

BEFORE THE
MISSOURI COMMISSION ON HUMAN RIGHTS
STATE OF MISSOURI

STATE OF MISSOURI <i>ex rel.</i>)	Case Number:	E-06/04-26959
Lashonda Hartman Reid,)		07-0027 HRC
)		
Complainant,)		
)		
vs.)		
)		
Missouri Department of Corrections,)		
)		
Respondent.)		
_____)		

DECISION AND ORDER

After reviewing the record in the above-styled case, the Commission Panel ("Panel") adopts the Hearing Examiner's Findings of Fact and Conclusions of Law set forth in the Hearing Examiner's Recommended Decision Upon Exceptions (the "Recommended Decision") except to the extent that this Decision and Order is inconsistent with the Recommended Decision. The Panel issues the following Decision and Order:

IT IS HEREBY ORDERED:

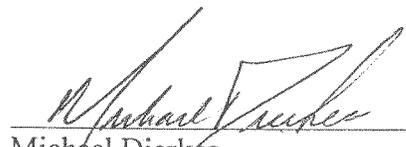
Respondent Missouri Department of Corrections shall

1. Pay Lashonda Hartman Reid ("Reid") \$28,213.00 in back pay, plus interest on said back pay at the rate of 3.25 percent per annum calculated from and after April 18, 2005;
2. Pay Reid \$100,000.00 in actual damages for humiliation and emotional distress;¹
3. Pay Reid \$66,000.00 in actual damages for violation of Reid's civil rights;
4. Cease and desist from further discriminatory practices; and

¹ The complained of conduct of the employees of the Department of Corrections was reprehensible. Nonetheless, the Panel believes that the case of *Eich v. Board of Regents* cited by the Hearing Examiner involved harassment over a much longer period of time than that suffered by Reid and, although the Panel believes that the facts in *Eich* could have justified a non-economic damages award in an amount substantially more than \$200,000, the Panel believes that taking into consideration the shorter duration of the harassment suffered by Reid, an appropriate award for humiliation and emotional distress damages is \$100,000 rather than the \$200,000 recommended by the Hearing Examiner.

5. File a report with the Missouri Commission on Human Rights within 180 days of the date this Decision and Order is signed by the Presiding Commissioner (set forth below) which report shall summarize the efforts made by the Missouri Department of Corrections to ensure its compliance with the Missouri Human Rights Act.

 4-15-2011
Date
Daniel E. Champion
Commissioner
Agree X
Disagree _____

 4-27-11
Date
Michael Dierkes
Commissioner
Agree ✓
Disagree _____

 5/3/2011
Date
Susan Lee Pentlin
Presiding Commissioner
Agree ✓
Disagree _____

Before the
Commission on Human Rights
State of Missouri



STATE EX REL. LASHONDA HARTMAN)
REID,)
)
Petitioner,)
)
vs.)
)
MISSOURI DEPARTMENT OF)
CORRECTIONS,)
)
Respondent.)

No. 07-0027 HRC

RECOMMENDED DECISION UPON EXCEPTIONS

The Administrative Hearing Commission (“the Hearing Examiner”) recommends that the Missouri Commission on Human Rights (“MCHR”) order the Missouri Department of Corrections (“DOC”) to pay Lashonda Hartman Reid \$28,213 in back pay, pre-judgment interest at the rate of 3.25 percent, \$200,000 in actual damages for humiliation and emotional distress, and \$66,000 in actual damages for violation of her civil rights. Major Maurice Guerin, Lieutenant Paul Crowe, and Sergeant David Vandergriff, supervisors at DOC, sexually harassed Reid and also discriminated against her on the basis of her race. Guerin testified that racism and racist behavior against employees and inmates occurred, that he was aware of it in his institution, and described it as “the American way.” DOC failed to enforce its zero tolerance policy to the detriment of women, minorities and inmates. The Hearing Examiner recommends that MCHR

order DOC to cease and desist from further discriminatory practices and enforce its zero tolerance policy as to Lieutenant Crowe, Sergeant Vandergriff, and Mildred Radford. The Hearing Examiner also recommends that MCHR order DOC to file a report with MCHR, within 180 days of the date of MCHR's order adopting this recommended decision, summarizing efforts made by DOC to ensure compliance with its own policies against harassment and discrimination, the Missouri Human Rights Act ("MHRA"), and evaluating DOC's compliance with the MHRA and related training for its employees.

Procedure

Reid filed a complaint with MCHR on June 21, 2004. MCHR filed an amended complaint on December 7, 2007. The Hearing Examiner convened a hearing on the amended complaint on December 18 and 19, 2008. Rachel M. Lewis and Shelly Kintzel, with the Missouri Department of Labor and Industrial Relations, represented MCHR. Gerald Meyr represented DOC. Briefs were not submitted by the parties. On December 9, 2010, DOC filed exceptions to this recommended decision, and MCHR filed a response to those exceptions on December 21, 2010. We made no changes to this recommended decision as a result of those filings.

Objections Taken with the Case

We took a hearsay objection with the case as to Reid's testimony regarding a comment about Pontiacs.¹ Because other testimony regarding the incident was received without objection,² we later allowed latitude in questioning regarding the incident.³ Therefore, we overrule the objection.

¹Tr. at 65.

²Tr. at 156-57.

³Tr. at 191-93.

We also took a hearsay objection with the case as to what Reid told Carolyn Rowe about an incident.⁴ Reid testified and was also called as a rebuttal witness; thus, she was available for cross-examination. We overrule the objection.

Findings of Fact

Reid's Employment with DOC

1. DOC is one of the largest state agencies, with over 11,000 employees.
2. Reid is an African-American, and she is female.
3. Reid began employment with DOC in 1997 as a Corrections Officer I (“CO1”) at the Northeastern Correctional Center in Bowling Green, Missouri. After working there for approximately one year, she transferred to the Farmington Correctional Center, where she worked for approximately four years. Reid transferred to the Eastern Reception and Diagnostic Correctional Center (“ERDCC”) in Bonne Terre, Missouri, in 2002, still as a CO1. Reid was a reception and diagnostic intake officer. In that capacity, she processed offenders as they came in from other counties – helping with fingerprinting, going through and arranging backup cards, preparing prisoners for transport, cuffing and uncuffing prisoners, escorting prisoners through the building, writing down emergency contacts, documenting tattoos, and other duties as assigned.
4. Reid received employment appraisal ratings from successful to highly successful during her employment at ERDCC.
5. Reid and other CO1s wore blue uniforms.
6. From 2002 to 2004 Reid worked at ERDCC.

⁴Tr. at 144.

