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

Lisa M. Easi,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 08 CV 7024
	)	
Richard A. Randall, not individually but as,	)	Judge Bucklo
Kendall County Sheriff and Terry Tichava	)	Magistrate Judge Cox
	)	
Defendants.	)	

DEFENDANTS'
MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT

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DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiff's three count Complaint arises from her employment and cessation of employment with the Kendall County Sheriff's Office ["KCSO"]. Plaintiff alleges Title VII claims for hostile work environment sexual harassment and retaliation against Kendall County Sheriff Richard Randall, in his official capacity ["Sheriff Randall"] (Counts I and III), and for sexual harassment in violation of principles of equal protection against the Sheriff and Chief Deputy Terry Tichava, under 42 U.S.C. § 1983 (Count II). Defendants now seek summary judgment on all Counts because there is no genuine issue of material fact to preclude judgment in their favor on any of Plaintiff's claims.

SUMMARY OF FACTS

Richard Randall is the Sheriff of Kendall County and employs approximately 150 persons. (*Defendants' Statement of Facts in Support of Their Motion for Summary Judgment*, ¶¶4, 8, 10 [hereinafter "SOF"].) Defendant Terry Tichava is his Chief Deputy of Operations, and second in command. (*Id.*, ¶¶9, 14.) Chief Tichava's duties were to plan, organize, implement, administer and evaluate all Sheriff's Office operations and programs, and he assumes the duties, responsibility and authority of the Sheriff in the Sheriff's absence. (*Id.*, ¶ 14.)

Plaintiff began her employment with the KCSO in 1995 as a records clerk and was promoted to Chief Tichava's administrative assistant and Human Resources Director/Manager in 2000. (*Id.*, ¶¶15-17.) As a result of working closely together, Plaintiff and Chief Tichava became friends; they had pet names for each other, had lunch together, and they would socialize

together and with others, going out for drinks a couple of times per month. (*Id.*, ¶¶19-22.) There was often joking among employees, some of a sexual nature, and Plaintiff was never offended by these jokes. (*Id.*, ¶¶23-24.) Plaintiff and Chief Tichava mutually exchanged jokes, banter and innuendo on a daily basis, a lot of it suggestive or sexual in nature. (*Id.*, ¶¶25-26.) For instance, Plaintiff played at least one practical joke of a sexual nature on Chief Tichava when she and another employee left a sexual blow up doll at his residence in his absence. (*Id.*, ¶27.)

The Hire of Kate Rassmussen as the Office Manager

In March 2006, Kate Rassmussen, a friend of Chief Tichava's, was hired to be the new KCSO Office Manager. (*Id.*, ¶28.) Rassmussen's hiring upset Plaintiff because she allegedly knew Rassmussen had shared a sexual relationship with Chief Tichava and thought she was trouble. (*Id.*) Rassmussen noticed Plaintiff's dislike of her and testified that Plaintiff was unapproachable and went out of her way to avoid helping Rassmussen learn her position as Office Manager, even refusing to speak to her at one point. (*Id.*, ¶¶29-30.) Sheriff Randall became aware of the personality conflict between the two women almost immediately upon Rassmussen's hire**.** (*Id.*, ¶31.)

At some point, Plaintiff began making complaints to Sheriff Randall about things at the Sheriff's Office, but these complaints were always in the nature of he said/she said complaints. (*Id.*, ¶36.) Due to the nonspecific nature of the Complaints, Sheriff Randall told Plaintiff on one occasion that he did not want to hear it anymore, although he was unable to recall when or in what context, but he testified that if she had provided him with sufficient facts to allow him to investigate a particular allegation, he would have listened to her. (*Id.*, ¶37-38.)

Events Immediately Preceding Plaintiff's Departure from the KCSO

On June 11, 2007, Plaintiff received a written reprimand from Chief Tichava for refusing to help him and Rassmussen enter payroll. (*Id.*, ¶39.) Plaintiff refuted the reprimand by letter on June 25th. (*Id.*, ¶40.) Plaintiff's response did not make any allegation or complaint of sexual harassment. (*Id.* ¶41.)

During the week of June 25, Plaintiff reported to Chief Tichava that fellow employee Tonya Johnson told her that Rassmussen had used Plaintiff's identity with a member of the public. (*Id.*, ¶42.) Chief Tichava told her he would get to the bottom of it. (*Id.*, ¶43.) Chief

Tichava and Rassmussen spoke with Johnson, who denied that she had seen Rassmussen use Plaintiff's identity or that she had told Plaintiff anything to the contrary. (*Id.*, ¶44.) During a meeting between Chief Tichava, Plaintiff, and Rassmussen to discuss the allegation, Plaintiff allegedly asked to be excused. (*Id.*, ¶¶45.) Chief Tichava yelled that he was "fucking sick of [Plaintiff's] goddamned attitude," and to not start with him or she would be an "ex-employee by the end of the day." (*Id.*.) Plaintiff then phoned Sheriff Randall at home, told him that Chief Tichava had yelled and cussed at her, and that she felt there was a target on her back. (*Id.*, ¶46.) Plaintiff made no complaint or allegation of sexual harassment. (*Id.*, ¶48.) Plaintiff asked if she could go home, and the Sheriff said she could. (*Id.*, ¶47.)

