

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.

October 5, 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 remained. Defendants moved for summary judgment on all remaining claims. In a memorandum and order dated July 17, 2000, the court granted summary judgment on all claims except the Title VII retaliation claim against the Bureau.

The Bureau asks the court to reconsider the portion of its decision denying summary judgment on the retaliation claim. The Bureau asserts that the court: (1) erroneously determined that plaintiff's proffered evidence on causation was sufficient to establish a prima facie case of retaliation; and (2) failed to

follow the burden-shifting framework established for evaluating Title VII claims. Upon review of the July 17, 2000 Memorandum and Order, the court recognizes that the analysis on causation and burden-shifting did not adequately present the rationale of the court. The court will grant the motion for reconsideration for the purpose of clarifying the reasons for its decision, but defendant Bureau's motion for summary judgment again will be denied.

The disposition of all other claims will not change, but this opinion will replace the opinion filed July 17, 2000.

BACKGROUND

Because the determination of a summary judgment motion so requires, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962), the facts are set out here in the light most favorable to the non-moving party, the plaintiff.

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. LEOs conduct investigations into illegal activity, write reports, and participate in judicial proceedings against violators of Pennsylvania liquor laws.

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 direct supervisors.

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 from the Academy in September, 1995, as one of approximately eleven new LEOs. Clarkson stated a preference for a Philadelphia, Allentown, or Wilkes Barre work location, and was assigned to Philadelphia. Pettus and some other cadets also were assigned to the Philadelphia office.

After graduation, cadets participate in a coach/pupil training program. Each cadet is paired with an experienced LEO as a coach for a thirty day period of supervision, training, and evaluation. After two periods with different coaches, the cadet

enters a six-month probationary period. After successful completion of the probationary period, the cadet becomes a full-fledged LEO.

Defendant Lyle was responsible for pairing trainees with coaches in the coach/pupil program. Clarkson's coach for her first training period was LEO Sharon Williams ("Williams"). Clarkson and Williams reported to defendant EO Corbett. Shortly after beginning her first training period, Clarkson told both Williams and Corbett, her direct supervisors, that Pettus had sexually harassed her and expressed a preference not to work near Pettus. Clarkson did not directly inform Lyle of the prior harassment or her desire to be separated from Pettus.

At some point during her first training period, Clarkson's coach, 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 Clarkson worked with Knight and Pettus, Clarkson witnessed Pettus sexually harass Knight. Clarkson supported Knight when she reported the harassment by Pettus.

At the end of her first training period, Clarkson spoke with Corbett about her experience. The conversation led Corbett to suspect that LEO Williams was violating Bureau rules by going home early. Defendant Corcoran followed Williams one afternoon and corroborated that suspicion. An official investigation

followed during Clarkson's second training period in which Knight was assigned as Clarkson's coach. Williams was eventually disciplined for violating Bureau policies.

In connection with the investigation of Williams, Clarkson informed Corbett of her mounting stress. Corbett discussed this with Corcoran, who said he would recommend Clarkson's transfer if her situation became unbearable. Corbett relayed that message to Clarkson.

On November 16, 1995, Pettus was terminated for inadequate work performance and harassment. Some LEOs who liked Pettus blamed Clarkson and Knight. At a heated meeting with the LEOs after the discharge of Pettus, Clarkson felt faint; she was briefly hospitalized.

Thereafter, 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, LEOs who were friendly with Pettus called a meeting of the Fraternal Order of Police to consider removing Clarkson from the union for being untrustworthy. 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 it was not granted.

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

In June, 1996, Clarkson was ordered to active duty in the United States Air Force for six weeks. Clarkson requested two days vacation leave and some accommodation in her work schedule to prepare, but was not granted the time. On June 25, 1996, her last day before Air Force duty, Clarkson argued with Bunting about completing certain paperwork. Clarkson was leaving when Bunting asked her if she had filled out certain forms summarizing her most recent work. Clarkson responded that she was unaware she had to do so before leaving. Bunting ordered her to fill out the forms. Clarkson replied that she would return in the morning and complete the forms. She then departed. When Bunting discovered that Clarkson had not stayed to finish the forms, she called Clarkson and ordered her to return immediately and

complete the forms. Clarkson obeyed and then left for her six weeks of active duty. Upon her return from duty six weeks later, 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 a written request to Corcoran for a hardship transfer to a different Bureau office. In the request, Clarkson cited continuing 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, but the investigator concluded that Clarkson's claims were unsubstantiated and did not qualify as hardship. The Bureau Director denied Clarkson's transfer request on October 10, 1996. On October 18, 1996, Clarkson signed a Pennsylvania Human Relations Commission ("PHRC") complaint, but the Bureau did not receive the complaint until January 6, 1997.

