

STATE OF MICHIGAN
WASHTENAW COUNTY CIRCUIT COURT

TOM NOWACKI,

Plaintiff,

v

Case No. 11-852-CD

Hon. David S. Swartz

STATE OF MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant.

James K. Fett (P39461)
FETT & FIELDS, P.C.
805 E. Main St.
Pinckney, MI 48169
734-954-0100/734-954-0762-fax
Counsel for Plaintiff

Jeanmarie Miller (P44446)
Assistant Attorney General
P.O. Box 30736
Lansing, Michigan 48909
517-373-6434/517-373-2454-fax
Attorney for Defendant

Glen N. Lenhoff (P32610)
Law Office of Glen N. Lenhoff
328 S. Saginaw St., Fl. 8, North Bldg.
Flint, MI 48502-1923
810-235-5660/810-235-5641-fax
Co-Counsel for Plaintiff

**Plaintiff's Response to Defendant MDOC's
Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)**

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I. INTRODUCTION

Because the BFOQ defense is a narrowly construed affirmative defense, MDOC has to prove by the preponderance of the evidence that **its officials believed that the BFOQs were reasonably necessary to the normal operation of the prison, that it engaged in a reasoned decision-making process in deciding to adopt the BFOQs and that no reasonable alternatives exist to the sex discrimination.** *Everson v. MDOC*, 391 F.3d 737, 748-749 (6th Cir. 2004). These are demanding legal standards and consequently, BFOQs are “few and far between.” *Teamsters Local Union No. 117 v. Washington Dep’t of Corrections*, 789 F.3d 979, 987 (9th Cir. 2015).

When creating gender classifications like the BFOQ-gender only positions at issue here, the law requires proof of the *actual* decision-makers’ justification, “not hypothesized or invented post hoc” justifications “in response to litigation.” *U.S. v. Virginia*, 518 US 515, 532-533 (1996); *Communities for Equity v. Mich. High School Athletic Ass’n*, 178 F. Supp. 2d 805, 851 (W.D. Mich. 2001) (Eschewing post hoc rationalization in context of Elliott-Larsen and Title IX case); *Rucker v. City of Kettering Ohio*, 84 F. Supp. 2d 917 (S.D. Ohio 2000) (Eschewing post hoc analysis under Ohio discrimination statute and 42 U.S.C. § 1983); *Haight v. Thompson*, 763 F.3d 554 (6th Cir. 2014). The principle is particularly important in this case because the alleged decision-makers admitted that they played no role in developing the BFOQs. Their testimony is therefore irrelevant.

Haight v. Thompson, a prison case, is particularly instructive on this point. It involved two groups of Native-American death row inmates invoking their rights under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). The RLUIPA provides certain relief to inmates if they can prove that a prison policy substantially burdens a religious practice. The prison policy survives only if the state can establish that it serves a compelling governmental interest in the least restrict way. *Id.* at 559-560. One group of inmates asserted that state officials violated the RLUIPA by denying them access to sweat lodge and refusing to provide the traditional foods for Native-American religious ceremonies. *Id.*

Prison officials justified the denial of the sweat lodge and foods on the grounds that such a request had never been granted before and it would set a precedent.

The district court granted the defendants' motion for summary judgment, reasoning "the prohibition [on a sweat lodge] furthers the government interest in safety and security at a maximum security prison, and even though the prohibition is absolute, it is carried out in the least restrictive means possible." *Id.* at 561.

That justification did not satisfy the Sixth Circuit and it reversed. As is relevant here, the Sixth Circuit noted:

The prison officials add several after-the-fact explanations for denying the request for access to a sweat lodge. Yet explanations offered for the first time in litigation ought to come with a truth-in-litigating label, requiring the official to disclose whether the new explanations motivated the prison officials at the time of decision or whether they amount to post hoc rationalizations. Only the true explanations for the policy count. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 908 n. 4, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) ("To be a compelling interest, the State must show that the alleged objective was the ... 'actual purpose' for the [government's action]."). Although various prison officials now claim that they denied the inmates' sweat-lodge request for "security" reasons, see, e.g., R. 32–2 at 1, these claims appear only in affidavits that form the litigation record in the case, not the record memorializing the prison's decision-making process in response to the inmates' grievance. Nobody wrote, swore to or signed an affidavit until after the inmates named them as defendants in this lawsuit. A genuine issue of material fact exists over whether these affidavits represent the true explanations for the warden's decision, as required. See *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 39 (1st Cir.2007); cf. *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (noting that, in the context of a gender-discrimination dispute where "heightened" review applies, the government's asserted interest "must be genuine, not hypothesized or invented *post hoc* in response to litigation").

Id. at 562 (emphasis added)

The Sixth Circuit was also unimpressed with the affidavits themselves:

Even on their own terms, the prison officials' affidavits suffer. They discuss security at a cloud-level height of abstraction, far too high to establish as a matter of law that a compelling interest undergirds the decision. Many of the affidavits simply mention "security" and leave it at that—without elaboration, without explanation. See, e.g., R. 32–2 at 1, 5, 13. Even the most specific affidavit describes the prison's security concerns in the barest of terms. "[A] sweat lodge cannot be placed in a maximum security prison," the deputy commissioner of the Kentucky Department of Corrections submits, because prison staff must be able to "immediate[ly] observe[]" inmates to avoid any "breach of security," "danger" to inmates, or "medical" problems. *Id.* at 3. How, however, is this a complete answer?

Id. The *Haight* affidavits look a lot like MDOC's discovery responses. See Exhibits 10, 24 and 26. See also *Sheriff's Silver Star Ass'n v. County of Oswego*, 59 F. Supp. 2d 263, 268-269, n. 9 (N.D. NY 1999) (After the fact affidavit justifying sex-segregating of jobs inadmissible), *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 190-191 (D. Mass. 2015) (Post hoc public safety rationale for ordinance "immaterial").

Unlike the *Haight* prison officials, and the officials in *Sheriff's Silver Star* and *McLaughlin*, it is undisputed that Warren and Evans played **no role** whatsoever in determining which position would be designated BFOQ-female only. Their testimony does not even create a question of fact.

II. CLASS REPRESENTATIVE TOM NOWACKI

MDOC claims that the class action must be dismissed because CO Nowacki released his claims. Nonsense. Substitution of class representatives is freely granted when an intervening event moots the claim of a class representative, *Newberg on Class Actions*, § 2.17, 5th ed 2011, pp. 140-145 (**Ex. H**).

Class counsel will shortly file a motion to substitute class counsel. They have not yet done so because CO Nowacki signed a release after class certification while MDOC had this matter tied up in the appellate courts.

III. FACTS

A. No Basis in Fact for Belief that Gender Discrimination is Reasonably Necessary

MDOC claims it should be allowed to justify its discrimination against male COs based on the thinnest of proofs. It justifies its 2009 BFOQs by (1) the ancient history of sexual abuse (1991-1999) at three now closed facilities chronicled in the *Everson* case and (2) the fact that female inmates complained 233 times of sexual misconduct, sex harassment, or over-familiarization.

The rampant sexual abuse of female inmates prompting the BFOQs in *Everson* was remedied long ago. See Motion for PSD, pp. 2, 4-5, PSD Brief at 1, 16. Moreover, the abuse occurred between 1991 and 1999 at three now closed facilities. *Id.*

Employing voodoo statistical analysis MDOC asserts that 233 complaints of sexual abuse, sexual harassment and over-familiarization at WHV over 9 years (2004-2013) justify its blatant gender discrimination even though:

1. 154 of those complaints (**2/3s**) were against **female** COs;
2. During the relevant period 2006-2008 (after the 2000 housing unit BFOQs were implemented in 2005 and before the 2009 BFOQs were implemented) there were **0** sustained findings of sexual misconduct against male COs (same for female COs), **0** sustained findings of sex harassment against male COs (7 for female COs), and 2 sustained findings of over-familiarization against male COs (same for women); and¹
3. No alleged decision-maker has identified sexual abuse at WHV as a justification for the discriminatory BFOQs.

Rather than further characterize MDOC's statistical analysis of inmate complaints, Plaintiff simply invites the Court to review MDOC's chart of statistics (**Ex. A**)² to verify that there has never been *any*, let alone rampant, sexual abuse by male COs at WHV to remedy.

MDOC's purported intention of implementing the BFOQs to protect inmates from being seen in a state of undress or being in a one-on-one situation with male COs is belied by the following facts:

1. MDOC and its expert, Daniel Mahoney, were satisfied that the housing unit BFOQs are sufficient to address these issues;³
2. Deputy Director Manns testified that BFOQ designations were unnecessary for 6 of the 11 contested positions: Food Service, Yard Rover, Health Care, School, Gate Control and Gym Officer;⁴
3. Male COs had been performing the non-housing positions at issue for years,⁵ *see, e.g. Reese v. MDOC*, 2009 WL 799173, *3 (E.D. Mich.) (Duggan) (**Ex. G**) (Question of fact precluded summary judgment);
4. Plaintiff's affidavits confirm that privacy and isolation issues were non-issues;⁶
5. Cameras (1,400 of them) have always been available to address the isolation issues;⁷

Numerical exhibits are attached to Plaintiff's Brief in Support of Partial Summary Judgment. Bolded letter exhibits are attached to this brief.

¹ Ex. 4: last page

² Chart attached as last page to Ex. 4: Interrogatory Answers/attachments.

³ *Everson*, 391 F.3d at 751 and Ex. 19: Mahoney Report, last page

⁴ Ex. 8: Manns at 45, 49-51, 54-55

⁵ Ex. 16: Finch Affidavit; Ex. 29: Plaintiff Affidavit

⁶ *Id.* and Ex. 5: McKinney and Spisak Affidavits

⁷ **Ex. B**: Camera Affidavits and Ex. 2: Warren at 146-148.

6. MDOC withdrew the BFOQs for all but the Rover and Electronic Monitor positions on March 22, 2016 and asserted a pretextual explanation for doing so;⁸ and
7. Warren and Evans themselves made admissions in their depositions that establish that personal privacy and isolation concerns were not an issue with most of the positions. See pp. 6-14 *infra*.

Moreover, MDOC’s claim that it adopted the BFOQs to comply with settlement agreements should have “come with-a-truth-in-litigating label” since it too is a post hoc justification. MDOC claimed in its discovery responses that it was complying with the *Neal* settlement agreement (even though the agreement was signed a year after the BFOQs were developed).⁹ Plaintiff having pointed out the pretextual nature of this justification, MDOC now, for the first time, claims it was the earlier settlement agreements in the *USA v. State of Michigan* (Def. Ex. 2) and *Nunn v MDOC* (Def. Ex. 4) that prompted it to adopt the BFOQs. However, this claim is equally unavailing since the *USA v. State of Michigan* agreement applies only to the Crane and Scott facilities (Def. Ex. 2, p. 11) and MDOC can comply with both by utilizing cameras to ensure that prisoners at all times are “clearly visible to other prisoners and staff.” See Def.’s Brief, Ex. 2, p. 11 and Ex. 4, p. 5.

MDOC’s rationale for each of the eleven contested positions is rebutted below. The following chart summarizes the proofs by position:

	BFOQ Withdrawn 03-22-16 (Ex. 28) MDOC Brief at 18	Manns: BFOQ Unnecessary (Ex. 8: 45, 49-51, 54-55)	BFOQ Triggered by Searches/Obviated by Team Approach ¹⁰	Inadmissible Post Hoc Rationales for BFOQs
Food Service	√	√	√	
Yard Control	√		√	
Yard Rover		√	√	Possibility of Relieving Housing Unit
Health Care	√	√	√	Privacy/Undress
Property Room	√		√*	1 on 1
School	√	√	√	Half walls in bathroom
Off-Site Hospital	√		√*	Privacy/Undress
Gate Control	√	√	√	
Gym	√	√	√	Half wall in bathroom
Electronic Monitoring			√*	Monitor observation cells
Industries	√		√	

⁸ Ex. 28: 03-22-16 Lopez Letter; MDOC Brief at 18, n. 2.

⁹ Ex. 10: Defendants’ Response to Requests for Admissions and Interrogatories Dated June 13, 2012

¹⁰ Every contested BFOQ is based on a job description that lists as a duty “**Conducts shakedowns and searches of female prisoners, including strip searches.**” See Defendant’s Ex. 16. Contrary to the descriptions, Warren and/or Evans testified that shakedowns and strip searches are not required for the Health Care, Property Room, Off-Site Hospital and Electronic Monitoring Officers. See *infra*, pp. 6-14.

Warren's and Evans' post hoc rationalizations described below are relevant only to prove MDOC's mendacity or, where consistent with Plaintiff's proofs, to confirm that the search requirements were a ruse to justify the BFOQs.

1. Food Service Officer

All food service positions, where corrections officers provide custodial supervision of prisoners eating or working in the food service areas, are gender BFOQ positions.¹¹ Warren testified that strip searches and pat-downs are required to be conducted by Food Service Officers and that was the only reason for the gender BFOQ.¹² Thus, the Team Approach division of labor is a feasible alternative to the BFOQs.

While Warren claimed that the male/female team pat-down approach would interrupt the feeding of prisoners, she conducted no research in coming to that conclusion¹³ and COs, a female lieutenant and a captain all testified that the Team Approach is not only feasible, but works well.¹⁴

Privacy is not an issue with food service assignments. Prisoners are also not supposed to be in a state of undress in the food service area unless those who are preparing food change their clothes in the bathroom.¹⁵ Though the officers may also need to go into the bathrooms to supervise prisoners, female officers may be present to do so without barring males from food service.¹⁶

Equally important, Deputy Director Manns has testified that the BFOQ designation is unnecessary for this position¹⁷ and MDOC recently withdrew the designation.¹⁸

¹¹ Ex. C: Warren 69; Ex. D: Evans 70-72

¹² Ex. C: Warren 48, 70; Ex. D: Evans 67-68

¹³ Ex. C: Warren 87-90

¹⁴ Ex. 5: Strip Search Affidavits; Ex. 16: Finch Affidavit; Ex. 29: Plaintiff's Affidavit

¹⁵ Ex. D: Evans 82-83

¹⁶ Ex. C: Warren 70; Ex. D: Evans 68

¹⁷ Ex. 8: Manns at 54-55

¹⁸ Ex. 28: 03-22-16 Lopez Letter' MDOC Brief at 18

2. Yard Control Officer

There are two sets of Yard Control Officers, one of which is designated a BFOQ position and one which is designated a non-BFOQ position.¹⁹ Evans testified the position was a BFOQ position because of the need for shakedowns.²⁰ The “team search” policy clearly obviates the need for more than one female Yard Control Officer.

Further, it is contrary to prison regulations for a prisoner to be in a state of undress in the yard.²¹ As such, there is no need for a Yard Control Officer to see a prisoner in a state of undress unless they are called upon to relieve another officer in a housing unit.²² However, Yard officers are not assigned to housing units except in emergency (i.e. non-routine) situations.²³

Also, strip searches are not routinely conducted in the yard and Warren is not aware of any such instances where a strip search was conducted there during her tenure.²⁴

Equally important, Deputy Director Manns has testified that the BFOQ designation is unnecessary for this position²⁵ and MDOC recently withdrew the designation.²⁶

3. Yard Rover Officer

Half of the Yard Rover Officer positions are gender BFOQ positions because of the need for shakedowns and the possibility that they could relieve Housing Unit Officers.²⁷ The “team search” policy clearly obviates the need for more than one female Yard Rover Officer to conduct shakedowns. Yard Rover Officers also do not perform strip searches unless they conduct them out of assignment.²⁸ Further, it is contrary to prison regulations for a prisoner to be in a state of undress in the yard.²⁹ Warren testified that Yard Rover Officers may need to relieve Housing Unit Officers as a reason for the gender BFOQ

¹⁹ Ex. C: Warren 112-113-116

²⁰ Ex. D: Evans 78

²¹ Ex. C: Warren 103-104; Ex. D: Evans 82

²² Ex. C: Warren 115-116

²³ Ex. C: Warren 109-110

²⁴ Ex. C: Warren 120

²⁵ Ex. 8: Manns at 44-45

²⁶ Ex. 28: 03-22-16 Lopez Letter; MDOC Brief at 18

²⁷ Ex. D: Evans 110

²⁸ Ex. C: Warren 182

²⁹ Ex. C: Warren 103-104, Ex. D: Evans 82, 110

designation,³⁰ but neither Warrens nor Evans cited it as a reason the gender BFOQ was established in the custodial assignment sheet process. Moreover, the mere *possibility* of seeing a prisoner in a state of undress does not justify blatant gender discrimination. *Rucker v. City of Kettering*, 84 F. Supp. 2d 917, 926 (S.D. Ohio 2000) (Possibility that CO might have to perform strip search did not justify BFOQ) (**Ex. G**).

Equally important, Deputy Director Manns testified that there was no need for a BFOQ designation for this position.³¹

4. Health Care Officer

Health Care Officers monitor prisoners in the clinic area and provide security for medical staff.³² Health Care Officers do not perform strip searches and Warren is not aware of any strip search being assigned in that area.³³

The Health Care Officers' area is a clinic, and there may be prisoners in a state of undress as they are treated.³⁴ However, curtains and doors are present to protect prisoners' privacy and Warren admits a "knock-and-announce" policy would alleviate the possibility of seeing prisoners in a state of undress.³⁵ Plaintiff worked as a Health Care Officer, and, during those times, female prisoners were always examined by a health care professional in a private room.³⁶ The mere possibility of seeing a prisoner of the opposite sex in a state of undress is insufficient to justify gender discrimination. *Rucker, supra* (**Ex. G**).

Warren indicated that patdown searches are required because of the presence of dangerous medical equipment in the clinic.³⁷ She stated that calling a female officer to conduct them would be "very inefficient." However, those claims are belied by the successful and longstanding practice of "team

³⁰ **Ex. C:** Warren 176-181

³¹ **Ex. 8:** Manns at 45

³² **Ex. D:** Evans 99-100

³³ **Ex. C:** Warren 153

³⁴ **Ex. C:** Warren 157-158; **Ex. D:** Evans 100

³⁵ **Ex. C:** Warren 157-158; **Ex. 29:** Plaintiff's Affidavit

³⁶ **Ex. 29:** Plaintiff's Affidavit

³⁷ **Ex. C:** Warren 159-161

searches” using a male and female officer and the possibility of calling a female officer other than the Infirmiry Officer.

Finally, Deputy Director Manns testified that, in his experience, the position would not require a BFOQ designation³⁸ and MDOC recently withdrew the designation.³⁹

5. Property Room Officer

Property Room Officers are custodians of prisoner property, process orders for prisoner clothing and monitor the property room.⁴⁰ Warren admits that Property Room Officers do not conduct strip searches and should never see female prisoners in a state of undress.⁴¹

Warren and Evans testified that the position is a gender BFOQ position because it could place male officers in a one-on-one situation with female prisoners and because of the need for shakedowns.⁴² Property room officers are usually assisted by a prisoner worker who must be shaken down at the end of their assignment.⁴³ However, the “team approach” allows for shakedowns of female prisoners when there is a male Property Room Officer. Moreover, the “one-on-one situation” not an issue because there are cameras that record all occurrences in the Property Room area and it can be observed by the Electronic Monitoring Officer in real time.⁴⁴

Note also that MDOC recently withdrew the designation.⁴⁵

6. School Officer

School Officers are responsible for prisoners in the vocational education and school areas.⁴⁶ Warren testified the School Officer position is a gender BFOQ position because of the need for shakedowns and the “open” bathroom area obscured only by a low cement wall.⁴⁷ She also testified that

³⁸ Ex. 8: Manns at 51

³⁹ MDOC Brief At 18

⁴⁰ Ex. D: Evans 114-115, 116

⁴¹ Ex. C: Warren 183, 187

⁴² Ex. C: Warren 184-186; Ex. D: Evans 114-115

⁴³ Ex. D: Evans 116-117, 118-119

⁴⁴ Ex. C: Warren 196-199

⁴⁵ Ex. 28: 03-22-16 Lopez Letter; MDOC Brief at 18

⁴⁶ Ex. C: Warren 188-189

⁴⁷ Ex. D: Evans 120; Ex. C: Warren 188

the need to call a female officer for patdowns would disrupt the WHV schedule.⁴⁸ However, at one point in time during Warren’s tenure, the position was staffed with a male and a female officer and there were never any problems regarding patdowns.⁴⁹

Further, the bathroom wall still prevents a corrections officer from seeing prisoners in a state of undress in the bathroom and Warren admits there is no reason to see female prisoners in a state of undress in the school area.⁵⁰ Warren admits that strip searches are not performed in the school except in emergency situations.⁵¹

Equally important, Deputy Director Manns has testified that the BFOQ designation is unnecessary for this position⁵² and MDOC recently withdrew the designation.⁵³

7. Off-Site Hospital Officer

Offsite hospital officers provide custodial supervision for prisoners receiving medical treatment at local hospitals.⁵⁴ It is a gender BFOQ position because prisoners can be in a state of undress during medical procedures, while using the rest room or being bathed in bed.⁵⁵ The Off-Site Hospital Officers must observe the prisoner at all times, keeping “basic visual contact.”⁵⁶ However, two corrections officers are assigned to a prisoner for an off-site hospital visit.⁵⁷ Evans assumes that if there is a male officer and a female officer assigned, the female officer can maintain visual contact while the female is in a state of undress.⁵⁸ Finally, proving that the BFOQ designation is not genuine, MDOC withdrew it in March 2016.⁵⁹

⁴⁸ Ex. C: Warren 192

⁴⁹ Ex. C: Warren 189-190, 193

⁵⁰ Ex. D: Evans 123; Ex. C: Warren 188

⁵¹ Ex. C: Warren 187-188

⁵² Ex. 8: Manns at 53-54

⁵³ Ex. 28: 03-22-16 Lopez Letter; MDOC Brief at 18

⁵⁴ Ex. C: Warren 203

⁵⁵ Ex. C: Warren 203-204

⁵⁶ Ex. D: Evans 125-126

⁵⁷ Ex. D: Evans 127

⁵⁸ Ex. D: Evans 128

⁵⁹ MDOC Brief at 18

8. Gate Control Officer

Gate Control Officers monitor the front gate, and Evans testified the position was designated as a BFOQ position because of the need for shakedowns of prisoners and visitors.⁶⁰ Yet the only time a Gate Control Officer would conduct a strip search is if the “shakedown officer” was assigned to perform another duty and was not available.⁶¹ Again, the “team search” policy obviates the need for a female Gate Control Officer, especially given that a second officer is assigned to the Gate during shift change or high traffic times.⁶² Deputy Director Manns agrees that a gender BFOQ is unnecessary for this position.⁶³ MDOC withdrew the BFOQ designation in March 2016.⁶⁴

9. Gym Officer

The Gym Officer supervises prisoners during their leisure time activity in the gym area.⁶⁵ It was designated a gender BFOQ position because of the need for shakedowns and because of the need for female prisoners to use the bathroom.⁶⁶

However, Gym Officers do not conduct strip searches unless they are called away from their assignment at the gym to do a strip search in the designated strip search areas.⁶⁷ They would do shakedowns of prisoners,⁶⁸ but, again, the “team search” policy applies to the position.

Further, prisoners are not supposed to be in a state of undress outside of the bathroom stalls of the gym bathroom.⁶⁹ Warren admitted that there is no reason the “knock-and-announce” policy could not be used if a male Gym Officer needed to access the bathroom in an emergency.⁷⁰ Note also that there are no showers in the gym area and the prisoners do not change clothes there.⁷¹

⁶⁰ Ex. C: Warren 122-123; Ex. D: Evans 84-85

⁶¹ Ex. C: Warren 124

⁶² Ex. D: Evans 84-85

⁶³ Ex. 8: Manns at 48-49

⁶⁴ MDOC Brief at 18

⁶⁵ Ex. D: Evans 91

⁶⁶ Ex. D: Evans 93

⁶⁷ Ex. C: Warren 132, 140

⁶⁸ Ex. C: Warren 132, 134-135

⁶⁹ Ex. C: Warren 134; Ex. D: Evans 104

⁷⁰ Ex. C: Warren 139

⁷¹ Ex. C: Warren 132-133; Ex. D: Evans 103-104

Equally important, Deputy Director Manns has testified that the BFOQ designation is unnecessary⁷² for this position and MDOC recently withdrew the designation.⁷³

10. Electronic Monitoring Officer

Electronic Monitoring Officers monitor cameras placed throughout the facility.⁷⁴ This assignment takes place in “a very closed restricted area in which you don’t have prisoner contact.”⁷⁵ There is no requirement that the Electronic Monitoring Officer conduct strip searches.⁷⁶

Cameras do not provide views of restrooms or the showers.⁷⁷ According to Evans, cameras are only pointed into cells when prisoners are in observation cells for suicide or self-injurious behavior, and Warren testified that those cells do contain toilets.⁷⁸ However, two to three officers staff the control center where the cameras are monitored, including a Count Officer, and thus only one of those officers would need to be female due to the observation cell cameras.

11. Industries Officer

The Industries Officer, which no longer exists, supervised prisoners who worked in the sewing or dental factories.⁷⁹ The position was designated as a gender BFOQ position because of the need for shakedowns of female prisoners, particularly because of the possibility of a prisoner stealing dangerous tools.⁸⁰ This assignment did not require the conducting of strip searches, and Warren is unaware of any strip searches being generated from the area.⁸¹

MDOC withdrew the BFOQ from this position in March 2016.⁸²

⁷² Ex. 8: Manns at 49-50

⁷³ Ex. 28: 03-22-16 Lopez Letter; MDOC Brief at 18

⁷⁴ Ex. D: Evans 95

⁷⁵ Ex. C: Warren 143

⁷⁶ Ex. C: Warren 149-150

⁷⁷ Ex. C: Warren 147-149. Warren testified the shower entranceways are visible.

⁷⁸ Ex. D: Evans 95-97; Ex. C: Warren 146

⁷⁹ Ex. C: Warren 163-164, 167

⁸⁰ Ex. D: Evans 106-107, Ex. C: Warren 162

⁸¹ Ex. C: Warren 162

⁸² MDOC Brief at 18

12. Upshot

When Warren's and Evans' post hoc rationalizations are discarded the only thing left are the Affidavits of Lieutenant Deborah Eckerly and Captain Robert Finch which constitute direct evidence that MDOC inserted the search (strip and shakedown) requirement to justify BFOQ designation. Not coincidentally, every job description at issue here (see MDOC Ex. 16) contains such a requirement.

B. MDOC's Mysterious Decision-Making

MDOC's decision-making process is important for several reasons. It determines if (1) MDOC's judgment in implementing the BFOQs is entitled to deference and (2) MDOC has established its BFOQ affirmative defense by a preponderance of the evidence by showing that it engaged in a reasoned process. MDOC has provided no competent evidence of *any* decision-making process, except perhaps that its staff "... met and conferred regarding the staffing plans and required positions"⁸³ Who are these mystery staff members? MDOC cannot tell us. We know they did not include Warren or Evans.

MDOC claims that it engaged in a reasoned decision-making process based on the testimony of a Warden Warren and Deputy Warden Evans who admit they played no part in the discriminatory decisions⁸⁴ and a host of other employees that can remember virtually nothing about that process.⁸⁵

Warren cannot testify as to the process because she had no role in it:

Q. Okay. I'm going to ask you just a few question about that. *Were you the individual responsible for designating these positions that we discussed today as BFOQ?*

A. ***No, I was not.***

Q. *Did you participate in any work group relating to designating these positions BFOQ?*

A. ***No, I was not.***

* * *

Q. *So the BFOQ designations were made before you arrived at the facility?*

A. ***That's correct.***⁸⁶ (emphasis added)

⁸³ MDOC Brief at 6, 16

⁸⁴ Ex. 2: Warren at 207-208

⁸⁵ See *infra*

⁸⁶ Ex. 2: Warren at 207-208

Evans similarly played no role:

Q. Now during the process, the conversion process **did you play any role** in determining what positions would be considered BFOQ female only when the facility became all female?

A. **I did not.**

Q. **Did you consult with Warden Warren** about what positions would be considered BFOQ female only?

A. **I did not.**⁸⁷ (emphasis added)

Bruce Curtis, identified by Warren as having participated in the BFOQ-designation decisions, testified to his role:

Q. Okay. **Did you have a role** in selecting which positions at the Women Huron Valley Prison when it was all women were to be designated BFOQs?

A. **I did not.**⁸⁸ (emphasis added)

Deputy Director Straub knows little more than Curtis.⁸⁹

Deputy Director Gary Manns who signed the August 2, 2000 and March 27, 2009 letters to Civil Service requesting approval for the MDOC “BFOQ-female only” designations could not even remember signing the 2009 letter: “Quite honestly, I didn't even remember I wrote this letter, but it looks like to expand the BFOQs in areas that we felt needed to have female-only staff.”⁹⁰

There are no competent witnesses or documentation regarding the information or experience considered in making the designations.⁹¹ However, statements by the WHV Warden (Warren) and Deputy Warden (Evans) confirm that MDOC administrators were unconcerned with making reasoned decisions about BFOQs or considering gender neutral alternatives to “BFOQ-female only” positions. Their only concern was ridding WHV of male COs.

⁸⁷ Ex. 12: Evans at 19. See generally 19-22.

⁸⁸ Ex. 9: Curtis at 20-21.

⁸⁹ Ex. 13: Straub at 21-22, 32.

⁹⁰ Ex. 8: Manns at 34-35.

⁹¹ MDOC also provided no substantive evidence in its written discovery responses despite direct inquiry. See Ex. 10: Response to Requests to Admit, Ex. 24: Response to Affirmative Defense Interrogatories and Ex. 26: Response to 10-06-11 Interrogatories.

C. No Consideration of Gender Neutral Alternatives

Even weaker are MDOC's proofs regarding its duty to consider reasonable alternatives to gender discrimination. It claims that the "Team Approach" to searches is impractical based on Warren's and Evans' inadmissible after-the-fact testimony. Their 2012 testimony, three years after the fact in 2009, is irrelevant. What matters is what MDOC considered in 2009 before implementing the discriminatory BFOQs.

Even if the after-the-fact Warren and Evans' testimony is admissible, it is flatly contradicted by:

1. Deputy Director Manns' testimony;⁹²
2. The affidavits of Plaintiff,⁹³ male and female COs,⁹⁴ a captain⁹⁵ and a female lieutenant;⁹⁶
3. Their own testimonial admissions;⁹⁷ and
4. Its withdrawal in March 2016 all but the Rover and Electronic Monitor BFOQs, MDOC Brief at 18, n. 2.

Finally, MDOC has presented no evidence, even after-the-fact evidence, that cameras did not, or would not have, alleviated BFOQs for the **one position**, property room, entailing one-on-one contact with inmates. Such technology has been available since WHV opened in 2009 and before.⁹⁸ Warren herself acknowledges that MDOC had 1,400 cameras in place in 2012.⁹⁹ MDOC implicitly admitted that cameras have been reasonable alternatives to BFOQs when it withdrew most of the BFOQs via Lopez's March 22, 2016 letter to Civil Service.¹⁰⁰

MDOC now claims, for the first time, that camera technology only became available to it in 2016 and that it was not feasible earlier. MDOC can cite no admissible evidence in support of this proposition, only Lopez's hearsay letter. This shortfall in proofs is fatal to MDOC's claim that it considered

⁹² Ex. 8: Manns at 44-45, 49-51, 54-55

⁹³ Ex. 29: Plaintiff's Affidavit

⁹⁴ Ex. 5: Search Affidavits

⁹⁵ Ex. 16: Finch Affidavit

⁹⁶ Ex. 15: Eckerly Affidavit

⁹⁷ See Section II, A, pp. 6-15, *supra*

⁹⁸ **Ex. B:** Affidavits re: cameras.

⁹⁹ Ex. 2: Warren at 207-208

¹⁰⁰ Ex. 28: Lopez letter

alternatives. MDOC, not Plaintiff, has the burden of proof. The only proof is that 1,400 cameras have been feasible since before 2009. See **Ex. B: Affidavits re: Cameras.**

The truth is MDOC never considered reasonable alternatives. HR Director Tony Lopez confirmed this:

- Q. All right. So – and I just want to make this clear for the records. So I think the positions are the industries officer, health care infirmiry officer, electronic monitor officer, yard control officer, gym officer, which we'll get to next, food service officer, gate control officer, inpatient/RTP medical aide, inpatient/RTP medical unit officer, school officer, rover officer, property room officer, off sight hospital officer and intake officer, you're not aware of an analysis being done to determine whether there was a reasonable alternative to BFOQ'ing those positions, true?
- A. I'm not familiar with any specific study. I would say yes to that.
- Q. You would say true to that, actually?
- A. To my statement.
- Q. Right. Well, I asked you whether that was true or not. *As far as you know, there was no analysis done to determine whether there was a reasonable alternative to BFOQ'ing the positions I just listed, true?*
- A. **Yea, I'm not familiar with any analysis.**¹⁰¹ (emphasis added)

III. Argument

A. Actual Evidence of Justification Lacking

When creating gender classifications the law requires the employer to prove the legality of the decision-makers' actual justifications for the classifications; post hoc, or after-the-fact, rationalizations are inadequate. *U.S. v. Virginia*, 518 U.S. 515, 532-533 (1996); *Haight v. Thompson, supra*; *Communities for Equity, supra*; and *Rucker v. City of Kettering Ohio, supra*.

MDOC has produced no evidence of its justification because (1) Warren and Evans played no role in creating the initial BFOQ positions and Curtis and Straub could provide no information about the process and (2) its discovery responses provide no substantive information.

¹⁰¹ Ex. 14: Lopez Dep. pp. 32-33

B. No Basis in Fact to Believe that BFOQs Essential to MDOC's Mission Requires Summary Disposition of MDOC's BFOQ Affirmative Defense

With no admissible evidence to justify its discriminatory BFOQs, MDOC is left to shoehorn this case into the mold of the housing unit cases where the justification, rampant sexual abuse, was well documented. This case does not fit that mold.

Rampant sexual abuse was the impetus for BFOQs in *Everson*, 391 F.3d at 751 and *Teamster Local No. 117 v. Washington Dep't of Corrections*, 789 F.3d 979, 983-984 (9th Cir. 2015). Here is what rampant sexual abuse looks like:

Teamsters: 46 substantiated instances of misconduct by male COs in 2.5 years (18.4/yr). *Id.* at 983

Everson: 208 allegations against male COs in 6 years (35/yr) of which 58 (10/yr) were sustained. *Id.* at 741-742.

Here is what rampant sexual abuse does *not* look like:

WHV: 12 allegations of misconduct (4/yr) in three years (2006-2008) of which none were sustained.¹⁰²

Moreover, *Everson* and *Teamsters* involved primarily housing unit type positions. *Everson, supra* at 745-746. *Teamsters* involved **18 housing** unit positions, *id.* at 992, **32 relief positions** in which COs substituted for positions **in housing** already designated for women only, *id.* at 994, three programs and activities positions, *id.* at 993 and six work crew positions, *id.* Thus, *Everson* and *Teamsters* are inapposite.

C. Lack of Decision-Making Process Proofs – Reasoned or Otherwise – Requires Summary Disposition of MDOC's BFOQ Affirmative Defense

MDOC points to its 1999 decision-making process in adopting the 2000 BFOQs for housing units at 3 now closed prisons. It has produced no evidence that it engaged in *any* process before implementing the **2009** BFOQs.

MDOC's knee-jerk reaction is not reasoned decision-making, but the kind of capricious decision-making that precludes any kind of deference. *Everson, supra* at 751. MDOC's knee-jerk reaction is a far cry from the processes described in *Everson*, 391 F.3d at 751-752 or *Teamsters*, 789 F.3d at 983-984. The

¹⁰² See **Ex. A: Sex Abuse Statistics Chart**

non-existent process falls far short of the process found deficient in *Ambat v. City and County of San Francisco*, 757 F.3d 1017, 1026-1027 (9th Cir. 2014).

Plaintiff is entitled to partial summary disposition on this basis alone.

D. Failure to Consider Gender Neutral Alternatives to BFOQs Requires Summary Disposition of MDOC's BFOQ Affirmative Defense

Q. ... you're not aware of an analysis being done to determine whether there was a reasonable alternative to BFOQ'ing those positions, true:

A. I'm not familiar with any specific study. I would say yes to that.

Q. Right. Well, I asked you whether that was true or not. *As far as you know, there was no analysis done to determine whether there was a reasonable alternative to BFOQ'ing the positions I just listed, true?*

A. **Yea, I'm not familiar with any analysis.**¹⁰³ (emphasis added)

Enough said.

E. Judge Boonstra's Opinion in *Buckner v. MDOC*

MDOC relies on Judge Boonstra's opinion in *Buckner v. MDOC* granting MDOC's motion for summary disposition. That reliance is misplaced.

This Court properly denied the exact same motion 2.5 years earlier.¹⁰⁴ With all due respect to Judge Boonstra, his October 2016 opinion is rife with significant, case determinative errors. They include, but are not limited to:

1. He failed to consider direct evidence of MDOC officials' intent to rid WHV of all male COs and how that intent created an issue of fact as to whether gender bias, or privacy and security interests, motivated their adoption of the BFOQs;
2. He rejected the notion that the BFOQs and MDOC's campaign to rid WHV of male COs could have been a knee-jerk reaction to the class action verdicts even though:
 - a. The BFOQs followed closely on the heels of the verdicts; and
 - b. The verdicts were based on sex abuse occurring between 1991 and 1999;
3. He badly misinterpreted sex abuse statistics that can be read only one way – there was no problem of sexual abuse by male COs at WHV;

¹⁰³ Ex. 14: Lopez Dep. pp. 32-33

¹⁰⁴ Ex. F: *Buckner v. MDOC*, April 24, 2014 Order Denying Summary Disposition

4. He determined that Deputy Director Manns' admissions that most of the BFOQ designations were unnecessary were inadmissible by weighing evidence in a fashion that ignored positive evidence for Plaintiff and overstated positive evidence for MDOC;¹⁰⁵
5. He credited the helpful after-the-fact testimony of Warren and Evans contrary to *U.S. v. Virginia, supra* and ignored their admissions which benefited Plaintiff;¹⁰⁶
6. He failed to consider whether Plaintiff's affidavits flatly contradicting Warren and Evans created issues of fact on the feasibility of the Team Work division of labor approach to searches;
7. He assumed, with no evidentiary support, that MDOC did not have access to camera technology until 2016 based on the unsworn statements in Lopez's 03-22-16 letter;
8. He treated *Everson* "as a blanket future authorization for the MDOC to proscribe males from filling positions at its female prisons." *Reese v. MDOC*, 2009 WL 799173 *4 (E.D. Mich.) (Duggan) (**Ex. G**); and
9. He minimized the ruse of inserting search requirements into job descriptions to justify BFOQs by ignoring direct evidence of same (See Ex. 15: Eckerly Affidavit and Ex. 16: Finch Affidavit).

Judge Boonstra, who should have at least conducted a bench trial (he was the trier of fact under the Amended Court of Claims Act), jumped the gun and improperly dismissed the case.

F. This Court's *Buckner* Ruling

This Court should enter partial summary disposition for this plaintiff because it has before it, for the first time:

1. Undisputed evidence that there has never been a problem of sex abuse, rampant or otherwise, at WHV (the fact that MDOC misconstrues that evidence is immaterial);
2. Undisputed evidence that neither Warren nor Evans participated in developing the instant BFOQs and MDOC has failed to identify witnesses or documents to describe its decision-making process;
3. Authority for excluding MDOC officials' post hoc testimony; and
4. Mr. Lopez's admission that MDOC did not consider gender neutral alternatives to the BFOQs.

Any of these reasons, alone or together, require partial summary disposition for Plaintiff.

¹⁰⁵ Judge Boonstra incorrectly determined that Deputy Director Manns' testimony lacked foundation and was therefore inadmissible because Manns testified that others had more information than him regarding these positions. However, Manns was a deputy director and MDOC identified Manns as a person "involved in requesting permission from the Civil Service Commission to designate positions gender based BFOQ positions." Moreover, Manns did the research to justify the 2000 housing unit BFOQs which were upheld in *Everson* (**Ex. E**: Manns at 10). Deputy Director Manns was competent to testify that the 2009 BFOQ were bogus.

¹⁰⁶ See Section II, A, pp. 6-12, *supra*

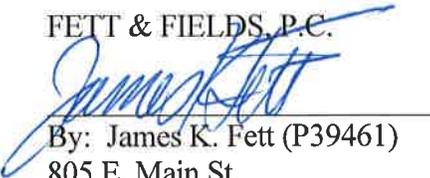
IV. Conclusion

MDOC wanted all males out of WHV based on the notion that they could not conduct themselves in a decent and professional manner. This outrageous gender stereotyping is a slap in the face to every male CO at WHV. Equally offensive are the contrived excuses offered up by MDOC in response to this suit.

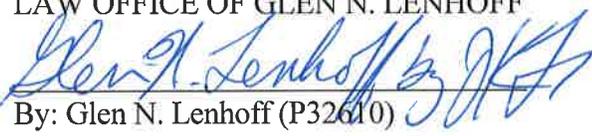
This Court should recognize MDOC's made up post hoc explanations for what they are – pretext – and deny MDOC's motion.

Respectfully submitted,

FETT & FIELDS, P.C.


By: James K. Fett (P39461)
805 E. Main St.
Pinckney, MI 48169
734-954-0100
Co-Counsel for Plaintiff

LAW OFFICE OF GLEN N. LENHOFF

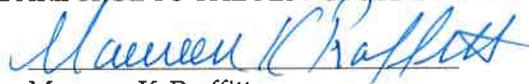

By: Glen N. Lenhoff (P32610)
328 S. Saginaw St. Fl. 8, North Bldg.
Flint, MI 18502-1923
810-235-5660
Co-Counsel for Plaintiff

Dated: September 21, 2017

Affidavit of Mailing

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause via email and by mailing the same to them at their respective business addresses as directed by the pleadings and records herein, with postage fully prepaid thereon on the date indicated.

