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United States District Court, District of Columbia.

Bessye NEAL, et al., Plaintiffs,
v.
DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, et al., Defendants.

Civ. A. No. 93-2420 (RCL. | Aug. 9, 1995.

Opinion

MEMORANDUM OPINION III

(CLASS WIDE INJUNCTIVE RELIEF)

Attorneys and Law Firms

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LAMBERTH, District Judge.

***1** The court today issues this Memorandum Opinion III and accompanying order covering Class Wide Injunctive Relief. Separately issued today are the following opinions and accompanying orders: Memorandum Opinion I entering Final Judgment on Jury Verdicts; Memorandum Opinion II covering Equitable Relief for Individual Named Plaintiffs; and Memorandum Opinion IV covering Procedures for Absent Class Members.

I. BACKGROUND

On April 4, 1995, the jury returned a verdict in the liability phase of this case, finding that defendants had engaged in a pattern or practice of sexual harassment and retaliation in violation of §§ 703 and 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* The jury also found that defendants had engaged in a custom or usage of sexual harassment and retaliation in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983. Based on these findings of liability, the jury awarded compensatory damages to six of the eight named plaintiffs. Subsequently, after a bench trial, the court awarded equitable relief to seven of the named plaintiffs. Now, the court turns to injunctive relief for the class.

Title VII provides that where an employer has been found to have engaged in unlawful employment practices,

> the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees ... or any other equitable relief as the court deems appropriate.

42 U.S.C. §2000e-5(g). The court's discretion in shaping an appropriate injunction should be guided by the "overriding ameliorative goals of Title VII," and the goal of discouraging employers from committing discrimination in the future. *McKenzie v. Sawyer,* 684 F.2d 62, 75 (D.C. Cir. 1982). This court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975) (quoting *Louisiana v. United States,* 380 U.S. 145, 154 (1965)).

Courts faced with evidence of a pattern and practice of sexual harassment, as exists here, have found it necessary to issue mandatory as well as prohibitory injunctive relief. The mere prohibition of sexual harassment in the future, for example, was an insufficient remedy in both *Jenson v. Eveleth Taconite Co.,* 824 F.Supp. 847, 888-89 (D. Minn. 1993), and *Robinson v. Jacksonville Shipyards, Inc.,* 760 F. Supp. 1486, 1534 (M.D. Fla. 1991). The *Robinson* court observed, in reasoning equally applicable here, that:

> The history of management's condonation and approval of sexually harassing conditions, together with the past failures to redress effectively those instances of sexual harassment of which management disapproved, argues

> forcefully for affirmative relief that provides guidance for all employees regarding acceptable and offensive conduct, provides confidence to female employees that their valid complaints of sexual harassment will be remedied, and provides male employees who transgress the boundaries of sexual harassment with notice that their conduct will be penalized commensurate with the seriousness of the offense.

***2** *Robinson*, 760 F. Supp. at 1534.

The need for extensive mandatory relief is even greater here because the Department has been subject to an injunction prohibiting sexual harassment for 14 years, issued in *Bundy v. Jackson*, No. 78-1359 (D.D.C. March 23, 1981), and has nonetheless openly and wantonly continued to engage in a widespread pattern of sexual harassment and retaliation. Nor has the defendants' record of compliance with orders of this court barring retaliation against the named plaintiffs and other witnesses been any better. Accordingly, the strongest measures to address sexual harassment and retaliation at the Department of Corrections are needed here.

As set forth in more detail below, the court directs the establishment of a new, independent office within the Department of Corrections, to be responsible for investigation and resolution of complaints, training, and other issues related to sexual harassment and retaliation. Further, the court promulgates policy for the Department -- including guidelines for complaint investigation, resolution and discipline, and requirements for record keeping.

II. SPECIAL INSPECTOR

While the Department has for some time had a stated policy prohibiting sexual harassment and retaliation, it has done little to enforce it. The primary objective for the court is to ensure enforcement of a policy that affords employees an opportunity to have their claims fairly and fully investigated. Prompt and appropriate measures must be taken to redress harm caused by misconduct and to punish the perpetrators in order to deter future misconduct.

Numerous problems with the existing system were revealed at trial. First and foremost, the persons assigned to serve on the fact-finding committees were untrained in the law governing claims of sexual harassment and in the proper methods for conducting investigations. This led, in many instances, to inaccurate analyses and unsound decisions. Second, the persons conducting the investigations and adjudicating the claims were employees drawn from the mainstream of the Department's work force, and often lacked the independence and impartiality to make fair determinations and create the appearance of fairness. Third, even where these fact-finding committees operated independently, their determinations were subject to review by senior Department officials who lacked that independence. Indeed, evidence at trial disclosed that some of these senior officials actively engaged in, or openly condoned, rather than condemned, the sexual harassment and retaliation so widespread at the Department of Corrections. Fourth, the disciplinary actions which were proposed when persons were found to have committed sexual harassment or retaliation were *rarely* in proportion to the severity of the offense.

Given this history, the court directs the creation of a new office, Special Inspector, operating within the Department but subject to review by this court. The SI will have the expertise, impartiality, and commitment necessary to address and dispel sexual harassment and retaliation at the Department of Corrections.

