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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 II

(EQUITABLE RELIEF FOR INDIVIDUAL NAMED PLAINTIFFS)

Attorneys and Law Firms

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LAMBERTH, District Judge.

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

I. BACKGROUND

To date, this litigation has included two successive trials before the same jury, followed by a non-jury trial. The first jury trial addressed only common issues related to class liability. The second jury trial addressed legal damages (i.e., medical expenses; pain and suffering) for the named plaintiffs. The non-jury trial addressed equitable remedies (i.e., back pay; front pay; job reinstatement; promotions; injunctive relief) for the named plaintiffs. Later proceedings will address liability and remedies for absent class members.

In the liability phase of the trial, the jury found that plaintiffs had established, by a preponderance of the evidence, that defendants had engaged in a pattern and practice of quid pro quo sexual harassment, hostile environment sexual harassment, and retaliation in violation of Title VII.[1] Specifically, the jury unanimously answered "yes" to the following questions: (1) Do you find that the Department of Corrections engaged in a pattern and practice of sexual harassment by creating a sexually hostile working environment for female employees? (2) Do you find that the Department of Corrections engaged in a pattern and practice of sexual harassment by making or threatening to make job benefits for women conditioned upon the granting of sexual favors? (3) Do you find that the Department of Corrections engaged in a pattern and practice of retaliation against employees who challenged or complained of sexual harassment or who assisted others in challenging sexual harassment?

In the legal damages phase of the trial, the same jury made determinations in favor of six individual plaintiffs on their Title VII claims. With respect to Vera Brummell, Barbara Carter, Bessye Neal, Shivawn Newsome, Tyrone Posey and Teresa Washington, the jury answered the following question in the affirmative: Do you find that defendants' pattern or practice of sexual harassment and/or retaliation[2] in violation of Title VII of the Civil Rights Act of 1964 adversely affected plaintiff [name]?[3]

In order to have answered the Title VII question affirmatively, the jury was instructed to find, for each individual, *one* of the following: (a) that advances of a sexual nature were made to her and were unwelcome; (b) that she found the sexually hostile environment personally offensive, and that a reasonable person would find the environment offensive; or (c) that the pattern or practice of retaliation played a role in any action or threat of action taken against him or her, or any changes in his or her job conditions.

***2** The jury's first verdict thus establishes liability of the Department of Corrections for a pattern or practice of sexual harassment and/or retaliation. The second verdict establishes that such pattern or practice had an adverse effect on six of the plaintiffs. Therefore, the court's findings for these six plaintiffs will be limited to additional particularized facts necessary to substantiate their claim for equitable relief.

The court will treat separately the claims for equitable relief of plaintiff Essie Jones. Her allegations involved sexual favoritism; but the jury found, under both Title VII and section 1983, that sexual favoritism did not disadvantage Jones in the terms and conditions of her employment. The court will also treat separately the claims for equitable relief of plaintiff Sharon Bonds. The jury at the legal damages phase of the trial was not asked to render a verdict on Bonds; her claims pre-dated the cutoff for legal remedies under either Title VII or section 1983.

II. INITIAL CONCLUSIONS OF LAW

There are seven issues of law that the court must resolve before examining factual implications. These issues are: (1) the starting date for establishing claims to equitable relief; (2) presumptions arising from the jury trial and resultant burdens of proof; (3) the binding effect on the court of the jury's factual determinations; (4) front pay versus reinstatement; (5) mitigation of damages; (6) reduction of awards for workers' compensation, unemployment benefits and periods of unavailability; and (7) reduction of awards for income taxes and other payroll taxes.

A. Starting Date

Section 706(g) of Title VII dictates that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [Equal Employment Opportunity] Commission." The earliest sexual harassment charge in this case was filed by plaintiff Sharon Bonds on January 26, 1990. The earliest retaliation charge was filed by plaintiff Bessye Neal on January 29, 1992. Accordingly, back pay claims may go back to January 26, 1988 for sexual harassment, and to January 29, 1990 for retaliation.[4]

B. Presumptions and Burden of Proof

The jury in the liability phase rendered a verdict establishing that the Department was culpable for its pattern or practice of harassment and/or retaliation. This "proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 362 (1977). Consequently, all members of the class are "presumptively entitled to relief." *Id.* Once the employer has been proven to be a discriminator, and adverse effect on a particular plaintiff has been demonstrated, the plaintiff's prima facie case is complete. Both the burden of production and persuasion then shifts to the employer to show that the adverse job action or employment condition would have transpired even if the plaintiff had not been the victim of discrimination. *Day v. Mathews,* 530 F.2d 1083, 1085 (D.C.Cir.1976).

***3** The *Mathews* formulation was updated by the D.C.Circuit five years later in *Bundy v. Jackson,* 641 F.2d 934, 953 (D.C.Cir.1981). Combining these two precedents, the court will impose upon the parties the following burdens:

First, the individual plaintiff must establish a prima facie case by demonstrating that she or he was unfavorably affected by the Department's pattern or practice of harassment and/or retaliation. As noted, plaintiff is entitled to an inference under *Teamsters,* deriving from the jury's liability phase verdict, that any unfavorable employment incident arose from the Department's pattern or practice. It will be sufficient for plaintiff to show that an adverse action or job condition eventuated with no obvious alternative explanation. For example, plaintiff might offer evidence that she applied for and was denied a promotion for which she was technically eligible and of which she had a reasonable expectation. The court will not require plaintiff to prove as part of the prima facie case that other less-qualified employees were promoted instead of plaintiff.

Plaintiffs' establishment of a prima facie case is necessary, notwithstanding the jury's verdict in the damages trial. Specific events that would justify equitable relief at the current stage may not have been decided in favor of plaintiff in the earlier damages proceeding (see Part II–C *infra*).

Second, the burden shifts to the Department of Corrections to demonstrate, by clear and convincing evidence,[5] that it had legitimate non-discriminatory reasons for the adverse action or job condition. For example, the Department might show that, despite the plaintiff's technical eligibility for promotion, other better-qualified employees were promoted to the job for which plaintiff had applied, and their better qualifications were relevant in predicting job performance. If the Department successfully meets this burden, then third, plaintiff still has an opportunity to prove that the Department's purported reasons were mere pretext.

C. Binding Effect of Jury Findings on the Court

This litigation encompasses legal claims tried to a jury and equitable claims tried to the court. "When legal and equitable claims are joined in the same act, 'the right to jury trial on the legal claim, including all issues common to both claims, remains intact.' " *Lytle v. Household Mfg., Inc.,* 494 U.S. 545, 550 (1990) (quoting *Curtis v. Loether,* 415 U.S. 189, 196 n. 11 (1974)). Accordingly, the court is bound by the factual determinations of the jury in both the liability and damages phases of this lawsuit.

Defendants argued unsuccessfully to the court that the special verdict form for the legal damages phase should have included more detailed findings of fact. The court would thereby have known the factual basis for the jury's verdict as to each plaintiff. For example, detailed findings would have informed the court which individual plaintiffs, if any, were determined by the jury to have suffered psychological injuries that would entitle them to equitable recovery for front pay. Defendants maintain that the generalized findings in the special verdict form are inadequate to gauge whether particular equitable relief is consistent with the jury's verdict for a given plaintiff. As a result, say defendants, they were denied their Seventh Amendment right to jury trial on these common issues.

***4** The court rejects this argument for a number of reasons. First, defendants offer no case law suggesting that special verdict forms must be so explicit as to cover every event that might be considered by the court in a subsequent related proceeding. Second, 21 questions appeared on the jury form at the damages phase of the trial. More detailed interrogation would run the risk of confusing and demoralizing the jury—a risk especially evident in this case where the court found it necessary to dismiss three jurors. Third, some common issues that materialized during the non-jury trial simply could not be anticipated; it is most improbable that the court could have succeeded, even if it were so inclined, to identify in advance every conceivable issue that might subsequently arise.

Fourth, the events underlying equitable relief (e.g., back pay) are not always congruent with the events underlying legal relief (e.g., pain and suffering). The jury may well have decided that a particular plaintiff was sexually harassed and experienced pain and suffering, without deciding whether the plaintiff was denied a promotion. Juries must not be required to settle controversies that are not integral to their verdict. Fifth, the directive of *Lytle* and *Curtis* is that juries resolve issues "common to both claims." However, few if any of the issues that the court must decide today were *necessarily* common (in a "but for" sense) to both legal and equitable relief. That is, if events A, B and C might each have justified a damage award, the jury could have based its verdict on, say, A without addressing B and C. It follows that B and C were not issues common to both jury and non-jury trials.

Sixth, the omission of precision detail from the verdict form probably benefited defendants. If the jury had found no adverse effect (as in the case of plaintiff Essie Jones), the court would be bound by this generalized verdict. Obviously, a generalized "no" precludes the possibility of a specific "yes" as to any particular event. On the other hand, if the jury responded "yes" to adverse effect (as it did for six of the plaintiffs), the court will nevertheless re-evaluate as to each plaintiff whether his or her prima facie case can be sustained for each event. This renewed deliberation by the court is necessary because the events that might justify equitable relief may not have been decided in favor of the plaintiff in the legal damages proceeding.

All things considered, defendants' objection to the special verdict form is not persuasive.

D. Front Pay Versus Reinstatement

Defendants assert that the court should exercise great restraint in awarding front pay. Plaintiffs' psychiatric expert, Dr. Ellen McDaniel, posited lengthy periods of time for plaintiffs to recover from the effects of harassment and retaliation. Defendants urge the court to avoid speculative front pay under such circumstances. Instead, defendants urge the court to monitor plaintiffs' progress and adjust back pay awards at specific intervals until each plaintiff has been re-employed.

***5** There is some merit in this argument. Perhaps taxpayers should not be forced to shoulder the burden of lost future earnings when the duration of the commitment is somewhat conjectural. However, as long as the court does not systematically err on the side of over-estimation, the expected outcomes, *ex ante,* for both taxpayers and plaintiffs are fair and reasonable; i.e., incorrect forecasts of recovery periods are as likely to be too low as too high.

Courts frequently must grapple with imperfect information. The mere existence of uncertainty does not excuse the court from rendering a decision based upon the best information available. This principle is no less applicable when the defendant is a public entity and taxpayers must therefore foot the bill. Consider, for example, the Supreme Court's pronouncement on the general subject of uncertainty, couched in the context of a tort claim for lost wages under the Federal Employers' Liability Act.

> [F]uture employment itself, future health, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction. Any one

> of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury.

Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 494 (1980). If life expectancies of decedents, and other variables related to lost earnings, are not too conjectural for a jury, then surely estimated recovery periods ranging to 27 months are not too conjectural for a judge.

There are two other factors that argue for front pay rather than reinstatement. First, front pay minimizes any recurring imposition on the court's resources. Even if the court were to delegate oversight functions to a special master, the workload would be significant. Each plaintiff's mental and physical health would have to be monitored. Ongoing expert opinions would be required. Personnel decisions and employment conditions that might adversely affect each plaintiff would have to be closely scrutinized. Management and staff of the Department would be faced with two equally unpalatable alternatives—either maintain an available job slot that would otherwise have been filled, or accept a reinstated employee with no place to put her. Displaced employees might also demand legal redress.

Second, premature reinstatement of plaintiffs could exacerbate their psychological problems and prolong their recovery. After all, the Department is the source of plaintiffs' trauma. Until corrective measures have been fully implemented, the risk of injecting plaintiffs into the very environment that proximately caused their depression is one that the court is unwilling to take. Perhaps defendants could be ordered to relocate each plaintiff to a comparable job elsewhere within the District government. But this solution creates commensurate burdens on the court—to analyze job comparability, weigh the preferences of each plaintiff, and monitor the consequences.

