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Sexual Assault of Female Inmates by a Correctional Officer: --A Case Study

- **Introduction**
- **Facts of the Case**
- **Individual Liability**
- **Governmental Liability**
- **The Prison Rape Elimination Act (PREA)**
- **Resources and References**

❖ Introduction

A federal appeals court, ruling en banc in *J.K.J. v. Polk County*, #18-2177, 960 F.3d 367 (7th Cir. 2020), recently upheld jury awards of damages against both a correctional officer and a county, in a case in which two female jail inmates claimed that they were both repeatedly sexually assaulted by the same male correctional officer. The compensatory damages were $2 million to each woman against both the now ex-officer and the county, as well as awards of punitive damages of $3.75 million to each woman against the ex-officer alone.

This article takes a detailed look at the case and examines just what it takes to satisfy the legal standard for liability in claims against both the individual officer and the governmental entity employing him. There is also a section of the article examining the federal Prison Rape Elimination Act (PREA). At the conclusion, there is a brief listing of useful and relevant online resources and references.

❖ Facts of the Case

Two women, J.K.J. and M.J.J., suffered from addictions and committed various crimes that landed them in the Polk County Wisconsin Jail intermittently between 2011 and 2014. The jail houses up to 160 inmates, including a small number of women, and employs about 27 correctional officers. Male officer Christensen worked for 19 years as one of the guards assigned to protect the inmates. The two women's experiences with were individually unique but shared a basic pattern.

He began by commenting on their appearances—remarks such as "nice ass" and "you're looking good." The verbal harassment subsequently escalated to explicit sexual overtures. Then came physical contact, which began with him "groping" and kissing them and from there advanced to oral sex, digital penetration, and eventually to intercourse.

J.K.J. could not specify the total number of times he assaulted her but, by way of example, stated that, during a two-month period in the summer of 2012, he insisted on sexual contact every time he was on duty.

The second woman, M.J.J. estimated that he engaged in sexual contact with her 25 to 75 times over a period of about three years.

The officer attempted to conceal his misconduct in the jail. While he did sometimes make inappropriate sexual comments in front of others, he always made sure to take one of the women to hidden areas to engage in physical contact, and cautioned both of them not to tell anyone of these encounters because, if word got out, he would lose his job and family.

The women generally followed his warnings, and kept the abuse to themselves during their incarceration. They subsequently explained their silence, the appeals court noted, "in terms familiar to many victims of sexual harassment and assault—shame, doubt anyone would believe them, and fear of retaliation."

Despite this, the facts eventually came out. Another county's investigator phoned Polk County to report an accusation that the officer had engaged in sexual contact with an inmate. Polk County then opened an internal investigation, and Christensen resigned upon being confronted.

A criminal investigation followed, which led the Wisconsin Department of Justice to interview J.K.J. and M.J.J. After they expressed initial reluctance to talk, both women finally were able to feel safe enough to trust the investigators with the details of their abuse.

The officer pled guilty to criminal charges and is now serving a 30-year sentence. The two women sued both the ex-officer and the county for federal civil rights violations under 42 U.S.C. § 1983. They claimed that the defendants violated the Eighth and Fourteenth Amendments by acting with deliberate indifference to a serious risk of harm to their safety and well-being. They also asserted a negligence claim under Wisconsin law against the County.

A five-day jury trial ended with both defendants being found liable on all claims. In a damages phase of the trial which followed, during which evidence was presented on the impact of the abuse on the plaintiffs' lives, the jury awarded $2 million in compensatory damages to each woman against both defendants, and punitive damages of $3.75 million to each woman against the ex-officer.

In an earlier appeal in the case, *J.K.J. v. Polk County*, #18-1498, 928 F.3d 576 (7th Cir. 2019), the appeals court ruled that the trial court properly denied the correctional officer's request for a new trial because his assaults were "predatory and knowingly criminal," improperly refused to grant the county's motion for judgment as a matter of law because the evidence showed no connection between the assaults and any county policy. The full appeals court granted rehearing en banc and upheld the damage award against the county also, for reasons subsequently spelled out in this article.

