1985 WL 3530
Only the Westlaw citation is currently available.
United States District Court; D. Nebraska.

TERRY BRAASCH, Plaintiff,
v.
FRANK GUNTER, et al., Defendants.
WILFRED W. NIELSEN, Plaintiff,
v.
FRANK GUNTER, et al., Defendants.

Nos. CV83–L–459, CV83–L–682. | July 15, 1985.

Opinion

MEMORANDUM OF DECISION

??, Magistrate.

***1** These consolidated cases pit the rights of privacy of male inmates at the Nebraska State Penitentiary against the rights of female correctional employees to equal employment opportunity. The two cases, raising substantially the same issues, were consolidated for trial, and were tried before the undersigned pursuant to the provisions of 28 U.S.C. § 636(c)(4). Trial was held April 15 and 16, 1985, and the trial included a visit to the Nebraska State Penitentiary to examine facilities there relevant to the issues raised. The parties were given opportunities for post-trial briefing, and the matter is now ready for decision.

In CV83–L–459 there was, prior to the assignment of the case to the undersigned, a hearing on the plaintiff's application for a temporary restraining order requiring defendants to alter their policies and practices at the penitentiary so as to alleviate the possibility of female guards viewing male inmates in the nude in or various states of undress. That application was denied by Judge Urbom without a written opinion. It was reported to the undersigned, however, by counsel and the parties that one of the judge's reasons for denying temporary relief was the lack of representation of the female guards themselves, either as having been made defendants, or as having been represented at the hearing. This situation was later altered when the court agreed with counsel and the parties that the female guards at the penitentiary should be made parties to the actions and certified a class of defendants under the provisions of Rule 23(b)(2), Fed.R.Civ.P., consisting of 'all present and future female employees who are, have been, or may be subject to being assigned to the housing units at the Nebraska State Penitentiary.' The court directed that copies of the amended complaints be served upon each member of the class of defendants, which was done by counsel for the then defendants; that counsel then entered her appearance for all defendants including the class of female employees.

At the final pretrial conference, held in both cases on January 29, 1985, the plaintiff Wilfred Nielsen appeared pro se in CV–83–L–682; the plaintiff Braasch appeared represented by counsel, as did the defendants. The parties agreed to the following statement of uncontroverted facts in both cases:

1. Frank Gunter is Director of the Nebraska Department of Corrections and, as such, has general overall responsibility for the operation of all Nebraska Correctional facilities. He replaced Charles Benson in that position in February 1984.

2. Charles Black is Warden of the Nebraska State Penitentiary and, as such, has general overall responsibility for the operation of that facility.

3. All other defendants are past, present, or future female employees who are, have been, or may be subject to being assigned to the housing units at the Nebraska State Penitentiary.

4. All defendants are sued only in their official capacities as officers or employees of the Nebraska Department of Correctional Services.

***2** 5. Both plaintiffs are inmates at the Nebraska State Penitentiary. At the time the suits were filed and at the time female guards were first assigned to the living units, both resided in one of the main living units at the facility but plaintiff Braasch was subsequently moved at least three times, only once at his request, and is currently at the Diagnostic and Evaluation Center.

6. Housing units at the Nebraska State Penitentiary comprise four main housing units, a trustee dormitory, and a building called the Adjustment Center.

7. The word 'employees' in paragraph 3 includes all employees who may be assigned to housing units, including but not necessarily limited to, correctional officers ('guards') and counselors.

8. All inmates at the Nebraska State Penitentiary are male.

9. Each of the four main living units at the Nebraska State Penitentiary has two control rooms, each of which controls two two-story wings of the unit. Each control room contains two 11″' x 17″' windows each situated in a

common wall between the control room and a shower area, and a larger front window that gives a clear view of the day room and hallways on two levels.

10. Each inmate room contains a toilet and sink which are situated just inside the door and to one side of the door and are not enclosed in any way. The door of each room contains a 5″‘ x 8″‘ window, the bottom edge of which is approximately 5′ above the floor.

11. At three fixed times during the day, employees check all inmate rooms. Employees performing these checks look into each room. Inmates are required to be in their rooms during these checks, each of which last approximately one-half hour. Hallways are subject to being patrolled at all times of the day or night and security checks of rooms are made without prior notice. When a security check of a room is performed, any inmate in the room is required to submit to a ‘pat search’ of his body.

12. Each shower room contains three shower heads in an open room. There are no partitions, curtains, or other dividers between showers. A shower curtain separates the shower area from a vestibule and there is a door between the vestibule and the hallway leading to the inamtes’ rooms. Shower water is maintained at a temperature of approximately 110° F. by facility personnel.

13. On or about July 17, 1983, the administrative officials at the Nebraska State Penitentiary began assigning female correctional officers to the control rooms of the four main housing units at the Nebraska State Penitentiary. These female employees work regular shifts consisting of 8-hour days 5 days per week. Their duties include surveillance of shower areas and performance of room checks and searches, and ‘pat searches’ of inmates.

14. Female guards working in the control rooms observe the shower facilities for security reasons.

15. By working regular shifts in the said four housing units, the female guards could view male inmates using the toilet facilities or in the nude in their rooms.

***3** 16. Other female employees including counselors, work on the housing units.

17a. As a general rule a correctional officer at the Nebraska State Penitentiary changes duty assignment every six months.

17b. Sharon Vinci is the non-voting chair of a four-member promotion board that makes recommendations to the warden on promotions to the rank of corporal or sergeant.

