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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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NATHEAULEEN MASON, RENEE WILLIAMS, YOLANDA LIMMITT, HELISHA BAILEY, TAMMY LaCROSS, VELVET FARLEY-JOHNSON, EBONY BATES, KANDICE HALL, DAVONE WILSON, CHRISTINA SCHUSTER, DYANNA McDADE and JILL FLANDERS, on behalf of the themselves and all others similarly situated,

Plaintiffs,

v

JENNIFER GRANHOLM, in her official capacity, as Governor of the State of Michigan, PATRICIA CARUSO, Director, Michigan Department of Corrections, NANCY ZANG, CLARICE STOVALL, SUSAN DAVIS, JOAN YUKINS, SALLY LANGLEY, THOMAS DeSANTIS, WILLIS CHAPMAN, JERRY HOWELL, FIRAS AWAD, JODY NUNN, CARLTON CARTER, ART LANCASTER, CROSBY TALLEY, KIRK TOLLZEIN, WILLIAM MERROW, RODNEY MADDEN, jointly and severally,

Defendants.
_____/

Case No. 05-73943

Hon. Paul D. Borman

FIRST AMENDED COMPLAINT

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FIRST AMENDED COMPLAINT

NOW COME Plaintiffs by and through their counsel and for their Complaint against the Defendants and each of them state as follows:

INTRODUCTION

1. Plaintiffs, Natheauleen Mason, Renee Williams, Yolanda Limmitt, Helisha Bailey, Tammy Lacross, Velvet Farley-Johnson, Ebony Bates, Kandice Hall, Davone Wilson, Christina Schuster, Dyanna McDade and Jill Flanders, are all former or current prisoners who have been subjected to discrimination, sexual abuse and degrading treatment by male prison staff, while under the jurisdiction of the Michigan Department of Corrections (hereinafter "MDOC"). Plaintiffs bring this action on behalf of themselves and all other former, current and future female prisoners under MDOC jurisdiction since March 10, 2000, whose rights have been similarly violated.

Plaintiffs are currently members of a certified class action in the case of *Neal, et al. v. MDOC, et al.,* File No. 96-6986-CZ, pending in the Washtenaw County Circuit Court. Plaintiffs, in the state action, allege violations of their state constitutional and civil rights protected by the state's Civil Rights Act. On February 10, 2005, the Michigan Court of Appeals ruled that the *Neal* Plaintiffs' claims, which arose after the effective date of an amendment to the state's Civil Rights Act, MCL 37.2101, *et seq.*, were no longer viable as the amendment deleted prisoners from the Act's protection. M.C.L. 37.2301(b). (Exhibit 1).

Plaintiffs in this case are those *Neal* class members whose claims of discrimination, sexual abuse and degrading treatment arose after the March 10, 2000 amendment of the state's Civil Rights Act. Plaintiffs' claims were tolled by the filing of *Neal, et al. v. MDOC,*

et al., File No. 96-6986-CZ, on March 26, 1996, and now seek relief for violation of the Federal Civil Rights Act, pursuant to 42 U.S.C. §1983 and the Constitution of the United State

In this complaint, Plaintiffs seek: 1) Injunctive relief to prevent the Defendants' continuing deprivation of Plaintiffs' constitutional and statutory rights; 2) Certification of Plaintiffs as a class; 3) A declaratory ruling that the policies, procedures and practices of the Michigan Department of Corrections and Defendants have and continue to deprive female prisoners of equal privileges and opportunities; and subject Plaintiffs to a pervasive risk of custodial sexual misconduct, including sexual assaults, sexual harassment, degrading treatment and unnecessary viewing and touching by male employees of the MDOC; intimidate, punish and retaliate against Plaintiffs who report discrimination, custodial sexual misconduct and degrading treatment; and constitute a violation of Plaintiffs' rights as secured by the Constitution, treaties and law of the United States; 4) A declaratory ruling that the March 10, 2000 amendment to Michigan's Civil Rights Act, M.C.L. 37.2301, violates Plaintiffs' rights to equal protection under the law and deprives Plaintiffs of a remedy for actual wrongs; and 5) A monetary award to Plaintiffs to compensate for their injuries together with punitive damages, costs and attorney fees for themselves and all similarly-situated female prisoners.

JURISDICTION

2. This is a civil action brought pursuant to 42 U.S.C. §1981 *et seq.*, seeking declaratory, injunctive relief and monetary damages against Defendants for purposeful discrimination and violation of the United States Constitution including the First, Fourth,

Eighth and Fourteenth Amendments, and violations of the laws, conventions, treatics and customary international law norms.

3. This Court has jurisdiction pursuant to 28 U.S.C. §§1331, 1343(a)(3) and 1343(a)(4). Jurisdiction for declaratory relief is also premised on 28 U.S.C. §§2201, 2202 and 42 U.S.C. §1983.

4. The amount in controversy exceeds Seventy-five Thousand ($75,000.00) Dollars, excluding interest and costs.

VENUE

5. Venue lies in the Eastern District of Michigan pursuant to 28 U.S.C. §1391(d). The majority of the events in controversy occurred in the counties of Wayne, Washtenaw, and Livingston, which are located within the jurisdiction of United States District Court for the Eastern District of Michigan, Southern Division.

PARTIES

PLAINTIFFS

6. Plaintiff Representatives are citizens of the United States and, at all relevant times, were under the jurisdiction of the Michigan Department of Corrections. Plaintiffs bring this action on behalf of themselves and all former, current and future female prisoners who from March 10, 2000, were subjected to sexual misconduct, sexual assaults, sexual harassment, degrading treatment, gender discrimination and violation of their privacy rights by male employees of the MDOC and who suffered economic and non-economic injury as a result of the deprivation of their rights including intimidation and retaliation for reporting same.

7. Plaintiff Representative Natheauleen Mason was repeatedly sexually assaulted by a male correctional officer and subjected to sexually degrading and harassing treatment beginning in 2002 while incarcerated at the Western Wayne Correctional Facility located in Wayne County, Michigan. Beginning in 2003, Plaintiff Mason was again sexually assaulted, sexually harassed and subjected to violations of her privacy, and retaliated against by correctional officers and staff at Camp Brighton located in Livingston County, Michigan. Plaintiff Mason is currently on parole under the jurisdiction of the MDOC. The specific facts of her claims are set forth below.

8. Plaintiff Representative Yolanda Limmitt was repeatedly sexually assaulted, sexually harassed and subjected to cruel and degrading treatment by male correctional officers beginning in September 2002 and continuing through 2003 while she was incarcerated at the Western Wayne Correctional Facility located in Wayne County, Michigan. In 2003, Plaintiff Limmitt was sexually harassed, subjected to privacy violations and retaliated against by corrections officers and staff at Camp Brighton located in Livingston County, Michigan. Plaintiff Limmitt is currently on parole under the MDOC. The specific facts of her claims are set forth below.

9. Plaintiff Representative Davone Wilson was sexually assaulted in 2005 by a male correctional officer while incarcerated at the Huron Valley Women's Complex, located in Washtenaw County, Michigan. In 2005, Plaintiff Wilson was subjected to sexual harassment and privacy violations at Camp Brighton located in Livingston County, Michigan. Plaintiff Wilson is currently on parole under the jurisdiction of the MDOC. The specific facts of her claims are set forth below.

10. Plaintiff Representative Helisha Bailey was sexually assaulted, sexually harassed and subjected to cruel and degrading treatment by two male correctional officers beginning in 2003 while incarcerated at the Western Wayne Correctional Facility. Plaintiff Bailey was also subjected to sexual harassment and privacy violations at Western Wayne Correctional Facility. Plaintiff Bailey is currently incarcerated at the Huron Valley Women's Complex located in Washtenaw County, Michigan, where she continues to be subjected to sexual harassment and privacy violations. The specific facts of her claims are set forth below.

11. Plaintiff Representative Kandice Hall was sexually assaulted, sexually harassed, retaliated against and subjected to cruel and degrading treatment and privacy violations by male correctional officers while incarcerated at the Huron Valley Women's Complex in 2005. Plaintiff Hall is incarcerated in the Huron Valley Women's Complex where she continues to be subjected to privacy violations, sexual harassment and retaliatory actions. The specific facts of her claims are set forth below.

12. Plaintiff Representative Ebony Bates was sexually assaulted, sexually harassed and subjected to cruel and degrading treatment and privacy violations by male correctional officers while incarcerated at the Huron Valley Women's Complex from April 2005 to present. Plaintiff Bates continues to be incarcerated in the Huron Valley Women's Complex where she is subjected to ongoing sexual harassment, privacy violations and retaliation. The specific facts of her claims are set forth below.

13. Plaintiff Representative Renee Williams was repeatedly sexually assaulted, sexually harassed and subjected to cruel and degrading treatment and privacy violations by

male correctional officers beginning in September or October of 2002 and continuing through February 2003. Plaintiff Williams was subjected to ongoing retaliation by staff while incarcerated at the Western Wayne Correctional Facility located in Wayne County, Michigan and Camp Brighton located in Livingston County, Michigan. Plaintiff Williams is currently on parole under the jurisdiction of the MDOC. The specific facts of her claims are set forth below.

14. Plaintiff Representative Christina Schuster was repeatedly sexually assaulted, sexually harassed, battered and subjected to privacy violations by male correctional officers beginning in 2003 and retaliated against by staff while incarcerated at the Western Wayne Correctional Facility located in Wayne County, Michigan and Camp Brighton located in Livingston County, Michigan. Plaintiff Schuster is currently incarcerated at Camp Brighton located in Livingston County, Michigan, where she is subjected to ongoing privacy violations, sexual harassment and retaliatory acts. The specific facts of her claims are set forth below.

15. Plaintiff Representative Tammy LaCross was repeatedly sexually assaulted, sexually harassed and subjected to cruel and degrading treatment and privacy violations by a male assistant deputy warden and male correctional officers and staff beginning in 2000 and continuing until 2003 and retaliated against by staff while incarcerated at the Western Wayne Correctional Facility. Plaintiff LaCross was subjected to sexual harassment and privacy violations by male correctional officers and staff and retaliated against by staff at Camp Brighton located in Livingston County, Michigan. Plaintiff LaCross is no longer under the jurisdiction of the MDOC and resides in the State of Michigan. The specific facts

of her claims are set forth below.

16. Plaintiff Representative Velvet Farley-Johnson was repeatedly sexually assaulted, sexually harassed and subjected to cruel and degrading treatment and privacy violations by a male assistant deputy warden and male staff and correctional officers while incarcerated at the Western Wayne Correctional Facility from 2001 until 2002 and subjected to retaliation by staff and correctional officers. Plaintiff Farley-Johnson was subjected to sexual harassment and privacy violations by male correctional officers and staff and retaliated against by staff at Camp Brighton located in Livingston County, Michigan. Plaintiff Farley-Johnson is on parole under the jurisdiction of the MDOC. The specific facts of her claims are set forth below.

17. Plaintiff Representative Jill Flanders was repeatedly sexually assaulted, sexually harassed and subjected to cruel and degrading treatment and privacy violations by male employees of the MDOC from April through the Fall of 2000 while incarcerated at Camp Branch located in Branch County, Michigan. Plaintiff Flanders is currently incarcerated at the Huron Valley Women's Complex located in Washtenaw County, Michigan, where she continues to be subjected to sexual harassment and privacy violations by male employees. The specific facts of her claims are set forth below.

18. Plaintiff Representative Dyanna McDade was repeatedly sexually assaulted, sexually harassed and subjected to privacy violations by male employees of the MDOC and subjected to retaliation by MDOC employees while incarcerated at the Robert Scott Correctional Facility, located in Wayne County, Michigan. Plaintiff McDade is currently incarcerated at the Robert Scott Correctional Facility, where she continues to be subjected

to sexual harassment, privacy violations and retaliatory acts. The specific facts of her claims are set forth below.

DEFENDANTS

19. Defendant Jennifer Granholm is the Governor of the State of Michigan invested with executive power pursuant to Art. V §1 of the Michigan Constitution. Governor Granholm is sued in her official capacity for purposes of addressing Plaintiffs' claims for injunctive relief. Defendant Granholm is ultimately responsible for the care and custody of women prisoners in the State of Michigan, and has the authority and ability to remedy current and future conditions at facilities housing women and girl prisoners which have given rise to the custodial sexual abuse and degrading treatment set forth in this complaint. Defendant Granholm resides in Ingham County and the capitol of the State of Michigan is in Ingham County.

20. Defendant Patricia Caruso, as the Director of the Michigan Department of Corrections, is charged with the responsibility of developing and implementing policies and procedures for the management of the Michigan Department of Corrections and its employees, and is responsible for the care, custody and protection of prisoners under the jurisdiction of the Michigan Department of Corrections. Defendant Caruso is being sued individually and in her official capacity.