Supervisors

7. Supervisors at DOC have rankings such as major, lieutenant and sergeant, as in the armed forces.
 8. Supervisors wear white uniforms.
 9. Maurice Guerin held the rank of major at ERDCC during the entire period when Reid worked there.
 10. Guerin is a Caucasian male.
 11. Guerin knew that members of his staff used racial slurs related to African-Americans at ERDCC.
 12. Guerin did not enforce the DOC's zero tolerance policy that prohibited racial and sexual discrimination.
 13. Guerin did not enforce the DOC's zero tolerance policy that prohibited racial and sexual harassment.
 14. Guerin characterized "racial jokes" told in DOC facilities by DOC employees as "It's the American way."
 15. Guerin retired sometime after Reid complained to MCHR.
 16. Paul Crowe was a lieutenant and a supervisor of Reid at ERDCC.
 17. Crowe is a Caucasian male.
 18. David Vandergriff was a sergeant and a supervisor of Reid at ERDCC during the entire period when she worked there.
 19. Vandergriff is a Caucasian male.
 20. Crowe and Vandergriff were Reid's supervisors all day during her work hours.
- Guerin supervised Crowe and was responsible for all staff at the facility. He worked in another

building, but often came into the building where Reid worked. Reid reported to Crowe, Vandergriff, and Guerin.

21. Guerin, Crow and Vandergriff discriminated against Reid based on her race and sex. Guerin, Crow and Vandergriff sexually harassed Reid.

Co-workers

22. Reid's co-workers included Carolyn Rowe, an African-American female; and Carmen Valdez, a Hispanic female.

Racial Comments

"Nigger"

23. Nigger is a racially derogatory term most often used in reference to African-Americans.

24. Employees at ERDCC frequently used the term "nigger" and referred to things as being "nigger-rigged." ERDCC employees referred to black offenders as "niggers" and also referred to black corrections officers as "niggers." Reid sometimes complained to the Caucasian DOC employee who said it that usage of the term "nigger" was derogatory, insulting, and humiliating. The DOC employees who had used the term nigger or one of its derivations made excuses such as:

- they "didn't mean anything by it,"
- "it just slipped,"
- they "wouldn't say it to hurt her feelings,"
- or their "best friend is African-American."

Reid was embarrassed, humiliated, and offended when she heard these terms because they are racially derogatory.

25. One DOC employee, Mildred Radford, used the terms “nigger” or “nigger-rigged,” or said “there must have been a nigger in the woodpile” or haystack. Then she would say that she was not racist but that she just “grew up like that.” She would say that she was sorry and that she didn’t mean anything by it. Radford is Caucasian.

“Token”/“Token Nigger”

26. Guerin, Vandergriff, and Crowe used the term “token” in reference to Reid, to Rowe, African-American females; and to Valdez, a Hispanic female. Guerin used the term more often than Vandergriff and Crowe. Guerin also stated that he had a “token nigger.” Crowe and Vandergriff were present when the term was used by others. Guerin stated that he met his quota for African-American females and Hispanic females. Being referred to as a “token” offended, humiliated, and embarrassed Reid. It bothered her because she was singled out because of her race and sex, even though she had completed the requisite training to work in her position and had done so with distinction.

“Pontiac”

27. In a conversation with co-workers where Rowe was the only African-American, a Caucasian DOC employee asked Rowe if she drove a Pontiac. She replied “A Nissan. Why?” Someone responded “Oh, I thought you drove a Pontiac.” She stated “A Pontiac? No. Officer Reid drives a Pontiac.” Someone responded that Rowe looked like she drove a Pontiac, and they kept laughing at her. Rowe asked why she looked like she drove a Pontiac, when she drove a Nissan. Some employees laughed and walked out, and when Rowe asked “What was so funny?” someone said “Pontiac stands for ‘Poor Old Nigger Who Thinks It’s A Cadillac.’” Rowe told Reid about the incident. Rowe filed a report with DOC on the incident, and the employee who made the comment lost his job. Reid was offended, embarrassed, and humiliated about the incident.

“Chocolate”

28. Guerin, Vandergriff, and Crowe referred to Reid and Rowe as “chocolate” and sometimes as “sexual chocolate.” Guerin referred to Reid and Rowe as “chocolate candies” or as his “little chocolate girls” at least on a weekly basis, if not daily. These terms were used in the presence of offenders and affected Reid’s employment because she needed to build rapport with co-workers and have a good reputation with the prisoners to get them to comply with her instructions. The use of these terms caused the prisoners and co-workers to treat her with less respect than other employees. The term was used often.

“Shadow”

29. One time when Rowe was walking behind Guerin, he said “Look, I got a shadow.” The use of the term bothered, embarrassed, and humiliated Reid, who heard the comment. The use of the term in this context related to race.

“Black Ass”

30. On one occasion Guerin ordered Rowe to “Get your black ass over here.” Rowe asked Reid to confirm what Guerin said, to which Rowe responded yes.

“Tijuana Crack Whore,” “Wetback,” and “Fence Cutter”

31. Guerin, Crowe, and Vandergriff used the terms “Tijuana crack whore,” “wetback,” and “fence cutter” in reference to Valdez. They would ask how long it took for her to cut through that fence from Mexico up here and whether she could swim well.

Tattoo Incidents

32. Vandergriff once radioed and instructed Reid to report to Crowe. When Reid reported to Crowe, a prisoner was sitting with Crowe, and Crowe said “What the fuck do you want? Don’t you see I’m fucking busy?” Reid replied that Vandergriff ordered her to come

there. The prisoner was Caucasian and was sitting without a shirt on. He had swastikas and different tattoos on his body. Staff members were in the hallway laughing at her embarrassment.

33. Reid was singled out to work in processing inmates who were tattooed with racist images. Employees would send Reid to take pictures of an inmate's tattoos if he had racist tattoos, and they would say "We got somebody for you." Reid was subjected to this treatment, but other employees were not. Reid was subjected to this treatment based on her race and status as a female.

34. Due to the nature and construction of the facility, it echoed a lot when empty, and even when full of inmates comments made on one end of the intake area could be heard on the other end of the intake area. Sometimes the comments echoed through the facility.

Reid's Response

35. When people used racial slurs, Reid would sometimes tell them that she didn't want to hear that, and she would sometimes walk away. Many times the supervisors were present or were engaged in the conduct that Reid sought to complain about.

36. Crowe was one supervisor to whom Reid complained about his use of the term "nigger."

Sexual Harassment

37. DOC's Department Procedure D2-11.4 states:

Sexual harassment is defined as unwelcome sexual advances, request for sexual favors, unwelcome touching, explicit sexual comments or innuendos, indecent exposure, or overt displays of sexually oriented pictures. This list is non-exhaustive, as other forms of behavior, such as repeated requests for a date or after hour socializing, may constitute sexual harassment.

Employees who believe they have been subjected to sexual harassment are responsible for informing their supervisor, or chief administrative officer or Human Relations Officer immediately. An investigation of allegations of sexual harassment follows the normal procedure for departmental or divisional investigations. If

substantiated and depending on the nature of the violation, discipline may be initiated, up to and including dismissal. Employees who make inappropriate comments or engage in inappropriate behavior of a sexual or racial nature may be disciplined for discourteous or unprofessional conduct even though such conduct does not qualify as harassment. For example, the use of derogatory racial names is prohibited.

