

Spring 2020

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### Recommended Citation

Olivia Alden, *Beyond Dothard: How State Correctional Facilities Are Failing to Protect Their Female Employees*, 25 Pub. Interest L. Rptr. 86 ().

Available at: <https://lawecommons.luc.edu/pilr/vol25/iss2/3>

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## **Beyond *Dothard*: How State Correctional Facilities Are Failing to Protect Their Female Employees\***

Olivia Alden

In 1977, the Supreme Court found in *Dothard v. Rawlinson* that the State can discriminate based on gender in the hiring of correctional officers in “contact” positions.<sup>1</sup> Contact positions are those which involve close physical proximity to inmates.<sup>2</sup> In *Dothard*, the Court found that the State of Alabama’s discrimination in the hiring of correctional officers was justified as a bona fide occupational qualification (BFOQ).<sup>3</sup> The BFOQ is a defense that employers can use in discrimination actions brought under Title VII of the Civil Rights Act of 1964 (Title VII).<sup>4</sup> The language of the statute provides that discrimination on the basis of sex, religion, or national origin can be a “bona fide occupational qualification reasonably necessary to the normal operation of a particular business or enterprise.”<sup>5</sup> The BFOQ defense is controversial and seldom used, but in *Phillips v. Martin Marietta Corp.*, the first gender discrimination case to reach the Court under Title VII, the Court suggested the respondent use the BFOQ defense on remand.<sup>6</sup> The Court did make it clear, however, that there is a very narrow range of jobs where the BFOQ defense will prevail.<sup>7</sup>

In *Dothard*, the discriminatory qualifications at issue were a minimum and maximum height and weight requirement.<sup>8</sup> Based on statistical analysis presented by respondent, the height requirements disqualified 33.29% of women in the United States between the ages of 18 and 79.<sup>9</sup> The Court held that while this was a clearly discriminatory qualification that had a disparate impact, the BFOQ defense applied.<sup>10</sup> The Court found that the State of Alabama had a legitimate interest in hiring almost exclusively, male correctional officers because a woman has less ability to maintain order in a male prison

\* Please be advised that this article discusses extreme acts of sexual violence and sexual assault.

<sup>1</sup> *Dothard v. Rawlinson*, 433 U.S. 321, 365-66 (1977).

<sup>2</sup> *Id.* at 321

<sup>3</sup> *Id.* at 365-66.

<sup>4</sup> Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17 (1964).

<sup>5</sup> Civil Rights Act, 42 U.S.C. § 2000e-2 (1964).

<sup>6</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971).

<sup>7</sup> *Id.*

<sup>8</sup> *Dothard*, 433 U.S. at 323-24.

<sup>9</sup> *Id.* at 329.

<sup>10</sup> *Id.* at 365-66.

relative to men.<sup>11</sup> *Dothard* does not provide an outright ban on hiring women as correctional officers, as is evident by the number of female correctional officers across the United States.<sup>12</sup> Women can and do work in prisons, and the Court correctly recognized that there are dangers specific to women working directly with incarcerated populations.<sup>13</sup> However, rather than banning women from what are often, high-paying, lucrative positions,<sup>14</sup> the State should supply support to female correctional officers and take their concerns seriously rather than claiming danger and harassment are expected parts of the job.<sup>15</sup> In the twenty-first century, female correctional officers and other civilian women that work in prisons are receiving the financial benefits of employment in these positions, but face extreme sexual harassment at the hands of the inmates.<sup>16</sup>

This article focuses on the abhorrent sexual harassment female correctional officers face at the hands of the prison and jail detainees, and why States have a duty to protect these women under Title VII. After *Dothard*, States treated women as if they were doing them a favor by hiring them.<sup>17</sup> Women are expected to tolerate sexual harassment as an implicit responsibility of the job.<sup>18</sup> This article argues that sexual harassment is not to be expected in any position, specifically within correctional positions, and that by failing to take any action to address the sexual harassment within prisons, States are exposing themselves to liability under Title VII.<sup>19</sup> We can have our opinions about the problems of the prison industrial complex and mass incarceration, but in the meantime, there are thousands of women employed in these institutions.<sup>20</sup> These women

<sup>11</sup> *Id.* at 336.

<sup>12</sup> See FEDERAL BUREAU OF PRISONS: STAFF STATISTICS (2020), [https://www.bop.gov/about/statistics/statistics\\_staff\\_gender.jsp](https://www.bop.gov/about/statistics/statistics_staff_gender.jsp) (showing that 27.9% of correctional officers in federal prisons are female).

