UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
MIAMI DISTRICT OFFICE
HEARINGS UNIT

DECISION

In the Complaint of Taronica White, Et al.,	)	
	)	
v.	)	EEOC Case No.
	)	510-2012-00077X
Eric Holder, Attorney General,	)	
U.S. Department of Justice,	)	AGENCY Case No.
Federal Bureau of Prisons.	)	BOP-2011-000528
	)	
_____/		

Complainant's Representative	Heidi R. Burakeiwicz, Esq.
Agency Representative	Angie Wiesman, Esq.
Nature of the Complaint	Discrimination: sexual harassment
Administrative Judge	Joy R. Helprin U.S. Equal Employment Opportunity Commission One Biscayne Tower 2 South Biscayne Boulevard Suite 2700 Miami, Florida 33131
Date of Hearing	Decision Rendered Without A Hearing
Date of Decision	April 9, 2013
Place of Complaint	Coleman, Florida

I. Introduction

This proposed class complaint, filed by Taronica White, et. al.[1] ("Class Complainants" or "Complainants"), was originally submitted by the United States Department of Justice, Bureau of Prisons ("Agency") to the United Stated Equal Employment Opportunity Commission on December 2, 2011 for a decision by an Administrative Judge ("AJ") as to whether the class complaint should be accepted or dismissed. *See* 29 CFR 1614.204(d). The Complainant alleges the Agency created a hostile work environment when it failed to correct known egregious sexual harassment perpetrated by inmates at the Federal Correctional Complex ("FCC") Coleman since February 6, 2011[2].

II. Background

FCC Coleman is comprised of four institutions, three of the four of which house exclusively male inmates. At the time in question, there were approximately 363 women who were working at FCC Coleman. More than 150 of those women initiated counseling with the Agency, alleging sexual harassment by inmates at FCC Coleman. Two-hundred and five women have already retained counsel regarding the alleged sexual harassment, according to the Complainants.

The Class Complainants assert that, "regardless of the institution at FCC Coleman where a woman works, the Department to which a woman is assigned or the job title a woman holds, all women are subjected to the same sexual harassment when they come into contact with male inmates." Complainant's Motion for Class Certification ("MFCC") at 6. They allege that the environment is saturated with sexual abuse and assaults, including a barrage of gender-based epithets, crude comments, sexual threats, remarks about a woman's appearance, lewd sexual gestures, nudity, exhibitionist masturbation with and without clothes, and/or efforts to get women to look at them while they are naked or masturbating. Female employees, they allege, have been groped or

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[1] Named class complainants in addition to Ms. White are Lena Londono, Tammy Padgett, Eva Ryals, and Carlissa Warren-Spurlock.

[2] Preliminary discovery had been conducted in this case. The undersigned conducted a pre-hearing conference subsequent to it being reassigned from the prior AJ. At that time, the parties agreed there were still discovery requests by the Complainant that were outstanding, and a pending discovery motion regarding such. However, they agreed that such disputes would be rendered moot by a determination that the class would be certified. As such, those additional discovery requests will not be addressed in the certification phase of this process.

touched by inmates, had rape threats made against them, and have been used as "bait" by management to appease unruly inmates. They are called "bitch," "slut," "whore," and "cunt." The women allege that they are frequently threatened with violent sexual acts in the form of statements such as, "Suck my dick you fucking bitch. I'll bend you over;" and "I'm going to fuck you up, you cunt." They contend that they cannot walk from place to place inside the prison without inmates knocking on the windows of their cells in an effort to get their attention in connection with some type of sexual act or gesture.

Class Complainant Tammy Padgett stated she endures masturbatory behavior approximately once per week; for example, an inmate will approach her while rubbing or touching his penis. Class Complainant Eva Ryles reported that in February, 2011, an inmate in her classroom masturbated to the point of ejaculation. Inmates stick their penises through the food slots in the cell door. The Class Complainants assert that inmates knock on the windows and if the women look, they see inmates exposing their penises in the windows, masturbating or pretending to masturbate. They contend the inmates do not do this when male employees walk by. They assert inmates have placed sperm where women will come into contact with it, have stalked female employees, and made explicit rape threats. Class Complainant Padgett stated two inmates plotted to rape her.

Inmates have requested a female staff member come to their cell, ostensibly for legitimate purposes, but will instead harass the women or manipulate the situation to increase their time with the women. Women wear large smocks and jackets even in hot Florida weather in order to cover their bodies as much as possible in response to the harassment.