***3** Appointment of an SI, argue defendants, would "fly in the face of a demonstrated record of commitment by Director Moore and other Departmental staff." The Department currently has two persons who fulfill the role of SI -- Fred Staten, the EEO/Ethics Officer; and Talaya Gilmore-Moye, the EEO/Sexual Harassment Coordinator. It nonetheless required to hire an SI, the Department prefers to recruit him or her through the merit staffing process, and to have the SI accountable to the Director.

The court finds, however, that the overwhelming evidence in this trial divulged fundamental, systemic defects, requiring a fresh and dynamic approach. No matter how well-intended and dedicated, Staten and Gilmore-Moye were singularly ineffective in harnessing pervasive harassment and retaliation at the Department over an extended period of time. The court will not allow this pattern to continue.

A. Selection and Control of the Special Inspector

The SI shall be selected by the court from candidates proposed by the parties. Candidates should be attorneys who are knowledgeable about the laws and methods of investigating and proving claims of sexual harassment and retaliation, and who have experience representing

persons who have made those claims.

In order to achieve the independence and impartiality required to restore confidence in the protections against sexual harassment and retaliation at the Department, the SI shall operate independently of all Departmental staff, including the Director. Accordingly, decisions of the SI on claims that are pursued through the Department's internal process shall be final and binding on the Department and not subject to review or modification by the Director or other officials of the District of Columbia government. Claimants will, of course, retain all rights of appeal that they currently possess -- whether through the D.C. Department of Human Rights ("DHR"), the U.S. Equal Employment Opportunity Commission ("EEOC"), or the courts.

Defendants point to *In re Bituminous Coal Operators' Ass'n, Inc.,* 949 F.2d 1165, 1169 (D.C. Cir. 1991), arguing that blanket delegation of unreviewable discretionary power is beyond the court's authority. But their reliance on *Bituminous Coal* is misplaced. There, the court referred an entire case, including liability determination, to a special master. Here, the court is simply transferring certain functions now under the Director's auspices to a Special Inspector. In handling sexual harassment complaints, the SI may do whatever the Director is now authorized to do -- but no more. Nothing in *Bituminous Coal* precludes appointment of one official to assume a portion of the authority formerly exercised by another official. Moreover, activities of the SI shall be subject to review by the court and shall be described in reports that are submitted regularly to the court and to the parties.

The Department's position on this issue reflects a misunderstanding of the SI's role. He or she will be the final decision maker within the Department for consideration of complaints. For this limited purpose, the SI would simply replace the Director, who presently serves in that capacity. The SI's authority would not exceed that currently entrusted to the Director. A complainant would have the same recourse from a decision of the SI as is now available from a decision of the Director -- through the DHR or the EEOC. The Department, however, would have no recourse from the SI's decision to either agency, nor to the courts -- because it is the Department, acting through the SI in place of the Director, that has itself rendered the decision.

***4** Whether through the SI or by alternate means, defendants object to the court's involvement in monitoring sexual harassment at the Department. While sexual harassment may be a very important issue, it should not, say defendants, be elevated "above any other civil rights or public, employee and resident health and safety matter." To the contrary, the court finds that sexual harassment should and must be the focus of its attention -- not because it is more important than other civil rights matters; not because other issues may not be ripe for remedial action; but rather because this entire litigation has centered exclusively on unrestrained violations of the statutory and constitutional rights of Department employees to be free from sexual harassment and retaliation. Plaintiffs have proven their case to a jury which has presented its findings to the court. The unanimous verdict of the jury is that defendants are liable. It is now up to this court to implement the jury's verdict; to structure remedies consistent with evidence in the record; and to assure that corrective actions are instituted. The court need not address all possible concerns in order to redress one proven problem.

B. Duties and Responsibilities of the Special Inspector

The SI shall be responsible for four main areas regarding sexual harassment and retaliation: complaint investigation, training, policy/programs, and performance evaluations.

1. Complaint Investigation. The system for investigating complaints of sexual harassment has been flawed and feckless. As a partial corrective measure, the SI shall be authorized to hire one or more persons, who have not been compromised by the previous practices of sexual harassment and retaliation, to work under his or her supervision as Investigators. These individuals shall work full time for the SI, thus free of entangling relationships with employees whom they may be investigating. Investigators shall receive special and regular training in sexual harassment and retaliation law, and in how to conduct an investigation. It is anticipated that they will develop the independence and expertise lacking until now in the complaint process.

Some specific rules for the conduct of investigations are presented in Part III below. Essentially, Investigators shall report to the SI, who will make final decisions as to whether or not alleged sexual harassment or retaliation occurred.

2. Training. Problems with the Department's existing system of sexual harassment training were also exposed during the course of trial. The primary deficiency is that employees do not receive training that is officially required by Departmental order. A mechanism is required for the Department to track when each employee receives sexual harassment training and when such training is again due. The Department must also ensure that each employee actually attends required training. One responsibility of the SI shall be to establish such a mechanism.

***5** In order to assure consistent and appropriate instruction on sexual harassment, the SI shall be given authority to select and approve both the instructors and the curriculum used in sexual harassment training.

