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August 24, 2017

Clerk of the Court
Washtenaw County Circuit Court
101 E. Huron St.
PO Box 8645
Ann Arbor, MI 48107-8645

Re: Nowacki v MDOC
Case No. 11-852-CD

Dear Clerk:

Enclosed for filing with regard to the above captioned matter please find:

- Check No. 1328 for $20.00 motion fee
- Plaintiff's Motion for Partial Summary Disposition Pursuant to MCR 2.116(C)(10) (No Issue of Material Fact)
- Judge's copy

I have not included a praecipe or a notice of hearing per the court's August 7, 2017 Order that the motion will be decided without oral argument.

Thank you for your assistance.

Sincerely,

FETT & FIELDS, P.C.

Maureen K. Proffitt
Paralegal

Enclosure

cc: Jeanmarie Miller
Glen N. Lenhoff

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STATE OF MICHIGAN
WASHTENAW COUNTY CIRCUIT COURT

TOM NOWACKI,

Plaintiff,

v

Case No. 11-852-CD
Hon. David S. Swartz

STATE OF MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

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Motion for Partial Summary Disposition Pursuant to MCR 2.116(C)(10) (No Issue of Material Fact)

Plaintiff, through counsel, moves for partial summary disposition pursuant to MCR 2.116(C)(10) as follows:

Overview

1. This Court should determine that Defendant's practice, begun in 2009, of requiring that only female employees fill the vast majority of *non-housing* corrections officer ("CO") positions at its female prison violates the Elliott-Larsen Civil Rights Act ("ELCRA") because admissions by Defendant's officials prove that Defendant had no

legally justified reason for the practice; rather, it decided to employ females exclusively at its new female prison, the Women's Huron Valley Facility ("WHV"), based on the 2008 *Neal v MDOC* class action verdicts for female inmates abused by male CO abuse between 1991 and 1999[1] (**Ex. 2**: Warren Dep. at 55-56; **Ex. 3**: Affidavits reciting admissions by MDOC officials). The officials made these decisions even though the undisputed evidence showed that measures developed in 2000, and approved by the Sixth Circuit in 2004, eliminated male CO abuse of female inmates in 2006 before WHV even opened in 2009 (**Ex. 4**: chart showing incidence of sexual misconduct and supporting MDOC 05-08-13 Interrogatory Answers).

2. The Equal Employment Opportunity Commission has determined that the practice also violates female COs' rights under Title VII because Defendant is using "too broad of an application of the BFOQ ... without a clear analysis and consideration of non-gender specific alternatives;" the Department of Justice has filed suit, *United States of American v State of Michigan and Michigan Department of Corrections*, Civil No. 2:16-cv-12146, to invalidate the BFOQs; The consequence for women of Defendant's overbroad use of BFOQs is that they are required to work dangerously high amounts of overtime and are precluded from transferring to other facilities.[2]

The Ruse

3. Defendant assigns females only to the vast majority of *non-housing* positions at the Women's Huron Valley Correctional Facility (the "WHV") because it claims that gender is a Bona Fide Occupational Qualification ("BFOQ") for such positions.

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[1] **Ex. 1**: *Neal v MDOC*, 2009 WL 187813, *1 (Mich App)
[2] *USA v State of Michigan and MDOC*, p. 10, para. 34-35

4. This pretextual explanation for the BFOQs is based on the ruse of inserting "strip searches" or "pat downs" as duties into the job descriptions for the various *non-housing* position job descriptions; affiants from COs to Captains have testified that strip searches and pat downs are not bona fide requirements of the non-housing positions (**Ex. 5**: Strip search affidavits); nonetheless, Defendant justifies the vast majority of the BFOQs by reference to the strip search or pat down requirements (**Ex. 2**: Warren at 51-52; **Ex. 16**: Finch Affidavit).

History

5. In 2000 Defendant designated many *housing* unit positions at three other female prisons as *"BFOQ–female only"* (WHV was not yet in existence); this lawsuit is about *non-housing* positions at Defendant's only remaining female prison, WHV, which opened in 2009; the housing/non-housing distinction is significant because female prisoners can be in a state of undress in the housing unit, whereas they are not in the cafeteria, classroom, gym or other *non-housing* units where privacy is not an issue.

