AMERICAN UNIVERSITY

WASHINGTON, DC

THE NATIONAL INSTITUTE OF CORRECTIONS PROJECT

To:
From: Brenda V. Smith, Director & Nairi M. Simonian, Research Associate, NIC/WCL Project on Addressing Prison Rape
Re: Policies Prohibiting Staff-Felon Relationships
Date: January 27, 2006

MEMORANDUM

I. Background

We are following up on your initial e-mail to Gary Dennis and then to us about developing a policy on staff relationships with offenders, particularly once those offenders have been released from custody.

The following memorandum is to provide information on existing case law concerning relationships between correctional officers and inmates/ex-inmates who may be in the community on probation and parole. We are explicitly not entering into a lawyer-client relationship with you and provide this information only as guidance. It is not authoritative, given that we do not have all of the facts – simply the information that we gleaned from your e-mails.

The memorandum is organized as follows. First, we discuss controlling case law in the Ninth Circuit which includes . Second, the memorandum discusses court decisions on this issue in other parts of the country. In the discussion of each case, we footnote the exact policy or rule in question. It would be wise to read the precise language of the rule/policy in order to determine which rules/policies were deemed constitutional and as a reference for developing your own policy.

II. Brief Answer

It appears that most circuits permit correctional employers to limit relationships between correctional employees and inmates/ex-inmates. Moreover, these courts have held that correctional policies that prohibit these relationships and/or require employees to report them do not violate employees' First Amendment rights of freedom of association and privacy or Fourteenth Amendment rights to substantive due process.

Below is a more detailed discussion of the case law. However, you will notice that *Reuter,* the Oregon case which you forwarded to us is distinguishable from other Ninth Circuit cases and cases from other jurisdictions. It appears that in *Reuter,* the court relied upon the fact that the parties had developed an intimate relationship which *predated* the enactment or implementation of the sheriff's rules that made association with a person who was convicted of a felony within

WASHINGTON COLLEGE OF LAW

4801 MASSACHUSETTS AVENUE, NW WASHINGTON, DC 20016-8181 202-274-4385 FAX: 202-274-4226
nic@wcl.american.edu

the past ten years a "presumptive conflict of interest". The relationship also predated Oregon's enactment of a state law criminalizing sexual abuse of individuals in custody by staff.[1]

III. Case law in the Ninth Circuit

A. *Reuter v. Skipper*

In *Reuter v. Skipper*[2], a female corrections officer brought a §1983[3] action seeking a declaration that her association with an ex-felon was protected by the First Amendment and that the county sheriff's work rules were constitutionally overbroad. As already noted, *Reuter* is factually distinct from most, if not all, the freedom of association cases simply because, at the time plaintiff began her relationship with the ex-felon, correctional policy[4] did not prohibit her actions. Plaintiff also orally reported the status of her relationship when she learned that her boyfriend was an ex-inmate and filed a written report.

In order to determine the constitutionality of governmental conduct restricting employee associations, a court must first determine the appropriate standard to apply to evaluate the conduct. The Supreme Court has laid out three standards by which governmental conduct which restricts or prohibits rights guaranteed by the Constitution, in this case the right to intimate association in violation of the First Amendment, must be analyzed.[5] Those three standards are rational relation, intermediate scrutiny and strict scrutiny[6] -- the lowest standard to satisfy is the rational relationship standard and the most difficult to satisfy is the strict scrutiny standard. The intermediate level, clear from its name, is in the middle.

---

[1] Oregon passed a law in 2005 criminalizing sexual contact between staff and offenders. ORS § 163.412.

[2] 832 F. Supp. 1420 (NEED COURT 1993).

[3] Section 1983 prohibits violation of federal or state law by persons acting under color of state law. 42 USCS § 1983 (2005).

[4] The rule had been amended after plaintiff began her relationship with the ex-inmate. "The amended work rule provides, in part:

> (2) Presumptive Conflicts of Interest. A prohibited conflict of interest is presumed to exist where a member engages in an ongoing and continuous business, social or non-marital sexual relationship with another person, when:
>
> . .
>
> (b) the other person has been imprisoned for or convicted of a felony within the past ten years . . . .
>
> (3) If a presumptive conflict of interest is shown to exist, the burden shall be upon the member to show their activity or relationship with the other person is unavoidable and would not endanger safety and security of Sheriff's Office operations or facilities, negatively impact the member's job performance, or cerate an unfavorable public perception of the Sheriff's Office."

[5] Pickering v. Board of Education, 391 U.S. 563 (1968).