On October 19, 1996, Clarkson informed Bunting that she might need the evening of October 20, 1996 off in order to care for her son who was ill. Bunting told Clarkson to fill out a

¹ On September 26, 1996, Clarkson 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 violations of Bureau or Commonwealth regulations.

"leave slip" and put it prominently on her desk so that if she did need the night off, Bunting could submit the slip on her behalf. Clarkson did call out of work the following evening, but upon her return, Corbett informed her that the leave previously approved by Bunting was disapproved because Clarkson had failed to submit a doctor's note. Clarkson responded that she would use sick leave to cover the missed hours because she did not have sufficient annual leave to do so. Corbett refused to permit Clarkson to use sick leave and ordered her to use annual leave. Clarkson continued to refuse, and Corbett eventually signed Clarkson's name to an annual leave form. Clarkson was issued a reprimand in connection with the incident, but Captain Corcoran intervened, permitted her to use sick leave, and withdrew the reprimand.

On November 14, 1996, Clarkson approached Lyle to discuss her concerns that she was being treated unfairly by her supervisors. The conversation turned heated, and Clarkson felt ill and went to the doctor. The doctor advised that she not return to work. She remained on leave because of stress until March, 1997. Clarkson's worker's compensation claim for stress leave was denied, but on December 4, 1996, Clarkson was granted sick leave for up to six months without pay but with benefits. While at home between 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) 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 another job commencing in early April. On March 24, 1997, Clarkson received a written reprimand and supervisory notation for prior incidents. The supervisory notation alleging improper use of a state vehicle was later withdrawn. On April 5, 1997, Clarkson resigned.

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).

A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the court must draw all justifiable inferences in the non-movant's favor. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). 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. The Retaliation Claim Against the Bureau

Clarkson alleges unlawful retaliation under Title VII by the Bureau. See 42 U.S.C. § 2000e et seq. The analysis of a summary

judgment motion in a Title VII action must proceed in three steps. See Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403, 410 (1999)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973)). First, the court must evaluate if plaintiff has offered evidence sufficient to establish a prima facie case of retaliation. See id. If plaintiff successfully establishes a prima facie case, the burden shifts to defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action taken. See id. Finally, if the defendant offers a non-retaliatory reason, plaintiff must demonstrate sufficient evidence from which a factfinder might find the reason offered is pretextual. See id.

A. The Prima Facie Case of Retaliation

Title VII, 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 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). The parties agree that Clarkson engaged in protected conduct when she: (1) 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); (2) provided information in connection with the investigation into Valda Knight's 1995 harassment charge against Pettus (same); and (3) 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).

Plaintiff also argues that Clarkson's contribution to Corcoran's investigation of her hardship transfer request was protected conduct, but defendants dispute this conclusion. To invoke the opposition clause, an employee must demonstrate a subjective belief that her employer engaged in conduct violating

Title VII that is objectively reasonable. See, e.g., Harper v. Blockbuster Entertain. Corp., 139 F.3d 1385, 1388 (11th Cir. 1998). The subjective prong requires that Clarkson demonstrate that she believed the Bureau was violating Title VII. Clarkson so believed, as evidenced by the transfer request itself, which was based upon a charge that the behavior of members of her department constituted a hostile work environment. See D. Ex. T.

The objective prong requires that Clarkson demonstrate that it was reasonable to believe the Bureau's actions violated Title VII. Title VII does not impose a "general civility code" for all workplaces, Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998), but an employer's failure to address an employee's harassment by a co-worker because of her opposition to sexual harassment (here, by Pettus) could cause a reasonable person to believe that Title VII has been violated. It is objectively reasonable to believe that Clarkson's hostile office environment claims constituted a violation of Title VII. 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 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 claims the following adverse employment actions were taken against her: (1) unwarranted written criticisms of her work which, while not disciplinary in nature, remained in her file for use in future performance evaluations; (2) unjust and excessive written reprimands; (3) unwarranted negative performance evaluations; (4) less desirable and dangerous work assignments; (5) repeated refusal of requests for backup on dangerous work assignments; (6) sick leave restriction; (7) denial of transfer despite a promise that one would be granted; (8) denial of a training opportunity; and (9) confiscation of her gun and badge by her supervisor without explanation.

