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## **Prison Work Release Programs**

### *Contents*

- **Introduction**
- **No independent constitutional right to work release**
- **State law may create a protected liberty interest**
- **Due process rights prior to removal**
- **Certain prisoners may properly be excluded**
- **Liability for crimes by prisoners on work release?**
- **Resources and References**

### ❖ **Introduction**

Many jurisdictions have established work release programs under which prisoners in custody are temporarily released to go to jobs with private employers, returning to their place of confinement when their work shifts or working days are over. The first such program in the U.S. was established in Wisconsin in 1913 under the [Huber law](#), which is still the name of the state's [current work release program](#).

There has been [some research](#) that tends to show that, in appropriate cases, participation in work release programs can be beneficial and helpful in easing the transition to prisoner reentry into society, and that it may help prevent recidivism.

A variety of legal issues arise concerning such programs, including assertions by some prisoners that they have a right to be selected for and participate in work release programs, or that they are entitled to due process rights such as a notice and hearing before they are removed from participation.

This article briefly discusses some of the caselaw on these issues, as well as decisions about the ability to exclude certain types of prisoners, such as murderers or sex offenders, from such programs, or the possibility of liability for crimes committed by prisoners on

work release. At the conclusion of the article, a number of relevant resources and references are listed.

### ❖ **No independent constitutional right to work release**

It has long been clear that participation in a work release program is not a constitutional right. A state has no obligation to create or offer a work release program for prisoners, but may decide to do so. State law, accordingly, may set forth criteria for which prisoners are selected to participate. See [\*Joseph v. Nelson Correctional Center\*](#), #09-7670, 2009 U.S. Dist. Lexis 122356 (E.D. La.), ruling that a prisoner's lawsuit over his denial of participation in a work release program should be dismissed as he had not shown that he had any constitutional or statutory right to participate in such a program.

In [\*Lee v. Governor of State of New York\*](#), #95-2779, 87 F.3d 55 (2nd Cir. 1996), the court ruled that a change in the basis of eligibility for temporary work release programs did not violate prisoners' constitutional rights, since they had no constitutional right to participation. In accord is [\*Carter v. McCaleb\*](#), #97-139, 29 F. Supp. 2d 423 (W.D. Mich. 1998), holding that a jail did not violate any right of prisoner when it failed to process him for participation in work release program. While his sentence provided an "okay" for work release, it did not mandate it, and the prisoner had no protected constitutional right to participation in such a program. See also, [\*Grant v. Temporary Release Committee\*](#), #93-04114, 619 N.Y.S.2d 106 (A.D. 1994), ruling that a New York inmate was properly denied work release so long as the denial was not "affected by irrationality, bordering on impropriety."

### ❖ **State law may create a protected liberty interest**

Once state law or administrative regulation establishes a work release program and sets forth specific criteria for participation, prisoners selected for participation may have a constitutionally or statutorily protected liberty interest in continued participation, absent some misconduct which terminates their eligibility. This is illustrated by [\*Segreti v. Gillen\*](#), #01-C-7879, 259 F. Supp. 2d 733 (N.D. Ill. 2003).

In that case, an Illinois prisoner serving a sentence of incarceration was placed in a work-release program which allowed him to engage in outside employment. On one day, however, when he returned to the "Transition Center" detention facility from work, he was allegedly confronted by a supervisory officer who "falsely" advised him that his movement out of the facility was not approved. The officer allegedly became "agitated

and verbally abusive” when the prisoner attempted to explain that he had been following proper procedure.

The prisoner then filed a written grievance against the officer describing the confrontation. After this was submitted, the officer filed an inmate disciplinary report charging the prisoner with “giving false information to an employee,” “insolence,” and “unauthorized movement,” charges the prisoner contended were filed even though the officer knew them to be false.

A hearing on the disciplinary report was held and the supervisory officer was allegedly “allowed to participate in the deliberations of the hearing and dictated its result,” which was that the prisoner was immediately transferred out of the Transition Center and sent to higher security facility, losing the ability to participate in the work release program. He filed a federal civil rights lawsuit claiming that the transfer was retaliatory for his filing of grievance against the officer, an exercise of his [First Amendment](#) rights.

The trial court rejected the argument that the prisoner had no protected liberty interest in remaining in the detention facility where he could participate in the work-release program. The court noted that the U.S. Court of Appeals for the Seventh Circuit held in [Montgomery v. Anderson](#), #00-2869, 262 F.3d 641 (7th Cir. 2001) that a prisoner has a statutory liberty interest in good-time credits and parole once they have been awarded pursuant to state or administrative regulations. “Each prisoner is then entitled to remain in the designation that they have been assigned to, unless he or she commits a violation, because of the significant hardship such a reduction would impose upon the prisoner,” and therefore must receive due process before a reduction due to a rule violation can take place.