[6] The rational relation standard requires that the rule and/or prohibition implemented by the government be rationally related to the government's stated interest. The strict scrutiny standard requires that the rule and/or prohibition be narrowly tailored to serve a compelling government interest.

The *Reuter* court applied the intermediate level of scrutiny to the Sheriff's work rule. The intermediate level of scrutiny was first established in *Pickering v. Board of Education.*[7] This level of scrutiny balances the interests of the employee and the interests of the state when the government employee association affects the greater public. Moreover, this standard of scrutiny requires that governmental rules that restrict constitutional behavior need to be tailored in a reasonable manner to serve a *substantial* state interest.

The court in *Reuter* agreed with the officer and determined that "a couple living together as husband and wife constitutes a 'family' in today's society." Consequently, the state was intruding on the family unit. When the state intrudes into the family unit, the appropriate standard to apply is intermediate scrutiny. While the state's professed interest was to maintain "security and protection of the jail facility"[8], the court found that efforts to accommodate this interest were not tailored in a reasonable manner.

The court provides various examples to demonstrate that the construction of the rule itself was not reasonable. First, the rule violated Oregon's state constitution[9] because it continued to punish the ex-convict for his association with another. Second, the rule was inconsistent as it allowed employees with a family member in jail to visit and communicate with that family member. Finally, the rule was unique in that it not only prohibited inmates and department employees from associating, but also prohibited association of employees with anyone who might have at one time been convicted of a crime.

The court also found that even if it had determined that the relationship did not qualify as "family", the rule did not even pass the lower rational relation standard. To pass the rational relation standard, the rule must be rationally related to the government's interest. Here the interest was maintaining the security and safety in jails. The court determined that the Defendant had failed to offer sufficient evidence to show harm to this interest. Defendant had not offered evidence that the officer was performing her job unsatisfactorily or that security in the jail had been compromised.

In *Reuter*, the court gave significant weight to the relationship between the plaintiff and ex-offender. The nature of the relationship was the court's only reasoning for applying a higher constitutional standard. Therefore, *Reuter* serves as a lesson that courts may consider the nature of the relationship that the officer and inmates are engaged in when determining whether correctional policies prohibiting these relationships are constitutional.

Though the *Reuter* court cited and discussed all the Ninth Circuit case law, which will be discussed in turn below, it relied on *Thorne v. The City of El Segundo.*[10] The *Reuter* court found

---

[7] *Id.*

[8] Reuter *supra* note 1, at 1423.

[9] Oregon's state constitution states, "Laws for the punishment of crime shall be founded on the principles of reformation, and not vindictive justice." Art. I, Sec. 15.

[10] 726 F.2d 459 (9th Cir. 1983).

Thorne[11] persuasive because in its opinion the relationships in both *Reuter* and *Thorne* did not affect the officers' effective performance of her job or the safety and security of the facility, and the policies' regulations were not narrowly constructed. In *Reuter*, the court said:

> Plaintiff's intimate association with her domestic partner was only conducted off-duty and in private. Second, her private, off-duty sexual activities came to light only because she had to report them under the challenged work rule. Third, the Sheriff has made no showing that plaintiff's relationship with her domestic partner has had any impact on plaintiff's on-the-job performance, a showing that is required by *Thorne, Fugate*, and *Fleisher*. . . I further note an additional distinguishing feature between plaintiff's case and the facts in *Fugate* and *Fleisher*; her intimate relationship with an ex-convict, even if he is presently married to another person, is not in any way prohibited by the laws of the State of Oregon, as were the relationships in *Fleisher* and *Fugate.*

Like *Reuter*, the *Thorne* court also relied on the fact that the agency had not established that the general public even knew of the criminal record of correctional employee's domestic partner. Under these circumstances, the *Reuter* court found that the employee relationship was unlikely to cause any harm to the public's perception of the Sheriff's office.[12]

However, there is a strong argument that *Thorne* is factually distinct from the *Reuter* case. In *Thorne*, the relationship which caused the disciplinary action was between *two correctional employees*, and not between an employee and felon/ex-felon. A correctional agency's interests in prohibiting relationships between correctional officers and ex-offenders, is clearly distinguishable from its interest in prohibiting staff-staff relationships. Moreover, the *Thorne* court's main reason for finding for Plaintiff was based on her Title VII discrimination claim.[13]

