IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PAULETTE ALSETH, JULIE A. RUIKKA, KIMBERLY K. KESHINEN AND LISA MUNICH,

Plaintiffs,

ORDER AND OPINION
99-C-627-C

v.

DOUGLAS COUNTY AND WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION,

Defendants.

- -

This is a civil action for monetary, injunctive and declaratory relief in which plaintiffs Paulette Alseth, Julie Ruikka, Kimberly Keskinen and Lisa Munich contend that defendant Douglas County violated their rights under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, and under the equal protection and due process clauses of the Fourteenth Amendment. Plaintiffs also bring state law claims for violations of the Wisconsin Fair Employment Law, for violations of their rights protected by the equal protection and due process clauses of the Wisconsin constitution and for negligence.

After plaintiffs filed suit in Wisconsin state court in Douglas County, defendants removed this case to federal court pursuant to 28 U.S.C. § 1441. Subject matter jurisdiction is present. See 28 U.S.C. § 1331. Presently before the court is defendants' motion for summary judgment.

A review of plaintiffs' responses to defendants' proposed findings of fact reveals that plaintiffs failed to comply with this court's Procedures to be Followed on Motions for Summary Judgment, a copy of which was given to each party with the Preliminary Pretrial Conference Order on November 16, 1999. Rule 56(e) states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56. Plaintiffs cite to affidavit statements that do not set forth the specific information that is the subject of their responses to defendants' proposed findings. For example, plaintiffs' response to defendants' proposed finding #33 relies on plaintiff Keskinen's affidavit ¶ 2, in which she states, "I have had the opportunity to review the Plaintiff's Response to Defendant's Proposed Findings of Fact and that to the extent each such response involves me personally, or that I refer to a practice with which I am familiar, that I have read the same and verify that the facts are true and correct to my own personal knowledge." See also Pltf. Ruikka Aff. ¶ 2; Pltf. Alseth Aff. ¶ 2; Pltf. Munich Aff. ¶ 2; Pltf.

Alseth Aff. ¶ 15 ("The facts regarding our contact with an attorney and Mr. Ellis's response to our proposed contact as set forth in response _____ are true and correct recitation of the situation."). Although I have allowed such general affidavit statements to provide the requisite support for plaintiffs' responses, plaintiffs' counsel should be aware that affidavit statements should set forth facts with specificity rather than make reference to all of the facts in a set of proposed findings.

In plaintiffs' brief as well as in their responses to defendants' proposed findings, plaintiffs refer to their reply to defendants' response to plaintiffs' EEOC complaint. See, e.g., Plts.' Resp. to Defs.' Proposed Findings of Fact #23. To the extent that the allegations in plaintiffs' reply were not made the subject of a response to one of defendants' proposed facts, I have disregarded the reply. Referring to their reply to the EEOC is not an adequate substitute for submitting their own proposed findings, which they did not do. See Procedures, II.C.4 ("If properly disputing the movant's proposed findings of fact alone does not adequately support the nonmovant's position or adequately address the undisputed facts necessary to the movant's position, the nonmovant may present its own proposed findings of fact . . . and such proposed findings shall be made with the specificity required of the movant.") It would not be fair to defendants to consider plaintiffs' reply to the EEOC because defendants did not have the opportunity to respond and attempt to put into dispute the allegations contained in the reply.

For purposes of summary judgment, I find the following facts submitted by the parties to be material and undisputed.

UNDISPUTED FACTS

A. Parties

At all relevant times, plaintiffs Paulette Alseth, Kimberly Keskinen, Lisa Munich and Julie Ruikka were full time employees of Douglas County, working as jailers in the Douglas County jail. Plaintiffs were represented by a labor organization. Currently, plaintiffs Alseth, Keskinen and Ruikka work as jailers at the Douglas County jail. Plaintiff Munich is working as a police officer for the Duluth police department. Defendant Douglas County is a county in Wisconsin. At all relevant times, defendant Douglas County had a comprehensive sexual harassment policy. Douglas County's sheriff's department had a policy prohibiting sexual harassment as well.

B. Defendant Douglas County Employees

From 1997 until January 1, 1999, Larry McDonald was the sheriff of Douglas County. He was replaced by Richard Pukema. Candace Fitzgerald was the human resources manager for Douglas County. From summer 1998 until October 31, 1998, Gordon Ellis was the

administrative coordinator and chief executive officer for Douglas County. Gregory Guenard was the sheriff's chief deputy; he supervised the jail.

