IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

LEANNA KRAUSE
and NANCY O'NEAL,

OPINION AND
ORDER

Plaintiffs,

99-C-0389-C

v.

GENE PFAFF, WAYNE
DELAGRAVE and CITY OF
LA CROSSE,

Defendants.

- -

Plaintiffs Leanna Krause and Nancy O'Neal have brought this civil lawsuit against defendants Gene Pfaff, Wayne Delagrave and the City of La Crosse, Wisconsin, contending that Pfaff and Delagrave violated plaintiffs' rights under 42 U.S.C. § 1983 by discriminating against them in pay and in training opportunities and by subjecting them to sexual harassment in the form of a hostile workplace. Plaintiff Krause contends also that the defendant city retaliated against her in violation of Title VII, 42 U.S.C. § 2000e, and that all of the defendants retaliated against her in violation of the Equal Pay Act, 29 U.S.C. §§ 209. (Plaintiffs alleged four other claims that they have now moved to dismiss voluntarily.)

Defendants have moved for summary judgment, denying that they violated plaintiffs' rights in any respect. The motion is before the court for decision. I conclude that disputed issues of fact prevent a grant of summary judgment to defendants on plaintiff O'Neal's claim of a hostile environment, as that claim relates to defendant Pfaff. However, I conclude that plaintiffs have failed to adduce facts sufficient to raise jury questions as to their claims that they were discriminated against in pay and that plaintiff Krause was subjected to a hostile environment or was retaliated against for having complained of sex discrimination.

In reviewing the facts proposed by both sides, I noted two matters that deserve comment. First, defendants offered as factual propositions long passages of deposition testimony. Plaintiffs objected to this practice as violative of the court's rule that factual propositions are to be set forth in numbered paragraphs, and that to the extent practicable, each paragraph is to state only one factual proposition. See Procedure to be Followed on Motions for Summary Judgment, § I (C)(2). Defendants' use of deposition excerpts resulted in the combination of many factual propositions in one numbered paragraph. In addition, the practice reflects confusion about “facts” that are material to a motion for summary judgment. It is a fact that so-and-so testified to such-and-such but it is not a *material* fact. It is also a fact that counsel came to work, sat at his desk and prepared the proposing findings of fact; again this fact is not material. The material facts are those that bear on the resolution of defendants'

motion. If for example, defendants wish to propose as a fact that defendant Pfaff never blocked plaintiff O'Neal's exit from her cubicle, they might cite her deposition testimony to support the proposed fact. Merely asserting that she gave certain testimony that is then reproduced does not comply with the court's procedures. The fact should be identified separately. For the most part, I have ignored the deposition excerpts in finding the undisputed facts.

Second, plaintiffs supported a number of their proposed findings of fact and objections to defendants' proposals with citations to affidavits submitted by plaintiffs contemporaneously with their proposed findings of fact and objections. Not surprisingly, defendants objected to plaintiffs' reliance on such affidavits. When a party waits until the opposing side has filed and briefed a motion for summary judgment and then "amplifies" her deposition testimony with seven and nineteen-page affidavits, as plaintiffs have done, it tends to make a mockery of both the deposition process and the idea of a motion for summary judgment. The Court of Appeals for the Seventh Circuit has criticized "efforts to patch up a party's deposition with his own subsequent affidavit." Russell v. Acme-Evans Co., 51 F.3d 64, 67 (7th Cir. 1995) (citing cases). The one exception is when "it is demonstrable that the statement in the deposition was mistaken, perhaps because the question was phrased in a confusing manner or because a lapse of memory is in the circumstances a plausible explanation for the discrepancy." Id. at 68 (citing Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1297 (7th Cir. 1993) ("A subsequent affidavit

may be used to clarify ambiguous or confusing deposition testimony, or it may be based on newly discovered evidence.")). See also Shepherd v. Slater Steels Corp., 168 F.3d 998, 1007 (7th Cir. 1999) (allowing use of subsequent affidavit when previous deposition testimony was ambiguous as to length of time that harassment persisted); but see Brill v. Lante Corp., 119 F.3d 1266, 1274 n.4 (7th Cir. 1997) (when plaintiff is asked a series of open-ended questions in deposition that provide ample opportunity to describe each incident of alleged harassment, court will "generally discount -- indeed, disregard -- an affidavit that is in conflict with a party's deposition testimony"). In this case, plaintiffs have offered no plausible reason for having to augment their testimony; it is evident from the deposition transcripts that they testified from notes and that they had kept careful records of defendants' alleged discriminatory actions. However, to the extent that the affidavits merely augment, rather than contradict plaintiffs' deposition testimony, I will consider them. Given the resolution of the case, consideration of the affidavits will not prejudice defendants and it will provide additional assurance that plaintiffs have had a full opportunity to make their best cases.

Therefore, I will take as undisputed for the purpose of deciding this motion those proposed findings made by plaintiffs to which defendants' only objection is that they were not the subject of testimony at a deposition, except to the extent that the proposed findings drawn from the affidavits are actually contradicted by the affiant's deposition testimony.

For the sole purpose of deciding this motion, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiffs Leanna Krause and Nancy O'Neal are employees of the city of La Crosse, Wisconsin. Krause works in the finance department. O'Neal is a former employee of the treasurer's office who works for the municipal court. Defendant Gene Pfaff is the city's finance director and treasurer and defendant Wayne Delagrave is the deputy finance director and treasurer.

1. City pay plan

Effective July 2, 1993, the city changed to a 9-step pay plan from the 5-step merit pay plan that had been in place for non-represented employees such as plaintiffs. Under the new plan, employees are eligible for advancement as a result of annual performance evaluations, subject to length of service requirements. They are evaluated by their supervisors according to a form devised by the personnel department, which uses a point system to give an employee a rating in five areas: quantity of work, quality of work, job attitude, effectiveness of work and achievement of set goals. An employee can be awarded between zero to five points in each of

the five areas. An “exceptional” employee would be one who earns 21-25 points; an inadequate employee would be one who earns 1-5 total points.

