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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MERCY AMBAT, et al.,

No. C 07-03622 SI

Plaintiffs,

**ORDER DENYING PLAINTIFFS’
MOTION FOR RECONSIDERATION OF
ORDER GRANTING SUMMARY
JUDGMENT IN DEFENDANT’S FAVOR
ON CLAIMS OF GENDER
DISCRIMINATION**

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

Now before the Court is plaintiffs’ motion for reconsideration of the Court’s February 17, 2010 order granting defendant’s motion for summary judgment and denying plaintiffs’ motion for summary judgment on plaintiffs’ claims of gender discrimination. Having considered the papers submitted, and for good cause shown, the Court hereby DENIES plaintiffs’ motion for reconsideration.

BACKGROUND

Plaintiffs in this action are a group of male and female sheriff’s deputies employed by the San Francisco Sheriff’s Department. Plaintiffs filed this action on July 13, 2007, shortly after the Sheriff instituted a policy of placing only female deputies in the female inmate housing units of County Jail #8 (“CJ8”), alleging that the new staffing policy (“the Policy”) constituted gender discrimination in violation of Title VII and the California Fair Employment and Housing Act (“FEHA”).¹

On February 17, 2010, the Court granted summary judgment in defendant’s favor on the gender discrimination claims. *See* Feb. 17 Order at *13-14 (Docket No. 272). The factual background

¹ Some of the plaintiffs also stated claims for retaliation. Those claims are not at issue in the present motion.

1 with respect to an employee’s compensation or in the terms, conditions, or privileges of employment,
2 or to “limit, segregate, or classify” on the basis of sex in any way that deprives an employee of
3 employment opportunities or adversely affects his or her employment status. 42 U.S.C. § 2000e-2(a)(1)
4 & (2); Cal. Gov. Code § 12940(a). A statutory defense to liability exists under both Title VII and
5 FEHA, however, when an employee’s sex qualifies as a BFOQ that is “reasonably necessary to the
6 normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e); Cal. Gov. Code §
7 12940.

8 “As its language indicates, the BFOQ is an extremely narrow exception to the general
9 prohibition of discrimination on the basis of sex that may be invoked only when the *essence* of the
10 business operation would be undermined by hiring individuals of both sexes.” *Breiner*, No. 09-15568,
11 slip op. at 9685 (original emphasis) (quotation marks and citations omitted); *see also Dothard v.*
12 *Rawlinson*, 433 U.S. 321, 333 (1977). In the correctional context, the “essence” of the business includes
13 “the security of the prison, the safety of inmates, and the protection of the privacy rights of inmates.”
14 *Everson v. Mich. Dep’t of Corr.*, 391 F.3d 737, 753 (6th Cir. 2004). The employer must also
15 demonstrate that the qualification is directly related to an employee’s ability to do the job and is
16 reasonably necessary – not “merely reasonable or convenient” – to ensure continued operation of the
17 business. *Id.* at 748. The employer may prove reasonable necessity by showing “that sex is a legitimate
18 proxy for the qualification because (a) it has a substantial basis for believing that all or nearly all men
19 lack the qualification, or (b) it is impossible or highly impractical to insure by individual testing that its
20 employees will have the necessary qualifications for the job.” *Breiner*, No. 09-15568, slip op. at 9685
21 (citation and alterations omitted). Finally, the employer must show that its interests could not have been
22 achieved through a viable non-discriminatory alternative. *Everson*, 391 F.3d at 749; *Robino v. Iranon*,
23 145 F.3d 1109, 1111 (9th Cir. 1998).

24
25 **II. Background on *Breiner***

26 The plaintiffs in *Breiner* were four male correctional officers employed by the Nevada
27 Department of Corrections (“NDOC”). NDOC learned in 2003 that an inmate at the Southern Nevada
28 Women’s Correctional Facility (“SNWCF”) had become pregnant as a result of a sexual encounter with

1 a male guard. *Breiner*, No. 09-15568, slip op. at 9676. The incident spurred an investigation into
2 conditions at SNWCF, and NDOC learned that, as a result of lax management by the Corrections
3 Corporation of America (“CCA”), the private corporation running the facility under contract with
4 NDOC, the facility was plagued by sexual and other improper relationships between female inmates and
5 male front-line prison staff. *Id.* These revelations led NDOC to terminate its contract with CCA and
6 resume direct control of the facility. At that time, NDOC also implemented two gender-based staffing
7 policies, which required (1) that seventy percent of the front-line prison guard positions must be filled
8 by women, and (2) that SNWCF’s three correctional lieutenant supervisor positions must be filled by
9 women. *Id.* at 9676-77.