❖ Individual Liability

The appeals court again found that the ex-officer had provided no good reason to overturn the jury verdict against him. To show that his conduct violated their Eighth Amendment rights, the plaintiffs had to show that he acted with deliberate indifference to an excessive risk to their health or safety. But as the jury believed their accusations, it was more than reasonable to conclude that this legal standard was met.

"To say that the sexual assaults he committed against J.K.J. and M.J.J. objectively imposed serious risk to their safety would be an understatement. And the evidence was equally sufficient to show that Christensen knew of that danger. Indeed, he admitted at trial that he knew he was putting the plaintiffs at risk and that his conduct not only violated prison policy but was criminal. Christensen's only defense was to try to somehow persuade the jury that J.K.J. and M.J.J. consented to the sexual relations. The effort failed and now on appeal he contends that the district court erred in not giving the jury a special instruction on his consent defense."

The appeals court's examination of the trial transcript, however, revealed a complete and accurate jury instruction concerning the elements of an Eighth Amendment violation, so there was no need for a further explanation to instruct the jury on how to consider the "consent" issue. Had the jury "bought" the ex-officer's story that the women were "willing participants (and, for that matter, even capable of being willing participants under the circumstances)," the jury could have found that he did not act with deliberate indifference, but it did not do so.

The ex-officer had testified at the trial. During his testimony, he explicitly acknowledged each of the following:

•He had knowledge that his actions violated jail policy;

•He received training on the fact that such conduct was a crime;

•He knew that he was putting the plaintiffs at risk;

•He never forgot that sex with inmates was a crime; and

•He agreed that he did not require more training to know that his actions were a crime.

Establishing an Eighth Amendment violation, under the prior precedent of *Sinn v. Lemmon*, #18-1724 911 F.3d 412 (7th Cir. 2018) requires two elements, according to the appeals court:

"The harm to which the prisoner was exposed must be an objectively serious one"; and judged subjectively, the prison official "must have actual, and not merely constructive, knowledge of the risk."

The court found that the first element was easily established here since sexual assault against an inmate is "always serious." As for the second element, the ex-officer's own trial testimony had established it.

As a comment, it is worth saying that an inherent problem under the circumstances for any "consent" argument is that inmates are not free individuals. They are incarcerated and under the authority and subject to the orders of correctional officers. They are dependent on the officers for all the necessities of their daily lives, including access to food, medical care, water, exercise, recreation, communication, and safety. A predatory officer who wishes to prey on them in a criminal manner has many coercive mechanisms at his disposal.

Additionally, it should be noted, the analysis of sexual assaults on detainees or prisoners by correctional officers is unlike the analysis of the ordinary use of force by those officers. There are many instances in which the use of some degree of force may be justified by the need to impose order or discipline or protect the officer, other prison or jail staff, other detainees or prisoners, or accomplish other legitimate penological goals. So the legitimacy of the force employed may often be a matter of degree or how much was justified. No legitimate correctional objective is ever served by a correctional officer's sexual interaction with an incarcerated individual.

The ex-officer further argued that the damage awards were problematic because the jury gave identical amounts to both plaintiffs. While the appeals court acknowledged that the sexual assaults undoubtedly had "unique" effects on each of the women, that did not necessarily mean that they suffered different amounts of compensatory damages. Confirming this was the fact that a psychology expert recommended identical courses of treatment for both of them.

Finally, as to the amount of punitive damages, which are intended to punish the ex-officer for his wrongdoing, the amount awarded was not "so great as to be unreasonable or outside the bounds of due process." In the final analysis, given the egregious nature of the ex-officer's misconduct, the court found that the judgment against him individually could be "easily affirmed."

