IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LISA M. EASI Plaintiff,	)	
	)	CASE NO. 08CV7024
v.	)	
	)	**JURY DEMAND**
RICHARD A. RANDALL, NOT INDIVIDUALLY BUT AS, KENDALL COUNTY SHERIFF AND TERRY TICHAVA Defendants.	)	JUDGE BUCKLO MAG. JUDGE COX

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Now comes the Plaintiff, Lisa Easi, (hereinafter referred to as "Plaintiff") by and through her attorneys, Andrew W. Levenfeld and Jeffrey Sell and responds and opposes Defendant's Motion for Summary Judgment. In support of this opposition, she states as follows:

FACTS

Defendants' Summary of Facts attempts to mislead this Court by misstating facts, extrapolating isolated statements into general platitudes or not setting forth contradictory facts that disprove or raise issues of fact in contravention of their conclusions.

I. KCSO RULES AND REGULATIONS

The Kendall County Sheriff Office (hereinafter "KCSO") Rules and Regulations were not disseminated to all employees. The rules and regulations were only given to sworn officers. (Plaintiff's Response Opposing Defendant's Local Rule 56.1 Statement (hereinafter referred to as "Plaintiff's Response to DSOF[1]) #94 and Plaintiff's Local Rule 56.1 Statement of Facts (hereinafter referred to as "PSOF") #13.

[1] Defendant's Statement of Facts hereinafter referred to as "DSOF".

KCSO did not conduct sexual harassment training for all of its employees. Two patrol officers testified that there was some mention of sexual harassment at a roll call held too many years ago to remember who made the reference or what was said. Several other patrol officers said there was no sexual harassment training. (PSOF #17). Debra Peters who worked in the jail and Tonya Johnson, who was a records clerk, also testified that there was no sexual harassment training at the KCSO when Plaintiff was employed there. (PSOF #17).

One of Plaintiff's duties was to keep the master copy of the Policies and Procedures Manual in her office. (DSOF #17). The KCSO Rules & Regulations were a part of the Policies and Procedures Manual. (DSOF #93). However, her only duties in relation to the Policy and Procedures Manual was to remove old pages and substitute new ones. She had no requirement to read the inserts. (DSOF #17).

There is no evidence that she has ever replaced the page in the Policy and Procedure Manual that dealt with sexual harassment. She testified that she never read this rule. (DSOF #103). There is no written document signed by Plaintiff requiring her to read the Policies and Procedures Manual. As Chief Deputy Terry Tichava (hereinafter referred to as "Chief Tichava") said, there was no need for her to read a manual that contained mostly policing procedures having nothing to do with her job duties. (PSOF #13).

Rule 69 (DSOF Ex. DD) clearly prohibited KCSO employees from circumventing the chain of command. Chief Tichava could not identify any exceptions contained in the Policy and Procedures Manual to Rule 69. In fact, Officer Michael Peters when asked what he would do if he received an inappropriate email from the next person in his chain of command, he said he would delete it. If he received an inappropriate email from a coworker, he would report it up the chain of command. He wouldn't report a supervisor sending an inappropriate email unless he

absolutely had to. He clearly was not comfortable reporting rule violations outside the chain of command. He didn't even know who up the chain of command he would report it to. (Plaintiff's Response to DSOF #97). There is definitely an issue of fact as to what employees understood as to the meaning of chain of command.[2]

There is no evidence that the Sheriff had an "open door policy" for the rank and file employees in contravention of the chain of command rule and procedure. Commander Smith is the only employee who testified as to this "open door policy" and he was upper level management. Defendant's SOF #11 and Rule #69 contradict an alleged "open door policy".

II. COMMAND STAFF

Plaintiff was only a member of the command staff because of her position as Chief Tichava's administrative assistant. As his administrative assistant, her duties were to assist the command staff in ongoing projects by lending support to the commanders (PSOF #4&5). Defendants state that Plaintiff participated in discussions and expressed her opinion. Yet they offer no testimony as to what issues were being discussed or what Plaintiff was offering her opinion about. Unlike the other members of the command staff, Plaintiff was appointed to her position as Chief Tichava's administrative assistant by Chief Tichava not the Sheriff. It was because of that appointment that she participated in command staff meetings not because the Sheriff singled her out to be on the command staff as opposed to some other records clerk. (DSOF #105).

