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Wendy L. Lemons, Complainant, v. Eric Holder, Attorney General, Department of Justice (Federal Bureau of Prisons), Agency

Equal Employment Opportunity Commission-OFO

Appeal No. 0120081287

Agency No. P-2006-0215

April 23, 2009

Related Index Numbers

31.0962 Sexual Harassment, By Nonemployee

31.0967 Sexual Harassment, Employer Liability

31.0974 Sexual Harassment, Work Environment

Ruling

A Bureau of Prisons employee was subjected to sexual harassment by an inmate who repeatedly exposed himself to her and ultimately assaulted her. The agency could not avoid liability because it failed to respond appropriately when notified of the inmate's initial acts of misconduct. It waited until after the assault to take concrete, effective action.

Meaning

Once an agency is aware that an employee is being sexually harassed, it must take immediate and effective action to stop the harassment. An employee who works in a correctional facility is entitled to the same protections under Title VII as employees who work in other environments.

Case Summary

The complainant, a senior officer specialist with the Bureau of Prisons, alleged she was subjected to sexual harassment by an inmate who exposed himself to her four times, and ultimately came to her office while naked and physically assaulted her. The agency found the alleged incidents of exposure did not create a hostile work environment in the context of the correctional environment. It found the assault, which included groping of the complainant's private areas,

was sexual harassment, but that it avoided liability by taking appropriate action. The EEOC reversed on appeal. It found the agency improperly separated the indecent exposure incidents from the assault, when the inmate's conduct should have been viewed as a pattern of misconduct that created a sexually hostile work environment. The EEOC concluded that the agency was liable because the complainant reported each incident as it occurred, but it took no effective action to stop the inmate until after he assaulted her.

In making its decision, the EEOC specifically rejected the agency's suggestion that the inmate's indecent exposure was not directed at the complainant. It found the credible evidence indicated that he followed her on one occasion in order to expose himself, that he "laid in wait" for her to pass his cell so he could expose himself to her, and that he "looked angrily at complainant after she reported his indecent acts."

The EEOC also found no merit in the agency's "suggestion that its duty to protect its employees in this case is somehow reduced by the nature of a prison facility." It cited a 9th U.S. Circuit Court of Appeals decision where the court concluded that prison officials cannot simply ignore sexual misconduct in a correctional institution because Title VII creates a legal obligation for it to protect employees from sexual harassment. The EEOC noted that the decision outlined a number of actions prisons can take to address indecent exposure in the prison setting. However, the agency tried none of these measures. Instead, it allowed the inmate's misconduct to escalate until he attacked the complainant.

Full Text

Decision

On January 15, 2008, complainant filed an appeal from the agency's December 20, 2007 final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The appeal is deemed timely and is

accepted pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission REVERSES the agency's final decision.

Issues Presented

(1) Whether complainant was subjected to sexual harassment by a prison inmate;

(2) Whether the agency took immediate and appropriate corrective action when made aware of the harassment against complainant.

Background

The record reveals that complainant has worked for the Bureau of Prisons since June 1991. At the time of events giving rise to this complaint, complainant worked as a senior officer specialist at the agency's Federal Correctional Institution in Tucson, Arizona.

On June 2, 2006, complainant filed an EEO complaint alleging that she was subjected to a sexually hostile work environment by an inmate and that management officials failed to take reasonable steps to address the harassment.

In an EEO investigative affidavit, complainant stated that on August 5, 2005, a male inmate exposed his penis to her at his cell door as she locked cell doors in preparation for the 4:00 p.m. inmate count. Complainant stated that she told the inmate to "quit what he was doing," but the inmate spoke very little English and she had a difficult time communicating with him. Complainant stated that she reported the incident to a lieutenant (Lt. 1) and wrote an incident report that day. Complainant further stated that after she returned to work the following week after having the weekend off work, the inmate remained in her housing unit. Complainant stated that a lieutenant (Lt. 2) told her that if the inmate exposed himself again, complainant should report the incident again. Complainant stated that another female officer informed her that the same inmate exposed himself to her on the weekend following the August 5, 2005 incident, and the inmate was sent to a special housing unit for the weekend.

