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## **Civil Liability for Sexual Assaults on Prisoners**

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### **1. Introduction**

A serious problem in many prisons and jails is the prevalence of sexual assaults on inmates. It has been estimated that as many as one in five male prisoners and one in four female prisoners may have been subjected to sexual assault or abuse of some kind, with youthful prisoners, homosexual prisoners, and transsexual or transgendered prisoners frequently targeted.

In recent years, there has been increasing attention to this problem, which has led to a number of reports, the gathering of statistics, and the passing of legislation. Some of the more recent and useful material is listed at the end of this article, with links to the full texts of the material when available on-line.

The problem has also led, inevitably, to a number of lawsuits by prisoners seeking to impose liability on correctional institutions, and on supervisory personnel, as well as rank and file correctional officers, for alleged failure to protect them against such assaults.

In the following article, we will briefly examine some of the existing case law in the areas of sexual assaults on prisoners by other inmates, sexual assaults on prisoners by correctional officers or employees, and such assaults based on sexual orientation and/or against youthful prisoners.

## 2. Sexual Assaults on Prisoners by Other Inmates.

In an important U.S. Supreme Court case, [Farmer v. Brennan](#), No. 92-7247, 511 U.S. 825 (1994), the problem of protecting prisoners from sexual assault by other inmates was addressed. The case involved a preoperative transsexual prisoner who projected feminine characteristics, and who was in custody in the federal prison system with other males, occasionally in the general population, but more often in segregation. He claimed that he had been both beaten and raped by an inmate after he was transferred from a correctional institution to a penitentiary, which is usually a higher security facility with more "troublesome prisoners," and placed in the general population there.

He filed a federal civil rights lawsuit seeking damages for the alleged failure of federal prison officials to protect him against such assaults, arguing that they acted with "deliberate indifference" to his safety, thereby violating the Eighth Amendment's prohibition on cruel and unusual punishment.

He based this claim on assertions that the officials knew that the facility to which he was sent was a "violent environment," and that it had a prior history of such assaults, as well as that he would be especially vulnerable to sexual assaults because he was a transsexual.

The U.S. Supreme Court rejected the notion that prison officials could only be held liable for a violation of the Eighth Amendment if they acted recklessly "in a criminal sense," or, in other words, had "actual knowledge" of an impending attack or potential danger. The Court ruled that it was sufficient for liability if it is proven that prison officials have acted with "deliberate indifference" to inmate health or safety. This can be shown if the official knows that prisoners face a "substantial risk" of serious harm, and despite that disregards the risk by failing to undertake reasonable measures to prevent the harm. In order to make out an Eighth Amendment violation, the Court also states, the prisoner must also show that the alleged deliberate indifference has resulted in "sufficiently serious harm."

Negligence alone is not enough, the Court held, but a plaintiff prisoner need not show that prison officials acted or failed to act intentionally, or for the "very purpose" of inflicting harm on the prisoner. The Court characterized the "deliberate indifference" requirement as "subjective recklessness," i.e., disregarding a risk of harm of which the defendant was aware. Accordingly, the failure to remedy a significant risk of harm that a prison official "should have" been aware of, but was not aware of, while unfortunate, would not be enough to impose liability. In prisoner lawsuits over sexual assaults, therefore, the court must necessarily inquire into a prison official's "state of mind."

Under this test, the Court cautioned, a prison official may not escape liability

for deliberate indifference by demonstrating that, while he or she was aware of an "obvious, substantial risk" to inmate safety, he did not know that the prisoner was "especially likely to be assaulted by the specific prisoner who eventually committed the assault."

It should be noted, however, that a lesser standard (in some instances negligence) may be enough under state law, including state law applied to federal prisons pursuant to the Federal Tort Claims Act, to impose liability for failure to protect a prisoner from a sexual assault.

