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865 F.3d 1154

Cynthia FULLER, Plaintiff-Appellant,

v.

**IDAHO DEPARTMENT OF CORRECTIONS;
Brent Reinke; Henry Atencio,
Defendants-Appellees.**

No. 14-36110

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 6, 2017,
Seattle, Washington

Filed July 31, 2017

Appeal from the United States District Court for
the District of Idaho, Justin L. Quackenbush, District
Judge, Presiding, D.C. No. 1:13-cv-00035-JLQ.

Kathryn K. Harstad (argued) and Erika Birch,
Strindberg & Scholnick LLC, Boise, Idaho, for Plaintiff-
Appellant.

Phillip J. Collaer (argued) and Tracy J. Crane, An-
derson Julian & Hull LLP, Boise, Idaho, for Defendants-
Appellees.

Before: SUSAN P. GRABER, SANDRA S. IKUTA,
and ANDREW D. HURWITZ, Circuit Judges.

Dissent by Judge IKUTA

OPINION

HURWITZ, Circuit Judge:

Cynthia Fuller was raped by an Idaho Department of Corrections (“IDOC”) co-worker. Before that sexual assault, the IDOC had placed the co-worker, whose conduct had been the subject of several complaints by female employees, on administrative leave because he was under criminal investigation for another rape. Shortly before Fuller was raped, a supervisor told employees (including Fuller) that the agency “looked forward” to the co-worker’s prompt return from leave. One day after Fuller reported the rape, a supervisor told her that the rapist “had a history of this kind of behavior.” Nonetheless, the supervisor sent an e-mail to all agency employees the very next day, telling them to “feel free” to contact the rapist and “give him some encouragement.” When Fuller asked for paid administrative leave to deal with problems caused by the rape, she was told that her case was not “unusual” enough to warrant that treatment; the rapist, however, was provided paid leave.

The district court granted summary judgment to the IDOC on Fuller’s hostile work environment claim. We hold that Fuller proffered sufficient admissible evidence to avoid summary judgment, and we remand for a trial on her hostile work environment claim.¹

¹ We have affirmed the district court’s summary judgment to the IDOC on Fuller’s other claims in a memorandum disposition issued today.

FACTUAL BACKGROUND²

A. Rape Allegations and Cruz Investigation.

In January 2011, Cynthia Fuller began working as a probation and parole officer in the IDOC District 3 office in Caldwell, Idaho. During her first week on the job, Fuller met Herbt Cruz, a senior probation officer. Months later, they began an intimate relationship. Although IDOC policy required reporting the relationship, they kept it secret.

In late July 2011, Idaho State Police notified the IDOC that the Canyon County Sheriff's Office was investigating Cruz for the rape of "J.W.," a civilian. On August 15, the IDOC placed Cruz on administrative leave with pay. District Manager Kim Harvey called a District 3 staff meeting, advising the employees that Cruz was on administrative leave because of a confidential, ongoing investigation and "was not authorized to be on the premises." But, Harvey also stated that the IDOC looked forward to Cruz's prompt return to work.

The next day, Fuller disclosed her relationship with Cruz to her supervisors, who did not reveal the nature of the ongoing investigation to her. Eventually, Fuller learned that Cruz had been accused of rape, but nonetheless continued her relationship with him.

² We view the evidence in the light most favorable to Fuller, the party opposing summary judgment. *JL Beverage Co. v. Jim Beam Brands Co.*, 828 F.3d 1098, 1105 (9th Cir. 2016).

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On August 22, Cruz raped Fuller at his home. A second rape took place on August 30 or 31, and a third on September 3, both also outside the workplace.

On September 6, after the IDOC received photos of her injuries, Fuller confirmed to Harvey that Cruz had raped her. Harvey took Fuller to the Canyon County Sheriff's Office and sat in on part of her interview with detectives. Afterwards, Harvey told Fuller "that Cruz had a history of this kind of behavior and that he knew of several instances."³ The next day, Fuller obtained a civil protection order prohibiting Cruz from coming within 1000 feet of her.

Henry Atencio, Deputy Chief of the IDOC Probation & Parole Division, directed Harvey to maintain contact with Cruz while he was on leave, to keep him informed of the investigation's status and "make sure he's doing okay in terms of still being our employee." Fuller knew about Cruz's continued contacts with supervisors while on leave. On September 7, the day Fuller obtained the civil protection order, Harvey sent this e-mail to District 3 staff, including Fuller:

³ Prior to the rape of Fuller, the IDOC had received complaints from three female employees about inappropriate behavior by Cruz. One of the employees filed a suit against the IDOC in 2006, alleging sexual harassment by Cruz. Cruz was not disciplined in connection with any of these events, although in 2010, the IDOC decided not to transfer him to a district office in which two of the complainants worked, after they objected. Harvey then was asked by Henry Atencio, his supervisor, to tell Cruz that "that behavior won't be tolerated," and to "keep an eye on him."

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Just an update on Cruz. I talked to him. He sounds rather down, as to be expected. . . . Just as a reminder – and this is always one thing I hate about these things – he cannot come to the office until the investigation is complete. Nor can he talk to anyone in the Department about the investigation. So, if you want to talk to him, give him some encouragement etc., please feel free. Just don't talk about the investigation. At this point, I honestly don't know the status of it.

The IDOC began an internal investigation of Cruz on September 12, and on September 14 expanded the investigation to include Fuller's allegations. IDOC investigators met with Cruz twice in September, and also interviewed Fuller. The investigation concluded in late October, with the IDOC deciding to terminate Cruz's employment. But, waiting to see if Cruz would be criminally charged, the IDOC did not issue a Notice of Contemplated Action until December 27, nor did it apprise Fuller whether Cruz had been cleared. Cruz promptly resigned after being notified that the IDOC intended to terminate his employment.

B. The IDOC's Responses to Fuller's Report.

After Fuller reported the rapes to the Canyon County Sheriff's Office, Harvey told Atencio and Fuller's direct supervisors about the allegations. He told the supervisors that she was taking leave and that, if other employees inquired about her absence, the agency should say that it was related to her known illness.

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Harvey told Fuller that he would determine whether she was eligible for paid administrative leave. On September 19, Atencio formally denied Fuller's leave request in an e-mail, explaining that only employees under investigation are eligible for administrative leave, and advising her to use accrued vacation and sick time instead. He copied Roberta Hartz, a Human Resources ("HR") representative, on the e-mail, despite knowing she had previously lived with Cruz.

IDOC Standard Operating Procedure ("SOP") 206 permitted the Director to grant paid administrative leave "[w]hen a manager (or designee) deems it necessary due to an unusual situation, emergency, or critical incident that could jeopardize IDOC operations, the safety of others, or could create a liability situation for the IDOC."⁴ But, IDOC Director Brent Reinke granted paid leave under this policy only for "acts of God, nature," because state officials had instructed him to restrict paid leave.

Fuller later received intermittent Family & Medical Leave Act leave. After her doctor certified that she was "unable to concentrate, and perform," had "severe anxiety," and was "unsafe to carry [a] weapon," the IDOC placed Fuller on modified duty doing data entry.

Fuller again requested paid leave, noting that (1) Cruz was being paid during his administrative

⁴ SOP 206 also permits the director to grant paid administrative leave "[w]hen the employee is being investigated" and "[w]hen the employee is in the due process procedure of a disciplinary action." Cruz received paid leave under these provisions.

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leave; (2) she had “received no guidance from the IDOC regarding any assistance . . . as a victim, including” filing a sexual harassment claim; and (3) the IDOC had put other “potential victim[s]” at risk by failing to disclose to staff why Cruz was on leave and by stating that it “hopes he returns soon.” The IDOC did not respond to her letter.

Fuller met with Atencio, Harvey, and Hartz⁵ on November 10, 2011, asking for reinstatement of her vacation and sick time and for paid administrative leave for the work she missed, and would continue to miss, because of the rapes. Atencio said she did not meet the SOP 206 criteria, because her situation was not “unusual.”

Fuller also described her “uncomfortable work environment” to the supervisors. Staff, unaware of why she had been absent from work, suspected that she was “faking being sick.” This ostracization occurred, she believed, “because [the staff have] been misled” about Cruz’s situation. Harvey explained that he was “not at liberty to say why [Cruz is on leave] because . . . that wouldn’t be fair . . . if the allegations were proven untrue,” and Cruz would have a “stigma hanging over [him].” Harvey said that at the time he told staff that he looked forward to Cruz’s prompt return to work, “the only alleged victim that [he] knew about was the gal . . . that had originally come forward,” not Fuller.

⁵ Fuller was uncomfortable with Hartz’s presence at the meeting because of Hartz’s previous relationship with Cruz, and Hartz’s failure to discipline another IDOC employee whom Fuller had previously accused of inappropriately touching her.

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Fuller said Harvey's later encouragement of staff to give Cruz "moral support," despite knowing that she had accused him of rape, was "completely insulting." Harvey replied that he was "trying to keep [her] out of it."

Fuller asked that the IDOC inform District 3 employees of the civil protection order, explaining that she did not "feel safe" because Cruz could walk in to the building and no one would call the police. Atencio responded that, "as much as you find this distasteful, Cruz is still our employee. And we have to be conscious of his rights."

On November 16, Harvey sent this message to District 3 staff:

I want to update you regarding Herbt Cruz. As you know, Herbt is on leave pending an investigation. The investigation is on-going and we hope to bring this to a resolution as soon as possible. As the investigation is currently underway, Cruz is not allowed in the D-3 offices. If you see him, please contact a supervisor.

Fuller resigned that day.

PROCEDURAL BACKGROUND

After exhausting administrative remedies, Fuller sued the IDOC, Reinke, and Atencio in the District of Idaho. After the district court granted a defense motion for partial summary judgment, four claims remained:

(1) a Title VII hostile work environment claim against the IDOC; (2) a Title VII gender discrimination claim against the IDOC; (3) a 42 U.S.C. § 1983 claim alleging equal protection violations against Reinke and Atencio; and (4) an intentional or negligent infliction of emotional distress claim against Atencio.

The parties filed cross-motions for summary judgment on these four claims. The district court granted the defendants' motion. The court rejected Fuller's hostile work environment claim on the grounds that the rapes occurred outside the workplace and that the IDOC had taken remedial action. Fuller timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291, and we review the district court's grant of summary judgment de novo. *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir. 2005). "[W]e must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Id.* (quoting *Ray v. Henderson*, 217 F.3d 1234, 1239-40 (9th Cir. 2000)); *see also* Fed. R. Civ. P. 56(a).

We recently explained in a case involving a hostile work environment claim that "what is required to defeat summary judgment is simply evidence such that a reasonable juror drawing all inferences in favor of the respondent could return a verdict in the respondent's

favor.” *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017) (internal quotation marks omitted). In assessing whether a genuine issue of material fact exists for trial, we do not weigh the evidence, nor make factual or credibility determinations. *Id.* “[W]here evidence is genuinely disputed on a particular issue – such as by conflicting testimony – that issue is inappropriate for resolution on summary judgment.” *Id.* (internal quotation marks omitted). And, “where application of incorrect legal standards may have influenced the district court’s conclusion, remand is appropriate.” *Id.* at 442.

DISCUSSION

Title VII of the Civil Rights Act of 1964 prohibits employer discrimination on the basis of sex regarding “compensation, terms, conditions, or privileges of employment.” 42 U.S.C. § 2000e-2(a)(1). The statutory prohibition extends to the creation of a hostile work environment that “is sufficiently severe or pervasive to alter the conditions of the victim’s employment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (internal quotation marks omitted). To prevail on a hostile work environment claim, an employee must show that her employer is liable for the conduct that created the environment. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2002).

A. Hostile work environment.

A hostile work environment occurs when an employee 1) “was subjected to verbal or physical conduct of a sexual nature, 2) this conduct was unwelcome, and 3) this conduct was ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’” *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) (quoting *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991)). “The working environment must both subjectively and objectively be perceived as abusive,” and the objective analysis is done “from the perspective of a reasonable” woman. *Id.*

In determining whether a work environment is sufficiently hostile, the court evaluates the totality of the circumstances, “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.” *Little*, 301 F.3d at 966 (quoting *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (per curiam)). While “‘simple teasing, offhand comments, and isolated incidents (unless extremely serious)’ are not sufficient to create an actionable claim under Title VII . . . the harassment need not be so severe as to cause diagnosed psychological injury.” *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 687 (9th Cir. 2017) (alteration omitted) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)). “It is enough ‘if such hostile

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conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay in her position.'" *Id.* (quoting *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994)).

Fuller argues that the IDOC's reactions to the rapes – effectively punishing her for taking time off, while both vocally and financially supporting her rapist – created a hostile work environment. The issue is whether an objective, reasonable woman would find “her work environment had been altered” because the employer “condoned” the rape “and its effects.” *Little*, 301 F.3d at 967-68.⁶ Viewing the facts in the light most favorable to Fuller, we hold that Fuller has raised triable issues of fact as to the existence of a hostile work environment.⁷

When Fuller reported her rapes, Harvey told her “that Cruz had a history of this kind of behavior” and “he knew of several instances” of misconduct by Cruz. But, nonetheless, Harvey almost immediately thereafter told District 3 staff to “feel free” to “give [Cruz] some encouragement” and that he “hate[d]” that Cruz “cannot come to the office until the investigation is complete.” This e-mail came on the heels of Harvey's previous statement to staff that he looked forward to

⁶ It is undisputed that Fuller subjectively perceived her work environment as hostile.

