

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/SB 828

INTRODUCER: Criminal Justice Committee and Senator Rader

SUBJECT: Lewd or Lascivious Exhibition

DATE: April 10, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Storch	Jones	CJ	Fav/CS
2.	Forbes	Jameson	ACJ	Recommend: Favorable
3.	Forbes	Kynoch	AP	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 828 expands the scope of the prohibition on lewd or lascivious exhibition in the presence of an employee of a correctional institution to include any person employed at or performing contractual work for a *county detention facility*. Current law prohibits such conduct in a state or private correctional facility only.

The Criminal Justice Impact Conference has determined the fiscal impact for this bill will be positive insignificant (increase of 10 or fewer prison beds). See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2019.

II. Present Situation:

Sexual Harassment at Correctional Facilities

Employees, specifically females, in many correctional institutions face sexual harassment and sexual abuse directed at them by prisoners.¹ For example, “gunning” refers to the practice of inmates exposing themselves and masturbating directly at female staff members.² Correctional

¹ 2010 (7) AELE Mo. L. J. 301, *Civil Liability for Sexual Harassment of Female Employees by Prisoners*, pg. 301, (July 2010), available at <http://www.aele.org/law/2010all07/2010-07MLJ301.pdf> (last visited April 1, 2019).

² *Id.* at 302.

agencies have a legal obligation to take reasonable measures to prevent and remedy sexual harassment in the workplace and failure to respond properly can result in extensive civil liability. Despite this fact, gunning and other lewd or lascivious conduct has been a crippling issue at both federal and state correctional institutions.³

Sexual Harassment at Federal Institutions

The sexual harassment of female employees at the federal level came to light almost a decade ago when the Equal Employment Opportunity Commission (EEOC) issued a report concluding that the Bureau of Prison (Bureau) mishandled harassment claims.⁴ The report detailed that Bureau employees were advised not to report things and that there was a fear of retaliation among employees.⁵ Additionally, the report concluded that anti-sexual harassment training occurred on an infrequent and inconsistent basis.⁶ In its recommendation, the EEOC advised the Bureau to establish a broad anti-harassment policy with effective procedures for preventing and addressing sexual harassment complaints.⁷

Despite the implementation of new policies required by that report, the problem still remains at federal prisons. In 2017, 524 female prison workers filed a class-action complaint, alleging that inmates at the Coleman Federal Correctional Complex in Sumter County, Florida, regularly made lewd comments and rape threats toward female employees in the prison. The parties to the complaint agreed to a \$20 million settlement, signifying one of the largest class-action sexual harassment settlements in U.S. history. In the case, the court also permitted a group of the women to take action against their employer for failing to address sexual harassment by non-employees.⁸

The terms of the settlement specified new procedures that would be in place, such as the requirement for prison staff to identify inmates who are harassing female workers, which could lead to those inmates losing privileges, in addition to providing notice to inmates that repeated harassment of female staffers would result in a referral to psychological services.⁹

Sexual Harassment at State Institutions

Similar problems have plagued state correctional facilities as well. Since 1987, the Department of Corrections (DOC) has paid more than \$5 million in settlements to state workers who alleged they were sexually harassed at work. In 2009, a class action lawsuit brought by mostly women

³ *Id.* at 301.

⁴ Caitlyn Dickerson, *Hazing, Humiliation, Terror: Working While Female in Federal Prison*, The New York Times (November 17, 2018), available at <https://www.nytimes.com/2018/11/17/us/prison-sexual-harassment-women.html> (last visited April 1, 2019).

⁵ EEO Commission Final Report on BOP, pg. 23 (November 24, 2010), available at <https://www.scribd.com/document/74311966/EEO-Commission-Final-Rpt-on-BOP-Nov-24-2010> (last visited April 1, 2019).

⁶ *Supra* n. 5 at pg. 12.

⁷ *Supra* n. 5 at pg. 28.

⁸ Hanna Kozłowska, *Female prison workers, harassed by inmates and ignored by bosses, stood up for their rights – and won*, Quartz, (February 16, 2017), available at <https://qz.com/910810/female-prison-workers-harassed-by-inmates-and-ignored-by-bosses-stood-up-for-their-rights-and-won/> (last visited April 1, 2019).

⁹ Mike Schneider, *Harassed Female Workers at Federal Prison Reach Settlement*, U.S. News, (February 13, 2017), available at <https://www.usnews.com/news/florida/articles/2017-02-13/harassed-female-workers-at-federal-prison-reach-settlement> (last visited April 1, 2019).

claimed inmates would expose themselves and masturbate in front of them. Further, the complaint alleged that the DOC failed to remedy the sexually hostile work environment created by male inmates. The lawsuit went into further detail, alleging that, upon seeing female staff members approaching a dorm, prisoners would commit the practice of “gunning,” exposing themselves and masturbating directly at the staff.¹⁰ In its discussion of the jury’s ruling, the court found that pursuant to Title VII (of the Civil Rights Act of 1964), the DOC is required to adopt reasonably remedial measures to protect its female employees from the sexually hostile environment that the inmates created.¹¹

The DOC appealed this decision, but the court upheld the judgment, ruling that exhibitionist masturbation, especially gunning, is sex based and highly offensive conduct. Furthermore, the court held that the jury was entitled to find that the DOC made almost no effort to protect its employees from this sex-based harassment.¹² As a result of this decision, the DOC paid out more than \$1.14 million in settlements.¹³

Lewd or Lascivious Exhibition

Section 800.09, F.S., was created in response to the class action lawsuit brought against the DOC in 2009, as a way to deter such lewd or lascivious conduct.¹⁴ Specifically, the law prohibits a person who is detained in a state correctional institution¹⁵ or a private correctional facility¹⁶ from doing any of the following in the presence of a person he or she knows or reasonably should know is an employee:

- Intentionally masturbating;
- Intentionally exposing the genitals in a lewd or lascivious manner; or
- Intentionally committing any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to:
 - Sadoomasochistic abuse;
 - Sexual bestiality; or
 - The simulation of any act involving sexual activity.¹⁷

An “employee” is defined as:

- Any person employed by or performing contractual services for a public or private entity operating a facility;

¹⁰ Lauren Sweeney, *Florida paid out \$11 million in sexual harassment claims to more than 300 state workers*, Wink News, (February 27, 2018), available at <http://www.winknews.com/2018/02/26/florida-paid-11-million-sexual-harassment-claims/> (last visited April 1, 2019).

¹¹ *Beckford v. Dep’t of Corrections*, 605 F.3d 951, 960 (11th Cir. 2010).

¹² *Id.*

¹³ *Supra*, n. 10.

¹⁴ Ch. 2010-64, s. 4, Laws of Fla. (2010).

¹⁵ “State correctional institution” means any prison, road camp, prison industry, prison forestry camp, or any prison camp or prison farm or other correctional facility, temporary or permanent, in which prisoners are housed, worked, or maintained, under the custody and jurisdiction of the DOC. Section 944.02(8), F.S.

¹⁶ “Private correctional facility” means any facility, which is not operated by the DOC, for the incarceration of adults or juveniles who have been sentenced by a court and committed to the custody of the DOC. Section 944.710(3), F.S.

¹⁷ Section 800.09(2)(a), F.S.

- Any person employed by or performing contractual services for the corporation operating the prison industry enhancement programs or the correctional programs under part II, ch. 946, F.S.; or
- Any person who is a parole examiner with the Florida Commission on Offender Review.¹⁸

Any person who violates s. 800.09(2)(a), F.S., commits a third degree felony.¹⁹ Since the law's passage in 2010, reports of such lewd or lascivious conduct has decreased in correctional facilities. For example, the DOC wrote 99 disciplinary reports at Charlotte Correctional Institution in Punta Gorda, Florida, for gunning in 2017, which was down from the average of 300 reports written at the prison every year prior to 2010.²⁰

III. Effect of Proposed Changes:

Current law prohibits lewd or lascivious exhibition in the presence of an employee in a state correctional institution or private correctional facility. The bill expands the scope of the prohibition on such conduct to include any person employed at or performing contractual work for a *county detention facility*.

Additionally, the bill defines a county detention facility as a county jail, a county stockade, a county work camp, a county residential probation center, and any other place except a municipal detention facility used by a county or county officer for the detention of persons charged with or convicted of either a felony or misdemeanor.²¹

The bill is effective July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

¹⁸ Section 800.09(1)(a), F.S.

¹⁹ Section 800.09(2)(b), F.S. A third degree felony is punishable by a term of imprisonment not exceeding 5 years, a fine of \$5,000, or both. Sections 775.082 and 775.083, F.S.

²⁰ *Supra*, n. 13.

²¹ This is the same definition as provided in s. 951.23(1)(a), F.S.

E. Other Constitutional Issues:

None identified.

V. **Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference has determined the fiscal impact for this bill will be positive insignificant (increase of 10 or fewer prison beds)²². According to the DOC, five offenders were sentenced under the current statute, with two of those offenders sentenced to prison during FY 2017-18.²³ The overall fiscal impact to the inmate and community supervision population is indeterminate²⁴.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends section 800.09 of the Florida Statutes.

IX. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 4, 2019:

The Committee Substitute clarifies that lewd or lascivious exhibition is prohibited in the presence of *any person employed at or performing contractual work* for a county detention facility.

²² Estimate from Office of Economic and Demographic Research, February 27, 2019 Criminal Justice Impact Conference.

²³ Information provided by EDR staff (on file with the Senate Criminal Justice Committee).

²⁴ The DOC, SB 828 Agency Analysis, p. 3.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