<sup>13</sup> *Dothard*, 433 U.S. at 336.

<sup>14</sup> Interview with Marni Willenson, Owner, Willenson Law (Feb. 21, 2020). See also Dani Arbuckle, *The Advantages of a Career as a Corrections Officer*, CHRON, <https://work.chron.com/advantages-career-corrections-officer-15094.html> (last visited Feb. 19, 2020).

<sup>15</sup> Megan Crepeau, *Female jail guards join public defenders in suing over sexual harassment by detainees*, CHICAGO TRIBUNE (Nov. 10, 2017), <https://www.chicagotribune.com/news/breaking/ct-met-sex-harassment-correctional-officers-lawsuit-20171110-story.html>.

<sup>16</sup> Michael Alison Chandler, *Women working in male prisons face harassment from inmates and co-workers*, WASHINGTON POST (Jan. 27, 2018), [https://www.washingtonpost.com/local/social-issues/women-working-in-male-prisons-face-harassment-from-inmates-and-co-workers/2018/01/27/21552cee-01f1-11e8-9d31-d72cf78dbbee\\_story.html](https://www.washingtonpost.com/local/social-issues/women-working-in-male-prisons-face-harassment-from-inmates-and-co-workers/2018/01/27/21552cee-01f1-11e8-9d31-d72cf78dbbee_story.html).

<sup>17</sup> Crepeau, *supra* note 14.

<sup>18</sup> *Id.*

<sup>19</sup> See *Garrett v. Dep't of Corr.*, 589 F.Supp.2d 1289, 1298 (M. D. Fl. 2007); *Freitag v. Ayers*, 468 F.3d 528, 539 (9th Cir. 2006).

<sup>20</sup> FEDERAL BUREAU OF PRISONS, *supra* note 11.

deserve a workplace free from sexual harassment. The States have the power in their hands to combat this epidemic and keep their employees safe from sexual assault and harassment in their workplace.<sup>21</sup>

#### THE REALITY OF WORKING IN PRISONS WHILE FEMALE

A prison is a correctional institution, but it is also a workplace.<sup>22</sup> Aggressive sexual behavior from inmates often contributes to a hostile work environment.<sup>23</sup> This behavior includes female correctional officers being catcalled, receiving sexual threats, and inmates masturbating and exposing themselves to female employees.<sup>24</sup> In some prisons, the sexual violence is so widespread that female employees attempt to hide any trace of their femininity when going into work.<sup>25</sup> The sexual harassment is so severe in these environments that some experts report that it is a “miracle” that no sexual assaults have occurred yet.<sup>26</sup> Rapes will inevitably happen unless the States take corrective actions against inmates that commit sexually violent behavior.<sup>27</sup> The details of some of the assaults and exposure incidents female prison employees have experienced are extremely difficult to read, but it is important to discuss some specific incidents in order for readers to understand the reality of working in these sexually charged environments.

In 2017, the Bureau of Prisons (BOP) agreed to pay \$20 million to female employees at the Coleman prison complex, which was the largest settlement of any Title VII gender discrimination settlement of the past decade.<sup>28</sup> One class member in the suit reported that she often saw 25 to 30 inmates masturbating during a single shift.<sup>29</sup> In a Pennsylvania prison, one female correctional officer

<sup>21</sup> See *Freitag*, 468 F.3d at 539.

<sup>22</sup> Interview with Marni Willenson, *supra* note 13.

<sup>23</sup> Alysia Santo, *The Unique Sexual Harassment Problem Female Prison Workers Face*, THE MARSHALL PROJECT (Nov. 9, 2017), <https://www.themarshallproject.org/2017/11/09/the-unique-sexual-harassment-problem-female-prison-workers-face>.

<sup>24</sup> Chandler, *supra* note 15.

<sup>25</sup> Caitlin Dickerson, *Hazing, Humiliation, Terror: Working While Female in Federal Prison*, N.Y. TIMES (Nov. 17, 2017), <https://www.nytimes.com/2018/11/17/us/prison-sexual-harassment-women.html>.

<sup>26</sup> Interview with Marni Willenson, *supra* note 13.

<sup>27</sup> *Id.*

<sup>28</sup> Dickerson, *supra* note 24.

