



U.S. Department of Justice  
Complaint Adjudication Office

EEOC Number 510-2012-0077X  
Agency Complaint Number BOP-2011-00528

MAY 22 2013

950 Pennsylvania Avenue, N.W.  
Patrick Henry Building, Room A4810  
Washington, DC 20530

DEPARTMENT OF JUSTICE FINAL ORDER

in the matter of

Taronica White, et al. v. Federal Bureau of Prisons

Based on a review of the record in this case, the Department of Justice accepts the Administrative Judge's certification of the class complaint as satisfying the procedural prerequisites pursuant to 29 C.F.R. §§ 1614.204(a)(2).

A handwritten signature in black ink, appearing to read "Mark L. Gross", written over a horizontal line.

Mark L. Gross  
Complaint Adjudication Officer  
Department of Justice



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DEPARTMENT OF JUSTICE MEMORANDUM

Explaining the Final Order

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Under the EEOC regulation at 29 C.F.R. §1614.110, when an Administrative Judge has issued a decision, the Department of Justice shall issue a final order notifying the complainants whether the Department of Justice will fully implement the Administrative Judge's decision. In this class discrimination complaint filed by Federal Bureau of Prison employees at FCC Coleman, the Administrative Judge found that "the prerequisites of class certification have been met and class certification is warranted" pursuant to 29 C.F.R. §1614.204 (a)(2). AJ Decision at 9.

The class agents' representative filed a Motion for Class Certification with Exhibits and Declarations on June 29, 2012. The motion asserted that "all female employees [of FCC Coleman] are impacted by the culture of harassment that permeates the atmosphere at FCC Coleman." Motion at p. 10. The Administrative Judge examined the record against the regulatory standards require for class certification set forth at 29 C.F.R. 1614.204(a)(2) and concluded that class certification was appropriate. The AJ certified a class of "[a]ll female employees who have worked for the Department of Justice, Federal Bureau of Prisons, FCC Coleman since February 6, 2011, who were allegedly subjected to discriminatory sexual harassment." AJ Decision at 10.

The standard of review accords deference to the Administrative Judge's findings, and requires affirmation of the Administrative Judge's decision if it is supported by "substantial evidence." Hankins v. United States Postal Service, EEOC DOC 01972447 (May 1, 2000). Here, the Administrative Judge determined that the putative class

complaint met the four requirements of numerosity, commonality, typicality, and adequate representation necessary for class certification. See 29 C.F.R. § 1614.204(a)(2)(i). BOP disagreed with these conclusions and asserted that the certification should have been denied. After reviewing the Administrative Judge's decision, the record and the materials provided, some areas merit discussion.

This is an extremely close call. BOP asserts that the class should not have been certified because the putative class does not meet the requirements of commonality and typicality. BOP argues that class certification should be denied because each of the four facilities at FCC Coleman are unique, the class agents have different duties from each other and from other members of the class, and because the allegations vary in frequency and degree such that a "finding of liability compels individual inquiries into whether and to what extent each CA and potential class member has suffered an actual injury." Memorandum of Law in Opposition to Administrative Judge's Decision, hereinafter "BOP's Response," at 16-17.

BOP's position obscures the core facts and allegations that underlie the motion for class certification. The core facts developed thus far, based in large measure on 64 separate affidavits, show that women employees of FCC Coleman who come into contact with inmates have been subjected to vulgar, assaultive and graphic sex-based conduct by some inmates. According to the record compiled thus far, such incidents have taken place often over a two year period, throughout all the institutions housed within FCC Coleman. They have primarily occurred in the housing portion of the facilities. The record in support of the motion for class certification also indicates that there have been repeated complaints by numerous women to BOP management, but that BOP management has either ignored the complaints or responded with tepid and clearly ineffective measures instead of, plaintiffs allege, attempting to effectively deal with the issue as required by Title VII.

Accordingly, the class action claim is that BOP management violated Title VII by failing to respond in any way to claims of sex discrimination that arise out of inmate sex-based harassment of female guards and other female personnel. That is the claim that must present common questions of law and fact.

