IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JAY GREGORY, SHERIFF OF PATRICK COUNTY, a Constitutional Officer of the Commonwealth of Virginia and elected under the Laws of the Commonwealth, Defendant.	)	CIVIL ACTION NO. 83-0094-D

MEMORANDUM OF PLAINTIFF UNITED STATES
IN RESPONSE TO DEFENDANT'S ASSERTION OF A
MALE ONLY BONA FIDE OCCUPATIONAL QUALIFICATION
FOR THE POSITION OF CORRECTIONAL OFFICER

We are submitting this brief in response to the Court's inquiry, made during oral argument after the close of trial, with respect to this matter.

I

THE DEFENDANT HAS FAILED TO PROVE A BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ) FOR THE POSITION OF CORRECTIONAL OFFICER

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. ("Title VII"), prohibits an employer from engaging in employment practices that discriminate on the basis of sex. The defendant concedes that he has engaged in overt and intentional discrimination against women by maintaining a policy

of refusing to employ them as correctional officers because of their sex. (Williams Dep. 8/11/83, p. 225; and Williams Dep. 10/12/83, pp. 311-316).

Section 703(e) of Title VII, 42 U.S.C. §2000-2(e), allows sex based discrimination only when sex is a bona fide occupational qualification ("bfoq") of the particular business.[1/] The Sheriff formally raised a bfoq defense in his Answer to the Complaint by affirmatively pleading "that sex is a bona fide occupational qualification ("bfoq") for some positions as sworn officers in the Patrick County Sheriff's Department." Answer, para. 11. The Sheriff did not articulate - in his Answer or in any other papers submitted to the Court - the rationale or factual basis to support his bfoq contention. In fact, his Answer is so vague that it is not even clear to which positions the Sheriff intended the defense to apply.

The Sheriff did not present any evidence at trial to support this vague bfoq defense. The only illuminating evidence on the issue is found in the depositions taken by the United States of

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1/ Section 703(e) provides, in pertinent part, that:

> Notwithstanding any other provision of this subchapter,...it shall not be an unlawful employment practice for an employer to hire and employ employees...on the basis of...sex...in those certain instances where...sex...is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise....

42 U.S.C. §2000-2(e).

the Sheriff. On deposition, Sheriff Williams testified that during his tenure as Sheriff he maintained a policy of refusing to consider women for hire as corrections officers in the PCSD (Williams Dep. 8/11/83, p. 225; and Williams Dep. 10/12/83, pp. 311-316).[2/] The Sheriff testified that he did not know of any State law which prohibited him from hiring women as corrections officers (Williams Dep. 10/12/83, p. 312), and that he was not of the view that women could not physically handle the job of corrections officer in the PCSD (Id., p. 316). Rather, the Sheriff testified that the sole reason for his policy of refusing to consider women for hire as corrections officers was that the Patrick County jail houses only adult male inmates (Id., pp. 312, 316).

The Sheriff did not elaborate upon his belief that the housing of male inmates in the County jail would preclude the hiring of female correctional officers. Since he has conceded that the physical capabilities of women working as correctional officers is of no security concern,[3/] the only possible rationale for his

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2/ Similarly, Sheriff Gregory testified at his deposition of January 10, 1984 that he did not seriously consider Kathy Sheppard for a corrections officer job because "we house only men here at the jail, we house no females...." (Gregory Dep. 1/10/84, pp. 27-28).

3/ In this regard, Dothard v. Rawlinson, 433 U.S. 321 (1977), may be distinguished from the case at bar. The Supreme Court in Dothard upheld a male bfoq in the Alabama penetentiaries; however, the Court painstakingly limited its decision to that "particularly inhospitable" environment "where violence is the order of the day." Id. at 335-336. The question of inmate privacy interests was never at issue in Dothard.

belief and hence his bfoq defense, however cryptically stated, is the assertion of a privacy interest on behalf of male inmates.

The Sheriff has, however, already conceded, by the manner in which he has operated the County jail during the past four years, that any privacy interests that male inmates may have is not sufficient to bar employment to women as correctional officers. Male inmates in the Patrick County jail are presently exposed to the view of female employees of the PCSD by way of camera surveillance. Cameras monitor both floors of the jail and can be adjusted to view different sections of the cell blocks. The only monitor screen or console for the cameras is located on the dispatcher's desk, downstairs in the Patrick County Sheriff's Department ("PCSD"). (Williams Dep., 10/12/83, p. 313). Women have been employed as dispatchers in the PCSD since 1980; indeed, the record reflects that three of the four dispatchers currently employed are women. Since the Sheriff has for some time allowed observation of male inmates by female dispatchers, employees who are not even trained as correctional officers, to assert a privacy argument on behalf of male inmates at this juncture is merely to attempt a prextual excuse for not hiring women as correctional officers.

Section 703(e) of Title VII permits "only the narrowest of exceptions to the general rule requiring equality of employment opportunities." Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

In order for the Sheriff to make out a bfoq defense, he must, having already conceded discrimination on the basis of sex, go on to prove that "the essence of the business operation would be undermined by not hiring members of one sex exclusively." (emphasis in original) Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir.), cert denied, 404 U.S. 950 (1971). See also, Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 235 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416, F.2d 711 (7th Cir. 1969); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); and the Equal Employment Opportunity Commission's Guidelines on Sex as a Bona Fide Occupational Qualification, 29 C.F.R. 1604, et seq.

In the instant case, the Sheriff has failed to carry this burden of proof. There has been absolutely no showing that having only male correctional officers is fundamental to the operation of the Patrick County jail, nor has there been any showing that jail inmates have an unqualified right to privacy.

II
DEFENDANT'S PRIVACY ARGUMENT DOES NOT ESTABLISH A BFOQ DEFENSE.

A prison or jail inmate does not have an unqualified, constitutionally protected right to privacy. Confinement in a correctional institution by its very nature imposes certain limitations on any constitutional right, including any privacy right that an inmate might otherwise enjoy. The necessary withdrawal or limitation of many privileges is justified by the considerations

underlying the penal system. Jones v. N.C. Prisoners Labor Union, Inc., 433 U.S. 119, 126 (1977). "The fact of confinement as well as the legitimate goals and policies of the penal institution limits those retained constitutional rights." Bell v. Wolfish, 441 U.S. 520, 546 (1979). Although an inmate is not stripped of his constitutional rights at the prison gate, these rights properly are subject to a much greater degree of intrusion than would be allowed outside the prison gate. Madyun v. Franzen, 704 F.2d 954, 958 (7th Cir. 1983). "[S]imply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations." Bell v. Wolfish, 441 U.S. at 545.

A prison inmate retains those constitutional rights that are not inconsistant with his status as a prisoner, but those rights must be balanced against the "legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974). Therefore, whatever right to privacy an inmate may have must be balanced against the legitimate objective of providing equal job opportunities regardless of sex, as mandated by Title VII. Avery v. Perrin, 473 F.Supp. 90, 92 (D. N.H. 1979). See also, Forts v. Ward, 471 F.Supp. 1095, 1098 (S.D.N.Y. 1979), aff'd. in part and rev'd in part, 621 F.2d 1210 (2nd Cir. 1980).

It is obvious that an inmate cannot expect the same degree of privacy expected by a person living outside a correctional

facility. "In prison, official surveillance has traditionally been the order of the day." Bonner v. Coughlin, 517 F.2d 1311, 1316 (7th Cir. 1975) (quoting Lanza v. New York, 370 U.S. 139, 143 (1962)). "Unquestionably, entry into a controlled environment entails a dramatic loss of privacy." Id. at 1316.

Each of the two identical cell blocks in the Patrick County jail consists of a large room containing four adjacent cells; they are separted by bars, not by solid walls. In each cell is a toilet and two bunks. At one end of the common area, onto which each of the cells opens, is a toilet-sink combination and a curtained shower.[4/] There are two cameras on each floor of the jail which can be manually adjusted to focus on different areas of the cell blocks. The television monitor for these cameras is located on the dispatcher's desk downstairs in the PCSD and is operated on a daily basis. (Williams Dep. 10/12/83, p. 315). Therefore, inmates are subject not only to the view of the correctional officer, but also to the view of any of the male or female dispatchers.

Further, simply raising the privacy issue does not by any means preclude the employment of women as correctional officers

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4/ Government Exhibit No. 1 attached to the Nicholson deposition, a diagram labeled "Layout of the Patrick County Sheriff's Department Jail," was inadvertently not physically attached to the deposition when it was proffered at trial. Therefore, the exhibit is enclosed with this Memorandum to the Court. A copy of the exhibit has previously been provided to counsel for the defendant.

in male facilities. Although various courts have found that male inmates retain some degree of right to privacy from being viewed by female correctional officers under certain circumstances, even these courts have not banned the use of female correctional officers; rather, they have addressed the issued by balancing an inmate's restricted right to privacy with the right to be free of sex discrimination. For instance, the district court in Hudson v. Goodlander, 494 F.Supp. 890 (D. Md. 1980), upheld the use of female correctional officers in a male correctional situation, finding that a male inmate had a right not to be viewed by a female correctional officer, but only when he was entirely unclothed and in non-emergency circumstances.

