

CROSS-GENDER SUPERVISION

DRAFT

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CROSS-GENDER SUPERVISION

Course Goal:

To present a multi-part scenario regarding cross-gender supervision to teach issues identified in objectives below. The scenario begins prior to the decision to expand the number of cross-gender posts in a prison setting and carries through post-implementation issues as viewed from the perspectives of administrators, supervisors, female and male officers, and inmates.

Course Objectives:

At the end of this training, you will be able to:

1. Identify administrative, supervisory, line staff and inmate perspectives on cross-gender supervision.
2. List benefits and drawbacks involved in cross-gender supervision from administrative perspectives.
3. Identify first steps that administrators should take before implementing or expanding cross-gender supervision in order to minimize potential problems.
4. State informal and formal steps officials may take to increase cross-gender assignments in institutions.
5. Identify potential barriers to increased cross-gender assignments from other custody staff.
6. Acknowledge the role that rumors play in institutions and recognize problems of misunderstanding that may result from rumors.
7. Identify attitudes and expectations from institutional staff that may hinder implementation of increased cross-gender supervision.
8. Identify inmates' perspective on cross-gender supervision.

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9. List the legal arguments that may be raised by administrators, supervisors; male and female officers, and inmates in a suit over cross-gender supervision and identify which of these are of greatest significance.
10. Identify the sources of law in conflict in cross-gender supervision.
11. State the recent trends in court decisions resolving legal conflicts of cross-gender supervision.
12. Implement a court order requiring correctional administrators to implement expanded cross-gender supervision.
13. Identify potential management problems and solutions in implementing increased cross-gender supervision, including training, policy revisions and additions.
14. Identify potential problems and solutions to implementation problems at the line and supervisory level.
15. Define sexual harassment and discrimination.
16. Apply a definition of sexual harassment to case studies and view the possible effects of sexual harassment issues on institution management and staff morale.
17. Understand legal and administrative processes for handling sex harassment complaints, what relief is available.
18. Emphasize the need for an effective sex harassment grievance procedure.
19. Review types of sexual harassment and discrimination which may arise in the workplace.
20. Identify additional concerns raised by increased cross-gender supervision and to problem solve.

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Note to Participants:

The success of this training exercise depends to a large degree on your willingness to offer a wide range of views and to participate actively in an extended role play dealing with issues of cross-gender supervision. You are the primary source of ideas and information. Since much of the value of this exercise will come from your contributions, you are encouraged to take notes of the comments and discussions. In playing your roles, remember, that often there will be no “right” answer being sought, only a reflection of the range of views and opinions that may exist in a prison about the questions **under** discussion.

CASE STUDY: BACKGROUND

Gotcha State Prison for Men is a 1500-bed, close custody facility. It has classic cell block construction, with open front cells, 3- and 4-tiered cell blocks. Gang showers are used without screens. Discipline in the facility is adequate but not tight (for both inmates and staff). Inmate dress and behavior can at best be called casual. Inmates in segregation are strip searched upon leaving their cells and every time they leave or enter the unit. Other inmates in the facility are strip searched on a “for-cause” basis. Any inmate leaving the security perimeter of Gotcha Prison is strip searched upon his return. There is an active Muslim group in the institution.

There are 350 custody staff, of which only ten are women. These women perform basically clerical functions, although they are “custody officers.” They also conduct pat searches of female visitors. They have very limited contact with male inmates and except for the visiting room do not directly supervise any male inmates. No posts in the prison have officially been designated male only, but no woman has ever worked in any position other than the ones described above. No woman at Gotcha has ever been promoted to sergeant or above.

The Warden, Folsom J. Stillwater, has worked at Gotcha for 25 years, beginning as a correctional officer and working his way up to warden. He has been warden for 10 years.

Loosely Run Correctional Institution for Women is the state’s only facility for women, housing 100 women inmates of every custody status. It is located in the same town as Gotcha State Prison. Custody staff consists of fifty female officers and three males. None of the males work regularly in direct inmate contact positions. They are mainly around for muscle purposes. This function is occasionally supplemented by male maintenance staff and/or male counselors.

Loosely Run houses its inmates in individual single cells, each with a solid door which contains a small window. Toilets are in the cells. Gang showers are used. The showers have dividers between them, but are open front.

CASE STUDY: BACKGROUND

Dr. Belle V. Wolfish has been warden of Loosely Run Correctional Facility for 4 months. Her expertise is in management and she has never worked as a line officer in an institution.

