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Transsexual Prisoners: Protection from Assault

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Introduction

[Transsexual](#) prisoners are persons who identify with a physical sex different from the one they were born with. Many of them dress as the opposite sex, and acquire some physical appearances of the other sex through hormone therapy. Some seek sex reassignment surgery.

The presence of born male prisoners who identify as, dress as or look like women in some ways, such as developing breasts, or who seek a complete sex change, pose many challenges and issues for prison and jail administrators. Among them is the need to take protective measures to prevent physical and sexual assault by other inmates, to which such inmates are particularly vulnerable. The special medical needs of such prisoners has also been an area of much controversy and litigation.

This article focuses on protecting transsexual prisoners from assault, including sexual assault. There are, however, also many issues that arise in the context of prisoner housing assignments and classification, and medical care, which cannot be addressed within the confines of this short article. Additionally, it is important to recognize that there are inmates born female who self-identify as males, and whose presence in female facilities or units pose similar challenges. The case law presented here, however, has focused on male-to-female transsexual prisoners, as does this article.

Transsexualism is also recognized as Gender Identity Disorder by the medical profession, and is defined by the American Psychiatric Association's [Diagnostic and Statistical Manual](#) (DSM) in the following manner:

“There must be evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is of the other sex (Criteria A). This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex. There must also be evidence of persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex (Criteria B). The diagnosis is not made if the individual has a concurrent physical inter-sex condition (e.g., androgen insensitivity syndrome or congenital adrenal hyperplasia) (Criteria C). To make the diagnosis, there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criteria D).”

Protection from Assault

Not only is it clearly established that correctional officials and employees have a legal duty to protect transsexual prisoners from assault, but, in fact, it was in a case involving a transsexual prisoner that the U.S. Supreme Court set forth the legal standard for imposing liability for failure to protect all prisoners in general against sexual assault by other prisoners. In that case, [Farmer v. Brennan](#), #92-7247, 511 U.S. 825 (1994), the plaintiff was a federal preoperative transsexual prisoner who projected feminine characteristics. She was in custody with male inmates, sometimes in the general population, but usually in segregation.

The filed federal civil rights lawsuit contended that she had been beaten and raped by another prisoner when she transferred to a higher security facility with more “troublesome” inmates, and there placed in the general population.

She argued that prison officials acted with “deliberate indifference” in failing to protect her against these assaults, violating the Eighth Amendment right not to be subjected to cruel and unusual punishment.

She further argued that the defendants knew that the facility was a particularly violent environment with a history of prior assaults. Further, she stated, they knew of her particular vulnerability to sexual assaults in particular as a transsexual.

The defendant prison officials countered with the notion that they should only face possible civil liability if it could be shown that they were reckless in a criminal manner, having “actual knowledge” that there was a potential danger of an impending attack.

The U.S. Supreme Court disagreed. Ruling that it was sufficient for liability if it is demonstrated that prison officials acted with “deliberate indifference” to inmate health or safety. 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, that establishes deliberate indifference.

To be awarded damages for an Eighth Amendment violation, finally, the plaintiff prisoner also must show that such deliberate indifference resulted in “sufficiently serious harm.”

It is not enough, the Court stated, for a prisoner to show that prison officials acted negligently, but he need not show that they acted or failed to act intentionally, or for the “very purpose” of inflicting harm on the prisoner.

“Deliberate indifference” was characterized by the Court as “subjective recklessness,” disregarding a risk of harm of which the defendant was aware. Therefore, under this standard, failing 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.” But the Court warned that a prison official may not escape liability for deliberate indifference by claiming that he knew of an “obvious, substantial risk” to inmate safety, but did not know that the prisoner was “especially likely to be assaulted by the specific prisoner” who actually attacked him.

In the subsequent case of [Greene v. Bowles](#), #02-3626, 361 F.3d 290 (6th Cir. 2004), a federal appeals court utilized these rules to reinstate claims against a prison warden for alleged failure to protect a transsexual inmate from an attack by a maximum-security prisoner. The prisoner was found to have raised a sufficient factual issue as to whether the warden had knowledge of the possible risk to her safety because of her vulnerability and her attacker’s status as a “predator,” but failed to act to protect her.