After supervisors rate their employees, they send their evaluations and recommendations to the Personnel Department, where James Geissner, Director of Personnel, recommends merit increases or decreases to the Finance and Personnel Committee, subject to the limitations and eligibility requirements contained in the plan and to Common Council approval. For non-department heads, only a percentage of the employees in each employee group can occupy the higher steps of the plan (6 through 9). Only 25% can be in steps 6 and 7; only 10% can be in steps 8 and 9.

For the years 1991 and 1993, the non-represented employees in the Finance Department and the treasurer's office received the following overall rankings. (No evaluations were performed in 1992.)

Employee	1991 Rating	1993 Rating
Wayne Delagrave	20	25
Kelly Branson	20	23
Gary Miller	18	22
Sandra Schultz	18	No longer working
Nancy O'Neal	17	19
Leanna Krause	16	17
Sue Wieman	16	12

Plaintiff O'Neal received a merit increase in 1991 and 1992. In 1992, Delagrave moved

a step up under the old pay plan, making him eligible for a step 7 when the new pay plan was implemented in 1993. Pfaff recommended that plaintiff O'Neal receive a merit increase in 1994 because of her 1993 performance, but the recommendation was not adopted.

Following the decision on representation in January 1994 (see below), only three of the employees in the Finance Department and treasurer's office were subject to the performance pay plan. For the years 1994 through 1998, their ratings were as follows.

Employee	1994 Rating	1995 Rating	1996 Rating	1997 Rating	1998 Rating
Wayne Delagrave	25	25	25	(not done)	25
Nancy O'Neal	20	24	20	(left position)	
Leanna Krause	17	15	15	15	11

In 1995, defendant Pfaff recommended again that plaintiff O'Neal advance from step 5 to 6, but his recommendation was not adopted. In 1996, he recommended that plaintiff O'Neal receive a merit increase; again, his recommendation was denied. Defendant Delagrave moved from step 8 to 9; after that he was at the top of the range and he received no further merit increases.

Plaintiff Krause remained at step five of the new pay plan.

2. Wisconsin Employment Relations Commission action

In January 1994, the Wisconsin Employment Relations Commission decided that under

the collective bargaining contract between the city and Local 180, Service Employees International Union, AFL-CIO, plaintiff Krause was a "professional employee" and plaintiff O'Neal was a supervisory employee. As a result, neither plaintiff was added to the bargaining unit. However, the accounting clerks in the finance department, who worked directly with Krause, were found to hold non-professional and non-supervisory jobs. They became members of the union.

3. Plaintiff Nancy O'Neal

Plaintiff O'Neal was hired by the city in 1985. In 1990, she went to work for the treasurer's office as a cashier. In January 1991, she was appointed head cashier. In that position, she supervised three cashiers, all of whom were female and all of whom were union members. Her supervisors were defendants Pfaff and Delagrave. Plaintiff O'Neal worked in the treasurer's office on the second floor of the La Crosse city hall; defendants Pfaff and Delagrave had their offices in the Finance Department on the sixth floor.

Defendant Pfaff visited the treasurer's office at least twice a week. When it was necessary for him to help the cashiers with work displayed on their computer screens, he often crowded the work space and positioned himself so that he made full body contact with the cashier. O'Neal found the physical contact unpleasant and unwelcome. Defendant Pfaff told

O'Neal on one occasion that women are catty and that it was impossible to deal with a roomful of women.

In October 1995, plaintiff O'Neal and other supervisory personnel, including Pfaff, attended a daylong training session for city employees on sexual harassment. Pfaff's behavior did not change. In October 1997, O'Neal approached defendant Pfaff and told him that she and the other cashiers did not appreciate his touching them. This was the first time she had complained to anyone about Pfaff's touching of her and others. After plaintiff O'Neal told Pfaff that his touching and crowding were not appropriate, it stopped. However, Pfaff mocked O'Neal thereafter.

In November 1997, plaintiff O'Neal went to see Director of Personnel James Geissner to ask about transferring to municipal court. O'Neal told Geissner she was willing to take a sizable pay cut to transfer to the municipal court because she had "had it with Gene (Pfaff)." She told Geissner that Pfaff's habit of touching female employees made her feel uncomfortable and that after she had told Pfaff of her discomfort, he had reacted by making sarcastic remarks about how he could not look at anything on a computer in case one of the cashiers was standing nearby. O'Neal told Geissner that on another occasion, Pfaff had come into the treasurer's office with his arms in the air and had said something to the effect that he needed to be careful. Geissner asked O'Neal whether she would consider staying in the treasurer's office if he

investigated the matter and asked Pfaff to stop his behavior. O'Neal said she would not because she wanted to leave and she believed Pfaff would retaliate against her for mentioning the situation to Geissner.

On November 14, 1997, Geissner interviewed O'Neal again, after which he interviewed eight current and former female employees of the finance department and treasurer's office. On November 19, 1997, Geissner gave the mayor a written report of his findings. His conclusion read as follows:

> Based on the information obtained from the employee interviews, it is apparent that there is validity to Ms. O'Neal's complaint. All interviewees have experienced or witnessed Mr. Pfaff make unwanted physical contact with various employees. Our preliminary investigation has shown that this contact does not seem to be of a sexual nature. It is not clear whether this conduct is intentional or simply bad judgment.
>
> Our preliminary investigation also revealed that perhaps Mr. Pfaff is lacking in managerial skills. Several employees commented about Mr. Pfaff's alleged practices of treating employees differently, belittling or degrading employees in front of others; lying to employees, retaliating against employees that complain or that are not on his "pet" list.
>
> It is my recommendation that Mr. Pfaff be made aware of the unwanted physical contact complaint and be ordered to cease all physical contact with employees immediately. I also recommend that Mr. Pfaff be counseled in areas of sexual harassment, interpersonal relationships and supervisory management skills. It should be made very clear that any form of retaliation by Mr. Pfaff will not be tolerated.
>
> If you have any questions regarding this report, please feel free to contact me.

Geissner and the mayor met with defendant Pfaff and showed him Geissner's report.