21. Defendant Nancy Zang was, at all times relevant to this action, employed as an administrator for women prisoners' affairs and responsible for developing, implementing and overseeing any policies or procedures for preventing, reporting, investigating custodial sexual misconduct and/or disciplining staff for sexual misconduct against female prisoners

in Michigan. Defendant Zang was also responsible for the training of male staff working at female prisons, responding to complaints of custodial sexual misconduct and degrading treatment of female prisoners and for ensuring the promulgation and/or implementation of any MDOC rules, policies and procedures for preventing custodial sexual abuse of female prisoners. She is being sued individually and in her official capacity.

22. Defendant Clarice Stovall was, from the time it began to house women female prisoners until its closure, the Warden of the Western Wayne Correctional Facility, and responsible for overseeing its operations. Defendant Stovall is currently the Warden of the Robert Scott Correctional Facility. In her capacity as a Warden for female facilities, Defendant Stovall was responsible for the training, assignment, supervision, discipline and investigation of correctional officers and MDOC employees assigned to or working at those facilities. Defendant Stovall, in her warden capacity, was at all relevant times, responsible for the custody, safety, protection, fair treatment and rehabilitation of female prisoners at facilities housing female prisoners. Defendant Stovall was also, at all relevant times, responsible for ensuring that the facilities housing female prisoners were operated according to proper correctional standards, developing procedures for implementing policies and for ensuring an adequate and effective mechanism for safe reporting of staff misconduct and treatment of victims of custodial sexual abuse. Defendant Stovall is being sued individually and in her official capacity.

23. Defendant Susan Davis is currently the Warden of the Huron Valley Complex for Women and Camp Brighton, and responsible for overseeing their operation for female prisoners. In her capacity as Warden, Defendant Davis has at all times been responsible for

the training, assignment, supervision, discipline and investigation of correctional officers and MDOC employees assigned to or working at the Huron Valley Women's Complex. Defendant Davis, during the time she was the warden, was responsible for the custody, safety, protection, fair treatment and rehabilitation of female prisoners at these facilities housing female prisoners. Defendant Davis was also, during the time she was the warden of Huron Valley Women's Complex and Camp Brighton, responsible for ensuring that the facilities were operated according to proper correctional standards, developing procedures for implementing policies and for ensuring an adequate and effective mechanism for safe reporting of staff misconduct and treatment of victims of custodial sexual abuse. Defendant Davis is being sued individually and in her official capacity.

24. Defendant Joan Yukins was the prior Warden of the Robert Scott Correctional Facility and Camp Brighton, and responsible for overseeing its operation for female prisoners. Defendant Yukins, during the time she was the Warden of the Robert Scott Correctional Facility and Camp Brighton, was responsible for the training, assignment, supervision, discipline and investigation of correctional officers and MDOC employees assigned to or working at the Robert Scott Correctional Facility and Camp Brighton. Defendant Yukins was, at all relevant times, responsible for the custody, ensuring the safety, protection, fair treatment and rehabilitation of female prisoners at the Robert Scott Correctional Facility and Camp Brighton. Defendant Yukins was also, at all relevant times, responsible for ensuring that the Robert Scott Correctional Facility and Camp Brighton were operated according to proper correctional standards, developing procedures for implementing policies and for ensuring an adequate and effective mechanism for safe reporting of staff

misconduct and treatment of victims of custodial sexual abuse. Defendant Yukins is being sued individually and in her official capacity.

25. Defendant Sally Langley was at all relevant times the Warden of the Florence Crane Correctional Facility and Camp Branch, located in Coldwater, Michigan, and responsible for overseeing its operation for female prisoners. Defendant Langley, during the time she was the Warden of the Florence Crane Correctional Facility and Camp Branch, was responsible for the training, assignment, supervision, discipline and investigation of correctional officers and MDOC employees assigned to or working at the Florence Crane Correctional Facility and Camp Branch. Defendant Langley was, at all relevant times, responsible for the custody, ensuring the safety, protection, fair treatment and rehabilitation of female prisoners at the Florence Crane Correctional Facility and Camp Branch. Defendant Langley was also, at all relevant times, responsible for ensuring that the Florence Crane Correctional Facility and Camp Branch were operated according to proper correctional standards, developing procedures for implementing policies and for ensuring an adequate and effective mechanism for safe reporting of staff misconduct and treatment of victims of custodial sexual abuse. Defendant Langley is being sued individually and in her official capacity.

26. Defendant Thomas DeSantis was, at all times relevant to this action, the Site Supervisor of Camp Brighton, and in that capacity, responsible for the onsite training, assignment and supervision of correctional officers and staff at Camp Brighton. Defendant DeSantis was responsible for the safety, custody and protection of female prisoners at Camp Brighton and for ensuring the implementation of all rules, policies and procedures.

Defendant DeSantis is being sued individually and in his official capacity.

27. Defendant Willis Chapman was, until August of 2004 and at all times relevant to this action, an Assistant Deputy Warden at the Western Wayne Correctional Facility, responsible for the custody and security in the housing units, assignment and supervision of staff and investigations of staff misconduct. He is being sued individually and in his official capacity.

28. Defendant Jerry Howell was, at all times relevant to this action, the Supervisor of the SAI Boot Camp, and in that capacity, responsible for the onsite training, assignment and supervision of correctional officers and staff at the SAI Boot Camp. Defendant Howell was responsible for the safety, custody and protection of female prisoners at the SAI Boot Camp and for ensuring the implementation of all rules, policies and procedures. Defendant Howell is being sued individually and in his official capacity.

29. Defendants Firas Awad, Jody Nunn, Carlton Carter, Rodney Madden, William Merrow, Crosby Talley and Kirk Tollzein were, at all times relevant to this action, employed as correctional officers by the Michigan Department of Corrections and assigned to supervise female prisoners.

30. Defendant Art Lancaster, was at all times relevant to this action employed by the Michigan Department of Corrections and assigned to work with female prisoners.

GENERAL ALLEGATIONS

31. Defendant supervisors and wardens assigned male officers and staff to supervise female prisoners at all facilities housing female prisoners without providing adequate training, oversight or mechanisms to ensure the safety and protection of female

prisoners including Plaintiffs.

32. Defendants, without adequate procedures, training or supervision, assigned male officers and staff to supervise women prisoners, including Plaintiffs while in states of undress and performing basic bodily functions and required male staff to perform random and specific body searches of female prisoners including Plaintiffs which searches included male staff touching female breasts and genital areas.

33. Defendants assigned male officers to transport women prisoners including Plaintiffs to facilities, clinics and hospitals without ensuring the privacy and safety of female prisoners in states of undress and during intimate medical procedures.

34. Female prisoners, including Plaintiffs, were and are routinely subjected to offensive sex-based language, sexual harassment, offensive touching and requests for sexual acts and degrading treatment by male staff at all facilities housing women prisoners.

35. There is a pattern and practice of male officers and male staff sexually assaulting women prisoners, including Plaintiffs, under the jurisdiction of the Michigan Department of Corrections, in contravention of law and policy.

36. There is a pattern and practice of male officers requesting sexual acts from women prisoners, including Plaintiffs, under the jurisdiction of the Michigan Department of Corrections as a condition of retaining good time credits, work details, educational and rehabilitative program opportunities, among other rights, privileges and benefits.

37. Plaintiffs have been subjected to intimidation, threats and retaliation upon refusal to participate in sexual activity with male staff, for reporting male staff sexual misconduct and as a mechanism to force and coerce women to remain silent about sexual

misconduct of male staff in Michigan's women's facilities.

38. Defendants were aware, from reports by women prisoners, reports and findings of state and federal commissions, independent investigative agencies and human rights organizations, that there existed an endemic problem of custodial sexual abuse of female prisoners in Michigan prisons as a result of Defendants' policies, procedures, acts and omissions.

39. The level of sexual abuse and degrading treatment of women prisoners by male employees from 2000 to the present was described as rampant by the United States Court of Appeals in its ruling in *Everson v. Michigan Dep't of Corrections,* 391 F 3d 737 (6th Cir 2004). The Defendants and each of them were or should have been aware of the pervasive risk of sexual assault and abuse by male staff on Plaintiffs.

40. Defendants were aware of prior complaints by female prisoners against male staff, including Defendants, for sexual assaults, sexual misconduct, sexual harassment and invasion of privacy including knowledge of the prosecutions of male staff for sexual assaults on female prisoners. Despite this knowledge, Defendants failed to take adequate steps to remedy the situation and/or deter such sexual misconduct against female prisoners and these Plaintiffs in particular including failure to properly train, assign, supervise, investigate and discipline.

41. Despite their knowledge of prior sexual assaults, misconduct, harassment and violation of privacy, Defendants failed to implement an effective mechanism to identify, investigate and prevent the widespread sexual, emotional and physical abuse and discriminatory treatment of women prisoners, including Plaintiffs.

42. Defendants knew or should have known that as a result of their acts and omissions there was a strong likelihood of further sexual misconduct and/or great bodily harm and injury to female prisoners, including Plaintiffs, by male staff of the MDOC.

43. Defendants' acts and omissions created a hostile environment and pervasive risk of harm to female prisoners, including Plaintiffs, and Defendants knew or should have known of the undue threats to Plaintiffs which have resulted from placing inadequately trained or supervised male staff on duty in areas where female prisoners, including Plaintiffs, are subjected to sexual misconduct and violation of their privacy rights.

44. Defendants in supervisory positions exhibited reckless disregard and deliberate indifference to the sexual harassment, sexual misconduct, assaults, degrading treatment and violations of the basic privacy rights of Plaintiffs by failing to take adequate steps to deter violations of Plaintiffs' rights, including but not limited to: failing to adequately investigate allegations of sexual assaults, harassment and degrading treatment of female prisoners, failing to provide adequate supervision of staff, failing to adequately discipline staff who violated Plaintiffs' rights and/or failing to adequately train and screen their staff, including investigators and supervisory staff.

45. Defendants failed to adequately screen employees prior to assignment to a women's facility and failed to provide adequate training to staff, investigators and supervisors, on issues of cross-gender supervision, sexual misconduct, sexual harassment, reporting violations of work rules, privacy rights of women prisoners, despite their knowledge of incidents of sexual misconduct and incidents of sexual activity between male staff and women prisoners.

46. Defendants' acts and omissions regarding screening, training, supervision, investigation, discipline of staff and failures to protect women prisoners, including Plaintiffs, from retaliation, permitted, encouraged and ratified the discriminatory and sexually abusive and degrading treatment of Plaintiffs.

47. The management and supervisory practices, rules, procedures and acts of the Defendants were so deficient in their failure to limit the risks of sexual misconduct by male staff on female prisoners as to constitute deliberate indifference to the safety needs of female prisoners under their jurisdiction, including Plaintiffs.

48. The management and supervisory practices, rules, procedures and acts of the Defendants were so deficient in their failure to limit the risks and incidents of sexual misconduct by male staff on female prisoners as to constitute encouragement and aid to male staff who violated female prisoners', including Plaintiffs', rights to be free of sexual assault, harassment, degrading treatment and privacy violations.

49. Defendants, by their actions, aided and abetted the sexual assaults, sexual harassment, degrading treatment and retaliation against female prisoners, including Plaintiffs, by giving assistance and encouragement to other Defendants who engaged in discriminatory and unlawful conduct, either affirmatively or by failing to report, investigate and discipline staff.

50. Defendants placed and housed women prisoners in facilities including Western Wayne Correctional Facility, Huron Valley Women's Complex, Camp Brighton and SAI Boot Camp, without taking adequate steps to ensure Plaintiffs' privacy, protect Plaintiffs from risk of custodial sexual abuse, and without adequate staff supervision and/or

mechanisms for reporting abuse.

51. Defendants failed to identify, screen, treat or protect Plaintiffs with prior histories of abuse, rendering them particularly vulnerable to harm by male staff and failed to take adequate steps to identify, house, treat and protect Plaintiffs from further harm and exacerbation of their injuries.

52. Defendants' placement of girls, including Plaintiffs under the age of 18 in areas where they were supervised by male staff and subjected to viewing in states of undress and while performing basic bodily functions without taking adequate steps to protect them from harm, constitutes deliberate indifference and reckless disregard of their safety and rights and rendered them particularly vulnerable to harm by male staff.

53. The failures, acts, and/or omissions of Defendants, as set forth above, were and are a proximate cause of Plaintiffs' injuries.

54. The deprivation of constitutional rights alleged in this complaint are the direct result of official policies, custom and practices of Defendants and each of them.

EXHAUSTION OF ALL ADMINISTRATIVE REMEDIES

55. Plaintiffs have exhausted all 'available' administrative remedies, or alternately, have taken all available steps to bring these matters to Defendants' attention and seek resolution prior to filing litigation.

56. The Michigan Department of Corrections, and Defendants do not allow female prisoners, including Plaintiffs, claiming staff sexual misconduct to exhaust their administrative remedies through the grievance procedure and do not provide an alternative administrative mechanism.

57. Plaintiffs were and are routinely discouraged from use of the grievance system by threats and intimidation by staff, including Defendants, procedural barriers created by Defendants and Defendants' failure to ensure Plaintiffs are provided grievance forms, Defendants' refusal to process grievances, and/or Defendants' failure to ensure responses to grievances, rendering any administrative process for Plaintiffs unavailable or futile.