I DECLARE THAT THE STATEMENTS ABOVE ARE TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.



Maureen K. Proffitt

Dated: September 21, 2017

Exhibit List

- A. Chart showing incidence of sexual misconduct and supporting MDOC 05-08-13 Interrogatory Answers
- B. Camera Affidavits
- C. Warren Deposition Excerpts
- D. Evans Deposition Excerpts
- E. Manns Deposition excerpt
- F. *Buckner v. MDOC* April 24, 2014 Order Denying Defendant's Motion for Summary Disposition
- G. *Reese v. MDOC*, 2009 WL 799173, *3 (E.D. Mich.) (Duggan) and *Rucker v. City of Kettering*, 84 F. Supp. 2d 917, 926 (S.D. Ohio 2000)
- H. *Newberg on Class Actions*, § 2.17, 5th ed 2011, pp. 140-145

A

**Allegations of Sexual Harassment, Sexual Misconduct and Overfamiliarity Toward Women Prisoners Made
Against Corrections Officers**

January 2004 through May 2013

Allegation	Staff/Pris	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	TOTAL
SM	M/F	8	10	1	6	5	1	2	1	0	0	34
SM	F/F	0	3	0	0	1	1	2	2	0	0	9
SH	M/F	15	6	10	5	5	5	1	0	2	1	50
SH	F/F	19	13	20	19	23	12	4	1	0	0	111
Overfamiliar	M/F	4	2	2	3	1	0	2	0	1	0	15
Overfamiliar	F/F	3	6	4	2	3	2	7	1	4	2	34
TOTAL		49	40	37	35	38	21	18	5	7	3	253

Allegation	Staff/Pris	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	TOTAL
SM	M/F											
Sustained		0	0	0	0	0	0	0	0	0	0	0
Not Sustained		3	5	0	1	1	0	0	1	0	0	11
Unfounded		5	5	1	5	4	1	2	0	0	0	23
SM	F/F											
Sustained		0	0	0	0	0	0	0	0	0	0	0
Not Sustained		0	0	0	0	0	1	0	0	0	0	1
Unfounded		0	3	0	0	1	0	2	2	0	0	8
SH	M/F											
Sustained		0	0	0	0	0	0	0	0	0	0	0
Not Sustained		10	5	8	2	4	4	0	0	2	0	35
Unfounded		5	1	2	3	1	1	1	0	0	1	15
SH	F/F											
Sustained		2	0	2	1	4	0	0	0	0	0	9
Not Sustained		13	7	9	11	11	4	2	1	0	0	58
Unfounded		4	6	9	7	8	8	2	0	0	0	44
Overfamiliar	M/F											
Sustained		1	1	1	1	0	0	2	0	1	0	7
Not Sustained		1	1	0	2	0	0	0	0	0	0	4
Unfounded		2	0	1	0	1	0	0	0	0	0	4
Overfamiliar	F/F											
Sustained		1	3	0	0	2	0	2	1	4	1	14
Not Sustained		2	3	3	0	0	0	1	0	0	0	9
Unfounded		0	0	1	2	1	2	4	0	0	1	11
TOTAL		49	40	37	35	38	21	18	5	7	2	252
											(1 open)	

Facilities include: Western Wayne, Robert Scott, Huron Valley Complex-Women, Camps Brighton, White Lake & Valley, Special Alternative Incarceration

NOTE: Overfamiliarity includes any overly familiar conduct/contact with prisoners or their families, not necessarily of a sexual nature.

SM = Sexual Misconduct
SH = Sexual Harassment

as of May 31, 2013

007271

STATE OF MICHIGAN
WASHTENAW COUNTY CIRCUIT COURT

TOM NOWACKI,

Plaintiff,

v

Case No. 11-852-CD
Hon. David S. Swartz

STATE OF MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant.

James K. Fett (P39461)
FETT & FIELDS, P.C.
805 E. Main St.
Pinckney, MI 48169
734-954-0100/734-954-0762-fax
Counsel for Plaintiff

Jeanmarie Miller (P44446)
Assistant Attorney General
P.O. Box 30736
Lansing, Michigan 48909
517-373-6434/517-373-2454-fax
Attorney for Defendant

Glen N. Lenhoff (P32610)
Law Office of Glen N. Lenhoff
324 S. Saginaw St., Ste. 8100
Flint, MI 48502
810-235-5660/810-235-5641-fax
Co-Counsel for Plaintiff

AFFIDAVIT OF MR. SCOTT KEMMER

I, Scott Kemmer, after being duly deposed and sworn, states as follows;

1. I have been employed by the Michigan Department of Corrections since 1995.
2. I have been assigned to the Women's Huron Valley ("WHV") facility since 2004.
3. I currently work as a yard control office and have been in that position since approximately 2005.
4. Cameras were in widespread use prior to the establishment of BFOQ positions at WHV.

5. I have personal knowledge of the facts stated in this affidavit and can competently testify thereto.

Dated:

9.14.2017



Scott Kemmer

Subscribed and sworn to before
me this 14 day of September, 2017.



Lucas County, Michigan ^(no) Ohio

My Commission Expires: 11-27-21

Acting in the County of Lucas



MICHAEL QUICK
Notary Public, State of Ohio
My Commission Expires
November 27, 2021

STATE OF MICHIGAN
WASHTENAW COUNTY CIRCUIT COURT

TOM NOWACKI,

Plaintiff,

v

Case No. 11-852-CD
Hon. David S. Swartz

STATE OF MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant.

James K. Fett (P39461)
FETT & FIELDS, P.C.
805 E. Main St.
Pinckney, MI 48169
734-954-0100/734-954-0762-fax
Counsel for Plaintiff

Jeanmarie Miller (P44446)
Assistant Attorney General
P.O. Box 30736
Lansing, Michigan 48909
517-373-6434/517-373-2454-fax
Attorney for Defendant

Glen N. Lenhoff (P32610)
Law Office of Glen N. Lenhoff
324 S. Saginaw St., Ste. 8100
Flint, MI 48502
810-235-5660/810-235-5641-fax
Co-Counsel for Plaintiff

AFFIDAVIT OF MR. STEVE McKINNEY

I, Steve McKinney, after being duly deposed and sworn, states as follows;

1. My name is Steve McKinney. I have been employed by the Michigan Department of Corrections for almost 25 years.
2. My current position is that of Corrections Officer. My assignment is mainly yard control but I also work the "bubble" and visiting room.
3. I have been assigned to the Women's Huron Valley Correctional Facility ("WHV") since September 2009.
4. The vast majority of cameras presently in place at WHV were in place when I arrived at the facility in 2009.

5. I have personal knowledge to the facts set out in this Affidavit and can testify competently thereto.

Dated: 9-19-17

Steve McKinney
Steve McKinney

Subscribed and sworn to before me this 19 day of SEPTEMBER, 2017.

Dawn Hoover
Dawn Hoover, Notary Public
LIVINGSTON County, Michigan
My Commission Expires: 10-18-2019
Acting in the County of LIVINGSTON

STATE OF MICHIGAN
WASHTENAW COUNTY CIRCUIT COURT

TOM NOWACKI,

Plaintiff,

v

Case No. 11-852-CD

Hon. David S. Swartz

STATE OF MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant.

James K. Fett (P39461)
FETT & FIELDS, P.C.
805 E. Main St.
Pinckney, MI 48169
734-954-0100/734-954-0762-fax
Counsel for Plaintiff

Jeanmarie Miller (P44446)
Assistant Attorney General
P.O. Box 30736
Lansing, Michigan 48909
517-373-6434/517-373-2454-fax
Attorney for Defendant

Glen N. Lenhoff (P32610)
Law Office of Glen N. Lenhoff
324 S. Saginaw St., Ste. 8100
Flint, MI 48502
810-235-5660/810-235-5641-fax
Co-Counsel for Plaintiff

AFFIDAVIT OF MR. ROBERT ROBBINS

I, Robert Robbins, after being duly deposed and sworn, states as follows;

1. I have been employed by the Michigan Department of Corrections since May 3, 1998.
2. I started my law enforcement career at the Huron Valley Men's facility from May of 1998 until the Michigan Department of Corrections converted it into the Women's Huron Valley ("WHV") facility in June 2009.
3. I am currently still employed at WHV.
4. The vast majority of cameras presently in place at WHV were in place when the facility was converted to a women's prison in 2009, including those in the field house, programs building and food service.

5. These cameras are viewed and watched inside of our control center on a daily monitored system.

6. In the past few years there have been no recent installation of cameras excluding the maintenance area.

7. I have personal knowledge of the facts stated in this affidavit and can competently testify thereto.

Dated: September 15th, 2017

Robert Robbins
Robert Robbins

Subscribed and sworn to before
me this 15 day of September, 2017.

Robert John Robbins
PROCCS, A FOUNDATION, Notary Public
Washtenaw County, Michigan
My Commission Expires: 02/24/2021
Acting in the County of Washtenaw

James A. Robbins



STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW
CIVIL DIVISION

TOM NOWACKI, et al,

Plaintiffs,

Case No. 11-852-CD

-v-

HON. ARCHIE C. BROWN

STATE OF MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant.

The Deposition of MILLICENT D. WARREN, taken
before Timothy J. Boroski, RPR/CSR-2378 and Notary Public in
and for the County of Clinton, State of Michigan, at the
Women's Huron Valley Correctional Facility, 3201 Bemis Road,
Ypsilanti, Michigan, on Tuesday, October 16, 2012, commencing
at or about 8:40 a.m.

APPEARANCES:

Law Office of Glen N. Lenhoff
BY: ROBERT D. KENT-BRYANT, ESQ., (P40806)
328 South Saginaw Street
8th Floor, North Building
Flint, Michigan 48502
810.235.5660

Co-Counsel appearing on behalf of plaintiffs,

1 roles or job descriptions. I have to depose people. So
 2 the group of persons that met with regard to transition
 3 of Huron Valley, who were those people, specifically?
 4 **A I can't give you all the names.**
 5 **Q Okay. Who can you give me?**
 6 **A If I can have leeway to describe what I understand?**
 7 **Q Sure.**
 8 **A When I was asked to come here, there were already work**
 9 **groups that had been established of staff working at**
 10 **Women's Huron Valley, Camp Valley, Camp White Lake, Scott**
 11 **Correctional Facility and Men's Correctional Facility.**
 12 **They were -- and people from central office, budget**
 13 **people, psychological services staff. Because this was a**
 14 **huge change in closing one big operation, moving out**
 15 **mentally ill men. So there were several work groups that**
 16 **were meeting. They developed post orders for**
 17 **assignments.**
 18 **Q What is a post order?**
 19 **A Post orders are specific identified responsibilities for**
 20 **assignments. Generally, they are custodial assignments**
 21 **for officers.**
 22 **Q So each of these work groups developed post order**
 23 **assignments?**
 24 **A Work groups had different tasks.**
 25 **Q Okay.**

1 of the same gender.
 2 **Q Now -- okay. I want to make a distinction between why**
 3 **the determination was made and the process by which the**
 4 **determination was made; okay? So you have given me the**
 5 **why and you started on the process.**
 6 **So the reason that you're saying that the food**
 7 **service officer position became BFOQ-female only was**
 8 **because of the search requirement of the position; true?**
 9 **A Yes.**
 10 **Q All right. You mentioned the process for arriving at**
 11 **these post order assignments, right, through these work**
 12 **groups and so forth. So in terms of a specific position,**
 13 **like the food service officer position becoming**
 14 **designated BFOQ-female only, what happens after those**
 15 **post order assignments are developed? I mean, does it go**
 16 **to Curtis and Straub? What happens?**
 17 **A No. Each -- each assigned as a post order assignment and**
 18 **a book for each assignment is created. So that that**
 19 **assignment, if you're working it, I give you this book**
 20 **and these are your job duties and the copies of the**
 21 **policies and operating procedures that you need to know**
 22 **to work this assignment.**
 23 **Q Such as food service officer?**
 24 **A Such as food service officer.**
 25 **Q All right. So that's developed. And for a food service**

1 **A Some developed the operating procedures, which were based**
 2 **on department policy that said, based on this policy,**
 3 **your facility will do A, B, C, D and E. They developed**
 4 **those.**
 5 **All of this pre-work occurred prior to my being**
 6 **asked to come here, the composition of which I did not**
 7 **create. I can't tell you all who was on there. I**
 8 **attended some of those meetings. A lot of work and**
 9 **thought went into this move that I was not privy to. The**
 10 **warden at the time who was assigned here, fairly**
 11 **abruptly, as I understood, had personal reasons --**
 12 **Q Who was that?**
 13 **A Susan Davis.**
 14 **Q Okay.**
 15 **A -- to retire. I received a phone call, was asked to come**
 16 **here and said yes.**
 17 **Q Okay. So you've got the work groups. The work groups**
 18 **work on these post order assignments, among other things.**
 19 **Get me from that to a specific determination that food**
 20 **service officer at Huron Valley would be BFOQ-female**
 21 **only?**
 22 **A I believe I answered that. The assignments were for**
 23 **custodial assignments, if the -- one of the essential**
 24 **functions of that assignment was to conduct searches of a**
 25 **female prisoner, they were to be done by a staff member**

1 officer in that book, there would have been a search
 2 requirement?
 3 **A Yes.**
 4 **Q All right. Now, would that book have also included**
 5 **designating the position BFOQ only?**
 6 **A I can't say without seeing a copy of the post order. I**
 7 **don't believe the post order says this assignment is BFOQ**
 8 **only.**
 9 **Q All right.**
 10 **A I believe we list the various assignments. I don't -- I**
 11 **believe that is defined in department policy.**
 12 **Q All right. So the -- so we get this book, but it**
 13 **doesn't -- let's assume that it doesn't -- this book does**
 14 **not include a BFOQ-female only designation. What happens**
 15 **next then that leads to a position such as food service**
 16 **officer becoming BFOQ only, female only?**
 17 **A In developing -- you know, for that particular**
 18 **assignment, we would say what are the essential functions**
 19 **of the assignment? In food service, will the officer**
 20 **ever have to do a search?**
 21 **Q Okay. Let me -- and the only reason I'm interrupting you**
 22 **is pronouns. I don't know necessarily who you're**
 23 **referring to. So this book is received by whom? Who**
 24 **gets this book to determine whether this position should**
 25 **be BFOQ-female only?**

1 Q All right. So there is shifts at which people eat?
 2 A Yes.
 3 Q All right. And how many shifts for each meal?
 4 A I'm going to pretend I know.
 5 Q All right.
 6 A If I'm a shift commander, I have a supervisor out there.
 7 And the supervisor will say, "Send housing unit A, B, C."
 8 Q All right.
 9 A And A, B, C will start walking over there. When A gets
 10 out of there, they call for housing units D, E and F.
 11 Q All right.
 12 A So they run a system where you keep your lines constantly
 13 moving, that's a goal, so you never have a backup of
 14 people standing in line. And you don't have any empty
 15 seats in there. It's a trick.
 16 Q Okay. And who prepares the food?
 17 A We call them food service stewards.
 18 Q Okay.
 19 A There are food service supervisors and prisoner laborers.
 20 Q And the stewards are -- are they Department of
 21 Corrections employees or are they outside contractors?
 22 A They are Department of Corrections employees.
 23 Q Okay. Now, do they have a specific designation, like EB
 24 or anything like that?
 25 A Yes. Those are pay codes. Civil service -- all civil

1 longer.
 2 There are different classifications of job
 3 assignments for prisoners in food service. Some may be a
 4 dishwasher. Some could be prep. Some could be cook.
 5 There are various skills that it would take to provide,
 6 you know, food from the storage area, to prep it, to
 7 serve it, to cook it, to put it on the serving line, to
 8 clean up, to do dishes.
 9 Q All right.
 10 A All of that.
 11 Q But at any given time there may be as many as 30
 12 prisoners actually working food service; is that true?
 13 A Approximately.
 14 Q All right. And at any given time, how many prisoners are
 15 eating?
 16 A We have a fire safety code capacity. I didn't know this
 17 was going to be a quiz. I think 188. It could be more
 18 than that.
 19 Q Okay. So there may be as many as 188 people in the
 20 facility; true?
 21 A There could be more than that.
 22 Q All right. So is the 188 the limit for people eating?
 23 A Seating capacity.
 24 Q All right. And at any given time, it may be near
 25 capacity is what you're saying?

1 service employees have pay codes. I can't tell you
 2 specifically what their pay code is.
 3 Q All right.
 4 A There is different levels. There is the entry level and
 5 then there is a more skilled level and then there is a
 6 supervisor level and there is a director level.
 7 Q Are they trained as corrections officers?
 8 A No.
 9 Q And not trained as resident unit officers or --
 10 A Correct.
 11 Q All right. And for any given meal, how many prisoner
 12 laborers are there?
 13 A I'm going to say 30.
 14 Q Okay.
 15 A I don't mean to sound bad, but I have people that do
 16 that. I can't tell you how many are assigned to each
 17 shift.
 18 Q So let's just say it's approximately 30. Are they there
 19 for the whole meal or does the number of prisoners that
 20 are working in food service change over the course of any
 21 given meal?
 22 A They have what I would call shifts.
 23 Q Okay. So prisoners will work the a.m. shift, the p.m.
 24 shift. Some prisoners may be called in as extras if they
 25 are having backups on the meal or the prep is taking

1 A Yes.
 2 Q All right. And how many -- other than the people
 3 preparing the food, how many corrections officers are in
 4 food service when a meal is being served, or assigned
 5 there?
 6 A The exact number is determined by the shift commander.
 7 Q Okay.
 8 A And if I could explain that. If the sergeant calls
 9 housing Unit A, there is a housing Unit A rover who will
 10 escort the prisoners and go to the chow line with the
 11 prisoner in addition to the officers who are already
 12 assigned to food service.
 13 Q All right. So there may be rovers there that are
 14 assigned to the -- any particular housing unit?
 15 A Correct.
 16 Q And then there is the individuals that are assigned to
 17 food service; true?
 18 A Correct.
 19 Q Are those the food service officers?
 20 A Yes.
 21 Q All right. How many of them are there at any given time
 22 during a meal?
 23 A I believe two. I could be wrong.
 24 Q Okay. And is that true -- I assume meals aren't going on
 25 constantly; is that true?

(Pages 66 to 69)

1 A They go on for long periods of time.
 2 Q Almost constantly.
 3 A It seems like it's all day.
 4 Q By the time you're done with breakfast, it's time for
 5 lunch?
 6 A Yeah, they start prepping. You know, we have a time
 7 where we do count and those kinds of things. It is --
 8 you know, there are down times. But there is
 9 specifically a meal, a meal and a meal. So the activity
 10 results --
 11 Q All right.
 12 A -- around -- It may take a couple hours to have that
 13 accomplished. Because we do it custody level.
 14 Q All right. And there are typically two food service
 15 officers. Those are -- those positions are BFOQ-female
 16 only?
 17 A I believe so.
 18 Q All right. And the reason that they are BFOQ-female only
 19 is what?
 20 A Two. One is the strips -- the search requirement. And,
 21 secondly, there are bathrooms there where women go. And
 22 it may require a female officer to go in the area to
 23 ensure there is one prisoner in each stall instead of
 24 multiple.
 25 Q Okay. Any other reasons?

1 why there might not need to be searches. It just seems
 2 that applies more to patdowns than strip searches or do
 3 you disagree?
 4 A I'm sorry?
 5 Q With regard to food service, it sounded like what you
 6 told me would apply more to an increased need for
 7 patdowns rather than an increased need for strip searches
 8 over other parts of the facility; do you agree with that
 9 or disagree?
 10 A Neither. I believe the assignment has potential for a
 11 request for strip search, which always starts, generally,
 12 with a pat search.
 13 Q Okay.
 14 A If there is a suspicion that a particular prisoner has
 15 contraband.
 16 Q Okay.
 17 A And so a pat search is done within the authority and
 18 decision making of each individual corrections officer.
 19 If they don't find anything on a pat search, they may
 20 call for authorization for a strip search, because they
 21 have a strong sense through their observation skills that
 22 this prisoner may have secreted contraband.
 23 Q All right. Let's talk about -- so someone makes a
 24 request for authorization for a strip search at Huron
 25 Valley. So you just have a food service officer do it.

1 A Food service is an assignment, historically, that incurs
 2 a lot of theft. Primarily, of food stuff, food products,
 3 but also of tools.
 4 It's probably our biggest critical tool
 5 assignment we have at a facility inside the secure
 6 perimeter. Because we have knives and cutting tools and
 7 those kinds of things.
 8 So searches are critical in that area to ensure
 9 prisoners do not remove those items. We have counts of
 10 those items.
 11 And also food stuffs. It's not uncommon for a
 12 prisoner to be searched and found to be in possession of
 13 a quantity of cheese or meat. Usual not -- usually not
 14 the healthy stuff, but those kinds of products they will
 15 secure on their persons to take back out of there.
 16 Q Okay. Now, with regard to the searches -- or, actually,
 17 that can be broken down in at least two ways. There are
 18 patdowns and there are strip searches; true?
 19 A Yes.
 20 Q All right. Now, when you're talking about search
 21 requirements with regard to food service, are you talking
 22 about patdowns, strip searches or both?
 23 A Could be both.
 24 Q Okay. All right. With regard to strip searches, let's
 25 talk about that. I understand what you said before about

1 Let's just use this hypothetical. Who do they call?
 2 A A supervisor, which would -- sergeant could be. Could be
 3 a lieutenant. When meal lines are running --
 4 Q Okay. Well, that okay. With -- that answered my
 5 question.
 6 A Okay.
 7 Q Now, on this facility, is there not a specific strip
 8 search room or place on the facility where strip searches
 9 are typically performed?
 10 A Preferably, there are strip searches performed in
 11 identified areas.
 12 Q Okay. And on this facility, what are the identified
 13 areas?
 14 A There is an area on each side of the facility in the
 15 administration building. It is adjacent to the visiting
 16 room.
 17 Q Okay.
 18 A And strip searches are performed on every prisoner who
 19 has contact with someone from the outside --
 20 Q Right.
 21 A -- in a visit. Or if they are removed from the facility
 22 under custodial assignment and they have any potential
 23 contact with the public. That would be going to court,
 24 going to the hospital; any public contact.
 25 Q So someone -- you have got -- there is lunchtime and a

(Pages 70 to 73)

1 pat-down is performed of one of the prisoners, but based
 2 on the observational skills of the correction officer,
 3 there is a need to perform a strip search.
 4 He calls in for authorization from a
 5 supervisor. The supervisor gives the authorization.
 6 Typically, that prisoner would be taken to one of the
 7 designated strip search areas; true?
 8 **A Yes.**
 9 **Q All right.**
 10 **A Or segregation. You stopped me. That would be another**
 11 **area that a strip search is routinely done.**
 12 **Q All right. And then there is on duty, typically, an**
 13 **officer who performs the strip search; true? It's not**
 14 **usually the food service officer or somebody -- or just a**
 15 **typical corrections officer; true?**
 16 **A No.**
 17 **Q That's not true? Is there someone that usually performs**
 18 **the strip search at the facility?**
 19 **A Any officer, who is a female, could be designated by a**
 20 **supervisor to perform a strip search on a prisoner.**
 21 **Q Who usually performs, what position usually performs**
 22 **strip search as a matter of practice?**
 23 **A Any female corrections officer.**
 24 **Q So it's your contention that there aren't specific -- I'm**
 25 **not saying what's in their job description. I'm saying**

1 **They have been done in food service.**
 2 **They are daily done -- pat searches are daily**
 3 **done in food service. Where, again, it requires a female**
 4 **to touch the body, clothed body, of a prisoner before**
 5 **they leave the assignment. That must be done by a**
 6 **female.**
 7 **Q With regard to the -- but so I'm clear. If a strip**
 8 **search -- if it's determined by a food service officer**
 9 **that a strip search is required, the prisoner will**
 10 **usually be taken to a designated area; true?**
 11 **A Yes. Unless approval is given for it to be conducted on**
 12 **site.**
 13 **Q Now, since you have been warden -- first of all, have**
 14 **there been any strip searches that have emanated from**
 15 **food service? In other words, has anyone -- has any food**
 16 **service officer ever requested a strip search?**
 17 **A Yes.**
 18 **Q All right. How many times has that happened to you?**
 19 **A I don't know.**
 20 **Q Do you know whether there would be a record of that, and**
 21 **if so, where it would be?**
 22 **A There would be records. The reason we assign them**
 23 **generally in a particular area, a room designated to do**
 24 **strip searches, is that you need a proper room --**
 25 **Q I understand that. But stay on this topic for a second,**

1 who actually, on a day-to-day basis, usually does it?
 2 It's your contention that there is not any distinction
 3 between the different positions?
 4 **A I'm trying to answer this very honestly for you.**
 5 **Q Um-hum.**
 6 **A If a need for a strip search is -- occurs --**
 7 **Q Right.**
 8 **A -- and you happen to be assigned in a housing unit, and**
 9 **you're coming back from lunch, the shift commander can**
 10 **say officer so and so, female, go and strip search this**
 11 **prisoner right now.**
 12 **So depending on the circumstance, yes. On a**
 13 **routine basis, if you work in segregation, every prisoner**
 14 **who comes into segregation is strip searched. So you may**
 15 **do some more often if your "normal" assignment is in**
 16 **segregation as a female officer.**
 17 **Q Right.**
 18 **A The same would hold true for a visit. If you are working**
 19 **in a visiting room, you could be a male or a female.**
 20 **However, the female officer that is designated to work in**
 21 **the visiting room that day is the one that performs the**
 22 **strip search after the visit.**
 23 **I don't want to mislead you that, you know, if**
 24 **you're a female and a need for a strip search is done and**
 25 **you're a corrections officer, you could be assigned that.**

1 though. I have limited mental capacity. So if we have
 2 got two going on at the same time, I'm not -- I tend to
 3 lose my train of thought.
 4 So the records for whether a strip search
 5 emanated from food service, where would that be found?
 6 **A It should be found in the strip search log that is**
 7 **maintained on the west side of the facility in the**
 8 **control center.**
 9 **Q Okay. Now, you're not sure how many strip searches since**
 10 **you've been here have emanated from food service; right?**
 11 **A No.**
 12 **Q Now, do you know whether those strip searches have been**
 13 **performed at the designated area versus right there in**
 14 **food service?**
 15 **A Yes, I know.**
 16 **Q Okay. And what is the answer?**
 17 **A Both.**
 18 **Q How many have been performed in food service?**
 19 **A I don't know.**
 20 **Q Do you know what the circumstances of that were -- or of**
 21 **those were?**
 22 **A I know of one particular incident.**
 23 **Q Okay. Tell me about it.**
 24 **A An officer, I don't recall if the supervisor was --**
 25 **authorized it, decided it was important to do a strip**

(Pages 74 to 77)

1 search because they believed the prisoner had contraband.
 2 Q Okay.
 3 A Much after the fact, I became aware that there were
 4 multiple prisoners who were strip searched in food
 5 service in what I determined was an inappropriate manner.
 6 An investigation ensued and those persons who were
 7 involved were subject to corrective action.
 8 The policy is clear, for a non-routine strip
 9 search, you must get authorization from the warden's
 10 office. That is why we have designated areas. Routine
 11 strip searches are done, as I indicated, in -- after
 12 visits and in segregation. It is not a routine to have
 13 one done in food service.
 14 Q All right.
 15 A Therefore, it would precipitate a request. And if time
 16 would allow, we would do it in the area designated for
 17 that.
 18 Q All right. And it would have to go -- non-routine strip
 19 searches would have to go through the warden's office?
 20 A Or a designee.
 21 Q Okay, so who? So that would be either you or who else?
 22 A A deputy. It can be a captain.
 23 Q Okay.
 24 A Generally --
 25 Q A senior officer at the facility?

1 A By the time the whole investigation was completed, there
 2 probably were 20.
 3 Q Okay. Did you ever make a determination of how many
 4 actually were involved?
 5 A There was no way to make that determination.
 6 Q What was the alleged motivation for performing the strip
 7 searches?
 8 A Contraband.
 9 Q Do you know what kind of contraband?
 10 A Food.
 11 Q Did your knowledge of this emanate from a prisoner
 12 complaint or --
 13 A Yes.
 14 Q So not only was this not -- well, was this reported --
 15 strike that.
 16 Was authorization requested of anyone for the
 17 strip searches?
 18 A No.
 19 Q All right. So the officers just took it upon themselves?
 20 A Correct.
 21 Q All right. Was there an allegation of, by the prisoners,
 22 of sexual assault or sexual harassment arising out of
 23 this incident?
 24 A That's a broad term. Allegations were it was not done in
 25 a private area. And that allowed the prisoners to be

1 A Senior, um-hum.
 2 Q Is that a yes?
 3 A Yes.
 4 Q All right. And in this case that you're referencing,
 5 that was not done; true?
 6 A Correct.
 7 Q And when did this incident occur?
 8 A Maybe 2010.
 9 Q And this involved female officers?
 10 A Yes.
 11 Q No male officers were involved in this --
 12 A No.
 13 Q -- inappropriate strip search; true?
 14 A No.
 15 Q And what corrective actions were received?
 16 A I don't recall, specifically. I can't tell you the names
 17 of the persons.
 18 Q How many were involved in terms of officers?
 19 A I'm going to say several.
 20 Q Okay. How many were involved in terms of prisoners?
 21 A Well, it kind of morphed.
 22 Q Give me a range.
 23 A I was only told, initially, reported by a prisoner, of
 24 two to three.
 25 Q Okay.

1 seen or observed in a state of undress by other prisoners
 2 or multiple officers.
 3 Q Okay. Where was it done?
 4 A In the old food service building. I call it old because
 5 it was the only food service building up until earlier
 6 this year when the new one was opened. And it's located
 7 here on the west side of the facility.
 8 Q Where in that facility was it done? You said that it was
 9 not in a private area.
 10 A Right. It was in the back -- the back of food service
 11 where they prep and store and cook meals. It was not
 12 done in the dining area.
 13 Q All right. Were any of those officers discharged, do you
 14 know?
 15 A No.
 16 Q Any other examples of a strip search being done at the
 17 food service facility that you're aware of?
 18 A No.
 19 Q Okay. Now -- oh, maybe I'll try to get to one or two
 20 more exhibits before we have to break for the day.
 21 (Exhibit Number 3 marked for identification by
 22 the reporter).
 23 Q (BY MR. KENT-BRYANT) I have handed you what has been
 24 marked as Exhibit 3. Can you identify that document,
 25 please?

(Pages 78 to 81)

1 coat --
 2 **A A prisoner is told to take their coat off.**
 3 **Q Okay. And then the coat can be handed to the male**
 4 **officer who can search the coat?**
 5 **A Yes.**
 6 **Q All right. And then the patdown on the prisoner is**
 7 **performed on the female -- or by the female; true?**
 8 **A Yes.**
 9 **Q All right. Now, by the way, when you worked at the Thumb**
 10 **Correctional Facility, was it against regulations for**
 11 **females to patdown male prisoners?**
 12 **A No.**
 13 **Q Do you know why not?**
 14 **A No.**
 15 **Q Was it against the rules for females to see males in a**
 16 **state of undress when you worked at the Thumb**
 17 **Correctional Facility?**
 18 **A No.**
 19 **Q And at the Thumb Correctional Facility, did women work in**
 20 **housing?**
 21 **A Yes.**
 22 **Q Did they work in intake?**
 23 **A Could have.**
 24 **Q Did they work in segregation?**
 25 **A Yes.**

1 **be fed within certain time frames for medication reasons**
 2 **and for standards that there can't be a lapse of time**
 3 **between one meal and the next.**
 4 **Q What did you do to determine -- I mean, what evidence did**
 5 **you use that having the patdowns achieved in the manner**
 6 **described -- that we just discussed in Exhibit 3, would**
 7 **delay the performance of -- or the provision of meals or**
 8 **in any other way affect the institutional needs? I mean,**
 9 **what did you do to determine that those delays would**
 10 **actually happen?**
 11 **A If I have 30 prisoners arriving for a shift, that same 30**
 12 **generally will leave at the same time when they are**
 13 **relieved by an oncoming shift.**
 14 **Q If I may interrupt, I think I understand your logic. But**
 15 **I'm wondering what you did to determine whether that**
 16 **logic was actually true.**
 17 **So, for instance, when this was a mixed**
 18 **facility, male officers worked food service when women**
 19 **were present there; true?**
 20 **A Yes.**
 21 **Q Did you do anything to determine whether the patdowns as**
 22 **they were performed then in any way was detrimental to**
 23 **the efficiency of the food service operations?**
 24 **A It took a long time.**
 25 **Q Right. Well, first of all, when you say it took a long**

1 **Q Did they work in food service?**
 2 **A Yes.**
 3 **Q All right. In the food service, just in terms of**
 4 **performing patdowns in food service at Huron Valley**
 5 **Women's, would it be a reasonable alternative when it's**
 6 **staffed by two corrections officer, if one of them is**
 7 **male, for any patdown to be accomplished in the way that**
 8 **is described in Exhibit 3?**
 9 **It doesn't have to be, you know, your favorite.**
 10 **But would that be a reasonable alternative?**
 11 **A Not based on operational needs.**
 12 **Q And what do you mean by that?**
 13 **A As I testified earlier, food service is a very busy area.**
 14 **And it -- the schedule in food service typically runs**
 15 **your institutional daily activity.**
 16 **Searches need to be done efficiently,**
 17 **effectively, with staff that are available. We have**
 18 **prisoners who will be coming in -- relieving each other**
 19 **on shifts, for example. Might be in the middle of food**
 20 **lines.**
 21 **It's not necessarily a break in time when you**
 22 **can call for assistance to do a search for a prisoner.**
 23 **Therefore, for operational needs, having females perform**
 24 **that duty ensures the institutional schedule is not**
 25 **unduly delayed in feeding prisoners. Prisoners have to**

1 **time, what is your evidence for that?**
 2 **A It required women to report for work at Women's Huron**
 3 **Valley. We identified. Put on a pass. Put in a**
 4 **vehicle. Transported out of Women's Huron Valley in a**
 5 **vehicle.**
 6 **Transported into Men's Huron Valley. Go into**
 7 **food service. Work the assignment. When the assignment**
 8 **was over, they had to be pat searched. They got in the**
 9 **vehicles. They went through the sallyport. They drove**
 10 **over to the women's facility. They went into the**
 11 **facility. They were strip searched and then they were**
 12 **allowed to go back to their assignment. It was very**
 13 **laborious.**
 14 **Q I guess I'm not following you. What does that have to do**
 15 **with -- I'm not saying it doesn't, but I'm not following.**
 16 **What does that have to do with a male working in food**
 17 **service?**
 18 **A The male can't perform that function.**
 19 **Q Right. But if there is -- it's staffed by two now,**
 20 **right?**
 21 **A At the time it was not. We had to bring in additional**
 22 **female staff to do the work.**
 23 **Q All right. But the suggestion isn't that there would be**
 24 **no females in food service. The suggestion is that there**
 25 **could be a male.**

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1 What did you do to research whether there
2 were -- If there was a male and a female in food service,
3 that this would interfere so much with the food service
4 operation that there is no reasonable alternative to
5 BFOQing the whole position?
6 **A I did no research.**
7 **Q All right.**
8 (Off the record from 11:25 to 11:26).
9 **MR. KENT-BRYANT: Back on the record.**
10 **Q (BY MR. KENT-BRYANT) Do you know who Ralph Goliday is,**
11 **if I'm pronouncing it right?**
12 **A Yes.**
13 **Q Am I pronouncing it right?**
14 **A Goliday, G-O-L-I-D-A-Y.**
15 **Q And who is he?**
16 **A He's a corrections officer who works at the facility.**
17 **Q Is he involved with the union also?**
18 **A No, he's not.**
19 **Q He's not. Okay. He's testified that you made a comment**
20 **to him on more than one occasion, "We are going to do**
21 **some things to motivate male correction officers to leave**
22 **the facility."**
23 **Did you make that statement to him?**
24 **A No, I did not.**
25 **Q Did you make a statement to that effect?**

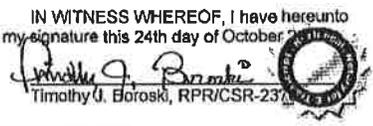
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1 **A No.**
2 **Q Did you -- I guess it's called an academy. Did you**
3 **attend an academy in Lansing for new officers in May 2012**
4 **of this year?**
5 **A I think so. I attend many. I can't tell you the exact**
6 **date of the last one I went to.**
7 **Q All right. And did you kind of give a speech or a talk?**
8 **Do you recall doing that?**
9 **A We talked to the class.**
10 **Q All right. Did you tell the class that it was "Our**
11 **intention to make Huron Valley Women's an all female**
12 **corrections facility"?**
13 **A No.**
14 **Q You're positive of that?**
15 **A Absolutely.**
16 **Q Now, Mr. Goliday also -- Officer Goliday testified that**
17 **Lucille Evans said, "We are doing some things to motivate**
18 **male corrections officers to leave."**
19 **Have you ever heard her say that?**
20 **A No, I have not.**
21 **Q Have you ever said that to her?**
22 **A No, I have not.**
23 **MR. KENT-BRYANT: It's probably a logical place**
24 **for today.**
25 **MS. MILLER: Okay.**

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1 **MR. KENT-BRYANT: I'm going to go into**
2 **depositions then.**
3 **MS. MILLER: Okay.**
4 **(Deposition adjourned at 11:30 a.m.)**
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1 CERTIFICATE OF NOTARY PUBLIC
2 DEPONENT: MILLICENT D. WARREN (STATE OF MICHIGAN)
3 RECORDED: October 16, 2012 (SS)
4 LOCATION: Ypsilanti, Michigan (COUNTY OF CLINTON)
5 Being a Notary Public duly
6 commissioned and qualified in and for the State of Michigan
7 at Large, I do hereby certify that pursuant to notice there
8 came before me the deponent herein, who was by me first duly
9 sworn to testify to the truth and nothing but the truth
10 touching and concerning the matters in controversy in this
11 cause.
12 Being thereupon carefully examined
13 under oath, said examination was recorded stenographically
14 and was later reduced to transcription under my supervision;
15 said transcription being a true record of the testimony
16 given by the witness.
17 I further certify that I am neither
18 attorney or counsel for, nor related to or employed by any
19 of the parties to the action in which this deposition was
20 taken; and further, I am not a relative or employee of any
21 attorney or counsel employed by the parties hereto or
22 financially interested in the action.
23 IN WITNESS WHEREOF, I have hereunto
24 subscribed my signature this 24th day of October 2012
25 
26 MY COMMISSION EXPIRES:
27 October 30, 2012

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW
CIVIL DIVISION

TOM NOWACKI, et al,

Plaintiffs,

Case No. 11-852-CD

-v-

HON. ARCHIE C. BROWN
VOL. 2

STATE OF MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant.

The Deposition of MILLICENT D. WARREN, taken
before Timothy J. Boroski, RPR/CSR-2378 and Notary Public in
and for the County of Clinton, State of Michigan, at the
Women's Huron Valley Correctional Facility, 3201 Bemis Road,
Ypsilanti, Michigan, on Tuesday, February 20, 2013, commencing
at or about 10:00 a.m.

APPEARANCES:

Law Office of Glen N. Lenhoff
BY: ROBERT D. KENT-BRYANT, ESQ., (P40806)
328 South Saginaw Street
8th Floor, North Building
Flint, Michigan 48502
810.235.5660

Co-Counsel appearing on behalf of plaintiffs,

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1 pronouncement and ensuring that staff are there only for
 2 a very brief period of time. Not going into the areas
 3 where someone is taking their clothes off, where someone
 4 is showering, someone is using the bathroom.
 5 Q All right. So a position will not necessarily be subject
 6 to BFOQ merely because a female prisoner might have the
 7 ability to expose themselves?
 8 A True.
 9 Q All right. And very picayune for the record, by expose
 10 themselves, we're talking about revealing what people
 11 normally consider private parts; posterior, genitals or
 12 breasts, true?
 13 A Yes.
 14 Q All right. Now, with regard to housing supervisors, and
 15 you listed a number of them, are they in a position to
 16 see women in a state of undress?
 17 MS. GROSSI: Calls for speculation.
 18 Q (BY MR. KENT-BRYANT) You can answer.
 19 A I believe any male person going into the unit could
 20 potentially see someone in a state of undress, or they
 21 could see them out in the yard in a state of undress. We
 22 have had prisoners strip clothes off and run in the yard
 23 outside.
 24 Q All right. That's contrary to regulations, though, of
 25 course, right?

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1 A Of course.
 2 Q But women are sometimes in a state of undress in the
 3 housing units, true?
 4 A Yes.
 5 MS. GROSSI: Same objection.
 6 Q (BY MR. KENT-BRYANT) I'm sorry?
 7 MS. GROSSI: I'm sorry to step on your answer.
 8 That's my fault.
 9 THE WITNESS: That's okay.
 10 MS. GROSSI: You have to repeat your answer.
 11 THE WITNESS: I'm sorry, say that again,
 12 please.
 13 Q (BY MR. KENT-BRYANT) Yes. But women are in certain
 14 circumstances allowed to be in a state of undress in the
 15 housing units, true?
 16 A Not without certain precaution, no.
 17 Q Well, in their cells they are allowed to be in a state of
 18 undress, true?
 19 A Yes. Changing clothes, for example. Changing out of
 20 clothing to get into a shower, for example.
 21 Q Correct. So, when you were saying except in certain
 22 circumstances, what were you referencing?
 23 A I'm not clear what you're asking.
 24 Q Right. You said that -- I asked the question, are women
 25 allowed to be in a state of undress in the housing unit.