⁷ Fuller also alleged that the rapes created a hostile work environment. We affirm the district court's grant of summary judgment to the defendants as to that claim in the memorandum disposition filed today.

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Cruz returning quickly. Fuller was privy to both of those announcements, in which her supervisor publicly supported an employee whom he knew was accused of raping two women and sexually harassing several others.⁸

Fuller was aware that IDOC supervisors were communicating with Cruz, offering him support during his suspension. And, although Fuller was interviewed by IDOC investigators in September, and the agency had concluded by late October that he should be terminated, no disciplinary action was taken until after Fuller resigned. As far as Fuller knew, Cruz might return to work any day.

When Fuller raised concerns about her safety should Cruz return to the workplace, Harvey and Atencio emphasized that Cruz was “still our employee,” and that they did not want a “stigma hanging over” him in the event “the allegations were proven untrue.” Therefore, she reasonably could have suspected that the IDOC had exonerated Cruz, and that he would soon return to work.

⁸ The IDOC’s knowledge of previous sexual harassment complaints against Cruz, “while alone insufficient to create a hostile work environment, “is relevant and probative of [the IDOC’s] general attitude of disrespect toward [its] female employees.” *Zetwick*, 850 F.3d at 445 (quoting *Heyne v. Caruso*, 69 F.3d 1475, 1479-81 (9th Cir. 1995)). Because Fuller learned after she was raped that the IDOC was aware of Cruz’s “history of this kind of behavior,” she reasonably could have believed that the IDOC would continue to support Cruz at the expense of its female employees.

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In light of the severity of the sexual assaults on Fuller, documented by the photographs seen by the IDOC supervisors, a reasonable juror could find that the agency's public and internal endorsements of Cruz "ma[de] it more difficult for [Fuller] to do her job, to take pride in her work, and to desire to stay in her position." *Reynaga*, 847 F.3d at 687 (quoting *Steiner*, 25 F.3d at 1463). 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. This conclusion is reinforced by the fact that Harvey and Atencio held important supervisory positions. See *Zetwick*, 850 F.3d at 445 (emphasizing "the potentially greater impact of harassment from a supervisor").

The repeated endorsements of Cruz were not "simple teasing, offhand comments, and isolated incidents," or ordinary workplace interactions. *Faragher*, 524 U.S. at 788, 118 S.Ct. 2275 (citation and internal quotation marks omitted). The decision to publicly support an employee accused of raping another employee was "humiliating" and potentially "physically threatening" to Fuller, not "a mere offensive utterance." *Id.* at 787-88, 118 S.Ct. 2275. A reasonable juror could credit Fuller's statements that Harvey's e-mail was "completely insulting" to her, and that she felt the IDOC had given no "assistance for [her] as a victim" of a rape which "impaired [her] ability to live normal, sleep normal, or feel safe." These facts raise a genuine dispute as to

whether the work environment was “sufficiently hostile” to violate Title VII. *Little*, 301 F.3d at 966.

Other evidence, while perhaps not sufficient by itself to support Fuller’s Title VII claim, supports the conclusion that a reasonable woman could perceive a hostile work environment at the IDOC.⁹ Atencio denied Fuller’s request for paid administrative leave to recover from her rapes in an e-mail in which he copied Hartz, who was not the assigned HR representative, despite knowing that Hartz had a previous romantic relationship with Cruz. Fuller produced evidence that she was “forced to return to work against” her therapist’s and doctor’s recommendations, while her rapist was granted paid administrative leave. Fuller also expressed concern about her co-workers’ hostility toward her for missing work, blaming Harvey’s e-mail, which failed to divulge why Cruz was on leave.

“While each of these incidents may not in itself be sufficient to support a hostile work environment claim, their cumulative effect is sufficient to raise material issues of fact as to whether the conduct was so severe or pervasive to alter the conditions of the workplace.” *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189,

⁹ As we note in the memorandum disposition discussing Fuller’s other claims, the denial of her paid leave request does not itself violate Title VII. Co-worker ostracism alone is also insufficient to violate the statute. *See Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000). However, these facts are part of “the totality of the circumstances” that we must consider in evaluating whether a reasonable woman would perceive her workplace environment as hostile. *See Zetwick*, 850 F.3d at 444.

1207 (9th Cir. 2016), *cert. denied*, ___ U.S. ___, 137 S.Ct. 623, 196 L.Ed.2d 515 (2017); *see also Zetwick*, 850 F.3d at 444 (requiring consideration of “*the cumulative effect of the conduct at issue* to determine whether it was sufficiently ‘severe or pervasive’”). The defendants do not contest that these actions occurred. Rather, they disagree with Fuller’s interpretation of events, arguing that the IDOC was supportive of Fuller after the rapes. But, at the summary judgment stage, we ask only whether “a reasonable juror drawing all inferences in favor of [Fuller] could return a verdict in [her] favor;” we do not “weigh the evidence” or resolve whether the employer’s actions were more supportive than discriminatory. *Zetwick*, 850 F.3d at 441 (internal quotation marks omitted).

The IDOC’s actions were less drastic than those of the employer in *Little*, who advised the plaintiff to drop her rape complaint, and when she did not, reduced her pay and fired her. 301 F.3d at 964-65. But, a reasonable juror could nonetheless conclude that the IDOC “effectively condoned” the rapes.¹⁰ *Id.* at 967-68. Fuller was forced to return, before she had recovered from her rapes, to a workplace run by supervisors who showed public support for her rapist, eagerly anticipated his return, and continued to pay him while denying her

¹⁰ It is not necessary that the IDOC either intended to discriminate or knew that its conduct created a hostile work environment. *Reynaga*, 847 F.3d at 687 (explaining that “hostility need not be directly targeted at the plaintiff to be relevant to his or her hostile work environment claim”); *EEOC v. Nat’l Educ. Ass’n*, 422 F.3d 840, 844-45 (9th Cir. 2005) (concluding that harassers need not intend to discriminate).

paid leave. In contrast, the employer in *Brooks* removed the alleged harasser from the workplace “as soon as his misdeeds” – an isolated instance of fondling which the court found not “severe” – were discovered and took no actions which could be perceived as supportive of the harasser or indicative that he might return. 229 F.3d at 921-22, 924, 926. Like the victim in *Little*, Fuller “was victimized by three violent rapes,” and a reasonable juror could find that her employer thereafter reacted in ways that “allowed the effects of the rape[s] to permeate [her] work environment and alter it irrevocably.” 301 F.3d at 967.

A finder of fact may ultimately conclude, as does our dissenting colleague, that the IDOC acted reasonably when confronted with a difficult situation. Today we conclude only that, viewing the evidence in the light most favorable to Fuller, a reasonable trier of fact could also find that the IDOC’s actions were sufficiently severe or pervasive to create a hostile work environment.¹¹

¹¹ The dissent claims that we are condemning “the IDOC’s refusal to denigrate Cruz merely because he was accused of wrongdoing.” Dissent at 1178. Incorrect. We hold only that a reasonable juror could find that the IDOC’s decision to support Cruz, both publically and internally, after Fuller reported that he raped her, contributed to a hostile work environment – whether or not the IDOC reasonably decided not to disclose the sealed protective order or publicize the allegations against Cruz before they were proven.

B. Employer liability.

“An employer may be held liable for creating a hostile work environment either vicariously (i.e., through the acts of a supervisor) or through negligence (i.e., failing to correct or prevent discriminatory conduct by an employee).” *Reynaga*, 847 F.3d at 688. Fuller argues that the IDOC is vicariously liable for the hostile work environment created by its supervisors’ responses to her rapes. The IDOC does not dispute that Harvey, Atencio, and Reinke were “supervisors.” *See id.* at 689 (defining supervisor as “a person who can take tangible employment actions against an employee”). Nor does the IDOC dispute that the supervisors’ actions here were within the scope of their employment.¹² *See Faragher*, 524 U.S. at 807-08, 118 S.Ct. 2275. Thus, if a jury finds that the IDOC supervisors created a hostile work environment, the IDOC would also be liable.

¹² The IDOC argues that Fuller must demonstrate negligence by the agency, rather than seek to impose vicarious liability for the actions and omissions of its supervisory employees. But, the cases it cites involve harassment by co-workers or non-employees, not the creation of a hostile work environment by supervisors. *See Little*, 301 F.3d at 968 (discussing when “employers are liable for harassing conduct by non-employees”); *Ellison*, 924 F.2d at 881-82 (setting forth liability standard “for sexual harassment by co-workers” and explicitly distinguishing “employer liability for a hostile environment created by a supervisor”); *Brooks*, 229 F.3d at 924 (analyzing whether employer can be liable for “an isolated incident of harassment by a co-worker”). We recently emphasized the distinction between these two forms of liability in *Reynaga*, 847 F.3d at 688-89.

C. The Dissent.

The dissent is flawed in two important respects. First, it ignores that, in reviewing the grant of summary judgment, we must take all the facts and reasonable inferences in favor of Fuller. Second, in concluding that Fuller did not suffer discrimination “because of sex,” the dissent takes an improperly narrow view of the inferences that can reasonably be drawn from the facts actually in the record.

(1) Improper summary judgment analysis.

The dissent criticizes us for drawing all inferences from the evidence in the light most favorable to Fuller. Dissent at 1168-69. But, that is precisely our judicial duty at the summary judgment stage. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The dissent repeatedly ignores this directive. For example, it claims to accept Fuller’s sworn testimony that Cruz raped her, but then emphasizes that “Cruz has never been charged or convicted” of the rapes and highlights that the relationship with Cruz was once consensual. Dissent at 1169-70 & n.4. Similarly, the dissent purports that “the IDOC investigated and addressed each of” the prior sexual harassment incidents

involving Cruz adequately, when in fact the record evidence on this point is far from undisputed. *Compare* Dissent at 1170-71 & n.6 (deeming evidence as “unsubstantiated complaints”) *with* Atencio Deposition at 36, Harvey Deposition at 52 (Atencio expressing concern about Cruz’s behavior and asking Harvey to “keep an eye on him,” but taking no disciplinary action or making “any sort of report” of the allegations), Harvey Deposition at 239 (Harvey testifying that Atencio never directed him to “make any report to HR or [the Office of Professional Standards]” (OPS) about Davila and McCurry’s allegations against Cruz and that he was not aware of “any informal or formal discipline that Cruz received as a result of the events”), OPS Supplemental Investigation Report at 2 (Davila and McCurry’s supervisor “felt both incidents were inappropriate” and “was not aware of any disciplinary action taken against Cruz for these incidents”). Other improper factual and credibility determinations abound. *See, e.g.*, Dissent at 1169-70 & n.3 (acknowledging Cruz “received supportive phone calls . . . even from IDOC supervisors,” but concluding that Fuller could not possibly perceive such conversations as evincing support for Cruz because they occurred only “on a couple of occasions”), 1169 & n.9 (emphasizing that Fuller was forced to return to work only by “her own assessment of her financial situation,” but discounting evidence that Fuller felt she was treated poorly as a rape victim), 1172 n.13 (dismissing Fuller’s belief “that the IDOC had exonerated Cruz” as merely “second-hand gossip”), 1172 (highlighting that “Fuller surreptitiously recorded” the meeting with IDOC supervisors).

In concluding that the IDOC's denial of administrative leave could not have contributed to a hostile work environment because it was not itself discriminatory, the dissent ignores undisputed record evidence about what the IDOC actually *told* Fuller – that her situation was not “unusual” enough to warrant paid leave, although her male rapist was entitled to such leave and his colleagues’ support. *See* Dissent at 1171 n.9, 1172 n.12, 1173 n.15, 1176 n.17. And indeed, perhaps most tellingly, the dissent brushes over and de-emphasizes the critical lines from Harvey’s comments about Cruz, both in the initial staff meeting and in the later email to the staff, sent after Fuller reported her rapes. *See* Dissent at 1169 (describing Harvey’s comment that the IDOC “looked forward to [Cruz’s] coming back very soon” as made “in passing”), 1171 (discounting lines “if you want to talk to him, give him some encouragement, etc., *please feel free*” and “[j]ust as a reminder – and *this is always one thing I hate about these things* – he cannot come to the office until the investigation is complete”) (emphasis added). Yet, as the dissent correctly notes, “we cannot ignore undisputed evidence simply because it is unhelpful to” our own view of the merits. Dissent at 1169.

At trial, a jury might conclude, as the dissent does, that the IDOC’s conduct was “proper.” Dissent at 1178. But, we “must adopt the inference that is most favorable to the nonmoving party,” rather than “weigh the merit of [competing] inferences.” *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1123-24 (9th Cir. 2009). That the dissent can point to some irrelevant

evidence as “undisputed” does not deem the inference from other evidence that Fuller was discriminated against because of her sex to be not “rational or reasonable.” Dissent at 1168.

(2) Incorrect “because of sex” analysis.

The dissent also contends that Fuller presented no evidence that she was discriminated against “because of” her sex. Dissent at 1175-79. However, that argument, which the IDOC did not raise, misreads the precedent.

