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**Federal Court Allows Transgender Prisoner's 8th Amendment Suit
Against Prison Management for Failure to Implement Prison Rape
Elimination Act Rules Intended to Protect Transgender Inmates**

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LAW NOTES

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SCOTUS Given a Ringside Seat to the Rights of Transgender Girls to Participate in Sports

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Based on the foregoing, the court found the balance of equities tipped clearly in favor of plaintiffs and granted their motion for a preliminary injunction.

Judge Carter was appointed by President Obama. Plaintiffs were represented by Barry Nelson Covert, Esq. and Daniel Ortner, James Michael Diaz, and Darpana Mukund Sheth of the Foundation for Individual Rights and Expression. ■

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Federal Court Allows Transgender Prisoner's 8th Amendment Suit Against Prison Management for Failure to Implement Prison Rape Elimination Act Rules Intended to Protect Transgender Inmates

By Arthur S. Leonard

U.S. District Judge Haywood S. Gilliam, Jr. (N.D. California), rejected the defendants' motion to dismiss an 8th Amendment claim by a transgender inmate who alleges that the failure of San Quentin Warden Ron Davis and California Corrections Secretary Ralph Diaz to implement rules for protection of transgender inmates adopted as part of the Prison Rape Elimination Act (PREA), a federal statute, was a cause of the "numerous acts of assault, discrimination, harassment, and threats of retaliation related to her gender expression and identity by other people in custody and by CDCR employees" resulting in cruel and unusual punishment. *Smith v. Diaz*, 2023 WL 2190147, 2023 U.S. Dist. LEXIS 31042 (N.D. Cal., Feb. 22, 2023).

One of the great frustrations in reviewing the dozens of prisoner litigation cases that come to our attention each month is the number of *pro se* cases, in particular, that founder on the general agreement among federal courts that Congress did not create an individual right to sue under PREA, and that violations of PREA by prison officials don't necessarily violate the constitutional rights of injured inmates under the 8th Amendment. Furthermore, courts are generally united in rejecting vicarious liability for management staff at the prison or state corrections department level for the failures of line staff to protect inmates. This case, in which plaintiff C. Jay Smith, a transgender woman, is represented by counsel, Felicia Maria Medina of Medina Orthwein LLP, Oakland, CA, and Shauna R. Madison of Cotchett Pitre McCarthy LLP, Burlingame, CA, bids fair to change that by showing that the failure of top-level management to

implement PREA rules itself constitutes deliberate indifference to known risks to the health and safety of transgender inmates. Imposition of personal liability on wardens and corrections department officials could prove a game-changer in the frequently futile effort to provide safety for transgender women who are incarcerated in male-only correctional settings where it is highly foreseeable that they will be subject to sexual assault if not afforded appropriate protection.

Plaintiff C. Jay Smith, whose allegations in summary are quoted above, asserts that Diaz and Davis "knew of and perpetuated a culture of permitting sexual harassment and assault to continue by failing to implement PREA rules intended to protect transgender people in custody," and that, "in their respective roles, [they] were aware of or should have been aware that their failure to implement trans-specific PREA rules, in particular for transgender women in men's prisons, puts those women in danger." Smith alleged that a recent "PREA audit" at San Quentin "shows that it failed to implement PREA rules designed to protect transgender women, including Plaintiff."

The lawsuit also includes various 8th and 14th Amendment claims against individual prison employees with direct prisoner contact duties, but those claims are not the subject of this ruling on the motions to dismiss by Diaz and Davis.

Warden Davis serves as chair of San Quentin's Institutional Advisory Committee, and was present at meetings where Smith and other transgender inmates raised concerns about showering privacy. He also serves as chair of the Institutional PREA Review Committee, in which capacity his Committee is responsible for investigating incidents, to

examining the area in the facility where incidents occurred, preparing a report and recommendation concerning each investigated incident, and developing a plan to correct problems. This Review Committee is established pursuant to a PREA rule, and requires the chair, as final decisionmaker, to sign off on the reports and recommendations. Unless he was completely blowing off these responsibilities, Davis could not credibly claim that he was ignorant about concerns articulated by transgender inmates and the incidents in which they suffered sexual assault.