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1 And I thought your testimony was except in certain
 2 circumstances, no. So I'm wondering what certain
 3 circumstances you were referencing?
 4 A Changing of their clothes. You know, if they need to
 5 change clothes. If they need to go to the bathroom.
 6 Those kinds of things. But there are rules that say you
 7 can't leave your room, even if you are in pajamas,
 8 without a robe on. You have to be covered leaving your
 9 housing cell, your cell, but -- they can't lay in bed
 10 naked. They have to cover up.
 11 Q Now, are there any other areas in the entire facility
 12 where, other than what you have listed, where women are
 13 permitted to be in a state of undress?
 14 A If I'm saying that they are in the state of undress in
 15 health care and in shakedown areas and in housing units,
 16 those would be areas that would be a reasonable
 17 expectation to find them in a state of undress.
 18 Q Okay. So health care areas, restrooms and housing units,
 19 but I take it in the housing units, that's subject to the
 20 restrictions that you have already testified to, correct?
 21 You mentioned --
 22 A Yes.
 23 Q All right. Since the prison has opened as a female only
 24 facility, have male corrections officers received any
 25 overtime?

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1 A Yes.
 2 Q In what capacity?
 3 A All assignments for which they are qualified.
 4 Q In other words, all of the assignments that are not BFOQ?
 5 A Correct.
 6 Q And they are not eligible for any overtime, obviously, in
 7 the assignments that are BFOQ, true?
 8 A Yes.
 9 Q And has it been true that, overall, female corrections
 10 officers, and I'll include in that resident unit officers
 11 and so forth, have received the majority of overtime that
 12 has been available overall?
 13 A We have a much larger number of female staff who work at
 14 the facility versus men. So, normally, they will have
 15 more overtime because there is more of them to receive
 16 overtime. And it's -- it's administered according to the
 17 union contract, the collective bargaining agreement,
 18 based on seniority and qualifications for an assignment.
 19 Q Have the women sometimes been, the female officers I'm
 20 talking about, required to clock mandatory overtime?
 21 A Yes.
 22 Q Have any of the male officers been required to clock
 23 mandatory overtime?
 24 A I honestly can't testify to that.
 25 Q Have you received, or become aware of, complaints on the

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1 part of the female officers concerning what they consider
 2 to be excessive overtime?
 3 **A Yes.**
 4 **Q** How many such complaints have you received,
 5 approximately?
 6 **A I can't put a number on it.**
 7 **Q** Are we talking about just a few? Are we talking about
 8 dozens? Are we talking about hundreds?
 9 **A The best way I can describe it is it is cyclical. In**
 10 **other words, when I have a greater number of vacancies,**
 11 **and there is less staff available who are status who can**
 12 **work overtime, the mandatory overtime goes up. When I'm**
 13 **able to fill vacancies, the mandatory overtime goes down.**
 14 **It also has --**
 15 **Q** Do they -- oh, go ahead.
 16 **A It also relates to how many staff are on a medical leave**
 17 **of absence and that I have to replace on shift based on**
 18 **an overtime. Because I can't replace them unless I have**
 19 **a vacancy.**
 20 **Q** Have you ever had an occasion where there was no one
 21 available to fill an assignment since you have been here?
 22 **A I can try to answer this as honestly as I can. All**
 23 **circumstances can't be assumed up that easily. We have**
 24 **the ability to close an assignment if we don't have**
 25 **adequate staff and there is no activity going on in that**

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1 area.
 2 **Q** What does close an assignment -- I'm sorry, just
 3 definitionally -- what do you mean by close an
 4 assignment?
 5 **A It means we're required to have X number of staff here to**
 6 **staff our assignments. If, for example, we have no**
 7 **activity, or the facility is on lockdown in a certain**
 8 **area, I could close the assignment because I don't need**
 9 **anyone in that area to provide custodial supervision.**
 10 **Say, for example, we have no heat or light in a**
 11 **program building. That building could be closed down,**
 12 **the assignment could be closed. That means there is no**
 13 **one that has to staff that assignment when the building**
 14 **is not accessible. So we do a close of an assignment.**
 15 **We also would potentially have people mandated.**
 16 **I mean, there are a minimum staff. So, to say, have you**
 17 **ever not staffed an assignment? Under an emergency,**
 18 **we're going to staff it with whoever we have. That's**
 19 **just running a prison.**
 20 **Q** I guess I don't totally understand the last part, under
 21 an emergency you're going to staff it with whoever you
 22 have. What are you referencing?
 23 **A Our policy is very clear. If we have an emergency**
 24 **situation, all staff are called in to respond. And we**
 25 **staff it with all responding staff.**

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1 **Q** All right.
 2 **A So, therefore, we could -- we will not close the facility**
 3 **and send everybody home because I don't have enough**
 4 **staff.**
 5 **Q** Now, you know, unfortunately, it looks like for some of
 6 these positions -- I'm going to go over position
 7 descriptions -- I don't have extra copies, so we'll have
 8 to share.
 9 **A Um-hum.**
 10 **Q** I apologize for that.
 11 (Exhibit Number 5 marked for identification by
 12 the reporter).
 13 **Q (BY MR. KENT-BRYANT)** All right. I want to show you
 14 what's marked as Exhibit 5. The 4 in the upper
 15 right-hand corner of the first page is my mark.
 16 Can you identify that document, please?
 17 **A State of Michigan, Department of Civil Service, Position**
 18 **Description.**
 19 **Q** For what position?
 20 **A This is for a corrections officer yard control officer.**
 21 **Q** And, essentially, what does a yard control officer do?
 22 **A They provide a safe environment, whether it be outdoors,**
 23 **in a living area, in a building. Essentially, it's an**
 24 **assignment that works out of doors. However, if there**
 25 **are no prisoners out of doors, they may be assigned**

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1 elsewhere to provide a safe and humane area for the
 2 safety and security of prisoners, staff and visitors.
 3 **Q** All right. They are not assigned to housing, true?
 4 **A They respond in emergency situations.**
 5 **Q** Other than that, they are not assigned to housing?
 6 **A Correct.**
 7 **Q** All right. And just to be clear, an emergency
 8 situation -- first of all, I guess we should define what
 9 you mean by an emergency situation.
 10 **A If there is a problem, and that could be defined from**
 11 **anywhere from a fight to a disturbance to a medical**
 12 **emergency, if there is a problem that staff need**
 13 **assistance for, they will call for assistance on the**
 14 **radio.**
 15 **And the supervisor in the area, which is like**
 16 **yard staff, a yard sergeant, would say, you know, A, B**
 17 **and C responding. So they respond to the emergency to**
 18 **act as backup, whether it is to control prisoner's**
 19 **behavior, to provide first aide, to escort people; those**
 20 **kinds of things. An emergency would require them to**
 21 **leave their assignment and report to another assignment**
 22 **in an emergency situation.**
 23 **Q** All right. And in responding to emergency situations,
 24 either male or female can be called upon to respond,
 25 true?

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1 A Yes.
 2 Q And that would be even in housing, true?
 3 A Yes.
 4 Q And I just want to make sure, it's been awhile since the
 5 first day of your deposition. This facility does not
 6 include intake, true?
 7 A Yes, it does.
 8 Q Oh, it does include intake. All right. It doesn't
 9 include segregation?
 10 A Yes, it does.
 11 Q Oh, it does. All right.
 12 A We have everything.
 13 Q Okay. Intake and segregation are BFOQ positions, true?
 14 A Yes.
 15 Q All right. Looking at Exhibit 4, first of all, do you
 16 know who drafted that document? Or Exhibit 5, I'm sorry.
 17 Looking at Exhibit 5, do you know who drafted that?
 18 A No, I do not.
 19 Q Take a look at it. Is it accurate? Is there anything
 20 there that is inaccurate?
 21 MS. GROSS: Are you asking, is it accurate as
 22 of today?
 23 MR. KENT-BRYANT: Sure.
 24 THE WITNESS: (Examining document). I tried to
 25 quickly scan it. But, no, I do not believe it's

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1 accurate.
 2 Q (BY MR. KENT-BRYANT) In what respect is it not accurate?
 3 A Should I go page by page?
 4 Q Just however is easiest to point out the inaccuracies.
 5 A Okay. Yard control officer is not exclusively a BFOQ
 6 designated position. In other words, there should be an
 7 assignment that mirrors this for men as well as for
 8 women.
 9 Q Okay.
 10 A So if I'm looking at specifically for BFOQ, and there is
 11 not a counter one, then I would say it doesn't cover all
 12 yard assignments.
 13 Q Okay.
 14 A All right. Specifically, if it's for female yard
 15 officers, there are some things that don't necessarily
 16 happen every day, but they could be related. But this is
 17 not -- It does not cover anything for people who are not
 18 qualified for BFOQ. In other words, we have yard control
 19 officers who are non-BFOQ and yard control officers who
 20 are BFOQ.
 21 Q Okay. All right. We'll talk about that in a moment.
 22 What other inaccuracies, if any, do you see in there?
 23 A Okay. If this is just for a BFOQ assignment?
 24 Q Sure.
 25 A Okay. Because it's two distinctions. I want to make

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1 that clear --
 2 Q All right.
 3 A -- that we have some that are BFOQ and some that are not.
 4 Q Right. I understand.
 5 A Okay. So if it's just BFOQ, the observes prisoners
 6 activities on Page 6, including changing of clothes.
 7 That may happen. I think 10 percent of the
 8 time is pretty generous. The only time I would expect a
 9 yard control officer to be in the housing unit performing
 10 that task would be if they were relieving an officer who
 11 is assigned to the housing unit for some particular
 12 reason.
 13 Q Okay.
 14 A All right. So on a daily basis, 10 percent seems a
 15 little bit high to me.
 16 Q So, in other words -- can I trade this back and forth
 17 with you a little bit?
 18 A Yes.
 19 Q So one of the individual tasks related to duty is
 20 "observes prisoner activities, including the changing of
 21 clothes." First of all, you're saying that that is
 22 something that happens infrequently, true?
 23 A Yes.
 24 Q And for a yard control officer, under what circumstance
 25 would that occur?

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1 A If for some reason the shift commander assigns a yard
 2 control officer to relieve a housing unit officer, then I
 3 could see that being a part of their function. But under
 4 duty Number 4, for this particular assignment --
 5 Q Oh, you've got a copy?
 6 A Yes.
 7 Q Okay, very good.
 8 A -- the individual tasks are more mirroring a housing unit
 9 officer's assignment more than a yard.
 10 Now, yes, they do ensure prisoners shower and
 11 maintain appropriate appearance. If I'm a yard officer
 12 and I see a regular -- on a daily basis, Prisoner Warren,
 13 and Prisoner Warren has an unkempt appearance, or is
 14 starting to smell, I'm going to say, you know, when was
 15 the last time you took a shower? You know, how are you
 16 feeling? One of those kinds of things. So, yes, they
 17 may observe that kind of state of poor hygiene.
 18 As far as the changing of the clothes, the
 19 toilet, keeping linens and clothing thoroughly clean,
 20 they might see their clothes are dirty when they are in
 21 the yard. But they wouldn't necessarily see that their
 22 linens are.
 23 Yes, if they have a porter assigned to them for
 24 some reason on the yard -- which generally doesn't
 25 happen, there are usually yard control officers will

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1 monitor ground maintenance people -- but they would
 2 ensure the porters are responsible for doing their job.
 3 And if they had an area that they were responsible for
 4 then, yes. If they were responsible for the yard shack,
 5 for example, they would be responsible for making sure
 6 that that is clean and it falls under that task.
 7 But most of these tasks are related to a
 8 housing unit assignment as opposed to a yard assignment.
 9 Q What is a yard check?
 10 A Yard shack, I'm sorry.
 11 Q Oh, yard shack?
 12 A Yeah.
 13 Q What is that?
 14 A It is best described as like a bus station.
 15 Q Okay.
 16 A A square kind of building that people can go into to get
 17 out of the elements. They have windows all around in
 18 ours. There probably is a chair in there. But there is
 19 no phone or anything else to that. It's just to allow
 20 you to observe the yard under inclement weather.
 21 Q With some shelter?
 22 A Yes.

23 Q So in terms of yard control officers, unless they are
 24 called upon to relieve another officer in a housing unit,
 25 for instance, there is no need for them to see female

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1 prisoners in a state of undress, true?
 2 A Correct.
 3 Q All right. So the BFOQ designation here is not
 4 necessarily inaccurate, but there are also yard control
 5 officer positions that are not BFOQ? Is that what you're
 6 saying?
 7 A Yes.
 8 Q And what is the split in terms of assignment?
 9 A It's half.
 10 Q Okay. And why is it half and half?
 11 A When I was first asked my opinion by CFA
 12 administration --
 13 Q And CFA stands for...?
 14 A Correctional facilities administration --
 15 Q Correctional facilities administration, okay. I gotcha.
 16 Go ahead.
 17 A The staffing chart that I was authorized for the facility
 18 had them all BFOQ as indicated in this.
 19 Q All right. And this is something you have referenced
 20 before I believe --
 21 A Yes.
 22 Q -- with Straub and Curtis; is that correct?
 23 A Yes.
 24 Q All right.
 25 A And I advocated too that the concern for providing a

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1 search in the times a search would have to be done for a
 2 prisoner on the yard, that if a male officer observed a
 3 situation in which it would require a search, they had
 4 the ability to call a female partner, for lack of a
 5 better term, to come over and conduct that search so that
 6 it was not essential to limit the yard control officers
 7 to only BFOQ assignments.
 8 Q Now, the yard control officers have the responsibility to
 9 perform, or assist in performing five pat-downs a day; is
 10 that true?
 11 A Yes. But the caveat says that they're exempt from that
 12 if they are male. There is no other best way for me to
 13 say that. Men are exempt from that.
 14 Q Is that documented?
 15 A I believe so. I can't tell you exactly where.
 16 Q And while we're talking about documents, you also
 17 mentioned earlier, or we were talking about overtime
 18 assignments. If we wanted to look over the last year or
 19 two to determine overtime assignments and who has
 20 received overtime assignments, what would we look for?
 21 Or, I mean, what would we order?
 22 A Could you say that again?

23 Q Yes, sure. I would like to determine the total amount of
 24 overtime that has been assigned particularly since this
 25 has become a female only facility, and the individuals to

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1 whom it has been assigned.
 2 What records would we look for to determine
 3 those issues?
 4 A Well, we track overtime by hours. I really would have to
 5 refer to the collective bargaining agreement how long we
 6 keep what is called overtime equalization lists.
 7 Q Okay.
 8 A There is a retention period, I'm sure, that would list
 9 names. I am not aware of the ability to track with any
 10 document overtime based on gender.
 11 Q Unless we -- now, just with people's names, do they have
 12 full names or --
 13 A I honestly don't manage that. I know there is a process.
 14 I don't know if they use initials or full names.
 15 Q Okay. But it's called an overtime equalization list?
 16 A Yes.
 17 Q All right. So you went to -- you mentioned with regard
 18 to Duty 4 that, on Exhibit 5, that there were a number of
 19 these that applied more to housing than to the yard
 20 control officer.
 21 Any other, what you consider, inaccuracies in
 22 Exhibit 5?
 23 A On Page 7 of that exhibit, under tasks related to general
 24 summary duty Number 5, it talks about assistance
 25 supervising urine drops. I'm not sure if that's 10

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1 percent of their time, very honestly. Depending on if
2 they're -- what type of urine drop. For example, if it's
3 an emergency, or like it's probable cause, it's generally
4 done at control center.

5 If it is a list we get for random drops, which
6 is slim to none anymore these days, it could be assigned
7 to anybody. But not necessarily yard staff unless it's
8 convenient for them to be assigned to it. So I'm not so
9 sure. I'm trying to be really accurate about the --

10 Q That's what I'm --

11 A -- the point there.

12 Q Okay.

13 A I don't believe under -- on Page 8, under Number 17, I
14 don't believe any of our yard staff would be required to
15 complete a security classification screen.

16 Q Under what number was that?

17 A Number 17 --

18 Q Okay.

19 A -- on Page 8.

20 Q All right.

21 A They do write misconducts. They may be in a position to
22 order supplies. They may set up schedules. Although, it
23 might not be a porter or laundry schedule. It might be
24 an on-grounds maintenance. I don't believe they would
25 have those kinds of assignments under them.

1 of the institution, they are in their housing units.

2 A supervisor may pull a yard officer, yard
3 control officer who is female and ask them to help with
4 the strip search to get the rest of the prisoners back
5 from their visits to their housing unit.

6 So, potentially, yes. But we do have someone
7 normally assigned to perform that function.

8 Q All right. And you're not aware of a yard control
9 officer ever having been called upon to do that?

10 A I don't have personal knowledge.

11 Q All right.

12 (Exhibit Number 6 marked for identification by
13 the reporter).

14 Q (BY MR. KENT-BRYANT) I want to show you what has been
15 marked as Exhibit 6 and first ask you to identify that.

16 A It is the State of Michigan, Department of Civil Service,
17 Position Description, specifically for the gate control
18 officer.

19 Q And, again, I'd like you to look through there to see if
20 you're able to identify any inaccuracies?

21 A (Examining document).

22 MS. GROSS: Was this Lucille Evans' dep Number
23 5 exhibit?

24 MR. KENT-BRYANT: That's probably where that
25 other number is coming from.

1 Q All right.

2 A And I believe the security classification, I don't
3 believe I have ever seen them complete one of those. So
4 I don't think that is accurate.

5 Q All right. Are you aware of a strip search ever being
6 generated out of the yard control officer position?

7 A Routinely, no, I don't believe. I believe because those
8 are supposed to be done in designated areas, they should
9 be done by the officer assigned to the area, which would
10 all be a BFOQ assignment.

11 Q Right. And just to be clear, so there is an officer --
12 we went over this the last time, I believe. But there
13 are officers assigned to visitors and so forth, or the
14 visiting area, and they have to perform strip searches of
15 the prisoners after a visitation, true?

16 A Correct.

17 Q And that's where the strip searches are usually
18 performed, true?

19 A The majority of them, yes.

20 Q Right. And are you aware of any time that a yard control
21 officer has ever had to perform a strip search?

22 A No particular incident comes to mind. However, it is
23 very -- it's possible that a yard officer be assigned --
24 I'm going to give you a theoretical. It's the end of the
25 day. It's -- 8:30 visits are done. And for the majority

1 MS. GROSS: I do have a copy in case you need
2 extra.

3 THE WITNESS: Do you want me to just look at
4 hers?

5 Q (BY MR. KENT-BRYANT) Why don't you begin by looking at
6 the one that is actually marked. I'm pretty sure she's
7 right. And then we can switch back and forth, or avoid
8 switching back and forth.

9 A (Examining document).

10 Q You have had a chance to review Exhibit 6?

11 A Yes.

12 Q Do you see anything inaccurate in there?

13 A I'll make two clarifications as I did in the last one.

14 Q Sure.

15 A This is specific to a BFOQ position for that area.
16 However, a male officer assigned to the bubble, or to the
17 information desk, or another non-BFOQ assignment, would
18 perform the same duties with regard to males.

19 So when I say that, to clarify, I'm talking
20 about male visitors, male staff. Because we have no male
21 prisoners. This assignment specific to the female
22 prisoners is done specifically by female staff.

23 Q All right.

24 A Also, female visitors and female staff -- females who are
25 visitors or staff can waive and allow a male to do that.

(Pages 119 to 122)

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1 **But if they do not, short of that waiver, a male officer**
 2 **has to perform the search of a male visitor, a male staff**
 3 **member on the assignment.**
 4 Q Okay.
 5 A **So, you know --**
 6 Q What you're talking about, though -- now, working --
 7 A **These duties are performed by men when it relates to a**
 8 **male staff volunteer or prisoner.**
 9 Q All right. The gate control officer position, however,
 10 is distinct from the bubble position and the information
 11 desk position; is that true?
 12 A Yes.
 13 Q All right. And a gate control officer is a BFOQ
 14 position, true?
 15 A Yes.
 16 Q Do you know who drafted that position description?
 17 A No.
 18 Q All right. Do you know when that position was declared
 19 BFOQ?
 20 A No.
 21 Q Do you know who was involved in the decision to make that
 22 a BFOQ position?
 23 A **Honestly, no. I -- I believed it to be longstanding.**
 24 Q Now, why is the gate control officer position a BFOQ
 25 position?

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1 A **Well, in particular here because of the female prisoner**
 2 **issue and the prisoners -- it's a potential for having**
 3 **your hands put on a prisoner, a female prisoner, to**
 4 **perform various types of searches.**
 5 Q What types of searches?
 6 A **Strip searches, clothed body searches, pat-down.**
 7 Q Is it typically the gate officer who performs the strip
 8 search of female prisoners who are receiving visitors?
 9 A **That would vary based on the availability of other staff.**
 10 Q So not always?
 11 A Correct.
 12 Q When would the gate officer be called upon to perform a
 13 strip search?
 14 A **If there wasn't a staff member available.**
 15 Q When is there not a staff member available?
 16 A **There could be a variety of situations. The supervisor**
 17 **has determined that the "shakedown officer" would be**
 18 **assigned to perform some other duty, maybe they are**
 19 **taking urine samples that day, and we have a visitor we**
 20 **have to process for a particular reason, then they may**
 21 **have to do that. So it -- It would be based on**
 22 **individual daily circumstances.**
 23 Q Okay. Typically, the shakedown officer is going to be
 24 the one that performs the strip search of the female
 25 prisoners after a visitation?

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1 A **That would probably be their primary duty.**
 2 Q Are you aware of specific occasions when the gate
 3 officer, or the gate control officer, has performed a
 4 strip search?
 5 A **I don't know particularly, no.**
 6 Q Now, the gate control officer has that five pat-down
 7 requirement; is that true?
 8 A **They have other requirements, because they do searching**
 9 **of staff. So there is additional requirements that they**
 10 **must do and --**
 11 Q All right. Do they have the five pat-down requirement,
 12 the requirement to pat-down five female prisoners?
 13 A **They would do that if there were five prisoners who would**
 14 **be traversing the gates. The gate is not an area where**
 15 **prisoners traverse without clear authorization.**
 16 Q Okay.
 17 A **So if I have two prisoners that are allowed to traverse**
 18 **the gate that day that are prisoners, then they could not**
 19 **possibly pat-down five.**
 20 Q All right. So is that requirement in general waived for
 21 that position?
 22 A **I don't think there is an official waiver, because**
 23 **normally there are that many prisoners. We have changed**
 24 **some of our practices. So, for example, we don't have**
 25 **visits seven days a week any longer. So there are two**

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1 **days of the week where it is not likely prisoners will be**
 2 **in the area to have that done.**
 3 **We do, however, have a number of what we call**
 4 **gate pass assigned prisoners who traverse the gates**
 5 **daily. Often it's more than two, up to five, it could be**
 6 **ten. So they do it based on the traffic in the gate that**
 7 **day. They don't have to go find somebody to do a search**
 8 **on to meet that criteria.**
 9 Q And what would cause female prisoners to be traversing
 10 that area?
 11 A **If they are being allowed out on a gate pass assignment,**
 12 **primarily.**
 13 Q Okay. And is that one of the reasons, in your opinion,
 14 that a position is BFOQ female only?
 15 A **I'm speaking from my experience. Every correctional**
 16 **facility in the state, if not the country, does their**
 17 **very best to assign a female to your gate and male in**
 18 **either the bubble or the information desk to perform a**
 19 **pat-down search of persons entering through their area of**
 20 **control who are the opposite sex.**
 21 Q All right. Is that a yes, that it's -- that this is one
 22 of the reasons --
 23 A Yes.
 24 Q -- that the position is BFOQ only?
 25 A Yes.

(Pages 123 to 126)

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1 A It was not identified as a BFOQ, but it is staffed. I
 2 recall it being staffed with a female on a regular basis.
 3 Q Female only?
 4 A Again, as I said, I don't believe there is a BFOQ
 5 anywhere else. I don't believe the assignment is
 6 identified as a BFOQ anywhere else.
 7 Q Right. Which means that it's formally designated female
 8 only. As a practical matter, if you know, when you were
 9 warden at Thumb Correctional Facility, was the gate
 10 control officer position staffed only by females?
 11 A I can't say exclusively, no.
 12 Q Okay. See if they are in the same order. This is going
 13 to be the gym control officer position.
 14 MS. GROSS: I just have gym officer.
 15 MR. KENT-BRYANT: Right. Okay. You're right.
 16 I'm wrong.
 17 (Exhibit Number 7 marked for identification by
 18 the reporter).
 19 Q (BY MR. KENT-BRYANT) I want to show you -- and you may
 20 be spotting a pattern here -- I'm going to show you what
 21 has been marked as Exhibit 7. I'll ask you to identify
 22 that and whether there are any inaccuracies in that
 23 particular document.
 24 A This document is a State of Michigan, Department of Civil
 25 Service Position Description for the position of gym

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1 officer. (Examining document). Okay.
 2 Q Are there any inaccuracies in the job description?
 3 A Yes.
 4 Q What would that be?
 5 A On Page 5, Number 15.
 6 Q Okay. You can -- she can look at that.
 7 A (Handing document).
 8 Q Thank you.
 9 A Duty 1, individual tasks related to the duty, conduct
 10 shakedowns and searches of female prisoners including
 11 strip searches. Strip searches would not be performed in
 12 that gym area. However, they would do shakedowns and
 13 searches of prisoners. They may be asked to do a strip
 14 search in the areas that strip search are performed, but
 15 not on that assignment.
 16 I'm not sure what it means by saying completes
 17 reclass reports for job lists. It seems like it's an
 18 incomplete sentence and I don't know what it refers to.
 19 On Page 6, under Duty 23, ensures prisoners
 20 shower and maintain appropriate appearance. Yes, to the
 21 point that if they look disheveled and smell, that would
 22 be an indication that they are not maintaining proper
 23 hygiene.
 24 However, there are no showers in the building
 25 to observe. And they don't -- I don't believe they

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1 change clothes there at all. There are bathroom
 2 facilities there. They do have porters, so they do have
 3 to do all of that. But there was no showers that I know
 4 of that are in place in the gymnasium.
 5 On the same page, under Duty 4, assist in
 6 prisoners security screen reports. And assist obtaining
 7 information for PER reports. That seems a bit of a
 8 stretch that --
 9 Q What is a PER report?
 10 A A parole eligibility report.
 11 Q Okay.
 12 A It would be typically done in a housing unit. However,
 13 they could be called upon to -- by a housing supervisor
 14 to have input as to how they behave in the gymnasium.
 15 And, again, I think it's much of a stretch.
 16 On Page 7, under duty, Number 5, again, we find
 17 that assists in supervising urine drops. Urine drops are
 18 not taken in that building unless it's a mass number and
 19 that's designated as an area for some particular
 20 emergency reason they would be taken. But that would not
 21 be a duty unless that assignment was a closed and the
 22 supervisor had no one else to perform that duty.
 23 Yes, I believe everything else is fairly
 24 accurate.
 25 Q All right. With regard to Exhibit 7, do you know who

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1 drafted this?
 2 A I thought we were on 6?
 3 MS. GROSS: Don't mind this. This is Number
 4 7.
 5 Q (BY MR. KENT-BRYANT) I'm sorry. (Indicating).
 6 A Oh, yes, I'm sorry. No, I do not.
 7 Q Do you know when this position was BFOQ'd?
 8 A No.
 9 Q Do you know who was involved in the decision to BFOQ it?
 10 A Relating back to previous testimony, when it was
 11 determined that this would be the female facility, a
 12 staffing chart, which is the authorized assignments by
 13 the deputy director of correctional facilities
 14 administration makes that determination. At that time it
 15 was designated that. By whom, it would have been by
 16 the -- the authority in that would have been Dennis
 17 Straub.
 18 Q All right. And why is this position BFOQ?
 19 A Again, in that area prisoners are subject to searches of
 20 their persons and property. And the officer, custodial
 21 officer assigned would be called upon to do that. As
 22 well as potentially observing them in a state of undress
 23 while they are using the restroom.
 24 Q Okay. And when you're talking about the searches, you're
 25 talking about pat-down searches, true?

(Pages 131 to 134)

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1 **A Yes. Clothed body searches, yes.**
 2 **Q** And why -- there is a procedure that we have gone over
 3 for men to perform their five pat-down requirement. You
 4 recall that, true?
 5 **A Yes.**
 6 **Q** All right. Why would a male assigned to the gym officer
 7 position not be able to make use of that process?
 8 **A** In that area in particular there are several items that
 9 could be considered dangerous if used without direct
 10 supervision by prisoners. So, potentially, they could
 11 secret them. There would be a reason for them to obtain
 12 or secret that contraband on their person, which would
 13 require a custodial officer to perform a thorough search
 14 of the prisoner to ensure those items do not leave the
 15 area of his or her control.
 16 **Q** And why would a male officer called upon to do that not
 17 be able to seek the assistance of a female officer?
 18 **A** In most cases, it's a single officer assignment.
 19 **Q** Are there other officers readily available to assist in
 20 those sorts of situations?
 21 **A** Not in the building.
 22 **Q** Now, officers in the facility commonly call each other
 23 for assistance with a number of matters, correct?
 24 **A** Yes.
 25 **Q** And why -- well, first of all, you went back -- or you

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1 testified that there are a number of items potentially
 2 dangerous that could be secreted. What items in the gym
 3 area are you referencing?
 4 **A** They have weight equipment, for example, that are free
 5 weights, for example. They have musical instruments.
 6 They have baseball bats, baseballs, basket balls. Other
 7 kinds of physical fitness equipment; ropes, those kinds
 8 of items.
 9 There are generally a large number of prisoners
 10 in that area. And so when you're trying to search them,
 11 you need to be able to perform that duty sometimes
 12 without the assistance of someone else. Because they are
 13 leaving that area to traverse the yard. In other words,
 14 they have to leave that area and go back to where they
 15 are allowed to be. And the officer that is supervising
 16 that area may not be available to come and assist in that
 17 search.
 18 **Q** All right. And the secreting of items from the gym area,
 19 are you aware of how frequently that actually occurs?
 20 **A** No, I can't say. No.
 21 **Q** Is there any source of information for how frequently
 22 that occurs?
 23 **A** I don't believe so.
 24 **Q** Have you ever spoken to any of the officers from the gym
 25 area concerning how frequently that occurs?

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1 **A** No.
 2 **Q** Now, was this a position, if you know, that before this
 3 became a female only facility was sometimes staffed by
 4 male officers?
 5 **A** I don't know.
 6 **Q** Do you know whether before this BFOQ, or this position
 7 was declared BFOQ, whether there was, by anyone, any
 8 effort to speak to the officers that actually had this
 9 assignment for how frequently this secreting of items
 10 occurred?
 11 **A** No, I do not.
 12 **Q** The -- now, if this is -- and let me rephrase this just a
 13 little bit. I mean, there may be items that are secreted
 14 that are undetected. But I'm talking about situations
 15 where it's been detected, or at least suspected that
 16 someone has been secreting an item and then requiring a
 17 search.
 18 If this occurred, let's say, just once a year,
 19 just hypothetically, that would not be a major
 20 inconvenience for a male officer, true? If just,
 21 hypothetically, if a male officer held that position?
 22 **MS. GROSSI:** I'm going to object. Calls for
 23 speculation.
 24 **THE WITNESS:** It would be unusual that
 25 prisoners in the area do not take the opportunity to do

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1 inappropriate things in that area, including hiding
 2 things like that.
 3 **Q** (BY MR. KENT-BRYANT) But my question is, you have cited
 4 really the idea of having to search the prisoners for
 5 secreted items as a reason for the BFOQ. But the extent
 6 to which that's a major problem or a minor problem really
 7 depends on how frequently it occurs, doesn't it?
 8 **A** There could be non-dangerous contraband found on a
 9 regular basis that is not reported.
 10 **Q** That's not my question, though. As to whether it's a
 11 major problem or a minor problem depends on how
 12 frequently it actually occurs, true?
 13 **A** Yes.
 14 **Q** And you also mentioned that there is a restroom in the
 15 gym area where women are in a state of undress, true?
 16 **A** Yes.
 17 **Q** And you're talking about actually using the facilities?
 18 **A** Yes.
 19 **Q** All right. In the gym area, that's not a place where --
 20 that restroom area is not a place where the women are
 21 supposed to be changing clothes, correct?
 22 **A** Not that I'm aware of, no.
 23 **Q** It's a facility where you use the toilet?
 24 **A** Yes.
 25 **Q** All right. And the people using the toilet, are there

(Pages 135 to 138)

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1 stalls, are they protected in there from being able to be
 2 seen by others that are in that facility, the bathroom
 3 facility?
 4 **A The bathroom in the gymnasium is in an area that has**
 5 **windows that open to the gymnasium. Very large windows.**
 6 **Ten -- from the ceiling down to waist area, perhaps, that**
 7 **look right into the area where you can visually see the**
 8 **sinks and a short partition in which somebody walks in.**
 9 **You see the head and you see the feet. If they are**
 10 **seated, you don't necessarily see the head.**
 11 **I do not know if they have doors that close on**
 12 **the front of there, but there is simply a very short**
 13 **partition.**
 14 **Q All right. But they are designed to -- I mean, you can't**
 15 **look from the gymnasium into the bathroom and see**
 16 **people -- see any of the people's private areas while**
 17 **they are using the restroom, true?**
 18 **A No.**
 19 **Q All right. And is there any reason why, if a male**
 20 **officer needed to access the bathroom in an emergency,**
 21 **that the knock and announce policy couldn't be used?**
 22 **A No.**
 23 **Q Are you aware of male officers having been assigned to**
 24 **this gym facility or other gym facilities where the**
 25 **prisoners have been female at all at any point?**

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1 **A I don't know.**
 2 **Q Do you know if anyone spoke to any male officers who had**
 3 **the assignment of gym officers involving female prisoners**
 4 **before this position was BFOQ'd?**
 5 **A I do not know.**
 6 **Q So women who are in the gym, and really even outside of**
 7 **the stalls, are not supposed to be in a state of undress**
 8 **in the gym, true?**
 9 **A Correct.**
 10 **Q And, typically, if the need arose to perform a strip**
 11 **search arising out of the gym area, that would be**
 12 **performed in one of the designated rooms on any of the**
 13 **east or west administration buildings, true?**
 14 **A Right, correct.**
 15 **Q Now, in male facilities where you have been a warden,**
 16 **have there been similar gym facilities?**
 17 **A Yes.**
 18 **Q And have those gym officer positions been BFOQ male only?**
 19 **A No.**
 20 **Q Why not?**
 21 **A I don't know that any of the assignments in facilities**
 22 **where I was warden were specifically identified BFOQ or**
 23 **not.**
 24 **Q All right. And when you were at the Thumb, was there a**
 25 **gym?**

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1 **A Yes.**
 2 **Q And that was not a BFOQ only position -- women BFOQ**
 3 **female -- or male only position?**
 4 **A This is the first facility that I have worked at, that I**
 5 **know of, BFOQ in that definition exists.**
 6 **Q Okay. My question is, though, say, for instance, at the**
 7 **Thumb, I understand that it never was BFOQ, but why**
 8 **wasn't it BFOQ male only?**
 9 **A I don't know.**
 10 **Q All right.**
 11 **MR. KENT-BRYANT: All right. Let's mark this**
 12 **8.**
 13 **(Exhibit Number 8 marked for identification by**
 14 **the reporter).**
 15 **Q (BY MR. KENT-BRYANT) Just for safety's sake, I'm going**
 16 **to give you Exhibit 8 and ask you to look specifically at**
 17 **the version of it that is marked. And, again, ask you to**
 18 **identify what Exhibit 8 is and tell me if you find any**
 19 **inaccuracies. (Handing document).**
 20 **A (Examining document). The document is a State of**
 21 **Michigan, Department of Civil Service, position**
 22 **description for the specific assignment of electronic**
 23 **monitor officer.**
 24 **Q Okay.**
 25 **MR. KENT-BRYANT: Counsel, is that just a**

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1 collection of the Lucille Evans' --
 2 **MS. GROSS: These are all the --**
 3 **MR. KENT-BRYANT: -- exhibits?**
 4 **MS. GROSS: Yes, these are all the exhibits**
 5 **used at the Lucille Evans deposition.**
 6 **MR. KENT-BRYANT: Would you mind if I --**
 7 **MS. GROSS: No.**
 8 **MR. KENT-BRYANT: -- I just went in the same**
 9 **order, if possible. See if we're -- while she's looking.**
 10 **A (Examining document).**
 11 **MR. KENT-BRYANT: Okay. I might make reference**
 12 **to them, because there is a couple of things I want to**
 13 **skip here.**
 14 **MS. GROSS: Okay.**
 15 **Q (BY MR. KENT-BRYANT) Are there any inaccuracies in**
 16 **Exhibit 8?**
 17 **A The best way I can answer that is to say, understanding**
 18 **their task is to monitor electronic equipment, for**
 19 **example, on Page 5, under duty Number 2, it states,**
 20 **"Monitor prisoner porters to ensure they complete job**
 21 **duties."**
 22 **Prisoner porters do not work in control center.**
 23 **They are not allowed in there. However, technically, an**
 24 **officer could observe a prisoner doing that duty using a**
 25 **camera by observing them anywhere in the facility doing**

(Pages 139 to 142)

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1 that job.
 2 Q Okay.
 3 A So it doesn't say that specifically, but I'm trying to be
 4 as --
 5 Q Okay.
 6 A -- honest as I can be.
 7 The rest of it is, again, based on what they
 8 observe in the assignment, which is really inside a very
 9 closed restricted area in which you don't have prisoner
 10 contact in that assignment. So to write misconducts is
 11 based on what you observe on the camera, for example, not
 12 something you are -- directly have seen like we are
 13 seeing one another. All of those duties would be based
 14 on their ability to observe the activity on the area in
 15 front of them.
 16 Q So what are you referencing with regard to the job
 17 description and inaccuracies?
 18 A What I'm saying is it says a general duty doesn't
 19 specifically say using the security monitoring equipment
 20 available. It just says ensures prisoners compliance
 21 with department policy, rules and regulations. And says
 22 monitor prisoners activity and behavior.
 23 Q All right.
 24 A Most people would consider that being a direct
 25 observation. There is no direct observation of the

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1 officer on that assignment.
 2 Q Okay.
 3 A Okay?
 4 Q I understand that.
 5 A Otherwise, I would say it is one of the more accurate
 6 position descriptions you have shown me thus far.
 7 Q All right. And in regard to Exhibit 8, do you know who
 8 drafted that?
 9 A No, I do not.
 10 Q Do you know when this position was BFOQ'd?
 11 A I know that it was on the staffing chart that I was
 12 authorized to administer here.
 13 Q Do you know if, prior to that time, if was a BFOQ female
 14 only position?
 15 A No, I do not.
 16 Q All right. And this is BFOQ female only on all shifts,
 17 true?
 18 A Correct.
 19 Q And, again, would it have been Straub and Curtis who
 20 would have been involved in the BFOQ decision for this
 21 position?
 22 A Yes.
 23 Q And why is this position BFOQ?
 24 A This particular position has access to all facilities
 25 cameras that report back to control center. So they have

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1 the potential of seeing a prisoner in a state of undress
 2 on a regular basis.
 3 Q Under what circumstances will the electronic monitor
 4 officer see a prisoner in a state of undress?
 5 MS. GROSSI: I'm going to object. Calls for
 6 speculation.
 7 Q (BY MR. KENT-BRYANT) You can answer.
 8 A The positioning of the camera allows for viewing of
 9 prisoners going into particular areas. A prisoner who
 10 would remove their clothing going into a shower area.
 11 Certainly, any emergency situation.
 12 Q Okay. So any other examples of situations where the
 13 electronic monitor officer would see a prisoner in a
 14 state of undress?
 15 MS. GROSSI: Same objection.
 16 THE WITNESS: This is speculation. But,
 17 potentially, if the prisoner willfully put themselves in
 18 that position.
 19 Q (BY MR. KENT-BRYAN) All right. I mean, that
 20 particular -- yes, it was responsive to my question and I
 21 appreciate that. That can occur on any position, true?
 22 A Correct.
 23 Q And the emergency situations that you're referencing,
 24 what are you thinking of there?
 25 A The same situation.

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1 Q Okay. Now, the cameras that the electronic monitor
 2 officer would be viewing, they do not focus on the inside
 3 of prisoner cells, true?
 4 A There are some that do, yes.
 5 Q In which situations?
 6 A We have a number of cells that have cameras installed for
 7 the purpose of direct observation.
 8 Q What are those?
 9 A They are specifically identified cells that would be what
 10 we refer to as stripped of any items that could be used
 11 to harm themselves. Primarily, it's just a bed and a
 12 mattress without any other implements of self-harm
 13 available to a prisoner. There are times when the
 14 prisoner clearly is in a state of undress.
 15 Q In these particular cells you're talking about?
 16 A Yes. Yes.
 17 Q It has not -- it's not uncommon for them even to be in
 18 their own cell and be under direct observation to have
 19 removed their clothing, taken off their suicide
 20 protection gown. Checking their restraints, you know, is
 21 very frequent.
 22 And also observing them using the bathroom
 23 where there is a toilet involved. In most of those cells
 24 there is a toilet. And you do observe all of that on
 25 those cameras.

