UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Ft. Pierce Division

**Case Number: 06-14324-CIV-MARTINEZ-LYNCH**

MELANIE BECKFORD; SUSAN BLACK; TITA DE LA CRUZ; CHARLENE FONTNEAU; LINDA JONES; PAULA LACROIX, JOYCE MEYER; SUSHMA PAREKH; DONNA PIXLEY; VESNA POIRIER; MICHELLE POLLOCK; LOURDES SILVAGNOLI; JANET SMITH; and LEE WASCHER,

Plaintiffs,

vs.

DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,

Defendant.
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**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT**

This CAUSE came before the Court upon the Defendant's Motions for Summary Judgment against Plaintiffs Melanie Beckford (D.E. No. 61), Susan Black (D.E. No. 69), Tita de la Cruz (D.E. No. 73), Charlene Fontneau (D.E. No. 82), Linda Jones (D.E. No. 105), Paula LaCroix (D.E. No. 107), Joyce Meyer (D.E. No. 55), Sushma Parekh (D.E. No. 62), Donna Pixley (D.E. No. 66), Vesna Poirier (D.E. No. 71), Michelle Pollock (D.E. No. 74), Lourdes Silvagnoli (D.E. No. 81), Janet Smith (D.E. No. 85), and Lee Wascher (D.E. No. 99).

The Court prefaces this discussion by noting one point about the docket entry numbers that appear in this Order. The Plaintiffs initiated this action in 2002, when they filed a class

action suit against the Defendant Department of Corrections ("DOC") in the Circuit Court for Washington County, Florida, alleging employment discrimination on the basis of sex. At that time, the Plaintiffs' class was made up of twenty-nine women who had worked for DOC or were still working for DOC at male prison facilities throughout the State of Florida. The DOC removed the case to the United States District Court for the Northern District of Florida, and the district court decertified the class on November 9, 2006, giving rise to a trio of smaller cases in the Northern, Middle and Southern Districts.

All the documents that had been filed in the class action suit up to that point, which include the Plaintiffs' Second Amended Complaint, Plaintiffs' depositions, the Defendant's motions for summary judgment and the Plaintiffs' responses in opposition to those motions, were collectively transferred into this District's docketing system as docket entry number 214. The individual documents were re-labeled as exhibits to that first docket entry.

However, to facilitate identification of the documents that were filed prior to transfer, the Court references all documents according to the number that they were assigned at the time of filing, rather than using their exhibit number under docket entry 214. The Defendant's motions for summary judgment are fully briefed and ripe for adjudication. After careful consideration and for the reasons set forth below, the Court finds that the Defendant's motions should be granted in part and denied in part.

## I. Relevant Facts

The Plaintiffs are suing their former employer, the DOC, for allegedly fostering a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* and the Florida Civil Rights Act, Chapter 760, Florida Statutes

("FCRA").[1] More specifically, the Plaintiffs allege that while they were employed at the DOC's Martin Correctional Institution, they were subjected to sexual harassment by inmates in the close management dorms and confinement units of the male prison. Close management units are areas where inmates who abuse the rights of other inmates or are otherwise unable to follow prison rules are housed to segregate them from the general prison population. The Plaintiffs, who were mainly nurses or health officers,[2] assert that their work brought them into regular contact with inmates in close management custody or other confinement units such as isolation cells in the prison infirmary. As a result, they allege that they were subjected to a steady stream of sexual harassment which ranged from obscene and sexually offensive comments and gestures to indecent exposure and "gunning," a practice in which inmates masturbate in the presence of female staff. They allege further that the DOC had knowledge of this harassment, but allowed it

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[1]The Plaintiffs allege in Count I of their Second Amended Complaint (D.E. No. 14) that the Defendant has violated the Florida Human Rights Act of 1977 and the Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes ("FCRA"). However, their reference to the Florida Human Rights Act of 1977 is misleading. When the Legislature of the State of Florida adopted the FCRA in 1992, it amended Sections 760.01 of the Florida Statutes to read: "[s]ections 760.01-760.11 and 509.072 [760.10] shall be cited as the "Florida Civil [Human] Rights Act of 1992 [1977]." 1992 Fla. Laws ch. 177. Thus, the Florida Human Rights Act of 1977 does not provide the Plaintiffs with a separate cause of action for sexual discrimination; it is simply the statutory predecessor to the FCRA. Accordingly, the Court analyzes the Plaintiffs' claims solely in terms of the FCRA and Title VII of the Civil Rights Act of 1964.

Because the Florida legislature patterned the FCRA after Title VII and Florida courts have analyzed FCRA claims by reference to Title VII case law, however, there really is no meaningful distinction between the Plaintiffs' FCRA and Title VII claims. *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); *Singh v. Green Thumb Landscaping*, 390 F. Supp. 2d 1129, 1133, n.2 (M.D. Fla. 2005). Therefore, the Court's analysis of the Plaintiffs' Title VII claims applies equally to the Plaintiffs' FCRA claims.

