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Homosexual and Bisexual Prisoners

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Introduction

Many homosexual and bisexual prisoners and detainees are confined in U.S. jails and prisons. There have been many changes over the years concerning how the law regards homosexuality. This article does not attempt to survey all of those changes, from the court decisions eliminating criminal penalties for consensual same sex sexual relations, to recognition of same sex marriage in at least six states, to state statutes and local ordinances prohibiting discrimination on the basis of sexual orientation. What it does attempt to do, however, is examine some of the court decisions in which the issue of treatment of homosexual or bisexual prisoners or detainees present. These cases have often concerned questions about the need to provide such prisoners with protection against assault and harassment, or the issue of whether such prisoners can lawfully be separated or isolated from heterosexual prisoners in housing assignments. There is also at least one court decision concerning homosexual displays of affection during visitation.

This article also does not attempt to address special concerns involving transsexual prisoners, or the possible impact that legal recognition of same sex marriage may have in some jurisdictions on such areas as visitation, conjugal visits or family reunion programs, etc. At the conclusion of the article, a number of useful resources are listed.

Protection from Assault and Harassment

A number of court decisions in recent years have addressed the need to provide protection to homosexual or bisexual prisoners against assault or harassment. In Radillo v.

Lunes, #1:04-CV-5353, 2008 U.S. Dist. Lexis 82576 (E.D. Cal.), the court held that a prisoner who was a member or associate of the Mexican Mafia gang could pursue his claim that a prison guard put him at risk of assault by gang members by telling others that he had engaged in a homosexual act. This was the case even though he had not actually been subsequently attacked as a result of the statement.

The prisoner presented undisputed facts indicating that the gang did not tolerate homosexual acts, and that the guard knew of the risk of harm that making such a statement to gang members created. The court stated that this was different from cases in which prisoners' claims of a failure to protect were rejected when they were based on a speculative fear that they would later be attacked if other prisoners thought that they were a "snitch," since the alleged action here would create a known specific risk of attack.

In Harvey v. California, #02-16539, 82 Fed. Appx. 544 (Unpub.9th Cir. 2003), a federal appeals court ruled that a homosexual prisoner did not successfully show that 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. An alleged three-day delay in providing medical treatment following the rape did not show inadequate medical care, in the absence of any showing that the delay caused any harm.

In R.G. v. Koller, #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. The court rejected, however, the claim that staff members violated the First Amendment rights of the juveniles by quoting from the Bible or discussing religion with them, when there was no evidence that these actions were based on the facility's policies.

In this case, three juveniles who either are or are "perceived as" lesbian, gay, bisexual or transgender, and who have been confined at a state juvenile correctional facility in Hawaii claimed that various practices there violated their rights to due process, equal protection of law, and under the Establishment of Religion clause of the First Amendment. They claimed that they were subjected to harassment and abuse 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 rejected the argument that the plaintiffs' claims were moot because none of them were currently incarcerated at the facility, as they showed a likelihood of repetition of their injuries, since each of them had previously been incarcerated at the juvenile facility two or three times, so that each of them was likely to return at some time.

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.

The court rejected, however, the claim that the staff members at the facility violated the plaintiff's rights under the First Amendment's Establishment Clause by promoting religion through discussion and quoting from the Bible, since there was no evidence that they did so pursuant to an explicit policy, that the facility ratified their actions, or that the employees in question had any policy-making powers.

In a subsequent preliminary injunction order, the court ordered the facility and its employees not to discriminate against, abuse, or harass any juvenile ward because of their actual or perceived sexual orientation, and to counsel or discipline employees who did so.

The injunction bars the use of isolation against such wards as a means of keeping them "safe," except for temporary emergency protective segregation in certain instances, as opposed to its use as a routine practice.

The court further ordered the defendants to develop policies and procedures to help protect gay, lesbian, bisexual or transgender wards against abuse and harassment and to hire a consultant to guide their compliance with the court's injunctive order.

In Johnson v. Johnson, #03-10455, 385 F.3d 503 (5th Cir. 2004), a federal appeals court ruled 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.

In this case, a Texas prisoner filed a federal civil rights lawsuit against fifteen prison officials. According to his version of events, which was disputed by the defendants, he endured a "horrific" eighteen-month period of incarceration during which the defendants failed to protect him from repeated rape by prison gangs who "bought and sold him as a sexual slave." He asserted Eighth Amendment claims, as well as equal protection claims based on his status as a homosexual and an African-American.

The plaintiff claimed that prison officials knew he was a homosexual and possessed an "effeminate manner," and that he had been housed in "safekeeping" at a prior facility. He

further asserted that he was told, at his present facility, that “we don’t protect punks [homosexuals] on this farm.” He was put into the general population, and claimed that he was raped by other inmates almost immediately.