III. HARASSING CONDUCT

Defendants leave out of their summary of facts the most egregious conduct of Chief Tichava. Chief Tichava grabbed Plaintiff's crotch, buttocks and pinched her breast at the

[2] Defendants stretch credibility when they try to extrapolate what the understanding of all KCSO employees was as to the chain of command based solely on the testimony of Tonya Johnson, especially when she has credibility issues. (See Response to DSOF#97).

December, 2006 office holiday party. Although Chief Tichava testified he did not touch Plaintiff's breast, crotch or buttocks at the part; Debra Peters, Ronda Thomas, Anita Flanders and Jeff Raysby testified that they saw the Chief do exactly that several times. (Plaintiff's Response to DSOF #142 & 143). Debra Peters, Tonya Johnson and Plaintiff saw the Chief come out of the bathroom with a plunger sticking out of his pants at a party at his house. (Plaintiff's Response to DSOF #136). While she was playing pool, the Chief came up behind Plaintiff and made like he was having sex with her while she was bent over the table. Plaintiff, Debra Peters and Ronda Thomas saw the Chief expose his genitals. (DSOF #118, Plaintiff's Exhibits [Hereinafter referred to as "P. Ex."] X and XVII).

Additionally, Defendants state that Plaintiff participated in joking of a sexual nature, sexual banter and innuendo and put a blow-up doll in the Chief Tichava's office. None of this conduct gave the Chief Tichava right to touch Plaintiff's breast, buttocks or crotch. (P.Ex. XIII, pg. 39, 44-46, 51-57; P. Ex. XXII, pg. 28, 56-57, 72, 125,127, 136-137. P. Ex. XI, Pg. 24-25; P. Ex. XII, pg. 165).

ARGUMENT

I. PLAINTIFF IS AN EMPLOYEE COVERED UNDER TITLE VII

Plaintiff has brought suit alleging that she was sexually harassed by Chief Tichava. The Sheriff contends that she is not an employee within the meaning of Title VII because she was a member of the command staff. The Sheriff claims that Plaintiff was chosen by him to be a member of the command staff. The Sheriff argues that Plaintiff's position falls within this exclusion. Plaintiff disagrees.

When Congress amended Title VII to include state and local government employees it wanted to avoid federal interference in the selection of key pubic officials. However, Congress

specifically noted that this exemption should be narrowly construed and it is intended to cover only those appointees who are chosen by the elected official and who are in close personal relationship and in immediate relationship with the elected official. Those are his first line advisors. 118 CONG. REC. 4493-93 (1972) as quoted in *O'Neill v. Indiana Comm on Public Records*. 149 F. Supp. 2d 582. The key word here is "selection". This case does not involve the selection of a first line advisor but the sexual harassment of an administrative assistant for the Chief Tichava.

In *Heap v. County of Schenectady*, 214 F. Supp. 2d 263 N.D. N.Y. 2002, the Court quoted the House and Senate Conference Committee report as stating that the exemption was enacted to apply to persons appointed by elected officials as advisors or to policy making positions at the highest level of the department such as cabinet officers and persons with comparable responsibilities, 1972 U.S.C.C. AN. 2137, 2180. Congress intended that this exemption be construed narrowly. *Butler v. New York State Dept of Law*, 211 F. 3d 739 (2d Cir. 2000)

As in *Anderson v. City of Albuquerque*, (1982 10th Cir) 690 F.2d 796, Plaintiff reported directly to and was supervised by Chief Tichava who was appointed by the Sheriff. (PSOF #1 & 2). The 10th Circuit held that the application of the exemption cannot be supported where the employee occasionally advised the elected official. There is no allegation by Defendant's that Plaintiff advised the Sheriff on anything other then administrative matters within her duties. The Command Staff only met periodically (Plaintiff's Response to DSOF #107). Direct interaction between the Sheriff and Plaintiff was minimal at best. The Sheriff puts his major emphasis on the fact that Plaintiff was considered a member of the command staff and had some vague input in their infrequent meetings. However, in her job description the only reference to the command

staff describes her duties as "assisting the command staff with Projects and Studies". (PSOF #3). In fact, Chief Tichava, himself, testified that as a member of the command staff, Plaintiff simply participated in projects "lending support to the commanders." (PSOF #4) All of the rest of her duties were mostly clerical in nature as would be expected for an administrative assistant position. (PSOF EX. #1) Plaintiff could not possibly be equated to a "cabinet officer".