[2]Twelve of the Plaintiffs worked at Martin Correctional Institution as Registered Nurses (RN) or Licensed Practical Nurses (LPN): Melanie Beckford, Susan Black, Tita de la Cruz, Charlene Fontneau, Linda Jones, Paula La Croix, Joyce Meyer, Donna Pixley, Vesna Poirier, Michelle Pollock, Lourdes Silvagnoli, and Lee Wascher. Plaintiff Sushma Parekh also worked in health care, serving as a Senior Physician/Chief Health Officer at Martin Correctional Institution. Plaintiff Janet Smith worked as a Classification Officer at Martin Correctional Institution where she was charged with keeping inmates apprised of matters that related to their custody status, including eligibility for gain time, job opportunities and monitoring disciplinary hearings. Although Janet Smith did not conduct daily medical rounds in the close management units as most of her co-Plaintiffs did, nonetheless, her duties also required that she visit inmates in the close management units on a regular basis.

to go unchecked, fostering a hostile and abusive work environment. The Plaintiffs are seeking damages and injunctive relief.

The Defendant has moved for summary judgment with respect to four different issues, but not all of the issues apply to each of the fourteen Plaintiffs. Accordingly, to facilitate discussion of the Defendant's motions, the Court briefly identifies each of these issues below before it discusses the standards of review and delves into a more detailed analysis of the Defendant's arguments.

Failure to Establish a *Prima Facie* Case for Hostile Work Environment

The Defendant argues that six of the fourteen Plaintiffs — Melanie Beckford, Tita de la Cruz, Linda Jones, Sushma Parekh, Michelle Pollock, and Lee Wascher — have failed to establish one of the five elements that are required for a *prima facie* case of hostile work environment. That is, they have failed to show that the environment of sexual harassment which existed in the close management units of Martin Correctional Institution was sufficiently severe and pervasive, in both subjective and objective terms, to alter the terms and conditions of their employment and create a discriminatorily abusive working environment. *See Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) (noting that the employee himself must perceive the harassment to be sufficiently severe and pervasive to alter the terms or conditions of employment, and his perception must also be objectively reasonable). For the reasons discussed more fully below, the Court disagrees and finds that the Defendant is not entitled to summary judgment on this issue.

No Basis for Employer Liability under *Faragher/Ellerth* Affirmative Defense

The Defendant argues that it is entitled to assert an affirmative defense with respect to the

claims of Plaintiffs Tita de la Cruz, Charlene Fontneau, Linda Jones, Sushma Parekh, Donna Pixley, Michelle Pollock, and Lourdes Silvagnoli because these Plaintiffs have failed to show that they utilized the anti-harassment procedures available to DOC employees. Consequently, the Defendant argues that it lacked knowledge of the Plaintiffs' complaints and thus, it cannot be held liable as an employer in accord with the rulings in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). For the reasons discussed more fully below, the Court disagrees and finds that the Defendant is not entitled to summary judgment on this issue.

Failure to Establish Damages

The Defendant argues that thirteen of the fourteen Plaintiffs have failed to provide evidence that they sustained any specific recoverable damages from the sexual harassment that they experienced at Martin Correctional Institution. As a result, the Defendant argues that it is entitled to summary judgment in its favor on the claims of Plaintiffs Melanie Beckford, Susan Black, Tita de la Cruz, Linda Jones, Paula La Croix, Joyce Meyer, Sushma Parekh, Donna Pixley, Vesna Poirier ,Michelle Pollock, Lourdes Silvagnoli, Janet Smith and Lee Wascher. For the reasons stated more fully below, the Court disagrees and finds that the Defendant is not entitled to summary judgment on this basis.

Lack of Standing to Seek Injunctive Relief

The Defendant argues that the Plaintiffs lack standing to seek injunctive relief because they are no longer employed by the DOC. The Defendant asserts this argument against all fourteen Plaintiffs and all fourteen Plaintiffs concede that they are, indeed, no longer employed by DOC. For the reasons stated more fully below, the Court agrees and finds that the Defendant

is entitled to summary judgment on this one issue.

## II. Legal Standard of Review

A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). By its very terms, this standard provides that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there will be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Anderson*, 477 U.S. at 248; *Matsushita Electric Indus. Co.*, 475 U.S. at 586. It is "material" if it might affect the outcome of the case under the governing law. *Anderson*, 477 U.S. at 248. As the United States Supreme Court has cautioned, in considering a motion for summary judgment, a court must draw all reasonable inferences in favor of the non-moving party and not make credibility determinations or weigh the sufficiency of the evidence. *See Reeves v. Sanderson Plumbing Prods., Inc.* 530 U.S. 13 (2000) (noting that the standard for granting judgment as a matter of law is the same as that for granting summary judgment). Thus, the only issue that the court considers on a motion for summary judgment is whether the plaintiff's evidence has placed material facts at issue.