When Plaintiff returned to work on June 28, 2007, she personally handed Sheriff Randall her June 25 written response to the June 11 reprimand and tried to tell him about Rassmussen using her identity. (*Id.*, ¶¶49-50.) Sheriff Randall allegedly put his hand up and told her "that never happened." (*Id.*, ¶50.) Sheriff Randall contends that he delivered a direct order to Plaintiff at that time to stop spreading rumor and innuendo in the KCSO and that Chief Tichava was made aware of that order. (*Id.*, ¶51.) Plaintiff denied ever receiving the order. (*Id.*, ¶52.)

Plaintiff's Departure from The Sheriff's Office

The next day, on June 29, 2007, Plaintiff was talking with Sgt. Michael Simms after lunch when Rassmussen walked past Simms' door, and Plaintiff told Simms she did not trust Rassmussen. (*Id.*, ¶¶53-54.) Though Rassmussen did not hear Plaintiff's comment, she could tell she was the subject of their conversation because she observed Plaintiff, who looked guilty and surprised, whispering to Simms, who looked very uncomfortable. (*Id.*, ¶55.) Rassmussen reported to Chief Tichava what she saw when she walked past Simms' door. (*Id.*, ¶56.)

Chief Tichava then spoke with Simms, who confirmed that earlier that day, Plaintiff told him that Rassmussen had used Plaintiff's identity and that she had gone to Chief Tichava and Sheriff Randall about it. (*Id.*, ¶57.) Plaintiff saw Simms exiting Chief Tichava's office, so she phoned him and he confirmed that Tichava had asked about their earlier conversation. (*Id.*, ¶58.)

Plaintiff contends she immediately became ill after talking to Simms and then left the KCSO building at 2:30 p.m. (*Id.*, ¶¶59-60.) In the meantime, Chief Tichava informed Sheriff Randall that Plaintiff had violated his order to stop spreading rumors. (*Id.*, ¶61.) Disheartened at hearing this news and unaware of Plaintiff's departure, Sheriff Randall went to discuss the issue with her and discovered she had already left. (*Id.*, ¶¶62-63.) At 5:08 p.m. that day by email, Plaintiff informed Sheriff Randall that she left the office due to illness. (*Id.*, ¶64.) A faxed note from a nurse followed later that evening stating that Plaintiff should be excused from work until further notice due to medical illness. (*Id.*, ¶65.) Plaintiff never returned to work at the KCSO. (*Id.*, ¶66.)

Events Leading to Plaintiff's Termination

On August 13, 2007, Chief Tichava sent a letter to Plaintiff, which provided that among other things, the Sheriff's Office had become aware that she improperly submitted Family Medical Leave Act ("FMLA") paperwork to the County Administrative Offices rather than the Sheriff's Office that also failed to provide sufficient information, but that she would be given until August 24 to submit the proper documentation to the proper office. (*Id.*, ¶68.) Further, the letter stated that there were outstanding disciplinary issues which would need to be discussed upon her return to work, including whether she violated an order of the Sheriff to focus on her job duties and eliminate certain inappropriate conduct in the workplace before her June 29 departure, and that her departure without notifying anyone in her chain of command, was a violation of policy. (*Id.*, ¶68-69.)

On August 21, 2007, the Sheriff's Office received a letter from Plaintiff's attorney stating that Plaintiff had a claim for worker's compensation arising on or about June 29, 2007 from a work-related injury or illness, and that she continued to be restricted from full time employment as a direct result of such illness or injury. (*Id.*, ¶70.) On August 30, 2007, Plaintiff completed an Equal Employment Opportunity Commission ("EEOC") Questionnaire. (*Id.*, ¶71.) Neither Sheriff Randall or Cheif Tichava ever saw Plaintiff's Questionnaire. (*Id.*, ¶72.)

On September 4, 2007, Plaintiff received a letter from Chief Tichava, providing her with notice of a hearing that had been scheduled for September 25, 2007 in order to allow her the opportunity to respond to the disciplinary matters she faced. (*Id.*, ¶¶74, 88.) This

correspondence asserted that the hearing would address: (1) Plaintiff's having walked off the job on June 29th without approval or notification after packing up all of her personal belongings; (2) reasons for her late and insufficient submission of FMLA paperwork to the County rather than the Sheriff's Office; (3) whether conversations she had with Sheriff's Office personnel on June 29 violated the Sheriff's directive to her on June 28th to focus on her job duties and eliminate certain inappropriate conduct in the workplace; (4) her unexcused absences since June 29th and whether they were properly reimbursed as sick time; and (5) whether Plaintiff was entitled to continued health coverage and contribution by the County. (*Id.*, ¶¶73, 75.) Chief Tichava's September 4 correspondence further informed Plaintiff that she was subject to discipline, up to and including termination, based on the resolution of the issues delineated therein. (*Id.*, ¶76.)

Plaintiff signed an EEOC Charge, alleging sexual harassment, on September 10, 2007. (*Id.*, ¶77.) The EEOC issued a Notice of Charge dated September 12, 2007. (*Id.*, ¶78.) With Plaintiff's EEOC Charge on file, Plaintiff's counsel, Attorney Levenfeld, sent Chief Tichava a letter on September 20, 2007, which purported to be Plaintiff's response to the disciplinary issues outlined in the September 4 correspondence, and which further notified Chief Tichava that Plaintiff had filed an EEOC Charge based upon sexual harassment allegedly perpetrated by him. (*Id.*, ¶¶80, 82.) Levenfeld's correspondence addressed Plaintiff's June 29 conversation with Simms, and did not refute that Plaintiff had received an order or directive from Sheriff Randall to discontinue rumor and innuendo just the day before that conversation. (*Id.*, ¶81.) Further, attached to Levenfeld's letter was the opinion of Gregory Hawley, M.D., that the September 25 hearing would be detrimental to Plaintiff's health and should be postponed. (*Id.*, ¶83.)

