

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GEORGIA ERICKSON,

Plaintiff,

OPINION AND ORDER

v.

04-C-0265-C

WISCONSIN DEPARTMENT OF
CORRECTIONS,

Defendant.

This civil suit for monetary damages is before the court following a trial in which the jury returned a verdict in favor of plaintiff Georgia Erickson, awarding her damages in the amount of \$300,000 for past and future pain and suffering she incurred as a result of a rape by a prison inmate in her workplace. Plaintiff brought the suit alleging claims under 42 U.S.C. § 1983 (violation of substantive due process rights under the state-created danger theory of liability) and Title VII (discrimination in the form of sexual harassment in the work place). Prior to trial, I granted the individual defendants summary judgment on the § 1983 claims against them and allowed the case to go forward against plaintiff's employer under Title VII.

At the close of plaintiff's case, defendant Wisconsin Department of Corrections moved for judgment as a matter of law on the ground that plaintiff had not adduced sufficient evidence to allow the jury to find that supervisory personnel knew or should have known that plaintiff was at risk of sexual harassment by the inmate janitor assigned to her work area. I took the motion under advisement at the time. Defendant made another motion for judgment as a matter of law at the end of the liability phase of trial: I took this motion under advisement as well. (Defendant does not contest the amount of the damage award.) The fully briefed motions are now before the court.

In summary, the evidence adduced at trial consisted of the following.

TRIAL EVIDENCE

Plaintiff Georgia Erickson worked for the Wisconsin Correctional Center System from 1997 until 2001, with short breaks when she worked for other state agencies. In 2001, she was working in payroll and benefits and was housed in the same building as the Oregon Correctional Center, a low security institution. When she started in 1997, she was given three days of "nonsecurity employee" training about avoiding relationships with inmates, adverse consequences for employees who became involved with inmates, the system's sexual harassment policy, inmate fantasies about women and misconduct reports.

In December 2001, plaintiff was working flexible hours and sometimes working extra

hours to keep up with her workload. At that time 10 to 12 people worked in the system office; two of them were male. Andrea Bambrough was plaintiff's immediate supervisor; Mickey Thompson (now Mickey McCash) was head of the system. Bambrough, Thompson, Wayne Mixdorf (a sector chief within the system) and another sector chief had their own offices; the other employees occupied cubicles.

In 2001, it was common for the door to the center system's offices to be unlocked during the day but locked at 4:30 p.m. Throughout the year, inmate janitors worked in the offices, emptying wastebaskets, moving furniture and cleaning. In December 2001, the inmate janitor was John Spicer. Plaintiff was unaware of any janitor's coming into the offices after 4:30 to work.

On December 20, 2001, some of plaintiff's supervisors invited her to join them after work at Hack's bar for some "Christmas cheer." At some time between about 4:45 and 5:15 that afternoon, when plaintiff believed that she was alone in the office, she turned around in her chair and noticed an inmate about 10 to 15 feet away from her, "just looking like he was trying to look busy with a vacuum, and it really freaked [her] out." Tr. I-A-41. She testified that it scared her because her understanding was that she was not to have been left alone with an inmate and that she "felt like he was stalking [her]." Id. She described the inmate as "sitting or squatted down by [the vacuum cleaner] and just monkeying around with it and looking back and forth at me." Id. at 42. When asked why she was frightened,

she explained that she had heard no doors open or close and she had not heard a vacuum cleaner running.

Plaintiff told the inmate that she was leaving right away to meet some friends. She shut down her computer and the file room, went to the door and unlocked it so that the inmate could leave and then locked the door again after he had walked out. Plaintiff did not stop to tell anyone at the correctional center about the inmate's presence in her office after hours but drove immediately to Hack's, where she found Warden Thompson; her supervisor, Andrea Bambrough, sector chief Mixdorf and Todd Johnson, Assistant Superintendent of the center. She joined them, took off her coat and then told them right away "that I was freaked and scared because the inmate, that I didn't know his name, but that the inmate was in there, in my work area, into my work area and that — I guess that is mainly it. I just told them I was scared and really freaked. That he was monkeying around — he kind of looked like he was just monkeying around with a vacuum." Tr. I-A-50. She told them she had come directly from work and may have said that she "kind of didn't finish things and shut up things and closed up things and left." Id. She described her demeanor at Hack's as "[s]cared and excited or, you know, kind of probably a little bit emotional." Id. at 51.