***6** In sum, front pay, notwithstanding its imperfections, is a preferable alternative to reinstatement for those plaintiffs not presently able and willing to return to work at the Department.[6]

E. Mitigation

Back pay awards will be reduced by the amount plaintiffs earned in alternative employment, or could have earned if they had exercised reasonable diligence. 42 U.S.C. § 2000e–5(g); *Hartman v. Wick,* 678 F.Supp. 312, 337–38 (D.D.C.1988). Defendants have the burden of going forward with evidence to establish the amount of earnings to be deducted, and to establish that plaintiffs failed to exercise reasonable diligence, if applicable. *Id.* at 338; *Nord v. United States Steel Corp.,* 758 F.2d 1462, 1470 (11th Cir.1985).

In seeking alternative employment, plaintiffs are only required to accept a position "substantially equivalent" to the one previously held. *Hartman,* 678 F.Supp. at 338; *Ford Motor Co. v. Equal Employment Opportunity Comm'n,* 458 U.S. 219, 231–32 (1982). A plaintiff need not enter a different line of work, accept a demotion or take a demeaning position. *Id.* at 231. If part-time or other non-comparable work is accepted, wages will be deducted from any back pay award; but the employee may quit to resume pursuit of full time comparable employment without jeopardizing the right to back pay. *Stone v. D.A. & S. Oil Well Servicing, Inc.,* 624 F.2d 142, 144 (10th Cir.1980).

Furthermore, if a plaintiff accepts a comparable job but subsequently loses the job through no fault of her own, defendants remain liable for back pay. *Equal Employment Opportunity Comm'n v. Fotois,* 671 F.Supp. 454, 460 (W.D.Tex.1987) (plaintiff laid off for economic reasons). Only if a plaintiff's termination can be attributed to her own acts (e.g., disobeying work rules) is there a failure to mitigate. *See, e.g., Brady v. Thurston Motor Lines, Inc.,* 753 F.2d 1269, 1279 (4th Cir.1985).

F. Workers' Comp, Unemployment Benefits, Unavailability

Defendants maintain that the court should reduce any award of back pay to take into account disbursements by the District of Columbia for workers' compensation or unemployment benefits. Additionally, back pay should be reduced, according to defendants, to adjust for intervals during which a plaintiff might not have been available to work.

As to workers' compensation and unemployment, defendants rely upon *Smith v. Office of Personnel Management,* 778 F.2d 258 (5th Cir.1985), *cert.*

*denied,*476 U.S. 1105 (1986). There, the Fifth Circuit offset plaintiff's recovery by the disability compensation he received. *Id.* at 263. The court concluded in dicta that deduction of unemployment benefits from back pay might also be within the court's discretion. *Id.* Plaintiffs concede that workers' compensation may be subtracted from back pay; and their economics expert has adjusted his computations accordingly. Plaintiffs disagree, however, as to unemployment benefits. The case law supports plaintiffs' position.

***7** In *National Labor Relations Bd. v. Gullett Gin Co.,* 340 U.S. 361, 364 (1950), the Supreme Court held that, in cases arising under the National Labor Relations Act (NLRA), it is permissible to award back pay without reduction for any unemployment benefits received by the plaintiff. The back pay provisions of Title VII are expressly modeled on the NLRA. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419 (1975). Consequently, the authority of *Gullett Gin* is applicable here. Furthermore, in this court's view, the collateral source principle, properly applied, suggests that unemployment benefits should not be subtracted.

The principle states that benefits from a collateral source should not lessen recoverable damages. *Smith,* 778 F.2d at 263. Arguments against the rule are threefold. First, it should only be applied where benefits are received from a source wholly independent of the wrongdoer. That is, if plaintiff receives collateral benefits from the defendant, not from an independent third party, courts should decline to apply the rule. *Id.* Second, the doctrine condones multiple recovery and thus violates a principle objective of corrective justice: place the victim in as favorable a position as he or she would have been absent the injury—but no more favorable. *See, e.g., Restatement (Second) of Torts* § 901 cmt. a (1979). Third, by allowing benefits in excess of actual loss, the collateral source rule converts a tort-based system from a compensatory to a punitive standard. In this case, all parties concur that the taxpayers of the District of Columbia are not subject to punitive damages.

The court finds these arguments to be unconvincing. Unemployment benefits do not represent multiple recovery for injuries inflicted upon the plaintiffs by the Department of Corrections. Instead, these benefits are remuneration under a separate contract with the government, financed by payroll taxes and payable whether or not an employer is culpable of sexual harassment or any other tort. Plaintiffs are separately entitled to back pay and to unemployment benefits. The former is compensation for the wrong they have suffered. The latter is an obligation incurred by the government under a distinct and unrelated statutory regimen. Payment of unemployment benefits is not punitive; it is mandatory, and entirely independent of defendants' transgressions.

Collateral benefits should be deducted, if at all, only when they are gratuitous (e.g., free medical care received by the plaintiff from a friend or relative, with no expectation of repayment in any manner). Gratuitous benefits must be distinguished from collateral receipts arising from sources like an insurance contract, where consideration pursuant to a separate bargained arrangement was exchanged by the plaintiff in the form of policy premiums. Unemployment benefits are analogous to insurance. The plaintiff ultimately pays for the benefits—if not by policy premiums, then by lower wages to offset employer payroll taxes. Logically, it makes no difference whether the insurer is the defendant or an independent third party.[7]

***8** The court concludes, based upon the case law and upon the collateral source doctrine, that unemployment benefits need not be subtracted from back pay awards.

Less controversial is defendants' assertion that back pay must be reduced to account for intervals of time that plaintiffs might have been unavailable for work. In *Ostapowicz v. Johnson Bronze Co.,* 541 F.2d 394, 401 (3rd Cir.1976), *cert. denied,*429 U.S. 1041 (1977), the court held that periods of unemployability due to illness should be identified and excluded from back pay awards. This principle is unobjectionable. Subject of course to a fact-based inquiry, the court will not award plaintiffs back pay for those periods during which plaintiffs would not have been able to work, unless such disability is traceable to defendants' actions.

G. Income and Payroll Taxes

Lastly, defendants insist that the court subtract income and payroll taxes in calculating back pay. The reasoning is that plaintiffs would have paid such taxes if they had been employed; thus they would be overcompensated if the court did not reduce back wages by the amount of the tax. In a nutshell, the argument boils down to this question: Are back pay awards includable as gross wages for purposes of income and payroll taxes? If they are, then the government will collect the taxes and any deduction by the court would be duplicative. If, however, back pay awards are non-taxable, then to place the plaintiffs in the same financial position they would have occupied absent defendants' discriminatory conduct, the court must subtract income and payroll taxes.

Defendants correctly cite *Social Security Bd. v. Nierotko,* 327 U.S. 358, 364 (1946) for the proposition that back pay constitutes wages for purposes of Social Security taxes. But this holding eviscerates defendants' insistence that the court subtract payroll taxes. There is no reason for the court to interpose itself between the taxpayer and the government as long as the after-tax award will be no

greater than plaintiffs would have received if they had been employed. Because the government will include back pay awards in gross wages for payroll tax purposes, the court must refrain from imposing its own "tax" on top of the government's.

Income taxes must be identically analyzed. Section 104(a)(2) of the Internal Revenue Code excludes damage awards from taxable gross income if they are received "on account of personal injuries or sickness." The Supreme Court has recently concluded, in the context of an award under the Age Discrimination in Employment Act of 1967:

> The amount of back wages recovered is completely independent of the existence or extent of any personal injury. In short, § 104(a)(2) does not permit the exclusion of respondent's back wages because the recovery of back wages was not "on account of" any personal injury and because no personal injury affected the amount of back wages recovered.

Commissioner of Internal Revenue v. Schleier, 1995 WL 352847, *4 (U.S. June 14, 1995). Unlawful termination may precipitate injury equivalent to pain and suffering from an automobile accident. But in an accident case, the event produces the injury which in turn results in lost wages. By contrast, discrimination causes both the injury and the lost wages; however neither is linked to the other. *Id.*

***9** The Supreme Court's explicit holding—that back pay awards are taxable as gross income—commits this court to treat income taxes the same as payroll taxes. Neither will be subtracted in computing the amount of back pay to which plaintiffs are entitled. The requisite subtraction will be discharged at the appropriate time—undoubtedly with great relish—by the relevant taxing authorities.[8]

III. FINDINGS OF FACT

These findings will be divided into three sections, based upon the jury's verdict in the damages phase of the trial. First, the court will discuss plaintiff Sharon Bonds. The jury was not asked to render a legal damages verdict on Bonds; her claims pre-dated the cutoff for legal redress. Second, the court will treat separately the equitable claims of plaintiff Essie Jones. Her allegations involved sexual favoritism; but the jury found that she was not thereby disadvantaged in the terms and conditions of her employment. Third, the court will address the six remaining plaintiffs, each of whom was found by the jury to have been adversely affected by defendants' pattern or practice of sexual harassment or retaliation.

A. No Jury Verdict

Sharon Bonds

Bonds was hired by the Department of Corrections as a correctional officer in October 1984, when she was 22 years old. Over a 4–½ year period, through April 1989, Bonds was routinely subjected to outrageous and offensive sexual harassment.

Defendants note that the D.C. Office of Human Rights found no probable cause with respect to Bonds' allegations; and the Equal Employment Opportunity Commission concluded that there was insufficient evidence to establish a Title VII violation. Despite these administrative findings, this court holds, after *de novo* review, that evidence in the trial of these cases overwhelmingly substantiates Bonds' charges of sexual harassment. Indeed, defendants' reference to the two prior administrative proceedings is perfunctory; defendants make no serious attempt to contest Bonds' recitation of specific events, nor her characterization of these events as repugnant and unwelcome.

Edward Paylor exercised supervisory authority over Bonds. Paylor made unwelcome sexual advances toward Bonds and explicitly made submission to such conduct a term or condition of her employment. Paylor also exercised his authority to make employment decisions concerning Bonds, and based those decisions on her response to his sexual advances. His advances and comments had the purpose or effect of unreasonably interfering with Bonds' work by creating a hostile, intimidating environment.

The issue that the court must address today is not whether Bonds was sexually harassed. That question has been resolved affirmatively to the court's satisfaction. Instead, the issue is whether Bonds was constructively discharged as a consequence of the harassment, and if so, whether she is entitled to back pay and reinstatement.

In April 1989, Bonds suffered a job-related injury. She was unable to work, but continued to receive either pay or disability compensation through August 1989. Rather than return to the Department where she feared further harassment, Bonds applied for and secured a position with the Metropolitan Police Department (MPD). Her new appointment was effective on August 27, 1989, shortly after her resignation from the Department of Corrections. When submitting her resignation, Bonds told Sgt. Taylor

that she was leaving because of sexual harassment.

***10** Bonds attended MPD training as early as 1983 to become a member of the MPD Reserve Corps. She was an active member of the Reserve Corps for two years thereafter. In 1986, Bonds applied for a position with MPD; she updated her application in 1987, 1988 and 1989. Nonetheless, the court credits Bonds' testimony that she would have stayed at the Department of Corrections had she not been subjected to sexual harassment.

Due to the rampant and pernicious character of the harassment by the Department of Corrections, the court concludes that Bonds was constructively discharged. She demands back pay and reinstatement. Both claims depend upon the employment status of Nathaniel Collins, who was a member of Bonds' training class when she started at the Department in 1984. Bonds asserts that the court should look to Collins' progress in the Department because he was comparably situated. By comparing Bonds and Collins, the court supposedly could determine the position to which Bonds would have advanced absent defendants' unlawful conduct. Since Collins' current position is DS–11, step 3, Bonds argues that she is entitled to reinstatement at that level, or to receive pay at that level until she is properly trained to assume DS–11/3 duties. Further, she argues that she is entitled to back pay equal to the difference between Collins' pay and her own from 1989 to date.