B. *Thorne v. The City of El Segundo*

---

[11] *See generally* Montgomery v. Stefanaik, 410 F.3d 933 (2005)(holding that discharging a probation officer for buying a car for her fiancé from a probationer under her supervision did not interfere with her right of intimate association with her fiancé); Anderson v. City of Lavergnem, 371 F.3d 879 (2004)(holding that the city's policy forbidding an employee from dating a higher-ranking colleague rationally furthered the governmental interest of preventing sexual harassment lawsuits); Flaskamp v. Dearborn Public Schools, 385 F.3d 935 (2004)(suspending and denying a teacher tenure for having an intimate relationship with a former student was not irrational or arbitrary state action); Mercer v. City of Cedar Rapids, 104 F. Supp. 2d 1130 (2000)(finding that probationary police officer's civil rights were not violated when she was terminated for having an affair with a police captain).

[12] Reuter *supra* note 1, at 1424.

[13] "[T]he trial court found that the City had no authority to discipline the officer involved for his role in the affair. The fact that the affair, nonetheless, was an actual reason for the decision not to hire Thorne, a woman, is grounds for an inference that different moral standards were applied to women and men." Thorne *supra* note 6, at 467.

In *Thorne*, the plaintiff was a typist for defendant police department. She ranked highly in an examination for persons desiring to become police officers. Following an extensive pre-employment examination, which included a polygraph, the agency learned that the plaintiff had engaged in an affair with an officer in the police department. The polygraph also inquired into a failed pregnancy of the applicant, whether the officer was the father and whether the failed pregnancy was a miscarriage or an abortion. Upon learning this information, the defendant refused to hire Thorne. Plaintiff filed an action against the defendants, alleging that they had violated her privacy rights under 42 U.S.C. § 1983 and had discriminated against her in violation of Title VII.[14]

The court held that the evidence presented was sufficient to find that Thorne was rejected because of intentional discrimination in violation of Title VII. "A refusal to hire a woman because of a sex-stereotyped view of her physical abilities is the kind of invidious discrimination that violates Title VII."[15] "Similarly, application to women of a standard of moral integrity that is not applied equally to men violates Title VII".[16]

The court also determined that if the private, off-duty, personal activities do not have an impact upon on-the-job performance, or upon narrow regulations within specific policies then rejecting an applicant for employment based on these private non-job related activities violated the applicant's protected constitutional interests. The court also determined that rejecting the applicant for the reasons stated above could not be justified under any level of constitutional scrutiny.[17] In other words, absent an articulation of how these relationships affect an employee's work performance, or having more narrowly drawn regulations, the state did not meet any constitutional test.

C. *Fugate v. Phoenix Civil Service Board*

In another Ninth Circuit case, *Fugate v. Phoenix Civil Service Board*[18], police vice officers engaged in sexual activities with prostitutes and paid for some services with public money. The police department fired the officers and the officers appealed alleging that their First Amendment rights had been violated. The court of appeals found in favor of the city because the constitutional right of privacy did not extend to this type of sexual behavior, since the conduct occurred while the officers were on duty and perhaps paid for with public money. The court found that city regulations prohibited the police officers from engaging in conduct unbecoming

[14] Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C.S. § 2000e-2(a)(1).
[15] *Id.* at 468.

[16] *Id.*

[17] The Court notes that the Defendants never attempted to show evidence that Thorne's affair with a police officer affected or could affect her job performance. The affair was also not public knowledge and therefore could not diminish the department's reputation. Finally, the affair was not grounds for discipline, nor had any disciplinary measures against the male officer involved been attempted. Thorne *supra* note 6, at 471.

[18] 791 F.2d 736 (9th Cir. 1986).

an officer and contrary to the general orders of the police department. The court found that this broad regulation was intended to protect the legitimate interests of the police force from employee behavior that was potentially damaging to both the mission and reputation of the agency.

In distinguishing *Fugate* from *Thorne*, the court stated:

> In *Thorne*, the court recognized a right of privacy in "private, off-duty" sexual behavior. In the present case we confront police officers who engaged in sexual relations while on the job. In *Thorne*, the City made no showing that Thorne's sexual activities "affected or could potentially affect her job performance." In the present case, the City has demonstrated that Appellants' job performance was threatened by obvious conflicts of interest as well as by the possibility of blackmail. In *Thorne*, the sexual activities in question were "not a matter of public knowledge, and could not therefore diminish the department's reputation in the community . . . or cause morale problems within the department." In the present case, the officers' sexual activities were carried on openly and were widely known.[19]