This Court in *Deneen v. City of Markham*, 1993 WL 181885 (N.D. Ill.) summarized six criteria to consider in the course of this "highly factual inquiry." Plaintiff does not meet five out of those six criteria. She was not personally accountable to the Sheriff. She never represented the Sheriff in the eyes of the public. (PSOF#6). The Sheriff exercised minimal supervisory control over Plaintiff as she reported to the Chief Tichava. She did not report directly to the Sheriff in the chain of command. She did not have an intimate working relationship with the Sheriff. The only direct interaction they had was at intermittent command staff meetings where her assignment was to assist with projects and studies. Only one of the six criteria is met here - that is that the Sheriff is an elected official. However, Chief Tichava was not an elected official.

Plaintiff had four distinct areas of responsibility as Chief Tichava's administrative assistant. She was his personal secretary; she maintained the personnel files as human resource coordinator; she was the administrative assistant to the Kendall County Emergency Medical Agency (hereinafter referred to as "KC EMA") and she assisted the command staff with projects and studies. She reported to Chief Tichava not the Sheriff.

Defendants own brief describes the subject of command staff meetings as merely discussing budgetary issues, adding staff and improvement in the Sheriff's Office. Plaintiff had no budgetary responsibilities as an administrative assistant. Defendants do not assert that the Command Staff assists the Sheriff in making policy decisions. Even the Sheriff on direct

examination does not say that the command staff advises him as to policy (DSOF Ex. N pg.434-35). Based on this testimony, it appears that the command staff deals with routine office matters. There is no direct evidence cited by Defendants that the command staff operates as an advisory board.

Even though, Defendants claim Plaintiff took part in discussions at command staff meetings they do not set forth what topics of discussion Plaintiff took part in or what policy opinions she may have expressed directly to the Sheriff. Defendants' must show that Plaintiff was a close intimate advisor of the Sheriff. Yet they do not cite any specific advice she gave the Sheriff other then she had input. There is an issue of fact as to her input at these meetings. She may only have had input as related to her assisting with projects and studies which would not be equivalent to policy matters.

Even if this Court decides that Plaintiff is not an employee under Title VII because of her assisting the Command Staff with projects and studies, she is not exempt in her other roles as administrative assistant to the Chief Tichava and the KC EMA and human resources coordinator.

The *Deneen* Court and other Courts have bifurcated Plaintiff's jobs when they have worn more than one hat. These Courts have held that a person can be exempt for one position and not the other positions. Therefore, even if she was exempt during Command Staff meetings she was not exempt when acting as the Chief Tichava's and the KC EMA administrative assistant or the personnel resource coordinator. As Plaintiff does not claim any incidents of harassment occurred at command staff meetings, this issue is moot.

The statute exempts an elected official from claims of discriminatory practices. This is a case of sexual harassment. This Court should also keep in mind that the Sheriff was not the harasser. The harasser was Chief Tichava, who is not an elected official. If Defendants' position

is upheld, any employee of an elected official could sexually harass a member of that elected official's staff with impunity. Congress surely did not mean to condone the type of behavior complained of in this litigation just because the woman gave minimal input at a meeting attended by the elected official. If the logic of the exclusion is to avoid federal interference in the selection of key public officials, how could this exception possibly apply to sexual harassment? If there is some logic in exempting elected officials from discriminatory hiring practices then it is beyond reason to exempt the employees of the elected official from sexual harassment claims. The Sheriff may be free to remove all of the women from the command staff because they were women with impunity. But does this allow Chief Tichava to grab Plaintiff's crotch, buttocks or breasts with impunity when she is acting as an administrative assistant? This question must be decided by this Court in the negative. All of the cases cited by Defendants and those discovered by Plaintiff deal with discrimination in hiring or promotion. There are no cases exempting an employee under Title VII for harassment purposes.