This same approach, attempting to mediate between each interest in the fashioning of a solution to the problem, has been used by other courts. See, e.g., Madyun v. Franzen, 704 F.2d 954 (7th Cir. 1983), (limited frisk searches of male prisoners by female guards is reasonable); Smith v. Fairman, 678 F.2d 52 (7th Cir. 1982), (female prison guard conducting pat-down search of male inmate, excluding genital area, violated no constitutional guarantee); Harden v. Dayton Human Rehabilitation Center, 520 F.Supp. 769 (S.D. Ohio 1981), (approving use of female guards except in performing strip searches of males and observing male inmates showering).

III
THE SHERIFF HAS FAILED TO DEMONSTRATE THAT HE CANNOT TAKE STEPS TO ELIMINATE ANY PERCEIVED INFRINGEMENT OF INMATES' PRIVACY

Even assuming, arguendo, that the Patrick County jail inmates have some sort of sex-specific right to privacy, the Sheriff may not sustain a bfoq exception on this ground without showing that it is impossible to accommodate both the right to equal employment opportunity under Title VII and the privacy concerns of the inmates. Where a court is faced with assertions of conflicting employment and privacy rights, "[r]esolution of such cases requires a careful inquiry as to whether the competing interests can be satisfactorily accommodated before deciding whether one interest must be vindicated to the detriment of the other." Forts v. Ward, 621 F.2d 1210, 1212 (2d Cir. 1980). See, e.g., Smith v. Fairman, 678 F.2d at 55; Fesel v. Masonic Home of Del. Inc., 447 F.Supp. 1346 (D. Del. 1978), aff'd without opinion, 591 F.2d 1334 (3rd Cir. 1979); Gunther v. Iowa State Men's Reformatory, 462 F.Supp. 952, 957 (N.D. Iowa 1979), aff'd, 612 F.2d 1079 (8th Cir.), cert. denied, 446 U.S. 966 (1980); Hardin v. Stynchcomb, 691 F.2d 1364 (11th Cir. 1982).

The Sheriff had to show that there are no steps that can be taken to minimize any perceived clash between the employment rights of women and the asserted privacy concerns of inmates. Hardin v. Stynchcomb, 619 F.2d at 1370-1371. Gunther v. Iowa State Men's Reformatory, 612 F.2d at 1086. Administrative inconvenience in taking such steps cannot justify discrimination.

Hardin v. Stynchcomb, 691 F.2d at 1373-74; Gunther v. Iowa State Men's Reformatory, 462 F.Supp. at 957. See also, Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971).[5/]

The Sheriff has failed to demonstrate that he is incapable of taking steps to avoid any conflict he perceives between the employment rights of women under Title VII and the privacy concerns which male inmates may have. Simple devices may be implemented by the Sheriff to achieve this end. Obviously, one step that could be taken would be either to vary the inmates' daily routine or assign women to shifts during which male inmates are not dressing or showering.

Accommodating inmate privacy for bodily functions could easily be achieved by installing a head or chest height simple curtain or translucent screen around the toilet and sink combination that is located at one end of the common area of each cell block. It would not be burdensome to have the inmates in each cell block use the same screened toilet, particularly if any of the inmates desires to utilize the privacy such a screen would

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5/ The district court in Dawson v. Kendrick, 527 F.Supp. 1252, 1316-17 (S.D. W.Va. 1981), a case involving prison conditions, addressed a situation in which female prisoners had absolutely no privacy from male guards or male prisoners. The court specifically ordered the correctional facility to draw up a plan which would accommodate privacy rights of female inmates. The court did not suggest that male correctional officers should not be employed.

afford, as each of the two cell blocks sleeps only eight inmates. Furthermore, the PCSD's own records reflect that in 1983 the jail averaged only 9.4 prisoners per month. (Govt. Tr. Ex. 7). Presumably, this monthly average number of prisoners reflects both those individuals detained for a few hours or a day as well as those serving more extended time.

Steps such as these have been found to accommodate both employment rights and privacy concerns. See e.g., Hardin v. Stynchcomb, 691 F.2d at 1372; Forts v. Ward, 621 F.2d at 1216; Gunther v. Iowa State Men's Reformatory, 612 F.2d 1087.

Conclusion

For the above stated reasons, the assertion that the Sheriff is entitled to a bfoq exception found in Title VII based upon a privacy argument is without merit.

Respectfully submitted,

WILLIAM B. FENTON
Deputy Chief
JOHN M. GADZICHOWSKI
Senior Trial Attorney
MELISSA P. MARSHALL
Trial Attorney
Department of Justice
Civil Rights Division
Washington, D.C. 20530
(202) 633-2188

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 1984, a copy of the foregoing Memorandum of Plaintiff United States in Response to Defendant's Assertion of a Male Only Bona Fide Occupational Qualification for the Position of Correctional Officer was served by Federal Express, upon:

Anthony P. Giorno
Blue Ridge Street
P.O. Box 1076
Stuart, Virginia 24171

Melissa P. Marshall
Trial Attorney
U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530
(202) 633-3895