Private Prisons and Their Employees:  
Civil Liability and Defenses

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Introduction

There are numerous arguments both for and against the privatization of prison facilities. While some of these are linked to in the resources and references section at the end of this article, this article does not attempt to address them.

Given that private companies and their employees currently do, for better or worse, operate a significant number of correctional facilities, there are numerous questions that arise in the context of civil liability arising out of claims asserted by detainees and prisoners.

Clearly, as privately run correctional facilities are faced with all the tasks and issues confronted by government run facilities, such as housing, feeding, supervising, disciplining, and rehabilitating prisoners, and managing their visits, correspondence, phone use and medical care, these liability questions arise in a myriad of contexts. This
article also makes no attempt, nor could it, to address or even touch on them all, and on many substantive questions, the general law set forth for all correctional institutions in articles in this publication adequately address them.

Instead, this article attempts to hone in on a few special questions that necessarily arise because of the somewhat unique nature of private companies and their employees engaged in running correctional facilities under contract. Ultimately, their authority over the prisoners flows from government, which has sentenced offenders to confinement through the courts. Yet at the same time, the companies are not units of government, and their employees are employees of the private entity, rather than government employees.

This has led to confusion as to what laws are applicable, what kinds of civil actions can be brought, and what defenses can be raised by the companies and their employees.

At the end of the article, a number of useful resources and references are listed.

Civil Rights Claims Versus Companies Operating Federal Facilities

In Correctional Services Corp. v. Malesko, #00-860, 534 U.S. 61 (2001), the U.S. Supreme Court, in a 5-4 decision, ruled that federal prisoners may not file civil rights claims against private corporations operating a halfway house under a contract with the Federal Bureau of Prisons (BOP). The Court declined to extend the implied damage remedy for violation of constitutional rights first recognized in Bivens v. Six Unknown Federal Narcotics Agents, #301, 403 U.S. 388 (1971) to claims against private companies allegedly acting under color of federal law.

A federal prisoner diagnosed with a heart condition was transferred to a halfway house where he was to serve the remainder of his sentence, and was assigned to living quarters on the fifth floor. The company running the facility adopted a policy requiring inmates residing below the sixth floor to use the staircase rather than the elevator to travel from the first-floor lobby to their rooms.

While the prisoner was exempted from this policy, he claimed that one of the company’s employees forbade him to use the elevator to reach his fifth-floor bedroom, and that he then suffered a heart attack and fell, injuring his left ear after climbing the stairs. In addition to suing individual employees of the facility, he sought to impose liability on the company for alleged violation of his constitutional rights.

The Court’s majority noted that federal prisoners in government run facilities do not enjoy the remedy sought by the plaintiff prisoner. “If a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a Bivens claim against the offending individual officer, subject to the defense of qualified immunity. The prisoner may not bring a Bivens claim against the officer’s employer, the United States or the BOP.”
The Court noted that federal prisoners’ only remedy for an alleged constitutional deprivation lies against the individual officer, and not against the federal government itself. The Court concluded that it should not “impose asymmetrical liability costs on private prison facilities alone.” If such a decision is to be made, the Court said, that is a “question for Congress, not us, to decide.”

**Claims Versus Employees in Privately Run Federal Facilities**

The Supreme Court suggested that federal prisoners in a facility operated by a private company might well have a remedy for civil rights violations against the company’s individual employees. In *Pollard v. GEO Group, Inc.*, #07-16112, 2010 U.S. App. Lexis 11496 (9th Cir.), one federal appeal court found such a claim assertable.

The case involved a federal prisoner who was injured in an accident, slipping on a cart left in a doorway. He was referred to an orthopedic clinic outside the prison. Prior to being transported there, a prison employee allegedly required him to put on a jumpsuit, despite his protests that putting his arms through the sleeves would cause him severe pain. Two employees also allegedly forced him to wear a “black box” mechanical restraint device despite his complaints about the resulting pain.

He also claimed that a doctor’s direction that his left elbow be put into a posterior splint for two weeks was not followed at the prison because of limitations in staffing and facilities. He was allegedly unable to feed or bathe himself for several weeks, and prison employees failed to make alternative arrangements for him.