The Department offers three counter-arguments. First, when Bonds resigned from the Department, her grade was DS–7/4. Her entry position at MPD paid approximately the same salary. Obviously, there can be no back pay for a lateral transfer. Second, according to defendants, there was a good and valid reason for Bonds' slow progress as an employee at the Department. It involved her excessive use of leave—unrelated to any harassment to which she may have been exposed. Bonds was on disability compensation from the Department on five occasions beginning in October 1985, August 1986, February 1988, February 1989 and April 1989. In February 1989, she received a letter of admonition for excessive leave usage and was placed on leave restriction. Still, the court is unwilling to assume, absent supporting evidence, that Bonds' disabilities constituted an adequate basis for her slow advancement at the Department. Defendants have not met their burden to show that her injuries were without justification, nor that she was otherwise un-promotable.

Third, the Department rejects the validity of a career comparison between Bonds and Nathaniel Collins. There were 23 uniformed officers in Bonds' 1984 graduating class at the Department's Training Academy. Seven of these persons are still employed at the Department. Two of the seven are currently at Grade DS–8, step 6. Four of the seven are currently at Grade DS–8, step 7. Only Collins has achieved DS–11 status, and he has done so by means of a different career path; Collins is now a non-uniformed officer working as a correctional treatment specialist.

***11** In *Hartman,* the district court approved of back pay computations premised upon "average salaries actually paid to persons currently employed by the agency who were hired into positions similar to the one that the class member would have filled absent discrimination." 678 F.Supp. at 337. Indeed, a one-man comparison was sanctioned in *Brown v. Marsh,* 713 F.Supp. 20, 22 (D.D.C.1989), *aff'd,*918 F.2d 214 (D.C.Cir.1990), *cert. denied,*502 U.S. 810 (1991); but the man selected was the person promoted to the job that plaintiff had applied for. In the case at bar, there is no reason to prefer Collins as a one-man cohort over the other six uniformed members of Bonds' class who remain with the Department. To the contrary, the other six appear to have followed a career path more directly comparable to Bonds.

The court finds that, even if Bonds had not resigned from the Department, her grade would be no greater than DS–8, step 7 at the present time. Since her current MPD compensation as a police officer exceeds this level, she is not entitled to back pay arising from her constructive discharge. Nor of course, applying the same logic, would she be entitled to reinstatement at grade DS–11.

There is, however, one basis upon which the court concludes that back pay is justified. While at the Department, Bonds applied for a promotion from DS–7 to DS–8 in February or March 1989. This promotion was denied, for reasons that are unclear. Bonds testified that she was interviewed for the job, and that she met the minimum qualifications. Defendants contended, but made no showing, that Bonds' leave record was a factor considered by the panel in denying her promotion. Thereafter, Bonds did not apply for promotion within the Department. Because of the presumption arising from the jury's verdict at the liability phase, and a deficiency of contrary evidence, the court holds that the 1989 denial of promotion was due to sexual harassment. Back pay is therefore appropriate for the interval beginning on the date that the promotion would have been effective, and ending on the date that Bonds' actual salary at MPD exceeded the salary she would otherwise have earned as a DS–8. Correspondingly, the amount of the back pay award shall be the difference between Bonds' salary had she received the DS–8 promotion, and her actual salary over the specified period, adjusted for interest to April 1, 1995. The court directs defendants to pay Bonds this amount.

Defendants declare that, prior to the non-jury trial, they had no notice of this claim by Bonds. Because of this "ambush," and because the quantification of the claim

was not included in the testimony or exhibits of plaintiffs' economics expert, defendants assert they have been prejudiced, and should not be required to reimburse Bonds even if the court were to find for her as to the underlying job action. There are two replies to this objection: First, no principle of law suggests that a plaintiff be restricted in her recovery to those events covered by an expert witness. Plaintiffs' evidence may emanate from a variety of lay sources. If not adequately rebutted, the plaintiff must prevail. Second, defendants were in fact on notice of Bonds' claim—both from her answers to interrogatories on May 18, 1994,[9] and her subsequent deposition on August 8, 1994.[10]

***12** Because the court concludes that Bonds was constructively discharged, and because she should have received a promotion to DS–8 prior to her termination, Bonds is entitled to reinstatement at the Department of Corrections at a DS–8 level. However, her request for reinstatement was premised upon promotion to DS–11, which the court has denied. Accordingly, Bonds may, if she chooses, notify the Department within 30 days of her desire for reinstatement as a DS–8; and she shall, if so desired, be thereafter reinstated at that level.

B. Jury Verdict for Defendants

Essie Jones

The jury determined that defendants did not engage in sexual favoritism that disadvantaged Jones in the terms and conditions of her employment. A jury's verdict as to legal issues binds the court as to equitable issues arising from the same facts. *Lytle,* 494 U.S. at 556 n. 4. Therefore, Jones typically would not be entitled to equitable relief at this stage of the trial. However, Jones argues that the court may reach conclusions that differ from those reached by the jury if new evidence is introduced that the jury did not hear. *Snider v. Consolidation Coal Co.,* 973 F.2d 555 (7th Cir.1992), *cert. denied,*113 S.Ct. 981 (1993).

In this case, Jones presented additional evidence to the court, allegedly discovered after commencement of the damages trial. She contends that she was adversely affected by sexual favoritism and retaliation in the denial of her promotion to DS–12 level in November 1994. On these grounds, she demands retroactive promotion and back pay, notwithstanding the jury's earlier verdict in favor of defendants.

The facts are as follows: Jones has been employed as an accountant at the Department of Corrections since 1990. As of November 1994, her position was grade DS–11, step 4. During this interval, the chief of the accounting office was Loretta Braxton; she reported to the comptroller who in turn reported to Benny Hodges, Associate Director for Administration. Jones alleges that Braxton received preferential treatment from Hodges because they had a sexual relationship.

In May 1994, Jones applied for a position as a financial monitor in Health Services. She and two others were interviewed for the position, which was posted at both DS–11 and DS–12 grades. Jones elected to compete at grade DS–12. She was not selected for the promotion; moreover, she was not notified of her non-selection. Jones learned in April 1995, after the jury trial, that Mehasti Behbahani had been selected in November 1994. Both Jones and Behbahani possessed master's degrees in business management. Behbahani had applied at the DS–11 level, and had already been employed for several years in Health Services. Jones contends that retaliation by Braxton, because Jones had exposed Braxton's sexual relationship with Hodges, was a significant factor in preventing Jones from getting the promotion to DS–12. In fact, Jones claims to have heard Braxton admit at her deposition that Braxton made disparaging remarks about Jones to the selecting official.

***13** Although Jones testified at the jury trial regarding Braxton's remarks, she did not make a retaliation claim. Jones' allegations at the jury trial were limited to sexual favoritism; i.e., supervisors favored women who acceded to sexual overtures and disfavored women who rejected those overtures. Jones declares that she did not know of the DS–12 denial until after the jury trial and thus could not tie the denial to retaliation by Braxton. The court does not find this to be credible.

Approximately four months elapsed between the date that Behbahani was selected for the job and the end of the jury trial. Jones had ample time to check on the status of her application, particularly in light of her awareness of Braxton's disparaging remarks. Once this litigation commenced, it was incumbent upon plaintiffs to come forward in a timely fashion with their complaints and associated remedies. Delay in such matters cannot be allowed to ambush defendants, to foreclose adequate discovery, nor to deny defendants their right to trial by jury.

The circumstances prevalent in *Snider* are not prevalent here. In *Snider,* an evidentiary ruling by the trial judge kept certain critical testimony from the jury; the evidence was later admitted in the non-jury trial. 973 F.2d at 560. *Snider* allowed the normally binding effect of the jury trial to be bypassed only because the plaintiff was blameless as to the original exclusion of testimony. *Id.* In this instance Jones is not blameless. The court may not circumvent the jury's verdict.

Jones also states that she applied for the DS–12 job

despite suspecting that it was pre-selected for Behbahani. If Jones was was under the supervision of John Henderson, Administrator of CDF. The jury found that Brummell was subjected to sexual harassment and/or retaliation while under Henderson's supervision. There was ample evidence, based on numerous episodes, to support this verdict.

Among the actions unlawfully taken by Henderson was issuance of a letter of reprimand to Brummell, despite the recommendation of a disinterested designee that a less severe sanction be imposed. Brummell had instructed a subordinate to assign trained personnel to the mental health unit. She was not on duty when an untrained person was assigned there. When she learned of the incident, she proposed disciplinary action against the subordinate, but her charges were not processed by her superiors. The court finds that the letter of reprimand was unjustified; it was part of the retaliation and/or harassment against Brummell, and it must be expunged from her record.

Plaintiffs' psychiatric expert, Dr. Morrison, credibly testified that Brummell suffers from major depression, severe, single episode, and generalized anxiety disorder. Defendants' psychiatric expert, Dr. McDaniel, and psychological expert, Dr. Elion, agree broadly with this diagnosis, although McDaniel would substitute the adjective "moderate" in lieu of "severe." Morrison further testified that Brummell's mental disorders had their onset in June 1993, and were caused by the Department's unlawful conduct. As a result, states Morrison, Brummell has been unable to work since June 1993 and will be unable to return to work for a period of time ranging from six to 24 months.

***14** During her illness from June 1993 to the present, Brummell was recorded as absent without leave (AWOL), even though she had requested in writing to be carried on leave without pay (LWOP). Being charged AWOL exposes Brummell to disciplinary action and could make her ineligible for promotion. The court finds that the AWOL charges were improperly levied and shall be stricken from Brummell's record.

The court also finds that, when Brummell returns to work, she will require a less stressful work environment in order to avoid a relapse. Accordingly, she will at that time be reassigned to a Department position with the parole board, home monitoring program or a halfway house, at her existing grade level. Brummell is not to be placed under the direct or indirect supervision of John Henderson or William Plaut without her express consent.

Brummell claims back pay from June 15, 1993 until April 1, 1995. Plaintiffs' economics expert, Rick Bell, has calculated the back pay at $70,618, including interest based upon the average rate on three-month Treasury bills.[11] With respect to front pay, Bell computed lost wages from April 1995 forward for a period of 15 months (the midpoint of Morrison's predicted range). After presumably discounting the forecasted wages back to April 1, 1995,[12] Bell arrived at a present value of $47,322.[13]

Defendants raise two objections to Brummell's demand for back pay and front pay. First, defendants contend that Brummell's failure to return to work after June 15, 1993 was because she had not arranged for child care. Brummell and her husband adopted an infant son in April 1992. At the time, Brummell was assigned to the midnight shift; but after her maternity leave in June 1992, Brummell was transferred to the day shift, where she remained until June 1993.

On or about May 1993, Brummell requested to remain on the day shift. Her request was approved by her two immediate supervisors, but overruled by Henderson. Two weeks after the scheduled shift change, Brummell was notified that someone else would be assigned to the day shift and she would be moved to the midnight shift. Brummell contacted the Department's Employee Assistance Program to arrange for child care to cover her new work hours, but she was unsuccessful. Defendants claim that Brummell's exertions were inadequate.

The court accepts Brummell's testimony that she undertook to procure care for her infant son. More importantly, Dr. Morrison has testified that Brummell was mentally unable to work after June 15, 1993. Brummell's mental state, which Morrison attributes to the Department's harassment and retaliation, would not have miraculously improved even if Brummell had been able to orchestrate child care. She could not have returned to work with or without the child care problem. Major depression, confirmed by defendants' psychiatric and psychological experts, was the underlying culprit.

