IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

TARYN HOLLY HARBISON,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 01-1373-T
	)	
CROCKETT COUNTY, TENNESSEE, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff has filed this action against her former employer, Crockett County, Tennessee, and Troy Klyce, individually and as sheriff of the Crockett County Sheriff's Department, pursuant to 42 U.S.C. § 1983 and the Tennessee Human Rights Act, T.C.A. § 4-21-101 et seq.("THRA"), alleging that she was sexually harassed during her employment.[1] Plaintiff also alleges that she was retaliated against for complaining of the alleged sexual harassment and that she was constructively discharged. Defendants have filed a motion for summary judgment, and Plaintiff has responded to the motion. For the reasons set forth below, Defendants' motion is DENIED.

[1] Although the complaint states that the action is also brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) et seq., see Complaint at para. 1, Plaintiff's response states that she "has not brought suit under Title VII." Response at p. 3 n. 1 (emphasis in original). See also Response at p. 15 ("Plaintiff has not sued Klyce or even the County under Title VII." (emphasis in original)). Based on Plaintiff's assertions in her response, to the extent that the complaint could be construed as bringing a claim under Title VII, that claim is DISMISSED.

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. To prevail on a motion for summary judgment, the moving party has the burden of showing the "absence of a genuine issue of material fact as to an essential element of the nonmovant's case." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). The moving party may support the motion with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter, however. Anderson, 477 U.S. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street, 886 F.2d at 1479 (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

According to the complaint, Plaintiff worked for the Crockett County Sheriff's Department as a reserve deputy and part-time deputy. Beginning in August 2001, Corporal Barnie Robertson allegedly began touching Plaintiff and making sexually offensive remarks to her. Plaintiff reported these incidents to her supervisors at the sheriff's department including Sheriff Klyce, but no remedial action was taken. Plaintiff reported the incidents to the County Executive of Crockett County on November 15, 2001. Plaintiff was suspended from her duties, pending further investigation. Plaintiff resigned on November 20, 2001.

The complaint alleges that the actions of Defendants constituted sexual discrimination and created a hostile working environment. The complaint further alleges that Plaintiff was retaliated against for reporting Corporal Robertson's behavior and that she was constructively discharged from her employment.

Sexual Harassment and Hostile Environment Claims

Defendants contend that they are entitled to summary judgment on Plaintiff's hostile environment claim because the alleged harassment was not sufficiently pervasive to alter the conditions of her employment or to create an abusive or hostile environment. Sexual harassment by a government official violates the Equal Protection Clause of the United States Constitution.[2] Poe v. Haydon, 853 F.2d 418, 429 (6th Cir.1988). To state a claim of sexual harassment based on a hostile work environment, a plaintiff suing under § 1983 must allege facts that are sufficient to establish the following four elements: (1) she was a member of a

[2] Section 1983 allows recovery for constitutional violations caused by an official acting under the color of state law.

protected class; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on her sex; and (4) the harassment created a hostile work environment. Williams v. Gen. Motors Corp., 187 F.3d 553, 560 & n. 2 (6th Cir. 1999); Gutzwiller v. Fenik, 860 F.2d 1317, 1325 (6th Cir. 1988) ("[T]he showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section 1983.") Not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

Conversely, conduct that is not sufficiently severe or pervasive to create an objectively hostile environment, or that is not perceived subjectively by the victim as abusive, is not within the reach of Title VII or, in this case, § 1983. Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 370 (1993). Whether the conduct is actionable may be determined only by looking at all of the circumstances underlying the claim, 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. at 371. Although "isolated, minor episodes of harassment do not merit relief," "even a single episode of harassment, if severe enough, can establish a hostile work environment," Torres v. Pisano, 116 F.3d 625, 631. (2nd Cir. 1997) For example, "even a

single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment." Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2nd Cir. 1995).