* * *

The Department of Corrections has zero tolerance of any form of harassment. Investigation of a complaint may occur even if the employee does not wish to have the complaint reviewed.

(Emphasis added).

Comments About Reid's Body

38. Male DOC employees told Reid that she was pretty.

39. Male DOC employees also said that Reid had a nice butt. They said it was “like a beer keg” and that it was “like a table” because they could set a beer on it. Guerin said that Reid’s butt was firm. They made these comments in front of other DOC employees, supervisors, and prisoners. These comments and references to her anatomy embarrassed Reid.

Comments Soliciting Sex

40. Male DOC employees asked Reid if she was the spokesperson for African-Americans when it came to sex.

41. Crowe routinely used obscene and vulgar language while on duty. Crowe and other male DOC employees referred to female DOC employees as “hookers.” Reid found this demeaning.

42. In front of other people, Crowe said that Reid had pretty lips for sucking “dick.” This comment made Reid feel self conscious. Reid felt that Crowe made the comment because she was female and also because of her race, as African-Americans are stereotypically depicted as having fuller lips.

43. On one occasion, when the seats in the room were all taken, Crowe wiped his mouth off and told Reid “Well, you can sit here. I’ll clean this off for you (indicating his mouth).” Crowe requested that Reid engage in a sex act – sitting on his face.

44. On one occasion when Reid was discussing the problems she was having with her husband, Guerin said that she “should have married a good white guy” and that if she had married him (Guerin) she wouldn’t be having all these problems with her husband, and her son would be his. Another employee heard this and said “Well, then that would be your ‘baby’s mama’.” After that point, Guerin frequently called Reid his “baby’s mama.” A co-worker said “There’s your baby’s daddy,” and Reid responded “Yeah, that’s my baby’s daddy.” Reid did not value these interactions. She wanted to avoid additional conflict.

45. Reid’s husband wrecked a car, and Reid was discussing that it would cost \$6,000 out of pocket to get it fixed. Guerin responded “You’re sitting on a gold mine. You should be using what your mama gave you.” Guerin then asked her to sit on his lap. Reid believed this was a request for sex in exchange for money or a promotion.

46. Reid’s husband was arrested. Reid informed Guerin, Crowe, and Vandergriff that he had been arrested, and he was brought to ERDCC even though it was against DOC policy for him to be at the same institution where Reid worked. Reid told Guerin that her husband was not supposed to be at the same institution at the same time. Guerin said that his hands were tied, and he said that she could come in his office with him with the lights out or she could go work in a different part of the institution. Reid complained to Crowe about how Guerin responded, and he told her to just go work in the back. From where she was working, Reid’s husband, Mr. Hartman, saw her and starting crying and yelling. He was almost hysterical. He said that he was sorry, that he loved her, and that he didn’t want a divorce. He told everybody, including inmates and DOC employees, that she was his wife. Co-workers observed the incident. Reid went home

because she was upset. Reid used her annual leave or sick leave for three days and two hours while her husband was in the facility where she worked. Reid returned to work when Hartman was gone, but found that people avoided her and weren't really talking to her.

"Harry Ballsack"

47. DOC employees used the facility's loudspeakers to page "Harry Ballsack" as a "joke." This reference to male anatomy was repugnant and embarrassing to Reid.

Reid's Responses

48. Reid responded to sexually charged and derogatory comments from Guerin by telling him that "you don't get anywhere lying on your back" and that she wasn't raised that way. She told him that his comments were "not cool" and that she didn't want to hear it. Reid would tell Crowe to shut up and that his comments were nasty. However, Guerin and Crowe did not stop making the racist and sexist comments. They would respond that black women were overly sensitive and that she needed to calm down.

49. Reid never heard Guerin tell Crowe that his comments violated policy, and none of her co-workers ever said anything to Guerin or Crowe about their comments being inappropriate. Reid eventually grew tired of telling them that the comments were inappropriate, and just tried to do her job so that she could provide for her family.

Complaint and Damages

50. The prisoners could tell when there was an issue between Reid and the staff even when they were not present for sexual or racially derogatory comments. Prisoners knew that supervisors were not dealing with it, and that made her more vulnerable. Prisoners have assaulted other female DOC employees after the use of sexually and racially derogatory comments in front of them.

51. Reid was offended, embarrassed, and humiliated by the sexual and gender-related comments. The environment depressed her and made it difficult for her to go to work. The comments made her feel like the prisoners would not respect her as much as they would a male officer. She had to deal with sexual advances from prisoners.

52. Male employees at DOC were not subjected to comments based on their sex.

53. DOC supervisors and employees failed to follow the DOC's own policies and procedures regarding zero tolerance for sexual harassment and housing an inmate where their family member worked.

54. Reid had no one to go to at her place of employment to complain about the inappropriate comments because her immediate supervisors were the ones making the comments, and she had repeatedly asked them to stop making the sexual and racially derogatory comments.

55. While Reid was working at ERDCC, she lost weight and suffered headaches, shakes, and panic attacks as a result of her working conditions. Reid felt sick to her stomach as soon as she got to the parking lot at ERDCC. She became nervous and reclusive. She does not talk to people much. She stopped going out regularly because someone in the rural Missouri community of Bonne Terre told her that they heard she filed a complaint that was not true and that everybody knew about it. She did not attend her class reunion because she did not want to hear people ask about the filing of her complaint and the discriminating and embarrassing conduct she had endured.

56. On March 8, 2004, Reid sought treatment from a mental health professional, who ordered her to take leave from work until March 23, 2004. On March 23, 2004, Reid met with James Purkett, the superintendent and highest ranking supervisor at ERDCC, to complain about the harassment and how Hartman was brought to ERDCC. When she returned to her work area, Crowe stated that he had been told to report to Guerin's office and asked where Reid had been.

Reid stated that she had a meeting with Purkett, and Crowe replied “Oh my God, what have you done?” When Crowe returned from his meeting with Guerin, he wouldn’t speak to Reid. Staff members were avoiding her, and when Guerin entered the building, staff members walked away. Guerin did not speak to her. The inmates could sense that Reid did not have the support of her co-workers, which compromised her safety at work because the inmates could have harmed her in this circumstance. A Caucasian co-worker threatened that it could take people a while to get to her if she were assaulted.

57. Reid did not request a transfer to another correctional facility because her doctor would not give her a release to do so and she feared further retaliation.

58. Reid contacted DOC’s Human Resources Department in Jefferson City to complain about the discrimination and spoke to J.T. Laws. Laws arranged a meeting with Reid on March 24, 2004, in Farmington. Reid went to the meeting together with Rowe. Laws told her that she could go through the chain of command at DOC or she could go straight to MCHR and file a complaint. She stated that she would go to MCHR because the perpetrators of the discrimination were in her chain of command at DOC.

59. After speaking with Laws and returning to work, Reid found that people would not speak to her, especially if Guerin was in the area. Reid visited her doctor, who recommended that she remain off work until she saw her psychiatrist on April 6, 2004. The psychiatrist certified that he was treating her for “emotional illness,” and as of May 4, 2004, placed her on six months’ indeterminate leave.