Defendant's Motion for Summary Judgment must be denied because Plaintiff does not fall within the definition. At the very least, Plaintiff has raised material issues of fact.

II. DEFENDANTS FAIL TO ESTABLISH AFFIRMATIVE DEFENSES UNDER *FARAGHER/ELLERTH.*

There is no question that Chief Tichava was Plaintiff's immediate supervisor. For purposes of this Motion, Defendants do not dispute that he sexually harassed Plaintiff within the meaning of Title VII. Because Chief Tichava was Plaintiff's immediate supervisor, the Sheriff is vicariously liable for his actions. Therefore, the Defendants must establish an affirmative defense to prevail in this litigation. The Sheriff raises the affirmative defenses as enumerated by the Supreme Court in *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) and *Faragher v Boca Raton*, 524 U.S.775, 118 S.Ct.2275 (1998)

The Sheriff in order to establish the affirmative defense must show that he exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Sheriff or to otherwise avoid harm. If Plaintiff can show an issue of fact as to either of these prongs then this Motion for Summary Judgment must be denied. Failure to establish either prong of the affirmative defense is fatal to this motion.

Defendants rely heavily on the Seventh Circuits opinion in *Shaw v. Auto Zone, Inc.*, 180 F.3d 806 (1999). Plaintiff believes this opinion is enlightening as to the contrast between an organization that had an effective anti-harassment program and the woefully inadequate and feeble effort on the part of the KCSO to protect its employees from harassment.

The Auto Zone employee handbook contained an explicit, clearly delineated sexual harassment policy. Auto Zone emphatically stated that it would not tolerate sexual harassment and a violation could result in termination. The Auto Zone policy clearly defined sexual harassment. Auto Zone gave explicit instructions as to its complaint procedure with alternative sources to lodge a complaint without regard to chain of command. Auto Zone policy was given to each employee.

Auto Zone also conducted training sessions specifically dealing with their sexual harassment policies and guidelines. One of the Auto Zone managers testified to attending at least 20 such sessions. Shaw signed a form stating that she received and understood her responsibility to read this manual.

The difference is striking between the *Auto Zone* policy and its implementation compared with the KCSO's policy and its lack of implementation. The KCSO's sexual harassment rule was set forth in the next to last page of its Rules and Regulations which were buried in its Policy

and Procedure Manual. (DSOF Ex. DD). The policy and procedure manual was a book that was the size of two Chicago phone books. (P. Ex. III, pg. 23; DSOF Ex. C.) The rule dealing with sexual harassment was one paragraph; and was listed as paragraph 67 out of 74. It contained no definition of sexual harassment or complaint procedure. Instead of warning that a violation could result in termination, it said that sexual harassment would be treated as misconduct; thus diminishing the seriousness of any violation.

Not only did the sexual harassment paragraph not deal with complaint procedures, Rule 69 specifically states that it is a violation of the rules to circumvent the chain of command. When questioned on the complaint procedures, Chief Tichava reluctantly admitted that there was nothing in the rules and regulations contradicting this paragraph (PSOF#7). This rule clearly has a chilling effect on the reporting of harassment by a supervisor. In fact, when Plaintiff wanted to make a complaint to the Sheriff about the payroll reprimand and the assumption of identity issues, the Chief had to give his permission. (PSOF #8). The Sheriff even sought the Chief's permission to discuss the open office manager position with Plaintiff. (PSOF#9).

When Plaintiff did make a complaint about the assumption of her identity by Kate Rasmussen (hereinafter referred to as "Rasmussen"), the Sheriff assigned the Chief Tichava and Rasmussen to conduct the investigation. The Sheriff admitted that he had Rasmussen, herself, and her close friend investigate a complaint against Rasmussen. (PSOF #10; DSOF Ex. B). The Sheriff further testified that the original complaint was not even addressed in the investigation. (PSOF #11). They investigated the sufficiency of a Freedom of Information Act application not Rasmussen's assumption of Plaintiff's identity (P. Ex. IV, pg.51-53). After Rasmussen investigated the complaint against herself, she and the Chief met with Plaintiff. The Chief told Plaintiff he was "fu __ ing sick of her goddamn attitude and not to start with him or she would

be an ex-employee by the end of the day." (P. Ex. III, pg. 55 DSOF #45). When she complained of the foul language, the Sheriff did nothing. Why would she reasonably expect any better treatment if she complained of sexual harassment by Chief Tichava?