Complainant further stated that she felt unsafe

after the August 5, 2005 incident because the inmate was returned to her unit days after the incident. Complainant stated that the next incident occurred on January 3, 2006 while she was working in the Saguaro Unit. Complainant stated that at approximately 4:45 a.m., she was unlocking cell doors for the morning. Complainant stated that while she was performing this work duty, the inmate followed her with his pants dropped around his ankles, held his erect penis in his hand, and gazed at complainant. Complainant stated that she instructed the inmate to go back to his room and called her lieutenant (Lt. 3) to report the incident.

Complainant stated that Lt. 3 directed her to write an incident report and send the inmate to see Lt. 3. Complainant stated that she wrote an incident report and gave it to Lt. 3, although she is not sure if it was placed in the logbook. Complainant stated that after the inmate met with Lt. 3, the inmate came back to her unit and mumbled something while looking at complainant. Complainant stated that she felt very uncomfortable and unsafe after the inmate returned to her unit. Complainant stated that after the inmate returned to the cell, she told Lt. 3 that she felt that it was not right to send him back to the unit. Complainant stated that Lt. 3 stated that inmates exposing themselves to her is "part of the job."

Complainant further stated that on January 25, 2006, the inmate exposed his penis to her again while she was conducting an inmate count at 12:48 p.m. Complainant stated that after she finished counting, she reported the incident to the lieutenant on duty (Lt. 4), who instructed her to write an incident report. Complainant stated that she submitted an incident report to Lt. 2 regarding the matter. Complainant stated that Lt. 2 instructed her to send the inmate to him, which she did, but the inmate returned to her unit within minutes and looked angrily at complainant. Complainant stated that when she asked Lt. 2 why the inmate remained in her unit, Lt. 2 "acted like it was no big deal." "He [Lt. 2] said he didn't care and then that was the end of the conversation," complainant stated. Complainant's Affidavit at p. 15.

Complainant also stated that at approximately 2:30 a.m. on January 26, 2006, the inmate exposed himself to her yet again in a similar manner as she was doing an inmate count. Complainant stated that she reported the incident to the lieutenant on duty (Lt. 5), Lt. 5 asked her to write an incident report, and complainant submitted the incident report to Lt. 5. Complainant stated that nothing was done about the matter.

Complainant further stated that at 4:00 a.m. on January 26, 2006, she released Food Service workers from their cells and prepared for the 4:00 a.m. count. Complainant stated that as she worked in her office, the inmate walked past her office window and stood in front of her office door completely naked. Complainant stated that she directed the inmate to stand back, but he came toward her holding his penis. Complainant stated that the inmate had oil on his body. Complainant further stated that she activated her body security alarm and screamed for the inmate to leave her alone and return to his room. Complainant stated that she tried to hold the inmate back, but the inmate grabbed her left hand in an attempt to force her to touch his penis. Complainant stated that she held her arm out in an attempt to hold the inmate back, but the inmate pushed her arm away, touched her between her legs with his hand, grabbed her breast, called her by her name, and pinned her against the window. Complainant stated that a senior officer then entered her office and took the inmate off complainant and out of the unit in handcuffs. Complainant stated that Lt. 5 came to the unit and asked complainant to write an incident report and memorandum on the incident. Complainant stated that she was examined at the facility hospital because she hurt her back when the inmate shoved her against a window and was unable to work for two weeks after the assault.

Lt. 2 stated that he did not recall the August 5, 2005 incident. He further stated that he recalled the January 25, 2006 exposure incident. Lt. 2 stated that he processed complainant's incident report and forwarded it to the Unit Disciplinary Committee. Lt. 2

stated that he decided to allow the inmate to remain in complainant's unit because another officer was "only a second behind" complainant but did not see the inmate engage in misconduct. Lt. 2 stated that he instructed the inmate "not to do it again" and sent him back to complainant's unit.

Lt. 3 stated that on January 3, 2006, complainant reported that the inmate exposed his genitals to her. Lt. 3 stated that the inmate was brought to her office so that she could talk with him. Lt. 3 stated that she sent the inmate back into the unit because he was lucid, although the inmate has "mental issues" and has a history of not taking his medication. Lt. 3 stated that a pending Mental Health Evaluation was being conducted because two previous incident reports had been logged concerning the inmate. Lt. 3 stated that exposure is "not that common" in the facility, and she has only known of two other inmates exposing themselves to officers in her ten-year career at the Tucson facility. Lt. 3 stated that it is the lieutenant's job to manage the inmate and safety of the institution, including staff. Lt. 3 stated that inmates can be moved into a disciplinary special housing unit but special housing units have limited space. Lt. 3 stated that complainant turned in her January 3, 2006 incident report to the Control Center, instead of properly submitting it to her office.