In the present case, Defendants contend that the alleged harassment consisted of several isolated incidents in which Corporal Robertson discussed his sex life with Plaintiff, asked her to have a relationship with him, and put his arm around her and kissed her on the cheek. Plaintiff, however, has presented evidence that Corporal Robertson, while acting in a supervisory capacity to Plaintiff, see Robertson Depo. at 26-27, "constantly" told Plaintiff how beautiful she was, made remarks that he would "have her in a heartbeat," that "white women like black men," and that "white women turn him on," and asked Plaintiff if she would consider cheating on her husband. Plaintiff's Depo. at 91-95. Corporal Robertson, also, allegedly commented to Plaintiff about an affair he was having with another woman who performed oral sex on him and told Plaintiff that his "penis was very large" and asked her if she wanted to "find out how large it was." Id. at 95-96. Corporal Robertson allegedly winked at Plaintiff, stuck his tongue out and moved it up and down, and laughed at Plaintiff. Id. at 96. Corporal Robertson allegedly was "always trying to put his hand" on Plaintiff while in the patrol car and put his arm on Plaintiff's shoulder and tried to kiss her on the cheek. Id. at 102. He allegedly tired to touch Plaintiff "all the time." Id. at 110. Additionally, he allegedly kissed Plaintiff on the cheek while in the snack room and tried to kiss her on the mouth. Id. at 115.

Plaintiff also alleges that Corporal Robertson continued to touch her and try to hug her, even after she had reported his actions to the Chief Deputy. Id. at 129. Plaintiff further alleges that, when Sheriff Klyce learned of her complaints, he "slammed the door," began "cussing, and asked "what the F-U-C-K [she] was doing making a complaint on one of his deputies." Id. at 130. The other officers allegedly began ignoring Plaintiff and called her a "bitch" and "whore." Id. at 132. The officers called her names when she walked into a room or attempted to clock in. Id. at 133. Plaintiff was allegedly told that Corporal Robertson was going to "make it hard" on her because she refused to have sex with him. Id. at 134. Corporal Robertson also allegedly told the other officers and their wives that Plaintiff "wanted to sleep" with the officers. Id. at 132. Plaintiff further alleges that Sheriff Klyce followed her on several different occasions, drove into her yard, and sat in front of her house "grinning" at her while she mowed her lawn. Id. at 158-160.

The incidents alleged by Plaintiff, if proved at trial, go beyond the "simple teasing, offhand comments, and isolated incidents" found by the Court in Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998), not to give rise to a hostile work environment. Instead, the trier of fact could find that these incidents constitute conduct that is "severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive." See Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) ("The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so

objectively offensive as to alter the 'conditions' of the victim's employment. . . .") Therefore, Defendants' motion for summary judgment on Plaintiff's hostile environment claim is denied.

Retaliation Claim

Next, Defendants contend that Plaintiff has not established a prima facie claim of retaliation. The framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) is applicable to claims of retaliation. Prince v. Commissioner, U.S.I.N.S., 713 F. Supp. 984, 996 (E.D. Mich. 1989), citing McKenna v. Weinberger, 729 F.2d 783, 791 (D.C. Cir. 1984). To establish a prima facie case of retaliation, the plaintiff must show: (1) that she engaged in a statutorily protected activity; (2) that the employer knew that she had engaged in a statutorily protected activity; (3) that the employer took a tangible, adverse personnel action; and (3) that a causal connection existed between the two. Prince, 713 F. Supp. at 996. In Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000), the Sixth Circuit modified the third element of the prima face case to provide that the defendant took adverse employment action against the plaintiff or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor.

According to Defendants, Plaintiff's suspension from work for a day, the alleged outburst by Sheriff Klyce, and being told to report to work at the Courthouse rather than the Sheriff's Department do not rise to the level of a tangible, adverse personnel action. However, as noted above, Plaintiff can establish the third element by showing that she was

subjected to "severe or pervasive retaliatory harassment by a supervisor."

Plaintiff has met her burden by pointing to evidence that Corporal Robertson served in a supervisory capacity to Plaintiff, see Robertson Depo. at p. 26, and that Corporal Robertson threatened to "make it hard" on Plaintiff if she did not have a sexual relationship with him. Plaintiff's Depo. at 134. Furthermore, Sheriff Klyce allegedly used foul language toward Plaintiff after hearing her complaints and followed her in his car, as described above. He also allegedly threatened to "fire her ass," depending on the results of the investigation. Id. at 145-46. Additionally, he allegedly told Plaintiff that he could "play dirty, too" and suggested that Plaintiff was trying to have sex with him and his officers. Id. at 152.