From 1998 until March 1999, James Webber served as the jail sergeant in Douglas County jail. Sergeant Webber was on voluntary leave from May 1998 until September 1998. In March 1999, Sheriff Pukema transferred Sergeant Webber to a road deputy position, which removed him from the jail. Sergeant Webber was a member of the same collective bargaining unit as plaintiffs.

C. Plaintiffs' Allegations of Sexual Harassment

1. Plaintiffs' initial complaint

On January 26, 1998, Sheriff McDonald and Human Resource Manager Fitzgerald met with plaintiffs Keskinen and Alseth to discuss a complaint against plaintiff Keskinen. At the meeting, plaintiffs Keskinen and Alseth raised allegations of sexual harassment concerning Sergeant Webber. McDonald and Fitzgerald told plaintiffs Alseth and Keskinen to file written complaints. Plaintiff Alseth reported that other people had complaints as well. In letters dated January 26, 1998, plaintiffs filed written complaints in which they complained of offensive comments but did not complain of physical touching or sexual advances. For instance, they complained that Sergeant Webber had referred to plaintiffs Munich and Keskinen as tokens,

meaning that they were token females. Also, Sergeant Webber had called plaintiff Munich and told her that while he was going to the bathroom, his son walked into the bathroom and said that his dad had a "long tail like Scooby Doo."

2. Defendants' investigation

On February 17, 1998, a report was completed following an investigation of plaintiffs' written complaints. The report was signed by McDonald and Fitzgerald. The report concluded that Webber had made some offensive comments to plaintiffs. In the report, McDonald and Fitzgerald recommended that Webber attend a sensitivity training program and supervisory training and that the report be placed in Webber's personnel file. Plaintiffs did not receive a copy of the report but they did receive a detailed summary of the findings. Plaintiff Alseth was not satisfied with Fitzgerald's investigation.

After plaintiff Alseth contacted Diane Caffrey (a county employee), Caffrey conducted a second investigation of plaintiffs' complaints. After Caffrey completed her investigation, Administrative Coordinator Gordon Ellis issued a final report. Plaintiff Alseth believed that Ellis did not address the sexual harassment in the jail. In his report, Ellis recommended that Webber be required to attend a diversity workshop and that a permanent letter of reprimand be placed in his personnel file. Plaintiff Alseth believed that Webber should have received

progressive discipline.

At a meeting on March 17, 1998, Chief Deputy Greg Guenard expressed concern that plaintiffs had not complained to him or Sergeant Webber before complaining to Sheriff McDonald.

3. Incidents of sexual harassment after plaintiffs' complaints

While standing near jailer Tim Magnuson, who was kneeling, Webber stated, "While you're down there." Also, Webber asked an army recruiter to turn around in front of plaintiff Munich, continued to tell dirty jokes in front of plaintiff Ruikka, called plaintiff Alseth "the blonde" and hummed the theme song from the cartoon "Scooby Doo." Plaintiff Munich stopped complaining because the comments continued; she did not talk to Fitzgerald because she felt threatened by McDonald's response to her complaint. Plaintiff Alseth did not file certain complaints because she did not know with whom to file them. Plaintiff Ruikka did not file certain complaints because she saw what was happening to the other plaintiffs when they complained. Plaintiffs Ruikka and Alseth were afraid of Webber.

4. EEOC complaint

Between December 22 and 24, 1998, plaintiffs filed administrative complaints of sex

discrimination and retaliation with the Equal Employment Opportunity Commission.

D. Retaliation

1. Plaintiff Alseth

The same day plaintiff Alseth filed an internal complaint alleging sexual harassment, Webber said, "See ya, wouldn't want to be ya."

Within two and a half weeks after plaintiff Alseth filed the initial complaint, Webber asked a co-worker whether the co-worker had a post office shirt that Webber could borrow to go with Webber's post office pen. Webber made this comment in front of plaintiff Alseth, who thought Webber was referring to the shootings by post office workers. In a letter dated February 13, 1998, jailer Brad Hoyt described this incident in a letter to Fitzgerald in which he complained about "veiled threats against staff members of the jail."

A meeting was scheduled for March 17, 1998, to discuss the final summary of the investigation. Ellis told plaintiff Alseth that she would be retaliated against if she failed to show up for the meeting or complained to the state about the alleged harassment. Plaintiff Alseth did not want to attend the meeting without her lawyer.

On March 20, 1998, plaintiff Alseth requested assistance while she was booking an inmate who was agitated and threatening self-harm. Jailer Magnuson came out of the jail office

to help. While he was doing so, Webber ordered him back into the office. When plaintiff asked for help a second time, Magnuson came out and again, Webber told Magnuson to come back in the office and ordered him to call the local mental health center. After plaintiff Alseth wrote a letter to Guenard complaining of the incident, Sheriff McDonald wrote plaintiff a letter of reprimand for insubordinate behavior. After plaintiff Alseth filed a grievance, McDonald's letter was removed from her personnel file. In December 1998, McDonald placed a second formal letter of reprimand in plaintiff Alseth's personnel file. Sheriff Pukema removed the letter voluntarily.