Lt. 4 stated that he does not recall the January 25, 2006 exposure incident or complainant reporting such an incident. However, Lt. 4 stated that if he had been informed that an inmate indecently exposed himself to complainant, he would have "yanked him out and put him in special housing." When asked by the EEO investigator if such a course of action would have been normal, Lt. 4 responded that "it depends on the lieutenant" on duty.

Lt. 5 stated that she told complainant to write an incident report regarding the earlier January 26, 2006 exposure incident and send the inmate to her later that morning. Lt. 5 stated that complainant informed her that the inmate had masturbated in front of her before. Lt. 5 stated that even so, "there was nothing for me to do" because the inmate was secured in his cell. Lt. 5

stated that it was the job of the lieutenant to investigate and respond to indecent exposure incidents. She stated that indecent exposure incidents are "not uncommon, but it's not common." Lt. 5 stated that if the situation warranted it, she could have locked up an inmate who exposed himself.

The Associate Warden stated that he became aware of the harassing inmate's conduct after complainant was assaulted. He stated that he investigated the matter and found that Lt. 2 processed one of complainant's incident reports, recommended that the report be expunged and forwarded the matter to the next level of disciplinary action, the Unit Disciplinary Committee.

The Warden stated that she was first made aware of the inmate's harassing conduct after the assault occurred on January 26, 2006. The Warden stated that complainant wrote reports on the inmate that were entered into the Inmate Information Management System. The Warden stated that she questioned complainant about why she left the inmate's cell door open after unlocking it to let his cellmate go to work with Food Services. The Warden stated that complainant could have locked the cell after letting the inmate's roommate out if she felt threatened, although "we all leave it open because it just makes it easier later." The Warden further stated that she felt that lieutenants should not informally resolve reports of inmate misconduct, although lieutenants have the ability to do so.

A senior officer on duty with complainant on January 25, 2006, stated that complainant told him that the inmate exposed himself to her, but when the senior officer later went by his cell, the inmate was merely underneath blankets. Another senior officer stated that on January 26, 2006, complainant also told her that the inmate had exposed himself. The senior officer stated that he then followed behind complainant by about three to five seconds, but only saw the inmate covered with a sheet when he passed his cell.

A senior officer stated that on January 26, 2006, he responded to complainant's body alarm. He stated

that as he entered the Saguaro unit, he heard complainant screaming from the office. He stated that after he entered the office, he observed that the inmate was naked and had complainant pinned against the wall while groping her body. The senior officer stated that he pulled the inmate off complainant, placed him on the ground, handcuffed him, escorted him to the lieutenant's office, and sent him to the special housing unit. The record reveals that the inmate was transferred to the Federal Correctional Institution in Phoenix, Arizona on January 26, 2006. On September 26, 2006, a federal court found the inmate guilty of aggravated sexual abuse and resisting or impeding officers in the January 26, 2006 incident involving complainant and sentenced the inmate to 60 months incarceration.

At the conclusion of the investigation, complainant was provided with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). When complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its final decision, the agency found that the "few isolated alleged incidents of the [inmate] exposing himself in complainant's presence likely did not rise to the level of actionable harassment" in the context of a correctional environment because it is unlikely that a reasonable correctional officer would have viewed these incidents as sufficient to create a hostile work environment. The decision further stated that there was no evidence that the inmate specifically targeted complainant prior to January 25, 2006. However, the agency further determined that the January 26, 2006 physical assault on complainant in her office was sufficiently severe to constitute actionable sexual harassment.

The agency decision nonetheless found that the agency took appropriate actions prior to the January 26, 2006 assault in light of the fact that the objectionable inmate conduct occurred in a prison environment and there was insufficient evidence that

the inmate targeted complainant. The agency decision further stated that management acted appropriately in response to complainant's reports that the inmate had exposed himself on January 3 and 25, 2006 by talking to the inmate, evaluating the inmate, determining that he was not a danger to anyone, and returning him to his cell. The decision noted that a lieutenant stated that inmates are usually only moved out of the unit if they present a safety risk, and complainant did not express any fear for her safety before the January 26, 2006 physical assault.