Both prisons are part of a 5100-bed prison system, with the other male facilities scattered across the state. For a variety of reasons, one of which is the typical locations of the various institutions, there are chronic problems of getting enough qualified staff to work at the facilities. This is especially true at Gotcha.

CASE STUDY: SCENE I

The women staff from Gotcha State Prison and Loosely Run Correctional Institution form a committee for the purpose of increasing the number of posts at Gotcha State Prison available for females. Women staff want more opportunities to work and to be promoted.

A delegation from the committee arranges an appointment with Warden Stillwater at which they present their demands that more positions be opened to them. At the meeting, they remind the warden that several women currently have bid for previously "male only" jobs, including tower officer positions and cell block officer positions and indicate that they will be bidding for such posts regularly in the future. They meet or exceed the paper requirements for these posts, including having seniority to put them high on the list for these positions. No obvious reason exists to deny them these positions except that they are women.

Additionally, two of the women at Gotcha have also taken the sergeant's exam and are ranked in first and second place on the job Register on the basis of their scores. Civil Service regulations require promotions to be made from one of the top three scorers or the promoting authority must show cause why a lower scorer is selected. The third place score is significantly lower than the scores of the two women. The next likely sergeant's position to come open will be a cell block position.

There is no affirmative action program in place in the Department for women.

The women indicate that unless they receive a satisfactory response, they will pursue their legal remedies.

Male officers at Gotcha State have become aware of the women's efforts for increased employment. Some male officers wish to transfer into Loosely Run Correctional Institution for Women, because the facility is cleaner than Gotcha, its location more convenient and they believe the stress is less intense. They bid on jobs in Loosely Run Correctional Institution and arrange an interview with Dr. Wolfish. They too indicate that unless they receive a satisfactory response, they will take legal action.

CASE STUDY: SCENE I

Directions: Each group should answer the following questions.

Administrator's Group:

- 1) Identify the benefits and drawbacks of allowing female staff to work in contact positions with male inmates.
- 2) Identify the benefits and drawbacks of allowing male staff to work in contact positions with female inmates.

Supervisors and Male Officers:

- 1) You have heard of the meeting between the women and Warden Stillwater; and rumors that the women want an affirmative action program set up which would require 50% of all new hires promotions of custody staff be women.

Identify the types of concerns and problems you would expect to be voiced both by your co-workers and inmates, in regard to the news that women will be working in direct contact with inmates.

What response(s) do you want Warden Stillwater to make to the women's demands and why? Do you expect him to make a different response than the one you want? Why?

- 2) What reactions do you have to male officers working in contact positions with females?

Female Officers

- 1) What arguments can you make to support your claim to expanded work opportunities? List these in order of importance.
- 2) What reactions do you have to male officers working in the female institution? Are the male officers' claims any different than the female officers' claims?

CASE STUDY: SCENE 2A

The administrators of both institutions decide to deny male and female officers requests to open contact positions to cross-gender officers, based on the privacy interests of inmates.

Directions: Brainstorm what legal remedies are available.

CASE STUDY: SCENE 2B

Male and female officers pursue administrative remedies with EEOC but are unsuccessful. They then sue the administrators of both institutions, claiming their right to employment without discrimination on the basis of sex has been violated. The inmates intervene in the lawsuit to make their legal claims in opposition to expanded cross-gender supervision. (If the administrators had granted the officers' requests, the inmates would have sued and the officers' intervened.)

Directions: In small groups, administrators, male officers, and female officers identify what legal arguments to present to court. Supervisors identify what arguments inmates will make to oppose cross-gender supervision in contact positions. Consider how your group might attempt to prove its contentions. (If the male officers wish, they may also argue in opposition to the female officers' suit. These arguments, if made, should be different than those presented by the administrators.)

The arguments that each group develops will be presented to a panel of three "judges" selected from the group. These persons may participate in the small group discussions, but must assume a neutral, "judicial" role for the arguments.

CASE STUDY: SCENE 3

The judge analyzes the case in this way: Men and women from the beginning of recorded history have had a basic need of privacy in certain areas of living. Invasions of privacy cause shame and embarrassment. While an inmate's privacy must be limited in the interest of security, a right of privacy still exists in the institutions to some degree.

The job of a correctional officer can be performed equally well by any qualified and trained man or woman, so the positions must be open to either sex under the Equal Employment Opportunity Act.

Only those tasks which involve direct, regular observation of persons in the nude or using the toilet must be performed by persons of the same sex. Before a post is limited to a single sex, the institution must demonstrate there is no reasonable way in which the post can be filled by a person of the opposite sex, consistent with the court's ruling on privacy. The judge does not order implementation of an affirmative action program of any sort.