In response, Chief Tichava informed Plaintiff by correspondence on September 21, 2007, that the Sheriff's Office would accept a written response to the charges in lieu of a personal appearance so long as it was received by September 25, 2007. (*Id.*, ¶84.) Plaintiff did not report in person for the hearing on September 25, 2007, but Attorney Levenfeld sent correspondence via *facsimile* on that date indicating that his prior correspondence of September 20, 2007 had been intended to respond to the disciplinary issues and further explained that the conversation Plaintiff had with Simms on June 29 was personal in nature. (*Id.*, ¶¶85-86.) Again, Levenfeld's correspondence did not refute that Sheriff Randall had given Plaintiff an order to stop spreading rumor and innuendo. (*Id.*, ¶86.) Plaintiff submitted no additional response or defense to the disciplinary allegations. (*Id.*, ¶87.)

Sheriff Randall terminated Plaintiff's employment by correspondence dated September 26, 2007. (*Id.*, ¶89.) Specifically, Sheriff Randall found that Plaintiff had violated 6 separate Rules and Regulations by (1) engaging in a conversation with Simms on June 29 that violated both Rule and Regulations #60 and his direct order; (2) being absent from her position since June 29, 2007 without notice and/or permission; and (3) failing to provide proper notice and documentation regarding her absence. (*Id.*, ¶89.) Plaintiff received the correspondence on the same day. (*Id.*, ¶90.) During her deposition, Plaintiff was unable to provide the name of any other Sheriff's Office employee who was found to have violated the same rules and regulations as she. (*Id.*, ¶92.) Plaintiff was paid her full salary until the date of her termination. (*Id.*, ¶91.)

Relevant Sheriff's Office Rules and Regulations

The Sheriff's Office had in effect at all relevant times Rules and Regulations, which it disseminated to all new employees upon their hire. (*Id.*, ¶¶94-95.) One of Plaintiff's duties included maintaining the master copy of the *Policy and Procedure Manual*, which included the Rules and Regulations. (*Id.*, ¶¶18, 93.) Rule & Regulation #67 stated that:

> "Failure to provide a business like work environment free from all forms of employee discrimination including incidents of sexual harassment. No employee shall make any unwelcome sexual overtures or actions, either verbal or physical. Sexual harassment will be treated as misconduct with appropriate disciplinary actions."

(*Id.*, ¶95.) Training regarding sexual harassment was also available to all employees. (*Id.*, ¶100-01.) When complaints of sexual harassment were reported to the KCSO, whether levied by the alleged victim or not, the complaint was investigated and when appropriate, discipline imposed. (*Id.*, ¶102.)

The Rules and Regulations also prohibited arbitrary or capricious complaints against another member of the Sheriff's Office, and provided that employees may not circumvent the "chain of command" unless otherwise allowed therein or by the Policies and Procedures. (*Id.*, ¶¶11-12, 96, 104.) Employees understood that the chain of command requirement meant that an employee should make complaints to his direct supervisor, unless the employee was uncomfortable doing so, and then the complaint should be delivered to the next level of command. (*Id.*, ¶97.) Plaintiff understood as much, although she believed approval of the

supervisor was necessary before reporting to the next level. (*Id.*, ¶98.) Moreover, Chief Tichava reported directly to Sheriff Randall, who possessed ultimate authority within the Sheriff's Office regarding termination of employees and who had an open door policy for employees with concerns regarding other employees. (*Id.*, ¶¶11, 13, 99.)

Plaintiff testified that she was unaware of the Rules and Regulation prohibiting sexual harassment, and she did not know if she should report the alleged sexual harassment of Chief Tichava to the Sheriff or to someone at the County. (*Id.*, ¶103.) Plaintiff never complained to Sheriff Randall, any other member of Command Staff, or any one at the County about any sexual harassment on the part of Chief Tichava. (*Id.*, ¶¶32-35.)

Plaintiff's Status as a Member of the Sheriff's Command Staff

As Chief Tichava's administrative assistant and the Human Resources Manager/Director, Plaintiff was a member of the Sheriff's Command Staff, a group composed of the seven (7) non-union highest ranking officers in the Sheriff's Office. (*Id.*, ¶¶17, 105-06.) At all relevant times, the Command Staff consisted of Sheriff Randall, Chief Tichava, all three Commanders (Jail, Support Services, and Patrol), the Office Manager (Kate Rassmussen upon her hire), and Plaintiff, Chief Tichava's administrative assistant and the Human Resources Manager/Director. (*Id.*, ¶106.) At monthly meetings, the Command Staff considered how to proceed and how the Sheriff's Office will operate, discussing budgetary issues, adding staff, and improvement in the Sheriff's Office. (*Id.*, ¶107.) Plaintiff testified the Command Staff is a "management staff" and it is an important position. (*Id.*, ¶¶108, 110.) Plaintiff participated in the discussions, expressing her opinion if she had one. (*Id.*, ¶109.) Unlike union employees, Sheriff Randall personally chose, hired, and promoted persons for the Command Staff, without going through any merit commission or hearing process. (*Id.*, ¶111.)

Alleged Harassing Conduct

The record discloses several alleged incidents of harassment that occurred off-duty at various social gatherings, and relatively few instances of allegedly harassing conduct at work. With regard to alleged harassment while at work, Plaintiff testified that Chief Tichava made several comments of a sexual or flirtatious manner, that he sent a pornographic email to her, that he looked down her shirt one-half or a dozen times, and that he exposed his penis to her on two occasions. (*Id.*, ¶¶112-19.)