Even if the court were to assume that Brummell's efforts to obtain care were half-hearted, and that she stayed home from work for that reason, the Department would not be exculpated. Because evidence of mental disorder is compelling, the court would have to assess the impact of two underlying causes, each independently sufficient, for Brummell's absence from work. As a logical matter, when two or more causes are each sufficient, then none of the causes is necessary. That might suggest failure of "but for" causation. But it is a settled principle of both criminal and tort law that any cause, in itself sufficient, shall be deemed to have satisfied the "but for" test whether or not there are other sufficient causes. *See, e.g., United States v. Feliciano,* 45 F.3d 1070, 1075 (7th Cir.1995). Brummell's child care dilemma does not nullify her major depression.

***15** Defendants' second rejoinder is that Brummell has not exercised reasonable diligence in mitigating damages.

Specifically, she has refused to take anti-depressant medicine despite recommendations from several mental health professionals.

Brummell's treating psychologist, James Ballard, diagnosed her as suffering from depression in July 1993. Since that time, Brummell has been in psychotherapy on a weekly basis. As a psychologist, Ballard is not authorized to prescribe medicine. Still, he did recommend against anti-depressants to Brummell after she expressed a predisposition antagonistic to such medicine, and a concern over undesirable and disruptive side effects.[14]

Every mental health specialist who examined Brummell and testified in this proceeding—Morrison for plaintiffs, Elion and McDaniel for defendants—agreed that medication would probably improve Brummell's mental state to a significant degree. McDaniel testified that if Brummell were to take therapeutic doses of one of the currently available medications, such as Prozac, it is likely she could return to work in four to six months. Brummell has thus far refused medication, and has signified that she will not take it hereafter.

Ordinarily, the court would be most reluctant to interpose itself between a patient and her treating professional. However, the obligation to mitigate is clearly established. In this case, there is unanimous and credible evidence that Brummell's likely improvement from medication would be material. Her treating doctor is a psychologist who is not authorized to prescribe medicine. His recommendation was more a response to his patient's misgivings than an affirmative declaration that medication would be unavailing or detrimental. Under the circumstances, the court finds that it would be reasonable to reduce Brummell's request for front pay by one-half—from $47,322 to $23,661.[15]

The court does not find that a reduction in back pay is warranted. Not until the trial, when disparate medical analyses were distilled and integrated, was Brummell made fully aware of the professional consensus and its mental health consequences. Previous separate recommendations by psychiatrists and psychologists, undoubtedly rendered with varying degrees of certainty and exigency, deriving in part from a doctor paid by the Department of Corrections, would not justify imposing upon Brummell a penalty for not taking medication prior to April 1995.

Barbara Carter

Carter was employed by the Department of Corrections from 1987 through her discharge on May 28, 1993. The jury found that she was subjected to sexual harassment and/or retaliation. Dr. Morrison credibly testified that, as a result of the harassment and retaliation, Carter suffers from major depression, severe, single episode and generalized anxiety disorder with panic attacks. She was hospitalized for psychological treatment on four occasions, and unable to work on several other occasions.

***16** Frequently, when Carter called in sick, and even when she was hospitalized, she was marked AWOL by the Department. She was not permitted to use the sick leave or annual leave that she had accrued, nor LWOP. Being charged AWOL exposes Carter to disciplinary action and could make her ineligible for promotion. She submitted a memorandum to her supervisors explaining the circumstances of her absences and requesting assistance in expunging the AWOL's. No action was ever taken in response to her entreaties. The court finds that the AWOL charges were improperly levied and shall be stricken from Carter's record.

The Department terminated Carter on May 28, 1993, allegedly for excessive AWOL in February 1993, an interval during which Carter was mentally depressed and had so notified her supervisors. Carter did not receive final notice of the proposed termination until May 20, eight days prior to its effective date. Only then was she notified of her opportunity to seek review from a disinterested designee. Carter was never granted a hearing. Although she requested reconsideration of the decision to terminate her, Carter received no response. Nor would the Department agree to stay her termination pending resolution of a complaint Carter had filed with an at-large Equal Employment Opportunity counselor.

The court finds that Carter was terminated on May 28, 1993 as a result of the Department's sexual harassment and retaliation. Defendants have not met their burden to show a legitimate non-discriminatory reason for her termination. Further, the court finds that, when she is able to return to work, Carter must be employed in a less stressful environment in order to avoid recurrence of her mental disorders. Accordingly, she will at that time be reassigned to the Department of Youth Services. Carter is not to be placed under the direct or indirect supervision of James West, John Brown or L.C. Jones without her express consent.

Defendants point to Carter's hospitalization at The Arlington Hospital from May 23, 1989 to June 7, 1989 as evidence that stressors other than her job caused her depression. Carter concedes that a male cousin was killed by one of her female friends, that she (Carter) was distraught at not being able to see her son for two years, that her uncle who was a close friend had died, and that her car was vandalized. During her stay at Arlington Hospital, Carter admitted to a similar depressive episode 2–½ years prior—a time that ante-dated her employment at the Department of Corrections. Further, Carter failed to take prescribed medicine for her depression and smoked marijuana.

These contentions are somewhat troubling. Still, Carter did not suffer a diagnosable, clinical depression until after she commenced employment with the Department. A notation of a prior depressive episode from a hospital admitting report is simply not sufficient to establish that symptoms of clinical depression existed prior to 1988. Nor is it sufficient to dismiss sexual harassment and retaliation as a substantial causal factor as to Carter's mental condition. The court, without a convincing showing, will not attempt to apportion Carter's illness among multiple causal factors—especially when one of the factors, sexual harassment, could independently have provoked her depression. Defendants have not satisfied the requisite burden. Nor have defendants introduced evidence that would support a finding that Carter's use of marijuana, or her failure to take prescribed medicine, had a material deleterious effect on her condition or recovery.

***17** Carter's back pay claim, with interest, is $54,504. Part of that is attributable to wrongful discharge, upheld above; and part is attributable to a promotion allegedly denied for unlawful reasons, to be discussed below. Carter's front pay claim is premised upon a recovery period of 27 months, until her psychological condition improves to the point where she can return to work. Dr. Morrison estimated a range between six months and five years; plaintiffs say they have applied the mid-point of the range[16] and arrived at discounted future wages of $56,871. Part of this amount, as well, depends upon the validity of Carter's claim for a higher future pay rate due to a lost promotion.

While working at the Youth Center, Carter requested permission to appear before a promotion panel to become a DS–8, effective April 1991. She was a DS–7 at the time. Carter was not given permission, and she was not promoted. While at CTF during 1992, Carter expressed a desire to take a sergeant's test for promotion to DS–9. She was not allowed to take the test, say plaintiffs, because she had not yet received a promotion to DS–8. For these reasons, Carter argues she is entitled to: (1) back pay retroactive to April 1991 for the difference between her DS–7 salary and the DS–8 salary which she was denied; (2) front pay for 27 months at the DS–8 rate; and (3) reinstatement at a DS–9 level when she is able to return to work. The court agrees with the first two claims, but disagrees with the third.

Defendants have not offered a plausible rationale why Carter, who was qualified for the DS–8 promotion in April 1991, was not allowed to appear before the panel. Because of the presumption arising from the jury's verdict at the liability phase, and a deficiency of contrary evidence, the court holds that the 1991 denial of promotion was due to sexual harassment. Back pay is therefore appropriate retroactive to April 1991 for the difference between Carter's DS–7 salary and the DS–8 salary she would have earned had she been promoted. Front pay is also appropriate, at the higher DS–8 rate. The court sustains Carter's claims of $54,504 and $56,871 for back and front pay respectively, subject to reduction of $3,072 in wages earned from the U.S. Postal Service (see *infra*).

Carter observes that rejection of her promotion to DS–8 became the excuse for denying her request to take the DS–9 sergeant's exam in January of 1992. If the DS–8 denial was unlawful—and the court has concluded that it was—then, ineluctably, says Carter, the DS–9 denial was unlawful as well. But evidence at trial indicated that qualification for the DS–9 sergeant's exam was conditioned on one year's tenure at a DS–8 level. Even if Carter had gotten her DS–8 promotion in April of 1991, the Department would have been justified in refusing permission to take the sergeant's exam nine months later. Nothing in the record suggests that the exam was repeated, nor that Carter attempted to take the exam after April 1992, when she would have served a full year at a DS–8 level.

***18** A second DS–9 position is also at issue. On April 23, 1992, the Department acknowledged receipt of Carter's application for a DS–9 vacancy at CTF. Carter had also sent her application to William Plaut, dated April 5, 1992. However, defendants have shown that the position closed on March 31, 1992. Therefore, Carter has not established that she applied for and was denied a promotion for which she was technically eligible and of which she had a reasonable expectation. Considering her untimely application for one DS–9 opening, and her legitimate disqualification for another DS–9 opening, there is little support for granting Carter reinstatement at the higher level. When she returns to work, Carter will be reinstated at the DS–8 level that she would have attained if she had been promoted in April 1991. Her sick leave, annual leave, retirement benefits and all other benefits shall be correspondingly restored.

Defendants also contend that Carter failed to mitigate her damages. From November 1993 until February 1994, Carter obtained temporary employment with the U.S. Postal Service. She was then injured in a car accident and unable to work for a month. In April 1994, she was terminated by the Postal Service. The court has already stated that temporary employment by the plaintiff does not and defendants' liability for back pay. Nor does leaving the temporary job in order to continue searching for a permanent position. The two relevant cases are *Fotois,* 671 F.Supp. at 460, where defendants remained liable after plaintiff had been laid off for economic reasons, and *Brady,* 753 F.2d at 1279, where plaintiff's voluntary termination for disobeying the employer's rules was held to be a failure to mitigate. Since the car accident that injured Carter was caused by a drunken driver, through no fault of her own, Carter maintains that *Fotois*

is apposite. The court agrees.

Plaintiffs assert that Carter would not have been hired on a permanent basis even if she had not been injured. But based on her own testimony, Carter's post office employment was continued beyond the temporary Christmas season, and she might have remained but for her disability. On this basis, defendants declare that the automobile accident was the supervening cause of Carter's failure to remain employed with the Postal Service. Defendants' causation argument may well be correct; but it is nevertheless irrelevant. The obligation to mitigate is to exercise reasonable diligence in seeking alternative equivalent employment. The court does not need to distinguish between foreseeable and supervening proximate causes of Carter's termination at the post office. The proper inquiry is not foreseeability, but culpability. If Carter was at fault, then she failed to exercise reasonable diligence in mitigation. But if her termination occurred despite her reasonable diligence, then she cannot be penalized. The choice here is rather obvious. Carter's accident and her subsequent termination by the post office is not failure to mitigate.[17]

***19** While the court refuses to subtract wages that Carter might have earned at the Postal Service if she had not been injured, it is quite clear that the wages she actually did earn, $3,072, must reduce the back pay to which she is entitled. Plaintiffs concede as much; and their expert has made an appropriate subtraction.

Bessye Neal

Neal has held a DS–12 position with the Department since 1988. As of June 1990, when her grade was DS–12, step 6, Neal was rejected for promotion to assistant administrator at the DS–13, step 2 level. She was well qualified for the job. The Department has not shown that Neal would have been denied the promotion were it not for unlawful retaliation.

Defendants note that Neal did not specifically identify the facility at which the vacancy existed, nor the person selected in her stead. Neal's name did not appear on the list of persons certified as qualified for the DS–13 position by the Office of Personnel. Accordingly, say defendants, Neal was passed over either because she did not submit a timely application or because she was not qualified.