The Sheriff did not even disseminate the meager paragraph prohibiting sexual harassment buried in the Policy and Procedure Manual. Only sworn officers received a copy of the Policy and Procedure Manual. (PSOF #13). The Sheriff even testified that he did not expect his employees to know the Policy and Procedures Manual. (DSOF Ex. N. pg. 453-454). A copy of the voluminous manual was left on a shelf in the office for non-sworn personnel. The Policy and Procedure Manual mostly dealt with police procedures. Non-sworn employees would have little or no need to refer to the manual. (Response to DSOF #94, PSOF#13 & Debra Peters Memorandum dated 2/7/08, P. Ex. II).

The Sheriff did not train personnel on sexual harassment; and there was no requirement for training. The Sheriff himself never viewed the optional computer training modules, which, by the way, failed to make any reference to sexual harassment. (PSOF #15 & 16). The Sheriff, Tonya Johnson, Debra Peters, Phillip Smith, Matthew Hogan, Michael Peters and John Trevarthen testified that there was no sexual harassment training at the KCSO while Plaintiff was employed (PSOF #17 & 18); and that Chief Tichava had no such training.

Gordon vs. Southern Bells, Inc., 67 F. Supp. 2d. 966, held that where the employer did not effectively disseminate its sexual harassment policy; had no signed form indicating that the Plaintiff knew of the policy and no anti-harassment training had taken place, Defendant was not entitled to summary judgment.

In *EEOC v. Wal*-Mart, 187 F. 3d. 1241 (10th Cir. 1999), the Court held that a written anti-discrimination policy standing alone does not generate an implemented good faith policy of educating employees and demonstrates a broad failure on the part of the Defendant.

Gentry v. Export Packaging Co., 238 F. 3d 842 (7th Cir. 2001), held that a harassment policy must provide for effective grievance mechanisms. In *Faragher*, *Id.* at 808, 118 S. Ct. 2275, the Supreme Court stated that without assurance that the harassing supervisors could be bypassed in registering complaints there would be no affirmative defense. The Seventh Circuit in *Haugerud v. Amery School District*, 259 F. 3d 678 (7th Cir. 2001), reaffirmed these holdings. In all of these cases, the Courts have placed the burden on the employer to establish by a preponderance of the evidence both prongs of the affirmative defense.

Defendants make a point of the fact that Plaintiff failed to make a specific complaint to the Sheriff about the sexual harassment she endured by Chief Tichava. In *Kornely v. Carson,* 2000 WL 1788348 (N.D. ILL.), Judge Pallmeyer stated that to determine whether an employer had notice of harassment a Court must determine whether the employer has designated a channel for complaints of harassment.

In this case there are clear issues of fact as to the adequacy of KCSO Rules #67 and #69; the dissemination of the Rules and Regulations; the extent of any sexual harassment training and to what extent, if any, the chain of command provided a complaint procedure. There is no question that Plaintiff did not sign any form acknowledging receipt and understanding of the sexual harassment rule. Furthermore, no complaint forms were available in the workplace and no grievance procedure existed while Plaintiff was employed.

The issue is not whether Plaintiff made any complaints about the sexual harassment she endured. The issue is whether or not Plaintiff acted reasonably under the circumstances when the Sheriff provided no preventive or corrective opportunities to avoid harm.

Clearly the Sheriff cannot sustain either prong of the *Faragher/Ellerth* Affirmative defense; and Summary Judgment must be denied.

III. PLAINTIFF'S §1983 SHOULD STAND BECAUSE CHIEF TICHAVA WAS A STATE ACTOR AND KCSO HAD A MUNICIPAL POLICY/CUSTOM THAT ENCOURAGED SEXUAL HARASSMENT.