He filed a federal civil rights lawsuit against the private company that ran the prison under a contract with the federal Bureau of Prisons, as well as a number of their employees, claiming violation of his constitutional rights. Overturning dismissal of the lawsuit against the employees, while upholding the dismissal of the claims against the company under the Supreme Court ruling in *Malseko*, a federal appeals court ruled that the company’s employees acted under color of federal law for purposes of a civil rights lawsuit.

The court further held that the availability of state law remedies did not bar the prisoner’s *Bivens* civil rights action.

A number of earlier decisions, however, were either to the contrary, or not clear on the issue. In *Holly v. Scott*, #05-6287, 434 F.3d 287 (4th Cir.), cert. denied, 547 U.S. 1168 (2006), the court ruled that individual employees of a privately operated prison cannot be sued for violation of prisoner’s federally protected constitutional rights under *Bivens*. The case involved alleged inadequate medical care provided to a federal inmate, in violation of the Eighth Amendment.

The appeals court stated that it was “declining” to extend the *Bivens* cause of action to these circumstances both because the actions taken by a private prison employee are not
“fairly attributable” to the federal government, and because the prisoner had adequate state law remedies in North Carolina for his injuries. The appeals court therefore overturned the trial court’s refusal to dismiss the lawsuit.

Similarly, in *Alba v. Montford*, #06-14508, 517 F.3d 1249 (11th Cir.), *cert. denied*, 129 S. Ct. 632 (2008), the court ruled that a prisoner at a privately operated federal facility could not assert a Bivens civil rights claim against an employee of the private prison management company for alleged inadequate medical treatment. Available state law remedies for medical malpractice, the court reasoned, were adequate to protect the prisoner’s rights, so there was no need to extend a Bivens remedy.

In *Peoples v. CCA Detention Ctrs.*, #04-3071 & 04-3124, 449 F.3d 1097 (10th Cir. 2006), a federal prisoner held at a privately run prison as a pre-trial detainee under a contract with the U.S. Marshals Service sued prison employees for alleged violation of his Eighth Amendment right to be free from cruel and unusual punishment and for alleged violation of his Fifth Amendment right to due process. The claims were asserted under Bivens. While a three-judge panel of the appeals court found that the prisoner could not pursue federal civil rights claims for money damages against individual employees of the private corporation operating the facility, initially establishing precedent for that rule of law, a rehearing by the full federal appeals court was evenly divided on that issue.

While this had the effect of upholding the result that the prisoner could not pursue those damage claims, it also means that the prior three-judge panel decision is no longer a valid precedent, leaving the issue itself still undecided by that federal appeals court.

The appeals court panel had ruled that there is no implied private right of action for damages under Bivens against employees of a private prison for alleged constitutional deprivations when “alternative state or federal causes of action for damages are available to the plaintiff.”

In this case, the appeals court found that the plaintiff prisoner could pursue a negligence claim under Kansas law for the injury he asserted that he suffered from the alleged Eighth Amendment violation based on the existence of a special relationship that exists between prison employees and prisoners in their care.

Such employees of private companies operating federal facilities may not be sued for violation of federal civil rights under 42 U.S.C. Sec. 1983, which is used to sue employees of state and local government. In *Sarro v. Cornell Corrections, Inc.*, #00-11, 248 F. Supp. 2d 52 (D.R.I. 2003), the court ruled that guards and the operator of a private facility with custody over only federal prisoners could not be sued under that statute since they did not act under “color of state law.”
Claims by Prisoners at Privately Run State and Local Facilities

Employees of privately run state and local facilities have almost uniformly been found to be operating under “color of state law,” and therefore to be susceptible to federal civil rights claims under 42 U.S.C. Sec. 1983.

In *Rosborough v. Management & Training Corporation*, #03-40493, 350 F.3d 459 (5th Cir. 2003), for example, the court found that a privately owned and run correctional facility and its corrections officer acted “under color of state law” for purposes of a federal civil rights claim. The appeals court reinstated a lawsuit by a prisoner claiming that the officer subjected him to cruel and unusual punishment by slamming a door on his fingers, severing two fingertips.

The court noted that acting “under color of state law” does not require that the defendant be an officer of the state. A private entity or person acts under color of state law when “that entity performs a function which is traditionally the exclusive province of the state.”

The appeals court held that “private prison-management corporations and their employees may be sued under § 1983 by a prisoner who has suffered a constitutional injury. Clearly, confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function. These corporations and their employees are therefore subject to limitations imposed by the Eighth Amendment.”