The Department states that it has significantly modified and improved its sexual harassment training and re-training programs. In 1994, the Department purchased an elaborate software system for this purpose. The process of computerization commenced a number of years ago, but initially failed when the Department's database was destroyed, most likely by sabotage, through no fault of the Department. Defendants' expert witness, Bruce Bagin, has testified that the Department's training curriculum meets applicable standards. Nevertheless, Bagin testified based on his perusal of programs on paper. He never observed the Department's treatment of harassment or retaliation, nor did he visit Department facilities. Testimony from several witnesses -- including, among others, Charlie Weaver, Darlene Crawford, and Arletha Tyson -- documented the sorry state of sexual harassment training at the Department. If true improvements have been made, the SI can build on them; but the Department's history of problems is ample justification for injunctive remedies.

3. Policy/Programs. The third area in which the SI shall be given authority is in the design of sexual harassment policy and programs. Defendants argue there is no need, based on the record of this case, for court-ordered policies and procedures in the area of sexual harassment and retaliation. Policies and procedures set out in Departmental Order 3310.4 were approved by the court in *Bundy v. Jackson*, 641 F.2d 934, 948 (D.C. Cir. 1981). Since then, they have been revised and refined; and defendants profess a willingness to refine them further, to accommodate certain objections raised by plaintiffs. Defendants' expert, Bruce Bagin, testified that the Department's policies and procedures contain all of the elements integral to an effective sexual harassment program. So, say defendants, the court must not limit its deliberations to considering past deficiencies; it must weigh the quality of the present program, and give the Department the opportunity to rectify any apparent policy or programmatic defects.

The court has considered defendants' Zero Tolerance Sexual Harassment program, as well as recent declarations submitted by Gilmore-Moye and Earthel Foster, attesting to recent improvements in Departmental programs and policies. These asserted improvements are, quite simply, too little and too late. "[A]bsent clear and convincing proof of no probability of further noncompliance with the law, a grant of injunctive relief under Title VII is mandatory." *Thompson v. Boyle*, 499 F. Supp. 1147, 1168 (D.D.C. 1979). Defendants have certainly not established that there is no probability of future violations. Moreover, "protestations of repentance and reform timed to anticipate or to blunt the force of a lawsuit offer insufficient assurance that the practice sought to be enjoined will not be repeated." *Cypress v. Newport News General and Nonsectarian Hospital Ass'n, Inc.*, 375 F.2d 648, 658 (4th Cir. 1967) (quotation omitted).

***6** On December 16, 1994, the court held Director Moore in contempt for failing to take timely steps to ensure compliance with the court's preliminary injunction of June 7, 1994. The court also found that, under Moore's stewardship, the Department had permitted retaliatory actions against named plaintiffs Jones and Posey. After an evidentiary hearing and oral argument, these actions as well were held to be contemptuous of the June 7 injunction. Moore also played a direct role in plaintiff Newsome's charges that she was assaulted by Sgt. Salley. Newsome presented her allegations to Moore, in person. It is undisputed, despite a promise to the contrary, that Moore never got back to Newsome regarding her complaint. Furthermore, an investigatory board, accepting Salley's version of the facts without even giving Newsome an opportunity to appear, recommended discipline against Newsome. When the board's preposterous report was reviewed by Moore, it should have been repudiated immediately. Instead, Moore testified shortly thereafter, before this court, that she had not yet decided what action to take.

Moore demonstrated to the court that she was incapable of ensuring that the June 7 injunction was obeyed. She forfeited her right to directly supervise the working conditions and personnel actions governing the plaintiffs named in the injunction. As a result, the court appointed a Special Master who has served since that time to stop continuing harassment and retaliation by the Department. It is beyond debate: A belated willingness by defendants to redress outrages that have recurred over more than 15 years, up to and including the present, despite multiple court-ordered injunctions already in place, cannot persuade the court to refrain from further remedial action.

Not only sexual harassment policy, but also preventive and educational programs related to sexual harassment and retaliation, shall be coordinated by the SI's office. The court shall appoint an Ombudsperson to serve as the initial contact for employees who seek assistance in filing a sexual harassment complaint, to answer questions during investigations, and to provide general advice and counseling to persons complaining of sexual harassment or retaliation. The Ombudsperson shall chair a Sexual Harassment Advisory Committee which will provide feedback to the SI on matters of harassment and

retaliation. See Part V, *infra.*

4. Performance Evaluation. Development of a performance evaluation system that ensures that all supervisors are accountable if prohibited sexual harassment occurs in units which they supervise, must be a goal of the court. Otherwise, there cannot be systemic change to the Department's "business as usual" approach that the court has witnessed.

The SI will be expected to develop, recommend and ensure implementation of revisions to the Department's method of evaluating job performance. The new system must guarantee that each supervisor in the Department deals effectively and affirmatively to put an end to sexual harassment and retaliation. Specific performance standards must be established to certify that employees are properly evaluated on these matters.