The decision further stated that the agency acted promptly after the January 25 and 26, 2006 exposure incidents by having a lieutenant talk to the inmate and tell him to stop the inappropriate behavior, processing complainant's incident report, and referring the matter to the Unit Disciplinary Committee. The decision further determined that although complainant believed that the inmate should have been moved to another unit prior to the January 26, 2006 assault, the agency will not transfer an inmate to another housing unit "for something that BOP considers a fairly minor infraction." The decision concluded that lieutenants had discretion to handle this matter informally, and the lieutenants appropriately determined that complainant was not in danger merely because of the exposure incidents.

Contentions on Appeal

On appeal, complainant argues that the agency improperly found that it was not liable for the inmate's harassing conduct. Complainant notes that the Warden acknowledged in his investigatory statement that the lieutenants improperly processed complainant's incident reports and improperly handled such incidents in an informal matter. Complainant further argues that the agency's argument that she was not harassed by the indecent exposure because the inmate was locked in his cell is erroneous since complainant had to observe the inmate in his cell in order to fulfill her essential work duties. Complainant also contends that correctional officers often left the cells of Food Service Workers open so that they could go eat meals or go to work or

school. Complainant maintains that the Tucson facility was "not a lockdown prison," and "inmates pretty much have free range from 10:00 p.m. until the morning around 3 a.m., when I start opening cell doors to let Food Service Workers out." Complainant's Appellate Brief at p. 2. The agency did not submit a statement on appeal.

Analysis and Findings

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See EEOC Management Directive 110, Chapter 9, § VI.A (November 9, 1999) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and ... issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

Sexual Harassment/Hostile Work Environment

It is well-settled that sexual harassment in the workplace constitutes an actionable form of sex discrimination under Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). In order to establish a prima facie case of sexual harassment, the complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her sex; (3) that the harassment complained of was based on her sex; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See *McCleod v. Social Security Administration*, EEOC Appeal No. 01963810 (August 5, 1999) (citing

Hanson v. City of Dundee, 682 F.2d 987, 903 (11th Cir. 1982).

Here, complainant, a female, is a member of a statutorily protected class. Further, we find that the inmate's conduct was based upon complainant's sex because the evidence indicates that the only other employee who was subjected to similar indecent conduct by this inmate was also female, and the inmate covered himself when male guards observed him. Complainant, other witnesses, and documentary evidence reflect that complainant immediately reported the harassing incidents to management verbally and through incident reports and resisted the inmate's physical attack on her. Thus, the record reflects that the inmate's conduct was unwelcome to complainant.

Turning to the fourth prong of the prima facie case, we note that whether or not an objectively hostile or abusive work environment exists is based on whether a reasonable person in complainant's circumstances would have found the alleged behavior to be hostile or abusive. The incidents must have been "sufficiently severe and pervasive to alter the conditions of complainant's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 23 U.S. 75 (1998). To ascertain this, we look at the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; whether it was hostile or patently offensive; whether the alleged harasser was a co-worker or a supervisor. See *Harris*, 510 U.S. 17, 23 (1993); see also Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050 (Mar. 19, 1990).

In this case, the agency improperly severed the incidents wherein the inmate indecently exposed himself to complainant from the inmate's ultimate physical assault on complainant when examining whether the inmate's conduct subjected complainant to a hostile work environment.¹ We determine that the

inmate's conduct should be viewed as a whole because each incident is part of an ongoing pattern of similar conduct directed against complainant by the same harasser over a span of five and a half months.²

As such, we first determine that complainant credibly reported that on four occasions, an inmate intentionally exposed and touched his genitals while gazing at or following complainant. Although the agency attempts to cast doubt on complainant's account of the inmate's indecent exhibitionism on January 25 and 26, 2006 by asserting that two male co-workers merely saw the inmate covered under a sheet or blanket when they arrived on the scene, we are persuaded that complainant's accounts are accurate because there is consistency between the incident reports filed contemporaneously with the harassing conduct and complainant's subsequent investigatory and appellate statements. Further, we are convinced that complainant's immediate reporting of each incident to management and submission of incident reports indicates that complainant's accounts of the inmate's conduct are accurate and trustworthy. We further note that by the male co-workers' own accounts, they did not observe the inmate at the precise moment complainant stated that the inmate exposed himself to her, but followed complainant after she reported the harassment. The lapse of seconds afforded the perpetrator the opportunity to obscure his misdeeds toward complainant underneath bed sheets, which we are persuaded was the case here.³ Furthermore, the details of the sexual assault on complainant is corroborated by a senior officer whose description of the inmate's conduct is very similar to the modus operandi of the inmate described in complainant's accounts of his previous acts of indecent exposure.