60. Rowe was assaulted by offenders and struck numerous times in the face on May 2, 2004. Because of this assault, Rowe subsequently left her employment with the institution.

61. After approximately six months away from work, Reid spoke with Captain Billingsley, who told her that if she came back to work, she would probably be terminated or forced to quit for talking to Laws.

62. After leaving ERDCC, Reid lived with her mother, who had a home in Ironton and a home in St. Louis. Reid lived in both homes. Reid and her son received Medicaid. Reid borrowed money from her mother and other relatives, and relied on other people to provide clothing for her son. Reid also incurred credit card debt to pay for necessities for herself and her son. Reid relied on her mother to make her car payments and pay her car insurance. Reid took out a student loan and attended college for a while at Mineral Area College. Reid applied for jobs at fast food restaurants and at a factory in the Ironton and Farmington area, but was unable to find employment.

63. On November 2, 2004, Reid's psychiatrist certified that she was under his care for "emotional illness" and that she should be on leave from work "indeterminate at least 6 months." He never gave her a release to return to work at the prison.

64. On March 17, 2005, Superintendent Purkett sent a letter to Reid instructing her to return to duty on or before March 28, 2005, with a physician's release and that if she was unable to return with a physician's release, to submit a voluntary resignation. Purkett stated that Reid's paid leave was exhausted on May 18, 2004, and her FMLA leave expired on June 3, 2004. Reid had been on leave without pay ever since she was ordered by her doctor to refrain from working at ERDCC. On April 5, 2005, DOC sent a letter to Reid dismissing her from her position, effective at the close of business on April 18, 2005, for being absent from duty.

65. After finding employment opportunities limited in the area of Ironton and Farmington, Reid made St. Louis her permanent residence in 2005. Reid worked briefly as a

clerk at Dillard's in St. Louis, but left because she found better employment with U.S. Cellular in June or July 2005.

66. Reid did not receive unemployment benefits from March 2004 through April 2005 because she was still a DOC employee.

67. In 2003, Reid earned \$22,570 from DOC.

68. In 2004, Reid earned \$9,229 from DOC.

69. In 2005, Reid earned \$48 from Mineral Area College, \$6.00 from DOC, \$65 from Dillard's, and \$15,240 from U.S. Cellular.

70. In 2006, Reid earned \$20,147 from U.S. Cellular and \$1,109 from Community Alternatives.

71. In 2007, Reid earned \$19,572 from U.S. Cellular and \$3,421 from Washington University.

Conclusions of Law

I. Credibility

MCHR must judge the credibility of witnesses, and has the discretion to believe all, part, or none of the testimony of any witness.⁵ The "credibility of a witness's testimony is for the fact finder to determine."⁶ "Credibility means capacity for being believed or credited."⁷ Anything that sheds light on the accuracy, truthfulness, and sincerity of a witness, which by necessity includes facts and circumstances, is proper for determining the credibility of a witness.⁸ Because the Hearing Examiner has had the opportunity to observe the demeanor of the witnesses, the

⁵*Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992).

⁶*Clark v. Reeves*, 854 S.W.2d 28, 30 (Mo. App., W.D. 1993).

⁷*Marvin E. Neiberg Real Estate Co. v. Taylor-Morley-Simon, Inc.*, 867 S.W.2d 618, 626 (Mo. App., E.D. 1993).

⁸*Roberts v. Emerson Elec. Mfg. Co.*, 362 S.W.2d 579, 584 (Mo. 1962).

Hearing Examiner recommends that MCHR adopt its determination as to the credibility of witnesses.

Reid was a credible witness. Her demeanor showed that she was severely affected by the environment at ERDCC, even to the extent that a break was taken during the hearing to allow Reid to wipe tears away and compose herself.⁹ Reid's account of the events that occurred at ERDCC has remained consistent throughout her complaint to MCHR, her statements to MCHR investigators, her deposition in this proceeding, and her testimony at the hearing.

Reid's account of the events was corroborated by other witnesses. Rowe's testimony corroborated Reid's, and some of DOC's own witnesses acknowledged that certain events occurred. For example, Barbara Skaggs admitted that terms such as "token," "Tijuana crack whore," "wetback" and "hooker" were used. Mildred Radford testified as to the time when Guerin told Rowe to get her "Black ass out" of his office, as to the "Harry Ballsack" incident, and as to the racist tattoo incident. She also acknowledged her own use of the term "nigger in the wood pile" in front of Reid and that she apologized, but that Reid was so offended that she ended their close friendship.

Guerin testified by deposition. Guerin's testimony was equivocal:¹⁰

Q: Did staff members at this facility in Bonne Terre use racial slurs during their employment?

A: That's a difficult question.

Q: Why is that so difficult to answer?

A: Because you try to train the staff not to use racial slurs because most of the time they refer to inmates. So they use racial slurs, but you try to stop them from doing that.

Q: How would you try to stop them?

⁹Tr. at 75.

¹⁰Guerin Depo. at 29-30.

A: You just tell them. You tell them that's not a proper way to address or talk to somebody, or refer to somebody.

Q: Have you ever heard a racial slur used in mixed company of employees?

A: No.

Q: During your employment with the Department of Corrections, did you ever use racial slurs?

A: No, ma'am.

Q: In the whole 31 years you never used a racial slur?

A: I try not to. I believe that I have not. . . .

Q: Have you ever told a racist joke?

A: Not that I recall.

Q: Have you ever used the N word that refers to African-Americans?

A: No, ma'am.

Q: Have you ever used that word at the Department of Corrections?

A: No, ma'am.

Q: Have you ever heard that term used by employees of the Department of Corrections?

A: I didn't hear the first part of the question.

Q: Did you ever hear that word being used by employees of the Department of Corrections?

A: Yes, ma'am.

Q: What employees?

A: I don't recall who they were, but that word has always been used, as long as I know.

Q: It has always been used in the 30-plus years that you worked?

A: Yes.

Guerin knew that African-Americans in the DOC facility that he supervised were being referred to as “niggers.” Rather than follow DOC procedure, he tolerated and allowed discriminatory conduct without imposing any formal discipline. Guerin denied that racial jokes were ever told in front of him, but stated that he was sure they were told among employees because “It’s the American way.”¹¹

Crowe’s hearing testimony was inconsistent and was also at odds with his deposition testimony. At the hearing, Crowe testified as follows:¹²

Q: And have you ever heard -- while employed by the Department of Corrections, have you heard employees tell racial jokes?

A: No, ma’am.

Q: Okay. Do you recall giving a deposition? I -- I sat down with you and Mr. Meyr was there and we asked -- I asked you several questions and we had a court reporter; --

A: Yes, ma’am.

Q: -- do you recall that? Was that on or about May 14th of 2008?

A: Yes, ma’am.

Q: And have you looked at that deposition?

A: Yes. Yes, ma’am, I have.