III. COMPLAINTS, INVESTIGATIONS AND RESOLUTIONS

A. Complaints

***7** The Department's current system permits employees to raise a complaint with any supervisor, up through the Deputy Director.[1] However, evidence at trial was that supervisors did not consistently pass written complaints up the chain of command as required. Moreover, by passing complaints through the hands of multiple employees, complainants are denied confidentiality. Therefore, while employees shall retain the right to complain to any supervisor in the Department, they shall be encouraged to complain directly to the SI's office, specifically through the Ombudsperson. Any supervisor who receives a complaint shall forward it immediately to the SI. Centralizing investigations in the SI's office and allowing direct access to that office will allow for greater accountability and confidentiality.

Many women have complained orally about sexual harassment. Testimony at trial revealed that supervisors often failed to respond to such complaints; or if they did respond, they failed to do so formally and effectively. Hereafter, any supervisor who receives a verbal complaint of sexual harassment shall reduce the complaint to writing and submit a memorandum to the SI, in the same way that a written complaint would be transmitted. The supervisor shall inform the employee of her or his right to file a complaint with the SI, but, in any event, the supervisor shall document the complaint and register it with the SI.[2] Finally, a hotline shall be established so that employees can call the SI's office to report problems, even anonymously if necessary.[3]

B. Investigation Procedures

The investigation is the heart of the process for redressing complaints of sexual harassment and retaliation. It has been sorely defective. It is vital that Investigators be given extensive training in sexual harassment and retaliation law and in how to conduct an investigation. Investigations must be completed and determinations made promptly. Testimony at trial uncovered instances in the recent past where disciplinary action was warranted, but was not taken because the Department failed to comply in a timely fashion.

Subject to more detailed guidelines to be promulgated by the SI for Investigators, the court will adopt the following general rules addressing areas which have been deficient under the current system:

Investigations will typically not involve adversarial, trial-like proceedings. Instead, the Investigator should conduct a series of in-depth interviews separately with the complainant, the respondent, and then all witnesses identified by either party or identifiable by the Investigator. Currently, fact-finding committees sometimes fail to question employees named as witnesses by the complainant. Investigators shall be required to interview all witnesses identified by either party, or provide a written reason why a witness identified by a party was omitted. Investigators should also be encouraged to question employees who worked with the complainant and respondent, and who may have observed relevant behavior on other occasions. Finally, as even defendants' expert at trial acknowledged, there are rarely witnesses to sexual harassment. Investigators should be encouraged to question people who can corroborate the account offered by the complainant based on the complainant's earlier complaints to them, or their own observations of the complainant's demeanor. The Investigators also should have access to all documents that may be relevant to their investigation.

***8** Upon completion of their investigation, Investigators shall submit a written report to the SI, including summaries of their interviews, copies of all relevant documents, a statement of their findings of fact and a conclusion of whether sexual harassment or retaliation occurred.

Defendants contend there is no credible evidence that Departmental fact-finding committees lack independence or impartiality. The Department, according to defendants, has a fully functioning investigative process in place. If perchance the fact-finders should have an entangling

relationship with a party to a sexual harassment complaint, the Department can utilize the services of the Office of Personnel Management or an equivalent outside contractor. The Department claims that under existing policies and procedures, investigations move forward expeditiously, and actions are typically taken within the requisite 45-day period after the Department knew or should have known of an offense. Missed deadlines are disciplined unless it is determined that the responsible parties could not realistically have accomplished their task with the allotted time frame.

The court cannot agree with this optimistic assessment. Depositions of Gilmore-Moye and Director Moore disclosed that committee members are not given adequate training. Bagin conceded as much on cross-examination. Both the Newsome and Carter fact-findings uncovered legal and factual inconsistencies and improprieties. In handling Newsome's complaint, the committee required that she prove her charges "beyond reasonable doubt." Despite clear testimony from Newsome and from an inmate who witnessed the incident, and despite the respondent's memory lapse, the committee found the evidence insufficient. In Carter's case, the committee refused to take verbal testimony from two eyewitnesses who observed the respondent putting his arms around a protesting Carter. Submission of the statements in writing failed to convince the committee of the adequacy of Carter's showing. The committee wrongly applied a "conclusive evidence" standard, and determined that Carter did not meet her burden to overcome the respondent's denial.

There are further examples: Fact-finding committees ignored key witnesses in the cases of Jacqueline Jennings and Jacqueline Thomas, and improperly demanded that Thomas prove "deliberate intent to sexually harass." The committee investigating charges by Debbie Wiggins found "low level harassment," but still recommended that the respondent be *commended* as a no-nonsense supervisor. Wiggins learned afterward that the committee chairperson was a Masonic brother of the supervisor against whom she had brought her complaint. Estine Hall testified that a man charged with sexual harassment told her he was unconcerned with a committee investigation because the chairperson was a friend who had promised to look out for him. Even Director Moore admitted that the committees lacked the necessary impartiality; and expert witness Bagin agreed that several of the fact-finding reports that he examined were incorrectly decided.[4]

***9** Other testimony has established to the court's satisfaction that the fact-finding processes were biased, and that discipline has not been commensurate with the severity of the offenses. To cite a few egregious examples: Virginia King testified that Reginald Johnson coerced her to have sex with him. Despite a DHR finding in her favor, the Department slapped Johnson with a mere two-week suspension. And no discipline was imposed when EEOC determined that the same Johnson sexually harassed Shivawn Newsome. EEOC also determined that Edward Paylor had engaged in quid pro quo sexual harassment against Teresa Washington, and created an environment in the Records Office that was hostile to women in general. But the Department merely issued a letter of reprimand, even though it was Paylor's second offense. Several other cases are summarized in plaintiffs' exhibit 142, where letters of admonition or reprimand were given for sexual advances that included physical touching and loss of promotions.

