



ISSN 1935-0007

Cite as: 2010 (6) AELE Mo. L. J. 301

Jail & Prisoner Law Section – June 2010

Cross Gender Strip Searches of Prisoners

Contents Part One (May issue)

- **Introduction**
- **Do Cross Gender Strip Searches Violate Prisoner Rights?**
- **Balancing Employee Rights and Inmate Privacy**
- **Cross Gender Strip Searches for an Improper Purpose**
- **Cross Gender Strip Searches Lacking Discriminatory Intent**
- **Resources and References**

Contents Part Two (this issue)

- **Necessity for Cross Gender Strip Searches Due to Limited Staff**
- **Necessity for Cross Gender Strip Searches for Security Purposes**
- **Incidental Presence of Opposite Gender Officers During Strip Searches**
- **Prison Rape Elimination Commission Proposed Standards**
- **Some suggestions**

This is the continuation of a two-part article. To read Part One, click [here](#).

Necessity for Cross Gender Strip Searches Due to Limited Staff

Almost everyone will agree that a preferable situation is to have strip searches of detainees and prisoners carried out by officers of the same gender. Yet limited budgets and staffs may sometimes, or even frequently mandate that this preference be ignored. When a task must be done, it must be done by available personnel. This may be particularly the case at smaller facilities, which may sometimes have only a few, or even just one, staff member on duty at a given time.

In [Soto v. City of Haltom](#), #03-10650, 106 Fed. Appx. 903 (Unpub. 5th Cir. 2004), for instance, the court found that even if a female prisoner's constitutional rights were arguably violated when she was allegedly strip searched by male guards at city jail “without good

cause,” she did not claim that the city had a policy or custom of allowing “baseless cross-gender strip searches,” so that the city could not be held liable.

Further, the Constitution does not require jails that house female detainees either to staff more than one jailer at a time or to staff a female jailer.

Necessity for Cross Gender Strip Searches for Security Purposes

If a strip search absolutely must be conducted for important security considerations, it would be foolish to forego it simply because the personnel available to carry it out are the opposite gender than the prisoner, or because the circumstances will result in personnel of the opposite gender observing the search.

In [Dye v. Lomen](#), #01-3766, 40 Fed. Appx. 993 (7th Cir. 2002), for instance, the correctional employee’s action in strip searching a male prisoner in front of female employees was not cruel and unusual punishment in violation of the Eighth Amendment. The prisoner was strip searched for his and the officers’ safety after he did not respond to requests for his attention.

In an earlier case, [Johnson v. Phelan](#), #94-3753, 69 F.3rd 144 (7th Cir. 1995), the court also found that cross-sex monitoring of prisoners, by itself, does not constitute cruel and unusual punishment.

Incidental Presence of Opposite Gender Officers During Strip Searches

While no one encourages the unnecessary and gratuitous presence of opposite gender officers or other personnel in an area where strip searches of prisoners are being carried out by officers of the same gender, courts have been loath to make a big issue of this when it happens incidentally, given the realities of limited staff availability, and the many tasks that must often simultaneously be carried out.

See, for example, [Jackson v. Wiley](#), 352 F. Supp.2d 666 (E.D. Va. 2004), affirmed per curiam, 103 Fed. Appx. 505, 2004 U.S. App. Lexis 15198 (4th Cir), finding that a corrections officer did not violate a male prisoner's constitutional right to privacy in his genitals by carrying out a “routine” strip search during the intake process, even with the presence of two female nurses. Medical personnel routinely examine patients of the opposite sex, the court noted, and this practice does not violate their rights.

Prison Rape Elimination Commission Proposed Standards

Concern over the problem of prison rape led to the passage of the federal [Prison Rape Elimination Act of 2003](#) (PREA), 45 U.S.C. Secs. 15601-15709, and the mandating of a [Prison Rape Elimination Commission](#) to conduct studies and draft proposed “Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails.” The Commission sent its [final report](#) to the U.S. Attorney General’s office in June of 2009.

The Attorney General is required to publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape. That rule will be published in the Federal Register, subjected to public comment, and then finalized. Compliance will be mandatory for the Federal Bureau of Prisons and voluntary for state and local facilities.

The proposed standards cover many topics. But as it concerns the topic of this article, one thing is crystal clear: the Commission strongly cast its weight against cross-gender strip searches except in emergency circumstances.

Proposed Prevention Planning standard PP-4, entitled “Limits to cross-gender viewing and searches,” states that:

“Except in the case of emergency, the facility prohibits cross-gender strip and visual body cavity searches. Except in the case of emergency or other extraordinary or unforeseen circumstances, the facility restricts nonmedical staff from viewing inmates of the opposite gender who are nude or performing bodily functions and similarly restricts cross-gender pat-down searches. Medical practitioners conduct examinations of transgender individuals to determine their genital status only in private settings and only when an individual’s genital status is unknown.”

The Commission’s belief, expressed in its discussion of this standard, is that protection for inmate privacy and dignity, and the reduction of opportunities for staff-on-inmate sexual abuse can be achieved in this manner.

It further suggests that “these more intrusive strip and body cavity searches should be undertaken only by specially trained, designated employees of the same gender and conducted in conformance with hygienic procedures and professional practices. Agencies without adequate security staff of the same gender as the inmate population may want to consider training non-security staff to conduct these searches.”