Plaintiff testified that the group "looked a little bit surprised and their mouths kind of dropped and that Mickey [Warden Thompson] responded right away that she was so sorry. That they would make sure nothing like this would ever happen again." Id. She does

not remember any comments from anyone else but described everyone as showing “a little concern.” Id. No one asked her any follow up questions. She did not speak to anyone associated with the center system or with the center itself about the December 20 incident again until after December 28.

Plaintiff returned to work on December 27. She did not check to see whether Spicer was still working as a janitor in the center system office and she does not recall having seen any janitor at work that day or the following one. On December 28, Spicer attacked and raped her, then stole her car and escaped from the correctional center.

Andrea Bambrough (plaintiff’s immediate supervisor) testified that none of the persons in the group at Hack’s appeared to be intoxicated, although three of them were drinking, and that the noise level was low enough that people at the table could hear one another. She recalled that when plaintiff arrived, she told the group, which included Thompson, Johnson and Mixdorf, that a prisoner had made her feel uncomfortable, that the prisoner had been hanging around her cubicle and that the incident had happened near the end of the day. Bambrough did not respond to plaintiff’s comments. She testified that she would have inquired further of plaintiff had she understood it to be a concern for plaintiff, but that she did not understand from plaintiff’s body language and the way she came in to the bar that plaintiff viewed it as a problem.

Cheryl Schuchardt testified that she worked in the center system office with plaintiff

and that she had complained about the behavior of the inmate janitor that preceded Spicer, when he spent too much time trying to talk to her about family matters; she talked to Todd Johnson about her objections and Johnson had the inmate reassigned immediately. She never said anything to Johnson about Spicer because he never seemed to her to be a threat. She saw him in the office twice on December 28, 2001, once at about 4:35 or about ten minutes before she left for the day.

Todd Johnson testified that he was responsible for the day-to-day operations of the correctional center. It was not his practice to advise persons working in the center system offices of the criminal records of the persons in the correctional center. He knew that the center system staff was predominantly female and that prisoners can be violent with staff, although he had never seen any incidents of that nature at the Oregon center. The center system was off-limits to prisoners who lacked specific authority to be there.

Before December 20, 2001, Johnson was aware that one of the potential signs of inappropriate inmate activity can be increased vigilance of staff activities. Johnson does not know who approved Spicer for the position of inmate janitor. He removed the prior inmate janitor the same day that Schuchardt complained to him about the janitor's excessive chatting. Had a woman come to him in 2001 and indicated that an inmate janitor was harassing or stalking her, he had the authority to remove the inmate janitor immediately.

On December 20, 2001, Johnson arrived at Hack's about 4:30 just as Mixdorf was

arriving. Bambrough arrived next, followed by Thompson and later by plaintiff. When plaintiff arrived, Johnson was drinking his third pint-sized glass of beer. He was not intoxicated and did not observe that any other member of the group was. He understood plaintiff to be expressing a concern about the inmate janitor but did not know what level of concern she felt. He did not think she was upset or that she was expressing fear. He did know that the incident that concerned her had occurred just before she left work to come to Hack's. At the time, he did not make the connection between the description of Spicer's fiddling with the vacuum cleaner and the fact that this had occurred after hours. He had no direct supervisory responsibility for plaintiff and knew her only casually. He believed that the warden had left before plaintiff discussed the incident with Spicer. Johnson told plaintiff to talk with Bambrough and never told plaintiff to write up a conduct report of some kind. He testified that if before December 28, he had been reminded of the Spicer incident or remembered it himself, he would have done something about Spicer.

