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Cross Gender Strip Searches of Prisoners

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Introduction

In a jail or prison, inmate privacy rights are necessarily severely limited. The practical reality of large numbers of detainees or prisoners living in close quarters and having to perform actions relating to dressing, bathing, and toilet functions in often crowded spaces, together with the need for security to prevent violence and assault means that a prisoner can normally expect that there will be many instances in which his or her body, in various degrees of undress, will be observed by other prisoners, and by correctional officers.

It is not the case, however, that concern for privacy for prisoners is abandoned altogether, rather it is modified and limited by institutional needs. While most detention and correctional facilities are largely segregated along gender lines as far as prisoners, staff members of both the male and female genders work at many institutions.

Under applicable federal and state employment law, which this article will not explore in detail, correctional officers, medical personnel, and other staff members have a right to such employment regardless of their gender, whether a facility is largely or entirely male or female, except in very limited circumstances where it could be argued that gender is a bona fide occupational qualification. See [Sinclair v. Stalder](#), #03-30456, 78 Fed. Appx. 987 (5th Cir. 2003), holding that the assignment of female correctional officers to supervise male prison living areas was not a violation of male prisoner's First, Fourth, Eighth, or 14th Amendment (equal protection) rights. The prisoner's privacy rights were minimal and the state had a legitimate interest in providing equal employment opportunities to female officers and in flexibility in personnel staffing.

Correctional personnel in a variety of circumstances conduct strip searches of prisoners. So the question necessarily arises of cross gender strip searches. Are they permitted? Should they be limited to circumstances in which no officer of the same gender is available to conduct such a search? What considerations should go into planning for such cross gender strip searches? What about the presence in the area of officers of the opposite gender even when the strip search itself is being directly conducted by officers of the same gender?

It should be noted that the [Prison Rape Elimination Commission Standards](#) that address this topic. They are discussed in Part Two.

Part One takes a brief look at how courts have addressed these issues. There is much about the approach of some of the courts that is still unfolding and evolving. At the end of Part Two are several prudent recommendations. At the conclusion of Part One, a number of helpful resources and references are cited.

Do Cross Gender Strip Searches Violate Prisoner Rights?

Many courts are still relatively undecided on the issue, and there is no “bright line” rule.

In [Graham v. Van Dycke](#), #08-3193, 2009 U.S. App. Lexis 6819 (Unpub. 10th Cir.), the court ruled that because there was no clearly established law that a strip search of a female prisoner by male officers necessarily violates the Eighth Amendment, the defendant officers were entitled to qualified immunity in a lawsuit brought over one such search.

In [Somers v. Thurman](#), #96-55534, 109 F.3d 614 (9th Cir. 1997), a male prisoner claimed that female officers conducted visual body cavity searches and ridiculed him while doing so. He also claimed that female officers "gawked" at him while he was using the showers.

The court said that it was "highly questionable even today whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex, or from the viewing of their unclothed bodies by officials of the opposite

sex." The defendants were held to be entitled to qualified immunity because of a lack of clearly established law on the subject.

These two cases are separated in time by twelve years. To gather information from which one can build an approach and policy, it is necessary to look at some of the particular circumstances in which the issue has arisen.

Balancing Employee Rights and Inmate Privacy

Courts examining cases arising in the context of cross gender strip searches have had to balance the privacy rights of prisoners and the rights to employment of correctional officers of the opposite sex.

In [Canedy v. Boardman](#), #92-2568, 16 F. 3d. 183 (7th Cir. 1994), a federal appeals court overturned the dismissal of a prisoner's claim that female guards strip searched him and regularly observed male prisoners while they used the toilet, dressed and showered. The trial court had held that the full employment rights of females "trumped" any privacy rights of prisoners.

The appeals court, however, found that the full employment rights of female employees did not mean that the prisoners should be deprived of their constitutional rights.

The court reasoned that the needed balance required that the facility accommodate the interests of both groups by making adjustments in schedules, installation of partitions, or use of curtains. The court held there was a duty to accommodate both interests.

The court observed that the facts showed that the occasional viewing of male prisoners by female correctional officers appeared at most to be infrequent and incidental to their job duties in the facility.

It is also important to note that the facility (Cook County Jail) made a good faith effort to minimize privacy intrusions by installing translucent material in the shower area. Finally it ruled that all strip searches would have to be done by staff of the same sex.

The same case went back to the appeals court after trial, with the prisoner then claiming that being seen naked by female officers would violate his religious rights as a Muslim. This argument was rejected. The trial court found against him on that and the appeals court upheld that result. The court said that it was "not at all clear" that the prisoner's interest in observing religious nudity taboos outweighed the legitimate interests of the facility. [Canedy v. Boardman](#), #95-1931, 91 F.3d 30 (7th Cir. 1996).

Cross Gender Strip Searches for an Improper Purpose

Perhaps the easiest issue is that cross-gender strip searches that are intentionally carried out for an improper purpose will violate inmate privacy rights, limited though they are, and may lead to civil liability. In the worst-case scenario, they may amount to little more than a form of sexual assault or abuse.

In [Boxer X v. Harris](#), No. 04-13083, 2006 U.S. App. Lexis 2008 (11th Cir.), for instance, the court ruled that a male prisoner's claim that a female guard made him strip naked and masturbate for her enjoyment, if true, was a violation of his privacy rights, but not "cruel and unusual punishment," since he only suffered minimal injury.

