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Deputy's Right to Privacy Determined to Outweigh Gov't Interest

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When is filming your female subordinate while in various states of undress a constitutional violation? That was the issue the 3rd U.S. Circuit Court of Appeals grappled with in its Oct. 12 opinion in *Doe v. Luzerne County* . While the court did not find a violation of 42 U.S.C. § 1983, employers would be well-advised to ensure their employees are not videotaping co-workers in the shower.

The 3rd Circuit has remanded the *Doe* case to the district court for a determination of whether incidents in the Luzerne County Sheriff's Department amounted to violations of a deputy sheriff's 14th Amendment right to privacy. The 3rd Circuit agreed with the district court's summary judgment for the sheriff's department, dismissing her Section 1983 claim of failure to train employees and Fourth Amendment claim of an unlawful search and seizure.

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According to the *Doe* opinion, in 2007, "Jane Doe," a female deputy sheriff, and her male partner, Deputy Brian Szumski, were exposed to a multitude of fleas crawling on them after serving a warrant at a home. They were directed by their superior to use decontamination showers at a nearby emergency management building. Doe and her partner were ordered to remain in the police cruiser until the facilities were available, during which time their superior allegedly laughed at, taunted and filmed the officers' visible agitation at the biting fleas and intense heat inside the police car.

Doe testified at her deposition that she asked her superior, Deputy Chief Ryan Foy, to stop filming on at least four specific occasions during the events in question, but that he continued and told her at least one time to "shut up" because it was for "training purposes." In a footnote, the 3rd Circuit declared Foy's "decontamination" explanation as suspect, at best, because he uploaded the video and showed it to other officers as a joke, not in the context of a training video. Further, the court noted that no training video was ever produced from the footage shot that day. Thus, the court concluded, a reasonable jury could find that the training video explanation was a pretext to mask misconduct.

The opinion said that when Doe was eventually able to use the decontamination shower, she did not undress until after another female deputy who was providing her with decontamination instructions, Erin Joyce, left the shower area. When Doe finished showering, she realized there were not any towels. There was a roll of thin paper in the room, which she wrapped around her chest and buttocks area. At that point, Joyce came back to check Doe's hair and body to ensure there were no more fleas. Their backs were to the door, and most of Doe's back, shoulders and legs were completely exposed, and the thin paper, which could have been semi-transparent, was wrapped around her buttocks and breasts. Doe and Joyce heard noise and comments from the door.

According to the opinion, Doe turned around and saw that Foy was filming her, and she heard comments being made about her from other individuals near the door. Doe asserted that an unknown individual was captured on video stating that he could see her "boobies" and that somebody should grab something to "cover [Doe] up." Doe also testified that the outline of her buttocks was visible through the wet paper, and that one of her superiors, Chief Deputy Arthur Bobbouine, could be heard saying on video that he could "see [Doe's] ass." Doe demanded that he leave, and eventually he did. Doe later learned, and other employees provided statements, that Foy played the video on his computer at work and called co-workers over to see it. Foy allegedly saved the video and still images into a public folder on the county server, making it easily accessible to anyone with access to the system, the opinion said.

In June of 2008, Doe filed a two-count complaint against the county as a municipal defendant and against individual defendants. Count one asserted violations of the Fourth Amendment's right to be free from unreasonable searches and seizures, the 14th Amendment's right to privacy and comparable state-law claims. Count two alleged a failure to train claim against the county under 42 U.S.C. § 1983.

According to the 3rd Circuit decision, "The issue of whether one may have a constitutionally protected privacy interest in his or her partially clothed body is a matter of first impression in this circuit, other circuits — including the 2nd, 6th and 9th Circuits — have held that such a right exists."

"Privacy claims under the 14th Amendment necessarily require fact-intensive and context-specific analyses, and unfortunately, bright lines generally cannot be drawn. The difficulty in drawing a bright line is evident as we are not aware of any court of appeals that has adopted either a requirement that certain anatomical areas of one's body, such as genitalia, must have been exposed for that person to maintain a privacy claim under the 14th Amendment or a rule that a nonconsensual exposure of certain anatomical areas constitutes a per se violation."

The 3rd Circuit found that Doe had a reasonable expectation of privacy while in the decontamination area. There was no evidence that Doe expressly or implicitly consented to males opening the door or filming her. The 3rd Circuit noted that the right to avoid disclosure of personal matters may be outweighed by the government's interest in the disclosure. In this case, however, the court stated that factors weigh "overwhelmingly" against an interest in disclosure. Potential harm was noted to be "exacerbated" by the ease of uploading images and video to the Internet, that the video was allegedly shown to others in the workplace, and that the video was allegedly made and shared by superior officers who may have been abusing their authority. Consequently, the dismissal of Doe's 14th Amendment claim was in error.

With respect to Doe's Section 1983 claim, the court upheld the district court's dismissal. Section 1983 makes municipalities liable for the failure to train employees where that failure amounts to deliberate indifference to the constitutional rights of persons with whom the police come in contact. The decision explains that the municipality must know that employees will confront a situation, that the situation will involve a difficult choice or a history of employee mishandling, and that the wrong choice by an employee will cause deprivation of constitutional rights.

There was not sufficient evidence presented that such factors were present in this case, thus the district court's dismissal of Doe's Section 1983 claims was upheld. There was no history of this type of problem, nor was one reasonably expected. The 3rd Circuit further found that "it cannot be said that a wrong choice by a county employee while producing a training video or videotaping in general will frequently cause a deprivation of one's constitutional right to privacy. ... Consequently, any alleged failure by the county to train its employees did not amount to deliberate indifference toward Doe's constitutional rights." There was not sufficient evidence of deficiencies in the county's training program to show such deficiencies led to these constitutional violations.

One of the interesting items to note from this opinion, is the court's refusal to follow a bright line approach in these 14th Amendment constitutional claims. These inquires are fact-intensive and one may reasonably conclude a less egregious set of facts may have resulted in a complete dismissal of the case. Privacy issues under the 14th Amendment are particularly troublesome when the government can articulate an interest in disclosure that outweighs the individual's privacy interest. While it is not entirely clear where that line is drawn, one can rest assured it ends at the shower door.

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