In sum, the evidence does not support defendants' claim that the Department's fact-finding committees should be allowed to continue doing business as usual.

C. Determinations and Penalties

Determinations of the SI shall be final within the Department of Corrections, and not reversible by the Director or other Department employee. If the SI finds there is not sufficient evidence to substantiate the complaint of sexual harassment or retaliation, the employee should be informed of his or her right to file a complaint with the EEOC or the DHR. If the SI determines that there is sufficient evidence to substantiate the complaint, the SI shall make findings in two additional areas. First, the SI shall propose appropriate disciplinary action to be taken against the harasser or retaliator, subject to a review system consistent with D.C. personnel regulations. Second, the SI shall prescribe the remedial measures to which the complainant is entitled.

Due to the Department's history of proposing unduly lenient disciplinary action -- a problem acknowledged even by the Director herself -- a schedule of penalties shall be adopted, which the SI shall follow in making proposals for disciplinary action in individual cases.[5] Any deviation from the table shall require written documentation of aggravating or mitigating circumstances.

According to Bagin's testimony, penalties imposed by the Department for sexual harassment were consistent with EEOC and union guidelines. A proposed set of penalties complying with the District Personnel Manual ("DPM") is slated for submission to the Director shortly. On the other hand, there is no evidence in the record of defendants' new schedule of penalties, nor did defendants produce such a schedule as part of their papers on class wide injunctive relief. The Department's lamentable disciplinary record is hardly cause for confidence.

The SI shall hold a place in the disciplinary system at the Department of Corrections similar to that which the Civilian Complaint Review Board ("CCRB") held at the D.C. Metropolitan Police Department. D.C. personnel regulations and the D.C. Comprehensive Merit Protection Act ("CMPA") allowed CCRB's investigation and findings to constitute the notice and opportunity to respond required by the CMPA, and to serve as the formal proposal required by D.C. law. *See District of Columbia Metro. Police Dep't v. Perry,* 638 A.2d 1138, 1146 (D.C. 1994). The CCRB recommendation is sent to the Chief of Police who may adopt it explicitly, or implicitly by not taking action within 30 days, or he may recommend a greater or lesser penalty and submit the question to the Mayor. *Id.* at 1147. The Chief thus fills the role of both the disinterested designee and the deciding official,[6] except in cases where he or she recommends a different penalty and the Mayor becomes the deciding official.

***10** In similar fashion, the investigation and recommendation of the SI shall serve as notice and opportunity to respond, and fill the role of "proposing official" in initiating disciplinary action. Although one individual may be both disinterested designee and deciding official, he or she may not also be the proposing official. Therefore, the Director of the Department shall serve as disinterested designee and deciding official -- the same responsibility held by the Chief of Police. If the Director opposes the recommended penalty, the final decision shall be made by the Mayor. Most significantly, the employee's response to the Director may only address the level of the sanction; the employee may not reargue the determination that there had been sexual harassment or retaliation. This is consistent with the CCRB procedures approved in *Perry*, 638 A.2d at 1147 n.25.

The SI shall have authority to award the full range of remedies available under the D.C. Human Rights Act. The SI should also consider transferring the harasser in order to provide the complainant with a harassment-free work environment. If the complainant so requests, the SI should consider transferring her instead or in addition.

The SI may also initiate disciplinary action against Department employees in cases of sexual harassment determined outside of the Department. Thus, where an employee has filed a complaint with the DHR, EEOC, or in court, and receives a determination in his or her favor, the report of such action should be sent to the SI for disciplinary action -- just as if the cause finding had been made within the SI's office. The Department maintains that the SI should not be authorized to interpose itself when the DHR, EEOC or a court has issued an order directing the Department to take disciplinary action; this function belongs to the Director. Here, too, defendants misconstrue the SI's function. The SI will not be interposed between the Department and, say, DHR; instead, the SI *is* the Department. He or she will serve, for this limited purpose, as Director -- subject, for the time being, to the court's overview and supervision.

IV. RECORD KEEPING AND REPORTS

A copy of the final investigative report, as approved by the SI, shall be given to the complainant, to the respondent, and to the Director. Initially at least, a copy of each report should also be provided to the court and to counsel for the parties to facilitate a review of the process. A summary of the activity of the SI's office should be submitted to the court every quarter to permit review of the office.

A database shall be created in which information can be stored concerning complaints and their outcome. The Department's EEO Officer admitted in his deposition that he did not have complete records of the sexual harassment complaints that had been filed. He further admitted that it was not possible to search for prior complaints against an alleged harasser in any systematic way. Accordingly, all files of sexual harassment and retaliation shall be permanently maintained in the SI office -- indexed by the name of the complainant, the name of the respondent, the institution or unit where the complaint arose, the allegations, the date, and the outcome. In cases where cause has been found either by the SI, the DHR, EEOC or a court, the report and findings shall also be made a part of the culpable employee's personnel file.

