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## Labor and Employment Law: Tools for Prevention, Investigation and Discipline of Staff Sexual Misconduct in Custodial Settings

Susan D. Carle



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**Labor and Employment Law: Tools for Prevention,  
Investigation and Discipline of Staff Sexual Misconduct in Custodial Settings**

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**Labor and Employment Law: Tools for Prevention,  
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*Labor and Employment Law: Tools for Prevention, Investigation and Discipline of Staff Sexual Misconduct in Custodial Settings* is the end product of work by many organizations and individuals concerned about preventing and addressing sexual abuse of individuals under custodial supervision.

We would like to thank the supporters of this important work including: the National Institute of Corrections (NIC), Morris Thigpen, Director; Thomas Beauclair, Deputy Director; Chris Innes, Chief, Research and Evaluation Division; and Dee Halley, Correctional Program Specialist.

This publication builds on important work done by Prof. Brenda V. Smith in researching and identifying legal responses to sexual violence in institutional settings. It addresses rapidly developing areas of law and practice in the United States; therefore, the information contained herein is subject to change. This publication is not intended to be an exclusive resource and should be supplemented by the reader as needed.

## **Foreword**

In 1999, The American University, Washington College of Law (WCL) entered into a cooperative agreement with the National Institute of Corrections (NIC) to provide training to high level correctional decision makers on addressing and investigating staff sexual misconduct. With the enactment of the Prison Rape Elimination Act in 2003, the Project's focus shifted to addressing prison rape – both staff sexual misconduct with offenders and offender on offender sexual violence and abuse.

This publication as well as others published by the NIC/WCL Project on Addressing Prison Rape are a critical part of NIC's response to its obligation to provide training, education, information and assistance under § 5 of the Prison Rape Elimination Act of 2003.

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## **I. INTRODUCTION**

### **A. Background and Scope**

This publication arises from a project of the United States Department of Justice National Institute for Corrections (NIC) designed to provide training and technical assistance to prevent sexual violence in custodial situations. Professor Brenda V. Smith directs the NIC/WCL Project on Addressing Prison Rape. One part of that project, through a cooperative agreement between the American University Washington College of Law (WCL) and NIC, is addressing staff involvement in sexual abuse of persons in custodial settings. Over a period of almost ten years, the NIC/WCL Project has trained upper- and mid-level corrections and community corrections managers on preventing, investigating and responding to problems of staff sexual misconduct, and also has issued a series of publications and other materials in order to provide further technical support and guidance on those issues. Many of those materials can be found at the Project's website at <http://www.wcl.american.edu/nic>.

Persons in custody are protected from sexual abuse by the federal Constitution<sup>1</sup> as well as many federal and state laws.<sup>2</sup> In addition, the Prison Rape Elimination Act (PREA),<sup>3</sup> which was passed by Congress in 2003, further advanced the goal of eliminating sexual abuse of persons in custody. PREA provides a variety of tools and mechanisms aimed at achieving zero tolerance for sexual abuse of persons in custodial situations. PREA raises the stakes involved in corrections agency managers' efforts to prevent, investigate and respond to problems of both offender and staff sexual abuse of persons in custodial situations. It requires, among other things, that corrections agencies comply with federal standards or risk loss of federal criminal justice assistance and funding. In light of PREA, as well as the development of a growing body of other law aimed at eliminating sexual abuse of persons in custody, the NIC/WCL Project has prepared this publication addressing human resources concerns related to preventing staff sexual misconduct in custodial situations.

This publication does not address standards governing when corrections managers or agencies are liable—either civilly or criminally-- for failing to prevent staff sexual misconduct; our website can direct you to other sources addressing that topic. Instead, this publication focuses on employment and labor law issues that arise as managers work to prevent and eliminate staff sexual misconduct in their agencies. This publication summarizes information and

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<sup>1</sup> See, e.g., *Gonzales v. Martinez*, 403 F.3d 1179, 1180-81 (10th Cir. 2005) (holding a sheriff would be liable under the Eight Amendment for denying humane conditions of confinement to an inmate whom corrections officer had sexually assaulted if inmate could show that sheriff knew that inmates faced substantial risk of serious harm in his facility and had disregarded that risk by failing to take reasonable measures to abate it).

<sup>2</sup> For a fifty state survey on laws related to staff sexual misconduct, see *Fifty State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody*, available at <http://www.wcl.american.edu/nic/documents/50StateSurveyofSSMLawsUPDATEMay2009.pdf?rd=1>

<sup>3</sup> Prison Rape Elimination Act of 2003 (hereinafter "PREA"), 42 U.S.C. §§ 15601-15609 (2003).

strategies we developed over a decade of training, discussion and learning among conference participants and training session leaders. We do not try to answer all of the questions that arise in this area of employment and labor law, but rather “flag” some of the key concerns that have emerged that are of particular interest to corrections managers.

We do not intend this publication to serve a substitute for legal advice, but instead as a resource to help corrections managers and others think through the questions for which they may want to seek legal advice. Accordingly, you should not substitute the basic information in this publication for specific legal advice tailored to the facts of your particular agency or state. We anticipate that this general overview of legal considerations that arise in situations involving prevention, response, and discipline and termination of staff will help to identify strategies that employers can use to address labor and human resources issues that often arise when there is staff involvement in custodial sexual misconduct.

## **B. Classifying the Employee Setting**

As you think through employment and labor law issues, you should first identify the employment setting in which the issues arise, because the legal rules that apply will vary depending on the employment setting. Employment lawyers generally classify these settings using two different variables. First, they classify them as either public employment – *i.e.*, where a federal, state or local government is the employer – or as private-sector employment – *i.e.*, where the employer is either a private service contractor or a privately run, non-government facility. Second, they classify employment settings according to whether they are union or non-union. A setting is a union environment when a certified collective bargaining representative represents the employees, and is a non-union environment when a union does not represent the employees. Thus, the employment setting will fall into one of the following four categories:

	<b>Public</b>	<b>Private</b>
<b>Union</b>	Union/Public Sector	Union/Private Sector
<b>Non-Union</b>	Non-union/Public Sector	Non-union/Private Sector

### ***1. Public Employees***

Public employees will have protections under state and federal constitutional law, state statutory law governing civil service employees, and other sources of law, including many laws that also apply to private-sector employees. Public employees will generally have due process rights to an administrative procedure in connection with dismissal or serious discipline, often

including the right to a hearing before a neutral decision maker. Public employees' rights under these statutes are generally lower during their initial probationary period.

## **2. Private Sector Employees**

Private-sector employees are the employees of non-public employers, including sub-contractors providing services within a correctional institution. Only state and federal laws that apply to private-sector employees cover these staff. Given the growing scope of privatized ventures in corrections, many persons who work in corrections facilities can fall in this category, such as private-contractor canteen workers, food service workers, and medical, mental health and program staff. These employees generally cannot bring constitutional law claims against their employers because the federal and most state constitutions only apply to government actors. The main sources of law that apply to private-sector employees include, most significantly, federal and state anti-discrimination laws; some privacy laws; and some common law doctrines such as defamation, *i.e.*, injury to reputation. We will discuss these legal issues at greater length below.

## **3. Unionized Employees**

Unionized employees are employees that a collective bargaining agreement covers. In this context, state or federal labor law applies to the employer. Employees will also have rights arising out of the collective bargaining agreement their union has entered into with their employer, including a right to be free of discipline or dismissal in the absence of "just cause," and some procedural rights such as access to a grievance and arbitration process. They may also have a right to union representation in those proceedings and in work-related investigations that might lead to discipline. The specific rules and procedures of state labor laws covering public employees will apply to unionized employees who work for state agencies. These laws may provide some but not all of the legal procedures or protections available to private-sector unionized employees. For example, some states do not grant public employees collective bargaining rights. In some states, unionized state employees may fall under a hybrid scheme of civil service and labor law regulation, or may be able to choose which type of process they wish to use.

## **4. Non-union Employees**

Non-union employees are employees who work in public or private-sector non-union environments. Please keep in mind that in this context the discussions below addressing union issues will not apply. In the private sector, only federal and state employment law statutes and common law doctrines that apply to all workers, such as anti-discrimination laws and defamation causes of action, will apply. In the public non-union sector, constitutional law principles, as adapted to the workplace setting, will apply, as will state laws applying to public employees.

In the discussions that follow, we distinguish among these employment contexts. This is because any legal analysis must start by placing the employees in question in the relevant "box" in the table above.

## II. PREVENTION

You will see that this section on prevention is the longest section in this publication. That is appropriate given that the best defense is a good offense. The best use of law is as a tool to prevent staff sexual misconduct against offenders. Law applies at many stages of prevention, beginning with hiring and related issues of background checks and personality testing, and continuing to the implementation and enforcement of policies to deter, detect and discipline staff sexual misconduct of persons in custody. We discuss the role of prevention in these various stages of the employment relationship in turn.

### A. Hiring

#### 1. Background Checks

Background checks can involve many different kinds of investigation into an applicant's personal and work history, including criminal record checks, verification of prior employment, education, military credentials, credit checks, and/or interviews of neighbors or other character witnesses. State laws may regulate the scope and frequency of updating of background checks, especially for staff working with children or other especially vulnerable populations.<sup>4</sup> You should check with your legal counsel to determine what laws apply in your jurisdiction and corrections situation.

In any event, in order to find the best employees, employers seeking to hire corrections staff should conduct background checks of an appropriate scope on job applicants. These background checks are also important for legal reasons. In particular, some courts have recognized a cause of action against private-sector employers for "negligent hiring" where an employer has hired an employee for a position affecting the public trust without having uncovered something in the employee's background that clearly made him or her an inappropriate hire.<sup>5</sup> Employers therefore should conduct a background check prior to hiring a new employee in a position involving contact with persons in custody. Such a check should, of course, include a check for past criminal convictions, but should explore other avenues for obtaining information about applicants' past employment histories as well.

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<sup>4</sup> See generally, NIC/WCL Project on Addressing Prison Rape. *Fifty State Survey of Abuse of Vulnerable Persons Statutes* (June 2009) available at <http://www.wcl.american.edu/nic/documents/50StateSurveyVulnerableVictimsFINALJune2009.pdf?rd=1>

<sup>5</sup> See, e.g., *Malorney v. B & L Motor Freight, Inc.*, 496 N.E.2d 1086, 1089 (Ill. App. Ct. 1986) (holding employer liable for hiring a driver who later sexually assaulted a young female in his truck, where the employer had failed to investigate and discover this employee's criminal record for prior sex offenses). In the public employer context, courts have applied a "gross negligence" standard to cases alleging constitutional violations based on an employer's failure to discover sex offenses in an employee's background. See, e.g., *Wassum v. City of Bellaire, Texas*, 861 F.2d 453, 456 (5th Cir. 1988).

