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Civil Liability for Sexual Harassment of Female Employees By Prisoners

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Introduction

Female employees in many correctional institutions face harassment and abuse of a sexual nature directed at them by prisoners. As employers, correctional agencies have a legal obligation, under federal and state sex discrimination laws, to take reasonable measures to prevent and remedy sexual harassment in the workplace, particularly when it becomes pervasive enough to create a hostile work environment in which women do not feel that they can work with dignity.

It is widely recognized that this obligation extends to preventing sexual harassment of female employees by male co-workers and such third parties as vendors or the customers of a business. A recent federal appeals court emphasizes that this obligation also applies to sexual harassment of female prison staff members by male inmates. Failure to respond properly to such misconduct can result in extensive civil liability. A number of other courts have also recognized these principles.

This article focuses on a recent federal appeals court decision, examining the facts and legal principles presented. It then briefly surveys some of the other case law in this area,

and makes a number of suggestions intended to help deter harassment and prevent liability. At the end of the article, a number of useful resources and references are listed.

A court upholds substantial damages for inmate harassment

In Beckford v. Dept. of Corr., #09-11540, 2010 U.S. App. Lexis 9452 (11th Cir.), a federal appeals court ruled that the Florida Department of Corrections could be held liable, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 200e-2(a)(1) for failing to remedy a sexually hostile work environment that male inmates created for female employees at a correctional facility. The court upheld awards of $45,000 each in damages to fourteen female former employees, for a total award of $630,000, to which a significant amount in awards of attorneys fees and costs will be added under 42 U.S.C. Sec. 1988.

The 14 plaintiff employees included 12 nurses, a physician, and a classification officer, each of whom worked in "close management" housing dorms at the prison. The nurses had to enter the dorms daily to hand out medicine, answer sick calls, and respond to real or purported medical emergencies. The other employees had to enter the same dorms several times a week, at a minimum, to either engage in similar duties or discuss administrative matters with prisoners.

Those confined in the "close management" dorms are prisoners whose pattern of behavior has shown that they are unable to be left in the general population, and that they pose a greater threat to other prisoners, as well as staff members.

A pattern of pervasive harassment

The plaintiffs, in their lawsuit, presented ample evidence that these prisoners abused them, acting out against all staff members, but especially against female staff. Male staff members occasionally faced incidents in which these prisoners threw urine or feces on them.

A more pervasive pattern on inexcusable conduct, however, was exhibited towards the female staff. When they saw female staff members approaching a dorm, the evidence showed, they routinely called them sexually charged names, such as "cunt, whore, slut, and bitch," and stated, using graphic detail, the sexual acts they would want to perform with the female employees, should the opportunity occur.

These prisoners also yelled out to each other to "lock and load," referring to practice of exposing themselves and masturbating directly at the female staff members, which was also referred to as "gunning," with the aim of ejaculating towards or on the female staff. Prisoners engaged in such activity would stand at the windows to their cells, hang off cell

door jambs, stand on toilets, or stand on rolled up mattresses in order that the employees could see them through the cell windows.

The masturbating inmates would ejaculate on cell windows, or through the food slot or flap on the cell door, sometimes doing so when female staff were standing at doors. The masturbation went on while female employees attempted to complete necessary paperwork in the dorms, or saw prisoners in an isolation room in a medical building.

Rather than representing isolated incidents, such masturbation involved virtually every one of the prisoners, and prisoners used a "team effort" for "gunning" female employees.

This also occurred when female employees responded to supposed medical "emergencies." One nurse testified that a full "99.9%" of the emergencies were "bogus," and just manufactured by prisoners in order to have "entertainment for the evening." Another nurse stated that the inmates, in faking emergencies, regarded it like "hiring a call girl or a whore."

In one such incident, a male nurse responding to a supposed emergency came back almost immediately, since the inmate who called swore at him, stating that he didn't need any medical assistance, and demanded to know "where is the female nurse."

Male employees allegedly sometimes ignored female employees' pleas for help, and in a number of cases, female employees quit on the spot following such incidents.

Employee complaints and management response

Female employees attempted various forms of self-help to try to protect themselves against the inmates' harassment, such as trying to place screens in front of windows in isolation rooms, and suggesting papering cell door windows, but security personnel prohibited these efforts.