Viewed in this light, which is the information that was available to the Administrative Judge, the record did provide adequate evidence of common questions of law and fact among class members. The record affidavits detail individual allegations that FCC Coleman inmates acted offensively through words and actions directed toward female staff members, primarily in the housing units, but also in social areas such as libraries and class rooms. The affidavits make clear that the inmate actions included repeated exposure of their genitals, masturbation, graphic comments and other highly offensive and unwanted behavior. Equally importantly, the affidavits make clear that substantial numbers of the women reported to management that this was unacceptable, even in an institutional setting, but their concerns were repeatedly ignored or minimized.

In this case, Title VII liability does not attach based only on the actions of the inmates. Indeed, at this stage the only important thing about the inmates' actions is that many, many were made the subject of complaints to BOP managers by female personnel asking management to address the sexual harassment. It is management's awareness of the harassment, coupled with management practice or policy after receiving them which might violate Title VII by permitting the inmate conduct to continue without penalty, or to fail to address or consider means to protect female guards from this sex-based harassment. See, Lemons v. Holder, EEOC DOC 012008127, 2009 WL 1173547 at \*8 (April 23, 2009) (liability where the employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action;" citing, 29 C.F.R. § 1604.11(e); Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999).

Here, the affidavits clearly alleged that when female guards or other female personnel complained to BOP managers, the BOP managers discouraged, destroyed, or in some instances, downgraded the seriousness of disciplinary reports. This information, contained in numerous affidavits, along with the fact that over 60 EEO declarations were filed about such harassment, establishes, for purposes of certifying a class, that there are sufficient issues and facts in common among the affiants and putative class members to establish commonality. The commonality is that so many women complained about the inmates' sex-based harassment of them and management took no action. Given this evidence in the record, there is no appropriate basis to conclude that the Administrative Judge's ruling is not supported by substantial evidence.

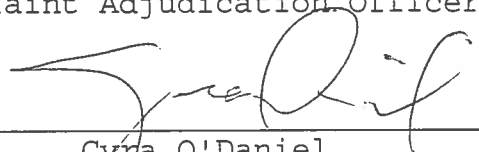
BOP also argues that class certification is inappropriate because of conflicts within the putative class. BOP states that the class definition includes "female class members who also hold management positions," creating a "clear intra-class conflict" because the "CAs cannot represent female employees in management roles while simultaneously seeking to hold them accountable for their harm." BOP's Response at 9-10. However, the Administrative Judge has the latitude to redefine a class, subdivide it or recommend dismissal if it is discovered that there is no longer a basis to proceed as a class complaint. Hines v. Air Force, EEOC DOC 05940917, 1996 WL 46716 at \*3 (EEOC January 29, 1996). At this point, no obvious conflict is apparent as it appears that women who were line employees as well as women with supervisory authority complained to their superiors about the abusive treatment by inmates, with no appropriate response by the superiors. If a conflict does become apparent, 29 C.F.R. §1614.(d)(6) provides that when "appropriate, the Administrative Judge may decide that that class be divided into subclasses and that each subclass be treated as a class."

The parties have engaged in limited discovery and many issues may not be fully developed. Dunbar v. Social Security Administration, EEOC DOC. 01975435, 1998 WL 390957 at \*2 (EEOC July 8, 1998). Because the rules provide the Administrative Judge with the ongoing ability to refine the class, any inherent conflicts can likely be resolved without need to reject the certification at this point. Similarly, it is true that different women were exposed in different manners and to differing degrees, and therefore were subjected to differing individual events. In some instances, the harassment by the inmates might amount to a hostile work environment and in others may not. However, if the final decision on the class complaint is that BOP's management policy at this facility was not to address this type of harassment, and thereby Title VII was violated, the Administrative Judge will have the flexibility to address the individual circumstances of each class member. The Supreme Court has made clear that, in this context, questions of individual harm may be assessed through an individualized proceeding described in Teamsters v. United States, 431 U.S. 324 (1977) if the liability issue regarding management knowledge and response to sexual harassment is resolved in the complainants' favor.

For all these reasons, the Administrative Judge's decision is fully supported by substantial evidence. The question of fact common to the class renders the matter appropriate for class certification. For these reasons, the Department of Justice accepts the Administrative Judge's decision and enters a final order acknowledging that the Administrative Judge's decision will be fully implemented.



Mark L. Gross  
Complaint Adjudication Officer



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