A Title VII plaintiff must prove discrimination “because of . . . sex.” 42 U.S.C. § 2000e-2(a)(1). “The critical issue, Title VII’s text indicates, 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.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (internal quotation marks omitted). The Supreme Court has emphasized that a plaintiff is not confined to a specific “evidentiary route” to meet this requirement. *Id.* at 81, 118 S.Ct. 998. Although the dissent correctly notes potential evidentiary routes that Fuller *could* have followed to raise a triable issue of fact as to discrimination because of her sex, Dissent at 1175, her claim does not fail merely for following a different route than the ones the dissent favors. *See Oncale*, 523 U.S. at 80-81, 118 S.Ct. 998 (explaining that “[w]hatever evidentiary route the plaintiff chooses to follow,” they must prove discrimination because of sex);

EEOC v. Nat'l Educ. Ass'n, 422 F.3d 840, 844-45 (9th Cir. 2005) (finding discrimination “because of . . . sex” where “primarily women were the targets” of employer’s conduct).

In *Little*, we held that “[b]eing raped is, at minimum, an act of discrimination based on sex. Thus, the employer’s reaction to a single serious episode may form the basis for a hostile work environment claim.” 301 F.3d at 967-68 (citation omitted). The dissent correctly notes that the rape in *Little* occurred in the workplace, while the rapes of Fuller did not. Dissent at 1176-77. But, *Little* directly responds to the dissent’s legal argument that any disparate treatment of a rape victim who was not assaulted in the workplace cannot be because of sex. *Little* teaches that when an employer acts in a way that “effectively condone[s]” or ratifies a rape or sexual assault and its effects, a jury may reasonably infer that the employer itself is discriminating “because of sex.” 301 F.3d at 968.

Indeed, “Little [did] not seek relief based on imputed liability for the rape. Rather, her claim [was] about whether [her employer’s] reaction to the rape created a hostile work environment.” *Id.* at 966. And, while Little’s rape occurred in the workplace, we found “more significant[]” the fact that the employer’s “subsequent actions reinforced rather than remediated the harassment.” *Id.* at 967. Thus, we held that a question of material fact arose as to whether the employer’s actions created a sexually hostile work environment because it “allowed the effects of the rape to permeate Little’s work environment and alter it irrevocably.” *Id.*

Thus, contrary to the dissent’s assertion, *Little* did not confine its holding to an employer’s response to rapes that themselves “qualify as workplace conduct.” Dissent at 1177. Nor would such a holding make sense: if an employer, acting in the workplace, discriminates against a female rape victim in the conditions of her employment by condoning her rape and its effects, that employer should not escape Title VII liability for its discrimination merely because a rapist employee conducted his assault off the premises. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (holding that Title VII “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment” (internal quotation marks omitted)). Although we decline to opine on whether other circumstances may constitute “condoning or ratifying” a rape, we find that Fuller has raised a question of material fact as to whether the IDOC did so here. And, contrary to the dissent’s assertion, we are aware of no case requiring proof of a tangible adverse employment action – such as silencing an employee’s complaint, cutting her pay, or firing her – in a hostile work environment claim, let alone in one based on an employer’s reaction to a rape. *Compare* Dissent at 1177-78 *with Meritor*, 477 U.S. at 64, 106 S.Ct. 2399 (holding that a hostile work environment violates Title VII because “the language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination”).¹³

¹³ The dissent concedes that an employer’s actions undertaken “because of a rape (whether in or outside of the workplace)

Furthermore, an inference of discrimination because of sex is even more reasonable where, as here, the record also contains evidence of Fuller’s *male* supervisors’ solicitous treatment of the *man* whom they knew may have raped Fuller and their less solicitous treatment of the *woman* who reported the rape. When “[t]he record reveals at least a debatable question as to the objective differences in treatment of male and female employees, and strongly suggests that differences in subjective effects were very different,” summary judgment is inappropriate. *EEOC*, 422 F.3d at 845-46.

To the extent that the dissent argues that the record does not permit the inference that the IDOC’s treatment of Fuller would have been any better had Fuller been a man, or that any such inference would be based on “overbroad generalizations” based on gender, *see* Dissent at 1178 n.20, it ignores reality. We must view the evidence in light of “the different perspectives of men and women.” *Ellison*, 924 F.2d at 878. “[W]omen are disproportionately victims of rape and sexual assault,” and, accordingly, “women have a stronger incentive to be concerned with sexual behavior. . . . Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that

might give rise to a reasonable inference of discrimination because of sex.” Dissent at 1177. We agree. But, an equally reasonable inference of discrimination because of sex surely also arises when an employer, knowing that a female employee was sexually assaulted by a male coworker, nonetheless tells its employees that it looks forward to the rapist’s return to work and encourages them to contact him with messages of support.

a woman may perceive.” *Id.* (footnote omitted). Therefore, a jury armed with “[c]ommon sense, and an appropriate sensitivity to social context” could reasonably conclude that the actions of Fuller’s supervisor – siding with Cruz, her alleged rapist, over her – were because of her sex. *Oncale*, 523 U.S. at 82, 118 S.Ct. 998. It is up to a jury, not us, to decide whether that plausible inference is the best one to draw from this record.

CONCLUSION

We vacate the summary judgment in favor of the IDOC and remand for a trial on Fuller’s Title VII hostile work environment claim. Costs on appeal are awarded to Plaintiff-Appellant.

IKUTA, Circuit Judge, dissenting:

An employer is liable for sexual harassment under Title VII only if it engages in discriminatory conduct that alters the “terms, conditions, or privileges of employment, because of . . . sex.” 42 U.S.C. § 2000e-2(a)(1). Courts may conclude that abusive conduct is “discriminat[ion] . . . because of . . . sex,” *id.*, based on evidence that “members of one sex [were] exposed to disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed,” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (Ginsburg, J., concurring)). Because

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there is no evidence in the record that the Idaho Department of Corrections (IDOC) treated any female employee differently because of her sex, it is impossible to point to any such discrimination here. Nevertheless, the majority concludes that the IDOC may have violated Title VII because it abstained from damaging an employee's reputation while an investigation into the employee's alleged misconduct was still pending. In reaching this conclusion, the majority ignores Supreme Court precedent directly on point and writes "because of . . . sex" out of the statute. *See id.* at 80-81, 118 S.Ct. 998. I dissent.¹

I

The threshold flaw in the majority's analysis is its misapprehension of the summary judgment standard.

A

A party seeking summary judgment must demonstrate that "there is no genuine dispute as to any material fact" and that the party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that "might affect the outcome of the suit under the governing law," and a genuine dispute is one for which "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477

¹ I concur in the concurrently filed memorandum disposition that affirms the district court's entry of summary judgment in the IDOC's favor on the remaining claims. *See Fuller v. Idaho Dep't of Corr.*, 694 Fed.Appx. 590, 2017 WL 3225875 (9th Cir. 2017).

U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). We draw inferences “in the light most favorable to the nonmoving party,” but only if the inferences are rational or reasonable. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party,” even if the jury credited the nonmoving party’s evidence and drew all reasonable inferences in the nonmoving party’s favor, then “there is no genuine issue for trial” and the moving party is entitled to summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (internal quotation marks omitted).

Taking this record as a whole and drawing all reasonable inferences in favor of Fuller, no reasonable jury could conclude that the IDOC engaged in “discriminat[ion] . . . because of . . . sex,” 42 U.S.C. § 2000e-2(a)(1), a necessary element of Fuller’s Title VII claim. Because no reasonable jury could return a verdict in Fuller’s favor, the IDOC is entitled to judgment as a matter of law. Rather than consider the record as a whole, however, the majority focuses only on those circumstances favoring Fuller.² This is a misapprehension of the summary judgment standard; we must credit

² Indeed, the majority seems to think that it is an error to acknowledge undisputed facts that are not helpful to Fuller. *See, e.g.*, Maj. op. at 1165 (criticizing the dissent for noting, among other undisputed facts, that Cruz has not been charged or convicted of rape, that Fuller had been in a consensual relationship with Cruz, and that Fuller had surreptitiously recorded the meeting with IDOC supervisors).

Fuller's evidence where a conflict exists (there are no such conflicts in this case), and we must draw all reasonable inferences in her favor, but we cannot ignore undisputed evidence simply because it is unhelpful to her case or make inferences that are unreasonable. Because the majority fails to recite all the relevant, undisputed facts (and therefore mistakes unreasonable inferences for reasonable ones), I provide them here.

B

Fuller and Herbt Cruz first met while coworkers at the IDOC. A few months after their first meeting, they embarked on a voluntary romantic relationship. By all accounts, their relationship was ordinary and functional from its genesis through the late summer of 2011. But events in August and September of that year tore the relationship apart and set this lawsuit into motion.

The key facts for this story begin, in large part, on August 15, 2011. That was the day the IDOC placed Cruz on paid administrative leave after learning that the Canyon County Sheriff's Office was investigating allegations that he raped a woman identified as "J.W." That same day, IDOC supervisor Kim Harvey announced at a staff meeting that Cruz was on administrative leave due to an investigation. He also said, in passing, that he hoped things would be cleared up so that Cruz could return to work. Fuller, who was still in a romantic relationship with Cruz at the time, was in

attendance at that staff meeting. She was unaware, however, of the nature of the allegations against Cruz.

While Cruz was on administrative leave, he received supportive phone calls from his friends, coworkers, and even from IDOC supervisors. Fuller was aware of these contacts; she and Cruz were still dating, so she would overhear Cruz on the phone, or Cruz would simply tell her about the calls. She also knew that Cruz “had various friends that worked for the department” who were reaching out to him. As for the IDOC supervisors, all Fuller ever knew was that Cruz spoke with them “on a couple of occasions.”³

It was not until late August and early September that Fuller and Cruz’s relationship turned sour. In the span of those few weeks, Fuller alleges that Cruz raped her on three different occasions.⁴ Each incident occurred while the two were away from work and on their own private time.

So how did this become a workplace harassment issue? The IDOC learned of the alleged rapes in early September 2011 when Fuller’s friend, Renee Bevry, showed Harvey photographs of Fuller’s bruises and said “you need to be aware of this.” Harvey immediately

³ Although the majority states that Fuller was aware that IDOC supervisors were “offering [Cruz] support during his suspension,” Maj. op. at 1162, there is nothing to this effect in the record.

⁴ For purposes of summary judgment, we assume the truth of this allegation, which the IDOC neither denies nor concedes. It is undisputed that Cruz has never been charged or convicted of any misconduct with Fuller or J.W.

notified the IDOC's professional standards office and local law enforcement of this further allegation that Cruz had engaged in serious misconduct, and he then met with Fuller to find out what happened and to encourage her to report her allegations to the sheriff. When Fuller agreed, Harvey accompanied her to an interview with law enforcement to report her accusations, and he took her to lunch the day she reported. At that lunch, Harvey mentioned that there had been prior accusations of misconduct against Cruz, but did not provide any further information. Afterwards, Harvey escorted Fuller home and searched her house before she entered to make sure no one was inside. Once Fuller had collected some personal items, he then took her to Bevry's home, where she felt safer staying.

As Harvey correctly indicated to Fuller, Cruz had been on the receiving end of complaints more than once before.⁵ The record shows that the IDOC investigated and addressed each of these complaints. In early 2003, Sandra Martin, an IDOC employee, alleged that Cruz had shown romantic interest in her by abandoning his post to follow her into the recreation yard where she was monitoring inmates. Martin also accused Cruz of taking her car keys. Martin made clear to the IDOC that she perceived this as sexual behavior, and the IDOC investigated the allegations and met with all concerned parties. Martin eventually sued the IDOC in 2006, alleging sexual harassment by Cruz and another male employee, but the lawsuit was resolved by final

⁵ Fuller admits that she never witnessed Cruz sexually harass a female employee at the IDOC.

judgment in the IDOC's favor. See *Martin v. Idaho Dep't of Corr.*, No. 06-cv-55, 2007 WL 1667597 (D. Idaho June 7, 2007). In 2010, Letticia Davila, an IDOC employee, expressed concern about reports that Cruz might be transferred to her office. Her concern arose from a long ago training session in which Cruz portrayed an offender attempting to take over Davila's office by force. Davila stated that Cruz took "his role-playing too seriously," and blocked her office door when she tried to leave; he moved out of the way, however, when she threatened to knee him. Davila stated she did not perceive Cruz's conduct as sexual. She also told the IDOC that in 2008, Cruz had behaved inappropriately with one of her coworkers by putting a hand on the woman's knee. When interviewed by the IDOC, the coworker stated that, in her view, no sexual harassment had occurred and that her interaction with Cruz was "not a big deal." Because the investigation disclosed no misconduct, the IDOC did not discipline Cruz.⁶ However, the IDOC decided not to transfer Cruz to the office where Davila worked, and Harvey told his

⁶ The majority conflates a failure to discipline with a failure to investigate, Maj. op. at 1165, and argues that the complaints against Cruz are probative of a general disrespect for woman at the IDOC, *id.* at 1162 n.8. This misrepresents our precedent; although actual sexual harassment of others can be probative of attitudes toward women, unsubstantiated complaints are not. Compare *id.* (focusing on "knowledge of previous sexual harassment complaints"), with *Zetwick v. County of Yolo*, 850 F.3d 436, 445 (9th Cir. 2017) (focusing on "[t]he sexual harassment of others" that has been "shown to have occurred").

staff to “watch [Cruz] and see if there’s any further incidents that you think are inappropriate.”