Q: Okay. Let me read an excerpt from page 30. The question, “While employed by the Department of Corrections, you have heard employees tell racial jokes?” The question. The answer was, “Yes, ma’am.” Question, “What kind of racial jokes?” Answer, “All different kinds. Sexual jokes, racist jokes, all kinds of them.” Question on page 31, “Is it a regular occurrence that you would hear a racial joke or slur?” Answer, “No, not regular.” Question, “But is it -- is it not uncommon?” Answer, “Right.” Were you under oath when you took this deposition?

¹¹Guerin Depo. at 27-28.

¹²Tr. at 344-47.

A: Yes, ma'am.

Q: And you understand that you're under oath today?

A: Yes, ma'am.

Q: Okay. And you -- you testified earlier that you've never heard the word token used while working at the Department of Corrections. Is that correct?

A: Yes, ma'am.

* * *

Q: Okay. Again, I'm going to refer you to the deposition that we took on May 18th -- or May 14th, excuse me, of 2008. Question, "Have you heard the term token?" Answer: "Yes, ma'am." Question, "What does that mean?" Answer, "Anybody can be a token. Like two males and female, the female is supposed to be a token, or two males [sic] and a male, the male would be a token." Question, "What about lots of white employees and two blacks; would one of the black women be a token? Answer, "That's what they call them." Question, "Have you heard that term here at the Department of Corrections?" Answer, "Yes, I have." Question, "Who said that term?" Answer, "A lot of people." Were you under oath when you took that?

A: Yes, ma'am.

Q: And you understand that you're under oath today?

A: Yes, ma'am.

Q: And does use of the term "token" at the Department of Corrections as you testified in the deposition violate the policy of the Department of Corrections?

A: Yes, ma'am.

Q: Okay. When you heard the term "token" at the Department of Corrections, did you address that as a violation of such policy?

A: That term was used against me.

Q: I'm sorry?

A: I was the token.

Q: You were the token?

A: They have a -- yes.

Q: So a lot of people called you a token at the Department of Corrections?

A: Whenever I'd sit down with two females and I'm the only male, yes, I was the token.

Q: But a lot of people at the Department of Corrections called you a token, that's your testimony?

A: No, ma'am. Just -- just that one time.

Crowe's testimony on redirect did nothing to clear up the inconsistency:¹³

Q: Let me followup, Sergeant (sic) Crowe, with this token. You heard the testimony regarding the word token. You said in your deposition you had heard it used, and here today you testify you hadn't heard it. Can you explain the -- the difference between your deposition testimony and your testimony here today?

A: Yes. I was asked if I ever called Lashonda Hartman, Carolyn Rowe or Carmen Valdez a token. I never called them a token.

Q: Okay. You never called them a token?

A: No, sir.

Q: Okay. All right. But then you have heard the term used in the workplace?

A: Yes, sir.

Neither the deposition testimony nor the hearing testimony was specific as to Reid, Rowe, or Valdez. Crowe's attempted explanation is not credible.

Crowe testified at one point that he never used the word "hooker" at DOC¹⁴ and later stated that he used the word in conversation, but not in reference to employees.¹⁵ Crowe then acknowledged that referring to a "hooker" is unprofessional and a violation of policy:¹⁶

¹³Tr. at 350-51.

¹⁴Tr. at 348.

¹⁵Tr. at 471.

¹⁶Tr. at 472-74.

Q: In what context at work would the conversation about hookers come up?

A: Well, it was we was talking about my job down at the Dugout, and then they was asking me about the hookers that was down there.

Q: Who was asking you about that?

A: The co-workers.

Q: Co-workers. Were they male and female workers, or just the male?

A: Yes. Yes, ma'am. Both.

Q: And you would say hookers?

A: Yes, ma'am.

Q: Did anyone tell you that that's not really a nice word to say about women?

A: No, ma'am. Nobody ever said anything about it.

Q: Do you think that it's a nice term for a woman?

A: No, ma'am, it ain't.

Q: Why would you use it if it's not very nice?

A: Because that's what they were. They was prostitutes.

Q: Okay.

A: One or the other.

Q: And does the Department have a policy against the proper professional code that you're supposed to exhume [sic] while you're working for the Department of Corrections?

A: Yes, ma'am.

Q: And do you think using the term "hookers" at your workplace is appropriate and falls within that policy?

A: At a certain time.

Q: Do you think --

A: Like I said, I got a sergeant named Hooker now. What am I supposed to call him, Sergeant Don?

Q: Well, we can specify the one person. That's fine. Of course, it's respectful and professional to call somebody by their name. I'm calling you by Mr. Crowe right now.

A: Right.

Q: I would expect that you would call me by Ms. Lewis. However, if I'm -- if Mr. Hooker, the worker, is not at the bar being, as you say, a hooker, is it appropriate to talk about those women who aren't at your workplace in your workplace and refer to them as hookers? Is that professional?

A: No, it isn't.

Q: And it violates the policy, correct?

A: In -- somewhat, yes. I guess you could say that.

Q: And if there are female workers who complain about using the term "hookers" at work, they have a legitimate complaint, correct?

A: If they complain about it, yes, ma'am.

Q: Okay.

Crowe's attempted explanation is not credible.

Crowe also denied that he told Reid that she had pretty lips for sucking dick.¹⁷ Crowe also denied the tattoo incident in his office:¹⁸

Q: Now, do you remember a point in time there where the -- Lashonda Hartman-Reid came into the Gang Task Force office while you were in there and Cynthia Slinkard was in there with a White Supremist [sic] or Arian member [sic] -- Arian [sic] Brotherhood member, an offender? Do you recall an incident where she came into the office?

A: There she come in quite a few times. Everybody used to.

¹⁷Tr. at 341.

¹⁸Tr. at 342.

Q: Okay. Do you ever -- did you ever cuss her out in front of an offender in this office?

A: No, sir.

Q: Did you ever say to her -- I'll just use the word, "Get the fuck out of my office" or "What the fuck you doing in my office" with an offender present?

A: No, sir.

Guerin and Crowe's denials as to their use of racial and sexual terms are simply not credible, in light of their inconsistencies and their divergence with Reid's convincing testimony, which was corroborated by other witnesses including past and present DOC employees. In *Conway v. Missouri Comm'n on Human Rights*,¹⁹ the court stated:

In this case, the Commission expressly found that Employer's testimony concerning its proffered reasons was internally inconsistent, inconsistent with undisputed facts, incredible, uncorroborated and unsupported by documentation. The disparity in pre-promotional training coupled with Employer's failure to produce documentation Supervisor claimed to have complied were further found to give rise to a "suspicion of mendacity" on the part of Employer. Based on our careful review of the record, and with due regard to the Commission's superior opportunity to evaluate the credibility of the witnesses, we cannot say that the inferences drawn by the Commission are unsupported by substantial evidence.²⁰

Similarly, in this case we find by a preponderance of the evidence Guerin and Crowe's testimony incredible and mendacious.²¹

Crow and Vandergriff's demeanor while on the stand was edgy, evasive, and they paused when answering questions on cross-examination. Both their expressions and answers while on cross were flippant. In addition, the light-hearted attempts to explain away their usage of

¹⁹7 S.W.3d 571 (Mo. App., E.D. 1999).