Plaintiff Alseth requested a day off and the sheriff or chief deputy approved her request. Webber crossed off the approval on plaintiff Alseth's request form; the approval was restored.

While plaintiff Alseth and other jailers were reading books and magazines, Webber sometimes directed plaintiff to perform extra work, such as perform an extra round of checking on inmates.

2. Plaintiff Ruikka

At some point before July 1998, Webber and Guenard instructed plaintiff Ruikka, who was pregnant, to attend a firearms training. Firearms training officer Paul Johnson told

Guenard that plaintiff Ruikka should not attend the training because of the risk of exposure to lead while she was pregnant. Plaintiff Ruikka believed that Webber directed her to attend the training because of her concerns about her fetus. Plaintiff Ruikka did not suffer any formal reprimands, disciplinary action, loss of pay or loss of benefits.

3. Plaintiff Keskinen

After plaintiff Keskinen filed an internal complaint alleging harassment, Webber denied her time off between two and four times. On one occasion, plaintiff Keskinen had to attend a mandatory training session until 5:30 p.m. and she was supposed to start her shift at 4:00 p.m. Webber denied plaintiff Keskinen's request to start work after the training session. Because plaintiff Keskinen received an unrelated suspension, she attended the training session but did not work that day.

Guenard suspended plaintiff Keskinen for giving two cigarettes to an inmate on October 9, 1998, in violation of a new rule banning cigarettes in the jail. In a directive dated October 8, 1998, Guenard instructed that sheriff department employees were not allowed to bring any tobacco products into the jail and that jail staff and inmates were not allowed to possess or use tobacco products in the jail. Plaintiff Keskinen learned of the policy when she arrived at work on October 9, 1998, at which point she gave an inmate two cigarettes that she had brought to

work because the inmate was leaving the jail on work release. After plaintiff Keskinen filed a grievance, the letter of reprimand she received for the incident was removed from her file, but she did not receive pay for the day she missed work.

4. Plaintiff Munich

On one occasion after plaintiff Munich filed her complaint, Webber commented to the jail nurse, "Why don't you ask Lisa (Munich) how much hers cost," referring to the cost of head lice spray.

On one occasion, plaintiff Munich signed up to attend a mandatory training session on a Monday and Webber crossed off her name and signed her up to attend training on Thursday of that week. During the shift plaintiff Munich signed up to attend training, she was the only female scheduled to work and more than one male was scheduled to work. Webber told plaintiff that he switched her because she was a female and would have to be replaced because each shift needed at least one female jailer. Plaintiff complained to the chief deputy, who approved her request to attend the training on the day she had signed up to attend initially.

There were many opportunities to work overtime in the jail. On numerous occasions, plaintiff Munich turned down opportunities for overtime. Plaintiff Munich declined some of the overtime because she felt stressed. On October 22, 1998, Webber ordered plaintiff Munich

to work overtime in order to allow a more junior male employee (Troy Smith) to continue on an out-of-town trip even though Smith said he could be back in time for the shift. Plaintiffs Alseth and Munich complained about the incident to Sergeant Webber, Chief Deputy Guenard and Sheriff McDonald.

On November 30 and December 1, 1998, plaintiff Munich took two vacation days that had been approved while Webber was on vacation. Because Webber did not have a vacation request form for plaintiff Munich, he called her at home during her scheduled shift to ask why she was not at work. When Webber called plaintiff, plaintiff's replacement was at the jail. Plaintiff Munich did not lose any pay or benefits as a result of this incident.

On one occasion, plaintiff Munich signed up for an open shift and was told that she could not work the shift because Webber had decided that the open spot on the shift would not be filled. Plaintiff Munich learned that a male employee who was more junior to her was asked to fill in for five hours during that shift. After filing a grievance, plaintiff Munich received pay for four hours.

In a letter dated December 18, 1998, McDonald responded to plaintiff Munich's complaint of harassment. In the letter, McDonald wrote, "I know it was your resolve to have Sgt. Webber terminated, because you clearly stated that in the mediation process. . . ." Plaintiffs did not demand that Webber be terminated; they requested that the appropriate

action be taken to stop his negative behavior. Plaintiff Munich believed it was retaliatory that McDonald's letter was put in her personnel file. After plaintiff complained, the letter was removed from her file.