The prisoner alleged that he informed an assistant warden and a correctional sergeant of the rapes and requested medical attention, but that they told him that care was available “only for emergencies,” and that he should file a written request for medical attention. Another prisoner allegedly began to “rent” him out to perform coerced sexual favors for other inmates, and he believed that he would be severely beaten or killed if he refused. Indeed, the prisoner “renting him out” allegedly beat him on one occasion, and medical personnel documented his bruising and swelling on his face. He was subsequently moved to different buildings at the facility, but was allegedly raped and “owned” by different prison gangs in those buildings.

He wrote letters to prison administrators, according to his lawsuit, as well as seeking help from correctional officers and filing numerous “life-endangerment” forms, but officers who investigated his complaints generally determined that they could not be corroborated. The prisoner also claims that the officers usually did not interview any of the inmates mentioned in his complaints, purportedly out of a concern to protect the “integrity of the investigation” or to protect him. He also asked that he be placed in safekeeping, protective custody, or transferred to another prison, but these requests were denied, allegedly because there was “no concrete evidence of victimization.” Formal grievances he filed were also denied.

The prisoner claimed that he was told repeatedly that he either had to fight off his attackers or submit to being used for sex. He also said that some prison employees made remarks to the effect that since he was homosexual, he probably “liked” the sexual assaults, and that, as a Black homosexual, he should be able to “fight and survive” in the general population if he didn’t want to be sexually assaulted. The employees denied making such statements.

The filing of a grievance, the appeals court found, alerted prison officials to the fact that the prisoner was allegedly being subjected to repeated assaults and “was not receiving any protection from the system, in particular a transfer to safekeeping status.”

If the prisoner’s version of events and the defendants’ statements were true, those who openly expressed a decision not to protect him from sexual assault in general were not entitled to qualified immunity, as such decisions would violate clearly established law. Some of the defendants, however, were not alleged to have made such statements, and did take steps to respond to the prisoner’s complaints or at least investigate them, and therefore could not be held liable.

On the sexual orientation claim, the defendants argued that the law was not clearly established as to whether the use of sexual orientation as a "factor in state prison classification decisions" violates the equal protection clause, when the use is rationally related to a legitimate penological interest. The appeals court rejected this argument:

> "The defendants' manner of phrasing the issue is inapt. First, while it is somewhat uncertain to what extent sexual orientation can legitimately be taken into account in fashioning prison housing policies, the defendants in this case deny that they took Johnson's race and orientation into account. That is, they do not say that such status-based decision-making would be justified because of legitimate countervailing penological aims--as they would need to say in a case involving a policy of housing all black or all homosexual inmates together--but rather they say that they made their decisions based on a status-neutral determination that Johnson was not unusually vulnerable."

Further, the appeals court noted, if the defendants did actually deny the prisoner protection because of his homosexuality, as he alleged, "that decision would certainly not effectuate any legitimate interest." It is clearly established, the court stated, that all prison inmates are entitled to reasonable protection from sexual assault. While the courts have not recognized sexual orientation as a suspect classification, "nevertheless, a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims," the court reasoned, citing Romer v. Evans, #94-1039, 517 U.S. 620 (1996).

> "The defendants have not attempted to argue that according homosexuals less protection than other inmates would advance any legitimate aim. Thus, we conclude that Johnson has alleged conduct that would be unreasonable in light of law that was clearly established at the time of the alleged events."

In summary, jail and prison officials and employees who know of specific risks to homosexual or bisexual prisoners and detainees cannot refrain from taking protective measures without facing the very real risk of civil liability. And officials with policy-making authority who have knowledge of pervasive violence or harassment of such prisoners need to examine their facility policies and practices and to take corrective measures. It was in Farmer v. Brennan, #92-7247, 511 U.S. 825 (1994), a case involving a transsexual prisoner, that the U.S. Supreme Court established the legal standard for liability for failure to protect prisoners in general against sexual assault by other prisoners—deliberate indifference to a known substantial risk of serious harm.

Can Homosexual and Bisexual Prisoners Be Segregated?

What about segregation of homosexual and bisexual prisoners or measures preventing

such prisoners from sharing a cell? At least one federal appeals court has approved such actions.

In Veney v. Wyche, #01-6603, 293 F.3d 726 (4th Cir. 2002), the court ruled that segregation of male homosexual inmates was justified by legitimate penological interests in prison safety and security. Preventing homosexual and heterosexual inmates from sharing cells was a rational means of preventing violence between groups and preventing homosexual inmates from sharing cells, the court also stated, was a rational means of preventing sexual activity and spread of sexually transmitted diseases. The court also upheld disparate treatment between male homosexual and female homosexual prisoners.

The case involved a prisoner in a jail in Virginia who claimed that his equal protection rights were violated by correctional officials treating him differently from other inmates because of his gender and sexual preference. Specifically, he claimed that the defendants denied his requests to move from his single-occupancy cell into a double-occupancy cell because he is a homosexual male.