The Class Complainants acknowledge that while a prison is expected to be rough environment to work in, the Agency is aware of the inmates' behavior and has refused to take effective steps aimed at preventing or at least minimizing the harassment. They assert that Labor Management Relations meetings have been held in which the union has raised concerns about sexual harassment of female staff, inmate masturbation and the Agency's failure to adequately respond to sexual misconduct. The Class Complainants contend management has common policies and practices at the Coleman complex that enable the harassment. The female staff members are limited in the number of incident

reports that they are allowed to file. Class Complainant Ryals was instructed to stop writing so many incident reports about sexual acts. They contend managers have thrown away incident reports about sexual conduct by inmates, and coerced women into writing incident reports for lesser offenses even when the inmate has engaged in a sexual act. When incident reports are not forwarded to the Unit Disciplinary Team and Disciplinary Hearing Officer, the inmates cannot be disciplined.

The Class Complainants contend inmates are not disciplined for sexual harassment, or sanctions are shortened. When Wanda Rushing complained about inmates leering at her, a supervisor responded, "well look at you, I would look too if I was an inmate." A manager told Lorry Andrews, "If I was an inmate I would do the same thing." Complainants MFCC at 17.

Further, they allege that tools the Agency has at its disposal for preventing and correcting sexual harassment, such as semi-opaque or one-way windows, serious disciplinary measures, and working with district attorneys to prosecute repeat offenders, are not used. The Agency does not prevent inmates from having pockets as a deterrent. Inmates at the prison cut holes in their pockets so they can touch their genitals more easily and masturbate at female staff members. Inmates who repeatedly sexually harass women with vulgar comments or lewd sexual gestures, they contend, are not included in the "Posted Picture File" for identifying high accountability inmates.

In fact, the Class Complainants contend the Agency has not even adopted the recommendations of a Bureau of Prisons workgroup on the subject of inmate sexual harassment.

III. Issue

Does the instant complaint satisfy the requirements of 29 CFR § 1614.204(d)(7) for acceptance as a class complaint?

IV. Analysis

For a class complaint to be accepted, it must meet the following requirements:

1) the class is so numerous that a consolidated complaint of the members of the class is impractical;
2) there a questions of fact common to the class;
3) the claims of the agent of the class are typical of the claims of the class;
4) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

See 29 C.F.R. § 1614.204(a)(2); *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982); *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 n. 8 (1977); *Goodman v. Justice*, EEOC Appeal No. 01995812 (March 25, 2002); *Starks v. Navy*, EEOC Appeal No. 01981476 (January 12, 2000); *Glover v. Treasury*, EEOC Appeal No. 01972950 (December 1, 1999). "In addressing a class complaint it is important to resolve the requirements of commonality and typicality prior to addressing numerosity in order to 'determine the appropriate parameters and the size of the membership of the resulting class.'" *Fusilier v. Treasury*, EEOC Appeal No. 01A14312 (February 22, 2002); *Glover*, EEOC Appeal No. 01972950.

The United States Supreme Court has held that an allegation of across-the-board discrimination is not, by itself, sufficient to justify its acceptance as a class claim. *See Falcon*, 457 U.S. at 157; *see also Myers v. Treasury*, EEOC Appeal No. 01952738 (Sept. 25, 1996); *Glover*, EEOC Appeal No. 01972950. A class complaint will not be approved merely because the class members share the same protected class. *See Falcon*, 457 U.S. at 157; *Glover*, EEOC Appeal No. 01972950. In *Falcon*, the Supreme Court held that evidence of a failure to promote an individual because of national origin does not necessarily mean that discrimination exists in other employment practices such as hiring. 457 U.S. at 158. Furthermore, the Commission has held that "[m]ere conclusory allegations, standing alone, do not show commonality." *See Glover*, EEOC Appeal No. 01972950.

After reviewing the formal complaint, the other documents contained in the materials provided by the Agency, and the briefs of the parties, I find that certification of this matter as a class complaint is appropriate. It is clear that rejection is proper if anyone criterion of a class complaint is not met. *Baldwin v. USPS*, EEOC No. 01890416 (1989); *Tillman v. Air Force*, EEOC No. 01890695 (1989) *McNeal v. Marsh Army*, EEOC No. 01890250 (1989); *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982). However, as more fully set forth below, I find that all of the necessary requirements for certification have been met.