Suggestions of installing two-way mirrors at nursing stations were rejected by management as too expensive, and staff shortages made impractical a suggestion that prisoners be brought to a medical building so that female employees wouldn't have to visit the dorms.

Employees made other suggestions, such as making repeat gunners wear pink uniforms to shame them, and wore baggy clothes, sunglasses to avoid eye contact, and headphones to avoid verbal harassment.

Additionally, the female employees filed complaints with prison management, including the warden, and filed disciplinary reports about inmate conduct. Their lawsuit

contended that these complaints were ordinarily ignored, with one captain, for instance, telling a complaining nurse that the prisoners could do whatever they wanted because they were "in their living room." Other male employees allegedly told the plaintiffs they should accept the masturbation as "a compliment."

While sometimes inmates were punished for their conduct, management allegedly discouraged the nursing staff from filing disciplinary complaints.

There was a formal sexual harassment policy in place, but it was largely assumed to apply only to such harassment by fellow employees and outside vendors, not prisoners.

After continued complaints, the warden met with some of the complaining employees and after the meeting a so-called "three minute rule" was adopted, authorizing employees to refuse service to inmates who "gunned" them for more than three minutes. The lawsuit contended that this only made matters worse, as prisoners who learned of the rule knew they "had three minutes," leading them to make remarks like "you can't refuse me, you got to wait."

Ultimately, the fed-up former employees sued, and won.

Management's arguments following the jury awards

The defendant correctional Department in the lawsuit reacted to the jury's awards of damages by arguing that it could not be liable for harassment by inmates unless Department employees encouraged or participated in the conduct, and that no such encouragement or participation was proven. It further argued that the inmate harassment was not based on sex.

On appeal, the court found that the jury was entitled to find the Department liable for a hostile work environment on the basis of an unreasonable failure to remedy the harassment, and that no direct encouragement or participation by employees was required. The court further ruled that the harassment of the female employees was based on sex, and that the trial court did not abuse its discretion in refusing to sever the individual claims, and instead trying them all together despite the argument that the cumulative impact of the inflammatory nature of the allegations, repeated by various plaintiffs, was prejudicial.

The court found that it was well established that employers can be held liable for failing to take action to remedy harassment of employees by third parties who create a hostile work environment, such as the customers or vendors of a business. The court found that this general principle also applied when the harassment is by prisoners.

> "We refuse the invitation of the Department to treat inmates differently from other third-party harassers and prisons differently from other employers under Title VII. Several of our sister circuits have refused this invitation too and permitted liability for sexual harassment by inmates. Like them, we reject the notion that'prisons are uniquely exempt from liability for sexual harassment under Title VII.'"

While prisons may not be able to prevent all such sexual harassment of female employees by inmates, and are unable to eject unruly prisoners like businesses can eject unruly customers, and there are cost and constitutional considerations and limitations, a prison cannot refuse to take "reasonable measures" to curtail inmate sexual harassment of employees.

What could have been done?

In this case, the court found, prison officials could have enforced a dress policy that required inmates to wear pants when female staff members were in the close management dorms. Security personnel could have also accompanied female staff in the dorms, and been required to write disciplinary reports or at least allowed female staff members to report instances of misconduct.

Nurses could have also been allowed to use screens at cell windows, and the prison could have treated masturbation toward female staff as seriously as it treated other abuse of the all-male security staff, which resulted in the referral of some incidents for outside prosecution.

Management could have adopted a "specific anti-gunning policy." Instead, the court commented, it sought a "blanket exemption" from the requirements in Title VII to make reasonable efforts to deter harassment, and "that strategy was misguided."

The inapplicability of the "Faragher" defense

The defendant Department also argued that the jury should have been instructed on an affirmative defense to sexual harassment claims spelled out by the U.S. Supreme Court in Faragher v. City of Boca Raton, #97-283, 524 U.S. 775 (1998), telling the jury that it could not be found liable if it exercised reasonable care to prevent or promptly correct any sexual harassment and the employees unreasonably failed to take advantage of any preventive or corrective opportunities provided.