Plaintiff and witness Deborah Kasper-Peters also testified to several acts that occurred off duty at various social gatherings of Sheriff's Office employees, most often at local drinking establishments, on Chief Tichava's boat or at his residence, including offensive comments and unwelcome physical touching of themselves and employees Sabrina Jennings and Tonya Johnson, and Plaintiff added that she once woke up on Chief Tichava's boat to him attempting to have sexual intercourse with her without having obtained her consent. (*Id*., ¶¶112-147, 149-50.) However, Jennings and Johnson deny any offensive comments or unwelcome physical touching on the part of Chief Tichava (*Id.*, ¶¶148, 152-53), Thomas testified the entire group was touchy and would touch each other's butts, and Kasper-Peters never made a complaint to the Sheriff or a member of command staff regarding the alleged conduct she now claims to have endured. (*Id.*, ¶¶151.) Plaintiff did stop socializing the last year or two that she worked at the Sheriff's Office. (*Id.*, ¶154.)

STANDARDS GOVERNING A MOTION FOR SUMMARY JUDGMENT

The 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); *Montgomery v. Potter*, 661 F.Supp. 2d 983, 985 (N.D.Ill. 2009). As the movant, Defendants initially have the burden to identify those portions of the evidence which they believe demonstrate the absence of a genuine issue of material fact. *Montgomery*, 661 F.Supp. 2d at 985, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If Defendants meet this burden, Plaintiff may not simply rest upon the allegations or denials of a pleading, but "must set forth specific facts showing that there is no genuine issue for trial." *Id.* This Honorable Court should construe the facts in a light most favorable to Plaintiff, and further, draw all reasonable and justifiable inferences in her favor. *Id.*

ARGUMENT

I. PLAINTIFF'S EXEMPTION FROM THE PROTECTIONS OF TITLE VII ENTITLES THE SHERIFF'S OFFICE TO SUMMARY JUDGMENT ON COUNTS I AND III

Count I of Plaintiff's Complaint alleges "Sexual Harassment" and Count III alleges "Retaliation," both in violation of Title VII. However, Title VII's definition of "employee" explicitly exempts from its protection the "first line of advisors" for elected public officials: members of the official's personal staff, an appointee to the policy-making level, or an immediate

advisor regarding the Constitutional or legal powers of the elected office. 42 U.S.C. § 2000e(f); *Deneen v. City of Markham*, No. 91 C 5399, 1993 WL 181885, at *2-3 (N.D. Ill. 5/26/93), quoting *Anderson v. City of Albuquerque*, 690 F.2d 796, 801 (10th Cir. 1982.)

The test to determine when this exemption is applicable in Title VII cases is the same as that employed in political patronage cases: "whether the position held by the individual authorizes, either directly or indirectly, meaningful input into governmental decision-making issues where there is room for principled disagreement on goals or their implementation." *Bervid v. Alvarez*, 647 F.Supp.2d 1006, 1009 (N.D.Ill. 2009), quoting *Americanos v. Carter*, 74 F.3d 138, 141 (7th Cir. 1996). When undertaking this analysis, a court should examine "the 'powers inherent in a given office,' rather than the actual functions the occupant of that office performed." *Id.* (internal citations omitted.)

In the case at bar, there is no dispute that Sheriff Randall is an "elected public official" with approximately 150 employees. (SOF, ¶¶4, 8, 10.) ILL. CONST. ART. 7, § 4(C). It is additionally undisputed that upon becoming Chief Tichava's administrative assistant, Plaintiff was appointed by Sheriff Randall to be a member of his Command Staff, which consists of the seven highest ranking employees of the Sheriff's Office and meets regularly to discuss how the Sheriff's Office should proceed and ways for it to improve. (*Id.*, ¶¶16-17, 105-108, 111.) Plaintiff admits that she actively took part in Command Staff discussions and expressed her opinion, if she had one. (*Id.*, ¶109.)

These undisputed facts establish that Plaintiff was one of Sheriff Randall's "first line of advisors," because she contributed the necessary "meaningful input" with regard to the operation of the Sheriff's Office. *See, Deneen,* 1993 WL 181885, at *3. For this reason, Plaintiff is exempt from Title VII's definition of "employee," and summary judgment should be granted in favor of the Sheriff's Office on Count I of Plaintiff's Complaint. *See Cromer v. Brown*, 88 F.3d 1315, 1323-24 (4 Cir. 1996) (affirming grant of summary judgment on claim that captain in sheriff's department was exempt from Title VII because he was a member of the Sheriff's command staff and therefore, contributed to policy-making discussions, but denying summary judgment for period plaintiff was merely a lieutenant); *Crain v. Butler*, 219 F.Supp. 2d 785, (E.D.N.C. 2005) (legal advisor to sheriff held exempt from Title VII).

II. ALTERNATIVELY, PLAINTIFF CANNOT ESTABLISH A BASIS FOR EMPLOYER LIABILITY ON COUNT I

To survive summary judgment on her Title VII sexual harassment claim, Plaintiff must establish that: (1) she was subjected to unwelcome conduct of a sexual nature; (2) the conduct was sufficiently severe or pervasive to create a hostile work environment; (3) the conduct was directed at her because of her sex; and (4) there is a basis for employer liability. *Roby v. CWI, Inc.*, 579 F.3d 779, 784 (7th Cir. 2009). For purposes of this Motion, the Sheriff's Office challenges only whether there is a basis for employer liability, asserting that it is entitled to summary judgment by virtue of the affirmative defense articulated in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

An employer is strictly liable for the alleged sexual harassment of a supervisor if there was a tangible employment action, such as discharge, demotion, or a change in working conditions. *Roby*, 579 F.3d at 784. Where a plaintiff has suffered no tangible employment action, the employer may avoid liability for supervisory harassment if it can establish that: (1) it exercised reasonable care to prevent or promptly correct any sexual harassment, and (2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities or to otherwise avoid harm. *Roby*, 579 F.3d at 784; *Ellerth*, 425 U.S. at 765.