6. The 2000 BFOQs are relevant only because Defendant attempts to justify its BFOQ designations for *non-housing* positions at a different facility (WHV), nine years later, based on a 2004 Sixth Circuit case that upheld the 2000 BFOQ designations for *housing* positions based largely on inmate sexual abuse during 1991-1999 at 3 *other* prisons; *Everson v MDOC,* 391 F3d 737, 751 (6th Cir 2004) (Defendant's designation of these *housing* positions as *"BFOQ-female only"* upheld based on MDOC's "**considered** decision that a BFOQ was necessary to address the grave problem of **sexual abuse of female inmates**.") (emphasis added) (Federal cases attached in alphabetical order as **Appendix A**)

7. The *Everson* court concluded that MDOC met its burden of showing that its housing BFOQ designations were "a product of a **reasoned decision-making process based on available information and experience**" because it relied on (a) studies conducted pursuant to settlement agreements, (b) a report it commissioned (the Mahoney Report), (c) consultations with MDOC staff, (d) discussions with prison officials from other states; and (e) an array of materials, including expert reports from other lawsuits, a summary of disciplinary action taken against MDOC employees for sexual abuse, data on practices in female prisons in other states, job descriptions for positions in its housing units, applications for a BFOQ for officer positions at a women's prison prepared by Wisconsin corrections officials, and an internal study known as the "GSAC study, *id.* at 751-752. Defendant has no such factual basis for the 2009 BFOQs, none whatsoever. *See Ambat v City and County of San Francisco*, 757 F3d 1017, 1026-1027 (9th Cir 2014).

8. The designation in 2000 of positions in Defendant's *housing* units as *"BFOQ-female only"* had their desired effect – sexual abuse of female inmates drastically declined so that, as a practical matter, it is no longer an issue and Defendant, who has the burden of proof, has provided no evidence to the contrary. **Ex. 4**: chart showing incidence of sexual misconduct and supporting MDOC 05-08-13 Interrogatory Answers.

9. In fact, the evidence shows that to the extent abuse of prisoners occurs, it is perpetrated by the female COs. *Id.*

10. Plaintiff does ***not*** challenge the 2000 *housing* unit position designations.

Everson **– The Red Herring**

11. Plaintiff does challenge April 2009 *"BFOQ-female only"* designations for *non-housing* positions at WHV because gender is **not** a BFOQ for those positions.

12. Nonetheless, Defendant continues to assert that the 2004 *Everson* case applicable to *housing* positions at different facilities than WHV and based on abuse occurring from 1991 to 1999 (and rectified by the 2000 measures) justifies its 2009 BFOQs for *non-housing* positions at WHV. *Everson, supra* at 761 ("Nor do we hold that gender constitutes a BFOQ for positions ... beyond the approximately 250 positions we have discussed.")

Discriminatory Impetus for BFOQs

13. This lawsuit probably would never have been necessary if Defendant had not sustained the 2008 verdicts in the *Neal* class action; *Neal* was based on sexual abuse between 1991 and 1999 perpetrated by male officers at three separate women's prisons that were closed in 2008-2009 when Defendant consolidated its female inmate population at the WHV; note: the abuse ended in 2006. **Ex. 4**: chart showing incidence of sexual misconduct and supporting MDOC 05-08-13 Interrogatory Answers.

14. It bears emphasizing that there has never been a problem of male officers sexually abusing female inmates at the WHV; in fact, more claims have been asserted against female officers (**Ex. 6**: Defendant's Response to Plaintiff's Request to Admit Dated April 9, 2013 and **Ex. 4**: chart showing incidence of sexual misconduct and supporting MDOC 05-08-13 Interrogatory Answers).

15. Warden Millicent Warren testified that former MDOC Director Patricia Caruso, in response to the *Neal* verdicts, directed that "to avoid future allegations of that nature, a comment was made all staff should be female working with female prisoners ... I was told [by Deputy Director Straub and Regional Prison Administrator Bruce Curtis] it was from Pat Caruso." (**Ex. 2**: Warren at 55-56)

16. MDOC's stated intention to exclude male officers from positions in female prisons is confirmed by the following affidavits collectively attached as **Ex. 3**:

a. Corrections Officer ("CO") Ralph Golidy states that (1) Warren stated that "we are going to do some things to motivate male corrections officers to leave" or words to that effect multiple times and (2) Deputy Warden Lucille Evans also stated that "we are doing some things to motivate the male corrections officers to leave" the facility; Golidy was the union president for the WHV MCO chapter and had regular interaction with Warren;

b. CO Gomoluch, a former union steward, states that Warren stated in October 2010 that "when all these males leave [referring to WHV male COs] there will be no more males here;"

c. CO Stennis George states that Deputy Director Straub stated at a labor/management meeting that the Department would not have any more males work at the women's prisons and the department intended to get rid of all males in the female prisons; and

d. CO Shirley McClain states that Warden Warren told her academy class in 2012 that "It is our intention to make WHV an all-female corrections facility."