18. Operational Memorandum No. 112.26.101 (August 20, 1984) contains current policies and procedures for operation of the promotion board.

19. Inmates at the Nebraska State Penitentiary are subject to transfer among living units.

20. Inmates committed to the care and custody of the Nebraska Department of Correctional Services are always subject to being moved to different institutions throughout the State of Nebraska and, in fact, since the inception of this lawsuit, Plaintiff Braasch has been housed in a regular living unit, in the trustee dormitory, at the Lincoln Work Release Center, and at the Diagnostic and Evaluation Center.

21. An inmate is subject to a ‘pat search’ whenever a security check is performed of a room he is occupying and anytime he moves from one area of the prison to another. A ‘pat search’ is a thorough manual search of the inmate’s clothed body.

22. Except for the provision that female employees perform strip searches only in case of emergency, male and female correctional officers are required to perform identical tasks.

23. Sex offenders and men convicted of other violent crimes comprise a portion of the inmate population at the Nebraska State Penitentiary and are not segregated from the rest of the inmate population.

Subsequently, pursuant to an order of the court, a supplement to the pretrial order in CV83–L–682 was agreed to by plaintiff and counsel for the defendants and included the following additional uncontroverted facts:

1. Female guards employed at the Nebraska State Penitentiary perform the same tasks as do the male guards working there, except the female guards do not conduct full body searches of the male inmates known as strip-searches.

2. Female guards works throughout all parts of the Nebraska State Penitentiary, including, but not limited to, the main administration building and the school areas.

3. Female guards can go throughout all areas of the four housing units at the Nebraska State Penitentiary during their work periods in those units, conducting room checks, room searches, pat-down searches of the inmates, and head counts.

4. A pat-down search of a male inmate is required at the Nebraska State Penitentiary before the inmate is permitted to enter the prison’s law library and the school area at that facility.

The issues raised by the parties in the original joint

pretrial order, and the supplement in CV83–L–682, are as follows:

1. Whether the claim of plaintiff Terry Braasch is moot because he now lives in a different housing unit.

2. Whether the plaintiffs retain a right to bodily privacy and, if so, what is the extent of that right.

***4** 3. Whether the refusal to appoint female correctional officers to perform duties in the housing units of the Nebraska State Penitentiary would constitute a violation of Title VII or otherwise deny equal employment opportunity to the female officers.

3a. Whether the alleged constitutionally protected right of female employees of the Department of Correctional Services to equal employment opportunity outweighs the plaintiffs' alleged constitutionally protected limited right to privacy.

4. Whether service on a housing unit in the Nebraska State Penitentiary is necessary for a promotion to the rank of corporal or sergeant.

5. Whether the plaintiffs are entitled to an award of damages and/or any other relief and, if so, what relief is appropriate.

6. Whether the Eleventh Amendment to the U.S. Constitution prohibits the award of any damages and/or any other relief to the plaintiffs against the defendants in their official capacity.

7. Whether the Eleventh Amendment to the U.S. Constitution prohibits this suit against the defendants in their official capacity.

8. Whether sex is a bona fide occupational qualification for guards assigned to the housing units at Nebraska State Penitentiary.

The additional issues added by the supplement in CV83–L–682 are as follows:

1. Whether the conducting of pat searches by female correctional officers at the Nebraska State Penitentiary violates the plaintiff's alleged constitutionally protected right to privacy?

2. If pat searches conducted by female correctional officers violate the plaintiff's constitutionally protected right to privacy, what, if any, limitations would have to be placed on female correctional officers conducting pat searches to make the pat searches constitutional?

3. Whether the refusal to allow female correctional officers to perform pat searches would constitute a violation of Title VII or otherwise deny equal employment opportunity to the female officers?

4. Whether the plaintiff must carry the burden of proof in showing that male guards working on the four housing units at the Nebraska State Penitentiary is a bona fide occupational qualification reasonably necessary to the normal operation of that prison?

5. Whether the defendants need present any evidence regarding a bona finde occupational qualification?

At the commencement of trial paragraph 2 of the uncontroverted facts was amended to substitute Gary Grammer for defendant Black, as warden at the Nebraska State Penitentiary. In addition, paragraph 5 thereof was amended to provide that plaintiff Braasch has been moved at least five times, and now resides at the Air Park work release facility operated by the Department of Correctional Services.

I

First, regarding the issue of mootness with respect to plaintiff Braasch, it should be noted that the fourth amended complaint seeks as relief both injunctive relief and damages. Although, as more fully discussed below, I find his prayer for damages to be barred by the Eleventh Amendment, it is clear from the uncontroverted facts that he has been and continues to be subject to being moved from institution to institution, and from housing unit to housing unit within the Nebraska State Penitentiary, as well as the other institutions operated by the Department of Correctional Services. In these circumstances I conclude that his claims for injunctive relief against the defendants are not moot. See Sosna v. Iowa, 419 U.S. 393 (1975).