A. The Sheriff's Office is Entitled to the Affirmative Defense Because There Was No Tangible Employment Action Taken by Chief Tichava

Plaintiff was terminated by the Sheriff (SOF, ¶89), but her termination is not a tangible employment action sufficient to defeat applicability of the *Faragher/Ellerth* defense with regard to Count I because only those tangible employment actions undertaken by the harassing supervisor will undercut the defense. *Durkin v. City of Chicago*, 341 F.3d 606, 611 (7th Cir. 2003); *Johnson v. West*, 218 F.3d 725, 730-31 (7th Cir. 2000). Here, Chief Tichava was the alleged harasser, but it was Sheriff Randall, not Chief Tichava, who terminated Plaintiff. (SOF, ¶¶32, 89.)

Moreover, Count I is not concerned with Plaintiff's termination: she does not allege that the sexual harassment (the conduct at issue in Count I) resulted in her termination, rather she alleges she was terminated by the Sheriff in retaliation for her complaint about the alleged

harassment (see Count III, Compl., ¶¶18, 29.)[1] And finally, it cannot be otherwise inferred that the alleged harassment led to Plaintiff's termination because it is undisputed that Plaintiff was not terminated until after a self-imposed separation from the allegedly harassing conduct for a period of three months. (*Id.*, ¶¶66, 89.) *See Roby*, 579 F.3d at 783-84 (alleged harassment victim, who never returned to work after a one month leave and never informed the employer that she did not want to work anymore, was not terminated). Accordingly, there was no tangible employment action undertaken by Tichava for purposes of Count I of Plaintiff's Complaint and the Sheriff's Office may assert the affirmative defense.

B. The Sheriff's Office Can Establish the Affirmative Defense

While not required as a matter of law, the existence of an appropriate anti-harassment policy will usually satisfy the first prong of the affirmative defense. *Shaw v. Autozone*, 180 F.3d 806, 811 (7th Cir. 1999). *See*, *Ellerth*, 524 U.S. 765. The Sheriff's Office had a Rule and Regulation in place that prohibited sexual harassment as discipline-worthy misconduct and provided the chain-of-command as a grievance mechanism, and employees understood that if they were not comfortable taking the complaint to their direct supervisor, to take it to the next level of command. (SOF, ¶¶95-97, 99.) Further, although it was not always mandatory, training regarding sexual harassment was available to all employees of the Sheriff's Office (*Id.*, ¶ 100-01) and the Sheriff's Office has responded to past reports of sexual harassment in a prompt and appropriate manner, even if brought to light by someone other than the purported victim. (*Id.*, ¶102.) Simply, there is no evidence upon which to infer that the efforts of the Sheriff's Office to prevent and promptly correct any sexual harassment were not reasonable.

An anti-harassment policy must be disseminated to employees, *Shaw*, 180 F.3d at 811, and the Sheriff's Office disseminated its Rule and Regulation prohibiting sexual harassment to employees upon their hire. (SOF, ¶94.) Plaintiff's purported ignorance of the Rule & Regulation

[1] Plaintiff does allege in Count I that the harassment itself resulted in a more obscure "loss of her position." (Compl., ¶18.) However, any attempt to turn her voluntary departure into a constructive discharge, *Penn. State Police v. Suders*, 542 U.S. 129, 142-43 (2004) (a constructive discharge can qualify as a tangible employment action), fails since there must be an "official act" underlying the constructive discharge to eradicate the defense, *Id.* at 148, and there is no evidence of any such act in this case.

and the reporting structure (*Id.*, ¶103) does not defeat the defense because it is undisputed that, even if she did not read the Rules and Regulations, they were in her possession throughout her employ as she kept the master copy in her office. (*Id.*, ¶¶18, 93.) *See Shaw*, 180 F.3d at 811 (finding constructive knowledge where it was undisputed that plaintiff received a copy of the policy and was required to read it, and that she signed an acknowledgment that it was her responsibility to read and learn the employer's policies). Moreover, even were it true that she never knew about the Rule and Regulation itself, Plaintiff clearly understood that the chain of command allowed her to complain about Chief Tichava to Sheriff Randall, as she did just that at least twice, *i.e.* when she called Sheriff Randall at home to tell him Chief Tichava yelled at her, and when she both carbon copied him on, and personally provided him with a copy of her response to the June 11 reprimand. (*Id.*, ¶¶40, 46, 49.)

With regard to the second prong of the defense, proof of a plaintiff's failure to use any complaint procedure provided by the employer will normally satisfy the employer's burden. *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 952 (7th Cir. 2005), quoting *Ellerth*, 524 U.S. at 765. Here, the record establishes that Plaintiff made complaints to Sheriff Randall about other things, both orally and in writing (SOF, ¶36, 40, 46, 49, 50), yet she admits she never reported Chief Tichava's alleged sexual harassment until after she knew she was facing possible termination and had filed her EEOC Charge. (*Id.*, ¶¶32-35, 41, 48, 68-70, 72, 74-77.)