V. SEXUAL HARASSMENT ADVISORY COMMITTEE

***11** A Sexual Harassment Advisory Committee shall be created, consisting of employees at all levels in the Department, and including appropriate representatives of the plaintiff class. The SI could select members from employees who respond to a notice soliciting candidates. The purpose of this committee is to provide feedback from the employees to the SI regarding the effectiveness of training and other programs, and to *consider* problems that may later arise regarding sexual harassment and reprisal. The Advisory Committee, chaired by the Ombudsperson, shall review the reports generated by the SI's office.

VI. COUNSELING

Testimony at trial demonstrated repeatedly and poignantly the emotional and psychological consequences of sexual harassment and retaliation for employees in the Department of Corrections. The SI shall consider offering a counseling service to victims of such practices. The SI could select, or contract with, a licensed therapist to offer counseling as needed.

There is, according to defendants, no justification for a directive that the Department provide psychological counseling services for victims of sexual harassment. All employees have access to the D.C. Employee Assistance Program, where they can obtain an initial counseling session without charge, then a referral which is fully or partially reimbursable through health insurance. There may be validity in the Department's position. Without pre-judging the effectiveness of existing options, the court has elected to authorize, but not to direct, the SI to expand upon the Department's counseling alternatives. The SI will be best situated to determine the need for such services and the extent to which that need is presently satisfied.

VII. DISCIPLINARY ACTION

As disclosed at trial, many of the employees who have committed sexual harassment or retaliation have yet to be disciplined. The defendants shall consider disciplinary action against those persons still employed by the District of Columbia who were identified as having committed sexual harassment or retaliation during the liability phase of this case. These employees would be afforded the same right to notice and hearing that is available to other employees charged with misconduct. A similar process was established by Judge Pratt for this court in *Broderick v. Ruder*, No. 86-1834, slip op. at 3-5 (D.D.C. June 16, 1988). There, the Securities and Exchange Commission was directed to consider disciplining individuals responsible for sexually harassing Commission employees. After an independent third-party investigation, the Chairman was to evaluate the results, take appropriate disciplinary action, and report back to the Commission and to plaintiff's counsel.

The Department urges the court not to mandate that prior harassers be disciplined. None was a defendant, no findings were made, none had an opportunity to be heard. Proceedings against these persons might be hampered by stale evidence, lost records, faulty memories. Indeed, in some cases, past Directors have already rejected disciplinary action. Of course, if these individuals were parties, the court could order action directly. But precisely because they are not parties, the court has instructed the Department to consider disciplinary action, subject to the obvious due process safeguards.

***12** It is not unprecedented for the Department of Corrections to pursue disciplinary action against officials who have not been parties to litigation. For example: Edward Paylor was issued a letter of reprimand following an EEOC finding in favor of Teresa Washington; Reginald Johnson was suspended following a DHR ruling in favor of Virginia King; John Lattimore was issued a letter of reprimand following a DHR finding in favor of Deborah Bryant. Nor is it unprecedented for the Department to discipline an official long after the harassment or retaliation occurred. Paylor's reprimand came after a July 1993 EEOC finding on a complaint filed in December 1992. Paylor was ultimately terminated following a jury verdict in *Webb v. Hyman*, No. 93-1822, slip op. (D.D.C. Mar. 21, 1994). The underlying conduct commenced in June 1992 and was first complained of in June 1993.

Normally, in accordance with D.C. Code § 1-617.3(a)(1)(A), the Department must notice the action sought and the charges preferred within 45 business days of the date that the agency knew or should of known of an infraction. However, an exception is provided in DPM Chapter 16, § 1603.1(t), which permits disciplinary action based upon a "finding by the Office of Employee Appeals, the Office of Human Rights, the Commission on Human Rights, or a court of competent jurisdiction in the District of Columbia that the employee has violated the guarantees in D.C. Code Title I, Chapter 6, Subchapters I and VII (1981) [D.C. Human Rights Act], in the performance of that employee's official duties."

Here, the SI as a representative of the court will investigate allegations, notify each accused person of the alleged misconduct and evidence thereof, and afford the accused an opportunity to respond and identify witnesses on his or her behalf. The SI will then report the results and, where appropriate, recommend discipline. Any such recommendation shall be submitted to the court and shall be subject to its approval. In this manner, the 45-day time bar will not apply; and the accused will be scrupulously assured due process.

VIII. CONCLUSION

Defendants have argued, in effect, that they can be trusted to address sexual harassment and retaliation on their own. The court does not find this to be a credible assertion. It

ignores the results of a protracted trial in which the jury determined that this form of virulent discrimination has been the pattern and practice at the Department of Corrections, and a custom and usage condoned by the highest ranking officials. Despite these findings, defendants persist in their remarkable avowal that the Department is essentially blameless; whatever problems may have existed in detecting and redressing sexual harassment have been alleviated. This denial is reflective of an underlying infection that the court must extirpate.