If the moving party bears the burden of proof at trial, the moving party must establish all

essential elements of the claim or defense in order to obtain summary judgment. *See United States v. Four Parcels of Real Prop. in Greene and Tuscaloosa Counties*, 941 F. 2d 1428, 1438 (11th Cir. 1991). The moving party "'must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial.'" *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (Brennan, J., dissenting)). "If the moving party makes such an affirmative showing, it is entitled to summary judgment unless the nonmoving party, in response, 'come[s] forward with significant, probative evidence demonstrating the existence of a triable issue of fact.'" *Four Parcels of Real Prop. in Greene and Tuscaloosa Counties*, 941 F. 3d at 1438 (quoting *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.3d 1472, 1477 (11th Cir. 1991)). *See also* Fed. R. Civ. P. 56(e).

When the non-moving party bears the burden of proof, the moving party does not have to "support its motion with affidavits or other similar material *negating* the opponent's claim." *Celotex*, 477 U.S. at 323 (emphasis in original). To the contrary, the moving party may discharge its burden in this situation by showing the Court that "there is an absence of evidence to support the nonmoving party's case." *Id.* at 324. Once the moving party discharges its initial burden, a non-moving party who bears the burden of proof must "go beyond the pleadings and by [its] own affidavits or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting Fed. R. Civ. P. 56(e)).

## III. Analysis

### A. Do the Plaintiffs Lack Standing to Seek Injunctive Relief?

Because the question of standing is a threshold matter, the Court addresses this argument

first, deferring consideration of the Defendant's other arguments until it resolves the question of whether the Plaintiffs may seek injunctive relief. The Defendant argues that the Plaintiffs lack standing to seek injunctive relief because they are no longer employed by DOC.

The Court notes, at the outset, that this fact is not in dispute. All fourteen Plaintiffs concede that they are no longer employed by DOC, and as a result, all fourteen Plaintiffs have stated in their individual responses to the Defendant's motion for summary judgment that they decline to address this issue. In order to claim injunctive relief, a plaintiff must demonstrate that there is a real or immediate threat that he/she will be wronged again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Thus, as the Supreme Court has advised, a plaintiff must show --"a 'likelihood of substantial and immediate irreparable injury.'" *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974).

Accordingly, where a plaintiff asks a court to enjoin her former employer from committing future discriminatory acts in violation of Title VII, she must allege and/or provide factual support for the claim that the former employer will subject her to future discrimination. *Jackson v. Motel 6 Multipurpose*, 130 F.3d 999, 1007 (11th Cir. 1997). Otherwise, as the Eleventh Circuit has stated, the plaintiff lacks standing to obtain injunctive relief. In view of these facts, the Court finds that the Plaintiffs lack standing to seek injunctive relief and the Defendant is entitled to summary judgment on this issue as a matter of law. Because the Plaintiffs are also seeking damages, however, the resolution of the case cannot be decided on the basis of this issue alone.

B. Have the Plaintiffs Established a Prima Facie Case for a Hostile Work Environment?

Title VII states that it is unlawful for an employer "to fail or refuse to hire or to discharge

any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* The phrase "terms, conditions or privileges of employment" protects "the entire spectrum of disparate treatment of men and women" including sexual harassment. *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986). *See also Gupta v. Fla. Bd. of Regents*, 212 F. 3d 571, 582 (11th Cir. 2000).

The courts recognize two types of sexual harassment claims: "(1) quid pro quo, which are 'based on threats which are carried out' or fulfilled, and (2) hostile environment, which are based on 'bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.'" *Id.* (quoting *Ellerth*, 524 U.S. at 751). In this case, the Plaintiffs have alleged a hostile work environment claim. To support such a claim, each plaintiff must establish each of the following five elements:

> (1) that she belongs to a protected group; (2) that she has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment was based on her sex; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable.

*Gupta*, 212 F. 3d at 582.

The Defendant argues that six of the fourteen Plaintiffs have failed to demonstrate that the harassment was sufficiently severe, from both a subjective and objective perspective, to alter the terms and conditions of employment. Accordingly, the Defendant argues that the Plaintiffs Melanie Beckford, Tita de la Cruz, Linda Jones, Sushma Parekh, Michelle Pollock, and Lee Wascher cannot demonstrate one of the five elements that define a *prima facie* case for a hostile work environment claim under Title VII.

Additionally, the Defendant argues that several of these same Plaintiffs and a number of their co-Plaintiffs have failed to establish a basis for employer liability, which is yet another one of the five elements that define a *prima facie* case for a hostile work environment claim. More specifically, the Defendant argues that the DOC cannot be held liable in this type of case where the Plaintiffs' do not allege they were subjected to a discriminatory employment action, unless the Plaintiffs show that they utilized the anti-harassment procedures available to DOC employees. According to the Defendant, Plaintiffs Tita de la Cruz, Charlene Fontneau, Linda Jones, Sushma Parekh, Donna Pixley, Michelle Pollock, and Lourdes Silvagnoli have failed to make this type of showing.

As a result, the Defendant argues that it is entitled to assert what is known as the *Faragher/Ellerth* affirmative defense. *See Faragher,* 524 U.S. at 807 (holding that an employer who is alleged to be vicariously liable for the discriminatory conduct of one of its supervisors may be relieved of liability if it can demonstrate that: (a) the employer exercised "reasonable care to prevent and correct promptly any sexually harassing behavior" and (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.")

The Court addresses each of these issues in turn.

*B. (1) Was the harassment sufficiently severe and pervasive?*

In determining whether harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of a person's employment, the Supreme Court has advised courts to consider four factors: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct rises is "physically threatening or humiliating" or whether it is limited to offensive

comments; and (4) whether the conduct "unreasonably interferes with the employee's job performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). Courts should not view these factors in isolation, but should examine the conduct in context under the totality of the circumstances to determine whether the harassment is actionable. *Mendoza*, 195 F. 3d at 1246.

Additionally, the harassing conduct should be evaluated from both a subjective and objective perspective. *Mendoza*, 195 F. 3d at 1247. In other words, "the plaintiff must show both that a reasonable person would find the environment 'hostile or abusive' and that she actually did find the environment to be offensive." *Dees v. Johnson Controls World Servs., Inc.*, 168 F.3d 417, 422 (11th Cir. 1999) (quoting *Harris*, 510 U.S. at 21).

Analyzing the Plaintiffs Melanie Beckford, Tita de la Cruz, Linda Jones, Sushma Parekh, Michelle Pollock, and Lee Wascher's claims according to these factors, the Court finds that their deposition testimony clearly establishes that they each perceived their work environment to be hostile and abusive.[3] There is no requirement that a plaintiff present evidence of concrete psychological harm to demonstrate that she perceived her work environment to be hostile. As the Supreme Court has cautioned, "[t]he effect on the employee's well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required." *Harris*, 510 U.S. at 22.

Likewise, the Court also finds that a reasonable person would undoubtedly perceive the

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[3]See the following depositions and affidavits or declarations: Beckford Deposition (D.E. No. 125, #4-5 at 34: 7-25); Beckford Affidavit, (D.E. No. 122 at 4, ¶15); de la Cruz Deposition (D.E. No. 125 at #7, #9 at 32: 7-20; 51: 1-6; 60: 1-15); Jones Deposition (D.E. No. 120, #7-8 at 37: 22-25; 42: 2-16, 24-25; 43: 1-18; 45: 5-17); Parekh Deposition (D.E. No. 121, #2-3 at 43: 11-22; 62: 20-24); Parekh Affidavit (D.E. No. 124, #3-4 at 2, ¶¶ 4-8; 3, ¶ 15); Pollock Deposition (D.E. No. 121, #5-6 at 52: 1-19); Wascher Deposition (D.E. No. 122, #5-6 at 17: 13-25; 29: 8-9; 29: 15-21, 24-25; 30:1; 37: 23-25).

Plaintiffs' work environment to be hostile and abusive given the barrage of sexually offensive comments, gestures, exhibitionist behavior and gunning that awaited the Plaintiffs when they entered the close management units. Although the Eleventh Circuit has not addressed a hostile work environment case where the employees' claims deal with sexual harassment by inmates in a correctional setting, the Ninth Circuit has addressed such a claim in the case of *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006). The Court finds that this ruling is directly on point.

In *Freitag*, the Plaintiff was a female security officer for a state correctional institution who alleged, like the Plaintiffs in this case, that she had been routinely subjected to exhibitionist masturbation by male inmates. *Id.* at 532. The Defendant had argued that prison employers should be uniquely exempt from liability for sexual harassment under Title VII given the inherently hostile nature of correctional settings and the fact that inmates are in custody for having breached social norms. *Id.* at 538. However, the Ninth Circuit wisely refused to carve out an exception for correctional institutions under Title VII, noting that "[n]othing in the law suggests that prison officials may ignore sexually hostile conduct and refrain from taking corrective actions that would safeguard the rights of the victims, whether they be guards or inmates." *Id.* at 539. This Court agrees.

Additionally, the Ninth Circuit held that there was substantial evidence to support the jury's finding that exhibitionist masturbation was sufficiently severe or pervasive to constitute abuse, even though the Plaintiff's first complaint to prison administrators only detailed three incidents of masturbation. *Id.* at 540. Nevertheless, the Defendant argues that it cannot be held liable for the offensive conduct of the close management inmates, citing to a series of decisions in which correctional officers brought hostile work environment claims based upon harassment

by inmates.[4] The Court notes, however, that the Eleventh Circuit has stated that employers may be found liable for the harassing conduct of non-employees if the employer knew or reasonably should have known that the conduct was occurring, but failed to take prompt corrective action. *See, e.g., Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258, n.2 (11th Cir. 2003) (noting that an employer may be held liable for the harassing conduct of its customers if it knew about the conduct and failed to promptly address it). *See also* 29 C.F.R. § 1604.11(e) (2009)(providing that "an employer may be held liable for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agent or supervisory employees) knows of should have known of the conduct and fails to take immediate and appropriate corrective action).