17. Defendant brazenly announced its intention to exclude all males from its female prisons in October 2008, shortly before WHV opened in May 2009 (**Ex. 7**: Michigan Citizen article in which MDOC Public Information Officer Russ Marlan cited "the termination of male guards in female prisons" as a response to the *Neal* litigation.)

Law and Application

18. "...[T]he BFOQ defense is written narrowly, and is to be read narrowly" (citations omitted); the **burden is on an employer** to establish a BFOQ defense." (citations omitted) (emphasis added), *Everson* at 748.

19. Institutional embarrassment occasioned by "very high profile" media coverage does not justify BFOQ gender discrimination. *Breiner v Nevada Dep't of Corrections*, 610 F3d 1202, 1205, 1216 (9th Cir 2010)

No Basis in Fact

20. "It is impermissible ... to refuse to hire an individual woman or man on the basis of stereotyped characterization of the sexes," *id.* and an employer must have a **"basis in fact,"** *id.* at 355, for its belief that gender discrimination is "reasonably necessary" --not merely convenient – to the normal operation of its business." (citations omitted), *Everson* at 748 (emphasis added).

21. Deputy Director Gary Manns, who was formerly MDOC's Personnel Director when the first wave of BFOQ applications were submitted and who signed the request for the 2009 application letter, testified that BFOQ designations were ***not*** justified for the following *non-housing* positions: food service officer, yard control officer, yard rover officer, health care officer, school officer, gate control officer, gym officer and industries officer (**Ex. 8**: Manns at 45, 49-51, 54-55); in other words, the deputy director conceded that there is no basis in fact for the request made in his March 27, 2009 letter which he cannot recall signing! *Id.* at 35-36. See also **Ex. 9**: Curtis at 31-32. Compare with "the basis in fact" cited in *Everson* (see para. 7, supra) and *Ambat, supra*, 757 F3d at 1026-1027 (Attached and highlighted as **Appendix A**).

22. Moreover, it is largely undisputed that males had performed the non-housing BFOQ position for years, including those positions predicated on the newly inserted strip search/pat down duties (**Ex. 5**: Strip search affidavits; **Ex. 29**: Plaintiff's Affidavit; **Ex. 16**: Finch Affidavit). *White v Dep't of Correctional Services*, 814 F Supp 2d 374, 385-386 (SD NY 2011) (Regular performance of BFOQ position by female COs in the past created issue of fact regarding basis in fact requirement) (**Appendix A**)

23. As detailed above, the April 2009 BFOQ decisions in this case do not meet this standard; moreover, embarrassing verdicts based on conduct that was addressed and rectified years prior is insufficient.

Not the Product of Reasoned Decision-Making

24. The "basis in fact" requirement also requires that "the employer must introduce sufficient evidence to prove that the administrator's judgment – that a particular sex classification is reasonably necessary to the normal operation of the institution – is **the product of a reasoned decision-making process**, based on available information and experience." *Henry v Milwaukee County,* 539 F3d 573, 580-581 (7th Cir 2008) (**Appendix A**) citing *Torres v Wis Dept of Health & Social Services,* 838 F2d 1523, 1532 (7th Cir 1988) (*en banc*) and *Ambat, supra* at 1026-1027 (**Appendix A**)

25. Partial summary disposition is also appropriate because it is undisputed that MDOC's knee-jerk decision to make the *non-housing* unit positions *"BFOQ-female only"* in the wake of the embarrassing *Neal* verdicts was *not* "a product of a reasoned decision-making process based on available information and experience;" rather the proofs show no process whatsoever; consider:

a. MDOC, in its response to interrogatories,[3] justifies its 2009 BFOQs as follows:

* * * *

a. All BFOQ'd positions at WHV were put into place because of necessity and to ensure that the privacy and individual rights of the female inmates were not violated, **pursuant to Everson v MDOC, 391F.3d737, 761-762 (6th**

[3] **Ex. 10**: Defendant's Response to Plaintiff's Request for Admissions and Interrogatories Dated June 13, 2012, Response to No. 6

> **Cir.2004). The BFOQ's were put into place after examining each position in light of the settlement agreement reached in the Neal litigation;**[4]
>
> * * * *