As a result of the court order, most posts/tasks must now be opened to women in Gotcha State and to men in Loosely Run Institution.

Directions: In small groups, answer the following questions:

Administrators:

You recognize the importance of the court's order and determine your best approach is to implement both the letter and spirit of the order. You decide that opposition to the order through an appeal will be useless and that token attempts at compliance will only result in additional court intervention. You are further advised that the governor is fully committed to equal opportunity and expects you to exercise your best efforts to carry out this policy. In speaking with colleagues from other jurisdictions, you also decide that if properly done, cross-gender supervision will result in a better run institution.

CASE STUDY: SCENE 3

Identify what steps must be taken to implement the court order effectively and what problems may develop which, if not addressed, may have adverse effects on institution's operation, staff morale, and your goal of establishing meaningful equal opportunity. In considering these issues, note the concerns about cross-gender staff which have been previously identified. Identify any additional operational/management issues which you feel may be important in reaching your goals.

(Note this is not a "legal issues" question, but is primarily directed to identifying operational issues, many of which may of course-have direct legal implications.)

- 2) The court left you the option of having male-only posts in the male institution and female-only posts in the female institution, but provided little guidance as to which ones. Will you have single gender-only posts in each institution? Which tasks will they involve, and roughly what percentage of these positions will be single sex only?
- 3) Identify potential problems from officers and inmates that you foresee and suggest ways of dealing with these problems.
- 4) Should any policies or procedures be revised? If so, which ones?
- 5) How are you going to let staff know of the changes?

Supervisors

- 1) What are your reactions to the court order?
- 2) What recommendations will you make to Warden Stillwater about the assignment of female officers in Gotcha State?
- 3) What recommendations will you make to Warden Wolfish about the assignment of male officers in Loosely Run Correctional Institution?
- 4) What problems do you anticipate as supervisors in implementing cross-gender supervision?
- 5) What can be done to minimize these problems?

CASE STUDY: SCENE 3

Male Officers

- 1) What are your reactions to the court order allowing females to work in a male institution?
- 2) What problems do you anticipate in having females working for the first time in contact positions with male inmates and with male officers used to working only with males officers?
- 3) What can be done to minimize these problems?
- 4) What are your reactions to the court order allowing males to work in a female institution?
- 5) What problems do you anticipate in having males working for the first time in contact positions with female inmates and in working with female officers used to working only with female officers?

Female Officers

- 1) What are your reactions to the court order allowing females to work in a male institution?
- 2) What problems do you anticipate in having females working for the first time in contact positions with male inmates and working with male officers used to working only with males officers?
- 3) What can be done to minimize these problems?
- 4) What are your reactions to the court order allowing males to work in a female institution?
- 5) What problems do you anticipate in having males working for the first time in contact positions with female inmates and in working with female officers used to working only with female officers?

CASE STUDY: SCENE 4

A year has elapsed since the court order. The institutions' voluntary affirmative action program has worked quite well, and there are now 30 women working in various contact posts in the male institution and 5 male officers working in various contact posts in the female institution. But all is not sweetness and light. Within the space of a week, Warden Stillwater and Warden Wolfish each receive harassment complaints from staff, neither of which has come through normal institutional grievance procedures.

Complaint to Warden Stillwater: Two female officers, Officer Jane and Officer JoAnn, working in D Block, complained of being sexually harassed by other correctional officers. They complained that they have been frequently patted on the bottom by men and that on several occasions Officer Guber has grabbed their breasts. The control-room has one wall covered with Playboy centerfolds, although none were there when the women first went to work on the unit. Upon complaining about the pictures, they disappeared, only to be replaced with Playgirl centerfolds.

Officers Jane and JoAnn complained to the line staff involved but were afraid to complain to their supervisor, Sgt. Gruff. Sgt. Gruff had told both officers when they were assigned to the unit that "Honey, we're happy you are here. A pretty face and cute fanny should spruce up this dump. Your best chance of fitting in is to just become one of the boys. We get along with those who go along." At the end of the interview, Sgt. Gruff patted each woman on the hip as she left the room. Since then, the Sergeant has become known as "Fast-hands Gruff" to female staff throughout the institution. Sgt. Gruff has a general reputation for strongly supporting officers who agree with him but coming down hard on staff he perceives as being complainers. He is well aware of the sort of treatment the women are complaining of and that they have complained to other line staff about it.

One of the staff involved pointed out that a third female officer in the unit, Officer Mimi, joins in the sexual repartee and patting, and advised these two women to lighten up and join the fun.

CASE STUDY: SCENE 4

Officer JoAnn then quit her job, because she couldn't put up with the harassment any more. She now asks to be reinstated with back pay and that the institution be more responsive to harassment problems. Her evaluations, written by Sgt. Gruff, are mediocre at best.

The male officers who are the source of the complaints are popular officers, members of the SWAT team and have been decorated for bravery on more than one occasion. Two of them have, at different times, been named "Officer of the Year." They have been outspoken in their opposition to women working in the prison in union meetings and other public forums.

Complaint to Warden Wolfish: Dr. Do-right, the doctor employed by the women's institution, is female. It is rumored that she has been having a sexual relationship with one of the male emergency medical technicians, Mr. Mann. A job opening becomes available and the doctor promotes Mr. Mann over other seemingly more qualified employees with more years of experience. The employees who were passed over complain directly to the warden that they were subject to sexual discrimination by the doctor's preference for the man she was allegedly having an affair with.

Directions: Discuss the following questions in small groups, and report.

Administrators:

- 1) Since neither complaint came through normal channels, and you often emphasize that the well-run institution runs according to chain of command, will you consider the merits of the complaints, refer them back to the complaining individuals to pursue their concerns through proper channels, or take some other action? What are your reasons? Note that following "normal channels" would require the complaints be made to the officers' immediate supervisor.

CASE STUDY: SCENE 4

- 2) After investigating the complaints of Officer Jane and former Officer JoAnn, most of the conduct is confirmed. What response will you make?
- 3) After investigating the complaints of the medical staff passed over in Mr. Mann's promotion by Dr. Do-right, you are unable to determine whether or not the doctor and E.M.T. are having an affair. They deny it and claim to only be good friends. What response will you make?

Supervisors:

- 1) Assume that you had seen the actions of the officers harassing Officers Jane and former Officer JoAnn. You are generally aware of the "Fast-hands" nickname for Sgt. Gruff and have been with him as he has patted waitresses and barmaids numerous times. Also, you had observed that some female staff joined in the touching games and made sexual comments along with the male staff. How would you have responded to the complaints if they had been brought to you, noting the popularity of the officers involved, that they are very good friends of yours, and that Officers Jane and JoAnn didn't really seem to fit into the group all that well?
- 2) What recommendations would make to Warden Wolfish regarding the promotion of Mr. Mann?

Male Officers:

- 1) Your group has spoken to the officers in Gotcha State against whom the complaints are made. News of the complaints swept through the prison grapevine like Sherman through Georgia. The alleged harassers describe the complaints as "crap" and suggest that "if those broads can't take the heat inside, then they should go back to the kitchen!" What is your reaction to the complaints? What should be done about them?

CASE STUDY: SCENE 4

- 2) What is your reaction to the E.M.T.'s who claim that Mr. Mann's promotion over them was the result of his cooperation in requests for sexual favors from Dr. Do-right? What should be done?
- 3) What can be done about the reality that serious sexual harassment complaints divide staff bitterly?

Female Officers:

- 1) How does your group react to the Officers Jane and Joann's complaints? What should be done? How does the fact that some female officers go along with the sexual bantering and touching affect your decision?
- 2) What is your reaction to E.M.T.'s who claim that Mr. Mann's promotion over them was the result of his cooperation in requests for sexual favors from Dr. Do-right? What should be done?
- 3) What can be done about the reality that serious sexual harassment complaints divide staff bitterly?

CASE STUDY: SCENE 5

Assume that the matters (from the previous scene) went to court because no satisfactory relief could be negotiated through EEOC. The court finds in favor of Officer JoAnn and Jane and orders Warden Stillwater to rehire Officer JoAnn, pay her backpay and to take remedial steps to avoid recurrence of workplace harassment. The court also awards a substantial amount of attorneys' fees to Jane and JoAnn.

The court suggests that if further complaints of this sort emerge, the court will consider more intrusive sorts of remedies, including the possible appointment of a special master to oversee efforts to eliminate sexual harassment from the workplace.

Additionally, the court rules that evidence is insufficient to establish that Dr. Do-right's promotion of Mr. Mann was based on his acceptance of sexual favors from Dr. Do-right. Therefore, Mr. Mann will remain in his position. Fellow MTA's who brought the suit are now out of pocket the money they spent on attorney fees and are extremely resentful of working with Mr. Mann and Dr. Do-right.

SEXUAL DISCRIMINATION AND THE LAW: AN OVERVIEW

- I. Sexual discrimination is against the law. Actually, sexual discrimination may violate more than one law.
 - A. Federal and/or state constitutional requirements.
 - B. Federal and/or state statutory requirements. Or local ordinances in the case of local jails.
 - C. Federal, state, or local regulations.

- II. U.S. Constitution: 5th and 14th amendments
 - A. Fifth Amendment (applies only to federal government): forbids deprivation of life, liberty, or property without Due Process of law: government must act fairly, not arbitrarily.
 - B. Fourteenth Amendment - Due Process: Applies to state and local governments. Due Process clause identical to Fifth Amendment.
 - C. Fourteenth Amendment - Equal Protection: Forbids discrimination against similar groups without a valid reason. This is a more difficult test to win than under Title VII (federal statute).

- III. State constitutions: Typically also have Due Process and Equal Protection clauses. Some may also have “Equal Rights Amendments” which specifically make sexual discrimination unconstitutional.
 - A. Does your state have ERA?
 - B. Most of the legal “action” in area of sexual discrimination does not involve constitutional issues since legal burden on plaintiff is higher (at least with due process or equal protection arguments) than with other remedies, plaintiff must hire own lawyer (although attorneys’ fees may be available if plaintiff wins).

- IV. Federal statute: Equal Employment Opportunity. Title VII of the Civil Rights Act of 1964 (as amended in 1972).
 - A. Title VII applies to employers (including state and local governments) and makes it an “unlawful employment practice...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such inmate’s race, color, religion, sex, or national origin,” 42 USC Sec. 2000e-2(a)(1).
 - B. Statute also creates Equal Employment Opportunities Commission (EEOC) to assist in enforcement of law.
 - C. EEOC may investigate and conciliate charges of discrimination.
 - D. EEOC adopts guidelines interpreting Title VII. Not binding, but will be given some deference by courts. They do indicate how EEOC interprets law.

- V. State laws often create similar EEOC structure at state level, i.e., ban discrimination, create agency to administer law.
 - A. EEOC often defers to state statutory remedy.

- VI. EEOC complaint process.
- A. Person who feels discriminated against in employment setting files complaint with EEOC.
 - 1. Or with state agency, if one exists.
 - 2. Charge must be filed with EEOC within 180 days of occurrence (300 days if state agency filing required).
 - 3. This much simpler than filing lawsuit. Person must simply state facts which they feel show discrimination.
 - B. Within 10 days of filing, complaint served on respondent.
 - C. EEOC investigates to decide if reasonable cause exists to believe charge true. This occurs within 120 days, if practicable.
 - 1. Investigation may be very thorough, demand substantial amount of information and cooperation from respondent.
 - 2. Group question: Have any participants ever been involved in EEOC investigation in any way? What was it like?
 - D. If EEOC finds reasonable cause to believe discrimination occurred, then attempt is made to conciliate issues with respondent. If no reasonable cause found, complaint dismissed.
 - E. If conciliation doesn't satisfy EEOC within 30 days, then EEOC may sue in federal district court.
 - F. If EEOC doesn't sue within 180 days (assuming reasonable cause has been found), then a "right to sue" letter will be issued, authorizing the complainant to sue directly within 90 days.

- G. Relief available: Negotiated relief may include back pay, restoration of job or seniority, creation of affirmative action plan. If case goes to court, additional forms of relief possible, including damages (although courts split on whether damages, especially punitive damages, available under Title VII), and attorneys' fees.
- VII. Sexual discrimination: The concept of sexual discrimination is divided into two separate branches: traditional discrimination and harassment. Both are considered forms of discrimination which are prohibited by Title VII.
- A. Discrimination: Treating someone differently than someone else. Some forms of discrimination are not illegal, but favoring one person over another because of the person's sex is generally illegal (an exception-to the rule will be discussed shortly).
1. Some examples of discrimination include:
 - Passing over an individual for promotion because he or she is near retirement (age discrimination).
 - Requiring females to answer questions not asked of males during and employment interview (sex discrimination).
 - Refusing to hire persons of a particular sex or race (sexual, racial discrimination).
 - In general, any decision made about an individual on the basis of a general protected category the person falls into (such as sex), instead of making a decision on the specific merits of the individual, is likely to be found to be unlawful discrimination. This is known as stereotyping.