Furthermore, annual data collection and reports about San Quentin's PREA compliance were supposed to flow upwards to Diaz as Secretary of the Corrections Department, and Diaz had authority and responsibility to assure that PREA was implemented at California state correctional facilities. Alleges Smith, Annual PREA Reports made clear that privacy or modesty screens were needed to mitigate cross-gender viewing issues. She alleges that "Diaz and Davis' failures and inaction with regard to known constitutional violations were the moving force behind the deprivation of her constitutional rights," and that they "exhibited deliberate indifference by failing to comply with and implement the PREA rules." "Deliberate indifference" is the key under 8th Amendment caselaw for placing liability on prison staff when such indifference was a "moving force" behind actual injury to inmates.

These rules stem from the Supreme Court's decision in *Farmer v. Brennan*, 511 U.S. 825 (1994). As summarized by Judge Gilliam, "A prison official exhibits deliberate indifference when the official knows of and disregards a substantial risk of serious harm to inmate health and safety." In light of the findings of Congress, the explicit provisions of PREA, and the specific PREA rules that spell out how transgender inmates should be protected, it would be difficult to argue that either Davis or Diaz should enjoy qualified immunity if it can be shown that their failure to implement the PREA rules in the institutions under their management and control created a

known and foreseeable risk of harm to transgender inmates.

The Supreme Court also holds that in Section 1983 actions for violation of 8th Amendment rights, defendants must be personally involved in the constitutional deprivation, and that there is a causal connection between the supervisor's wrongful conduct and the constitutional violation. The defendants in this case argue that they did not have personal involvement, contrary to Smith's factual allegations.

Although there was some doubt under the original complaint whether Smith's allegations were sufficient to assert claims for personal responsibility on Davis and Diaz, the court held that these concerns had been met in the First Amended Complaint that is the subject of this February 22 decision. The opinion goes into detail about the basis for claiming that Davis and Diaz were aware of the risk of harms alleged in the complaint. "Plaintiffs allege that Davis failed to implement policies that would curb such violence despite San Quentin having failed PREA audits and being required to take corrective action," wrote the judge, adding that Davis "had knowledge of the risk to transgender inmates based on his review of Institutional PREA Review Committee data. And the court finds especially pertinent the FAC's allegation that Davis attended at least two meetings at which transgender inmates, including Plaintiff, expressed safety concerns based on San Quentin's implement of shower privacy policies."

Although defendants disputed some of Smith's factual allegations, the court pointed out that this would be relevant at the summary judgment stage, but not on a motion to dismiss, when the court is supposed to rule based on the plaintiff's plausible factual allegations. Judge Gilliam concluded, "At the pleading stage, all of these allegations are enough to establish an objectively serious harm: creation of an environment that both violates the privacy rights of transgender inmates and subjects them to increased risk of sexual assault, harassment or stalking. And they also plausibly allege that Warden Davis was sufficiently aware of this risk but failed to take

appropriate corrective actions required by the law, thereby disregarding the risk of harm to Plaintiff."

As to Diaz, the court found that this was a "close call," but that "accepting the allegations against Secretary Diaz as true, Plaintiff has plausibly alleged an Eighth Amendment violation at this stage." The court concluded that "the viability of the claim against him comes down to whether the PREA shower privacy policies as alleged were so deficient as to themselves violate the Eighth Amendment. The court finds that while the facts pled in support of this theory are not overwhelming, Plaintiff has alleged enough to proceed at this stage."

The essence of Smith's claim boils down to demonstrated differences between the PREA rules and the rules followed at San Quentin. Defendants argued that Smith's allegation that had the PREA rules been followed she would not have been subjected to the harassment, attacks, and stalking she suffered was "speculative." But Judge Gilliam placed weight on a California Inspector General's Office report, quoted in the First Amended Complaint, that "devotes an entire section to the dangers faced by transgender, nonbinary and intersex people in CDCR custody in the showers of CDCR transgender hub facilities because people in custody repeatedly raised this issue in the comments of their surveys." As a result, he found, there were sufficient allegations to support the claim that plaintiff would not have been subjected to the treatment described in the complaint had the PREA rules been followed. The very harms identified in the PREA rules themselves were alleged in this case.

Thus, the motion to dismiss was denied and the court set a case management conference to take place March 7 to determine how to proceed. One suspects there will be substantial and detailed discovery demanded by Smith's attorneys, and that Judge Gilliam will be averse to attempts by defendants to keep discovery tightly constrained.

The judge was appointed by President Barack Obama. ■