**a. Employer Reluctance to Provide Information**

It is often difficult to obtain candid reports from former employers about an employee's prior job performance and any incidents of misconduct or alleged misconduct. The reason former employers are hesitant to provide such references often have to do with their concern that former employees may file defamation actions against them. Frequently employees charged with misconduct may agree to resign from their position in return for having the charges against them dropped. When this happens, the former employer will not have a definitive finding of wrongdoing to rely upon when providing information to future prospective employers. Former employers' reluctance or refusal to provide past employment information in this situation may pose particular problems in hiring corrections staff with prior experience in other corrections systems or jurisdictions. Failing to provide a warning to future prospective employers about former employees who showed signs of being "bad apples" within the corrections system results in employees with sexual misconduct records simply moving from one corrections system to another.

This is one area where the law does **not** create good results. On the one hand, the law says that former employers do not have a duty to make known the problems of prior staff people, and may face liability exposure for giving out negative information about former employees. On the other hand, the law places a duty to investigate a job applicant's background on the hiring employer. In other words, the law creates a duty on the part of the hiring employer to investigate applicants' backgrounds but imposes no corresponding duty on former employers to reveal negative information (except in some situations where mandatory reporting statutes apply, such as child abuse reporting laws).<sup>6</sup> This is the reason why we give the advice here and later in this publication that as a hiring employer you should attempt to carefully investigate the background of job applicants, but as a former employer you should not release negative information about a former employee unless that employee has signed a waiver of liability.

This paradox has led some to recommend that new federal legislation be proposed to solve the double bind the law places on employers with regard to employee reference checks. There is no currently pending legislation of this type of which we are aware. Therefore, we must recommend adherence to current law which, unfortunately, does not impose an obligation on the former employer to share negative information about former employees.

**b. Strategies for Obtaining Needed Information**

There are a number of ways of dealing with this problem. One is to demand that former employees who request job references sign waivers of claims against their former employer as a

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<sup>6</sup> See generally, NIC/WCL Project on Addressing Prison Rape. *Fifty State Survey of Mandatory Reporting Statutes* (May 2009) available at <http://www.wcl.american.edu/nic/documents/FiftyStateSurveyofMandatoryReportingStatutesFINALMay2009Update.pdf?rd=1>.



condition of obtaining such a reference. Courts have upheld such waivers,<sup>7</sup> and corrections agencies should routinely request them of all former employees who request job references. The standard legal advice to employers in situations where an employee has not signed such a waiver is to confirm only dates and positions of employment because the employer wants to avoid the burden of defending against a costly defamation lawsuit.

Another way of obtaining information about job applicants is to rely on informal channels of personal communication between staff of different corrections systems – in other words, to seek “off the record” communications. In practice, this often occurs. However, it is not always an option where corrections managers have no such personal connections or they cannot reveal information they obtained “off the record” or cite it as the reason for denying a job to an otherwise seemingly well-qualified applicant. Moreover, corrections managers should be wary of the reliability of information obtained through such informal routes because it may well be biased or incorrect.

Prospective employers also should not overlook various potential sources of publicly available information, including the Internet (which may turn up newspaper reports of past allegations) Facebook, MySpace and other social networking sites, and state and federal Freedom of Information Act statutes and regulations.

## **2. Personality Testing**

Another option available to employers in the hiring process is personality or so-called “character” testing. Personality tests cannot, of course, inquire into areas that are protected by the law such as religion, race, or ethnic origin. Other than these protections, there are currently no direct prohibitions in federal or state employment law on the use of personality testing in hiring processes. A job applicant may challenge the use of personality tests by claiming that such a test had what is termed “disparate impact” (*i.e.*, an unduly harsh effect) on persons of a certain protected class, such as race, gender or ethnicity.

Extensive research has uncovered no cases where such challenges have succeeded, but we recommend that you confer with legal counsel prior to instituting a new hiring procedure or device. If corrections managers wish to use personality tests in hiring, they should use professionally developed and validated tests, because these are most likely to withstand challenge on disparate impact or other legal grounds.

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<sup>7</sup> See, e.g., *Smith v. Holley*, 827 S.W 2d 433 (Tex. App. 1992). In *Holley*, the plaintiff, who had failed her probationary period at a city police department, applied for a job with the U.S. Marshall's Service (USMS), where she signed an authorization for release of information from prior employers to the USMS investigators conducting her background check. The police department that had formerly employed her released information about her failing prior job performance, and she sued, alleging that it had defamed her for releasing this information after agreeing not to as a condition of her voluntary departure from that job. The court held that the plaintiff's consent as shown by her signing of the authorization requested by the USMS investigators completely barred her defamation action, citing numerous sources of legal law and case law authority in support of its conclusion. See *id.* at 436-39.

## **B. On-the- Job Prevention Policies**

### ***1. In General***

The best strategies are ones that prevent staff sexual misconduct in the first place. This is an area in which the old adage, “an ounce of prevention is worth a pound of cure,” is particularly appropriate. Corrections managers should design preventative policies that not only deter incidents of staff sexual misconduct but also avoid grounds for later employee complaints of discrimination or retaliation.

Corrections managers should take steps to ensure that workplace policies are clear and effective, that supervisors have communicated them to employees, and that employees have understood them. Corrections managers should also review specific policies aimed at preventing staff sexual misconduct and update them regularly to reflect new developments and experiences.

In both the public and private employment contexts, it is worth considering policies that include off-duty conduct and no-contact rules. Public employers -- and generally *only* public employers -- must consider constitutional law issues, such as freedom of association rights, in developing such policies. Constitutional standards, however, grant the government more discretion in its actions towards its employees than in its actions towards citizens, and courts generally grant corrections agencies fairly wide constitutional leeway in implementing reasonable staff conduct rules, as we discuss below.

Other preventative strategies include policies and practices providing for non-arbitrary and reasonable on-the-job surveillance of employees. In the public employer context,<sup>8</sup> these policies must conform to federal and state constitutional requirements, but again, courts allow public employers considerable leeway to institute reasonable and non-arbitrary measures to monitor employee conduct in safety and security-sensitive jobs. Courts view these jobs as including not only corrections staff but also other employees who work in contact positions in corrections facilities, such as medical personnel.

In the union context, preventative strategies should include a review of the provisions of collective bargaining agreements to ensure that management’s discretion to enforce rules to prevent sexual misconduct is clear. Where necessary, corrections managers should clarify such policies by notifying collective bargaining representatives of any minor modifications they find necessary. Managers should also work with union leadership to project a shared ethic of professionalism and zero tolerance for sexual misconduct. We discuss below each of these various issues that arise in prevention depending on employment context.

### ***2. Prevention Policies across all Employment Contexts***

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<sup>8</sup> In California the state constitution’s privacy protections apply in the private sector as well.



**a. Policies**

The key to prevention of staff sexual misconduct is implementing effective policies that clearly communicate to all relevant employees the agency's expectations about conduct, including zero tolerance for sexual contact with persons under custodial supervision or facilitation of anyone else's sexual misconduct. This is the reason for the advice to "Train, train, train." Such training should include conducting regular in-person sessions, as well as providing clear written statements of policies and rules to all employees. It should also include methods of evaluating the training to ensure that employees have absorbed the information the trainers have attempted to transmit. Another idea worth considering is requiring employees to sign a form after they have been trained to attest that they received and understood the training that took place.

**b. Training**

Training sessions should include opportunities for new employees to ask questions and to discuss hypothetical situations and appropriate responses to them. The written policy statements that supervisors distribute to employees should be clear and to the point. Agency managers should review such statements regularly to make sure they are up-to-date and as effective as possible.

In drafting written statements, corrections managers should keep in mind that rules and policies disseminated to employees, such as in employment manuals, can potentially create implied contract rights. Written policy statements should be drafted so as to preserve as much management discretion and flexibility as possible. In other words, such policy and rules statements should define employees' obligations, but should avoid making promises to employees that management may not want to honor in particular cases.

For example, management may not wish to disclose to non-management employees all of the details of the employer's internal procedures for investigating and disciplining employees for staff sexual misconduct, because "ideal" procedures may not always be possible to implement in certain cases. Even though management may want to articulate these procedures in some detail to supervisory-level employees so they can follow them and thus achieve more consistency and fairness in the handling of cases, management may not want to publicize these **detailed** procedures to non-supervisory employees.

Instead, management should provide non-supervisory employees with clear statements of basic disciplinary policies and procedures designed to help demystify these policies, without providing unnecessary details. There is no reason to provide the more complex aspects of these policies to employees, and doing so can create problems if an employee later argues that some slight deviation from these detailed procedures amounted to a breach of an implied contractual right.

**c. Consistency and Fairness**

Striving for consistency and fairness in the application of policies and rules surrounding staff sexual misconduct is important. Employees can use inconsistencies in the application of employment rules to support allegations of unfairness, retaliation, and/or discrimination. Corrections managers should be particularly careful to avoid situations that seem to be retaliation against employees who come forward with information concerning a fellow employee's misconduct.

In short, corrections managers should use policies and rules to prevent supervisors from engaging in arbitrary or unfair treatment of employees. Managers should strive to ensure that supervisors treat employees who have committed similar infractions in a consistent way. Clear and consistent management promotes professionalism and also helps avoid overlooking warning signs prior to their “blowing up” into major incidents. Good policies allow people to detect and respond to minor problems so that bigger problems do not develop.

**d. Confidentiality**

Employment policies and practices should also protect against unfounded or misinformed workplace gossip and unnecessary embarrassment or humiliation of employees, and in this way avoid potential defamation suits. These considerations are especially important in the context of staff sexual misconduct in light of the seriousness of these allegations and the damage they can cause to employees' reputational interests.

Employers should ensure that they have put systems in place to guard access to employee personnel files and to other sensitive employee information. Managers should limit access to such files to human resources personnel and others on a “need to know” basis. They should ensure that personnel officers lock files containing sensitive employee information or keep them in areas with restricted access. They should instruct staff to limit dissemination of information about ongoing investigations or charges to a “need to know” basis.

Supervisors, employee witnesses, and investigative personnel generally fall within this “need to know” circle. Some union representatives may also fall in this circle, as we discuss further below. Consistent with an ethic of professionalism, these employees should not share information beyond the relevant circle, especially prior to the relevant authorities' resolution of the misconduct charges. Even though some information may eventually be available through publicly available records, state and federal privacy laws shield a good deal of personnel information from such disclosure.<sup>9</sup> Managers should therefore protect personnel information unless and until the relevant officials have determined that it can be released pursuant to a valid public access request.

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<sup>9</sup> Questions regarding what personnel information employers can release under state and federal freedom of information statutes are beyond the scope of this publication. These statutes typically have exemptions aimed at protecting personal privacy, so you should not assume that you can automatically make available information in employee personnel files simply because members of the public can gain access to some government information through freedom of information statute requests.

Beyond these general considerations that apply across all employment contexts, some considerations apply only in particular kinds of workplaces. In the public employment context, employers must design policies that do not violate employees' constitutional rights. In the private sector context, these considerations do not apply because the U.S. Constitution, and the provisions of most – but not all – state constitutions, apply only to restrain government action. Thus *the discussion below applies primarily to public sector employees*, with limited exceptions such as in the state of California, where the state constitution grants privacy protections to private-sector as well as public employees.