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- B. Exception: Bona Fide Occupational Qualification (BFOQ). Where there is a truly legitimate reason for treating persons of different sexes, religions, or national origins differently, discrimination may be legal as a “BFOQ.” (Race or color can never be a BFOQ.) To establish a BFOQ, the employer must show:
1. All or substantially all persons of one sex would not be able to perform safely and efficiently the duties of the job; or
 2. The very essence of the business operation would be undermined by not hiring members of one sex exclusively.
 3. BFOQ exceptions will be narrowly construed by both EEOC and the courts.
 4. Some examples of BFOQs include:
 - Exclusion of women from an all-male maximum security prison where exceptionally high levels of violence, very low staffing levels, and generally abysmal conditions prevailed was acceptable both to maintain security and to protect women from sexual assault by the inmates, Dothard v. Rawlinson, 433 U.S. 321 (1977). Note: This is an exceptional result, which would probably not be reached for most prisons or jails in the country today. To use Dothard as a precedent to justify excluding women from a prison workforce virtually admits the prison is being run with unconstitutional levels of violence.
 - Height and weight requirements for particular jobs (such as law enforcement officers) have been found to discriminate because they exclude disproportionate percentages of women and cannot be shown to serve an important government purpose and be substantially related to such purpose.

- C. Harassment (a specific form of sexual discrimination.) Defined as uninvited conduct with sexual overtones which occurs in the workplace.
1. Note the conduct may be physical (patting, stroking, caressing), verbal (lewd or suggestive comments, dirty jokes), or visual (photos, drawings,)
 2. Harassment must involve one of the following conditions:
 - a. Submission to the conduct is made explicitly or implicitly a term or condition of an individual's employment. This occurs at initial hiring as the "you can have the job if you put out" job offer.
 - b. Submission to or rejection of the conduct is used as the basis for employment decisions. Promotions, training, working conditions, anything that affects an employee's career advancement once he or she is the job. An example would be a promotion made contingent on sexual favors.

Conditioning either hiring or promotion/job conditions on sexual grounds is called "quid pro quo" discrimination: to get something (the job, the promotion), the applicant must give something (some sort of sexual favor).
 - c. The conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

This area, probably the most common source of complaints, relates to the climate on the job.

- VIII. When is the employer liable for sexual harassment by employees? An employer is not automatically liable under Title VII for every type of sexual discrimination which may occur in the workplace.
- A. Most courts hold employers automatically liable for harassment by supervisors when the “quid pro quo” types of harassment are involved. This form of liability is known as strict liability or “respondeat superior.”
 - B. Courts are split as to whether strict liability applies for hostile work environment claims caused by actions of supervisors. Some say yes, others say the employer is liable only if the employer knew or should have known of the conduct.
 - 1. Were complaints filed about the supervisor or was the conduct so obvious that the employer can be assumed to have known about it?
 - 2. A “head in the sand,” or “see no evil” attitude won’t protect the employer.
 - C. For hostile environment claims based on actions of co-workers (not supervisors), a “know or should have known” test will be applied. No strict liability.
- IX. “Sexual discrimination/equal opportunity” and “affirmative action:” The concepts mean different things.
- A. Title VII prohibits sexual discrimination, but it does not require affirmative action programs.
 - B. “Affirmative action” refers to positive programs an employer may initiate to overcome the effects of past discrimination. Affirmative action programs may be begun voluntarily by the employer, may be part of a negotiated settlement with EEOC, or may be court ordered.

Voluntary programs: May be begun where there is a “manifest imbalance” in a traditionally segregated work category, even if the segregation is the product of societal pressures and attitudes, as opposed to any conscious action by the employer. The program should not bar non-protected groups (such as males, in a sex discrimination situation) from positions, but may allow a protected category (such as sex) to be considered in the employment decision. The goal of these programs should be to attain, not maintain, a balanced work force. Voluntary programs may not have specific hiring “quotas,” but instead may have only hiring goals.

Specific hiring quotas: May be court ordered where there is a clear history of discrimination by the employer and the employer has refused to take steps to remedy the problem.

Judicial Approaches to Cross-Gender Supervision

- I. When employees of one gender supervise inmates of the opposite gender, there can be a conflict of rights: The inmates' right to privacy vs. the employees' right not to be discriminated against on the basis of sex.

- A. Where does the right to privacy come from?

The right to privacy does not appear in the Constitution but it exists because of the U.S. Supreme Court decision in Griswold v. Connecticut, 381 U.S. 479 (1965), In that case, the US. Supreme Court was asked to decide whether prohibiting the use of contraceptives even by married people violated the Constitution. The Supreme Court said the law violated the constitutional right to privacy.