58. In addition to the above noted barriers, at all relevant times Plaintiffs were advised that a precondition to filing a grievance was consultation with the individual who was being grieved. Since complying with this requirement, in the context of Plaintiffs grieving staff criminal sexual conduct and staff abuse, would place Plaintiffs in danger, Defendants' requirement rendered the grievance system unavailable to Plaintiffs.

59. Plaintiffs' prior class action complaints, including *Neal, et al. v MDOC, et al.*, File No. 96-6986-CZ and *Anderson, et al. v MDOC, et al.*, File No. 03-162-MZ, have adequately advised Defendants, and each of them, of the existence of pervasive custodial sexual misconduct in Michigan's women prisons, staff sexual assaults, privacy violations, degrading treatment and retaliation, to allow Defendants the opportunity to take remedial actions prior to Plaintiffs filing this action.

INDIVIDUAL PLAINTIFF'S FACTS

Natheauleen Mason

60. During her incarceration Plaintiff Natheauleen Mason was routinely subjected to sexually degrading comments and privacy violations by male staff including the officers assigned to her housing unit at the Western Wayne Correctional Facility, located in Wayne County, Michigan and Camp Brighton located in Livingston County, Michigan.

61. Beginning in July 2002 Plaintiff Mason was forced to perform oral sex on Defendant Carlton Carter, a correctional officer employed by the MDOC and assigned to supervise her housing unit on the second shift at the Western Wayne Correctional Facility.

62. Defendant Carter entered Plaintiff Mason's prison cell on at least three occasions between July and October, 2002, and threatened, coerced and forced Plaintiff Mason to perform oral sex. Defendant Carter also physically assaulted Plaintiff Mason and subjected her to sexually degrading treatment on multiple occasions.

63. Defendant Carter, with the cooperation of other staff, including Defendant Madden, subjected Plaintiff Mason to ongoing sexual assaults, harassment and degrading treatment in such a manner that supervisory Defendants knew or should have known of the assaults.

64. Defendant Carter repeatedly threatened Plaintiff Mason physically and intimidated her with threats of future harm should she resist or report his assaults and criminal behavior.

65. Defendants failed to adequately investigate Plaintiff Mason's complaints against Defendant Carter and by such actions both ratified the actions of Defendant Carter and endangered the safety of other Plaintiffs including Plaintiffs Yolanda Limmitt and Davone Wilson.

66. Plaintiff Mason was transferred to Camp Brighton located in Livingston County where she became the target for sexual assaults and degrading treatment by another male correctional officer, Defendant William Merrow, beginning in the fall of 2003.

67. Defendant Merrow began soliciting sex from Plaintiff Mason, touching her

breasts and pressing his body against her on multiple occasions. Defendant Merrow routinely sexually harassed Plaintiff Mason by telling her what sexual acts he intended to do with her, using sexually offensive language and threatening her with physical harm if she reported his actions.

68. Defendant Merrow attempted to prevent Plaintiff Mason's parole by writing her false misconduct reports and his actions continued until Plaintiff Mason was released from MDOC custody.

69. Defendants failed to adequately investigate Plaintiff Mason's reports of abuse, failed to adequately supervise, discipline or take steps to prevent ongoing assaults against Plaintiff Mason.

70. While at Camp Brighton, Plaintiff Mason was subjected to retaliation by staff for reporting sexual abuse by male staff and continues to fear retaliation while she remains under the jurisdiction of the Michigan Department of Corrections.

71. The Defendants' policies and procedures of hiring and assigning male staff without adequate training or supervision; Defendants' policies and procedures which deter and punish women prisoners from reporting; and Defendants' policies and procedures for investigation and discipline of staff sexual misconduct were proximate causes of the harm to Plaintiff Mason.

YOLANDA LIMMITT

72. In 2002, Plaintiff Yolanda Limmitt was a prisoner housed at the Western Wayne Correctional Facility located in Wayne County, Michigan, and was supervised in her housing unit by Defendant Carlton Carter on the second shift.

73. At the time Plaintiff Limmitt was supervised by Defendant Carter, Defendants Stovall, Chapman and Zang were aware of prior allegations of sexual assaults and sexually degrading treatment of female prisoners by Defendant Carlton Carter at the Western Wayne Correctional Facility and had failed to adequately investigate, discipline, supervise or assign Defendant Carter subsequent to these reports.

74. On or about September 2002 Defendant Carlton Carter began sexually assaulting Plaintiff Limmitt in her cell, a tool room and in other areas at the Western Wayne Correctional Facility.

75. Defendant Carter's sexual assaults included forced oral sex and genital touching and forced sexual exposure. In addition to the sexual assaults, abuse and degrading treatment, Defendant Carter kept Plaintiff Limmitt from reporting with a combination of coercion, threats, intimidation and mental abuse.

76. Defendant Carter's sexual harassment and sexual abuse of Plaintiff Limmitt occurred with the knowledge and cooperation of other male officers, including Defendant Madden, who allowed Defendant Carter to remove Plaintiff Limmitt from her unit for purposes of sexually assaulting her and/or was aware that Defendant Carter was entering Plaintiff Limmitt's cell for purposes of sexually assaulting and degrading treatment and failed to take any steps to report or stop Defendant Carlton Carter's actions.

77. The actions of Defendant Carter were so open and obvious as to make Defendants aware of the sexual assaults and misconduct of the officer. However, Defendants failed to take adequate steps to protect Plaintiff Limmitt.

78. Defendant Carlton Carter continued to sexually assault and/or sexually harass

Plaintiff Limmitt up to and including the fall of 2003.

79. Defendants were or should have been aware that Plaintiff Limmitt has a prior history of sexual trauma and abuse that makes her particularly vulnerable and they failed to take adequate steps to protect Plaintiff.

80. Plaintiff Limmitt was fearful of reporting Defendant Carlton Carter until she was transferred from the Western Wayne Correctional Facility. Plaintiff Limmitt reported on or about October, 2003, while incarcerated at Camp Brighton, where she was then subjected to retaliation by MDOC employees.

81. Defendants Stovall, Chapman, Caruso and Zang failed to adequately investigate Plaintiff Limmitt's reports of abuse and failed to adequately discipline or supervise Defendant Carter. Defendant Carter continued to sexually assault and abuse Plaintiffs at the Western Wayne Correctional Facility until his transfer to the Huron Valley Women's Complex.

82. Upon Defendant Carter's transfer to the Huron Valley Women's Complex, Defendants Davis, Zang and Caruso failed to properly train, assign, supervise or discipline this Defendant. Defendant Carter again sexually assaulted and sexually harassed female prisoners at the Huron Valley Women's Complex until his transfer to a men's facility in 2005.

83. The Defendants' policies and procedures of hiring and assigning male staff without adequate training or supervision; Defendants' policies and procedures which deter and punish women prisoners from reporting; and Defendants' policies and procedures for investigation and discipline of staff sexual misconduct were proximate causes of the harm

to Plaintiff Limmitt.

DAVONE WILSON

84. Plaintiff Davone Wilson was twenty years old when she was incarcerated in the Huron Valley Women's Complex in August of 2004.

85. Shortly after Plaintiff Wilson arrived, Defendant Carlton Carter began to stalk her, exposing himself and groping her breasts and buttocks on multiple occasions.

86. Defendant Carter was assigned to supervise Plaintiff Wilson's unit and used his position to view her in states of undress, while showering, and to force physical contact and make sexually based comments and threats.

87. Plaintiff Wilson attempted to report Defendant Carter's acts and threats on multiple occasions both verbally and in writing requesting to talk to her counselor who failed and refused to speak to her.

88. Plaintiff Wilson was made aware that Defendant Carter assaulted other women prisoners and that no discipline or other actions were taken as a result of those assaults.

89. On or about February, 2002 Defendant Carter entered Plaintiff Wilson's cell after she had showered, exposed his penis and threatened her with a major misconduct ticket he claimed could cancel her pending parole and keep her in prison unless she performed oral sex. Defendant Carter then forced Plaintiff Wilson to perform oral sex on him in her cell.

90. Plaintiff Wilson was released on parole on or about July, 2005 and continues to fear retaliation while she remains under the jurisdiction of the Michigan Department of Corrections.

91. Defendants' system and practices for reporting abuse, Defendants' failure to

adequately supervise, discipline and investigate Defendant Carter and Defendants' policies and procedures with regard to cross-gender supervision were a proximate cause of Plaintiffs' assault and abuse.

RENEE WILLIAMS

92. Plaintiff Renee Williams was placed under the jurisdiction of the MDOC in 1999 and housed at the Robert Scott Correctional Facility and then Camp Branch.

93. In 2000, Plaintiff Williams was transferred to Western Wayne Correctional Facility where multiple male officers began making sexual comments to Plaintiff Williams and telling her they were going to have a lot of fun with her at that facility.

94. Plaintiff Williams was subjected to routine privacy violations, sexual harassment and touching. In the Fall of 2002, Plaintiff Williams was sexually assaulted by a male correctional officer, Defendant Madden. The sexual assaults included vaginal intercourse and forced oral sex.

95. The sexual assaults and rapes occurred in Plaintiff Williams' cell, a closet in the prison, the staff bathroom, a porter's closet and a counselor's office.

96. The sexual abuse of Plaintiff Williams was so open and obvious that Defendant Supervisors were or should have been aware of Defendant Madden's criminal actions yet took no steps to prevent further assaults and abuse.

97. The assaults and abuse occurred with the cooperation and/or knowledge of other staff and officers who failed to report or intervene.

98. Defendants' failure to take any actions in light of the open and obvious abuse together with Defendant Madden's threats of retaliation and Plaintiffs' experience with

retaliation by staff made any reporting futile and/or dangerous.

99. Defendants knew or should have known of Plaintiff Williams' experience of childhood sexual abuse and her vulnerability to any coercive sex and/or sexual abuse by male staff. Defendants failed to take adequate steps to protect or treat Plaintiff Williams.

100. Plaintiff Williams has also been the recipient of other acts of sexual harassment by male staff including a male correctional officer who watched Plaintiff Williams while she was naked and made lewd sexual comments to her. In the food service area and on her unit, a male correctional officer looked over her door cover to view her in a state of undress. A male correctional officer grabbed his penis and told Plaintiff Williams he wanted to perform sexual acts.

101. The custodial sexual abuse of Plaintiff Williams ended when she was paroled. Plaintiff Williams continues to fear retaliation while under the jurisdiction of the Michigan Department of Corrections.

102. Defendants' continued failure to take adequate steps to deter the assaultive behavior of Defendant Madden and protect Plaintiffs, including inadequate investigations, assignments, reporting mechanisms, supervision and discipline, resulted in Defendant Madden continuing to assault women prisoners the Huron Valley Women's Complex.

103. The Defendants' policies and procedures of hiring and assigning male staff without adequate training or supervision; Defendants' policies and procedures which deter and punish women prisoners from reporting; and Defendants' policies and procedures for investigation and discipline of staff sexual misconduct were proximate causes of the harm to Plaintiff Williams.

VELVET FARLEY-JOHNSON

104. In 2001, Plaintiff Velvet Farley-Johnson was incarcerated at the Western Wayne Correctional Facility.

105. Plaintiff Farley-Johnson had previously been subjected to sexually degrading treatment, sexual touching by male staff and routine viewing and sexual comments by male staff of the MDOC.

106. In the summer of 2001 Plaintiff Farley-Johnson was approached for sex by the assistant deputy warden, Defendant Williams Chapman, at the Western Wayne Correctional Facility.

107. Defendant Chapman used his position as assistant deputy warden to order Defendant Farley-Johnson to work in his office.

108. Plaintiff Farley-Johnson's job detail in the prison was recreation aide assigned to the same building as Defendant Chapman. Defendant Chapman ordered that Plaintiff Farley-Johnson be assigned to paint his office and, at this time, while in his office, began to touch Plaintiff Farley-Johnson sexually.

109. Defendant Chapman ordered Plaintiff Farley-Johnson into an empty office and on three occasions sexually assaulted and raped Plaintiff Farley-Johnson by bending her over and penetrating her vaginally.

110. Plaintiff Farley-Johnson was subjected to retaliation by employees of the MDOC for reporting assaults and continues to fear retaliatory acts by Defendants while she is under the jurisdiction of the Michigan Department of Corrections.

111. The Defendants' policies and procedures of hiring and assigning male staff

without adequate training or supervision; Defendants' policies and procedures which deter and punish women prisoners from reporting; and Defendants' policies and procedures for investigation and discipline of staff sexual misconduct were proximate causes of the harm to Plaintiff Farley-Johnson.

TAMMY LACROSS

112. Plaintiff Tammy Lacross was seventeen years old when she was placed in an adult prison and subjected to supervision by male correctional officers who routinely touched her while performing body searches, viewed her while nude in showers and while dressing and undressing.