The discussion on this standard also encourages agencies to use certain tools to aid compliance with the goal of reducing cross-gender viewing of inmates, such as the use of privacy panels in shower and toilet areas, and the making of verbal announcements when staff members of the opposite gender are in an area.

The limits on cross-gender strip searches and viewing should not constitute a reason for moving backwards in terms of equal employment opportunity. “The Commission likewise acknowledges that cross-gender supervision, in general, can prove beneficial in certain confinement settings and in no way intends for this standard to limit employment (or post assignment) opportunities for men or women.”

The discussion of this standard concludes with a comment concerning special concerns relating to transgendered prisoners: “In some facilities, employees conduct strip or body cavity searches of transgender individuals ostensibly to determine their genital status. All too frequently, such examinations are not necessary because the individual’s genital status was already determined at an initial medical screening. To protect the privacy and dignity of transgender individuals, this standard prohibits examinations to determine genital status when that status has already been ascertained. “

Some suggestions

Ordinarily, when it is at all possible, strip searches and body cavity searches should be conducted by staff members of the same sex. It should be recognized, however, that this may not be possible in extreme emergencies, following disturbances, and at times when a limited number of staff members are available.

Similarly, while incidental viewing of a strip search by employees of the opposite sex may sometimes happen, it is preferable to make this rare and to take precautions to keep it rare.

All jokes, snide remarks or comments, and all horseplay should be avoided during all strip searches, but this is especially important during cross gender strip searches, when it is most important to make it clear to prisoners and employees alike that the search is required for serious and legitimate purposes—to help prevent violence, injury, and health problems by limiting the presence of weapons, drugs, and other contraband in the facility.

Adequate training concerning how to carry out strip searches is essential, and should include explicit discussion of the types of problems and difficulties that may arise when an emergency situation and security concerns make it necessary that a cross-gender strip search be conducted, despite the strong preference for avoiding such searches.

It is also worth considering that cross-gender strip searches of female prisoners by male staff members may sometimes be even more traumatic for particular populations of prisoners than the reverse. In [Jordan v. Gardner](#), #90-35307, 986 F.2d 1591 (9th Cir. 1993), the court reasoned that the fact that female prisoners may have experienced past sexual and physical abuse could impact on their reaction to being searched by male officers.

In that case, the court found that prison officials had knowledge of the mental trauma that cross-gender body searches often caused, but were deliberately indifferent to it. And the case involved cross-gender clothed body searches (although often involving touching). How much more traumatic may a cross-gender strip search then be for a female victim of past male sexual or physical abuse?

Some additional cases of interest in this area include:

- [Hamer v. Jones](#), #09-20431, 2010 U.S. App. Lexis 2688 (Unpub. 11th Cir.), in which a federal appeals court held that an alleged strip search of a male prisoner by a female guard in the absence of exigent circumstances represented an arguable Fourth Amendment claim, so that a lawsuit based on such allegations should not have been dismissed. The court also found, however, that excessive force was not used against the prisoner.
- [Bryan v. Fultz](#), #1:08cv365, 2009 U.S. Dist. Lexis 10224 (E.D. Va.), in which a woman failed to show that she suffered from severe emotional distress as a result of cross-gender strip searches during her weekend incarcerations. While she allegedly cried all night after the first weekend, she went to work the following day and suffered no lost wages. While she saw a counselor who diagnosed her as suffering from acute stress disorder, she did not attend the regular counseling or seek any other medical attention. She also claimed to have refrained from intimate relations with her husband for several months, but led a mostly normal life aside from that. The court found that she failed to establish a claim for intentional infliction of emotional distress, since a reasonable jury could not find, on the basis of her allegations, that her emotional distress was too severe for a reasonable person to endure.
- [Graham v. Van Dycke](#), #05-3397, 2008 U.S. Dist. Lexis 53253 (D. Kan.), in which the use of male officers to remove a suicidal prisoner from her cell and remove her clothing was based on staffing exigencies. The clothing was removed so that it could not be used by the inmate to injure herself. The court granted all defendants summary judgment.
- [Roden v. Sowders](#), #02-6427, 84 Fed. Appx. 611 (6th Cir. 2003), finding that a male prisoner's strip search in the presence of a female sergeant was not a violation of his Eighth Amendment or privacy rights, even assuming that the sergeant laughed at his nakedness. The search, conducted in response to allegations of smoking marijuana, was reasonably related to legitimate security concerns, and verbal insults of an inmate were not violations of his constitutional rights.
- [Calhoun v. DeTella](#), #98-2894, 319 F.3d 936 (7th Cir. 2003), ruling that a strip search of a male prisoner in the presence of female correctional officers could

constitute cruel and unusual punishment in violation of the Eighth Amendment if female officers were, as prisoner alleged, “invited spectators” and the search was carried out in a manner designed to humiliate and demean him.

AELE Monthly Law Journal

Bernard J. Farber
Jail & Prisoner Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aele.org
Tel. 1-800-763-2802

© 2010, by the AELE Law Enforcement Legal Center
Contents may be downloaded, stored, printed or copied
but may not be republished for commercial purposes.

- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages long. Because of the brevity, the discussion cannot cover every aspect of a subject.
- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as “legal advice.” Lawyers often disagree as to the meaning of a case or its application to a set of facts.

[AELE Home Page](#) --- [Publications Menu](#) --- [Seminar Information](#)