During the course of her employment, plaintiff Munich was not denied any promotional opportunities and did not lose any pay or benefits. She received no reprimands or suspensions, except to the extent McDonald's letter of December 18 could be interpreted as a reprimand.

5. All plaintiffs

At a minimum, there must be one employee of each gender during each shift. If that requirement is satisfied, shifts are posted as "either," meaning that they are available to either gender. Near the end of 1998, Webber designated certain shifts as "male" when they should have been designated as "either."

In December 1998, Guenard directed jail staff to wear department-approved sweaters only. Jail employees received a uniform allowance. Plaintiffs were the only members of the jail staff that wore sweaters of any kind during the day shift.

Prior to a directive from Webber, the door between the POD area and the office area was kept open unless it was necessary to close the door to minimize the impact of sound or to isolate someone. When the door was open, jailers in the office area could interact with their co-workers in the POD area. At some point, Webber issued a directive that the door should be kept closed for security reasons. Apparently, the rule was followed during the day shift only. Webber's directive caused the plaintiffs in the POD area to be isolated from their co-plaintiffs and other co-worker in the office area.

Using written task sheets, Webber assigned tasks to plaintiffs Ruikka, Alseth and Munich that were supposed to be performed during specific time periods. Although the tasks were normal duties of a jailer, Webber wrote down assignments for plaintiffs and did not do so

for other jailers.

In the jail, male and female employees had their lockers in separate rooms. At some point after plaintiffs filed their complaints, the sheriff converted the female locker room to a locker room for men and women by assigning men lockers in the female locker room even though there were extra lockers in the male locker room. The male locker room continued to be used by men only and for storage. Although there were no signs to designate the bathrooms, women used the bathroom in the female locker room and men used the one in the POD area. At some point, Guenard changed that practice by posting a unisex symbol on the bathroom in the locker room.

Following the filing of plaintiffs' complaints, the sheriff's department hung posters stating that there was a zero tolerance sexual harassment policy. The posters were hung in areas of the jail frequented more by women, but visited by men as well.

OPINION

A. Standard of Review

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 324 (1986). All

evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Seventh Circuit has recognized that courts must apply the summary judgment standard with rigor in employment discrimination cases because "motive, intent and credibility are crucial issues." Crim v. Board of Education of Cairo School Dist. No. 1, 147 F.3d 535, 540 (7th Cir. 1998). However, even in employment discrimination cases, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial, see Celotex, 477 U.S. at 324, carrying her burden with more than mere conclusions and allegations. See id. at 321-22.

B. Title VII

1. Continuing violation doctrine

Before suing in federal court, a plaintiff alleging a Title VII violation must file a claim with the Equal Employment Opportunities Commission. See 42 U.S.C. § 2000e-5. Generally, parties must file their claims within 180 days of the allegedly unlawful employment practice, but where an aggrieved employee files first with a state or local agency possessing the authority to address the discrimination, the limitations period is extended to 300 days. See 42 U.S.C. § 2000e-5(e); Russell v. Delco Remy Division of General Motors Corp., 51 F.3d 746, 750 (7th Cir. 1995). Wisconsin is one of many states that have entered into work sharing agreements

with the EEOC under which both agencies treat a complaint filed with one agency as cross-filed with the other and the state agency waives its right to exclusive jurisdiction over the initial processing of a complaint. Therefore, in Wisconsin, a charge of discrimination actionable under federal law is timely if it is filed with the state Equal Rights Division within 300 days of the alleged discriminatory act. See Wisconsin Employment Law, §§ 14.182, 14.247 (1998). Generally, conduct that occurred outside the limitations period may not be challenged under Title VII. See Galloway v. General Motors Service Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996).

Although it is not clear that plaintiffs filed a complaint with the Wisconsin Equal Rights Division, I will assume that they have because both sides argue that the relevant time period is 300 days. Therefore, the limitations period began 300 days before plaintiffs filed their complaints with the EEOC on December 22 through December 24, 1998. Defendants argue that allegedly unlawful conduct that occurred outside the limitations period cannot be redressed under Title VII. Plaintiffs attempt to avail themselves of the continuing violation doctrine, arguing that the limitations period is not applicable because defendants' discriminatory conduct was ongoing throughout their employment.

The continuing violation doctrine allows a plaintiff to obtain relief for time-barred acts of discrimination by linking acts that fall outside and inside the statutory limitations period.