Each of the nine actions had a serious and tangible effect on the terms and conditions of her employment. The criticism, reprimands and performance evaluations became part of her file, affecting her ability to obtain promotions and all future evaluations of her work performance. The more dangerous work assignments and denials of back-up changed the conditions of her employment by making it less safe. Sick leave restriction employed, as in this case, indefinitely can be a means of

punishing an employee, and Clarkson has offered sufficient evidence that it was an adverse employment action. It changed the terms of Clarkson's employment by changing her relationships with her supervisors. The implication of continuous sick leave restriction was that she was prone to abuse leave and had to be watched. The denial of the training opportunity impeded her ability both to do her job and to advance in her profession, and the seizure of her badge and gun, although temporary, effectively took away any ability to perform her duties. These actions are sufficiently adverse in their effect on Clarkson's employment to establish a prima facie case of discrimination.

Defendants contest Clarkson's characterization of some of the alleged actions, but disputed issues of fact are for the jury. Clarkson has met her burden of producing evidence of 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

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 argues constructive discharge as part of the adverse employment action. See P. Brief on Summary Judgment, 33-34.

Connors v. Chrysler Fin. Corp., 160 F.3d 971, 974-75 (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 training period, Clarkson informed her supervisors of the stress caused by Pettus. During her tenure at the Bureau, Clarkson frequently reported to Lyle, Corbett, and Bunting that she routinely suffered harassment and lack of co-worker support. From Clarkson's perspective, the situation never improved despite her consistent reporting. Under these circumstances, a reasonable person could conclude that the Bureau was perpetuating the situation and that resignation was the only viable option. A jury will hear the evidence on constructive discharge to determine whether it 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. The traditional means of proving causation is to demonstrate a very close temporal proximity between the protected activity and the adverse employment action. See, e.g., Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989)(Plaintiff established sufficient evidence of causation by showing that his discharge occurred two days after his employer received notice of

his EEOC claim.). Here, there is not sufficient temporal proximity for timing alone to give rise to an inference of causation. Most of the adverse employment actions cited by the plaintiff took place after, but not immediately after, she complained about Pettus's sexual harassment and provided information in connection with Knight's complaint against Pettus, but before she provided evidence regarding her request for a hardship transfer and filed a PHRC complaint. However, temporal proximity is not the only way to show a causal connection.

The quantum and nature of evidence that must be produced by a plaintiff in order to establish this prong of a prima facie case of retaliation was specifically addressed in Farrell v. Planters Lifesavers Co., 206 F.3d 271 (3d Cir. 2000). Evidence of temporal proximity, a pattern of ongoing antagonism, or "other types of circumstantial evidence" supporting the inference, such as the offering of inconsistent rationales for the adverse action taken may support an inference of causal connection. Id. at 280-81. Clarkson offers sufficient evidence of a pattern of antagonism to infer causation under the Farrell standard.

The negative treatment of Clarkson began after Pettus was fired in November, 1995. Clarkson offers evidence that general negative treatment soon rose to the level of adverse employment actions. In May, she was given an allegedly unwarranted borderline performance review and placed on sick leave

restriction. See Pl. Ex. 2 & 3. In June, Clarkson left for six weeks of Military Duty; immediately upon her return, further adverse employment actions followed. She was allegedly given written reprimands, see, e.g., D. Ex. II, and at her next performance review she was given a "needs improvement" rating, the fourth lowest out of five possible ratings. See D. Ex. HH. Clarkson maintains that she did not deserve the warnings or rating she was given. She also was denied an opportunity to attend Gambling Device Training after initially having been granted permission. D. Ex. A, at 366-67; P. Ex. 5.

Shortly after these occurrences, Clarkson requested a hardship transfer to Allentown. She participated in Title VII protected activity when she gave evidence to support her transfer. See infra, at Section II(A)(2). Clarkson then was allegedly given more dangerous work assignments and denied back-up when she requested it. See P. Ex. 9 & 10; D. Ex. A, at 144-50. The evidence offered by Clarkson is sufficiently suggestive of a continuous pattern of antagonism following her Title VII protected actions to meet the standard required to survive summary judgment. Plaintiff has met her burden and established a prima facie case of retaliation.

B. Evidence of a Non-retaliatory Rationale for the Adverse Employment Actions Taken

Once a plaintiff has established a prima facie case of

retaliation, the burden shifts to the defendant to offer rebuttal evidence demonstrating legitimate, non-retaliatory reasons for the actions taken against the plaintiff. See Jones, 198 F.3d at 410. The Bureau claims that all of the negative evaluations, reprimands and warnings were warranted. The Bureau also argues that plaintiff's supervisors followed policy in issuing warnings, placing her on sick leave, denying her the hardship transfer, and confiscating her gun. The defendant offers a facially legitimate reason for each of the adverse employment actions taken, and meets its burden.