(Pages 143 to 146)

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1 Q And in the shower areas, the -- where are the cameras --
 2 you mentioned that the cameras see women undressing
 3 getting into the shower. Are they focused on the shower
 4 areas?
 5 A They are not -- they are --
 6 Q By focused, I mean pointed at. Not --
 7 A Right. They should be looking at the entrances to those
 8 areas. The way in which some of them are designed I
 9 guess is the best way to -- constructed.
 10 Q Which, the showers or the cameras?
 11 A The showers. The cameras I can point wherever. But you
 12 can pick up areas that -- you know, they can be in a
 13 state of undress. It's -- the showers, I mean, we use
 14 every space we can get. So the shower might be right up
 15 against the wall. And even though you're looking at who
 16 goes in there, you may be capturing part of that
 17 entranceway to the shower.
 18 Q Do you know, as you sit here today, whether it actually
 19 does?
 20 A I don't look at all the cameras. There is 1,400 cameras.
 21 I --
 22 Q But my question is, as you sit here today --
 23 A Not purposefully. The best way I can describe it, I have
 24 instructed the cameras to be placed so that we can
 25 determine who goes in a particular area and with whom,

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1 but not necessarily what is going on in that area.
 2 Q All right.
 3 A So...
 4 Q I guess the question stands, though, as you sit here
 5 today, do you know whether the cameras in the -- or in or
 6 near the shower area, actually do capture prisoners in a
 7 state of undress?
 8 A I can't answer that.
 9 Q All right.
 10 A I'm sorry.
 11 Q Have any electronic monitor officers told you that the
 12 cameras in and around the shower area see women in a
 13 state of undress?
 14 A No.
 15 Q Now, are the shower areas and the restroom areas, are
 16 they the same areas or different areas?
 17 A It depends on the housing unit.
 18 Q All right. So is there any problems with the cameras
 19 seeing women in restroom areas in a state of undress?
 20 A (No audible response).
 21 Q And by restroom areas, I mean restroom areas as distinct
 22 from the shower areas. I assumed before when you were
 23 talking about shower areas, that if those included
 24 restroom facilities, they were included in your prior
 25 answers.

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1 A For example, in those observation cells I mentioned,
 2 there are --
 3 Q Restroom facilities in there you mentioned.
 4 A Yeah. To help explain, there is wet cells. Wet cells
 5 have a toilet and a sink in them.
 6 Q Right.
 7 A Okay. Otherwise, there is a general bathroom area where
 8 there is stalls.
 9 Q Right.
 10 A And then adjacent to that is generally a shower. So that
 11 they would be in the same proximity, but not necessarily
 12 next to each other. I'm thinking, because every -- there
 13 are so many buildings around here with different setups
 14 or configurations of their bathrooms.
 15 A Dickinson, I don't know if you can see into that area. I
 16 believe all the toilets are in stalls, except for in the
 17 housing unit.
 18 Q All right. All right. So I just want to make sure I
 19 understand. So in answer to the questions, do any of the
 20 cameras in and around the restroom areas show women in a
 21 state of undress? Is the answer yes, no, or I don't
 22 know?
 23 A I'm going to have to say no.
 24 Q Okay. Now, the electronic monitor position, that's not a
 25 position that has a strip search requirement, is it?

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1 A No, not normally.
 2 Q Now, do you know if when this facility, before it became
 3 female only and there were men and women in different
 4 areas, do you know with regard to anywhere where females
 5 might reside whether male corrections officers ever were
 6 assigned to the electronic monitor officer position?
 7 A I do not know.
 8 Q Do you know if, before this position was designated BFOQ,
 9 whether any men or women were spoken to who had been
 10 electronic monitor officers in this facility?
 11 A I have no idea.
 12 Q Now, the electronic monitor position in male prisons,
 13 that's not a BFOQ male only position, true?
 14 A True.
 15 Q In the Thumb where you were warden, why wasn't that a
 16 BFOQ male only position?
 17 A I believe I have testified to this in the past. My
 18 experience with BFOQ assignments were specifically
 19 related to the female facilities.
 20 Q Okay.
 21 A When that became an acronym that was used in the
 22 department and it applied specifically to the female
 23 facilities, I don't recall any of my positions, whether
 24 they would normally or as a practice were staffed with
 25 females, were ever designated as BFOQ only. Maybe that

(Pages 147 to 150)

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1 occurred unbeknownst to me, but...

2 Q Well, so, at the Thumb, though, could people in the

3 electronic monitor positions view the prisoners in a

4 state of undress?

5 A I recall I believe one set of cameras, I can't recall the

6 housing unit now in particular, and because it did, we

7 put -- it had to have been our close custody unit.

8 Because it had some security mesh over them and we put

9 some material to block it from view.

10 So if you were looking at the camera, the

11 camera was in the shower area. That you wouldn't be

12 standing there looking at a naked person showering. But

13 I -- it's been so long, I can't tell you what housing

14 unit it was. It seems like -- I mean, we didn't have --

15 Q So you're not sure?

16 A -- the number of cameras. Yeah, I can't tell you the

17 number of cameras, but...

18 Q So, and my question was, at the Thumb, could the

19 electronic monitor officer see prisoners in a state of

20 undress? It sounds like, as you sit here today, you

21 don't know?

22 A No, I don't.

23 Q All right.

24 A Potential, yes.

25 Q All right. With that potential existing, why was that

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1 not a BFOQ only position? I understand that -- well, let

2 me withdraw that question.

3 Did you, when you were at the Thumb

4 Correctional Facility, know that you could suggest that

5 positions be male only positions?

6 A I don't remember that ever being a topic of discussion.

7 Q Were you aware before you came to this facility that

8 positions -- well, let me ask you this. Strike that.

9 When did you first become aware that a position

10 within the Department of Corrections could be declared a

11 BFOQ position?

12 A The first recollection -- you know, I -- the first

13 recollection I have of BFOQ was having a discussion with

14 Sue Davis, who was a warden. I don't know where she was

15 a warden at the time. But when she started working for

16 the department, she always worked with women. She never

17 worked at a men's facility.

18 And my first introduction to BFOQ was her

19 discussion about the position of, I believe, the

20 department, to remove men from assignments within areas

21 where they can -- where their primary duties were to

22 conduct searches of prisoners, whether it be strip

23 searches or pat searches.

24 Q When was that? When did that --

25 A I can't say the year.

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1 Q You were aware of the litigation that the department was

2 involved in concerning, you know, that was brought by

3 female prisoners, weren't you?

4 A Yes, very peripherally. It -- I don't know how to say

5 this, but the women's issues were very minor compared

6 to -- because of the size of the population, were very

7 minor overall to department. And so the majority of our

8 effort and energy has always gone to male facilities. So

9 while we would be on the periphery of what was going on,

10 it wasn't something we were directly affected by.

11 Q All right.

12 MR. KENT-BRYANT: Let's go ahead and mark that.

13 (Exhibit Number 9 marked for identification by

14 the reporter).

15 Q (BY MR. KENT-BRYANT) I want to show you what has been

16 marked as Exhibit 9. The same drill. I'll ask you to

17 identify it and then look through it and tell me whether

18 you see any inaccuracies.

19 A (Examining document). Yes, I'm ready.

20 Q All right. Do you see any inaccuracy in there?

21 A In general, yes. Again, on Page 5, under Duty 1, it

22 speaks of, "Conducts shakedowns and searches of female

23 prisoners, including strip searches." I don't believe a

24 strip search has ever been assigned in that area.

25 Q The health care infirmary officer?

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1 A Correct.

2 Q All right.

3 A Now, I'm on Page 6.

4 Q Okay.

5 A While under Number 3 there are those things that could

6 occur, they don't necessarily monitor -- they monitor the

7 prisoner going into an exam room. They are generally not

8 there when the prisoner changes clothes or is put in an

9 exam gown or anything like that. Potentially, yes.

10 Linens and clothing, potentially -- we don't

11 use any linens over there. It's pretty much all

12 disposable stuff so it's thrown out.

13 Job duties, yes. Dressing or undressing, that

14 would -- they would not be called upon to do it. Nursing

15 staff would be called upon to do that.

16 Assist in obtaining information from the parole

17 eligibility report. Only as it's assigned -- only as

18 they are assigned to the infirmary; not the health care

19 assignment. These are both combined.

20 And, again, on Page 7, under duty Number 5,

21 assist in room assignment, bed changes. That would only

22 apply to the infirmary, not to the health care

23 assignment. They don't have anything like that. That's

24 it.

25 Q All right. And this is a BFOQ only position -- or a BFOQ

(Pages 151 to 154)

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1 female only position, true?
 2 **A Yes.**
 3 **Q** And what is the reason for that?
 4 **A Because the officer is interchanged with the infirmary**
 5 **officer, switched out with the infirmary officer. And**
 6 **the infirmary is considered like a housing unit.**
 7 **Probably even more so because the prisoners are confined**
 8 **to the bed.**
 9 **Q** Under what circumstances are they interchanged with the
 10 infirmary officer position?
 11 **A I understand they can be assigned to provide lunch**
 12 **reliefs where there may be additional movement in and**
 13 **out. Maybe they have to pack up a cell and they need to**
 14 **be in the unit while that duty is performed.**
 15 **Q** All right. And so they may be switched with the
 16 infirmary officer position you're saying?
 17 **A Correct.**
 18 **Q** And how often does that occur?
 19 **A I would only speculate. I don't know if they -- the**
 20 **clinic itself is very busy, except for during count**
 21 **times.**
 22 **Q** So the -- and if someone had to be switched with an
 23 infirmary officer, what is it that an infirmary officer
 24 does that would require a BFOQ?
 25 **A The infirmary is considered a housing unit.**

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1 **Q** Okay.
 2 **A And so there are bedrooms, beds. They are confined to**
 3 **their bed for the most part.**
 4 **There are -- one shower in particular is really**
 5 **well opened up because of an infirm prisoner. If they**
 6 **have to do searches, you might see the prisoner in a**
 7 **state of undress on a regular basis.**
 8 **Q** Let me ask you this:
 9 Has the health care officer position always
 10 been, since you have been here, interchanged with the
 11 infirmary officer position?
 12 **A I believe so.**
 13 **Q** Well, if someone, I'm not saying who, testified that
 14 that's a relatively recent development, would you have
 15 any reason to dispute that?
 16 **A I'm -- I don't understand your question.**
 17 **Q** Well, I think there will be testimony in this case that
 18 the health care officer only recently interchanges with
 19 the infirmary officer. And before that that was not the
 20 case.
 21 Would you have any reason to dispute that?
 22 **A I don't have any knowledge of that.**
 23 **Q** All right. One way or the other?
 24 **A No.**
 25 **Q** You have to answer verbally.

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1 **A No.**
 2 **Q** If the health care officer did not have to interchange
 3 with the infirmary officer, would there be any reason for
 4 that position to be BFOQ?
 5 **MS. GROSSI:** I'm going to object. Calls for
 6 speculation.
 7 **THE WITNESS:** I believe it could be safely
 8 managed with certain accommodations.
 9 **Q (BY MR. KENT-BRYANT)** By a male officer?
 10 **A Yes.**
 11 **Q** All right. What sort of accommodations are you thinking
 12 of?
 13 **A** It really applies, again, to the knock and announce.
 14 **Q** Okay.
 15 **A** For example, the officer podium for that station with the
 16 phone and everything else is right at the door. And so
 17 they process prisoners in. But they leave that
 18 assignment quite frequently.
 19 **Q** Who does? Which --
 20 **A** The officer.
 21 **Q** The health care?
 22 **A** The health care officer.
 23 **Q** Okay.
 24 **A** And the area is, I'm going to describe it as a U-shaped
 25 hallway where doorways are open -- I mean, every time I

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1 round over there they never close doors it seems. You
 2 know, they may pull a curtain if they have a curtain.
 3 But there are nurses in the offices, doctors going back
 4 and forth. They are doing blood draws. It's a typical
 5 clinic.
 6 And so they would have to be announcing that,
 7 you know, male in the area every time they came around.
 8 And often the women are -- they have to remove clothing
 9 in order for a medical procedure to occur.
 10 **Q** That's in the infirmary area?
 11 **A** No, that's also in the -- this is like a regular -- the
 12 health care officer the best way I can describe is like a
 13 regular doctor's office. For example, the male medical
 14 providers cannot be in one of those rooms without a
 15 female medical provider there. So, in other words, if
 16 there is a male doctor, he cannot perform an exam or be
 17 in that room without the female nurse being present.
 18 So the same concept would play out that --
 19 because the officer is right there in that area, there
 20 would have to be some way to let the prisoner know it's
 21 not the doctor coming around. It is a male officer
 22 coming around and making checks.
 23 **Q** All right.
 24 **A** That's the best way I can put you there.
 25 **Q** And so the accommodation you made would be essentially

(Pages 155 to 158)

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1 the same as the doctor/nurse situation is what you're
 2 saying?
 3 **A Yes, I mean, continually announcing knock and announce --**
 4 **Q Okay.**
 5 **A -- male in the area. Because they should be rounding on**
 6 **an infrequent, at least every half hour basis, of the**
 7 **entire area.**
 8 **Q All right. And in this position there should not be a**
 9 **strip search requirement I think you already said, true?**
 10 **A That is correct.**
 11 **Q And you're unaware of any history of a health care**
 12 **officer having to perform a strip search, true?**
 13 **A That's correct.**
 14 **Q And maybe you just explained this. In terms of a**
 15 **pat-down requirement within health care, is that not**
 16 **applicable to that situation?**
 17 **A I'm not sure if you're paying attention to me. You're**
 18 **reading so --**
 19 **Q I'm listening. I'm multi-tasking. Just go ahead.**
 20 **A Okay. All right. I believe the question was the**
 21 **pat-search requirement?**
 22 **Q Right.**
 23 **A I believe they still have to perform the required number**
 24 **for that assignment. I believe, just with routine work**
 25 **there, they do more than five.**

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1 **Q All right.**
 2 **A I believe prisoners are routinely pat searched before**
 3 **they go into a medical procedure. And certainly**
 4 **afterwards it would be prudent to do so because they**
 5 **would be around medical equipment that could be used.**
 6 **Q And male officers would perform, if they were in the**
 7 **health care position, could perform that pat-down**
 8 **consistent with the procedure from the facility's**
 9 **procedure manual that we went over the last time, true?**
 10 **A No, a male could not be exempt in that assignment. There**
 11 **is many critical tools, to include syringes and those**
 12 **kinds of things that --**
 13 **Q Let me just interrupt you. The procedure I'm referring**
 14 **to, then we can get it out, but it's the one we looked at**
 15 **last time where males weren't exempt. It's a situation**
 16 **where males and females collaborate and the men can frisk**
 17 **the outer clothing that is removed and women would**
 18 **perform the actual pat-down. Do you recall that**
 19 **procedure?**
 20 **A Yes.**
 21 **Q All right. And that could be performed in the health**
 22 **care infirmary -- or health care officer position, true?**
 23 **A I would disagree.**
 24 **Q Why?**
 25 **A It would be very inefficient.**

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1 **Q Why?**
 2 **A The majority of prisoners who are seen in health care**
 3 **have -- should be pat searched upon leaving that --**
 4 **leaving that assignment.**
 5 **Q Can that be performed by the infirmary officer?**
 6 **A They are in two separate locations altogether.**
 7 **Q Which wasn't my question, though. Could it be performed**
 8 **by the infirmary officer?**
 9 **A There would have to be someone that relieves the**
 10 **infirmary officer, it has to be staffed with an officer**
 11 **all the time, before relieving them to come in and do a**
 12 **search of everyone coming out as they come in and out of**
 13 **the office.**
 14 **Q Is it true that, in the infirmary area, that the medical**
 15 **staff always closes the door during an exam of a**
 16 **prisoner?**
 17 **MS. GROSSI: I'm going to object. Calls for**
 18 **speculation.**
 19 **THE WITNESS: I can't testify --**
 20 **Q (BY MR. KENT-BRYANT) One way or the other?**
 21 **A -- one way or the other.**
 22 **Q All right. And, again, I understand the background**
 23 **information that you have given me, but when you were**
 24 **warden at the Thumb, the health care officer could be**
 25 **female, true?**

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1 **A Yes.**
 2 **Q All right. Do you know whether Exhibit 9 has been**
 3 **amended at any time since you have been warden?**
 4 **A No, I do not.**
 5 **Q All right.**
 6 **MR. KENT-BRYANT: What do you have as your next**
 7 **one?**
 8 **MS. GROSSI: I have industries officer.**
 9 **MR. KENT-BRYANT: Okay. Mark this as 10.**
 10 **(Exhibit Number 10 marked for identification by**
 11 **the reporter).**
 12 **Q (BY MR. KENT-BRYANT) All right. My question to you**
 13 **again is, first, can you identify what has been marked as**
 14 **Exhibit 10 and tell me any inaccuracies you see in it, if**
 15 **there are any?**
 16 **A This is the State of Michigan, Department of Civil**
 17 **Service, position description for the assignment of**
 18 **industries officer. (Examining document). Okay.**
 19 **Q What inaccuracies, if any, do you see in there?**
 20 **A Page 6, under 16, duty Number 1, conducts shakedowns and**
 21 **searches of female prisoners; correct. including strip**
 22 **searches; incorrect.**
 23 **Again, curious to me, is the "Complete reclass**
 24 **reports for job lists."**
 25 **Q Okay.**

(Pages 159 to 162)

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1 A I'm not sure what that means.
 2 Q Not sure that's a complete sentence. All right.
 3 A Yeah, another cut and paste it looks like. Page 6, under
 4 duty Number 3, again, assists in prisoner security screen
 5 reports. I do not believe that is --
 6 Q Okay.
 7 A -- a responsibility.
 8 On Page 7, under Duty 6, I do not believe they
 9 would assist in the supervision of large group
 10 activities.
 11 Q Okay.
 12 A It seems to be totally out of place. Everything else
 13 appears to be accurate.
 14 Q All right. And I assume you don't know who specifically
 15 drafted Exhibit 10, true?
 16 A That is correct.
 17 Q However, the fact that it's designated as BFOQ female
 18 only, that would have been a decision that Curtis and
 19 Straub made?
 20 A At some point, yes.
 21 Q And why is industries officer a BFOQ female only
 22 position?
 23 A I believe the industries officer position was also in
 24 place at Scott Correctional Facility.
 25 Q Okay.

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1 A The industries brought here was really totally under
 2 development and never did result in what they told me it
 3 was going to be. It was supposed to be prisoners making
 4 uniforms for prisoner -- for prisoners, female prisoners.
 5 So an area was designed where they would change their
 6 clothing from what we considered to be blues, uniform
 7 prisoner uniform, into a jump suit.
 8 Q Okay.
 9 A And we even fashioned a change area for that purpose.
 10 They would be searched, in particular everyone leaving
 11 the assignment because the nature of the assignment,
 12 which it still does use sewing machines, which has
 13 needles and thread which are huge contraband items,
 14 dangerous contraband inside a facility, as well as a
 15 number of other kinds of tools that they need to maintain
 16 the machinery in there.
 17 Q How many people are in there at a time?
 18 A There are two functions. Let me finish.
 19 Q I'm sorry.
 20 A One is a sewing operations.
 21 Q Um-hum.
 22 A And the other one is an operation that makes dentures for
 23 all prisoners throughout the State of Michigan. So they
 24 have a finite number of prisoners that are assigned in
 25 there. In other words, they only have so many work

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1 stations and I believe they have no more than 20
 2 prisoners who are working on dentures. And they do them
 3 for the entire State of Michigan.
 4 So there is lots of tools in there. There are
 5 molds. There are scrapers. There is -- I can't go into
 6 the whole process. It's unbelievable the number of
 7 tools.
 8 They work in an area separate from where they
 9 do the sewing. The sewing numbers never reached the
 10 potential they had told me. I think we may have 30 that
 11 are assigned in there at any given time. So between the
 12 two areas, 50 to 60 prisoners. The officer --
 13 Q Is that at once or is that --
 14 A Um-hum, yes.
 15 Q -- total?
 16 A Yes, at once.
 17 Q Okay.
 18 A In total between both of the factories.
 19 Q Right.
 20 A The officer is responsible for both operations, making
 21 rounds and, you know, completing the pat searches, the
 22 searches of prisoners. The bathroom are -- they are open
 23 in that they are a bathroom facility with what I call a
 24 cafe door. It's a half door so you can see a head and
 25 feet when you're standing. And you can only see the feet

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1 when you're seated on the commode. That's in the
 2 officer's area to monitor.
 3 I think I covered most of the essential
 4 assignments. All of the prisoners assigned in there are
 5 female, obviously. And the custodial responsibility is
 6 on the industries officer.
 7 Q Are the females, are all the females searched every day
 8 upon leaving?
 9 A I don't believe the requirement is to search every
 10 prisoners. I believe it's a random search. The reason I
 11 say that is it -- when we're random, we are less
 12 predictable. So, therefore, you don't know if you're
 13 going to be subject to search. So the risk becomes
 14 greater. I might be caught or I might not be caught in a
 15 search situation.
 16 Q Okay. So it's a random -- do you know how many searches
 17 are performed per day by the industry officer?
 18 A No, I do not.
 19 Q Are you aware if, whether yourself or anyone else, has
 20 have ever spoken to industry officers concerning how many
 21 searches are performed per day?
 22 A Not on that topic, no.
 23 Q All right. Are you aware of any strip searches being
 24 generated from the industries area?
 25 A No.

(Pages 163 to 166)

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1 Q Now, the industry officer has the same five searches --
 2 pat-downs per day requirement?
 3 **A I need to clarify. We need to be talking had the**
 4 **requirement, yes. We no longer have that assignment.**
 5 Q The five pat-downs per day?
 6 **A The industries officer assignment --**
 7 Q Oh, no longer --
 8 **A -- has been eliminated --**
 9 Q Oh, okay.
 10 **A -- from the department. So at the time, yes.**
 11 Q Well, is the industries area still functioning?
 12 **A Yes.**
 13 Q And what is the name of the position of the person that
 14 supervises that area?
 15 **A It is part of the duties of the yard staff.**
 16 Q Okay. Why was that position eliminated?
 17 **A It was eliminated by Deputy Director Treacher as an**
 18 **efficiency measure.**
 19 Q So is there someone in the industries area at all times?
 20 **A Yes.**
 21 Q All right. By someone, I mean an officer, of course.
 22 **A No.**
 23 Q No, there is not? So at times the prisoners, there is no
 24 one inside the building supervising them?
 25 **A There are no officers inside the building supervising**

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1 **them.**
 2 Q Who is supervising them?
 3 **A In the one area, their technical position is called an**
 4 **industry supervisor.**
 5 Q Okay.
 6 **A It's a general term for a work supervisor depending on**
 7 **the factory they are running.**
 8 Q Okay.
 9 **A One happens to be Mr. Burris who is the supervisor of the**
 10 **dental lab operation. And the other one is Amy Sabo who**
 11 **is an industry supervisor for MSI. And she is --**
 12 Q MSI?
 13 **A Michigan State Industries.**
 14 Q Okay.
 15 **A They run the factories.**
 16 Q All right. Are they Department of Corrections officers?
 17 **A They are not officers.**
 18 Q Okay. Are they Department of Corrections employees?
 19 **A Yes.**
 20 Q Do they perform searches?
 21 **A No.**
 22 Q So what happens if they detect someone secreting a tool
 23 or a needle or something of that sort?
 24 **A They call for assistance.**
 25 Q And to whom do they call for assistance?

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1 **A Control center.**
 2 Q And control center does what with that call for
 3 assistance?
 4 **A Depending on the circumstance, the control center will**
 5 **dispatch someone. The yard sergeant could send the yard**
 6 **officer who -- the yard officer now has duties to make**
 7 **rounds, custodial rounds in the area. They also have to**
 8 **search prisoners leaving the area at the end of their**
 9 **shifts.**
 10 Q Leaving the industries area?
 11 **A Yeah.**
 12 Q Okay. I'm sorry, I interrupted you.
 13 **A The industries, if you can imagine, it's like a normal**
 14 **job. It's a factory job. So you start at a certain**
 15 **time. They eat on their assignment. They stay in the**
 16 **building the whole time. And then they leave at the end**
 17 **of the day.**
 18 **So we can -- we can put somebody there to**
 19 **supervise who comes in the building. And once they are**
 20 **in the building, they secure the building. And then they**
 21 **leave and go do their other assignment and come in and**
 22 **make rounds. And then at the end of the shift, when**
 23 **everyone is done working for the day, they search the**
 24 **prisoners before they leave the building and then go back**
 25 **to their other duties.**

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1 Q All right. And randomly search the prisoners?
 2 **A I believe it's random.**
 3 Q All right. Has the -- have there been any problems
 4 involving prisoners secreting -- well, strike that.
 5 Strike that.
 6 **So the procedure, if there is an issue with**
 7 **prisoners secreting items, is that Mr. Burris or Ms. Sabo**
 8 **is supposed to call the control center, true?**
 9 **A Yes.**
 10 Q Has that happened?
 11 **A I don't know. The change happened within the last six**
 12 **months perhaps. Seems like a shorter period of time. So**
 13 **I don't know.**
 14 Q And there haven't been any problems reported to you
 15 concerning that procedure, true?
 16 **A You would have to define problem.**
 17 Q Well, I'll define it broadly and maybe I'll even say
 18 issue. Have there been any issues/problems reported to
 19 you concerning that procedure?
 20 **A I have received staff complaints about the failure to**
 21 **have custody staff in the area.**
 22 Q What have been the nature of those complaints?
 23 **A It's a change from what we have always done. And they**
 24 **feel that they aren't officers.**
 25 Q That Mr. Burris and Ms. Sabo aren't officers?

(Pages 167 to 170)

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1 R-O-V-E-R, officer. (Examining document). This
 2 assignment is specific to the midnight shift only --
 3 Q Okay.
 4 A -- according to this document. You all set?
 5 Q No. This is one we're going to have to share. This is
 6 the rover position for, it appears to me, to be for the
 7 a.m. and p.m. shifts as well. So why don't we go
 8 ahead and -- well, we'll have to share, because it's
 9 my -- this one is my only copy. It hasn't been
 10 previously mark.
 11 (Exhibit Number 12 marked for identification by
 12 the reporter).
 13 Q (BY MR. KENT-BRYANT) Why don't we have you go through 11
 14 first with the inaccuracies before we move onto Exhibit
 15 12.
 16 A Okay. Page 5, under 15, Duty 1, again, I find that
 17 language I have trouble with: "Completes reclass reports
 18 for job lists."
 19 Q Okay, go ahead. I understand your comments on that.
 20 A And then going to Page 7, under Duty 5, assists in
 21 supervision of large group activities outside the housing
 22 unit, such as meals, movies, special entertainment, et
 23 cetera. That would not occur on the midnight shift.
 24 Q Okay.
 25 A The other duties that are identified in here could occur

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1 on the midnight shift as assigned. Many typically would
 2 not be as that is an inactive shift and prisoners are
 3 primarily asleep during that time.
 4 Q All right. Generally, what does a rover do?
 5 A On the midnight shift, they will provide relief to
 6 officers assigned to various positions throughout the
 7 facility.
 8 Q All right. Let me show you Exhibit 12. And if you could
 9 identify that and also find any inaccuracies in that
 10 particular exhibit.
 11 A Very quickly, but in the interest of time, I find that
 12 there are some inconsistencies. I'm sorry, did you want
 13 me to go through the description, what we're looking at?
 14 Q Yeah, any inconsistencies. Are there any different than
 15 the ones you identified in Exhibit 11?
 16 A Yes. On Page 6, I believe, under Duty 3, it talks about
 17 assists in prisoner security screen reports; not really a
 18 responsibility of the rover. Could potentially obtain
 19 information for the parole eligibility report; not
 20 likely.
 21 The rest of the duties generally could be
 22 applied.
 23 Q All right. And both the -- well, all three shifts of
 24 rover are BFOQ, true?
 25 A Correct.

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1 Q And what is the reason for that?
 2 A The potential assignment for them to work in a housing
 3 unit where prisoners are often found in a state of
 4 undress, to perform their duties, relieving the officer
 5 normally assigned.
 6 Q How often do they relieve housing officers, or officers
 7 that work in housing?
 8 A To be honest it depends on the circumstance. They could
 9 be sent in to provide a bathroom relief. They could be
 10 sent in to provide a half hour meal relief. And because
 11 we have one on "each side of the unit", often they could
 12 be in there for an hour performing those duties. It
 13 depends on how long the need is for them to relieve the
 14 normally assigned officer on that position.
 15 Q How -- I'm sorry. How many rovers are there on each
 16 shift?
 17 A Without looking at my staffing chart, I can't tell you.
 18 Q More than one?
 19 A Yes.
 20 Q Are there more on one shift than another?
 21 A I believe so.
 22 Q Are the days shifts more -- are there more rovers than
 23 there are on the midnight shifts?
 24 A On our active shifts, which would be both days and
 25 afternoons.

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1 Q Okay. Right. Okay. So the reason it is BFOQ is that
 2 the rover may have to relieve someone in housing. Are
 3 there any positions that the rover does not provide
 4 relief for?
 5 A They could be called upon to provide relief for any
 6 assignment that is not supervisory.
 7 Q Have there been any efforts to balance the staffing of
 8 the rover so that females would be available to cover
 9 housing assignments or, you know, covering any sort of
 10 relief in housing, while the males could cover
 11 non-housing, non-BFOQ assignments?
 12 A To the extent possible.
 13 Q In each of these, and I'm talking about Exhibits 11 and
 14 12, they say that the rover is a BFOQ position. Is it?
 15 I mean, are men staffed on rover ever?
 16 A I don't believe they are precluded, but I would have to
 17 look at the chart to say for sure. I believe it's BFOQ.
 18 Q So they are precluded? I mean, this is a BFOQ position
 19 or it's not about a BFOQ position?
 20 A I believe it is. However, we could have a male, for
 21 example, that is assigned to relieve those that don't
 22 require a female to relieve them. I'm sorry, that was
 23 awkward.
 24 Q Well, the rover is an actual assignment, correct, that --
 25 you know, someone comes to work today and they are going

(Pages 175 to 178)

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1 to be the rover --
 2 **A Correct.**
 3 **Q -- for today, right?**
 4 Are any of those assignments given to males?
 5 **A Yes.**
 6 **Q Even though the position is BFOQ?**
 7 **A I can give you an example that recently happened.**
 8 **Q Okay.**
 9 **A Our programs building is normally closed. The programs**
 10 **deputy was working and required to have the maintenance**
 11 **of the floors to be an issue. Which she had to supervise**
 12 **with a custodial officer that happened to be a male.**
 13 **So although males don't normally work in the**
 14 **programs building because they have to do pat searches,**
 15 **she was there to perform that duty if it needed to be**
 16 **done so he could perform custodial responsibilities.**
 17 **So can it? Yes, I just gave you an example of**
 18 **how it could be. Rovers could be assigned to relieve**
 19 **your bubble officer and it doesn't require a woman or a**
 20 **female to work in the bubble to relieve that officer.**
 21 **Q Well, I'm asking the opposite, though. Maybe we're**
 22 **confusing one another.**
 23 **So when the assignment sheets are made up for a**
 24 **week or so forth, are men ever assigned to rover, to be**
 25 **the rover officer?**

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1 **A I believe I just said yes.**
 2 **Q Did you? All right. So in that particular circumstance,**
 3 **it was determined that you wouldn't need a female to be**
 4 **the rover for that particular circumstance; is that how**
 5 **it worked?**
 6 **A I believe it can be likened to the situation where we**
 7 **identified half of the assignments for the yard to be**
 8 **BFOQ and half of the assignment non-BFOQ. I believe the**
 9 **same principal applies to rover.**
 10 **Q All right. So, my understanding, and I guess I didn't**
 11 **see it there in what we received, but my understanding is**
 12 **there would be a yard control position description that**
 13 **is not BFOQ in addition to one that is BFOQ; is that**
 14 **correct?**
 15 **A That's correct.**
 16 **Q And that's the same for rover?**
 17 **A I believe so.**
 18 **Q If you know, is it half and half the way the yard control**
 19 **officer position is?**
 20 **A Honestly, I can't say. Sorry. The term rover and yard**
 21 **control has been interchanged with each other over the**
 22 **years for reasons beyond me. So I don't know what it**
 23 **currently looks like.**
 24 **Q Okay. Currently, is the rover position assigned**
 25 **approximately 50/50 males and females?**

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1 **A I believe so.**
 2 **Q All right. And, currently, as far as you know, there are**
 3 **both yard control officers and rover officers?**
 4 **A Yes. To understand the operation, we could have**
 5 **activities on the yard. In other words, prisoners on any**
 6 **given shift traversing the yard. So I need a yard**
 7 **officer out there.**
 8 **Q Right.**
 9 **A Additionally, it may be Officer Dine. So the rover may**
 10 **have to be assigned in the, you know, in the housing unit**
 11 **to relieve the officer. So both could be performing**
 12 **different but similar functions.**
 13 **Q All right.**
 14 **A Okay.**
 15 **MR. KENT-BRYANT: What are we on, 13, now?**
 16 **(Exhibit Number 13 marked for identification by**
 17 **the reporter).**
 18 **Q (BY MR. KENT-BRYANT) I want to show you what has been**
 19 **marked as Exhibit 13. And if you could identify the**
 20 **document and then, again, find any inaccuracies in the**
 21 **job description if there are any.**
 22 **A This is a State of Michigan, Department of Civil Service**
 23 **position description. I don't know if we can save a**
 24 **whole lot of time. But this was -- this is not a**
 25 **position that works at this facility.**

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1 **Q Has it ever been?**
 2 **A No.**
 3 **Q Okay.**
 4 **A This is a different classification altogether. We don't**
 5 **staff any corrections medical aides at this facility.**
 6 **I'm only aware of one facility in the state in which we**
 7 **do that.**
 8 **Q Okay. That probably does save some time.**
 9 **Going back to the rover position real briefly,**
 10 **that's not a position that requires that the officers**
 11 **perform strip searches, true?**
 12 **A Under normal circumstances, no. They could be called**
 13 **upon to do it clearly, but not in the assignment. They**
 14 **were relieving someone in the housing unit. We don't**
 15 **perform strip searches in the housing unit.**
 16 **MR. KENT-BRYANT: Mark this as 14.**
 17 **(Exhibit Number 14 marked for identification by**
 18 **the reporter).**
 19 **Q (BY MR. KENT-BRYANT) I want to show you what has been**
 20 **marked as Exhibit 14, if you could identify that and,**
 21 **again, determine any inaccuracies that are in the**
 22 **position description.**
 23 **A This is a State of Michigan, Department of Civil Service,**
 24 **position description for the assignment of property room**
 25 **officer. (Examining document). All right. Ready?**

(Pages 179 to 182)

Page 183

1 Q Yes.

2 A Okay. On Page 5, under 15, under general summary of

3 duties, it speaks on the responsibility to conduct strip

4 searches of female prisoners. I don't believe that is a

5 function of that assignment.

6 "Completes reclass reports for job lists."

7 Again, I don't know what that means.

8 Q Right.

9 A Page 6, Duty 4, they may observe changing of clothes if

10 it's a size-related issue. Probably more so shoes than

11 items of clothing.

12 There is not a toilet in the facility -- in the

13 area. And that I believe is all of it.

14 Q All right. And, once again, with regard -- well, what

15 does a property room officer do?

16 A Their primary function is to ensure the safety of all

17 incoming property to prevent the introduction of escape

18 materials or contraband to the prisoners.

19 Q Okay.

20 A They are also involved fairly intimately in the ordering

21 process of items for prisoners. I don't believe they do

22 any measuring. However, with women's clothing in

23 particular, items come in sized. So there may be a need

24 to try on an item. A shirt is too small. It has to go

25 back. So rather than have it leave that area, the

Page 184

1 officer then takes the product and returns it to the

2 manufacturer or the store or whatever the prisoner

3 purchased it from.

4 It's an isolated assignment. Prisoners come

5 over there on a pass or a call-out to pick up property.

6 They could be over there for a period of time by

7 themselves. So we call it an isolated assignment. They

8 shakedown prisoner property. This is essentially the

9 assignment.

10 They do clerical kinds of duties from the

11 standpoint of they maintain property cards so we have an

12 idea of what goes in and what comes out. Some property

13 is controlled by quantity. So if, for example, they say

14 Prisoner Warren already has two pairs of shoes. They are

15 only allowed two pairs of shoes. So you have to give me

16 the other pair of shoes in order for me to give you that

17 pair of shoes.

18 So it has to be an exchange process in some of

19 that. So that's where it comes into some of the

20 changing of the clothing. Essentially, that's what they

21 do.

22 Q And it's designated as a BFOQ female only position, true?

23 A Yes.

24 Q Why?

25 A Well, I believe part of it is it's an isolated

Page 185

1 assignment. And male officers are prohibited from being

2 in an area one-on-one with a female prisoner.

3 Q Prohibited by whom?

4 A I understand that's part of the department's policy.

5 Q Do you know where I could find that policy?

6 A Female prisoners cannot be -- I mean, if they are

7 under -- if they are working with a male, there generally

8 has to be two prisoners. If we are transporting a female

9 prisoner, the transport officer has to be at least one

10 male and one female.

11 It's for privacy rights and to minimize the

12 risk of abuse.

13 Q My question, though, was it sounds like you're saying

14 there is a general policy somewhere that male corrections

15 officers cannot be isolated with the female prisoners.

16 I haven't seen that in my research, but that doesn't mean

17 it's not there. Can you point me in the direction?

18 A I can't tell you the document.

19 Q Okay.

20 A I know that --

21 Q Is there a document?

22 A I can't tell you that. I know in practice we do not put

23 a male staff member in that position routinely.

24 Q Okay. Any other reasons that it's a BFOQ position?

25 A Could be information that I'm not privy to.

Page 186

1 Q All right. There is not a strip search requirement for

2 the position, true?

3 A True.

4 Q Is there a pat-down requirement for the position?

5 A They could be called upon to do a pat search.

6 Q Do they have that five pat-down per day requirement?

7 A I don't know.

8 Q Okay. Under what circumstances would they be required to

9 to do a pat-down?

10 A If there is any reason to believe the prisoner has

11 something they shouldn't have.

12 Q All right. Which is part of the pat-down policy

13 regardless of position, true?

14 A Yes.

15 Q So a yard control officer would have that same pat-down

16 responsibility, right?

17 A Yes.

18 Q Have you become aware of any situation in which the

19 property officer needed to do a pat-down that actually

20 occurred?

21 A One doesn't come to mind in particular.

22 Q All right. Do you know how common it is that the

23 property room officer has to perform a pat-down?