II

***5** All defendants have raised the Eleventh Amendment as a bar to the plaintiffs' claims for both damages and injunctive relief, relying upon Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984). The defendants' argument is not well taken, as in Pennhurst, the Supreme Court held only that the Eleventh Amendment constituted a bar to the granting of injunctive relief against a state on a pendent state law claim. The Court specifically withheld judgment on the district court's decision that the conditions at the Pennhurst School violated the Eighth and Fourteenth Amendments, and directed the Court of Appeals, on remand, to consider

'to what extent, if any, the judgment may be sustained on these bases.' Id. at ——, 52 U.S.L.W. at 4165. In its decision, the Supreme Court did not overrule explicitly or implicitly the doctrines of Ex Parte Young, 209 U.S. 123 (1908) to the effect that the Eleventh Amendment did not bar prospective injunctive relief against state officials on the basis of federal claims, nor Edelman v. Jordan, 415 U.S. 651 (1974), limiting the remedies available to the federal court against state officials to those that govern the officials' future conduct. The plaintiffs' claims in these actions are against state officials and employees and focus upon certain conduct permitted by a policy promulgated by one of the original defendants. The State of Nebraska is not named a defendant, nor was its agency, the Department of Correctional Services. Nor are the allegations and claims raised by the plaintiffs such as could be characterized as against the state itself; rather, they are against conduct authorized by individuals under authority granted by the sate. See, Alabama v. Pugh, 438 U.S. 781 (1978). I find the defendants' Eleventh Amendment argument to be without merit as it pertains to the plaintiffs' requests for prospective injunctive relief.

III

In April 1983, Charles Benson, the former Director of the Department of Correctional Services, implemented a policy regarding the integration of women correctional personnel at the Nebraska State Penitentiary, an all-male prison population facility. This policy provides that:

1. Correctional officers may pat search offenders of the opposite sex.

2. Correctional officers may be assigned to posts where offenders of the opposite sex may be observed using shower or toilet facilities.

3. Correctional officers may work in housing units where offenders of the opposite sex reside.

4. Correctional officers may conduct room checks of offenders of the opposite sex.

5. Correctional officers employed by the Department at the time of the implementation of the policy who did not want to work in contact positions with offenders of the opposite sex would be retained but that such employees could not be promoted above the rank of corporal. (Defendants Exhibit 101.)

This policy also instructs that correctional officers should not be assigned positions where offenders of the opposite sex are routinely strip searched, nor should a correctional officer be permitted to strip search an offender of the opposite sex except in emergency circumstances. Additionally, the policy directs institution personnel to make use of 'short' shower curtains or 'other minor adjustments in shower and toilet areas to help ensure that offenders can secure minimal privacy without jeopardizing the security of the facility.' This policy was apparently adopted in an effort to promote equal employment opportunities among women employees at the various penal institutions of the Department, as testified to by Sergeant Marilyn Ringer, one of the persons who was involved in submitting a report to then director Benson on such matters. As noted above, after the adoption of the policy female guards were assigned to the housing units at the Nebraska State Penitentiary, including units where both plaintiffs reside or have resided. The implementation of the policy has created the present clash with the plaintiffs' claimed privacy rights in three respects: first, allowing female correctional personnel to view nude male inmates in the showers at the institution; second, to allow female correctional personnel to view male inmates in the nude or in various stages of undress in their respective cells or rooms while sleeping, using the toilet, or at any other times; and third, by permitting female correctional personnel to perform pat down searches of male inmates at any time such searches are necessary, wherever that may be within the institution.

A

Additional Findings

***6** There are four regular living units at the Nebraska State Penitentiary, each divided into two wings. Each wing has two levels of cells, which are more aptly described as rooms along a hall emanating from the center control area. Each wing has its own control room, from which the locks to the various doors or cells and other areas are operated, medications are dispensed, and the hallways of both the upper and lower levels of rooms are clearly visible. From the hallways security officers are able to peer into the inmates' rooms through the glass windows in the doors, which may not be covered at any time. During my visit to the institution it was demonstrated that while peering through the windows, the configuration of the room and the toilet is such that if an inmate is sitting on the toilet, his genital area would be visible to the guard from the hallway.[1] In addition, there was testimony during the trial by inmates that some of them sleep in the nude due to personal habit or the temperature in the housing unit (there are windows in the units, but they are not permitted to be opened at any time, and in fact have been sealed closed for security reasons; the temperature of each housing unit is controlled by

facility staff within the limitations of the building equipment). The beds of the inmates' rooms are clearly visible from the observation window to the hallway, and testimony before me revealed that when performing room checks, the guard is required to verify that an inmate is in fact in the room; if the room is checked during sleeping hours the guard must see the flesh of the inmate to assure his presence. (Observation of the genital area is not required; an arm, hand, foot, etc. will suffice.) There is no prohibition against inmates wearing pajamas or underwear as they sleep at night, nor is there any prohibition against an inmate placing a towel or other covering on his lap, during use of the toilet.

Each housing unit is staffed by three officers, a 'first officer' and two others who are either beneath the first officer in rank or occupy the same rank. The 'first officer' is the supervisor of the correctional staff in the housing unit. There are two security personnel in each control room at most times. The control room is, as noted, located at the end of the two hallways. The officers in the control room, therefore, have a clear line of view of the hallways and of anyone in them. Prior to the institution of the present policy regarding female personnel, inmates commonly walked to and from showers in the nude. That practice still continues with respect to some inmates; others attempt to cover themselves by wrapping a towel around them. The latter is not prohibited by institutional rules. Although it is possible that a battrobe might be permitted an inmate who had been once outside the institution at another correctional facility, bathrobes are not regularly issued to inmates.