❖ **Governmental Liability**

The issue of liability for the county, however, was far more difficult, and it is much rarer to impose municipal liability. A governmental entity does not face liability under federal civil rights law merely for being the employer of an employee who violates a detainee or prisoner's rights. Instead, such liability must be based on the existence of an official policy or custom which caused the violation. *Monell v. Dept. of Social Services*, #75-1914, 436 U.S. 658 (1978). See also, *Bryan County v. Brown*, #95-1100, 520 U.S. 397 (1997) (collecting cases and reinforcing that the doctrine of "respondeat superior"—vicarious liability for the wrongful acts of employees-- does not apply under § 1983).

All parties in this case were agreed that the county did have a policy that clearly and explicitly forbid sexual assaults on those incarcerated at the jail by correctional officers.

The county's written policy prohibited sexual contact between inmates and guards but failed to address the prevention and detection of such conduct, the court stated. The county allegedly did not provide meaningful training on the topic. Near the beginning of the relevant period, the county learned that another officer made predatory sexual advances toward a different female inmate.

The county imposed minor discipline on the guard but made no institutional response—no review of its policy, no training, and no communication with inmates on how to report such abuse.

The plaintiffs did not argue that the county took affirmative action to harm them, but rather in inaction—in gaps in the county's sexual abuse policy and its deliberate failure to properly train the jailers in the face of obvious and known risks to female inmates. What was the evidence of such inaction?

The jury heard testimony from an expert witness about the importance of a policy that does not wait for reports of sexual abuse to trigger an institutional response, but instead contains measures both to prevent the wrongdoing in the first instance and to detect it if it does occur. He found that the county's policy, while addressing incident response, fell "far short" on prevention and detection.

He suggested the need for a "safe and confidential reporting channel," possibly something as simple as a lockbox available to inmates. Under the existing policy, an inmate seeking to report an incident of sexual abuse had to do so to one of 27

employees in a small jail that she suffered a sexual assault at the hands of his coworker.

Because of "perceived comradery" among the male officers and alleged acceptance of sexual harassment at the jail's highest levels, the court believed, the jury could have found that this was not a viable reporting option and indeed reflected a meaningful policy gap.

Further, based on the trial transcript, the appeals court found that the county's training on preventing and detecting the sexual harassment and abuse of inmates was "all but nonexistent." Instead training focused almost exclusively on the "easy and evident"--that the jail's policies prohibited sexual contact with inmates.

The only training even addressing the sexual assault of inmates by officers came in a single session on the federal Prison Rape Elimination Act (PREA) in 2014, well after much of the abuse of the plaintiffs had occurred. Based on internal communications, the jury could have found that the county itself hardly took the PREA training seriously.

There was no evidence of the county informing correctional officers of the "inherent vulnerability the confinement setting presents to female inmates, educating jailers on the symptoms of an inmate suffering from the trauma of abuse, requiring officers to report each other's misconduct, or taking any time to otherwise instruct guards on matters of prevention and detection, whatever form that might have taken."

However, the U.S. Supreme Court has made plain that a failure to act amounts to municipal action for ***Monell*** purposes only if the county has notice that its program will cause constitutional violations. *Connick v. Thompson*, 09-571, 563 U.S. 51. (2011). This often requires proof of a prior pattern of similar constitutional violations. The immediate case presented no such pattern.

An alternative path to municipal liability comes from *City of Canton v. Harris*, #86-1088, 489 U.S. 378 (1989). Under this theory, there may be circumstances in which "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights" that a fact-finder could find deliberate indifference to the need for training. "In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury."

The appeals court found that the jury had evidence that the county was aware of sexual misconduct happening within its jail, rendering the risk to female inmates far from hypothetical. The jury heard that a supervising captain knew of sexual comments male officers made about female inmates.

This was especially consequential because he was responsible for creating and implementing the jail's policies and standards, and his actions therefore could be attributed to the county for the purpose of liability. The captain even admitted to himself participating in jailhouse chatter that the jury easily could have found amounted to sexually inappropriate banter or harassment.