An allegation of deliberate indifference may be refuted by evidence that prison officials or employees did attempt to take remedial action after becoming aware that there was a potential problem, even if a sexual assault still takes place. In one such case, a prisoner allegedly sexually assaulted in another prisoner's cell after being brought there by a prison guard failed to show that other prison officials violated his constitutional rights in failing to protect him. Rather than acting with deliberate indifference, the court found, those prison officials promptly acted to transfer him to another facility for his protection after learning that he felt unsafe, even in protective custody. The prisoner was, however, awarded \$6,000 in damages in default judgment against prison guard. [Smith v. Cummings](#), No. 05-3180. 445 F.3d 1254 (10th Cir. 2006).

In [Hunt v. New York](#), 9623-9624, Claim 101841, 2007 N.Y. App. Div. Lexis 602, 828 N.Y.S.2d 355 (1st Dept.), correctional officials could not argue that they had no knowledge of the risk of a sexual assault on the plaintiff prisoner. Rather, the court found, the New York corrections department was liable for damages for a sexual assault on prisoner when it failed to comply with a criminal court judge's order that he be placed in protective custody based on prior sexual assaults against him while in a jail's general population.

In contrast, in [Allen v. York County Jail](#), No. 06-1461, 213 Fed. Appx. 13, 2007 U.S. App. Lexis 1436 (1st Cir.), the court found that a correctional officer did not act with deliberate indifference by placing an inmate in a cell with inmates who had previously sexually assaulted him when she did not have knowledge of that prior attack, and removed him from the cell as soon as he made a request that she do so.

The alleged failure to protect prisoners who are sexually assaulted against subsequent repeated rapes was at issue in another case. In [Conley v. Very](#), No. 05-2650, 2006 U.S. App. Lexis 15548 (8th Cir.), a prisoner claimed that a housing unit manager improperly denied his request for protective custody after his cellmate allegedly raped him, resulting in multiple subsequent rapes. The appeals court found that the trial judge improperly told the jury, in response to their

question, that there was "no evidence presented" about prior complaints about the defendant denying requests for protective custody, rather than instructing them that their question was irrelevant. The relevant issue, instead, was whether the defendant acted with deliberate indifference to a known risk of serious harm to the prisoner, based on his knowledge at that time. After the trial judge answered the jury's question, they quickly found for the defendant, so the appeals court ordered a new trial in the case.

In Brown v. Scott, 329 F. Supp. 2d 905 (E.D. Mich. 2004), the court found that the manager of a residential unit in a state prison was not entitled to dismissal or summary judgment in lawsuit asserting that he failed to protect prisoner from a sexual assault by his cellmate. There were genuine issues of fact as to whether the defendant knew that the cellmate was a "predatory" homosexual who had attacked others. The plaintiff prisoner claimed that he had informed the manager of this in making a request for a different cell assignment, and the court found that the inmate's right to be protected against such assaults by his cellmate was clearly established.

The mere fact that a particular action actually results in a sexual assault will not result in liability, in the absence of proof that the individual taking the action had knowledge of a risk of harm to the prisoner. A lieutenant who assigned a prisoner a new cellmate who subsequently sexually assaulted him was not liable, despite prisoner's claim that he feared an assault from a Latin Kings gang member. There was no showing that the sexual assault had anything to do with this gang, and there was no evidence from which the lieutenant could be said to be aware of a substantial risk of harm from pairing these two prisoners together. Riccardo v. Rausch, #02-1961, 359 F.3d 510 (7th Cir. 2004).

Similarly, a homosexual prisoner did not successfully show that a prison guard was deliberately indifferent to his safety in placing him with a cellmate who subsequently raped him.

The plaintiff's statement to the guard that he was "nervous" about being placed in a cell with another prisoner was insufficient to show that the guard in fact knew of the risk and ignored it. Harvey v. California, No. 02-16539, 82 Fed. Appx. 544 (9th Cir. 2003).

Prisoner lawsuits over the issue of failure to protect them against sexual assaults are, of course, also subject to the defenses available in other litigation, including technical ones such as statute of limitations. In Douglas v. York County, No. 05-1940, 433 F.3d 143 (1st Cir. 2005), the court ruled that a female prisoner could not pursue a lawsuit over her alleged gang rape by male prisoners over thirty years later because her claims were barred by the applicable statute of limitations,

and it could not reasonably be concluded that she was mentally ill from 1971 until 1996, thereby extending the statute.