We further find that contrary to the agency's assertion that the indecent exposure was not directed at complainant, complainant proved that the Conduct was directed at her by credibly testifying that the indecent exposure occurred as the inmate followed her with his pants dropped around his ankles, held his penis in his hand as he gazed at complainant, laid in

wait for complainant to pass his cell so that he could expose his genitals to her, and looked angrily at complainant after she reported his indecent acts.

Furthermore, we find that a reasonable person in complainant's circumstances would find that she was subjected to conduct that was sufficiently severe to alter the conditions of her employment when she was targeted by an inmate's indecent exposure on four occasions; physically overpowered against her will by the naked inmate; groped between the legs; touched on the breasts; pinned against a window; almost physically forced to touch the inmate's genitals; and, injured by the inmate's sexual assault. *See Cori A. Wilson v. Department of Justice (Federal Bureau of Prisons)*, EEOC Appeal No. 0120023614 (February 3, 2004) (Commission held that complainant was subjected to a hostile work environment when her coworker exposed himself, grabbed complainant's hand, and tried to force complainant to touch his exposed genitals as he was masturbating); *Lopez v. United States Postal Service*, Appeal No. 0120045212 (February 10, 2005) (Commission held that instance of co-worker grabbing complainant and grinding against her, coupled with one subsequent comment, was sufficient to establish a hostile work environment); *Hayes v. United States Postal Service*, EEOC Appeal No. 01954703 (January 23, 1998) (Commission held that incident where co-worker stuck his tongue into complainant's ear was sufficient to constitute hostile work environment); *Smith v. Sheahan*, 189 F.3d 529, 534 ((7th Cir.1999) (Court held that episode in which plaintiff was called a "bitch," was pinned against a wall, and had her wrist twisted severely enough to damage her ligaments, draw blood, and eventually require surgical correction was severe enough to create an actionable hostile work environment); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1072 (10th Cir.1998) (Court held that an incident in which a customer pulled his waitress by the hair, grabbed her breast, and placed his mouth on it severe enough to create an actionable hostile work environment); *Todd v. Ortho Biotech, Inc.*, 138 F.3d 733, 736 (8th Cir.) (Court held that single attempted

rape at national sales meeting was sufficiently severe misconduct to be actionable), *rev'd on other grounds*, 525 U.S. 802, 119 S.Ct. 33, 142 L.Ed.2d 25 (1998); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2nd Cir.1995) (Court held that "even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability"). Thus, we find that complainant was subjected to sexual harassment.

Agency Liability

Because complainant established that she was subjected to sexual harassment, the next inquiry is whether the agency is liable for the inmate's actions. EEO Regulations provide that employers may be held liable for the acts of non-employees where the employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action." 29 C.F.R. § 1604.11(e); Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999). That is, an agency can raise an affirmative defense when it shows that it took immediate and appropriate corrective action. *Id.* What is appropriate remedial action will necessarily depend on the particular facts of the case, such as the severity and persistence of the harassment and the effectiveness of any initial remedial steps. *See Taylor v. Department Of Air Force*, EEOC Request No. 05920194 (July 8, 1992) .

In this case, complainant immediately reported each incident of harassment to various management officials, both verbally and through incident reports. Thus, the agency was aware of the inmate's harassing conduct immediately after the harassing incidents occurred. After the first incident of indecent exposure and a subsequent incident involving another female coworker in August 2005, the agency reportedly sent the inmate to a special housing unit for the weekend, but inexplicably returned him to complainant's unit in time for complainant's next day of work.