Work-release, the court reasoned, which allows the inmate to participate in employment outside the institution, “is analogous to parole,” since both allow “a measure of restricted, supervised liberty during period otherwise encompassed by the inmate’s sentence.” A prisoner’s removal from work-release therefore results in an “atypical and significant hardship” in relation to the “ordinary incidents of prison life.”

An Illinois prisoner, the court ruled, has a statutory liberty interest in participation in work-release programs once it has been awarded, which cannot be terminated without due process.

This is not uniform, however, and the mere creation of a work release program by a state will not give a particular prisoner a right to either selection for participation or to continued participation if the details of the program do not restrict the discretion of correctional officials as to which prisoners to initially select or allow to continue to participate.

Additionally, if the work release participation was ordered by a court as part of its sentence, the court retains the jurisdiction to modify that order. See [\*McGoue v. Janecka\*](#), #01-CV-4603, 211 F. Supp. 2d 627 (E.D. Pa. 2002), finding that a Pennsylvania prisoner did not have a protected liberty interest in a work release assignment under either the due process clause of the Fourteenth Amendment or Pennsylvania state law, which barred him from pursuing a lawsuit that prison officials violated his rights by removing him from the work release program without either notice or a hearing, particularly as it was a court order which ended his participation.

#### ❖ **Due process rights prior to removal**

If the details of a state statute or administrative regulation do create a protected liberty interest in a prisoner selected for a work release program continuing to participate, they are then entitled to due process before being removed from the program—notice of the intent to remove them, the basis for the proposed removal, and some kind of hearing where they are able to contest the removal.

In [\*Anderson v. Recore\*](#), #05-4096, 446 F.3d 324 (2nd Cir. 2006), for example, a New York state prisoner claimed that his removal from a temporary work release program without notice and a hearing was a violation of his right to due process of law under the Fourteenth Amendment. He sued various correctional officials and employees allegedly involved in his removal.

The removal occurred after he was accused of engaging in the use of cocaine. The prisoner faced disciplinary charges regarding his drug use for which he had been found guilty during a separate disciplinary proceeding.

A federal appeals court, however, found that the prisoner had a liberty interest in continuing his participation in the work release program, and was therefore entitled to procedural due process before his removal.

This was the case because, under the applicable rules, the disciplinary conviction and any factual determinations that it made concerning the prisoner's drug use did not deprive the committee in charge of temporary work release program of the use of its discretion to continue his participation in the program, so that his removal from the program was not automatic.

The defendants, therefore, in allegedly not giving him notice and a hearing at which he could be heard prior to removing him from the program for the use of cocaine, violated his due process rights.

The court found that the defendants were entitled to qualified immunity from liability, however, because reasonable persons could have believed that they had no discretion to continue his participation in the program after the drug use charges, which formed the basis for his removal, were sustained at the disciplinary hearing, and after he was confined to the prison for 30 days as a result of the disciplinary hearing. Under these circumstances, they could have reasonably believed that no further hearing was required.

In [\*Kroemer v. Joy\*](#), #03-263, 769 N.Y.S.2d 357 (Misc. 2003), the court held that the removal of a New York prisoner from a work release program violated his right to procedural due process when he did not receive advance notice of the hearing, information about the evidence to be used against him, and an opportunity to present an opposing point of view.

The case involved a New York state prisoner who was accepted into the Temporary Release Program of the New York Department of Correctional Services. After fifteen months in the program, during which he was employed and spent five days at home and two days per week in a correctional facility, he was removed from the program and returned to prison full time.

This happened after he received two speeding tickets, which formed the basis of a misbehavior report charging him with a temporary release violation and false statements or information. A disciplinary hearing was held regarding the misbehavior report, at which the prisoner was present. The hearing officer relied only on the second alleged speeding ticket in finding the prisoner guilty. This hearing officer referred this result to the Temporary Release Committee (TRC) for review.

The committee held a hearing at which the prisoner was not present, and of which he was allegedly not given advance notice, and recommended that he be removed from the program for disciplinary reasons. This was carried out, and a subsequent administrative appeal of the decision was denied.

The prisoner claimed that his due process rights were violated when he was not allowed to participate in the TRC removal hearing.

A New York trial court agreed, finding that the procedure used to remove the prisoner from the program “did not comport with due process.” The prisoner should have, the court held, been given written notice of the claimed violation being considered by the TRC, as well as being told about the evidence that was forwarded to the TRC to be used against him. He additionally should have been given an opportunity to present proof in opposition to this evidence in front of the TRC.