### **3. *Specific Policies in the Public Employment Context***

#### **a. No-Contact Rules**

One preventative policy which many corrections departments use involves rules prohibiting corrections employees and contractors from having contact with persons currently or formerly under correctional supervision. For example, such a policy could forbid staff from living with or otherwise forming close personal associations with persons who have previously been incarcerated. Some policies that courts have upheld provide that corrections staff cannot communicate with persons in any corrections system, even in jurisdictions outside the staff person's location. Courts have generally been sensitive to corrections employers' need to strictly prohibit fraternization between employees and former and current offenders. <sup>10</sup>

In almost all reported cases, courts have upheld correctional institutions' no-contact policies against First Amendment challenges based on freedom of association rights. In so doing, courts have held that corrections employers' legitimate interests outweigh employees' interests in freedom of association. The legitimate interests of corrections agencies that courts have emphasized in rejecting employee freedom-of-association challenges include concerns about: (1) on-the-job performance; (2) off-the-job conduct implicating staff members' fitness for duty; and (3) the public reputation of the institution.<sup>10</sup>

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<sup>10</sup> Poirier v. Mass. Dep't of Corrections 532 F. Supp. 2d 274, 277 (D. Mass. 2008) (upholding the termination of a corrections officer after she requested permission to reside with a former inmate with whom she had been in contact while he was an inmate at the prison. Finding the department of corrections had an overriding interest in assuring "the integrity and objectivity of its correctional officers in the discharge of their official duties" and in preventing recently released inmates from using their friendships with correctional officers for illicit purposes); King v. Ohio, No.2: 05-CV-966, 2009 WL 73875 (S.D. Ohio Jan. 8, 2009) (rejecting an officer's challenge to her termination, holding that she had failed to prove that the anti-fraternization rule directly and substantially burdened her right to intimate association); Wolford v. Angelone, 38 F. Supp. 2d 452, 462 (W.D. Va. 1999) (rejecting a challenge of a corrections officer who was required to resign from her position after she married a convicted felon holding the corrections institution's anti-fraternization policy and it did not directly or substantially interfere with the officer's right to marry); Wieland v. City of Arnold, 100 F. Supp. 2d 984, 990 (E.D. Mo. 2000). (holding that a probation department's order that an officer terminate his personal relationship with a felony probationer or face demotion. The court concluded that the city's interest in maintaining order and efficiency in its police department outweighed the officer's associational and privacy interests. The court further reasoned that the city's determination that the probation officer's behavior could potentially cause disruption deserved considerable deference).

The following cases provide examples of situations in which courts upheld no-contact or anti-fraternization policies against employee challenges:

The United States Court of Appeals for the Third Circuit, in *Lape v. Pennsylvania*, upheld a no-fraternization policy against a challenge by a correctional officer who married an inmate formerly under her supervision.<sup>11</sup>

The United States Court of Appeals for the Sixth Circuit, in *Akers v. McGinnis*, approved a corrections department's prohibition of officers engaging in "improper or overly familiar" conduct with offenders or their family members, including exchange of letters, money or other items, and cohabitation.<sup>12</sup> The court upheld the department's regulation based on its legitimate interest in preventing fraternization between its employees and offenders.<sup>13</sup>

The United States Court of Appeals for the Seventh Circuit, in *Montgomery v. Stefaniak*, upheld the termination of a probation officer

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<sup>11</sup> 157 Fed. Appx. 491, 499 (3d Cir. 2005). This policy stated: "There shall be no fraternization or private relationship of staff with inmates, parolees, or members of their families. This includes, but is not limited to, trading, bartering or receiving gifts, money and favors from the inmate or the inmate's friends, relatives, or representatives. Moreover, employees are not to deliver gifts or money to inmates' friends, relatives or representatives." The policy further stated: "Employees will promptly report to their supervisor any information which comes to their attention and indicates violation of the law, rules, and/or regulations of the [DOC] by either an employee or an inmate, and will maintain reasonable familiarity with the provisions of such directives." *Id.* at 3.

<sup>12</sup> 352 F.3d 1030, 1034 (6th Cir. 2003). As the court explained:

"This Rule...strictly prohibited "improper or overly familiar conduct with [offenders] or their family members or visitors." Violations of the Rule "subject[ed] an employee to disciplinary action up to and including dismissal [ ]." A non-exhaustive list of improper actions included "exchange of letters, money or items, ... cohabitation [except in case of a pre-existing marriage], being at the home of [an offender] for reasons other than an *official* visit without reporting the visit, . . . giving [offender] [employee's ] home telephone number, [and] sexual contact of any nature." (emphasis in original). Furthermore, the Rule required reporting of "[a]ny contact made with [an offender], or their family member(s), outside the regular performance of an employee's job."

*Id.* at 1034 (all emphases and elisions in original).

<sup>13</sup> *Id.* at 1038-39. Several officers were plaintiffs in this case. One was a probation officer. A man whom she used to date before becoming a probation officer had contacted her. He was serving a life sentence without parole in a prison outside her jurisdiction. She exchanged several letters with him, and the corrections agency terminated her for violating the rule. Another was a bookkeeper at a correctional facility who befriended a prisoner clerk. Soon after the prisoner's release, this employee gave him a ride in her car to a job interview, and the agency terminated her for doing so. The court upheld both of these terminations as violations of the department's legitimate regulation.

for buying a car for her fiancé from a car dealership that employed one probationer she supervised.<sup>14</sup> The agency's work rules prohibited the probation officer from doing any business with companies that employed a probationer under her supervision,<sup>15</sup> and the court viewed the termination of the officer as appropriate under these rules.

The United States Court of Appeals for the Eleventh Circuit, in *Ross v. Clayton County*, upheld the demotion of a corrections officer who had allowed his probationer brother to live with him, holding that the corrections department's disciplinary action did not violate the officer's free association rights.<sup>16</sup>

There are several cases in federal district (*i.e.*, trial level) courts that have been resolved in favor of employees who raised constitutional challenges to discipline under no-contact rules,<sup>17</sup> but these cases appear at this point in the development of the case law to be the exceptions to growing numbers of court opinions from a wide variety of circuits that have upheld corrections agencies' use and strict enforcement of no-contact rules. This is an area of law that is still evolving and it is therefore important to check with legal counsel in implementing or enforcing no-contact rules, but the current state of the law suggests that courts will usually uphold reasonable no-contact rules tailored to the legitimate needs of corrections agencies.

#### **b. Off-Duty Conduct Rules**

Another way in which corrections departments may want to deter inappropriate contacts between employees and actual or potential clients is through off-duty conduct rules. Courts have in general demonstrated a strong awareness of the legitimate employer interests underlying such off-duty conduct rules in both corrections and police departments. Employers should take care to tailor their policies to the legitimate concerns of the corrections agency, because overly broad or harsh policies arguably could violate public employees' freedom of association rights under the First Amendment of the U.S. Constitution or comparable provisions in state constitutions. The current case law, however, provides strong support for the constitutional permissibility of

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<sup>14</sup> 410 F.3d 933, 938-39 (7th Cir. 2005).

<sup>15</sup> *Id.* at 936. The court did not provide the exact terms of the policy in its opinion.

<sup>16</sup> 173 F.3d 1305, 1312 (11th Cir. 1999).

<sup>17</sup> In one case, the court found that correctional institution's no-contact policy was unconstitutional because in that court's view it was not substantially related to ensuring discipline and security within the prison. *See* Via v. Taylor, 224 F. Supp. 2d 753, 758 (D. Del. 2002), *reaff'd*, No. Civ. A. 97-4-JJF, 2004 WL 1397536 (D. Del. June 16, 2004). The court also deemed the relationship between the correctional officer and ex-felon to be "family-like" and concluded that it therefore deserved higher degree of protection from state intrusion.

In another case, a court relied on the fact that the parties developed an intimate relationship before the implementation of the anti-fraternization rules. *See*, Reuter v. Skipper, 832 F. Supp. 1420, 1423-24 (D. Or. 1993). These two cases seem to be outliers, however, in light of the reasoning in the many higher-level court of appeals cases discussed above.



reasonable off-duty-conduct rules that prohibit correctional officers from engaging in illegal or unseemly activities.

Here are some examples:

In *Piscottano v. Murphy*, the Second Circuit upheld a corrections department in disciplining and then terminating a corrections officer for associating with the Outlaws Motorcycle Club in violation of a regulation prohibiting employees from engaging in behavior that could negatively reflect on the department.<sup>18</sup> The court held that the regulation was constitutional and that the department had acted properly in first informing the officer that the club was linked to widespread criminal activity and demanding that he sever his relations with the organization, and then terminating him when he continued to associate with the club.

In *Weicherding v. Riegel* a federal district court upheld the termination of a correctional officer affiliated with the Ku Klux Klan (KKK).<sup>19</sup> The court found that the corrections department's interest in maintaining racial harmony and preventing racially motivated disturbances outweighed the officer's associational rights.

Other case examples in which courts have upheld off-duty conduct rules involve officers and other employees of police and sheriff departments. Many of these cases involve sexual misconduct. For example:

In *Thaeter v. Palm Beach County Sheriff's Office*,<sup>20</sup> a sheriff's office fired two deputy sheriffs for violating a departmental rule that required them to obtain the sheriff's prior written approval before they undertook any off-duty employment after they participated in sexually explicit photographs and video for compensation. In upholding their dismissal, the Eleventh Circuit noted that the officer's activity could affect the efficiency and reputation of the department and damage public confidence in it.

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<sup>18</sup> 511 F.3d 247 (2nd Cir. 2007).

<sup>19</sup> *Weicherding v. Riegel*, 981 F. Supp. 1143, 1148-49 (D. Ill.1997). In the federal district court case, the corrections department terminated the corrections officer after learning that he had attended a KKK rally and distributed KKK literature during non-working hours. The court reasoned that a correctional officer's affiliation with KKK would create a perception in the mind of inmates and staff that the department condoned the KKK's philosophy. In reaching this conclusion the court disagreed with an earlier New York Court of Appeals case that had directed reinstatement of a correctional officer whose agency had terminated him because of his membership in the KKK. *But see also*, *Curle v. Ward*, 389 N.E.2d 1070, 1074 (NY 1979) (directing reinstatement of a corrections officer after he was terminated for membership in the KKK on the ground that corrections officials failed to provide sufficient evidence of claimed detrimental impact of employee membership in KKK upon the operation of the correctional facility).

<sup>20</sup> 449 F.3d 1342, 1357 (11<sup>th</sup> Cir. 2006).

