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Verdict

August 5, 2014

[Joanna L. Grossman](#)

Sex Behind Bars: Lessons From a Prison Sexual Harassment Case



One might watch the Netflix original series *Orange Is the New Black* and think that the rampant sexual encounters in the prison—involving the warden, correctional officers, and inmates in various pairings—are trumped up to appeal to the prurient interests of viewers. But there is no shortage of real cases involving similar behavior, raising complicated questions about harassment or other forms of discrimination.

In one notable example, *Miller v. Department of Correction* (<http://law.justia.com/cases/california/supreme-court/2005/s114097.html>), female correctional officers sued because their deputy warden was carrying on three affairs with other female employees who were subordinate to him and who were granted undeserved privileges and promotions because of his relationship with them. (This case is discussed in more detail [here](http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/grossman/20050728.html) (http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/grossman/20050728.html).

Miller raised questions about the law of sexual favoritism—when can sex between supervisors and subordinates be discriminatory to other employees? The short answer, in that case, is that isolated acts of consensual sex between supervisors and subordinates is not actionable, but when “such sexual favoritism is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as ‘sexual playthings’ or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or management.”

In a new ruling from the Seventh Circuit Court of Appeals, *Orton-Bell v. Indiana* (<http://law.justia.com/cases/federal/appellate-courts/ca7/13-1235/13-1235-2014-07-21.html>), the court had to address different questions arising out of sex between prison employees. Among the questions raised is whether using someone’s desk for sexual liaisons creates a hostile environment for the office holder and whether differential treatment of two employees disciplined for a forbidden sexual liaison is discrimination? The court’s job in this case was to sort through the facts to determine which might give rise to an actionable claim of discrimination and which were merely disgusting.

Workplace Life at an Indiana Prison

Connie Orton-Bell worked as a substance abuse counselor at a maximum-security prison in Indiana. She had complained at some point about the possibility that someone was using her office computer at night, which raised concerns about a security breach. An investigator looked into her complaint, discovering that her office was being used at night without her knowledge. But it wasn't being invaded by inmates or hackers—it was being used by night-shift employees for sexual liaisons. Specifically, they were having sex on her desk. (This explained why, in the past, she had noticed strange stains on her desk in the morning.) The investigator was apparently relieved by the absence of a security breach and not at all concerned about the sex-on-desk problem. Orton-Bell asked the investigator what she should do about the problem, and he replied: “I suggest you wash off your desk every day.” When she protested, he insisted that “staff having sex is no concern to us” as long as it does not involve sex between “staff and offender.” She also complained to the prison superintendent, and he, like the investigator, said he didn't care as long as offenders were not involved. Orton-Bell learned later that the misuse of her office was widely known and the subject of a long-running office joke.

Sex on the night shift was not the only indicator of a sexualized work environment. Orton-Bell complained of a barrage of sexual comments and incidents that seemed to permeate the environment. (The Seventh Circuit reviewed a grant of summary judgment and thus considered both undisputed facts and disputed facts viewed in the light most favorable to Orton-Bell.) For example, a superintendent who was later fired for an inappropriate sexual relationship with a subordinate had insisted that the subordinate attend department-head meetings, although it was not necessary for her job, so he could “look down the table at her.” The room was apparently filled with attractive women with no job-related reason for attending. And this same superintendent refused to allow her alone to take advantage of a jeans-on-Friday policy because “her ass looked so good that she would cause a riot.”

According to Orton-Bell, the sexual comments and innuendo began in the parking lot and extended throughout the work day. In addition to making sexual comments, male employees would “congregate around the pat-down area to watch female employees receive pat-downs on their way into the facility;” the onlookers would then comment that they needed a cigarette after watching Orton-Bell get patted down because it was almost like having sex with her. She was asked on one occasion to remove a sweater, leaving her with only a spaghetti-strap camisole underneath. She described the sexualized nature of the work environment as “an onslaught.”

Orton-Bell was herself involved in a sexual affair at work. She was involved with Major Joe Ditmer, an officer in charge of custody at the prison and a 25-year veteran of the facility. They were both married, but separated from their respective spouses. The affair took place at her home, mostly on lunch breaks, and, on some occasions, in his office. (She disputes this latter fact.) The two also engaged in sexually explicit conversations via work e-mail. The superintendent—the one who told Orton-Bell he did not care whether her co-workers were having sex on her desk—took the position that Orton-Bell's and Ditmer's affair was a violation of the State Code of Ethics and the internal standards of conduct. An investigation ensued, which revealed the sexually explicit e-mails and other evidence of the affair, including an admission by Ditmer that they had sex in his office.

Ditmer and Orton-Bell were both suspended for one month and then terminated. Both appealed through a state-employee process. Ditmer's appeal resulted in a settlement that allowed him to resign in good standing, retain his benefits including his pension, and continue to work for the prison as a contractor. Orton-Bell, however, was not able to settle her appeal. It went to a hearing, where the presiding officer determined that she was appropriately terminated. She lost all her employment benefits, was barred from working for the department of corrections in any capacity and had trouble obtaining unemployment benefits because of the characterization of her termination.