Until defendants acknowledge their wrongdoing, and accept responsibility for the deplorable state of affairs at the Department of Corrections, they cannot be trusted with responsibility for bringing about the real change that is needed in the Department. Instead, this court must intervene to secure compliance with the laws on sexual harassment and retaliation. The court is unwilling to take the immense risk that the Department's empty promises are simply a camouflage for more business as usual.

***13** A separate order shall issue this date.

FINAL JUDGMENT AND ORDER III

(CLASS WIDE INJUNCTIVE RELIEF)

LAMBERTH, District Judge.

Upon considering the submissions and oral arguments of the parties, and for the reasons more fully set forth in accompanying Memorandum Opinion III, the court hereby enters final judgment on class wide injunctive relief.

1. Every employee, agent and other person operating under the direction and control of the Department is permanently enjoined from engaging in sexual harassment or retaliation as defined below. Each supervisor is required to comply with procedures for forwarding complaints, cooperating with investigations, and carrying out the remedial and disciplinary orders of the Special Inspector, as set forth in this order. Employees may be subjected to sanctions for contempt of this court, as well as adverse or corrective action under Chapter 16 of the District Personnel Manual ("DPM") for any violation of this order.

a. *Sexual Harassment* is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature if:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

b. *Retaliation* is defined as taking or threatening to take adverse employment actions against a person because he or she has engaged in legally protected activity.

(1) Adverse employment actions include any negative change in the terms conditions or privileges or employment. It includes, for example, changes in assignments, shifts, or evaluations. It also includes creation of a hostile work environment because an employee has engaged in legally protected activity as defined below.

(2) Legally protected activity includes resisting or opposing sexual harassment, making oral or written complaints about sexual harassment, and testifying at, assisting in, or otherwise participating in an investigation of a sexual harassment complaint. Such activity is protected regardless of whether the conduct of which the employee complained was actually proved to have constituted sexual harassment.

2. The Department of Corrections shall create an Office of Special Inspector ("OSI") and shall provide such financial and personnel support as the court determines is necessary to effectuate its purposes.

(a) The position of Special Inspector ("SI") shall be established within the D.C. Department of Corrections at a grade level no lower than that of the Deputy Directors. Other positions within OSI shall be compensated at levels appropriate to the duties they perform.

(b) Initially, the SI will be appointed by this court and may be removed by the court upon a showing of good cause. Parties shall be permitted to suggest candidates for this position within 30 days of the entry of this order.

***14** (c) The SI shall be an attorney who is knowledgeable about the laws and methods of investigating and proving claims of sexual harassment and retaliation, who has experience representing

persons who have made those claims, who is free from any taint of association with the previous system, and who can be expected to act conscientiously, with independence and impartiality.

(d) The term of the SI shall not exceed three years, after which the SI shall be eligible for reappointment.

(e) The SI shall have the authority to hire and discharge employees within OSI.

3. OSI shall include such staff as the SI, with approval of the court, determines to be necessary to effectuate the terms of this order, but, in any event, shall include Investigators, Advisers, and an Ombudsperson. Their duties will be defined more fully by the SI, after input by the parties and approval by the court. At a minimum, their duties shall include:

(a) *Special Inspector:* The SI shall exercise the authority currently held by the Director of the Department with respect to enforcing the protections against sexual harassment and retaliation. Until further order of the court, the SI shall be subject exclusively to the supervision of the court.

(b) *Investigators:* They shall be specially trained, professional investigators, reporting to the SI and shall be responsible for investigating complaints of sexual harassment and retaliation filed internally within the Department.

(c) *Advisers:* They shall be responsible for counseling employees who complain about incidents of sexual harassment or retaliation regarding their rights under law and the manner in which such employees may exercise these rights, and shall respond to telephone calls received on the hotline described below.

(d) *Ombudsperson:* This person will help develop and implement Department policies regarding sexual harassment and retaliation and shall chair the Department's Sexual Harassment Advisory Committee.

4. OSI shall be responsible for drafting a new Departmental Order on sexual harassment and retaliation which complies with the terms of this order and other prevailing authorities and which sets forth procedures and rules for making, investigating, and resolving complaints, for training, for defining prohibited conduct, for the hotline, Sexual Harassment Advisory Committee and counseling program, and for any other responsibilities of OSI necessary to eradicate the practices of sexual harassment and retaliation from the Department. After conferring with the parties, the SI shall submit a proposed Departmental Order for approval by the court.

5. OSI will be expected to develop, recommend and ensure implementation of revisions to the Department's method of evaluating job performance. The new system must guarantee that each supervisor in the Department is evaluated on his or her ability to effectively and affirmatively put an end to sexual harassment and retaliation. Specific performance standards must be established to ensure that employees are properly evaluated on these matters.

***15** 6. OSI shall have the authority and responsibility to investigate all complaints of sexual harassment and retaliation filed internally within the Department. Every complaint, whether oral or written, shall be sent directly to OSI by the supervisor who first receives it.

(a) The Investigator assigned to a complaint must submit a written report to the SI, summarizing his or her findings and recommendations for action, on a timetable established by the SI, which will be within sufficient time to permit disciplinary action to be proposed in accordance with the DPM.

