

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWINA F. CLARKSON : CIVIL ACTION
 :
 v. :
 :
 PENNSYLVANIA STATE POLICE - BUREAU :
 OF LIQUOR CONTROL ENFORCEMENT; :
 JAMES P. CORCORAN; JOHN T. LYLE; :
 MARY LOU CORBETT; and BETTINA BUNTING : No. 99-783

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 14, 2000

Edwina Clarkson ("Clarkson"), an employee of the Pennsylvania Bureau of Liquor Control Enforcement ("Bureau"), brought an action under federal and state law against the Bureau and various supervisors. Early in the litigation, all state and some federal claims were voluntarily dismissed; claims under Title VII, 42 U.S.C. § 2000e et seq., against the Bureau and under 42 U.S.C. § 1983 against the individual defendants remain. Defendants have moved for summary judgment on all remaining claims. Because there are disputed issues of material fact on one of the federal claims, summary judgment will be granted in part and denied in part.

BACKGROUND

Clarkson was employed by defendant Pennsylvania State Police, Bureau of Liquor Control Enforcement as a Liquor Enforcement Officer ("LEO") from September, 1995 until April, 1997. Defendant James Corcoran ("Corcoran"), an Administration

Captain reporting to the Bureau director, is the highest ranking individual defendant. Lieutenant Mark Lomax ("Lomax"), the Eastern Section Commander, reported to defendant Corcoran, and supervised defendant John Lyle. Defendant John Lyle ("Lyle"), a sergeant, was Philadelphia District Office Commander, with supervisory responsibility over the Philadelphia Enforcement Officers; he was the second-level supervisor of plaintiff Clarkson. Defendants Mary Lou Corbett ("Corbett") and Bettina Bunting ("Bunting"), Enforcement Officers ("EOs"), were Clarkson's supervisors.

LEOs conduct investigations into illegal activity, write reports, and participate in judicial proceedings against violators of Pennsylvania liquor laws. In June, 1995, Clarkson entered the Pennsylvania State Police Academy for training to become a LEO. While a cadet at the academy, Clarkson was sexually harassed by a co-cadet, Mekel Pettus ("Pettus"). After Clarkson reported the harassment, a State Police Bureau of Professional Responsibility investigator substantiated Clarkson's complaint. Pettus was later suspended for one day.

Clarkson graduated in September, 1995, as one of approximately 11 new LEO's. Clarkson stated a preference for a Philadelphia, Allentown, or Wilkes Barre work location; Clarkson was assigned to Philadelphia, a large Bureau office. Pettus and some other cadets were also assigned to the Philadelphia office.

After graduation, cadets participated in a coach/pupil training program for sixty days; each cadet was paired with an experienced LEO for supervision, training, and evaluation. After two thirty day cycles with different coaches, the cadet entered a six month probationary period. After successful completion of the probationary period, the cadet became a full fledged LEO. Defendant Lyle was responsible for assigning trainees to coaches during the coach/pupil program.

Clarkson's coach for her first 30 day training period was LEO Sharon Williams ("Williams"). Clarkson and Williams reported to defendant EO Corbett. Clarkson had told Williams and Corbett that Pettus had sexually harassed her; Clarkson expressed a preference not to work near Pettus. Clarkson did not inform Lyle of the prior harassment or her desire to be separated from Pettus. During Clarkson's first 30 day period, Williams was called away from Philadelphia for a week; Lyle assigned Clarkson to LEO Valda Knight ("Knight") for that week. Knight's other trainee was Pettus. During the week that Pettus and Clarkson worked with Knight, Clarkson witnessed Pettus sexually harass Knight. Clarkson supported Knight when she reported the Pettus harassment.

After her first thirty day training period, Corbett spoke with Clarkson about her experience. The conversation led Corbett to suspect that LEO Williams was violating Bureau rules by, inter

alia, going home early. Defendant Corcoran followed Williams one day and corroborated that suspicion. After an official investigation, Williams was disciplined for violating work rules.

The official investigation into LEO Williams progressed during Clarkson's second thirty day training period. Clarkson informed Corbett of her mounting stress. At a later discussion with Corbett, Corcoran said he would recommend Clarkson's transfer if her situation became unbearable; Corbett relayed that message to Clarkson.