See Filipovic v. K & R Express Systems, 176 F.3d 390, 396 (7th Cir. 1999). Courts will then treat the series of acts as one continuous act ending within the limitations period. See Selan v. Kiley, 969 F.2d 560, 564 (7th Cir. 1992). There are three factors for the court to consider in making this determination: "(1) whether the acts involve the same subject matter; (2) the frequency at which they occur; and (3) the degree of permanence of the alleged acts of discrimination, 'which should trigger an employee's awareness of and duty to assert his or her rights.'" Filipovic, 176 F.3d at 396 (quoting Selan, 969 F.2d at 565). The continuing violation doctrine is applicable only if "it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." Galloway, 78 F.3d at 1167. If plaintiffs have been victims of a long chain of events, they cannot introduce the whole chain if, more than 300 days before filing, they should have been aware of their injury but failed to file. See id. If that is the case, a plaintiff can sue only for harassment that occurred within the 300-day limitations period. In this case, plaintiffs can sue for pre-February 1998 acts only if they can show that a reasonable person would not have realized that those acts constituted harassment. Plaintiffs cannot make this showing. Therefore, they cannot rely on the continuing violation doctrine.

Plaintiffs allege that before they filed their complaint in January 1998, Webber referred

to plaintiffs Munich and Keskinen as the token females and that he told a story about his son's comparison of Webber's penis to Scooby Doo's tail. In response to these and other incidents, plaintiffs filed written complaints. That plaintiffs felt the collective incidents were serious enough to complain to McDonald and Fitzgerald demonstrates their beliefs that the alleged discriminatory incidents that occurred before January 1998 could constitute actionable harassment by themselves. See Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 345 (7th Cir. 1999) (holding that it would not have been unreasonable for plaintiff to seek redress after she was subject to rude and offensive behavior about which she complained both verbally and in writing). Because plaintiffs cannot invoke the continuing violation doctrine, the merit of their Title VII claims turns exclusively upon a consideration of events that occurred after February 1998.

2. Hostile work environment claim

Title VII prohibits discrimination based on race, gender, religion or national origin that creates a hostile or abusive work environment. See Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1001 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). The Supreme Court has articulated a standard with objective and subjective components for determining whether

conduct rises to the level of a Title VII violation. See Harris, 510 U.S. at 21-22. Ultimately, the conduct must be such that a reasonable person would consider the work environment hostile and abusive and the subject of the treatment must have perceived it as such. See id.; see also Ngeunjuntr 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, 118 S. Ct. at 1001. Although courts in Title VII cases have had an easier time describing this concept than applying it, one accepted guideline is that actionable harassment has two inversely related parts: severity and pervasiveness. The more pervasive the conduct, the lower the required level of severity. See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (citing King v. Board of Regents of Univ. of Wis. System, 898 F.2d 533, 537 (7th Cir. 1990)); see also Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 885 (7th Cir. 1998) (quoting McKenzie v. Illinois Dept. of Transportation, 92 F.3d 473, 480 (7th Cir. 1996)) ("isolated and innocuous incidents will not support a hostile environment claim").

It is recognized that imposition of liability under Title VII for sexual harassment in the workplace is designed to rid the workplace of gender-based words and conduct that can make the workplace "hellish," but imposing liability is not intended to "purge the workplace of vulgarity." See Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995). The Court

of Appeals for the Seventh Circuit has provided additional guidance in drawing the line between legal and illegal conduct. On one side lie sexual assaults, other nonconsensual physical contact, uninvited sexual solicitations, intimidating words or acts, obscene language or gestures and pornographic pictures. See id. "On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers." Id.

From an objective point of view, plaintiffs have not introduced evidence from which a trier of fact could reasonably conclude that Webber's conduct was so severe or pervasive that it created a hostile working environment. "[I]t is established in this circuit . . . that there is a 'safe harbor for employers in cases in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of sex.'" Gleason v. Mesirow Financial, Inc., 118 F.3d 1134, 1144 (7th Cir. 1997) (quoting Galloway, 78 F.3d at 1168). Plaintiffs' allegations about comments that were not directed at them, such as Webber's comment to jailer Magnuson, "While you're down there," and to an army recruiter to turn around, are not actionable. "[T]he impact of 'second-hand harassment' is obviously not as great as the impact of harassment directed at the plaintiff." Gleason, 118 F.3d at 1144; see also Ngeunjuntr, 146 F.3d at 467 (no hostile environment claim where offensive comments were isolated and many were not directed at plaintiff). That Webber referred to plaintiff Alseth as "the blonde" is not actionable, but falls

clearly within the contours of “banter, tinged with sexual innuendo.” Baskerville, 50 F.3d at 430. The two remaining incidents, Webber's humming the theme song from the cartoon “Scooby Doo” and telling unspecified dirty jokes, are indicative of "a merely unpleasant working environment," not "a hostile or deeply repugnant one.” Id. at 431.