113. Shortly after her arrival at the Scott Correctional Facility, Plaintiff LaCross was, on a weekly basis, subjected to sexual overtures from male corrections officers, forced physical contact and sexually degrading language. Plaintiff LaCross was also made aware of sexual contact between female prisoners and male staff that was open and obvious and went undisciplined.

114. Plaintiff LaCross was also aware of incidents of retaliation against female prisoners who resisted or reported assaults by male staff.

115. In 2000, Plaintiff LaCross was transferred to the Western Wayne Correctional Facility which had recently been converted to a female prison.

116. Defendant Willis Chapman was the Assistant Deputy Warden (ADW) for Custody and Housing at the Western Wayne Correctional Facility and acted as an investigator of complaints of staff misconduct. Within five (5) months of women arriving at the Western Wayne Correctional Facility, ADW Chapman began sexually assaulting at

least two female prisoners, including Plaintiff Farley-Johnson. By May of 2001, he began sexually harassing Plaintiff Tammy LaCross.

117. Defendant Chapman's behavior was open and obvious to any supervisor concerned with ensuring the safety of female prisoners.

118. By July of 2001, Defendant Chapman had coerced Plaintiff LaCross into a sexual relationship with forced intercourse and touching on a weekly basis. These sexual assaults and coerced sex took place in multiple areas of the Western Wayne Correctional Facility and, including instances when Defendant Chapman ordered Plaintiff LaCross be brought to his assistant deputy warden's office, the school building and other offices and closets for purposes of the coerced sex and assaults.

119. The physical assaults and coercive sex by Defendant Chapman against Plaintiff LaCross resulted in physical injury to Plaintiff LaCross, including but not limited to multiple bruises, scrapes and lacerations. In addition to the sexual assaults and abuse, Defendant Chapman mentally abused Plaintiff LaCross and kept her from reporting the abuse with a combination of threats and mental abuse.

120. In June 2001, several employees of the Michigan Department of Corrections reported the sexual misconduct of Assistant Deputy Warden Chapman and his violations of facility rules, policies and procedures.

121. Defendant Stovall specifically directed that Defendant Chapman not be placed on any restrictions. As a result, Defendant Chapman could and did intimidate and threaten Plaintiff LaCross to prevent her cooperating with any investigation or reporting the assaults. Further, Defendant Stovall did not reassign Defendant Chapman, did not report the alleged

criminal activity to the Michigan State Police, did not adequately investigate the allegations and placed no restrictions on Defendant Chapman.

122. Defendant Chapman continued to sexually assault, degrade and intentionally inflict emotional distress on Plaintiff LaCross on a weekly basis, including acts of penetrative intercourse, forced oral sex, viewing Plaintiff LaCross in various states of undress and degrading treatment through 2003.

123. Defendant Chapman was not removed from his position until August, 2003.

124. Plaintiff LaCross was subjected to acts of retaliation by MDOC employees at both Western Wayne Correctional Facility located in Wayne County, Michigan and Camp Brighton, located in Livingston County, Michigan until her release.

125. The Defendants' policies and procedures of hiring and assigning male staff without adequate training or supervision; Defendants' policies and procedures which deter and punish women prisoners from reporting; and Defendants' policies and procedures for investigation and discipline of staff sexual misconduct were proximate causes of the harm to Plaintiff LaCross.

KANDICE HALL

126. Plaintiff Kandice Hall was incarcerated at the Huron Valley Women's Complex in March of 2005, when a male correctional officer on the midnight shift ordered her out of her cell and into another room of the housing unit.

127. The officer, Defendant Jody Nunn, then sexually assaulted Plaintiff Hall by grabbing her breasts and buttocks, digitally penetrating her and raping her from behind.

128. On the same date and time, Defendant Nunn forcibly removed Plaintiff Hall's

clothes, pushed her down and attempted forced oral sex.

129. Defendant Nunn then threatened Plaintiff Hall against reporting, said he knew where her family lived and reminded her that his wife was also an officer in the facility.

130. When Plaintiff Hall did report the assaults to prevent further abuse, she was retaliated against by staff, including Defendant Nunn, for reporting.

131. The Defendants' policies and procedures of hiring and assigning male staff without adequate training or supervision; Defendants' policies and procedures which deter and punish women prisoners from reporting; and Defendants' policies and procedures for investigation and discipline of staff sexual misconduct were proximate causes of the harm to Plaintiff Hall.

EBONY BATES

132. In April of 2005, Plaintiff Ebony Bates was incarcerated at the Huron Valley Women's Facility when she was assaulted by a male correctional officer, Defendant Jody Nunn, while he worked the second shift supervising her in temporary segregation.

133. Defendant Nunn routinely sexually harassed Plaintiff Bates by requesting she expose herself to him and using sexually offensive language.

134. Defendant Nunn ordered Plaintiff Bates to pull down her prison jumpsuit so he could view her. Defendant Nunn groped Plaintiff's genital area and made sexually offensive and degrading statements to her.

135. Plaintiff Bates reported the assault and has been subjected to retaliatory acts by Defendant Nunn, his wife and other staff since reporting.

136. The Defendants' policies and procedures of hiring and assigning male staff

without adequate training or supervision; Defendants' policies and procedures which deter and punish women prisoners from reporting; and Defendants' policies and procedures for investigation and discipline of staff sexual misconduct were proximate causes of the harm to Plaintiff Bates.

CHRISTINA SCHUSTER

137. Defendants knew of should have known that Plaintiff Christina Schuster was the victim of sexual and physical abuse throughout her adolescence, but failed to take any steps to protect her from further abuse.

138. While incarcerated in the Western Wayne Correctional Facility, Plaintiff Schuster was coerced into sex with a resident unit officer, Defendant Dallas Mesack.

139. Defendant Mesack routinely sexually harassed Plaintiff Schuster by requesting she expose herself to him and by using sexually offensive language.

140. Defendant Mesack entered Plaintiff Schuster's cell at night, ordered her cell mate to face the wall and ordered Plaintiff to engage in acts of oral sex on multiple occasions during the Spring and Summer of 2003.

141. Plaintiff Schuster was subjected to retaliation by MDOC employees after reporting the sexual assaults.

142. The actions of Defendant Mesack were open and obvious. The Defendants' policies and procedures of hiring and assigning male staff without adequate training or supervision; Defendants' policies and procedures which deter and punish women prisoners from reporting; and Defendants' policies and procedures for investigation and discipline of staff sexual misconduct were proximate causes of the harm to Plaintiff Schuster.

DYANNA MCDADE

143. Plaintiff Dyanna McDade was 21 years old when she was placed in the Robert Scott Correctional Facility in 2002.

144. Beginning in the Spring of 2004, Defendant Crosby Talley, who is a corrections officer at the Robert Scott Correctional Facility, began sexually harassing Plaintiff McDade by using sexually degrading language aimed at her.

145. During the same time period, Defendant Talley sexually touched, pruriently viewed and leered at Plaintiff McDade.

146. On or about September, 2004 Defendant Talley coerced Plaintiff McDade into a restroom at the MSI factory and followed her into the restroom, blocking her exit.

147. Plaintiff McDade attempted to resist and, on the day in question, Defendant Talley raped Plaintiff McDade and threatened her against reporting the assault.

148. Plaintiff McDade was fearful to report the assault in light of her knowledge of the lack of adequate investigation, lack of discipline and incidents of retaliation against women who reported such assaults.

149. On November 20, 2004, fearful that the assaults would continue, Plaintiff McDade did report this penetrative sexual assault, to Lieutenant Hockenhull, a member of the supervisory staff at Scott Correctional Facility.

150. MDOC's Internal Affairs' investigation into the sexual assault was inadequate and inconclusive.

151. On two occasions previous to this incident, Defendant Talley had been reported for sexually assaulting female prisoners.

152. Despite repeated reports of sexual assaults on female prisoners, Defendant Supervisors, including Defendants Yukins, Stovall, Zang and Caruso, have allowed Defendant Talley to remain employed by the MDOC with full access to female prisoners including working in the housing units.

153. Defendants were aware or should have been aware that Plaintiff McDade has a prior history of sexual trauma and abuse that makes her vulnerable and they failed to take adequate steps to protect Plaintiff. The subsequent assault exacerbated Plaintiff McDade's prior condition.

154. Defendants', including Defendants Yukins and Stovall, failure to adequately supervise the staff at Robert Scott Correctional Facility resulted in retaliatory actions being taken against Plaintiff McDade in the form of loss of detail, time in segregation and major misconduct tickets.

155. The Defendants' policies and procedures of hiring and assigning male staff without adequate training or supervision; Defendants' policies and procedures which deter and punish women prisoners from reporting; and Defendants' policies and procedures for investigation and discipline of staff sexual misconduct were proximate causes of the harm to Plaintiff McDade.

HELISHA BAILEY

156. In 2003, Plaintiff Helisha Bailey was incarcerated at the Western Wayne Correctional Facility where she was assaulted by two male correctional officers.

157. On or about January 2003, Defendant Firas Awad ordered Plaintiff Bailey into a closet and grabbed her breast and groped her vaginal area. Later that day, Defendant Awad

again forced Plaintiff Bailey into a closet and grabbed her breasts and forced her hand onto his penis. On the same date, later in the evening, Defendant Awad ordered Plaintiff Bailey to come out of her cell. Plaintiff Bailey left her cell and walked to the officer's station. At that time, Defendants Carter and Madden sent her into the laundry room where Defendant Awad forced Plaintiff to perform oral sex and digitally penetrated and raped her.

158. Defendant Awad threatened Plaintiff Bailey, with future sexual assaults and punishment.

159. On or about March 2003, Defendant Kirk Tollzein began making sexual comments to Plaintiff Bailey and in April 2003 grabbed her breasts on several occasions.

160. On multiple occasions Defendant Tollzein entered Plaintiff Bailey's cell on the second shift and forced her to expose her body to him, grabbed her breasts and digitally penetrated her.

161. Defendant Tollzien threatened Plaintiff Bailey against reporting the repeated sexual assaults.

162. Defendant Tollzein's and Defendant Awad's actions were open and obvious and the assaults occurred with the cooperation and assistance of other staff including Defendants Madden and Carter.

163. The Defendants' policies and procedures of hiring and assigning male staff without adequate training or supervision; Defendants' policies and procedures which deter and punish women prisoners from reporting; and Defendants' policies and procedures for investigation and discipline of staff sexual misconduct were proximate causes of the harm to Plaintiff Bailey.

JILL FLANDERS

164. Plaintiff Jill Flanders was repeatedly sexually harassed and sexually assaulted by Defendant Arthur Lancaster, a school teacher at Camp Branch in Branch County, Michigan, while she worked as a tutor in the school under Lancaster's supervision from November 1999 through July 2000.

165. The assaults were open and obvious to MDOC staff who failed to take adequate steps to investigate or discipline Defendant Lancaster and failed to assist or protect Plaintiff Flanders.

166. The assaults did not stop until Defendant Lancaster was allowed to resign in lieu of any investigation or discipline. Defendant Lancaster continued to harass, threaten and stalk Plaintiff Flanders while she was on parole, impairing her rehabilitation and interfering with her parole status.

167. The Defendants' policies and procedures of hiring and assigning male staff without adequate training or supervision; Defendants' policies and procedures which deter and punish women prisoners from reporting; and Defendants' policies and procedures for investigation and discipline of staff sexual misconduct were proximate causes of the harm to Plaintiff Flanders.

CLASS ACTION ALLEGATIONS

168. This action is brought by the named Plaintiffs on behalf of all women prisoners similarly situated who, since March of 2000, have been, are now or will be hereafter incarcerated under the jurisdiction of the Michigan Department of Corrections correctional system. Plaintiffs seek class action status pursuant to the provisions of Fed. R. Civ. P. Rule

23(a) and (b).

169. The number of female prisoners who have alleged they have been subjected to custodial sexual abuse while under the jurisdiction of the MDOC since March of 2000, exceeds two hundred women. Class action status is the most practical method for Plaintiffs to challenge the policies, procedures and practices of the MDOC which are a proximate cause of the ongoing custodial sexual misconduct in Michigan's women prisons.

170. There are common questions of law and fact in the action that relate to and effect the rights of each member of the class. The Plaintiffs as women prisoners have all been subjected to Defendants' policies, procedures and failures to provide for proper screening, training and supervision of male staff at the various facilities where they have been housed. The policies and procedures with regard to reporting, investigating and disciplining of custodial sexual misconduct apply to all facilities and Plaintiffs. Plaintiffs seek injunctive relief, declaratory relief and damages for themselves and class members for the injuries caused by Defendants' acts and omissions.

171. The claims of Plaintiffs who are representatives of the class herein are typical of the claims of the class of women prisoners under the jurisdiction of the Michigan Department of Corrections that are subjected to custodial sexual misconduct and degrading treatment by male employees of the Michigan Department of Corrections, while incarcerated under the jurisdiction of the MDOC.

