IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GEORGIA ERICKSON,

OPINION AND ORDER

Plaintiff,

04-C-265-C

v.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS,
SECRETARY, DEPARTMENT OF CORRECTIONS
and
STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, DIVISION OF ADULT INSTITUTIONS, WISCONSIN CORRECTIONAL CENTER SYSTEM,

Defendants.

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This is a civil suit for monetary damages brought pursuant to Title VII of the Civil Rights Act of 1964. Plaintiff Georgia Erickson, a payroll and benefits specialist for the Wisconsin Department of Corrections, contends that defendants Wisconsin Department of Corrections, the Secretary of the Wisconsin Department of Corrections and the Wisconsin Correctional Center System discriminated against her on the basis of sex when they failed

to prevent a sexual assault against her by an inmate who performed janitorial services in plaintiff's office. Plaintiff filed the action in the Circuit Court for Dane County, Wisconsin, but defendants removed it to this court pursuant to 28 U.S.C. § 1441. This court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331. 42 U.S.C. § 2000e-5.

Presently before the court is defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The parties agree that defendant Department of Corrections is plaintiff's employer for purposes of Title VII, so the remaining defendants will be dismissed. In addition, I agree that plaintiff's disparate impact claim must be dismissed because plaintiff has not identified a policy that affects women disproportionately.

However, defendant's motion to dismiss will be denied with respect to defendant Department of Corrections. I disagree with defendants' argument that an employer can never be liable under Title VII for failing to prevent sexual harassment by non-supervisors unless the employer is aware of harassment that has already occurred. Assuming, as the parties have done, that the inmate should be treated as a coworker for purposes of Title VII, defendant Department of Corrections may be liable if it was negligent in failing to prevent the assault. I agree with defendants that plaintiff has not pleaded all the facts necessary to establish that defendant Department of Corrections should have known that there was an unreasonable risk that the inmate would harass plaintiff because of her sex. However, I

cannot conclude that there is no set of facts consistent with plaintiff's allegations that would entitle her to relief. Finally, I cannot consider defendants' argument that a judgment in favor of plaintiff would lead to unlawful sex stereotyping because defendant raised the argument for the first time in their reply brief.

When considering a motion to dismiss for failure to state a claim, a court must accept as true the well-pleaded factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. Yeksigian v. Nappi, 900 F.2d 101, 102 (7th Cir. 1990). As a preliminary matter, I note that, in their brief supporting the motion to dismiss, defendants ask the court to take judicial notice of several facts, including their sexual harassment policies and the organization of the Wisconsin Correctional Center System. In ruling on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a court may take judicial notice of facts that are of public record, are generally known or are easily determined. Fed. R. Evid. 201(b); Palay v. United States, 349 F.3d 418, 425 n.5 (7th Cir. 2003). It is unnecessary to determine whether the facts provided by defendant meet this standard because defendant does not explain why these facts would require the court to dismiss plaintiff's case under Rule 12(b)(6). Although an anti-harassment policy may be relevant in determining an employer's liability under Title VII, the mere existence of such a policy does not immunize an employer from suit. Defendant cites no case in which a sexual harassment suit was dismissed under Rule 12(b)(6) because the employer had a policy

prohibiting sexual harassment. If defendant believes these facts are relevant, it may include them in a motion for summary judgment.

For the sole purpose of deciding the motion to dismiss, I find that the well-pleaded allegations of plaintiff's complaint fairly allege the following.

ALLEGATIONS OF FACT

Plaintiff Georgia Erickson was a payroll and benefits specialist at the Oregon Correctional Center in Oregon, Wisconsin. The Center is part of the Wisconsin Correctional Center System, a division of the Wisconsin Department of Corrections. John Spicer was an inmate at Oregon Correctional Center, incarcerated for violent crimes that included burglary and armed robbery. Spicer was also employed within the prison as a janitor. Defendant Wisconsin Department of Corrections is a governmental department of the state of Wisconsin.

Plaintiff's job duties required her to work late at times and sometimes by herself. Her supervisors were aware of this as they had to approve her work schedule. On Thursday, December 20, 2001, plaintiff was working alone in the administrative offices at Oregon Correctional Center after the usual hours of operation. At approximately 4:30 p.m., she realized that inmate Spicer was present. She left the offices and went to a local establishment where other staff of the administrative offices were attending a holiday

celebration.

Plaintiff told Warden Mickey Thompson, among others, that being left alone with Spicer made her concerned for her safety. Thompson had the authority to prevent Spicer from entering plaintiff's work area. Plaintiff was told that the situation would not be allowed to occur again. (Plaintiff does not allege who told her this.)

On Friday, December 28, 2001, at 5:00 p.m., plaintiff was left alone with Spicer again. Spicer put a knife to plaintiff's throat, kidnapped her, forced her into a restroom one floor below her work station and repeatedly sexually assaulted her and threatened her life. Spicer then stole personal property from plaintiff, including her car, her purse and some clothing.