A federal appeals court, upholding the dismissal of the plaintiff prisoner's complaint, found that, even if all his allegations were true, his rights had not been violated. The plaintiff claimed that he was treated differently from similarly situated heterosexual males and homosexual females, both of which are housed in double-occupancy cells. The appeals court assumed, for the purposes of the appeal, that the plaintiff was intentionally treated differently because he is a homosexual male.

The appeals court found that the plaintiff's case did not involve a "fundamental right," and further that homosexual males are not a "suspect class." There is no fundamental right to be held in a double-occupancy cell, the court stated and "there also is no fundamental right to engage in homosexual acts generally." Further, even if a right to engage in homosexual acts existed, "it would not survive incarceration." [It must be noted that this decision predates the U.S. Supreme Court's 6-3 ruling in Lawrence v. Texas, #02-102, 539 U.S. 558 (2003) invalidating the Texas same-sex sodomy law, and holding that private sexual conduct is protected by the liberty guarantees of the Fourteenth Amendment's due process clause.]

Outside of the prison context, the court noted, discrimination on the basis of sexual preference is subject to rational basis review, citing Romer v. Evans, #94-1039, 517 U.S. 620 (1996). When equal protection challenges arise in a prison context, however, the court stated, "courts must adjust the level of scrutiny to ensure that prison officials are afforded the necessary discretion to operate their facilities in a safe and secure manner."

In a prison context, therefore, the court must determine whether the disparate treatment is "reasonably related to [any] legitimate penological interests," and the plaintiff, in order

to prevail, must "allege facts sufficient to overcome the presumption of reasonableness applied to prison policies."

The appeals court disagreed with the plaintiff's argument that there is "no legitimate penological interest for the segregation of homosexual, male inmates." Prison safety and security, the court noted, are legitimate penological interests that must be considered. Among the "many valid reasons" that support the conclusion that "homosexuals should not be assigned to double-occupancy cells," the court cited the following:

1. Housing homosexuals with other homosexuals could lead to sexual activity between cellmates, which would jeopardize prison security.

2. Sexual activity between cellmates also raises concerns about the transmission of diseases, such as HIV.

3. Housing homosexuals with heterosexuals might cause friction between cellmates that potentially could lead to violence. "In light of examples of anti-homosexual violence in our society, we cannot ignore the fact that homosexuals are subject to bias-motivated attacks from heterosexuals."

4. "Studies also have shown that inmates known to be homosexuals are at a greater risk of being sexually attacked in prison." [The court cited Robert Dumond, Inmate Sexual Assault: The Plague that Persists, 80 Prison J. 407 (2000)].

The court concluded that not allowing heterosexuals to share cells with homosexuals is a rational means of preventing violence between the groups, and not allowing homosexuals to share cells with other homosexuals is a rational means of preventing sexual activity and the spread of sexually transmitted diseases. The defendant officials, therefore, are "not constitutionally precluded from limiting homosexuals to single-occupancy cells."

The plaintiff in the case, however, also claimed that the facility discriminated against him because he is a male. "We must, therefore, consider whether the gender-based dimension of the alleged discrimination is rationally connected to safety and security concerns in prison, while again keeping in mind the differential standard applicable to decisions regarding day-to-day prison management."

The court found that a difference in treatment between male homosexuals and female homosexuals was justified by the fact that "each gender faces unique safety and security concerns," with it being a "well-documented reality that institutions for females generally are much less violent than those for males." [The court cited Kimberly R. Greer, The Changing Nature of Interpersonal Relationship in a Women's Prison, 80 Prison J. 442 (2000); Klinger v. Dep't of Corr., #93-2928, 31 F.3d 727 (8th Cir. 1994) ("male inmates...are more likely to be violent and predatory than female inmates.")]

Additionally, the court noted that studies show that "male inmates are more likely than female inmates to have homophobic attitudes. See Christopher Hensley, Attitudes Toward Homosexuality in a Male and Female Prison, 80 Prison J. 434 (2000). Abstract

Because the "safety and security concerns that arise from housing homosexuals in double-occupancy cells are more significant with respect to males than they are with respect to females, we conclude that the complained of gender-related disparate treatment in the housing of homosexuals is rationally calibrated to address legitimate penological concerns," the court asserted.

This is only one appeals court's view of the issue, of course, and the decision is now seven years old. It cannot be predicted with any certainty if other courts will take the same view.

Displays of Homosexual Affection During Visitation

What about homosexual displays of affection during visitation? In Whitmire v. State of Arizona, #00-16896, 298 F.3d 1134 (9th Cir. 2002), a federal appeals court overturned the dismissal of a federal civil rights claim that prison policy prohibiting same-sex kissing and hugging during visits, except for family members, violated the right to equal protection of the homosexual partner of an inmate.

