Cir. 2008):** No BFOQ for females supervising male juveniles.



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Bona Fide Occupational Qualification – Federal Law

Title VII Claim

***Everson v. Michigan Dept. of Corrections*, 391 F.3d 737 (6th Cir. 2004)**

In response to sexual assaults of female inmates, the Michigan Department of Corrections designated approximately 250 positions in female housing as "female only." The plaintiffs filed suit under Title VII and Michigan state law.

The court held that gender was a BFOQ for housing positions in female prisons.



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Anti-Fraternization Policies



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Anti-Fraternization Policies

Legal Responsibilities and Obligations

- Constitutional Claims (Liable to Employee)
 - First Amendment
- Employer interests that support anti-fraternization policies
 - On-the-job performance
 - Off-the-job conduct that implicates officer's fitness for duty
 - Public reputation of correctional institution
- Many court cases involving police and corrections officers uphold policies regulating off-duty conduct



Anti-Fraternization Policies – Constitution

First Amendment

***Reuter v. Skipper*, 832 F. Supp. 1420 (D. Or. 1993)**

A female corrections officer was placed on administrative leave due to her intimate association with an ex-felon. She brought a claim alleging violation of her First Amendment rights.

The court granted her motion for summary judgment, relying upon the fact that the parties had developed an intimate relationship which *predated* the enactment or implementation of the sheriff's rules that made association with a person who was convicted of a felony within the past ten years a "presumptive conflict of interest."



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Anti-Fraternization Policies – Constitution

First Amendment

Poirier v. Massachusetts Dept. of Correction, 558 F.3d 92 (1st Cir. 2009)

Female corrections officer developed a relationship with male inmate and continued the relationship. She requested permission for the inmate to reside with her and was fired for unauthorized contact. Poirier claims that the DOC and its commissioner violated her First Amendment right, specifically the right to intimate association, and her Fourteenth Amendment right.

The court found the officer's rights were not violated and dismissed her complaint.



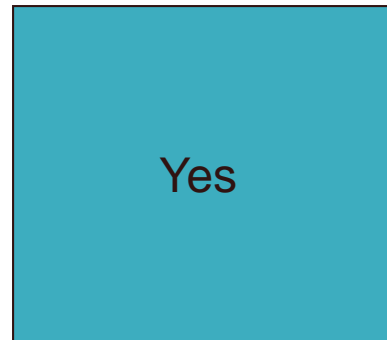
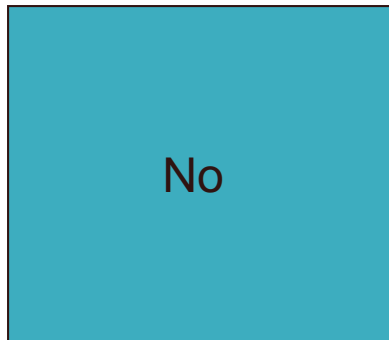
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Anti-Fraternization Policies

What's OK?

Termination of a state corrections officer who was married to a man who was previously incarcerated in the state prison system for a felony.



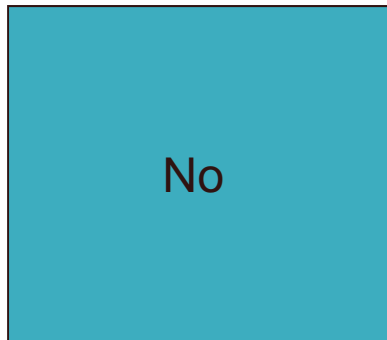
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Anti-Fraternization Policies

What's OK?

Termination of probation officer for buying a car at a dealership where probationer under her supervision worked though he was not involved in the sale.

No

Yes



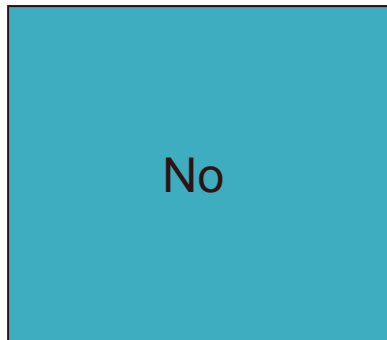
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Anti-Fraternization Policies

What's OK?

Termination of probation officer who exchanged letters with a man she had previously dated who was serving life sentence in prison outside her jurisdiction.

No

Yes



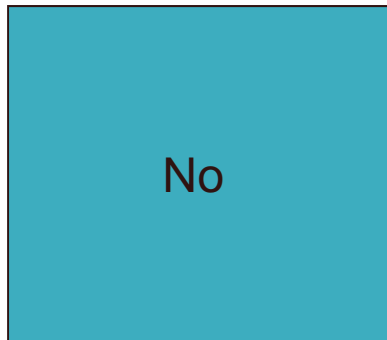
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Questions



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Resources

- Smith, Brenda V. and Melissa C. Loomis. Cross-gender Searches: A Case Law Survey (February 1, 2013)
 - http://www.wcl.american.edu/endsilence/documents/CrossGenderCases_PRC.pdf
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 - http://www.wcl.american.edu/endsilence/documents/AntiFratCases_FINAL.pdf
- United States. Office of Inspector General. *Enhanced Screening of BOP Correctional Officer Candidates Could Reduce Likelihood of Misconduct*. Washington, DC. September 2011.
 - http://www.wcl.american.edu/endsilence/documents/EnhancedScreeningofCOCandidates_OIG2011.pdf
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 - <http://www.wcl.american.edu/endsilence/documents/LaborandEmploymentLawFINALOctober2009.pdf>
- Simonian, Nairi and Smith, Brenda V. *A memo regarding Anti-Fraternization policies and case law in the Ninth Circuit* (January 2006)
 - <http://www.wcl.american.edu/endsilence/documents/11.Anti-Fraternization.pdf>



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Evaluation and Follow-up

We would like your feedback!

- An evaluation survey is posted at:
<http://www.surveygizmo.com/s3/1262179/The-National-PREA-Standards-Implications-for-Human-Resource-Practices-in-Correctional-Settings-May-2013>
- Surveys should be completed by **Thursday, June 13, 2013 at 5:00 p.m. EDT.**

A follow-up email will be sent immediately following this webinar. That email will include the link for the evaluation survey as well as a link to the recording and PowerPoint for this session.

If you watched this webinar in a group, please forward the link for evaluation to the whole group.



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