C. Evidence of Pretext

Once the defendant offers evidence of legitimate reasons for the adverse employment actions, plaintiff is given an opportunity to demonstrate that the reasons offered are pretextual. See Jones, 198 F.3d at 410. The plaintiff may, but need not, introduce new evidence to carry this burden. The court "may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom on the issue of whether the defendant's explanation is pretextual." Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2106 (2000). The court must determine whether the plaintiff has provided evidence sufficient for a jury to conclude that the defendant's stated reasons for the adverse employment actions were actually a pretext for retaliation. See Jones, 198 F.3d at 413. A

plaintiff will defeat a motion for summary judgment if he or she can point to evidence from which the factfinder could reasonably either: (1) not believe the employer's stated reasons; or (2) believe that invidious retaliation was more likely the employer's motivation. See id.

There is a factual dispute as to whether discriminatory animus was the motivation of the Bureau; plaintiff has offered sufficient evidence of pretext to survive a motion for summary judgment. Plaintiff notes that many of the actions that the defendant claims were taken as a matter of policy are in fact matters of discretion. The policy of the Bureau in these instances permits the supervisor to choose how and when to issue a supervisory notice or a reprimand, whether put an employee on sick leave restriction, when to permit an employee to attend a training seminar or whether to grant a request for backup. Plaintiff claims that matters within the discretion of her supervisors always were decided against her in retaliation for her various Title VII activities.

Moreover, the plaintiff offers evidence that some the adverse actions taken were not justified. Such evidence permits the inference that the actions were taken out of animus. It also permits the inference that in other instances the Bureau was motivated by animus, and this is sufficient to meet plaintiff's burden. For example, plaintiff was reprimanded for failure to

obey Officer Bunting's order to return and complete some paperwork before leaving on military leave. Plaintiff offers evidence that adequately demonstrates that this reprimand was issued even though the supervisor was informed that two of the three witnesses present heard the plaintiff say that she would return to complete the paperwork the following morning. See P. Ex. 4. Plaintiff was reprimanded as if she had flatly refused to do the paperwork; this permits the inference that defendant's stated reason for issuing the reprimand should not be given credence.

Similarly, despite a request for backup and the concurrence of a superior on her need for backup, backup was never ordered for Clarkson. See D. Ex. A, at 144-47; P. Ex. 10. The supervisor's agreement suggests that the reason for not ordering the backup was something other than a lack of need.

In November 1996, plaintiff was issued a written reprimand for failing to obey Corbett's order to use annual leave when Clarkson wanted to use her accumulated sick leave. After documentation was submitted to a higher-ranking supervisor, the written reprimand was rescinded. See P. Ex. 11. Another written reprimand was issued in October, 1997 but similarly rescinded just before Clarkson's resignation. See P. Ex. 13.

Based on the inconsistent behavior of the Bureau, a jury reasonably could doubt the reasons offered by the defendant for

adverse employment actions taken against the plaintiff. The court cannot say that no reasonable jury could conclude that animus motivated the defendant. Summary judgment cannot be granted.

III. 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, 399-400 (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). "[F]ailure 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,³ but she did not explicitly raise a sexual harassment or

³ 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.

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".⁴ 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 to include claims of sexual harassment and sex discrimination now. The motion for summary judgment as to the sexual harassment and sex discrimination claims will be granted for lack of administrative exhaustion.

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

Clarkson claims unlawful discrimination and retaliation

⁴ 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. (D. Ex. A) Ex. 5.

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 nor 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 as her employer, not against the individual defendants. 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 discharged Clarkson. 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 Count II, Clarkson's Title VII retaliation claim against the Bureau. Summary judgment will be granted on all other claims.

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ORDER

AND NOW this 3rd day of October, 2000, upon consideration of defendant Pennsylvania State Police, Bureau of Liquor Control Enforcement's Motion for Partial Reconsideration (docket # 33), plaintiff's opposition thereto (docket # 36), and defendant's reply (docket # 39),

It is **ORDERED** that:

1. Defendant Bureau's motion is **GRANTED**.
2. The court's memorandum and order dated July 17, 2000 (docket # 32) is **VACATED**.
3. 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).
4. 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.

S.J.