The day after Fuller reported her allegations to the police, she obtained the first of several confidential civil protection orders prohibiting Cruz from being within 1,000 feet of Fuller or her workplace. That same day, Harvey sent an email to IDOC staff in which he informed all staff members that Cruz “cannot come to the office until the investigation is complete and cannot “talk to anyone in the Department about the investigation,” although the staff was free to talk to him and “give him some encouragement.”⁷

Around this same period, Fuller took some time away from work. She did not need to request this time off, because the IDOC told her that she “could take as much time as [she] needed.” In addition, Harvey told Fuller that he would investigate whether Fuller qualified for pay during her leave. In mid-September, IDOC Deputy Chief Henry Atencio informed Fuller via email that the IDOC would not offer Fuller paid administrative leave, based on the IDOC’s longstanding practice

⁷ The email stated in full:

Just an update on Cruz. I talked to him. He sounds rather down, as to be expected. Said he is trying to stay busy. Just as a reminder – and this is always one thing I hate about these things – he cannot come to the office until the investigation is complete. Nor can he talk to anyone in the Department about the investigation. So, if you want to talk to him, give him some encouragement etc., please feel free. Just don’t talk about the investigation. At this point, I honestly don’t know the status of it.

to extend paid leave only “when there is departmental action against the employee, such as an investigation.” In that same email, Atencio told Fuller that she was free to use her sick leave and vacation balances. After Atencio denied Fuller’s request for paid administrative leave, she applied for leave under the Family and Medical Leave Act, and the IDOC promptly approved that request.

While Fuller was on leave, her supervisors at the IDOC were working towards ways to accommodate her situation. For example, on September 15 – the day Fuller had to appear in court to renew her confidential civil protection order – Harvey called to check in with her. During that call, Harvey told Fuller “that if she is not comfortable with coming back to work” at her division, Harvey “would do what [he] could to help her transfer.” Later in that month, Harvey continued to try to check in with Fuller, but to no avail. He “attempted to contact her by phone, leaving messages that [were] not returned,” and he “even went by her house[,] . . . but she was not there.” Atencio and the other supervisors were aware of Harvey’s efforts, which he communicated to them via email.⁸

In late October, Fuller emailed Atencio to inform him of her reluctant decision to return to work. In her email, she stated it was a “sad day” that Cruz “gets to

⁸ Fuller faults the IDOC because “Atencio did not ask Harvey to check on Fuller while on leave, in direct contrast to directing him to regularly check on Cruz.” This attempt to impute discriminatory animus falls flat in light of Atencio’s knowledge that Harvey was checking on Fuller of his own volition.

sit at home and collect a check at the tax payers expense” while she was denied paid administrative leave. Although she was “appalled by the way this situation has been handled,” she stated that she had “exhausted all leave and am now forced to return to work against my Doctor, Counselor, and Attorney’s recommendation.”⁹ Because Fuller’s doctor certified that Fuller was “unable to concentrate and perform,” suffered from “severe anxiety,” and was “unsafe to carry [a] weapon,” the IDOC placed her on modified duty. Upon her return, Fuller found the IDOC to be a “completely uncomfortable work environment,” in which her coworkers ostracized her because they believed she had been “faking” a medical issue. But the coworkers knew nothing about her alleged rapes. Indeed, no one made any comments about the rapes (or sexually suggestive comments more generally), and no one suggested that Fuller had done anything inappropriate.

On November 6, a little over two weeks after her return, Fuller submitted a letter to Atencio outlining why she believed that the IDOC should reverse course and grant her paid administrative leave. She identified eight reasons: (1) she had incurred significant expenses

⁹ Although Fuller’s email expresses her frustration over the denial of paid administrative leave, which the majority agrees was not unlawful, the email cannot reasonably be interpreted to mean that Fuller was forced to return to work by anything but her own assessment of her financial situation, i.e., she could not afford *not* to return. *Contra* Maj. op. at 1163 (claiming that Fuller has “evidence” that she was “forced to return to work”). There is no evidence in the record that the IDOC ever instructed or required Fuller to return to work.

in retaining an attorney to obtain her confidential civil protection orders; (2) it was “unbecoming” that Cruz, who was suspended pending a disciplinary investigation, receive paid leave but not her; (3) the IDOC was paying Cruz even though policy provided for unpaid suspension when an employee was indicted on felony charges;¹⁰ (4) Cruz was being extended a “courtesy”; (5) the IDOC failed in its obligation to provide Fuller with information about filing a harassment complaint;¹¹ (6) Cruz was a threat to safety; (7) paid administrative leave was discretionary;¹² and (8) “the department conducted an investigation which found Mr. Cruz innocent of a crime.”¹³ This letter prompted a meeting between Fuller and IDOC officials on November 10.

At the November 10 meeting, which Fuller surreptitiously recorded, Atencio explained the IDOC’s

¹⁰ As noted previously, it is undisputed that Cruz has never been criminally charged in relation to J.W.’s or Fuller’s allegations, so this ground was premised on a misapprehension of fact. *See supra*, note 4.

¹¹ As we hold today, no underlying workplace sexual harassment occurred because Fuller’s rapes were not related to the workplace. *See Fuller*, ___ Fed.Appx. at ___; Maj. op. at 1162 n.7. It follows that the IDOC had no such obligation.

¹² We hold today that Fuller has no evidence that the IDOC’s denial of her paid leave request was anything other than the lawful application of a neutral policy. *See Fuller*, ___ Fed.Appx. at ___; Maj. op. at 1163 n.9.

¹³ Fuller believed that the IDOC had exonerated Cruz based on a statement by the county sheriff, who in turn had allegedly heard the information from an unnamed source. Or, put more simply, this was second-hand gossip. There is no evidence that an IDOC official ever made any representation to Fuller that Cruz had been, or would be, exonerated.

neutral policy for extending paid administrative leave only to employees (like Cruz) who were under investigation. Fuller argued that the Standard Operating Procedure “clearly states” that the IDOC could award paid leave “under unusual circumstances.”¹⁴ Atencio acknowledged that the manual contained such language, but stated that “in discussing this with the leadership, and with HR, we don’t think that the situation rises to that point where it’s unusual, and would warrant leave with pay.”¹⁵

¹⁴ The IDOC’s Standard Operating Procedure Manual provided:

5. Paid Administrative Leave

The director of the IDOC, in consultation with the director of HRS and the applicable division chief, may grant paid administrative leave under the following conditions:

- When the employee is being investigated;
- When the employee is in the due process procedure of a disciplinary action;
- When the governor, manager, or designees declare an IDOC facility closed or inaccessible because of severe weather, civil disturbances, loss of utilities, or other disruptions;
- When a manager (or designee) deems it necessary due to an unusual situation, emergency, or critical incident that could jeopardize IDOC operations, the safety of others, or could create a liability situation for the IDOC; or
- When approved in advance by the governor (or designee).

¹⁵ The majority holds that Atencio’s statement contributed to a hostile work environment because he “actually *told* Fuller” that “her situation was not ‘unusual’ enough to warrant paid leave,

Later in the meeting, Fuller requested that her IDOC coworkers be informed of her confidential civil protection order against Cruz. Atencio responded that, although he knew that Fuller would find it “distasteful,” the IDOC could not comply with that request because “Cruz is still our employee and we have to be cautious of his rights.” But Atencio proposed a compromise: If the legal team verified that it was lawful to do so, the IDOC would send a reminder email to employees that Cruz was under investigation and not allowed at IDOC premises and that employees should contact a supervisor immediately if Cruz comes to the IDOC workplace. Atencio also informed Fuller that the IDOC would work with her to arrange for days when Fuller could take leave with pay to attend court hearings “and have time afterwards to recover.”

As had been proposed at the November 10 meeting, Harvey sent an email on November 16 reminding employees that Cruz “is on leave pending an investigation” and “not allowed in the [IDOC] offices.” Employees were further instructed to “contact a supervisor” if Cruz was seen on premises. The supervisors were aware of Fuller’s civil protection order, Fuller knew they were aware of the order, and the supervisors knew

although her male rapist was entitled to such leave and his colleagues’ support.” Maj. op. at 1166 (emphasis in original). As the majority acknowledges, there is no evidence that the IDOC’s limitation on paid administrative leave was anything other than a policy neutrally applied to all staff. *See* Maj. op. at 1163 n.9 (noting our unanimous holding that the denial of paid administrative leave did not violate Title VII). Verbalizing the neutral policy does not show discrimination on the basis of sex.

to contact police if Cruz came to the IDOC's premises. Fuller later explained that if the IDOC had sent an email notifying the staff that there was a civil protection order against Cruz, she "never would have resigned."

At the time Fuller resigned on November 16, IDOC supervisors were in the process of terminating Cruz's employment. By November 8, three supervisory IDOC officials had concluded that Cruz was responsible for multiple misconduct violations, including ones relating to Fuller's allegations. In late December, Cruz was formally notified that the IDOC was contemplating his termination, and he resigned on January 9, 2012.

II

The question in this case is whether these circumstances are sufficient, as a matter of law, to create a sexually hostile work environment. In holding that they are, the majority has lost sight of the key elements of Title VII liability, and effectively holds that an employer can be found liable even in the absence of evidence that any workplace conduct is "discriminatory . . . because of . . . sex." 42 U.S.C. § 2000e-2(a)(1).

A

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to

. . . terms, conditions, or privileges of employment, because of such individual's . . . sex." *Id.*¹⁶ This prohibition does not expressly ban "sexual harassment," but the Supreme Court has held that discriminatory conduct includes sexual harassment, *Meritor*, 477 U.S. at 64, 106 S.Ct. 2399 (1986), and that such conduct can alter the terms and conditions of employment if it is "sufficiently severe or pervasive" that it creates "an abusive working environment," *Harris*, 510 U.S. at 21, 114 S.Ct. 367. But as the statutory language makes clear, the key elements of a Title VII sexual harassment claim are (1) that the employer has engaged in discriminatory conduct (2) that affected the "terms, conditions, or privileges of employment" (3) because of such individual's sex. 42 U.S.C. § 2000e-2(a)(1).

In concluding that sexual harassment is discriminatory conduct, the Supreme Court looked to the EEOC Guidelines, which define sexual harassment to include both "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," as well as claims that are not *quid pro quo*, namely "so-called 'hostile environment' . . . harassment." *Meritor*, 477 U.S. at 65, 106 S.Ct. 2399.

¹⁶ This provision provides in full:

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) 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, sex, or national origin[.]

This can include “discriminatory intimidation, ridicule, and insult,” *Harris*, 510 U.S. at 21, 114 S.Ct. 367, such as the use of “sex-specific and derogatory terms,” *Oncale*, 523 U.S. at 80, 118 S.Ct. 998.

In order to affect the terms or conditions of employment, the discriminatory conduct must be unwelcome and either severe or pervasive. *See Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir. 1998) (per curiam). “[T]he work environment must both subjectively and objectively be perceived as abusive.” *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2002) (quoting *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995)). In making this determination, “we look ‘at all the circumstances, 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.’” *Id.* (quoting *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (per curiam)). We undertake this analysis from the perspective of “a reasonable woman.” *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

When engaging in a hostile work environment analysis, however, we must remember the Supreme Court’s repeated admonishment that “Title VII does not prohibit all verbal or physical harassment in the workplace.” *Oncale*, 523 U.S. at 80, 118 S.Ct. 998; *see also Vance v. Ball State Univ.*, ___ U.S. ___, 133 S.Ct. 2434, 2455, 186 L.Ed.2d 565 (2013) (“Title VII imposes no ‘general civility code.’”); *Faragher v. City of Boca*

Raton, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (similar). Rather, a plaintiff must always prove that complained-of conduct occurred because of the individual's sex. *Oncale*, 523 U.S. at 80, 118 S.Ct. 998. There are multiple evidentiary routes a plaintiff can follow to establish this critical element. "Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex." *Id.* Alternatively, where an employer treats men and women unequally, a trier of fact may infer that the differential conduct is because of sex. *Id.* at 80-81, 118 S.Ct. 998 ("A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."). Drawing on *Oncale*, we have held that where the conduct at issue "is not facially sex-or gender-specific," we may consider "differences in subjective effects" on women, "along with . . . evidence of differences in objective quality and quantity," in "determining whether or not men and women were treated differently." *EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845-46 (9th Cir. 2005). Nevertheless, the "main factual question" is whether the alleged perpetrator's "treatment of women differed sufficiently in quality and quantity from his treatment of men to support a claim of sex-based discrimination." *Id.* at 844. "Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at

issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimina[tion] . . . because of . . . sex.’” *Oncale*, 523 U.S. at 81, 118 S.Ct. 998.

B

Contrary to the majority, I would hold that Fuller has not raised a genuine issue of material fact regarding any of the three elements of a Title VII claim. There is no triable issue that the IDOC engaged in unwelcome harassing conduct of any sort, nor that the IDOC’s conduct created a working environment so abusive that it altered the terms and conditions of Fuller’s employment. *Cf. Gregory*, 153 F.3d at 1074. But even if there were a triable issue on these two elements, Fuller’s action would fail because there is not a shred of evidence to show that any conduct in the workplace was “because of . . . sex.” 42 U.S.C. § 2000e-2(a)(1). The majority has no answer to this dispositive flaw, which is fatal to Fuller’s case.

Although a plaintiff may use many evidentiary routes to raise an inference of discrimination because of sex, *see Oncale*, 523 U.S. at 80, 118 S.Ct. 998, Fuller has no viable route to follow. A court may infer discrimination because of sex when the conduct at issue is sexual in nature, but it is undisputed that Fuller experienced no “[u]nwelcome sexual advances” or “requests for sexual favors” at the IDOC. 29 C.F.R. § 1604.11(a). Nor did Fuller present any evidence of “verbal or physical conduct of a sexual nature” in the

workplace. *Id.* There is no evidence that anyone at the IDOC was “motivated by general hostility to the presence of women in the workplace,” nor is there “direct comparative evidence” that Fuller was treated differently from any similarly situated male. *Oncale*, 523 U.S. at 80-81, 118 S.Ct. 998. The record is entirely devoid of evidence that the IDOC engaged in differential treatment of Fuller because she is a woman. Because Fuller has failed to raise a genuine issue whether the conduct she deemed to be abusive was “because of . . . sex,” 42 U.S.C. § 2000e-2(a)(1), her claim fails.

