LEGAL DEFENSE TRUST TRAINING BULLETIN

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SEXUAL HARASSMENT A FEDERAL CIVIL RIGHTS VIOLATION?

Federal Appeals Court Holds Harassment Of Arrestee Can Constitute Violation of Her (or His) Civil Rights

We have become accustomed to thinking that "sexual harassment" is a workplace phenomenon, visited upon an employee by the employer, or another employee. This is correct, in that there are comprehensive state and federal laws prohibiting discrimination in employment, based upon certain classifications, of which gender is just one category. Sexual harassment is but one form of gender or sex-based discrimination, but it has dominated the workplace discrimination landscape for a number of years. Few public employees have escaped mandatory training and policy promulgation which are designed to discourage these behaviors.

On the other hand, the courts have resisted expanding the statutory protections and violations thereof to the rights and remedies available to civil rights plaintiffs for *constitutional* transgressions. [1]

In *Fontana v. Haskin*, No. 99-56629, 9th Cir, August 22, 2001, _F.3d_, the Court found a viable claim under the federal Civil Rights Act, stated by Mia Fontana, who was arrested by CHP Officer Dana Haskin, premised upon alleged sexual harassment of Ms. Fontana by Officer Haskin, following her arrest.

In August 1997 Fontana was involved in a freeway accident. Haskin and another CHP Officer arrested Fontana, believing she had been driving under the influence of alcohol. She was handcuffed, put in the back of the CHP unit, and taken to Orange County jail. The conduct claimed in her complaint allegedly occurred enroute to the jail:

> *On the way to the station, defendant Haskin sat in the back seat, right next to plaintiff, while his partner drove. During the ride to the station, defendant Haskin wrongfully and inappropriately touched and sexually harassed plaintiff. His conduct included the following: telling plaintiff she had nice legs; telling plaintiff that he could be her "older man"; putting his arm around plaintiff; massaging her shoulders. Defendant's conduct persisted, even after plaintiff asked him to stop. At the police station, defendant Haskin continued making sexual comments to plaintiff, including offering to "help her" in the restroom.*

[1] See, for example, *Wehrli v. County of Orange*, 175 F.3d 692 (9th Cir. 1999) – federal appeals court cautions against transforming ADA disability discrimination in employment claim of deputy marshal into a civil rights claim.

She also testified, in a deposition, that he repeatedly remarked how "she looked like the all-American girl, with light eyes, blond hair, the perfect body and nice legs." He also asked her if she had a boyfriend and tried to find out where she lived. Fontana testified that she was "not certain that the officers were planning to bring her to the police station and felt that they could have been driving around in circles until she accepted Officer Haskin's advances."

The U.S. District Court judge dismissed these claims, finding that, even in the light most favorable to Fontana, they failed to make out a claim under the Civil Rights Act (42 *USC* §1983).

The Ninth Circuit reversed and remanded the case, finding that these allegations stated a claim under the Fourth Amendment, and should go to trial.

Likened to an excessive force claim in connection with an arrest or detention, the Court held that Fontana's claim concerned conduct which took place *after* her arrest ("seizure") and *before* she was confined in jail. Hence, said the Court, the conduct of Officer Haskin would be measured against the "reasonableness" requirement imposed by the Fourth Amendment on all "(searches and) seizures":

> *The Fourth Amendment prohibits more than the unnecessary strike of a nightstick, sting of a bullet, and thud of a boot.*

The Court also held, following a U.S. Supreme Court case (*Albright v. Oliver* 510 U.S.266, 277[1967]) that Fontana's was a "continuing seizure", and Haskin was obligated, under the Fourth Amendment, to treat Fontana in a *reasonable manner* enroute to the jail.

From there, the Court reasoned that:

> *There is no situation that would justify any amount of purposeful sexual verbal and physical predation against a handcuffed arrestee. No risk of flight nor threat to officer safety exists to justify such an abuse of the one-sided power arrangement that arises from a custodial arrest such as this one.*

WHAT THIS CASE MEANS FOR US

Plainly, the Fourth Amendment's "reasonableness" standards apply from the moment of the initial detention or arrest ("seizure"), until the person is confined at a jail facility (a pre-trial detainee). After confinement, excessive or wrongful police conduct would be evaluated as a Fourteenth Amendment Due Process claim either as "cruel and unusual punishment" or "conduct which shocks the conscience."

Regardless, it is now clear that in the Ninth Circuit, *all* police conduct in connection with a detention or arrest, including the ride to the station or the lockup, will be scrutinized according to constitutional standards of reasonableness. Accordingly, excessive, unnecessary or unreasonable police conduct, even limited to verbal sexual harassment during the ride to the station or jail, is a violation of federal civil rights. So, avoid these situations just as you avoid the use of excessive force.

Finally, but important to note, these claims against Officer Haskin are just that: *claims*. They have not been proven to have occurred, and in fact, may be completely unfounded. No one should assume from this reported case that Officer Haskin acted in other than a professional and proper manner. [2]

[2] Indeed, Fontana entered a plea of driving under the influence, and is not pursuing a false arrest claim, also dismissed by the District Judge.