IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

VICKI McKELLIPS,

Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-127-S

STATE OF WISCONSIN,

Defendant.

Plaintiff Vicki McKellips commenced this civil action under Title VII claiming that defendant State of Wisconsin subjected her to a hostile work environment at the Oakhill Correctional Institution where she was employed as a correctional officer and retaliated against her for complaining about discrimination.

On August 1, 2005 defendant filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting 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. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Defendant moves to strike or ignore portions of plaintiff's affidavit. The Court will deny this motion and has considered plaintiff's affidavit in its entirety.

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Vickie McKellips is an adult resident of Dane County, Wisconsin. Defendant State of Wisconsin is a sovereign

state of the United States. The Department of Corrections is its agency.

Plaintiff was hired by the Department of Corrections (DOC) in October 1998 as a correctional officer. In October 2000 plaintiff began working at Oakhill Correctional Institution (OCI). At that time, Tessie Sundet, the Human Resources Director at OCI, provided her with a packet of information which included DOC's harassment policy.

On June 17, 2001 plaintiff was reclassified from Correctional Officer A to Correctional Officer B. On July 29, 2001 she began working the third shift at OCI from 11:00 p.m. to 7:00 a.m. as a patrol officer.

Officer Dustin Farberg also worked third shift in August 2001. He made objectionable comments to her which she did not like. In September or October 2001 plaintiff told Paul Wright, a sergeant on their shift, about Farberg's comments. Wright told plaintiff he would speak to Farberg about the comments.

On December 17, 2001 plaintiff got angry when Farberg called her on the radio about meal trays. She and Farberg then had a loud, unpleasant argument in the OCI parking lot after their shift. Plaintiff reported the incident to her supervisor Captain James Spoerl who advised her to prepare an incident report.

On December 19, 2001 Wright held an investigatory meeting with McKellips and her union representative Jeff Meicher about the

December 17, 2001 incident. He reminded her to submit an incident report which she did before the end of her shift on December 20, 2001.

On December 20, 2001 Wright met with Farberg and his union representative Jeff Meicher. He advised Farberg to submit an incident report which he did. He also reminded Farberg not to discuss the incident with anyone except his union representative.

Farberg approached plaintiff on December 21, 2001. Plaintiff wrote an incident report stating that Farberg approached her in the parking lot regarding the investigation. Wright held another meeting with Farberg and his union representative on December 27, 2001 and reminded him not to discuss the investigation with anyone.

Wright interviewed witnesses to the incident but did not complete the investigation until March 2002. Both plaintiff and Farberg admitted to using profanity during their argument in the parking lot. At the end of the investigation James Parisi, the Security Director at OCI, issued a job instruction to Farberg. The instruction stated as follows:

> In the month of December 2001, there were comments made and altercations between you and another Officer. At one point you made a sexual comment about the female officer which included words to the effect of "you don't want to put any weight on that pretty little ass of yours.

In the instruction Farberg was advised to refrain from using sexual or derogatory comments or phrases.

On February 10, 2002 plaintiff was promoted to sergeant and continued to work on third shift as utility relief for Cottage 2 and Cottage 6. On April 27, 2002 Wright entered Cottage 2 on his rounds and noticed graphic and inappropriate e-mail on the computer. The e-mail was between Sgt. Peterson and Sgt. Newton and had been forwarded to plaintiff. In the April 20 and 27 e-mails Newton said "he had a hard-on" for plaintiff and wanted to "sniff her panties".

Plaintiff sent Wright four e-mails which she had received. Wright sent the e-mails to Parisi. Captain Thomas Laliberte conducted an investigation concerning the e-mails and concluded that Tyler Peterson and Scott Newton sent inappropriate e-mails to plaintiff. It was also discovered that Newton had sent sexually offensive e-mails from McKellips computer which plaintiff never saw. As a result of this investigation Officer Newton was terminated on June 6, 2002 and Officer Peterson was demoted.

On July 17, 2002 Sgt. Ralph Ramos submitted an incident report concerning a rumor told to him by Sgt. Larry Daken. The rumor was about a possible relationship between plaintiff and Sgt. Colin Dyer. Captain Laliberte conducted an investigation to determine who started the rumor. He determined that Officer Bair had told Officer Peterson that he had seen plaintiff and Dyer in what he interpreted to be a compromising situation. No discipline was

imposed following this investigation because no work level violation was found.

On September 13, 2002 around 3:30 a.m. when plaintiff was in Cottage 6 an unidentified man dressed in black wearing a black mask looked in the bathroom window from outside when plaintiff was in the bathroom. Officer Farberg was the first officer to respond to plaintiff's call for help. An investigation of this incident was conducted by security staff. Two other correctional officers had previously reported similar incidents.

Plaintiff expressed concerns about her safety in Cottage 6. She was temporarily reassigned to housing unit A-1 from September 15-September 17. Spoerl told plaintiff that she would have to resume her regular housing unit assignments.

On October 15, 2002 plaintiff took a medical leave of absence because of anxiety and depression secondary to work-related stress.

On December 1, 2002 Dick Verhagen, the warden at OCI, issued plaintiff a written reprimand for overdrawing her leave in pay period August 11-24, 2002 by 32 hours without pre-approved leave without pay. Verhagen issued plaintiff a one day suspension on December 23, 2002 for overdrawing her leave in October 2002. Effective December 29, 2002 plaintiff began working first shift Utility Control Relief post.