Pfaff acknowledged that he needed to be more careful in managing his employees. On December 3, 1997, the mayor gave Pfaff a written reprimand setting forth the mayor's opinion that "unwanted touching of female employees by a supervisor [is] a very serious matter and is completely unacceptable conduct." Affid. of Kevin Reak, dkt. #13, Exh. H. The mayor went on to say that Pfaff was to refrain from unwanted touching of female employees and from making mocking comments about a woman's right not to be touched; to refrain from any retaliation against any employees because of their participation in the investigation of O'Neal's complaint; to improve working relationships between all employees under his supervision; and to refrain from giving disparate treatment to employees. See id. The mayor advised Pfaff that if his objectionable conduct continued, there would be a formal referral for discipline. A copy of the written reprimand was made part of Pfaff's personnel file. See id.

Plaintiff O'Neal started working in the municipal court on December 1, 1997. Except for a short period in which she worked with the city water department, she has remained in the municipal court.

O'Neal filed a discrimination complaint with the Equal Rights Division on September 8, 1998.

2. Plaintiff Leanna Krause

Plaintiff Krause was hired by the city as an account analyst in the Finance Department in October 1989. She remained in that position until January 1999, when she was promoted to a new position as Financial Coordinator. Krause obtained a B.S. degree in accounting in 1988, a CPA certificate in 1994 and a master's degree in business administration in 1996. She received merit increases in 1990 and 1991.

Krause worked in the Finance Department offices on the sixth floor of the city hall. As of January 1994, six other persons worked there, including defendants Pfaff and Delagrave. Krause and three accounting clerks, Sue Wieman, Brenda Hanson and John Gallagher, sat at desks in an open room behind a counter where members of the public stood to ask questions and conduct business.

In merit reviews held in 1994 and 1995, Pfaff talked to Krause about being a member of the union; Pfaff encouraged Krause to join. Krause rejected the suggestion on the ground that she had a four-year college degree and was performing senior level accounting functions for the Finance Department. In 1995, Krause told Pfaff that she had earned her CPA rating and that she hoped her accomplishments would be recognized with a merit increase. She asked Pfaff whether she could attend one or more seminars in the areas of finance accounting or accounting software. She had made a similar request in the preceding year but had been told there was inadequate funding in the training budget, although Pfaff and Delagrave together

had attended more than fifteen seminars in 1994. Despite her request, she was not given any opportunities to attend training seminars in 1995.

In July and August 1995, Krause took emergency leave for surgery. She was not allowed to use compensatory time for the leave. Upon her return from her medical leave, defendants took certain budget responsibilities away from Krause, including retiree computations and investment rate figures. On a number of occasions after that, Krause asked defendant Delagrave a question and he walked away without answering.

Krause was subjected to offensive jokes and pranks by her co-workers for a short period. On a couple of occasions, one of her coworkers threw or placed pencils in the ceiling tile over her desk. On another occasion, her coworkers refused to take her mail down because they believed she refused to take her fair turn at delivering the mail. the mail "strike" went on for some time. However, once defendants discovered the situation, they talked to the employees who were responsible and insisted that it stop.

On one occasion in October 1995, Pfaff signed a document using Krause's back for support for the document. Four years earlier, in December 1991, Pfaff pointed a rubber band at Krause's breast; the rubber band broke and snapped forward to land on her breast. Also, before 1993, Pfaff referred to one complaint file as the "tough titties" file.

In March 1996, plaintiff met with Geissner to complain about the Finance Department.

On March 6, 1997, plaintiff had a merit review session with defendant Delagrave. She asked again about having an opportunity to attend educational seminars and having the city pay her annual CPA license fee. Her requests were not granted.

On May 9, 1997, defendant Delagrave reprimanded plaintiff Krause for leaving her office early. He ordered her not to leave her desk when both he and Pfaff were gone and informed her that whenever she left the office she was to tell the office staff why she was leaving and her reasons for visiting any other office. Other employees in the office were not subjected to the same requirement. In the same month, defendant Delagrave began keeping a file on Krause. He did not keep such a file on any other employee.

On June 30, 1997, Krause told personnel director Geissner that working conditions in the Finance Department had become intolerable. He asked her whether they had created a hostile environment; she responded that they had.

On February 23, 1998, plaintiff met with defendant Delagrave for her merit review. Again she asked for continuing education opportunities and payment of her license fees. Again, her requests were denied. Also, she was told that she would not receive a merit increase.

Before March 1998, Krause had asked both Pfaff and Delagrave on a number of occasions whether she could move her work space from the front office to the back room to gain

more space. She discussed this with defendant Delagrave during her review in February 1998. On March 6, 1998, Delagrave met with plaintiff and told her he was granting her request to move. Plaintiff left Delagrave's office pleased with the news. On March 10, 1998, Delagrave wrote to Krause, saying that he had spent the previous two and a half weeks observing the front office in the Finance Department and had been extremely disappointed with Krause's "level of professionalism, lack of courtesy and consideration given to department coworkers as well as the lack of effort to be a department team player." Affid. of Kevin Reak, dkt. #13, Exh. I. Delagrave told Krause that she had left him no choice but to relocate her work space to "ease office tension." Id. Delagrave added that Krause was aware that the new location would have a number of drawbacks, such as having to share the space with auditors, census workers and equipment. Id.

In response to this letter, Krause wrote Pfaff a two-page letter dated March 23, 1998, in which she said that she had understood from Delagrave that he approved of her performance in the front office and had decided to grant her request to move to the back office area and that she had been pleased, but that she had not understood from him that he was disappointed with her or with her work. Affid. of Kevin Reak, exh. #13, Exh. J. Plaintiff wrote that she had been shocked to read the letter in which Delagrave had treated her move as a punishment. She added that because Delagrave had used language from her merit review, she was forced to

conclude that he was retaliating against her for her responses in the comment section of the review. See id. She added that she found Delagrave's choice of words an indication of his hostility to her and said that unless Delagrave rescinded the letter, Pfaff should treat her letter as an initial grievance form to be transmitted to the personnel department. See id. She said nothing in the letter about sexually discriminatory pay practices.

Sometime after plaintiff moved to her new office space, one of her coworkers went behind the curtains that had been hung to block off some of the boxes and pieces of equipment in the back of the department. He said something to the effect of being the Wizard of Oz.