Having properly rejected Fuller’s claim that the rapes were part of the hostile work environment, Maj. op. at 1162 n.7, the majority relies primarily on three incidents: (1) Harvey’s statement at a staff meeting that he hoped Cruz could return, and his later email telling employees that they were allowed to speak to Cruz, *id.* at 1162; (2) Harvey’s comment that Cruz had previously been accused of sexual harassment, *id.* at 1162; and (3) Atencio’s refusal to disclose Fuller’s confidential civil protection order in favor of sending a more general email that Cruz was not allowed at the IDOC pending the completion of his investigation, *id.* at 1162. While Fuller found this conduct offensive, there is no evidence in the record to support a claim that the IDOC took these measures because Fuller is a woman.¹⁷

¹⁷ The other circumstances cited by the majority likewise do not support any inference of “discriminat[ion] . . . because of . . . sex.” 42 U.S.C. § 2000e-2(a)(1). For instance, the majority cites the phone calls to Cruz from IDOC supervisors, Maj. op. at 1162, but

The majority rests its holding on *Little v. Windermere Relocation, Inc.*, see Maj. op. at 1162, but this case provides no support. The plaintiff in *Little* worked in business development to cultivate corporate clients. 301 F.3d at 964. As part of the plaintiff's job, the president of her company directed her to "do whatever it takes" to obtain a Starbucks account for the firm. *Id.* To that end, the plaintiff met with a Starbucks officer on several occasions, including once over dinner and drinks. *Id.* After dinner, the plaintiff passed out and was raped multiple times by the Starbucks officer. *Id.* When the employee reported the rape to the employer, the company president expressed his displeasure with her report, reduced her salary, and ultimately "told her it would be best if she moved on and that she should clean out her desk." *Id.* at 965. We held that the rape was part of the employee's work environment because "[h]aving out-of-office meetings with potential clients was a required part of the job" and "[t]he rape occurred at a business meeting with a business client." *Id.* at 967. As such, we concluded that the employee had

those were neither improper nor discriminatory. In fact, Fuller does not dispute that IDOC supervisors checked in on Fuller during her leave as well. Equally non-discriminatory was the denial of paid administrative leave, Maj. op. at 1163, which we unanimously conclude was not an employment action taken on account of sex, *id.* at 1163 n.9. The same is true of Fuller's ostracization by co-workers, *id.* at 1163, which not even Fuller has suggested was because of sex. And finally, the majority's statement that Fuller was "forced" to return to work, *id.* at 1163, fails in light of the fact that Fuller undisputedly returned to work because she could not afford to take any more leave, not because the IDOC required her to return, see *supra*, note 9.

raised triable issues as to all three elements of a Title VII hostile work environment claim. The rape was “unquestionably among the most severe forms of sexual harassment”; “[b]eing raped by a business associate, while on the job, irrevocably alters the conditions of the victim’s work environment”; and “[b]eing raped is, at minimum, an act of discrimination based on sex.” *Id.* at 967, 968.

Little distinguished a prior opinion holding that “a ‘single incident’ of harassment” (in that case, an employee’s forcing “his hand underneath [a female employee’s] sweater and bra to fondle her bare breast,” *Brooks v. City of San Mateo*, 229 F.3d 917, 921 (9th Cir. 2000)), which was “followed by immediate corrective action by the employer,” did not create a hostile work environment because it “was not sufficiently ‘severe or pervasive.’” *Little*, 301 F.3d at 967 (citing *Brooks*, 229 F.3d at 925-26). *Little* reasoned that *Brooks* did not control because in that case, “the harassing employee was fired,” but in *Little*, “not only was there no remediation, the harassment was arguably reinforced by [the victim’s] employer.” *Id.* In other words, the foundation for Title VII liability in *Little* was the failure to remedy a serious incident of workplace sexual harassment, coupled with the employer’s further abusive treatment of the victim by, for example, cutting her pay, which “reinforced rather than remediated the harassment.” *Id.*

By contrast to *Little*, Fuller’s rapes were unrelated to her “employment.” See *Fuller*, ___ Fed.Appx. at ___; Maj. op. at 1162 n.7. Accordingly, Fuller cannot rely on

the rapes as evidence that she suffered a severe form of sexual harassment on the job, which altered the terms and conditions of her work environment and constituted discrimination on the basis of sex. *Little* neither requires the IDOC to remedy harassment that occurs outside the context of work, nor holds that inadequate remediation of such harassment evinces discrimination because of sex. Thus, as the IDOC correctly argues, if the rapes do not qualify as workplace conduct, then there was no sexual harassment in the workplace. Because no other evidence suggests hostility towards women or disparate treatment of women, it follows that Fuller was not harassed “because of . . . sex.” 42 U.S.C. § 2000e-2(a)(1).

The majority contends that an employer’s discrimination against a female employee because the female employee had been raped could constitute discrimination based on sex, whether the rape occurred at the workplace or outside the workplace. Maj. op. at 1166. Although *Little* does not directly support such a rule,¹⁸ harassing conduct undertaken against a female employee *because of* a rape (whether in or outside of the workplace) might give rise to a reasonable inference of discrimination because of sex and therefore support a Title VII claim. The majority also argues that when an employer “effectively condone[s] or ratifies a rape or

¹⁸ Because *Little* relied on both (1) the plaintiff’s rape “by a business associate, while on the job” (which *Little* identified as among the most severe forms of discrimination based on sex), and (2) the employer’s response to the rape, the rule we announced in *Little* is not directly applicable to situations like Fuller’s. 301 F.3d at 967-68.

sexual assault and its effects,” the employer may be deemed to be discriminating against the raped or assaulted employee “because of sex.” Maj. op. at 1166 (internal quotation marks omitted). The majority declines to explain what constitutes condoning or ratifying a rape, *id.* at 1166-67, but in *Little* we held that an employer condoned a workplace rape by attempting to silence the employee’s complaint, cutting her pay, and ultimately firing her. 301 F.3d at 965. One can imagine circumstances where such a response to a non-workplace rape or assault could constitute discriminatory conduct based on sex that is so severe and pervasive as to affect the terms of employment.

Fuller, however, has not created a genuine issue for trial that any conduct – discrimination against an employee because the employee was raped, or conduct condoning or ratifying a rape – occurred here. By contrast to *Little*, the IDOC never attempted to silence Fuller’s complaint, cut her pay, or fire her. Rather, the record here indisputably shows that the IDOC took immediate remedial steps in response to Fuller’s complaints, even though her complaints were not based on workplace conduct. When Fuller reported her allegations to the IDOC, Cruz was already separated from the workplace, the IDOC warned employees that he could *not* be on premises, and at no point did anyone with the authority to speak on the IDOC’s behalf tell Fuller (or any IDOC employee) that Cruz had been exonerated or would return. Instead, the IDOC diligently investigated Fuller’s allegations, believed them, and ultimately used them as the basis of the decision to

terminate Cruz's employment. *Cf. Brooks*, 229 F.3d at 922 (noting the employer's "prompt remedial action" in investigating an incident and initiating termination proceedings against a misbehaving employee, who ultimately resigned).¹⁹ Even under the majority's expansive reading of *Little*, no reasonable jury would equate an employer's decision to terminate an employee accused of harassment with condoning the employee's behavior.

In the absence of any evidence of "discriminat[ion] . . . because of . . . sex," 42 U.S.C. § 2000e-2(a)(1), the majority points out that Fuller is a woman, but some of her IDOC supervisors were men. Maj. op. at 1167. But we long ago held that the mere fact that a plaintiff is a different sex from her alleged harassers "is not sufficient to raise a jury question." *Gregory*, 153 F.3d at 1075. This might be different if there were "a debatable question as to the objective differences in treatment of male and female employees" at the hands of the supervisors. *NEA*, 422 F.3d at 846. But on this record there is no evidence that Fuller was treated differently from any male employee, and so no inference of discrimination

¹⁹ The majority's argument that *Brooks* is distinguishable because the employer in *Brooks* "took no actions which could be perceived as supportive of the harasser or indicative that he might return," Maj. op. at 1164, finds no basis in the *Brooks* opinion. *Brooks* never mentions one way or the other what the employer did beyond investigating the incident and pursuing disciplinary action.

arises.²⁰ *Id.*; see also *Oncale*, 523 U.S. at 80, 118 S.Ct. 998.

The conduct that the majority deems to be abusive – the IDOC’s refusal to denigrate Cruz merely because he was accused of wrongdoing – was proper and perhaps legally necessary. Public employees can have a constitutionally protected property interest in their employment, and they are entitled to fair procedures before that interest is terminated. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Similarly, public employees have a protected liberty interest at stake; a public employee may sue an employer where contested, stigmatizing information about the employee is publicly disclosed in connection with the employee’s termination. *E.g.*, *Guzman v. Shewry*, 552 F.3d 941, 955 (9th Cir. 2009). The IDOC had an obligation of constitutional magnitude to tread carefully with its disclosure of any stigmatizing charges against Cruz until Cruz had been afforded an appropriate opportunity to clear his name. These concerns made it reasonable for the

²⁰ The majority also notes that despite the lack of any evidence in the record that would allow a reasonable jury to conclude that Fuller was treated differently because of sex, we should nevertheless conclude there is a triable issue because women are “disproportionately victims” who have “different perspectives” from men. Maj. op. at 1168. This suggests that, were Fuller a man, the majority may have entertained a different outcome, given the “different perspectives” men might have about sex. *Id.* In many areas of the law, “[o]verbroad generalizations of that order” are inappropriate – indeed, constitutionally suspect. *Sessions v. Morales-Santana*, ___ U.S. ___, 137 S.Ct. 1678, 1692, 1693 n.13, 198 L.Ed.2d 150 (2017).

IDOC to decline to reveal any information about the charges against Cruz until those charges had been substantiated, and to decline to disclose Fuller’s confidential civil protection order against Cruz in favor of an email that alerted employees that Cruz was not allowed on IDOC premises in a more neutral manner. I would hold that the IDOC’s decision to avoid prematurely injuring Cruz’s reputation was not discriminatory conduct that is objectively abusive. But in any event, the IDOC’s treatment of Cruz cannot support an inference of discrimination because of sex.

III

Even if the IDOC’s actions upset Fuller, subjective perception of abuse is not enough to prevail on a Title VII claim; the abuse must be “discriminat[ion] . . . because of . . . sex.” 42 U.S.C. § 2000e-2(a)(1); *Oncale*, 523 U.S. at 80, 118 S.Ct. 998. On this record, there is no evidence of workplace sexual abuse, *cf. Little*, 301 F.3d at 968, no evidence of supervisors’ addressing Fuller in any manner evincing hostility or sexual desire, *cf. Oncale*, 523 U.S. at 80, 118 S.Ct. 998, and no evidence that “members of one sex [were] exposed to disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed,” *id.* The IDOC did not give Fuller everything she wanted, but it applied facially neutral policies in denying some of her requests, and therefore did not discriminate against her because she is a woman. Rather, the only conclusion supported by this record is that the IDOC accommodated Fuller’s situation while respecting Cruz’s

rights. 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. That it may nevertheless find itself liable is a testament not to its missteps, but to our failure to heed *Oncale*'s central lesson.

Because there was no “discriminat[ion] . . . because of . . . sex” on this record, Title VII’s text and our precedents compel the conclusion that Fuller’s claim fails. 42 U.S.C. § 2000e-2(a)(1). I would therefore affirm the IDOC’s judgment in full, and I dissent from the majority’s contrary disposition.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CYNTHIA FULLER,
Plaintiff-Appellant,
v.
IDAHO DEPARTMENT OF
CORRECTIONS; BRENT
REINKE; HENRY ATENCIO,
Defendants-Appellees.

No. 14-36110
D.C. No.
1:13-cv-00035-JLQ
MEMORANDUM*
(Filed Jul. 31, 2017)

Appeal from the United States District Court
for the District of Idaho
Justin L. Quackenbush, District Judge, Presiding
Argued and Submitted March 6, 2017
Seattle, Washington

Before: GRABER, IKUTA, and HURWITZ, Circuit
Judges.

Cynthia Fuller was raped by an Idaho Department of Corrections (“IDOC”) co-worker, Herbt Cruz, whom she had been dating. She sued the IDOC and several supervisors, alleging violations of Title VII of the Civil Rights Act of 1964, the Equal Protection Clause, and Idaho tort law. The district court granted summary judgment to the defendants on all claims. In

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

an opinion filed today, we vacate that summary judgment insofar as it involved Fuller's claim that a hostile work environment was caused by the IDOC's actions after she was raped. We affirm the summary judgment with respect to Fuller's other claims.