A. Chief Tichava was a State Actor.

Defendants argue that under §1983, Plaintiff must show that her rights were violated by a person acting "under color of state law." *Chavez v. Guerrero*, 465 F.Supp.2d 864, 868 (N.D.Ill.2006). Defendants also state that the "'color of state law' requirement is met if the defendant acted in an official capacity as a public employee or exercised responsibilities pursuant to state law." *Defendants' Memorandum* at pg. 12, *citing Chavez* at 868-69.

The Defendants argue that Chief Tichava was not acting under "color of state law" because the sexual harassment did not relate to his duties and that they took place in a social setting. However, the testimony of attendees at the events and the KCSO employees and Chief Tichava, himself, undermines these arguments. At the very least, an issue of material fact has been raised.

Unlike any of the cases cited by Defendants, the KCSO sexual harassment rule #67 (DSOF Ex. DD) applied whether the employees were on duty or off duty. According to the testimony of all KCSO staff members, Kendall County Sheriff Rules and Regulations applied to the December 2006 Sheriff's Office Holiday Party. (P. Ex. XIII, pg. 15; P. Ex. VII, pg. 10; P. Ex. IV, pg. 23; P. Ex. III, pp. 71-81; P. Ex. VIII, pp. 13-15; P. Ex. IX, pp. 81-83; P. Ex. XII, pp.

157-160; P. Ex. XI, p. 10-11; and P. Ex. XIV, pp. 10-11). Furthermore, this was no simple chance gathering of Sheriff's Department employees. This was a party thrown by the Fraternal Order of Police every year and which the Sheriff's Department actually contributed funds to the event that it collected during the year from a benevolent fund. (PSOF #21, P. Ex. VII, pp. 31-32, P. Ex. XIII, pg. 22). The invitations were distributed to KCSO employees through the KCSO's email system and notices were posted throughout the KCSO's office. (P. Ex. XIII, pp. 23-24). Chief Tichava attended the party as a member of the command staff, a member of the Sheriff's Department and as Chief Tichava. (P. Ex. III, pp. 45-49). When this sexual harassment and "assault and battery" of Plaintiff took place, he was a representative of the Sheriff's Office, he was still acting as the Chief Deputy, and he was still Plaintiff's supervisor. Any attempts to claim that Chief Tichava was not appearing at the event in his official capacity and held no supervisory authority over Plaintiff are ludicrous. Furthermore, it must be reiterated that the KCSO Rules and Regulations, including Rule #67 pertaining to sexual harassment applied to this official gathering. The same argument could be made for the other events that the Chief Tichava and Plaintiff attended where the sexual harassment took place.

Irrespective of Defendants' arguments, the evidence shows that Chief Tichava committed an "assault and battery" on Plaintiff. Chief Tichava should not be absolved of such acts. If the Court feels that §1983 is not an appropriate cause of action, Plaintiff would request leave to amend her complaint to add a state law count of "assault and battery" against Chief Tichava to conform with the evidence.

B. <u>Municipal Policy or Custom of KCSO Encouraged Sexual Harassment.</u>

Defendants make the argument that under *Monel v. Dept. of Social Services*, 436 U.S.658, 98 S. Ct. 2018 (1978) a municipality cannot be vicariously liable for the acts of its

employees under a respondent superior theory. However in *Faragher* (*Id.*) the Supreme Court specifically held that a municipality was vicariously liable for the acts of its supervisors under an agency theory. Plaintiff is aware that *Monel* was decided under §1983 and *Faragher* was decided under Title VII. *Monel* was a case where the municipality had a policy of requiring pregnant women to leave work before they were medically required to do so and not sexual harassment by a supervisor as in *Faragher*. However if the Supreme Court was given the opportunity to revisit *Monel* under the issue of sexual harassment by a supervisor it may apply its reasoning in *Faragher* to §1983 cases such as this one. Plaintiff is aware that there are differences between §1983 and Title VII. However those differences are not relevant here. Plaintiff has been unable to find any cases supporting or contradicting this argument but does want to preserve the record.