Although it is difficult for a court to assess “the impact of words without taking account of gesture, inflection, the physical propinquity of speaker and hearer, the presence or absence of other persons, and other aspects of context,” id., even if I assume that Webber intended his comments to be infused with sexual innuendo, such comments are not actionable. Webber may have made plaintiffs' working environment disagreeable and stressful; however, his conduct pales in comparison to the plaintiffs' allegations in Galloway, 78 F.3d at 1168, that she was called a "sick bitch" repeatedly over a four-year period, which the Seventh Circuit held was not actionable harassment. Plaintiffs do not allege that Webber touched them, threatened them, invited them to have sex or go on a date, exposed himself, showed them dirty pictures or unreasonably interfered with their performance. See Gleason, 118 F.3d at 1145 (noting importance of taking into account what alleged harasser did not do).

Ordinarily, hostile environment discrimination claims require two inquiries: whether the employee was subjected to impermissible harassment and whether the employer is liable for the harassing conduct. See Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th

Cir. 1998) (stating that plaintiff must demonstrate that "there is a basis for employer liability"). An employer's liability for hostile environment sexual harassment depends upon the status of the harasser. See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998). Because I find that plaintiffs have failed to establish that Webber subjected them to actionable harassment, I need not decide whether he was their supervisor for purposes of Title VII liability.

3. Retaliation

Plaintiffs contend that they were retaliated against on several different occasions for complaining about Webber's allegedly harassing behavior. To establish a prima facie case of retaliation, plaintiffs must show that (1) they engaged in statutorily protected expression; (2) they suffered material adverse actions by their employer; and (3) there is a causal link between the protected expression and the adverse job action. See Dey v. Colt Const. & Development Co., 28 F.3d 1446, 1457 (7th Cir. 1994).

Plaintiffs' written complaints to McDonald and Fitzgerald, dated January 26, 1998, constitute protected activity within the meaning of 42 U.S.C. § 2000e-3(a). However, plaintiffs' retaliation claims fail because they cannot demonstrate either that they suffered a materially adverse change in their working conditions as a result of their protected expression or that the requisite causal link exists between their expression and any adverse job action.

Although the Court of Appeals for the Seventh Circuit has defined adverse employment action to include "a wide variety of actions, some blatant, some subtle," Bryson v. Chicago State University, 96 F.3d 912, 916 (7th Cir. 1996), the court has also explained that "the adverse job action must be 'materially' adverse." Ribando v. United Airlines, 200 F.3d 507, 510 (7th Cir. 2000). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993).

a. Comments

Plaintiffs contend that the following statements were retaliatory: (1) Webber's comment to plaintiff Alseth, "See ya, wouldn't want to be ya;" (2) Webber's inquiry to a co-worker about borrowing a post office shirt, referring to the recent spate of violence among postal workers; (3) Webber's comment that plaintiff Munich would know the cost of head lice spray; and (4) Ellis's comment to plaintiff Alseth that she would be retaliated against if she failed to show up for a meeting. Unpleasant as these comments are, they fall short of constituting a material change to plaintiffs' employment circumstances because they were not sufficiently frequent or severe.

b. Scheduling

Plaintiffs contend that Webber made certain scheduling decisions in retaliation for plaintiffs' internal complaint. Specifically, plaintiffs Alseth and Keskinen contend that Webber denied them time off a couple of times and plaintiff Munich contends that Webber tried to switch the day she was to attend a training session, called her at home during one of her two pre-approved vacation days to find out why that she was not at work and ordered her to work overtime to cover for a more junior employee. Viewing these incidents in the light most favorable to the nonmoving party, I cannot say that these incidents changed plaintiffs' benefits, salary or schedule *significantly*. "[N]ot everything that makes an employee unhappy is an actionable adverse action." Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996).

c. Assignment of tasks

For the same reason, plaintiffs have failed to show that they suffered materially adverse employment actions when Webber assigned them certain jail duties in writing and singled out plaintiff Alseth to perform extra work while others were allowed to read magazines and books. There is nothing to indicate that it was harmful to plaintiffs that they were asked to perform tasks in writing while other jailers were asked verbally. Also, that Webber occasionally required

plaintiff Alseth to perform tasks within her job responsibilities that others were not required to perform does not establish that she was subjected to an adverse employment action. Being required to perform such tasks instead of reading magazines during working hours is not the equivalent of "termination of employment, a demotion evidenced by a decrease in wage or salary, [or] . . . a material loss of benefits." Crady, 993 F.2d at 136.