<sup>29</sup> *Id.*

that she has seen “more men masturbate than I can count”.<sup>30</sup> The same correctional officer stated that she had seen so many men masturbate that she began to ignore when inmates exposed themselves to her and look away from their exposed penises in order to avoid going through the hassle of filling out the accompanying paperwork.<sup>31</sup> While escorting a high-risk inmate to the medical unit, she turned around and saw that the inmate was fully covered in semen.<sup>32</sup>

A case manager in a Tucson prison (a civilian worker) found herself facing incarceration after being criminally charged with raping an inmate who raped her.<sup>33</sup> She was prosecuted under a federal law that states that inmates are legally unable to consent to sex while incarcerated.<sup>34</sup> The law was enacted to protect inmates from rape by guards or fellow inmates who could later claim that the sex had been consensual, but in this case it was used as a sword to prosecute a rape victim.<sup>35</sup> The inmate in this case testified that the sex had been consensual.<sup>36</sup> After two years of fighting her attacker in court, a jury acquitted the case manager of all charges.<sup>37</sup>

The previous example was the worst case scenario for female correctional employees, but constant exhibitionist masturbation and inmates exposure is the norm for women who work in jails across the country.<sup>38</sup> The masturbation is so severe that many women cannot go a single shift without seeing an exposed penis.<sup>39</sup> In Cook County, inmates receive foods in their cells through small doors known colloquially as “chuck holes”.<sup>40</sup> All civilian workers that deliver food know that inmates will put their erect penises through the hole and masturbate towards any female employee that may be headed down the hall.<sup>41</sup> Feces and urine are also often thrown through these holes, but supervisory staff have implemented strict discipline when these fluids are thrown through the holes, which has led to a decrease in these incidents.<sup>42</sup>

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<sup>30</sup> Talisa J. Carter, *My Sexual Harassers Were Behind Bars. I Was Their Guard*, THE MARSHALL PROJECT (Feb. 8, 2018), <https://www.themarshallproject.org/2018/02/08/my-sexual-harassers-were-behind-bars-i-was-their-guard>.

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

<sup>32</sup> *Id.*

<sup>33</sup> Dickerson, *supra* note 24.

<sup>34</sup> *Id.*

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

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

<sup>37</sup> *Id.*

<sup>38</sup> Interview with Marni Willenson, *supra* note 13.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

Additionally, male guards are complicit, or are often deliberate, in allowing this level of harassment to occur. In some prisons, the inmates colloquially call the practice of masturbating or exposure to female employees “gunning” or “clapping.”<sup>43</sup> A lawsuit filed in California alleges that male officers in the prison allowed inmates access to female officers and used “gunning” as a reward for good behavior.<sup>44</sup> Inmates that were given this “reward” were moved into cells where they had a better view of female staff and could masturbate to them or expose themselves.<sup>45</sup> The male officers provided the inmates with empty milk cartons for their semen.<sup>46</sup>

Male supervisors in correctional institutions have told female employees that complain about sexual harassment and misconduct that this abuse is part of the job.<sup>47</sup> Those up the chain of command tell female employees that they voluntarily signed up to work in these environments and they are free to leave if they do not want to tolerate the harassment.<sup>48</sup> But as these positions often provide great pay and benefits to their employees, States should work to ensure that these positions are safe for all those that choose to undertake them.<sup>49</sup>

#### WHY WOMEN CHOOSE TO WORK IN PRISONS

As previously stated, correctional officer positions are often high-paying. The simple reason that women are drawn to these jobs is because they are stable, government jobs, with low entry requirements.<sup>50</sup> Prisons are particularly attractive work places in rural communities because many prisons are located in rural areas where there are fewer employment opportunities.<sup>51</sup> One former correctional officer reported that she was hired at a federal prison in Miami where she earned a pension and was given a chance for early retirement.<sup>52</sup> These positions can also stand as a starting point for women to return to school, while still being able to support their families.<sup>53</sup>

<sup>43</sup> Dickerson, *supra* note 24.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Crepeau, *supra* note 14.

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

<sup>49</sup> Chandler, *supra* note 15.

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

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

<sup>52</sup> *Id.*

<sup>53</sup> Interview with Marni Willenson, *supra* note 13; *see also id.*

The constant harassment, however, can prevent some female employees from accessing these benefits. For example, one former correctional officer became fearful in her daily life because of the harassment she was exposed to at work.<sup>54</sup> It is not uncommon for female correctional officers and civilian jail employees to suffer from extreme emotional distress and symptoms of post-traumatic stress disorder.<sup>55</sup> Eventually, the employee in this case took an early retirement, even though it meant taking a reduced pension, because she was unable to cope with the sexual harassment she faced at work.<sup>56</sup>