Pfaff did not respond to Krause's March 23 letter. Krause went to see Geissner, who told her to put something together listing all of her concerns about her job. With Geissner's help, Krause prepared a document entitled Grievance Hearing, City of La Crosse, Complaint, in which she listed 32 complaints about her job. On May 29, 1998, plaintiff Krause, defendants Delagrave and Pfaff, plaintiff's husband and Geissner met to discuss the grievance. Geissner decided later that he should bring in an outside investigator; he chose Susan Love from the Milwaukee law firm of Davis & Kuelthau, S.C. Love interviewed 45 witnesses and wrote four reports. As a result of the investigation, the mayor issued a written reprimand, identifying a number of areas in which Pfaff had acted improperly, such as exercising poor judgment, creating an appearance of preferential treatment of employees, failing to monitor employee

work hours, failing to provide proper supervision and failing to work professionally with the Personnel Department.

Plaintiff Krause filed a discrimination complaint with the Equal Rights Division on August 24, 1998.

DISPUTED FACTS

The parties dispute whether defendant Pfaff made some kind of physical contact with the women in the treasurer's office on the majority of his twice-weekly visits to the office, whether he hugged them frequently, whether he ever gave the cashiers neck or shoulder massages and whether his leaning against them when they stood at their computers was inadvertent or intentional. They dispute whether Pfaff ever made a derogatory comment about the women in the treasurer's office.

It is disputed whether defendant Pfaff used plaintiff Krause's back for bracing papers he wanted to sign or tried to do so more than once and as many as five times, whether he told Delagrave in Krause's presence that women are harder to deal with than men, whether he told Krause that CPA's were not needed in the finance Department, whether he criticized her in September 1995 for errors that had occurred while she was away on sick leave, whether he took away some of the responsibilities that had been part of her job and substituted clerical tasks,

whether he told her that educated people are "school stupid," whether he told her that if she forced him to put the comp time policy into writing he would issue her three reprimands and then fire her and that if she went to the Department of Industry, Labor and Human Relations to complain he would make life miserable for her.

It is disputed whether defendants Pfaff and Delagrave were hostile and antagonistic to plaintiff, whether they glared at her and refused to answer her questions and if so, when their behavior began.

OPINION

I. SECTION 1983 CLAIMS

A. Hostile Work Environment

Both plaintiffs contend that they were subjected to a hostile work environment in violation of their rights to equal treatment under the Constitution of the United States. Sexually harassing conduct that renders the workplace environment hostile and abusive to women can violate 42 U.S.C. § 1983, as well as Title VII (42 U.S.C. § 2000e), provided that the victim can show intentional discrimination on the part of the defendant, that is, that a discriminatory purpose was at least a motivating factor in the conduct. See King v. Board of

Regents of Univ. of Wis. System, 898 F.2d 533, 537-38 (7th Cir. 1990) ("In general, the [§ 1983] claim follows the contours of Title VII claims.") Not all kinds of objectionable conduct will create a sexually objectionable environment arising to the level of a constitutional violation. Rather, the 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." Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2283 (1998) (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993)). See also Negeunjuntr v. Metropolitan Life Ins. Co., 146 F.3d 464, 467 (7th Cir. 1998).

Harassment is actionable if it is severe or pervasive enough to alter an employee's terms and conditions of employment. See Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1001 (1998). This means that "isolated and innocuous incidents will not support a hostile environment claim." McKenzie v. Illinois Dept. of Transportation, 92 F.3d 473, 480 (7th Cir. 1996). As a general rule, courts tend to judge conduct using a scale that has severity on one side and pervasiveness on the other. The more pervasive the conduct, the lower the required level of severity, and vice versa. See, e.g., Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 885 (7th Cir. 1998); Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

Although defendants have brought this motion for summary judgment, they are not required to come forward with evidence sufficient to show that plaintiffs could not put into

dispute each of their claims. It is plaintiffs who bear the ultimate burden of proof on their claims; for that reason, it is plaintiffs that have an obligation to show the existence of facts sufficient to raise a question for the jury on all of the essential elements of their claims. See Celotex v. Catrett, 477 U.S. 317, 322 (1986). If, after all the evidence is viewed in the light most favorable to plaintiffs, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986), they cannot make this showing, then it is appropriate to grant judgment for defendants as a matter of law. See Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). Another way of saying this is that summary judgment will be granted if the court concludes that "if the record at trial were identical to the record compiled in the summary judgment proceedings, the movant would be entitled to a directed verdict because no reasonable jury would bring in a verdict for the opposing party." Russell v. Acme-Evans Co., 51 F.3d 64, 69 (7th Cir. 1995).

The Court of Appeals has held that making out a prima facie case of a hostile environment under Title VII requires a plaintiff to show

> 1) that she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature;
>
> 2) the harassment was based on sex;
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> 3) the sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment

that affected adversely the psychological well-being of the plaintiff; and

4) there is a basis for employer liability.

Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). For § 1983 liability, it is unnecessary to show employer liability. It is sufficient if a plaintiff can show that the harasser was her supervisor.

1. Plaintiff O'Neal

The facts concerning the treasurer's office are in dispute. Plaintiff O'Neal avers that on almost every occasion on which defendant Pfaff visited her office, he made unwanted physical contact with her and with the other cashiers, putting his arm around their shoulders or standing close enough to the cashiers when looking at their computer screens as to have full body contact with them. Other employees in the office have given deposition testimony that does not bear out plaintiff O'Neal's estimates of how frequently Pfaff had physical contact with them or how personal it became. For example, Kelly Branson testified at her deposition that when she worked in the treasurer's office, she never saw defendant Pfaff touch any other female employees, that on two occasions he had put his arm around her in "a consoling way" and that she had never heard a complaint from female coworkers about Pfaff's touching them.

Plaintiff O'Neal has not alleged that defendant Pfaff's touching had any sexual content (other than being confined to women). She does not say that Pfaff touched any intimate parts of her body or anyone else's or that he combined his touching with sexually-tinged remarks or solicitation. The only remarks she complains of are three isolated instances in which he described the women in the office on one occasion as catty, on another occasion as impossible to work with and when he told a suggestive and pointless joke. Cf. Shea v. Galaxie Lumber & Construction Co., 152 F.3d 729 (7th Cir. 1999) (company owner patted plaintiff's bottom, hugged her, kissed her and one occasion, came up to her and grabbed her breasts; son of owner asked plaintiff every day whether she would perform fellatio on him, told her his wife was out of town and invited her to his house and asked her and a co-worker whether he could have sex with both of them; evidence supported award of punitive damages against defendant for sexual harassment plaintiff endured); Adusumili v. City of Chicago, 164 F.3d 353 (7th Cir. 1998) (four isolated incidents of touching by co-workers did not constitute hostile environment). Nonetheless, I conclude that plaintiff O'Neal has shown the existence of evidence that could support a jury verdict. If, as plaintiff avers, it was defendant Pfaff's regular habit to touch the women in the treasurer's office on his visits (or even just O'Neal) and if his manner of touching was the sort that reasonable persons would have found objectionable and plaintiff found it to be so, a jury could find reasonably that Pfaff's conduct created a hostile environment. Women

employees should not have to anticipate and endure regular unwanted touching by their male superiors. On the other hand, if the arm-around-the-shoulder behavior was as infrequent as Kelly Branson testified and if the full body touching was inadvertent, as defendants maintain, a jury could find for defendants. At trial, it will be plaintiff O'Neal's task to show harassment severe or pervasive enough to work a significant alteration in the terms and conditions of her employment. See Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) ("The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women.").

Defendants have raised a generalized defense of qualified immunity to all of plaintiffs' claims. They contend that when defendant Pfaff hugged his employees, put an arm around their shoulders or established full body contact with them, it was not clearly established that such acts would violate his employees' constitutional rights. It is evident from their argument that their qualified immunity claim rests on the facts that are ultimately proved at trial. If plaintiff O'Neal proves what she alleges, that Pfaff put his arm around her on a regular basis and snuggled up to her at the computer so that he was making full body contact, Pfaff has no qualified immunity. He cannot maintain that it was unclear in 1994 that unwanted physical advances to female employees were illegal and unconstitutional. If, however, plaintiff can prove no more than infrequent, inoffensive or inadvertent touching, then Pfaff cannot be held liable

for creating a hostile environment and it will be irrelevant whether he would or would not have qualified immunity. See Johnson v. Jones, 515 U.S. 304 (1995) ("[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."); see also Omdahl v. Lindholm, 170 F.3d 730, 732-33 (7th Cir. 1999); Clash v. Beatty, 77 F.3d 1045, 1046 (7th Cir. 1996). Because plaintiff O'Neal's claim involves disputed issues of fact, I cannot determine whether defendant Pfaff is entitled to qualified immunity for his actions.

Plaintiffs brought this claim against both defendants Pfaff and Delagrave, but nothing in the undisputed facts or in plaintiffs' brief suggests any reason for holding Delagrave liable for Pfaff's conduct in the treasurer's office. To establish such liability, plaintiffs would have to show that Delagrave was involved personally in the conduct. They have adduced no evidence that he was. Therefore, I will dismiss plaintiffs' claim that plaintiff O'Neal was subject to a sexually hostile workplace as it relates to defendant Delagrave.

Defendant Pfaff's alleged mockery of the situation after O'Neal told him she objected to his conduct does not support a finding of a hostile workplace, either by itself or in combination with his other behavior. Rather, it indicates Pfaff's awareness that O'Neal and the other cashiers did not want him to touch them. Defendant Pfaff's comments and behavior tend

toward the immature but do not rise to the level of harassment. See Baskerville, 50 F.3d at 431 (supervisor's comment that he'd better think of plaintiff as Ms. Anita Hill "was the opposite of solicitation, the implication being that he would get into trouble if he didn't keep his distance").

2. Plaintiff Krause

It is undisputed that on one occasion in January 1996, defendant Pfaff used plaintiff Krause's back to brace some papers he was trying to sign. Plaintiff Krause avers that Pfaff did the same thing or tried to do so on three or four other occasions, twice in October 1995 and once in November 1995 and perhaps again in February 1996. On one occasion in 1991, Pfaff snapped a rubber band at her that hit her in her breast and on some occasions before 1993, he would refer to a box of complaints as "tough titties." These isolated instances of not very severe conduct do not amount to a sexually hostile environment in the usual sense. The 1991 and 1993 incidents fall outside the six-year statute of limitations for § 1983 claims but even if they did not, they would fall far short of establishing either sexual harassment or harassment that was either serious or pervasive. Even if defendant Pfaff made as many as five attempts to use plaintiff's back as a place on which to sign papers, no reasonable jury could find that this behavior would have made plaintiff's life at work "hellish," although it certainly qualifies as boorish behavior more suitable for adolescents than for managers. See Adusumili, 164 F.3d at

461 (four isolated incidents in which co-worker briefly touched plaintiff's arm, fingers or buttocks did not add up to actionable sexual harassment, even when considered together with sexually-tinged teasing and staring).

In addition to these examples of conduct she believes to be sexually improper, plaintiff Krause alleges the following instances of harassing behavior:

- In February 1994, Pfaff told Delagrave in Krause's presence that women are harder to deal with than men.
- At some unidentified time, Pfaff told plaintiff that CPA's were not needed in the Finance Department.
- Starting in September 1995, when plaintiff returned from emergency medical leave, Pfaff facilitated a campaign of abusive pranks by plaintiff's co-workers that included sticking pencils in the ceiling above her desk on three occasions.
- Also in September 1995, Pfaff criticized plaintiff for errors that had occurred while she was on sick leave, took away her responsibilities for signing off on bills, for doing retiree computations and investment rate figures and assigned her clerical tasks, including waiting on persons who came to the counter and answering the telephone. He told her also that educated people are "school stupid." Pfaff told plaintiff she was not eligible for compensatory time and when

plaintiff protested that she was being treated differently from other employees, he told her he could treat his employees differently if he wanted to. When plaintiff asked to see the policy on comp time, defendant Pfaff told her that if he had to put the policy in writing, he would issue her three reprimands and then fire her and that if she went to the Department of Industry, Labor and Human Relations to complain he would make life miserable for her.