²⁰*Id.* at 575.

²¹"[G]iven to or characterized by deception or falsehood or divergence from absolute truth." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 774 (11th ed. 2004).

derogatory, sexual and racial epithets belie their equivocal and incredible responses in direct and cross as well as in their depositions. Specifically, what they termed as jokes related to sex and race are not humor. Those comments by them and others are better characterized as hate-filled, derogatory language. The comments were used to ridicule an African-American woman who was their co-worker, a mother, a daughter, a wife, and a human and thus entitled to the same dignity as provided by the Constitution as any other person. The terms they used belittled Reid as a woman, an Africa-American, and were used purposefully in the same manner that schoolyard bullies punish others for their amusement. The characterization of terms such as “hooker” and “token” and phrases like “Harry Ball Sack” and “nigger-rigged” as jokes or moments of hilarity shows that these individuals not only hold a different impression as to the meaning and physical and psychological impact of derogatory terms of this sort, but also their conflicting perceptions of reality diverge from the laws and social morals to such a degree that their testimony cannot be relied upon as credible.

II. Discrimination

Section 213.055.1,²² which is part of the MHRA, provides:

It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, national origin, sex, ancestry, age or disability[.]

DOC was an employer as defined by statute because it had more than six employees.²³

²²Statutory references are to RSMo 2000, unless otherwise noted.

²³Section 213.010(7).

A. Race

Claims of race discrimination under the MHRA are determined using the same analysis as Title VII²⁴ and 42 U.S.C. § 1981.²⁵ To make out a prima facie claim for hostile work environment based on race discrimination, a plaintiff must prove: “(1) that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of his or her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer.”²⁶ To determine if the conduct is severe enough to constitute a hostile work environment, we consider “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; . . . whether it unreasonably interferes with an employee's work performance . . . [; and] the extent to which the conduct occurred because of plaintiffs' [race].”²⁷

The term “nigger” was frequently used at ERDCC, and the use of racially derogatory comments was frequent. In her own words, Reid testified that the term “nigger” was used “whenever they felt like saying it. Almost daily. It was the environment we were in.”²⁸ The use of the racially derogatory terms was blatant, commonplace, and severe. Comments were directed at Reid based on her race, and the terms were also directed at other minorities in her presence. The use of the terms interfered with Reid’s work performance because she suffered physical effects. Reid also found that the prisoners could tell when there was an issue between her and the staff and that supervisors were not dealing with it, and that made her more vulnerable. She legitimately feared for her safety. Once she complained to Laws about the conduct, Reid felt that

²⁴Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000E et seq.

²⁵*Evans v. Siegel-Robert, Inc.*, 139 F.Supp.2d 1120 (E.D. Mo. 2001), *aff'd*, 22 Fed. Appx. 688, 2001 WL 1562835.

²⁶*Mack v. Otis Elevator Co.*, 326 F.3d 116, 122 (2d Cir.2003) (internal quotation marks and brackets omitted).

²⁷*Demoret v. Zegarelli*, 451 F.3d 140, 149-50 (2d Cir.2006) (internal quotation marks and citation omitted).

²⁸Tr. at 49.

inmates could sense that she did not have the support of her co-workers, and she felt that this compromised her safety at work. She heard a co-worker say that it could take people a while to get to her if she were assaulted. DOC employees directed her into potentially threatening situations with white supremacist inmates and laughed about it. The workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of Reid's work environment. Reid told Guerin, Crowe, and Vandergriff, all senior to her in the chain of command, that she did not approve of the comments, but they did not stop. Therefore, a specific basis exists for imputing the conduct that created the hostile environment to the employer – her supervisors were the very ones who created the hostile environment. The pervasive attitude of DOC's management that permitted and perpetuated the rampant acts of discrimination cannot be more clearly demonstrated than through the testimony of Laws, a human resources officer with DOC who is charged with the responsibility of hearing employee grievances and advising and assisting DOC "on different issues of employee concerns"²⁹:

Q: (By Ms. Lewis:) Let me try it a little bit different way. When you hear somebody make an allegation my husband came here, I think it's because of race, do you not, as a Human Resource officer, have an obligation to further encourage that person to talk about other possible chances of racial discrimination at that facility?

A: I have no requirement to do so, no.

Q: You don't think that's within your duty to --

A: No.

Q: -- to protect the workers --

A: No, it's not my duty to protect the workers.

Q: -- and assist the workers?

²⁹Tr. at 477.

A: My duty is to protect the agency, to look into the worker's concerns as well as management's concerns. So it's a two-way street.

Q: Exactly. But a worker's concern is that racial discrimination has occurred. It doesn't phase you to ask if anything else has happened?

A: Why would I ask that question? I'm not too sure where you're trying to lead me with that question.^[30]

Reid suffered from a hostile work environment based on her race. DOC discriminated against Reid on the basis of her race, in violation of § 213.055.1.

B. Sex

MCHR's second amended complaint cites § 213.055.1 and asserts that DOC discriminated against Reid on the basis of her sex, in violation of the MHRA. Specifically, MCHR asserts that DOC subjected Reid to a sexually hostile work environment in violation of the MHRA. The racial and sexual terms used to describe Reid were mixed in some instances, such as references to her lips being good for oral sex. Such instances define both the racial and sexual treatment that Reid's co-workers and supervisors gave to her.

The Missouri Court of Appeals has held that in order for a plaintiff to prevail on a claim of hostile work environment sexual harassment under the MHRA, she must establish that: "(1) she is a member of the protected group; (2) she was subjected to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take appropriate remedial action."³¹ The court stated that federal employment discrimination decisions are useful for guidance in deciding a claim of hostile work

³⁰Tr. at 507-08.

³¹*Mason v. Wal-Mart Stores*, 91 S.W.3d 738, 742 (Mo. App., W.D. 2002).

environment sexual harassment brought under the MHRA.³² Reid is a female and thus a member of a protected group.

The conduct complained of must be “unwelcome in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive.”³³ Guerin and Crowe subjected Reid to unwelcome sexual harassment, including sexual comments, name calling, and solicitations to sit on a man’s lap or come into a room alone with him with the lights out. The behavior continued even though Reid complained of it and repeatedly asked them to stop. Most of the behavior took place in front of Reid’s co-workers and in front of inmates.

To establish that a hostile work environment was gender based, the plaintiff must show a causal nexus between any harassment and her protected group status, indicating that she was “singled out because of her gender.”³⁴ The key inquiry is “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”³⁵ Reid was subjected to comments such as:

- “sexual chocolate,” “chocolate candies,” or “chocolate girls”;
- she had a “nice butt”;
- her “butt was like a beer keg”;
- her “butt was like a table” because they could “set a beer on it”;
- she had a “firm butt”;
- female employees were referred to as “hookers”;
- she had “pretty lips for sucking dick”;
- Crowe would wipe off his mouth “so she could sit on it”;

³²*Id.* at 741.