Johnson testified that Spicer had nothing in his record having to do with sexual conduct. Spicer had received three minor conduct reports since 2000 and one major conduct report that he had received in February 2001 while at another correctional center in Milwaukee for being unaccountable for an hour and a half and for which his work release had been terminated and he had been transferred to the McNaughton Correctional Center. His criminal history included retail theft, attempted robbery, battery and delivery of a

controlled substance and he was classified as high risk. Spicer had been recommended for participation in programs to address his poor decision-making skills and cognitive distortions, for alcohol and drug treatment and for anger management. At a hearing on July 10, 2001, the parole board told Spicer he would have to wait eight months before he could be re-considered for parole because he was an unreasonable risk to the community. His participation in recommended programs had been unsatisfactory and he continued to have unmet drug treatment needs. Johnson considered him to be an unremarkable inmate.

Spicer worked as an inmate janitor in the center system offices from November 9, 2001 until December 28, 2001. He was rated as performing the janitorial job satisfactorily.

Mixdorf's memory of the evening at Hack's was that plaintiff arrived after everyone else, that she did not seem to be upset, that Warden Thompson left after plaintiff arrived but before plaintiff mentioned in a matter of fact tone that an inmate "creeped her out" and that Johnson responded to her comment by saying something to the effect that if she felt something needed to be done, they should talk about it and he'd be willing to take some action. Mixdorf noticed no change in expression on anyone's face.

Warden Thompson's testimony was that she was at Hack's when plaintiff arrived, that plaintiff seemed to be "[h]er usual bubbly self," Tr. 2-B-53, that Thompson bought plaintiff a beer and then left to pick up her foster child from day care and did not hear any comments from plaintiff about an inmate janitor or make any comment to her about one.

OPINION

In the order entered in this case on February 22, 2005, I held that defendant could be held accountable for negligence in failing to prevent inmate Spicer's sexual harassment of plaintiff and that the relevant questions would be the "employer's knowledge of the harassment, the employer's ability to end or prevent it and the "adequacy of the employer's remedial and preventative responses.'" Feb. 22, 2005 order, dkt. #71, at 37 (quoting Turnbull v. Topeka State Hospital, 255 F.3d 1238, 1244 (10th Cir. 2001)). In an earlier order entered on July 19, 2004, I rejected defendant's argument that an employer cannot be held liable under Title VII unless the sexual harassment is pre-existing. I held instead that defendant could be held liable for failing to prevent a sexually hostile work environment if it knew of an unreasonable risk of such a possibility.

After hearing all the evidence and having an opportunity to assess the credibility of the witnesses, the jury reasonably believed plaintiff's version of her conversation with Bambrough, Thompson, Johnson and Mixdorf at Hack's on December 20, 2001, including plaintiff's report that after she told the group of her concerns about Spicer, the listeners' jaws dropped and the warden told her that she was "so sorry" and the incident would not be allowed to happen again. The jury could reasonably believe that Johnson would have taken steps to remove Spicer from his position as inmate janitor had he remembered to do so when he returned to work, that he was negligent in failing to do so and that Bambrough and

Thompson were negligent in failing to remind him or otherwise follow up on plaintiff's concerns. In other words, the jury found that plaintiff's employer knew of the risk of harassment, had the ability to prevent it simply by removing Spicer from his janitorial duties and yet did nothing in response to the known risk.

The question is not whether this court or a different jury might have reached a different decision; the only question defendant's motions raise is whether it was reasonable for the jury to have reached the decision it did. Although it is a close case, I am persuaded that the evidence was sufficient to support the jury's verdict that defendant's agents knew of a significant risk of serious harassment, were in a position to take remedial action and failed to act to prevent the sexual harassment from occurring. Plaintiff adduced sufficient evidence to support the denial of defendant's motions for judgment as a matter of law. Accordingly, I will deny defendant's motions for judgment as a matter of law.

Contrary to defendant's argument, in reaching this result, I am not holding that prison officials are liable whenever a prisoner under their supervision subjects a female employee to sexual harassment; such liability may be found only when a plaintiff can show that prison officials knew of a significant risk of such harassment and did nothing about the risk although they had the opportunity and authority to do so.

ORDER

IT IS ORDERED that defendant Wisconsin Department of Corrections' motions for judgment as a matter of law are DENIED. Defendant may have until September 29, 2005, in which to file and serve a brief in response to plaintiff Georgia Erickson's motion for attorney fees and costs; plaintiff may have until October 14, 2005, in which to file and serve a reply brief.

Entered this 8th day of September, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge