U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

IN THE MATTER OF:	)	
	)	
	)	
	)	
COMPLAINANT,	)	CHARGE NO. 440-2019-04268
	)	
AND	)	
	)	
Watseka Police Department[1],	)	
	)	
RESPONDENT.	)	

POSITION STATEMENT

City of Watseka Police Department (the "City"), by and through its attorney K. Austin Zimmer of DEL GALDO LAW GROUP, LLC as its position statement in response to Complainant's Charge provides as follows:

Complainant was hired as a probationary police officer with the City of Watseka Police Department on or about December 16, 2014 and completed her probationary period in April of 2015. See letter dated 4/22/15 attached as Exhibit A. Complainant resigned from her employment with the City of Watseka effective September 14, 2018. See resignation letter dated 8-31-18 as Exhibit B. Complainant's employment was governed by the Collective Bargaining Agreement ("CBA") between the City of Watseka. See CBA as Exhibit C.

Complainant cannot establish discrimination/hostile work environment based on her gender or any retaliation against Complainant for several reasons. First, the City is not liable for the acts of Chief Jeremy Douglas as Complainant did not suffer any tangible employment action and the City promptly took corrective action. Second, Complainant has failed to show severe and

[1] Complainant was employed by the City of Watseka.

pervasive conduct as to sufficiently prove a hostile work environment. Third, Complainant additionally does not demonstrate any adverse employment action was taken against her such that she was discriminated against because of her gender. Fourth, Complainant has not been retaliated against by the City. Lastly, any allegations that occurred outside of the 300 days from the filing of the Charge of Discrimination ("Charge") should not be considered.

I. No Establishment of Sexual Harassment/Hostile Work Environment/ Sexual Discrimination

a. Complainant fails to demonstrate Hostile Work Environment by an alleged Supervisor

Complainant claims that Chief Jeremy Douglas created a sexually hostile work environment. To the extent Plaintiff asserts that Chief Douglas was her supervisor, Complainant cannot establish her claims.[2]

Courts have framed a sexual harassment claim wherein a supervisor is alleged to be the harasser as quid pro quo harassment. Quid pro quo sexual harassment occurs "when tangible employment benefits are conditioned upon one's compliance with a harasser's sexual demands." *Urban v. Blossom Hill Health Centre, Inc.,* No. 97 C 5507, 2000 WL 1262937, at *9 (N.D. Ill. Aug. 31, 2000) citing *Brill v. Lante Corp.,* 119 F.3d 1266, 1276 (7th Cir.1997)). According to the EEOC Guidelines on sexual harassment:

> *Unwelcome* sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. (emphasis added)

[2] The City does not concede that Chief Douglas was Complainant's supervisor for purposes of Title VII.

The United State Supreme Court held in *Farragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) that "[i]n order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies ... [a]n employer is subject to vicarious liability to a victimized employee for an *actionable hostile environment* created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. (emphasis added); holding also adopted in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

i. <u>The supposed acts alleged by Chief Douglas, do not qualify as actionable hostile work environment for vicarious liability purposes</u>

In *Farragher*, the Court noted that "in order [for harassment] to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." 510 U.S. at 787. To determine whether an environment is sufficiently hostile or abusive, courts are directed to "[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.* The court recognized, that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." *Id.* citing *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 81 (1998). The Court also noted, that "simple teasing, ... offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Farragher*, 510 U.S. at 787-788.

Complainant alleges that Chief Douglas among other things, placed his hands inside her blouse, rubbed her shoulders, made comments about her wearing yoga pants and questioned her about with whom she may have been having sex. *See Charge*. The conduct alleged by Chief Douglas was not both subjectively and objectively offensive. *Bannon v. University of Chicago*, 503 F.3d 623, 629 (2007) (emphasis added).

The City's Police Department has a policy which prohibits discrimination and outlines a process to report any alleged harassment/discrimination. The relevant portion of the policy in effect during Complainant's employment provides:

> An employee must promptly report all harassment to his/her department supervisor unless the complaint involves the department supervisor. In that event, the employee must report the harassment to the next higher supervisor in the chain of command. In addition, all complaints of harassment must be reported personally to the Mayor. This double reporting requirement is intended to ensure the all complaints of harassment are handled properly. See p. 32 of Exhibit D.

On March 15, 2016, Complainant signed an acknowledgement that she received a copy of the policy and reviewed it. See acknowledgement as Exhibit E. Under the City's policy, because the allegation was made against the Chief of Police, Complainant was required to report the alleged harassment to the "next higher supervisor in the chain of command" and the Mayor. However, Complainant did not adhere to the anti-harassment policy. In fact, she did not report any supposed harassment to the Mayor until after she resigned. As will be detailed below, the City thereafter promptly conducted an investigation. As such, Complainant's response to the alleged harassment, or lack thereof, demonstrates that she did not find, nor could a reasonable jury find, her workplace subjectively and objectively offensive. See *Bannon*, 503 F.3d at 629 (the plaintiff's conduct in failing to report behavior of supervisor alleged to have continued for at least five years along with admission to socializing with her boss, would prevent a reasonable jury from finding that she subjectively viewed her work environment as hostile); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d

258, 262 (4th Cir.1996)(affirming judgment setting aside jury verdict in favor of employee where evidence revealed plaintiff did not notify harassing supervisor's boss and employer was not informed of the harassment before plaintiff quit); *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1014 (7th Cir. 1997)(concession that the plaintiff never complained to anyone about the harassment before she quit was critical and the employer will not be liable in such a case where it had no reason to know about it).

Even if Complainant could demonstrate that the alleged conduct was offensive, it would nevertheless be insufficient to establish a hostile work environment because Complainant cannot demonstrate that the harassment was severe or pervasive. In *Weiss v. Coca-Cola Bottling Co,* the defendant allegedly asked the plaintiff for dates, called her a "dumb blond," put his hand on her shoulder several times, placed "I love you"' signs in her work area and attempted to kiss her in a bar, and "may have twice attempted to kiss her in the office." The 7th Circuit found such relatively isolated incidents failed to meet the standard for actionable sexual harassment. 990 F.2d 333, 337 (7th Cir.1993). See also *Hilt-Dyson v. City of Chi.,* 282 F.3d 456, 463-464 (7th Cir. 2002)(holding that the plaintiff's allegations that her supervisor twice rubbed her back and stared at her chest during a uniform inspection while telling her to raise her arms and open her blazer were isolated incidents that, even when taken together, did not create a sufficient inference of a hostile work environment); *Adusumilli v. City of Chi.,* 164 F.3d 353, 361-362 (7th Cir. 1998)(holding that the plaintiff's complaints of teasing; comments about bananas, rubber bands, and low-neck tops; staring and attempts to make eye contact; and four isolated incidents where a co-worker briefly touched her arm, fingers, or buttocks did not constitute sexual harassment); *Baskerville v. Cullingan Int'l Co.,* 50 F.3d 428, 430-431 (7th Cir. 1995)(a jury verdict in the plaintiff's favor overturned where evidence of "vulgar," "coarse, and "boorish" behavior, spread over months was

insufficient; finding "[t]he concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women. It is not designed to purge the workplace of vulgarity."); *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 941 (7th Cir. 2007) ("occasional vulgar banter, tinged with sexual innuendo of coarse or boorish words generally does not create a work environment that a reasonable person would find intolerable); *Coffman v. Indianapolis Fire Dept.*, 578 F.3d 559 (7th Cir. 2009) (workplace harassment not severe and pervasive).

The conduct alleged to have occurred in this case is similarly insufficient to establish the elements of a hostile work environment. As the cases referenced above demonstrate, this is not sufficiently severe or pervasive as to make Complainant's work environment "hellish."

ii. No tangible employment action was taken against Complainant

As the Court in *Farragher* explained, vicarious liability by a supervisor requires an analysis of whether a tangible employment action was taken in order to determine the availability of an affirmative defense to the employer. 524 U.S. 775, 807 (1998). "When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence." *Id.* A tangible employment decision requires an official act of the enterprise, a company act. *Ellerth*, 524 U.S. at 762. Here, Complainant cannot establish a tangible employment action. In the Charge, Complainant contends "she was forced to leave her job." In other words, Complainant claims she was constructively discharged.

The working conditions for "constructive discharge must be even more egregious than the high standard for hostile work environment because ... an employee is expected to remain employed while seeking redress." *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1050 (7th Cir.2000). Where Complainant's work environment was not sufficiently hostile as discussed

above, she fails to demonstrate the higher standard for constructive discharge. Moreover, upon information and belief Complainant left her employment with the City to become a patrol officer for the Village of Rantoul, a larger police department. See website printout of Village of Rantoul's current police officers and minutes from board meeting of Village of Rantoul Board of Trustees held on September 11, 2018 as Exhibit F. Notably, Complainant's resignation with the City was effective September 14, 2018 and yet Complainant was sworn in as a police officer with the Village of Rantoul Police Department days prior, on September 11, 2018. Exhibit B & F. The facts contradict any constructive discharge. See *Komen v No. 112 North Shore School Dist.*, 2003 WL 21181609, Case No. 01 C 314, *2 (N.D. Ill. 2003) (summary judgment granted on constructive discharge in part because the plaintiff left her employment with the defendant because of an opportunity).

iii. The City took prompt and corrective action

In *Faragher v. City of Boca Raton,* the Supreme Court held that where there is no tangible employment action, an employer facing liability for a supervisor's act of sexual harassment may raise an affirmative defense to that liability by arguing that it took reasonable care to prevent and correct any sexually harassing behavior. 524 U.S. 775, 807, (1998). "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise … And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Id.*

As demonstrated above, the City had an anti-harassment policy in effect during the period of Complaint's employment. *Exhibit D.* Complainant did not follow the procedure in the policy.

In particular, Complainant alleges Chief Douglas was her harasser, yet she did not report the alleged harassment to his superior and also to the mayor at the time the harassment was supposedly occurring. This failure to "use the complaint procedure provided by [the City] will suffice to satisfy the employer's burden" to establish the second element of the affirmative defense as described above. Furthermore, the City expeditiously investigated the matter upon the Mayor's receipt of a complaint of harassment, which was made by Complainant after she resigned. After a thorough investigation, the City entered into an agreement with Chief Jeremy Douglas which included the following terms:

> Chief Douglas agreed to serve a fifteen-calendar day suspension. The basis for the suspension was alleged violations of Rule 5-1, Respect and Disparaging Remarks, of the Rules and Regulations of the City's Police Department.
>
> Chief Douglas agrees to implement and attend mandatory workplace sexual harassment awareness training for all members of the Police Department. The training will be designed to achieve a greater understanding of sexual harassment and the best practices for preventing sexual harassment in the workplace.
> See Memorandum of Agreement as Exhibit G.

The City has established the affirmative defense and is, accordingly, not liable. See *Cooper-Schut v. Visteon Automotive Systems*, 361 F.3d 421, 427-429 (7th Cir. 2004) (employer took reasonable actions to remedy violations).

b. Without proof of an Adverse Employment Action, Complainant fails to Demonstrate Sexual Discrimination

An employee can support an adverse employment action made for discriminatory reasons by "directly show[ing] that [gender] discrimination motivated the employment decision, or, as is more common, [by relying] on the indirect burden-shifting method." *Sublett v. John Wiley & Sons*, 463 F.3d 731, 736-37 (7th Cir. 2006). Whether a plaintiff proceeds by direct or indirect method in proving discrimination, she must show a materially adverse employment action. *Phelan v. Cook County*, 463 F.3d 773, 780 (7th Cir. 2006). Complainant cannot establish that she suffered an

adverse employment action. An adverse employment action is a significant change in employment status. *Rhodes v. Illinois Dep't of Transp.*, 359 F.3d 498, 504 (7th Cir. 2004). The idea behind the requirement of proof of an adverse action "is simply that a statute that forbids employment discrimination is not intended to reach every bigoted act or gesture that a worker might experience in the workplace." *Phelan*, 463 F.3d at 780 citing *Hunt v. City of Markham, Ill.*, 219 F.3d 649, 653 (7th Cir. 2000). An adverse employment action includes a termination or a demotion evidenced by a decrease in wage or salary, a less distinguished title, or a material loss of benefits. *Moser v. Indiana Department of Corrections*, 406 F.3d 895, 904 (7th Cir. 2005).