24 A No.

25 Q In terms of seeing women in a state of undress, the

(Pages 183 to 186)

Page 187

1 property room officer shouldn't have to see women in a
 2 state of undress, true?
 3 **A I don't think so.**
 4 **Q All right. Did you have a -- you must have had a**
 5 **property room at the Thumb?**
 6 **A Yes.**
 7 **Q And that was a position that could be staffed either by**
 8 **males or females, true?**
 9 **A Yes.**
 10 **MR. KENT-BRYANT: Mark this as 15.**
 11 **(Exhibit Number 15 marked for identification by**
 12 **the reporter).**
 13 **Q (BY MR. KENT-BRYANT) All right. I'm going to show you**
 14 **what has been marked as Exhibit 15. Again, I would ask**
 15 **you to identify it and then leaf through it to identify**
 16 **any inaccuracies.**
 17 **A Department of Corrections -- I'm sorry, State of**
 18 **Michigan, Department of Civil Service, position**
 19 **description for the assignment of school officer.**
 20 **(Examining document). Okay.**
 21 **Q Inaccuracies?**
 22 **A Page 5, under Duty 15 -- or Item 15, duty Number 1,**
 23 **speaks on performing strip searches. They are not**
 24 **performed -- they do not perform strip searches in the**
 25 **school building routinely; only in emergencies. And**

Page 188

1 that's under a situational incident.
 2 "Completes reclass reports for job lists." I'm
 3 not clear on what that means.
 4 **Q Right.**
 5 **A Page 6, Duty 4, speaks on observes female prisoners**
 6 **changing clothes. The potential is there. Given the**
 7 **vocational programming that goes on in the building, there**
 8 **may be a need for them to change soiled clothes. But,**
 9 **generally, it's not out in the open.**
 10 **On duty Number 5, Page 7, speaks on the**
 11 **assisting supervising urine drops; generally not.**
 12 **Generally does not occur in that area. That would be it.**
 13 **Q All right. And why is this position BFOQ?**
 14 **A Again, there is a requirement to perform searches of**
 15 **prisoners' persons, pat-down searches -- which men are**
 16 **prohibited from doing by policy -- when they leave the**
 17 **school building and leave the classrooms.**
 18 **Q How many school officers are assigned at a time?**
 19 **A I'm going to say two.**
 20 **Q Is this another position where one can be male and one**
 21 **can be female or do they both need to be female?**
 22 **A They both are female. One works specifically in the**
 23 **vocational education area. It contains the largest tool**
 24 **crib, which contains the most critical, dangerous tools**
 25 **that are stored inside the facility.**

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1 **And the other one works in the school building**
 2 **proper where primarily classroom activity goes on. But**
 3 **there is other kinds of things that occur in the**
 4 **building; primarily, classroom.**
 5 **Q All right. I think you already said there is not a strip**
 6 **search requirement and, generally speaking, there is no**
 7 **reason to be seeing the women in a state of undress in**
 8 **this school officer position, true?**
 9 **A True.**
 10 **Q Now, the searches, are you aware that at times in the**
 11 **past, even when the school was servicing females, that**
 12 **male officers also were school officers before it got**
 13 **BFOQ'd?**
 14 **A Well, I don't know. I mean, it was always supposed to be**
 15 **BFOQ from my knowledge. I understand there was a male**
 16 **assigned there. And I pointed to the staffing chart that**
 17 **required it to be a BFOQ. So when I was aware of it, you**
 18 **know, I instructed staff to follow the staffing chart**
 19 **that identified it as being a BFOQ assignment.**
 20 **Q All right. Did you ever speak to any of the male or**
 21 **female school officers concerning whether the search**
 22 **requirement had ever caused any sort of problem?**
 23 **A No, I have never had a conversation.**
 24 **Q Do you have any evidence that there were any sorts of**
 25 **problems concerning the search requirement when the**

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1 position was being staffed by males and females?
 2 **A None was brought to my attention.**
 3 **Q So is the reason that you made sure that it was female**
 4 **only strictly because it was designated BFOQ?**
 5 **A Strictly because the assignment requires the custodial**
 6 **officer to perform a search of the prisoner to ensure**
 7 **there is no contraband leaving the area. Whether it be**
 8 **school books, whether it be screws, wrenches, hammers,**
 9 **drills; all those items.**
 10 **And so the officer would have to put --**
 11 **physically put his hands on the prisoner's body to do**
 12 **that search. That is a requirement under the BFOQ for a**
 13 **female to have that assignment.**
 14 **Q Now, is that one that was done to every inmate using the**
 15 **facility or is that a random search?**
 16 **A It should be random coming out of the school building**
 17 **proper. Out of the trades area, it should be all of**
 18 **them.**
 19 **Q And is that written down anywhere?**
 20 **A It may be in their post order. I don't know.**
 21 **Q Why from the trade area should it be all of them?**
 22 **A To familiarize you with the operation, we run a buildings**
 23 **trade, which means they run a wood shop. They have**
 24 **glues. They have hammers. They have drills. They have**
 25 **screw drivers. They have saws. They have a multiple**

(Pages 187 to 190)

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1 critical tools that I don't want find in anybody's back
 2 or being used as a weapon. So they should be searched
 3 whenever they are assigned over there. Auto mechanics
 4 has even more of those kinds of tools.
 5 Q How is this different than the Industries area?
 6 A Industries is a -- you know, the machines are fixed and
 7 what they are primarily getting are needles. While a
 8 needle can cause damage by poking you and spread disease,
 9 it's kind of ugly what happens when a wrench comes up
 10 somebody's head.
 11 Q Are there -- other than needles, are there any other
 12 tools or dangerous implements in the Industries area?
 13 A I believe all of the scissors are rounded off, except for
 14 when they have to do the large cutting. And that's done
 15 by the employees of the state --
 16 Q Okay.
 17 A -- not the prisoners.
 18 Q Other than the scissors, anything else?
 19 A The sewing machine operation itself. I mean, they have
 20 other things that are required to fix it. So if the
 21 industry supervisor has to fix a sewing machine, that's
 22 behind a caged area and is accounted for. But it's not
 23 used by prisoners.
 24 Q And what about in the dentures area? Are there awls or
 25 screw drivers or --

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1 A Not screw drivers. There are other kind of implements.
 2 I don't know what you call them. And they are handed
 3 out. They are controlled that way.
 4 Q In the schools area, why would, if one of the officers
 5 were female, why wouldn't she be able to perform the
 6 required searches? I'm listening.
 7 A From an operational stand, the facility operates on a
 8 schedule. So at the time the school is being released
 9 and the prisoners are subject to search, that's the same
 10 time that that activity is going on in the trades area.
 11 So I have the need to provide that search
 12 whether it be random or on every body coming out of there
 13 at identically the same time. So I can't be relieved by
 14 the other officer because they are already doing that
 15 duty on their assignment.
 16 Q So it has to be at identically the same time for what
 17 reason? I guess I --
 18 A Schedule. That's when class let's out.
 19 Q What would be the reason that it couldn't be staggered by
 20 a few minutes?
 21 A Because we're a 24/7 operation and we run by the minute
 22 on our schedule. And so count time, mealtime, school
 23 time, starting and ending, traversing the yard, it's very
 24 much controlled by a schedule.
 25 All of the teachers arrive at one time.

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1 Classes begin at one time. Classes end at a time.
 2 Buildings close at a time. Prisoners are released from
 3 those. The only exception to that is if somebody calls
 4 in sick and then we don't have that assignment.
 5 Q When there was a male and female in the school, how was
 6 it done, the searching?
 7 A I don't know.
 8 Q With regard to the implements in the school, like
 9 hammers, drills, those sorts of things, do the prisoners
 10 have to turn in their ID before they receive the tools?
 11 A They should.
 12 Q Are they required to?
 13 A Because I'm responsible for holding discipline at this
 14 facility, no, they are not always required to.
 15 Q In other words, sometimes -- what you're saying is
 16 sometimes the policy that they must turn in their ID is
 17 violated; is that what you're saying?
 18 A Right.
 19 Q How often does that happen?
 20 A I can't put a number on it.
 21 Q Fair to say, though, that the prisoners are required by
 22 policy to turn in their ID before they receive a tool,
 23 true?
 24 A Staff are required by policy to ensure prisoners that are
 25 assigned a tool are identified. Sometimes you have to

Page 194

1 turn in your ID. Sometimes an ID is kept on their
 2 person. But it must be logged who the tool is given to
 3 and by whom and who the tool is returned by and -- from
 4 and by whom.
 5 Q And none of the prisoners are actually allowed to leave
 6 the area until all the tools are accounted for, true?
 7 A They should not be, correct.
 8 Q All right. And isn't it true that the pat-downs occur
 9 only if there are tools that are missing and unaccounted
 10 for?
 11 MS. GROSSI: I'm going to object. Calls for
 12 speculation.
 13 THE WITNESS: That goes against policy.
 14 Q (BY MR. KENT-BRYANT) All right. Do you know as a matter
 15 of practice whether that's true or not?
 16 A No, I do not.
 17 Q And what policy are you referencing? Not the content of
 18 it. But is it a policy that is in writing somewhere?
 19 A About conducting pat searches on prisoners?
 20 Q No, no, no. Specifically, with regard to the school, I
 21 believe you testified that in the -- there were two
 22 areas. Tell me their names again.
 23 A The vocational?
 24 Q That all the prisoners needed to be searched. You said
 25 that was the policy for that. Is that written down

(Pages 191 to 194)

Page 195

1 anywhere?

2 **A You may find it in your post orders. I can't say**

3 **specifically.**

4 **Q All right. And it sounds like you're not sure one way or**

5 **the other whether, as a matter of practice, the searches**

6 **only occur there if there are tools missing?**

7 **A I can't answer that.**

8 **Q Okay. You know, similarly, if someone were -- I'm**

9 **skipping around a little bit right now. If someone were**

10 **to testify that the searches in the health care area did**

11 **not occur as a matter of practice when women left the**

12 **Infirmary, would you have any reason to say that's not**

13 **true?**

14 **A I will tell out that I would not condone that. It's a**

15 **high risk area for contraband leaving that area.**

16 **Officers should follow that post order and prisoners**

17 **should be pat searched leaving that area.**

18 **Q Is there a post order?**

19 **A There should be a post order for every assignment an**

20 **officer is given at this facility.**

21 **Q Okay. I mean, is there a post order that says that the**

22 **health care worker must shake down all prisoners leaving**

23 **the Infirmary?**

24 **A I can't answer that.**

25 **Q All right. So, as you sit here, you don't know one way**

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1 or the other whether it actually happens?

2 **A I don't perform that duty. I don't know.**

3 **Q All right. But, as you sit here today, it sounds like**

4 **you also don't know whether those officers have been**

5 **ordered to do so; is that true?**

6 **A I don't know what the officers are ordered to do --**

7 **Q All right. Well, I mean --**

8 **A -- by their supervisor. I couldn't testify to that.**

9 **Q -- have you ordered their supervisors to order them to**

10 **perform pat-downs of prisoners coming out of the**

11 **Infirmary?**

12 **A I don't remember any direct order to do so.**

13 **Q All right. And skipping around a little bit more, in the**

14 **property room -- is the property room equipped with**

15 **cameras?**

16 **A I believe so.**

17 **Q All right. Why does that not ameliorate the problem of**

18 **the officer being isolated with the prisoner?**

19 **A I'm going to try and be without passion on this. My**

20 **experience --**

21 **Q You can be with passion if you'd like.**

22 **A -- with this department is single officer assignments are**

23 **such a high risk that, left without property security**

24 **measures, has resulted in staff death both at this**

25 **facility and at the Thumb facility.**

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1 **Q Say that again. Left without...?**

2 **A Proper security monitoring. In other words, a partner in**

3 **the area on an isolated assignment. Frequent contact**

4 **with that officer to ensure that they are safe when**

5 **prisoners are in that area.**

6 **Q All right. But, I mean, a female -- maybe I'm not**

7 **understanding. A female property officer would face the**

8 **same risks to life and limb that a male would, true?**

9 **A Not with female prisoners.**

10 **Q In what respect?**

11 **A The tragic events involved sexual assault as well as**

12 **murder.**

13 **Q All right. I mean, so there is -- but the sexual**

14 **assault, I mean, you're not -- the primary concern is not**

15 **the female prisoner assaulting the corrections officer,**

16 **the male corrections officer, true?**

17 **A Repeat that.**

18 **Q Right. With regard to sexual assault, the primary**

19 **concern isn't that the female prisoner will assault the**

20 **male corrections officer? It's that the male corrections**

21 **officer will assault the female prisoner, true?**

22 **A It can go either way.**

23 **Q But --**

24 **A We have historically provided more protection to a**

25 **female, whether it be a prisoner or a staff member.**

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1 **Q All right. So, I mean, I think we could agree that when**

2 **we're assessing the risk of the corrections officer to**

3 **violence at the hands of the inmate, there is both the**

4 **male and female officers are at risk, right?**

5 **A The risk is greater.**

6 **Q For...?**

7 **A For a female to be assaulted by a male prisoner on a**

8 **single assignment.**

9 **Q Okay, right. I wouldn't disagree. Now, this is a female**

10 **facility. So here, isn't it fair to say, that the risk**

11 **to the male corrections officer of assault by the female**

12 **prisoner at least isn't any higher than it would be for a**

13 **female corrections officer?**

14 **A True. The reverse, however, is the potential for a male**

15 **officer to be inappropriate with a female prisoner on an**

16 **isolated assignment.**

17 **Q And this brings us back to the beginning. Why are the**

18 **cameras that are present in the property room, why do**

19 **they not ameliorate that problem?**

20 **A Camera observation can be used for investigation and**

21 **determination if there has been inappropriate behavior**

22 **after the fact.**

23 **Q Is this not something that links into the electronic**

24 **monitor officer?**

25 **A It is.**

(Pages 195 to 198)

Page 199

1 Q All right. So they are seeing it in real time, right?
 2 A Not necessarily.
 3 Q Why not necessarily?
 4 A You can't look at 1,400 cameras at the same time.
 5 Q So -- well, what is the job of the electronic monitor
 6 officer?
 7 A To monitor cameras throughout the facility.
 8 Q All right. So they are supposed to be trying to observe
 9 what is going on in real time, correct?
 10 A It is not possible to look at them all in real time in
 11 all locations.
 12 Q But that's what they're doing, right? They are
 13 looking --
 14 A They are looking at some areas all the time.
 15 Q Right. And then they are supposed to be scanning the
 16 different screens with, at intervals, to be able to see
 17 what is going on, right?
 18 A Not every camera is looked at every shift by every
 19 officer assigned to the electronic monitor.
 20 Q Would there be a major inconvenience in requiring the
 21 electronic monitor officer to maintain surveillance of
 22 the property room at certain intervals?
 23 MS. GROSSI: I'm going to object. It calls for
 24 speculation.
 25 THE WITNESS: I can't answer that. We have no

Page 200

1 policy on it.
 2 Q (BY MR. KENT-BRYANT) Okay.
 3 A This is the first experience the department has in the
 4 number of cameras installed in the facility.
 5 Q In your opinion, does the facility need more electronic
 6 monitor officers?
 7 A I don't have an opinion on that.
 8 Q If you could have anything you wanted, would you want
 9 another -- or more electronic monitor officers?
 10 A If I could have anything I wanted?
 11 Q Yes, you get three wishes for your whole life.
 12 A The first one would not be that.
 13 Q The first one is supposed to be to wish for more wishes.
 14 But, in all seriousness, do you think that that position
 15 could be better served with more officers staffed to it?
 16 A Well, this is not politically correct. I believe that we
 17 could have more officers assigned to the correctional
 18 facility than we currently have.
 19 Q All right.
 20 A Specific to that assignment, I have personally sought
 21 guidance on what we should be doing with the system they
 22 have installed here.
 23 Q The cameras system?
 24 A Yes. What to monitor, when to monitor it, how to release
 25 it, under what circumstances. The system was installed,

Page 201

1 and it's not finished being installed, and began as a
 2 project that has gone beyond anyone's expectation in
 3 running a correctional facility. There is not another
 4 facility in the state that has half the number of cameras
 5 we have here. The department's policy is silent on all
 6 of the use of this type of technology.
 7 I'm not an expert. I can't tell you. I can
 8 tell you that I feel it's inadequate. But I can't tell
 9 you what is adequate. I don't know what the expectation
 10 will be of using that equipment to its fullest extent.
 11 Q Okay. So the amount of equipment is not inadequate,
 12 but -- so I'll let you answer. You're not saying the
 13 amount of equipment is inadequate, right?
 14 A Certainly not.
 15 Q Right. Okay. When you say it's inadequate, what are you
 16 referencing?
 17 A This deposition is a perfect example. Your expectation
 18 is that I have an officer that can monitor every camera
 19 screen that could be going on in real time. You're not
 20 atypical of the average non-corrections person. What I
 21 call a lay person.
 22 The expectation is, if you have 1,400 cameras,
 23 why can't you prevent what you see going on? And my
 24 answer would be, I can't see what is going on in real
 25 time, realistically, 24/7.

Page 202

1 Q All right.
 2 A It's the proverbial --
 3 Q But what is inadequate?
 4 A -- chicken versus egg.
 5 What is adequate? You define that.
 6 Q No, no, no. I'm not under oath. You said that you
 7 considered something to be inadequate. I'm wondering
 8 what it is that you were referencing.
 9 Is the protocol for using them, the staff; what
 10 are you talking about.
 11 A All of that.
 12 Q Okay.
 13 MR. KENT-BRYANT: Let's mark this.
 14 (Exhibit Number 16 marked for identification by
 15 the reporter).
 16 Q (BY MR. KENT-BRYANT) All right. I'm going to show you
 17 what has been marked as Exhibit 16. If you could,
 18 identify that document and then, again, look to see if
 19 there are any inaccuracies in it.
 20 MS. GROSSI: This is -- okay.
 21 THE WITNESS: (Examining document). Okay.
 22 Q (BY MR. KENT-BRYANT) All right. And any inaccuracies?
 23 A Again, there should be one identical for non-BFOQ.
 24 Q Okay.
 25 A And on Page 5, under 15, again, that statement,

(Pages 199 to 202)

Page 203

1 "Completes reclass reports for job lists."
 2 Q Right.
 3 A And I believe on Page 8, under 16, there would not be any
 4 need to write a prisoner pass. A prisoner never leaves
 5 your area.
 6 There wouldn't be any reports on caustics or
 7 cleanliness associated with the assignment. The
 8 responsibility for cleanliness would be with the hospital
 9 housekeeping staff.
 10 They would not complete security classification
 11 screens or order supplies. They wouldn't set up
 12 schedules for porters or laundry.
 13 Q All right. And what does an offsite hospital officer do?
 14 A They provide custodial supervision for a prisoner
 15 confined as a patient, an inpatient at a local hospital,
 16 under which the department has a contract for services.
 17 Q All right. And it's your belief that right now -- you --
 18 well, strike that.
 19 Usually, there are two officers that will be
 20 offsite hospital officers on any given occasion?
 21 A Yes.
 22 Q And it's your belief that, currently, that one of those
 23 officers can be male?
 24 A Correct.
 25 Q Now, has this been this way since the facility has been

Page 204

1 converted to female only?
 2 A Yes.
 3 Q And in terms of the BFOQ position, why does that have to
 4 be a BFOQ position?
 5 A Again, the prisoner is in a state of undress often during
 6 medical procedures. They lay in hospital gowns with --
 7 usually without clothing underneath them. The officer
 8 has to maintain direct observation, even if it's a
 9 situation where they are delivering a child. Because we
 10 have responsibility for that prisoner not to leave our
 11 custody. They put on restraints. They may have to check
 12 restraints, whether it be around ankles or around belly's
 13 and wrists.
 14 Q Anything else?
 15 A Prisoner goes to the bathroom. They are confined to the
 16 bed. They might be bathed in the bed.
 17 Q Okay. I just want to make sure -- okay.
 18 Are there, again, published rules for where
 19 women can be in a state of undress and not in a state of
 20 undress?
 21 A Prisoner housing unit rules? I don't know what you're
 22 referring to.
 23 Q Okay. It may be. It may be.
 24 A Yes.
 25 Q All right. I'm going over a witness list that has been

Page 205

1 submitted by the Department of Corrections. One of the
 2 people listed is a man named Tony Lopez. Do you know
 3 what he would know about this facility and specifically
 4 the decisions made to declare certain positions BFOQ
 5 female only?
 6 A Mr. Lopez works for civil service in Lansing as our
 7 liaison for the Department of Corrections.
 8 Q Okay. Have you ever worked with him regarding the BFOQ
 9 issue?
 10 A No.
 11 Q All right. Same question with regard to Nancy Zang,
 12 Z-A-N-G?
 13 A The question?
 14 Q Yes. Do you know what she would know concerning this
 15 facility and specifically the decisions made regarding
 16 designating certain positions BFOQ female only?
 17 A No, I do not.
 18 Q Do you know what Clarice Stovall would know about those
 19 issues?
 20 A No, I do not.
 21 Q Do you know what Susan Davis would know about those
 22 issues?
 23 A I don't know what she would know.
 24 Q Who is Susan Davis?
 25 A She was the warden who was -- I replaced here.

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1 Q Oh, that's right. That's right. And who is Paul
 2 Slaughter?
 3 A Slaughter?
 4 Q Slaughter? Okay.
 5 A Yes. He is my administrative assistant.
 6 Q Okay. Do you know what he would know concerning
 7 decisions made to designate certain positions BFOQ only?
 8 A I couldn't imagine Paul knows anything.
 9 Q I'll tell him you said that.
 10 A Well, as regards to that. He came here long after this
 11 facility was opened.
 12 Q Right.
 13 A He was not involved in -- doesn't supervise anyone and
 14 doesn't do any HR work.
 15 Q Chances are he's listed -- I don't want to speak for
 16 counsel -- chances are he's listed to verify the
 17 authenticity of documents.
 18 A Possibly.
 19 Q Okay. I just didn't know who he was.
 20 MR. KENT-BRYANT: Let me speak with my client.
 21 (Off the record from 2:00 to 2:02).
 22 MR. KENT-BRYANT: Back on the record.
 23 No further questions.
 24 MS. GROSSI: I have a few questions.
 25 MR. KENT-BRYANT: I have no further questions.

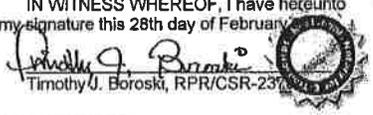
(Pages 203 to 206)

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1 well, many of them were people that were staffed right
 2 here at the facility, right?
 3 **A I believe they were a combination of staff from -- that**
 4 **had ever worked with female population.**
 5 **Q Right.**
 6 **A I believe there were maybe labor relations people on it.**
 7 **I don't -- I wasn't on it. Health care people. I --**
 8 **that's all I have.**
 9 **Q Okay.**
 10 **MR. KENT-BRYANT: I have nothing further.**
 11 **Thank you.**
 12 **MS. GROSSI: I don't have any other questions.**
 13 **(Deposition concluded at 2:25 p.m.).**

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Page 212

1 **CERTIFICATE OF NOTARY PUBLIC**
 2 **DEPONENT: MILLICENT D. WARREN (STATE OF MICHIGAN)**
 3 **RECORDED: February 20, 2013 (SS)**
 4 **LOCATION: Ypsilanti, Michigan (COUNTY OF CLINTON)**
 5 **Being a Notary Public duly**
 6 **commissioned and qualified in and for the State of Michigan**
 7 **at Large, I do hereby certify that pursuant to notice there**
 8 **came before me the deponent herein, who was by me first duly**
 9 **sworn to testify to the truth and nothing but the truth**
 10 **touching and concerning the matters in controversy in this**
 11 **cause.**
 12 **Being thereupon carefully examined**
 13 **under oath, said examination was recorded stenographically**
 14 **and was later reduced to transcription under my supervision;**
 15 **said transcription being a true record of the testimony**
 16 **given by the witness.**
 17 **I further certify that I am neither**
 18 **attorney or counsel for, nor related to or employed by any**
 19 **of the parties to the action in which this deposition was**
 20 **taken; and further, I am not a relative or employee of any**
 21 **attorney or counsel employed by the parties hereto or**
 22 **financially interested in the action.**
 23 **IN WITNESS WHEREOF, I have hereunto**
 24 **subscribed my signature this 28th day of February**
 25 
Timothy J. Boroski, RPR/CSR-237
MY COMMISSION EXPIRES:
October 30, 2018

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23
24
25

(Pages 211 to 212)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW
CIVIL DIVISION

TOM NOWACKI, et al.,

Plaintiffs, NO: 11-852-CD

vs. JUDGE BROWN

STATE OF MICHIGAN DEPARTMENT
OF CORRECTIONS,

Defendant.

The Deposition of LUCILLE EVANS, taken
before me, Daniel E. Ripka, CSR-2367, Notary Public, on
Wednesday, October 17, 2012, at the Woodland Correctional
Center, 91036 East M-36, Whitmore Lake, Michigan, commencing at
or about 9:30 A.M.

APPEARANCES:

LAW OFFICE OF GLEN N. LENHOFF
BY: ROBERT D. KENT-BRYANT, ESQ. (P40806)
328 South Saginaw Street
8th Floor, North Building
Flint, Michigan 48502
(810) 235-5660

Appearing on Behalf of Plaintiffs.

JEANMARIE MILLER, ESQ. (P44446)
525 West Ottawa Street, Floor 5
Lansing, Michigan 48909
(517) 373-6434

Appearing on Behalf of Defendant.

ALSO PRESENT: TOM NOWACKI

1 Q. Okay. Explain.
 2 A. During our conversion process the men that were housed on
 3 the men's side of the facility no longer worked in the
 4 food service preparation areas. So the male prisoners
 5 that originally cooked were being transferred out.
 6 Q. Right.
 7 A. They no longer cooked.
 8 The women prisoners then began a transition into
 9 the food service assignment and do the cooking for the
 10 facility. We sent only women to cover that assignment.
 11 We allow only women to escort in that assignment.
 12 But our conversion wasn't complete at that
 13 point, so that is why I say it's not 100 percent true that
 14 it was female only, because we never allowed anything
 15 except for female officers to supervise the women in food
 16 service and transport the women to that food service
 17 assignment from one side of the compound to the other.
 18 Q. All right. From the time that you arrived in January 2005
 19 is what you're saying?
 20 A. Our conversion, it's in the conversion process that we're
 21 speaking of, that probably started in maybe the following
 22 year or so. I can't be positive of the date, but women
 23 only worked in food service prior to the complete
 24 conversion.
 25 Q. Okay. I understand what you're saying.

1 A. Because there is -- This is a position where critical
 2 tools are on hand, critical tools for the Department of
 3 Corrections, your knives and spatulas and things that are
 4 metal that can be sharpened, and because prisoners have to
 5 be shaken down on this assignment.
 6 Because an officer in the food service position
 7 has to monitor the food service workers that means they
 8 have to check in the restroom to make sure that the female
 9 prisoners are appropriate in their actions and behaviors
 10 in the restroom.
 11 Q. Okay. Anything else?
 12 A. That's quite enough, I think. Yes. No, there's nothing
 13 else.
 14 Q. All right. Now, you gave me an example earlier of a strip
 15 search that took place actually in the food service area,
 16 true? That was the one where the people were reprimanded?
 17 A. Yes, it's the food service area.
 18 Q. Any other examples you are aware of where a strip search
 19 was required emanating from the food service area?
 20 A. I don't recall.
 21 Q. Well, you said it was frequent. What was your basis for
 22 saying strip searches were frequently required?
 23 A. Because the prisoners in food service have access to
 24 knives, the prisoners in food service have access to power
 25 items.

1 Looking at Exhibit 1, does it seem to reflect
 2 the description of duties of people in the food service
 3 position? And the exhibit's the whole stapled together
 4 thing not just the front page.
 5 A. Roughly this appears to be the working position
 6 description for the food service assignment.
 7 Q. All right.
 8 And this applied to all shifts; is that true?
 9 A. Yes.
 10 Q. And this was one of the positions that the group that you
 11 previously described discussed making BFOQ female only?
 12 A. I cannot be 100 percent positive in my memory of each and
 13 every position that we discussed. That facility has more
 14 positions than your average facility.
 15 Q. I'm just asking you about this one, though, at this point.
 16 A. I would like to say yes.
 17 Q. All right.
 18 A. Originally -- I'm about a hundred percent sure that this
 19 is part of the original discussion with BFOQ positions,
 20 but I just can't be positive.
 21 Q. All right. And do you recall the reason that this
 22 position was BFOQed?
 23 A. Because prisoners have to be strip searched on occasion
 24 often.
 25 Q. Any other reason?

1 Q. Okay. So I understand that. But do you have information
 2 that strip searches were frequently required in food
 3 service?
 4 A. Not any information that I can give you a specific date or
 5 time on.
 6 Q. Other than the situation in which the strip search was
 7 performed in the food service area and the officers were
 8 reprimanded do you recall any other specific times where a
 9 strip search emanated from the food service area?
 10 A. I don't recall.
 11 Q. All right. Now, in terms of --
 12 A. Can I add does it mean it doesn't happen?
 13 Q. You just did.
 14 In terms of the number of employees that were
 15 assigned to food service, were there two food service
 16 officers at any given time?
 17 A. Yes.
 18 Q. And when the prisoners were taken to food service were
 19 they accompanied by officers, like rovers?
 20 A. No.
 21 Q. They just walked through?
 22 A. Not necessarily.
 23 Q. Sometimes were they?
 24 A. No, not routinely.
 25 Q. Routinely how many corrections officers would be present

(Pages 66 to 69)

1 In the food service area?
 2 A. What specific time of day are you asking about?
 3 Q. Did it change according to the time of day?
 4 A. Yes, it did.
 5 Q. Okay. Tell me about that.
 6 A. On the start of the shift for prisoner workers there would
 7 be the food service worker that was assigned. There could
 8 be a yard officer that goes in through the area to make a
 9 round or check on the building.
 10 There are civilian food service state employees.
 11 When the chow lines are in progress and the
 12 feeding process is going on the number of officers in food
 13 service varies.
 14 Q. All right.
 15 A. Because you would send additional staff when the
 16 process -- when the food service lines are being
 17 processed.
 18 Q. So while food service is up and running -- I mean, is food
 19 service -- it's not 24 hours, is it? It's just whenever
 20 the meals are, or is there something going on 24 hours?
 21 A. Well, they have to prep the food prior to serving it,
 22 so...
 23 Q. Right. I mean, is there ever a time where it's closed?
 24 A. I don't remember what the food service hours are over at
 25 Women's Facility, but during the midnight -- I mean, it

1 but it's a vehicle. So you have a security officer with
 2 the vehicle, then that doesn't stop the production that's
 3 occurring in food service.
 4 Q. Right.
 5 A. So you need an officer to keep an eye on these prisoners
 6 that are in the production area, maybe those that's in the
 7 baking area. Then you would have another set of prisoners
 8 that will be chopping a vegetable, or something. Then
 9 there would be another set of prisoners that would be in
 10 the actual seating area that would be setting the food up
 11 on the line, so you couldn't take the officer from the
 12 vehicle to come and shake down someone.
 13 I guess the point that I'm making is this. The
 14 female officer was not always accessible to just stop to
 15 go shake down someone.
 16 Q. You say that the female officer wasn't accessible. Did
 17 you ever... Maybe I asked this question, but I think I
 18 asked it more generally. Concerning food service, did you
 19 ever receive any sort of complaint or information that
 20 having a male officer in food service made it more
 21 difficult to perform the shakedowns that were required?
 22 A. I answered that and I said, and I'll repeat myself, the
 23 female officers complained all the time.
 24 And you asked me for specific names and I
 25 couldn't give you specific names. You may have female

1 doesn't take them all night to make the bread, so to
 2 speak.
 3 Q. All right. So while it was open there were always at
 4 least two officers there, right?
 5 A. Sometimes there was one.
 6 Q. All right. What would that be?
 7 A. If an officer went to lunch and, you know, it may just be
 8 for a very short time. If an officer went to the
 9 restroom.
 10 Q. If someone had, for any significant period of time had to
 11 leave that assignment someone else would --
 12 A. Would be -- Correct. They would send a relief. I'm sorry
 13 to cut you off.
 14 Q. No. That's fine. That's exactly what I was asking.
 15 So in terms of shakedowns in food service, a
 16 male could have prisoners shaken down by a female
 17 correction officer at almost any time; is that true?
 18 A. That's not true.
 19 Q. Why?
 20 A. If there was a vehicle at the back dock unloading
 21 supplies, it may be an outside vendor, it may be an
 22 outside contractor that's bringing food supplies, a
 23 security officer needs to be in that location on that
 24 assignment to keep an eye on that vehicle. I mean, you've
 25 got a vehicle, a running vehicle. I mean, it's shut off,

1 officers walking past your office complaining. You may
 2 have female officers -- You may be in the general area
 3 when female officers are complaining. So I apologize, but
 4 I can't give you specific names.
 5 Q. All right. I thought I asked that generally about the
 6 facility, but I better make sure.
 7 So what you just said is certainly true of the
 8 facility in general, right, that you're saying female
 9 officers complained to you that they were pulled off of
 10 duty to perform shakedowns for male officers, but you
 11 don't remember who any of those females were, true?
 12 A. I never said they complained directly to me. I said that
 13 I could hear them in passing if they are...
 14 Q. Okay. All right. You never received a direct complaint
 15 about that?
 16 A. I may have, but I don't recall the name of the person.
 17 Q. Okay. Well, as you sit here today do you recall receiving
 18 directly, someone came to you and complained about being
 19 pulled off their duty to assist a male to perform a
 20 shakedown of a female inmate?
 21 A. I'm going to say not formally.
 22 I have... I would sit in the lunchroom a lot of
 23 times in the same lunchroom that the officers would eat in
 24 because I'm wanting to make myself available to the staff,
 25 and that is where a lot of conversation occurred amongst

(Pages 70 to 73)

1 document then, yes, it is a BFOQ position description.
 2 Q. Do you recall this being a position that the group that
 3 you described discussed being BFOQ female only?
 4 A. I do not recall. There were... I do not recall.
 5 Q. All right.
 6 The yard position, why was the yard position, if
 7 you know, BFOQ female only?
 8 A. Staff assigned to the yard are responsible to shake down
 9 five prisoners per day.
 10 Q. Okay.
 11 A. Staff on any assignment are to shake down prisoners.
 12 Q. Any other reason?
 13 A. If a prisoner is suspected to have contraband on some type
 14 of weapon on her she would need to be cuffed and shaken
 15 down and escorted to a secure area for strip search.
 16 Q. All right. Any other reason?
 17 A. That basically would be the main reason.
 18 Q. How many yard officers were there at any given time?
 19 A. I'm going to try and work --
 20 MS. MILLER: Are you talking about after it
 21 became all female in May of 2009?
 22 MR. KENT-BRYANT: Sure, I'll ask that. Then my
 23 next question will be whether it was any different.
 24 Q. (BY MR. KENT-BRYANT): But after it became all female how
 25 many yard officers -- Oh, I see what you're saying.

1 A. I don't recall.
 2 Q. Okay.
 3 And were there ever any strip searches that
 4 emanated from the yard area?
 5 A. That was a long time ago. I don't remember.
 6 Q. All right. Did you ever speak to any men who were
 7 assigned to the yard area concerning how convenient or not
 8 convenient it was to have female corrections officers
 9 assist them with shaking down female prisoners?
 10 A. I don't recall a conversation with a male about that.
 11 Q. Talking about shakedown, how long does a shakedown
 12 typically take?
 13 A. A couple of minutes. It depends on the person. It
 14 depends on what is being shaken down.
 15 Q. Well, just typically. A couple minutes?
 16 A. Probably three to five minutes.
 17 And, again, it does depend. If the female is
 18 wearing an outer coat, if there is suspicion that she has
 19 something like hidden in her bra it may be a shakedown
 20 that is a more detailed shakedown.
 21 If it is suspected that -- And prisoners do it
 22 as often as they can, take a loose stitching in their
 23 lining of their clothing to move contraband from one
 24 location to another. If those type of things are
 25 suspected then naturally the shakedown would be -- would

1 Okay. How many yard officers were there at any
 2 given time?
 3 A. My memory is not what it used to be. I want to say
 4 possibly six.
 5 Q. Okay.
 6 A. I don't remember how many yard positions right off of the
 7 top of my head.
 8 Q. Prior to the facility becoming all female were there men
 9 that worked the yard position in the female area?
 10 A. Your question is prior -- Please repeat the question.
 11 Q. Yeah, prior to the facility becoming all female were there
 12 men working the yard in the female part of the complex?
 13 A. There were men working the yard and women.
 14 Q. Okay. And were there any reports of there being any
 15 problems with men being able to perform shakedowns with
 16 the assistance of a female officer in the yard before the
 17 facility became all female?
 18 A. I don't recall.
 19 Q. Did you ever speak with -- You know, kind of similar
 20 series of questions here. Did you ever speak or overhear
 21 any complaints of females about any inconvenience caused
 22 by having to assist men in shaking down female prisoners
 23 in the yard area?
 24 A. You're asking me before it became one facility?
 25 Q. Right.

1 take longer because the person is being -- they're looking
 2 for something very, very specific and so they would want
 3 to be quite detailed.
 4 But I would say typically three to five minutes.
 5 Q. Okay. And now in the case where, you know, say it's
 6 wintertime and there's coats and that sort of thing, the
 7 male officer could inspect the coat for contraband, true?
 8 It would be removed first from the female, but then the
 9 male officer could inspect the coat, true?
 10 A. He could according to policy.
 11 Q. Right. All right.
 12 Now, here at this facility I assume there are
 13 yard officers?
 14 A. Yes.
 15 Q. And they can be male or female?
 16 A. They can be, yes.
 17 Q. All right. And if a yard officer is a female here at a
 18 men's facility the female yard officer can pat down the
 19 male inmate, true?
 20 A. That is true. If there is a female that is a yard officer
 21 at Woodland they could in theory shake down a male
 22 prisoner, yes.
 23 Q. I think what you're saying as it's currently constituted
 24 there aren't any women assigned to yard here at Woodland?
 25 Is that what you're implying?

(Pages 78 to 81)

1 A. We can assign women to yard to answer your question.
 2 Q. Okay.
 3 A. And they can shake down male prisoners. That is really
 4 your question. And so yes and yes.
 5 Q. All right. And in the yard women are not supposed to be
 6 in a state of undress, true?
 7 A. We're talking - Oh, we're back to female.
 8 Q. I switched back, as I do.
 9 A. Okay.
 10 MS. MILLER: She was hoping you weren't talking
 11 about the COs.
 12 THE WITNESS: Yes. That's true. Correct.
 13 MR. KENT-BRYANT: I wasn't. I wasn't.
 14 Q. (BY MR. KENT-BRYANT): At Huron Valley women were not
 15 supposed to be in a state of undress?
 16 A. Correct. Yes, sir. Correct.
 17 Q. In the yard area?
 18 A. That is correct.
 19 Q. The same for food service, true?
 20 A. Correct.
 21 Let's restate your question about food service.
 22 Q. Women were not supposed to be in a state of undress in the
 23 food service area, right?
 24 A. Traditionally and typically that is correct.
 25 Food service is an assignment where women have

1 Q. For what position?
 2 A. The working title is the gate control officer.
 3 Q. And this was a BFOQ female-only position at Huron Valley
 4 Women's; is that true?
 5 A. The document reads "This is a gender based BFOQ position."
 6 Q. All right. Now, is this a position that was discussed at
 7 the group meeting among administrators that you spoke of
 8 earlier?
 9 A. I don't recall. I'm sorry, I do not recall.
 10 Q. All right. Do you have any knowledge as to why that
 11 position was considered BFOQ female only?
 12 A. The women's... The Huron Valley Women's Facility has many
 13 gate pass prisoners.
 14 For corrections terminology a gate pass prisoner
 15 is a prisoner that works outside of the gates and
 16 therefore pass through the gated area to and from an
 17 assignment.
 18 Q. Okay. And why did that necessitate that this be a BFOQ
 19 female-only position?
 20 A. I can only speculate.
 21 Q. You don't know as you sit here today?
 22 A. No, no, no. You asked me why is it.
 23 Q. Right.
 24 A. And I'm just going to give you my speculation of why it
 25 is. That female prisoners traverse the gates and they

1 soiled their clothing or their garment and would need to
 2 change. Food service is an assignment that is longer than
 3 15 minutes or an hour, and by it being a - just the mere
 4 species of a female you would find that - Or you wouldn't
 5 find. That's certainly not appropriate English. Please
 6 strike that.
 7 Q. No, go ahead. I understand what you're saying.
 8 A. It could not - it would not be unnormal or unnatural for
 9 women to on a long-term assignment that would be four
 10 hours, five, six hours to maybe not have - they would
 11 need to maybe change occasionally or more often than you
 12 would find in a men's facility for purposes that are
 13 just -
 14 Q. Of personal hygiene?
 15 A. That is correct.
 16 Q. All right. And that would be performed in the restroom
 17 area?
 18 A. Correct.
 19 Q. All right.
 20 (Deposition Exhibit Number 5 was marked for
 21 identification by the reporter.)
 22 Q. (BY MR. KENT-BRYANT): Okay. Handing you what's been
 23 marked as Exhibit 5. Can you identify this document,
 24 please?
 25 A. It is a position description.

1 must be shaken down and strip searched as well.
 2 Q. Always have to be strip searched?
 3 A. Coming in from an outside detail where you have access to
 4 the public and contraband, that's correct.
 5 Q. How many officers were assigned at any given time to the
 6 gate?
 7 A. One. At shift change there was a second officer added, or
 8 if there was heavy traffic or during unusual events I
 9 should say with high volumes of traffic there would be
 10 two.
 11 MS. MILLER: Can I just ask you to clarify?
 12 Because the way you answered that. You said one, and then
 13 you said at shift change. Do you mean there was typically
 14 one, and then at shift change they would add another?
 15 THE WITNESS: That is correct.
 16 MS. MILLER: Okay.
 17 MR. KENT-BRYANT: Right. That's what I
 18 understood.
 19 THE WITNESS: Thank you for clarifying.
 20 MS. MILLER: That's okay.
 21 Q. (BY MR. KENT-BRYANT): So during before the facility
 22 became all female do you recall any men being assigned to
 23 gate control officer?
 24 A. Yes, I do.
 25 Q. And did those men shake down or search females?

(Pages 82 to 85)

1 A. It's been a while since I've worked at the women's
2 facility and exactly every space, and distance, and
3 location I'm just not going to be able to recall a hundred
4 percent.

5 Q. Right. I understand. I understand. And you got it on
6 the record.

7 And that's not uncommon at all. It's hard to be
8 sitting in a room like this and estimating distance and
9 this sort of picture you have in your mind, so I
10 understand that.

11 Just by the way, these position descriptions, do
12 you know -- Well, let's just use the gate officer
13 position, do you know who drafted those?

14 A. I do not know.

15 Q. Okay. Did you contribute to them in any way as far as you
16 know?

17 A. I'm sorry. I don't remember.

18 Q. All right. All right.

19 Now, I believe there will be some testimony that
20 the, let's say in the case of Exhibit 1 which was the food
21 service position description, that the strip search
22 requirement was added after or at the time of, I should
23 say, the facility became an all women's facility. Do you
24 know whether or not that's true?

25 A. I don't know that to be true or not.

1 service building that we used as a gym during the evening
2 hours.

3 Q. Okay.

4 A. And so it's still safe to say that we didn't have a gym.

5 Q. All right. Still don't have a gym?

6 A. We did not have a gym. You asked about January of 2005 --

7 Q. Right.

8 A. -- and that's what I'm speaking of.

9 Q. Right. Did they construct a gym or was something
10 converted to a gym after that?

11 A. Once the conversion was completed the portion of the
12 facility which was the west entrance which we gained had a
13 gym.

14 Q. All right. So is the gym officer position, was that a new
15 position as of the conversion of the facility to an
16 all-female facility?

17 A. I don't recall.

18 Q. All right.

19 Do you recall whether the gym officer position
20 was one of the positions your group discussed becoming a
21 BFOQ female-only position?

22 A. I'm sorry. I don't remember if that was a part of your
23 discussion.

24 Q. You don't remember if that was a part of your discussion?

25 A. Correct. Was that your question?

1 Q. Okay.
2 (Deposition Exhibit Number 6 was marked for
3 identification by the reporter.)

4 Q. (BY MR. KENT-BRYANT): Could you identify the document
5 that's been marked as Exhibit 6, please?

6 A. It's titled position description.

7 Q. And this is for the working title of gym officer?

8 A. Yes.

9 Q. Okay. What does a gym officer do?

10 A. A gym officer supervises prisoners during their leisure
11 time activity. A gym officer assists in the security
12 patrol of group activities, which may include outside
13 participants, outside meaning non-Department of
14 Corrections employees.