Making Sense of the Mess: Orton-Bell's Hostile Environment Claim

Orton-Bell filed a lawsuit alleging that she had been subjected to a hostile work environment, that she was retaliated against for complaining about the sexual incidents on her desk, and that she was discriminated against by being punished more severely than her male paramour. The trial court ruled against her on all claims and granted summary judgment to the State of Indiana (the defendant in the lawsuit). The Court of Appeals, however, reversed on the hostile environment and discrimination claims, upholding summary judgment only on the

retaliation claim.

Orton-Bell's claim of a hostile environment was based on two types of behavior—the constant barrage of sexual comments and conduct (including the unnecessarily public pat-downs of female employees) and the use of her desk for sexual liaisons by night-shift workers. To be actionable, a work environment must be both subjectively and objectively hostile and offensive, severe or pervasive, and based on sex. For an employer to be held liable for an actionable hostile environment, there must also be some basis for direct or vicarious liability.

Orton-Bell's complaints about the constant barrage of sexual comments and manipulations could meet this standard—a decision for a trier of fact to make on remand. It was inappropriate, in the Seventh Circuit's view, for the district court to preclude a trial by granting summary judgment to the State. The comments were clearly at least as pervasive as those in prior cases in which hostile environments had been deemed actionable. It was also clearly offensive and based on Orton-Bell's sex. She would not have been told to attend meetings unnecessarily just to serve as eye candy for the male supervisor if she were a man; nor would her male co-workers have gawked and made sexual references while she and other women were patted down if they had not been women. And while Orton-Bell did engage in one sexually explicit e-mail exchange with a co-worker, the court deemed that an insufficient basis for concluding that the environment was not subjectively offensive to her.

There was also a basis for holding the state liable for this conduct. Much of it was conducted by supervisors, which means the employer is automatically liable unless it can make out a two-pronged affirmative defense based on its efforts to prevent and correct harassment and the employee's failure to take advantage of corrective opportunities. But here, the evidence suggested that Orton-Bell had complained and requested simple changes such as pat-downs in a less public place; her complaints were met with complete indifference.

Sex on the desk raised a different question: Was the use of Orton-Bell's desk and office for sexual liaisons a contributing or independent cause of the hostile environment? It was clearly unwelcome to Orton-Bell, clearly pervasive given its frequency and the widespread knowledge of the practice, and clearly offensive to the objective eye (washing one's desk every morning is hardly a sufficient remedy). Yet, the Seventh Circuit held, this behavior could not create an actionable hostile environment because there was no evidence it occurred because of Orton-Bell's sex. In other words, if the night-shift workers did not choose her office in particular—or the investigator and superintendent did not ignore her complaints—because she is a woman, the environment is not hostile “because of sex” within the meaning of Title VII.

Her retaliation claim lost for the same reason. Although she may well have been retaliated against for complaining about the sex on her desk, her complaint was not about a form of actionable discrimination and, therefore, does not come with protection from retaliation.

Orton-Bell's Sex Discrimination Claim

In addition to her claim of a hostile environment—which is now revived for a trial on remand—Orton-Bell claimed that the state's more favorable treatment of Ditmer's appeal was unlawful sex discrimination. Why would two people being punished for precisely the same conduct end up with such different outcomes? Title VII generally prohibits employers from taking sex into account when setting the terms or conditions of employment—including, of course, termination.

In the Seventh Circuit's view, Orton-Bell made out a *prima facie* case of discrimination by showing that she suffered an adverse employment action and that a similarly situated employee not in her protected class (i.e., not female) was treated more favorably. The question here is whether Ditmer and Orton-Bell were similarly situated. The burden is on the plaintiff to show that the comparator had the same supervisor, was subject to the same standards, and engaged in similar conduct without mitigating or differentiating circumstances. In this case, the Seventh Circuit concluded that the only differentiating circumstances—Ditmer's twenty-five years of experience and higher position of authority—cut both ways. Perhaps he was treated more leniently because of his long career. But at the same time, one could conclude that he should be judged more harshly for abusing discretion and engaging in behavior that he knew was impermissible. After all, he got his job after his predecessor—the superintendent who made women come to meetings unnecessarily just so he could ogle them—lost his job for

exactly the same conduct, engaging in a sexual affair with a subordinate.

It is fair to say, the court concluded, that the two were similarly situated for purposes of being punished for their workplace discretion. Yet, they were treated very differently without explanation. More discovery was warranted, the court reasoned, as was a trial on the merits. Thus, it was error for the lower court to grant summary judgment to the State on this claim.

Conclusion

This case does not make one yearn for a job in the Indiana Department of Corrections, but the Seventh Circuit has done a fair job of matching up the messy allegations with the legal protections against discrimination available under Title VII. Orton-Bell is entitled to her day in court.



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