On such a basis, a federal appeals court in *Muldrow v. Re-Direct, Inc.*, #05-7169, 493 F.3d 160 (D.C. Cir. 2007), upheld an award of $200,000 in compensatory and $797,160 in punitive damages to a parent whose son was murdered in a residential program for juvenile delinquents. By the end of 1999, four youths had been murdered while in the same juvenile facility, provided by a private company for the District of Columbia.

The plaintiff’s son became the fifth in 2000. The plaintiff had argued that the private company that operated the facility acted in a reckless manner in failing to protect the decedent against a foreseeable risk of harm, and violated his constitutional rights, and the jury returned a verdict for the plaintiff on both claims.

See also, *Palm v. Marr*, 174 F. Supp. 2d 484 (N.D. Tex. 2001), finding that a private company and individual employee defendants who operated a correctional facility under a contract with the state were “state actors” for purposes of a federal civil rights claim under 42 U.S.C. Sec. 1983.

In another case, a court found that a correctional officer employed by a private corporation running state prison acted under “color of state law” when he allegedly raped female prisoner in her cell, but was not a “state employee” entitled to immunity from state law assault and battery claim.

There was no showing, however, that prison officials had knowledge of a “substantial risk” of sexual assault on prisoner. *Giron v. Corrections Corp. of America*, 14 F.Supp.2d 1245
Qualified Immunity Defense for Employees in Privately Run Prisons

Qualified immunity is an important defense in federal civil rights litigation, protecting prison employees not only from liability in appropriate cases, but also often from many of the burdens of litigation itself, depending on what stage of the process the defense is found acceptable.

In Richardson v. McKnight, #96-318, 521 U.S. 399 (1997), however, the U.S. Supreme Court ruled that a qualified immunity defense in federal civil rights lawsuits is not available to correctional officers working for privately run state prisons.

The plaintiff, a prisoner in a privatized Tennessee correctional center, filed a federal civil rights lawsuit for physical injuries allegedly inflicted by prison guards.

The Supreme Court found that the guards, employed by a private firm, were not entitled to a qualified immunity from suit.

The Court stated that there was not a “firmly rooted tradition of immunity applicable to privately employed prison guards.” While government employed prison guards may have enjoyed a kind of immunity defense arising out of their status as public employees at common law, correctional functions “have never been exclusively public.”

Indeed, the Court noted, in the 19th century both private entities and government itself carried on prison management activities. But it found “no conclusive evidence of an historical tradition of immunity for private parties carrying out these functions. “

The Court also reasoned that the immunity defense’s purposes also did not support immunity for private prison guards, especially when they perform a job without government supervision or direction.

The most important government immunity producing concern, the Court continued, is protecting the public from unwarranted timidity on the part of public officials.

There is not the same issue when “a private company subject to competitive market pressures operates a prison.”

Such a company “whose guards are too aggressive” may “face damages that raise costs, thereby threatening its replacement by another contractor, but a firm whose guards are too
timid will face replacement by firms with safer and more effective job records.” The Court believed that the marketplace would play a role that effectively reduced or eliminated any need for the same types of immunity available to government entities and employees.

In Swann v. Southern Health Partners, Inc., #03-14387, 388 F.3d 834 (11th Cir. 2004), the court compared the private corporation operating a correctional facility to the “functional equivalent” of a municipality, and ruled that it, like a municipality, could not assert a qualified immunity defense, which is only available to government employees in their individual capacities.

Resources

The following are some useful resources related to the subject of this article.

- Community Education Centers, Inc. Website of a private company providing reentry treatment and education services for adult correctional populations.
- Corrections Corporation of America, Wikipedia article.
- Corrections Corporation of America (CCA). Website of private prison company.
- GEO Group. Wikipedia article.
- GEO Group. Website of private prison company.
- Private Corrections Working Group. Website of a group critical of private prisons.
- Private Prison. Wikipedia article.
- Private Prisons and Entities. Summaries of cases reported in AELE publications.
- Privatization of Prisons, Website with links to online resources and references.

References:

- “Privatization in Corrections: Increased Performance and Accountability Is Leading to Expansion,” by the Management & Training Corporation (MTC) (December 2009).


• “Private Corrections: A Review of the Issues,” by Richard P. Seiter, Ph.D., Corrections Corporation of America, presentation to Corrections Section, Academy of Criminal Justice Science (March 2008).


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.