In *Fleisher v. City of Signal Hill*,<sup>21</sup> a police department terminated a probationary police officer after he admitted that when he was 19 he had engaged in sexual conduct with a 15 year-old girl. The Ninth Circuit upheld the officer's termination on the ground that his misconduct threatened to undermine the police department's "community reputation and internal morale."<sup>22</sup>

In *Glenn v. Bachand*,<sup>23</sup> a police department terminated a police officer after it discovered that he had an extra-marital affair with a woman, who accused him of sexual assault. An Arkansas federal district court upheld the officer's termination and concluded that police officers must maintain "a semblance of discipline and restraint" in order to perform their law enforcement duties, adding that the public holds police officers to higher standards because they protect the public and enforce the laws.<sup>24</sup>

Corrections managers should also keep in mind that off-duty conduct of a sexual nature may be a signal that an employee is a risk for workplace sexual misconduct. Facts showing that managers had notice of off-duty sexual misconduct but failed to act on such a warning can help support a liability claim against corrections officials for failing to prevent staff sexual assault against a person in custody. In *Gonzales v. Martinez*, for example, the Tenth Circuit noted that the sheriff in that case knew about yet failed to act on evidence of a staff member's off-duty sexual misconduct. The court ruled that an inmate's constitutional claim could go forward against the sheriff for failing to prevent the staff member from later committing a sexual assault against the inmate.<sup>25</sup>

### **c. Employee Surveillance and Searches**

Another frequent constitutional issue related to prevention policies in the sexual misconduct area concerns employee surveillance and searches. These actions may affect public employees' Fourth Amendment rights to be free of unreasonable search and seizure, but, as with the associational rights cases just discussed, courts have proved themselves sensitive to and supportive of the special needs of corrections agencies. Courts have generally upheld employee surveillance programs where legitimate security interests supported these programs and they were not unreasonably intrusive on employees' privacy interests. On the other hand, where surveillance or search programs unreasonably interfered with public employees' privacy

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<sup>21</sup> 829 F.2d 1491 (9<sup>th</sup> Cir. 1987).

<sup>22</sup> *Id.* at 1498-99.

<sup>23</sup> No. 2:05CV00132-WRW, 2007 WL 865488 (E.D Ark. March 20, 2007).

<sup>24</sup> *Id.* at 5-6.

<sup>25</sup> 403 F.2d at 1183.

expectations, courts have found them to violate Fourth Amendment protections.

(1) *The Legal Standard*

Under Fourth Amendment law in the public employment context, courts generally apply a balancing test, weighing the extent of the intrusion to employees' reasonable expectations of privacy against the weight of public employers' interests. Where the employer's interest is great, especially with regard to security and safety, employees' privacy interests must give way.<sup>26</sup> Corrections agencies' interests in maintaining security and safety are obviously very high, and for this reason courts are likely to uphold reasonably designed employee surveillance policies.

In addition, in areas of a corrections facility that officials tightly control and heavily survey, employees' reasonable expectations of privacy are extremely low. Expectations change with context, however, so that an employee accustomed to working in a private office, such as a probation officer, may have higher reasonable expectations of privacy than will an employee working on the floor of a prison wing subject to constant surveillance. Similarly, employees will have higher reasonable expectations of privacy in staff-only areas such as changing rooms.

Methods of surveillance can also affect the analysis. For example, metal detectors, which are routine in public buildings, pose an acceptable intrusion even on general citizens' reasonable expectations of privacy. It follows that they pose even less concern in the employment context, in which the balance between employer and employee interests tips more in the government employer's favor. But even though everyday citizens have greater protection against government surveillance than government employees do, courts recognize that government employees do retain some protection against invasions of their privacy interests.

Employee surveillance methods therefore become increasingly problematic as they become more intrusive. For example, courts may consider surveillance using both video and sound more intrusive than using only one or the other technology, and may consider either of these methods more intrusive than monitoring employees' radio frequency transmissions as a way determining their general whereabouts.<sup>27</sup>

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<sup>26</sup> In *NTEU v. Von Raab*, 489 U.S. 656 (1989), for example, the U.S. Supreme Court reviewed a union challenge to the U.S. Customs Service's institution of a random drug testing program of all employees who were directly involved in the agency's drug interdiction efforts, carried firearms, or handled classified information. The Court held that the program was a search under the Fourth Amendment, but "balanced the public interest in the Service's testing program against the privacy concerns" of the affected employees, and concluded that even a suspicion-less search program was constitutional. *Id.* at 680; *see also* *Skinner v. RLEA*, 489 U.S. 602, 653-54 (1989) (holding that the government's interest in preventing and investigating accidents related to railway employee drug use outweighed employees' privacy interests under the Fourth Amendment and permitted institution of program involving random drug testing without particularized suspicion).

<sup>27</sup> Another important factor for corrections managers will be cost, as some surveillance devices may be costly.



(2) *Ensuring Successful Employee Surveillance Programs*

Corrections employers can help ensure that employees cannot mount successful claims of privacy expectations by posting general notices of possible surveillance methods in areas not accessible to offender populations, such as employee locker rooms, staff offices, office phones, and the like. Employers should also notify staff that they may be using additional methods of surveillance, such as monitoring phone records and employee e-mail. Such notice can diminish the force of employees' later arguments that they had a reasonable expectation that their conduct or conversations would not be subject to surveillance.

Corrections departments seeking to deter, prevent, and detect staff sexual misconduct may consider several different types of employee surveillance, including video surveillance; searches of employee lockers, cars and personal belongings; and, in some cases, searches of employees' persons. Discussion of some examples of the case law addressing these various types of surveillance follows. Most of these cases involve surveillance to prevent or detect forms of employee wrongdoing other than sexual misconduct, but their reasoning applies equally in the sexual misconduct scenario.

(3) *Video Surveillance*

Here is a selection of cases addressing video surveillance of public employees in contexts analogous to corrections or community corrections facilities.

In *Sacramento County Deputy Sheriffs' Assoc. v. Sacramento*,<sup>28</sup> a California appellate court held that video surveillance of a county jail release office as part of a theft investigation did not constitute a search for purposes of the Fourth Amendment. The court determined that the release office, located next to the prison cashier's office, was not "private"<sup>29</sup> and unlike a bathroom, locker room, or office assigned to one person, the release room was "an integral component of the system for recording and releasing inmates' property," and was "a room to which inmates ha[d] access."<sup>30</sup> Furthermore, the court stated, "it is a room in which jail security concerns are appropriate and in which [employees] have a diminished expectation of privacy."<sup>31</sup>

In *Thompson v. Johnson County Community College*,<sup>32</sup> a Kansas

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<sup>28</sup> 51 Cal. App.4th 1468, 59 Cal. Rptr. 2d 834 (1996).

<sup>29</sup> *Id.* at 1482, 843.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 930 F. Supp. 501 (D.Kan. 1996).

federal district court ruled that the security officers did not have a reasonable privacy expectation in the locker area and that the surveillance therefore did not violate their Fourth Amendment rights.

In contrast, in *Trujillo v. City of Ontario*,<sup>33</sup> a California federal district court considered the constitutionality of warrantless video surveillance of a police station locker room and concluded that the surveillance was **not** reasonable. The court first held that the recording of officers while changing clothes violated their reasonable expectation of privacy.

In sum, courts have generally upheld video surveillance of corrections staff in areas in which they did not have strong privacy interests, even when those areas were not accessible to offenders. Courts have sometimes found video surveillance of locker areas permissible, but in these situations courts often consider employees' privacy interests more significant. Managers therefore should avoid routine surveillance of areas such as changing rooms, and certainly bathrooms. Surveillance of these areas in circumstances presenting facts supporting reasonable individualized suspicion will probably pass constitutional scrutiny under the case law applying to personal searches, as discussed further below.

#### (4) *Searches of Cars and Lockers*

Courts have used a balancing test, weighing corrections departments' legitimate interests in security against employees' expectations of privacy, in assessing the constitutionality of searches of employee cars and lockers in corrections and analogous contexts.

Here are some case examples:

In *McDonnell v. Hunter*,<sup>34</sup> the Eighth Circuit analyzed the constitutionality of warrantless searches of employees' vehicles parked

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<sup>33</sup> 428 F.Supp.2d 1094, 1125-26 (C.D. Cal. 2006). The court distinguished *Sacramento County*, discussed above, because there was a "fundamental difference" in the privacy reasonably expected in a locker room and in a shared office. The court also concluded that the evidence suggested that the real purpose of the search was to gain evidence of criminal conduct for a later prosecution rather than to detect work-related misconduct. *See also*, *DeVittorio v. Hall*, 589 F.Supp.2d 247 (S.D.N.Y. 2008), where the New York Police Department installed a hidden video camera in the locker room to solve a vandalism problem; however, the camera never worked and no video recordings were ever made. *Id.* at 256. The court stated that "given the fact that the room is used for private functions, such as changing clothes, plaintiffs do have a reasonable expectation of privacy from covert video surveillance while in the locker room," but because no video recordings were ever made, the court concluded that there had been no search within the meaning of the Fourth Amendment.

<sup>34</sup> 809 F.2d 1302 (8th Cir. 1987). The court further held that searches of employee vehicles parked outside the area accessible to inmates, but still on ground the corrections facility owned, was permissible if corrections managers conduct them on a random or uniform basis and if the managers could show that inmates could sometimes gain unsupervised access to those vehicles. Searches that managers did not conduct uniformly or by systematic random selection required reasonable suspicion, based on specific objective facts, and reasonable inferences drawn from those facts in light of experience, that the vehicles to be searched contained contraband

within a corrections institution's confines and accessible to inmates. The court first noted that "an individual's expectation of privacy in his vehicle is less than in other property."<sup>35</sup> The court held that the search program was reasonable but cautioned, that although such searches may be conducted without cause, they "must be done uniformly or by systematic random selection."<sup>36</sup>

In *Fraternal Order of Police v. Washington*,<sup>37</sup> the D.C. Department of Corrections conducted a "shake-down" and searched the cells and common areas of a jail and then, the next day, searched the lockers of corrections staff. In addition, the Department required each officer reporting for work that morning to consent to an automobile search as a condition of parking in a lot next to the institution. The District Court for the District of Columbia held that the employees had voluntarily consented to the car searches because they could decline the search, and one had in fact done so without suffering discipline. The court further held that the Department had not violated the Fourth Amendment by conducting warrantless searches of prison employees' lockers because its regulations clearly stated that its managers could order such searches, the scope of the intrusion was minimal, the manner of the searches was not coercive, and officials had conducted such searches without embarrassment to any employee.<sup>38</sup>

In *Wiley v. Dep't. of Justice*,<sup>39</sup> prison officials searched an employee's car that the employee had parked within the institution after the prison received an anonymous letter that the employee carried a gun in his car. The Federal Circuit Court of Appeals stated that the officials need only support their search of a car on the confines of a prison institution on "reasonable suspicion," not probable cause, as long as the search of the car was "work related" and for investigation of "work-related misconduct."<sup>40</sup>

We hesitate to draw definite conclusions from the case law discussed above, because the holdings vary. As a general rule, it appears that reasonable suspicion will support the

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<sup>35</sup> *Id.* at 1309.

<sup>36</sup> *Id.*

<sup>37</sup> 394 F. Supp.2d 7 (D.D.C. 2005).

<sup>38</sup> *Id.* at 23.

<sup>39</sup> 328 F.3d 1346 (Fed. Cir. 2003).