The appeals panel, by a 2-1 vote, overturned a summary judgment in favor of the prison warden. The plaintiff is a male-to-female transsexual, who, at the time of her incarceration at the facility in question was preoperative, but who still displayed female characteristics, including developed breasts and a feminine demeanor. She was undergoing hormone therapy and because of her feminine appearance was placed in the protective custody unit to guard against attacks from other inmates. A second inmate in that unit allegedly assaulted her on several occasions, culminating in a severe attack in which he beat her with a mop handle and then struck her with a fifty-pound fire extinguisher.

The alleged attacker had a long history of assaults on other inmates and was classified as a maximum-security prisoner at the time of the attack. The transsexual prisoner was classified as medium-security. The warden himself admitted that the alleged attacker was a “predatory inmate.”

This “predator,” however, was placed in the protective custody unit in order to protect him from the repercussions of his testimony against his fellow inmates in a prison riot in which he himself had been convicted of aggravated assault for beating two prisoners during that riot.

In granting summary judgment to the warden in the prisoner's lawsuit, the trial court stated that as the attack on the plaintiff wasn't sexual, her status was “irrelevant to the determination of a substantial risk” and that there was no evidence from which it could be concluded that the warden knew of the attacker's history of violence and specifically of attacks upon other inmates.

The appeals court disagreed, finding that there was evidence from which a trier of fact could conclude that the prisoner was vulnerable not just to sexual assault, but also to physical assaults from her fellow inmates, so that her presence in the unit with other inmates without segregation or protective measures presented a “substantial risk to her safety” of which the warden was aware. It also found that there was evidence from which a trier of fact could conclude that the warden was “in fact aware” of the substantial risk that the attacker posed to “any inmate with whom he was placed.”

Deliberate indifference, the appeals court stated:

“can be demonstrated through ‘inference from circumstantial evidence,’ and a prison official cannot ‘escape liability . . . by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault.’ Our cases [...] demonstrate that the converse is true as well: where a specific individual poses a risk to a large class of inmates, that risk can also support a finding of liability even where the particular prisoner at risk is not known in advance.”

Such evidence included a protective control screening form concerning the transsexual prisoner, which was signed by the warden, and indicated that she was placed in the protective custody unit for her own personal safety. The warden's own testimony indicated that “transgendered inmates are often placed in protective custody because of the greater likelihood of their being attacked by their fellow inmates.” Additionally, the warden himself characterized the attacker as a predatory inmate, and the attacker's record included a long institutional history of being a “disruptive, violent inmate.”

A strong dissent by one judge found that the warden's testimony at most indicated that he “recognized the existence of certain risks attendant with the placement of certain categories of inmates in protective custody,” but that this however, did not amount to an awareness of a significant risk of harm to the plaintiff's health or safety. “The Eighth Amendment requires, instead, that a warden actually recognize a significant risk of harm arising from particular facts. While the majority properly states that, in some contexts, a

particular victim, or a particular perpetrator, need not be known, general recognition of some risks is not enough.”

“Moreover, the majority takes a position that will make it more difficult for prison officials to deal with the complicated issues involved in incarcerating pre-operative transsexual inmates. These inmates may not be well-suited to the general populations of either men’s or women’s institutions, and protective custody may be a warden’s best alternative to provide for the safety and security of transsexual inmates. The majority’s broad position that protective custody poses obvious harms to transsexual inmates could impel correctional officials to avoid liability for harms to these inmates by either placing all transsexual inmates in individual isolation or by building prisons solely for transsexuals. The Eighth Amendment cannot be read to compel such a result.”

Similarly, in [Doe v. Bowles](#), #00-3159, 254 F.3d 617 (6th Cir. 2001), a court ruled that a correctional officer and protective custody unit manager could be liable for failing to protect a biologically male prisoner suffering from gender identity disorder, and appearing to be a woman, from physical assault from another inmate in an all-male prison.