The court in *Fugate* determined that the kind of association at issue warranted the application of the rational relation standard. To reiterate, the rational relation standard requires that the rule be rationally related to the government's interest. The court, using the analysis expressed in *Kelley v. Johnson*,[20] determined that the inquiry was "whether the departmental regulation prohibiting 'conduct unbecoming an officer and contrary to the general orders of the police department' is based on the City's method of organizing its police force."[21] If the regulation is based on an agency's method of organizing its work force, then it is presumed to be valid and the burden shifts to the officers to demonstrate the absence of any rational connection between the regulation and the promotion of safety. If a regulation is not based on this method, then the regulation is presumed to be invalid, and will be analyzed according to the appropriate level of constitutional scrutiny. The court concluded that the prohibition was "clearly intended to protect the legitimate interests of the department from potentially damaging behavior by the department's officers."[22] The officers' activities had "created conflict of interest, compromised their performance as officers, raised the possibility of blackmail, threatened the morale of the department, and jeopardized the department's reputation in the community."[23]

---

[19] Fugate *supra* note 3, at 741.

[20] 425 U.S. 238 (1976). In *Kelley*, a police officer challenged the constitutionality of a departmental order establishing hair-grooming standards for male members of the police force. The Court found that because the regulation was based on the county's method of organizing its police force, the regulation was presumed to be valid, and the burden fell on the officer to demonstrate that there was no rational connection between the regulation and the promotion of the safety of persons and property.

[21] Fugate *supra* note 3, at 741.

[22] *Id.* at 742.

[23] *Id.*

So for the *Fugate* court, the open, notorious nature of the conduct, where staff and offenders knew about the relationship, was critical to the decision. This open behavior posed a threat to the agency by damaging its reputation and credibility with staff, offenders and the public. The credibility of any paramilitary organization is critical to its effectiveness. This open behavior also exposed the officers to blackmail and sent the message that they were willing to break rules that they were supposed to enforce. Finally, from a common sense point of view, it is unlikely that sex on the job paid for with public money is ever going to be unobjectionable. Taking into consideration these surrounding circumstances and that the regulation operated as part of the City's method of organizing its police force, the court held the regulation to be presumptively valid.

D. *Fleisher v. City of Signal Hill*

Finally, in *Fleisher*[24] a probationary police officer engaged in sexual conduct with a 15-year-old girl prior to being hired. The officer and the youth had been Explorer Scouts with the police department. Plaintiff was terminated after he admitted that he had engaged in sexual conduct before he was hired, which at the time constituted statutory rape—he was 19 years old at the time of the rape. The police officer sued for damages pursuant to 42 U.S.C. § 1983 alleging violation of his right of privacy, under the First Amendment of the Constitution.

The court held that the department did not violate Fleisher's right of privacy by terminating him. The court stated that this conduct was "illegal, [and] inappropriate in an individual who aspired to become an officer on the Department's police force, and detrimental to the Department as a whole. The illegality of Fleisher's behavior creates a substantial barrier to successfully asserting a privacy claim . . . ."[25]

Relating *Fleisher* to *Fugate*, the Court states that:

> "Fleisher's sexual misconduct, like that of the officers in *Fugate*, compromised his performance as an aspiring police officer. Although Fleisher committed the conduct while still an Explorer, the conduct nevertheless has some bearing on his foreseeable conduct as a police officer. It is understandable that the Department would be concerned that individuals hired to be guardians of the law should themselves have a history of compliance with the law. Like the officers' conduct in *Fugate*, Fleisher's conduct threatened to undermine the Department's community reputation and internal morale."[26]

It seems then that, in adopting a standard for analyzing these freedom of association cases, the Ninth Circuit has determined that the relationship between the correctional officer and the ex-inmate/inmate must affect the officer's on-the-job performance, morale and reputation of the Department, or security of the correctional agency. All of the cases including *Reuter* and *Thorne* find that if the state can articulate legitimately that the employee relationship affects the

[24] 829 F.2d 1491 (9th Cir. 1987).

[25] *Id.* at 1498.

[26] *Id.* at 1498-99.

Department, then the agency does not violate the employee's constitutional or other rights by prohibiting the relationship or terminating or refusing to hire the employee.

IV. Freedom of Association Case Law in Other Jurisdictions

Other jurisdictions have also followed reasoning similar to that expressed by the Ninth Circuit in analyzing cases involving off duty relationships between staff and offenders.

A. The Sixth Circuit

1. *Akers v. McGinnis*

In *Akers v. McGinnis*[27], the Michigan Departments of Corrections (MDOC) had a rule[28] on "Improper Relationships with Prisoners, Parolees or Probationers, Visitors or Families." This rule strictly prohibited "improper or overly familiar[29] conduct with offenders or their family

---

[27] 352 F.3d 1030 (6th Cir. 2003).

