

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KATHLEEN L. LYONS, et al.,)
)
 Plaintiffs)
)
 v.) Civil No. 95-0194-B
)
 JESSE BROWN, et al.,)
)
 Defendants)

**MEMORANDUM OF DECISION ON DEFENDANT
JESSE BROWN'S MOTION FOR NEW TRIAL¹**

Judgment having entered in favor of Plaintiff as against the federal Defendant on the basis of a jury verdict rendered in this action on January 21, 1997, Defendant now moves for a new trial pursuant to Federal Rule of Civil Procedure 59(a). Defendant raises two grounds for relief under Rule 59. First, Defendant asserts that a new trial should be ordered in light of an intervening change in the law regarding sexual harassment in the workplace. Second, Defendant argues that the evidence was insufficient to support the verdict. In the alternative, Defendant asks the Court to condition the denial of a new trial on Plaintiff's acceptance of a remittitur.

I have carefully considered the submissions of both parties on these issues.² I hereby DENY the Motion for New Trial or for Remittitur. I am satisfied that the changes rendered in the controlling law by the Supreme Court decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), apply only to cases

1 Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

2 Initially, I agree that Defendant's Motion fails to comply with the Court's local rule regarding the length of supporting memoranda. D. Me. R. 7(e). In light of my conclusions regarding the merits of Defendant's arguments, there is no need to belabor the point at this time. Defendant's Motions for Leave to File a Memo in Excess Page Limits, filed with respect to both the original Motion, and the Reply Memorandum, are both GRANTED.

where a direct supervisor is the harasser. *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999); *Burley v. Atlantic City Police Dept.*, 174 F.3d 95, 119 (3d Cir. 1999). Although this factual question was apparently never resolved, Defendant's position has consistently been that Dr. Pathak did not have supervisory authority over Plaintiff. As Defendant points out in its Motion, "The management channel of authority for [Plaintiff] 'went up the channel' of command, initially to the Charge Nurse, Head Nurse, Asst. Chief Nurse, then Chief Nurse." Memo. at 2 (docket no. 213). Dr. Pathak was in a different "channel of command."

In any event, the Court's jury instructions in this case, while not as thorough a rendition of the law as displayed in Defendant's Proposed Instruction Number 19, accurately reflected the law in effect in this circuit at the time, which in turn fairly accurately forecasted the *Ellerth/Faragher* standard. Specifically, as Defendant cited it in its Motion, the Court instructed that "[i]f you determine there was a hostile work environment, the VA can be liable only if you determine that the VA knew or should have known of a hostile environment and failed to promptly act to correct the environment." Memo. at 22. These requirements of actual or constructive knowledge and a failure to remediate were required in cases of supervisory harassment in the First Circuit, *Morrison v. Carleton Woolen Mills*, 108 F.3d 429, 437 (1st Cir. 1997) (citing *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897-98 (1st Cir. 1988)), even when other jurisdictions applied the standard only in cases of co-worker harassment. *Faragher*, 524 U.S. at 799-800 (collecting cases).

The *Ellerth/Faragher* affirmative defense "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

Faragher, 524 U.S. at 807. While the Court's instruction did not exactly track this language, the evidence Defendant would seek to present, and the argument that would arise from it, would be the same. Further, the Court's instruction kept the burden of proof with Plaintiff, and so was more beneficial to the Government than the new affirmative defense Defendant seeks to utilize. Defendant is not entitled to a new trial on this basis.

Finally, I conclude that the evidence presented at trial was sufficient to permit a factfinder to find in Plaintiff's favor, and I further decline Defendant's request that I reduce Plaintiff's damage award.

SO ORDERED.

Margaret J. Kravchuk
United States Magistrate Judge

Dated: July 17, 2000

CLOSED STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 95-CV-194

LYONS, et al v. VETERANS AFFAIRS SEC, et al Filed: 08/30/95
Assigned to: MAG. JUDGE MARGARET J. KRAVCHUK ury demand: Plaintiff
Demand: \$400,000 Nature of Suit: 442
Lead Docket: None Jurisdiction: US Defendant
Dkt# in other court: None

Cause: 42:2003 Job Discrimination

KATHLEEN L LYONS
plaintiff

MARCI A. ALEXANDER, Esq.
[term 12/05/95]
[COR LD NTC]
ASSISTANT ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333
626-8800

RICHARD L. O'MEARA
773-5651
[COR LD NTC]
MURRAY, PLUMB & MURRAY
PO BOX 9785
PORTLAND, ME 04101-5085
773-5651

ERIC M. MEHNERT, ESQ.
[COR LD NTC]
MEHNERT LAW OFFICES
P.O. BOX 10632
PORTLAND, ME 04104
(207) 671-9208

v.

SECRETARY OF VETERANS AFFAIRS
defendant

DAVID R. COLLINS
207-780-3257
[COR LD NTC]
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257

GAIL FISK MALONE
[term 11/12/99]
[COR LD NTC]
U.S. ATTORNEY'S OFFICE

Docket as of August 4, 2000 8:49 am

Page 1

Proceedings include all events.
1:95cv194 LYONS, et al v. VETERANS AFFAIRS SEC, et al

CLOSED

STNDRD

P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344

NIKHIL J PATHAK
defendant

ALTON C. STEVENS, Esq.
[COR LD NTC]
MARDEN, DUBORD, BERNIER &
STEVENS
44 ELM STREET
P.O. BOX 708
WATERVILLE, ME 04903-0708
873-0186

EUGENE M BEAUPRE, DR
defendant
[term 01/07/97]

DAVID R. COLLINS
[term 01/07/97]
(See above)
[COR LD NTC]

GAIL FISK MALONE
[term 01/07/97]
(See above)
[COR LD NTC]

USA
movant

DAVID R. COLLINS
(See above)
[COR LD NTC]

GAIL FISK MALONE
[term 11/12/99]
(See above)
[COR LD NTC]

=====
NIKHIL J PATHAK
counter-claimant

ALTON C. STEVENS, Esq.
[COR LD NTC]
MARDEN, DUBORD, BERNIER &
STEVENS
44 ELM STREET
P.O. BOX 708
WATERVILLE, ME 04903-0708
873-0186

v.

Proceedings include all events.

1:95cv194 LYONS, et al v. VETERANS AFFAIRS SEC, et al

CLOSED

STNDRD

KATHLEEN L LYONS
counter-defendant

MARCI A. ALEXANDER, Esq.
[term 12/05/95]
[COR LD NTC]
ASSISTANT ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333
626-8800

RICHARD L. O'MEARA
773-5651
MURRAY, PLUMB & MURRAY
PO BOX 9785
PORTLAND, ME 04101-5085
773-5651

ERIC M. MEHNERT, ESQ.
[COR]
MEHNERT LAW OFFICES
P.O. BOX 10632
PORTLAND, ME 04104
(207) 671-9208

=====

RANDY LYONS
plaintiff

RICHARD L. O'MEARA
773-5651
[COR LD NTC]
MURRAY, PLUMB & MURRAY
PO BOX 9785
PORTLAND, ME 04101-5085
773-5651

ERIC M. MEHNERT, ESQ.
[COR LD NTC]
MEHNERT LAW OFFICES
P.O. BOX 10632
PORTLAND, ME 04104
(207) 671-9208