Clarkson's second thirty day training period, began in mid-October, 1995, she was assigned to LEO Knight. On November 16, 1995, Pettus was terminated for inadequate work performance and harassment. Some LEOs who liked Pettus blamed Clarkson and Knight for Pettus's firing and considered Clarkson a "plant" and a "rat." At a heated meeting with the LEOs after Pettus's departure, Clarkson felt faint; she was rushed to the hospital and later discharged.

After the Pettus termination, LEOs treated Clarkson poorly. They would not: 1) voluntarily assist her in "raids" of establishments; or 2) communicate with her regarding work related questions or issues. Clarkson's complaints to her superiors did not alleviate the situation. In January or February, 1996, the Fraternal Order of Police union met to consider removing Clarkson from the union for being untrustworthy; the meeting was called by

LEOs who were friendly with Pettus. After explaining herself, Clarkson was not removed.

In April, 1996, Clarkson approached Lyle and Lomax concerning her co-worker induced distress. While Lyle and Lomax were not helpful, a counselor from another office became a useful sounding board for Clarkson. Clarkson expressed complaints to her counselor about her supervisors, Bunting and Corbett; Clarkson suspects her complaints were disclosed because Bunting and Corbett became increasingly hostile toward her. In April, 1996, Clarkson asked Lomax for a transfer to Allentown, Pennsylvania, but no action resulted.

In May, 1996, Corbett put Clarkson on sick leave restriction because of her use of sick leave. Sick leave restriction requires an employee to present a doctor's note in connection with any request for time off for doctor visits, personal or family illness.

Clarkson was ordered to active duty in the United States Air Force for six weeks beginning June 26, 1996. Clarkson requested two days vacation leave and some accommodation in her work schedule to prepare. Clarkson was not allowed the vacation time she requested. On June 25, 1996, her last day before Air Force duty, Clarkson argued with Bunting about completing certain paperwork. On her return, Clarkson: 1) was reprimanded for disobeying Bunting's June 25 direct order; and 2) received a

performance review, covering June 1995 through June 1996, with an overall rating of "Needs Improvement" (the fourth lowest assessment out of five).

On August 27, 1996, Clarkson submitted to Corcoran a written request for a hardship transfer to a different Bureau office. In the request, Clarkson cited ongoing verbal abuse, harassment, alienation by her co-workers, and a lack of support from her supervisors.¹ The Bureau Director ordered an investigation into Clarkson's hardship; the investigator concluded Clarkson's claims were unsubstantiated and did not qualify as a hardship. The Bureau Director agreed and Clarkson's transfer request was denied on October 10, 1996.

On October 18, 1996, Clarkson signed a Pennsylvania Human Relations Commission ("PHRC") complaint. The Bureau received the complaint on January 6, 1997.

After being absent from work for much of November, 1996 because of sick leave, scheduled days off, and holidays, Clarkson had a heated discussion with Lyle on November 14, 1996. Following the discussion, Clarkson felt ill, went home, and did not return to work until March, 1997. Clarkson's workers compensation claim for stress leave was denied, but on December

¹ On September 26, 1996, Clarkson had completed a Complaint Verification Form stating certain LEOs were generating a majority of the hostility of which she complained in her hardship transfer request. On March 21, 1997, the investigation into Clarkson's allegations concluded there were no violation of Bureau or Commonwealth regulations.

4, 1996, Clarkson was granted sick leave without pay, with benefits, for up to six months. While at home between early November, 1996 and March, 1997, Clarkson received two visits by her supervisors: 1) Bunting visited Clarkson to complete paperwork and take her gun for servicing; the gun was returned a week later; and 2) On November 11, 1996, Corbett and a third party delivered a letter from Lyle; Clarkson would not acknowledge its receipt.

On March 21, 1997, Clarkson returned to work although she had accepted a new job commencing in early April. On March 24, 1997, Clarkson received a written reprimand and Supervisory Notation for prior incidents. On April 5, 1997, Clarkson resigned.

Clarkson has produced evidence of the following adverse actions by her supervisors and co-workers: 1) disparate scrutiny of her paperwork; 2) unwarranted barrage of "supervisory notices"; 3) assignment to dangerous, undesirable investigations without backup; 4) inadequate accommodation of her Air Force schedule; 5) downgrades in evaluations unrelated to actual work performance; and 6) degrading actions and comments made in front of co-workers.

DISCUSSION

Clarkson alleges hostile working environment sexual harassment, unlawful retaliation, and sex discrimination against

the Bureau under 42 U.S.C. § 2000e et seq. (Counts I, II, and III), and unlawful discrimination and retaliation against the individual defendants under 42 U.S.C. § 1983 (Counts IV and V).