A. Commonality and Typicality

The purpose of the commonality and typicality requirements is to ensure that class agents possess the same interests and suffer the same injury as the members of the proposed class. *See General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982); *Holmes v. USPS*, EEOC Appeal No. 07A20020 (Oct. 27, 2003). The existence of an alleged policy applied to the members of the class as a whole satisfies the requirement regarding the existence of common questions of law and fact. *See East Texas Motor Freight v.* Rodriguez, 431 U.S. 395 (1977). The Commission has recognized that in application commonality and typicality prerequisites tend to merge and are often "indistinguishable." *See Glover v. USPS*, EEOC Appeal No. 01A04428 (April 23, 2001). Typicality requires that the class agent has suffered the same injury as other class members and possesses substantially the same interest as the other class members. *Bowen v. Department of Agriculture*, EEOC Appeal No. 01920303 (Dec. 11, 1992) (citing *East Text Motor Freight*, 431 U.S. 395). Typicality exists where the class agent demonstrates some nexus with the claims of other class members, which can be shown by demonstrating the similarity between the agent's conditions of employment and those of other members, and the alleged discrimination affecting the agent and that affecting the class. *Id.*

The Complainants' allegations create clear common questions of fact regarding whether the Agency created a hostile work environment for women, management's knowledge of and tolerance for sexual harassment by inmates, and whether they took reasonable care to prevent and promptly correct sexually aggressive and threatening behaviors by inmates. Further, the claims of the class agents are typical of those alleged of the other class members.

The proposed class members are all women working at FCC Coleman, which has a common management structure. The Complainants allege that the female employees are subject to sexually aggressive conduct such as exhibitions of masturbation, rape threats, nudity, and groping--not simply because they are employees or because of the positions they hold, but because they are female. The sexual harassment of women, they contend, is so frequent, severe, and ever-present in Coleman as a whole that any reasonable woman would regard the environment as hostile. The Complainants provided

affidavits from numerous women at Coleman describing the conduct by inmates and the failure by management to act.

There are further common questions of law and fact regarding the policies of FCC Coleman regarding the actions taken by management in the face of this harassment. The class complainants allege the existence of an alleged policy applied to members of the class as a whole. *See East Texas Motor Freight*, 431 U.S. 395 (1977). The allegations by the Complainants are that management has been repeatedly made aware of the sexual harassment of female employees by inmates; there have been meetings with the union regarding such, numerous incident reports, observation by management officials of the harassment itself, and actions taken by women (and observed by management) in wearing large smocks and jackets to cover their bodies in an attempt to avoid the harassment.

The Complainants allege a pattern and practice by management of minimizing, deterring, and destroying incident reports when it comes to sexual offenses by inmates against female employees. There are common questions of law and fact regarding FCC Coleman managements' failure to implement any proactive measures to prevent or mitigate the sexual harassment, and its policy of not implementing workgroup recommendations of the Bureau of Prisons.

With respect to typicality, while each Class Complainant's "individual allegation may involve a unique combination of facts," the Class Complainants claims are typical in alleging they were subjected to severe and pervasive sexual harassment by inmates, and that management was aware of this harassment and failed to take steps to prevent it or discipline inmates who engaged in it. *See Wylie et al. v. Treasury*, EEOC Appeal No. 07A40012 (Dec. 21, 2004).

The Agency argues that "the subjective and objective experiences of Complainants would require individualized assessments." Agency Response to MFCC at 3-4. The Agency further contends that because the Class Complainants held different positions and had differing amounts of contact with inmates, this impacts the subjective and objective components of the sexual harassment claim.

Courts and the Commission have rejected the argument that individual differences in the circumstances of each class member somehow preclude certification of a sexual harassment class complaint. *See Markham v. White,* 171 FRD 217 (Jan. 28, 1997); *Wylie,*

EEOC Appeal No. 07A40012. The question is whether there is are common questions of law and fact regarding whether the harassment occurred and the steps FCC Coleman management took in response. The allegations are that all the Class Agents were in contact with inmates at FCC Coleman and were subjected to egregious sexually hostile conduct by inmates while management failed to take steps to correct this conduct. The claims made by the Class Complainants are typical of those alleged for the class.

Because of the nature of hostile environment claims, the existence of individual factual diversity in both the type and degree of discriminatory conduct will not preclude a finding of commonality. *See Warnell v. Ford Motor Co.,* 189 FRD 383 (ND Ill. 1999); *see also BreMiller v. Cleveland Psychiatric Institute*, 195 FRD 1 (ND OH 2000); *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 75 FEP Cases 1379 (CL IL. 1998).

The Complainants have alleged that the total work environment as a whole was discriminatory and all the class members were subjected to a common policy which failed to take steps to minimize the inmate harassment in Coleman. I therefore find they have established the elements of commonality and typicality.