Based upon Neal's testimony, her employment record, supporting testimony as to her experience, competence and diligence, evidence of egregious retaliation pervasive throughout the Department, the undisputed existence of a DS–13 vacancy, and the inference of improper conduct arising from the jury's liability phase verdict, the court finds it more probable than not that Neal applied for the job, was qualified for the job, and was denied promotion in retaliation for her past activities in prosecuting sexual harassment complaints. Neal does not have to show who was promoted, nor to ascertain why her name did not appear on a list of qualified persons. She need only demonstrate, by a preponderance of the evidence, that she applied for an open slot, that she was technically eligible, and that she had a reasonable expectation of filling the position. The court concludes that Neal has made the requisite showing; she is entitled to promotion to DS–13, step 2, retroactive to June 1, 1990.

In February 1992, Neal applied for two DS–14 promotions. One was for assistant administrator at CTF; the other was for administrator at Lorton.[18] In October 1993, the administrator position at Lorton was upgraded to DS–15. Normally, the Department requires that an employee serve one year at the next lower grade (i.e., DS–13) before being eligible for promotion. Occasionally, waivers are granted. Neal inquired as to the procedure for obtaining a waiver and submitted a written request to Director Ridley.

The evidence shows that others had received waivers of the time-in-grade requirement, that Neal had properly applied for a waiver pursuant to instructions she had received, that she was eligible for consideration, and that she was otherwise qualified to fill the position. Indeed, if the Department had not retaliated against Neal by denying her DS–13 promotion in June 1990, a waiver would not have been necessary. Defendants have not proven that Neal would have been refused the DS–14 promotion in February 1992 for legitimate, non-discriminatory reasons. Instead, the Department simply asserts that Neal must first have been certified as qualified by the Office of Personnel, then request a time-in-grade waiver. There is no substantiation for this assertion.

***20** The Department further claims that Neal did not offer competent testimony that the Lorton opening was filled, nor the name of the individual selected. But this again fundamentally misconstrues the burdens that each party must satisfy in this phase of the litigation. Plaintiffs are entitled to an inference under *Teamsters,* deriving from the jury's finding of liability, that any unfavorable employment incident arose from the Department's pattern or practice of harassment or retaliation. The court does not require Neal to prove that other less-qualified employees were promoted. Once Neal has established her prima facie case, the burden shifts to the Department to demonstrate valid reasons for the adverse action or job condition. The Department, not the plaintiff, must prove that other better-qualified employees were promoted to the job for which Neal had applied.

Because Neal has met her burden and the Department has not, the court holds that she shall be promoted retroactively to DS–14, step 1, as of February 1, 1992,

and to DS–15, step 1, as of October 1, 1993. Back pay for these two promotions, together with back pay for the DS–13, step 2 promotion as of June 1, 1990, aggregate $47,712 inclusive of interest through April 1, 1995. Additionally, Neal shall have her sick leave, annual leave, retirement benefits and all other benefits restored as if she had received the three promotions. The annual leave that she took to pursue this litigation—255 hours—shall also be restored, as shall 98 hours of sick leave attributable to stress-related incapacity. The one-day suspension imposed by Joyce Carmouche and Paul Quander shall be expunged from Neal's file. She shall not be placed under the direct or indirect supervision of William Plaut without her express consent.

This lengthy and distressing litigation, with its procession of witnesses each recounting a story more appalling than the one before, has exposed an epidemic of sexual harassment tolerated at the highest levels of the Department of Corrections. There is a compelling need for a high-level employee within the Department to address the legitimate concerns, anxieties and apprehensions of female employees. Bessye Neal is manifestly well-qualified to fill such a position. Characteristically, the Department complains that Neal does not possess the impartiality and objectivity that such a position entails. But if diligence in pursuit of her lawful rights is a reflection of partiality or subjectivity, then those traits could be ideal antidotes for the troglodytic behavior that has become a lifestyle at the Department. The evidence is overwhelming; it is the Department itself, not Ms. Neal, that cannot be entrusted to control its own excesses.

The court directs that Neal be assigned the position of Ombudsperson for women employees, with special responsibility in the area of sexual harassment. Her role, and that of the Special Inspector to whom she will report, has been delineated in Final Judgment and Order III (Class Wide Injunctive Relief), issued today by the court in this matter. The Special Inspector shall determine whether Neal will serve exclusively as Ombudsperson, or whether her duties in that position would admit of additional Departmental responsibilities.

Shivawn Newsome

***21** Newsome maintains that she would have been assigned additional overtime had she not been the subject of retaliation and sexual harassment by the Department. She was eligible for, and applied for, the added overtime. Further, Newsome claims she is entitled to pay for two days on which she was wrongfully charged with AWOL, and that the charges should be purged from her employment records. She also asks that she not be placed under the supervision of Reginald Johnson or L.C. Jones, and that she be detailed to the D.C. Department of Youth Services, or, if no openings are available, to one of the half-way houses in the Department of Corrections system.

Defendants argue that Newsome's assignment should be determined by Departmental needs, but they do not object to screening Newsome from the supervision of Johnson and Jones. Aside from personal preference, the only legitimate basis advanced by Newsome for her assignment to Youth Services was that her brother was incarcerated at CTF, where Newsome had previously been stationed and where her brother required medical treatment not available elsewhere. Policy considerations suggest that Department employees not work at the same facility in which a close family member is an inmate. Accordingly, upon her return from pregnancy leave, Newsome shall be assigned to a position of appropriate grade and function, in compliance with standard departmental procedures; but she shall not be stationed at a facility where her brother is incarcerated, nor shall she be placed under the direct or indirect supervision of Reginald Johnson or L.C. Jones without her express consent.

From 1990 through June 1993, Newsome was assigned to the Minimum Security Facility at which she was subjected to aggressive and repugnant sexual harassment. She filed a formal complaint in July 1992. Newsome contends that, in retaliation for her complaint and for bringing this lawsuit, she has been denied overtime, and that she was also unjustifiably charged with AWOL on two occasions. The first AWOL was levied on September 28, 1994 after Newsome had notified her supervisor, Captain Thyra Griffin, that she would be late. Griffin approved the late arrival; but instead of allowing Newsome to apply leave time, Griffin charged her with AWOL and would not permit her to work the remainder of the shift.

Defendants respond that Newsome was five hours late for her eight-hour shift, and was not in uniform. This is, say defendants, a legitimate and non-discriminatory reason for placing Newsome on AWOL; permission to arrive a little late is not so elastic as to encompass gross tardiness. Defendants also note that Griffin is herself a member of the plaintiff class and has filed charges of sexual harassment against the Department; thus, Griffin's adverse job action against Newsome cannot plausibly be traced to retaliation.

Ordinarily, defendants' rationale would be convincing. The Department surely retains ultimate discretion to deny leave when an employee reports to work after an extended, mostly-unexcused absence. Still, the circumstances here suggest that Newsome's request to purge the AWOL should be granted. Newsome testified that she had to meet with counsel in preparation for a court hearing to be held the next day. She spoke by phone with Griffin and was given permission to be late.

Newsome was to check-in with Griffin when she arrived, then cover her absence with administrative leave. After meeting with her attorneys, getting her hair done and picking up her uniform, Newsome finally reported to work at 7:50 p.m. Her shift had commenced at 4:00 p.m. When Newsome requested her leave slip, Griffin raised no objection—subject only to review of Newsome's court papers to confirm that administrative leave would be appropriate.

***22** It was then that Griffin was told, by Jones, to deny Newsome leave, to send her home and mark her AWOL for the entire shift. This chronology, undisputed by defendants, is strongly suggestive of discriminatory motive. The Department offered no alternative rationale why Jones, who had been Newsome's harasser, would immerse himself in a personnel action that Griffin was quite competent to handle. Griffin's approval of administrative leave was undeniably within her discretion. Whether or not the best decision, it was certainly a permissible decision. Jones' influence was more likely than not an unlawful exercise of his supervisory prerogative. Because there is no evidence to the contrary, the court concludes that the September 28, 1995 AWOL charge against Newsome was unjustified; it shall be expunged from her record, and she shall be paid for the eight-hour shift.

On January 28, 1995, Newsome was charged with a second AWOL. She was scheduled to attend a psychological examination by defendants' expert, Dr. Poirier. Newsome had informed her supervisors and received approval to use a day of administrative leave. Nonetheless, she was subsequently notified that she would not be paid for the day, and would be placed on AWOL status. Defendants concede that the AWOL entry was erroneous. Yet they insist that Newsome not be compensated because she improperly took a full day of administrative leave to meet with Poirier on another date, despite her cancellation of the appointment due to inclement weather. Defendants' explanation is not compelling. The erroneous AWOL from January 1995 shall be expunged from Newsome's record and she shall be compensated for the day in question. She is entitled to leave with pay for examinations by defendants' experts connected with this litigation. Any dispute between the Department and Newsome regarding the propriety of administrative leave on other days has nothing to do with the determination of this day's status. If Newsome took leave improperly on another occasion, the Department can seek to correct that.

Newsome's claim for disallowed overtime breaks down into two periods: (1) from July 26, 1992 through November 14, 1992, prior to her transfer to the Community Action Squad[19]; and (2) from November 15, 1992 through June 30, 1993, while she served on the Community Action Squad. Newsome argues that her allocation of overtime was substantially reduced in retaliation for filing a sexual harassment complaint in late July 1992. The court will examine separately each of the claims—pre-transfer and post-transfer.

Plaintiffs' expert determined that Newsome worked, on average, 26.06 overtime hours per pay period, covering eight periods prior to July 26, 1992. This average diminished to 17.81 hours for the eight periods from July 26 through November 14, 1992. The "lost" overtime was thus 8.25 hours per pay period, or 66 hours total. At her then-current wage rate, paid at 150% for overtime, Newsome would have earned an additional $1,271, inclusive of $101 in interest through April 1, 1995.

***23** Defendants assert that the 26.06 base average is overstated. For example, Newsome took eight hours of sick leave on July 18, 1992 (the day after she was sexually harassed), but worked eight hours of overtime on the same day. While this combination of sick leave and overtime on the same day may seem paradoxical, the time sheets are in evidence and have not been refuted. Moreover, as plaintiffs point out, the overtime occurred on the day shift; Newsome's sickness occurred thereafter, shortly before commencing the evening shift, when she was obliged to work with Johnson who had harassed her the prior day. The court finds this chronology to be plausible, and supported on the record.

Defendants also assert that the 17.81 average from July 26 through November 14, 1992, is understated due to two pay periods when Newsome earned no overtime, but took both compensatory time and sick leave. This allegation is without merit. The court is not here addressing Newsome's leave habits. The concern is that she was denied overtime. Two weeks of no overtime, with or without concurrent leave, is entirely consistent with Newsome's charge of retaliation. She has presented a reasonable basis for her claim, bolstered by the jury's verdict. Defendants have offered no legitimate alternative explanation. Newsome's first demand for $1,271 in lost overtime will be upheld.

The second (post-transfer) claim relates to Newsome's voluntary assignment to the Community Action Squad. There, she was automatically allotted ten hours of overtime per week, or 20 hours per pay period. Newsome contends that she requested, but was frequently denied, additional overtime. Some employees on the Squad, who had not raised claims of sexual harassment, worked 40–50 hours overtime beyond the mandatory 20 hours per pay period. A few employees, according to Newsome, worked a total of 80 overtime hours per period. Newsome says Lt. Collins divulged that Reginald Johnson, the supervisor who sexually harassed her, had told other lieutenants not to select her for overtime. Based on this, Newsome claims she lost 40 hours of overtime per pay period from November 15, 1992 through June 30, 1993. The total

dollars of wages over more than 16 periods accumulate to $13,134 inclusive of interest.

