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.
_____/

ORDER ON MOTION FOR JUDGMENT AS A MATTER OF LAW

This matter is before the Court on Defendant's Motion for Judgment as a Matter of Law or In the Alternative New Trial (D.E. Nos. 382, 383). The above-captioned case went to trial before a jury commencing on April 29, 2008, and the jury found the Defendant liable on Counts I and II of the Plaintiffs' Second Amended Complaint (D.E. No. 14), which allege violations of the Florida Civil Rights Act, Chapter 760, Florida Statutes and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. The jury awarded each Plaintiff damages in the amount of $45,000.00, and the Court entered judgment in accordance with the jury's verdict.

I. Standard

Rule 50(b) of the Federal Rules of Civil Procedure provides that a party may renew a motion

for judgment as a matter of law after the entry of judgment following a jury verdict. Fed. R. Civ. P 50(b). Rule 50(b) also provides that the movant may request a new trial at this time under Rule 59 of the Federal Rules of Civil Procedure.

In deciding whether to grant a motion for judgment as a matter of law at the conclusion of a jury trial, a court applies many of the same standards that it uses to evaluate pretrial motions for summary judgment. *See Berman v. Orkin Exterminating Co.*, 160 F.3d 697, 701 (11th Cir. 1998). Thus, as is the case with a motion for summary judgment, on a motion for judgment as a matter of law, "a court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmoving party." *Id.* The court should grant the motion only if it finds that "reasonable people exercising impartial judgment could not arrive at a contrary verdict." *Id.* "[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151.

Rule 59 provides that the "court may, on motion, grant a new trial on all or some of the issues--and to any party-- . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). "As . . . in the context of judgments as a matter of law, courts are generally not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Aronowitz v. Health-Chem Corp.*, 513 F.3d 1229, 1242 (11th Cir. 2008) (internal quotations omitted).

II. Analysis

Defendant has raised several grounds for overturning the jury's verdict in this case. For the reasons discussed below, the Court finds that these do not provide sufficient grounds for granting Defendant's motion.

A. Defendant's liability for harassment by inmates

Defendant renews its argument, raised in its motion for summary judgment, that because it is legally obligated to house inmates, and because inmates' offensive behavior cannot be wholly eliminated, it should not be liable for harassment by the inmates. As discussed in this Court's ruling on Defendant's motion for summary judgment, however, this argument is not persuasive.

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."). Although the Eleventh Circuit has not spoken on the subject, many courts, even those cited by Defendant, have held that "a corrections department can be held liable for inmate sexual harassment directed at female employees, particularly when it is shown that the department refused to take appropriate corrective action." *Garrett v. Dep't of Corrections*, 589 F. Supp. 2d 1289, 1297 (M.D. Fla. 2008); *accord Freitag v. Ayers*, 468 F.3d 528,

539 (9th Cir. 2006); *Slayton v. Ohio Dep't of Youth Services*, 206 F.3d 669, 677 (6th Cir. 2000); *Powell v. Morris*, 37 F. Supp. 2d 1011, 1017 (S.D. Ohio, 1999). Defendant's argument that holding it liable under Title VII for sexual harassment by inmates is the equivalent of holding them strictly liable for inmate behavior is without merit. This Court and the other courts that have held corrections departments may be liable for harassment by inmates have not ruled that corrections departments are required to eliminate all harassing behavior by inmates, merely that they must "take appropriate corrective action," *Garrett*, 589 F. Supp. 2d at 1297, or, in the words of the verdict form before the jury, "exercise *reasonable care* to prevent and correct promptly" sexual harassing behavior. (D.E. Nos. 366-79) (emphasis added); *see also Freitag*, 468 F.3d at 539 ("[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."); *Slayton*, 206 F.3d at 677 (holding a corrections department liable when "the institution fail[ed] to take appropriate steps to remedy or prevent illegal inmate behavior."). There was sufficient evidence at trial that Defendant failed to take reasonable and prompt corrective action to remedy sexual harassment.

B. Harassment based upon sex

Defendant has asserted that Plaintiffs have failed to prove that they suffered harassment because of their sex, because there was evidence at trial that inmates sometimes harassed male corrections employees. Sexual harassment under Title VII must be based upon the Plaintiffs' sex. *Gupta v. Fla. Bd. of Regents*, 212 F. 3d 571, 582 (11th Cir. 2000). In this case, however, there was sufficient evidence for the jury to find that the harassment was because of Plaintiffs' sex.

The fact that inmates masturbated at the Plaintiffs, rather than merely making sexual remarks

or performing actions less indicative of sexual arousal, provides evidence that the harassment was because of Plaintiffs' female gender. "A harasser may well make sexually demeaning remarks and putdowns to the plaintiff for sex-neutral reasons, . . . but he is far less likely to make sexual advances without regard to sex." *La Day v. Catalyst Technology, Inc.*, 302 F.3d 474, 480 (5th Cir. 2002). No male employees testified that they were masturbated at or "gunned." Furthermore, the evidence clearly showed that females were disproportionately targeted for harassing behavior by the inmates, and Defendant acknowledged that there was testimony that Defendant followed up on complaints by male corrections officers more often than complaints by female nurses. That evidence was sufficient to find that the harassment was because of Plaintiffs' sex.

C. Availability of corrective measures

Defendant next asserts that the verdict should be overturned because the Plaintiffs did not prove that the correction actions that Defendant could have taken would have worked. In support of this argument, Defendant cites cases which refer to speculative evidence[1] being insufficient to show discriminatory *animus*. *See, e.g., Slusher v. Arlington County*, 673 F. Supp. 752, 753-54 (E.D. Va. 1987). Defendant has not cited any cases requiring Plaintiffs to prove the effectiveness of corrective measures that Defendant declined to take. Defendant has also not cited to any cases holding that such proof is an element of a hostile environment sexual harassment claim, nor is the Court aware of any. *See Gupta*, 212 F. 3d at 582 (listing elements of a hostile environment claim).

As discussed above, Defendant's liability in this case is premised upon their failure to take

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[1] Although Defendant did not object at trial that Plaintiff's expert, Ron Andrews, gave speculative testimony regarding measures Defendant could have taken, Defendant's rely on this in their motion. Defendant's failure to object in trial operates as a waiver, however. *Christopher v. Cutter Laboratories*, 53 F.3d 1184, 1191-92 (11th Cir. 1995).

appropriate steps and promptly implement corrective action, not their failure to control utterly all aspects of inmate behavior. *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); *Slayton v. Ohio Dept. of Youth Services*, 206 F.3d 669, 677 (6th Cir. 2000) (holding that a corrections department may be held liable for failure to take corrective steps). In this case, there was evidence that Defendant failed to enforce its own rules requiring that inmates be dressed, that Plaintiffs were discouraged from writing disciplinary reports and their reports and complaints were largely ignored, and Defendant prohibited the measures the nurses themselves took to remedy the situation, such as erecting screens. This evidence is sufficient to show that Defendant failed to take prompt remedial action to prevent the harassing behavior.

D. Defendant's *Faragher* defense and proposed jury instruction

Defendant argues both that this Court should have instructed the jury on the *Faragher* defense and that this Court should grant Defendant judgment as a matter of law on the *Faragher* defense. The *Faragher* defense is an affirmative defense that may be raised only by an employer who is being held indirectly or vicariously liable for sexual harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). Plaintiffs proceeded with this case under a theory of direct liability, instead of indirect liability. "Direct liability arises when the employer either knew or should have known of supervisory harassment but failed to take remedial action." *Howard v. City of Robertsdale*, 168 Fed. Appx. 883, 889 (11th Cir. 2006); *see also Dees v. Johnson Control*, 168 F.3d 417, 421 (11th Cir. 1999) (holding that an employer is directly liable for harassment where the employer "either intended, or negligently

permitted, the tortious conduct to occur."). In this case, the jury was instructed that, in order to find the Defendant liable, they had to find that Defendant knew or should have known of the harassment, which is consistent with the requirements for direct liability. *See* (D.E. No. 363 - Jury Instructions); *Dees*, 168 F.3d at 422; *Howard*, 168 Fed.Appx. at 889. Because the Plaintiff proceeded with, and the jury was instructed for, direct liability, and because the *Faragher* defense is not available in cases of direct liability, the Court was correct not to instruct the jury on *Faragher*. Thus, the lack of a *Faragher* instruction is not grounds for a new trial.