[28] Presently Rule 46 states:

Employees are prohibited from:

- Engaging or attempting to engage in sexual misconduct or sexual harassment with an offender.
- Engaging in overfamiliarity with an offender, or a family member or listed visitor of an offender. .

An employee shall not make any contact with an offender outside the regular performance of the employee's job except as provided in rule #26, "Improper Entry into a Correctional Facility." Further, an employee shall not make any contact with any family member of an offender, or a listed visitor of an offender, outside the regular performance of the employee's job unless approval has been granted in writing by the Director or applicable Deputy Director or designee. . .

If an unavoidable contact is made with an offender, a family member of an offender or a listed visitor of an offender, such contact must be reported verbally to the employee's immediate supervisor by the end of the employee's next regularly scheduled workday. Such reporting is not required if a written exception has been granted as to a family member or a listed visitor. The supervisor will determine whether an unavoidable contact warrants a written report, and if so determined, a copy will be sent to the employee's Warden, Regional Prison Administrator or Central Office Administrator, as applicable, within five calendar days.

An employee shall not live with, nor provide lodging for, an offender, except if the offender is a family member of the employee, including a spouse where the employee's marriage to the offender existed prior to the employment date or where the spouse became an offender after the employment date. In all cases where the employee lives with or provides lodging to an offender who is a family member, this must be immediately reported in writing to the employee's Warden, Regional Prison Administrator, Field Operations Administration Regional Administrator or Central Office Administrator, as applicable.
Unless an exception has been granted pursuant to this rule, examples of behavior which presume overfamiliarity include, but are not limited to:

- Giving or receiving letters, money, personal mementos or telephone numbers to or from an offender or a family member, or a listed visitor or an offender.
- Being at the residence of an offender or a family member or listed visitor of an offender.
- Non-work related contact or visits with an offender or a family member or listed visitor of an offender without authorization.

Failure to report unauthorized contact until such contact is detected shall be considered an aggravating factor for determining the level of discipline issued. An employee who is discharged for violation of this rule or who resigns in lieu of termination during an investigation for sexual misconduct, sexual harassment, overfamiliarity, other conduct prohibited by policies established pursuant to these topics or failure to report a violation of Department policy or work rules in these areas will not be eligible for rehire with the Department.

[29] The rule was originally known as Rule 12 and also required reporting of "any contact made with [an offender], or their family member(s), outside the regular performance of an employee's job." *Id.* at 1034. Rule 12 was repromulgated as Rule 24 then was replaced by a substantially identical Rule 46. Finally, "Rule 46 was revised to clarify the definitions of family member and visitor and recognize the power of the MDOC to grant individual employees limited exemptions to the Rule. To receive such an exemption allowing contact with offenders' visitors

members or visitors." Violations of this rule "subjected an employee to disciplinary action up to and including dismissal."[30] Some of the prohibited actions included exchange of letters, money or items, cohabitation, being at the home of an offender for reasons other than an official visit without reporting the visit and sexual contact of any nature.

In *Akers*, plaintiff Loranger, then a Wayne County probation officer, was contacted by a man she had dated before becoming an MDOC employee who was then serving a life sentence without parole in a prison outside her jurisdiction. She exchanged several letters with him. When Loranger realized that she was in violation of the rule, she approached her supervisor about the matter. Four months later, she was terminated for her rule violation. Plaintiff Akers, while a bookkeeper at a correctional facility in Chippewa County, Michigan had befriended a prisoner clerk. Shortly after the prisoner's release, Akers gave him a ride in her car to a job interview. Akers was similarly terminated by MDOC for this rule violation. Previously, both women had received positive evaluations from their supervisors and in neither case is there an allegation that their specific conduct had adversely affected the function of the MDOC.

The Sixth Circuit held that the MDOC's regulation easily met the rational basis test[31]. The court found that MDOC had a legitimate interest in preventing fraternization between its employees and offenders and their families, and that the rule was a rational means for advancing that interest. Consequently, the rule withstood the constitutional challenge.

2. *Weiland v. City of Arnold*

Similarly, in *Weiland*, the District Court for the Eastern Division of Missouri[32] held that a city had an interest in order and efficiency that outweighed the officer's associational and/or privacy interest in continuing his dating relationship with a felony probationer; and that the rule was not void due to vagueness and was not overly broad.[33] The Court gave the nod to the department's interest in regulating the behavior of its police officers.