Both plaintiffs testified they had been observed in the showers by female officers, who, when observing plaintiffs, did so for periods of 10–15 seconds, and who were readily identifiable by plaintiffs while doing so. The shower rooms are located directly adjacent to the control room. During my visit to the penitentiary I visited housing unit 3 and observed the control rooms for both wings of that housing unit. I visited the showers in both 'C' and 'D' galleries, both of which are located on the upper floors of their respective wings, and looked into the shower area of 'A' gallery from the control room window. From my observations of the facility it is clear that a security officer in the control room would have the ability to look at nude inmates in the shower areas in both the upper and lower galleries of the respective housing wings, by peering through the separate control room window which is approximately 11‴ x 17‴ in size, and thus to view the inmates' genital areas in an unobstructed fashion. The window's location (near the floor of the upper wing shower rooms, and near the ceiling of the lower wing shower rooms) would make some difference in the officer's viewing due to the accumulation of moisture and steam on the windows located near the ceiling of the shower area; this 'fogging' would not, however, be sufficient to block the guard's view of the inmates' nude bodies in the shower from a distance of approximately 4′ - 10′, depending upon the shower head being used.[2]

***7** Although there was considerable testimony regarding the security reasons for the requirement that inmates be visible in the showers, such as to prevent assaults, sexual activity, the passing of contraband, etc., the 'vestibule' area located between the shower area itself and the hallway and consisting of an area approximately 4′ x 9′ in size, is not visible from the control room in any way. The purpose of the 'vestibule' is to permit inmates to dry themselves before returning to their rooms to dress. There was no testimony to the effect that this area had been a site of any inmate assaults or other breaches of security.

In addition to the 'regular' viewing of inmates in their rooms and in the shower areas, there are unscheduled or random 'shakedowns' of the rooms, performed by the housing unit officers for the purpose of finding any contraband located in the inmates' rooms. During the search of a room, an inmate is not permitted to be present, but must be subjected to a pat down search prior to being permitted to leave the immediate area. If the officer conducting the search is female, she also conducts the pat down search of the inmates. As noted, inmates are also subjected to pat down searches at random times when they are in the penitentiary's yard area, as well as when they travel between certain areas of the institution, such as to and from the 'turn-key' area, law library[3], school area, and others. Again, these pat down searches may now be conducted by the women officers at the particular duty station requiring the pat down search. Such searches are common at the institution, and plaintiff Nielsen testified that he has been subjected to pat down searches as many as 'a dozen or more' times in one day, although I do not find that number to be typical. It is safe to say, however, that the testimony supports the conclusion that pat down searches are a necessary part of prison security, and are conducted both regularly and at random on most inmates several times per day.

A pat down search is conducted by requiring the inmate to turn his back on the security officer and extend his arms and legs. His arms, legs, and torso, are patted or touched by the officer so as to detect any contraband located on the body. This is done while the inmate is fully clothed. There was differing testimony on the matter of whether a pat search, when conducted by a female officer, must omit the genital area. Defendant Gunter testified that although correctional officers receive initial and periodic training, there is no specific training regarding the conduct of pat down searches by women officers. Marilyn Ringer, the only female correctional sergeant at the institution, testified that in regard to conducting pat down searches of male inmates, she did not recall ever being told exactly how to treat the genital area. She said that in conducting the pat down searches, she made no specific

effort to touch the area but that to avoid the genital area would compromise the search, as it was not uncommon to find contraband located in an inmate's genital area. Both plaintiffs testified that they had been subjected to pat down searches by female correctional officers, and Nielsen testified that in conducting the search, the female officers commonly touched his buttocks, penis, and testicles, through his clothing. There was no testimony that any policy exists at the institution, or ever existed, which would guide the female officers in conducting such searches, would prevent them from conducting such searches in the genital area, or would permit an inmate to request that at least that portion of the search be conducted by a male officer.

***8** There was no testimony during the trial of this matter that the policy of using female correctional officers had any goal other than equal employment opportunity. That is, the placement of female officers in the housing units or in other positions to perform pat down searches of inmates was not shown to be related to penological objectives. Rather, the objective of the policy in question was to promote equal employment opportunity among women staff at the penitentiary. There was testimony by Karen Shortridge, the warden at the Omaha Correctional Center, also a men's facility, as well as by inmates who had been at the Lincoln work release center, regarding the use and activities of female correctional officers in those institutions and the effects of their presence. However, this testimony does not support a conclusion that the purpose of the policy here in question was anything other than to prevent employment descrimination against women security officers at the penitentiary. This fact, together with the post responsibilities of the female officers at the penitentiary, as noted above, clearly set this case apart from most of those considered by other courts on the questions presented.

For example, in Madyun v. Franzen, 704 F.2d 954 (7th Cir. 1983), cert. denied 104 S.Ct. 493 (1983), cited by the defendants, the court found that pat down searches performed outside the male inmate's clothing did not violate his Fourth Amendment right against unreasonable searches, nor his First Amendment privacy rights, relying upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. It is noteworthy, however, that the policy there in question prohibited the female guards from manually searching the male inmates' 'genital-anal areas.' Likewise in Smith v. Fairman, 678 F.2d 52 (7th Cir. 1982), cert. denied 461 U.S. 907 (1983), the inmate challenged the conduct of pat down searches by female guards as violative of his Fourth and Eighth Amendment rights; again, however, the policy in question specifically directed that females were not to conduct such searches of males' genital areas. In addition, in Sam'I v. Mintzes, 554 F.Supp. 416 (E.D. Mich. 1983), a challenge to pat down searches by female guards by a plaintiff inmate who was of the Muslim religion and believed that it was forbidden for a man to be touched by a woman who was not of his family, the policy in question required that no searching of the genital area was to be done in a pat down search, that being reserved to 'strip' searches, which were to be performed by guards of the same sex as the inmate, except in emergencies.