In this case, a male Georgia prisoner filed a federal civil rights lawsuit against a female guard at the prison who he claimed made him "strip and masturbate" for her enjoyment. A federal appeals court, overturning judgment for the defendant, found that the prisoner stated a viable claim for violation of his right to privacy and for retaliation in violation of his First Amendment rights.

The prisoner claimed that for a period of approximately four months, the female guard "repeatedly" approached his cell and demanded that he strip naked and "perform sexual acts of self-gratification." It allegedly began when the prisoner complained that his food was cold and his tray was dirty, and the female guard responded that she would get him a new dinner if he did her a "favor" by showing her his penis while she watched through the flap in the cell door. He allegedly declined, and she allegedly promised retaliation.

These sorts of incidents allegedly continued for several months, with the male prisoner sometimes disobeying the female guard's commands, and sometimes obeying her. He received two disciplinary reports following one such encounter with the guard in which he did perform for her, being cited for failure to follow instruction and "exposure/exhibition." He was allegedly not given an opportunity to challenge the female guard's statements in these reports in front of a disciplinary hearing officer.

The appeals court found that a prisoner has a constitutional right to bodily privacy, and against compelled nudity and masturbation. While the scope of such privacy rights must be decided on a case-by-case basis, the court stated, in this case, the prisoner's claims, if true, that a female guard asked him to masturbate for her viewing, states a claim for violation of his privacy rights.

Cross Gender Strip Searches Lacking Discriminatory Intent

Most courts have had little difficulty in upholding the legality of cross gender strip searches that are carried out without discriminatory intent, without a harassing taint, and for legitimate objectives.

In [Byrd v. Maricopa County Sheriff's Dept.](#), #07-16640, 2009 U.S. App. Lexis 10939 (9th Cir.), for instance, a pretrial detainee failed to show that there was any discriminatory intent towards male detainees in subjecting him to a partial strip search and pat down of his groin area by a female cadet officer despite the nearby availability of male detention officers.

The search was reasonably related to legitimate objectives and there was no showing of deliberate indifference to any pain the search might have caused because of its cross-gender aspect. Under these circumstances, the court also found, the search did not constitute "punishment."

Resources:

- [Search: Body Cavity](#). Summaries of cases reported in AELE publications.
- [Search: Prisoners/Cells](#). Summaries of cases reported in AELE publications.
- [Strip Search: Prisoners](#). Summaries of cases reported in AELE publications.
- Prison Rape Elimination Commission [Proposed Standards](#) (2009).
- [A Jailhouse Lawyer's Manual](#), Chapter 25, "[Your Right To Be Free From Illegal Body Searches](#)," (Columbia Human Rights Law Review, 8th Edition 2009). (Includes a section on cross-gender body searches).
- Commissioner of the Correctional Service of Canada, Directive No. 577, "[Operational Requirements for Cross-Gender Staffing in Women Offender Institutions](#)," (Aug. 10, 2008).

Prior Relevant Monthly Law Journal Articles

- Monthly Law Journal Article: [Routine Strip Searches to Combat Contraband](#), 2010 (4) AELE Mo. L. J. 301.

References (chronological):

- Laura E. Bedard, Ph.D., "[Cross-gender Supervision: The Inmate Perspective](#)," CorrectionsOne (November 1, 2008).
- Flynn L. Flesher, "Note: [Cross-Gender Supervision in Prisons and the Constitutional Right of Prisoners to Remain Free From Rape](#)," 13 Wm. & Mary. J. of Women & L. 841 (Spring 2007).

- Jennifer R. Weiser, “Fourth Amendment Right of Female Inmates to be Free From Cross-Gender Pat-Frisks,” 33 Seton Hall Law Rev. No. 1, pgs. 31-66 (2002). [Abstract](#).
- Teresa A. Miller, “[Keeping the Government’s Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches](#),” 4 Buffalo Criminal Law Review No.2, pgs.861-889 (Jan. 2001).
- John Dwight Ingram, “[Prison Guards and Inmates of Opposite Genders: Equal Employment Opportunity Versus Right of Privacy](#),” 7 Duke Journal of Gender Law & Policy No. 3, pgs. 3-27 (2000).
- Mary Ann Farkas and Kathryn R.L. Rand, “Sex Matters: A Gender-specific Standard for Cross-gender Searches of Inmates,” 10 Women and Criminal Justice No. 3, pgs. 31-55 (1999). [Abstract](#).
- Karoline E. Jackson, “[The Legitimacy of Cross-Gender Searches and Surveillance in Prisons: Defining an Appropriate and Uniform Review](#),” 73 Ind. Law J. No.3 (Summer 1998).
- Judge Emory A. Plitt Jr., “Prisoner Privacy and Staff Employment,” [Corrections Legal Defense Quarterly](#), No. 98-1 (1998). Includes a discussion of issues relating to the use of employees of the opposite gender from the prisoner conducting or participating in a search, including a strip search.
- Judge Emory A. Plitt Jr., “Searches of Prisoners and Visitors,” [Corrections Legal Defense Quarterly](#), #96-1 (1996). Includes sections discussing strip and body cavity searches.

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