15 Q. Now, when you arrived in January of 2005 were some of the
16 gym officers male?

17 A. When I arrived in 2005 if memory serves me correctly we
18 didn't have a gym.

19 Q. Okay. When did there start to be a gym?

20 A. I don't remember.

21 Q. Okay. All right.

22 Do you remember at any time when you were there
23 after January of 2005 any males being gym officers?

24 A. Excuse me. Let me retract that.

25 When I arrived in January of 2005 we had a food

1 Q. Yes. Yes, it was.

2 Do you know why the gym officer position was
3 designated BFOQ female only?

4 A. The requirement that prisoners are to be shaken down. And
5 the gym also had a rest room area, which of course would
6 require -- I mean, it wouldn't require, but it would just
7 be kind of logical if prisoners went into the restroom
8 area it's at a point where they would be in a state of
9 undress.

10 Q. All right. Well, in the gym was this a rest room or a
11 locker room? I mean, was it a place where people changed
12 clothes or was it a place where they went to the bathroom?

13 A. In the gym they had a locker room and a rest room.

14 Q. All right. How many gym officers were there at any given
15 time?

16 A. To my knowledge?

17 Q. Right.

18 A. There was one on each shift that the gym was open.

19 Q. Okay. What shifts was it open?

20 A. That would have been A.M. and the P.M. shift.

21 Q. Okay. One and two?

22 A. Yes.

23 Q. All right.

24 Now, other than in the locker room were women
25 allowed to be in a state of undress in the gym area?

1 **A. No, sir.**
 2 **Q. All right.**
 3 Now, did you ever receive directly any
 4 complaints from any female corrections officers having to
 5 assist male correction officers in the gym area to perform
 6 shakedowns?
 7 **A. I don't recall that.**
 8 **Q. In -- Oh, go ahead.**
 9 **A. I don't recall that a female complained to me about**
 10 **anything related to the gym.**
 11 **Q. Okay. And do you ever recall a strip search emanating**
 12 **from the gym area; in other words, an officer called in**
 13 **for permission to have a strip search performed from the**
 14 **gym area?**
 15 **A. I don't recall if it occurred. I don't remember.**
 16 **Q. And I think I asked you this. Getting maybe a little bit**
 17 **tired. You don't recall one way or the other whether any**
 18 **men ever worked as a gym officer, true?**
 19 **A. No, I don't recall, I really don't.**
 20 **(Deposition Exhibit Number 7 was marked for**
 21 **identification by the reporter.)**
 22 **Q. (BY MR. KENT-BRYANT): All right. Can you identify**
 23 **Exhibit 7?**
 24 **A. A position description.**
 25 **Q. For what position?**

1 **don't have an exact number or date, or I can't say how**
 2 **many instances per day.**
 3 **Q. Is there a record of that somewhere, do you know?**
 4 **A. I can't be positive.**
 5 **Q. And for what reasons would a prisoner be put on**
 6 **observation status?**
 7 **A. Suicide precaution.**
 8 **Q. Any other reason?**
 9 **A. Self-injurious behavior.**
 10 **Q. Anything else?**
 11 **A. Those are documented items and that's normally determined**
 12 **by QMHP, so it would be a qualified mental health person**
 13 **that makes a determination of these two scenarios where it**
 14 **would be suicide precaution or a self-injurious behavior**
 15 **issue.**
 16 **Q. Other than when someone's on observation status cameras**
 17 **are not pointed inside the cells, true?**
 18 **A. That's correct.**
 19 **Q. The electronics officers, they're located in the control**
 20 **center?**
 21 **A. Correct.**
 22 **Q. All right. How many officers are typically in the control**
 23 **center?**
 24 **A. I pause because I'm thinking.**
 25 **Q. Uh-huh (Yes).**

1 **A. Electronic monitor officer.**
 2 **Q. And is this a position that you recall the group**
 3 **discussing in terms of it being a BFOQ female-only**
 4 **position?**
 5 **A. I don't recall whether the group discussed this one.**
 6 **Q. And what does the electronic monitor officer do?**
 7 **A. Electronic monitor monitors cameras throughout the**
 8 **facility.**
 9 **Q. Are there any cameras that are actually pointed at any**
 10 **area where women are allowed to be in a state of undress?**
 11 **A. Their cell. If you have a prisoner that is on observation**
 12 **status, in addition to there being a physical person**
 13 **observing, the camera.**
 14 **Q. Do you ever recall a time while you were there where**
 15 **cameras were pointed into cell areas?**
 16 **A. If you have an observation, prisoner on observation, the**
 17 **camera would be in addition to the individual that would**
 18 **provide observation for the prisoner. So, yes.**
 19 **Q. But my question was, and maybe you answered it, my**
 20 **question was do you recall that happening?**
 21 **A. Yes.**
 22 **Q. How often did that happen?**
 23 **A. When a prisoner was on observation status.**
 24 **Q. I mean, and how often did that happen?**
 25 **A. A prisoner could be on observation status at any time. I**

1 **A. Between two and three.**
 2 **Q. All right.**
 3 **And do the officers in the control center have**
 4 **different responsibilities if there's more than one?**
 5 **A. Yes.**
 6 **Q. And would one of them be the electronic monitor officer?**
 7 **A. Yes.**
 8 **Q. And what are the others?**
 9 **A. My memory doesn't serve me as well, I'll repeat that.**
 10 **Q. Okay.**
 11 **A. The other officer could be the officer that is the count**
 12 **officer. That person is the individual that is the master**
 13 **of... to handle all the -- is the individual that handles**
 14 **the master count boards and the movement in and out of the**
 15 **facility, in addition to many other duties.**
 16 **Q. And people in the control -- officers in the control**
 17 **center, do they have any shakedown responsibilities?**
 18 **A. Yes. We discussed that earlier that that person is**
 19 **traditionally the one that does the shakedowns, the strip**
 20 **searches.**
 21 **Q. All right. Okay. I understand what you're saying now.**
 22 **So the person that's the electronic monitor**
 23 **officer, does that person have --**
 24 **A. It may be the electronic monitor who goes to do the strip**
 25 **search, it may be the control center -- the count officer**

1 In control center.
 2 Q. Okay.
 3 A. It could be either one. If the electronic monitor officer
 4 is watching a prisoner that is making suicidal gestures
 5 that's on observation for suicide naturally that person
 6 wouldn't be moved from that assignment to go do a
 7 shakedown or strip search.
 8 Q. Right.
 9 A. So it could be the monitor officer -- To answer your
 10 question, is it exclusively the electronic monitor that
 11 does the shakedowns and strip searches, to answer your
 12 question the answer is no.
 13 Q. All right. All right. I understand what you're saying.
 14 Going back to the gate officer assignment, if
 15 they required assistance it would likely come from one of
 16 the people in the control center, but not necessarily one
 17 particular assignment or the other, it would depend?
 18 A. That is correct. That is correct.
 19 Q. All right.
 20 (Deposition Exhibit Number 8 was marked for
 21 identification by the reporter.)
 22 Q. (BY MR. KENT-BRYANT): I want to show you what's marked as
 23 Exhibit 8. Can you identify that, please?
 24 A. It's a position description.
 25 Q. For which position?

1 medical staff that work at the facility. It is their job
 2 to make rounds throughout the healthcare area.
 3 In doing such a prisoner could be in the state
 4 of undress if they're being examined by a nurse or doctor,
 5 which is what the intent of the healthcare facilities is
 6 for, to provide medical services, and that could include
 7 physical exam.
 8 Q. All right. So in your mind what's the distinction between
 9 a healthcare officer and an infirmary officer?
 10 A. The infirmary officer, they have very like duties. The
 11 infirmary is a location where prisoners are housed for
 12 long-term traditionally based on medical problems,
 13 generally severe medical problems that it would be similar
 14 to a hospital, and so just for my description, and the
 15 healthcare officer is the officer that is responsible for
 16 the doctor's office.
 17 Q. Okay.
 18 A. The infirmary officer is the officer who is responsible
 19 for the hospital.
 20 Q. All right. And typically at any given time how many
 21 officers are assigned to the healthcare and/or infirmary
 22 officer position?
 23 A. One. One per position.
 24 Q. One per shift?
 25 A. Correct. We don't have a healthcare officer -- When I was

1 A. A resident unit officer.
 2 Q. And what working title?
 3 A. Healthcare and/or infirmary officer.
 4 Q. Okay. And this is a BFOQ female-only position, true?
 5 A. The document reads "This is a gender based BFOQ position."
 6 Q. At any time that you were at Huron Valley was that ever
 7 not a BFOQ female-only position?
 8 A. I do not recall, because the working title is twofold.
 9 It's a healthcare and an infirmary.
 10 Q. Would you separate those two in your mind as two different
 11 things?
 12 A. For the purpose of this meeting I think it -- It's just my
 13 opinion that they should be separated for the purpose of
 14 your questioning because I don't want to give information
 15 related to both that could very well be exclusive to one
 16 or the other in a given scenario.
 17 Q. All right. So I'll try and follow up on that.
 18 Healthcare officer, what would a healthcare
 19 officer do?
 20 A. The healthcare officer is the officer that is responsible
 21 for the entire... I guess it's similar to a doctor's
 22 office environment at the facility. That is person is
 23 responsible, as the other officers, to conduct the
 24 shakedowns. The healthcare officer provides safety and
 25 security for -- additional safety and security for the

1 at the women's facility there was not a healthcare officer
 2 on the midnight shift.
 3 Q. Okay. Now, is this one of the positions that you recall
 4 the group discussing to be BFOQ female only?
 5 A. It is one of the positions that we discussed.
 6 Q. And the reason that it was determined to be BFOQ female
 7 only is because women might be seen in a state of undress?
 8 A. That would be number one.
 9 Q. And what else?
 10 A. Number two would be that the officers would be required to
 11 conduct shakedowns of the females.
 12 Q. And do you recall ever receiving any complaints either
 13 directly or indirectly about female officers having to
 14 assist male officers in the healthcare infirmary area with
 15 shakedowns?
 16 A. Not that specific area.
 17 And I'd like to clarify. When I indicated to
 18 you that females complained all the time because they had
 19 to go and assist in other areas and it left the area that
 20 they were assigned to vulnerable, the discussion that was
 21 heard was not applicable to each and every specific
 22 location or assignment.
 23 I've noted as we've gone through the position
 24 descriptions you asked about it, and when we go to the
 25 various locations, and so just, you know, for the record

1 It was not specified, specifically to answer your
 2 question, the general conversation that I heard that it
 3 was the healthcare issue or a necessarily infirmary
 4 officer issue but just an issue in general.
 5 Q. All right. Do you recall at any time you were there men
 6 working in that position?
 7 A. I don't recall men working in that position.
 8 MR. KENT-BRYANT: Let's take a little break
 9 here.
 10 MS. MILLER: Okay.
 11 (Discussion off the record. Recess taken
 12 at 12:42 P.M. Deposition resumed at or
 13 about 12:53 P.M.)
 14 (Deposition Exhibit Number 9 was marked for
 15 identification by the reporter.)
 16 Q. (BY MR. KENT-BRYANT): Just a couple of questions about
 17 things we discussed previously.
 18 With the healthcare infirmary areas you
 19 mentioned that women might be seen in a state of undress
 20 when the prisoners are examined.
 21 Are the -- Now, I've never been there. Are the
 22 beds separated from one another by barriers or curtains?
 23 A. To my memory it is just your typical pull curtain like you
 24 would...
 25 Q. Okay. So when physicians perform or healthcare

1 changing clothes, true?
 2 A. Never said that.
 3 Q. All right. Well, I'm just making it clear.
 4 A. I didn't say that. I said that they had a locker facility
 5 there.
 6 Q. All right. And there was -- Women would be in a state of
 7 undress actually only within the stall area, right?
 8 A. Yes.
 9 Q. And there was a sign outside of the bathroom locker
 10 facility about males having to knock and announce before
 11 entering, true?
 12 A. I don't recall. I can't sit here and honestly say that I
 13 recall a specific sign in a specific location.
 14 Q. All right. And do you know one way or the other whether
 15 in fact male corrections officers did utilize the knock
 16 and announce procedure before going into a female bathroom
 17 area in the gym area?
 18 A. I cannot sit here exclusively and say an affirmative yes
 19 or no to that because I cannot in all honesty say that I
 20 was there in each instance where an individual male went
 21 into that area.
 22 I can say this, throughout the entire facility
 23 there are knock and announce postings. And the proximity
 24 it is to the restroom that you've asked me about I can't
 25 answer that, but I will assure you that there are knock

1 professionals perform any sort of examination they do pull
 2 the curtain so that other, not only officers, but other
 3 prisoners can't see the examination, true?
 4 A. I can't answer that concretely. I wasn't -- I'm not
 5 there. But I could assume that they would.
 6 Q. All right.
 7 A. I mean, as a professional... I mean, it's an ethical,
 8 professional, ethical requirement, I would think.
 9 Q. Right.
 10 Now, in the gym you mentioned that there were
 11 bathrooms that women could use while they were in the gym
 12 area, right?
 13 A. Yes.
 14 Q. Now, are you sure that there were locker facilities there
 15 for them?
 16 A. There is lockers in -- There were lockers in that facility
 17 when we expanded and the conversion was completed and we
 18 were -- when we had become one women's facility.
 19 On the frequency in which the women used them, I
 20 cannot answer that.
 21 Q. When women would... when women would change clothes after
 22 using the gym isn't it true that they had to go to their
 23 cell to change clothes?
 24 A. Yes.
 25 Q. All right. So the locker facility wasn't used for women

1 and announce signs throughout the facility in the area of
 2 the restroom.
 3 And from a professional standpoint I would
 4 really hope that a male would not go into the restroom
 5 area even in a knock and announce state, that if there was
 6 a need for someone to go into the rest room area that a
 7 female officer would be contacted and notified and go into
 8 that area.
 9 Q. Well, outside of the stall areas were women supposed to --
 10 in the restroom area were women supposed to be in a state
 11 of undress?
 12 A. No.
 13 Q. Did you ever receive any complaints concerning the gym
 14 area that men had ever seen any women in a state of
 15 undress?
 16 A. I haven't received any specific complaints on that.
 17 Q. Any nonspecific -- Any complaints of any kind?
 18 A. No, sir.
 19 Q. All right.
 20 Okay. We've had marked as Exhibit 8 a document.
 21 Can you identify that document for me, please?
 22 A. Exhibit 8?
 23 Q. Yes.
 24 A. It says position description, healthcare slash infirmary
 25 officer.

1 Q. Ops. You're absolutely right.
 2 Could you identify Exhibit 9? I'm sorry.
 3 A. It's a position description.
 4 Q. For what position?
 5 A. The Industries officer.
 6 Q. And is this one of the positions that the group that you
 7 referenced earlier discussed making BFOQ female only?
 8 A. I'm sorry, I do not recall.
 9 Q. Is this a position where you recall prior to the facility
 10 becoming all female that men worked on at least some of
 11 the time?
 12 A. I was not at the women's facility when the Industries
 13 opened.
 14 Q. Okay. So, I mean, this description says it's a BFOQ
 15 female-only position. If I asked you why it was
 16 determined that this was a BFOQ female-only position would
 17 you have any information on that?
 18 A. Industries would be a position where there is dangerous
 19 tools, critical tools, the opportunity to... It's a
 20 volatile position where a prisoner could utilize that
 21 position in itself as part of escape opportunity.
 22 Industries position required a prisoner to be
 23 strip searched because of the nature of the tools and
 24 equipment the prisoners are working with, and of course
 25 they would need to be shaken down.

1 for identification by the reporter.)
 2 Q. (BY MR. KENT-BRYANT): All right. I've handed you
 3 Exhibit 10. Could you identify Exhibit 10 for me, please?
 4 A. It's a position description.
 5 Q. And for what position?
 6 A. It's a rover officer.
 7 Q. What does a rover officer do?
 8 A. A rover officer, I believe... Some facilities define a
 9 rover officer as a yard rover and some define them as
 10 housing unit rover. I would need to read the position
 11 description to attempt to know whether this -- what the
 12 rover did if it would be different for housing as opposed
 13 to yard --
 14 Q. That's fine.
 15 A. -- so may I?
 16 Q. Yes. Absolutely.
 17 A. We can continue.
 18 I've confirmed that it does apply to, it is
 19 applicable for a housing unit. It's written on the
 20 document.
 21 Q. Okay. This particular position.
 22 Now, at Huron Valley were there rovers that were
 23 working in the housing units and also not working in
 24 housing units?
 25 A. If memory serves me correct there is a yard rover

1 So my response in just experience in the
 2 Department of Corrections and experience with working with
 3 female prisoners would be that the Industries position
 4 would be a BFOQ position because it would require a
 5 prisoner to be shaken down and strip searched.
 6 Q. Right. But you weren't part of the decision to make the
 7 BFOQ designation for the industries officer at Huron
 8 Valley, true?
 9 A. I do not recall whether this was part of the discussion
 10 when we discussed BFOQ positions. I was not at the
 11 facility when the Industries position opened, when the
 12 Industries opened.
 13 Q. Was there any similar sort of facility prior to this
 14 particular building opening?
 15 A. What would you define as similar facilities?
 16 Q. Well, let me back up a little bit. Do you know what the
 17 industries officer at Huron Valley does?
 18 A. No, I wasn't there when the position opened.
 19 Q. All right. So that's a new position then?
 20 A. Correct.
 21 I could assume, but that's not appropriate for
 22 this venue.
 23 Q. I agree.
 24 Okay. You can set that aside.
 25 (Deposition Exhibit Number 10 was marked

1 assignment.
 2 Q. Let's see if we've got that one here.
 3 A. I really work hard to make sure that memory serves me
 4 properly.
 5 Q. Let me ask you this. Was the yard rover position BFOQ
 6 female only?
 7 A. I don't remember.
 8 Q. Do you remember your working group of which you were a
 9 member discussing the yard rover position in terms of it
 10 being a BFOQ female only?
 11 A. I don't. I don't recall.
 12 Q. Okay.
 13 A. And it's a good possibility that... At this facility we
 14 have a yard rover. I thought we had one at Women's
 15 Facility and I wanted to clarify before I mentioned it
 16 that my memory fails me, so I wasn't sure if it was
 17 housing or yard, because at this facility I have housing
 18 and yard, and it's been a long time since I've been at
 19 Women's and I'm really working to ensure that I'm not
 20 mixing rovers with, you know, the two facilities.
 21 Q. Understood.
 22 I want you to assume hypothetically that there
 23 was a yard rover position at Huron Valley. I think there
 24 was.
 25 A. I think there was as well.

(Pages 106 to 109)

1 Q. Or probably still is.
 2 A. I can't be a hundred percent positive, but I do think
 3 there was.
 4 Q. And I also think that it was BFOQed female only. I want
 5 you to assume that hypothetically.
 6 A. Right. I don't..
 7 Q. Do you know reasons there would be for making the yard
 8 rover position BFOQ female only?
 9 A. The same reason that you would... I should state that,
 10 I'm sorry.
 11 Because the requirement is that a prisoner -- a
 12 staff person shake down a prisoner to prevent the
 13 introduction of contraband.
 14 Q. Right. This is not, a yard rover position isn't a
 15 position where you'd be --
 16 A. In the housing.
 17 Q. It wouldn't be in housing?
 18 A. Okay.
 19 Q. Correct? The yard rover is different than a rover that
 20 would be in housing?
 21 A. Correct.
 22 Q. And so the yard rover position isn't a position where
 23 you'd be concerned about prisoners being seen in a state
 24 of undress, true?
 25 A. True.

1 assist in shakedowns. Do you recall any specific position
 2 to which any of those complaints pertained?
 3 A. I do not.
 4 Q. All right. And the rover officer position in housing
 5 units, did they actually enter the housing units? Was
 6 that part of the job responsibility?
 7 A. Yes.
 8 Q. All right.
 9 A. They were assigned in the housing unit.
 10 Q. Right.
 11 (Deposition Exhibit Number 11 was marked
 12 for identification by the reporter.)
 13 Q. (BY MR. KENT-BRYANT): I'm showing you what's been marked
 14 as Exhibit 11. Can you identify that document, please?
 15 A. It's a position description.
 16 Q. For what position?
 17 A. The position title is an inpatient and/or RTP medical
 18 aide.
 19 Q. And what does an inpatient/RTP medical aide do?
 20 A. This position or this person functions as would a resident
 21 unit officer. They control the security, flow of the
 22 housing unit to ensure there is no contraband. They're
 23 responsible for shaking down, for providing additional
 24 security for when there is group activity. They're
 25 responsible for taking the count. They are to assist the

1 Q. So that the reason for BFOQing that position would have to
 2 do with the shakedown requirements, true?
 3 A. That is true if in fact there is a position that exists
 4 and I'm accurate --
 5 Q. Right. Assume hypothetically. Assume hypothetically
 6 until we move on to the same topic -- or to a different
 7 topic.
 8 Now, did you ever receive any complaints
 9 specific to the yard rover position that males having to
 10 use females to perform shakedown responsibilities was
 11 causing any sort of disruption?
 12 MS. MILLER: I'm just going to place objection
 13 as to that because you're asking her if she received
 14 complaints about a position you told her to hypothetically
 15 assume existed.
 16 THE WITNESS: That I can't --
 17 MS. MILLER: So you're asking her did she
 18 receive complaints about a hypothetical position.
 19 THE WITNESS: That I can't really even confirm
 20 myself is a position at Women's.
 21 Q. Right. All right. You know what, I'll say that's fair
 22 enough.
 23 In fact, why don't I ask you generally. You
 24 mentioned that you overheard complaints and comments from
 25 women about having to be pulled off of an assignment to

1 doctors, nurses, and so on and so forth, in making rounds.
 2 They participate in the treatment team meetings regarding
 3 what is in a prisoner's best interest for recovery or
 4 discharge from the housing unit.
 5 Q. Now, do you recall whether your group discussed whether
 6 this should be a female-only position?
 7 A. I do not recall whether we specifically discussed this
 8 position, but I would like to add, an inpatient/RTP
 9 medical aide is an assignment that is inside of a housing
 10 unit and this position is exactly comparable for the most
 11 part to a resident unit officer.
 12 Q. And resident unit officers are in housing?
 13 A. Correct.
 14 Q. And that's BFOQed?
 15 A. And this is an in housing assignment.
 16 But to answer your question, no, I don't recall
 17 whether we discussed this position or not.
 18 Q. All right. And so this particular position... Does this
 19 particular position participate in transportation of the
 20 inmates to outside medical facilities at all?
 21 A. It could.
 22 Q. Is there a separate position that does that?
 23 A. Officers are... officers are qualified with weapons, and
 24 once an officer is qualified they are capable of taking
 25 outside medical transportation runs.

1 Q. All right.
 2 (Deposition Exhibit Number 12 was marked
 3 for identification by the reporter.)
 4 Q. (BY MR. KENT-BRYANT): Could you identify the document
 5 that is identified or that is marked as Exhibit 12?
 6 A. It is a position description, and the working title is
 7 property room officer.
 8 Q. All right. And this has been designated as a gender-based
 9 BFOQ position as well, true?
 10 A. According to the document, yes, that is correct, that's
 11 what it states here.
 12 Q. And was this one of the positions that was discussed in
 13 your working group during the conversion process?
 14 A. I'm sorry. I do not recall whether this was one of the
 15 positions discussed or not.
 16 Q. Do you know why this position is designated BFOQ female
 17 only?
 18 A. Property room officer has the responsibility to shake down
 19 prisoners. The property room officer is basically a
 20 single assignment and that assignment is located in an
 21 area that's separated from housing units or living area.
 22 The property room officer is traditionally
 23 afforded a prison worker or prison workers, they may have
 24 a prison worker assigned, and that would create a
 25 one-to-one position -- situation with a female prisoner or

1 A. Property room officer is responsible to store prisoner
 2 property, property that may have come from another
 3 facility that has not been -- that's not allowable at that
 4 particular facility.
 5 I'm sure there's what we call a grandfather
 6 clause, there's items that were allowable many years ago
 7 but they're not allowable now.
 8 Q. Why is there -- just out of curiosity, why is there a
 9 particular officer assigned to the property room?
 10 A. The property room officer processes catalog orders for the
 11 whole entire facility. So if you've got 1800 women and
 12 they're allowed to order up to \$150 worth of clothing, or
 13 whatever items per month, so 1800 women are allowed to
 14 order once a month up to \$150, in theory you may have 1200
 15 prisoners order, so you may have 1200 orders.
 16 And then family members, I mean, are -- if a
 17 prisoner is decreasing their property and they have more
 18 shoes than the department allows and they want to send
 19 those shoes out to a family member the property room
 20 officer is responsible to ensure that they're packaged up
 21 and the contraband doesn't go out and the contraband
 22 doesn't come in with these items.
 23 So the property room officer is responsible for
 24 handling and issuing property.
 25 Q. I got it. And they work with inmates who are assisting in

1 female prisoners.
 2 Q. All right. And the one to one -- Well, strike that.
 3 So the shakedown responsibility, when -- Well,
 4 first of all, I guess I have to ask. Are you aware of men
 5 ever having occupied the property room officer position?
 6 A. I do not recall.
 7 Q. All right. Do you recall what men would do in the
 8 property room position if a shakedown were required?
 9 A. The same thing he would do in any other area where a
 10 shakedown would be required. He would need to contact
 11 control center and they would need to relieve a female to
 12 come and conduct the shakedown.
 13 Q. So tell me what the responsibilities of a property room
 14 officer are. I mean, in general.
 15 A. In general, the property room officer enforces the rules,
 16 the regulations, they issue property, they're responsible
 17 to make rounds.
 18 Q. What's in the property room?
 19 A. Property.
 20 Q. Well, whose property?
 21 A. Prisoner property.
 22 Q. Okay.
 23 And the prisoners, what do they have to do to
 24 use their property? I don't know how the property room
 25 works at all. Tell me how the property room works.

1 the property room?
 2 A. They traditionally are allowed a worker.
 3 Q. All right. And that's the one-on-one contact you were
 4 talking about?
 5 A. That could occur if there is more -- if there is not more
 6 than one prison worker.
 7 Q. And typically how many prison workers were there?
 8 A. I don't recall.
 9 Q. You don't know? All right.
 10 And the shakedown responsibilities, they have --
 11 How does someone in the property room -- They have to do
 12 five random shakedowns per day also?
 13 A. Uh-huh (Yes). They shake down their -- Well, housing
 14 officers have the responsibility as well. Everyone has
 15 the responsibility to conduct shakedowns.
 16 I do not recall for the property room whether
 17 it's specifically five. I would really need to read, you
 18 know, the document in totality to say, you know,
 19 absolutely and positively it's five versus three versus
 20 one. I don't recall what the exact number is for a
 21 property room officer.
 22 Q. All right. That's fine.
 23 And the property room wasn't within housing, was
 24 it?
 25 A. The property room is not -- The property room is in a

(Pages 114 to 117)

1 building where a housing unit is located, but it's --
 2 Q. But not in the unit?
 3 A. That is correct.
 4 Q. All right.
 5 And so we're not certain what the responsibility
 6 of the property room officer was with regard to random
 7 shakedowns, but they would have responsibility for
 8 shakedowns if the need arose with prison employees, or
 9 prison workers within the property room, true?
 10 A. I'm sorry, what's your question?
 11 Q. Well, if there was some need to shake down a prison worker
 12 that would be a responsibility of -- within the property
 13 room, that would be a responsibility of the property room
 14 officer, true?
 15 A. That's correct.
 16 Q. All right. And if it were a male they would have to call
 17 out to control or to a supervisor to have a female assist
 18 in the shakedown, true?
 19 A. That is true.
 20 Prisoners on a work assignment are shaken down
 21 when they report to the assignment. When they leave the
 22 assignment there is no if they need to be shaken down. If
 23 a prisoner is working in an area with other prisoners'
 24 property, such as another prisoner's headphones, such as
 25 property that another person has purchased, they have to

1 operation of the property room or the facility in general?
 2 A. Not that I can specifically recall on this -- To narrow it
 3 by position, not that I can specifically recall.
 4 Q. Okay.
 5 (Deposition Exhibit Number 13 was marked
 6 for identification by the reporter.)
 7 Q. (BY MR. KENT-BRYANT): Can you identify Exhibit 13,
 8 please?
 9 A. It's a position description.
 10 Q. And that's for the school officer position?
 11 A. Working title is school officer, yes.
 12 Q. And do you recall whether this is one of the positions
 13 that your group discussed making BFOQ female only?
 14 A. I'm sorry, I do not recall.
 15 Q. Do you know why this position was designated BFOQ female
 16 only?
 17 A. The design of the facility is the restroom area is almost
 18 similar to an open bay style with just a very low cement
 19 wall, so there would be privacy issues related to female
 20 prisoners when they're using the restroom, and also the
 21 requirement of the shakedowns as well.
 22 Q. Okay. And dealing with the requirement of the shakedowns
 23 with regard to the school officer, first, at any given
 24 time is it just one school officer or is there more than
 25 one?

1 be shaken down before they leave to make sure they
 2 don't...
 3 Q. Before they leave the housing unit?
 4 A. Before they leave their assignment. If we could visualize
 5 a warehouse and...
 6 Q. No, I got you. I got you.
 7 A. I mean, we don't want them to steal other individuals'
 8 property and leave the property room with it, and so
 9 they're shaken down when they leave, that assignment, food
 10 service, when they leave assignments.
 11 Q. Are they shaken down when they leave the housing unit to
 12 go on the assignments?
 13 A. Very well could be.
 14 Q. All right. But as a matter of course, are they?
 15 A. It's not mandatory.
 16 Q. Okay.
 17 Now, when they return from the assignments are
 18 they shaken down?
 19 A. The property room officer conducts their shakedowns prior
 20 to them leaving the property room.
 21 Q. All right. And if it were a male the male would call a
 22 female to perform that shakedown, true?
 23 A. Correct.
 24 Q. Did you ever receive any complaints or have any
 25 information that that ever caused a problem with the

1 A. To my knowledge it's just one.
 2 Q. All right. And if that officer is male and a shakedown is
 3 required the male officer calls a female officer for
 4 assistance?
 5 A. He can't shake the female down.
 6 Q. Right.
 7 A. He would need to call his supervisor and his supervisor
 8 would need to assign a female officer.
 9 In all of these scenarios one officer, a male
 10 officer can't call a female officer from her assignment.
 11 Q. I understood that. I misspoke. I know what you've said.
 12 Now, for school how many prisoners are typically
 13 in the school area at any given time?
 14 A. I'm not sure, sir.
 15 Q. All right.
 16 Are they accompanied by housing officers at the
 17 school?
 18 A. No, they're not.
 19 Q. So from your understanding it's just the school officer
 20 and the female prisoners?
 21 A. Correct.
 22 Q. And, you know, again, I take it that you don't recall
 23 receiving any specific complaints specific to the school
 24 officer position where females complained that having to
 25 assist the males with shakedown was burdensome?

(Pages 118 to 121)

1 A. Correct.
 2 Q. The --
 3 A. I'll say this, though, if I may add -- And I apologize if
 4 I cut you off. I'll say this, if I may add. The school,
 5 the industries, the recreational building, those are in
 6 pretty far proximity from your traditional housing units
 7 based on the physical layout of the facility.
 8 And the point that I'm making is this. In this
 9 very casual conversation that we just call a female
 10 officer to come and assist in a shakedown is just really
 11 not as casual as that, because it's a good distance from
 12 one location to another. And if there is kind of an
 13 emergent situation that a male calls for a female to
 14 assist in a shakedown, well, control center would actually
 15 authorize that person to be released from their
 16 assignment, and depending on the urgency of the nature
 17 it's a bit of a distance.
 18 Q. Do you have an estimate of what the distance is?
 19 A. No, I don't.
 20 Q. You also mentioned the privacy concerns because the cement
 21 walls aren't very high in the bathroom?
 22 A. It's the physical design of...
 23 Q. Of the bathroom.
 24 There are also stalls in there, correct?
 25 A. I don't remember. I'm trying to recall how it's made.

1 A. This is one of the positions that I recall us discussing.
 2 Q. And do you recall why this position was BFOQed female
 3 only?
 4 A. Women in an off-site hospital, as in anyone in an off-site
 5 hospital are in the state of undress. We're not normally
 6 in a hospital bed clothed.
 7 And when the doctor or nurse comes in to conduct
 8 the physical exam of the prisoner that usually requires
 9 they take off.
 10 Q. But is it your understanding that that examination would
 11 not be screened from the officer?
 12 A. The officer has to -- it's the officer's job to provide
 13 coverage for the prisoner. They can't... If the doctor
 14 comes in the officer can't -- they just can't leave.
 15 Q. No, I know. But typically in a hospital when the physical
 16 exam is performed -- Hold on -- the area, the bed area is
 17 screened from people walking in and other patients, and so
 18 forth. Is that not the situation with the off-site
 19 hospital officer?
 20 A. I can't say that's a hundred percent true any or all of
 21 the time.
 22 Q. Are you saying it's not true, or do you just not know?
 23 A. It's safe to say I don't know.
 24 Q. All right. All right.
 25 Do you recall there being any complaints or

1 I know that there is a cement barrier and an
 2 entrance on like the right and the left side of the
 3 restroom.
 4 I don't recall.
 5 Q. All right.
 6 A. There's absolutely some type of dividers, but I don't
 7 recall whether it's a stall, or a stall door. I just...
 8 Q. All right. And women are not allowed to be in a state of
 9 undress in the school area, true?
 10 A. Correct.
 11 Q. And you can't see them in a state of undress in the
 12 bathroom area from the school area, true?
 13 A. True.
 14 (Deposition Exhibit Number 14 was marked
 15 for identification by the reporter.)
 16 Q. (BY MR. KENT-BRYANT): Can you please identify Exhibit 14?
 17 A. It's a position description.
 18 Q. For what position?
 19 A. It's for working title of off-site hospital officer.
 20 Q. And this is a BFOQ female-only position?
 21 A. As defined by the document, "This is a gender based BFOQ
 22 position designated for female officers."
 23 Q. And is this one of the positions that you recall your
 24 group discussing prior to the conversion of the facility
 25 to female only?

1 comments about off-site hospital officers seeing women in
 2 a state of undress?
 3 A. Excuse me. I'd like to go back to your original question
 4 about... Would you just repeat your last question,
 5 please?
 6 Q. Right. Do you recall receiving any complaints or comments
 7 concerning off-site hospital officers seeing women in a
 8 state of undress?
 9 A. I'd like to go to the question before that.
 10 Q. Oh, I have no idea what the question before that was.
 11 A. The question before that you asked is the officer
 12 basically present when the prisoner is in the state of
 13 undress, is the officer present and at the
 14 officer's (sic.) bedside, and I said -- my response was I
 15 can't say that that's true a hundred percent of the time
 16 or all of the time. And you indicated, well, then is it
 17 safe for me say that I'm not sure, and I indicated that
 18 that was a fair answer.
 19 I'd like to retract my saying that it is not
 20 true.
 21 Q. Just go ahead.
 22 A. It is true that an officer is required to keep basic
 23 visual contact of a prisoner when the prisoner is on --
 24 when the prisoner is in an outside hospital.
 25 Visual contact may... It could mean different

1 things. But the point is this, an officer that's on duty
 2 with a prisoner that is in a hospital has a requirement to
 3 be present with that prisoner.
 4 Q. Do you recall while you were at Huron Valley any males
 5 working as an off-site hospital officer?
 6 A. Males have worked on off-site hospital, yes.
 7 Q. All right. And do you recall there being any complaints
 8 or comments concerning males viewing female prisoners
 9 under those circumstances in a state of undress?
 10 A. There has been several prisoner grievances that were filed
 11 regarding issues that occurred on off-site hospital.
 12 Q. We talked about a number of positions. Again, and I want
 13 to return a little bit to your current position here at
 14 Woodland. Do you have a gym facility here?
 15 A. I do.
 16 Q. Are women allowed to work at the gym facility as a gym
 17 officer?
 18 A. They are allowed.
 19 Q. All right. I mean, here at Woodland are there any BFOQ
 20 male-only positions?
 21 A. I think BFOQ is specific gender base for female
 22 assignments. To ask if I have those positions at a men's
 23 facility I would say no.
 24 Q. No, that's not what I'm saying.
 25 A. Okay. I'm sorry.

1 Q. The BFOQ could be either male or female, and my question
 2 is here at a male facility do you have any BFOQ male-only
 3 positions that only men can work?
 4 A. No.
 5 Q. Do you have a school facility here?
 6 A. No.
 7 Q. All right. An industries facility?
 8 A. No.
 9 Q. And in terms of off-site hospital officer, do you have an
 10 off-site hospital officer?
 11 A. We don't have a specific assignment on our staffing
 12 schedule that gives us an off-site hospital position.
 13 Q. But sometimes people would have to go to the hospital?
 14 A. Absolutely. Yes.
 15 Q. And if someone has to go to the hospital, if one of the
 16 inmates has to go to the hospital can it be a female that
 17 accompanies the male inmate?
 18 A. We send two officers.
 19 Q. Okay. And for the off-site hospital officer at Huron
 20 Valley weren't usually two officers assigned to that?
 21 A. Usually I -- Usually.
 22 Q. And when they would arrive at the -- Well, let me ask you
 23 this. Why would there be two officers usually assigned?
 24 A. It's based on the Department of Corrections' policy.
 25 Policy requires based on a prisoner's security, custody

1 classification level, what his level of restraint in
 2 transport will be. All of those things are not determined
 3 at a facility level, they're determined based on the
 4 threat of the prisoner, his history, what his security
 5 classification is.
 6 Q. So if there were two officers and one of them were female,
 7 in the period of time where a woman might be in a state of
 8 undress the female officer could maintain visual contact
 9 with the prisoner, correct?
 10 A. I assume that would be correct.
 11 Q. Now, here at Woodland you mentioned two officers that are
 12 assigned. Can both of them -- Is it allowable for both of
 13 them to be female?
 14 A. It is allowable. Not that I have enough female staff to
 15 do that.
 16 Q. When you were at Huron Valley did you receive any
 17 complaints or overhear any conversations involving
 18 complaints from women corrections officers about
 19 difficulty transferring from Huron Valley?
 20 A. Not particularly, no.
 21 Q. Do you recall that being an issue at Huron Valley whether
 22 it was through the union or through some other means that
 23 the women's corrections officer had a harder time having a
 24 request for transfer granted because women corrections
 25 officers were so in demand at Huron Valley?

1 A. You want to know if I've heard?
 2 Q. Yeah. Was it an issue that you recall?
 3 A. Yes, it was a bit of an issue.
 4 Q. And did you ever hear complaints from women corrections
 5 officers about mandatory overtime?
 6 A. Of course. Yes.
 7 Q. And was that -- Was the mandatory overtime in part caused
 8 by the fact that much of the overtime couldn't be staffed
 9 by men because the positions were BFOQ female only?
 10 A. I can't answer what the exact reason was. It varied why
 11 overtime was overtime.
 12 Q. Okay. That could have been one of the reasons, wouldn't
 13 you agree?
 14 A. Could.
 15 Q. And same thing with the transfers, wasn't one of the
 16 reasons that it was difficult for women to successfully
 17 request transfers was because they were so needed at Huron
 18 Valley because so many positions were BFOQ female only?
 19 A. That would be speculation.
 20 It would be logical that because you have many
 21 BFOQ positions you would need many females. But I don't
 22 have any type of concrete information to support that to
 23 be true or not true as to why women transferred or didn't
 24 transfer. That would be speculation on my part.
 25 Q. While you were at Huron Valley were there complaints of --

1 CERTIFICATE OF NOTARY PUBLIC.

2

3 DEPONENT: LUCILLE EVANS (STATE OF MICHIGAN)
4 RECORDED: October 17, 2012 (SS)
5 LOCATION: Whitmore Lake, Michigan (COUNTY OF WASHTENAW)

6 Being a Notary Public duly commissioned and qualified
7 in and for the State of Michigan at Large, I do hereby certify
8 that pursuant to notice there came before me the deponent
9 herein, who was by me first duly sworn to testify to the truth
10 and nothing but the truth touching and concerning the matters
11 in controversy in this cause.

12 Being thereupon carefully examined under oath, said
13 examination was recorded stenographically and was later reduced
14 to transcription under my supervision; said transcription being
15 a true record of the testimony given by the witness.

16 I further certify that I am neither attorney or
17 counsel for, nor related to or employed by any of the parties
18 to the action in which this deposition was taken; and further,
19 I am not a relative or employee of any attorney or counsel
20 employed by the parties hereto or financially interested in the
21 action.

22 IN WITNESS WHEREOF, I have hereunto subscribed my
23 signature this 28th day of October 2012.

24

25

26

27

Daniel E. Ripka
Daniel E. Ripka, CSR-2367



28 NOTARY PUBLIC:
29 GENESEE COUNTY, MICHIGAN
30 MY COMMISSION EXPIRES:
31 January 19, 2014

32

33

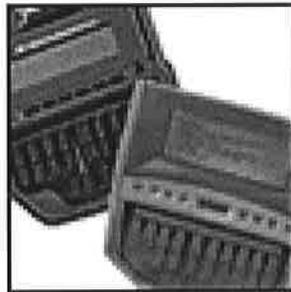
34

E

Nowacki v. State of Michigan Department of Corrections

Deponent: Gary Manns

Taken: 4/4/2013



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Page 9

1 A. Dan Heynes.
2 **Q. Okay. Is he --**
3 **MS. MILLER:** And that's H-E-Y-N-E-S.
4 **THE WITNESS:** Correct.
5 **BY MR. FETT:**
6 **Q. Is he a Snyder appointee?**
7 A. Yes.
8 **Q. How about McKean?**
9 A. McKean was, too.
10 **Q. And Overton, who appointed?**
11 A. Overton was appointed briefly by Engler, and then that
12 transitioned over into Granholm. Caruso was Granholm,
13 and then, let's see, yeah, then we're here with Heynes
14 which is Snyder.
15 **Q. Okay. How much interaction would you have with Bill**
16 **Martin when you worked?**
17 A. Quite a bit, quite a bit.
18 **Q. Okay. So if he had a personnel issue, would you be**
19 **the first person he would call?**
20 A. He would call me, yes.
21 **Q. Okay. Same question as to Miss Caruso.**
22 A. Yes. Even as deputy director, she called on me for a
23 lot of personnel. But when I went to deputy director,
24 the person that is the personnel director then and
25 currently is is Tony Lopez.