A biologically male inmate at an Ohio prison had been diagnosed with a gender identity disorder and had feminine characteristics. The prisoner had the appearance of a woman and dressed as one, but had been placed in an all-male prison. The prisoner was placed in a protective custody unit to provide protection from “predation by other inmates.”

Another prisoner ultimately physically attacked the female-appearing inmate. The alleged assailant was housed in the same unit to protect him from other inmates against whom he testified regarding their involvement in a 1993 prison riot, and he also had a history of attacking other prisoners. He hit the other prisoner on the back of the head as he walked by the plaintiff’s cell. The plaintiff later claimed that he spoke with several prison employees and gave details about this attack, as well as the assailant’s threats to kill him.

The assailant later entered the plaintiff’s cell while other inmates were at dinner, attacked him again and again threatened to kill him. A correctional officer caught the assailant and wrote up a conduct report. The injured prisoner went to the medical clinic to be examined, and while he was gone, the assailant was permitted to leave his cell for a shower. When the plaintiff later returned to his cell, the assailant returned, having been allowed out of his cell to obtain a mop, which was not permitted under the rules for someone on cell isolation. Another assault then occurred, and the officer on duty was unable to stop this attack by herself, so that the plaintiff was injured before more help could be summoned.

The injured prisoner brought a federal civil rights lawsuit against the manager of the protective custody unit, the shift supervisor on duty when the final assault occurred, and the correctional officer on duty in the unit when the assault occurred.

The federal appeals court granted qualified immunity to the shift supervisor but not to the other two defendants. The court noted that the shift supervisor's actions were based on information received from the unit manager and that it was only reported to him that the assailant had “harassed” the plaintiff, not that an actual physical assault had occurred. In addition, he asked the unit manager whether segregation of the assailant was required, and was told that it was not. His order that the assailant be kept in cell isolation was an action intended to prevent any assault, even though it proved not to do so.

The appeals court stated that it could not hold as a matter of law that the other two defendants were entitled to qualified immunity, as there were genuine issues of material fact as to how detailed the unit manager's information and knowledge concerning the problems between the two inmates were. As to the correctional officer on duty in the unit, there was a genuine dispute as to whether she was deliberately indifferent to the plaintiff's safety when she let the assailant out to go to the shower or allowing him to walk by the plaintiff's cell to retrieve a mop.

While a jury might find the correctional officer's conduct to be “simply negligent” it might also find that allowing the assailant out of his cell that day under the circumstances was “not a reasonable response to the admittedly known risk to plaintiff.”

In [R.G. v. Koller](#), #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.

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: Leach, Donald L., [American Jails](#), Hagerstown: November/December 2007; [LJN Exchange](#), National Institute of Corrections, US Department of Justice, 2006; and [Corrections Professional](#), November 2007.
- [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).
- Law Review: “Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District of Columbia,” by Katherine C. Parker, American University

Journal of Gender, Social Policy & the Law (2002) 10 Am. U.J. Gender Soc. Pol'y & L. 443 (16402 words).

- Law Review: "When is an Attempted Rape Not an Attempted Rape? When the Victim is a Transsexual," by Katrina C. Rose, American University Journal of Gender, Social Policy & the Law (2001) 9 Am. U.J. Gender Soc. Pol'y & L. 505 (15920 words).
- Law Review: "Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism," by Darren Rosenblum, Michigan Journal of Gender & Law (2000) 6 Mich. J. Gender & L. 499 (31657 words).
- Law Review: "The Sexual Continuum: Transsexual Prisoners," by Anita C. Barnes, New England Journal on Criminal and Civil Confinement (Summer, 1998) 24 N.E. J. on Crim. & Civ. Con. 599 (23378 words).
- Law Review: "The Predicament of the Transsexual Prisoner," by Debra Sherman Tedeschi, Temple Political & Civil Rights Law Review (Fall, 1995) 5 Temp. Pol. & Civ. Rts. L. Rev. 27 (12787 words).

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