The Plaintiffs in this case have testified in their depositions and affidavits to a regular

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[4]The Court has examined each of these decisions — *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669, 677 (6th Cir 2000), *Powell v. Morris*, 37 F. Supp. 2d 1011, 1017 (S.D. Ohio, 1999), and *Hicks v. Alabama*, 45 F. Supp. 2d 921 (S.D. Ala. 1998). However, the Court is not persuaded that these decisions support the Defendant's argument. For example, the Defendant notes that the *Slayton* court held that "'[i]t is without doubt that inmates' conduct, without more, is an insufficient predicate for a hostile work environment claim." *See, e.g.*, (D.E. No. 73) (quoting *Slayton*, 206 F.3d at 677). Nevertheless, the *Slayton* court upheld a jury verdict for a female officer who had been subjected to sexual harassment by male inmates where "the institution fail[ed] to take appropriate steps to remedy or prevent illegal inmate behavior." *Slayton*, 206 F.3d at 677. Similarly, the Defendant quotes the *Powell* court's observation that "[I]t is absurd to expect that a prison can actually stop all obscene comments from its inmates . . . people who have been deemed unsuited to live in normal society." *See, e.g., Id.* (quoting *Powell*, 37 F. Supp. 2d at 1017). However, the *Powell* court also recognized that prisons may be liable for sexual harassment where they fail to take "proper preventative and remedial steps with regard to inmate behavior." *Powell*, 37 F. Supp. 2d at 1017. Finally, the plaintiffs in the *Hicks* case, unlike the Plaintiffs in the instant case, were female correctional officers who had received training in dealing with exhibitionist masturbation by inmates and had been warned that this type of conduct would occur in advance. *Hicks,* 45 F. Supp. 2d at 926-27. Additionally, the *Hicks* court ultimately found that the employer was not liable on the plaintiffs' hostile work environment claims because the plaintiffs failed to identify any remedial measure which the prison could have used to curtail the inmates' offensive conduct, but deliberately withheld. *Id.* at 933. Thus, none of the case which the Defendant cites actually support the proposition that a prison cannot be held liable to its employees for the sexually harassing conduct of its wards or inmates.

pattern of exhibitionist masturbation.[5] They have also testified that they were not warned about the nature of the work environment before they accepted the employment, that they were not given any training in dealing with inmates under close management custody, and that they made repeated complaints to supervisors or correction officers within the close management units and filled out disciplinary reports when they subjected to gunning, but their complaints and disciplinary reports were largely ignored.[6] Given these facts, the Court cannot say that "there is an absence of evidence to support the nonmoving party's case" on this issue. *See Celotex*, 477 U.S. at 324. Accordingly, the Defendant has not met its burden for summary judgment against Plaintiffs Melanie Beckford, Tita de la Cruz, Linda Jones, Sushma Parekh, Michelle Pollock, and Lee Wascher's on the issue of whether their work environment was both subjectively and objectively hostile and abusive.

*B. (2) Is the Defendant relieved of liability by the Faragher/Ellerth affirmative defense?*

The *Faragher/Ellerth* defense requires an employer prove: "(1) that the employer exercised reasonable care to prevent and promptly correct harassing behavior and (2) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer, or to otherwise avoid harm." *Faragher*, 524 U.S. at

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[5]See the following depositions and affidavits or declarations: Beckford Deposition (D.E. No. 125, #4-5 at 21: 23-25; 22: 1-15; 23: 15-2); Beckford Affidavit (D.E. No. 122 at 2, ¶¶ 4-6); de la Cruz Deposition (D.E. No. 125 at #7, #9 at 32: 7-20;); Jones Deposition (D.E. No. 120, #7-8 at 37: 22-25; 42: 2-16, 24-25; 43: 1-18; 45: 5-17); Parekh Deposition (D.E. No. 121, #2-3 at 21: 16-22; 22: 5-14; 32: 1-14); Parekh Affidavit (D.E. No. 124, #3-4 at 2, ¶¶ 4-8); Pollock Deposition (D.E. No. 121, #5-6 at 52: 1-19); Wascher Deposition (D.E. No. 122, #5-6 at 17: 13-25; 18: 1-7; 38: 5-19).

[6]See the following depositions and affidavits or declarations: Beckford Deposition (D.E. No. 125, #4-5 at 26: 1-3; 27: 14-25; 35: 7-13:); Beckford Affidavit (D.E. No. 122 at 3, ¶¶ 9-11, ¶ 14; ); de la Cruz Deposition (D.E. No. 125 at #7, #9 at 41: 21-23; 42: 8-9; 61: 13-25; 62: 1-11); Jones Deposition (D.E. No. 120, #7-8 at 25: 14-16; 49: 2-25, 50: 1-23; 43: 1-18; 45: 5-17); Parekh Deposition (D.E. No. 121, #2-3 at 4: 14-23; 23: 7-18; 24: 6-18; 25: 5-16; 48: 20-25; 49: 1-19); Parekh Affidavit (D.E. No. 124, #3-4 at 3, ¶ 9-10, ¶ 14); Pollock Deposition (D.E. No. 121, #5-6 at 30: 8-25; 31: 1-10); Wascher Deposition (D.E. No. 122, #5-6 at 27: 13-20; 31: 17-25; 32: 8-10).