The Arizona Department of Corrections prohibited same-sex kissing and hugging during prison visits, unless the visitors are members of the inmate's family. This policy was challenged in a federal civil rights lawsuit by the homosexual partner of a inmate who claimed that the policy violated his right to equal protection.

The Department of Corrections asserted, without corroborating evidence, that the visitation policy furthered a legitimate penological interest of correctional safety.

The challenged regulation on inmate visitation provided: "Kissing and embracing shall be permitted only at the beginning and end of each visit and shall not be prolonged." These same regulations, however, further provide that "same-sex kissing, embracing (with the exception of relatives or immediate family) or petting" is prohibited.

Whitmire, the plaintiff, and William Lyster, the incarcerated prisoner, were an openly gay couple. Lyster was instructed by prison staff that he was not permitted to hug or kiss Whitmire during visits, and after Lyster briefly hugged Whitmire during a visit, Lyster was told by ADOC officials that "if that happens again it will be a long time before you see him again."

The appeals court stated that:

"Common sense indicates that an inmate who intends to hide his homosexual sexual orientation from other inmates would not openly display affection with his homosexual partner during a prison visit. Rather, prisoners who are willing to display affection toward their same-sex partner during a prison visit likely are already open about their sexual orientation. Whitmire's and Lyster's situation is illustrative. Lyster openly told other prisoners that he was gay. In situations like this, Arizona's policy prohibiting same-sex displays of affection during visitation does nothing to prevent the marking of homosexual prisoners. See Espinoza v. Wilson, #86-5098, 814 F.2d 1093, 1098 (6th Cir. 1987) (finding the homosexual "marking" justification unbelievable when 'neither [plaintiff] tried to hide the fact that they were homosexual')."

Other Cases of Interest

Other cases of interest in this area include:

* Brown v. Scott, #02-10160, 329 F. Supp. 2d 905 (E.D. Mich. 2004), finding that the manager of residential unit in state prison was not entitled to dismissal or summary judgment in a 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.

* Gibbs v. Bolden, #02-1560, 65 Fed. Appx. 519 (Unpub. 6th Cir. 2003), in which the court ruled that a plaintiff prisoner who sued correctional employees for alleged failure to protect him from stabbing by another prisoner could not object on appeal to the admission of evidence that he was labeled a "homosexual predator" on correctional records when his own lawyer made a "strategic decision" to allow the jury to learn that in order to lessen any "negative impact the information may have had if left unexplained."

* Wayne v. Jarvis, #97-9152, 197 F.3d 1098 (11th Cir. 1999), cert. denied, #99-8555, 529 U.S. 1115 (2000), stating that a prisoner who was assaulted three times by other inmates after assignment to a medium security housing unit when he stated that he was a bisexual failed to show that county jail had a policy or custom of assigning homosexual, bisexual or HIV-positive prisoners to medium-security unit regardless of their violent propensities.

* Thomas v. District of Columbia, #93-2313, 887 F. Supp. 1 (D.D.C. 1995), holding that an officer's alleged sexual harassment of an inmate, including spreading rumors to other prisoners that he was a homosexual and a "snitch," stated a claim for Eighth Amendment violation.

* City of Waco v. Hester, #10-89-087, 805 S.W.2d 807 (Tex. App. 1991), finding a city liable for $250,000 to nineteen year-old inmate homosexually raped in jail's shower, based on negligent implementation of policies of segregation of violent or homosexual prisoners

Resources

The following are a few useful resources on the topic of this article. Inclusion of an item does not indicate agreement with its viewpoint.

- LGBT people in prison (Wikipedia) http://en.wikipedia.org/wiki/LGBT_people_in_prison
- Managing Lesbian, Gay, Bisexual, Transgender, and Intersex Inmates: Is Your Jail Ready? Author(s) Leach, Donald L., II Source(s) LIS, Inc. (Longmont, CO) National Institute of Corrections Information Center (Aurora, CO) Sponsor(s) National Institute of Corrections (Washington, DC) Details Published 2007. 6 pages.
- **"**In The Shadows: Sexual Violence in U.S. Detention Facilities," a report by Stop Prisoner Rape. (renamed Just Detention International) (29 pgs., .pdf format, 2006). Reviews application of the Eighth Amendment, the Prison Rape Elimination Act, and U.S. rape and custodial misconduct laws to prison sexual assault, discusses the relationship of overcrowding and inmate classification to prison sexual assaults, and describes particular custodial populations vulnerable to sexual assault, including first-time, non-violent offenders, youth, gay and transgender detainees, and immigration and customs enforcement detainees, and other issues.
- "Stonewalled – still demanding respect: Police abuses against lesbian, gay, bisexual and transgender people in the USA," by Amnesty International. (March 23, 2006). Includes a section on abuse in detention circumstances.

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