10 In their lawsuit against NDOC, the plaintiffs challenged only the second of the two staffing
11 policies listed above, alleging that the restriction on the correctional lieutenant positions unlawfully
12 limited their employment and promotional opportunities on the basis of their gender. *Id.* at 9677.
13 NDOC moved for summary judgment and the district court granted the motion, finding both that the
14 gender limitation had only a de minimis impact and that NDOC had carried its burden of proving that
15 gender constituted a BFOQ for the correctional lieutenant positions. The Ninth Circuit reversed on both
16 grounds. *Id.* at 9696-97. In finding that NDOC had failed to prove that gender was a BFOQ for the
17 correctional lieutenant positions, the Ninth Circuit rejected each of the three justifications advanced by
18 NDOC: (1) that male correctional lieutenants were more likely to condone sexual abuse by inferior
19 officers; (2) that male lieutenants were themselves likely to sexually abuse female inmates; and (3) that
20 female lieutenants had “an innate ability to manage women [and] understand some of the emotional
21 outbreaks” and were “more patient [and] . . . more maternal.” *Id.* at 9686-88.

22 First, with respect to leadership, the Ninth Circuit pointed out that NDOC had resumed control
23 of the facility precisely as a result of prior mismanagement, and could not simply presume from the
24 leadership problems present under CCA that all male supervisors would turn a blind eye to sexual abuse
25 of female inmates by their subordinates. *Id.* at 9692, 9694. Second, the court held that NDOC could
26 not support the discriminatory policy by citing the potential for sexual abuse of female inmates by male
27 lieutenants themselves, absent any evidence of even a single such incident. The court noted that
28 although there was at least one documented incidence of abuse by a male guard, NDOC left a significant

1 percentage of the front-line positions open to males. *Id.* at 9692-93. Third, the Ninth Circuit rejected
2 NDOC’s attempt to justify the discriminatory policy with “specious gender stereotypes” regarding
3 women’s superior ability to understand and manage female inmates. *Id.* as 9695. In holding that NDOC
4 had failed to establish that gender was a BFOQ for the correctional lieutenant positions, the court also
5 noted that NDOC had failed to refute the viability of any non-discriminatory alternatives for achieving
6 its goals. *Id.* at 9694-96.

7 The Court finds that the facts of the *Breiner* case are distinguishable from the facts of this case
8 in several key respects. First, the staffing decision in *Breiner* was implemented immediately after a
9 management shift which was carried out precisely in order to address pervasive mismanagement issues,
10 before the positive effects of the management change had been felt, and without adequate consideration
11 of any non-discriminatory alternatives. By contrast, this case involves a continuity of management and
12 a staffing policy that was developed and implemented by correctional officials well-acquainted with the
13 facility at issue and with potential alternative approaches. Second, *Breiner* involved a gender restriction
14 on hiring for supervisory positions, while this case involves a restriction on hiring for front-line guards
15 who are in direct contact with female inmates. Third, the correctional officials in *Breiner* relied largely
16 on gender stereotypes and unproven gender-based assumptions, while the officials who implemented
17 the policy at issue in this case relied on the actual history of misconduct in the San Francisco jails. In
18 light of these important distinctions, the Court finds that *Breiner* does not warrant reconsideration of
19 the Court’s order granting summary judgment in defendant’s favor.

20
21 **III. Application of BFOQ Defense**

22 **A. Essence of the Business**

23 In its order granting summary judgment to defendant, the Court first found that defendant had
24 proved that the Policy was implemented in order to protect essential correctional interests, including the
25 safety, security, privacy, and rehabilitation of female inmates and the maintenance of efficiency and
26 morale among deputies. *See* Feb. 17, 2010 Order at *5-7. With respect to inmate protection concerns,
27 the Court cited the history of sexual misconduct and other inappropriate relationships between male
28 deputies and female inmates, which included two civil rights lawsuits brought by female inmates as well

1 as twelve inmate complaints during the five years preceding the implementation of the Policy, some of
2 which resulted in deputies resigning or being disciplined, and one of which was referred to the District
3 Attorney for prosecution. *Id.* at *5-6 (citing Flewellen Decl. ¶ 16; Hennessey Decl. ¶ 9; Ofierski Decl.
4 Ex. A & B). The Court also observed that the Policy aided in protecting female inmates’ privacy
5 interests by ensuring that male deputies could not view them while they were showering, using the toilet,
6 or changing clothes, an issue of particular concern due to the circular structure of CJ8. *Id.* at *7 (citing
7 Dempsey Decl. ¶¶ 12, 27). With respect to maintenance of deputy morale and efficiency, the Court
8 cited evidence that male deputies’ reluctance to supervise female inmates closely due to a fear of false
9 misconduct allegations had led to increased possession of contraband by female inmates, and to
10 resentment among female deputies who were forced to shoulder a heavier workload. *Id.* at *6 (citing
11 Hennessey Decl. ¶ 12; Dempsey Decl. ¶¶ 22-23).