172. All women prisoners have been subjected to Defendants' assignment of male staff to unsupervised positions in women's housing units, all women have been housed under the inadequate policies and procedures for training, assignment, supervision, investigation

and discipline of its male employees assigned to Michigan women's prisons. All have been deterred from reporting by Defendants' inadequate and unusable policies. As a result, all Plaintiffs have been incarcerated in a hostile and unsafe sexual environment which has resulted in a pervasive risk of harm to their safety.

173. The named Plaintiffs are the representative parties of the class, and are able to and will fairly and adequately protect the interests of the class. The attorneys for Plaintiffs are experienced and capable litigants in the field of civil rights and prison litigation and have successfully represented claimants in other litigation of this nature.

174. The class consists of all former, current and future female prisoners under the jurisdiction of the MDOC who suffered and who will suffer damages and injuries as a result of sexual assaults, sexual harassment, degrading treatment, violation of their privacy and retaliation for reporting same, and deprivation of their constitutional and statutory rights to fully and equally utilize prison programs and facilities and who seek injunctive and remedial relief.

175. This action meets the requirements of F.R.C.P. 23(a) and (b) because:

A. The class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims of the representative parties are typical of the claims of the class, and the representative parties will fairly and adequately protect the interests of the class.

B. Additionally, the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications or adjudications with respect to individual members of the class where as a practical matter it would be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or the party opposing the class has acted or refused to act on grounds generally applicable to the

> class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

176. Further, Plaintiffs constitute a sub-class of a previously certified class action in the state action of *Neal, et al. v MDOC, et al.*, No. 96-6986-CZ, who are prevented from pursuing their claims for violations of their statutory rights under the state civil rights act.

Accordingly, this action meets all the requirements for a class action under F.R.C.P. 23(a) and F.R.C.P. 23(b)(1), (2) or (3).

CAUSES OF ACTION
FIRST CAUSE OF ACTION
(VIOLATION OF 42 U.S.C. § 1983)

177. Plaintiffs incorporate by reference paragraphs 1 through 176 as if set forth fully herein.

178. Defendants' failure to prevent and remedy the sexual assaults, harassment, degrading treatment and privacy violations by Defendants and employees of MDOC upon the Plaintiffs, constitutes an official policy, custom, pattern or practice that has deprived Plaintiffs of their constitutional right to bodily integrity and right to privacy without due process of law in violation of the Fourth, Eighth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §1983.

179. The supervision of Plaintiffs by male officers and subjection of Plaintiffs to unnecessary viewing and touching by male officers violates the prohibition against cruel and unusual punishments as guaranteed by the Eighth Amendment of the United States

Constitution, the prohibition against unreasonable searches and seizures as guaranteed by the Fourth Amendment of the United States Constitution, and deprived Plaintiffs and all similarly-situated prisoners of the equal protection of laws under the Fourteenth Amendment of the United States Constitution. The supervision of Plaintiffs by male officers and subjection of Plaintiffs to verbal and physical sexual harassment and unnecessary viewing and touching by male officers also violate the customary international law norm prohibiting cruel, inhuman or degrading treatment or punishment.

180. The deprivation of constitutional rights alleged in this complaint are the direct result of official policy, custom and practices of Defendants and each of them.

181. The supervision of Plaintiffs by male officers, subjecting Plaintiffs to unnecessary viewing and touching by male staff and the sexual assaults and degrading treatment, deprived Plaintiffs and all similarly-situated female prisoners of the right to humane treatment, the right to privacy, and the right to equal treatment under the law and equal protection against discrimination in violation of customary international law and articles 7, 10, 17 and 26 of the International Covenant on Civil and Political Rights, and articles 1, 2 and 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment.

SECOND CAUSE OF ACTION
(BODILY INTEGRITY)

182. Plaintiffs incorporate by reference paragraphs 1 through 181 above as if set forth fully herein.

183. The above described acts constitute unreasonable searches and seizures,

deprivations of liberty and invasions of privacy and bodily integrity, without adequate penalogical justification and without due process of law in violation of the Fourth Amendment to the United States Constitution and 42 U.S.C. §1983.

THIRD CAUSE OF ACTION
(CRUEL & UNUSUAL PUNISHMENT)

184. Plaintiffs incorporate by reference paragraphs 1 through 183 above as if set forth fully herein.

185. The above-described acts of the Defendants constitute the unnecessary and wanton infliction of pain and suffering and emotional distress on the Plaintiffs, without penalogical justification.

186. Defendants' failure to prevent and remedy the sexual abuse, harassment, degrading treatment and retaliatory acts which Plaintiffs have been and are subjected constitutes deliberate indifference to the Plaintiffs' medical, psychological and emotional needs and amounts to cruel and unusual punishment under the Eighth Amendment to the United States Constitution and 42 U.S.C. §1983, and constitutes cruel and degrading treatment or punishment in derogation of Article 16 of the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment.

FOURTH CAUSE OF ACTION
(EQUAL PROTECTION)

187. Plaintiffs incorporate by reference paragraphs 1 through 186 above as if set forth fully herein.

188. Defendants' failure to prevent and remedy the sexual abuse, harassment, degrading treatment, retaliation and ongoing violations of Plaintiffs' privacy violates

Plaintiffs' rights to equal protection of the law under the Fourteenth Amendment of the United States Constitution, 42 U.S.C. §1983 and customary international law standards.

189. Defendants' employment and assignment of male officers and other male employees in the women's prisons, in positions where they commonly observe women in states of undress and performing basic bodily functions and Defendants' failure to remedy the resultant sexual assaults and sexual harassment of women prisoners and ratification of the hostile conditions and treatment for women prisoners constitutes discrimination based on sex. This inferior treatment is not substantially related to an important and legitimate governmental interest and violates Plaintiffs' rights to equal protection under the law and 42 U.S.C. §1983.

190. The denial of Plaintiffs, and those similarly situated, of the right to equal opportunity for rehabilitation and the subjection of the Plaintiffs and those similarly situated to a hostile prison environment constitutes prohibited discrimination based on their sex in violation of the Fifth and Fourteenth Amendments to the United States Constitution and customary international law standards.

191. At all times relevant to this action, Defendants and each of them were acting under color of law and, in doing so, deprived Plaintiffs and all similarly-situated female prisoners of the equal protection of the law under the Fifth and Fourteenth Amendments of the United States Constitution, and under customary international law and articles 2, 3 and 26 of the International Covenant on Civil and Political Rights.

FIFTH CAUSE OF ACTION
(RETALIATION AND INTIMIDATION)

192. Plaintiffs incorporate by reference paragraphs 1 through 191 above as if set forth fully herein.

193. Defendants' retaliation and failure to prevent or remedy retaliation against Plaintiffs for reporting staff misconduct constitutes a violation of their rights to freedom of speech and association guaranteed under the First and Fourteenth Amendments to the United States Constitution.

SIXTH CAUSE OF ACTION
(DECLARATION THAT THE ELCRA'S MARCH 10, 2000 AMENDMENT IS UNCONSTITUTIONAL)

194. Plaintiffs incorporate by reference paragraphs 1 through 193 above as if set forth fully herein.

195. Prior to March 10, 2000, the facilities, camps and centers housing Plaintiffs were recognized as a"public service" facility within the meaning of the ELCRA, MCL 37.2301(b). *Neal, et al. v MDOC, et al,* 232 Mich App 730 (1998). (Exhibit 2)

196. On December 20, 1999, the State of Michigan amended the ELCRA's definition of "public service" by excluding from the definition "a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment." Michigan Public Act No. 202 of 1999. (Exhibit 1, M.C.L. 37.2301). The amendment took effect on March 10, 2000. The stated purpose of the amendment was to target Plaintiffs who were and are part of a class of prisoners in *Neal, et al. v MDOC, et al.*, No. 96-6986-CZ (Exhibit 1, Enactment Language).

197. The amendment of the ELCRA deprives Plaintiffs, and all those similarly-situated, of equal protection of the laws in violation of the Fourteenth Amendment, because the amendment targeted deprivation of a single class of persons (Michigan female prisoners) for all state statutory protection from unconstitutional discrimination. This deprivation of protection lacks any rational relationship to any legitimate state purpose.

198. The amendment to the ELCRA subsequent to the limitations contained in the Prison Litigation Reform Act, 42 U.S.C. § 1997, deprives Plaintiffs of an effective remedy or redress for serious deprivations of their rights under customary international law and in violation of the International Covenant on Civil and Political Rights, article 2, and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, article 14.

199. The Amendment to the Elliot-Larsen Civil Rights Act is a violation of the federal due process and the equal protection clauses of the Fourteenth Amendment of the United States Constitution.

SEVENTH CAUSE OF ACTION
(BILL OF ATTAINDER)

200. Plaintiffs incorporate by reference paragraphs 1 through 199 above as if set forth fully herein.

201. The amendment to the Elliott-Larsen Civil Rights Act, precluding Plaintiffs from the protection of the Civil Rights Act and its protection against sexual discrimination in Michigan, constitutes a Bill of Attainder in violation of Article I, §10 of the United States Constitution.

202. This amendment punishes Plaintiffs based upon their gender and status as a prisoner.

203. The amendment disqualifies Plaintiffs from the protections of their rights as women, allows for sexual harassment and discriminatory treatment based on their gender without recourse under state laws.

204. The amendment does not serve any purpose of the Civil Rights Act but instead its sole purpose is to punish Plaintiffs.

DAMAGES

205. Plaintiffs incorporate by reference paragraphs 1 through 204 above as if set forth fully herein.

206. The acts and omissions of Defendants constituting violation of Plaintiffs' constitutional, statutory and common law rights were and are a proximate cause of Plaintiffs' damages.

207. As a result of Defendants' acts and omissions, Plaintiffs, individually and as a class, have suffered emotional and physical injuries and damages, loss of freedom and rehabilitation opportunities.

208. The acts and omissions of Defendants constitute violations of Plaintiffs' rights and were and are a proximate cause of Plaintiffs' damages.

209. As a result of Defendants' acts and omissions, Plaintiffs have suffered the following injuries and damages, among others: physical injuries; increased levels and length of incarceration, loss of freedom and rehabilitation opportunities; loss of wages and income; loss of educational and training opportunities; severe psychological injuries and damages;

and exacerbation of prior medical conditions and injuries.

RELIEF REQUESTED

WHEREFORE, Plaintiffs pray for a judgment against the Defendants and each of them and requests that this Court:

a. Issue a declaratory judgment that the policies, practice, acts and omissions complained of herein violate Plaintiffs' constitutional rights guaranteed by the specified sections of the United States Constitution, statutory law, customary international law and treaties;

b. Certify this case as a class action;

c. Issue preliminary and permanent injunctions against Defendants' practices, acts and omissions complained of herein;

d. Order remedial action to remedy Defendants' unlawful policies, practices, acts and omissions and to deter future violations;

e. Issue a declaratory judgment that the amendment to the ELCRA is unconstitutional as violative of Plaintiffs' rights to equal protection and constitutes a bill of attainder, and violates Plaintiffs' rights under customary international law and treaties;

f. Retain jurisdiction over this action until such time as the Court is satisfied that the unlawful policies, practices, rules, acts and omissions complained of herein have been satisfactorily rectified;

g. Award compensatory damages to Plaintiffs for injuries incurred;

h. Award punitive and exemplary damages;

I. Award Plaintiffs attorney fees and costs;

j. Award such other and further relief as seems just and proper.

DEMAND FOR TRIAL BY JURY

NOW COME Plaintiffs by and through their counsel and hereby demand a trial by jury as to all those issues so triable as of right.

Respectfully submitted,

DATED: October 20, 2005

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05-73943
Attach
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Historical and Statutory Notes

Source:
P.A.1976, No. 453, § 211, Eff. March 31, 1977.

C.L.1970, § 37.2211.

Law Review and Journal Commentaries

Affirmative action in extremis. Ralph Smith, 26 Wayne L.Rev. 1337 (1980).

Reducing seniority as a disciplinary tool. Carl E. Ver Beek, 60 Mich.B.J. 356 (1981).

Library References

Mich Civ Jur, Civil Rights § 9.
15 Am Jur 2d, Civil Rights § 190.
12 Am Jur Proof of Facts 2d 49, 'Business Necessity' Justifying Prima Facie Discriminatory Employment Practice.
4 Am Jur Proof of Facts 2d 477, Racial Discrimination in Employment-Post-hiring Practices.
21 Am Jur Trials 1, Employment Discrimination Action Under Federal Civil Rights Acts.

Forms
5 Am Jur Pl & Pr Forms, Rev, Civil Rights, Form 61.3.

Texts and Treatises
Gillespie Mich Crim L & Proc § 1371 (2nd Ed).

Notes of Decisions

In general 1

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1. In general

To the extent district court imposed liability on union for breach of duty to represent fairly and adequately by reason of sex discrimination by reason of union's adherence to terms of collective bargaining agreement, neutral on its face, ruling of liability was precluded by virtue of this section which respects legitimacy of seniority. Jones v. Truck Drivers Local Union No. 299, C.A.6 (Mich.)1988, 838 F.2d 856, rehearing denied, reconsideration denied 873 F.2d 108, certiorari denied 110 S.Ct. 404, 493 U.S. 964, 107 L.Ed.2d 370.