1. Fuller argues that her rapes created a hostile work environment. But, the rapes occurred outside the workplace, and after the IDOC had placed Cruz on leave because of a criminal investigation into other non-workplace conduct. Because Fuller does not claim that Cruz sexually harassed her in the workplace or a related environment, or that he returned to work after the rapes, the district court properly granted summary judgment to the IDOC on this claim. *See Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) (requiring workplace conduct "sufficiently severe or pervasive to alter the conditions of the victim's employment" (internal quotation marks omitted)).¹

2. Fuller claims that she was constructively discharged because IDOC supervisors declined her

¹ The Ninth Circuit cases Fuller cites for the proposition that off-site conduct can contribute to a hostile work environment involve partial workplace conduct or conduct related to job performance. *See Galdamez v. Potter*, 415 F.3d 1015, 1023-24 (9th Cir. 2005); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967 (9th Cir. 2002); *Fuller*, 47 F.3d at 1525-28. Similarly, the out-of-circuit cases that she cites all involve environments akin to the workplace, where the employer controlled how employees spend their off-duty time. *See Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008); *Doe v. Oberweis Dairy*, 456 F.3d 704, 715-16 (7th Cir. 2006); *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 134-35 (2d Cir. 2001); *Parrish v. Sollecito*, 249 F. Supp. 2d 342, 345-46, 352 (S.D.N.Y. 2003).

request to inform the staff about a sealed protective order she had obtained against Cruz. But, even putting aside the sealed nature of the order, the IDOC had already removed Cruz from the workplace and responded to Fuller's request by informing staff that he was not permitted on the premises, directing them to call a supervisor if he should appear. These actions did not create working conditions "so intolerable that a reasonable person in [Fuller's] position would have felt compelled to resign." *Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007) (internal quotation marks omitted).

3. Fuller argues that she was denied paid administrative leave because of her gender. But, it is undisputed that, for budgetary reasons, the IDOC has not approved any request for paid administrative leave since 2008 under an administrative rule applicable to "unusual" situations. Fuller has not demonstrated that the IDOC's continued refusal to approve leave for her "unusual situation" – as opposed to leave granted to other employees under provisions governing investigations or disciplinary actions – was on account of her gender. See *Hishon v. King & Spalding*, 467 U.S. 69, 75-76 (1984) (requiring that denial of a "privilege" of employment be discriminatory to violate Title VII); *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156-59 (9th Cir. 2010) (requiring evidence that similarly situated males were treated more favorably).²

² Fuller's equal protection claim against her supervisors fails for the same reasons. See *Keyser v. Sacramento City Unified Sch.*

4. Fuller argues that her supervisor's actions after she reported her rapes amounted to negligent infliction of emotional distress under Idaho law. Because she alleges only "a series of ongoing, discrete events or conduct," rather than a "continuing tort," any claim arising before November 16, 2011, is time-barred. *Cobbley v. City of Challis*, 59 P.3d 959, 962-64 (Idaho 2002) (citing IDAHO CODE § 6-905). And, the district court properly concluded that the actions she alleges that occurred during the limitations period were not unreasonable. *Frogley v. Meridian Joint Sch. Dist. No. 2*, 314 P.3d 613, 624 (Idaho 2013).

AFFIRMED.

Dist., 265 F.3d 741, 754 (9th Cir. 2001) (requiring proof of gender discrimination for equal protection claim under 42 U.S.C. § 1983).

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

CYNTHIA FULLER,	)	No. CV-13-035-JLQ
Plaintiff,	)	MEMORANDUM
vs.	)	OPINION AND ORDER
STATE OF IDAHO, DEPT.	)	RE: SUMMARY
OF CORRECTIONS,	)	JUDGMENT
BRENT REINKE, and	)	(Filed Dec. 2, 2014)
HENRY ATENCIO,	)	
Defendants.	)	

BEFORE THE COURT are Defendants' Motion for Summary Judgment (ECF No. 39), Plaintiff's Motion for Partial Summary Judgment (ECF No. 40), and the parties various Motions to Strike supporting evidentiary materials (ECF No. 56, 57, and 71). The court heard oral argument on the matters in Boise, Idaho on September 22, 2014. Kathryn Harstad and Erika Birch appeared for the Plaintiff, who was present. Philip Collaer and Tracy Crane argued on behalf of Defendants. The court allowed the parties to submit supplemental briefs, which the court has received and considered.

I. Introduction/Procedural History

This action was filed on January 22, 2013. Defendants filed an early Motion for Partial Summary Judgment (ECF No. 6) on March 13, 2013. The court granted in part the Motion for Partial Summary

Judgment. (ECF No. 19). As a result of that ruling, the following claims remained:

1. The Title VII claims in Counts I and II against IDOC (“Idaho Department of Corrections”);
2. The 42 U.S.C. § 1983 claims in Count III against Defendants Atencio and Reinke in their official capacities;
3. The claim in Count VI against Atencio in his individual capacity for negligent/intentional infliction of emotional distress.

II. Factual Background

The court herein recites the basic undisputed Factual Background and will reference the applicable facts in its discussion of the individual claims.

Plaintiff, Cynthia Fuller, (hereafter “Plaintiff” or “Fuller”) is a former employee of the Idaho Department of Corrections (“IDOC”). She resigned on November 16, 2011. Plaintiff began working for IDOC as a correctional officer in 2004 and was promoted to Sergeant. In October 2010, she became a probation and parole officer. In 2011, she requested, and received, a transfer to the Caldwell Division III Probation and Parole Office (“D-3 Office”). In March or April 2011, Fuller began a sexual relationship with a co-worker, Herbt Cruz. Plaintiff was aware of a Department of Corrections policy requiring that employees disclose romantic relationships with co-employees, but neither

Plaintiff or Cruz disclosed their ongoing relationship to supervisors until sometime after August 15, 2011.

On or about August 1, 2011, a criminal investigation of Cruz was opened in Idaho for allegedly raping another woman (not Plaintiff). On August 15, 2011, IDOC placed Cruz on administrative leave pending the investigation. Plaintiff continued her romantic relationship with Cruz. Plaintiff alleges that thereafter she was assaulted and raped by Cruz on three occasions, the first of which was August 22, 2011. Fuller did not immediately report that alleged assault to her employer or law enforcement and resumed her relationship with Cruz. Plaintiff alleges she was also assaulted by Cruz on August 30, 2011, but that alleged assault was also not reported until September 6, 2011. Despite the assaults, Plaintiff testified that she continued to be “romantically involved” with Cruz, and continued the sexual relationship, until on or about September 3, 2011 when she was allegedly assaulted again by Cruz. (See Fuller Depo. p. 122-125; 140-141)¹. Fuller reported the Cruz assaults to law enforcement on September 6, 2011. On September 7, 2011, Plaintiff obtained an Order of Protection and took leave from work.

Plaintiff was not allowed paid administrative leave, but was allowed to use her sick leave and vacation time while she was at home. Plaintiff was also offered intermittent leave under the Family Medical

¹ Fuller and Cruz also continued to communicate extensively via text message during this time period. The texts were submitted in the record as Fuller deposition exhibit 72 at ECF No. 45-16 and 45-17.

Leave Act (“FMLA”). Fuller makes no claim under FMLA. She returned to work on October 19, 2011. Plaintiff alleges that although Cruz was on administrative leave while being investigated concerning the alleged assault on the third-party and she had an Order of Protection, she felt unsafe at work, although Cruz at no time returned to the work place. Fuller claims the IDOC did not take adequate remedial measures to protect her from further contact by Cruz even though no such contact occurred.

On November 10, 2011, Plaintiff attended a meeting with Henry Atencio, Kim Harvey, and Roberta Hartz, supervisors, to discuss further notice to other employees that Cruz was not allowed on the IDOC premises and Plaintiff’s request for paid leave. Plaintiff secretly recorded that meeting and a transcript of the meeting is part of the record. (at ECF No. 47-26). At the November 10, 2011, meeting, Fuller told her supervisors that she felt ostracized because her co-workers did not know the full story as to why she had been on leave and had missed POST training. Fuller also stated, “and I believe the supervisors have been very supportive, absolutely.” Fuller further stated that although she was now in an “uncomfortable situation,” that “the whole thing – I mean, granted, you know, it’s not your guys’ fault that I – you know, I got into that kind of relationship.” (Tr. p. 32). At the conclusion of the meeting, Atencio stated: “Well, I think the two things we need to do, we’ll talk to one of our AG’s [Assistant Attorney Generals] about how we can, you know, announce Cruz’s not being allowed to be by the

building, or in the building, how we can do that legally. And then the other thing is looking at it, again, with paid leave options in the future for you.” (Tr. p. 39).

On November 16, 2011, Kim Harvey sent a notice to all District 3 employees informing them that Cruz is “on leave pending an investigation” and that he is “not allowed in the D-3 offices” and that “if anyone sees him, they are to notify a supervisor.” (ECF No. 47-40). That very same day, after receiving the e-mail, Plaintiff submitted her “Resignation Memo”. (ECF No. ECF No. 47-41). Plaintiff later filed for unemployment benefits. The IDOC contested the claim. An Idaho Department of Labor hearing was held on January 27, 2012, and benefits were denied.

III. The Remaining Claims

The Title VII claims in Count I allege hostile work environment and constructive discharge. (ECF No. 1, p. 9). Plaintiff claims that IDOC “failed to take adequate remedial measures to prevent [Cruz’s] on-going sexual harassment within the workplace” and that IDOC’s failures to take such measures led to Ms. Fuller’s constructive discharge. (ECF No. 1, ¶¶ 48-53). Count II alleges gender discrimination and disparate treatment leading to constructive discharge. Plaintiff complains that she was not offered paid administrative leave, and that Cruz was on paid administrative leave. Count III alleges violation of Equal Protection under the Fourteenth Amendment. Count VI against Atencio alleges that Atencio caused Plaintiff emotional

distress by not offering her paid administrative leave, inadequately protecting her in the workplace, and contesting her unemployment application after she was constructively discharged. (ECF No. 1, p. 15). Defendants deny these allegations.

Defendants' instant Motion for Summary Judgment seeks judgment in Defendants favor on the remaining claims. Plaintiff's Motion for Partial Summary Judgment seeks judgment in her favor on Counts I and II.

IV. Standard of Review

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the material facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled to summary judgment when, viewing the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, there are no genuine issues of material fact in dispute. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). While the moving party does not have to disprove matters on which the opponent bears the burden of proof at trial, they nonetheless bear the burden of producing evidence that negates an essential element of the opposing party's claim and the ultimate burden of persuading the court that no genuine issue of material fact exists. *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102 (9th Cir. 2000). When the nonmoving party has the burden of proof at trial,

the moving party need only point out that there is an absence of evidence to support the nonmoving party's case. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001).

Once the moving party has carried its burden, the opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the opposing party must come forward with specific facts showing that there is a genuine issue for trial. *Id.*

Although a summary judgment motion is to be granted with caution, it is not a disfavored remedy: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citations and quotations omitted).

V. Discussion

A. Count I – Hostile Work Environment and Constructive Discharge

Plaintiff brings her claims in Counts I and II under Title VII which is codified at 42 U.S.C. 2000e-2, which provides in pertinent part:

(a) Employer practices

It shall be an unlawful employment practice for an employer –

- (1) 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, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Plaintiff contends she was subjected to a hostile work environment, and ultimately constructively discharged. This claim is without factual and legal merit. When considering a claim of sexual harassment based on a hostile work environment, there are two primary considerations: “whether the plaintiff has established that she or he was subjected to a hostile work environment, and whether the employer is liable for the harassment that caused the environment.” *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2002). Title VII is “not a general civility code.” *Manatt v. Bank of America*, 339 F.3d 792, 798 (9th Cir. 2003) *citing Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). To establish a prima facie hostile work environment claim, Plaintiff must show: 1) she was subjected to

verbal or physical conduct because of her sex, 2) the conduct was unwelcome, and 3) the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment. *Manatt*, 339 F.3d at 798. Although Title VII “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment,” to be actionable, the offending conduct must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75, 78 (1998).

Plaintiff has not demonstrated that she was subject to a hostile work environment, or that her employer is responsible for the alleged harassment. Plaintiff admits that what she considers the sexual harassment – Cruz’ alleged assaultive behavior – occurred outside the workplace. Further, it occurred while Cruz was suspended. Both parties rely upon *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2002), but the case does not aid Fuller. In *Little*, the plaintiff was employed as a “Corporate Services Manager”, and she worked with corporate clients providing relocation services for those employees. Little attended a business dinner with a client, and after dinner became ill, passed out, and was raped by the client. When Little told a co-worker, the co-worker advised her not to tell management. When Little told a vice-president of operations of the assault, she advised that she “wished there was something she could do,” and would not tell the president, Gayle Glew, unless

Little was going to pursue legal action. When Plaintiff told Glew, he told her to speak to his attorneys, and immediately lowered her pay. He then told Little that if the pay cut was not acceptable, “it would be best if she moved on and that she should clean out her desk.” *Id.* at 965.

The Ninth Circuit Court of Appeals noted that the “rape occurred at a business meeting with a business client” and that “having out-of-office meetings with potential clients was a required part of the job.” *Id.* at 967. The Circuit also stated that, “being raped by a business associate, while on the job, irrevocably alters the conditions of the victim’s work environment.” *Id.* at 967-68. The court also observed that Little’s employer had demoted her and terminated her when she reported the rape. The employer had also failed to take steps to prevent contact between Little and the client. The court found that a jury could find the employer liable for a hostile work environment after the rape “if a jury finds that [the employer] ratified or acquiesced in the rape by failing to take immediate corrective action once it knew or should have known of the rape.” *Id.* at 969.