In several cases the inmates' rights to privacy from viewing and touching by officers of the opposite sex has merely been assumed by the courts or conceded by the parties, without argument. See e.g. Fisher v. Washington Metro Area Transit Authority, 690 F.2d 1133 (4th Cir. 1982) ('indiscriminate viewing' by officers of the opposite sex); Cumbey v. Meachum, 684 F.2d 712 (10th Cir. 1982); Lee v. Downs, 641 F.2d 1117 (4th Cir. 1981); Forts v. Ward, 621 F.2d 1210 (2d Cir. 1980). In other cases, the regularity or predictability of the challenged actions sets the case apart from circumstances at the Nebraska State Penitentiary. See e.g. Robbins v. South, 595 F.Supp. 785 (D. Mont. 1984) (a female staff member's 'occasional' passing by cells in the process of dispensing medications did not deprive the plaintiff of privacy interests); Grummett v. Rushen, 587 F.Supp. 913 (N.D. Cal. 1984) (distant viewing by female guards did not violate male inmates' privacy rights); Avery v. Perrin, 473 F.Supp. 90 (D. N.H. 1979) (where the male inmate's right to privacy was not violated by a female mail clerk who was able to see him in various stages of undress or using the toilet when she delivered mail to prisoners in cells, when such delivery was only once per day within a specified two or three minute period).

***9** Other courts, faced with the challenge to equal employment opportunity raised in this action, have directed prison officials to accommodate both the privacy interests of the inmates and the equal employment opportunities of staff personnel, where possible. See e.g. Bowling v. Enomoto, 514 F.Supp. 201 (N.D. Cal. 1981); Hudson v. Goodlander, 494 F.Supp. 890 (D. N.D. 1980).

Of particular importance is the only case found in the area by the Eighth Circuit Court of Appeals, Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980), cert. denied 446 U.S. 966 (1980). There, the plaintiff, a female correctional employee at the men's reformatory, successfully challenged the employment practices of the institution which prevented her from rising above the level of Correctional Officer I because of her sex, which policy was the result of the defendants' position that security considerations required that sex be held a 'bona fide occupational qualification (bfoq).' The district court and the court of appeals both held that the defendants had not successfully proved that the conditions at the reformatory required the bfoq designation for Correctional Officer II's. In doing so, the court distinguished the Supreme Court case of Dothard v. Rawlinson, 433 U.S. 321 (1977), in which the horrendous conditions at the Alabama prison in question justified the

bfoq designation for guard positions of the same sex. In Gunther, however, the court did not address specifically the privacy interests of the inmates, although it acknowledged that 'if appellants' allegations were established, serious questions would be raised.' Id. at 1086.

Those 'serious questions' are raised by these cases, as it appears that the defendants' policies clearly are designed to promote equal employment opportunity among women correctional employees at the Nebraska State Penitentiary, and that in order to carry out the responsibilities that would enable such policies to exist, inmates' constitutional rights of privacy must be curtailed. The only case in which these two interests have clashed so dramatically, on factual circumstances similar to those before me, is the case of Bagley v. Watson, 579 F.Supp. 1099 (D. Or. 1983). There, the plaintiffs were female correctional officers challenging male-only designations to certain posts where because of a lack of overtime opportunities, their promotional opportunities would be limited. The parties stipulated that no accommodation could be made either to obstruct viewing or restrict the presence of women correctional officers, in conducting pat down searches including anal and genital areas, and visual observation of nude males in the shower and toilet areas of the institution, thereby forcing a head-to-head confrontation. The case was decided on a motion for summary judgment, and the trial judge adopted the conclusions of an affidavit which was submitted in behalf of the class of female plaintiffs. The court, without authority or discussion, simply declared that inmates have no privacy rights the consideration of which would even influence the goals of Title VII. I do not believe that this decision represents the current state of the law, and must, therefore, respectfully disagree with the trial judge's conclusions in that regard.

B

Privacy

***10** It is true, as argued by the defendants in their brief, that the Supreme Court has never per se held that a convicted felon has a right to privacy such as would prevent his or her unclothed body from observation by correctional officers of the opposite sex, or being pat searched by correctional officers of the opposite sex. Nor, of course, has the Court declared precisely that such right does not exist. There have been, however, several allusions to inmates' limited rights of privacy in other contexts. See, e.g. Hudson v. Palmer, 104 S.Ct. 3194 (1984) (inmates do not have a legitimate expectation of privacy in their cells, so as to prevent searches of them, or to be present during such searches); Bell v. Wolfish, 441 U.S. 520 (1979) (strip searches, including body cavity searches are not unreasonable or unconstitutional when performed by guards of the same sex); Houchins v. KQED, Inc., 438 U.S. 1, 5, n.2 (1978) (institutionalized persons retain certain fundamental rights of privacy and are not subject to indiscriminate viewing by the public).