ARTICLE 3. PUBLIC ACCOMMODATIONS AND SERVICES

Caption editorially supplied

37.2301. Definitions

Sec. 301. As used in this article:

(a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. Place of public accommodation also includes the facilities of the following private clubs:

(*i*) A country club or golf club.

(*ii*) A boating or yachting club.

(*iii*) A sports or athletic club.

(*iv*) A dining club, except a dining club that in good faith limits its membership to the members of a particular religion for the purpose of furthering the teachings or principles of that religion and not for the purpose of excluding individuals of a particular gender, race, or color.

(b) "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a

political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment.

Amended by P.A.1992, No. 70, § 1, Imd. Eff. May 29, 1992; P.A.1999, No. 202, Eff. March 10, 2000.

Historical and Statutory Notes

Source:

P.A.1976, No. 453, § 301, Eff. March 31, 1977.

C.L.1970, § 37.2301.

The 1992 amendment, in subd. (a), added the last sentence and subds. (a)(*i*) to (a)(*iv*).

For Executive Order No. 1994-16, issued May 23, 1994, relating to the Michigan Equal Employment and Business Opportunity Council, see the Historical and Statutory Notes following § 37.1101.

For Executive Order No. 1996-13, issued December 23, 1996, and filed with the Secretary of State December 23, 1996, relating to the establishment of the State Equal Opportunity Workforce Planning Council, see the Historical and Statutory Notes following § 37.1101.

P.A.1999, No. 202, in subd. (b), added ", except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment"; and made nonsubstantive changes throughout the section.

P.A.1999, No. 202, enacting § 1, provides:

"Enacting section 1. This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision Neal v Department of Corrections, 232 Mich App 730 (1998). This legislation further expresses the original intent of the legislature that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act."

For effective date provisions of P.A.1999, No. 202, see the Historical and Statutory Notes following § 37.2103.

Law Review and Journal Commentaries

No dogs allowed: Freedom of association v. Forced inclusion anti-discrimination statutes and their applicability to private organizations. Kevin Francart, 17 T.M. Cooley L.Rev. 273 (2000).

Library References

Civil Rights ⇐104.1, 119.
WESTLAW Topic No. 78.
C.J.S. Civil Rights §§ 11, 18, 23 to 24, 53 to 55.
Mich Civ Jur, Civil Rights, § 14.
15 Am Jur 2d, Civil Rights §§ 28-59.

Forms
5A Am Jur Pl & Prac Forms, Rev, Civil Rights, Forms 21 et seq.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

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Validity 1

1. Validity

Article of Michigan's Elliott-Larsen Civil Rights Act (MELCRA), as amended to eliminate exclusionary and restrictive practices of private clubs, and section providing for private club exemption, did not unconstitutionally impinge on fraternal organization's constitutionally protected rights of associational freedom by regulating its membership policies, or implicate constitutional issues of intimate and expressive association, as statute did not indicate that private clubs, apart from their facilities which are statutorily defined as places of public accommodation, are not entitled to benefit of private club exemption, and where statute did not otherwise reach membership issues. Benevolent and Protective Order of Elks of U.S. v. Reynolds, W.D.Mich.1994, 863 F.Supp. 529.

Article of Michigan's Elliott-Larsen Civil Rights Act (MELCRA), as amended to eliminate exclusionary and restrictive practices of private clubs, was not unconstitutional, as it would not require fraternal organization challenging statute to admit women as members; language of statute requiring that "all classes of membership" be available without regard to, inter alia, gender, plainly applied only to individuals who were already members of a given private club. Benevolent and Protective Order of Elks of U.S. v. Reynolds, W.D.Mich.1994, 863 F.Supp. 529.

2. Purpose of law

Michigan's Elliott-Larsen Civil Rights Act (MELCRA) amendment was adopted to eliminate exclusionary and restrictive practices of private clubs, such as clubs which adopted rules restricting times when spouses and children of members could use certain club facilities, such as the golf course. Benevolent and Protective Order of Elks of U.S. v. Reynolds, W.D.Mich. 1994, 863 F.Supp. 529.

3. Public accommodation

State high school athletic association failed to establish, as matter of law, that it was not public accommodation or public service under Michigan civil rights law, as law of public accommodation was very broad and statutory definition of "public service" included tax exempt private agencies established to provide services to public, which description could have applied to association. Communities for Equity v. Michigan High School Athletic Ass'n, W.D.Mich.1998, 26 F.Supp.2d 1001.

Local Lions club was a place of public accommodation and a public service within meaning of this section, where its meetings were held in a public place and open to the public and where it was a tax exempt nonprofit corporation organized to provide volunteer public services through its members. Rogers v. International Ass'n of Lions Clubs, E.D.Mich.1986, 636 F.Supp. 1476.

4. Public service

State high school athletic association failed to establish, as matter of law, that it was not public accommodation or public service under Michigan civil rights law, as law of public accommodation was very broad and statutory definition of "public service" included tax exempt private agencies established to provide services to public, which description could have applied to association. Communities for Equity v. Michigan High School Athletic Ass'n, W.D.Mich.1998, 26 F.Supp.2d 1001.

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Antidiscrimination provisions of Civil Rights Act (CRA), and Persons with Disabilities Civil Rights Act (PWDCRA), apply to prisons and prison inmates. Doe v. Department of Corrections (2000) 611 N.W.2d 1, 240 Mich.App. 199, remanded 625 N.W.2d 750.

Facilities operated by Michigan Department of Corrections are places of "public service" for purposes of provision in state Civil Rights Act prohibiting discrimination by places of public accommodation or public service on basis of certain criteria. Neal v. Department of Corrections (1998) 592 N.W.2d 370, 232 Mich.App. 730, special panel convened, opinion vacated.

Correctional facilities were not places of "public service," under the Civil Rights Act, in their dealings with prisoners. Neal v. Department of Corrections (1998) 583 N.W.2d 249, 230 Mich.App. 202, on rehearing 592 N.W.2d 370, 232 Mich.App. 730, special panel convened, opinion vacated.

For an agency or department to fall within the scope of the Civil Rights Act, it must be established to provide service to the public. Neal v. Department of Corrections (1998) 583 N.W.2d 249, 230 Mich.App. 202, on rehearing 592 N.W.2d 370, 232 Mich.App. 730, special panel convened, opinion vacated.

To the extent a prison opens its doors to visitors, employees, officials, or other persons who voluntarily seek admittance or to utilize any service available to free citizens, those persons may not be the subject of any form of discrimination proscribed by the Civil Rights Act. Neal v. Department of Corrections (1998) 583 N.W.2d 249, 230 Mich.App. 202, on rehearing 592 N.W.2d 370, 232 Mich.App. 730, special panel convened, opinion vacated.

Prisoners are not protected against discrimination by the Civil Rights Act. Neal v. Department of Corrections (1998) 583 N.W.2d 249, 230 Mich.App. 202, on rehearing 592 N.W.2d 370, 232 Mich.App. 730, special panel convened, opinion vacated.

It was beyond legislative purpose to provide civil rights action under public accommodation section of Civil Rights Act for breach of contract in claims processing; upon issuance of policy of insurance, services owed by insurer to insured are no longer "services . . . made available to the public" but involve private rights and obligations of contracting parties. Kassab v. Michigan Basic Property Ins. Ass'n (1992) 491 N.W.2d 545, 441 Mich. 433, rehearing denied 491 N.W.2d 829, 441 Mich. 1202.

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Westlaw.
592 N.W.2d 370
232 Mich.App. 730, 592 N.W.2d 370
(Cite as: 232 Mich.App. 730, 592 N.W.2d 370)

Court of Appeals of Michigan.
Tracy NEAL, Helen Gibbs, Stacy Barker, Ikemia Russell, Berth Clark, Linda Nunn, and Jane Doe,on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,
v.
MICHIGAN DEPARTMENT OF CORRECTIONS, Director of Michigan Department of Corrections, Joan Yukins, Sally Langley, Carol Howes, Robert Salis, Cornell Howard, Officer Portman, and Officer Robey,
Defendants-Appellants (On Rehearing),
and
Officer Tate, Officer Ellison, and Officer Gallagher,
Defendants.
Docket No. 198616.

Submitted Sept. 4, 1997, at Grand Rapids.
Decided June 5, 1998, at 9:15 a.m.
Submitted on Rehearing Sept. 23, 1998.
Decided on Rehearing Nov. 24, 1998, at 9:20 a.m.
Released for Publication Feb. 23, 1998.

Female prisoners brought class-action suit under state Civil Rights Act, seeking injunctive and declaratory relief against Michigan Department of Corrections (MDOC) and individual employees for alleged gender-based discriminatory conduct, sexual harassment, and retaliation. The Washtenaw Circuit Court, Timothy P. Connors, J., denied defendants' motion for summary disposition. Defendants appealed. The Court of Appeals affirmed in part, reversed, in part, and remanded, 230 Mich.App. 202, 583 N.W.2d 249. On rehearing, the Court of Appeals, MacKenzie, J., held that: (1) facilities operated by Michigan Department of Corrections are places of "public service" within meaning of state Civil Rights Act; (2) such facilities do not fall within exemption for private clubs or other establishments not in fact open to the public; (3) different treatment of prisoners on basis of gender is permissible if its passes constitutional muster; and (4) Circuit Court, rather than Court of Claims, had subject-matter jurisdiction over present action.

Affirmed.

O'Connell, P.J., filed a dissenting opinion.

West Headnotes

[1] **Civil Rights 1004**
78k1004 Most Cited Cases
(Formerly 78k102.1, 78k101)
Purpose of state Civil Rights Act is to prevent discrimination directed against a person because of that person's membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. M.C.L.A. § 37.2101 et seq.

[2] **Civil Rights 1004**
78k1004 Most Cited Cases
(Formerly 78k102.1)
State Civil Rights Act is remedial and must be liberally construed to effectuate its ends. M.C.L.A. § 37.2101 et seq.

[3] **Civil Rights 1090**
78k1090 Most Cited Cases
(Formerly 78k135)
Facilities operated by Michigan Department of Corrections are places of "public service" for purposes of provision in state Civil Rights Act prohibiting discrimination by places of public accommodation or public service on basis of certain criteria. M.C.L.A. § 37.2302(a).

[4] **Civil Rights 1050**
78k1050 Most Cited Cases
(Formerly 78k124)

[4] **Civil Rights 1090**
78k1090 Most Cited Cases
(Formerly 78k135)
Michigan Department of Corrections does not fall within exemption in state Civil Rights Act for private clubs or other establishments not in fact open to the public, even though some of its physical structures are not fully open to the public. M.C.L.A. § § 37.2101 et seq., 37.2303.

[5] **Civil Rights 1044**
78k1044 Most Cited Cases
(Formerly 78k119.1)
Provision of Civil Rights Act guaranteeing full and equal enjoyment of public services is essentially a codification of State Constitution's Equal Protection

and Antidiscrimination Clauses, broadened to include categories not covered under those clauses, such as age, sex, and marital status. M.C.L.A. Const. Art. 1, § 2; M.C.L.A. § 37.2302(a).

[6] Constitutional Law 210(1)
92k210(1) Most Cited Cases
Constitutional equal protection guarantee applies to prisoners. M.C.L.A. Const. Art. 1, § 2; M.C.L.A. § 37.2302(a).

[7] Constitutional Law 70.1(2)
92k70.1(2) Most Cited Cases
A court must not judicially legislate by adding into a statute provisions that the Legislature did not include.

[8] Constitutional Law 208(1)
92k208(1) Most Cited Cases
"Discrimination," in constitutional terms, refers to baseless and irrational line drawing; when there is a sufficiently important governmental interest and the classification is adequately related to that interest, it does not amount to discrimination to draw legislative lines on the basis of those classifications. M.C.L.A. Const. Art. 1, § 2.

[9] Prisons 17(1)
310k17(1) Most Cited Cases
Michigan Department of Corrections may treat prisoners differently on the basis of gender, provided that the gender-based treatment serves important penological interests and is substantially related to achievement of those interests. M.C.L.A. Const. Art. 1, § 2; M.C.L.A. § 37.2302(a).

[10] Courts 472.1
106k472.1 Most Cited Cases
Circuit Court, rather than Court of Claims, had subject-matter jurisdiction over female prisoners' class-action suit against Michigan Department of Corrections and individual employees for declaratory and injunctive relief in connection with alleged violations of state Civil Rights Act. M.C.L.A. § § 37.2101 et seq., 37.2801(1), 600.6419(1)(a).

[11] Courts 472.1
106k472.1 Most Cited Cases
Complaint against the state seeking only equitable or declaratory relief must be filed in the Circuit Court.

