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## *Sexual Harassment*

### **Employer's 'Concern' for Alleged Rapist Revives Harassment Claim**

The Idaho Department of Corrections must defend at trial a female employee's sexual harassment claim based on its purported support of her alleged rapist, a split federal appeals court ruled July 31 (*Fuller v. Idaho Dep't of Corr.*, 2017 BL 264681, 9th Cir., No. 14-36110, 7/31/17).

The disagreement between a two-judge panel majority of the U.S. Court of Appeals for the Ninth Circuit and the dissenting judge focused on whether the employer's actions created a hostile work environment because of sex under Title VII of the 1964 Civil Rights Act.

Cynthia Fuller, a probation and parole officer, reported to supervisors that she was raped three times by Herbt Cruz, a male co-worker she'd been having a romantic relationship with. Cruz already was on paid administrative leave pending a separate investigation involving his alleged rape of a civilian.

Fuller presented evidence that male supervisors told staff about Cruz's leave without disclosing either her or the civilian's rape allegations, encouraged employees to "feel free" to give Cruz "some encouragement," and said they looked forward to Cruz's return. When Fuller raised safety concerns about Cruz returning to work, the supervisors allegedly said they wouldn't disclose the rape allegations because they didn't want "stigma hanging over" Cruz if the claims were found to be untrue.

"A reasonable woman in Fuller's circumstances could perceive the repeated statements of concern for Cruz's well-being by supervisors as evincing their belief that Fuller was lying or, perhaps worse, as valuing Cruz's reputation and job over her safety," Judge Andrew D. Hurwitz wrote for the majority, reviving Fuller's Title VII claim for trial. He was joined by Judge Susan P. Graber.

Additionally, Fuller presented evidence that she was denied paid administrative leave to recover from her

rapes, even though paid administrative leave was provided to Cruz.

A jury could infer discrimination because of sex where the record contains evidence of the male supervisor's "solicitous treatment of the man whom they knew may have raped Fuller and their less solicitous treatment of the woman who reported the rape," the majority said.

**Dissent: No Discrimination Based on Sex** Judge Sandra S. Ikuta disagreed, arguing that Fuller's evidence didn't show discrimination based on sex.

The male supervisors didn't treat Fuller "in any manner evincing hostility or sexual desire," Ikuta said. Nor was there evidence that members of either sex were "exposed to disadvantageous terms or conditions of employment," she said.

"In other words, this is the story of an employer that worked hard to do the right thing by effectively removing a potential threat from the workplace immediately and permanently, without smearing any employee's reputation before an investigation had been completed," Ikuta said.

Representatives of Fuller and the Department of Corrections didn't immediately respond to Bloomberg BNA's July 31 requests for comment.

Kathryn K. Harstad and Erika Birch of Strindberg & Scholnick in Boise, Idaho, and Salt Lake City represented Fuller. Phillip J. Collaer of Anderson Julian & Hull in Boise represented the department.

By JAY-ANNE B. CASUGA

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