---

or family members, but not offenders themselves, an employee would have to submit a misleadingly titled "Offender Contact Exception Request" form and await approval from the Director of the MDOC or a designee." *Id.* From the creation of the exception procedure, 226 exceptions had been sought and of these 223 had been granted. The appellate court determined that even in the absence of an exemption procedure, the Rule would still be constitutional.

[30] *Id.* at 1034.

[31] The court dismissed applying intermediate level of scrutiny because the employee's associations with the inmates and all the associations alleged to have been discouraged by the Rule, did not touch on matters of public concern. *Id.* at 1038. In other words, the associations were "purely private matters of little or no concern to the community as a whole." *Id.* When the restraint on government employee association affects purely private matters, the Supreme Court has ruled that a lower level of scrutiny is applied, that of rational relation. "[U]nder rational basis review, a 'proferred explanation for the statute need not be supported by an exquisite evidentiary record; rather we will be satisfied with the government's 'rational speculation' linking the regulation to a legitimate purpose, even 'unsupported by evidence or empirical data.'" *Id.* at 1039.

[32] Weiland v. City of Arnold, 100 F.Supp. 2d 984 (2000).

[33] "Knowingly associating, on or off duty, with convicted criminals or lawbreakers under circumstances which could bring discredit upon the Department or impair an Officer in the performance of his duty." *Id.* at 987.

The Court deferred to the department's interest by applying what they termed a "modified Pickering Test".[34] The *Weiland* court discussed how in traditional First Amendment speech cases involving government employers, courts have applied the *Pickering* balancing test. This test "involves balancing the employee's right to free speech against the interest of the public employer."[35] Courts can apply the "modified *Pickering* test" when the government employer claims a special interest in regulating its employees' behavior -- in this circumstance the employee's associational rights -- in order to avoid the disruption of public functions -- here the proper functioning of the police department.[36]

The officer, Mr. Weiland, had an on-going, off-duty, personal relationship with a felony probationer.[37] The felony probationer also accompanied the officer to a public event and the two appeared together in a photograph published by a local paper. Unlike the Ninth Circuit decisions, the Missouri court concluded that "[s]imply because Weiland's relationship has not affected his own performance on the job does not make it unreasonable to assume a very real likelihood that it could affect the chain of command as well as the public image of the department."[38] The court viewed appearing at a public function with a well-known felon as undermining Weiland's authority as a law enforcement officer. Moreover, the court felt that junior officers who observed Weiland acting against the department's policy could be affected, potentially undermining Weiland's ability to serve in his command position.

B. The Seventh Circuit

In *Keeney*, a captain in an Indiana county jail[39] became suspicious of a relationship between a female officer and an inmate, and had the inmate transferred to state prison. The officer visited the inmate in the other prison while she was employed by the jail and told the Captain that she and the inmate planned to marry. The Captain told the officer to end the relationship or lose her job for violating the rule[40] that employees cannot become involved socially with inmates in or out of the jail. The officer voluntarily resigned and married the inmate. The officer sued saying that the rule forcing her to choose between her job and marriage infringed her constitutional right to marry.

The Seventh Circuit held in *Keeney* that rules which prohibit a jail "guard" from dating an inmate who is in or out of jail do not violate the Fourteenth Amendment Due Process Clause. The court

[34] Weiland *supra* note 19, at 988.

[35] *Id.*

[36] *Id.*

[37] The officer had already been disciplined once for the relationship.

[38] *Id.* at 989.

[39] Keeney v. Heath, 57 F.3rd 579 (7th Cir. 1995).

[40] The regulation of the jail forbade employees from becoming "involved socially with inmates in or out of the [jail]." *Id.* at 580.

reasoned that the burden the regulation imposed on Nancy Keeney's right to marry was light or at most moderate. The court also reasoned that since Indiana specifically had a unitary system of prisons and jails, and prisoners are shuttled among these facilities, a guard who became romantically involved with an inmate could potentially become a facilitator of unlawful communication and a provider of favored treatment. Finally, the court felt that knowing all this, male inmates would have incentive to "romance" their female guards, and prisoners not in these types of relationships would attribute any differences in treatment to the relationship.