The Court ruled that the Constitution creates “zones of privacy” based on several constitutional rights, including both the First and Fourth Amendments, among others. This “zones of privacy” analysis has come under attack by persons favoring interpretation of the Constitution consistent with the original intent of the founders of our country. This view denies that a right to privacy exists in the Constitution.

Despite the dispute about where the right to privacy comes from, the fact remains that courts today clearly recognize that the right exists under the U.S. Constitution.

- B. What other source might there be for a right to privacy? States may create a right of privacy in their own state constitution or through state statutes.

- C. Where does the right to be free from job discrimination come from? The Equal Employment Opportunity Act (Title VII), similar state laws, possible federal or state Constitutions. The most important source of the right is Title VII. (The details of Title VII have previously been discussed.)

One exception to the federal ban on sex discrimination is the B.F.O.Q. This exception is narrowly construed by EEOC and the courts and the burden to justify a BFOQ will be on the employer.

- II. In corrections, this conflict comes about because institutions designate certain posts either formally or by practice as male-only or female-only.
- A. Reasons for this may include a concern for inmate privacy (the balancing of rights), a feeling that women can't perform the tasks of a correctional officer and their presence thus will compromise security (a form of sexual stereotyping, probably indefensible in a Title VII case), and the historical fact that particularly women have seldom sought work as correctional officers (societal norms, aka "we've always done it this way," also not an acceptable justification for excluding women). Other reasons may also be offered.
- B. Cross-gender cases are relatively few and new in corrections and judicial trends seem to have changed within a few years. Almost all of the cases involve women working in male prisons.
1. Early cases suggested that institutional administrators must accommodate both the privacy interests of the inmates as well as the equal opportunity interests of the women through such means as erecting privacy screens and juggling shifts.

2. More recently, the trend (although not a strong one) seems to find little or need to accommodate both sides by holding that limited, incidental viewing of male inmates in the nude or using the toilet, etc. by female officers does not violate any privacy rights of the inmates.
 - In at least two cases, use of female officers in cell house arrangements similar to those at Gotcha State Prison have been upheld, even though the women might catch occasional glimpses of unclothed inmates. Unless the inmates were regularly or routinely seen unclothed by female officers, the interests of the institution in furthering both security and equal opportunity for women overcame the privacy interests of the inmates, Grummett v. Rushen, 779 F.2d 491 (9th Cir., 1985), Johnson v. Pennsylvania Bureau of Corrections, 661 F.Supp. 425 W.D. Pa., 1987). The Johnson opinion noted that in many cases the inmates could protect their own privacy by draping themselves when using the toilet, wearing towels when they came out of the shower, etc.
 - A complaint that patdown searches by women violated religious interests of Muslim inmates was rejected in another case, although the patdowns specifically did not involve touching the genital area, Madyun v. Franzen, 704 F.2d 954 (7th Cir., 1983).
 - The assumption in current female officer/male inmate cases seems to be that unless there is direct, routine observation of inmates in the nude (such as would occur in female officers regularly performed strip searches), the use of female officers throughout male prisons does not violate any rights of the inmates.
 - Where inmate privacy is asserted as a basis for a BFOQ, the institution still may have to show that there are no reasonable alternatives to its gender-based hiring policy (the accommodation approach), at least where the BFOQ, if granted, would preserve a substantial number of positions as single-sex positions.

3. Male officer/female inmates. There are far fewer cases dealing with this version of cross-gender supervision and they provide very limited guidance. There is at least some reason to question whether the female officer/male inmate cases are strong precedents to follow.
 - In a 1980 case, the court of appeals took an accommodation approach and ordered that male officers be assigned to work in housing areas during day and evening shifts after certain procedures and privacy protections were implemented. Inmates were allowed to hang curtains over the small windows in their single person cells for short periods of time. Shower areas had to be screened off with smoked glass which allowed staff only to observe general forms, not individuals. Forts v. Ward, 621 F.2d 1210 (2d Cir., 1980).
 - More recently, a women's prison decided to sharply reduce the number of cross-gender posts it maintained (even though there had been no complaints from the inmates). Two male officers were demoted under the new policy. The state argued the policy was justified as a BFOQ in light of the privacy interests of the women, security, and rehabilitation. The state's position was rejected.

The facility was run in a way which minimized any likelihood of anyone intruding on an inmate's privacy. Toilets were covered by privacy curtains. The small cell windows could be covered for up to 10 minutes during the day. Appropriate sleeping apparel was supplied. Correctional staff did not routinely enter shower rooms when occupied. Searches of all types were performed by female staff. The court felt the state had failed to show there was even a serious conflict between privacy rights of inmates and employment rights of male staff.