³³*Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

³⁴*Palesch v. Missouri Comm’n on Human Rights*, 233 F.3d 560, 567 (8th Cir. 2000).

³⁵*Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996).

- she was Guerin's "baby's mama";
- "You're sitting on a gold mine. You should be using what your mama gave you."

Male employees at DOC were not subjected to the type of sexual comments to which Reid was subjected. The harassment was clearly based on her sex.

In order to affect the terms, conditions, or privileges of employment, and thus be actionable as sexual harassment, "conduct must be extreme and not merely rude or unpleasant."³⁶ The sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact perceived to be so.³⁷ Courts consider the "totality of the circumstances" to determine whether a work environment is hostile or abusive.³⁸ In considering the totality of the circumstances, courts look to a number of factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."³⁹ "More than a few isolated incidents are required," and the alleged harassment must be "so intimidating, offensive, or hostile that it poisoned the work environment."⁴⁰

Conduct that the courts have found sufficient to establish a hostile work environment includes pervasive sexual innuendo.⁴¹ The supervisors' conduct here was repeated and extreme. It occurred from 2003 through March 2005. The term "hooker" was commonly used to refer to female employees. Guerin and Crowe made crude sexual comments and propositions to Reid. Reid was offended by the comments, as any reasonable person would be. The harassment was so

³⁶*Alagna v. Smithville R-II School District*, 324 F.3d 975, 980 (8th Cir. 2003).

³⁷*Id.*

³⁸*Baker v. John Morrell & Co.*, 382 F.3d 816, 828 (8th Cir. 2004).

³⁹*Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

⁴⁰*Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 967 (8th Cir. 1999).

⁴¹*Baker*, 382 F.3d at 828.

intimidating, offensive, hostile, and routine that it poisoned the work environment and made it very difficult for Reid to work. We have no doubt that Guerin and Crowe's conduct was actionable as harassment and that it affected the terms, conditions, and privileges of Reid's employment.

As to the final factor, the employer knew of the harassment and failed to take remedial action. Guerin and Crowe were supervisors, but failed to stop their actions despite Reid's protests. Crowe's testimony, which is otherwise not credible, corroborates Reid's to the extent that he admitted that no action was taken to stop the continuing harassment of Reid:

Q: Okay. When you heard "baby daddy" mentioned at the Department of Corrections, does that violate the policy?

A: Yes, ma'am.

Q: And what did you do when you heard that term being used?

A: I walked away. I didn't say nothing.

Q: Okay. You didn't say nothing because why?

A: Because it was Lashonda.

Q: So a subordinate says something inappropriate, you're in the chain of command, and you just walk away? Is that your testimony?

A: Yes, ma'am.^[42]

DOC has a zero tolerance policy for sexual harassment. The conduct of Reid's supervisors, by their use of racially and sexually degrading terms, as well as gestures, nullified any effect that the policy may have had, retarded legitimate attempts to report offending behavior, and denigrated Reid and her female co-workers.

⁴²Tr. at 347-48.

MCHR has proven each element of its hostile work environment sexual harassment claim. Reid was sexually harassed and discriminated against by her employer on the basis of her sex, in violation of § 213.055.1.

III. Damages

Section 213.075.11 provides in part:

The panel shall state its findings of fact and conclusions of law, and if, upon all the evidence at the hearing, the panel finds:

(1) That a respondent has engaged in an unlawful discriminatory practice as defined in this chapter, the commission shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice. The order shall require the respondent to take such affirmative action, as in the panel's judgment will implement the purposes of this chapter, including, but not limited to, payment of back pay; hiring; reinstatement or upgrading; . . . [and] payment of actual damages[.]

Cease and Desist Order

In this case, Reid is no longer employed at DOC and has not been for some time. She has found other employment, and she feared transferring to another DOC facility due to the danger of further retaliation. Therefore, reinstatement or upgrading would not be an appropriate remedy, and a cease and desist order would have no practical effect as to Reid. However, the Hearing Examiner recommends that MCHR issue a cease and desist order so that future employees and inmates do not suffer from the same discriminatory practices and order DOC to enforce its zero tolerance policy regarding the co-workers and supervisors found to have violated the MHRA and DOC policies related to sexual harassment and racial discrimination.

Back Pay

In general, a victim of employment discrimination and discharge is entitled to back pay from the date of discharge until the date of the final judgment.⁴³ However, the claimant also has a duty to make reasonable efforts to mitigate damages by seeking other employment.⁴⁴ Reid's physician excused her from work at DOC for approximately one year, from March 2004 until she was discharged in March 2005. Reid then found her employment opportunities very limited in her area. Reid found employment at U.S. Cellular in June or July 2005. Reid's efforts to mitigate damages were reasonable. Therefore, we recommend that MCHR award back pay for one year and three months. Reid's salary at DOC was \$22,570 per year, so the award of back pay is \$28,213.

Prejudgment Interest

An award of prejudgment interest is also appropriate in cases under the MHRA.⁴⁵ The purpose of anti-discrimination laws is to provide "make whole relief," and prejudgment interest is included in this concept.⁴⁶ Section 408.040.3 awards prejudgment interest equal to the applicable Federal Funds rate, plus three percent. The federal funds rate, as of 10/28/10, is 0.25 percent.⁴⁷ We allow interest at the rate of 3.25%.⁴⁸

Actual Damages for Humiliation and Emotional Distress

Actual damages in a Missouri civil rights case may also include amounts for humiliation and emotional distress.⁴⁹ MCHR may award damages for emotional distress even without a

⁴³ *Pollock v. Wetterau Food Distr. Group*, 11 S.W.3d 754, 770 (Mo. App., E.D. 1999).

⁴⁴ *Id.*

⁴⁵ 11 S.W.3d at 770.

⁴⁶ *Id.*

⁴⁷ Federal Reserve Bank of New York, "Federal Funds Rate," <http://www.ny.frb.org/markets/omo/dmm/fedfundsdata.cfm>.

⁴⁸ Section 408.040 RSMo Supp. 2009.

⁴⁹ *Conway v. Missouri Comm'n on Human Rights*, 7 S.W.3d 571, 575 (Mo. App., E.D. 1999).

medical diagnosis.⁵⁰ The medical records in evidence are comprised of two notes from Reid's psychiatrist placing her on leave and certifying that he was treating her for "emotional illness." Though DOC, in argument at the hearing, attempted to blame Reid's domestic situation for her emotional distress, it is clear that the discriminatory conduct caused great emotional distress to Reid, and this was exacerbated by DOC's deliberate acts in bringing her husband to the facility, which was a direct result of DOC's violation of its own policy prohibiting him from being at the same facility where she worked. This, combined with racially motivated discrimination and intense sexual harassment, made Reid feel unsafe. Reid's psychiatrist placed her on leave for two indeterminate periods of at least six months, never giving her a release to return to work.