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1 **Q. Okay. All right. Tell me how familiar you are with**
2 **the concept of BFOQ or Bona Fide Occupational**
3 **Qualifications.**
4 A. In '99 I had to do the research on it when Bill Martin
5 wanted to look at implementing that, and so I'm
6 familiar with it from 1999, and I dealt with it a few
7 years and then turned it over to Tony Lopez. Even
8 when I was personnel director and underneath operation
9 support at that time, that was all the internal
10 operations of the department which HR was one of them,
11 I turned that over to Tony. So I started phasing
12 myself out of the day-to-day stuff with the BFOQs.
13 **Q. Okay.**
14 A. Tony's maintained -- I gave him all my records, so he
15 has everything under the sun for the last since 2006
16 or even before that.
17 **Q. All right. Explain in your understanding the notion**
18 **of BFOQ.**
19 A. Well, the BFOQ really is a legalized way in which you
20 theoretically can discriminate based on gender. In
21 this particular case, we had so many lawsuits coming
22 out of one facility that the director at that time,
23 Bill Martin, looked at what can we do to minimize
24 impact coming out of that facility based on the
25 lawsuits going on.

Page 11

1 So he explored the idea of a BFOQ,
2 basically identifying positions that he thought would
3 be better served if they were gender based.
4 **Q. Okay.**
5 A. And at the time we looked around the United States,
6 and there was really only one position in the United
7 States we could find, and that was in Wisconsin on
8 second shift in one unit that had a person that was
9 part time, BFOQ.
10 **Q. Female?**
11 A. Female, yeah, yes.
12 **Q. Okay. So this would have been around 1999?**
13 A. 1999.
14 **Q. Okay. And you said these lawsuits emanated out of one**
15 **particular facility.**
16 **Name the facility, please.**
17 A. Well, the Scott Correctional Facility.
18 **Q. Okay.**
19 A. And, also, at that time, too, there was Western Wayne,
20 and I can't remember when we phased Western Wayne out,
21 We closed that, moved the prisoners to Scott. Then
22 ultimately all the prisoners at Scott when we closed
23 it went to Huron Valley.
24 **Q. Are there any other women -- well, women prisons is**
25 **all women, right?**

Page 12

1 A. Correct.
2 **Q. Okay. And --**
3 A. Prisoners.
4 **Q. Prisoners. Any other women prisons right now as we**
5 **speak besides Huron Valley?**
6 A. No, no. We consolidated everything into the one
7 facility for management.
8 **Q. Okay. What percentage of the prison population is**
9 **female?**
10 A. Departmental-wide?
11 **Q. Yeah.**
12 A. I couldn't even take a guess. The population itself,
13 and I'm -- I want to say it's forty-eight thousand but
14 I am not sure because I've stepped out of the
15 statistical numbers a while ago.
16 **Q. Sure.**
17 A. And so we have one facility out of thirty something
18 that are female. So I'm not sure what percentage that
19 would be because I don't know how many female
20 prisoners we have currently at the Valley.
21 **Q. Okay. I was just curious. I'm not sure that it**
22 **matters in this case, but I'm sure maybe Mr. Curtis**
23 **will know.**
24 A. He should know because he's the regional administrator
25 over that area.

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1 correct?
2 A. Yes, they are position descriptions.
3 Q. And do you recall sending position descriptions over
4 as opposed to a list like you did in 2000?
5 A. No, I don't. I don't remember.
6 Q. That's fine. That's fine. I'm not going to ask you
7 to answer any specific questions on there. I just
8 wanted to make sure that -- I can see why you wouldn't
9 want to attach all those pages to your letter in
10 response.
11 MS. MILLER: Well, I would point out that
12 the letter actually talks about the attached
13 positions, so --
14 MR. FETT: Yep. But, I mean, my point is
15 we never, we never got those.
16 MS. MILLER: Well, you have the
17 descriptions, you have all those PDs.
18 MR. FETT: Yep, yep.
19 MS. MILLER: And maybe that would have been
20 what happened instead of attaching the PDs twice.
21 MR. FETT: Yeah. I'm not suggesting
22 anything nefarious here.
23 MS. MILLER: Because the PDs have all been
24 provided, but that may be the case.
25 MR. FETT: I'm on record saying she's very

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1 professional and civil. So I am not insinuating
2 there's anything nefarious going on here. I just
3 didn't have it. So now we know exactly what the
4 situation is.
5 Okay. Well, I don't have anything further
6 for you, Mr. Manns. It's been nice meeting you again.
7
8 (Deposition concluded at 12:00 noon.)
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Page 71

1 STATE OF MICHIGAN)
2)SS.
3 COUNTY OF LIVINGSTON)
4 CERTIFICATE OF NOTARY PUBLIC
5 I certify that this transcript
6 is a complete, true, and correct record of the
7 testimony of the deponent to the best of my ability
8 taken on Thursday, April 4, 2013.
9 I also certify that I am not a
10 relative or employee of a party, or a relative or
11 employee of an attorney for a party, have a contract
12 with a party, or am financially interested in the
13 action.
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Cheryl McDowell, CSR-2662, RPR
Notary Public, Livingston County
State of Michigan
Commission Expires September 13, 2013

F
MAY 01 2014

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 22ND JUDICIAL CIRCUIT
WASHTENAW COUNTY

ALEIKA BUCKNER,

Plaintiff,

No. 13-636-CD

v

HON. DAVID S. SWARTZ

STATE OF MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant.

James K. Fett (P39461)
Joshua R. Fields (P68559)
Fett & Fields, PC
Co-Counsel for Plaintiff
805 E. Main Street
Pinckney, MI 48169
734-954-0100

Glen N. Lenhoff (P32610)
Law Office of Glen N. Lenhoff
Co-Counsel for Plaintiff
328 S. Saginaw Street, Floor 8,
North Building
Flint, MI 48502
810-235-5660

Brittany A. Campbell (P75152)
Jared Warner (P74890)
Assistant Attorneys General
Attorneys for Defendant
Employment, Elections & Tort Division
PO Box 30736
Lansing, MI 48909
(517) 373-6434

**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY
DISPOSITION**

At a session of said Court, held in the 22nd Circuit Court
for the County of Washtenaw
On this 23rd day of April, 2014

PRESENT: HON. DAVID S. SWARTZ
CIRCUIT COURT JUDGE

Following oral argument on Defendant's Motion for Summary Disposition in the above referenced matter, and for the reasons stated in the record,

IT IS HEREBY ORDERED THAT:

1. As to Count I, Discrimination on the basis of Gender under the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) on the basis that there is no genuine issue as to any material fact is **DENIED**.
2. As to Count II, Retaliation under the ELCRA, MCL 37.2101 *et seq.*, Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) on the basis that there is no genuine issue as to any material fact is **DENIED**.

This Order does not resolve the last pending claim and does not close the case.

IT IS SO ORDERED.

Date: APR 23 2014

/S/ DAVID S. SWARTZ

DAVID S. SWARTZ
CIRCUIT COURT JUDGE

The undersigned parties, through their respective counsel, stipulate to the form of the above order and waive notice of entry:

4/17/14
Date

J. Fett (w/perm.)
James K. Fett (P39461)
Fett & Fields, PC
Co-Counsel for Plaintiff
805 E. Main Street
Pinckney, MI 48169
734-954-0100

4/17/14
Date

G. Lenhoff (w/perm.)
Glen N. Lenhoff (P32610)
Law Office of Glen N. Lenhoff
Co-Counsel for Plaintiff
328 S. Saginaw Street, Floor 8, North Bldg
Flint, MI 48502
810-235-5660

4/17/14
Date

Brittany Campbell
Brittany A. Campbell (P75152)
Jared M. Warner (P74890)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
Lansing, Michigan 48909
(517) 373-6434

Prepared by:

Brittany A. Campbell (P75152)
Assistant Attorney General
Attorney for Defendant
PEET Division
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

will G

2009 WL 799173
United States District Court,
E.D. Michigan,
Southern Division.

OPINION AND ORDER

William REESE, Plaintiff,

PATRICK J. DUGGAN, District Judge.

v.

MICHIGAN DEPARTMENT OF CORRECTIONS
and Gerald Brown, Defendants.

No. 08-10261.

March 24, 2009.

*1 In this lawsuit William Reese (“Plaintiff”) alleges that the Michigan Department of Corrections (“MDOC”) and Gerald Brown, the Assistant Deputy Warden at Camp White Lake correctional facility, made discriminatory employment decisions against him on the basis of gender. Specifically, this lawsuit arises from the MDOC’s refusal to assign male corrections officers to the third shift and public works positions at Camp White Lake, an all-female correctional facility. Presently before the Court is Defendants’ Motion for Partial Summary Judgment, filed on January 15, 2009.¹ The motion has been fully briefed and the Court held a hearing on March 19, 2009. For the reasons set forth below, the Court denies the motion.

West KeySummary

1 Federal Civil Procedure

☞ Employees and Employment Discrimination,
Actions Involving

Genuine issues of material fact existed regarding whether gender was a bona fide occupational qualification for third-shift control center and public works officer positions at an all-female prison. The male employee denied a position asserted that male officers had been allowed to fill analogous positions at other all-female facilities. However, the department of corrections had been allowed to restrict positions based on gender in the past out of concern for sexual abuse in female facilities. Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e-2(a).

I. Factual and Procedural Background

Plaintiff has worked for the MDOC since 1987. On March 26, 2007, the MDOC opened Camp White Lake as a new, all-female correctional facility and Plaintiff was transferred to that location. At Camp White Lake, Plaintiff expressed an interest in working the third shift and in filling the “Public Works” position. In general terms the public works position involves the transportation and supervision of prisoner work crews that perform work at off-site locations. Plaintiff was informed, however, that the third shift and public works positions at Camp White Lake are restricted to female officers.² Because of the manner in which schedules were created at Camp White Lake, the MDOC’s policy of limiting the third shift to females prevented Plaintiff from working overtime.

Cases that cite this headnote

Plaintiff filed an internal complaint regarding the denial of his work requests on May 3, 2007, alleging that the MDOC was discriminating against him on the basis of his gender. On June 13, 2007, Plaintiff filed similar complaints with the Michigan Department of Civil Rights and the Equal Employment Opportunity Commission (“EEOC”). On June 15, 2007, the MDOC policy was revised to allow males to work in the control center on the third shift at Camp White Lake. Plaintiff was the first male to work the third shift that night. On December 5, 2007, Plaintiff received a “right to sue” letter from the EEOC and he filed this lawsuit on January 17, 2008.

Attorneys and Law Firms

Glen N. Lenhoff, Robert D. Kent-Bryant, Law Office of
Glen N. Lenhoff, Flint, MI, for Plaintiff.

Steven M. Cabadas, MI Dept of Attorney General,
Lansing, MI, for Defendants.

Plaintiff's complaint contains four counts against the MDOC and Gerald Brown: count one alleges a gender discrimination claim against the MDOC under Title VII of the Civil Rights Act of 1964; counts two and three allege retaliation and gender discrimination against the MDOC under Michigan law; and count four alleges gender discrimination against Gerald Brown under Michigan law. In response to these claims, the MDOC maintains that gender is a bona fide occupational qualification ("BFOQ") for the positions at issue in this case. The MDOC and Brown filed the present motion on January 15, 2009, requesting summary judgment on counts one and four. On January 29, 2009, the parties stipulated to dismissal of the state law claims—counts two, three, and four. Consequently, there are no remaining claims against Gerald Brown and the request for summary judgment as to count four is moot. The Court now considers the MDOC's motion for summary judgment as to count one.

II. Standard of Review

*2 Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

The movant has an initial burden of showing "the absence of a genuine issue of material fact." *Id.* at 323. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). To demonstrate a genuine issue, the non-movant must present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. *See Liberty Lobby*, 477 U.S. at 252, 106 S.Ct. at 2512.

The court must accept as true the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. *See id.* at 255. The inquiry is whether the evidence presented is such that a jury applying the relevant

evidentiary standard could "reasonably find for either the plaintiff or the defendant." *See id.*

III. Gender Discrimination and the BFOQ Defense

"Title VII of the Civil Rights Act of 1964 broadly proscribes gender-based discrimination in the workplace." *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 747 (6th Cir.2004); *see also* 42 U.S.C. § 2000e–2(a). Nonetheless, an employer may make decisions on the basis of gender when gender presents a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e–2(e). The exception for BFOQs "is written narrowly, and is to be read narrowly." *Everson*, 391 F.3d at 748. When asserted, the employer bears the burden of proof in establishing a BFOQ. *Id.*

In this case, the MDOC admits that Plaintiff was denied the opportunity to work on the third shift at Camp White Lake from March 26, 2007, until June 15, 2007, and that he was denied, and continues to be denied, the opportunity to fill the public works position because of his gender. The MDOC maintains that being female is a BFOQ for those positions and that the modification to the third shift policy was only made feasible after the implementation of strict rules for the male officers and female prisoners at Camp White Lake.

*3 This is not the first time the MDOC has been sued for its practice of restricting positions to female officers. In *Everson v. Michigan Department of Corrections*, the Sixth Circuit agreed with the MDOC that gender is a BFOQ for certain positions in Michigan's all-female correctional facilities. 391 F.3d 737. There the Sixth Circuit held that "the decisions of prison administrators are entitled to a degree of deference" in the employment context "[b]ecause of the unusual responsibilities entrusted to them, the redoubtable challenges they face, and the unique resources they possess" *Id.* at 750. The court went on to explain that a prison administrator's decision may not deserve deference if it is made "capriciously," but that, otherwise, "[t]he MDOC [is] not obligated to follow any particular protocols in order to earn deference" *Id.* at 751.

Applying those concepts to the facts before it, the Sixth Circuit concluded that the MDOC had appropriately classified approximately 250 positions in its all-female correctional facilities as female-only. *Id.* at 741. In support of its opinion, the court discussed the MDOC's obligation to promote security and safety within the correctional facilities and its legitimate interest in ensuring some degree of privacy for the female prisoners.

See id. at 753–59. Of special concern to the court was an “endemic problem of sexual abuse” documented in the all-female correctional facilities and the MDOC’s need to resolve that problem. *See id.* at 741–45, 753–60. Ultimately, the court concluded that, “given the endemic problem of sexual abuse in Michigan’s female facilities, given the constellation of issues addressed by the MDOC’s plan (security, safety, and privacy), and given the deference accorded the MDOC’s judgment, the MDOC’s plan is reasonably necessary to the normal operation of its female prisons.” *Id.* at 761.

In support of its **BFOQ** defense in this case, the MDOC primarily relies on *Everson* and maintains that the third shift and public works positions at issue here fall within the types of positions discussed in *Everson*. Plaintiff, meanwhile, disputes the MDOC’s description of the actual job duties for third shift control center and public works officers and asserts that male officers have always been allowed to fill analogous positions at other all-female facilities. Plaintiff also argues that *Everson* does not apply to this case because, at the conclusion of its opinion, the Sixth Circuit warned of the “limited nature” of the holding; the court explained, “We do not hold that gender constitutes a **BFOQ** for corrections officers in female prisons outside of Michigan. Nor do we hold that gender constitutes a **BFOQ** for positions in Michigan’s female prisons beyond the approximately 250 positions we have discussed.” *Id.* at 761.⁴

Based on the record facts, the Court cannot determine whether the third shift and public works positions at issue in this case fall within the type of positions analyzed in *Everson*. While the *Everson* opinion expressly involved housing unit positions, transportation officers, and intake offers, the positions discussed in *Everson* were identified more by their duties than by their shift or title. All of the positions affected by the female-only restrictions in *Everson* placed officers in a position to interact with the female prisoners in situations where the prisoners would be most vulnerable to sexual abuse. Specifically, each of the positions required officers to interact with or observe prisoners in various states of undress. *See id.* at 740. Furthermore, there does not appear to have been any dispute between the parties in *Everson* that the positions at issue involved these higher risk scenarios.

*4 In this case, Plaintiff takes issue with the MDOC’s characterization of the third shift control center and public works positions as being analogous to the positions discussed in *Everson*. The MDOC maintains that it was necessary to restrict all third shift positions at Camp White Lake to female officers until the prisoners could be given notice they would be observed by a male guard in

the control center if they left their sleeping quarters and walked to the restroom facilities. MDOC officials allegedly feared that, until the prisoners were given notice of the presence of a male officer, they would leave their sleeping quarters in a state of undress. At the same time, however, Plaintiff and MDOC officials have testified that, from the opening of Camp White Lake, rules required that prisoners be fully dressed when leaving their sleeping quarters. Under these circumstances, Plaintiff argues that the third shift gender restrictions were never reasonably necessary.

In regard to the public works position, there remains a dispute as to the actual duties of those officers. The MDOC maintains that public works officers are required to perform pat-down searches of the prisoners on the work crew before returning to the prison. The “position description” for public works officers also reflects this requirement. Because of the pat-down requirement, an MDOC official testified that gender restrictions for this position began to be implemented after the *Everson* decision in 2005. Nonetheless, Plaintiff testified that he filled the public works position at another all-female prison until the time of his transfer in March 2007. Plaintiff further testified that, in the approximately seven years that he worked as a public works officer with all-female work crews, he was never required nor had occasion to perform pat-downs on the prisoners.

In the face of Plaintiff’s claims and testimony, the MDOC argues that *Everson* requires the Court to defer to its position. The Court agrees that *Everson* requires the Court to defer to the MDOC’s professional judgment that gender restrictive employment policies are necessary where undertaken to combat established problems with sexual abuse. If, for example, the public works position actually requires regular pat-down searches of the work crew members, the Court must defer to the MDOC’s decision to restrict the position to female officers. The factual circumstances surrounding the positions at issue, however, are not judgments to which the Court must defer. Given the factual disputes regarding whether the third shift control center and public works positions actually involve scenarios with a high risk for sexual abuse, the Court cannot conclude that the MDOC is entitled to summary judgment in this case.

Finally, the Court notes that the **BFOQ** defense generally requires a “case-by-case” analysis and that *Everson* itself was decided only after a full bench trial. *See id.* at 746, 760. The Sixth Circuit clearly did not intend *Everson* to act as a blanket future authorization for the MDOC to proscribe males from filling positions at its female prisons. Until the factual issues regarding the precise

circumstances and responsibilities of the positions at issue are resolved, the Court cannot determine whether the female-only restrictions are “reasonably necessary” for the MDOC to address the issues of security, safety, and privacy in its all-female correctional facilities.

*5 Accordingly,

IT IS ORDERED that defendants’ motion for summary judgment is **DENIED**.

Footnotes

- 1 Plaintiff’s complaint alleges four separate counts: the first three against the MDOC and the fourth against Gerald Brown. Defendants’ motion for “partial” summary judgement seeks summary judgment on counts one and four. Since the filing of the motion, however, the parties stipulated to the dismissal of counts two, three, and four. Consequently, count one against the MDOC is the only remaining count.
- 2 The Michigan Department of Civil Service approved MDOC requests to classify the positions at issue as female-only on grounds that such a requirement is a bona fide occupational qualification (“BFOQ”) for these positions.
- 3 The court later described the appropriate “degree of **deference**” as “substantial weight.” *Everson*, 391 F.3d at 755.
- 4 Plaintiff makes additional arguments that the MDOC’s decision in this case is not entitled to **deference** and that the Court should follow a Seventh Circuit case, *Henry v. Milwaukee County*, 539 F.3d 573 (7th Cir.2008), over *Everson*.
As to the first argument, Plaintiff sets forth no evidence suggesting that the MDOC’s employment decisions in this case were “capricious” and the Sixth Circuit made it clear that prison administrators need not earn **deference** for their decisions by following any specified procedures. *Everson*, 391 F.3d at 751–52.
As to the second argument, the juvenile detention center at issue in *Henry* presented different issues than the all-female correctional facilities run by the MDOC. *Henry*, 539 F.3d at 582. As the Seventh Circuit noted, the juvenile detention center in *Henry* had no history of sexual abuse problems and the prison administrators were applying their same-sex employment policy in a manner inconsistent with the privacy interests of the juveniles. *Id.* Furthermore, the primary justification for the same-sex policy in *Henry* was rehabilitation rather than concerns with safety, security, and privacy. *Id.* at 583. Given these facts, the Court concludes that *Everson*, which considered similar MDOC operated all-female prisons, provides the most relevant guidance for this case.

All Citations

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post hoc

= pro = BFOQ analysis
p6

84 F.Supp.2d 917
United States District Court,
S.D. Ohio,
Western Division.

Bobbie A. RUCKER, Plaintiff,

v.

CITY OF KETTERING, OHIO, et al., Defendants.

No. C-3-99-429.

Feb. 7, 2000.

Female applicant for civilian jailer position brought action against city, and city employees, asserting claims under § 1983 and Ohio statute prohibiting gender discrimination in employment. Applicant moved for preliminary injunction. The District Court, Rice, Chief Judge, held that: (1) applicant did not show that city's policy was not narrowly tailored to achieve compelling state interests, and therefore, did not show likelihood of success on the merits, and (2) applicant was likely to suffer irreparable harm if city was not enjoined from permanently filling existing jailer vacancy.

Motion denied.

West Headnotes (9)

[1] **Injunction**

Grounds in general; multiple factors

District Court considers four factors when deciding whether to grant a preliminary injunction: (1) likelihood that the party seeking relief will succeed on the merits of the claim; (2) whether the party seeking relief will suffer irreparable harm without the preliminary injunction; (3) probability that granting the requested relief will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the preliminary injunction.

Cases that cite this headnote

[2]

Civil Rights

Employment practices

Civil Rights

Employment practices

Female applicant for civilian jailer position in all-male facility, alleging that city's refusal to accept her application violated Equal Protection clause of Fourteenth Amendment, and Ohio statute prohibiting gender discrimination in employment, failed to show that city's policy was not narrowly tailored to achieve compelling state interests, and therefore, did not show likelihood of success on the merits as required for preliminary injunction to prevent city from accepting additional applications for position of civilian jailer; Ohio regulations for city jailers provided that certain tasks be performed by jailers who were of the same sex as inmates. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; Ohio R.C. Code §§ 4112.02(A), (E)(5); Ohio Admin. Code §§ 5120:1-10-01(L)(4, 10), 5120:1-10-03(V).

1 Cases that cite this headnote

[3]

Civil Rights

Liability of Public Officials

Suit against an individual in his official capacity, under § 1983, is equivalent to a suit against the governmental entity for which he works. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[4]

Civil Rights

Substantive or procedural rights

Section 1983 does not itself create any constitutional rights; rather, it creates a federal cause of action for the vindication of constitutional guarantees found elsewhere. 42

U.S.C.A. § 1983.

Cases that cite this headnote

151

Civil Rights

☞ Nature and elements of civil actions

In order to succeed on her § 1983 claim, plaintiff must show that: (1) she was deprived of a right secured by the federal Constitution or laws of the United States, and (2) she was subjected to this deprivation by a person acting under the color of state law. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

161

Civil Rights

☞ Acts of officers and employees in general; vicarious liability and respondeat superior in general

Civil Rights

☞ Governmental Ordinance, Policy, Practice, or Custom

City cannot be held responsible under § 1983, under a theory of respondeat superior; rather, plaintiff must show that the city, through a custom or policy, caused the alleged constitutional violation. 42 U.S.C.A. § 1983.

Cases that cite this headnote

171

Prisons

☞ Privacy in general

Person's interest in not being viewed unclothed by members of the opposite sex survives incarceration.

Cases that cite this headnote

181

Civil Rights

☞ Injunction

Infringement upon First Amendment rights results in irreparable harm sufficient to justify injunctive relief. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

191

Civil Rights

☞ Employment practices

Civil Rights

☞ Employment practices

Female applicant for civilian jailer position in all-male facility was likely to suffer irreparable harm if city was not enjoined from permanently filling existing jailer vacancy, as required for preliminary injunction to prevent city from accepting additional applications for position of civilian jailer, in applicant's suit under § 1983 and Ohio statute prohibiting gender discrimination in employment; city only employed five civilian jailers, and vacancies for position were infrequent. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; Ohio R.C. § 4112.02(A), (E)(5); Ohio Admin. Code §§ 5120:1-10-01(L)(4, 10), 5120:1-10-03(V).

Cases that cite this headnote

Attorneys and Law Firms

*918 Isabel Suarez, Dayton, OH, Mark Allan Anthony, Dulaney & Phillips, Dayton, OH, for Bobbie A. Rucker, plaintiff.

David L. Eubank, City of Kettering, Kettering, OH, Robert Forrest Cowdrey, Jenks, Surdyk & Cowdry Co., Dayton, OH, for Kettering City, defendant.

Michael William Krumholtz, Joseph C. Oehlers, Bieser, Greer & Landis, Dayton, OH, for James O'Dell, Chief of Police, defendant.

Louise S. Brock, Dinsmore & Shohl, Cincinnati, OH,

Gary Edward Becker, Dinsmore & Shohl, Cincinnati, OH, for Richard Strader, defendant.

*919 DECISION AND ENTRY OVERRULING MOTION FOR PRELIMINARY INJUNCTION (DOC. # 2), FILED BY PLAINTIFF BOBBIE A. RUCKER

RICE, Chief Judge.

This lawsuit stems from the Plaintiff's unsuccessful attempt to apply for employment as a civilian jailer. In response to an advertised job opening, the Plaintiff sought an application for the jailer position from Defendant City of Kettering, Ohio. City employees refused to provide the Plaintiff with an application, however, because she was a female. As a result, the Plaintiff commenced the present litigation, asserting causes of action under 42 U.S.C. § 1983 and Ohio Revised Code § 4112.02, and seeking injunctive relief and compensatory damages. (Amended Complaint, Doc. # 17). Her amended Complaint names several Defendants, including the City of Kettering, Chief of Police James O'Dell, Human Resources Director Richard Strader, and Human Resources Analyst Karen Sejas, all of whom are City employees who have been sued in their official capacities.¹ (*Id.*). Along with her amended Complaint, the Plaintiff also has filed a Motion for a Temporary Restraining Order ("TRO"), and Preliminary and Permanent Injunction. (Doc. # 2).

Following a telephone conference call, the Court entered a September 8, 1998, TRO, enjoining the City from accepting additional applications for the position of civilian jailer. (Doc. # 5). The Court also enjoined the City from filling a vacant jailer position² or conducting a written examination for the job. (*Id.*). Thereafter, on September 21, 1999, the Court held an oral and evidentiary hearing on the Plaintiff's Motion for a Preliminary Injunction. The parties subsequently filed post-hearing briefs, further addressing the legality of the City's failure to provide the Plaintiff with an employment application. After reviewing those filings and the evidence introduced at the hearing on the Plaintiff's Motion, the Court concludes that she has not demonstrated her entitlement to a preliminary injunction. Accordingly, for the reasons set forth more fully below, the Plaintiff's Motion for a Preliminary Injunction (Doc. # 2) will be overruled.

1. *Findings of Fact*³

Plaintiff Bobbie A. Rucker is a thirty-seven year old

female. She began her career as a correctional officer at the Hocking Correctional Institution in Nelsonville, Ohio, where she worked from March, 1986, until January, 1987. At Hocking, Rucker worked on shifts with male and female correctional officers who guarded the all-male inmate population. Among other things, her responsibilities included conducting "pat-downs" and watching as inmates stood behind curtains and "dressed out" into prison jump suits.⁴ From the Hocking facility, Rucker went to work as a correctional officer at the Dayton Correctional Institution in Dayton, Ohio, where she performed similar tasks. While working at the Dayton facility, *920 Rucker also worked with male and female correctional officers guarding an all-male inmate population. Ultimately, she rose to the rank of captain and had approximately 115 correctional officers under her supervision. She quit her job in September, 1996, however, and began driving trucks commercially.

Thereafter, in August, 1999, Rucker saw a newspaper advertisement for a civilian jailer position with the City of Kettering, Ohio. After reviewing the advertisement, she went to the City's government center and expressed her interest in applying for the job. In response, Kettering Human Resources Analyst Karen Sejas refused to accept Rucker's application. Sejas informed Rucker that the City hires only males to work as civilian jailers. Sejas also explained to Rucker that the Ohio Civil Rights Commission had approved the City's decision to hire only male jailers.

The City's refusal to hire female jailers stems from the fact that its jail is a five-day holding facility, which houses only male inmates who have not been convicted of a crime. The jail has a maximum capacity of seven inmates, and ninety percent of its occupants have been arrested for misdemeanor offenses. Arrested females are not integrated into the Kettering facility. Rather, they are taken to the facility only briefly and given an opportunity to post bond. If they cannot do so, they are transported immediately to the Montgomery County jail, which houses male and female inmates.

Five full-time civilian jailers staff the Kettering facility in eight-hour shifts, seven days a week, twenty-four hours a day. Thus, the seven-day work week includes three eight-hour shifts per day, for a total of twenty-one shifts each week. Of those twenty-one shifts, seventeen are covered by one jailer, and four are covered by two jailers working together. Consequently, all of the City's civilian jailers spend at least part of their work week alone supervising the inmates. Shift assignments are made on the basis of seniority, and the jailers do not operate under a union contract.

The job responsibilities of the civilian jailers are varied. Among other things, they perform occasional pat-down searches. At the Kettering facility, such searches require the jailers to pat the clothing covering the male inmates' genitals. Performing strip searches is also considered a job responsibility of the City's jailers. In practice, however, strip searches at the Kettering facility are extremely rare, and they require written pre-approval from a supervisor.⁴ The jailers also provide inmates with various shower supplies each morning, including towels, shavers, soap, shaving cream, and razors. After showering, the inmates return their supplies and walk, often naked, through the jail's day room. In addition, the jailers are responsible for observing new inmates as they strip to their underwear and replace their personal clothing with City-issued pants, shirts, and shoes. Pursuant to jail policy, the civilian jailers are also responsible for directly observing each inmate every thirty minutes. Such observation is conducted by viewing video monitors and by physically checking on the inmates in their cells. Finally, the jailers' job responsibilities include cleaning all toilets, urinals, laboratories, drinking facilities, and bathing facilities on a daily basis.

Although the City insists that allowing female jailers to perform many of the foregoing tasks would be "inconvenient," jail supervisor Craig Bailey conceded during the September 21, 1999, oral and evidentiary hearing that a female jailer could perform the required pat-down searches. He also acknowledged that female jailers could dispense shower supplies, particularly if jail inmates were supplied with robes to wear to and from the shower. Additionally, Bailey recognized the possibility that male inmates could remain in their street clothes until a male jailer arrived on duty *921 to observe the "dress down" procedure. Likewise, he acknowledged that any required strip searches could be postponed until after a male jailer arrived on duty.

II. Analysis

^[1] A District Court considers four factors when deciding whether to grant a preliminary injunction. Those factors are: (1) the likelihood that the party seeking relief will succeed on the merits of the claim; (2) whether the party seeking relief will suffer irreparable harm without the preliminary injunction; (3) the probability that granting the requested relief will cause substantial harm to others⁶; and (4) whether the public interest is advanced by the issuance of the preliminary injunction. *Cf. Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir.1994). These four considerations are factors to be balanced, rather than prerequisites that must be met. *Id.* With these standards in mind, the Court turns now to its analysis of Rucker's

pending Motion.

A. Likelihood of Success on the Merits

^[2] ^[3] Rucker's amended Complaint asserts two causes of action against the City of Kettering and the individual Defendants, in their official capacities⁷: (1) a federal claim alleging a violation of 42 U.S.C. § 1983; and (2) a state law claim alleging a violation of Ohio Revised Code § 4112.02. Upon review, the Court concludes that Rucker has failed to demonstrate a likelihood of success on either claim.

1. 42 U.S.C. § 1983 (Count I)

^[4] ^[5] ^[6] Section 1983 does not itself create any constitutional rights. Rather, it creates a federal cause of action for "the vindication of constitutional guarantees found elsewhere." *Braley v. City of Pontiac*, 906 F.2d 220, 223 (6th Cir.1990). Thus, in order to succeed on her § 1983 claim, Rucker must show, as a threshold matter: (1) that she was deprived of a right secured by the federal Constitution or laws of the United States; and (2) that she was subjected to this deprivation by a person acting under the color of state law. *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir.1994). Furthermore, because she has sued the City of Kettering, a municipality, Rucker must show that the City itself caused a constitutional deprivation. The City cannot be held responsible under a theory of *respondeat superior*. Rather, Rucker must show that the City, through a custom or policy, caused the alleged constitutional violation. *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The custom or policy must be the "moving force" behind the violation. *Id.* at 694, 98 S.Ct. 2018. "[T]o satisfy the *Monell* requirements[,] a plaintiff must 'identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.'" *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir.1993), quoting *Coogan v. City of Wixom*, 820 F.2d 170, 176 (6th Cir.1987).

In the present case, Rucker's amended Complaint alleges that the City has deprived her of rights secured by the Fifth, *922 Ninth, and Fourteenth Amendments. (Doc. # 17). In her Memorandum in support of a preliminary injunction and her post-hearing brief, however, Rucker fails to address any of these alleged constitutional violations specifically. Rather, she asserts generally that the City has violated § 1983 by discriminating against her because of her sex. (Doc.7, 10). The City has construed Count I of Rucker's lawsuit as alleging a violation of her

rights under the Equal Protection Clause of the Fourteenth Amendment. (Doc. # 11). After reviewing Rucker's filings, and the evidence presented at the September 21, 1999, oral and evidentiary hearing, the Court agrees with the City's interpretation of Rucker's amended Complaint. In essence, Rucker's argument is that the City denied her an employment opportunity on the basis of her gender. Therefore, she appears to assert a Fourteenth Amendment equal protection violation.

Insofar as Rucker's amended Complaint mentions the Fifth and Ninth Amendments, she has failed to make any substantive argument supporting a claim under either Amendment. In any event, the Court envisions no basis for Rucker to assert a § 1983 claim under the Fifth or Ninth Amendment. The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Sixth Circuit has recognized that this Amendment "does not confer substantive rights in addition to those conferred by other portions of our governing law." *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir.1991). Consequently, the Ninth Amendment "has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim." *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir.1986) (concluding that an alleged violation of the Ninth Amendment will not support a claim under 42 U.S.C. § 1983); *Basile v. Elizabethtown Area School Dist.*, 61 F.Supp.2d 392, 403 (1999) (recognizing that a § 1983 claim cannot be premised upon an alleged violation of the Ninth Amendment). Likewise, Rucker's purported reliance upon the Fifth Amendment is unavailing. "[T]he right to equal protection of the laws expressed in the fourteenth amendment has been found by implication in the due process clause of the fifth amendment, which applies to federal action." *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281 n. 4 (7th Cir.1990) (emphasis added). In the present case, Rucker alleges that City employees acted under the color of state law. She does not allege any "federal action." Consequently, the Fifth Amendment is not implicated.

The critical inquiry, then, is whether the City's refusal to accept a civilian jailer application from Rucker violates the Equal Protection Clause of the Fourteenth Amendment. In *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), the Supreme Court recently reiterated the proper analysis when a plaintiff alleges a gender-based equal protection violation:

Focusing on differential treatment or denial of opportunity for which relief is sought the reviewing court

must determine whether the proffered justification is exceedingly persuasive. The burden of justification is demanding and it rests entirely on the State. The State must show at least that the [challenged] classification serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.

Id. at 532–533, 116 S.Ct. 2264 (internal quotation marks and citations omitted).

In their respective briefs, the parties fail even to mention the foregoing "intermediate scrutiny" standard, which has traditionally been applied to Fourteenth Amendment equal protection challenges based upon gender. Rather, Rucker and the City vigorously dispute whether being a male is a bona fide occupational qualification *923 ("BFOQ") for the position of Kettering civilian jailer—an issue which is critical in Title VII jurisprudence but not directly implicated by the Equal Protection Clause. In support of their respective positions, the parties rely entirely upon case law construing Title VII, which prohibits, among other things, sex discrimination. Title VII provides a narrow exception to its prohibition against sex discrimination, however, if an employer can show that being of a particular gender is a "bona fide occupational qualification" for the job at issue. In order to make such a showing, the employer must demonstrate that " 'the essence of the business operation would be undermined by not hiring members of one sex exclusively.' " *Harden v. Dayton Human Rehabilitation Center*, 520 F.Supp. 769, 776 (S.D. Ohio 1981) (Rice, J.), *aff'd* 779 F.2d 50 (6th Cir.1985), quoting *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.1971); *see also Reed v. County of Casey*, 184 F.3d 597, 599 (6th Cir.1999), quoting 42 U.S.C. § 2000e–2(e)(1) ("Thus, under the BFOQ defense, facial gender-based discrimination is permitted if gender 'is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise.' ").

In the present case, however, Rucker's amended Complaint does not allege a violation of Title VII. Rather, she alleges a violation of 42 U.S.C. § 1983, as a result of a deprivation of her equal protection rights under the Fourteenth Amendment. Unlike Title VII, the Equal

Protection Clause does not include a BFOQ exception, per se. Cf. *Doyle v. Suffolk County*, 786 F.2d 523, 528 (2d Cir.1986) (recognizing that equal protection claims do not require a BFOQ analysis); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 473 (1st Cir.1990). As noted above, an equal protection analysis requires the Court to consider whether the exclusion of women from Kettering's civilian jailer positions serves any important governmental objectives and whether the discriminatory means employed are substantially related to the achievement of those objectives. Although the Fourteenth Amendment does not include a BFOQ exception, as such, the Court recognizes that a BFOQ analysis is not wholly incompatible with gender-based equal protection claims. In other words, if being male is reasonably necessary to the normal operation of Kettering's jail, for purposes of a BFOQ, then the City's gender-based hiring of civilian jailers would appear to serve an important governmental objective and to be substantially related to its achievement of that objective, for purposes of equal protection scrutiny. Indeed, the Sixth Circuit has recognized that "[a] plaintiff who alleges disparate treatment by a state employer is bringing essentially the same claim under Title VII as under § 1983. If there is liability under Title VII, there should be liability under § 1983. Similarly, if there is no discriminatory intent, there cannot be liability under either Title VII on a disparate treatment theory, or § 1983." *Grano v. Dept. of Development of the City of Columbus*, 637 F.2d 1073, 1082 (6th Cir.1980). Consequently, the Court finds the parties' Title VII BFOQ arguments to be pertinent, notwithstanding the fact that Rucker's amended Complaint alleges a violation of the Fourteenth Amendment and 42 U.S.C. § 1983. Cf. *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 n. 16 (11th Cir.1982) ("When section 1983 is used as a parallel remedy for violation of section 703 of Title VII the elements for the two causes of action are the same.")⁸

*924 In the instant case, the City argues that its refusal to accept an application from Rucker was justified under the so-called "BFOQ defense" set forth, *supra*. In support, it advances two arguments. *First*, the City insists that its "males-only" hiring policy constitutes a BFOQ for the job of civilian jailer because of general security concerns and issues related to inmate privacy. (Doc. # 11 at 18). *Second*, it contends that several provisions of the Ohio Administrative Code preclude the hiring of Rucker as a civilian jailer. The Court will address these arguments in turn.

a) *Security Concerns and Privacy Issues*

The City's specific security-related concerns involve female jailers: (1) performing strip searches and

pat-downs; (2) observing the inmates changing into jail clothes; (3) conducting in-person surveillance; (4) performing periodic body counts; and (5) providing inmates with razors. (Doc. # 11 at 18). The City's privacy-related concerns involve female jailers: (1) observing the inmates changing into jail clothes; (2) monitoring the shower and toilet areas; and (3) conducting general "surveillance." (*Id.*).

Insofar as the City relies upon the foregoing "security" interests, it completely fails to explain how a female's performance of the aforementioned duties would raise security problems that would not exist if a male jailer performed those same responsibilities. From a strictly security-oriented perspective, the Court discerns no meaningful distinction between a female and male jailer performing strip searches and pat-downs, observing clothing changes, conducting in-person surveillance, performing body counts, and providing inmates with shaving razors. The City's Memorandum is devoid of any explanation why Rucker's performance of the such tasks would raise gender-related security problems. An unsupported assertion of "security concerns" will not support the City's refusal to consider Rucker for the civilian jailer position. Based upon the evidence presented at the September 21, 1999, oral and evidentiary hearing, the City has not shown that jail security requires only males to be employed as civilian jailers.

¹⁷¹ Upon review, the Court finds the City's privacy concerns to be no more persuasive. It is well-settled that "a person's interest in not being viewed unclothed by members of the opposite sex survives incarceration." *Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir.1998) (reasoning that gender was a BFOQ reasonably necessary to accommodate inmates' privacy interests and to reduce the risk of sexual conduct between guards and inmates); see also *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir.1993); *Covino v. Patrissi*, 967 F.2d 73, 78 (2nd Cir.1992). In *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir.1992), the Sixth Circuit recognized that even a "convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners."

Consequently, the Court does not dispute that the individuals held at the Kettering facility retain some privacy rights. Approximately ninety percent of the City's inmates are held on misdemeanor charges, and they have not been convicted of a crime. It stands to reason that their privacy rights must equal, if not exceed, the privacy rights of prisoners who have been convicted of serious crimes.⁹ On the other hand, it is equally apparent that

= pro = BFOQ analysis

women such as Rucker possess a right not to be discriminated against with respect to employment *925 opportunities. *Harden*, 520 F.Supp. at 780.

