Tennessee Valley Authority, Post Office Box 2000, Spring City, Tennessee 37381-2000

MAR 2 7 2001

10 CFR 50.4

U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D. C. 20555

Gentlemen:

In the Matter of) Docket No.50-390
Tennessee Valley Authority)

WATTS BAR NUCLEAR PLANT (WBN) UNIT 1 - DEPARTMENT OF LABOR (DOL) CASE NO. 1999-ERA-25 (CURTIS C. OVERALL V. TENNESSEE VALLEY AUTHORITY)

In letters to J. A. Scalice dated July 17, 1999, and September 4, 1998, NRC requested that TVA provide copies of future filings made to DOL by TVA in connection with Curtis C. Overall's Case No. 97-ERA-53. TVA has provided NRC with copies of each of its filings in that case.

As you are aware, Mr. Overall has filed a second DOL complaint which, although separate, involves issues closely related to his first complaint. For your information, TVA has enclosed its latest three filings. Enclosure 1 is entitled "Respondent's Prehearing Submission." Enclosure 2 is entitled "Respondent Tennessee Valley Authority's Motion for Summary Decision." Enclosure 3 is entitled "Respondent Tennessee Valley Authority's Brief in Support of Motion for Summary Decision."

IE54

Public
Rec: G Cwalina

MAR 2 7 2001

There are no Regulatory Commitments identified in this letter. If you have any questions about these filings, please contact me at (423) 365-1824.

Sincerely,

P. L. Pace
Manager, Site Licensing
and Industry Affairs

Enclosures
cc (Enclosures):
NRC Resident Inspector
Watts Bar Nuclear Plant
1260 Nuclear Plant Road
Spring City, Tennessee 37381

Mr. L. Mark Padovan, Senior Project Manager
U.S. Nuclear Regulatory Commission
MS 08G9
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2739

U.S. Nuclear Regulatory Commission
Region II
Sam Nunn Atlanta Federal Center
61 Forsyth St., SW, Suite 23T85
Atlanta, Georgia 30303

Dr. Frank J. Congel, Director
Office of Enforcement
U. S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

ENCLOSURE 1

OFFICE OF ADMINISTRATIVE LAW JUDGES
CASE NO. 1999-ERA-25
RESPONDENT'S PREHEARING SUBMISSION

BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

IN THE MATTER OF

CURTIS C. OVERALL	)	
	)	
Complainant	)	
	)	
v.	)	Case No. 1999-ERA-25
	)	
	)	
TENNESSEE VALLEY AUTHORITY,	)	
	)	
Respondent	)	

RESPONDENT TENNESSEE VALLEY AUTHORITY'S
MOTION FOR SUMMARY DECISION

Pursuant to 29 C.F.R. § 18.41 (2000) and Rule 56, FED. R. CIV. P., respondent Tennessee Valley Authority (TVA) moves for summary decision on the grounds that the material on record, including the declarations of G. Donald Hickman and Richard T. Purcell and extracts from the depositions of James G. Adair, Ann Pickle Harris, G. Donald Hickman, Randy W. Higginbotham. Nancy J. Holloway, C. Ron Hudson, Peter Langdon, complainant Curtis C. Overall (Overall), Amanda Overall, Janice Overall, Joseph (Joey) Overall, Richard T. Purcell, Phillip S. Smith, Richter E. Wiggall, and Douglas F. Williams, filed herewith, show that there are no disputed issues of material fact and that TVA is entitled to judgment as a matter of law. Overall is unable to establish a prima facie case of hostile working environment. Even if Overall could establish a prima facie case, TVA would have no liability for discrimination since its responses to the alleged harassment were adequate.

A brief which more fully sets forth the grounds for this motion is submitted herewith.

Respectfully submitted,

Maureen H. Dunn
General Counsel

Thomas F. Fine
Assistant General Counsel
Tennessee Bar No. 867

Brent R. Marquand
Senior Litigation Attorney
Tennessee Bar No. 4717

Dillis D. Freeman, Jr.
Attorney
Tennessee Bar No. 17983

Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone No. 865-632-2061

Attorneys for Respondents

003684303

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion for summary decision, together with a supporting brief, the declarations of G. Donald Hickman and Richard T. Purcell, and extracts from the depositions of James G. Adair, Ann Pickle Harris, G. Donald Hickman, Randy W. Higginbotham. Nancy J. Holloway, C. Ron Hudson, Peter Langdon, Curtis C. Overall, Amanda Overall, Janice Overall, Joseph (Joey) Overall, George T. Prosser, Richard T. Purcell, Phillip S. Smith, Richter E. Wiggall, and Douglas F. Williams, have been served upon complainant by mailing copies thereof to:

Lynne Bernabei, Esq.
Bernabei & Katz, PLLC
1773 T Street, NW
Washington, D.C. 20009-7139

This 19th day of March, 2001.