807; *Ellerth*, 524 U.S. at 765 (same). "Both elements must be satisfied for the defendant-employer to avoid liability, and the defendant bears the burden of proof on both elements." *Frederick v. Sprint/United Mgmt. Co.*, 246 F. 3d 1305, 1313 (11th Cir. 2001).

The Defendant asserts that it had a formal process for pursuing employment and work-related complaints of harassment, but Plaintiffs Tita de la Cruz, Charlene Fontneau, Linda Jones, Sushma Parekh, Donna Pixley, Michelle Pollock, and Lourdes Silvagnoli have failed to show that they took advantage of this process. Thus, the Defendant asserts that it is entitled to summary judgment on the basis of the *Faragher/Ellerth* affirmative defense.

The Court disagrees for a number of reasons. As a threshold matter, the Court is not persuaded that the *Faragher/Ellerth* affirmative defense even applies in this case. Both the *Faragher* and *Ellerth* cases dealt with situations where an employer in a Title VII suit was subject to vicarious or indirect liability for the harassment of an employee by a supervisor but the victimized employee had not suffered a tangible employment action.[7] *See Faragher*, 524 U.S. at 780, 807; *see also Ellerth*, 524 U.S. at 746, 764-65. The Supreme Court held that in cases of indirect liability, the defending employer is entitled to assert an affirmative defense. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 764. Although the Plaintiffs in the instant case do not allege that they suffered a tangible employment action such as a demotion or firing, they are not proceeding against their employer on theory of indirect or vicarious liability for supervisory conduct. Rather, they allege that the Defendant is directly liable for the harassing conduct of its inmates or wards because it negligently permitted them to engage in tortious conduct. (d.E. No.

[7]Indeed, the Defendant acknowledges that the *Faragher* case arose in the context of a vicarious liability claim. *See, e.g.*, (D.E. No. 73 at 10).

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As the Eleventh Circuit observed in *Dees v. Johnson Controls World Servs., Inc.*, 168 F.3d 417, 422 (11th Cir. 1999), an employer may be held liable for sexual harassment under either one of two theories; direct liability or indirect/vicarious liability. Nevertheless, regardless of whether employer liability is alleged to be direct or indirect, if the employer had notice of the harassment, then it can be held liable. *Id.* at 422 (11th Cir. 1999).

However, assuming *arguendo*, that the Defendant is entitled to assert the *Faragher/Ellerth* affirmative defense in this case, the Court finds that the Defendant has failed to meet its burden for summary judgment. As the Court noted above, there are two elements that must be established under this defense, and the defendant employer bears the burden of establishing both elements. *Frederick,* 246 F. 3d at 1313. To reiterate, the Defendant must show that (1) it exercised reasonable care to prevent and promptly correct the harassing conduct by the close management inmates and (2) that the Plaintiffs unreasonably failed to take advantage of DOC's preventative or corrective policies or measures, or "to otherwise avoid harm." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765 (same).

The Plaintiffs have presented evidence to dispute the Defendant's assertion that it had a formal sexual harassment process or policy for dealing with inmate abuse. According to the deposition testimony of DOC's designated expert on DOC employment policies, James Upchurch, the DOC's sexual harassment policy dealt with sexual harassment by other employees and did not address sexual harassment by inmates. (D.E. No. 126 at 44; 4-12, 14-25; 46-48. 49: 17-25; 50: 1-2). Additionally, the Plaintiffs have testified in their depositions and affidavits that they repeatedly filed disciplinary reports on inmates who had exposed themselves or masturbated

in front of them, and attempted to implement their own corrective measures such as putting up screens to block the inmates' view, but that their supervisors largely ignored these reports and prohibited them from taking their own corrective measures, and/or largely refused to enforce a policy requiring that inmates be clothed when medical personnel arrived.[8] Thus, this material fact remains very much in dispute and summary judgment is not appropriate.

Moreover, the Defendant has not cited to any evidence in the record which would show that it exercised reasonable care to prevent and promptly correct sexual harassment by close management inmates. The burden to demonstrate this fact rests with the Defendant. Because, the Defendant has failed to establish the requisite elements of the *Faragher/Ellerth* affirmative defense, the Defendant is not entitled to summary judgment against Plaintiffs Tita de la Cruz, Charlene Fontneau, Linda Jones, Sushma Parekh, Donna Pixley, Michelle Pollock, and Lourdes Silvagnoli.