Correctional officers in most States also benefit from being members of strong and influential unions.<sup>57</sup> In many southern States, the local departments of corrections do not have unions, and correctional officer positions are therefore lower paying.<sup>58</sup> Further, in States with no correctional officer unions, there are severe staff shortages.<sup>59</sup> Having the backing of the union can assist female jail employees in filing disciplinary reports against inmates that engage in sexual misconduct.<sup>60</sup> The correctional officer unions also play a role in ensuring that the correctional institution, and those that run it, follow proper disciplinary procedures for inmates that engage in exhibitionist masturbation or other forms of sexual violence.<sup>61</sup>

#### THE STATE'S RESPONSIBILITY TO PROTECT ITS EMPLOYEES FROM SEXUAL VIOLENCE

Generally, employers are liable for harassing conduct by non-employees when the employer ratifies or acquiesces in the harassment by not taking immediate care and/or corrective actions when it knew or should have known of the conduct.<sup>62</sup> Sexual violence against female employees occurs even in protective jurisdictions.<sup>63</sup> The problem is not with the individual incidents of the harassment, rather correctional institutions are failing to take corrective and

<sup>54</sup> Santo, *supra* note 22.

<sup>55</sup> Interview with Marni Willenson, *supra* note 13.

<sup>56</sup> Santo, *supra* note 22.

<sup>57</sup> Chandra Bozelko, *Corrections officers can be the engine of justice reform, if they are in a union*, THE GUARDIAN (Sept. 7, 2015), <https://www.theguardian.com/commentisfree/2015/sep/07/corrections-officers-engine-justice-reform-if-in-a-union>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Interview with Marni Willenson, *supra* note 13.

<sup>61</sup> *Id.*

<sup>62</sup> *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir. 1997).

<sup>63</sup> Interview with Marni Willenson, *supra* note 13.

reasonable actions.<sup>64</sup> In Cook County, a lawsuit is currently pending on behalf of female correctional officers against the Cook County Sheriff's Office (CCSO).<sup>65</sup> The suit alleges that the constant harassment is so inherently traumatizing it effectively creates a hostile work environment.<sup>66</sup>

The CCSO claims that there is nothing they can do to address the sexual harassment.<sup>67</sup> However, Marni Willenson, lead counsel on *Howard v. Cook County Sheriff's Office*, believes that the CCSO does not care about their employees and that they are more concerned with being perceived as a progressive Sheriff's Office through publicizing their efforts to improve conditions for inmates.<sup>68</sup> While it is certainly important to ensure that inmates maintain their constitutional rights during their incarceration, a jail still needs to be treated as a workplace.<sup>69</sup> Cook County has taken a position that there is nothing that can be done to prevent harassment because the inmates are uncontrollable.<sup>70</sup> However, prisons and jails are meant to be rehabilitative in nature. Therefore, in order to maintain order and discipline, there must be a response to the sex crimes perpetrated by inmates against female employees.<sup>71</sup>

Furthermore, there are concrete steps that have been implemented in other prisons that have greatly reduced incidents of sexual harassment. For example, Cook County uses special jumpsuits that restrict access to the groin area for known masturbators.<sup>72</sup> However, the CCSO has been extremely lax in enforcing the dress code, largely because of a lack of staff knowledge and training.<sup>73</sup> The CCSO has a stipulated zero-tolerance policy for masturbation,<sup>74</sup> but the zero-tolerance policy is not implemented in practice, as is clearly demonstrated by the frequency of incidents and lack of discipline for offending inmates.<sup>75</sup> In Cook County jails, there is no coordinated way for civilian staff to report masturbation and exposure incidents.<sup>76</sup> In fact, there are civilian staff members working in the jail that do not even have a whistle to use as an alarm system if

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<sup>64</sup> *Freitag*, 468 F.3d at 538.

<sup>65</sup> See *Howard v. Cook County Sheriff's Office*, 2019 WL 3776939.

<sup>66</sup> Crepeau, *supra* note 14.

<sup>67</sup> *Id.*

<sup>68</sup> Interview with Marni Willenson, *supra* note 13.

<sup>69</sup> *Id.*

<sup>70</sup> Crepeau, *supra* note 14.

<sup>71</sup> Interview with Marni Willenson, *supra* note 13.

<sup>72</sup> Crepeau, *supra* note 14.

<sup>73</sup> Interview with Marni Willenson, *supra* note 13.

<sup>74</sup> Crepeau, *supra* note 14.

<sup>75</sup> Interview with Marni Willenson, *supra* note 13.