- At this same time, the atmosphere in the office grew hostile. Pfaff and Delagrave ignored plaintiff's questions and refused to communicate with her.
- On May 9, 1997, defendant Delagrave reprimanded plaintiff for leaving the office early, told her she was not to leave when both he and Pfaff were gone and required her to tell the staff whenever she left and for what purpose.
- In May 1997, defendant Delagrave began keeping a file on plaintiff.

Defendants deny all of plaintiff Krause's allegations, with the exception of the last two. At least one of them cannot be considered. Plaintiff Krause has adduced no evidence that defendants "facilitated" the pranks or even knew of them. In fact, the undisputed fact is that defendants put a stop to the pranks and the mail strike as soon as they learned of them. In any event, the allegations of "abusive pranks" fall far short of true abuse, whether considered alone or with plaintiff's other allegations of hostile environment.

Plaintiff Krause's claim of a hostile environment rests on allegations of acts that involve no sexual innuendos, sexual propositions or sexually humiliating remarks or jokes and only one or possibly a few incidents of a non-sexual, non-threatening physical touching. It is not clear that acts such as those alleged would ever amount to a sexual harassment claim. The cases in this circuit assume that a hostile environment case will turn on proof of unwelcome sexual harassment. See e.g., Parkins, 163 F.3d at 1032. See also 29 C.F.R. § 1604.11 ("[U]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct constitute sexual harassment when . . . 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.") There is language in Justice Ginsberg's concurring opinion in Harris, 510 U.S. at 25, to the effect that the determining criterion of a sexual harassment claim is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." One could argue from this that hostile environment claims are not limited to those that involve sexually oriented behavior. However, plaintiffs have cited no such cases and I have found only one. In Kopp v. Samaritan Health System, Inc., 13 F.3d 264 (8th Cir. 1993), the Court of Appeals for the Eighth Circuit held that a cardiologist's treatment of female nurses and technicians created a hostile environment. The facts in Kopp were egregious and clear-cut; whether Kopp is an anomaly or

an example is difficult to know. In Kopp, the cardiologist had thrown things at plaintiff and others, had shouted at female staff, had grabbed plaintiff with both hands by the label of her scrub smock, held onto her and shook her for thirty seconds before releasing her and pushing her back, sworn at other female employees and referred to them by vulgar names, such as "fat bitch " or "fat lady," shoved them around and, on one occasion, shocked a respiratory technician with defibrillator paddles, when she did not move as fast as he thought she should. The court of appeals found that the cardiologist's behavior exposed female employees to disadvantageous terms or conditions of employment to which male employees were not subjected. The incidents involving the female employees were of a more serious nature, involving actual physical contact and harm; the male employees were subjected only to raised voices and verbal insults.

Nonetheless I will assume that a plaintiff such as Krause can prevail on a hostile environment claim that does not involve sexual conduct or remarks. Without such incidents, it may be harder for a plaintiff to show that the conduct she finds objectionable was conduct that defendants would not have engaged in had she been a male. It is particularly difficult for plaintiff to do that in this case because she is deprived of the usual method of proving differential treatment, which is to show that other similarly situated men were not exposed to the same conduct. As the Wisconsin Employment Relations Commission acknowledged,

plaintiff Krause was the only professional in the office who was not also a supervisor. There were no other similarly situated men in her office.

Plaintiff Krause's argument proceeds as if it were self-evident that defendants' downgrading and changing of her work tasks and denying her compensatory time were discriminatory acts that would not have been taken had she not been a woman. As a general rule, however, employers have the authority to decide what work their employees will perform and whether they are entitled to use comp time for sick leave or other purposes. There are limits to this rule of course, imposed by governmental laws and regulations, union contracts and civil service rules, but plaintiff does not contend that she was asked to do anything that was illegal or that defendant Pfaff violated any law or rule in denying her the use of compensatory time for sick leave.

Plaintiff's argument with defendant Pfaff over his refusal to allow her to use comp time is no more suggestive. Nothing plaintiff has alleged would support an inference of discrimination by itself. If Pfaff told her he would fire her if she complained about the lack of a written comp time policy, he was acting improperly and may have been violating a state law or a regulation of the city, but plaintiff has produced no evidence that would support a jury finding that his response was motivated by sex discrimination and not sheer irritation with plaintiff, anger at her lengthy medical leave or his own bad mood. See Bohen v. City of East

Chicago, Ind. 799 F.2d 1180, 1187 (7th Cir. 1986) (employer can defeat charge of sexual harassment of female plaintiff by showing that any harassment directed to "plaintiff [was] because of factors personal to her and not because she is a woman."). Lengthy depositions of both defendants Pfaff and Delagrave as well as of plaintiff Krause's coworkers have produced no such evidence.

Plaintiff contends that defendant Pfaff's antagonism derived from his prejudice against professional women and that it began when she obtained her CPA certification. It was in response to that, she maintains, that defendants Pfaff and Delagrave downgraded her tasks and began their campaign of hostility and antagonism. This contention is not supported by her proposed facts, in which she proposes as fact that the adverse actions did not occur until September 1995, approximately a year after she had been certified. Just as chronology can support a claim of discrimination by establishing a "telling temporal sequence," see, e.g., McClendon v. Indiana Sugars, Inc., 108 F.3d 789, 796 (7th Cir. 1997), if an adverse action follows immediately on the heels of a particular event, the lack of action for a long time after an event tends to disprove any causal connection.

Plaintiff Krause has had ample time in which to conduct discovery on her claim of hostile environment. Not only has she taken numerous depositions, she has supplemented her own testimony with a nineteen-page affidavit. Despite all this discovery, she has not adduced any

evidence that would allow a reasonable jury to find that defendants treated her as they did because she was a woman.

If plaintiff Krause had been able to show that defendants' objectionable behavior was motivated by sex discrimination, she would still have to prove that it was so severe and pervasive as to make her workplace "hellish." I do not believe that a reasonable jury could reach such a conclusion, even if it found all of plaintiff's allegations to be true and viewed them in the light most favorable to her. Plaintiff's disputes with her supervisors and her coworkers do not add up to a "hellish" or even an unusually difficult work environment. Much as plaintiff might have wanted to be recognized for her achievements in obtaining her CPA certification and her master's degree and to be rewarded with more challenging tasks and freedom from the mundane responsibilities of the office, defendants' failure to give her such recognition is not enough to prove sex discrimination.