Plaintiff took a leave of absence for medical reasons on May 18, 2003 and again on October 19, 2003. She voluntarily terminated her employment on June 15, 2004.

It is disputed whether Officer Farberg made the following comments to plaintiff from August to December 2001: asked her to "sit on his face"; asked her if she had nice "DSL's" which he explained meant "Dick Sucking Lips"; told her that she has a "nice ass"; told her "not to put any weight on your pretty little ass" and that he liked her in that position while she was kneeling.

MEMORANDUM

Plaintiff claims that she was subjected to a hostile work environment. Title VII prohibits sexual harassment in the work place which is defined as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature. 29 C.F.R. §1604.11(a)(1985). To violate Title VII sexual harassment must be so severe or persuasive to alter the conditions of the victim's employment and create an abusive work environment. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 67 (1986). The conduct does not need to be both severe and pervasive. Hostetler v. Quality Driving, Inc., 218 F.3d 798, 808 (7th Cir. 2000).

The harassment must be both objectively and subjectively offensive. The victim must have perceived the environment to be sexually offensive, and the environment must also be one that a

reasonable person would find offensive. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Whether sexual harassment is sufficiently severe or pervasive from an objective standpoint depends on the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. at 23.

The United States Court of Appeals for the Seventh Circuit discussed the conduct that establishes an objective hostile work environment in Baskerville v. Culligan International Company, 50 F.3d 428, 430 (7th Cir. 1995) as follows:

> Drawing the line is not easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures, pornographic pictures.(Citations omitted). On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers. (Citations omitted).

Plaintiff claims that she was subjected to a hostile work environment in 2001 because of the comments made to her by Officer Farberg. Accepting plaintiff's allegations as true for purposes of deciding this motion Farberg made the following comments to plaintiff in November and December 2001: asked her to "sit on his face"; asked her if she had nice "DSL's" which he explained meant "Dick Sucking Lips"; told her that she has a "nice ass"; told her

"not to put any weight on your pretty little ass" and that he liked her in that position while she was kneeling. There is no evidence that Farberg made any comments after December 2001. Although plaintiff testified in her deposition that Farberg made twenty comments to her from August 2001 through December 16, 2001, she has only described the above five statements. She has not described when in the five month period these five statements were made.

These comments are more the occasional vulgar banter tinged with sexual innuendo rather than threatening behavior, uninvited sexual solicitation or intimidation. Further, this conduct was not sufficiently severe or pervasive to constitute a hostile work environment. Further, there is no evidence that these occasional comments unreasonably interfered with plaintiff's work performance.

Plaintiff also claims that she was subjected to a hostile work environment because of e-mails written by Newton and forwarded to her by Peterson which were offensive. These e-mails which were offensive were quickly investigated. Newton was terminated and Peterson was demoted.

There is no evidence presented that either the incident concerning the rumor about plaintiff or the incident where someone peeped in the window when plaintiff was working in Cottage 6 were sexually harassing behavior by a co-worker.

Had a hostile environment been created by plaintiff's co-workers' offensive e-mails and Farberg's comments the employer is

liable only where it did not take steps to discover and rectify the harassment. Adusumilli v. City of Chicago, 164 F.3d 353, 361 (7th Cir. 1998). There is no evidence that Farberg's comments continued after December 21, 2001. (See PPFF #40). Plaintiff's complaints concerning Farberg's comments were investigated and Farberg received a job instruction advising him to refrain from making sexual or derogatory comments. The original writer of the offensive e-mails was terminated and the person who forwarded the e-mails to plaintiff was demoted. The harassment ended and plaintiff presents no evidence that any sexually harassing behavior occurred after April 2002 and she continued to work at OCI until June 2004. Defendant is entitled to judgment in its favor on plaintiff's hostile work environment claim.

Plaintiff also claims that she was retaliated against after she complained of the sexual harassment. To succeed on her retaliation claim plaintiff must show that she engaged in statutorily protected activity, that she was subjected to an adverse employment action and that the two events had a causal connection. Lang v. Illinois Dept. Of Children and Family Service, 361 F.3d 416, 418 (7th Cir. 2004). In order to establish a causal link between protected activity and an adverse employment action, plaintiff must demonstrate that the employer would not have taken the alleged adverse action "but for" the plaintiff's protected

activity. Wells v. Unisource Worldwide, Inc., 289 F.3d 1001, 1008 (7th Cir. 2002).

Plaintiff claims that she was reprimanded and received a one day suspension for overdrawing her leave in December 2002. She has not presented any evidence of a causal link between her complaints of sexual harassment in December 2001 and April 2002 and this discipline because she has not shown she would not have been disciplined absent any protected activity. Defendant is entitled to judgment as a matter of law on plaintiff's retaliation claim concerning her December 2002 discipline.

Plaintiff also claims she was refused a transfer in September 2002 in retaliation for complaining about sexual harassment. A refusal to transfer is not an adverse employment action. Further she has not shown that she would have been given the transfer absent her protected activity. Defendant is entitled to judgment in its favor on plaintiff's claim that she was retaliated against when she was refused a transfer.

ORDER

IT IS ORDERED that defendant's motion to strike plaintiff's affidavit is DENIED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is GRANTED.

McKellips v. State of Wisconsin, 05-C-154-S

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING her complaint and all claims contained therein with costs.

Entered this 31st day of August, 2005.

BY THE COURT:

S/

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JOHN C. SHABAZ
District Judge