d. Policy changes

Plaintiffs contend that there were three policy changes in the jail that were retaliatory: (1) the requirement that jailers wear department-approved sweaters; (2) the requirement that the door between the POD area and the jail office be closed; and (3) the conversion of the female locker room and bathroom into unisex facilities. Although the three changes in policy may have had a negative effect on plaintiffs' working environment, wearing uncomfortable sweaters, being separated from co-workers and sharing a bathroom with men are too trivial to constitute adverse employment action. See Place v. Abbott Laboratories, Nos. 99-2418, 99-2971, 2000 WL 706035, at *6 (7th Cir. June 1, 2000) ("Some of [plaintiff's] complaints--losing her telephone and cubicle--are too trivial to amount to an adverse employment action.") Even if the policy changes rose to the level of adverse employment action, plaintiffs have not demonstrated that such department-wide changes were implemented in order to retaliate

against certain employees, even if they affected certain employees more than others.

e. Other incidents

Plaintiffs also assert that the following three incidents were retaliatory: (1) McDonald's letter that stated that plaintiff Munich wanted Webber to be terminated even though that was untrue; (2) Webber's instruction to plaintiff Ruikka to attend firearms training while she was pregnant; and (3) Webber's directive to jailer Magnuson to call the local mental health center rather than assist plaintiff Alseth book an agitated inmate. Again, none of these incidents qualify as an adverse employment action. Without more, there is nothing to support plaintiffs' assertion that these incidents adversely affected plaintiffs' positions as jailers in any way. In fact, I cannot conclude that McDonald's statement that plaintiff Munich wanted Webber fired was anything more than an understandable mistake given her repeated complaints about Webber, that Webber instructed plaintiff Ruikka to attend firearms training for any reason other than because it was an appropriate training for a jailer and that Webber's decision that plaintiff Alseth did not need backup was inappropriate. See Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) ("[o]therwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit").

f. Suspension

Plaintiff Keskinen contends that she received a suspension in retaliation for filing a complaint. Although a one-day suspension constitutes an adverse employment action, the undisputed evidence demonstrates that she received the suspension because she violated a new rule banning tobacco in the jail. Even though it is likely that plaintiff Keskinen's violation was inadvertent, she has not shown that the suspension was linked to her complaint rather than to her violation of the new policy.

g. Overtime opportunities

Finally, plaintiffs allege that near the end of 1998, Webber designated certain shifts as "male" when the shifts should have been designated as "either" and, as a result, plaintiffs were deprived of the opportunity to work extra shifts. The reduction of an employee's opportunities to earn overtime pay may constitute a material adverse job action in certain circumstances. See, e.g., Hodgkins v. Kontes Chemistry & Life Sciences Product, No. 98-2783, 2000 WL 246422, at *19 (D.N.J. March 16, 2000) (stating that diminished overtime could constitute adverse employment action); Robinson v. Rhodes Furniture, Inc., 92 F. Supp.2d 1162, 1169 (D. Kan. 2000) (same). Plaintiffs filed an internal complaint of discrimination in January 1998; they allege that Webber deprived them of overtime opportunities at the end of 1998.

The gap in the events does not provide strong support for a retaliation claim. Plaintiffs have adduced no additional evidence to demonstrate that Webber's shift designations were linked to plaintiffs' retaliation claims. Considered separately or as a whole, none of plaintiffs' complaints rise to the level of an adverse employment action with the exception of plaintiff Keskinen's suspension and Webber's shift designations, for which plaintiffs cannot establish a causal link to their sex discrimination complaints. None of the plaintiffs suffered discharge, any loss of pay, benefits, promotions or disciplinary action or significant change of job responsibilities or working conditions. Defendants' motion for summary judgment on plaintiffs' retaliation claim will be granted.

C. § 1983

1. Equal protection clause

"Under § 1983, actions of a state entity's employees are attributable to the state entity itself if those actions are in furtherance of the entity's 'policy or custom.'" Bohen v. City of East Chicago, Indiana, 799 F.2d 1180, 1188 (1986). The Court of Appeals for the Seventh Circuit has identified three instances in which such a "policy" or "custom" exists:

> (1) an express policy that, when enforced, causes a constitutional deprivation (citing Monell v. Dep't of Social Services of City of New York, 436 U.S. 658, 690 (1978));
>
> (2) a widespread practice that, although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a

> 'custom or usage' with the force of law" (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (plurality opinion) (quoting Adickes, 398 U.S. at 167-68); or
>
> (3) an allegation that the constitutional injury was caused by a person with 'final policymaking authority' (citing Praprotnik, 485 U.S. at 123; Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) (plurality opinion)).