Plaintiff Krause's § 1983 claim of hostile environment will be dismissed as to both defendants Delagrave and Pfaff.

B. Disparate Treatment

The second prong of plaintiffs' § 1983 claim is that they were subjected to disparate treatment based on their sex when they were denied merit pay increases that similarly situated

men received. (In addition, plaintiff Krause contends that she was denied equal protection because she was not given the same opportunities for training that similarly situated men received.) In moving for summary judgment, defendants assert that plaintiffs cannot prove that they were denied merit increases because of their sex. I agree.

To meet their burden, plaintiffs have two ways in which to show that sexual discrimination was the reason for the actions they complain of. The first is by showing discriminatory intent directly, see, e.g., McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 371 n.2 (7th Cir. 1992), such as with evidence of discriminatory statements by the employer. To this end, plaintiffs quote defendant Pfaff's statements that women were "catty" and that it was impossible to work with a roomful of women. However, the general rule is that stray remarks such as Pfaff's must be related to the employment decision in question; if they are not, they cannot be considered direct evidence of a discriminatory employment decision. See, e.g., Hasham v. California State Board of Equalization, 200 F.3d 1035, 1049 (7th Cir. 2000); Monaco v. Fudruckers, Inc., 1 F.3d 658, 660 (7th Cir. 1993). However, they may be probative of discriminatory bias when determining whether plaintiffs have met their burden of proving discrimination through the indirect method and specifically, by showing that defendants' proffered reasons for making the employment decision it did was pretextual. See Hasham, 200 F.3d at 1049-50.

Pfaff's statements do not supply direct proof that he discriminated against women employees in the matter of merit pay increases. Therefore, plaintiffs will have to use the indirect method of proving discrimination. This method builds on the McDonnell Douglas model. It requires plaintiffs to prove that 1) they are members of the protected class; 2) they were performing their jobs satisfactorily; 3) they suffered an adverse employment action; and 4) their employer treated similarly situated males more favorably. See, e.g., Check v. Peabody Coal Co., 97 F.3d 200, 204 (7th Cir. 1996). If plaintiffs make their prima facie case, it becomes defendants' task to come forward with an explanation for the adverse employment action and plaintiffs' job to show that the explanation is not to be believed.

Obviously, plaintiffs are members of a protected class. Both were performing their jobs satisfactorily, although it is a separate question whether they were performing so well as to be entitled to merit pay increases. It is at least arguable that plaintiffs suffered an adverse employment action when they were denied merit pay increases made available to only limited numbers of employees. The last factor is determinative, however, because plaintiffs have adduced no evidence to suggest that they would be able to prove that their employer treated similarly situated males more favorably.

The only male to whom plaintiffs have compared themselves is Delagrave. Because he is plaintiffs' supervisor, he is not similarly situated to them. There is an additional distinction

between him and plaintiffs: he ranked higher than plaintiffs on his yearly performance reviews every year. It is possible that his rankings were the result of sex discrimination, but plaintiffs have adduced no evidence that they were. Their only challenge to Delagrave's ranking is based on the evidence that the outside review of the finance department identified a number of deficiencies in Delagrave's performance and on their own subjective personal opinions that he was a poor manager with mediocre credentials. This is obviously insufficient evidence. No factfinder could infer from the outside investigator's finding of certain deficiencies in Delagrave's management style that his performance scores were erroneous in all respects. Plaintiffs' low opinions of Delagrave's ability and credentials do not add any support for drawing the inference.

Although plaintiffs contend that defendant Pfaff discriminated against them in the matter of merit pay increases, the fact is that he tried for three years in a row to secure a merit pay increase for plaintiff O'Neal, whose performance ranking was exceptional or close to it for four years. (For the years 1993-96, she had scores ranging from 19 to 24.) It is hard to argue that his failure to do the same for plaintiff Krause was a product of sex discrimination when her highest performance ranking was a 17 (in 1993 and 1994). If the city would not approve an increase for O'Neal, with her high scores and supervisory position in the treasurer's office, it is unlikely it would have given any serious consideration to a request made on behalf of Krause.

Plaintiff Krause contends that defendants' sex discrimination took another form when defendants refused to allow her to attend professional seminars or obtain specialized training at city expense. In addition, she contends it was discriminatory for the city to deny her request to pay her annual CPA dues. Again, her claim founders on her inability to show that a similarly situated male was given the opportunities she wanted. Merely showing that her two supervisors had such opportunities is not enough. She must show that their jobs and their job needs were identical to hers if she is to raise an implication of discrimination in their refusal to approve her attendance at similar seminars. She has failed to do so.

Plaintiff Krause contends that she was treated differently from Delagrave, the only other professional employee in the Finance Department, in a number of other ways. She alleges that he threatened to fire her on many occasions, that he threatened to make life miserable for her if she filed a claim with the Wisconsin Department of Industry, Labor and Human Relations, that he removed important budget duties from her and replaced them with secretarial duties, such as answering the phone, and belittled her educational accomplishments. As evidence of disparate treatment, these allegations fail for the same reason her claim of discriminatory denial of merit pay increases fails: she has not shown that similarly situated men were treated differently. Plaintiff has not shown that Pfaff never threatened to fire anyone else, never changed other employees' job duties and never belittled other employees' educational

accomplishments or other aspects of their lives. Plaintiff's allegations paint a picture of a poor manager, but they do not imply sex discrimination.