The evidence in this case establishes that the Sheriff's Office is entitled to assert the *Faragher/Ellerth* affirmative defense, and the Sheriff's Office has established both of its elements. As a result, the Sheriff's Office is entitled to judgment as a matter of law on Count I.

III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT II (42 U.S.C. § 1983) BECAUSE CHIEF TICHAVA WAS NOT A STATE ACTOR AND THERE IS NO EVIDENCE OF A MUNICIPAL POLICY OR DELIBERATE INDIFFERENCE

A. Chief Tichava Did Not Act Under Color of Law

Plaintiff's claim under §1983 requires her to establish 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). The "color of law" requirement is met if the defendant acted in an official capacity as a public employee or exercised responsibilities pursuant to state law. *Id.* at 868-69. While

employment with a public institution is often sufficient to establish a defendant's status as a "state actor," not every act by a public employee is taken under color of state law. *Hughes v. Meyer*, 880 F.2d 967, 971 (7th Cir. 1989). The determination of whether a public employee is cloaked with the color of law focuses on the nature of the acts performed by the employee. *Latuszkin v. City of Chicago*, 250 F.3d 502, 505-06 (7th Cir. 2001). Acts will be deemed under color of state law only when the employee exercises "power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Polk Co. v. Dodson*, 454 U.S. 312, 317-18 (1981), quoting *U.S. v. Classic*, 313 U.S. 299, 326 (1941). Conversely, where those acts are undertaken as part of a personal pursuit, the public employee is not subject to liability under Section 1983. *See Screws v. U.S.*, 325 U.S. 91, 111 (1945). *See also, West*, 487 U.S. 42, 50 (1988) ("generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law"). Here, Chief Tichava is a Kendall County sheriff's deputy and an administrator for the Sheriff's Office (SOF, ¶¶9, 14), and the nature of the act performed is his alleged sexual harassment of Plaintiff. (*Id.*, ¶7; Compl., ¶¶11-13.)

Alleged sexual harassment is a purely private/personal pursuit not related to Chief Tichava's duties as a sheriff's deputy. *See Chavez*, 465 F.Supp. 2d at 870-71. *See also, Barnard v. City of Chicago Hgts.*, Case No. 91 C 3626, 1992 WL 309567, at *2-3 (N.D.Ill. 10/22/92) (granting motion to dismiss city desk clerk's §1983 claim of sexual harassment brought against police sergeant). *See also*, *Garrison v. Burke*, Case No. 91 C 20150, 1993 WL 29909, at *2 (N.D.Ill., 2/8/93) (granting dismissal of firefighter's §1983 harassment claim against ranking firefighter). Nor is the alleged sexual harassment related to Chief Tichava's duties as an administrator with regard to the operations and programs of the Sheriff's Office. (SOF, ¶14.) *Murphy v. Chicago Transit Auth.*, 638 F.Supp. 464, 468 (N.D.Ill. 1986)(staff attorney's allegations of sexual harassment did not relate to harassing attorneys' duties and mere fact that they had access to co-worker by virtue of their employment was insufficient to establish under color of law). And neither does the mere fact that Chief Tichava was Plaintiff's supervisor render his alleged sexual harassment related to the performance of his official duties. *Garrison*, 1991 WL 29909, at *3; *Mainor v. Chicago Transit Auth.*, Case No. 03 C 9102, 2005 WL 3050604, at *5 (N.D.Ill. 11/15/05) (alleged harassment was not related to a supervisor's duties).

Indeed, the overwhelming majority of harassing acts occurred when Plaintiff and Chief Tichava attended admittedly voluntary, social functions that arose from their social activities and friendship, an entirely separate and distinct association than their supervisor/employee relationship. (SOF, ¶¶19-27, 120-47, 149-50.) *See*, *Cooke v. Stefani Mgmt. Services, Inc.*, 250 F.3d 564, 567 (7th Cir. 2001) ("the balance of power between a supervisor and employee is qualitatively different in a social setting than it is as work). Though several of these events were tangentially related to the Sheriff's Office by attendance of several Sheriff's Office employees, such as Christmas parties, golf outings, or social detours while attending business conferences (SOF, ¶¶120, 137, 139, 144), these were not official functions of the Sheriff's Office, and Plaintiff was not compelled to attend them as part of her employment. (*Id.*, ¶¶120, 137, 140, 144.) This leaves only those few remaining acts that Plaintiff testified occurred while she and Chief Tichava were at work, including sexual comments, one pornographic email, looking down Plaintiff's shirt, and exposing himself on at least two separate occasions. (SOF, ¶¶112-19.) Nonetheless, these isolated acts still fail to defeat summary judgment as such comments and gestures cannot be reasonably suggested to be related to Chief Tichava's administrative, supervisory, or police-related duties, and as such, remain purely personal pursuits. *See, Chavez*, 465 F.Supp. 2d at 870-71; *Barnard*, 1992 WL 309567, at *2-3; *Garrison*, 1991 WL 29909, at *3.

Finally, with regard to any of the alleged acts, whether on or off duty, there is no support in the record for an inference that Chief Tichava ever invoked the power of his authority in a manner that related to the alleged comments and acts, or that he compelled any female employee to succumb to his sexual desires or conduct by threatening use of the official authority he enjoyed by virtue of his ranking position at the Sheriff's Office. *See, Griffin v. City of Opa-Locka*, 261 F.3d 1295 (11th Cir. 2001) (city manager used his authority to harass plaintiff where he held her job and benefits over her head and used his position to create the opportunity to be alone with her to rape her.)