Outside the condition of confinement, the Supreme Court has recognized citizens' rights to privacy concerning a number of activities and subjects, including marriage, Zablocki v. Redhail, 434 U.S. 374 (1978); procreation, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Skinner v. Oklahoma, 316 U.S. 535 (1942); contraception, Griswold v. Connecticut, 381 U.S. 479 (1965); abortion, Roe v. Wade, 410 U.S. 113 (1973), and family relationships, Moore v. City of East Cleveland, 431 U.S. 494 (1977). The sources of the right to privacy have been variously found in the first, Fourth, Ninth, or Fourteenth Amendments, or the 'penumbras' of the Bill of Rights. See, e.g. Griswold, supra; Carey v. Population Services, 431 U.S. 678 (1977). Although the Supreme Court has not specifically said that one has a protected privacy right to urinate, defecate, or bathe outside the viewing of a person of the opposite sex, or not to be touched in the genital area, even through clothing, by a member of the opposite sex, these things are so fundamental to personal dignity and self respect in this culture that I believe if presented with such issues, the Supreme Court would find one's own body and its personal functions protected by the recognized privacy rights of unincarcerated citizens. Other federal courts, in the context of employment rights, recognize the proposition that people enjoy a basic right to keep their bodies andpersonal functions and maintenance shielded from the uninvited view or touch of the opposite sex. See, e.g. Norwood v. Dale Maintenance System, Inc., 590 F.Supp. 1410 (N.D. Ill. 1984) (privacy of tenants and patrons in business building washrooms from female attendants); Brooks v. ACF Industries, Inc., 537 F.Supp. 1122 (S.D. W.Va. 1982) (privacy of male employees of plant in bath-toilet-locker-room facilities from female janitors); Ludke v. Klein, 461 F.Supp. 86 (S.D. N.Y. 1978) (privacy of baseball players in locker room from women reporters); Fesel v. Masonic Hospital, 447 F.Supp. 1346 (D. Del. 1978) (privacy of female residents of retirement home in intimate personal 'total care' by male nurse); Sutton v. National Distillers Products Co., 445 F.Supp. 1319 (S.D. Ohio 1978), aff'd 628 F.2d 936 (6th Cir. 1980) (privacy of male distillery employees regarding search by female guard); Hodgson v. Robert Hall Clothes, Inc., 326 F.Supp 1264 (D. Del. 1971), aff'd in relevant part, 473 F.2d 589 (3d Cir.), cert. denied 414 U.S. 866 (1973) (privacy of clothing store customers in service by same sex sales person).

***11** It is clear that prisoners, by virtue of their

confinement, do not lose all of the constitutional rights they hold as citizens of this country. Wolff v. McDonnell, 418 U.S. 539 (1974). The Supreme Court's most recent decision regarding prisoners' rights to privacy is noted by the plaintiff Braasch in his trial brief:

> [W]e have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.

Hudson v. Palmer, supra at ——. This is but an amplified restatement of the earlier standard set forth in Pell v. Procunier, 417 U.S. 817 (1974), whether challenged actions are 'inconsistent with [the prisoner's] status as a prisoner or with the legitimate penological objectives of the correctional system.' Id. at 822. (Emphasis added.) The inquiry here then becomes whether in the instances cited by the plaintiffs the conduct complained of runs afoul of this standard.

It is clear that the security needs of a maximum security penal institution are paramount and cause prisoners to lose or compromise what would otherwise be fundamental constitutional rights. Pell v. Procunier, supra. It has further been decided that prisoners' rights to privacy must be subservient to the prison's fundamental need to protect prison security. Hudson v. Palmer, supra; Bell v. Wolfish, supra.

The Supreme Court has not decided whether a prisoner's privacy rights may be compromised in order to privide equal employment opportunities to the prison employees of the opposite sex, although, as pointed out by the plaintiffs, it has had recent opportunities to do so. See Smith v. Fairman, 678 F.2d 52 (7th Cir. 1982), cert. denied 461 U.S. 907 (1983); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980), cert. denied 446 U.S. 966 (1980); Carey v. New York State Human Rights Appeal Board, 61 App. Div. 2nd 804, 402 N.Y.S. 2nd 207 (2nd Dpt. 1978), aff'd 390 N.E. 2nd 301, app. dis'd 444 U.S. 891; Bell v. Wolfish, supra (lower courts' holdings that privacy of inmates in rooms and toilet areas be observed were left undisturbed by the Supreme Court). Thus, there is no Supreme Court ruling on whether subjecting prisoners to pat searches by the opposite sex, viewing in showers, or viewing in toilet areas or sleeping is 'not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.' Hudson v. Palmer, supra.

C

Equal Employment Opportunity

The defendants in this case argue, and the testimony supports that the purpose of the policy in question is to promote equal employment opportunity to women employees at the Nebraska State Penitentiary. The testimony reveals that the defendant's policy requires, as a practical matter, that in order to be promoted to the position of 'corrections sergeant,' the third lowest of the ranks for security officers at the institution, the applicant must have worked in most of the 'post positions' at the institution, including the so-called 'contact positions.' According to the testimony of Sharon Vinci, the personnel clerk at the penitentiary, this would include assignment to and work in the control rooms of the housing units at the penitentiary, including the housing units in which the two plaintiffs here reside or resided. Although her testimony was somewhat equivocal with respect to the vagueness of the wording of the job description for corrections sergeant itself, her testimony does establish, and I find, that as a practical metter the description is applied so as to require work in the housing units as a prerequisite to promotion to corrections sergeant. Thus, in order to gain such a promotion, women security officers are required to work in the various posts of the institution which include positions in which they would routinely view men inmates in the showers, using the toilets, in various stages of undress in their cells, and also would have to perform pat searches at various locations of the institution where such searches are routinely performed whenever an inmate enters or leaves, such as the school area, the law library and other locations.

***12** The prevention of employment discrimination on the basis of sex is one of the policies of 42 U.S.C. § 2000e. It is without question a 'legitimate' objective of every employer. In order to overcome the constitutional right to privacy of inmates, however, it must, in the prison setting, be consistent with legitimate penological objectives. Pell, supra. Although the defendants argue that the security of the institution requires that inmates be observed while showering, using the toilet, otherwise in their rooms, and also that they be subjected to no-notice pat down searches in addition to regular pat down searches at specific locations, which argument I accept, it does not follow that the conducting of these activities by members of the opposite sex serves a legitimate penological interest.