The state's rehabilitation argument was to the effect that many women offenders, having been abused in various ways by men, would be adversely affected by the presence of male officers. The state also argued being observed showering or using the toilet by men would be counterproductive to the women's rehabilitation. Both arguments failed for the lack of any facts to substantiate them.

This case is difficult to draw general principles from because of the facts, which failed to show any significant intrusions in the privacy of the women. Had privacy issues been in fact present in the case, the court clearly would have required the defendants to show there were no reasonable alternatives available to them which would have accommodated both the privacy interests and the competing employment interests before the court would have approved of removing the plaintiffs from their jobs. Torres v. Wisconsin Department of Health and Social Services, 838 F.2d 944 (7th Cir., 1988).

The Torres case is also perhaps unique because it involved an attempt to remove persons from jobs they already held, as opposed to demanding that additional positions be opened to men. If the latter argument is made, two issues may have to be addressed. The first is that the equal opportunity argument for men is somewhat weaker than for women in that the vast majority of jobs in corrections (indeed almost the entire career ladder) are available in male institutions. The second question is whether the privacy interests of female inmates will be seen as being any different from those of male inmates.

4. Security interests. An argument which has not yet been strongly made in cross-gender cases, but which appears to be available, is that the presence of officers of the opposite sex of the inmates has a calming effect on the population and hence enhances institutional security.
 - Most correctional litigation involves the court trying to balance a particular right of the inmates against a legitimate institutional interest (typically security). If the interest is reasonable, a court often will defer to the judgment of the correctional administrator and rule that furthering the institutional interest outweighs the inmate's interest in whatever constitutional right may be involved.

- Thus, if having female officers working in male institutions, including living units, (or male officers working in female institutions) does in fact produce a beneficial effect on safety and security, then this is yet another reason (besides equal opportunity) for the inmates' privacy interests to give way to more cross-gender posts. Correctional administrators who have used women extensively in male institutions often report such beneficial effects, at least where the female officer is accepted as part of the correctional team by her co-workers and supervisors.

Key Points About Sexual Harassment

It is a violation of the law.

It is defined as any unwelcome sexual conduct that “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.”

The hypotheticals did not deal with the most classic form of harassment, the “quid pro quo” situation where a job or promotional offer is conditioned on the granting of some sort of sexual favor. Note that personnel decisions based on the granting or withholding of sexual favors violates Title VII.

The EEOC prohibits related practices such as sex discrimination where employment opportunities or benefits are granted because of an individual’s submission to the employer’s sexual advances or requests for sexual favors. In these cases, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

The EEOC will look at all the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred, in order to decide on a case-by-case basis whether or not sexual harassment occurred.

Employers are liable for supervisors’ acts of harassment when they knew or should have known of it. If a pervasive sexually harassing work environment exists, then employers should have known. Employers are liable for sexual harassment directed against an employee by a nonsupervisory co-employee, where the employer knew or should have known of the conduct unless it can be shown that it took immediate and appropriate corrective action. Sergeant Gruff’s reputation probably had reached the “should have known” stage. Similarly, the posters should have been noticed and addressed by management.

Liability for inmate harassment is possible. Employers may be responsible for harassment acts of non-employees where the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action. EEOC will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the non-employees. Thus under the right set of facts, employers may be liable for inmate actions of sex harassment, since they have some ability to control the inmates' conduct.

The very nature of sexual harassment--the fact that it is normally done secretly, against the employer's wishes and that it can grow out of or be alleged to grow out of consenting relationships makes it difficult to prove.

Employers have a duty to investigate sexual harassment complaints and to take appropriate action to remedy the problem. Failure to do so has resulted in employer liability. Conversely, employers who have demonstrated swift, continuous and thorough responses to sexual harassment complaints have successfully defeated claims of liability.

Various sorts of relatively innocuous behavior which may not be serious enough to create a hostile work environment may nevertheless reflect inappropriate, stereotypical views of women. While they may not provide the basis for litigation, they nevertheless detract from a positive workplace and harm morale. Ask the group to identify some of these sorts of actions, practices, etc. List the responses on a flip chart.

- Using phrases such as "honey," "dear," etc.
- Locker-room discussions of sexual prowess, lewd jokes, language.
- Intervening in situations because "she's a woman and needed help."
- Making assumptions about an employee which begin "because she is a woman she...really doesn't want a career in corrections...will be absent more than men...won't accept criticism...won't like to work certain jobs or shifts...doesn't mind being asked to get the coffee and takes notes of the meeting...etc.