The final agency decision concluded that the

lieutenants complainant complained to each addressed her allegations and handled her complaints properly. However, the lieutenant's "response" merely consisted of talking to the harassing inmate, instructing him "not to do it again," and returning the inmate to complainant's unit, which was wholly inadequate because it made complainant vulnerable to further harassment without disciplining the harasser. In fact, the lieutenant to whom complainant reported the August 5, 2005 incident could not recall responding to the incident and stated that he merely instructed the inmate to "not to do it again" after exposing himself to complainant on January 25, 2006. The lieutenant to whom complainant reported the January 3, 2006 incident stated that after complainant reported the incident, she merely talked to the inmate and sent him back to complainant's unit because he was "lucid." Likewise, the lieutenant to whom complainant reported the January 26, 2006 exposure incident stated that although complainant informed her that the same inmate had masturbated in front of her before, she could do nothing because the inmate was secured in his cell. Although a lieutenant stated that lieutenants had the authority and ability to immediately transfer the inmate to a special housing unit where he would have no interaction with complainant, the lieutenants did not exercise their discretion to do so in this case until after complainant was physically attacked.⁴ Consequently, we find that the agency did not take immediate and appropriate steps to ensure that the harassment would not recur.

Despite the final decision's attempt to insulate the agency from liability by asserting that the agency followed its own process for handling inmate misconduct, there is no evidence that the agency actually used the process to effectively respond to complainant's reports of harassment. In fact, although complainant provided the EEO investigator with copies of her incident reports after the agency failed to provide them for the record, there is no indication in the record that the agency actually took any action in response to complainant's incident reports.⁵ Even if the agency forwarded complainant's incident reports

to the Unit Disciplinary Committee in accordance with its inmate disciplinary process, there is no evidence that the Committee took any prompt or corrective action to address the harassment before complainant was sexually assaulted. After complainant reported that she was subjected to harassment when an inmate repeatedly exposed himself to her, the agency was required to take immediate and effective corrective action instead of deferring its duty to respond to a protracted procedure that did not adequately address the urgency of the situation. Given the fact that inmates were allowed to sometimes roam outside their cells, complainant's job duties included going into or near the inmate's cell, the repeated nature of the indecent exposure, the questionable mental state of the inmate, and the targeted and confrontational manner in which the inmate exposed himself to complainant, we find that the agency did not exercise reasonable care to prevent further harassment of complainant before she was sexually assaulted.

Additionally, we reject the agency's suggestion that its duty to protect its employees in this case is somehow reduced by the nature of a prison facility. In *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), the Ninth Circuit upheld a jury's determination that a female correctional officer was subjected to a hostile work environment when inmates subjected her to exhibitionist masturbatory conduct on at least five occasions within several months. Regarding the agency's liability for the inmate's harassment of the officer, the Ninth Circuit concluded:

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. As the district court found, "even in an inherently dangerous working environment, the focus remains on whether the employer took reasonable measures to make the workplace as safe as possible." The CDCR is not, by simple virtue of its status as a correctional institution, immune under Title VII from a legal obligation to take such measures and to protect

its employees to the extent possible from inmate sexual abuse.

Freitag, 468 F. 3d at 539.

Finally, we note that in *Freitag*, the Court observed that prisons have curtailed indecent exposure by imposing serious disciplinary measures for sexual misconduct; restraining sexually aggressive inmates or taking away their yard privileges; working with the prosecutor's office to prosecute serious and repeat offenders; and, even installing devices so that officers can observe inmates but inmates cannot see the officers. *Freitag*, 468 F.3d at 535. In this case, the agency failed to avail itself of any such measures, which allowed the inmate's conduct to escalate to the point of physically attacking complainant.

The final agency decision concluded that the agency was not aware of any threat to complainant's safety until complainant was physically assaulted on January 26, 2006. However, we determine that the physical assault on complainant was the foreseeable escalation of the inmate's indecent exposure against complainant in light of the agency's failure to take advantage of the options available to control his indecent exhibitionist behavior. The inmate's violent propensity was revealed in his reported stalking of complainant while exposing his genitals to complainant on January 3, 2006, yet the agency failed to fulfill its obligation to do "whatever is necessary" to end the harassment, make the victim whole, and prevent the misconduct from recurring. Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050 (Mar. 19, 1990); see also Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999) (stating that "remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur").

In essence, the fact that the harassment recurred and escalated after complainant immediately reported the inmates' repeated harassment indicates that the agency's response was not prompt, effective, nor appropriate. See *Logsdon v. Department of*

Agriculture, EEOC Appeal No. 07A40120 (Feb. 28, 2006) (Commission held that taking only some remedial action does not absolve the agency of liability where that action is ineffective); *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669, 677 (6th Cir. 2000) (Court held that although allegations of inmate misconduct alone cannot support a hostile work environment claim, "this general rule against prison liability for inmate conduct does not apply when the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior"). Due to the agency's failure to keep the harasser away from complainant or properly discipline him, complainant was forced to work with the harasser which culminated in the sexual assault. Accordingly, because the agency has not satisfied the affirmative defense, we find that it is liable for the harassment of complainant.