The Supreme Court has proclaimed that '[I]nmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others.' Houchins v. KQED, Inc., supra, 438 U.S. at 5, n.2. The education of the public is not considered by the Court to be a legitimate penological objective of incarcerating institution, no matter how

beneficial unlimited access to the prison may be to others. Likewise, I do not believe that the penitentiary exists as an institution to encourage laudable societal movement toward equality of sex roles.

Commentators suggest that using the societal norms and community standards of decency regarding opposite sex contact to justify an exception to the equal opportunity mandate is just a facade for perpetuating the differentiation of sex roles which has disadvantaged females in employment. It is argued that the sooner these notions surrounding bodily privacy dissipate or are ignored, the sooner complete equal employment can be realized, analogizing to the racial bigotry which had to be overriden by the courts to begin to establish equality for racial minorities. See, Bratt, Privacy and the Sex BFOQ: An Immodest Proposal, 48 Albany L. Rev. 923 (1984); Comment, Sex Discrimination in Prison Employment: The Bona Fide Occupational Qualification and Prisoner's Privacy Rights, 65 Iowa L. Rev. 428 (1980).

While that argument may have merit as a social catalyst, I do not believe the privacy of individuals in their person, which is currently a weighty enough societal concern to support recognition of the bfoq defense in discrimination suits outside of the prison, should be disregarded as to prisoners in order to speed social change, especially when speeding social change is not a legitimate penological purpose. Just as inmates are not animals in the zoo for the public's indiscriminate gaze, neither are they a population whose standards of modesty may be forcibly lowered in order to achieve inroads on public attitudes toward women in sexually sensitive areas of employment.

D

BFOQ and Equal Protection

***13** While there may be some doubt as to whether the court should even consider the issue of bona fide occupational qualification status for guards at the Nebraska State Penitentiary in light of the lack of prior administrative procedures on the question pursuant to Title VII, see, Forts v. Ward, supra, at 1215–1216, the plaintiffs are the ones who are seeking to establish bfoq status for such positions, as against the policy of the institution which permits females to occupy those positions. Thus, as in Forts, the defendant class of female employees at the penitentiary is in no position, and has been in no position to institute administrative proceedings under Title VII to resolve this issue; nor, even if they had, would the EEOC have had jurisdiction to decide the constitutional issues raised by these cases. Therefore, I proceed to address it.

The plaintiffs' testimony with respect to the bfoq matter is insufficient to establish that security guards at the Nebraska State Penitentiary must be male when working in the so-called 'contact' positions. First, the testimony clearly established that many, if not a majority, of the inmates were not offended by the use of female correctional officers in such positions.[4] Second, there are, or appear to be, means available to the prison administration by which to accommodate both the privacy interests of the inmates and the equal employment interests of the female security personnel, such as would permit the coexistence of these interests, for the most part, without significant clashes. For these reasons, I do not find that the bfoq designation is appropriate so as to designate the contact positions at the penitentiary male only. See Gunther v. Iowa State Men's Reformatory, supra[5]

E

Conclusion

There has been no testimony put forth by the defendants that routinely subjecting inmates to the viewing of their nude bodies while showering, sleeping, or using toilet facilities, or that the conduct of pat down searches of their clothed bodies, by members of the opposite sex, when not required by prison security, serves any penological objective. Although the goal of equal employment opportunity is legitimate, incarcerated persons retain those constitutional rights not 'fundamentally inconsistent' with incarceration or penological objectives.

To the extent such viewing and searches by opposite sex officers are not required by prison security, I conclude that they are 'fundamentally inconsistent with imprisonment itself' Hudson, supra, and do not further any legitimate penological objectives. Pell, supra. Accordingly, the plaintiffs are entitled to relief.

II

Relief

My conclusion that the plaintiffs' rights of privacy override the defendants' policy of requiring inmates to be subjected to viewing in the nude or pat searches by female

correctional officers does not require that female officers be removed from the housing units. Rather, as is outlined in many of the cases involving these subjects, various institutions have taken various measures to reduce the conflict between privacy and equal employment opportunity, none of which has been taken at the Nebraska State Penitentiary. Such measures have included permitting windows to inmate's rooms to be covered for brief periods at designated times; removing opposite sex officers from shower areas altogether; prohibiting opposite sex officers from conducting pat searches of genital/anal areas; and requiring the announcement of presence of opposite sex officers of personnel. The evidence before me does not support the necessity for taking the extreme measures in this case of excluding female officers for the housing units altogether.

***14** With respect to inmate privacy in the rooms, the evidence is clear that there is no prohibition against the use of pajamas or other sleepwear by inmates to protect their privacy while sleeping and there is also no policy against an inmate covering himself while sitting on the toilet where he could be viewed by a correctional officer from the hallway. The inmate's back would be turned toward the window while he stood in front of the toilet to urinate. These measures are sufficient to allow the inmates to protect their own privacy, should they choose to do so, without any changes on the part of the defendants.

Similarly, the evidence before me indicates that if an inmate chooses to walk from his room to the shower of the housing unit in the nude, he may do so, and some still do even in the presence of female correctional officers, but that no policy of the defendants prohibits the inmates from covering themselves with a towel, or even wearing underwear or a swimming suit to and from the shower. Thus, again, no measures are necessary to be taken by the defendants to protect the plaintiffs' privacy interests.

