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Private Prisons and Their Employees: Civil Liability and Defenses

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Privately Run Prisons and the Americans With Disabilities Act

Prisoners in government run prisons and jails have been able to bring some disability discrimination lawsuits arguing that they were discriminated against on the basis of a disability in terms of participating in programs provided by a governmental entity.

At least one federal appeals court recently held that, because of the explicit language of the federal disability discrimination statute, this is inapplicable to private companies running prisons.

In Edison v. Douberly, #08-15819, 604 F. 3d 1307 (11th Cir. 2010), a legally blind prisoner in a Florida prison operated by a private prison management company under

contract sued three employees of the company in their official capacities, seeking injunctive relief and damages for disability discrimination under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. Sec. 12132, which prohibits a "public entity" from discriminating against qualified persons because of their disabilities.

Upholding summary judgment for the defendants, a federal appeals court held that the private corporation was not a public entity merely on the basis that it entered into a contract with a public entity to provide services. An "instrumentality of the state" is a government unit or a unit created by a government unit. Accordingly, no ADA claim could be considered.

A decision by the Second Circuit Court of Appeals, while it involved a private hospital rather than a private prison, is also worthy of note in this regard. In Green v. New York, #04-1006, 465 F.3d 65 (2nd Cir. 2006), the plaintiff tried to argue that a private hospital was a "public entity" for purposes of bringing a disability discrimination claim under the ADA, because the hospital was carrying out a public function pursuant to a contract with New York City to provide certain services.

The court rejected this interpretation, and found that the exact words of the statute and their plain meaning were controlling, so that a private entity was not converted into a public entity for purposes of the ADA simply by contracting to perform a public function. The reasoning of the Second Circuit in this case would also appear to be applicable in the context of ADA claims against private prisons.

See also, Cox v. Jackson, #06-CV-13407, 579 F. Supp. 2d. 831 (E.D. Mich. 2008), ruling that a private medical provider for a prison was not a public entity for ADA purposes because it was not a governmental entity, despite contracting to provide governmental services. In accord, although not involving prisons, are Hahn v. Linn County, #99-19, 191 F. Supp. 2d 1051 (N.D. Iowa 2002), O'Connor v. Metro Ride, Inc., 98-civ-2340, 87 F. Supp. 2d 894 (D. Minn.), and Doe v. Adkins, #95-766, 674 N.E.2d 731 (Ohio App. 1996).

Do Prison Litigation Reform Act Rules Apply to Private Prisons?

The provisions of the federal Prison Litigation Reform Act, and similar state statutes, have played an important role in deterring and reducing frivolous litigation. The requirement that prisoners first exhaust available administrative grievance remedies before filing suit, 42 U.S.C. Sec. 1997e, has been particularly important. Do these rules apply in the context of privately run prisons?

The courts that have addressed this issue in the context of the exhaustion of remedies requirement have answered in the affirmative. The purpose, the courts have noted, was to reduce the number and improve the quality of prisoner lawsuits. The requirement of exhausting available administrative remedies before suing allows prison officials an

opportunity to satisfy the inmate's complaint and thereby avoid the need for litigation. It also filters out some frivolous claims, and creates an administrative record that facilitates review of cases that are ultimately brought to court.

Therefore, prisoners in private prisons and jails are still subject to those rules. Cases containing this ruling include Roles v. Maddox, #04-35280, 439 F. 3d 1016 (9th Cir. 2006), holding that the "plain language of § 1997e(a) makes clear that the exhaustion rule is to apply to all prisons, state owned or otherwise."

Other cases in accord are Boyd v. Corrections Corp. of America, #03-5227, 380 F.3d 989 (6th Cir. 2004), cert. denied, 544 U.S. 920 (2005), Ross v. County of Bernalillo, #98-2193, 365 F.3d 1181 (10th Cir. 2004) and Murphy v. Jones, #01-35336, 27 Fed. Appx. 826 (Unpub. 9th Cir. 2001). See also, Bias v. Cornell Corrections, Inc., #04-6353, 159 Fed. Appx. 868 (10th Cir. 2005).

In Pri-Har v. Corr. Corp. of Am., #05-11132, 154 Fed. Appx. 886, 2005 U.S. App. Lexis 24952 (Unpub. 11th Cir.), the court noted that "by its terms, § 1997e(a) applies to prisoners confined in 'any' prison. Accordingly, § 1997e(a) applies to federal criminal prisoners in any prison, regardless of whether it is a federal prison or a privately operated facility."

Placement in Private Prisons: A Rights Violation?

Some prisoners have tried to argue that their mere placement in a privately run prison was somehow a violation of their legal rights under state or federal law. Courts have uniformly rejected these claims.

In Lyons v. Zavaras, #08-1133, 2009 U.S. App. Lexis 925 (Unpub. 10th Cir.), the court ruled that a Colorado prisoner's lawsuit claiming that his transfer to a privately run prison in Oklahoma violated his federal constitutional rights was properly dismissed, as no such right was implicated by the transfer.