C. The Fourth Circuit

Finally, in *Wolford v. Angelone*[41], a state prison guard brought a §1983 action alleging that the Virginia Department of Correction's (VDOC) anti-fraternization policy[42] violated her First Amendment freedom of association right and her Fourteenth Amendment right to marry her ex-convict husband. The Plaintiff-correctional employee began living with her husband, James Wolford, in 1995, three years after she was hired by the VDOC. In 1996, the couple conceived a child and in 1997 the couple married. In 1997, James Wolford was convicted of multiple felony and misdemeanor offenses. On April 3, 1997 James Wolford was incarcerated and on April 19, 1997, the plaintiff returned to work after maternity leave, marriage and her husband's incarceration. On April 23, 1997, plaintiff was interviewed by the state investigator and the assistant warden concerning her relationship with her husband and that same day she submitted her resignation.

In *Wolford*, the determination of whether the policy was constitutional focused first on how voluntary Wolford's resignation was. This is because an involuntary resignation deprives a person of a property interest, his or her employment. In other cases, the Fourth Circuit has held that if an employee resigns voluntarily, then that employee cannot claim that the state deprived him or her of their property interest within the meaning of the Constitution. The court ruled that plaintiff had not presented sufficient evidence to determine whether her resignation was voluntary or obtained by coercion.

The District Court for the Western District of Virginia, Abingdon Division, also determined that VDOC's anti-fraternization policy did not sufficiently impact a prison guard's fundamental right to marry so as to trigger strict scrutiny analysis. The court applied the rational relation standard instead and concluded that the policy of firing a state prison employee for her intimate relationship with an inmate is rationally related to the goal of maintaining prison security.

---

[41] 38 F.Supp. 2d 452 (1999).

[42] Rule 5-22.7 states "Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and inmates, probationers, or parolees or families of inmates, probationers, or parolees shall be discouraged. Associations between staff and inmates, probationers, or parolees which may compromise security or which undermine the employee's effectiveness to carry out his responsibilities may be treated as a Group III offense under the Standards of Conduct and Performance (Procedure 5-10). *Id.* at 455. "The referenced 'Group III offenses' are explained in the 'Standards of Conduct,' where they are described to 'include all acts and behavior of such a serious nature that a first occurrence should normally warrant removal." *Id.*

The court applied the analysis of *Keeney*, discussed above, as instructive in reaching their conclusion. The court stated that *Keeney* was instructive because the facts of both cases were similar. In *Keeney*, the court held that though the regulation placed restrictions on the right to marry, the prison regulation did not outright prevent plaintiff from exercising her right to marriage. The court in *Wolford* court had similarly held that if the rule completely obstructed Wolford's employment opportunities or imposed absolute restrictions on the right to marry, the result would be different. The court was essentially saying that since Wolford could marry anyone else but her husband and still keep her job, her right to marry was intact.

In other words, VDOC had simply made it more costly for Wolford to marry her husband. The court found that VDOC's two alternatives were constitutionally permissible: either marry the ex-felon and lose employment or not marry the ex-felon and maintain employment.

III. Exceptions to the Majority Rule

Of course, there are decisions that are not consistent with the majority view. For example, in *Via v. Taylor*[43], the plaintiff, a former corrections department employee, sued the Commissioner of Correction, the former Commissioner of Corrections, the personnel director, and prison warden alleging that she was wrongfully fired from her job as a result of her off-duty relationship with a parolee in violation of her First and Fifth Amendment rights to freedom of association and privacy. The employee's relationship with the inmate violated the department's conduct code[44]. The court found that Plaintiff's relationship with the ex-felon was best described as a personal association. Given the characteristics of the relationship, the court determined that the

[43] 2004 U.S. Dist. LEXIS 11246 (2004); 224 F.Supp. 2d 753 (D.Del. 2002)

[44] The portion of the Code that was at issue in litigation states:

> "Trafficking with incarcerated offenders is prohibited. No staff person shall have any personal contact with an offender, incarcerated or non-incarcerated, beyond that contact necessary for the proper supervision and treatment of the offender. Examples of types of contact not appropriate include, but are not limited to, living with an offender, offering an offender employment, carrying messages to or from an offender, social relationships of any type with an offender, and physical contact beyond that which is routinely required by specific job duties. Any sexual contact with offenders is strictly prohibited. Contact for other than professional reasons with the offenders outside of the work place shall be reported in writing to the employee[']s supervisor." Via v. Taylor, 224 F.Supp. 2d at 759.