As a result of Newsome's transfer, she became entitled to a minimum of 20 hours overtime per pay period—not far different than the 26 hours that she averaged during the eight-week period prior to her July 1992 complaint, and indeed higher than the 17.8 hours that she averaged prior to her transfer. Defendants argue that the Department surely would not have authorized this benign assignment if the intent was to deprive Newsome of overtime. Furthermore, defendants contend that Newsome's recitation of hours worked by other employees on the Community Action Squad is not persuasive. Even if Newsome's estimates are correct, the cited employees are grade level DS–9 while Newsome is DS–8. There was no competent testimony regarding overtime earnings of any correctional officer at Newsome's DS–8 level.

***24** These arguments, however valid, do not satisfy defendants' rebuttal burden. Newsome established her prima facie case by demonstrating that an adverse action or job condition occurred with no obvious alternative explanation. Her testimony that she was treated differently than other employees on the Community Action Squad, and that Johnson was responsible for the discriminatory treatment, is sufficient in light of the *Teamsters* inference. To rebut, defendants must disprove Newsome's assertions or show a legitimate non-discriminatory reason for Newsome's unequal treatment. They have done neither.

To suggest that Newsome may have benefited by the transfer to the Community Action Squad does not dispel the notion that, once on the Squad, she was denied overtime routinely assigned to others. Whatever the Department's motivation for the transfer, Newsome's requests for overtime comparable to others on the Community Action Squad were regularly ignored. To suggest that Newsome introduced no statistics as to overtime earnings of her DS–8 co-workers, does not relieve the Department of its responsibility to produce those statistics. If comparably situated DS–9 employees are rewarded 40 more hours overtime than Newsome, it is incumbent upon defendants to prove that the disparity is attributable to her DS–8 grade.

There is, however, one valid reason for rejecting part of Newsome's $13,134 claim. She was absent from work for more than ¾ of June 1993. The court cannot sanction an award for a full month of overtime during a period when Newsome was barely present. Newsome's June 1993 leave aggregated roughly 1.8 pay periods. At 40 hours of overtime per pay period, her claim must be pruned by 72 hours. Her pay rate at the time was $18.84 per hour, or $1,356 over the 72–hour span. Adding interest of $85 for 1–¾ years through April 1, 1995 yields a total of $1,441. Accordingly, Newsome's post-transfer claim for $13,134 is allowed in the reduced amount of $11,693.[20]

Tyrone Posey

Posey is employed as a documents examiner at the Department of Corrections. During the relevant period, July 1993 to date, his grade was DS–8, step 5. Posey also functioned as union shop steward and assisted employees with complaints of sexual harassment. The jury examined exhaustive evidence and correctly concluded that he was subject to retaliation for his efforts on behalf of female employees.

As a result of the Department's retaliation, Posey suffers from major depression, severe, single episode. He is also a recovering alcoholic—a pre-existing condition unrelated to this litigation. Following his service in Vietnam, Posey experienced post-traumatic stress disorder (PTSD). He had materially recovered prior to the Department's retaliation, but has since suffered from recurrent PTSD problems. Posey was hospitalized to treat these disorders from July to October 1993, and he was unable to work from July 9, 1993 through July 5, 1994.

***25** Lost wages for the 1–year period during which Posey could not work were $28,595 inclusive of interest through April 1, 1995. He requests relief in the amount of $15,595, after an offset for $13,000 which he received in workers' compensation. Defendants object only to the amount of workers' compensation; they contend it should be $13,498 rather than $13,000. Based on Posey's testimony, the court finds that $13,000 is the proper offset. Defendants have not introduced or identified any document that contains the higher amount. Without further objection from defendants, the court will uphold $15,595 recovery for lost wages during Posey's hospitalization and convalescence. Any associated AWOL charges levied against Posey from July 9, 1993 through July 5, 1994, shall be expunged.

Posey also contends he was denied a promotion on December 1, 1994 due to improper AWOL charges against him. He would otherwise have been promoted from DS–8, step 5 to DS–8, step 6. The lost wages from December 1, 1994 through April 1, 1995 are $286. Defendants concede that Posey would have been eligible for the in-grade step increase if he had notified the Department of his workers' compensation award. But because he did not, the Department's computer records indicated that he had been on unpaid leave for more than four weeks during the year. As a result, he was automatically disqualified in compliance with the District Personnel Manual.

Defendants suggest that the responsibility for informing the Department of disability compensation awards rests with the employee. Posey admitted that at no time did he

notify the Department that he was passed over for the step increase or that he was drawing disability pay during the period when the computer records reflected unpaid leave status. Still, Posey claims that the Department was aware in April 1994 that his workers' compensation had been approved. These factual disputes are not worthy of extended treatment by the court. The amount involved is $286. A policy that requires employees to notify the District of a disability award paid by the District is at best baffling. And the root cause of the excluded step increase is acknowledged by both parties to have been the Department's retaliation. Posey is entitled to the step increase, retroactive to December 1, 1994, and the associated $286 in lost wages.

Next, Posey asks that 524 hours of AWOL incurred between September 1992 and July 1993 be removed from his record, and that he be compensated for the time. The AWOL breakdown is as follows: (1) September 22 through December 24, 1992, *passim,* and January 4 through May 20, 1993, *passim,* when Posey was sick from psychological, stress-related injuries; (2) March 26, 1993 when he was attending a hearing pursuant to a subpoena and should have been granted administrative leave; (3) April 13, 1993 when he was denied use of available sick leave; (4) May 11–14, 1993 when he was at work; (5) May 17–18, 1993 when he was in the union office; and (6) May 24–28, 1993 when he unjustly denied emergency annual leave.

***26** Defendants declare that AWOL was properly charged on April 13, 1993, and on March 26, 1993 when Posey failed to notify his supervisors that he would be absent and failed to present adequate documentation of the hearing he attended. Given the inference arising from the jury verdict and the defendants' unjustified conduct with respect to numerous other instances of recorded AWOL, the court finds in Posey's favor on these two disputed days. For those days when Posey was sick from stress-related injuries, the Department grants that LWOP might have been more appropriate than AWOL; but because Posey did not have sufficient leave to cover his absences, the Department opposes compensation for the time involved. This misses the point. Posey's absence was due to mental disorder brought on, or exacerbated, by the Department's retaliation. He should not be required to use leave in order to recover lost compensation arising from the Department's unlawful conduct.

The 524 hours of AWOL charged against Posey from September 1992 through May 1993 shall be purged from his record. He shall be compensated for the time. He shall also be credited with time in service during all periods he was marked AWOL (through July 5, 1994), and his sick leave, annual leave, retirement benefits, and other benefits shall be made equivalent to what they would otherwise have been. Any disciplinary actions relating to Posey's AWOL—including the alleged absence from his work station in the spring of 1993, and the alleged improper release of an inmate in October 1994—shall be expunged.

Lastly, Posey shall have 28 hours of annual leave and 16 hours of sick leave, taken in conjunction with this case (to attend depositions, hearings or doctor's appointments), restored. He shall further have 80 hours of annual leave and 20 hours of sick leave, taken while he was ill in 1993, restored. He shall not be placed in the same work environment as Althea Haynes.

Teresa Washington

Washington has been employed with the Department of Corrections as a documents examiner since April 1992. She is currently grade DS–8, step 5. The jury found that Washington was subjected to sexual harassment and/or retaliation while working under the supervision of Edward Paylor in the Records Office at the D.C. Jail. As a result, she suffers from PTSD and major depression, severe, single episode. Because of her mental disorders, Washington has been unable to work since February 1993, and will not be able to return to work for approximately six to 24 months.

Plaintiffs' expert estimates Washington's lost back pay at $64,076, inclusive of interest through April 1, 1995. He based his calculations on her extant pay scale—DS–8, step 5, subsequent to her promotion on February 22, 1993; and DS–7, step 6, from February 2 through February 21, 1993. Assuming Washington cannot work for 15 months, the mid-point of the range forecasted by Dr. Morrison, her future wage loss, discounted to present value, will be $33,057 at the DS–8, step 5 rate. Defendants contend that Washington should not receive front pay, and should only receive back pay from February 2, 1993 to February 15, 1994, which is the date that she could have returned to work.

***27** Washington was unable to work at all through November 1993. At that time, her doctor advised that she could seek work, but not at the Department of Corrections. The record indicates that Washington exercised reasonable diligence in pursuing alternative employment. Although her search was unsuccessful, defendants have not produced evidence that convincingly establishes failure to mitigate. Defendants proffer four arguments on the mitigation issue. First, they maintain that Washington should have applied for part-time work at or exceeding the hourly rate she earned at the Department. As the court stated above: In seeking alternative employment, plaintiffs are only required to accept a position "substantially equivalent" to the one previously held. *Hartman,* 678 F.Supp. at 338. Even if an employee succeeds at arranging part-time work, she may quit to resume pursuit of full-time comparable employment without jeopardizing the right to back pay.

Stone, 624 F.2d at 144.

Second, defendants note that Washington had declared her readiness to return to work in mid-February 1994. However, she would not report for duty at the Minimum Security Facility records office because she believed that her harasser, Edward Paylor, retained influence over the operations of all records offices throughout the Department. According to defendants, Paylor had already been relieved of his position as chief of the records office at the D.C. Jail. Defendants point further to Washington's continued refusal to return to work despite Paylor's termination at the end of June 1994. However, these contentions are not substantiated by any information submitted in evidence on the record. Washington attempted to return in September 1994, but suffered a flashback and general relapse in her psychological condition. Moreover, Washington did not testify as to her awareness that Paylor had been relieved of his responsibilities. Nor did defendants show that she should have been aware. Indeed, defendants elected not to call a party witness, e.g. Director Moore, who could have validated the dates of Paylor's transfer and ultimate dismissal.

Third, defendants claim that Washington canceled a scheduled return to duty in June 1994 because she needed surgery for a medical condition unrelated to this case. At a minimum, therefore, defendants contend that Washington should not receive back pay from June to September 1994, when she undertook to report for work. Here again, there is no evidence in the record regarding any interval of disability, not caused by defendants, which might have qualified for offset against Washington's back pay claim. Nor is there evidence that Washington fabricated a tale that surgery was imminent when it was not; nor that she concocted disability in order to prolong her absence from work.

Fourth, defendants suggest that Washington suffers from an adjustment disorder and could have returned to work, at least since January 1995, at any facility in the Department other than the D.C. Jail. This contention is belied by credible testimony from Dr. Morrison. Absent persuasive contrary evidence, the court has no basis upon which to reject conclusions of Dr. Morrison that Washington has been, since February 1993, psychologically unfit for full-time equivalent employment, and will remain so for another six to 24 months. Washington shall be awarded her full request of $64,076 for back pay and $33,057 for front pay. While the court has some misgivings about the mitigation issue and its impact on the legitimacy of these claims, the court can only base its judgment upon the record.

***28** Finally, a few tangential matters: First, Washington's sick leave, annual leave, retirement benefits and other benefits shall be made equivalent to what they would have been if she had worked continuously since February 2, 1993. Second, Washington was charged AWOL regularly from February 1993 to the present, although she asked to be carried on LWOP for a work-related injury. AWOL accusations expose her to disciplinary action and could make her ineligible for promotion. The court directs that these charges be expunged from her employment files. Third, the letter of admonition received by Washington from Paylor in late 1992, for purchasing a soda on the way back from a work-related errand, shall likewise be purged. Fourth, Washington's psychological condition makes it impossible for her to work at the D.C. Jail. When she is able to return to work, Washington shall be assigned to a position compatible with her skills and experience, at her current grade level, but not at the D.C. Jail. She may be assigned elsewhere in the Department of Corrections, or to another agency within the District of Columbia government.

Counsel for plaintiffs has notified the court that Washington as well as Neal wished to be considered for the position of Ombudsperson. The court has examined curriculum vitae for both parties, and has concluded that Ms. Neal is better qualified by education, skill level and experience. Moreover, because Washington is not expected to return to work for another six to 24 months, her appointment as Ombudsperson would unnecessarily delay progress toward eradicating sexual harassment and retaliation at the Department of Corrections.