When equal employment rights collide with inmates' privacy rights, resolution of the conflict requires an inquiry into whether the competing interests can be accommodated, or whether one interest must be vindicated to the detriment of the other.¹⁰ In the prison and jail context, "[t]he conflict between the right of one sex not to be discriminated against in job opportunities and the other to maintain some level of privacy has normally been resolved by attempting to accommodate both interests through adjustments in scheduling and job responsibilities for the guards." *Robino v. Iranon*, 145 F.3d 1109, 1110 (9th Cir.1998), quoting *Jordan v. Gardner*, 986 F.2d 1521, 1527 (9th Cir.1993) (en banc) (internal quotation and citation omitted). In *Harden*, 520 F.Supp. at 780, this Court recognized that the competing interests of inmate privacy and equal employment opportunity often can be reconciled by reassigning job responsibilities, rearranging shift schedules, or making physical alterations to the facility in question.¹¹ In the present case, however, the City appears to be incapable of altering job responsibilities or shift schedules to accommodate Rucker's employment. Given the jail's small staff size, Rucker would be required to work many shifts alone. Based upon the evidence presented at the September 21, 1999, hearing, however, the City has not demonstrated its inability to make minor work place adjustments which may be needed to accommodate Rucker's employment.

As a threshold matter, the Court notes that few such adjustments appear to be *926 necessary. In its Memorandum, the City alleges, in conclusory fashion, that Rucker's employment would raise "privacy concerns" related to "frisk searches, in-person surveillance, official prisoner counts, toilet and shower facilities, and custodial duties associated with these facilities." (Doc. # 11 at 14). With respect to frisk-searches or "pat-downs" of male inmates, however, the City's fears are unfounded. The Sixth Circuit has recognized that "[a] pat-down search, which is by definition of short duration and minimal obtrusiveness, is not unconstitutional, even when performed by a female officer." *Brown v. Withrow*, 985 F.2d 559, 1993 WL 15141 (6th Cir. Jan.22, 1993), citing *Timm v. Gunter*, 917 F.2d 1093, 1100 (8th Cir.1990). Furthermore, it is unclear precisely how Rucker's general surveillance of inmates, her involvement in periodic prisoner counts, and her performance of janitorial responsibilities would raise substantial inmate privacy concerns. To the extent that such activities may implicate inmate privacy, however, such concerns likely would involve: (1) Rucker's

observation of inmates who are asleep in various stages of undress; (2) her observation of inmates using shower facilities; and (3) her observation of inmates using the toilets in their cells. The City has failed to demonstrate, however, that it cannot economically minimize the foregoing concerns without refusing Rucker employment as a civilian jailer. For example, the City has failed to establish that it could not make available proper sleep wear to prevent the unwanted exposure of the inmates' bodies at night. The City also has failed to persuade the Court that it could not provide inmates with robes or towels to wear to and from the shower. Furthermore, the Court notes that observation of inmates in the showers is not a requirement of the civilian jailer position. At the September 21, 1999, oral and evidentiary hearing, jail supervisor Bailey specifically testified that jailers are not required to watch inmates taking their showers. In addition, the Court is unaware of any jail regulation which prohibits the inmates from covering themselves while sitting on the toilet, and the inmates could have their backs turned to Rucker while standing. As a result, the male inmates could protect their own privacy, to a large extent, if they chose to do so.¹²

Finally, the possibility that a strip search may be required does not constitute a legitimate "privacy" concern justifying Rucker's exclusion from the civilian jailer applicant pool. Notably, such a possibility appears to be more theoretical than real. Although conducting strip searches is included in the civilian jailer job description, jail supervisor Craig Bailey recalled only one strip search at the Kettering facility in the last four years. Bailey also testified that jailers must obtain written pre-approval from a supervisor such as himself before conducting a strip search. Given the infrequency of strip searches at the facility, and the fact that jailers must obtain written approval beforehand, the City could have Bailey or another male supervisor come to the jail to observe an occasional strip search. The Court simply is unpersuaded that Rucker's inability to perform a strip search approximately once every four years is a reasonable basis for depriving her of an employment opportunity as a civilian jailer. In short, the City has failed to establish that its expressed "security" and "privacy" concerns justify its refusal to consider Rucker for employment.

b) *Requirements of the Ohio Administrative Code*

The City also argues that being a male is a BFOQ for the Kettering civilian jailer position, because certain provisions of the Ohio Administrative Code preclude the *927 employment of a female in that position. As noted above, gender qualifies as a BFOQ when "the essence of the business operation would be undermined by not hiring

members of one sex exclusively.” *Harden*, 520 F.Supp. at 776. Stated differently, gender-based discrimination is permissible when being male or female “ ‘is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise.’ ” *Reed*, 184 F.3d at 599.

With the foregoing standards in mind, the Court finds the City’s argument regarding the Ohio Administrative Code to be persuasive. The essential nature of the Kettering jail “is to lodge, keep, transport, feed and care for prisoners.” *Reed*, 184 F.3d at 599. In so doing, the City must comply with state regulations established by the Ohio Department of Corrections. *Id.* At least three of those regulations may affect **Rucker’s** ability to work as a civilian jailer for the City of **Kettering**. *First*, O.A.C. § 5120:1-10-01(L)(4) requires strip searches of male inmates to be conducted by male jailers.¹¹ *Second*, O.A.C. § 5120:1-10-03(V) obligates the City to implement written procedures minimizing the time that prisoners are left alone with staff members of the opposite sex.¹⁴ *Third*, O.A.C. § 5120:1-10-01(L)(10) requires a male jailer to observe male inmates who are changing from street clothing into jail attire.¹⁵

Although the foregoing regulations do not expressly prohibit the City from hiring Rucker or any other females as civilian jailers, the first and third regulations do impose specific gender-based job responsibilities upon the City’s jailers. Those regulations provide that certain tasks must be performed by jailers who are of the same sex as the inmates. Furthermore, the second regulation requires the implementation of written procedures to “minimize” the time that prisoners are alone with opposite-sex staff members. As a means of analysis, the Court will review each of the foregoing regulations separately.

First, Ohio Admin.Code § 5120:1-10-01(L)(4) arguably impedes the City’s ability to hire Rucker as a civilian jailer. It requires strip searches to “be conducted by a person or persons who are of the same sex as the person who is being searched.” On its face, this regulation appears to prevent Rucker from working alone on a shift with the all-male inmates, because it precludes her from strip searching them. Based upon the testimony presented at the September 21, 1999, oral and evidentiary hearing, however, the Court concludes that the City easily could comply with § 5120:1-10-01(L)(4) and hire Rucker as a jailer. As noted, *supra*, jail supervisor Craig Bailey recalled only *one* strip search at the Kettering facility in the last four years. Furthermore, jailers must obtain written pre-approval from a supervisor before conducting a strip search. Consequently, the City could have Bailey or another male supervisor come to the jail to observe an occasional strip search. In light of the extremely rare

occurrence of *928 strip searches at the facility, and the requirement of written pre-approval, such a procedure is a reasonable alternative to denying Rucker employment.

Second, Ohio Admin.Code § 5120:1-10-03(V) also presents a potential obstacle to Rucker’s employment as a civilian jailer. That regulation obligates the City to implement written procedures “to minimize the time prisoners are left alone with staff members of the opposite sex.” Rucker interprets this regulation as requiring the City to minimize the time that prisoners are left alone one-on-one with staff members of the opposite sex. Conversely, the City interprets the regulation as requiring it to minimize the time that prisoners are left alone, both one-on-one *and* as a group, with staff members of the opposite sex. Although the Court has located no case law construing § 5120:1-10-03(V), it finds the City’s interpretation to be the more reasonable one. The regulation directs the City to limit the time that prisoners are alone with staff members, not the time that *a* prisoner is alone with *a* staff member. Even if the City’s (and the Court’s) interpretation of the regulation is correct, however, § 5120:1-10-03(V) does not prevent it from hiring Rucker. Notably, the regulation does not prohibit guards from being alone with opposite-sex inmates. Rather, it directs the City to implement written procedures to “minimize” the time prisoners are left alone with staff members of the opposite sex. The word “minimize” means to reduce to the smallest possible extent. *See Webster’s Third International Dictionary* at 1438. Thus, the City is merely required to have written procedures reducing, to the smallest possible extent, the time that female guards spend alone with male inmates at the Kettering facility. For example, the regulation might require the City to adopt a written procedure requiring male and female guards to work together on any two-person shifts. When a female jailer works a shift by herself, however, she necessarily will spend that time alone with inmates of the opposite sex, and nothing in the regulation prohibits her from doing so.

Third, Ohio Admin.Code § 5120:1-10-01(L)(10) presents a potential impediment to Rucker’s employment, because it requires jail inmates to “be visually observed by a person of the same sex if changing into clothing that is required to be worn by inmates in the facility....” At the September 21, 1999, oral and evidentiary hearing, Rucker’s counsel suggested that the City could comply with this regulation by having female jailers “visually observe” inmates through a semi-transparent partition or curtain. Admittedly, the City *could* implement such a procedure. The Court questions, however, whether such an accommodation for female jailers would violate the regulation. Although the Court has found no case law addressing § 5120:1-10-01(L)(10), the observation

requirement is likely intended to minimize the opportunity for new inmates to bring into and secrete contraband and/or weapons in the jail. Partially obstructing a jailer's view with a curtain or partition would interfere with this objective. Additionally, the City's utilization of a partition or curtain might address inmate privacy concerns, but it would do nothing to overcome the plain language of the regulation, which requires visual observation by a jailer of the same sex. With or without a partition, Rucker is not "of the same sex" as any of the jail inmates.¹⁶ The Court also finds unconvincing Rucker's argument that male inmates could be detained in their street clothes until a male jailer arrived on duty. Ohio Admin.Code § 5120:1-10-01(L)(10) contemplates new inmates changing into jail attire before being integrated into the jail population. In order to comply with the regulation's *929 visual observation requirement, the City would be forced to keep new arrestees segregated from the jail population and in their street clothes, possibly for many hours, until a male jailer arrived on duty.¹⁷ The Court is not persuaded that such an alternative is a reasonable one. Allowing arrestees to remain in their street clothes would increase the danger of contraband and/or weapons being secreted and smuggled into the jail. As noted, *supra*, the "essential nature" of the Kettering jail "is to lodge, keep, transport, feed and care for prisoners." *Reed*, 184 F.3d at 599. As the sole jailer on duty, however, Rucker could not properly "lodge" and "keep" a new inmate, who must be observed changing into jail clothing. Rather, she regularly would be required to forego proper "lodging" and "keeping" until a male jailer arrived to perform the necessary components of those tasks.¹⁸

Based upon the foregoing analysis, the Court concludes that the City *cannot* comply with Ohio law and hire Rucker as a civilian jailer, inasmuch as O.A.C. § 5120:1-10-01(L)(10) requires visual observation by same-sex jailers when inmates change their clothing.¹⁹ Given that the **Kettering** facility does not house female inmates, and that the jailers usually work one-person shifts, the City's rejection of **Rucker** as a candidate for employment is reasonably necessary to the proper and lawful functioning of its five-day holding facility. *Cf. Reed*, 184 F.3d at 599-600 (reasoning that the reassignment of a female jailer to third-shift was justified as a BFOQ, in light of a state regulation which required a female jailer to be present whenever women were lodged in the jail). In short, Rucker's gender is "manifestly related" to the City's ability to lodge inmates in compliance with state law. *Id.* at 600. Thus, insofar as Rucker rests her Fourteenth Amendment equal protection claim upon a BFOQ analysis, the Court concludes that the City's gender-based hiring policy *does* qualify as a BFOQ.²⁰

In opposition to this conclusion, Rucker argues, in largely conclusory fashion, that any provision of the Ohio Administrative Code which precludes her employment as a civilian jailer is unenforceable, because it violates state and federal statutory law. Specifically, Rucker contends that the Code provisions conflict with 42 U.S.C. § 1983 and Ohio Rev.Code § 4112.02, to the extent that they bar women from working as civilian jailers. With respect to her § 1983 claim, Rucker apparently contends, without any supporting constitutional analysis, that portions of the Ohio Administrative Code violate the Equal Protection Clause of the Fourteenth Amendment. It is well-settled, however, that federal courts are not quick to declare state statutes unconstitutional, as state legislation is entitled to a presumption of constitutionality. *See Aronson v. City of *930 Akron*, 116 F.3d 804, 809 (6th Cir.1997) ("Legislative enactments carry a strong presumption of constitutionality.... Rebutting the presumption is seldom easy, and it is far from easy here."). The same strong presumption of constitutionality applies to the provisions of the Ohio Administrative Code. *Roosevelt Properties Co. v. Kinney*, 12 Ohio St.3d 7, 13, 465 N.E.2d 421, 427 (1984) (recognizing that courts accord legislatively authorized administrative regulations a strong presumption of constitutionality). Despite this presumption of constitutionality, Rucker fails to present any substantive argument concerning the alleged unconstitutionality of the Ohio Administrative Code provisions at issue. Indeed, Rucker argues only that sex is not a BFOQ for the civilian jailer position at issue. She does not address whether the pertinent Ohio Administrative Code provisions violate the Equal Protection Clause of the Constitution. Consequently, the Court concludes that Rucker has not demonstrated a likelihood of success on the merits of her claim under 42 U.S.C. § 1983. Specifically, Rucker has not established a likelihood of success with respect to her allegation that the City has violated her Fifth, Ninth, and Fourteenth Amendment rights.²¹

Finally, insofar as Rucker alleges that the Ohio Administrative Code provisions at issue are unenforceable because they conflict with Ohio Rev.Code § 4112.02(A), such an argument has no bearing on her 42 U.S.C. § 1983 claim. As noted above, in order to prevail under § 1983, Rucker must establish a violation of her rights under the Constitution, not § 4112.02. Furthermore, Rucker has not demonstrated that any of the Ohio Administrative Code provisions actually conflict with Ohio Rev.Code § 4112.02(A). Based upon the analysis set forth, *supra*, the only Administrative Code provision that might conflict with § 4112.02 is O.A.C. § 5120:1-10-01(L)(10), which requires a jailer of the same sex to observe a new inmate changing his or her clothes. Notably, however, this

regulation does not prohibit five-day holding facilities from hiring female jailers to guard male inmates. Nor does it prohibit such facilities from hiring male jailers to guard female inmates. In short, nothing in O.A.C. § 5120:1-10-01(L)(10) mandates sex discrimination with respect to hiring decisions. Thus, the regulation does not appear to conflict with Ohio Rev.Code § 4112.02, which prohibits, *inter alia*, sex discrimination in employment decisions. What the administrative regulation does do, however, is force the City have same-sex jailers available to supervise clothing changes. That requirement creates a problem in the present case only because (1) the City's facility houses no women and (2) unlike larger facilities, the jail is staffed too thinly to permit Rucker to work alongside a male jailer who could observe the required clothing change. In the Court's view, however, O.A.C. § 5120:1-10-01(L)(10) is comparable to the Kentucky regulation in *Reed*, which required a female jailer to be present when female inmates were lodged in the county jail. *Reed*, 184 F.3d at 598. In *Reed*, the Sixth Circuit held that the Kentucky regulation established a valid BFOQ for the jailer position at issue. Similarly, in the present case, the Ohio Administrative Code establishes a valid BFOQ for the available position at the City's five-day holding facility. As set forth more fully, *infra*, the Ohio Supreme Court has recognized that a BFOQ is a valid defense to a claim of discrimination under Ohio Rev.Code § 4112.02. *Little Forest Med. Center v. Ohio Civil Rights Comm.*, 61 Ohio St.3d 607, 575 N.E.2d 1164 (1991).

2. Ohio Rev.Code § 4112.02 (Count II)

In Count II of her amended Complaint, Rucker alleges that her exclusion from the *931 civilian jailer application process violates Ohio Rev.Code § 4112.02. Upon review, the Court finds this argument unpersuasive. Although Rucker's amended Complaint fails to identify the portion of § 4112.02 upon which she relies, her gender-discrimination claim potentially implicates both § 4112.02(A) and § 4112.02(E)(5). The former provision states that it is unlawful for any employer to refuse to hire a person because of that person's gender. The latter provision makes it an unlawful discriminatory practice for any employer, prior to employment, to announce or follow a policy of denying employment opportunities to any group because of the sex of that group. On their face, both provisions appear to prohibit the City from denying Rucker the opportunity to apply for the civilian jailer position. In *Little Forest Med. Center v. Ohio Civil Rights Comm.*, 61 Ohio St.3d 607, 575 N.E.2d 1164 (1991), however, the Ohio Supreme Court construed § 4112.02(A) as including a BFOQ exception identical to the Title VII BFOQ exception discussed herein. Given the Court's determination, *supra*, that gender appears to be a

legitimate BFOQ for the civilian jailer position under federal law, the Ohio Supreme Court's ruling in *Little Forest* mandates the same result under § 4112.02(A). Finally, the express language of § 4112.02(E)(5) appears to preclude a finding of liability against the City under that section, which prohibits sex discrimination in hiring, "except where based on a bona fide occupational qualification certified in advance by the [Ohio Civil Rights] [C]ommission." In the present case, however, the City *did* obtain advance BFOQ certification by the Ohio Civil Rights Commission for the civilian jailer position. Consequently, the City appears to escape liability under § 4112.02(A) and § 4112.02(E)(5). Therefore, Rucker has not demonstrated a substantial likelihood of success on the merits of her state-law claim. Based upon the foregoing analysis, the Court concludes that first factor in its four-part analysis, likelihood of success on the merits, weighs in favor of the City.

B. Irreparable Harm

The second factor for the Court's consideration is whether Rucker will suffer irreparable harm without the issuance of a preliminary injunction. In opposition to such a conclusion, the City argues that the hiring process for its civilian jailers is lengthy, and that "there is absolutely no evidence before this Court that if an injunction is issued, Plaintiff will satisfy all of the other requirements for the position of civilian jailer." (Doc. # 11 at 10). The Court does not dispute that, in the end, Rucker may fail to be selected for the civilian jailer position, even with the issuance of a preliminary injunction. The problem with the City's argument, however, is that her failure is an absolute certainty in light of its refusal to accept her employment application. By refusing Rucker's application, the City has foreclosed her opportunity even to compete for the present job opening.

¹⁸¹ In her post-hearing Memorandum, Rucker argues that the deprivation of a constitutional right constitutes per se irreparable harm. She also contends that irreparable harm exists because the City may fill the available jailer position while her lawsuit is pending. (Doc. # 7 at 5). Upon review, the Court finds Rucker's first argument unpersuasive. In support of her contention that per se irreparable harm exists, Rucker relies solely upon case law involving alleged violations of an individual's First Amendment rights. Infringement upon First Amendment rights does indeed result in irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 353, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *see also United Food & Commercial Workers Union v. Southwest Ohio Regional Transit Auth.*, 163 F.3d 341, 363 (6th Cir.1998), citing *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989), for the proposition that

“even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.” In the present case, however, Rucker has alleged a violation of *932 42 U.S.C. § 1983, via the Fourteenth Amendment, and a violation of Ohio Rev.Code § 4112.02. She cites nothing to suggest that a violation of these provisions necessarily results in irreparable harm, and the Court has found nothing to support her assertion.

¹⁹ With respect to Rucker’s second argument, however, the Court agrees that she likely will suffer irreparable harm if the City is not enjoined from permanently filling the existing civilian jailer vacancy.²² In *N.A.A.C.P. v. City of Mansfield, Ohio*, 866 F.2d 162 (6th Cir.1989), the Sixth Circuit recognized that the filling of a vacancy within a city fire department may irreparably harm a plaintiff who wishes to be hired for the position. *Id.* at 171 n. 6; *see also Ashton v. City of Memphis*, 105 F.3d 659, 1996 WL 748163 (6th Cir. Dec.30, 1996) (“[M]any of the officers bringing suit may be irreparably harmed if the Department conducts another round of promotions.... There is every reason to believe that all of the positions will be filled by the time the district court [resolves the lawsuit].”). In the present case, the potential for irreparable harm is particularly high. The City employs only five civilian jailers. Consequently, if the current opening is filled, Rucker may be unable to obtain a job as a jailer for quite some time, even if she prevails on her lawsuit. The infrequency of vacancies for government employment can constitute irreparable harm. *N.A.A.C.P. v. Town of East Haven*, 70 F.3d 219, 224 (2nd Cir.1995). Furthermore, if the City fills the current vacancy and Rucker ultimately prevails on her lawsuit, any award of relief “would be complicated indeed.” *Id.*, citing *Firefighters Institute for Racial Equality v. City of St. Louis*, 616 F.2d 350, 362 (8th Cir.1980). For the foregoing reasons, the Court concludes that Rucker has demonstrated a likelihood of irreparable harm absent the issuance of a preliminary injunction. Consequently, this factor weighs in favor of the Court issuing a preliminary injunction.

C. Harm to Others

The third factor for the Court’s consideration is the probability that granting a preliminary injunction will cause substantial harm to others.²³ In her post-hearing Memorandum, Rucker suggests that “inconvenience” will be the only harm to the City if an injunction is granted. The Court finds Rucker’s argument unpersuasive. Although the City has completely failed to address this branch of the four-part inquiry, the Court notes that the issuance of a preliminary injunction would harm the City

after December 1, 1999, when one of its five civilian jailers retires. That retirement would result in either under-staffing of the jail or substantial overtime demands being placed upon the remaining four jailers. On the other hand, the record reflects that Kettering’s jail is the only five-day holding facility in the Dayton area and possibly in the state of Ohio. As a result, the Court’s failure to issue a preliminary injunction will cause Rucker to lose a unique employment opportunity, at least temporarily. Rucker has presented no evidence, however, suggesting that other jailer jobs are unavailable (or are unlikely to become available soon) in the greater Dayton area. After weighing the equities (i.e., balancing the harm to Rucker if a preliminary injunction is denied and the harm to the City if preliminary injunction is granted), the Court concludes that the competing interests militate slightly in favor of the City.

D. Public Interest

The final factor in the Court’s analysis is whether the public interest is advanced by the issuance of the preliminary injunction. *933 This factor weighs equally in favor of Rucker and the City. It is certainly in the public interest to hire law enforcement officials when a vacancy arises. *Cf. N.A.A.C.P. v. Town of New Haven*, 70 F.3d at 223. The public interest in filling the City’s civilian jailer position is evident in the present case. The retirement of a jailer presumably would result in the remaining four jailers working substantial overtime, in order to staff the facility twenty-four hours a day, seven days a week.²⁴ On the other hand, the public interest undeniably favors equal employment opportunities for women such as Rucker. As noted above, if the City fills its vacancy, Rucker may be unable to obtain a civilian jailer job even if she prevails in her lawsuit. After weighing these competing public interests, the Court concludes that they are in equipoise. Consequently, this factor does not weigh in favor of either party.

III. Conclusion

On the whole, after balancing the aforementioned four factors, the Court concludes that the Plaintiff has not demonstrated her entitlement to a preliminary injunction. Accordingly, based upon reasoning and citation to authority set forth above, the Plaintiff’s Motion for a Preliminary Injunction (Doc. # 2) is OVERRULED.

All Citations

84 F.Supp.2d 917

Footnotes

- 1 In her original September 2, 1999, Complaint (Doc. # 1), Rucker had named Kettering City Manager Steven Husemann as a Defendant, along with several Jane/John Doe Defendants. Thereafter, Husemann was dismissed as a party to this litigation (Doc. # 15), and he is not named as a Defendant in the Plaintiff's amended Complaint. Likewise, the amended Complaint does not include any Jane/John Doe Defendants.
Substantively, however, the Plaintiff's amended Complaint (Doc. # 17) is identical to her original Complaint. (Doc. # 1). Consequently, for purposes of its analysis herein, the Court will refer to the allegations contained in the amended Complaint.
- 2 Although the Court prohibited the City from filling the civilian jailer vacancy, it did allow the acquisition of civilian jailer services "on an emergency and temporary basis." (Doc. # 5).
- 3 The Court's factual findings are based upon testimony presented during the September 21, 1999, oral and evidentiary hearing on the Plaintiff's Motion for a Preliminary Injunction. The pertinent facts are essentially undisputed by the parties.
- 4 "Dressing out" involves changing from street clothes into prison-issued clothing.
- 5 During the September 21, 1999, oral and evidentiary hearing, jail supervisor Craig Bailey recalled only one strip search at the Kettering facility in the last four years.
- 6 Although the Sixth Circuit defines this branch of the four-part test in terms of harm to others, the focus is on the harm that a defendant will suffer if the requested injunctive relief is granted. It is with this factor that courts have traditionally balanced the equities (i.e., the harm that the plaintiff will suffer in the absence of an injunction is balanced against that which will befall the defendant if same is granted). See *Southern Ohio Coal Co. v. United Mine Workers of America*, 551 F.2d 695 (6th Cir.1977).
- 7 A suit against an individual in his "official capacity" is equivalent to a suit against the governmental entity for which he works. *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir.1994), citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 68, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Thus, Rucker's inclusion of City employees as Defendants adds nothing of substance to her Complaint. Therefore, in its analysis, *supra*, the Court will refer to the Defendants collectively as "the City."
- 8 See also *Dothard v. Rawlinson*, 433 U.S. 321, 324 n. 20, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) ("In the case of a state employer, the BFOQ exception would have to be interpreted at the very least to conform to the Equal Protection Clause of the Fourteenth Amendment." The parties do not suggest, however, that the Equal Protection Clause requires more rigorous scrutiny of a State's sexually discriminatory employment policy than does Title VII. There is thus no occasion to give independent consideration to the District Court's ruling that Regulation 204 [which established gender-based criteria for the assignment of "correctional counselors to certain prison positions] violates the Fourteenth Amendment.").
- 9 Cf. *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("A fortiori, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that ... are enjoyed by convicted prisoners."). *Id.* at 545, 99 S.Ct. 1861. It is beyond dispute, however, that the mere fact of incarceration, whether pre-trial or post-conviction, circumscribes the retained constitutional rights of an inmate. *Id.* at 545-546, 99 S.Ct. 1861.
- 10 See, e.g., *Reidt v. County of Trempealeau*, 975 F.2d 1336, 1339-1340 n. 3 (7th Cir.1992) (citations omitted) ("The BFOQ exception is recognized as very narrow, and only applies when the essence of the business operation would be undermined by not hiring members of one sex exclusively.... These cases recognize that Title VII's proscription against sexual discrimination in employment must be balanced against issues of inmate privacy and jail security in the context of the particular facts at hand. Stereotypical notions of a female's abilities, however, or unwarranted modesty, is not sufficient to justify a male-only position.... Administrative convenience also cannot justify limiting a position to one sex....").
- 11 In *Hardin*, this Court recognized that inmates' privacy interests might be protected by, inter alia, installing smoked glass, allowing inmates to cover their windows briefly, or making appropriate sleep wear available. *Hardin*, 520 F.Supp. at 780. Other courts also have recognized that asserted privacy concerns will not justify withholding employment opportunities from members of one sex unless no other alternatives are available. For example, in *Torres v. Wisconsin Dept. of Health & Social Serv.*, 838 F.2d 944, 952-954 (7th Cir.1988) the Seventh Circuit reasoned:

The Second, Eighth and Eleventh Circuits, as well as several federal district courts, have considered attempts by states to restrict correctional officer and similar positions in prisons to the same sex as that of the inmates; in each of these cases, the court held that the privacy interests of the inmates did not justify a sex bfoq for the position(s) involved.

...
A review of these analogous cases reveals that a prison can usually preserve the privacy interests of its inmates without sacrificing the right of correctional officers to equal employment opportunities; thus, a bfoq is rarely justified. The rationale for the daimed bfoq's that was most frequently offered in these cases was that the duties of the correctional officer positions at issue included performing strip searches and observing inmates while they were using the showers and toilets. These courts rejected this justification as inadequate and found that the prisons had not met their burden of proving that alternatives with less discriminatory impact were unavailable. For example, a prison could reassign duties involving strip searches and shower and toilet surveillance so that, other than in emergencies, these duties would be performed by officers of the same sex as the inmates.... In addition, a prison could install shower curtains that permit only enough visibility to allow the correctional officer to ascertain that the shower was occupied.... Absent countervailing security problems, a prison could afford inmates privacy when dressing or using a toilet in their cells by permitting them to cover the window on their cell doors while engaging in these activities.... Finally, a prison could provide inmates with suitable sleep wear to avoid inadvertent exposure of their bodies while sleeping....

Id. at 952–953 (citations omitted).

- 12 Even if Rucker did occasionally observe the jail inmates without dothing, such observation would be unlikely to violate the inmates' constitutional rights. *See, e.g., Cookish v. Powell*, 945 F.2d 441, 447 (1st Cir.1991) (recognizing that "inadvertent, occasional, casual, and/or restricted observations of an inmate's naked body by a guard of the opposite sex did not violate the Fourth Amendment").
- 13 O.A.C. § 5120:1–10–01(L)(4) provides:
A strip search and/or body cavity search of [persons confined for the commission of a misdemeanor or traffic offense] shall be conducted by a person or persons who are of the same sex as the person who is being searched.
Although § 5120:1–10–01(L)(4) mentions body cavity searches, those searches are not at issue in the present case, because they are conducted by physicians and nurses, not City jailers. *See* O.A.C. § 5120:1–10–01(L)(5).
- 14 O.A.C. § 5120:1–10–03(V) provides:
Written procedures shall be implemented to minimize the time prisoners are left alone with staff members of the opposite sex.
- 15 O.A.C. § 5120:1–10–01(L)(10) provides:
Persons who are afforded a reasonable opportunity to secure release on bail or recognizance, but who fail to secure such release, and who are to be integrated with the general population of the detention facility shall be visually observed by a person of the same sex if changing into clothing that is required to be worn by inmates in the facility in accordance with paragraph (N) of this rule.
- 16 Parenthetically, the Court notes that at the Dayton Correctional Institution, which *did* allow inmates to change clothes behind a curtain, Rucker was not allowed to stand outside the curtain by herself when a male inmate changed. She testified that, with the exception of emergency situations, a male officer was required to be present to observe the change of clothing.
- 17 If the City opened the civilian jailer application process to women, any number of the jailers ultimately might be female, resulting in a wait of not just one shift for a male jailer to arrive, but possibly several shifts.
- 18 Supervisor Craig Bailey testified that jail inmates "dress out" into City-issued clothing approximately five to seven times per week.
- 19 Based upon the analysis set forth above, the Court is unconvinced, however, that anything contained in O.A.C. § 5120:1–10–01(L)(4) and O.A.C. § 5120:1–10–03(V), the other Ohio Administrative Code regulations discussed, prevents the City from hiring Rucker.
- 20 In a larger facility, regulations such as O.A.C. § 5120:1–10–01(L)(10) would not operate to exclude women from working as jailers, because work assignments and schedules could be arranged to accommodate the employment of female jailers, without jeopardizing compliance with state law. Given the small staff at the **Kettering** facility, however, and the fact that it houses only male inmates, the City appears to be unable to comply with the "visual observation" requirement of the Ohio Administrative

Code and to hire Rucker as a civilian jailer. With few exceptions, the jailers at the City's facility work one-person shifts. Consequently, "[t]here is no doubt that [Rucker's] gender [is] manifestly related to the jail's ability to lodge ... [male] prisoners in compliance with state law." *Reed*, 184 F.3d at 600.

- 21 Given Rucker's failure to demonstrate a probable violation of her constitutional rights, the Court need not determine whether she is likely to satisfy the other requirements of her § 1983 claim. The Court notes, however, that the City has not disputed Rucker's ability to satisfy the requirements for municipal liability set forth in *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).
- 22 As noted, *supra*, the Court has allowed the City to fill the vacancy on a temporary, emergency basis. (See TRO, Doc. # 5).
- 23 As noted, *supra*, with this factor the Court balances the equities by weighing the harm that Rucker will suffer in the absence of an injunction against the harm which will befall the City if an injunction is granted. See *Southern Ohio Coal Co. v. United Mine Workers of America*, 551 F.2d 695 (6th Cir.1977).
- 24 As noted above, the Court has temporarily alleviated this concern by allowing the City to acquire civilian jailer services on an emergency basis.

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NEWBERG

ON CLASS ACTIONS

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William B. Rubenstein

Sidley Austin Professor of Law
Harvard Law School

First - Fourth Editions

Alba Conte, Esq.

JD, University of Pennsylvania Law School

Herbert B. Newberg, Esq.

Member of the Pennsylvania Bar
JD, Harvard Law School

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settlement agreement as to the reservation of a class interest and/or right to appeal waives the right.⁵ If a voluntary settlement is reached before the decision on class certification, the court is likely to find the action moot unless a substantive exception to mootness (e.g., inherently transitory claims tending to evade review) applies.⁶

D. SUBSTITUTION OF CLASS REPRESENTATIVES

§ 2:17 Substitution of class representatives in claims mooted before a ruling on class certification

When mootness of the named plaintiff's claims occurs, intervention by absentee members is freely allowed in order to substitute them as class representatives.¹ Some courts

Anderson v. CNH U.S. Pension Plan, 515 F.3d 823, 827 (8th Cir. 2008) ("We emphasized that a stipulation in a settlement agreement, by which a plaintiff reserves the right to appeal the denial of certification, is not sufficient in and of itself to satisfy Article III. Rather, we said that when individual claims are fully satisfied, the court of appeals, in determining whether a case or controversy remains, 'need only address whether [the plaintiff] retains an interest in shifting costs and attorney fees to the putative class members.'" (quoting *Potter v. Norwest Mortg., Inc.*, 329 F.3d 608, 614, 55 Fed. R. Serv. 3d 820 (8th Cir. 2003))).

⁵*Compare* *Narouz v. Charter Communications, LLC*, 591 F.3d 1261, 15 Wage & Hour Cas. 2d (BNA) 1222, 159 Lab. Cas. (CCH) P 60928 (9th Cir. 2010) (holding that settlement agreement, which released defendant from all claims arising out of plaintiff's employment if the district court did not approve the class, did not deprive the plaintiff of standing to appeal the court's denial of class certification) *with* *Walsh v. Ford Motor Co.*, 945 F.2d 1188, 1991-2 Trade Cas. (CCH) ¶ 69609, 20 Fed. R. Serv. 3d 1455 (D.C. Cir. 1991) (holding that settlement agreement, which released "any and all claims" plaintiff might have had against defendant, deprived him of standing to appeal the district court's denial of class certification).

⁶*See, e.g.*, *Davis v. Ball Memorial Hosp. Ass'n, Inc.*, 753 F.2d 1410, 1 Fed. R. Serv. 3d 120 (7th Cir. 1985) (holding that class should not have been certified where named plaintiffs settled their individual claims prior to the decision on class certification, and the exception for inherently transitory claims did not apply, because the plaintiffs' individual claims became moot and the class accordingly lacked a valid representative at the time of certification).

[Section 2:17]

¹First Circuit (District Court)

Griffith v. Bowen, 678 F. Supp. 942, 947, 20 Soc. Sec. Rep. Serv. 683 (D. Mass. 1988) ("[W]hen the intervening event has affected the posture of only the named plaintiff, the litigation remains viable as to the absent

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Fifth Circuit (Distric

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Motors Corp., 175 F.
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have gone to great lengths. In *James v. Jones*,² an action by juveniles alleging that state officials were violating the federal Juvenile Justice and Delinquency Prevention Act, the court held that the fact a named plaintiff had been dead for over a year when the class was originally certified did not warrant dismissal when the action could proceed with a different class representative.

Because intervention is freely permitted, courts may send Rule 23(d)(1)(B) [previously, Rule 23(d)(2)] notice to potential class members inviting intervention for the purpose of assuming the responsibility of the class litigation.³ Such an approach may be particularly appropriate when a class has been certified and the class so notified. Once a class complaint is filed, but certainly following certification, Rule 23 is designed to assure that the rights of absent class members are not prejudiced by the voluntary actions of the representative plaintiff. Accordingly, when mootness of the named plaintiff's claims occurs after initiation of the suit or certification, the procedures inherent in Rule 23 enable some effort to bolster representation or to find some suitable substitute

the possibility of permitting intervention, presumably because the issue was not raised. *See, e.g.*, *Foster v. Gardner*, 894 F.2d 407 (6th Cir. 1990); *Hechenberger v. Western Elec. Co., Inc.*, 742 F.2d 453 (8th Cir. 1984); *Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847 (W.D. Ky. 2007); *Ambalu v. Rosenblatt*, 194 F.R.D. 451 (E.D. N.Y. 2000).

²*James v. Jones*, 148 F.R.D. 196 (W.D. Ky. 1993). *See also* *Lightfoot v. District of Columbia*, 629 F. Supp. 2d 16 (D.D.C. 2009) (allowing counsel to substitute personal representative of deceased plaintiff's estate as class representative where substitution would not significantly prejudice defendants).

³*See, e.g.*, *Knuth v. Erie-Crawford Dairy Co-op. Ass'n*, 395 F.2d 420, 12 Fed. R. Serv. 2d 568 (3d Cir. 1968); *Berry v. Pierce*, 98 F.R.D. 237, 53 Fair Empl. Prac. Cas. (BNA) 1107, 36 Fed. R. Serv. 2d 1475 (E.D. Tex. 1983); *Rothman v. Gould*, 52 F.R.D. 494, Fed. Sec. L. Rep. (CCH) P 93013, Fed. Sec. L. Rep. (CCH) P 93096, Fed. Sec. L. Rep. (CCH) P 93127, 14 Fed. R. Serv. 2d 1541, 15 Fed. R. Serv. 2d 178, 15 Fed. R. Serv. 2d 316 (S.D. N.Y. 1971). *Cf. U.S. v. City of New York*, 258 F.R.D. 47, 64 (E.D. N.Y. 2009) (in case where court was concerned that intraclass conflicts might arise at the remedial stage, stating: "At any remedial stage, it may be appropriate for the court to provide notice to class members to allow them to 'come into the action' to the extent they may be willing and able to serve as representatives for possible subclasses relating to the four challenged practices. *See* Fed. R. Civ. P. 23(d)(1)(B)(iii) (allowing the court to order notice to class members of opportunity to 'signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action') . . .").

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class representative, following notice to all or part of the class.⁴ This effort is an appropriate alternative to dismissal of the class action. While the filing of a class complaint tolls the statute of limitations on behalf of the entire class, even when class certification is ultimately denied,⁵ the normal running of the statute following dismissal of the suit may be a factor in the court's determination to find a substitute class representative in order to avoid any possible prejudice to the class members when individual claims of the named plaintiff become moot.⁶

⁴*Stewart v. Winter*, 669 F.2d 328, 334 (5th Cir. 1982); *Simpson v. Miller*, 93 F.R.D. 540, 545 (N.D. Ill. 1982) ("[N]ame plaintiffs have a personal stake in the outcome of this case. Thus, there is no need to rely on class members to provide a non-mooted claim . . .").

⁵*See, e.g., American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713, 1974-1 Trade Cas. (CCH) ¶ 74862, 18 Fed. R. Serv. 2d 1 (1974); *Yang v. Odom*, 392 F.3d 97, 111, 85 Empl. Prac. Dec. (CCH) P 41907, Fed. Sec. L. Rep. (CCH) P 93048 (3d Cir. 2004) (noting that allowing tolling to apply to subsequent class actions where the original class was denied because of the lead plaintiffs' deficiencies as class representatives would not lead to the piggybacking or stacking of class action suits "indefinitely"—rather, applying tolling under these circumstances would allow subsequent classes to pursue class claims until a court has definitively determined that the claims are not suitable for class treatment; rather than arbitrarily eliminate the possibly meritorious claims of countless class members, the court preferred to see careful case management used to avoid the prospect of "indefinite" tolling). *See also* *Newberg on Class Actions* § 5:1 (4th ed.).

⁶*American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-53, 94 S. Ct. 756, 38 L. Ed. 2d 713, 1974-1 Trade Cas. (CCH) ¶ 74862, 18 Fed. R. Serv. 2d 1 (1974) ("We hold that in this posture, at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.").

See Newberg on Class Actions § 16:1 (4th ed.) for a discussion of timeliness of intervention.

Add under "Tenth Circuit" subheading, below Reed v. Bowen case:
 Roco, Inc. v. EOG Resources, Inc., 2014 WL 5430251, *4 (D. Kan. 2014)
 ("In class actions, where a named plaintiff's individual claims fail or become moot for a reason that does not affect the viability of the class claims, courts regularly allow or order plaintiffs counsel to substitute a new representative plaintiff.") (citing Robichaud v. Speedy PC Software, 80 U.C.C. Rep. Serv. 2d 43 (N.D. Cal. 2013)).

Chapter 3

Rule 23(a) Prerequisite Certification

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I. IMPLICIT REQUIREMEN

A. INTRODUCTION TO REQUIREMENTS

§ 3:1 Introduction: definite
 n. 1.

Opperman v. Path, Inc., 2016 WL 5 leave to appeal denied, (9th Cir. 16-8 ability is an inherent requirement of at (quoting Lilly v. Jamba Juice Compar 2014) (quoting **Newberg on Class Ac** omitted).

Replace footnote 1 with the following:
 Johannes v. Washington, 2015 WL ("[B]ecause Defendants have raised the comments briefly on one of Rule 'definiteness.'" (citation omitted) (citing I

Pagliari v. Mastic Home Exterio Mass. 2015) ("Although not explicitly ; prerequisite to class certification is th is, the standards must allow the cla (internal quotation marks omitted) (citi

Lilly v. Jamba Juice Company, 2014 ("The Court is unaware of the Ninth C explicitly acknowledging in any publish 'definiteness' is a required element o obligations independent of the enumera this Court joins numerous circuit courts ing that this criterion is an inherent re class actions." (citing **Newberg on Cla**