<sup>40</sup> *Id.* at 1350-52. The court found, however, that the evidence in the case did not rise to the level of reasonable suspicion because the officials relied on a tip "containing bare allegations that were not corroborated by anything outside the four corners of the tip itself."

constitutionality of warrantless car and locker searches. Searches on a random or uniform basis may also be supportable, although there is less consensus in the case law on this point.

(5) *Searches of Employees' Persons*

Courts that have considered the constitutionality of intrusive searches of corrections employees, such as strip searches, have held that employees have a reasonable expectation of privacy from such searches.<sup>41</sup> All intrusive physical searches require at least individualized suspicion. To meet this standard, the suspicion “must be articulable, particularized, and individualized.”<sup>42</sup> Corrections officials “must point to specific objective facts and rational inferences that they are entitled to draw from those facts in light of their experience.”<sup>43</sup> Furthermore, “the more personal and invasive the search, the more particularized and individualized the articulable information must be.”<sup>44</sup> Factors managers should consider in deciding whether the facts meet the reasonable suspicion requirement include: “(1) the nature of the tip or information; (2) the reliability of the informant; (3) the degree of corroboration; and (4) other facts contributing to suspicion or lack thereof.”<sup>45</sup> Random strip searches are **not** permissible.<sup>46</sup>

The following cases illustrate how courts apply these standards in cases involving intrusive searches of the physical person of a corrections employee:

In *Leverette v. Bell*,<sup>47</sup> a case arising in South Carolina, the Fourth Circuit concluded that a visual body cavity search was reasonable where a tip was “particularized and individualized” and “bore indicia of reliability”<sup>48</sup> because the informant had provided reliable information on prior occasions.

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<sup>41</sup> *E.g.*, *Leverette v. Bell*, 247 F.3d 160, 168 (4th Cir. 2001); *McDonell v. Hunter*, 809 F.2d 1302, 1306 (8th Cir. 1987); *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187, 202 (2d Cir. 1984).

<sup>42</sup> *Pierce v. Ohio Dep't of Rehabilitation and Correction*, 284 F.Supp.2d 811, 835 (N.D. Ohio 2003).

<sup>43</sup> *Security and Law Enforcement Employees*, 737 F.2d at 205 (internal quotation marks and citation omitted).

<sup>44</sup> *Pierce*, 284 F.Supp.2d at 835.

<sup>45</sup> *Security and Law Enforcement Employees*, 737 F.2d at 205.

<sup>46</sup> *Pierce*, 284 F.Supp.2d at 835-36.

<sup>47</sup> 247 F.3d 160 (4th Cir. 2001). The court further found that “the decision-making process was entirely orderly and reasonable” and “the search itself, although exceedingly personal in nature, was administered in a sensitive and professional manner” because members of the same sex conducted it in a private setting, and handled it expeditiously.

<sup>48</sup> *Id.* at 168.

In *Armstrong v. New York State Com'r of Correction*,<sup>49</sup> a federal district court in New York held that a strip search of a corrections employee was unconstitutional because officials failed to provide the court with “the names of the staff [informants] who supplied this information or with the manner in which the staff members came by the information.”<sup>50</sup> Since the search was based on nothing more than “assertions” of contraband smuggling, the court held that the institution had failed to demonstrate that it had reasonable suspicion to conduct the search.<sup>51</sup>

In short, to re-emphasize, intrusive bodily searches, including strip searches and, especially, body cavity searches, are the most problematic under Fourth Amendment standards and always require at least individualized suspicion. In some jurisdictions body cavity searches require probable cause -- in other words, a warrant from a judicial officer. These searches should never be instituted without consulting your legal counsel for further guidance.

(6) *Promising Practices in Designing Public Employee Surveillance Policies*

In light of the foregoing case law, the following are promising practices in the design of employee surveillance policies:

- Give general notice that surveillance may be conducted;
- Consider carefully using routine surveillance in areas in which employees arguably have legitimate expectations of privacy, especially employee-only areas such as changing rooms. Use surveillance in such areas sparingly if at all in the absence of reasonable individualized suspicion;
- In employee-only bathrooms, where employees arguably have the highest legitimate expectations of privacy, the most legally prudent approach is to confine surveillance to situations with facts supporting reasonable individualized suspicion;
- Choose the least intrusive method that will be effective. For example, if possible use video only, or audio only, rather than both video and audio surveillance;
- If a situation requires searches, start with less intrusive methods such as car

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<sup>49</sup> 545 F. Supp. 728 (N.D.N.Y. 1982).

<sup>50</sup> *Id.* at 730.

<sup>51</sup> *Id.* at 731.

and locker searches. Use intrusive searches of employees' persons only when there is individualized suspicion based on reliable info;

- If a situation requires searches of employees' persons, use the least intrusive method appropriate in the circumstances. For example, pat searches are less intrusive than strip searches, and body cavity searches are the most extremely intrusive and require careful legal guidance.
- In instances where corrections agencies plan to use the most intrusive searches, secure a search warrant.
- Ensure that supervisors use objective decision making about surveillance targets. Random targeting is permissible for less intrusive methods, but a reasonable suspicion standard applies for more intrusive methods.
- Consider instituting a management policy that supervisors to first seek approval from a supervising manager prior to instituting searches.

#### ***4. Implementing Preventative Policies in a Union Environment***

In implementing prevention policies in the union context, corrections employers may find themselves encountering resistance from the certified collective bargaining representative that represents the affected employees. Such reactions from labor union representatives can be frustrating, making it seem that the union is uninterested or opposed to the goal of ensuring corrections employees' adherence to professional standards. You should keep in mind that union representatives face their own legal obligations under the "duty of fair representation" doctrine. This duty requires union representatives to advocate for the interests of their members against the imposition of discipline and on other matters affecting the terms and conditions of employment. Union representatives must do so even though they may personally favor the policies or actions management has taken.

Strategically you should assume that union representatives are or wish to be on the same side as management in maintaining high professional standards within their membership ranks. Union representatives, although required to fulfill a legally prescribed role in arguing for their members' assumed interests in avoiding discipline or other actions, may in fact support eradicating misconduct that tarnishes the reputation of their profession. In the section below, we provide some practical suggestions for avoiding or minimizing union opposition to the imposition and enforcement of preventative policies aimed at staff sexual misconduct. Some of these suggestions may fit your situation while others may not. These suggestions only pertain when certified collective bargaining representatives represent the workforce. In non-union workplaces, these considerations do not require attention.

##### **a. Exercising Employer Rights under "Management Rights" Clauses**



In union environments, the certified collective bargaining representative has legally protected status to negotiate the terms and conditions of bargaining unit members' employment through a collective bargaining agreement. Some policies related to the prevention, detection, and discipline of staff sexual misconduct may implicate the terms of the collective bargaining agreement, especially those concerning discipline and termination, since collective bargaining agreements specify a mandatory grievance and arbitration procedure when the employer wishes to impose discipline or termination.

You should keep in mind that employee discipline for sexual misconduct responds to a serious infraction that clearly falls within employers' management rights to impose discipline and termination on employees engaged in wrongdoing. Nevertheless, employers' implementation of sexual misconduct rules and policies may sometimes lead unions to argue that employers are proposing mid-term contract modifications. Corrections employers should resist such arguments on the ground that additions to or modifications of existing discipline and workplace conduct rules and policies fall within their "management rights."

Almost all collective bargaining agreements have explicit language reserving employers' "management rights" over disciplinary policies, and even the few collective bargaining agreements that do not have such language arguably recognize or encompass this well recognized management prerogative implicitly. Accordingly, corrections employers should take care to frame the language of policies addressing the prevention, investigation and discipline of staff sexual misconduct as clarifications of or refinements to existing disciplinary policies and rules rather than as major changes.

Here are some examples of cases in which courts or arbitrators found that employers had no duty to bargain with their unions in announcing disciplinary, safety, or good conduct rules for their workforces:

In *Sioux City Police Officers' Ass'n v. City of Sioux*,<sup>52</sup> the Seventh Circuit upheld a city's unilateral change in its anti-nepotism policy on the ground that the policy was not subject to mandatory bargaining.

In *Chicago Tribune Co. v. NLRB*,<sup>53</sup> the Seventh Circuit upheld an employer's unilateral imposition of employee drug and alcohol testing where the management rights clause at issue established the employer's right to reasonably regulate employee conduct without limitation as to whether conduct was on or off the job.

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<sup>52</sup> 495 F.3d 779 (7th Cir. 2007). The policy was "self-acting," simply requiring that an employee not marry or co-habit with another employee, and as such there was nothing to negotiate about concerning how the policy would be applied. The policy fell within the powers granted to public employers to hire, transfer, and discharge public employees.

<sup>53</sup> 974 F.2d 933 (7th Cir. 1992).

In yet another Seventh Circuit case, *Local 15, Int'l Bhd. Of Elec. Workers v. Exelon Corp.*, the court upheld an employer's unilateral change in its discipline policy in conjunction with its adoption of a new automated phone system, noting that the management rights clause at issue expressly permitted the employer to issue reasonable workplace rules.<sup>54</sup>

As these cases illustrate, courts as well as arbitrators<sup>55</sup> generally uphold unilateral changes to work policies and rules on the ground that employers' management rights, often as expressed in "reservation of management rights" clauses in collective bargaining agreements, permit this action. This is not to say that all cases reach this conclusion, of course,<sup>56</sup> but the substantial majority do. Unilateral changes in discipline and work rules are especially likely to be upheld when they are framed in terms of clarifying existing rules or presenting instructive guidelines regarding work rules already in place.

In addition, courts and arbitrators have upheld policy changes relating solely to employee safety, discipline, or work conduct on the ground that management reserved the right to reasonably control the safety, work conduct and discipline of its employees. Courts and arbitrators may engage in a discussion of reasonableness when assessing unilateral policy changes, but the prevention of staff sexual misconduct against persons in custody is so obviously reasonable that corrections employers are unlikely to run into problems on this front.

In summary, you should maintain that there is no need to bargain with unions about

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<sup>54</sup> *Local 15, Int'l Bhd. of Elec. Workers v. Exelon Corp.*, 495 F.3d 779, 783 (7th Cir. 2007).

<sup>55</sup> *See, In re Martin-Brower Co.*, 106 Lab. Arb. Rep. (BNA) 385 (1996) (Duff, Arb.). An arbitrator held that an employer's memo delineating a six-step discipline procedure was a reasonable exercise of the employer's management rights, where the relevant contract clause permitted the employer to establish, change, or modify reasonable company rules and enforcement methods. The memo was simply the employer's statement pertaining to "enforcement methods" and did not make any substantive changes; *In re Armstrong World Indus., Inc.*, 122 Lab. Arb. Rep. (BNA) 1038 (2006) (Oberdank, Arb.) In another case, an arbitrator concluded that an employer did not violate its collective bargaining agreement when it unilaterally implemented new safety rules, where the agreement permitted the employer to make reasonable provisions for the safety and health of its employees. Most of the rules simply restated and clarified old accepted rules and guidelines; *In re City of Lansing and Capital City Lodge # 141*, 2006 WL 3879801 (May 25, 2006) (Daniel, Arb.) An arbitrator upheld an employer's unilateral change to its discipline procedures on the ground that the employer possessed the management right to deal with the subject of discipline, including the right to choose specific methods and procedures necessary to carry out its right to discipline.