The facts of this case are in stark contrast to *Little*. Here, Fuller was not sexually harassed while performing the functions of her job. Rather, viewing the facts in a light most favorable to her, she was sexually assaulted by her co-worker, Herbt Cruz, whom she had been having a consensual sexual relationship with

for four-to-six months². These assaults all occurred outside the workplace, and after Cruz had been suspended from work. Fuller testified that she had no conflicts with her direct supervisor, Orestes Alambra. (Fuller Depo. p. 46). Further, she could not identify any specific individual she had a conflict with at work, either before or after she was assaulted by Cruz. (*Id.* at p. 47). When she was assaulted on August 22, 2011, Cruz was already suspended from work. Unlike in *Little*, Fuller's employer took steps to prevent contact between Fuller and Cruz. The IDOC notified employees that Cruz was not to be on the premises. The IDOC conducted an investigation into Cruz' conduct and recommended his termination. Cruz resigned in lieu of termination. Unlike in *Little*, no adverse employment action was taken against Fuller. Fuller was not demoted, her salary was not decreased, and she was not terminated.

Plaintiff has not produced evidence to establish that the alleged sexually assaultive conduct by Cruz created a hostile work environment. Fuller was in a longstanding romantic relationship with Cruz. The alleged assaultive conduct occurred between August 22, 2011 and early-September 2011. The alleged assaults occurred outside of the workplace and after Cruz was

² For the purposes of summary judgment, the court views the facts in a light most favorable to Fuller and accepts that a jury could find the alleged sexual assaults occurred. The parties informed the court at oral argument that no criminal charges were ever brought against Cruz for these alleged assaults, and Cruz's affidavit states the same. The court makes no finding that the assaults did occur, but viewing the facts in a light most favorable to Fuller, finds that a jury could so conclude.

suspended from the workplace. To succeed on a hostile work environment claim, the “plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered.” *Vance v. Ball State University*, 133 S.Ct. 2434, 2441 (2013). Plaintiff has not established that her employer, IDOC, is liable. “[G]enerally an employer is not liable for the harassment or other unlawful conduct perpetrated by a non-supervisory employee after work hours and away from a workplace setting.” *Duggins v. Steak ’n Shake, Inc.*, 3 Fed.Appx. 302 (6th Cir. 2001) citing *Candelore v. Clark County*, 975 F.2d 588, 590 (9th Cir. 1992).

Plaintiff has also not demonstrated that IDOC failed to take appropriate remedial action. Cruz was suspended. Other employees were advised he was not to be on the premises. He did not return to the premises or have further contact with Fuller. Termination was recommended, and he resigned in lieu of termination. The Seventh Circuit has stated that when a sexual assault has occurred, “the emphasis of Title VII in this context is not on redress but on the prevention of future harm.” *Lapka v. Chertoff*, 517 F.3d 974, 984 (7th Cir. 2008). Stated otherwise, “the emphasis is on the prevention of future harassment” *Id.* The court further stated: “we have noted that taking effective steps to physically separate employees and limit contact between them can make it “distinctly improbable” that there will be further harassment.” *Id.* at 985. In *Lapka*, the court found the employer had taken effective steps to separate the co-workers, and in fact the alleged

harasser never entered Lapka's workplace again. However, Lapka complained that more could have been done – Federal Protective Services should have been notified and the employer should have specifically notified the harasser of the protective order. The Seventh Circuit stated: "it is not availing to say that the employer should have taken even more aggressive measures. The measures taken by employers often will not meet the plaintiff's expectations." *Id.* at 985. The court concluded the employer "took reasonable steps in this case; that is enough to justify denial of Lapka's claims." *Id.*

Plaintiff's hostile work environment claim fails for several reasons. Plaintiff has not established severe or pervasive conduct *in the workplace*. Plaintiff complains of no sexually harassing or assaultive conduct that occurred *in the workplace*. Rather, Plaintiff complains that Cruz, a suspended employee, whom she had been voluntarily seeing outside of the workplace, and whom Fuller had been engaged in a several month consensual sexual relationship with, assaulted her. Fuller's only complaint concerning the work environment is that some of her co-workers were not talkative after her leave of absence because they did not understand the circumstances of it. Title VII is not a civility code for the workplace, and the Ninth Circuit has repeatedly held that "ostracism by coworkers does not constitute an adverse employment action, at least where it does not have an effect on the employee's ability to perform her job." *Hellman v. Weisberg*, 360 Fed.Appx. 776 (9th Cir. 2009) *citing Brooks v. City of*

San Mateo, 229 F.3d 917, 929 (9th Cir. 2000). The IDOC took effective remedial action against Cruz. Cruz was suspended and IDOC notified co-workers and supervisors that Cruz was not to be on the premises. He did not return to the premises. Any future harassment in the workplace was prevented, and Cruz was forced to resign. Defendants' Motion for Summary Judgment on the hostile work environment claim is **GRANTED**.

1. **Constructive Discharge** – Plaintiff alleges she was constructively discharged from her employment because she no longer felt safe at work. Plaintiff left her employment with IDOC on November 16, 2011. “Constructive discharge occurs when, looking at the totality of circumstances, a reasonable person would have felt that he was forced to quit because of intolerable and discriminatory working conditions.” *Watson v. Nationwide, Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987). The test is an objective standard. The plaintiff “need not show that the employer subjectively intended to force the employee to resign.” *Id.* The Ninth Circuit Court of Appeals has further stated that “a plaintiff alleging constructive discharge must show some aggravating factors, *such as* a continuous pattern of discriminatory conduct.” *Id.* The determination of whether conditions were so intolerable and discriminatory as to justify a reasonable employee’s decision to resign is normally, but not always, a question of fact for the jury. *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir. 1989). In *Thomas*, the court found “insufficient evidence . . . from which a rational trier of fact could conclude” that his working conditions were such that a

reasonable person would have been compelled to quit. *Id.* The Ninth Circuit further observed: “It was not unreasonable for [plaintiff] to feel uncomfortable in his situation. His subjective personal discomfort, however, was most likely not the product of any action by [defendants] but, rather, the product of human nature.” *Id.*

As stated, *supra*, after reporting the non-work assaults by Cruz, and taking leave in early-September, Fuller returned to work on October 19, 2011. On November 10, 2011, Fuller met with her supervisors Henry Atencio, Kim Harvey, and Roberta Hartz to discuss the issues of Fuller taking additional leave, and again notifying employees that Cruz was not to be on premises. Shortly after Cruz was suspended on August 15, 2011, Kim Harvey had called a staff meeting and “advised everyone that Cruz had been placed on administrative leave because of an ongoing investigation . . . the details of which were confidential.” (ECF No. 44-9, Harvey Depo. p. 100). Harvey additionally informed employees that Cruz “was not authorized to be on the premises that if he was seen, that a supervisor was to be contacted immediately.” (*Id.*). At the November 10, 2011, meeting, Fuller stated that her supervisors had been supportive: “I believe the supervisors have been very supportive, absolutely.” (ECF No. 47-26, p. 22). Just six days later, on November 16, 2011, Kim Harvey sent out a notice to all District 3 employees informing them that Cruz was “on leave pending an investigation” and that he is “not allowed in the D-3 offices” and that if anyone sees him, they are to notify

a supervisor. (ECF No. 47-40). Fuller submitted a “resignation memo” later that same day, after receiving the e-mail notice.

Plaintiff was not constructively discharged. A reasonable person would not have felt that she was forced to quit because of intolerable and discriminatory working conditions. IDOC provided notice to all employees that Cruz was not to be on site. Plaintiff admits that Cruz surrendered his service weapon at the time of suspension and had not returned to the premises after being suspended on August 15, 2011. (Resp. to St. Of Facts, ECF No. 60, ¶ 5 & 6). Plaintiff describes a work environment where her supervisors were supportive and where she had no specific conflicts with any co-workers – other than Cruz – who was already suspended. Plaintiff has not shown a pattern of discriminatory conduct, nor a workplace situation in which a reasonable person would have felt that she was forced to quit because of intolerable and discriminatory working conditions created by the Defendants. Plaintiff has not met the “high bar” necessary to establish that she was constructively discharged. *See Poland v. Chertoff*, 494 F.3d 1174, 1185 (9th Cir. 2007) (“We set the bar high for a claim of constructive discharge because federal antidiscrimination policies are better served when the employee and employer attack discrimination within their existing employment relationship, rather than when the employee walks away and then later litigates whether his employment situation was intolerable.”). Defendants’ Motion for Summary Judgment on the constructive discharge claim is **GRANTED**.

B. Count II – Gender Discrimination

Plaintiff’s gender discrimination claim pertains to what she sees as unequal treatment between her and Cruz in the provision of administrative leave. She contends that he was given paid administrative leave while under investigation, and that she was “initially promised” paid administrative leave, but then paid administrative leave was denied. (Complaint ¶ 55-63).

A disparate treatment claim under Title VII is analyzed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Hawn v. Executive Jet Management*, 615 F.3d 1151, 1155 (9th Cir. 2010). Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged action, and if the defendant meets that burden, the plaintiff must then raise a triable issue of material fact as to whether the defendant’s proffered reasons are pretextual. To establish a prima facie case, Plaintiff must show: 1) membership in a protected class; 2) qualified for and performing satisfactorily in her employment; 3) that she experienced an adverse employment action; 4) that similarly situated individuals outside the protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. *Id.* at 1156. A plaintiff is not required to rely on comparison to similarly situated individuals, but may rely on “other circumstances surrounding the

adverse employment action that give rise to an inference of discrimination.” *Id.*

Plaintiff has failed to make a prima facie showing. Plaintiff is a member of a protected class. The court also assumes the second element is met, that Plaintiff was performing satisfactorily, although Plaintiff did admit to violating workplace policy by not disclosing her relationship with Cruz. As to the third element, Plaintiff did not suffer an adverse employment action. As set forth *supra*, she was not constructively discharged. Plaintiff was not demoted, nor were her pay or benefits reduced. Plaintiff was not legally entitled to paid administrative leave, and not providing her with such was not an adverse action. Even if the court assumes that not providing Fuller with paid administrative leave was an adverse action, Fuller has not provided evidence giving rise to an inference of discrimination.³ At oral argument, Plaintiff’s counsel argued that the inference was established because different IDOC supervisors gave different reasons as to why the administrative leave was not provided, and because Plaintiff claims she was initially told she would qualify, but then was told she did not. The court disagrees. No evidence was provided giving rise to an inference of discrimination. The decision whether to put an employee on paid administrative leave was

³ The Ninth Circuit has found that placing an employee on administrative leave can constitute an adverse employment action. *See Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir. 2013) (“We conclude that, under some circumstances, placement on administrative leave can constitute adverse employment action.”).

discretionary, and no evidence has been provided that such discretion was exercised in a discriminatory manner.

Even if the court assumes Plaintiff has made a prima facie showing, or that such showing was made merely because Cruz and Fuller were co-workers in a sexual relationship, and Cruz received paid administrative leave and Fuller did not, Defendants offered legitimate non-discriminatory reasons for the decision. Fuller has not created a triable issue that such reasons were pretextual.

The IDOC administrative leave policy provided in pertinent part:

Paid Administrative Leave

The Director of the IDOC, in consultation with the director of HRS and the applicable division chief, **may grant** paid administrative leave under the following conditions:

- 1) When the employee is being investigated;
- 2) When the employee is in the due process procedure of a disciplinary action;
- 3) [n/a]
- 4) When a manager (or designee) **deems it necessary** due to an unusual situation, emergency, or critical incident that could jeopardize IDOC operations, the safety of others, or could create a liability situation for the IDOC; or
- 5) [n/a]

(emphasis added) (P's Ex. QQ at ECF No. 47-29).

Cruz was put on paid administrative leave because he was being investigated with termination contemplated – implicating subsections 1 and 2 of the Policy. The investigation was initiated after IDOC found out that Cruz was under investigation by the Canyon County Sheriff’s office for an allegation of assault made by another woman, J.W. He was not suspended on August 15, 2011, for having an undisclosed relationship with his co-worker, Fuller. Fuller argues she should have received leave under subsection 4, “unusual situation”. However, any such leave was entirely discretionary – it “may” be granted, if deemed necessary. Plaintiff was allowed to take vacation and sick time and expended approximately 4 weeks of such time. She was also given intermittent leave under the Family Medical Leave Act.

Brent Reinke, the Director of IDOC, has averred that where an employee is being investigated and suspended concerning possible disciplinary action, an “employee is not allowed to be at work,” and therefore “continue[s] to receive all pay and benefits during the time they are not allowed to be at work.” (ECF No. 394). He further averred that he had received instruction, prior to September 2011, from the State Board of Examiners to be restrictive in exercising his discretion to put employees on paid administrative leave.

The record suggests that there may have been some miscommunication in September, 2011 regarding Fuller’s eligibility for paid administrative leave. Plaintiff contends she was initially told by a supervisor that he “did not believe that would be a problem.” (P’s

St. of Facts, ECF No. 44, ¶ 66). Atencio shortly thereafter communicated to Harvey that Fuller would not receive paid administrative leave “because she does not have any personnel action pending against her.” (*Id.* at ¶ 67). This was communicated to Fuller no later than September 19, 2011. (*Id.* at ¶ 70); *see also* Harvey and Atencio e-mails at ECF No. 47-19 & 47-23). Assuming that Fuller was told she “may” or “might” qualify for paid leave, or that a supervisor “believed” she qualified, such statements are not inconsistent with a discretionary policy and such statements do not evidence a discriminatory intent or motive. The record also reflects that her supervisors continued to evaluate various leave options, and provided Fuller with unpaid leave options, such as FMLA, up through November 16, 2011, when Fuller resigned. The record does not support a conclusion that there was any discriminatory intent or motive behind not providing Fuller with paid administrative leave. Employers are not legally required to always provide paid administrative leave to an employee who makes allegations of misconduct against another employee.