I. Summary Judgment Standard

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a

verdict for the non-moving party.” Id. at 248. In making this determination, the court must draw all justifiable inferences in the non-movant’s favor. See id. at 255. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

II. Title VII Claims Against the Bureau (Counts I-III)

A. Retaliation

To assert a Title VII claim, a claimant must first file an administrative charge with the EEOC and/or the equivalent state body. An administrative notice of right to sue is a jurisdictional prerequisite to a Title VII claim in federal court. Defendants do not challenge the administrative or procedural aspects of Clarkson’s retaliation claim because she alleged an unlawful discriminatory practice in violation of the retaliation portion of the Pennsylvania Human Relations Act with the PHRC . See 43 P.S. § 955(d); Clarkson PHRC Complaint ¶4. The Bureau was on notice that Clarkson would pursue a retaliation claim.

42 U.S.C. § 2000e-3(a) states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice under this Subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Subchapter.

To establish a prima facie case of discriminatory retaliation under Title VII, a plaintiff must demonstrate that: "1) she engaged in activity protected by Title VII; 2) the employer took an adverse employment action against her; and 3) there was a causal connection between her participation in the protected activity and the adverse employment action." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997) (citations omitted).

1. Protected Activity

Protected activity for purposes of a retaliation claim may include opposition to a practice made unlawful by Title VII (the "opposition clause"), or participation in a Title VII investigation, proceeding, or hearing by making a charge, testifying, or otherwise assisting (the "participation clause"). See, e.g., Robinson v. Southeastern Pa. Trans. Auth., 982 F.2d 892, 896 n.4 (3d Cir. 1993).

Clarkson engaged in protected conduct when she: 1) filed her PHRC complaint on October 18, 1996, see Tuthill v. Consolidated Rail Corp., No. 96-6868, 1997 WL 560603, *3 (E.D. Pa. Aug. 26, 1997) (Shapiro, J.) (filing EEOC charge is participation in a Title VII investigation); 2) filed an internal sexual harassment complaint against Pettus for his conduct at the Police Academy (constituting opposition to a practice made unlawful by Title VII, but not participation in a Title VII

investigation because the complaint was internal, not under Title VII); and 3) provided information in connection with the investigation into Valda Knight's 1995 harassment charge against Pettus (same).

Defendants argue that Clarkson's contribution to Corcoran's investigation of her hardship transfer request was not protected conduct. To invoke the opposition clause, an employee must demonstrate a subjective and objective belief that her employer engaged in conduct violating Title VII. See, e.g., Harper v. Blockbuster Entertain. Corp., 139 F.3d 1385, 1388 (11th Cir. 1998). Whether or not Clarkson believed the Bureau violated Title VII because of her co-workers' conduct is a question for a jury. It was objectively reasonable for Clarkson to believe that her hostile office environment claims constituted a violation of Title VII. Title VII does not impose a "general civility code" for all workplaces, Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998, 1002 (1998), but an employer's failure to address an employee's harassment because of her opposition to sexual harassment (here, by Pettus) can be the basis for an objective belief that Title VII is violated. For purposes of the motion for summary judgment, Clarkson's contribution to Corcoran's investigation of her hardship transfer request was protected conduct.

2. Adverse Employment Action

To establish an adverse employment action, a plaintiff must demonstrate that the defendant's retaliatory conduct had some tangible, material, employment-related impact. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300-01 (3d Cir. 1997).

"Retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." Id. at 1300. Not everything that makes an employee unhappy constitutes an adverse employment action. See id.

Clarkson attested to the following adverse employment actions taken against her: 1) she was given unwarranted written criticisms of her work which, while not disciplinary in nature, would remain in her file to be used in future performance evaluations; 2) she was unjustly and excessively issued written reprimands; 3) she was given unwarranted negative performance evaluations; 4) she was given the least desirable, and often dangerous, work assignments; 5) her requests for backup to accompany her on dangerous work assignments were repeatedly refused, but routinely granted to other LEOs; 6) she was placed on sick leave restriction; 7) she was denied a transfer to another Bureau office, although she had been promised a transfer; 8) she was denied a training opportunity; and 9) her gun and badge were confiscated without explanation by her supervisor while she was on stress leave in late 1996.