(b) The SI shall have the authority to make final determinations with respect to internal complaints of sexual harassment and retaliation, to initiate disciplinary action in all cases in which sexual harassment or retaliation has been found to have occurred, and to direct that such remedial measures as are appropriate be taken.

(c) The SI may direct that such remedies be provided to complainants as are available under the D.C. Human Rights Act.

7. Following the SI's proposal of disciplinary action against any employee found to have committed sexual harassment or retaliation, such person may submit objections to the Director, who will fulfill the responsibility of "disinterested designee" and "deciding official" as defined by the DPM.

(a) The level of disciplinary action may be contested and reviewed, but the underlying finding of sexual harassment or retaliation may not be altered by this process.

(b) If the Director wishes to alter the penalty recommended by the SI, then the Mayor must make the final determination. Otherwise, the SI's recommendation is the final decision.

(c) Once a final decision is made, the employee against whom the sanction has been imposed retains the existing rights to appeal to the Office of Employee Appeals pursuant to Chapter 16 of the DPM.

8. After conferring with the parties, the SI shall develop a Schedule of Penalties which prescribes the penalties that will ordinarily be recommended, absent mitigating or aggravating circumstances, for particular actions constituting sexual harassment or retaliation. Once approved by the court, the Schedule of Penalties shall be incorporated into, and enforced as part of, the departmental order on sexual harassment and retaliation.

9. OSI shall establish a hotline within the Department of Corrections through which employees may inquire about or disclose incidents of sexual harassment or retaliation, and inquire about their rights to be protected from such misconduct. The telephone number for the hotline shall be prominently posted throughout the Department, and the hotline should be equipped to receive and respond to calls during all shifts.

10. OSI may offer counseling services to those employees who believe they have been victims of sexual harassment or retaliation. OSI shall have authority to hire, or contract with, a licensed therapist to provide counseling services to employees as they are needed.

***16** 11. The Sexual Harassment Advisory Committee will transmit to the SI the views and concerns of Department employees regarding the effectiveness of programs addressing sexual harassment and retaliation, and will report on any problems pertaining to sexual harassment and reprisal.

(a) The Committee will be chaired by the Ombudsperson and composed of employees from all levels of the Department. The Committee will replace the sexual harassment advisory committee recently created by the Department.

(b) The SI will appoint the members of the Committee from among employees who respond to a general notice soliciting candidates. The Committee shall include representation from the plaintiff class.

12. OSI will review the sexual harassment and retaliation training materials in use at the Department each year and shall alter or supplement them as the SI finds necessary.

(a) The SI shall select and approve the instructors who will conduct the sexual harassment and retaliation training programs.

(b) OSI shall ensure that records are kept of each employee's sexual harassment and retaliation training, and that a system is established to ensure that each employee receives a minimum of four hours of sexual harassment and retaliation training each year.

13. For record keeping purposes, a computerized database shall be created in which information can be stored regarding complaints and their outcomes. To the extent that records of previous complaints are available, they shall be made a part of this database.

(a) A copy of the final report covering an investigation of sexual harassment or retaliation, as approved by the SI, shall be given to the complainant, to the respondent, and to the Director. Until further order of the court, a copy shall also be submitted to the court and to counsel for the parties.

(b) A copy of the final investigative report shall be kept on permanent file in OSI.

14. The SI shall report to the court quarterly, submitting a summary of the activities of OSI during the period. The SI will submit copies of the reports on individual complaints to the court as they are completed. At any time, the SI may bring to the court's attention matters within the jurisdiction of OSI, including any violations of orders of this court.

15. OSI shall consider *disciplinary action* for sexual harassment or retaliation that occurred during the period covered by this lawsuit -- against those employees found to have permitted, encouraged, condoned, or engaged in such practices at the Department of Corrections.

(a) Within 30 days of the entry of this order, the parties are each directed to advise the court of the identities of those employees whom the evidence at trial showed may have permitted, encouraged, condoned or engaged in the practices of sexual harassment and/or retaliation, and further to summarize the evidence that gives rise to an inference of such misconduct.

(b) OSI is directed to investigate these allegations in a manner consistent with the procedures set forth in this order. OSI shall afford to each person subject to investigation notice of the alleged misconduct and evidence thereof, and an opportunity to respond and identify witnesses on his or her behalf.

***17** (c) In conducting these inquiries, OSI may rely on any evidence admitted at trial in this action.

(d) OSI will report the results of its investigation and, where appropriate, recommend disciplinary action.

(e) The reports of OSI and any recommendations for disciplinary action pursuant to this order shall be submitted to the court and subject to its approval.

16. The court has reviewed its orders of March 15, 1995 and April 25, 1995, which *protect witnesses* in this

litigation from retaliation, and has determined that these orders shall remain in effect until further notice, pending resolution of the claims of absent class members. They are hereby AMENDED to add Essie Jones and Dennis Brummell, who shall not be retaliated against.

17. A copy of this order shall be *disseminated* to each person employed by the D.C. Department of Corrections. A signed acknowledgement of receipt must be obtained from each employee. Each new employee shall also be issued a copy of this order and sign an acknowledgement of receipt. The signed receipts shall be kept on file in OSI.

SO ORDERED.