The shower area involves a different matter altogether. Although it is true that the inmates are not prohibited from wearing bathing suits or underwear while showering, I find such a suggestion unreasonable; rather, the defendants must accommodate the inmates' privacy rights in this respect. Although I will not by this order require specific measures, I will require that sufficient measures be taken by the defendants to do so. It would seem from the evidence put forth during the trial, that such measures might include the following: erecting translucent screens or partiial screens in the shower area; adjusting the shifts of officers in the control rooms so as to allow at least one full, eight-hour shift to be regularly and predictably staffed by only male correctional officers so as to accommodate showering by any inmates who wish to protect their privacy during that shift; adjusting the shifts of correctional officers in the control rooms so that during a portion of more than one shift the occupants of the control room would be male only; and/or closing off the window between the shower and the control room for a period of time every day, during which a male officer would be physically stationed in the shower area. There may be others, as well, and I leave it to the prison administration to decide exactly which measures will be taken in this respect, so long as those inmates who wish to protect their privacy are afforded an opportunity to do so, without negatively affecting their work assignments, accessibility to improvement programs, health care, or otherwise affecting their administrative status at the penitentiary.

The matter of pat down searches is more problematical, in that it, unlike the accommodations for showering, could require the expenditure of funds for extra personnel. Nevertheless, if necessary, such administrative expenses must be accepted in the observation of constitutional rights. See Wolff v. McDonnell, supra. Goldberg v. Kelly, 397 U.S. 254 (1970). Within the housing units, it appears possible that the staff of a particular housing unit could be arranged and flexible enough that, in the event an inmate who is subject to a pat search requests that such search be performed only by a male officer, that such a male officer should be available. The 'first officer' of the housing unit staff was described in many ways as a 'rover' who might or might not assist in room shakedowns and other incidents requiring pat down searches. In addition, if the 'first officer' were female, it appears at least possible that one of the correctional officers assigned to the control room could be male, and available to perform such searches upon request, without compromising the security of the institution. At those posts where only one correctional officer is assigned, however, which require pat down searches either routinely or randomly, this ruling will require the availability of male officers to perform such searches, at least at to the genital areas of those male inmates who object to female officers searching such areas. This will require, it appears, either the assignment of guards to such positions in pairs, one male and one female, or the assignment of 'roving' guards to assist female officers in conducting pat down searches when required by the circumstance of an inmate objecting to the female correctional officer performing at least that portion of the pat down search involving the genital area.

***15** It should be made clear that these restrictions on the assignment of female correctional officers at the penitentiary do not apply in cases of emergencies which are of an immediate nature affecting the security of the institution. Although there was no evidence presented to me at the trial of this matter on the question of what might constitute an 'emergency,' common sense dictates that in situations where an unexpected upheaval arises or when the safety of inmates or prison personnel is threatened in such a manner as to require immediate action by officers in charge, such considerations override the inmates' interests in protecting their personal privacy, and during

such situations inmates are clearly subject to being searched, viewed, and even strip searched, without regard to the sex of the officer performing those acts. Bell v. Wolfish, supra.

As I find the plaintiffs to be 'prevailing parties' within the meaning of that term in 42 U.S.C. § 1988, counsel will be awarded attorneys fees, as applicable. Although the usual practice in this court is to withhold the entry of judgment pending the determination of attorneys fees under 42 U.S.C. § 1988, such practice is not necessarily required by the provisions of Local Rule 34, and in consideration of the nature of the relief requested and granted, I shall go forward with the entry of judgment at this time, and reserve for a collateral application the matter of attorneys fees. See White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982); Young v. Powell, 729 F.2d 563 (8th Cir. 1984); Obin v. District No. 9, Int'l Ass'n of Machinists and Aerospace Workers, 651 F.2d 574 (8th Cir. 1981). Judgment will be entered accordingly.

Footnotes

1 Plaintiff Nielsen and other inmates testified that they had been observed by women guards while sitting on the toilets in their rooms. Plaintiff Braasch testified that women officers at the Diagnostic and Evaluation Center, like at the penitentiary, are free to, and do roam over and talk to inmates while they are showering or on the toilet, however, it is not clear whether that was his experience at the penitentiary. In light of my disposition of this portion of plaintiffs' claims, I need not resolve this ambiguity.

2 The shower room in 'A' gallery (lower) was in use at the time I arrived to visit Unit 3. Therefore, I visited other parts of the building. At the time I visited the control room and looked through the window to the shower, some 10–15 minutes later, the occupant had existed. The window was partially 'fogged over,' but not so much that a person in the shower could not be observed.

3 Plaintiff Nielsen's current job assignment is that of an inmate legal assistant, which requires him to frequently move to and from the prison law library located in the prison administration buildling.

4 To the contrary the testimony indicated that at least in one housing unit, the trustee dormitory, which is not a issue in this case, the initial placement of female correctional officers at that facility had to be discontinued to permit the installation of screens or other remodeling, so as to prevent exhibitionism by the inmates. There was also testimony that some inmates requested the female guards to conduct searches of their rooms.

5 The pretrial order also raises the class defendants' argument that their claimed right to equal employment opportunity is constitutionally protected. There is no doubt that if the Department's employment practices required the prohibition of female correctional officers in the housing units, I would have to decide whether such a policy was 'substantially related' to legitimate governmental objectives. Craig v. Boren, 429 U.S. 190 (1976). However, because the evidence before me is insufficient to demonstrate that such a prohibition is necessary, the possible conflict between the constitutional claims is yet speculative and need not be reached.