IV. OTHER EQUITABLE RELIEF FOR ALL NAMED PLAINTIFFS

Front pay and back pay awards set forth above shall bear interest at 3.6% per annum from April 1, 1995 until this date.

In an accompanying order issued today, the court enters final judgment covering equitable relief for the individual named plaintiffs. Accordingly, the preliminary injunctions imposed for their protection by the court's orders entered June 7, 1994 and December 21, 1994, shall be dissolved. In its place, defendants are permanently enjoined from sexual harassment against the named plaintiffs (except Essie Jones), and from taking retaliatory action for their participation in this action.

Daniel Edelman, Esq. shall be reappointed pursuant to Fed.R.Civ.P. 53 to serve as Special Master. He shall continue to review personnel actions involving any of the named plaintiffs to insure that they have not been undertaken for retaliatory or discriminatory purposes. This ongoing process is intended to protect the interests of the named plaintiffs, at least until the Office of Special Inspector is fully operational (see Final Judgment and

Order III (Class Wide Injunctive Relief)). If and when the monitoring functions of the Special Master can be subsumed by the Office of Special Inspector, it may be possible to reduce or eliminate the Special Master's responsibilities. Meanwhile, his services are especially necessary given the Department's abysmal record in complying with prior injunctive orders, and defendants' recurring retaliation even as this litigation was in process.

Having made an express determination that there is no just reason for delay, the court, pursuant to Fed.R.Civ.P. 54(b), shall enter final judgment on equitable relief for the individual named plaintiffs. A separate order shall issue this date.

FINAL JUDGMENT AND ORDER II

(EQUITABLE RELIEF FOR INDIVIDUAL NAMED PLAINTIFFS)

Upon considering the arguments of counsel, testimony from witnesses at trial, exhibits received in evidence, and for the reasons more fully set forth in accompanying Memorandum Opinion II, the court hereby enters final judgment on equitable relief for the individual named plaintiffs.

Sharon Bonds

1. Bonds' claim for back pay resulting from denial of her promotion to DS–8 during the first quarter of 1989 is granted. Back pay shall be computed for the interval beginning on the date that the promotion would have been effective, and ending on the date that Bonds' actual salary at the Metropolitan Police Department exceeded the salary she would otherwise have earned as a DS–8 at the Department of Corrections. The amount of the back pay award shall be the difference between Bonds' salary had she received the DS–8 promotion, and her actual salary over the specified period, adjusted for interest to April 1, 1995. The court directs defendants to pay Bonds this amount.

***29** 2. Bonds' claim for back pay equal to the difference between her salary and that earned by Nathaniel Collins from February 1, 1989 to the present is denied.

3. Bonds' demand to be reinstated by the Department at grade DS–11 is denied. However, because the court concludes that Bonds was constructively discharged, and because she should have received a promotion to DS–8 prior to her termination, Bonds is entitled to reinstatement at the Department of Corrections at a DS–8 level. Accordingly, Bonds may, if she chooses, notify the Department within 30 days of her desire for reinstatement as a DS–8; and she shall, if so desired, be thereafter reinstated at that level.

Essie Jones

1. Jones' claim for retroactive promotion to grade DS–12 is denied.

2. Jones' claim for back pay associated with her non-selection to the DS–12 position is denied.

3. Jones' request for restoration of sick and annual leave is denied.

4. Jones' complaint is hereby DISMISSED.

Vera Brummell

1. The letter of reprimand issued to Brummell by John Henderson shall be expunged from her record.

2. AWOL charges against Brummell from June 1993 to date shall be expunged from her record.

3. When Brummell is able to return to work, she will be reassigned to a Department position with the parole board, home monitoring program or a halfway house, at her existing grade level. Brummell is not to be placed under the direct or indirect supervision of John Henderson or William Plaut without her express consent.

4. Brummell shall be granted front pay in the amount of $23,661.

5. Brummell shall be granted back pay in the amount of $70,618, inclusive of interest through April 1, 1995.

6. Brummell's sick leave, annual leave, retirement benefits and other benefits shall be made equivalent to what they would have been if she had been able to work from June 15, 1993 to the present, and continuing until she is able to return to work.

Barbara Carter

1. AWOL charges against Carter shall be expunged from her record, together with any resulting disciplinary actions.

2. When she is able to return to work, Carter shall be assigned to the Department of Youth Services. Carter is not to be placed under the direct or indirect supervision of

James West, John Brown or L.C. Jones without her express consent.

3. Carter shall be granted back pay in the net amount of $51,432, inclusive of interest through April 1, 1995. On a gross basis, Carter's back pay is $54,504, but it must be mitigated by $3,072 in wages earned at the U.S. Postal Service.

4. Carter shall be granted front pay in the amount of $56,871.

5. Carter's request for reinstatement at grade DS–9 is denied.

6. When she returns to work, Carter will be reinstated at DS–8, step 2—the level she would have attained if she had been promoted on April 1, 1991. Her sick leave, annual leave, retirement benefits and all other benefits shall be correspondingly restored.

Bessye Neal

***30** 1. Neal shall be promoted retroactively to DS–13, step 2, as of June 1, 1990; to DS–14, step 1, as of February 1, 1992; and to DS–15, step 1, as of October 1, 1993.

2. Neal shall have her sick leave, annual leave, retirement benefits and all other benefits restored as if she had received the three promotions.

3. Neal shall be granted back pay in the amount of $47,712, inclusive of interest through April 1, 1995.

4. Annual leave that Neal took to pursue this litigation—255 hours—shall be restored, as shall 98 hours of sick leave attributable to stress-related incapacity.

5. The one-day suspension imposed by Joyce Carmouche and Paul Quander shall be expunged from Neal's file.

6. Neal shall not be placed under the direct or indirect supervision of William Plaut without her express consent.

7. Neal shall be assigned the position of Ombudsperson for women employees, with special responsibility in the area of sexual harassment. Her role, and that of the Special Inspector to whom she will report, has been delineated in Final Judgment and Order III (Class Wide Injunctive Relief), issued today by the court in this matter. The Special Inspector shall determine whether Neal will serve exclusively as Ombudsperson, or whether her duties in that position would admit of additional Departmental responsibilities.

Shivawn Newsome

1. Upon her return from pregnancy leave, Newsome shall be assigned to a position compatible with her skills and experience, in compliance with standard departmental procedures; but she shall not be stationed at a facility where her brother is incarcerated, nor shall she be placed under the direct or indirect supervision of Reginald Johnson or L.C. Jones without her express consent.

2. Newsome's request that AWOL charges for September 28, 1994 and January 28, 1995 be expunged is granted, and she shall be compensated for the days in question.

3. Newsome shall be granted back pay in the amount of $12,964, inclusive of interest through April 1, 1995, to reimburse for lost overtime from July 26, 1992 through May 1993.

Tyrone Posey

1. Posey shall be granted back pay in the amount of $15,595, inclusive of interest through April 1, 1995 for lost wages during his illness from July 9, 1993 through July 5, 1994.

2. Additionally, Posey shall be granted back pay in the amount of $286 for denial of a promotion on December 1, 1994. He shall receive a step increase to DS–8, step 6, retroactive to December 1, 1994.

3. AWOL charges against Posey associated with his hospitalization and convalescence from July 9, 1993 through July 5, 1994 shall be expunged.

4. AWOL charges against Posey (524 hours) incurred between September 1992 and July 1993 shall be expunged, and he shall be compensated for the time in question.

5. Posey shall be credited with time in service during all periods he was marked AWOL (through July 5, 1994), and his sick leave, annual leave, retirement benefits, and other benefits shall be made equivalent to what they would otherwise have been.

***31** 6. Any disciplinary actions relating to Posey's AWOL—including the alleged absence from his work station in the spring of 1993, and the alleged improper release of an inmate in October 1994—shall be expunged.

7. Posey shall have 28 hours of annual leave and 16 hours of sick leave, taken in conjunction with this case, restored. He shall further have 80 hours of annual leave and 20 hours of sick leave, taken while he was ill in 1993, restored.

8. Posey shall not be placed in the same work

environment as Althea Haynes without his express consent.

Teresa Washington

1. Washington shall be granted back pay in the amount of $64,076, inclusive of interest through April 1, 1995.

2. Washington shall be granted front pay in the amount of $33,057.

3. Washington's sick leave, annual leave, retirement benefits and other benefits shall be made equivalent to what they would have been if she had worked continuously since February 1993.

4. AWOL charges against Washington from February 1993 to the present shall be expunged.

5. The letter of admonition received by Washington from Paylor in late 1992 shall likewise be purged.

6. When she is able to return to work, Washington shall be assigned to a position compatible with her skills and experience, at her current grade level, but not at the D.C. Jail. She may be assigned elsewhere in the Department of Corrections, or to another agency within the District of Columbia government.

All named plaintiffs

1. All of the amounts for front pay and back pay set forth in this order shall bear interest at 3.6% per annum from April 1, 1995 until the date of this order.

2. The court's preliminary injunction orders entered June 7, 1994 and December 21, 1994 to protect the individual named plaintiffs and Dennis Brummell are hereby dissolved.

3. Defendants are permanently enjoined from sexual harassment against the named plaintiffs, with the exception of Essie Jones, and from taking retaliatory action against the named plaintiffs, with the exception of Essie Jones, for their participation in this action.[1]

4. Daniel Edelman, Esq. is reappointed pursuant to Fed.R.Civ.P. 53 to serve as Special Master until further order of the court.

5. The Special Master shall be compensated at the prevailing market rate for his or her services and shall be reimbursed for all expenses incurred in connection with the appointment. The District of Columbia shall bear these costs.

6. Except in unforeseeable and emergency circumstances, the Department shall submit to the Special Master any plans or actions which will alter or affect the terms or conditions of employment or the working conditions for the named plaintiffs, excluding Essie Jones. The Special Master is hereby directed to review all such plans or actions regarding any of the persons identified above to insure that they have not been undertaken for retaliatory or discriminatory purposes. In order to discharge this responsibility, the Special Master is authorized to obtain information within the custody or control of the Department or of any employees in their official capacity, that is relevant to the review of such actions or plans that are subject to the Special Master's review. The Special Master shall make the inquiry and obtain the information through counsel for the Department, or if counsel is not reasonably available, through the Director or Acting Director. Further, the Special Master is directed to ascertain the views of any of the above identified persons who are, or may be, affected by any such action or plan as to the legitimacy of the proposed action. The proposed action shall not be implemented unless and until the Special Master approves of the action.

***32** 7. In the event that prior notice of the proposed personnel action could not be furnished to the Special Master by the Department, the Department is directed to provide notice of such action as soon as possible and to demonstrate to the Special Master why advance notice could not be achieved.

8. The Special Master is directed to file with the court reports on the first day of each month, for so long as the appointment remains effective, setting forth the personnel actions of which the Special Master has been informed, and the outcome of the Special Master's review of such action.

9. The Special Master may, at any time, call to the court's attention any matters that bear on the Department's compliance with this order.

Having made an express determination that there is no just reason for delay, the court, pursuant to Fed.R.Civ.P. 54(b), hereby enters final judgment on equitable relief for the individual named plaintiffs, as set forth herein.

SO ORDERED.

[1] The jury also found defendants liable under 42 U.S.C. § 1983. Plaintiffs, in their proposed findings of fact and conclusions of law as to the non-jury trial, have focused only on Title VII liability. Accordingly, the court will not incorporate the jury's § 1983 verdict in its deliberations. For all practical purposes, equitable relief under Title VII is congruent with equitable relief available under § 1983.

[2] In the cases of plaintiffs Neal and Posey, the question was limited to retaliation; neither plaintiff alleged sexual harassment. For purposes of equitable relief, the jury's affirmative answer on either ground is sufficient to establish adverse effect.