Some of Clarkson's isolated claims of adverse employment action are not legally sufficient themselves, but together they meet the legal burden. Taken as true, as required of a court considering a motion for summary judgment, Clarkson's nine examples establish a serious and tangible effect on the terms and conditions of her employment. Defendants contest Clarkson's characterization of some of the alleged actions, but disputed issues of fact are for the jury. Clarkson met her burden of producing evidence of an adverse employment action.

Clarkson claims her constructive discharge from the Pennsylvania State Police was an additional adverse employment action.² A constructive discharge may be found if an employer knowingly permits the occurrence or continuation of discriminatory conditions which are so unpleasant or difficult that a reasonable person subjected to them would resign. See Connors v. Chrysler Fin. Corp., 160 F.3d 971, 974 (3d Cir. 1998).

To establish constructive discharge, Clarkson must demonstrate that the Bureau created or perpetuated a situation in which any reasonable LEO would resign. As early as her first 30-day training rotation, Clarkson apprised her supervisors of the stress caused by Pettus. During her tenure at the Bureau,

² It is unclear from the complaint whether Clarkson maintains a separate claim for constructive discharge, or whether she claims constructive discharge as part of the adverse employment action. Based on Clarkson's brief in opposition to the motion for summary judgment, it appears Clarkson intends to argue constructive discharge as part of the adverse employment action. See Plaintiff's Brief, 33-34.

Clarkson frequently reported to Lyle, Corbett, and Bunting that she routinely suffered harassment and lack of co-worker support. It is for a jury to determine whether the facts established by Clarkson were so extreme that a reasonable person subjected to them would resign; it can not be decided as a matter of law. The jury will be allowed to hear evidence on constructive discharge to determine whether there was an adverse employment action.

3. Causation

A plaintiff must establish a causal connection between her participation in a protected activity and the adverse employment action she suffered. An inference of causation arises when plaintiff's engagement in a protected activity predates an adverse employment reaction. Clarkson engaged in the following protected activities: 1) filing her PHRC complaint on October 18, 1996; 2) filing an internal sexual harassment complaint against Pettus for his conduct at the Police Academy; 3) providing information in connection with the Bureau's investigation into Valda Knight's harassment charge against Pettus; and 4) contributing to Corcoran's investigation of the reasons for her hardship transfer request.

All of the claimed adverse employment actions occurred after the Pettus investigation, and some occurred after the investigation of the reasons for Clarkson's hardship transfer request. Clarkson's hardship transfer request predated some of

the adverse employment actions, including the poor evaluations and various reprimands. The Bureau fired Pettus for his improper conduct; Clarkson claims her co-workers and supervisors reacted by subjecting her to hostilities and other tangible adversities in the workplace, which Clarkson repeatedly reported to Bureau management. Clarkson could establish credibly at trial that the Bureau acted legally by terminating Pettus, but violated the law by failing to prevent its agents from retaliating against Clarkson for her role in his firing.

There are disputed issues of material fact concerning Clarkson's retaliation claim, so defendants cannot prevail as a matter of law. The motion for summary judgment as to the retaliation claim will be denied.

B. Sex Harassment and Sex Discrimination

No individual Title VII claim may be litigated in court unless it is first raised administratively. See Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 878-79 (3d Cir. 1990). The limit of the district court action is "defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination" Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976). EEOC charges are to be liberally construed to prevent repression of potentially meritorious claims. See, e.g., Schouten v. CSX Transp., Inc., 58 F. Supp. 2d 614, 616 (E.D. Pa. 1999). "Failure

to check a particular box on an EEOC charge . . . is not necessarily indicative of a failure to exhaust the mandatory administrative remedies." See id.

In her PHRC charge, Clarkson explicitly raised a retaliation claim, but she did not explicitly raise a sexual harassment or sex discrimination claim. Clarkson's PHRC complaint referred to 43 P.S. ¶ 955(d), the Pennsylvania Human Relations Act Retaliation provision. The only hint that Clarkson included sexual harassment or sex discrimination claims in her PHRC complaint was her use of the term "harassment".³ The PHRC complaint does not state that Clarkson was harassed because she was a woman, nor that she was treated less favorably than a similarly situated male LEO; such claims are essential to sexual harassment and sex discrimination. It was not foreseeable by defendants at the administrative level that they would have to defend against sexual harassment or sex discrimination. When Clarkson filed the PHRC charge in October, 1996, most of the allegedly discriminatory and harassing conduct had already taken place, so Clarkson could have included the sexual harassment and discrimination claims.