C. Have the Plaintiffs Established Damages?

The Defendant argues that thirteen of the fourteen Plaintiffs have failed to provide evidence that they sustained specific injuries as a result of the inmates' sexual harassment. Thus, according to the Defendant, these Plaintiffs simply did not suffer any damages. Therefore, the Defendant asserts that it is entitled to summary judgment in its favor with respect to the claims of the Plaintiffs Melanie Beckford, Susan Black, Tita de la Cruz, Linda Jones and Paula La Croix,

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[8]See the following depositions and affidavits or declarations: de la Cruz Deposition (D.E. No. 125 at #7, #9 at 36: 4-25; 40: 21-23; 43: 18-25); Fontneau Deposition (D.E. No. 124, #10 at 22: 15-23; 23-25; 29: 15-23; 38: 12-19; 46: 3-11; 50: 1-6, 10-21); Fontneau Declaration (D.E. No. 124, #10 at 3, ¶¶ 9-11); Jones Deposition (D.E. No. 120, #7-8 at 49: 2-25; 50: 1-23; 53: 18-23; 67: 1-9; 55-56); Parekh Deposition (D.E. No. 121, #2-3 at 23: 7-18; 24: 6-18; 25: 5-16; 33: 7-22; 48: 20-25; 49: 1-9); Parekh Affidavit (D.E. No. 124, #3-4 at 3, ¶ 9); Pixley Deposition (D.E. No. 121, #3-4 at 29: 9-10, 15-16, 21-23; 30: 10-20; 33: 1-12; 38-40); Pixley Affidavit (D.E. No. 124, #4-5 at 2, ¶¶ 6-7); Pollock Deposition (D.E. No. 121, #5-6 at 30: 8-25; 31: 1-10); Silvagnoli Deposition (D.E. No. 121, #7-8 at 31: 6-25; 32: 1-14; 38: 9-39; 43-44; 47: 8-13; 50: 5-18; 66: 1-3 ).

Joyce Meyer, Sushma Parekh, Donna Pixley, Vesna Poirier, Michelle Pollock, Lourdes Silvagnoli, Janet Smith and Lee Wascher.

The Plaintiffs correctly point out, however, that they are entitled to general compensatory damages under both Title VII and the FCRA and that general compensatory damages "may be inferred from circumstances as well as proved by testimony." *See Ferrill v. The Parker Group*, 168 F. 3d 468, 476 (11th Cir. 1999) (quoting *Gore v. Turner*, 563 F.3d 159, 164 (5th Cir. 1977)); *see also Akouri v. State of Florida Dep't. of Transp.*, 408 F. 3d 1338, 1345 (11th Cir. 2005). Moreover, a plaintiff need not proffer expert witness testimony concerning her pain and suffering; her own testimony of humiliation can be sufficient to establish grounds for general compensatory damages. *See Marable v. Walker*, 704 2d 1219, 1220 (11th Cir. 2005) (holding that a plaintiff's testimony about feeling embarrassed and humiliated was sufficient in and of itself to entitle him to compensatory damages). Indeed, the Eleventh Circuit's Pattern Jury Instruction for Title VII hostile work environment claims states that compensatory damages "cover both the mental and physical aspects of injury – – tangible and intangible". . . . and "no evidence of the value of such intangible things as emotional pain and mental anguish . . need be introduced." Instruction 1.2.2 - Title VII - Civil Rights Act Claims, Eleventh Circuit Pattern Jury Instructions (Civil Cases) 2005.

The Court finds that all thirteen of the aforementioned Plaintiffs have testified to experiencing humiliation or some form of pain and suffering as a result of their hostile work environment. For example, nearly all of these Plaintiffs testified that they felt humiliated when the inmates made sexually degrading comments, and degraded, violated or overcome with anger

and a sense of shame when the inmates exposed themselves and engaged in gunning behavior.[9] Similarly, a number of these Plaintiffs testified to feeling demoralized when they found that there was no follow-through on their complaints and the disciplinary reports that they filed on the inmates' behavior were rejected.[10] Additionally, twelve of these thirteen Plaintiffs testified to experiencing various forms of mental anguish such as intrusive thoughts, anxiousness, marital troubles, and lack of interest in sex, which they attributed to the stress of their hostile work environment.[11] Accordingly, the Court finds that the Plaintiffs Melanie Beckford, Susan Black, Tita de la Cruz, Linda Jones, Paula La Croix, Joyce Meyer, Sushma Parekh, Donna Pixley, Vesna Poirier, Michelle Pollock, Lourdes Silvagnoli, Janet Smith and Lee Wascher have offered evidence of their individual damages and the Defendant is not entitled to summary judgment on this basis.