12 These justifications continue to meet defendant’s burden of proving that the Policy was designed
13 to protect interests that go to the essence of the Sheriff’s business. The record does not support
14 plaintiffs’ assertion that the Policy was developed simply because the Sheriff believed that “all men are
15 predatory and cannot be trusted with female inmates.” Rather, as described above, defendant presented
16 evidence demonstrating that the Policy was designed to address fundamental and ongoing problems in
17 the San Francisco jails.³ This evidence distinguishes this case from *Breiner*, in which there was no
18 evidence that NDOC’s discriminatory policy aided it in protecting any of the essential interests claimed
19 by NDOC officials.

20
21 **B. Reasonable Necessity**

22 In its summary judgment order, the Court also found that defendant had proved that the Policy
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24 ³ Plaintiffs find fault with the Policy because it does not focus on other forms of “statistically”
25 likely sexual conduct, such as “male guard and male inmate, female guard and female inmate, and
26 female guard and male inmate.” However, plaintiffs provides no evidence that these potential forms
27 of violations ever occurred or were a serious problem in the San Francisco jails. The Undersheriff could
28 not recall any instance where the Department sustained an allegation of same-sex sexual misconduct,
nor any complaints by male inmates against female deputies. Dempsey Decl. ¶ 24. While the
possibilities outlined by plaintiffs might be of academic interest, the Sheriff and his staff were charged
with the management of a real-world facility that faced concrete problems. The Sheriff cannot be
expected to prioritize non-existent issues in formulating his policies.

1 was reasonably necessary to ensure the continued operation of the jails and to address the specific
2 problems identified by the Sheriff. Feb. 17, 2010 Order at *11-12. The Court noted first that the Policy
3 was directly aimed at solving the potential problems created by the circular, “direct supervision”
4 structure of the female housing units. *Id.* at *11. The Court also cited the security concerns associated
5 with male deputies’ fear of false misconduct allegations and their resulting reluctance to supervise
6 female inmates closely and thoroughly. *Id.* at *11-12.

7 *Breiner* requires correctional officials “to identify a concrete, logical basis for concluding that
8 gender restrictions are ‘reasonably necessary.’” *Breiner*, No. 09-15568, slip op. at 9690. “[E]ven in
9 the unique context of prison employment, administrators seeking to justify a BFOQ must show a high
10 correlation between sex and ability to perform job functions.” *Id.* at 9691 (quotation marks and citation
11 omitted). In *Breiner*, the Ninth Circuit found that there was no such correlation where NDOC’s
12 argument was essentially “that because the supervisors employed by CCA were male and had failed to
13 prevent sexual abuse, NDOC was entitled to conclude that men as a class were incapable of adequately
14 supervising front line staff in female prisons.” *Id.* at 9692. The Court found that CCA’s prior
15 mismanagement did not give NDOC the unchecked ability to experiment with discriminatory staffing
16 policies, absent any evidence that the past problems were likely to continue and that gender restrictions
17 were necessary to curb these problems. *Id.* The Ninth Circuit also found that NDOC could not show
18 a “high correlation” between sex and the ability to perform the correctional lieutenant position by
19 relying on gender-based stereotypes. *Id.* at 9688, 9695.

20 Unlike the policy rejected in *Breiner*, the Policy at issue in this case is devoid of baseless
21 assumptions regarding the recurrence of past problems and of reliance on stereotypes of male or female
22 behavior. The Sheriff did not attempt to defend the Policy by simply arguing that all male deputies were
23 likely to sexually abuse female inmates. Rather, the Sheriff cited concrete examples of the security,
24 privacy, and morale concerns created by male deputies’ presence within CJ8. With respect to inmate
25 security and safety, the Court has already pointed to evidence of the numerous complaints and incidents
26 of sexual misconduct by male deputies which occurred within the five years prior to the implementation
27 of the Policy. The Sheriff made multiple attempts to resolve these problems – including through
28 investigation, discipline, termination, and criminal referral – before formulating the Policy. With

1 respect to privacy, Undersheriff Dempsey noted that Sheriff’s Department policy requires male deputies
2 to announce their presence before entering a female housing unit, while female deputies face no such
3 restriction. Dempsey Decl. ¶ 25. Undersheriff Dempsey stated that female deputies therefore “have
4 additional opportunities to observe behavior that inmates attempt to hide, which increases safety for
5 everybody.” *Id.* Finally, with respect to deputy morale, defendant presented evidence that female
6 deputies were unwilling to report their male colleagues for the poor performance occasioned by their
7 reluctance to work closely with female inmates. Dempsey Depo., Murray Decl. Ex. F, at 192:5-7.