<sup>56</sup> Examples of cases and arbitrators' awards that have held that an employer improperly altered disciplinary policy include *California Newspaper Partnership*, 350 N.L.R.B. 1175 (2007) (holding an employer violated its collective bargaining agreement when it unilaterally revised its e-mail policy, where its management rights clause did not clearly and unmistakably waive the union's right to bargain over e-mail policy); *In re City of Okmulgee*, 124 Lab. Arb. Rep. (BNA) 423 (2007) (Walter, Arb.) (finding the city violated its collective bargaining agreement when it unilaterally issued policies on workplace violence, workplace searches, and workplace safety where these policies had not been included as possible grounds for discipline in the city's previously negotiated collective bargaining agreement).



policies specifically designed to prevent and discipline staff sexual misconduct because such policies fall squarely within the scope of management rights as reserved in almost all collective bargaining agreements.

**b. Eliminating Inconsistent Terms in Collective Bargaining**

Management generally should not consent to mid-term modification negotiations in announcing new, updated, improved or clarified policies related to staff sexual misconduct for the reasons discussed above – namely, because it has no duty to do so and should not invite such a precedent. Management also should regularly review collective bargaining agreements in anticipation of future negotiations to ensure that they do not contain provisions that interfere with management determinations about how best to deter, detect and discipline staff sexual misconduct in custodial settings. If management finds problems in a collective bargaining agreement, it should first attempt to clarify policies through the exercise of its rights under management rights clauses as just discussed.

The best way to accomplish this goal without stirring union objections is to send the clarifying statement of policy to the union as a routine correspondence at its official post office address, keeping a receipt verifying the fact and date of mailing in order to show that management provided routine notice to the union. If the union does not object to the change or policy clarification in a timely manner as based on the past practice of the parties, management can view the union as having ratified the adjustment under past practice or waiver of rights theories. Union-side labor lawyers know that managers often succeed in introducing significant substantive changes to collective bargaining agreements using this technique, because routine notice of such changes often escapes the union's attention.

If management cannot adjust inconsistent contract provisions in this fashion -- as, for example, when the union reacts with strenuous and convincing objections -- management should address them during bargaining at contract expiration.

### **III. INVESTIGATION**

If implementation and refinement of preventative policies raise one set of employment law considerations, investigations of allegations of staff sexual misconduct in custodial settings can raise another set of employment law issues. We have already addressed above some issues that arise in both the prevention and investigation contexts, such as employee surveillance. Here, we focus on special considerations that can arise once an employer undertakes an investigation of allegations of staff sexual misconduct.

**A. Thinking through *Garrity* Issues**

The first special issue investigations present concerns the fact that staff sexual misconduct can be both a violation of criminal law and either an administrative or a workplace misconduct offense, or both. An important U.S. Supreme Court case, *Garrity v. State of New*

*Jersey*,<sup>57</sup> establishes that the government cannot use, in a criminal proceeding, information government officials have obtained from a public employee who has been threatened with negative job consequences for failure to cooperate in an investigation. In *Garrity*, the Court reversed the criminal conviction of police officers on the basis of statements they had made acknowledging involvement in employment-related wrongdoing. The officers successfully argued that the employer had coerced these admissions by threatening that, if the officers refused to answer, they would lose their jobs. Under *Garrity*, however, public employees, including corrections staff, can be required to truthfully answer questions in an administrative investigation and can be fired for refusing to answer questions or based on the answers they give, provided that the government does not subsequently use those employees' statements against them in a criminal proceeding.<sup>58</sup>

*Garrity*, in other words, establishes that employers can require employees to answer questions in an administrative investigation under threat of negative job consequences for failure to cooperate. The employer cannot then use the information obtained in the coerced administrative proceedings in subsequent criminal proceedings. Corrections employers must carefully think through which of two avenues of investigation and discipline – administrative or criminal – they wish to pursue in investigating allegations of staff sexual misconduct. This is because they cannot allow information they obtain through an administrative investigation that poses possible negative employment consequences to contaminate the process leading to possible criminal prosecution. Employers may also wish to consult with prosecutors prior to undertaking an administrative investigation to avoid inadvertently compromising a criminal investigation through something that occurs in an administrative investigation.

## **B. Due Process Rights in the Public Employment Context**

Under the general legal framework we have already discussed, public employees have some constitutional protections because their employers are government entities. Employers in the public employment context therefore must attend to employees' due process rights in connection with investigations of misconduct and possible discipline. These due process rights generally include rights to an administrative hearing and other protections. State statutes applying to civil service employees generally spell out these rights.

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<sup>57</sup> 385 U.S. 493, 501 (1967).

<sup>58</sup> In *Debnam v. North Carolina Dep't of Correction*, 334 N.C. 380, 432 S.E. 2d 324 (1993), for example, the North Carolina Supreme Court sustained against a *Garrity* challenge the administrative investigation and firing of an assistant corrections superintendent who had invoked his Fifth Amendment privilege against self-incrimination in refusing to answer questions in an administrative investigation. The Court noted that once the employee had been told that he could be dismissed for refusing to answer questions, information obtained from him "automatically became excludable" from any criminal proceeding that might be brought against him, and the employee therefore could be required to answer questions on pain of being fired. *Id.* at 389, 330-31; *see also* *Spielbauer v. County of Santa Clara*, 45 Cal. 4th 704, 710, 199 P.3d 1125, 1128 (2009) ("a public employee may be compelled, by threat of job discipline, to answer questions about the employee's job performance, so long as the employee is not required, on pain of dismissal, to waive the constitution protection against criminal use of those answers").

As with other public employment law issues that may implicate constitutional rights, courts deciding how due process rights should apply in the public employment context are aware that public employers have significant and legitimate needs that courts must weigh against employees' interests. Thus courts require that employers have hearings but do not require that these hearings take place **before** an employer imposes suspension or other discipline.<sup>59</sup> The United States Supreme Court has explained that, in determining what due process rights apply, courts should balance several factors, namely:

- the employee's interest that the public employer's action will affect,
- the risk of an error affecting the employees's protected interests through the procedures the employer uses, and
- the public employer's interest in resolving the situation quickly and effectively.<sup>60</sup>

As in many legal situations, the facts in the particular case will strongly affect reviewing courts' assessment of employees' challenges to public employers' actions on due process grounds. You should consider each case on its particular merits. Courts have upheld correction agencies' actions when they have suspended employees without pay pending investigation of serious misconduct charges. These courts recognize the heavy weight of employers' interests in removing staff from contact with inmates pending resolution of serious charges.

Here are two case examples:

In *Virgili v. Allegheny County*,<sup>61</sup> the Third Circuit concluded that a corrections officer's suspension without pay after someone accused him of providing marijuana to an inmate did not violate his due process rights. The court acknowledged that the officer had a property interest in his position, which notice and hearing requirements protected, but held that constitutional protections do not always require pre-termination procedures.

In another federal district court case, *Macklin v. Huffman*, a third-party witness accused a prison food service employee of sexual misconduct

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<sup>59</sup> In *Loudermill v. Cleveland Board of Education*, 470 U.S. 523, 546 (1985), for example, the Court held, in a case involving a school security guard terminated for having failed to report a prior felony conviction, that public employees are not entitled to a full evidentiary hearing prior to suspension or termination, but rather to notice of the charges against them and an opportunity to respond to the evidence upon which the charge is based.

<sup>60</sup> See, *Gilbert v. Homar*, 520 U.S. 924 (1997) (holding that a state university employee was not entitled under the due process clause to notice and hearing prior to his suspension without pay based on his arrest on drug-related charges).

<sup>61</sup> 132 Fed. Appx. 947, 949 (3d Cir. 2005).

with an inmate.<sup>62</sup> The employer suspended the employee without pay for two weeks pending investigation. The employee sued, alleging violation of his due process rights because his employer had not held a hearing prior to his suspension. The court held that the employee did not have a right to a hearing prior to his suspension. The court balanced the minimal intrusion on employee's against the prison's substantial interest in the investigation and its safety concerns.

In summary, while you must take due process considerations account in suspending public corrections employees pending investigation of allegations of misconduct, it appears on the basis of the case law available that pre-hearing suspensions are permissible where corrections institutions' interests in removing an employee from active duty are substantial due to the seriousness of the misconduct alleged.

The fact that it may be possible to suspend an employee without pay pending an investigation for sexual misconduct does not, of course, mean that you should take this route. There may be a number of reasons to continue to provide pay during the investigations period, including the fact that this reinforces the duty on employees' part to make themselves available during the investigation, and prevents employees from being unfairly punished for unfounded accusations against them.

### **C. The Right to Representation in Investigative Interviews in the Union Context**

#### **1. Federal Labor Law**

In the union context, corrections employers often express significant concerns about union representatives' assertion of a right to be present in investigative interviews where a bargaining unit member is potentially subject to discipline. Under federal labor laws covering both private and public sector employees, and under some, but not all, state labor laws covering public employees as well, bargaining unit members **do** have rights to have a union representative present in interviews that could result in disciplinary action. Labor representatives commonly refer to these rights as *Weingarten* rights, referring to the case in which the Supreme Court found that federal, private-sector labor law provides the right to the presence of a union representative in investigatory interviews.

This same right also exists for federal correctional officers under federal public service labor laws. The D. C. Circuit held in *U.S. Department of Justice v. FLRA* that a federal corrections institution violated the Federal Service Labor-Management Relations Statute (FSLMRS) by denying a correctional officer's request for a union representative when it was investigating him for illegally smuggling drugs into the workplace. The court held that FSLMRS requires federal agencies to give employees the opportunity to have union representatives present in interviews a representative of the agency conducts, provided that the employee reasonably

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<sup>62</sup> 976 F. Supp. 1090, 1094 (W.D. Mich. 1997).

believes that the interview may result in disciplinary action and has requested union representation.<sup>63</sup>

*Weingarten* defined investigatory interviews as ones in which: (1) management questions an employee to obtain information which it could use as a basis for discipline; and (2) the employee has a reasonable belief that discipline or other adverse consequences may result. *Weingarten* further stated that, once the employee requests union representation, the employer may: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice of continuing the interview without the representative or having no interview at all.<sup>64</sup> The employer cannot continue the interview without a union representative present if the employee objects. The employee must specifically request the representation in order to invoke *Weingarten* protection.<sup>65</sup>

## 2. State Labor Law

Some public-sector state labor laws recognize *Weingarten* rights, but others do not. Pennsylvania and Vermont grant *Weingarten*-type rights to their public employees, for example,<sup>66</sup> and view the scope of those rights for unionized state employees as very similar to the *Weingarten* rights granted to private-sector unionized employees. New York's highest state court, on the other hand, has ruled that New York law does not give state employees the right to have a union representative present during an investigatory interview that may lead to discipline.<sup>67</sup> In that case, *NYCTA v. State Pub. Employment Relations Board*,<sup>68</sup> the court stated that management and a union may negotiate *Weingarten*-like rights as part of a collective bargaining agreement but that, in the absence of such a collectively bargained agreement, New York state public employees do **not** have *Weingarten*-type protection. It is therefore important to check with legal counsel about whether *Weingarten*-type rights apply in particular state corrections systems.