Defendants have conceded for purposes of summary judgment that the workplace constituted a hostile work environment and Chief Tichava was Plaintiff's supervisor. Defendants do not address causation or damages. Thus, this Court need only determine whether the creation of the hostile work environment was pursuant to a municipal policy or custom. Plaintiff contends that the Sheriff's failure to train his employees in any aspect of sexual harassment and promulgate an adequate sexual harassment policy was a deliberate indifference to Plaintiff's Equal Protection rights.

A municipality's failure to train its subordinate satisfies the policy or custom requirement only where the need to act is so obvious and the inadequacy of current practices was likely to result in a deprivation of federal rights, that the municipality or official can be found deliberately indifferent to the need. *City of Conton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1980). Plaintiffs may ordinarily establish deliberate indifference by showing that the officials consciously

disregarded a risk of future violations of clearly established constitutional rights by badly trained employees. *City of Conton , Id.* Employers have an affirmative duty to prevent sexual harassment. *Faragher*, *Id.* at 806. The *Faragher* Court further said that Title VII sets forth a policy of encouraging the creation of anti-harassment policies and effective grievance mechanisms. *Id.* at 764. It is certainly the policy of this country that an employer owes a duty to its employees to provide a workplace free of sexual harassment.

To survive summary judgment on a failure to train claim, a plaintiff must introduce "evidence as to the city's training program and the way that program contributed to the violation." *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004). Ordinarily, a plaintiff should introduce evidence of "how the training was conducted, how better or different training could have prevented the challenged conduct, or how "a hypothetically well-trained officer would have acted" differently under the circumstances. *Id.* at 130.

Plaintiff in this case has raised an issue of fact as to whether any sexual harassment training was conducted by the Sheriff prior to her leaving in June of 2007. Even if this Court believes the testimony of Scott Koster and Robert Wayne Dial that there was some vague reference to sexual harassment at Roll Call for patrol officers there is no evidence of any training for the balance of employees. There is no evidence of any training of the jail, support services, record clerks or management. The Sheriff himself admits that there was no sexual harassment training during Plaintiff's employment at the Sheriff's office. The Sheriff cannot claim ignorance because they have specifically not adopted the Kendall County policies on advice of their labor attorneys, Seyfarth & Shaw specifically, Bob Smith and Jill Leka (P. Ex. III, pg. 26). In addition, Defendant's state that there were prior incidents of sexual harassment thus putting

the Sheriff on notice that specific training on sexual harassment was necessary. Still the Sheriff failed to act.

After this litigation was commenced the Sheriff adopted a more comprehensive sexual harassment policy and required all personnel to view a video on sexual harassment. This evidences the fact that their prior policy and training were inadequate.

Chief Tichava would have benefited from sexual harassment training. He did not even know that when Plaintiff hit him and said knock that off after he grabbed her at the December 2006 office party that constituted sexual harassment. (P. Ex. III, pg. 71-81). A well-trained supervisor would not have acted the way Chief Tichava did towards Plaintiff.

All of the other witnesses including the Sheriff testified that the sexual harassment rules apply to conduct at the December 2006 office party. (PSOF #79).

Having no sexual harassment training whatsoever or effective policy with complaint procedures constituted a deliberate indifference on the part of the Sheriff to Plaintiff's 14th Amendment right to Equal Protection under Title VII as set forth in *Faragher*. Plaintiff has raised significant issues of fact to avoid summary judgment.

Defendants cavalierly state that the Chief Tichava has no final policy making authority. They attach as Exhibit D to their Statement of Facts his job description which provides numerous policy-making responsibilities especially in the Sheriff absence. The Chief's job description states that he exercises considerable independent judgment. In fact when the Chief wants to fire someone, it's a formality that it goes through the Sheriff. (PSOF #20). The Chief in his letter to Plaintiff September 4, 2007 threatened her with termination (DSOF # 74 & 88, DSOF Exhibit X). Chief Tichava even threatened Plaintiff at one point that she would be an ex-employee by the end of the day. Plaintiff clearly raises issues of fact as to the Chief functioning as a policy

maker at the Kendall County Sheriff's Office, which imposes liability under §1983. Summary Judgment must be denied.