8 These practical considerations distinguish the Policy at issue in this case from the poorly-
9 reasoned policy rejected by the Ninth Circuit in *Breiner*.

10
11 **C. Consideration of Alternatives**

12 In granting summary judgment in favor of defendant, the Court found that the Sheriff had
13 considered and rejected three non-discriminatory alternatives before enacting the Policy. First, the
14 Sheriff concluded that there was no reliable method of testing or screening male deputies to discover
15 those who might engage in sexual misconduct. Second, the Sheriff determined that installing additional
16 security cameras would be cost-prohibitive. Third, the Sheriff determined that additional training would
17 be ineffective, as all deputies were already taught that personal relationships of any kind between
18 deputies and inmates were forbidden. Feb. 17, 2010 Order at *12 (citing Hennessey Decl. ¶ 16). The
19 Court found that each of the other alternatives suggested by plaintiffs – namely requiring further
20 training, installing rotating cameras to provide more coverage of the female pods, and installing
21 improved cell doors and inmate restraints – would not address the problems targeted by the Policy. *Id.*
22 at *12-13. The Court noted in particular that plaintiffs’ own expert testified at his deposition that
23 additional training would “not prevent and not discourage all staff from engaging in sexual misconduct.”
24 *Id.* at *13 (citing Marquart Depo., Ofierski Decl. Ex. FF, at 90:6-9).

25 In *Breiner*, the Ninth Circuit found that NDOC had failed to show that it considered any
26 alternative, non-discriminatory measures before placing the gender restriction on its correctional
27 lieutenant positions. The court stressed that NDOC could not be absolved of the fundamental
28 responsibility to supervise its staff and listed the multiple resources that could be deployed to control

1 employee behavior, including “background checks, prompt investigation of suspected misconduct, . .
2 . . severe discipline for infractions,” and training. *Breiner*, No. 09-15568, slip op. at 9694.
3 Unfortunately, in this case, many of these measures have already been deployed by the Sheriff with little
4 success, or the Sheriff has advanced cogent arguments explaining why they will be ineffective. Thus,
5 there is no basis for plaintiffs’ contention that the Sheriff made no effort to identify alternative measures
6 before implementing the Policy. Additionally, as discussed below, the Sheriff’s extensive experience
7 in running the female housing units in the San Francisco jails lends credence to his evaluation of
8 reasonable alternatives. By contrast, in *Breiner*, NDOC lacked a history of operating SNWCF, and
9 under CCA, there was virtually no record of investigation and discipline of employee misconduct.
10

11
12 **D. Deference**

13 The Court previously found that the Sheriff’s policy decisions were entitled to “some deference”
14 based on the Sheriff’s and Undersheriff’s significant expertise and their consultation with senior staff.
15 Feb. 17, 2010 Order at *9-10. The Court emphasized that the Court is “not charged with determining
16 whether the Policy was the *best* means of addressing the problems the Sheriff and Undersheriff were
17 seeking to remedy,” but rather with “determining whether the Sheriff’s actions were lawful.” *Id.* at *10
18 (original emphasis). In *Breiner*, the illogical nature of NDOC’s policy, the lack of any direct
19 management history of SNWCF, and the speculative and stereotyped assumptions that pervaded the
20 policy made it all but impossible for the Ninth Circuit to defer to NDOC’s judgment. *Breiner*, No. 09-
21 15568, slip op. at 9692-95. In the present case, by contrast, the Sheriff based the Policy on the practical
22 considerations discussed above, and after months of deliberations with the Undersheriff and other senior
23 staff. As stated in the summary judgment order, the Court is unwilling to substitute its judgment for that
24 of these professional administrators.

25 In view of the deference due to the Sheriff’s policy decision, the evidence showing that the
26 restrictions set forth in the Policy were reasonably necessary to carry out essential correctional interests,
27 and the lack of viable non-discriminatory alternatives, the Court must conclude that reconsideration of
28 the grant of summary judgment in defendant’s favor is not warranted.


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CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES plaintiffs' motion for reconsideration of the Court's prior grant of summary judgment to the defendant. (Docket No. 301).

IT IS SO ORDERED.

Dated: August 25, 2010



SUSAN ILLSTON
United States District Judge