See Baxter v. Vigo County School Corp., 26 F.3d 728, 735 (7th Cir. 1994).

a. Hostile environment claim

Sexually harassing conduct that renders the workplace environment hostile and abusive to women can violate the equal protection clause of the Fourteenth Amendment, 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 Bohen, 799 F.2d at 1185. Because plaintiffs have failed to establish that defendants violated their rights under Title VII, their § 1983 claims fail as well. See King, 898 F.2d at 537-38 ("In general, the [§ 1983] claim follows the contours of Title VII claims.").

Even if plaintiffs established that Webber had subjected them to a hostile work environment, they have presented no evidence that Webber acted pursuant to any express policy adopted by defendant Douglas County, that defendant County customarily ignored complaints of sexual harassment or that "a 'final policymaking authority' deliberately chose to ignore [their] complaints of sexual harassment." Garrison v. Burke, 165 F.3d 565, 571, 572

(7th Cir. 1999). In fact, the record reveals that defendant County had a comprehensive sexual harassment policy, hung posters in the jail advertising its "zero tolerance" policy of sexual harassment and conducted two investigations into plaintiffs' allegations of harassment, culminating in the recommendation that Webber attend sensitivity and supervisory training programs and that a permanent letter of reprimand be placed in his personnel file. Plaintiff has presented insufficient evidence to raise a triable issue of fact that Webber acted pursuant to a policy or custom of defendant County when he allegedly harassed them.

b. Differential treatment

It appears that plaintiffs also contend that defendants violated their rights under § 1983 as a result of Webber's actions that were contrary to jail policy, such as when Webber ordered plaintiff Munich instead of a more junior employee to work overtime and when he posted shifts as available to men only. Plaintiffs' argument that Webber violated jail policy regarding assigning overtime or filling open shifts directly undermines their position that defendant County is liable: if Webber was acting *contrary* to jail policy, he was not acting *pursuant* to that policy. Because plaintiffs have failed to demonstrate that Webber "was acting pursuant to a [County] custom or policy" in subjecting them to differential treatment, defendants' motion for summary judgment on this claim will be granted. Garrison, 165 F.3d

at 571.

2. Due process

The due process clause of the Fifth and Fourteenth Amendments has come to embody two related but distinct concepts: procedural due process and substantive due process. Procedural due process guarantees persons a fair decision making process before a state actor deprives them of life, liberty or property. Procedural due process is unconcerned with outcomes: as long as fair decision making processes are offered, procedural due process is satisfied. By contrast, substantive due process is concerned with results. See Miller v. Henman, 804 F. 2d 421, 427 (7th Cir. 1986) ("the nub of a substantive due process claim is that some things the state just cannot do, no matter how much process it provides"). Rather than guaranteeing an individual the right to a fair decision making procedure, substantive due process prevents the state from taking certain actions even if it does provide procedural safeguards. Plaintiffs' contention that defendants violated their due process rights under the Fourteenth Amendment by failing to investigate their sexual harassment complaints properly falls under the concept of procedural due process.

Plaintiffs have failed to demonstrate a violation of their procedural due process rights. A procedural due process claim against government officials requires proof of inadequate

procedures *and* interference with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). The liberty interest guaranteed by the Fourteenth Amendment "'denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . ., and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness." Board of Regents v. Roth, 408 U.S 564, 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). Plaintiffs have adduced no evidence demonstrating that they were deprived of an interest falling within the Supreme Court's definition of liberty interests.

Property interests are not created by the Constitution, but are created and defined by "existing rules or understandings that stem from an independent source such as state law." Board of Regents,. 408 U.S. at 577. Although plaintiffs may have had a property interest in continued employment with defendant Douglas County, see Pleva v. Norquist, 195 F.3d 905, 914 (7th Cir. 1999), they were not deprived of their jobs. It is not enough that they may have been deprived of certain shifts. Because plaintiffs have failed to identify a liberty or property interest that was at stake, defendants' motion for summary judgment on this claim will be granted.

D. State Law Claims

Because plaintiffs have not raised a viable federal law claim, I decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over plaintiffs' state claims for violations of the Wisconsin Fair Employment Law, the equal protection and due process clauses of the Wisconsin Constitution and negligence. See 28 U.S.C. § 1367(c)(3). The Court of Appeals for the Seventh Circuit has recognized that "a district court has the discretion to retain or to refuse jurisdiction over state law claims." Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999).

ORDER

IT IS ORDERED that the motion of defendants Douglas County and Wisconsin County Mutual Insurance Corporation for summary judgment is GRANTED. The clerk of court is ordered to enter judgment for defendants and close this case.

Entered this _____ day of June, 2000.

BY THE COURT:

_____
BARBARA B. CRABB
District Judge