The only potential adverse action alleged by Complainant is the supposed constructive discharge. However, as demonstrated above, this claim fails because Complainant has not established that her work environment was egregiously hostile and Complainant left for a better opportunity. As such Complainant has failed to demonstrate an adverse employment action to establish discrimination.

II. No acts of Retaliation have been Taken against Complainant

Complainant asserts retaliation in her Charge but fails to allege or establish any of the elements: (1) that she engaged in protected conduct, (2) that she suffered an adverse employment action, and (3) that there was a causal connection between the two. *Jones v. Res–Care, Inc.,* 613 F.3d 665, 671 (7th Cir.2010). Title VII makes it "unlawful for an employer to discriminate against any of his employees ... because such individual ... has opposed any practice made unlawful...." *Alexander v. Biomerieux, Inc.*, 485 F. Supp.2d 924, 933 (N.D. Ill. 2007). In other words, to establish retaliation, a plaintiff must demonstrate he/she engaged in activity statutorily protected under Title VII. "Such activity consists of opposing or complaining about discrimination by the

employer based on race, color, religion, gender, national origin, age, or disability." *Small v. WW Lodging, Inc.*, 106 Fed. Appx. 505, 508 (7th Cir. 2004).

Complainant has not asserted any facts in her Charge that demonstrate that she was engaged in protected activity. To be exact, Complainant has not stated that she voiced any opposition to or complained about any supposed discrimination. Thus, her claim fails at the outset. Nevertheless, Plaintiff also fails to allege any adverse action that was taken against her in retaliation for her engagement in protected activity or a connection between the two. The only assertion made by Complainant is that she resigned, but as evidenced above, Complainant's resignation was voluntary.

III. Any allegations of conduct that occurred outside of the 300 days from the date of the Charge should be disregarded

Under Title VII, acts that occur more than 300 days prior to the filing of a charge of discrimination are barred. *42 U.S.C. § 2000e-5(e)(1).* Under the "continuing violation" rule, a hostile work environment claim may incorporate acts that occurred more than 300 days before filing into a "single employment action" so long as at least one of the acts occurred within the 300 days. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). However, if there are significant gaps between occurrences or where allegations are vague, Courts have barred the conduct as untimely. See *Tinner v. United Insurance Co. of America*, 308 F.3d 697, 709 (7th Cir. 2002)(eight-year gap between incidents could not constitute a single hostile work environment claim); *Selan v. Kiley*, 969 F.2d 560, 567 (7th Cir. 1992)(a two-year gap between alleged discriminatory acts was considerable and weighed heavily against finding a continuing violation); *Milligan-Grimstad v. Stanley,* 877 F.3d 705, 713 (7th Cir. 2017)(finding assertions lack the specificity necessary to show that allegations form a single employment practice where unspecific, speculative allegations cannot connect otherwise distant allegations into a single employment

practice); and *Lucas v. CTA*, 367 F.3d at 736 (an assertion that "racial slurs were commonly used in the workplace," but is vague on time, place, and persons present, is conclusory and not considered supportive of the hostile work environment claim as to avoid summary judgment). Because Complainant's allegations lack specificity and incorporate dates such as 2014 which is far removed from 2018, any conduct alleged to have occurred outside the 300 days from the filing of her Charge are untimely. Furthermore, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). To the extent Complainant alleges any discrete acts outside of the 300 days from the filing of her Charge, they should be disregarded. See *Padron v. Wal-Mart Stores, Inc.*, 783 F. Supp. 2d 1042, 1051 (N.D. Ill. 2011) (court found that any allegations that the defendant violated Title VII prior to the 300-day statute of limitations were time-barred.

IV. Conclusion

For all the reasons stated above, Complainant has failed to establish any of her claims.

Respectfully Submitted,
City of Watseka- Respondent

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