The trier of fact could find that the above described actions of Corporal Robertson and/or Sheriff Klyce constituted "severe or pervasive retaliatory harassment" sufficient to establish a prima facie case of retaliation.[3] Thus, Defendants' motion for summary judgment on this claim is denied.

Constructive Discharge Claim

To maintain a constructive discharge claim, Plaintiff must show that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Easter v. Jeep Corp., 750 F.2d 520, 522-23 (6th Cir. 1984). The "constructive discharge issue depends upon the facts of each case and requires an inquiry into the intent of the employer and the reasonably foreseeable

[3] Defendants have not contended that, even if Plaintiff has established a prima case of retaliation, they have offered a legitimate, nondiscriminatory reason for their actions.

impact of the employer's conduct upon the employee." Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982). An employee can establish a constructive discharge claim by showing that a reasonable employer would have foreseen that a reasonable employee would feel constructively discharged. Id.

In the present case, a jury could find that a reasonable person would feel compelled to resign after allegedly being subjected to (1) the taunts of her fellow officers, (2) Sheriff Klyce's tirade and threats to "fire [Plaintiff's ass], (3) continued sexual harassment by Corporal Robertson and his statement that he would "make it hard" on Plaintiff if she did not have sex with him, (4) her suspension, even though short-termed, and (5) the lack of an objective investigation into her complaints. Therefore, summary judgment is not appropriate on Plaintiff's constructive discharge claim.

Individual Liability

Sheriff Klyce has been sued in his individual capacity. An individual employee/supervisor who does not otherwise qualify as an "employer" may not be sued under Title VII. Wathen v. General Elec. Co., 115 F.3d 400, 405 (6th Cir. 1997). Individual liability is allowed under § 1983, however. Weberg v. Franks, 229 F.3d 514, 522 n. 7 (6th Cir. 2000); McCue v. State of Kansas, Dept. of Human Resources, 165 F.3d 784, 788 (10th Cir. 1999). As noted by Plaintiff, her claim is brought pursuant to § 1983 and not Title VII. Therefore, Defendants' argument is without merit on the § 1983 claim.

Sheriff Klyce may also be held liable as an individual under the THRA for allegedly

aiding and abetting sexual harassment. See T.C.A. § 4-21-301(2); Carr v. United Parcel Service, 955 S.W.2d 832 (Tenn. 1997). Plaintiff has pled that Sheriff Klyce is liable for "aiding, abetting, inciting, compelling, and/or commanding a person to engage in acts and practices declared discriminatory by the THRA including disparate treatment based on sex, retaliation, and hostile environment based on sex." Complaint at para. 22.

Although, under the doctrine of qualified immunity, government officials performing discretionary functions will not incur liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," see Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), the right to be free from sexual harassment is a clearly established constitutional right. See Hickman v. Laskodi, 2002 WL 2012648 at *5 (6th Cir.). Defendants have not argued nor presented any evidence that the actions of Sheriff Klyce were "objectively reasonable in light of the clearly established right." See Risbridger v. Connelly, 275 F.3d 565, 569 (6th Cir. 2002).

Sheriff Klyce contends that he is entitled to immunity in his individual capacity because "Plaintiff does not claim any individual actions on behalf of Sheriff Klyce." Defendants' Memo. at p. 17. Sheriff Klyce is in error. Plaintiff has pointed to specific actions by Sheriff Klyce against Plaintiff, including his alleged tirade against Plaintiff, his alleged threats toward Plaintiff, and his alleged stalking of Plaintiff. Accordingly, Sheriff Klyce, in his individual capacity, is not entitled to qualified immunity on Plaintiff's § 1983 claim.

Punitive Damages

Plaintiff has acknowledged that she is not entitled to punitive damages against Defendant Crockett County or Sheriff Klyce in his official capacity pursuant to City of Newport v. Fact Concepts, 453 U.S. 247 (1981). However, punitive damages may be awarded against a state or local official in his individual capacity under § 1983. Smith v. Wade, 461 U.S. 30 (1983). Therefore, Plaintiff will be allowed to pursue punitive damages against Sheriff Klyce in his individual capacity but not in his official capacity and not against Crockett County.

For all these reasons, Defendants' motion for summary judgment is DENIED.

IT IS SO ORDERED.

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JAMES D. TODD
UNITED STATES DISTRICT JUDGE

_____
DATE