Clarkson may not broaden her action at this phase to include claims of sexual harassment and sex discrimination. The motion

³ Clarkson stated she was "discriminated against," that she was subjected to "adverse and disparate terms and conditions of employment," and that she was "subjected to a campaign of harassment by both superiors and coworkers." See Clarkson Dep. Exh. 5.

for summary judgment as to the sexual harassment and sex discrimination claims will be granted for lack of administrative exhaustion.

III. § 1983 Claims Against Individual Defendants (Counts IV, V)

Clarkson claims unlawful discrimination and retaliation against individual defendants Corcoran, Lyle, Corbett, and Bunting under 42 U.S.C. § 1983 (Counts IV and V). Section 1983 allows an aggrieved party to sue any person who has deprived him or her of federally secured rights while acting under color of state law.

Section 1983 claims are subject to Pennsylvania's two-year personal injury statute of limitations. See 42 Pa. C.S. § 5524; Bougher v. University of Pittsburgh, 882 F.2d 74, 78 (3d Cir. 1989) ("[A]ll section 1983 claims are subject to the state statute of limitations for personal injury actions.") Clarkson filed this action on February 16, 1999; she can only challenge acts or events occurring on or after February 16, 1997. The only events occurring within the limitations period were Clarkson's March 24, 1997 written reprimand and Supervisory Notation for prior incidents.

Clarkson argues her April 5, 1997 resignation was a constructive discharge occurring within the limitations period. Clarkson maintains that the individual defendants were engaged in a chain of continuing violations so that otherwise time barred

incidents may be asserted against the individual defendants.

Clarkson has not argued or established the subject matter, frequency, and degree of permanence necessary to establish a continuing violation. See Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481-82 (3d Cir. 1997). Clarkson's claim of constructive discharge lies against the Bureau, not against the individual defendants, because Clarkson worked for the Bureau, not for any individual defendant. Clarkson was not discharged, constructively or otherwise, by any individual defendant. The collective acts of the individual defendants may constitute constructive discharge by the Bureau, but no individual defendant can be found to have discharged Clarkson on the evidence presented. See, e.g., Behrens v. Rutgers University, No. 94-CV-358, 1996 WL 570989, *6 (D.N.J. Mar. 29, 1996). An individual defendant without the power to hire or fire can not violate § 1983 by constructively discharging someone.

There was no deprivation of Clarkson's federally secured rights by the individual defendants during the two-year limitations period; there was no continuing violation or constructive discharge. Summary judgment will be granted on all § 1983 claims against the individual defendants.

CONCLUSION

Summary judgment will not be granted on Clarkson's Title VII retaliation claim against the Bureau in Count II. Summary

judgment will be granted on all other claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWINA F. CLARKSON	: CIVIL ACTION
	:
v.	:
	:
PENNSYLVANIA STATE POLICE - BUREAU	:
OF LIQUOR CONTROL ENFORCEMENT;	:
JAMES P. CORCORAN; JOHN T. LYLE;	:
MARY LOU CORBETT; BETTINA BUNTING	: No. 99-783

ORDER

AND NOW this 14th day of July, 2000, upon consideration of defendants' motion for summary judgment, plaintiff's response thereto, plaintiff's supplemental letter brief concerning individual liability under § 1983, and defendants' response thereto, and in accordance with the attached memorandum,

It is **ORDERED** that:

1. Defendants' motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**. Summary judgment is **DENIED** on plaintiff's claim of unlawful retaliation in violation of Title VII (Count II). Summary judgment is **GRANTED** on plaintiff's claims of sexual harassment and sex discrimination (Counts I and III). Summary judgment is **GRANTED** on plaintiff's claims under 42 U.S.C. § 1983 (Counts IV and V).

2. The caption will be amended as follows:

EDWINA F. CLARKSON	: CIVIL ACTION
	:
v.	:
	:
PENNSYLVANIA STATE POLICE - BUREAU	:
OF LIQUOR CONTROL ENFORCEMENT	: No. 99-783

3. This action is in the jury trial pool subject to call on 48 hours notice in accordance with the standing rule of this court as published in The Legal Intelligencer. On or before the date of trial, the parties shall submit any proposed voir dire questions and points for charge, preferably on computer disk.

Norma L. Shapiro, S.J.