Moreover, Warden Millicent Warren, who has been the WHV Warden since 2008, claims to know next to nothing about the process that led to the additional BFOQ designations in 2009 (**Ex. 2:** Warren at 207-209), Deputy Director Gary Manns cannot recall ever signing a letter seeking authorization on March 27, 2009 to create additional BFOQ positions (**Ex. 8**: Manns at 35-36), Deputy Warden Lucille Evans, identified by Warren as a person with knowledge of the process, knows painfully little (**Ex. 12**: Evans at 15-23; 62-63), Regional Prison Administrator Curtis, also identified by Warren as a person with knowledge of the process, had no recollection of the process (**Ex. 9**: Curtis at 20-21); and Deputy Director Straub, also identified by Warren as a person with knowledge of the process, knows little more than Curtis (**Ex. 13**: Straub at 10, 32).

No Consideration of Reasonable Alternatives to Sex Discrimination

26. MDOC's Personnel Director Tony Lopez admitted that MDOC did not consider alternatives to the BFOQs (**Ex. 14**: Lopez at 32), and therefore MDOC cannot meet "the burden of establishing that no reasonable alternatives exist to discrimination on the basis of sex. *Reed,* 184 F3d at 600." *Everson* at 749; moreover, MDOC implicitly admitted that there has always been a reasonable alternative to the BFOQs – security cameras – when it eliminated many (if not most) of the BFOQs on March 22, 2016,[5]

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[4] This is impossible since the BFOQs were developed before **September 2008** and the *Neal* Settlement was signed on **July 15, 2009**. (**Ex. 2**: Warren at 6, 207-208; **Ex. 11:** *Neal* Settlement Agreement Signature Page)

[5] **Ex. 28**: Lopez 03-22-16 letter to Civil Service

supposedly because of security camera installation; security cameras have been considered a viable alternative to widespread use of BFOQs since at least 1999, *Westchester County Corrections, et al v County of Westchester*, 346 F Supp 2d 527 (SD NY 2004) (cameras in use in 1999); finally, the "team approach" to inmate supervision was successfully employed as an alternative to BFOQs; this entailed assigning only female employees to perform strip searches (**Ex. 5**: Strip search affidavits; **Ex. 29**: Plaintiff's Affidavit); the team approach has been recognized as a viable alternative to BFOQs for years. *Gunther v Iowa State Men's Reformatory*, 612 F2d 1079 (8th Cir 1980) (**Appendix A**), *White v Dep't of Correctional Services, supra* at 385-386 (SD NY 2011) (**Appendix A**)

27. Plaintiff is entitled to partial summary disposition because MDOC administrators, prompted by the *Neal* verdicts, sought to eliminate male COs from WHV by manipulating the non-housing job descriptions (by including strip search and pat down duties) and then falsely designating them BFOQ-female only.

28. Neither the verdicts, nor the abuse giving rise to them, justify the instant BFOQs because (a) the abuse occurred during the period 1991-1999 at different facilities before MDOC in 2000 successfully implemented remedial measures in the housing unit, including designating housing positions as BFOQ-female only and (b) the *Everson* court and MDOC's own expert limited the BFOQs to housing-type jobs (*Everson* at 752, 761 and **Ex. 19**: June 2000 Mahoney Report, p. 16).

29. The Court should also grant Plaintiff partial summary disposition of MDOC BFOQ affirmative defense since its officials' MRE 801 (D)(2)(d) admissions establish that:

a. There is no "basis in fact" for the belief that the *non-housing* BFOQs are reasonably necessary to the normal operation of the institution;

b. The BFOQs were not the "product of a reasoned decision-making process;" and

c. MDOC failed to consider "non-discriminatory alternatives" to the BFOQ designations.

30. Warren, Evans, Straub and Curtis admittedly know nothing about the process by which non-housing positions were designated BFOQ. Under long-standing precedent, their post hoc rationalizations for the BFOQs cannot justify classifications based on sex, or any other protected characteristic. *US v Virginia*, 518 US 515, 532-533 (1996) ("The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " *Ibid.* (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980)). **The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation**.") (emphasis added)

WHEREFORE, Plaintiff requests entry of partial summary disposition.

Respectfully submitted,

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Dated: August 24, 2017

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FETT AND FIELDS PC 04/14
805 E. MAIN
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8/24/2017

PAY TO THE ORDER OF Washtenaw County Circuit Court

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Washtenaw County Circuit Court

MEMO 11-852-CD motion fee in Nowacki v MDOC

AUTHORIZED SIGNATURE

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UBT - Cost 11100699	11-852-CD motion fee in Nowacki v MDOC	20.00

FETT AND FIELDS PC 1328

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