### **3. Sexual Assaults on Prisoners by Correctional Officers or Employees.**

It is obvious that when a sexual assault on a prisoner is allegedly carried out by a correctional officer or employee, it violates the prisoner's rights, and will subject the officer or employee to liability under federal or state law, or both. What courts have had to grapple with more is the issue of potential liability for the correctional agency, for supervisory officials, and for other correctional officers or employees who arguably may have had knowledge of the risk of the assault occurring, and yet failed to act.

Correctional agencies will not be held vicariously liable for a sexual assault on a prisoner by a correctional officer or other employee merely on the basis of being their employer, since such activity is not within the scope of the assailant's employment, and cannot be said to have been carried out in order to further the employer's interests.

In [Shirley v. U.S.](#), No. 06-10654, 2007 U.S. App. Lexis 11696 (5th Cir.), for instance, the court ruled that a federal prison officer did not act within the scope of his employment during his alleged sexual assault on a female prisoner. His alleged wrongful actions did not arise from a legitimate employment duty or goal furthering his employer's interests. The fact that the officer was successfully criminally prosecuted for abuse of a ward under 18 U.S.C. Sec. 2243(b) did not bar the U.S. government from asserting that the officer was acting outside of the scope of his employment, because a conviction for that offense did not establish, under Texas state law, that the officer acted within the scope of his employment.

While the U.S. government was not liable for the intentional actions of one federal prison guard who was convicted of sexual assault of an inmate, there was an issue of material fact as to whether the actions of two other guards, who allegedly brought the inmate to that guard at his request, giving him unmonitored access to a female prisoner, in violation of prison regulations, after midnight, led to the assault. Summary judgment was therefore denied on the plaintiff prisoner's lawsuit under the Federal Tort Claims Act, 28 U.S.C. Sec. 1346. [Davis v. U.S.](#), 3:03-CV-0415, 474 F. Supp. 2d 829 (N.D. Tex. 2007).

The U.S. government could not be sued, under the Federal Tort Claims Act (FTCA), 28 U.S.C. Sec. 2671 et seq., for the negligent hiring, supervision, management, and training of an officer who allegedly raped a female jail inmate while assigned to transport her between correctional facilities. Because the underlying claim arose out of the alleged commission of intentional wrongdoing,

the rape, and the FTCA only provides for lawsuits based on negligence, the U.S. government was immune from the plaintiff's claims. [Martinez v. U.S.](#), No. CV02-1164, 311 F. Supp. 2d 1274 (D.N.M. 2004).

What basis may supervisory personnel be held liable? A court found that a prison superintendent and assistant superintendent could not be held personally liable for a correctional officer's alleged sexual assault on female prisoner in her cell, in the absence of any evidence that they were personally involved in the incident, had any actual or constructive knowledge of past violations which they failed to remedy, were grossly negligent in supervising the officer, or were deliberately indifferent to a known risk of harm. [Morris v. Eversley](#), 282 F. Supp. 2d 196 (S.D.N.Y. 2003).

One female inmate sexually assaulted by prison guard was found to have been properly awarded \$15,000 in compensatory and \$5,000 in punitive damages against a prison security director and \$25,000 in punitive damages against warden for failure to protect her against the assault, based on the guard's prior actions that a jury could have found put them on notice that he posed a substantial risk of serious harm to female prisoners. [Riley v. Olk-Long](#), #00-3411, 282 F.3d 592 (8th Cir. 2002).

Actions by prison officials to investigate and punish sexual misconduct by correctional officers, as well as providing training on the subject, can help defeat subsequent claims of deliberate indifference. In [Heggenmiller v. Edna Mahan Correctional Institution for Women](#), #04-1786, 128 Fed. Appx. 240 (3rd Cir. 2005), prison administrators were not shown to have acted with deliberate indifference to the risk of sexual assaults by male guards on female prisoners when they investigated six prior incidents occurring in a four year period, and this resulted in the firing and prosecution of five guards. The prison administrators also showed that they vigorously enforced the prison's "no contact" rules, and themselves established policies that forbid sexual activities between guards and prisoners. The policies in question were included in the training received by all officers.