Once the state has given a prisoner the “freedom to live outside an institution,” the court stated, “it cannot take that right away without according the inmate procedural due process.”

The court further noted that the TRC hearing made different findings than the disciplinary hearing officer. Specifically, the disciplinary hearing officer did not find the prisoner guilty concerning the violation involving the first speeding ticket, but the TRC based its recommendation to remove the prisoner from the program on the conclusion that the prisoner “jeopardized safety of community receiving two speeding citations” while on temporary release.

The court therefore ordered a new TRC hearing on the issue of the prisoner’s removal from the program.

In [\*Nesbitt v. Goord\*](#), #6811-05, 813 N.Y.S.2d 897 (Misc. 2006), the court stated that while participation in a New York state temporary work release program was a privilege, rather than a right, a prisoner could pursue her claim that the state Department of Corrections violated its own rules when it allegedly failed to have the superintendent of her facility review her application for participation,

The details of state law establishing a work release program make the due process rights of a prisoner depend on whether they have actually commenced participation in the

program. See [\*Caban v. N.Y. State Department of Correctional Services\*](#), #91114, 764 N.Y.S.2d 493 (A.D. 3d Dept. 2003), ruling that the revocation of a prisoner's approval to participate in a work release program without a hearing did not violate his due process rights, since any such approval was conditional under New York state law until his actual work release began.

The rights of prisoners to due process in relationship to a work release program may change over time. See [\*Aupperlee v. Coughlin\*](#), #98-7245, 97 F. Supp. 2d 336 (E.D.N.Y. 2000), ruling that correctional officials were entitled to qualified immunity from liability for removal of a prisoner from a New York work release program in 1994, when his right to be in the program was not clearly established, but not entitled to such immunity for removing him from the program again in 1997, when his right to a pre-removal hearing was clear.

The mere fact that technical violations of due process have occurred while removing a prisoner from a work release program does not necessarily entitle them to substantial damages in a federal civil rights lawsuit. They must show that they suffered substantial actual injury. In [\*Kim v. Hurston\*](#), #98-7051, 182 F.3d 113 (2nd Cir. 1999), the court found that a New York prisoner had a protected liberty interest in participation in a work release program that allowed her to live at home. However, a "technical" violation of the requirement that she have notice of the reason for her removal from the program only entitled her to \$1 in nominal damages when she had no real basis for contesting her removal, which was based on her flunking a drug test. She would have been removed anyway had a hearing been afforded to her.

Similarly, the right to due process and hearings is not endless, and the approval of removal in an administrative hearing and provided for appeals will ordinarily suffice. This is illustrated by [\*Roucchio v. Coughlin\*](#), #94-CV-4313, 29 F.Supp.2d 72 (E.D.N.Y. 1998), ruling that a prisoner removed from a work release program supposedly without an opportunity to be heard after being arrested for driving while intoxicated could not pursue a federal civil rights claim alleging violation of due process when his removal from the program was repeatedly upheld in prior administrative proceedings and state court hearings.

Additionally, since any liberty interest in participation or continued participation is a creation of state law, the state is free to alter or abolish a program, changing the criteria for either initial selection or continued participation. Criteria and procedures established

as guidelines may be able to be altered much easier than those set forth in statutes passed by a legislature. See [\*Watkins v. Secretary, Department of Public Safety and Correctional Services\*](#), #118, 831 A.2d 1079 (Md. 2003), holding that the establishment of new guidelines governing security classifications, work release, and family leave were not unconstitutional “ex post facto” laws increasing prisoners’ punishment retroactively by eliminating the eligibility of prisoners serving life sentences for work release participation. They were not laws, or even administrative regulations carrying out statutory duties, but merely guidelines promulgated as an exercise of discretion and correctional officials had the authority to modify them.

### ❖ **Certain prisoners may properly be excluded**

In a number of cases, courts have upheld the exclusion of certain types of prisoners or particular prisoners when there are good reasons to believe that their participation in a work release program may pose a real threat to public safety. See [\*People ex rel. Adler v. Beaver\*](#), 785 N.Y.S.2d 226 (A.D. 4th Dept. 2004), concluding that a New York inmate suspended from work release program was not denied due process when he was granted an appearance before a temporary release committee and advised of a confidential investigation that could result in felony charges against him, and the prison’s superintendent subsequently determined, on the basis of the committee’s recommendation, that his continued participation in work release was “inconsistent with public safety.”

Similarly, in [\*Vargas v. Pataki\*](#), #95-CV-174, 899 F.Supp. 96 (N.D.N.Y. 1995), the court held that a New York statute barring convicted killers from participating in a prison work release program did not violate a prisoner’s right to equal protection of law or increase his punishment. See also [\*Dominique v. Weld\*](#), #95-1465, 73 F.3d 1156 (1st Cir. 1996), finding that the revocation of a sex offender’s participation in work release program because of new regulations governing sex offenders did not violate any due process liberty interest.

### ❖ **Liability for crimes by prisoners on work release?**

Courts have generally rejected efforts to find some kind of constitutional duty to protect members of the public in general from the violent acts of prisoners. The fact that an

individual is in custody does not alter the general rule that there is no constitutional right to have protection by law enforcement against the violent acts of third parties.

A discussion of this is found in [Sandage v. Bd. of Commissioners of Vanderburgh County](#), #08-1540, 548 F.3d 595 (7th Cir. 2008), in which the court ruled that a county was not liable for the deaths of two persons allegedly murdered by an inmate on work release. The plaintiffs, representatives of the decedents' estates, argued that the prisoner's work release should have been revoked when one of the decedents complained that the prisoner was harassing her, and that failure to do so violated due process under the Fourteenth Amendment. The court noted that there is no constitutional right to protection against violence by private persons. Additionally, there was no evidence that county officials did anything that had the effect of limiting the decedents' ability to use self-help to defend themselves.

See also [Ornes v. Daniels](#), # A-2168-93T3, 651 A.2d 1040 (N.J. Super. A.D. 1995), holding that the state was entitled to absolute immunity, under N.J. state law, from liability for an alleged attack and rape by an inmate on work release. Also of interest is [Horton v. State of Oklahoma](#), #81,762, 915 P.2d 352 (Okla. 1996), holding that the state of Oklahoma was immune from liability for injuries a prisoner suffered while fighting fire during participation in a work release program.

## ❖ Resources

- [Employer's Guide to the Work Release Program](#), Anne Arundel County, Glen Burnie, Md.
- Gage County Nebraska Detention Center [Work Release Program](#).
- "[Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community](#)," by the Council of State Governments and ten project partners, [www.reentrypolicy.org](http://www.reentrypolicy.org).
- Wisconsin [Huber work release program rules](#).
- [Work Release](#). Summaries of cases reported in AELE publications.
- [Work Release](#). Wikipedia article.
- [Work Release](#). New York Times article collection.
- [Work Release Program](#). Minnesota Department of Corrections.

## ❖ Prior Relevant Monthly Law Journal Articles

- [Legal Issues Pertaining to Inmate Funds](#), 2008 (4) AELE Mo. L.J. 301.
- [Prisoner Work Programs](#), 2008 (8) AELE Mo. L.J. 301.
- [Public Protection: Liability for Actions of Prisoners and Former Prisoners](#), 2009 (2) AELE Mo. L. J. 301.

## ❖ References:

- [“Before the Next Storm: Some Evidence-Based Reminders About Temporary Release,”](#) by Leonidas K. Cheliotis, International Journal of Offender Therapy and Comparative Criminology, Vol. 53, No. 4, pp. 420-432, (2009).
- [“Reconsidering the Effectiveness of Temporary Release: A Systematic Review,”](#) by Leonidas K. Cheliotis, Aggression and Violent Behavior: A Review Journal, Vol. 13, No. 3, pp. 153-168 (2008).
- [“Treatment During Work Release Fosters Offenders’ Successful Community Reentry,”](#) by Lois Whitten, National Institute on Drug Abuse, Research Findings, Vol. 20, No. 4 (April 2006).
- [“Family Support, Substance Abuse Help, and Work Release Programs Are Essential as Ex-Prisoners Restart Lives in Baltimore,”](#) by The Urban Institute (March 15, 2004).
- [“Employment Dimensions of Reentry: Understanding the Nexus between Prisoner Reentry and Work,”](#) Urban Institute Reentry Roundtable, New York University Law School (May 19-20, 2003).
- [“Fee at Last? Work Release Participation Fees and the Takings Clause,”](#) by Sara Feldschreiber, Fordham Law Review, Vol. 72 Issue 1 (Jan. 2003).
- [“Making Rehabilitation Work: American Experience of Rehabilitating Prisoners,”](#) by Iain Murray, Director of Research, Statistical Assessment Service, Washington, D.C. (December 2002).
- “Work and Educational Release 1996: Programs Are Numerous, but Participation Rates Remain Low,” Corrections Compendium, Volume 22 Issue 5, pgs. 8-23 (May 1997). ([Abstract](#)).
- [“Work Release: Recidivism and Corrections Costs in Washington State,”](#) by Susan Turner and Joan Petersilia, National Institute of Justice, Research in Brief (December 1996).

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