IV. PLAINTIFF AT THIS TIME CHOOSES NOT TO PURSUE HER CLAIMS OF RETALIATION.

Plaintiff has determined at this point that she will not be pursuing her retaliation claim. As such, she will not respond to Defendant's arguments as to the retaliation claim and chooses rather to focus on the other claims brought against Defendants in her Complaint.

V. THE TESTIMONY OFFERED BY DEFENDANTS IN SUPPORT OF THEIR MOTION HAS CREDIBILITY ISSUES.

As Defendants state in their brief, a grant of summary judgment is proper when the pleadings, discovery, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c); *See also Montgomery v. Potter*, 661 F.Supp. 2d 983, 985 (N.D.Ill. 2009). It is axiomatic that the Court cannot make credibility determinations for purposes of deciding motions for summary judgment. Some of the witnesses relied upon by Defendants for facts in support of their motion for summary judgment testified to events that were contradicted by other witnesses. As such, the very testimony itself offered by Defendants in support of its Motion for Summary Judgment raises issues of material fact because of a lack of credibility.

One example of credibility issues is the testimony of Tonya Johnson. Tonya Johnson asserted in her testimony that the Rules and Regulations were disseminated to the non-sworn staff, which has been disputed by the testimony of others.

Tonya Johnson also testified that at a party at the Chief's house she and Plaintiff offered to expose their breasts if the Chief and Commander Smith exposed their genitals. (P. Ex. XI, pg. 23-5). She testified in detail that both women lifted their shirts and the men dropped their pants.

However, both the Chief and Commander Smith deny ever exposing their genitals to either woman or that the women lifted their shirts. (P. Ex. III, pg. 44; P. Ex. VII pg. 26). At that same party Tonya Johnson and Debra Peters testified they saw Chief Tichava with a toilet plunger sticking out of his pants. (P. Ex. XI, pg. 24; P. Ex. XII, pg. 216-217). Plaintiff also testified about this. (DSOF #136). Chief Tichava denied this incident. (P. Ex. III, pg. 56).

Commander Smith, Chief Tichava and the Sheriff testified that Commander Smith was present when the office manager job was offered to Plaintiff in the fall of 2005. (P. Ex. VII, pg. 12-19; P. Ex. III, pg. 13-17; and P. Ex. IV, pg. 34-36). But Smith testified that he was in Iraq during that time period other than the last 10 days of December 2005. He didn't remember going to the office during his leave time.

The Chief testified that he never touched Plaintiff's breast, crotch or buttocks. (P. Ex. III, pg. 43). Yet, Debra Peters, Ronda Thomas, Anita Flanders and Jeff Raysby all testified that they saw the Chief grab Plaintiff's crotch, buttocks and breast at the 2006 Christmas party. (P. Ex. XV, pg. 54-64; P. Ex. XVI, pg. 30-46; 68-70; 73-74; P. Ex. X, Dep. pg. 28-38; and P. Ex. XVII, pg. 130, 135 – 152, 274-5). They also testified that Plaintiff was clearly offended, slapped the Chief and left the party.

Scott Koster and Robert Wayne Dial testified that they had sexual harassment training at the Sheriff's office during Roll Call yet the Sheriff, Phillip Smith, Tonya Johnson, Debra Peters, Matthew Hogan, Michael Peters and John Trevarthan testified that there was no sexual harassment training at the KCSO while Plaintiff was employed.

The Chief testified that the Sheriff drafted the September 26, 2007 termination letter with minimal input on his part. (P. Ex. III, pg. 66). The Sheriff testified that the Chief wrote the letter

because he didn't write it. (P. Ex. IV, pg. 70-71). Rasmussen didn't know who wrote the letter. (Rasmussen Dep., pg. 102-103.

If the jury does not believe Tonya Johnson, Phil Smith, Scott Koster, Wayne Dial, Sheriff Randall or the Chief on these facts, they may discredit their entire testimony including the facts relied upon by Defendants in this motion. If a jury could question their testimony, then summary judgment cannot be granted. Clearly, issues of fact exist as to any testimony of these witnesses.

CONCLUSION

For the reasons enumerated above, issues of material fact exist. As such, Defendants' Motion for Summary Judgment must be denied.

Respectfully Submitted,

LISA EASI

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