As such, the alleged sexual harassment was not undertaken with the required "color of law," and Defendants are entitled to summary judgment on Count II.

B. The Sheriff's Office is Entitled to Summary Judgment Because There is No Evidence of a Municipal Policy/Custom

Additionally, in order to prevent summary judgement for the Sheriff's Office on Count II, Plaintiff must show that an "official policy or custom was discriminatory." *Sommerville v. City of Chicago*, 291 F.Supp.2d 737, 745 (N.D.Ill. 2003). To do so, Plaintiff must establish that: (1) the Sheriff's Office has an express policy that caused a constitutional deprivation; (2) the Sheriff's Office has a widespread practice of discrimination that is so permanent and well-settled that it constitutes a custom or usage; or (3) her injury was caused by a person with final policymaking authority. *Id.* Plaintiff can show none of the three.

First, there is no evidence of an express policy allowing or encouraging sexual harassment at the Sheriff's Office, nor could there be in light of the Rule & Regulation prohibiting such acts. (SOF, ¶95.) *Sommerville*, 291 F.Supp. 2d at 745. Second, there is no evidence by which to suggest a widespread custom of sexual harassment that is ignored by the Sheriff's Office. *Id.* Quite the opposite, there is evidence that the Sheriff's Office responded to complaints of sexual harassment promptly and took disciplinary action when warranted. (SOF, ¶102.) *See, Valentine v. City of Chicago*, 452 F.3d 670, 685 (7th Cir. 2006) (evidence that municipal employer responded to complaints of sexual harassment, once made, defeat a finding of widespread harassment). Third, there is no evidence that Plaintiff was sexually harassed by an individual with final policy-making authority; it is undisputed that Plaintiff complains only of harassment at the hands of Chief Tichava (SOF, ¶32), not Sheriff Randall, who is the final policymaker for the Sheriff's Office (*Id.*, ¶¶13, 111) and as noted elsewhere, the record is utterly void of any evidence that he knew of her allegations of harassment. (SOF, ¶¶33-36, 40-41, 48, 72.) Plaintiff's purported "failure to train" claim (Compl., ¶ 20) fails for the same reason. *See Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007) (Section 1983 failure to train claim requires a showing of deliberate indifference on the part of the municipality).

Having established that Plaintiff can show none of the three means by which to impose liability under §1983, the Sheriff's Office is entitled to summary judgment on Count II. The Sheriff's Office is also entitled to summary judgment on Count II because a municipality may only be held liable under Section 1983 if there is proof of a violation of law by one of its employees. *Durkin*, 341 F.3d at 615. Since Chief Tichava is entitled to summary judgment (see Section III-A, above), so too is the Sheriff's Office. *See id.*

IV. ALTERNATIVELY, THE SHERIFF'S OFFICE IS ENTITLED TO SUMMARY JUDGMENT ON COUNT III BECAUSE PLAINTIFF CANNOT ESTABLISH A *PRIMA FACIE* CASE OF RETALIATION OR PRETEXT

Count III claims retaliation against the Sheriff's Office under Title VII, which prohibits an employer's discrimination against an employee who has opposed a practice made unlawful by its provisions. *Scruggs v. Garst Seed Co.*, 587 F.3d 832, 838 (7th Cir. 2009). In the event this Court disagrees with the Sheriff's Contention that Plaintiff is not entitled to the protections of Title VII because she is exempt from the statute's definition of "employee," (SECTION I, *infra*). then Plaintiff may proceed with her claim of retaliation by either the direct or indirect method of proof. *Roby*, 579 F.3d at 786.

Under the direct method, Plaintiff must present evidence that there is a causal connection between a statutorily protected activity and a materially adverse action suffered by her. *Scruggs*, 587 F.3d at 838. Although Plaintiff did file a Charge alleging sexual harassment with the EEOC and she was also terminated by the Sheriff's Office (SOF, ¶¶77, 89), there is no direct evidence in the record that Plaintiff was terminated *because* she filed the Charge. *See Gonzales v. Cook Co. Bureau of Admin.*, 450 F.Supp. 2d 858, 865-66 (N.D.Ill. 2006) (the required element of causation can be shown by an admission or, at least a statement or conduct from the decision maker from which retaliation can be inferred). To the contrary, the evidence unequivocally establishes that disciplinary steps, including possible termination, were initiated before either Sheriff Randall or Chief Tichava knew about any complaint of sexual harassment, let alone Plaintiff's EEOC Charge. (*Id.*, ¶¶33-35, 40-41, 48, 50, 68-69, 72, 73-79.) Accordingly, Plaintiff must proceed under the indirect method.

The indirect method requires Plaintiff to show that: (1) she lodged a complaint about harassment; (2) she suffered a materially adverse action; (3) she was meeting her employer's legitimate expectations; and (4) she was treated less favorably than similarly situated employees who did not complain. *Scruggs*, 587 F.3d at 838; *Roby*, 579 F.3d at 786-87. If Plaintiff makes out a *prima facie* case, the burden shifts to the Sheriff's Office to provide a legitimate, nondiscriminatory reason for its action. *Scruggs*, 587 F.3d at 838; *Roby*, 579 F.3d at 787. Assuming it does so, the burden then returns to Plaintiff to establish a genuine issue of material fact regarding whether Defendant's proffered reason for the employment action is pretextual. *Id.*