An award of damages for humiliation and emotional distress is well justified in this case. The behavior of the supervisors at DOC was extreme, including the pervasive use of terms such as:

"nigger,"

"token,"

"chocolate,"

"black ass," and

"shadow."

Though the use of the terms "Tijuana crack whore," "wetback," and "fence cutter" was not directed at Reid, it shows the pervasive nature of the discriminatory environment. The white supremacist tattoo incidents purposefully subjected Reid to embarrassment in front of her co-workers and prisoners. Reid was subjected to demeaning sexual comments such as:

- her butt was like a beer keg, and like a table because they could set a beer on it;

⁵⁰7 S.W.3d at 575.

- asking her if she was the spokesperson for the African-American race when it came to sex;
- referring to female DOC employees as hookers; and
- saying that Reid had pretty lips for sucking “dick.”

Reid was subjected to unwelcome sexual advances. Crowe wiped his mouth and said that she could sit there. Guerin frequently called her his “baby’s mama.” While there was some evidence that Reid “played along” with being called Guerin’s baby mama, when bolstered with Guerin’s other overtly sexual conduct, this factor does not support a reduction in Reid’s award. Guerin told her that she was sitting on a gold mine and that she should use what her mama gave her. When Reid’s husband was arrested and brought into the facility, in violation of DOC policy, and Reid was extremely upset, Guerin said that she could come into his office with the lights out. Guerin expressed his desire to engage in sexual relations with Reid on numerous occasions in an offensive manner that abused his authority as her supervisor and were timed to show how she could exchange sex for privileges not granted to others and money.

The extensive and pervasive nature of the discriminatory conduct shows that damages for emotional distress are well justified. The conduct made her vulnerable to attacks by co-workers and subject to attacks by prisoners, and it showed a purposeful intent to intimidate her in the facility with the ultimate risk to her life if she was attacked, as was another African-American female employee in the facility.

Further, Reid experienced ongoing physical and psychological effects. While Reid was working at ERDCC, she was losing weight and suffered headaches, nausea, shakes, and panic attacks as a result of her working conditions. She became nervous and reclusive. She suffered in the hostile environment for two years and suffered embarrassment in front of her co-workers.

In *Kientzy v. McDonnell Douglas Corp.*,⁵¹ the court affirmed the jury's award of \$125,000 for mental anguish and suffering. In that case, an employee was terminated for stopping at home for lunch without her supervisor's permission, and the jury found that her sex was a motivating factor in the employer's decision. In *Sheriff v. Midwest Health Partners*,⁵² the court affirmed an award of \$100,000 in compensatory damages based on a finding of significant emotional trauma following a series of unwanted sexual advances that were not as extensive in the type of advance, nor as long in duration, as in this case.

A violation of the Human Rights Act is akin to the tort of intentional infliction of emotional distress, for which medically documented damages need not be proven with mathematical precision⁵³. This method of proof for Human Rights Act cases means that an employee will have difficulty establishing a precise dollar figure for emotional distress. We address this issue by comparing the evidence of emotional distress suffered by Reid to that suffered by similarly situated employees. A comparable case to Reid's case is *Eich v. Board of Regents*⁵⁴, where the employee's damages arose from a pattern of sexual harassment perpetrated on plaintiff by various employees of defendant.⁵⁵ She was awarded \$200,000 in compensatory damages, all arising from emotional distress.⁵⁶ We find that the victims' symptoms and the duration of the period in which they suffered them to be comparable.

The Hearing Examiner recommends that MCHR award Reid \$200,000 in actual damages for humiliation and emotional distress.⁵⁷

⁵¹990 F.2d 1051 (8th Cir. 1993).

⁵²619 F.3d 923 (8th Cir. 2010).

⁵³*State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 566 n.4 (Mo. banc 2006).

⁵⁴350 F.3d 752 (8th Cir. 2003).

⁵⁵*Id.* at 755-56.

⁵⁶*Id.* at 762.

⁵⁷*See Lynn v. TNT Logistics North America, Inc.*, 275 S.W.3d 304 (Mo. App., W.D. 2008).

Actual Damages for Violation of Civil Rights

In *Conway*,⁵⁸ the court awarded actual damages for violation of civil rights in the amount of one third of the amount of the damages for humiliation and emotional distress. In this case, DOC's violation of Reid's civil rights on the basis of both sex and race was pervasive and extreme. The Hearing Examiner recommends that MCHR award Reid \$66,000 in actual damages for violation of civil rights in reliance on the long time period over which the violations occurred, the high (and articulated) potential for physical harm to Reid while working at the prison as a direct result of the aforementioned civil rights violations, and finally the clear nature of the violations. A higher award is justified on the facts of this case.

Punitive Damages

Punitive damages may be awarded in a case under the MHRA.⁵⁹ Although we find no cases addressing the pleading requirements for punitive damages in a case under the MHRA, as a general proposition the statutes, case law, and rules are clear that "[p]unitive damages must be pleaded and proved."⁶⁰ Because MCHR's second amended petition does not plead for an award of punitive damages, we do not address whether they are warranted in this case.

Report

In this case, DOC's conduct is so egregious that the Hearing Examiner recommends that MCHR order DOC to have an independent agency prepare a report summarizing efforts made by DOC to ensure compliance with the MHRA, and that DOC file this report with MCHR within 180 days of its order adopting this recommended decision.

⁵⁸7 S.W.3d 571 (Mo. App., E.D. 1999).

⁵⁹*Kientzy*, 990 F.2d at 1062.

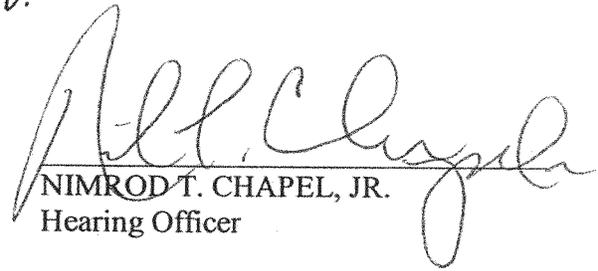
⁶⁰*Benson v. Jim Maddox Northwest Imports, Inc.*, 728 S.W.2d 668, 669 (Mo. App., E.D. 1987).

Summary

The Hearing Examiner recommends that MCHR order DOC to:

1. pay Reid \$28,213 in back pay, plus interest at the rate of two percent,
2. pay Reid \$200,000 in actual damages for humiliation and emotional distress,
3. pay Reid \$66,000 in actual damages for violation of civil rights,
4. cease and desist from further discriminatory practices,
5. follow its zero tolerance policy in regards to Crowe, Vandergriff and Radford,
and
6. file a report with MCHR, within 180 days of the date of MCHR's order
adopting this recommended decision, summarizing efforts made by DOC to
ensure compliance with MHRA.

SO ORDERED on December 27, 2010.



NIMROD T. CHAPEL, JR.
Hearing Officer