"A reasonable jury could have viewed the jail's denigrating culture as confirming the undeniable risk that a guard would grow too comfortable, lose his better angels, and step over the clear line marked in Polk County's written policies." The notice then "became undeniable" when the captain learned of another correctional officer's sexual misconduct against an inmate.

While the accusations against that officer fell short of rape, it was "a plain example" of predatory sexual behavior requiring corrective action. Yet the county, at that point did "nothing." It failed to "change its sexual abuse policy, institute a training, inquire of female in-mates, or even call a staff meeting."

The court cautioned that the risks to female inmates in the confinement setting are "obvious." Faced with the notice of another officer's sexual misconduct, even if not as serious, the county had an obligation to act.

The appeals court's en banc decision ruled that the evidence was sufficient to support the verdict. The evidence did not require the jury to accept as inevitable that the officer's conduct was unpreventable, undetectable, and incapable of giving rise to municipal liability.

Nor was the jury compelled to conclude that the sexual abuse had only one cause. The law allowed the jury to consider the evidence in its entirety, use its common sense, and draw inferences to decide for itself.

The jury was furnished with sufficient evidence, the court found, to hold the county liable on the basis of the county's own deliberate choice to stand idly by while the female inmates under its care were exposed to an unmistakable risk that they would be sexually assaulted.

❖ The Prison Rape Elimination Act (PREA)

The federal government enacted the Prison Rape Elimination Act (PREA) in 2003 with the intention of helping to deter the sexual assault of prisoners in the U.S.

In passing the statute, Congress estimated that at least 13 percent of the inmates in the U.S. have been sexually assaulted in prisons and jails, amounting to over 1,000,000 persons over a 20-year period, and making this a pervasive problem. The law sought to limit the number of such sexual assaults through a "zero-tolerance" policy, along with research and information gathering, and the development of national standards to prevent such incidents.

The statute established a National Prison Rape Reduction Commission which issued reports, and provided information and training materials. After issuing its final report and standards, the Commission sunsetted in 2009. The law instructs the U.S. Department of Justice to "make the prevention of prison rape a top priority in each prison system." Grants were made available to detention facilities for various purposes related to the objectives of the law.

❖ Resources

- Prison Rape Elimination Act
- Sexual Assault. AELE Case Summaries.
- Governmental Liability. AELE Case Summaries.
- National Prison Rape Reduction Commission.
- U.S. Department of Justice PREA Resource page.
- National Institute of Corrections PREA Resource page.
- Prison rape in the United States. Wikipedia article.
- Just Detention International. An organization focused on preventing sexual abuse in detention.

❖ Prior Relevant Monthly Law Journal Articles

- Civil Liability for Sexual Assaults on Prisoners, 2007 (8) AELE Mo. L.J. 301.
- Homosexual or Bisexual Prisoners, 2009 (6) AELE Mo. L. J. 301.
- Transsexual Prisoners: Protection From Assault, 2009 (7) AELE Mo. L. J. 301.
  Promise Amid Peril: PREA's Efforts to Regulate an End to Prison Rape, by Brenda V. Smith, 57 American Criminal Law Review 1599 (2020).

❖ **References (*Chronological Order*)**

1. Promise Amid Peril: PREA's Efforts to Regulate an End to Prison Rape, by Brenda V. Smith, 57 American Criminal Law Review 1599 (2020).
2. Engendering Rape, by Kim Shayo Buchanan, 59 UCLA L. Rev. 1630 (2012).
3. The Impact of Prison Rape on Public Health, by M. Dyan McGuire, Volume 3, Californian Journal of Health Promotion Issue 2, 72-83 (2005).
4. Prison Rape: A Critical Review of the Literature, by Gerald G. Gaes and Andrew L. Goldberg National Institute of Justice (March 10, 2004).
5.

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