Similarly, in Florez v. Johnson, #02-2131, 63 Fed. Appx. 432 (Unpub. 10th Cir. 2003), the court ruled that a state prisoner's incarceration in a private prison, by itself, does not raise any federal constitutional claim.

And in Madyun v. Litscher, #02-1788, 57 Fed. Appx. 259 (7th Cir. 2002), cert. denied, 538 U.S. 1062 (2003), the court concluded that a prisoner could not pursue a federal civil rights lawsuit over a state's practice of transferring inmates to out-of-state private prisons, since he had no constitutional right to be placed in a particular facility. In that case, the plaintiff also could not pursue his claim because, at the time, he had not actually been transferred to an out of state private prison, nor could he show that he was about to be transferred to one.

The prisoner's claim that officials denied timely parole hearings as part of a plan to create overcrowding in state prisons and therefore create a need for transfers to private prisons so

that they could increase the value of the stock in private prison corporations allegedly held in their retirement portfolios could not be pursued when the prisoner could not show that he was being held beyond his mandatory release date.

In California Correctional Peace Officers' Association v. Schwarzenegger, #C055327, 163 Cal. App. 4th 802, 2008 Cal. App. Lexis 832 (3rd Dist.), the court ruled that the Governor of California did not exceed his authority in declaring a state of emergency in relation to prison overcrowding, and then entering into contracts to house California inmates in out-of-state private prisons.

Under state law, he could proclaim such states of emergency when there is "extreme peril" in an area exclusively under the control of the state government. Until additional state prisons were constructed, there was an urgent need for services to provide safety from the risks created by overcrowding. The court therefore rejected a challenge to the Governor's actions filed by a prison guards union and others.

See also Hertz v. State of Alaska, #A-7585, 22 P.3d 895 (Alas. App. 2001). (Transfer of an Alaska prisoner to an out-of- state private prison did not violate his rights or constitute improper enhanced punishment; such transfers were authorized under state law and the contract with a private prison required it to adopt state corrections policies and procedures and comply with federal and state laws) and Pischke v. Litscher, #98-4013, 178 F.3d 497 (7th Cir.), cert. denied, 528 U.S. 954 (1999). (Wisconsin statute that authorized the transfer of state prisoners to private prisons in other states did not violate prisoners' rights under the Thirteenth Amendment; federal appeals court states that prisoners' claims were "thoroughly frivolous.").

Minimum Wages for Prisoners' Work in Private Prisons?

When prisoners at a privately operated prison perform work assignments, does the fact that the supervisor of their work is a private company and its employees somehow convert the prisoners into employees entitled to minimum wages and other work benefits? In Bennett v. Frank, #04-1959, 395 F. 3d 409 (7th Cir.2005), the court found that the answer was no. It commented that this case presented an issue "of some novelty, but little difficulty."

The plaintiff prisoners, who were incarcerated at Whiteville Correctional Facility, a private prison in Tennessee (owned by a private corporation, Corrections Corporation of America) that is under contract to the Wisconsin Department of Corrections, claimed that they were entitled to minimum wages for their prison work assignments under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq.

The appeals court found that the FLSA is intended for the protection of employees, and "prisoners are not employees of their prison, whether it is a public or a private one," and therefore are not protected by the Act.

The general rule is that prisoners are not employees for purposes of minimum wage legislation, since they are not "imprisoned for the purpose of enabling them to earn a living."

> "The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress."

The court noted that its conclusion that the FLSA does not apply to the inmates at a private prison was "reinforced by decisions that hold that a state prison does not lose its immunity from liability under the FLSA merely because it has hired a private company to manage the prison labor."

The appeals court expressed no disagreement with other cases that held that the minimum wage provisions of the FLSA applied to prisoners working for private companies under work-release programs.

> "Those prisoners weren't working as prison labor, but as free laborers in transition to their expected discharge from the prison. Unlike our plaintiffs."

Conclusion

In Agyeman v. Corrections Corporation of America, #03-16068, 390 F.3d 1101 (9th Cir. 2004), cert. denied, 545 U.S. 1128 (2005), the court ruled that the complexities of the legal issues in a lawsuit brought by an immigration detainee claiming that he was attacked by correctional officers while in a facility operated by a private corporation required the vacating of a jury award for the defendants when the trial court failed to appoint a lawyer to represent the detainee.

The prisoner's case, the appeals court noted, had a "triple complexity," including issues concerning what types of claims he could assert, given the private nature of the company operating the facility, and what claims could be brought against the government, which the private company contracted with, along with the normal issues as to how to make out his case that his rights had been violated.

We hope that this brief two-part article has served as a useful introduction to some of the complex issues that arise in lawsuits when a private company is operating a prison. There are many questions still unresolved by the courts, many of which will undoubtedly be

addressed as more cases involving prisoners in privately run correctional facilities are litigated and resolved.

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