<sup>76</sup> *Id.*



an inmate exposes themselves or attacks the employee.<sup>77</sup> Other jurisdictions also use a semi-opaque film on control tower cells to prevent inmates from viewing staff and thwart misconduct.<sup>78</sup>

The 7th Circuit has held that employers may be liable under Title VII for third-party conduct.<sup>79</sup> The court, in *Berry v. Delta Airlines, Inc.* analyzed third-party liability in the coworker on coworker context.<sup>80</sup> In this case, the court found that an employer may be held responsible for third-party sexual harassment only if the employer knew or should have known about the third-party's acts of harassment and failed to take appropriate remedial actions.<sup>81</sup> The 9th and 1st Circuits have also held that when a third-party is the one undertaking the harassment, the employer must implement corrective measures that are reasonably calculated to end the harassment.<sup>82</sup> If the employer knew or should have known about the harassment, the employer is under a duty to take reasonable measures to correct the behavior.<sup>83</sup>

In *Freitag v. Ayers*, the 9th Circuit found that the Department of Corrections had, in fact, ratified the harassment by failing to take any immediate or corrective actions to the harassment its female employees experienced.<sup>84</sup> A prison is not immune from a legal obligation to take measures to protect its female employees from sexual abuse.<sup>85</sup> The court in *Freitag* held that female jail employees have reason to expect that prison officials would seek, in good faith, to control extreme forms of inmate sexual misconduct.<sup>86</sup> The duty to protect employees from sexual harassment exists in all environments, even in a complex work environment such as a prison.<sup>87</sup> Prisons have a duty, as do all workplaces, to address a potentially dangerous situation created by nonemployees.<sup>88</sup> Therefore, as the 7th Circuit has already recognized third-party liability for sexual harassment, the CCSO has a duty to protect its employees from

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

<sup>78</sup> *Freitag*, 468 F.3d at 540.

<sup>79</sup> *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811-12 (7th Cir. 2001).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (quoting *McKenzie v. Illinois Dept. of Transp.*, F.3d 473, 480 (7th Cir. 1996)).

<sup>82</sup> *Freitag*, 468 F.3d at 540; *Roy v. Correct Care Solutions, LLC*, 914 F.3d 52, 68 (1st Cir. 2019).

<sup>83</sup> *Id.*

<sup>84</sup> *Freitag*, 468 F.3d at 538.

<sup>85</sup> *Id.* at 539.

<sup>86</sup> *Id.*

<sup>87</sup> *Roy*, 914 F.3d at 69.

<sup>88</sup> *Id.*

sexual harassment and other potentially dangerous conditions created by inmates.<sup>89</sup>

### CONCLUSION

Cook County has failed to address the sexual harassment and dangerous conditions created in its jails, and therefore has exposed itself to liability under Title VII.<sup>90</sup> Working conditions in prisons have clearly changed in the forty years since *Dothard* was decided. Today, 27.9% of correctional officers in federal prisons are female.<sup>91</sup> What has not changed is the notion that women are not meant to work in prisons and that their placement as employees is disposable. This is seen through the attitude that female employees should tolerate sexual harassment or leave.<sup>92</sup> Women are discouraged from reporting incidents of sexual misconduct either directly or through the lengthy paperwork process that will ultimately lead to no change and no discipline for the inmate.<sup>93</sup>

In order for conditions to change, Sheriff's Offices across the country need to begin treating inmate sexual harassment as a serious problem because jails are a workplace.<sup>94</sup> In Cook County specifically, there is such a lack of staff training that it prevents clear communication between supervisors and employees.<sup>95</sup> There is massive confusion among both female correctional officers and civilian staff about how to report, who to report to, what their rights are, and what discipline an inmate will face.<sup>96</sup> *Howard v. Cook County Sheriff's Office* will go forward to attempt to get monetary compensation for the female employees that have suffered massive trauma as a result of the sexual harassment and the CCSO's failure to act.<sup>97</sup> However, the main goal of the case is, and always has been, to improve the working conditions for these women.<sup>98</sup> Until the CCSO begins taking sexual harassment within its jails seriously, these women will continue to be at risk every time they go to work.

<sup>89</sup> See *Berry*, 260 F.3d at 803.

<sup>90</sup> Interview with Marni Willenson, *supra* note 13.

<sup>91</sup> FEDERAL BUREAU OF PRISONS, *supra* note 11.

<sup>92</sup> Crepeau, *supra* note 14.

<sup>93</sup> Carter, *supra* note 29.

<sup>94</sup> Interview with Marni Willenson, *supra* note 13.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See *Howard v. Cook County Sheriff's Office*, 2019 WL 3776939.

<sup>98</sup> Interview with Marni Willenson, *supra* note 13.