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[9]See the following depositions and affidavits or declarations: Beckford Deposition (D.E. No. 125, #4-5 at 34:7-10); Beckford Affidavit (D.E. No. 122 at 4,¶ 15); Black Deposition (D.E. No. 125, #5-6 at 60: 15-21); de la Cruz Deposition (D.E. No. 125 at #7, #9 at 32: 7-20; 51: 1-6); Jones Deposition (D.E. No. 120, #7-8 at 37: 22-25); LaCroix Deposition (D.E. No. 120, #8-9 at 67: 24-25; 68: 1-3, 23-25; 72: 17-19); Meyer Deposition (D.E. No. 120, #10: 59:16-22); Parekh Deposition (D.E. No. 121, #2-3 at 43: 11-22); Parekh Affidavit (D.E. No. 124, #3-4 at 3, ¶ 15); Pixley Deposition (D.E. No. 121, #3-4 at 40: 1-6); Pixley Affidavit (D.E. No. 124, #4-5 at 1-2, ¶¶ 3-5); Poirier Deposition (D.E. No. 121, #4-5 at 38: 9-10; 64: 17-18; 72: 23-25; 73: 17-18); Silvagnoli Deposition (D.E. No. 121, #7-8 at 51: 9-18; 63: 15-21); Smith Deposition (D.E. No. 121, #9-10 at 35: 1-9; 36: 9-16); Wascher Deposition (D.E. No. 122, #5-6 at 17: 13-25; 18: 1-7; 37: 23-25).

[10]See the following depositions and affidavits or declarations: Beckford Deposition (D.E. No. 125, #4-5 at 25-26); Black Deposition (D.E. No. 125, #5-6 at 59: 19-25; 60: 1-12); de la Cruz Deposition (D.E. No. 125 at #7, #9 at 60: 1-15); Jones Deposition (D.E. No. 120, #7-8 at 49: 2-25; 50: 1-23); Meyer Deposition (D.E. No. 120 , #10 at 54: 7-9; 66-67); Parekh Deposition (D.E. No. 121, #2-3 at 24:6-18; 25;5-16; 48: 20-25); Poirier Deposition (D.E. No. 121, #4-5 at 33-36; 38: 9-10); Pollock Deposition (D.E. No. 121, #5-6 at 30; 8-25; 31: 1-10); Silvagnoli Deposition (D.E. No. 121, #7-8 at 66:1-3); Smith Deposition (D.E. No. 121, #9-10 at 36: 9-16).

[11]See the following depositions and affidavits or declarations: Beckford Deposition (D.E. No. 125, #4-5 at 34:20-22); Black Deposition (D.E. No. 125, #5-6 at 49: 17-21; 50 ; 7-21, 25; 51; 1-16); de la Cruz Deposition (D.E. No. 125 at #7, #9 at 50: 6-25; 51: 23-24; 52: 1-17; 59: 11-25; 60: 1-25); Jones Deposition (D.E. No. 120, #7-8 at 69: 16-24; 70-72); LaCroix Deposition (D.E. No. 120, #8-9 at 67; 24-25; 68:1-3, 23-25; 69: 7-21); Meyer Deposition (D.E. No. 120 , #10 at 59: 3-4; 60: 16-25; 61-64); Parekh Deposition (D.E. No. 121, #2-3 at 42:14-17; 62: 20-24; 63: 2-12); Poirier Deposition (D.E. No. 121, #4-5 at 21; 64-65; 73: 3-7, 17-18); Pollock Deposition (D.E. No. 121, #5-6 at 52; 1-19); Silvagnoli Deposition (D.E. No. 121, #7-8 at 32-34; 38-39); Smith Deposition (D.E. No. 121, #9-10 at 33: 17-23; 34: 6-14, 24-25; 35); Wascher Deposition (D.E. No. 122, #5-6 at 30: 4-19).

In light of the foregoing, and for the reasons that the Court cited at calendar call on April 24, 2008,[12] it is:

**ORDERED and ADJUDGED** that

Defendant's Motions for Summary Judgment against Plaintiffs Melanie Beckford **(D.E. No. 61)**, Susan Black **(D.E. No. 69)**, Tita de la Cruz **(D.E. No. 73)**, Charlene Fontneau **(D.E. No. 82)**, Linda Jones **(D.E. No. 105)**, Paula LaCroix **(D.E. No. 107)**, Joyce Meyer **(D.E. No. 55)**, Sushma Parekh **(D.E. No. 62)**, Donna Pixley **(D.E. No. 66)**, Vesna Poirier **(D.E. No. 71)**, Michelle Pollock **(D.E. No. 74)**, Lourdes Silvagnoli **(D.E. No. 81)**, Janet Smith **(D.E. No. 85)**, and Lee Wascher **(D.E. No. 99)** are **GRANTED in part** and **DENIED in part.** They are GRANTED to the extent that the Defendant argues that the Plaintiffs lack standing to seek injunctive relief. In all other respects, the Defendant's motions for summary judgment are DENIED.

DONE AND ORDERED in Chambers at Fort Pierce, Florida, May 8, 2008.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Lynch
All Counsel of Record

[12]The Court informed the parties at Calendar Call how it would be ruling on the Defendant's Motions for Summary Judgment and briefly explained its reasons, advising the parties that it would follow the bench ruling with a formal written order.