The term "offender" is defined in the Code "as 'any person committed by a court to the care, custody, or control of the Department.'" *Id.* The prohibition also "does not distinguish between types or degrees of officer/inmate relationships and on or off duty relationships." *Id.* Finally, the Code contains no disciplinary standards and "[d]efendants make a case-by-case determinations as to whether and what degree of discipline should be imposed as a result of a violation of the Code". *Id.*

"The stated purpose of the Code is to:

> set[] out high moral and ethical standards for correctional employees to assure unfailing honesty, respect for dignity and individuality of human beings and a commitment to professional and compassionate service." *Id.* at 758.

relationship warranted a higher degree of protection from state intrusion and applied intermediate scrutiny.[45]

Applying intermediate scrutiny to the prohibition, the court found that the code was not constitutional because it was not substantially related to ensuring discipline and security within the prisons. The court found that applying the rule violated the employee's constitutional rights. Additionally, the court struck down the prohibition for vagueness. For example, the rule did not disqualify an individual from employment because of his or her relationship with an offender. The court also found that the rule was overbroad because it purported "to prohibit all relationships with former inmates or parolees, even those that did not impact on security or operations."[46] Finally, the rule was not uniformly enforced. Defendants admitted that they were not aware of a single applicant who had been rejected because of their pre-existing relationship with an offender. The Department did not even keep track of how many new employees had prior relationships with offenders. Moreover, once they were reported, the Department's only action was training employees about the dangers of associating with offenders.

Notwithstanding the result, a closer reading of *Via* shows that the court decided this case using reasoning similar to that used in *Thorne* and *Reuter*. The *Via* court found that the contested relationship did not affect the officer's job performance, did not have a security impact, did not adversely affect the institution, and the relationship itself resembled a family relationship which deserved heightened scrutiny. Moreover, the Department did not take additional security measures as a result of Via's relationship, and tolerated the relationship for months before terminating Via.

IV. Conclusion

The discussion above makes it clear that while the case law is very fact specific, the large majority of decisions and the decisions most on point at the court of appeals support agency prohibitions on correctional employees forming personal, love relationships with inmates, probationers, parolees and ex-offenders. Several reoccurring themes appear in the case law and can serve as a helpful guide in drafting your own policy.

- **Draft Clear Policies that Provide Notice:**

From a policy point of view, jurisdictions should draft narrowly tailored – only as broad as necessary to protect the legitimate interests in security, performance and reputation -- and clear policies which provide notice to employees regarding prohibited behavior or relationships. The policy should be in place prior to discipline. Relationships that predate the implementation of the policy may be managed and monitored, but probably cannot be totally prohibited. For example, an employee with an incarcerated spouse could be prohibited from working in the same institution, but probably could not be prohibited from employment if the relationship predated

[45] The Court's conclusion was based on plaintiff inviting Mr. Via into her home on a personal basis, and not for business-type reasons, and that the intimate relationship developed during off-duty hours. *Id.*

[46] *Id.* at 770.

the enactment of the rule and there was no security or performance interest at stake. Note however, that rules which require an employee to inform the agency of their relationship with an inmate/ex-inmate are constitutional. Failure to inform or provide notice could be a justification for sanctions or termination.

- **Apply the Policy Uniformly:**

The agency should ensure that the policy is applied consistently and uniformly to all similarly situated employees. Failure to do so could subject the agency to claims of discrimination or can put the entire policy at risk.

- **Policies Should Restrict Behavior which Affect Important Agency Interests:**

Policies should address relationships and behavior which affect the agency's interests. These include: employee's on-the-job performance, the reputation of the agency; the impact on discipline; and respect for the chain of command.

- **Examine the Relationship You are Presented With:**

In determining whether the behavior affects on-the-job performance, the department should examine; the nature of the relationship, and determine whether the behavior is truly private, determine whether the behavior is likely to affect operations of the agency or the behavior of the employee and its likely effect on job performance.

- **Policies Should have a Legitimate Penological Purpose:**

Any rule prohibiting staff-offender relationships must have a legitimate penological purpose – meaning there must be some connection between the rule and the harm it seeks to address. Examples of the harm the rule might seek to address include; safety, security, integrity and morale of the department. When the rule reasonably and legitimately addresses one or a combination of these harms, courts are likely to uphold the rule as constitutional.

- **Design a Procedure Which Requires Reporting and Evaluation on a Case-by-Case Basis:**

Courts are likely to analyze the nature of the relationships and the correctional policies on the relationships on a case-by-case basis. An agency should have a procedure which requires reporting and evaluation and response to these relationships on a case-by-case basis. This procedure will help prevent due process and overbreadth challenges in court.

- **Monitor the Policy at a High Management Level:**

Finally, effective implementation of the policy requires monitoring the supervisor's execution of the policy at a high management level.

We hope that this memo provides guidance to you in your efforts to address this issue. Please let us know if you have other questions.