The court found, however, that this defense was only available to employers who defend against claims of a hostile environment created by a supervisor with authority over

the employee, and does not apply to harassment by someone else, such as a fellow employee, or third party (such as the inmates). Additionally, the Department would still have been found liable if the instruction had been given, since the jury specifically found that the defendant "failed to exercise reasonable care to prevent and correct promptly any sexually harassing behavior in the workplace."

Cases finding liability or potential liability

A number of other courts have either imposed actual liability for inmate sexual harassment or found potential liability for failure to take reasonable measures to prevent or remedy such conduct.

In Erickson v. Wis. Dep't of Corr., #05-4516, 469 F.3d 600 (7th Cir. 2006), a federal appeals court affirmed a judgment for a woman corrections employee who was raped by an inmate janitor. The plaintiff previously complained about the inmate's harassing behavior, but no remedial action was taken. The appeals court held that a reasonable jury could have found a basis for employer liability under Title VII's negligence standard regarding harassment by non-supervisors.

The court in Freitag v. Ayers, #03-16702, 463 F.3d 838 (9th Cir. 2006), ruled that the California state Department of Corrections could be held liable for failure to remedy a hostile work environment caused by male prisoners' sexual harassment of female correctional officers, including exhibitionist masturbation. The jury at trial awarded the plaintiff $500,000 in economic damages and $100,000 in non-economic damages The appeals court noted that employers may be held liable for third-party conduct by non-employees where the employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action". The court also noted that "nothing in the law suggests that prison officials may ignore sexually hostile conduct and refrain from taking corrective actions that would safeguard the rights of the victims, whether they be guards or inmates."

In Dawson v. Co. of Westchester, #03-7858, 373 F.3d 265, 93 FEP Cases (BNA) 1697 (2d Cir. 2004), a federal appeals court reinstated a hostile environment claim brought by women correctional officers, who alleged that management tolerated the circulation of two inmate letters that degraded them. Although a certain amount of lewd behavior is anticipated in a prison environment, the plaintiffs claimed that management inaction undermined their authority and made their job more dangerous.

In Slayton v. Ohio Dep't of Youth Servs., #98-4528, 206 F.3d 669 (6th Cir. 2000), a sexually hostile work environment was created by the actions of a male co-worker, as well as inmates who the co-worker encouraged to engage in harassing behavior. A jury

awarded $ 125,000 to an employee on her hostile environment claim, and the award was upheld on appeal.

In Wright v. Dept. of Corrections, 97-D-1418 31 F.Supp.2d 1336 (M.D. Ala. 1998), a federal court ruled that a female correctional officer could pursue a sexual harassment lawsuit based on an alleged failure of correctional officials to discipline prisoners for masturbating in front of her in violation of prison rules, but found that the plaintiff officer failed to prove that such failure to discipline occurred.

In Troxa v. Contra Costa Co., Super. Ct. #C9304028, 107 (126) L.A. Daily J. [Verd. & Setlmts.] 3 (1994), a California jail employee was awarded $50,000 in her suit for sexual harassment by inmates and retaliatory discharge.

Inmate sexual harassment can rise to the level of causing a constructive discharge, or making it reasonable for female employees to quit. In State Dept. of Corrections v. Stokes, 558 So.2d 955 (Ala. 1990), the court ruled that a female corrections officer, depressed from viewing a male inmate who repeatedly masturbated in her presence, had "good cause" to resign and collect unemployment benefits.

Cases rejecting liability

Some courts have rejected liability, either imposing more stringent legal requirements, or finding, as a factual matter, that the alleged harassment did not occur pervasively enough to be actionable, or that the employer's response was adequate.

In Vajdl v. Mesabi Acad. of Kidspeace, Inc., #06-2482, 484 F.3d 546 (8th Cir. 2007), for example, the court ruled that, without special circumstances, the sexually harassing conduct of inmates in a juvenile correctional facility could not be attributed to the employer.

In Brittell v. Department of Correction, 717 A.2d 1254 (Conn. 1998), the Department of Corrections was not liable for sexual harassment in a case where a female officer asserted that co-workers and prisoners spread rumors that she had undergone a sex change operation and/or had male genitalia. The Department took remedial actions, including issuing a statement against sexual harassment, disciplining one officer, and offering the plaintiff officer a transfer to other facilities.

In Hicks v. Alabama, 45 F.Supp.2d 921 (S.D. Ala. 1998), the court concluded that prison officials could not be held liable for sexual harassment based on a male prisoner's offensive conduct, including masturbating on and around female correctional officers. Prisoners, the court stated, were not agents of the defendant officials and the plaintiff officers failed to present any effective way the defendants could prevent such behavior by prisoners.

Suggestions to help deter harassment and prevent liability

Correctional agencies and facilities should take the issue of sexual harassment of female staff members by inmates seriously. The findings in a number of cases would seem to suggest that at least some agencies or supervisory personnel are instead shrugging it off, accepting it, or at least failing to take aggressive action to prevent or remedy it.

Female correctional employees are a valuable and necessary component of the correctional workforce, and deserve and should have a working environment in which they can do their jobs, as nurses, doctors, and correctional officers, without the mental trauma, indignities, fear, and discomfort sexual harassment creates.

What can an agency and its management personnel do? While there is no exact blueprint that fits all agencies and facilities, some things seem clear:

1. An unambiguous policy against sexual harassment should be researched, drafted, and adopted, one which makes it clear that it applies to harassment by inmates, as well as by supervisors, co-workers, vendors, and other persons that female employees will come into contact with while performing their job duties.
2. Supervisory personnel and employees should be educated and trained regarding the policy, in an atmosphere that allows and encourages the asking of questions and discussion aimed at finding practical solutions to common problem situations that may arise
3. Inmates should also be informed of the policy, and clear cut disciplinary rules that prohibit harassing conduct and spell out specific punishments for violations should also be adopted and enforced. Inmates should know that there will be consequences for such misconduct.
4. Mechanisms for filing complaints about sexual harassment by inmates and disciplinary charges against prisoners should be established, and such complaints and charges should be welcomed and encouraged, and thoroughly investigated, rather than discouraged.
5. In appropriate cases, when inmate conduct amounts to criminal behavior that would clearly not be tolerated elsewhere, outside prosecution should be considered. Conduct that amounts to assault and/or battery on female employees must not be taken lightly. Tolerating such conduct will only encourage more prisoners to engage in it, while even a small number of prosecutions may make some think twice about doing so.

An additional point worth briefly making is that combating prisoner sexual harassment is also beneficial in terms of the desired rehabilitation of the prisoner. Most prisoners will return to the outside world at some point, and must function in communities, families, and workplaces, where engaging in sexual harassment may lead to ostracism, arguments, or even physical altercations, as well as inability to form and retain friendships and

relationships, or to hold jobs. Tolerating sexual harassment by prisoners during their incarceration also develops and reinforces behavior patterns that subsequently are unleashed with brutal consequences on the general public when such prisoners are released.

There is, no doubt, a cost to be paid for engaging in a concerted effort to combat sexual harassment by prisoners. But few things that are important to do are cost free. Exploring how to best do this with the resources available can be beneficial to the agency and its mission, to the public, to the prisoners, and last, but certainly not least, to the hard working female correctional employees who have a legal right to a workplace free of pervasive sexual harassment, and a moral and ethical right to dignity and respect.

Resources

The following are some useful resources related to the subject of this article.

- Sexual Harassment. Summaries of cases reported in AELE publications.
- Sexual Harassment - By Inmates in Correctional Facilities. Summaries of cases reported in AELE publications.
- Sexual Harassment. EEOC webpage (includes links to statutes, regulations, EEOC guidance documents, etc).
- Sexual Harassment. Wikipedia article.
- Hostile Environment Sexual Harassment. Wikipedia article.
- Federal Bureau of Prisons Program Statement P3713.23 (2005) on Discrimination and Retaliation Complaints Processing. Includes chapter 14 on sexual harassment, including harassment by inmates.
- Barry S. Roberts and Richard A. Mann, "Sexual Harassment in the Workplace: A Primer."
- National Women's Law Center, "Sexual Harassment in the Workplace."
- National Association of Female Correctional Officers.

Prior Relevant Monthly Law Journal Articles

- Civil Liability for Sexual Assaults on Prisoners, 2007 (8) AELE Mo. L.J. 301.
- Civil Liability for Sexual Assault and Harassment by Officers, 2008 (2) AELE Mo. L.J. 101

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