B. Numerosity

I find the Complainants have established the element of numerosity. While no fixed number is required to demonstrate numerosity, the general rule is that courts are reluctant to certify a class with fewer than thirty members. *See Turner v. VA*, EEOC Appeal No. 01971966 (August 27, 2001); *Hines v. Air Force*, EEOC Appeal No. 01931776 (July 7, 1994). In determining whether a class satisfies the numerosity requirement, courts look to the practicability of joinder. *See Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980). In order to make this determination, the factors that apply are: the size of the class; the ease of identifying class members and their addresses; the location and geographical dispersion of its members; and the nature of the action. *See McKinnis v. Dep't of Veterans Affairs*, EEOC Appeal No. 01912332 (September 9, 1991); *Baldwin v. USPS*, EEOC Appeal No. 01890416 (June 6, 1989).

Based on the discovery to date, the Complainants stated that the class consists of at least 363 members; women working at Coleman at the time in question. It is also noted that the Complainants contend more than 150 women have sought EEO counseling regarding the sexual harassment at Coleman, and over 200 women have sought legal

counsel regarding such. The complainants have submitted affidavits from over 60 women describing incidents of sexual harassment at Coleman and managements' lack of response to it. I find the proposed class is sufficiently numerous to render a consolidated complaint impractical.

C. Adequacy of Representation

"Adequacy of representation 'is perhaps the most crucial requirement because the judgment will determine the rights of the absent class members.'" *Fusilier*, EEOC Appeal No. 01A14312 (quoting *Bailey v. VA*, EEOC Appeal No. 05930156 (July 30, 1993)). "Adequacy of representation requires that (1) the class agent and class representative be qualified, experienced, and generally able to conduct the proposed litigation; and (2) the class agent and class representative must not have interest antagonistic to those of the class." *Goodman*, EEOC Appeal No. 10995812 (citing *Evans v. Treasury*, EEOC Appeal No. 01945396 (Dec. 11, 1995); *Martin v. Middendorf*, 420 F. Supp. 779 (D.D.C. 1976)). A class agent must demonstrate that he or she "has the necessary knowledge and skills to represent the class, or that he [or she] is able to insure adequate funding to procure adequate representation." *Fusilier*, EEOC Appeal No. 01A14312.

The Agency does not appear to dispute the element of adequacy of representation. The legal representative for the class, the law firm of Mehri & Skalet, PLLC, has experience and training in class actions, employment discrimination, and specifically federal employment issues. They assert that counsel has represented numerous women in class and individual sex discrimination matters, and Attorney Eardley teaches a course on sex discrimination at American University College of Law. I find the representatives in this case meet this element.

Further, it does not appear to be in dispute that the class agents are adequate to represent the class. There are no interests identified that would be considered antagonistic to the class, and, as stated above, I find their interests to be typical of those of the class. As such, they meet this element as well.

V. Conclusion

Based on the forgoing, I find the prerequisites of class certification have been met and class certification is warranted. The certified class shall include:

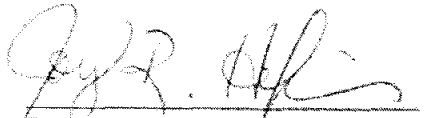
All female employees who have worked for the Department of Justice, Federal Bureau of Prisons, FCC Coleman since February 6, 2011 who were allegedly subjected to discriminatory sexual harassment.

VI. Notice to the Agency

Within 40 days of receipt of the report of findings and recommendations issued under 29 CFR § 1614.204(i), the Agency shall issue a Final Decision, which shall accept, reject, or modify the findings and recommendations of the Administrative Judge. The Final Decision of the Agency shall be in writing and shall be transmitted to the Class Agent by certified mail, return receipt requested, along with a copy of the report of findings and recommendations of the Administrative Judge. When the Agency's Final Decision is to reject or modify the findings and recommendations of the Administrative Judge, the Decision shall contain specific reasons for the Agency's action. Also, if the Final Order does not fully implement the Decision of the Administrative Judge, the Agency shall simultaneously appeal the Administrative Judge's Decision in accordance with § 1614.403. If the Agency has not issued a Final Decision within 40 days of its receipt of the Administrative Judge's report of findings and recommendations, those findings and recommendations shall become the Final Decision, and the Agency shall transmit the Final Decision to the Class Agent within 5 days of the expiration of the 40 day period. The Final Decision shall inform the Class Agent of the right to appeal or to file a civil action in accordance with 29 CFR § 1614.204(d) and of the applicable time limits.

The Agency shall use all reasonable means to notify all class members of the acceptance of the class complaint within 20 days of receipt of the Administrative Judge's Decision. 29 CFR § 1614.204(e)(1); *see also* EEO MD-110, 8-5, 8-6 (November 9, 1999). The Agency may file a motion with the Administrative Judge seeking a stay in the distribution of the notice for the purpose of determining whether it will file an appeal of the Administrative Judge's Decision. EEO MD-110, 8-6 (November 9, 1999).

It is so ORDERED.



Joy R. Helprin
Administrative Judge