Conclusion

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Commission REVERSES the agency's final decision. We REMAND this matter to the agency for further processing in accordance with this decision and the ORDER below.

Order

The agency is ordered to undertake the following remedial relief:

1. The agency shall undertake a supplemental investigation to determine complainant's entitlement to compensatory damages under Title VII. The agency shall give complainant notice of her right to submit objective evidence (pursuant to the guidance given in *Cade v. Department of the Navy*, EEOC Appeal No. 01922369 (January 5, 1993)) and request objective evidence from complainant in support of her request for compensatory damages within forty-five (45) calendar days of the date complainant receives the agency's notice. No later than ninety (90) calendar days after the date that this decision becomes final, the agency shall issue a final agency decision addressing the issue of compensatory damages. The

final decision shall contain appeal rights to the Commission. The agency shall submit a copy of the final decision to the Compliance Officer at the address set forth below.

2. Within sixty (60) calendar days after the date this decision becomes final, the agency shall restore any leave to complainant attributable to the hostile work environment, including the January 26, 2006 assault.

3. The agency shall provide training to all management officials in the Federal Correctional Institution facility in Tucson, Arizona regarding their responsibilities with respect to Title VII with special emphasis on preventing and responding to harassment (including inmate harassment) and EEO anti-retaliation provisions.

4. The agency shall consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary action. The agency shall report its decision to the compliance officer. If the agency decides to take disciplinary action, it shall identify the action taken. If the agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the agency's employ, the agency shall furnish documentation of their departure date(s).

The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the agency's calculation of back pay and other benefits due complainant, including evidence that the corrective action has been implemented.

Posting Order (G0900)

The agency is ordered to post at its Federal Correctional Institution facility in Tucson, Arizona copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision

becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

Implementation of the Commission's Decision (K1208)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, D.C. 20013. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. If the agency does not comply with the Commission's order, the complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

Statement of Rights -- On Appeal Reconsideration (M1208)

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, D.C. 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

Complainant's Right to File a Civil Action (R0408)

This is a decision requiring the agency to continue its administrative processing of your

complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

Right to Request Counsel (Z1008)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

¹We note that the final agency decision maintained that a reasonable correctional officer would not have viewed the indecent exposure as sufficient to create a hostile work environment. However, we note that the agency's own inmate disciplinary guide provides that indecent exposure is a prohibited offense that can result in serious sanctions against inmates, including rescission of parole, disciplinary transfers, segregation, restitution, loss of job, and banishment to living quarters. Moreover,

management stated that indecent exposure was "not that common" in the facility; a lieutenant stated that she could only recall two indecent exposure incidents during her ten years working at the facility; and, another lieutenant stated that the inmate's indecent exposure was so serious that he would have "yanked" the inmate out of his cell and placed him in a special housing unit after complainant reported such an incident.

²A complainant's legal claim of harassment should not be fragmented, or broken up, during EEO complaint processing, as fragmented processing comprises a complainant's ability to present an integrated and coherent claim of unlawful harassment. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (MD-110), Chapter 5, Section III (November 9, 1999).

³We note that the two co-workers did not indicate that they went into the inmate's cell to investigate the matter further; instead, they merely observed the inmate underneath the covers from outside the cell.

⁴In fact, the record is devoid of evidence documenting that the agency took any action to protect complainant or discipline the harassing inmate for reported indecent acts committed against complainant in January 2006 until after the inmate sexually assaulted complainant on January 26, 2006.

⁵We note that the agency contends that complainant improperly submitted an incident report to the Control Center instead of to a lieutenant. However, the agency has not shown that reporting the matter to the lieutenant on one occasion would have resulted in a prompt and effective response from the agency, since complainant clearly submitted other incident reports to lieutenants that did not result in a prompt and appropriate response from the agency.

Regulations Cited

29 CFR 1614.108(f)
29 CFR 1614.110(b)
29 CFR 1604.11(e)

Cases Cited

477 U.S. 57
EEOC Appeal No. 01963810
682 F.2d 987
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