In non-union private-sector contexts, the National Labor Relations Board (NLRB) has

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<sup>63</sup> *Id.* at 1233.

<sup>64</sup> U.S. Dept. of Justice v. FLRA, 266 F.3d 1228 (D.C. Cir. 2001).

<sup>65</sup> NLRB v. *Weingarten, Inc.*, 420 U.S. at 251, 257-58 (1975); *Joseph F. Whelan Co.*, 273 NLRB 340 (1984).

<sup>66</sup> See, *Pennsylvania Office of Admin. v. PLRB*, 916 A.2d 54, 546-471 (Pa. 2007); *Pennsylvania v. PLRB*, 826 A.2d 932, 936 (Pa. Commw. Ct. 2003); *Vermont State Employees Ass'n, Inc. v. PLRB*, 893 A.2d 333 (Vt. 2005). But see, *In re Exeter Police Ass'n*, 904 A.2d 614 (N.H. 2006) (declining to decide whether any *Weingarten* rights attach to New Hampshire public union employees).

<sup>67</sup> *NYCTA v. State Pub. Employment Relations Bd.*, 864 N.E.2d 56 (NY 2007).

<sup>68</sup> *Id.*



held that *Weingarten* rights do not apply. This conclusion comes from a 2004 NLRB ruling,<sup>69</sup> and may be subject to change in light of shifts in the composition of the NLRB, so we advise you to check with legal counsel for up-to-date advice.

In summary, for unionized public federal corrections employees and unionized private-sector employees, *Weingarten* rights clearly **do** apply. For unionized state corrections employees, some state laws recognize *Weingarten* rights as a matter of law, but others, such as New York, do not. In some of those states, employees may bargain for *Weingarten*-type rights in their collective bargaining agreements.

For employees who do have *Weingarten* rights, these rights include, according to prior rulings of courts and the NLRB, the following:

- Absent extenuating circumstances, the employee may receive a union representative of his or her choice;<sup>70</sup>
- The representative has a right to insist on admission to a meeting that appears to be a *Weingarten* interview;<sup>71</sup>
- Management should allow the representative to speak privately with the employee before the interview;<sup>72</sup>
- The representative can speak during the interview, but cannot insist on terminating the interview;<sup>73</sup>
- The representative can interrupt to clarify a question,<sup>74</sup> object to confusing or intimidating tactics,<sup>75</sup> and advise the employee not to answer questions that are abusive,

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<sup>69</sup> See *IBM Corp.*, 341 NLRB 1288, 1289 (2004) (reversing prior ruling which gave employees in non-unionized workplaces the right to have a co-worker present during investigatory interviews).

<sup>70</sup> *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 275 (4th Cir. 2003).

<sup>71</sup> *ILGWU v. Quality Mfg. Co.*, 420 U.S. 276, 280-81 (1975).

<sup>72</sup> *U.S. Postal Service*, 345 NLRB No. 26 (2005) (emphasizing that the union representative cannot be “made to sit silently like a mere observer”); *U.S. Postal Service*, 303 NLRB 463 (1991).

<sup>73</sup> *Id.*; *Yellow Freight Sys., Inc.*, 317 NLRB 115 (1995) (union representative can be issued a warning letter for disruptive behavior, such as interrupting the interview, profanity, and pounding on a manager’s desk).

<sup>74</sup> *U.S. Postal Service*, 288 NLRB 864 (1998).

<sup>75</sup> *Id.*

misleading, badgering, or harassing;<sup>76</sup>

- The representative can add information to support or justify the employee's conduct at the end of the interview.

In *Weingarten*, the Court cautioned that exercise of these rights should not be conducted in such a way as to interfere with “legitimate employer prerogatives.”<sup>77</sup> Thus, union representatives should not behave in such a way as to interfere with the employer's ability to carry out the interview and obtain relevant information. While an employer can terminate an interview where a union representative is behaving inappropriately, it may not continue to conduct the interview without a union representative present.

For this reason, it is not a good idea to get into a contest of wills with a designated union representative during a *Weingarten* interview, because such a strategy can result in slowing down the investigatory process without gaining any benefit. Instead, the better strategy may be to attempt to build a cooperative relationship between management and union representatives. Well-trained and experienced union representatives can be helpful in the investigatory process, by, for example, explaining the process and the potential consequences to the charged employee, helping the employee feel more comfortable in taking part in the interview, and assisting the employee in articulating his or her side of the story.

It is also important to remember that the law charges union representatives with a “duty of fair representation,” which means that the law requires them to represent, vigorously and thoroughly, all bargaining unit members charged with misconduct. Failure to fulfill this duty can expose the union to expensive legal liability. Recognizing this, union representatives understand that they must be strong advocates for the interests of all their members, even when they may not feel sympathetic to a union member's situation.

In interpreting union representatives' conduct and motives, management should be sensitive to the legal liability context in which unions operate. The fact that union representatives appear to be vigorously supporting bargaining unit members charged with misconduct does not necessarily mean that the union wishes to keep “bad apples” in its ranks. Most union representatives care about the professional reputation of their membership, just as managers do. A labor-management relationship may work best when it starts with recognition of this common bond of pride in the professionalism of an institution's staff. Appreciation of this common goal often leads to a more smoothly functioning investigatory process than does a situation in which management resents and attempts to deny union representatives their legally recognized role in relation to the bargaining unit member being investigated.

#### **D. Polygraph Testing**

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<sup>76</sup> *Weingarten*, 420 U.S. at 258.

<sup>77</sup> *Id.*

Another employment law issue that may arise in the investigation context is the legality of employee polygraph testing. A number of studies have raised serious questions about the reliability of polygraph testing,<sup>78</sup> and you may wish, at the level of policy considerations, to keep these questions in mind in using polygraph testing as a means of deterring or investigating allegations of staff sexual misconduct. On the level of legal considerations, a number of federal and state statutes closely regulate polygraph testing. Under a federal law, The Employee Polygraph Protection Act of 1988,<sup>79</sup> polygraph testing is generally permissible for public employees but is not permissible for many private-sector employees, with important exceptions for some safety and security-sensitive positions and workplace misconduct investigations.

State laws vary widely on this issue. A good source of information about employee polygraph laws, which are subject to change and which you should therefore research on a regular basis for updated material, is Matthew W. Finkin's *Privacy in Employment Law*.<sup>80</sup> With regard to polygraph testing, as with other areas of rapidly changing labor and employment law, the best advice is to consult your legal counsel so that you can tailor your practice to your particular situation.

## **IV. DISCIPLINE and TERMINATION**

The final topic of this primer concerns the discipline and termination of employees who you have determined engaged in such misconduct. Many of the principles that will apply at this stage have already been discussed in preceding sections of this publication. As in all stages of the prevention, investigation and response process, key considerations involve adhering to whatever procedural rights are relevant in the employment context as well as maintaining consistency across like cases to avoid later charges of discriminatory treatment.

### **A. Procedural Rights in Discipline and Termination Cases**

#### ***1. Non-Union Private Sector***

The procedural rights of employees in discipline and termination vary with their particular employment context. In the private-sector, non-union context, employers may fire "at will" for any reason except one involving illegal discrimination on the basis of race, gender, religion, national origin, age and the like. Employers need not adhere to any process in doing so

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<sup>78</sup> See, e.g., Dan Eggen and Shankar Vedantam, *Polygraph Results Often in Question*, WASHINGTON POST, May 1, 2006 (noting that despite growing use of polygraph tests by the FBI and CIA, scientific studies cast doubt on their reliability).

<sup>79</sup> See, Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (2008).

<sup>80</sup> MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* 439-540 (BNA Publ., 1996 & 2008 Cumulative Supp.).



other than that promised to employees in employment manuals or similar statements a court finds to have created legally binding obligations. For this reason, non-union employers should avoid making promises to follow any particular process or grant any procedural rights in discipline and termination. Employers should also include, in a prominent place in all employment manuals, broad general “disclaimer” clauses, explaining that they do not intend to offer legally enforceable promises to employees through the manual or other policy statement.

## **2. Union Context, Public and Private Sectors**

In the union context, in both public and private employment, bargaining unit members will have the right to use the grievance and arbitration process defined in their collective bargaining agreement. This process includes the right to binding arbitration before a neutral arbitrator and to union representation throughout the grievance and arbitration process. The union member has the right to put in evidence on his or her behalf and to call fellow employees as witnesses. Employers must allow fellow employees to testify on the union member’s behalf.

A concern management officials frequently raise relates to their right to discipline employee witnesses for lying on behalf of a fellow employee in grievance or arbitration proceedings. While giving false testimony under oath obviously does present grounds for employee discipline or termination, unions are likely to vigorously protest attempts to impose such discipline after an employee testifies in a grievance or arbitration proceeding. The union may claim that the employer’s disciplinary action against the testifying employee reflects a retaliatory motive against an employee who has exercised his or her legally protected right.

The right to testify on behalf of a fellow employee is a protected right under Section 7 of the National Labor Relations Act<sup>81</sup> and many public federal and state labor laws. In addition, it is often hard to prove to an outside fact finder that an employee has lied in his or her testimony on behalf of another employee. For these reasons, it is often best from a legal standpoint to refrain from taking disciplinary action against employees for giving apparently false testimony in a grievance or arbitration proceeding. At least, you should make the decision to impose discipline for untruthful testimony with awareness that this action may lead the union to file an unfair labor practice charge or grievance claim.

The preceding discussion addresses special considerations in the union context, but some considerations important in the discipline or termination of staff for sexual misconduct in custodial situations apply across all employment contexts. We discuss two of the most frequent grounds for lawsuits challenging negative employment actions below.

### **B. Frequent Grounds for Post-Termination Law Suits in all Employment Settings**

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<sup>81</sup> See, e.g., *NLRB v. Scrivener*, 405 U.S. 117, 118 (1972) (upholding employees’s right to give testimony in an NLRB investigation).

Two of the most likely grounds on which employees may bring lawsuits after you discipline or fire them for committing sexual misconduct are claims of defamation (*i.e.*, injury to reputation)<sup>82</sup> and claims of gender, race, or other forms of discrimination that are illegal under federal and state civil rights laws. As we already discussed briefly above, the law on defamation seeks to protect employers from non-meritorious lawsuits for defamation by granting them a limited protection, which courts refer to as “qualified immunity,” for good-faith statements and actions in the course of carrying out their duties.

It is always better, however, to avoid litigation altogether. Employers can minimize the chances of litigation by following the general suggestions we outlined above, including instructing managerial-level employees to avoid spreading information about an employee's discharge and the reasons for it, and refraining from making an example of the employee by parading him or her in front of other employees on the way out of the facility or some other step that the employee would view as embarrassing or humiliating.

Other ways of avoiding defamation claims include requiring former employees to sign explicit waiver forms as a condition of providing references beyond confirming dates and positions of employment, and instructing personnel departments not to give reference information aside from dates and positions of employment in the absence of such a signed waiver form. As we already discussed, you as a former employer do not have a legal duty to tell prospective new employers about the problems of prior staff.

### ***1. Defamation***

Defamation is the “act of harming the reputation of another by making a false statement to a third person.”<sup>83</sup> In defending against a defamation claim, a corrections agency may assert that the statement it made was true. But litigating questions of truth can be complicated and expensive; employers would prefer to avoid defamation actions altogether, or at least to have them thrown out of court at an early stage of the proceedings. In order to protect employers from unmerited defamation actions, courts have created several “privileges” that apply in the employment context, and these may be helpful in defending against defamation claims in staff sexual misconduct cases.

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<sup>82</sup> Employees may also file lawsuits against other officials involved in investigations of alleged sexual misconduct under other theories as well. *See, e.g.,* *Corona v. Lunn, aff'd*, 56 Fed. Appx. 20 (2d Cir. 2003). This unpublished case involved a corrections officer fired after being prosecuted but acquitted on criminal charges relating to allegations of having had sexual intercourse with an offender. The officer filed a civil lawsuit against the detectives who had investigated him, alleging malicious prosecution and false arrest. The district court and court of appeals had no difficulty summarily dismissing his claims on the ground that the officer had failed to allege facts sufficient to support them.

<sup>83</sup> BLACK'S LAW DICTIONARY 448 (8th ed. 2004).

The privileges that employers most use as defenses are the official statements privilege and the qualified privilege for employers' communications made in good faith. Further explanation of the privileges and cases examining them are detailed below.

**a. Official Statements Privilege**

The "official statements privilege" attaches to statements public officials make in carrying out their official duties. This is an "absolute" privilege, which means that the actor is always immune from suit, even if he or she committed a wrongful action with an improper motive. In the following cases, courts interpreted the scope of the official statements privilege:

*Alves v. County of Santa Clara*<sup>84</sup> involved an incident between a county corrections officer and a prisoner who suffered serious injury. The officer brought a defamation suit against the corrections director and assistant director after they issued press releases and public statements stating or implying that the officer had been responsible for the prisoner's injuries. A California appeals court held that the absolute privilege that attaches to statements made by a "public official . . . properly discharging an official duty" applied to this statement.<sup>85</sup>

In *Stewart v. Sun Sentinel Company*,<sup>86</sup> an investigation arising out of beatings of jail inmates implicated corrections officers. They brought a defamation lawsuit against the sheriff's officers who issued press releases about the situation. A Florida Court of Appeals rejected this argument, holding that the statements to the press fell within the officers' managerial job duties.

Thus, if the employer or representative of the employee can demonstrate that statements made -- even if they later turn out to be inaccurate -- are not defamatory if they are part of the statement they are required to make in the course of the official position.

**b. Qualified Privilege for Employer Communications**

A second, "qualified" privilege protects communications an employer makes in good faith on a subject in which the employer has an interest or duty, to another person having a

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<sup>84</sup> 2002 WL 173755 (Cal. App. Ct. 6th).

<sup>85</sup> *Id.* at 2. The court explained that this privilege exists "[b]ecause a public official's duty includes the duty to keep the public informed of his or her management of the public business," and that therefore "press releases, press conferences and other statements by such officials are covered.

<sup>86</sup> 695 So.2d 360 (Fla. Dist. Ct. App. 1997). The officers argued that the absolute privilege that applies to statements public officials make in carrying out their official duties did not protect the statements in the press release, because the officers who issued the release did not have specific job duties regarding the press.

corresponding interest or duty. The following cases more fully explain that privilege:

In *Leatherman v. Rangel*,<sup>87</sup> a corrections officer brought suit against her supervisor, alleging that he had defamed her in his termination letter. A Texas Appellate court held that the qualified privilege protected supervisor communications “made in good faith on a subject in which the author has an interest or duty, to another person having a corresponding interest or duty.”<sup>88</sup>

In *Kilroy v. Lebanon Correctional Institution*,<sup>89</sup> a social work student who was interning as a probationary employee at a corrections institution filed suit against the warden, who had told her professor that she was not welcome to return to the institution because she spent too much time with one inmate. An Ohio court of claims held that the warden’s statements fell under the qualified privilege for good faith communications from a person with an interest or duty in the subject matter of the statement to a person with a corresponding duty or interest, and that this qualified privilege protected the statements unless the employee could show actual malice. The court found that the employee had not shown actual malice because the warden had based his statement upon the reports of other employees whose reliability and veracity the warden had no reason to suspect.<sup>90</sup>

In *Wallin v. Minnesota Department of Corrections*,<sup>91</sup> a former corrections officer brought a defamation suit against a department of corrections and its warden and personnel director. The officer alleged that the warden had defamed him at a grievance hearing when the warden stated that his reasons for denying the grievance were the officer’s “bizarre” and “inappropriate behavior,” his “explosive temper,” and the fact that he posed a “serious security threat.”<sup>92</sup> A Minnesota

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<sup>87</sup> 986 S.W. 2d 759 (Tex. App. 1999).

<sup>88</sup> *Id.* at 762. The officer therefore would have to show that her supervisor made the allegedly defamatory statement with “actual malice,” which the court defined as “the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true.” The court held that officer had failed to prove that her supervisor had acted with actual malice.

<sup>89</sup> 61 Ohio Misc.2d 156, 162-63, 575 N.E.2d 156 (Ohio Ct. Claims 1991).

<sup>90</sup> *Id.* at 163.

<sup>91</sup> 598 N.W.2d 393 (Minn. Ct. App. 1999).

<sup>92</sup> *Id.* at 397, 402. Instead a qualified privilege applied to an employer’s communication to an employee stating the reason for his or her discharge. The court explained that the officer would have to establish that the warden acted with “ill-will and improper motive or wishing wantonly and without cause to injure the plaintiff.” The court found that officer had failed to make this showing, and that the warden had reasonable concerns about the officer’s instability and a reasonable basis for taking steps to ensure the safety of the

appeals court held that the absolute privilege applicable to statements public officials make incidental to their public duties did not protect statements made in the context of an administrative personnel matter.

In *Ikani v. Bennett*,<sup>93</sup> a counselor at a corrections facility filed a defamation suit against two supervisory co-workers, alleging that they defamed him when they falsely stated that he had an arrest record for gun smuggling and recorded this remark in his file. The Arkansas Supreme Court held that a qualified privilege covered the alleged defamatory statement because the communication was an exchange of information between two supervisory employees concerning an employee under their charge.

These cases make clear that the privilege for statements that officials make in good faith to others with similar duties is broad, but not absolute. Therefore, employers must have clear and consistent policies and practices about what they convey about employee conduct.

## ***2. Discrimination on the Basis of Sex, Race or Other Protected Characteristics***

Employees who decide to sue employers after being discharged often claim violations of anti-discrimination law. Employees may allege discrimination based on race, gender, religion, national origin, some kinds of disability, and age. With respect to race, gender, and national origin, employees can allege discrimination based on either “minority” or “majority” status; in other words, both women and men can allege gender discrimination, as can employees possessing either minority or majority racial identities. Proving a discrimination claim requires employees to show that their employer treated them differently than others who did not share their relevant identity characteristic. In other words, a female employee alleging gender discrimination must show that only women, and not men, were terminated for offenses similar to hers. The best way for an employer to avoid creating grounds for a plausible discrimination claim is to adopt and enforce consistent policies that supervisors objectively and neutrally apply.

Here are two examples of discrimination cases involving the corrections context. There are many such cases involving corrections agencies, just as they are for every employment context. In most corrections cases, as in most Title VII cases generally, the employer wins, though occasionally, where the facts are strong, an employee may succeed.<sup>94</sup> Note that in both

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institution.

<sup>93</sup> 682 S.W. 2d 747 (Ark. 1985).

<sup>94</sup> See, e.g., *Singleton v. City of New York*, 2009 WL 2238 75 (2d Cir. 2009) (affirming a Title VII jury verdict against the city but reducing its amount in a case in which a male corrections officer alleged hostile environment sex discrimination against a female supervisor who made repeated sexual advances towards him, threatened him with dismissal, and called and sent mail to his girlfriend alleging that he had been unfaithful, resulting in the breakup of his relationship and development of depression).



of the cases we have chosen for illustration here, the employer succeeded in showing that it had not engaged in discrimination by demonstrating that it had handled in an evenhanded manner other cases involving similar instances of employee misconduct.

In *English v. Colorado Department of Corrections*, a corrections agency fired a male African American supervisor following an investigation into allegations of sexual misconduct with an inmate.<sup>95</sup> The investigation concluded that there was sufficient evidence for termination, based on DNA evidence, witness statements, and a polygraph test. The officer filed suit, alleging race discrimination held that the agency had a legitimate conflict-of-interest reasons for replacing the investigating officer, the dismissal of criminal charges had no bearing on the evidentiary results of the internal investigation, and the case of the white officer whom the agency had not terminated involved a factually dissimilar situation.

In *Hooks v. Georgia Department of Corrections*, an African American female who worked as a probation officer alleged that her employer had discriminated against her on the basis of race and gender when it terminated her for failing to cooperate with her supervisors' attempts to train her and evaluate her performance.<sup>96</sup> The Eleventh Circuit held that the employee failed to show that her employer had retained similarly situated employees outside of the employee's protected class who had engaged in conduct similar to that for which her employer had terminated her.

In summary, as these cases show, you can best avoid discrimination claims by treating all employees who have committed similar disciplinary offenses the same way. To ensure this happens, you should develop objective rules and require supervisors to impose them consistently.

## **V. CONCLUSION**

In this publication we have discussed some of the employment and labor law considerations that managers of corrections agencies may want to keep in mind as they design and implement policies addressing the prevention, investigation, and discipline of staff sexual misconduct in custodial settings. We believe that these legal considerations can often provide tools or guidance that can help, rather than hinder, corrections employers in achieving their goals.

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<sup>95</sup> *English v. Colo. Dep't of Corr.*, 248 F.3d 1002 (10th Cir. 2001). In support of his claim, he pointed to evidence including that the agency had: (1) replaced the African American investigating officer handling his case with a white officer, (2) failed to reinstate the plaintiff after criminal charges were dropped, (3) failed to terminate a white officer facing similar accusations, and (4) permitted a general atmosphere of racial intolerance. The Tenth Circuit affirmed the lower court's grant of summary judgment

<sup>96</sup> *Hooks v. Ga. Dep't of Corr.*, 311 Fed. Appx. 295, 297-98 (11th Cir. 2009).



Key measures that employers can take are to clearly communicate policies and rules throughout the organization and to fairly and consistently implement and enforce those policies and rules. Although law can sometimes appear to impede employers' attempts at preventing sexual misconduct or disciplining employees who have engaged in it, more often employment and labor law can assist employers in achieving their management objectives by providing guidance and outlining paths of action that will lead to the fewest negative consequences in the long run.