Spicer was charged with kidnapping by seizing or confining without consent, armed robbery with use of force, three counts of first degree sexual assault while using a dangerous weapon, assault by a prisoner, taking and driving a vehicle without consent and escape from prison.

OPINION

A. Proper Parties

Title VII makes an individual's "employer" liable for discrimination in the workplace. 42 U.S.C. §2000e-2(a). In her complaint, plaintiff named ABC Insurance Corp., the

Wisconsin Department of Corrections, the Secretary of the Department of Corrections and the Wisconsin Correctional Center System as defendants, but defendants contend that only defendant Department of Corrections is plaintiff's employer under state law. Plaintiff agrees that she may not sue an employer's insurer and has dropped her claim against ABC Insurance Company. See Preliminary Pretrial Conference Order, dkt. #7 at 1. With respect to the remaining defendants, plaintiff argues that the statutes are ambiguous, but she does not object to treating the department as the sole defendant so long as defendants concede that the department is plaintiff's employer. Accordingly, I will dismiss defendants Secretary of the Department of Corrections and the Wisconsin Correctional Center System. (For the remainder of this opinion, I will refer to the Department of Corrections as "defendant".)

B. Failure to State a Claim

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73, (1984)); Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997)). Moreover, in a Rule 12(b)(6) motion to dismiss, all plaintiff's well-pleaded facts are taken as true, all inferences are drawn in favor of plaintiff and all ambiguities are resolved in favor of plaintiff. Dawson v. General Motors Corp., 977

F.2d 369, 372 (7th Cir. 1992).

The Federal Rules of Civil Procedure provide for a system of notice pleading pursuant to Rule 8, which requires only that the plaintiff set out a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "The primary purpose of [Rule 8] is rooted in fair notice: under Rule 8, a complaint 'must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is.'" Vicom, Inc. v. Harbridge Merchant Services., Inc., 20 F.3d 771, 775 (7th Cir. 1994) (citations omitted). In light of this liberal standard, a plaintiff can resist a 12(b)(6) motion to dismiss by setting out facts sufficient to outline the basis of its claim. Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 792 (7th Cir. 1996).

However, even the liberal notice pleading standards have their limits. If a plaintiff can point to no legally cognizable theory of liability, dismissal is proper on Rule 12(b)(6) grounds. Kirksey v. R.J. Reynolds Tobacco Co., 168 F.3d 1039, 1041 (7th Cir. 1999). Additionally, while plaintiff is not required to plead all facts necessary to ensure victory at trial, a plaintiff may indeed state too much in a complaint and effectively "plead themselves out of court by alleging facts that establish a defendant's entitlement to prevail." Bennett v. Schmidt, 153 F.3d 516, 519 (7th Cir. 1998).

1. Standard of employer liability

Section 703(a) of Title VII prohibits an employer from discriminating against an employee on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). Courts have long recognized that employers may be responsible for sexual harassment in the workplace under Title VII. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 751-55 (1998). In sexual harassment claims brought under Title VII, an employer's liability is determined by the status of the harasser and the type of injury caused by the harassment. Id. at 759. If the harasser is the plaintiff's superior, the employer is vicariously liable; the employer may avoid liability only if the plaintiff did not suffer a tangible job detriment and it can prove both that it exercised reasonable care to correct and prevent the harassment and that the plaintiff unreasonably failed to take advantage of the employer's corrective or preventative opportunities. Id. at 765. For coworker harassment, the standard of liability for the employer is negligence. Id. at 758-59 (quoting Restatement of Agency § 219(2)); Williams v. Waste Management of Illinois Inc., 361 F.3d 1021 (7th Cir. 2004).

In its brief, defendant discusses whether Spicer should be treated as a coworker or third party and what significance the resolution of that question has for choosing the appropriate standard of liability. Ultimately, however, it assumes for the purpose of its motion that Spicer may be treated as a coworker. Plaintiff makes the same assumption.

Accordingly, I need not decide whether Spicer would be more appropriately viewed as a third party or whether doing so would alter the standard of liability.

2. Prior notice of harassment

Defendant suggests that it is not liable for the existence of a sexually hostile environment unless it had notice that a hostile environment already existed. In other words, defendant implies that employers have a duty to remedy harassment, but not prevent it. Further, defendant argues that plaintiff's complaint must be dismissed because plaintiff does not allege that Spicer sexually harassed her before the sexual assault occurred or that defendant knew about any such harassment.

Title VII, however, does not require sexual harassment to be pre-existing in order to trigger an employer's liability. It is true that most of the cases dealing with Title VII hostile work environment claims focus solely on the remedial efforts of an employer after acquiring notice of sexual harassment. See, e.g., Shaw v. AutoZone, Inc., 180 F.3d 806 (7th Cir. 1999); Rhodes v. Illinois Dept. of Transportation, 359 F.3d 498 (7th Cir. 2004). However, the likely reason for this emphasis is not that employers have no duty to prevent harassment, but that, ordinarily, employers will not be aware of facts demonstrating an unreasonable risk that sexual harassment will occur.