In contrast, a sheriff who allegedly left two female inmates in the custody of the same male employees they alleged had sexually molested them was not entitled to qualified immunity in a lawsuit by one of them for failing to protect her against a known risk of harm. [Gonzales v. Martinez](#), No. 03-1348, 403 F.3d 1179 (10th Cir. 2005).

Similarly, failure to provide adequate training and supervision on the issue of sexual assault, or to provide any at all, may be a basis for liability. In [Drake v. City of Haltom](#), #03-10594, 106 Fed. Appx. 897 (5th Cir. 2004), the court found

that female prisoners who claimed that they were sexually assaulted by a jailer stated a viable claim against the city for alleged failure to adequately train or supervise its jailers. "We are unwilling to say, at this point, that it is not obvious that male jailers who receive no training and who are left virtually unsupervised might abuse female detainees."

In one Texas case, the possible liability of a county for sexual assault and harassment of female prisoners was based on a number of conditions in the facility. An intermediate Texas appeals court found that a lawsuit against the county by female prisoners who claimed that guards subjected them to sexual assault and harassment was improperly dismissed by the lower court.

The prisoners' claims that the county knew or should have known that security cameras in the facility were non-functioning and improperly placed, and that aspects of the layout of the facility permitted guards to have unlimited, unmonitored access to prisoners to facilitate such assaults and harassment was sufficient to come within a statutory waiver of governmental immunity based on premises defects. [Campos v. Nueces County](#), No. 13-03-724, 162 S.W.3d 778 (Tex. App. 2005).

In [Scott v. Moore](#), #93-8603, 114 F.3d 51 (5th Cir. 1997), however, in a federal civil rights lawsuit, requiring a showing of deliberate indifference rather than negligence, the failure of a city jail to have a female jailer on duty or to have two male jailers on duty who could watch each other did not constitute a policy of inadequate staffing making it liable for male jailer's repeated sexual assault of a female pretrial detainee in her cell.

A deputy who served as supervisor at county jail was not entitled to summary judgment in female detainee's lawsuit claiming that he had been deliberately indifferent to the risk that a correctional officer would sexually assault her. The deputy himself stated that no officer was authorized to go into a detainee's cell after lockdown, but that he knew that a trainee officer went into the plaintiff detainee's cell three times within an hour after lockdown. The detainee's right to be protected against sexual assault was clearly established, so that the supervisor was not entitled to qualified immunity. [Kahle v. Leonard](#), No. 06-2485, 477 F.3d 544 (8th Cir. 2007).

In another case, female former inmates of federal community confinement center operated by a private company failed to show that company was negligent in failing to uphold a one-year security experience requirement when transferring an employee to a "resident advocate" position. They failed to demonstrate that there was any connection between the employee's lack of security experience and his alleged sexual abuse of inmates. The company could not be held vicariously

liable for the alleged abuse simply on the basis of the employer-employee relationship. There was, however, a triable issue of whether the company was negligent in retaining the employee after it received a report of his alleged sexual harassment of one female prisoner. Adorno v. Correctional Services Corp., 312 F. Supp. 2d 505 (S.D.N.Y. 2004).

Some cases have involved alleged sexual assaults on inmates by correctional employees or other public employees who are not correctional officers. In one such case, a drivers' license examiner's alleged conduct of forcing a female inmate in a work release program to have sex with him in exchange for special privileges, and under threat of being removed from the program, was found to have violated clearly established Eighth Amendment law, and was sufficiently outrageous to support a claim for intentional infliction of emotional distress under Oklahoma state law. Smith v. Cochran, 216 F. Supp. 2d 1286 (N.D. Okla. 2002).

#### **4. Sexual Orientation and Youthful Prisoners.**

Sexual assaults on prisoners based on their sexual orientation, and sexual assaults on youthful prisoners have been the subjects of a number of cases.

In R.G. v. Koller, No. Civ.05-00566, 415 F. Supp. 2d 1129 (D. Hawaii 2006), [subsequent decision](#) at 2006 U.S. Dist. Lexis 21254, a juvenile facility in Hawaii was ordered to take steps to remedy "pervasive" sexual, physical, and verbal abuse of lesbian, gay, bisexual, or transgender juvenile wards, and to stop, except in emergencies, using isolation as a means of "protecting" such wards against abuse and harassment

Three juveniles at the facility claimed that they were subjected to abuse and harassment on the basis of their actual or perceived sexual orientation. Based on the evidence presented, the federal trial court found that the facility's use of isolation to "protect" lesbian, gay, bisexual or transgender juvenile wards was improper and constituted punishment in violation of their due process rights.

The court stated that such isolation, which effectively punished the wards based on the actual or possible reaction of others to their sexual orientations, was not an acceptable professional practice.

The court also found that officials at the youth facility had acted with "deliberate indifference" to pervasive sexual, physical, and verbal abuse of lesbian, gay, bisexual or transgender juveniles, which included threats of violence, physical and sexual assault, the constant use of "homophobic slurs" against them, and imposed social isolation.

In Ashmore v. Hilton, No. 02-816, 834 So. 2d 1131 (La. App. 2002), rehearing

denied (2003), a city was found liable under state law for the alleged rape of a 16-year-old female juvenile doing court mandated community service by an inmate-trustee working for the city. The trial court was found to have properly assessed the city as 70% negligent and the inmate-trustee as 30% at fault when the city had an obligation to supervise the inmate-trustee, but knowingly allowed the teenage victim to work with him in a situation where they were left alone. The city was held liable for 70% of a \$153,365.64 general damage award, but no liability was found for damages or attorneys fees under 42 U.S.C. Sec. 1983 and 1988.

The failure to protect prisoners from sexual assault on the basis of their sexual orientation may be an independent ground for finding liability. In one case a federal appeals court rules that if prison officials and employees actually declined to protect a homosexual prisoner from repeated prison rape because of his sexual orientation, that would violate clearly established law, so that qualified immunity on that claim should be denied. The court noted that the "[defendants have not attempted to argue that according homosexuals less protection than other inmates would advance any legitimate aim,](#)" so that the alleged conduct would be unreasonable. [Johnson v. Johnson](#), No. 03-10455 385 F.3d 503 (5th Cir. 2004).

## **5. Relevant Resources.**

There has been, in the last few years, a good amount of study of the problem of prison rape and sexual assault, as well as legislative action by both the federal government and the states.

Below are some relevant and useful resources to assist in grappling with this serious problem. Listing of an item here indicates that it contains useful or thought-provoking material, and does not imply endorsement of the particular point of view of a specific article or report. Items are generally listed with the more recent publications first:

### **Articles:**

- [Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act](#), Margo Schlanger and Giovanna Shay, Am. Constitution Soc'y for Law & Policy (March 2007).
- "[By the Light of Virtue: Prison Rape and the Corruption of Character](#)," 91 *Iowa L. Rev.* 561 (2006).
- [Rethinking Prison Sex: Self-Expression and Safety](#), 15 *Colum. J. Gender & L.* 185 (2006). Author(s) Smith, Brenda V.
- "[The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79--The Prison Rape Elimination Act of 2003](#)," by Robert W.

Dumond, 32 J. Legis. 142 (2006).

- ["The Prison Litigation Reform Act: A Proposal For Closing the Loophole For Rapists,"](#) by Deborah M. Golden, Am. Constitution Soc'y for Law & Policy (June 2006).
- [No Refuge Here: A First Look at Sexual Abuse in Immigration Detention,](#) by [Stop Prison Rape.](#) (34 pgs., October 2004, PDF, 3.15 megabytes). A report on alleged sexual assaults in [U.S. Immigration and Customs Enforcement](#) (ICE) detention facilities, which house an average of 200,000 people.
- ["The Impact and Recovery of Prison Rape,"](#) by Robert W. Dumond, Franklin Pierce College/Consultants for Improved Human Services. (2001) (.pdf format).
- ["Rape and Sexual Misconduct in the Prison System: Analyzing America's Most 'Open' Secret,"](#) by Cheryl Bell, et al., 18 Yale L. & Policy Rev. 195 (1999). (.pdf format).