Even had the *Faragher* defense been applicable, however, Defendant would not be entitled to judgment as a matter of law based upon it. As the Eleventh Circuit stated in Dees, "in regard to both the direct liability standard and the employer's affirmative defense to vicarious liability, the employer's notice of the harassment is of paramount importance; if the employer had notice of the harassment (which is required for direct liability but not required for vicarious liability), then it is liable unless it took prompt corrective action." *Dees*, 168 F.3d at 422. This is because the *Faragher* 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 807; *Ellerth*, 524 U.S. at 765. There was ample evidence before the jury that, despite notice of the harassment in the form of actual or constructive knowledge, Defendant did not exercise reasonable care to prevent and promptly correct harassing behavior. Thus, judgment as a matter of law on the *Faragher* defense is not warranted.

E. Limited Sequestration

Defendant argues that it is entitled to a new trial because the Court denied its motion for

limited sequestration of the Plaintiffs. Defendant wished each Plaintiff sequestered until after until she testified. Defendant does not cite any authority for the proposition that plaintiffs in a sexual harassment case should not be permitted to hear each other's testimony. Plaintiffs testified at length about their own experiences and adequately established their respective Title VII claims. Thus, the Court does not find this a reasonable basis for a new trial.

F. Admission of the Washington Correctional Institute letter

Defendant argues that it is entitled to a new trial because the Court permitted introduction of a letter prepared by nurses, not Plaintiffs, who worked at the Washington Correctional Institute, complaining of the same type of harassment suffered by Plaintiffs at their institute. The letter was probative evidence of knowledge at a high level of the Department of Corrections that the type of harassment Plaintiffs complained of was occurring in correctional institutes. The Court disagrees with Defendant that the prejudicial effect of this letter outweighed its probative effect. Its admission does not justify discarding the jury's verdict.

G. Defendant's proposed modification of pattern jury instruction

Defendant requested that the Eleventh Circuit Standard Jury Instruction 1.2.2 be modified to read as follows:

> It should be remembered that the Plaintiffs chose to work in a correctional facility. Anyone who works in a prison, particularly in a position with frequent inmate contact, must expect some off-color interactions. Prison employees inherently assume the risk of some rude inmates. It is absurd to expect that a prison can actually stop all obscene comments and conduct from its inmates – people who have been deemed unsuited to live in normal society.

Defendant has not, however, demonstrated that the Eleventh Circuit's pattern jury instruction was inadequate. The pattern jury instruction directs the jury to find liability only if a supervisor permitted the harassment and only if the plaintiff did not directly or indirectly invite or solicit the

harassment. This is more suitable for this case than the Defendant's proposed instruction, which misleadingly instructs the jury that it is "absurd" to expect a prison to stop "all" obscene comments, despite the fact that the prison's failure to stop all obscene comments is not the basis for liability asserted by Plaintiffs. This Court's use of the pattern jury instruction is not a sufficient reason to disregard the jury verdict and direct a new trial.

Finally, with respect to Defendant's last contention, the Court concludes that the Plaintiffs presented sufficient evidence to support the jury's verdict. Accordingly, it is

ORDERED AND ADJUDGED that

1. Defendant's Motion for Judgment as a Matter of Law or in the Alternative New Trial **(D.E. No. 382, 383)** is **DENIED**.

2. This case is **CLOSED** and all pending motions are **DENIED as MOOT**.

DONE AND ORDERED in Miami, Florida, this 23 day of February, 2009.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Lynch
All Counsel of Record