[3] The jury answered in the negative as to adverse effect under section 1983 for plaintiffs Posey and Washington. However, for purposes of equitable relief, it is sufficient that the jury found adverse effect under the Title VII claims, even if not under § 1983.

[4] Both of these dates are earlier than the relevant date under § 1983—November 24, 1990, which is three years prior to the date that this lawsuit was filed. The court will utilize the Title VII starting dates for these findings.

[5] Both *Bundy,* 641 F.2d at 953, and *Day,* 530 F.2d at 1085, agree that the proper standard is clear and convincing evidence. In *Hopkins v. Price Waterhouse,* 490 U.S. 228, 252–53 (1989), the Court held that the employers' burden in a mixed motive case is preponderance of the evidence. But that litigation is distinguishable from the remedial phase of a class action where a jury has already entered a liability verdict in favor of the plaintiffs. *Berger v. Iron Workers,* 1994 WL 151292, *2 (D.D.C. April 14, 1994). The court finds that a clear and convincing standard is appropriate in ascertaining whether defendants have met their burden to rebut the prima facie case. Nonetheless, the findings herein would not have been altered in any respect if a preponderance standard had been applied.

[6] In support of their contention that courts should exercise continuing jurisdiction rather than award front pay, defendants cite *Patterson v. American Tobacco Co.,* 535 F.2d 257 (4th Cir.), *cert. denied,*429 U.S. 920 (1976). But *Patterson* mentions continuing court supervision in a single passing sentence, and only as an alternative remedy. The court explicitly sanctioned front pay. "[C]ompensation should be supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position." *Id.* at 269. The court then added: "Alternatively, the court may exercise continuing jurisdiction over the case and make periodic back pay awards until the workers are promoted to the jobs their seniority and qualifications merit." *Id.* This language cannot reasonably be construed as an endorsement of continuing jurisdiction over front pay.

[7] Plaintiffs conceivably could have raised these same arguments against subtracting workers' compensation. Circuits have split on whether disability benefits are subject to the collateral source rule and hence not to be deducted from lost earnings. *See, e.g., Knafel v. Pepsi–Cola Bottlers of Akron, Inc.,* 899 F.2d 1473, 1480 (6th Cir.1990) ("[W]orkers' compensation, like unemployment benefits, are [sic] subject to the collateral source rule."); *Whatley v. Skaggs Cos., Inc.,* 707 F.2d 1129, 1138 (10th Cir.) ("The trial court's refusal to deduct plaintiff's disability benefits from defendant's back pay liability is likewise not error. Such benefits are from a collateral source, and offset is not required."), *cert. denied,*464 U.S. 938 (1983). *But see, e.g., Olivas v. United States,* 506 F.2d 1158, 1163–64 (9th Cir.1974) (collateral source rule does not apply when the collateral source is the defendant). In this case, the court need not decide whether the rationale underlying its treatment of unemployment benefits would have applied with equal force to workers' compensation, since plaintiffs have made no such argument.

[8] *Schleier* took care to distinguish back pay from lost future earnings (i.e., front pay). Back pay does not result from personal injury, and is therefore included as gross income under 26 U.S.C. § 104(a)(2). Front pay, however, is "excludable as being 'on account of personal injuries,' as long as lost wages resulted from time in which the taxpayer was out of work as a result of her injuries." *Schleier,* 1995 WL at *3. The implication for the court is that income taxes should be subtracted from front pay awards. *See also, Norfolk & Western,* 444 U.S. at 493–94 (after-tax income, not gross income before taxes, provides the only realistic measure of lost future wages).

> Defendants' position on subtracting income taxes would have prevailed if it had been advanced in the context of front pay. But it was not; defendants' proposed conclusions of law address back pay only. The court will not, *sua sponte,* propound an argument on defendants' behalf unless an unreasonable outcome would otherwise eventuate. Defendants did not object to the tax treatment of front pay by plaintiffs' economic expert. Defendants did not employ an economics expert of their own. Judge Posner's admonition is exactly on point:
>
> > [W]e will not reverse an award of damages for lost wages because of questionable assumptions unless it yields an unreasonable result—especially when, as in the present case, the defendant does not offer any economic evidence himself and does not object to the questionable steps in the plaintiff's economic analysis.
>
> *O'Shea v. Riverway Towing Co.,* 677 F.2d 1194, 1201 (5th Cir.1982).
>
> Even if the court were disposed to adjust the front pay awards for income taxes, there is no basis upon which to do so. The record contains no evidence as to plaintiffs' income, deductions, exemptions,

applicable tax brackets, etc.

[9] In Interrogatory No. 5, Bonds was asked to provide certain information "[w]ith respect to your contention that defendant failed to promote or denied you a benefit...." She responded that the position was for a DS–8 correctional officer, in late 1988 or early 1989, and that "Edward Paylor was my supervisor at this time, and I believe he acted to block my promotion because I rejected his sexual advances."

[10] The following exchange transpired in the August 8 deposition, pages 362–65:

> Q: Your complaint says that after you left the records office you never received a promotion. What promotion were you expecting?
> A: My 8.
> Q: And from whom?
> A: From the Department of Corrections.
> Q: I thought you said you never put in for an 8 after that one time you went before the panel and didn't get it.
> A: I was expecting an 8.
> Q: Without putting in for it?
> A: I never got a response back.
> ....
> Q: How can you hold the Department responsible for you not getting a promotion if you never put in for it?
> A: I'm telling you that I did put in for it. I said that I never got a response saying I got it or was denied it from the Department.

[11] The court will not address whether plaintiffs' choice of interest rate for back pay is appropriate, except to note that a higher rate—on an instrument of longer-term duration than three months—might have been entertained if plaintiffs had requested one. Properly, the rate applied to each increment of wages should match the time frame over which interest is to accrue. For wages received one year ago, the return on Treasury obligations with a duration of one year might be thought to establish the correct interest percentage. At that rate, plaintiff could invest her wages, risk-free for one year, without concern over fluctuating interest rates.

In the same fashion, plaintiffs' choice of a 3.6% discount rate for front pay will not be scrutinized, except to note that a higher rate might have been entertained if defendants had requested one. The selected rate was premised on recent 3–month Treasury bill yields.

[12] Plaintiffs have assumed no discount for front pay earned in 1995. To be consistent, expressing all dollar amounts as of April 1, 1995, wages earned over the nine-month period from April 1 through December 31 should have been discounted for an average of 4–½ months. Present value calculations for years after 1995 are also wrong. Brummell's wages for January 1 through June 30, 1996 were discounted for half a year. The correct period should have been a full year to produce a present value as of April 1, 1995.

[13] The interrelationship between interest rates and tax treatment is another point the parties seem to have mis-figured. It is worth a brief commentary to set forth the proper procedure—not because the errors are egregious in this instance, but rather because the issues are recurrent and potentially significant in other cases that may come to bar.

Plaintiffs' expert, in calculating front pay, applies the equivalent of a post-tax discount rate to pre-tax wages. The correct approach is to utilize a post-tax rate and post-tax wages (see note 8 *supra*). To illustrate, assume forecasted wages of $50,000 to be received one year out by a plaintiff in the 20% tax bracket; and assume a pre-tax interest rate of 3.6%. (In Brummell's case, the assumed tax rate appears to be 10.5%; although it is not easy to decipher the specific rate. Neither party offers support for any particular rate in their exhibits or testimony.) At a 20% tax rate, pre-tax interest of 3.6% converts to post-tax interest of 2.88%. Plaintiffs' expert would thus posit a present value of $48,600 (i.e., $50,000 ÷ 1.0288). The correct award should be $38,880 (i.e., $40,000 post-tax wages, divided by 1.0288). Here's the proof: Because the damage award for front pay is non-taxable, plaintiff could invest the full $38,880 when received. In one year, plaintiff would earn interest of $1,400 (i.e., $38,168 x .036). But the interest would be taxable, leaving $1,120 after paying a 20% tax. At the end of the year, plaintiff would have accumulated $40,000 (i.e., $38,800 + $1,120). That is the precise amount plaintiff would have earned if she had been able to work and pay taxes.

Plaintiffs' treatment of back pay is also incorrect—based upon pre-tax wages and pre-tax interest. Using the same assumptions, but substituting back pay for forecasted pay, plaintiffs' expert would argue for an award of $51,800 (i.e., $50,000 x 1.036). The correct award should be $51,440 (i.e., $50,000 x 1.0288)—using pre-tax wages but post-tax interest. An award for back pay is taxable; therefore plaintiff would net $41,152 from an award of $51,440 after paying a 20% tax. This amount, $41,152, corresponds exactly to $50,000 of income, less 20% in taxes, invested for one year at a 2.88% after-tax return. Since the government will tax the wages, the court cannot penalize the plaintiff by subtracting taxes from the defendants' restitution. But the government would not have taxed interest on the full amount of the wages. Only the after-tax residual wage could have been invested; thus the effective interest rate must be expressed as a post-tax

equivalent.

14 Defendants characterize Ballard's recommendation as hearsay. But of course, it is not; the relevance of the statement is that Ballard made it, not that it was correct or truthful. Defendants also observe that Brummell could have called Ballard to corroborate her testimony, but chose not to. The court notes that defendants were not themselves foreclosed from calling expert witnesses. Ballard could have been called by defendants if they had desired.

15 Dr. Morrison estimated that, absent medication, Brummell could return to work in approximately 15 months. Dr. McDaniel's forecast was four to six months, with medication. The effect of the court's ruling is to award front pay for about 7–½ months. (This rough calculation is somewhat overstated, given that the medication truncates the recovery period. More distant months which are eliminated have a lower present value than the near-term months which remain. Thus, a 50% reduction in the award is equivalent to more than a 50% reduction in months.)

16 The mid-point of six months and five years is 33 months. Inexplicably, plaintiffs' expert has used 27 months. The court must of course proceed on the evidence in the record.

17 Defendants also argue that Carter should have proven that she did not recover lost earnings from the driver of the accident vehicle. The production of such evidence, even assuming its relevance, is defendants' burden. *Nord,* 758 F.2d at 1470. They have not met the burden.

18 Defendants contend that the second vacancy was for an assistant administrator. But at least one of the available positions had its locus at Lorton, which at that time assigned a DS–13 grade to assistant administrators and a DS–14 grade to administrators.

19 Newsome's actual date of transfer to the Community Action Squad was late September 1992. Since the determination of overtime is significantly different for employees assigned to the Squad, Newsome's separation of her claim into pre-transfer and post-transfer periods is fitting and proper. What remains a mystery is why plaintiffs' expert chose November 14, 1992 as the cutoff for the first period rather than the actual transfer date. In effect, plaintiffs have included approximately four pay periods in the pre-transfer claim that should have been included in the post-transfer claim. Whatever plaintiffs' rationale, overstatement of the pre-transfer claim is more than offset by understatement of the post-transfer claim. Defendants, understandably, have not objected. The court will base its judgment on the numbers as submitted by plaintiffs.

20 Arguably, the dollar amount of an award for lost overtime should be reduced by the value of plaintiff's added leisure. That is, because Newsome was denied 40 hours of overtime per pay period, she was able to enjoy equivalent time in pursuit of other pleasures. The value of the extra time might properly be offset against the amount of her loss. *See, e.g.,* Richard A. Posner, *Economic Analysis of Law* 196 (4th ed. 1992) (wage rates for moonlighting jobs suggested as an estimate of the value of leisure time). Defendants did not, however, raise this issue. Even if the court were so inclined, there is nothing in the record that would permit the court to make an adjustment *sua sponte.*

1 A similar order will be issued today enjoining retaliation against Essie Jones and Dennis Brummell, who remain witnesses in this case.