### **Legislation:**

- The [Prison Rape Elimination Act of 2003](#) (Public Law 108-79, signed on September 4, 2003), requires the [Bureau of Justice Statistics \(BJS\)](#) to measure the incidence and prevalence of sexual assault within the Nation's correctional facilities.
- California has enacted a statute, the [Sexual Abuse in Detention Elimination Act](#), seeking to protect inmates from sexual assault while held in California detention facilities.
- Texas enacted, on May 22, 2007, [legislation](#) which focuses on preventing and addressing problems of prisoner rape. It takes effect in September of 2007, and creates a sexual assault ombudsperson for Texas correctional facilities, as well as eliminating a previously existing 15-day deadline for filing a grievance after a sexual assault.

### **Procedure:**

- [Director's Instruction #241, Sexual Assault Procedures. Arizona Department of Corrections.](#)

### **Reports:**

- ["Call for Change: Protecting the Rights of LGBTQ Detainees,"](#) a report by Stop Prisoner Rape, 8 pgs. May 2007.
- ["Hope for Healing: Information for Survivors of Sexual Assault in Detention,"](#) a report by Stop Prisoner Rape. (31 pages, .pdf format, 2006). A publication intended to offer information about the impact of sexual abuse and to assist survivors in efforts to heal from this form of violence.
- ["In The Shadows: Sexual Violence in U.S. Detention Facilities,"](#) a report by

Stop Prisoner Rape. (29 pgs., .pdf format, 2006). Sexual Violence in the Texas Prison System, NIJ-Sponsored, September 2006, NCJ 215774. (75 pages). [PDF](#) [NCJRS Abstract](#)

- [Still in Danger: The Ongoing Threat of Sexual Violence Against Transgender Prisoners](#). Joint publication by Stop Prisoner Rape and the [ACLU National Prison Project](#) (14 pgs., .pdf format, 2005).
- [Deterring Staff Sexual Abuse of Federal Inmates](#), by the U.S. Department of Justice, [Office of the Inspector General](#) (May 2, 2005). (27 pgs). [[PDF](#)] [[HTML](#)]
- "[The Sexual Abuse of Female Inmates in Ohio](#)," by [Stop Prison Rape](#) (SPR), 18 pgs, December 2003. [[PDF](#)]
- [Sexual Misconduct in Prisons: Laws, Remedies, and Incidence](#), U.S. Department of Justice, National Institute of Corrections (May 2000). (.pdf format).
- [Investigating Allegations of Staff Sexual Misconduct with Inmates](#), U.S. Department of Justice, National Institute of Corrections (2000).

#### **Statistical Information:**

- [Sexual Violence Reported by Correctional Authorities, 2005](#). Presents data from the Survey on Sexual Violence, 2005. 7/06 NCJ 214646 [Press release](#) | [Acrobat file](#) (337K) | [ASCII file](#) (34K) | [Spreadsheets](#) (zip format 60K)
- [Sexual Violence Reported by Correctional Authorities, 2004](#). Presents data from the Survey on Sexual Violence, 2004. 07/05 NCJ 210333 [Press release](#) | [Acrobat file](#) (322K) | [ASCII file](#) (39K) | [Spreadsheets](#) (zip format 40K)
- [Data Collections for the Prison Rape Elimination Act of 2003](#). This Status Report includes highlights of the legislation and addresses some of the complexities of collecting sensitive data from various correctional populations. 07/04 NCJ 206109 [Acrobat file](#) (26K) | [ASCII file](#) (651K) Draft survey instruments for the Survey on Sexual Violence: [State Prison Systems](#) SSV2 (568K) [Local Jail Jurisdictions](#) SSV3 (568K) [State Juvenile Systems](#) SSV5 (576K)

#### **Website:**

- Stop Prison Rape (SPR): <http://www.spr.org/>

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