[12] States 184.2(2)
360k184.2(2) Most Cited Cases
Guards and wardens employed by Michigan Department of Corrections were not "state officers" who could be sued in the Court of Claims. M.C.L.A. § 600.6419(1)(a).

****372 *732** Law Offices of Deborah LaBelle (by Deborah LaBelle, Richard A. Soble and Molly Reno), Ann Arbor, Goodman, Eden, Millender & Bedrosian (by Mary P. Minnet)Detroit, and Gail A. Grieger, Livonia, for the plaintiffs.

Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, and Lisa C. Ward, Assistant Attorney General, for the defendant.

Before O'CONNELL, P.J., and MacKENZIE and GAGE, JJ.

ON REHEARING

MacKENZIE, J.

This is a class-action suit brought, in relevant part, under the Civil Rights Act, M.C.L. § 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, by female prisoners housed in facilities operated by the Michigan Department of Corrections (MDOC). Defendants are the department, its director, and several wardens, deputy wardens, and corrections officers employed by the MDOC. Defendants appeal by leave granted from a circuit court order denying their motion for summary ***733** disposition pursuant to MCR 2.116(C)(4), (7), and (8). We affirm.

The case arises out of allegations that male corrections personnel have systematically engaged in a pattern of sexual harassment of female inmates incarcerated by the MDOC. Specifically, plaintiffs' complaint alleged that the MDOC assigns male officers to the housing units at all women's facilities without providing any training related to cross-gender supervision; that women are forced to dress, undress, and perform basic hygiene and body functions in the open with male officers observing; that defendants allow male officers to observe during gynecological and other intimate medical care; that defendants require male officers to perform body searches of women prisoners that include pat-downs of their breasts and genital areas; that women prisoners are routinely subjected to offensive sex-based sexual harassment, offensive touching, and requests for sexual acts by male officers; and that there is a pattern of male officers requesting sexual acts from women prisoners as a condition of retaining good-time credits, work details, and educational and rehabilitative program opportunities. The complaint also alleged that the inmates were subject to retaliation for reporting this gender-based

misconduct. Plaintiffs claimed that these actions, and defendants' failure to protect female inmates from this misconduct through adequate training, supervision, investigation, or discipline of MDOC employees, constitute gender-based discriminatory conduct, sexual harassment, and retaliation in violation of the Civil Rights Act. They sought injunctive and declaratory relief, their initial claim for monetary damages having been ordered dismissed.

*734 I

[1][2] The purpose of the Civil Rights Act is to prevent discrimination directed against a person because of that person's membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. *Noecker v. Dep't of Corrections*, 203 Mich.App. 43, 46, 512 N.W.2d 44 (1993). The act is remedial and must be liberally construed to effectuate its ends. **373*Reed v. Michigan Metro Girl Scout Council*, 201 Mich.App. 10, 15, 506 N.W.2d 231 (1993).

Article 3 of the Civil Rights Act prohibits discrimination in public accommodations and public services. Subsection 302(a) states:

> Except where permitted by law, a person shall not:
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status. [MCL 37.2302(a); MSA 3.548(302)(a)].

Section 103 of the act, M.C.L. § 37.2103; MSA 3.548(103), declares that sexual harassment is a form of sex discrimination.

Section 301 defines "place of public accommodation" and "public service" as those terms are used in subsection 302(a). It states:

> (a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public....
> (b) "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed *735 by or on behalf of the state, a political division, or an agency thereof, or a tax exempt private agency established to provide service to the public. [MCL 37.2301; MSA 3.548(301)].

Finally, § 303 of the act creates an exemption under article 3 for private clubs:

> This article shall not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the private club or establishment are made available to the customers or patrons of another establishment that is a place of public accommodation or is licensed by the state.... [MCL 37.2303; MSA 3.548(303)].

In denying defendants' motion for summary disposition with respect to plaintiffs' Civil Rights Act claim, the trial court ruled that the MDOC is a "public service" agency prohibited from engaging in gender-based discrimination or harassment under subsection 302(a) of the act. The court further noted that the act does not specifically exclude prisoners from its coverage and declined to read such an exclusion into the act.

II

[3] The narrow issue before us is whether the MDOC correctional facilities are places of "public service" in which discrimination against inmates, based on sex, is prohibited. The United States Supreme Court's recent decision in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998), leads us to conclude that the MDOC facilities are places of "public service" within the meaning of subsection 301(b).

*736 The question in *Yeskey* was whether a state prisoner could maintain a claim against a state department of corrections under another civil rights statute, the Americans with Disabilities Act of 1990(ADA), title II of which prohibits discrimination by a "public entity" against individuals with a disability. 42 USC 12132. The statutory definition of "public entity" at issue in *Yeskey* is similar to the definition of "public service" set forth in subsection 301(b): "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 USC 12131(1)(B). Writing for a unanimous Supreme Court, Justice Scalia held that "the statute's language unmistakably includes State prisons and prisoners within its coverage." 118 S.Ct. at 1954. Emphasizing the broad statutory language, the Court stated that "the ADA plainly covers state institutions without any exception that could cast the coverage of prisons into doubt." *Id.*

The Court therefore concluded that "[s]tate prisons fall squarely within the statutory definition of 'public entity'...." *Id.*

The Supreme Court's reasoning in *Yeskey* applies equally to this case. Under subsection **374 301(b), a "public service" includes "a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state...." The MDOC is a state agency, and this state's correctional facilities are operated by it. Any "exception that could cast the coverage of prisons into doubt," 118 S.Ct. at 1954, is conspicuously absent from the unambiguous statutory language of the Civil Rights Act. Thus, under the plain language of subsection 301(b), the MDOC clearly falls within the broad statutory definition of a "public service." Defendants essentially concede as much.

[4] *737 Defendants argue that even if the MDOC is a "public service," its prisons are nevertheless not required to comply with subsection 302(a) of the Civil Rights Act because they fall within the § 303 exemption for "private club [s], or other establishment[s] not in fact open to the public." We reject this argument. The fact that the MDOC operates buildings that are not fully open to the public does not mean that the MDOC itself is a "private club or other establishment" not open to the public. There is a distinction between a state agency and the buildings that house that state agency. There are presumably many departments of state government (this Court included) that operate facilities that members of the public may not enter at their will. This, however, does not mean that those departments themselves are private establishments not open to the public; it merely means that the *physical structures* used by those departments are not fully accessible to the public.

Moreover, "[r]esident inmates are obviously members of the public in a general sense." *Martin v. Dep't of Corrections*, 424 Mich. 553, 565, 384 N.W.2d 392 (1986) (Cavanagh, J., dissenting). Our Supreme Court has held that prisoners are members of the public for purposes of the governmental tort liability act, M.C.L. § 691.1401 *et seq.*; MSA 3.996(101) *et seq.* *Green v. Dep't of Corrections*, 386 Mich. 459, 464, 192 N.W.2d 491 (1971). The Supreme Court has also held that prisoners are members of the public for purposes of the Administrative Procedures Act, M.C.L. § 24.201 *et seq.*; MSA 3.560(101) *et seq.* *Martin, supra*, p. 555, 384 N.W.2d 392. Civil rights acts are to be liberally construed to provide the broadest possible remedy. *Reed, supra*. Only by reading "private club, or other establishment not in *738 fact open to the public" in its most restrictive, literal sense, may a correctional facility be deemed to be "not open to the public." We therefore conclude that the § 303 exemption does not relieve defendants of the obligation to act in conformity with subsection 302(a) of the Civil Rights Act.

III

Defendants contend that even if the § 303 exemption does not apply to state-run correctional facilities, subsection 302(a) of the Civil Rights Act was not intended to protect prisoners. Again, we disagree.

[5] We begin by reviewing the legislative purpose of the Civil Rights Act in general and subsection 302(a) in particular. Const 1963, art 1, § 2 states:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

The Civil Rights Act was enacted as 1976 PA 453. Its purpose was two-fold. First, it was intended to centralize and make uniform the patchwork of then-existing civil rights statutes applying to the private sector, such as the Fair Housing Act, the Fair Employment Practices Act, and the Public Accommodations Act. See *Dep't of Civil Rights ex rel. Forton v. Waterford Twp. Dep't of Parks & Recreation*, 425 Mich. 173, 187-188, 387 N.W.2d 821 (1986). Second, it was intended to broaden the scope of the then-existing civil rights statutes to include governmental action:

> *739 [T]he Legislature's addition of "public service" to [subsection] 302(a), thereby including state action violations that amount to constitutional deprivation with private sector, non-state action legislative violations, can be explained by the fact that article 1, § 2 of the Michigan Constitution **375 provides: "the legislature *shall* implement this section by appropriate legislation." It is the only provision of the Declaration of Rights to provide so. [*Id.*, p. 188, 387 N.W.2d 821 (emphasis in the original).]

Thus, insofar as subsection 302(a) of the Civil Rights Act governs "public service," it is essentially a codification of the constitution's Equal Protection and Antidiscrimination Clauses, broadened to include categories not covered under the constitution, such as age, sex, and marital status. See *Dep't of Civil*

Rights, pp. 188-189.

[6] The constitutional equal protection guarantee applies to prisoners. As explained in *Jackson v. Bishop,* 404 F.2d 571, 576 (C.A.8, 1968):

> Lawful incarceration may properly operate to deprive the convict of certain rights which would otherwise be his to enjoy. A classic example is [the] denial to the felon of the right to vote....
>
> * * * * * *
>
> On the other hand, a prisoner of the state does not lose all his civil rights during and because of his incarceration. In particular, he continues to be protected by the due process and equal protection clauses which follow him through the prison doors. [Citations omitted.]

Because, as our Supreme Court has stated, the protections of subsection 302(a) of the Civil Rights Act were intended to be coextensive with the Equal Protection and Antidiscrimination Clauses of the Michigan Constitution, and because prisoners do not lose ***740** their right to equal protection by virtue of their status as inmates, we can only conclude that the Legislature also intended all persons--including inmates--to be protected under subsection 302(a).

[7] Further, as noted by the trial court, nowhere does the language of the Civil Rights Act purport to preclude its application because of a person's status as a prisoner or inmate. Compare *Walters v. Dep't of Treasury,* 148 Mich.App. 809, 819, 385 N.W.2d 695 (1986); *Marsh v. Dep't of Civil Service,* 142 Mich.App. 557, 569, 370 N.W.2d 613 (1985). When the Legislature has seen fit to exclude prisoners from the provisions of a statute, it has specifically done so. See, e.g., M.C.L. § 15.231(2); MSA 4.1801(1)(2), excluding "those persons incarcerated in state or local correctional facilities" from provisions of the Freedom of Information Act. A court must not judicially legislate by adding into a statute provisions that the Legislature did not include. *Empire Iron Mining Partnership v. Orhanen,* 455 Mich. 410, 421, 565 N.W.2d 844 (1997). Accordingly, we decline to read into the Civil Rights Act an exclusion barring prisoners from bringing an action under subsection 302(a).

IV

[8][9] Defendants suggest that any holding that the Civil Rights Act applies to prisoners will unacceptably impair the MDOC's corrections responsibilities. Their fear is unwarranted. At least to the extent that a state agency's conduct is at issue, the protections of subsection 302(a) of the Civil Rights Act were intended to be coextensive with those of the Antidiscrimination and Equal Protection Clauses of the constitution. ***741** *Dep't of Civil Rights, supra,* p. 188, 387 N.W.2d 821. As our Supreme Court stated in *Dep't of Civil Rights, supra,* p. 189, 387 N.W.2d 821:

> Discrimination, in constitutional terms, refers to baseless and irrational line drawing.... When there is a sufficiently important governmental interest and the classification is adequately related to that interest, it does not amount to discrimination to draw legislative lines on the basis of those classifications.
>
> It would be anomalous at best and contradictory at worst to attempt to rid the state of discriminatory practices by the use of an arbitrary standard that would prohibit, in effect, any line drawn between the genders, regardless of its relevance to the purpose of the regulation, unless the Legislature, in its wisdom and its own good time, countervails it.

Thus, even though we hold that subsection 302(a) prohibits the MDOC from engaging in discriminatory practices in the operation of its correctional facilities, the MDOC may still treat prisoners differently on the basis of gender, provided that the gender-based ****376** treatment can pass constitutional muster. As the Court acknowledged in *Dep't of Civil Rights,* merely because the state engages in a practice that treats men and women differently, it does not necessarily mean that it engages in unlawful gender discrimination. Rather, the test is whether the gender-based treatment serves a sufficiently important governmental interest and is substantially related to the achievement of that interest. *Dep't of Civil Rights, supra,* p. 189, 387 N.W.2d 821. The MDOC may therefore treat prisoners differently on the basis of gender without violating subsection 302(a), as long as the gender-based treatment serves important penological interests and is substantially related to the achievement of those interests.