II. EQUAL PAY ACT AND TITLE VII RETALIATION CLAIMS

Plaintiff Krause's Equal Pay Act and Title VII claims are essentially identical, differing only in their statutory basis. Both are based primarily on her allegation that defendants retaliated against her by relocating her work space and giving her a letter of reprimand after she complained to Delagrave in February 1998 that she and plaintiff O'Neal were discriminated against because they never received merit pay raises. Defendant Delagrave denies that plaintiff made any such complaint to him and supports his denial with his deposition testimony. For the purpose of deciding this motion, however, I will assume that plaintiff made an explicit complaint of sex discrimination to Delagrave during her employee evaluation session. I will assume also that plaintiff's statements to Delagrave constitute protected activity within the meaning of 29 U.S.C. § 215(a)(3) (Equal Pay Act) and 42 U.S.C. § 2000e-3(a) (Title VII). Although the Court of Appeals for the Seventh Circuit has not yet ruled on the issue, many other courts have held that informal complaints to an employer constitute protected activity. See, e.g., Lambert v. Ackerley, 180 F.3d 997, 1007 (9th Cir. 1999) (holding that although "not all amorphous expressions of discontent" constitute complaints filed within meaning of §

215(a)(3), oral complaint to employer that communicates substance of employee's allegations is sufficient); EEOC v. Romeo Community Schools, 976 F.2d 985, 989 (6th Cir. 1992) (sufficient for § 215(a)(3) that employee complained to school district of unlawful sex discrimination and said she thought district was breaking some sort of law by paying her lower wages than male custodians); EEOC v. White & Son Enterprises, 881 F.2d 1006, 1011-12 (11th Cir. 1989); ("The charging parties did not perform an act that is explicitly listed in the [Fair Labor Standards Act]'s anti-retaliation provision; however, we conclude that the unofficial complaints expressed by the women to their employer about unequal pay constitute an assertion of rights protected under the statute."); Love v. RE/MAX of America, Inc., 738 F.2d 383, 387 (10th Cir. 1984).

In order to prove retaliation, plaintiff must make out a prima facie case that consists of three elements: 1) she engaged in protected expression; 2) she suffered an adverse action by her employer; and 3) there is a causal link between her protected expression and the adverse action. Plaintiff has overcome the first hurdle. The second one is more difficult. The facts and law do not support her claim that her move and her reprimand constitute adverse employment actions. It is undisputed that plaintiff had been asking for some time to make the exact move Delagrave directed her to make. She wanted to be away from the counter and the phones. She was pleased when Delagrave told her she was to make the move. Her mood did not sour until

she saw Delagrave's written reasons for the move. Thus, her real objection to the move, and her only one, is that it was the result of perceived deficiencies in her job performance, as documented by the letter of reprimand Delagrave left on her chair. Unfortunately for plaintiff, the law in this circuit is that a letter of reprimand is not an adverse employment action unless it is accompanied by something more, such as job loss or demotion. See Sweeney v. West, 149 F.3d 550, 556 (7th Cir. 1998) ("At most Sweeney has documented instances in which she was unfairly reprimanded for conduct she either did not engage in or should not have been responsible for. Absent some tangible job consequence accompanying these reprimands, we decline to broaden the definition of adverse employment action to include them."); Smart v. Ball State University, 89 F.3d 437, 442 (7th Cir. 1992) (even undeservedly poor performance evaluation does not constitute materially adverse employment action if it is not accompanied by any other action). See also DeGuiseppe v. Village of Bellwood, 68 F.3d 187, 192 (7th Cir. 1995) ("To be considered materially adverse a change in the circumstances of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. And it certainly must be adverse in the sense that the employee is made worse off by it.")

Plaintiff continues to work for the city of La Crosse and was promoted recently. She cannot argue that the letter of reprimand was accompanied by any adverse job-related action

or that it contributed to such an action.

Plaintiff does argue that the letter of reprimand she received was far different from anything discussed in Sweeney or Smart because it was not a "facially neutral tool designed to identify strengths and weaknesses in order to further the learning process" as in Smart, 89 F.3d at 442. Moreover, it was not imposed "alone," but in conjunction with a move to the back of the office, thereby changing her request into a harshly punitive measure. Additionally, she asserts, both defendants Delagrave and Pfaff became increasingly hostile to her, glaring at her, refusing to speak to her and addressing her in angry tones. Neither Sweeney nor Smart is limited in its effect to facially neutral communications to an employee from an employer; indeed, Smart involved what plaintiff alleged were undeserved negative evaluations of her work and Sweeney involved letters quite similar to the one Delagrave gave plaintiff, in which Sweeney was criticized for actions she had taken. Unlike the letter given to plaintiff however, Sweeney's concluded with the warning that "any further complaints of behavior and conduct of this nature will result in disciplinary action." Sweeney, 149 F.3d at 556.

Delagrave's letter must be considered separately, not as plaintiff would have it, as turning the move to the back office into a "harshly punitive" action. The proof is in her reaction to the news when she first heard it. Before she received the letter, she believed all her efforts had come to fruition: she was finally going to move to the location she preferred. She

knew where her new office would be, she knew it could be noisy and dingy and she knew that she would have to accommodate temporary workers and persons on break. None of this deterred her; she had achieved her objective. It was only when she saw the letter and realized how she had achieved the move that she considered it to be punishment. Plaintiff cannot characterize her move as a separate punishment when it was the very thing she had wanted all along.

Finally, the causal connection between defendants' acts and her complaint of sex discrimination is tenuous at best. Plaintiff alleges that defendants Pfaff and Delagrave became hostile and antagonistic to her immediately after she made her complaint to Delagrave during her February 1998 merit pay evaluation. She makes the same allegation of their becoming hostile and antagonistic to her in September 1995. Moreover, she leaves unexplained why defendants would have retaliated against her in 1998 after she complained of sex discrimination to Delagrave but would have had no reaction to the sex discrimination complaint she says she made to Delagrave at her merit pay evaluation meeting in March 1997.

In summary, I conclude that plaintiff Krause cannot make out any of her claims of sex discrimination under 42 U.S.C. § 1983 or illegal retaliation under the Equal Pay Act or Title VII.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants City of La Crosse, Gene Pfaff and Wayne Delagrave is DENIED with respect to plaintiff Nancy O'Neal's § 1983 claim against defendant Gene Pfaff that he subjected her to sexual

harassment in the form of a hostile workplace and GRANTED in all other respects.

Entered this _____ day of March, 2000.

BY THE COURT:

_____
BARBARA B. CRABB
District Judge