Plaintiff has not provided evidence to support her claim that the decision to provide Cruz paid administrative leave, and not to provide her paid administrative leave was impermissibly based on gender. Defendants’ Motion for Summary Judgment on Count II is **GRANTED**.

**C. Count III – Plaintiff’s Section 1983 claims
against Atencio and Reinke**

In this Count, Plaintiff repeats the same factual allegations that underlie Counts I and II and argues that Defendants’ conduct amounts to a violation of the Equal Protection Clause. Defendants argue that in order to establish a violation of equal protection, a plaintiff must prove discriminatory intent or motive. Defendants argue that the discretionary decision of Atencio and Reinke to deny Fuller paid administrative leave does not implicate the Equal Protection Clause. Defendants argue that Fuller was treated the same as other similarly situated employees. At her deposition, Fuller testified that she could not identify anyone that had requested voluntary paid administrative leave and had the request granted. (Fuller Depo. p. 180).

For the same reasons discussed, *supra*, in regard to Plaintiff’s Title VII claims, this § 1983 claim also fails. Although the analysis under Title VII is not identical to the analysis of an Equal Protection claim under Section 1983, “because both disparate treatment and § 1983 claims require a showing of intentional discrimination, it is unsurprising that summary judgment decisions with regard to § 1983 claims are remarkably similar to their Title VII counterparts.” *Keyser v. Sacramento City School Dist.*, 265 F.3d 741, 754 (9th Cir. 2001). Defendants’ Motion for Summary Judgment on Count III is **GRANTED**.

D. Count VI – Infliction of Emotional Distress against Atencio

The Complaint, in Count VI, alleges “Intentional and/or Negligent Infliction of Emotional Distress” (Complaint ¶ 91-96). These are distinct torts and should not be combined in one count. Plaintiff alleges that Atencio “revoked a promise,” “refused” to act, and “contested” her unemployment benefits – acts which appear to be intentional. The crux of the allegation is that after the reported assaults by Cruz, Atencio told Plaintiff she could take “as much paid leave as she needed,” but then revoked this promise. (*Id.* at ¶ 92). Plaintiff appears to claim she was entitled to indefinite paid leave because she made an allegation of sexual assault against a co-worker, one she had been sexually involved with for several months. Cruz was suspended from the workplace, so Fuller was not required to return to work and work with him. IDOC provided Fuller leave from work. IDOC allowed Fuller to use vacation and sick leave to be absent from work from early-September to mid-October, and then offered her intermittent Family Medical Leave Act (“FMLA”) leave.

In Defendant’s earlier Motion for Partial Summary Judgment (ECF No. 6), Defendants had claimed that they were entitled to summary judgment on this Count because Plaintiff did not file a timely notice of claim under Idaho Code § 9-605. This Count VI claim is asserted against only Defendant Atencio in his individual capacity. The court set forth in its prior Order (ECF No. 19) a timeline of the relevant events:

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- March/April 2011 Plaintiff began a relationship with Cruz;
- August 15, 2011 Cruz was placed on administrative leave;
- August 30, 2011, Plaintiff was allegedly assaulted by Cruz;
- September 15, 2011, Plaintiff was informed orally that she would not receive paid administrative leave;
- September 19, 2011, Plaintiff received written notification from Atencio that she would not receive paid administrative leave;
- October 19, 2011, Plaintiff returned to work;
- November 7, 2011, Plaintiff challenged the denial of leave in writing;
- November 10, 2011, Plaintiff met with IDOC administrators including Atencio and requested reinstatement of sick time and vacation leave that she had used;
- November 17, 2011, Plaintiff ceased her employment; and
- May 14, 2012, Plaintiff filed a Notice of Claim with the Idaho Secretary of State's Office.

These dates are still essentially accurate, but the evidence presented with the current summary judgment motions has provided more information. For

example, Fuller alleges she was first assaulted by Cruz on August 22, 2011. Also, Fuller's resignation was submitted the evening of November 16, 2011, not November 17, 2011. Idaho Code § 6-905 provides that all claims against the state or against an employee of the state for any act or omission of the employee within the course and scope of his employment shall be presented to the Secretary of State within 180 days "from the date the claim arose or reasonably should have been discovered, whichever is later." Plaintiff's Notice of Claim was submitted to the Secretary of State 180-days after her last day of employment. Pursuant to Idaho Code 6-905 and 6-908, no claim shall be allowed that has not been timely presented and the "notice of claim requirement is a mandatory condition precedent to bringing suit against the state or its employee." *Overman v. Klein*, 103 Idaho 795, 797 (1982).

Fuller had argued in the prior briefing that the infliction of emotional distress was a continuing tort that continued at least until November 16, 2011, the day she claims she was constructively discharged due to what she alleged was an unsafe working environment. She therefore asserted her claim is timely. Although compliance with the ITCA's notice requirements is mandatory and failure to comply "is fatal to the claim, no matter how legitimate," Idaho courts have extended the time in cases of continuing torts. *See Cobbley v. City of Challis*, 138 Idaho 154 (2002) *citing favorably to Farber v. State*, 102 Idaho 398 (1981) (in suit alleging damages from negligent planning, construction, and design, ITCA notice period began when the project was

complete rather than when the project or damage began). Thus, in cases of continuing torts, the Idaho courts have held that the 180-day time period is tolled until the tortious behavior has ceased. However, the Idaho Supreme Court also stated in *Cobbley* that, “upon filing their notice of claim, the [Plaintiffs] could seek damages that resulted during the 180-day period preceding their notice.” *Id.* at 159.

In this case, the only acts which occurred within 180-days of the Notice of Claim were the November 16, 2011 e-mail from Mr. Harvey informing employees that Cruz was “on leave pending an investigation” and “not allowed in D-3 offices”; and Plaintiff’s alleged constructive discharge on November 16, 2011. (Complaint, ¶ 39, 44). Plaintiff also complains of IDOC contesting her application for unemployment benefits (Complaint, ¶ 93), which would have occurred during the 180-day period. However, Plaintiff has previously admitted that her claim concerning unemployment benefits was not included in her tort claim notice. See Plaintiff’s Response to Defendant’s Motion for Partial Summary Judgment (ECF No. 16, p. 12) (“It is true that Ms. Fuller did not state in her notice of claim that she was injured because Defendants contested her request for unemployment benefits.”).

Defendants have renewed the argument that the claim is untimely. (ECF No. 39-1, p. 19). Defendants also argue that Atencio’s conduct was not extreme and outrageous. Defendants argue that Fuller was asked at deposition to describe the actions of Atencio that were wrongful and she stated: “denying paid administrative

leave, refusing to disclose the protection order, and denying me unemployment benefits.” (Fuller depo, p. 208).

Under Idaho law, intentional infliction of emotional distress requires a plaintiff to show: 1) defendant’s conduct was intentional or reckless; 2) the conduct was extreme and outrageous; 3) there was a causal connection between the wrongful conduct and plaintiff’s emotional distress; and 4) the emotional distress was severe. *Spence v. Howell*, 126 Idaho 763, 774 (1995). “It is for the court to determine, in the first instance, whether the defendant’s conduct may reasonably be regarded as so extreme and outrageous to permit recovery.” *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 180 (2003) *citing* Restatement (Second) of Torts § 46. “Although a plaintiff may in fact have suffered extreme emotional distress . . . no damages are awarded in the absence of extreme and outrageous conduct by a defendant.” *Id.* at 179. The Idaho Supreme Court has said that “very extreme conduct” is required before awarding damages for intentional infliction of emotional distress. *Id.* The conduct must go “beyond all possible bounds of decency that would cause an average member of the community to believe it was outrageous.” *Id.* at 180. None of Atencio’s alleged wrongful conduct could be found to have been so extreme and outrageous as to go beyond all bounds of decency. Even if the claim is timely, Defendants are entitled to summary judgment on the Intentional Infliction of Emotional Distress claim.

Negligent Infliction of Emotional Distress requires a showing of: 1) a legally recognized duty, 2) a breach of that duty, 3) a causal connection between the defendant's conduct and the breach, and 4) actual loss or damage. *Bollinger v. Fall River Rural Elec. Co.*, 152 Idaho 632, 642 (2012). A plaintiff must demonstrate "physical manifestation of the alleged emotional injury." *Id.* An employer does not breach a legal duty to an at-will employee simply by terminating her, even if such termination is without cause. *Id.*

As this court has stated, *supra*, the only acts which occurred within 180-days of the Notice of Claim were the November 16, 2011 e-mail from Mr. Harvey informing employees that Cruz was "on leave pending an investigation" and "not allowed in D-3 offices"; and Plaintiff's alleged constructive discharge on November 16, 2011 when she resigned. The court has determined, as a matter of law, that Fuller was not constructively discharged. The November 16, 2011 e-mail does not support a claim of negligent infliction of emotional distress, and certainly the e-mail sent by Mr. Harvey does not support such claim against Mr. Atencio.

Defendants also argued that Atencio had immunity from the tort claim Count VI by virtue of Idaho Code § 6-904, which provides in pertinent part: "A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity

or employee thereof, whether or not the discretion be abused.” I.C. § 6-904(1). It appears that this section could foreclose an emotional distress claim based on Fuller’s claim that IDOC should have exercised its discretion to provide her paid administrative leave. There has been no evidence produced of “malice or criminal intent” on the part of Atencio.⁴ However, Plaintiff argues that Atencio’s decisions were routine operational decisions not entitled to immunity. Defendants have presented valid argument that Count VI is time-barred and that I.C. § 6-904 provides immunity. However, the court has, for the purposes of these Motions, resolved those close questions in favor of Plaintiff, and proceeded to the merits of the claims. The court has addressed the legal sufficiency of this claim and Defendants’ Motion for Summary Judgment on Count VI is **GRANTED**.

E. Plaintiff’s Motion for Partial Summary Judgment

For the reasons stated, *supra*, in granting Defendant’s Motion for Summary Judgment on Counts I and II, Plaintiff’s Motion is **DENIED**.

⁴ Idaho Code 6-903(5) provides “a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment and without malice or criminal intent.”

F. Motions to Strike

Defendants have filed a Motion to Strike (ECF No. 56) portions of the Affidavits of Aleshea Boals, Kim Harvey, and Patty Booth. Defendants contend the affidavits contain inadmissible hearsay and statements that are speculative, conclusory, and/or about which the affiant lacks personal knowledge. The court has reviewed the affidavits and given them their appropriate evidentiary weight, if any. The Affidavits need not be stricken from the record and the Motion is **DENIED**.

Plaintiff has filed a Motion to Strike the affidavits of Catherine Gates and Mark Kubinski. (ECF No. 57). As to Ms. Gates, Plaintiff argues that she was not disclosed on Defendants' witness list and therefore cannot offer an affidavit. However, Plaintiff admits that she identified Ms. Gates in Interrogatory responses as someone Mr. Cruz allegedly harassed. Defendants point out that Ms. Gates was listed on Plaintiff's initial witness list, but removed when Plaintiff filed an amended list. Mr. Kubinski is an attorney in the Idaho Attorney General's Office, and Plaintiff complains he was not earlier disclosed. Mr. Kubinski's affidavit offers no substantive testimony about the facts at issue but merely states that the IDOC has adopted certain workplace policies. There is no prejudice to Plaintiff. In fact Plaintiff states, "the subject matter of Mr. Kubinski's affidavit, Defendant's relevant policies, is not a newly discovered issue." (ECF No. 57-1, p. 4). Plaintiff's Motion to Strike is **DENIED**.

Plaintiff filed a Second Motion to Strike (ECF No. 71) the affidavit of Ms. Dickinson (ECF No. 55-4) that Defendants submitted with their summary judgment response. Plaintiff states that “Ms. Dickinson presents testimony including purportedly sending information to Ms. Fuller regarding disability benefits.” Ms. Dickinson’s testimony concerning the mailing of a disability claim form to Fuller on October 12, 2011 is not material to the facts at issue and has not affected the court’s judgment herein. The Motion to Strike is **DENIED**.

IT IS HEREBY ORDERED:

1. Defendants’ Motion for Summary Judgment (ECF No. 39) is **GRANTED**.

2. Plaintiff’s Motion for Partial Summary Judgment (ECF No. 40) is **DENIED**.

3. Plaintiff’s Motions to Strike (ECF No. 57 & 71) are **DENIED**.

4. Defendant’s Motion to Strike (ECF No. 56) is **DENIED**.

The Clerk is directed to enter Judgment in favor of Defendants dismissing the Complaint and the claims therein with prejudice.

IT IS SO ORDERED. The Clerk shall file this Order, enter Judgment in favor of Defendants as directed herein, furnish copies to counsel, and close this file.

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Dated this 2nd day of December, 2014.

s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED
STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CYNTHIA FULLER, Plaintiff-Appellant, v. IDAHO DEPARTMENT OF CORRECTIONS; et al., Defendants-Appellees.	No. 14-36110 D.C. No. 1:13-cv-00035-JLQ District of Idaho, Boise ORDER (Filed Oct. 5, 2017)
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Before: GRABER, IKUTA, and HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Ikuta voted to grant the petition.

Judges Graber and Hurwitz voted to deny the petition for rehearing en banc. Judge Ikuta voted to grant the petition.

The full court has been advised of the petition for rehearing or rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc, Dkt. 45, is **DENIED**.