In this case, however, the harasser is a prisoner and the employer is the Department

of Corrections. In such a case, it is more likely that the employer will be aware of facts demonstrating that there would be an unreasonable risk of sexual harassment if the prisoner was left alone with a "coworker," both because prisoners as a group tend to be more dangerous than employees in other settings and because defendant would know much more about the prisoner's propensity to commit sexual assault than other employers would.

Additionally, Title VII case law suggests that an employer's duty to protect its employee attaches both to the remedy for and to the prevention of a sexually hostile work environment created by a coworker. Title VII's "'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998) (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)). Employers are to "'take all steps necessary to *prevent* sexual harassment from occurring.'" Id. at 806 (emphasis added) (quoting 29 CFR § 1604.11(f) (1997)). Although Faragher dealt with supervisor harassment, its basic teaching applies regardless of the harasser's status. The only difference is that an employer is strictly liable for failing to prevent supervisor harassment but liable for failing to prevent coworker harassment only when it is negligent. Id. at 805. Accordingly, I conclude that an employer may be liable for failing to prevent a sexually hostile work environment if it knew or should have known that there was an unreasonable risk that one would occur, regardless whether the plaintiff had been sexually harassed before.

3. Sufficiency of the pleadings

Defendant makes several arguments relating to the sufficiency of plaintiff's complaint. Although defendant acknowledges that plaintiff's complaint provides fair notice of her claim, it points out correctly that compliance with the notice requirements of Fed. R. Civ. P. 8 does not protect plaintiff from dismissal under Rule 12(b)(6). Defendant relies heavily on Kirksey v. R.J. Reynolds Tobacco Co., 168 F.3d 1039, 1042 (7th Cir. 1999), in which the court affirmed the dismissal of a claim under Rule 12(b)(6) because the plaintiff failed to identify a cognizable legal theory. Defendant's reliance on Kirksey, however, is misguided. In this case, plaintiff has identified a cognizable legal theory, Title VII.

Second, defendant argues that plaintiff's complaint establishes that it did not have notice that plaintiff would be harassed *because of her sex*. Defendant points out that plaintiff alleges only that she expressed concern over an attack, not a sexual assault. In addition, she did not allege that the inmate had a history of sexual assaults, only violence. Thus, defendant contends that plaintiff has pleaded herself out of court. This argument assumes that the only notice defendant could have had was the actual notice from plaintiff herself, and assumes that what plaintiff told defendant involved only her concern over her physical safety. However, by including one allegation in her complaint, plaintiff has not conceded that no other facts exist. A complaint is not meant to tell the entire story. Unlike all of the cases cited by defendant, in this case there are facts consistent with plaintiff's complaint that

could entitle her to relief. For example, defendant may have had knowledge beyond plaintiff's voiced concerns or plaintiff may have told defendant more than she included in her complaint that would enable them to know that a sexual assault could occur. Plaintiff's pleading needs only to provide notice to the defendant, state a legally cognizable theory of liability and allow for the introduction of further facts that would prove her case, consistent with that pleading. She has done so in this case.

4. Disparate impact

Plaintiff's complaint contains the following sentence: "There was also a disparate impact upon female workers in this situation." Cpt., dkt. #4, at ¶ 31. It is not clear whether plaintiff intends to assert a disparate impact claim, but to the extent that she does, she has failed to state a claim upon which relief may be granted. Disparate impact is based on the notion that policies or practices that are neutral on their face but discriminatory in effect violate Title VII. Teamsters v. United States, 431 U.S. 324, 349 (1977). To establish a prima facie case of disparate impact, a plaintiff must: 1) isolate and identify a specific employment practice; 2) isolate and identify a statistical disparity among members of a protected group in the employer's workforce; and 3) produce evidence capable of showing that the challenged practice has caused the disparity. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (O'Connor, J., concurring). In her complaint, plaintiff does not

identify a policy or practice that had a disparate impact on female employees, let alone indicate how that policy affects women disproportionately. Accordingly, any claim based on a disparate impact theory of liability is dismissed.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants Wisconsin Department of Corrections, Secretary of the Department of Corrections and the Wisconsin Correctional Center System is GRANTED with respect to all claims against Secretary of the Department of Corrections and the Wisconsin Correctional Center System and with respect to plaintiff's disparate impact claim. Defendants Secretary of the Department of Corrections and Wisconsin Correctional Center System are DISMISSED from this action.

FURTHER, IT IS ORDERED that the motion to dismiss claim is DENIED with respect to plaintiff's claim that defendant Department of Corrections discriminated against her because of sex when it failed to prevent her from being sexually assaulted.

Entered this 19th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge