Prison Tobacco Policies and Litigation

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Existing Challenges in Establishing and Enforcing Tobacco Policies in Correctional Settings

In *Hall v. Warren*, 443 F. App'x 99 (6th Cir. 2011), the Sixth Circuit Court of Appeals considered whether the U.S. District Court for the Eastern District of Michigan erred in dismissing a claim filed by Stephen Hall, a prisoner in the custody of the Michigan Department of Corrections (MDOC). In this claim, Mr. Hall alleged violation of his Eighth Amendment rights due to his housing placement, which led to exposure to environmental tobacco smoke (ETS), despite a medical order indicating his need for tobacco-free housing. He sought compensatory and punitive damages from several officials within the MDOC.

Facts of the Case

Mr. Hall was transferred to Thumb Correctional Facility (TCF) from Bellamy Creek Correctional Facility (BCCF) on December 22, 2006. Prior to this transfer, he was issued an MDOC Special Accommodation Notice (SAN) by his medical provider at BCCF. Per this SAN, Mr. Hall had a permanent need for both "tobacco free housing and a bottom bunk" (*Hall*, p 100). A separate medical record indicated that Mr. Hall was prescribed Albuterol after he experienced shortness of breath, attributed to exposure to second-hand smoke. He was then moved to TCF housing. Upon transfer to TCF, Mr. Hall was assigned to a smoke-free unit. Critically, unlike a tobacco-free unit, this unit allowed the possession of smoking paraphernalia, although smoking was explicitly prohibited.

The day after arriving at TCF, Mr. Hall sent written communications to two unit supervisors requesting transfer to tobacco-free housing. In the latter communication, Mr. Hall noted difficulty breathing and chest pains, which he attributed to ETS in his current housing. The following week, he sent letters to the prison health unit requesting to see a physician to evaluate his symptoms, as well as to the prison warden and two others in senior leadership, reiterating his need for smoke-free housing and noting the details of the SAN. He continued to send letters to the various defendants regarding his request until March 13, 2007, when he filed a formal grievance. At that time, he was informed that the request could not be immediately accommodated, because there were no available beds in the tobacco-free unit. Notably, this was the first official response he received. He was moved on March 24, 2007. He filed two additional appeals to the grievance (one before the move, one after it).

Mr. Hall filed a *pro se* prisoner civil rights complaint in November 2008 with the court of the Eastern District of Michigan. In February 2009, the attorney representing the prison leadership (except the physician) filed a motion for summary judgment, citing a lack of evidence to support "deliberate indifference"(*Hall*, p 104) to Mr. Hall's medical need and asserting qualified immunity. The validity of Mr. Hall's claims was also questioned, given the prohibition against smoking. Shortly thereafter, the physician's attorney filed a motion to dismiss due to failure to exhaust administrative remedies, because Mr. Hall did not specifically name him in any grievance procedures. Mr. Hall filed responses, and the case was assigned to a magistrate judge, who recommended dismissal of the case against all defendants except the supervisor in the tobacco-free unit. The supervisor filed an objection and on September 21, 2009, the district court dismissed all charges, ruling that Mr. Hall had not established a "sufficiently serious medical need" (*Hall*, p 105) and that delays in accommodating his request were not indicative of deliberate indifference. The same day, Mr. Hall filed a late objection to the ruling and recommendation (R&R) by the magistrate judge, which the court treated as a motion for reconsideration, but subsequently denied. Mr. Hall filed an appeal on October 20, 2009.

Ruling and Reasoning

The court of appeals ruled on three points. First, Mr. Hall's allegation of prejudicial error by the district court for treating his objection to the R&R as a motion for reconsideration. Upon review, the court determined that the district court gave adequate consideration to the objection and that no error had been

committed. Second, the appeals court considered whether dismissal of the claim against the physician was appropriate. Per the Prison Litigation Reform Act, 42 U.S.C.S. § 1997e(a) (2008), prisoners must exhaust all available administrative remedies before filing a legal claim against prison officials. Given that MDOC grievance procedures require prisoners to specifically name all individuals involved in the grievance, the court upheld the lower court's decision to dismiss the claim against the physician.

The court focused primarily on the third point, involving whether the lower court properly dismissed the claims against the remaining defendants. Qualified immunity only applies in the absence of a constitutional violation. To establish an Eighth Amendment violation due to exposure to ETS, Mr. Hall needed to establish a serious medical need for a smoke-free environment and that prison staff acted with deliberate indifference to this need. The court of appeals found that these criteria were met. The court also acknowledged that smoke-free housing is not synonymous with tobacco-free housing, and ruled that a ban on smoking does not eliminate responsibility, as prison officials retain the burden of enforcement. The court found sufficient evidence for a trier of fact to decide on the merits, reversed the district court ruling, and remanded the case for further proceedings.

Discussion

The Surgeon General's 2014 Report attributes numerous health consequences, including nearly 500,000 premature deaths each year, to smoking and exposure to second-hand smoke (U.S. Department of Health and Human Services: The Health Consequences of Smoking . . . , 2014. Atlanta, GA: Centers for Disease Control and Prevention, 2014). In recognition of the negative health consequences of ETS, smoking policies in prison and nonprison contexts have evolved and expanded across indoor and outdoor settings over the past several decades. With regard to prisons, in 2004, all federal prisons became smoke-free. Since that time, many state correctional systems have similarly begun to address smoking in prisons. Despite this policy shift, a high percentage of prisoners continue to use tobacco (Tobacco Behind Bars . . . , Public Health Law Center, Policy Options Brief, March 2012).

In *Helling v. McKinney*, 509 U.S. 25 (1993), the U.S. Supreme Court ruled that the Eighth Amendment can be invoked by prisoners who establish that prison staff have been "deliberately indifferent" to the negative health consequences of ETS on a prisoner, clarifying that this protection applies to both immediate health consequences, as well as "unreasonable risk of serious damage to . . . future health" (*Helling*, p 35). In the present case, the court found potential Eighth Amendment violations related to Mr. Hall's claims of a serious acute medical need and deliberate indifference on the part of prison staff. The *Hall* court also addressed the important distinction between a smoking ban and a tobacco ban, the former of which allows tobacco products but bans their use in certain contexts. Significantly, by banning smoking but allowing possession of tobacco products, an institution is taking on the burden of enforcement. Moreover, as evidenced by *Hall*, such policies do not ensure full protection of prisoners from tobacco exposure, or of the prison from legal challenges.

Looking beyond *Hall* to the future of prison tobacco policy, the subjective nature of determining unreasonable risk and serious damage in the context of predicting distal health consequences presents an immense challenge for both courts and policymakers. This complexity is compounded by the fact that negative health consequences related to ETS may result from numerous potential interactions among ETS and a multitude of specified or unspecified risk factors. Although the Court noted in *Helling*, "the prisoner must show that the risk of which he complains is not one that society chooses to tolerate" (p 36), the Surgeon General reported that "there is no risk-free level of exposure to secondhand smoke" (U.S. Department of Health and Human Services: The Health Consequences of Involuntary Exposure to Tobacco Smoke. . . . Atlanta, GA: Centers for Disease Control and Prevention, 2006, p 11). When it comes to prison policies related to the health consequences of ETS, discrepancies between protections offered to the general public and what prisoners are expected to tolerate should be addressed. In light of current research findings and recommendations, policies on tobacco use that do not provide for a smoke-free environment may become increasingly difficult to defend.

The *Hall* case exemplifies the need to establish clear, concise, and consistent science-based policies that are strictly enforced and also mirror societal laws, norms, and expectations. Ultimately, a com-

bined approach involving both policy reform and smoking cessation treatment is likely to yield the greatest short- and long-term benefits, to both prisoners and prisons. Clear policies can better address prisoner ETS exposure and potential liability for prisons. Treatment programs afford prisoners the opportunity and skills to quit smoking permanently, while benefiting prisons by reducing medical costs and furthering policy-related goals. Expansion of prison smoking-cessation programs should be considered as an important next step.

Disclosures of financial or other potential conflicts of interest: None.

Forced Medication to Restore Competency

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Involuntary Medication Order to Restore Defendant's Competence to Stand Trial Upheld Using *Sell* Criteria

In *United States v. Dillon*, 738 F.3d 284 (D.C. Cir. 2013), the United States Court of Appeals for the District of Columbia Circuit, relying heavily on criteria set forth in *Sell v. United States*, 539 U.S. 166 (2003), affirmed the district court's decision to medicate an inmate involuntarily with psychotropic medications for the purpose of competency restoration.

Facts of the Case

On December 10, 2011, Simon Dillon, who had a history of psychiatric hospitalizations, is alleged to have sent an e-mail to a United States Secret Service Agent from a location three blocks from the White House. The e-mail stated that "no harm would come to the President if he met with Mr. Dillon and agreed to meet the demands of God" (*Dillon*, p 288). The e-mail went on to state that if, however, these demands went unmet, the president would "get the worse [*sic*] Christmas present ever," "will suffer for 30 days," and "will wish for death, but death will not come to him" (*Dillon*, p 288). The next day, Mr. Dillon was arrested and detained by the U.S. Secret Service. On January 5, 2012, he was civilly committed to outpatient treatment by the D.C. Department of Mental Health. On January 13, 2012, a grand jury indicted Mr. Dillon for threatening to inflict bodily harm on the president.

During the course of his incarceration and pretrial hearings, Mr. Dillon's competency to stand trial was evaluated on three separate occasions. In March 2012, Drs. William Ryan and Elissa Miller diagnosed his condition as paranoid schizophrenia and concluded that he was competent to stand trial, despite reporting that he was "unable to rationally consider an Insanity Defense to which he may be entitled" (*Dillon*, p 288). Following this evaluation, both parties moved for further psychiatric evaluation. In August 2012, Dr. Heather Ross evaluated Mr. Dillon, diagnosed delusional disorder, grandiose type, and concluded that he was incompetent to stand trial due to his inability to assist properly in his defense. He was subsequently committed to the custody of the Attorney General for a determination regarding his restorability. In February 2013, Drs. Jill Grant and Jill Volin authored a competency restoration report in which they diagnosed schizoaffective disorder, bipolar type in Mr. Dillon and concluded that he remained incompetent to stand trial. They opined that there was a substantial probability that he could be restored to competency with antipsychotic medication, citing multiple competency restoration studies and his history of favorable responses to psychotropic medications.

Following this evaluation, Drs. Grant and Volin requested a judicial order under *Sell* authorizing a course of involuntary medication to restore Mr. Dillon's competency. In particular, the doctors sought authorization for involuntary medication under *Sell* because they did not believe Mr. Dillon met criteria under *Washington v. Harper*, 494 U.S. 210 (1990) (i.e., dangerousness to self or others). In April 2013, the district court conducted a *Sell* hearing. Mr. Dillon disputed the doctors' findings, testifying that his past psychosis was due to prior use of peyote and that he had suffered side effects of severe depression and extremity numbness after receiving the antipsychotic Risperdal. At the conclusion of the hearing, the district court authorized the use of involuntary medications to restore Mr. Dillon's competency.