Even under the indirect method, an employer cannot retaliate against an employee for activity about which it has no knowledge. *Tomanovich v. City of Indianapolis et al.*, 457 F.3d 656, 668-69 (7th Cir. 2006) ("proof of retaliation under the indirect method presupposes that the decision-maker knew that the plaintiff engaged in a statutorily protected activity..."). *See also, Stephens v. Erickson*, 569 F.3d 779, 788 (7th Cir. 2009). Here, the facts indisputably establish that when Defendants notified Plaintiff about the prospect of discipline, including possible termination on September 4, 2007, Defendants were unaware of any complaint of sexual harassment on the part of Plaintiff; she had never lodged a complaint during her employ (SOF, ¶¶33-35, 40-41, 46, 48, 50), and she had not yet communicated any such claim through her counsel (*Id.*, ¶70) or filed her EEOC Charge. (*Id.*, ¶77.) In that regard, it is well established that the Sheriff's Office was not required to suspend its previously planned discipline when it later discovered that Plaintiff had engaged in protected activity. *See, Clark Co. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001); *Gonzales*, 450 F.Supp. 2d at 866 (granting summary judgment because events leading to the plaintiff's termination were in motion by the time decision-makers became aware of complaint of sexual harassment).

In addition to her inability to provide evidence of causation, Plaintiff cannot establish her *prima facie* case because she cannot show she was meeting the legitimate expectations of the Sheriff's Office at the time of her termination or that similarly situated employees who did not complain of harassment were treated more favorably. First, Plaintiff cannot show that she was meeting the legitimate expectations of the Sheriff's Office at the time of her termination because it is undisputed that she had not reported to work for three months. (SOF, ¶¶66, 89.) Moreover, even if Plaintiff had returned to work during that time frame, she was facing discipline, including possible termination, for the manner in which she left the Sheriff's Office on June 29, 2007, her failure to follow proper procedures with regard to FMLA leave, and for violating the Sheriff's order and a Rule and Regulation prohibiting arbitrary and capricious complaints. (SOF, ¶¶68-69, 73-76.)

Second, Plaintiff cannot show that similarly situated employees were treated more favorably. To survive summary judgment under the indirect method, Plaintiff "must show that she is 'directly comparable to [the similarly situated employee] in all material respects.'" *Gonzales*, 450 F.Supp. 2d at 864. This requires a showing that Plaintiff is similarly situated to

the other employee(s) with regard to performance, qualifications and conduct. *Id.; Lewis v. City of Chicago*, 590 F.3d 427, 436 (7th Cir. 2009) (to be sufficiently comparable, other employees must have engaged in comparable rule or policy violations). Simply stated, there is no evidence the Sheriff's Office retained any other employee who (1) failed to provide information requested for purposes of allowing the Sheriff's Office to determine continued employment, discipline and medical leave information (SOF, ¶¶68-69, 73, 75); (2) failed to report (in person or sufficiently in writing) for a disciplinary hearing provided prior to possible termination (*Id.*, ¶¶74, 80, 85-88); and (3) remained off of work for a period of three (3) months with pay, but without having been certified for leave under the FLMA (*Id.*, ¶¶68, 73, 89.) *See id.* Nor is there any evidence that any other employee found to have violated several Rules and Regulations was not terminated (SOF, ¶92) let alone a member of the Command Staff. In sum, the record is utterly void of any similarly situated employee who did not complain of harassment that was not also terminated. Accordingly, the Sheriff is entitled to summary judgment on Count III.

A. The Sheriff's Office Possessed a Legitimate Non-Discriminatory Reason for Plaintiff's Termination

Even if Plaintiff could meet her burden to establish a *prima facie* case of retaliation, the Sheriff has provided evidence of a legitimate non-retaliatory reason for Plaintiff's termination. Although Plaintiff disputes that Sheriff Randall issued an order to stop spreading rumors, this dispute is not material, because there are other equally as justified reasons supporting her termination, namely she admits she engaged in the conduct that Sheriff Randall determined constituted a violation of the prohibition on arbitrary and capricious complaints against fellow employees (SOF, ¶¶54, 89, 110) and she left work without obtaining proper approval and then remained off work for a period of three months, without taking the proper steps to qualify for FMLA or other leave. (SOF, ¶¶60, 64-66, 68, 73.) When September 26, 2007 arrived, Sheriff Randall's decision to terminate Plaintiff, made without the benefit of any kind of meaningful response from her (*id*., ¶¶70, 80, 86) and the unrefuted evidence provided by Sgt. Simms (*id.*, ¶¶67, 89), was not only reasonable, but compelling. *See, Roby*, 579 F.3d at 787.

In order to avoid summary judgment, Plaintiff must establish that the reasons for her termination are pretextual. *Scruggs*, 587 F.3d at 838-39. Pretext is more than simple faulty reasoning or a mistake in judgement. *Id.* at 838. Rather, pretext is a "lie, specifically, a phony reason for some action. " *Id*. at 838-39 (internal citations omitted). If the employer honestly

believed the reason it proffers for its decision, then the reason is not, by definition, pretextual. *Id.* at 839. There is no evidence here that the reasons for Plaintiff's termination are false. Accordingly, there is no pretext, and the legitimate non-discriminatory reasons for Plaintiff's termination warrant summary judgment in favor of the Sheriff's Office on Count III of Plaintiff's Complaint.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Honorable Court grant them each summary judgment on Plaintiff's Complaint.

Dated: February 24, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury pursuant to 28 U.S.C.A. § 1746 that the foregoing is true and correct: that on Wednesday, February 24, 2010, I electronically filed the foregoing**,** Defendants' Memorandum of Law of In Support of Their Motion for Summary Judgment, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record: Mr. Andrew Levenfeld.

Respectfully submitted,

/s/Sara M. Cliffe

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