***742** This approach to state sex discrimination claims by inmates mirrors not only the analysis employed in equal protection cases, but also the analyses typically employed by federal courts in 42 USC 1983 actions. See anno: *Sex discrimination in treatment of jail or prison inmates,* 12 A.L.R.4th 1219. Because the MDOC admits that prisoners may bring equal protection claims under § 1983, our holding that prisoners are not excluded from the protections of subsection 302(a) of the Civil Rights Act should impose upon defendants no stricter standards than those to which they must presently adhere in order to survive either a constitutional or § 1983 challenge.

V

[10][11] Finally, defendants argue that the Court of Claims, not the circuit court, had subject-matter jurisdiction over plaintiffs' case. While it is generally true that the Court of Claims has exclusive jurisdiction over "all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state" or any of its agencies, M.C.L. § 600.6419(1)(a); MSA 27A.6419(1)(a), that exclusivity does not extend to Civil Rights Act claims. MCL 37.2801(1); MSA 3.548(801)(1); *Rangel v. Univ. of Michigan*, 157 Mich.App. 563, 564-565, 403 N.W.2d 836 (1987). Moreover, a complaint against the state seeking only equitable or declaratory relief must be filed in the circuit court. *Watson v. Bureau of State Lottery*, 224 Mich.App. 639, 643, 569 N.W.2d 878 (1997), *Silverman v. Univ. of Michigan Bd. of Regents*, 445 Mich. 209, 217, 516 N.W.2d 54 (1994). Because plaintiffs no longer are seeking money damages, the circuit court, rather than the Court of Claims, had jurisdiction to consider the Civil Rights Act claims, as well as ***743** the remaining equitable and declaratory claims against the MDOC and defendant McGinnis in his official capacity as the director of the MDOC.

[12] The circuit court also had jurisdiction over plaintiffs' Civil Rights Act claims against the remaining individual defendants. MCL 600.6419(1)(a); MSA 27A.6419(1)(a). Moreover, the defendant guards and wardens are not state officers who may be sued in the Court of Claims. *Lowery v. Dep't of Corrections*, 146 Mich.App. 342, 349, 380 N.W.2d 99 (1985); *Burnett v. Moore*, 111 Mich.App. 646, 648-649, 314 N.W.2d 458 (1981); *Bandfield v. Wood*, 104 Mich.App. 279, 282, 304 N.W.2d 551 (1981). Accordingly, we find no error in the circuit court's ruling that it had jurisdiction to hearing plaintiffs' claims.

Affirmed.

GAGE, J., concurred.

O'CONNELL, P.J. (*dissenting.*)

My views with respect to the legal issues here presented have already been published at length in what was then a majority opinion, *Neal v. Dep't of Corrections*, 230 Mich.App. 202, 583 N.W.2d 249 (1998), and I readopt that opinion without repeating it. All that needs now to be added is comment concerning the application to this case of the decision in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998).

In *Yeskey*, the United States Supreme Court was faced with determining, under the federal jurisprudential standards for statutory construction of legislation affecting states' rights, whether title II of the Americans with Disabilities Act of 1990(ADA), 42 USC 12131 *et seq.*, applies to state correctional facilities. The language ***744** used by Congress embraced within the ambit of the ADA "the services, programs, or activities of a public entity," 42 USC 12132, with "public entity" being defined as including "any department, agency, ****377** special purpose district, or other instrumentality of a State or States or local government," 42 USC 12131(1)(B).

The facts in *Yeskey* involved a Pennsylvania program, the motivational boot camp, that offered the plaintiff inmate the opportunity, if successfully undertaken, of reducing his minimum incarceration before parole from eighteen months to six months. 118 S.Ct. at 1953. Because Yeskey was hypertensive, the Pennsylvania Department of Corrections concluded that his participation in the boot camp program was medically contraindicated, and it refused to admit him to the program. Yeskey then claimed that this was discrimination proscribed by the ADA. The Supreme Court held that the statutory definition of a "qualified individual with a disability," 42 USC 12131(2), does not exclude prisoners, rejecting the contention that the terms "eligibility" and "participation" necessarily imply a prerequisite voluntariness that is inherently lacking in the case of persons confined against their will.

In contrast to the ADA, the Civil Rights Act (CRA), M.C.L. § 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, defines "public service" so as to include only entities that "provide service to the public." MCL 37.2301(b); MSA 3.548(301)(b). [FN1] State prisoners, by definition, are not part of the general public to whom any otherwise public service proffered by the Michigan Department of Corrections can be provided. This limitation of the definition of "public service" is conspicuously absent from the definition of " public entity" found in the ADA, which has no corresponding language of limitation. [FN2] The MDOC is subject to the CRA, as we held in the original majority opinion, to the extent that it opens the doors of any place of confinement under its jurisdiction to visitors, employees, officials, or other persons voluntarily seeking admittance. 230 Mich.App. at 209, 583 N.W.2d 249. Indeed, with respect to employees of the Department of Corrections, the CRA applies by virtue of article 2,

which extends the CRA's prohibition of the statutorily enumerated forms of discrimination to the employment relationship, *McCallum v. Dep't of Corrections*, 197 Mich.App. 589, 496 N.W.2d 361 (1992), rather than article 3, which covers places of public accommodation and public services. The majority's current expansion of the CRA's reach conflates all these crucial ***746** distinctions. [FN3] I am unable to subscribe to the notion that the decision in *Yeskey*, which involved a different statute, significantly different statutory language, different facts, ****378** and different jurisprudential principles of statutory construction, somehow controls the present case or even usefully informs our analysis and decision.

FN1. One of the goals of the CRA is to prevent discrimination in public accommodations and public services. MCL 37.2102(1); MSA 3.548(102)(1). In my opinion, references to "public accommodation" and "public service" within the CRA are not intended to include establishments that are not open to the general public or that do not provide a service to the public at large. I note that even for purposes of the Civil Rights Act of 1964, "public accommodations" were originally understood to include only such public gathering places as restaurants and theaters. See Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (New York: The Free Press, 1997), p 50. It should be clear that our Legislature similarly envisioned only entities serving the general public when bringing the CRA to bear on public accommodations and public services.

FN2. Section 303 of the CRA provides that "[t]his article shall not apply to ... establishment[s] not in fact open to the public...." Not only are prisons not open to the general public, but their very mission--forcibly keeping felons away from the public--renders them the very antithesis of those public accommodations that offer services to the public. 230 Mich.App. at 214, 583 N.W.2d 249. Even if I were to agree with the majority's liberal definition of the term "public service," I would nonetheless conclude that § 303 created an exemption for prisons.

FN3. Plaintiffs advocate a liberal interpretation of the terms "place of public accommodation" and "public service." For the reasons stated in my prior opinion, I believe that a liberal reading of these terms, or any specific term, is inappropriate and dangerous. Defining specific terms in a liberal fashion leads to a slippery slope of absurd results. This Court should not be in the business of adding a liberal meaning to a specific and well-recognized term. An example regarding the term "place of public accommodation" may clarify my concern:
In their brief, plaintiffs allege that prisons are also places of public accommodation as defined by CRA, "because prisons house members of the general public at taxpayers expense." A liberal interpretation of the term "place of public accommodation" would on the surface seem to support their position. However, once this Court adopts plaintiffs' definition, it will not be long before another plaintiff argues that some private residences are also "places of public accommodation." I anticipate the argument would be that because we allow members of the public (our friends, neighbors, and relatives) to spend nights at our homes, and in some cases the government either pays or subsidizes the rent, our private homes are now transformed into places of public accommodation, because they house "members of the public at taxpayers' expense." This slippery slope logic is untenable and, as I have previously stated, inappropriate and dangerous. 230 Mich.App. at 213, 583 N.W.2d 249.
Appropriately the majority has not adopted plaintiffs' definition of "place of public accommodation." However, the majority has adopted plaintiffs' definition of "public service," even though prisons in no way perform a service to the general public. Prisons are not situated similarly to some of our other establishments that do perform a "public service," such as a court, a hospital, or an office of the Secretary of State, all of which were established to provide, and do provide, services to the general public. *Id.* at 214, 583 N.W.2d 249.

It bears reiteration that, if article 3 of the CRA applies generally to prisons and prisoners, the MDOC may find that it cannot legally maintain separate facilities ***747** for men and women [FN4] and that it may no longer segregate young from old, even

though the inevitable result of this judicial stampede toward political correctness will be a penological conflict. The female prisoners will, in general, be terrorized by the male prisoners, who are normally physically larger, stronger, and more aggressive, and likewise the juvenile and geriatric prisoners will be subjected to the predations of the more vigorous adult population. Perhaps these prospects ought to caution plaintiffs to bear in mind the adage to be careful what they wish for, because it may come to pass.

> FN4. The majority states that "the MDOC may still treat prisoners differently on the basis of gender, provided that the gender-based treatment can pass constitutional muster." *Ante* at p. 375-76. I suspect that drawing of the line that delineates what "pass[es] constitutional muster" will be no simple task for trial courts; however I suspect that an explosion of prisoner litigation will give the trial courts an ample array of cases to assist them in drawing this line. But I further suspect that the "line" will be anything but clear cut, tending to move in the varied directions of the sensitivities of judges and the objectives of such high-stakes litigation. For these reasons, I choose to draw the line on the basis of the commonly understood meaning of "public service," which I would define to include only entities that are open to the general public or that provide a service to the public at large. This commonsense definition does not embrace the relationship between state prisons and their inmates.

Nothing in the prior majority opinion suggests that any correctional program that may further a prisoner's rehabilitation, or enhance the prospect of pardon, commutation, or parole, may be made available on a basis that discriminates because of gender, race, religion, national origin, or on any other invidious basis. Although that issue is not properly before us, and whatever we say with respect to that issue is obiter dictum, any such programmatic discrimination would appear to fall well within prohibitory penumbra of the federal Civil Rights Act of 1964 concerning ***748** race, religion, gender, or national origin, 42 USC 2000a(d), 2000d-4a(1)(A), *United States v. Wyandotte Co.*, 343 F.Supp. 1189 (D.Kan., 1972), rev'd on other grounds 480 F.2d 969 (C.A.10, 1973), and of the ADA relative to disabilities, *Yeskey, supra* (assuming that either federal enactment may constitutionally be applied to the states at all, an issue reserved for later decision in *Yeskey*, 118 S.Ct. at 1956). However, MDOC programs do not admit of participation by nonprisoners, that is, by any members of the public (in the sense of making the program available *to* the public, although members of the public may well participate *in* a correctional program as leaders, instructors, facilitators, and so forth.). To the extent that outside agencies offer public programs that the MDOC permits prisoners to have access to, those outside agencies, of course, remain precluded by the CRA from discriminating against prisoners by virtue of gender, race, and so forth (but are not limited in discriminating against prisoners as a class per se, as the status of being a prisoner is not covered by the CRA, or by the Civil Rights Act of 1964, *Rosado Maysonet v. Solis*, 409 F.Supp. 576 [D PR, 1975]).

The present plaintiffs do not allege gender discrimination in prison employment, educational opportunities, or housing, so we need not determine whether other articles of the CRA protect prisoners from discrimination in such contexts. All we face today is a claim of gender discrimination concerning public services ****379** under Article 3. [FN5] Inasmuch as prisons are not, ***749** with respect to prisoners, "public services" as defined by the CRA, I would adhere to our initial decision holding that plaintiffs' claim under the CRA should be dismissed pursuant to MCR 2.116(C)(8) for failure to state a claim on which relief may be granted.

> FN5. The major flaw in the majority opinion is the treatment of a statutory right as coextensive with a constitutional right. A state statute is by design an entity distinct from a constitutional provision. The majority fails to provide support for its inaccurate conclusion. In fact, there exists a significant difference between a cause of action alleging a violation of the Equal Protection Clause and a cause of action alleging sex discrimination under the CRA. A party proceeding under constitutional equal protection doctrine must prove intentional or purposeful discrimination. *Harville v. State Plumbing & Heating, Inc.*, 218 Mich.App. 302, 306, 553 N.W.2d 377 (1996). In contrast, a party proceeding under the CRA need show only disparate treatment, the prima facie case requiring legally admissible and sufficient evidence that "she was a member of a class deserving of protection under the statute, and that, for the same conduct, she was treated differently [from] a man." *Schellenberg v.*

> *Rochester, Michigan, Lodge No. 2225, of Order of Elks*, 228 Mich.App. 20, 33, 577 N.W.2d 163 (1998).
> The majority's failure to recognize the distinctions between these two bases for litigation is the vehicle through which the majority reaches a result not intended by the drafters of the CRA. The majority posits that "because prisoners do not lose their right to equal protection by virtue of their status as inmates, we can only conclude that the Legislature also intended all persons--including inmates--to be protected under subsection 302(a)." *Ante* at p. 375. I agree that inmates do not lose *all* of their constitutional rights by virtue of their status as inmates. However, this conclusion by no logical path leads to the corollary that a state statute is intended to apply to prisoners. This holds especially in light of § 303's exclusion of "establishments not in fact open to the public," plus the majority's observation that the CRA's protection against sex discrimination exceeds the expressed scope of our state constitution.

I therefore respectfully dissent.

232 Mich.App. 730, 592 N.W.2d 370

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