Attorney for Respondents

ENCLOSURE 2

OFFICE OF ADMINISTRATIVE LAW JUDGES
CASE NO. 1999-ERA-25
Respondent Tennessee Valley Authority's
Motion for Summary Decision

BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

IN THE MATTER OF	)	
	)	
CURTIS C. OVERALL	)	
	)	
Complainant	)	
	)	
v.	)	Case No. 1999-ERA-25
	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	
	)	
Respondent	)	

RESPONDENT'S PREHEARING SUBMISSION

A. STATEMENT OF THE CASE

Introduction

Respondent Tennessee Valley Authority (TVA) tenders this prehearing submission pursuant to the October 3, 2000, notice of hearing and prehearing order in this proceeding. This case involves a February 19, 1999, complaint filed by Curtis C. Overall under Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1994) (ERA). In this proceeding, Overall's second ERA case, he claims that TVA is liable to him because, he alleges, TVA violated the ERA), "by (1) its fail[ing] to prevent the hostile work environment and the related harassment occurring outside the workplace, and (2) its fail[ing] to conduct an adequate investigation of these incidents of harassment" (compl. at 2). He claims that he has been the object of retaliatory harassment both at work and away from work.

Factual Background

1. Overall's first ERA complaint. Overall was employed in TVA's Nuclear (TVAN) organization[1] and worked at its Watts Bar Nuclear Plant (Watts Bar) since 1984. In 1994 he was notified that his position at Watts Bar was targeted for elimination in 1995. When his position was in fact eliminated in mid-September 1995, he was transferred outside of TVAN to TVA's Services organization. Within a few weeks, Overall had accepted a position in the Services organization.

The Services organization itself was under financial pressure and found that it could not continue to support employees in fiscal year 1997 who were not bringing in enough contract income to support their positions. Overall's entire work group was determined not to be self-supporting, and his TVA employment was terminated in a reduction in force (RIF) effective September 30, 1996.

In April 1995, Overall discovered a number of whole and broken screws in the ice condenser melt tank. The screws were of the type used in the assembly of ice baskets which hold ice used to cool the reactor in the event of an emergency. Overall initiated Problem Evaluation Report WBPER 950246 (PER 246) on April 21, 1995, to document the presence of the screws.[2] Overall was transferred to Services

---

1 TVA is a Federal agency created by the TVA Act of 1933, 16 U.S.C. §§ 831-831ee (1994 & Supp. V 1999), with responsibility for controlling floods, promoting navigation, promoting agricultural and industrial development, and producing, distributing, and selling electricity. TVAN is one organization within TVA with responsibility for maintaining TVA's nuclear facilities and for generating electricity from those facilities.

2 A PER is part of TVAN's documented corrective action process. TVAN uses a PER to document a perceived problem, to evaluate the existence, significance, and extent of the problem, to ascertain any necessary corrective action, and to track corrective action to completion. The PER is also used to determine the root cause of the problem and whether the problem may exist elsewhere in the plant or at other of the licensee's plants. Because there is no threshold for initiating a PER and employees are encouraged to report problems so that they may be corrected, PERs are common. As indicated by the serial number on PER 246, when it was written on April 21, 1995,

before all of the work on the PER was complete. Eventually, TVAN closed the PER based on a determination that the existing conditions were acceptable. The NRC agreed that the existing conditions were acceptable but determined that TVAN had made an error in documenting the closure of the PER and issued a notice of violation (NOV) in 2000.

Overall filed his first ERA complaint, No. 97-ERA-53, on January 15, 1997. In that complaint, he alleged that he had been transferred from Watts Bar and ultimately RIFed because he had initiated a PER regarding Watts Bar's ice condenser system in April 1995. After a December 1997 hearing, the ALJ issued a recommended decision and order (RDO) on April 1, 1998, finding that Overall had been discriminated against for raising safety concerns. TVA appealed that decision which is now pending before the Administrative Review Board (ARB) as ARB Case Nos. 98-111 and 98-128. Because the ERA provides for preliminary relief based on an RDO that finds discrimination, the ALJ issued a preliminary order on May 12, 1998, granting relief which included reinstatement and backpay. Accordingly, TVA informed Overall in a May 20, 1998, letter that he was to return to work at Watts Bar on June 1, 1998.

2. The alleged harassment. On May 28, 1998, prior to reporting to work, Overall made a prediction to his psychologist that he was "fearful of reprisals" and expressed a desire for his psychologist "to talk [with his] attorney" who "wants him to be positive and to go back to work." The next day, May 29, Overall reported that an anonymous note had been found on his car at his home that said simply "Silkwood." As a result, TVA was forced to agree to delay the date for him to report to work while continuing to pay his salary. Overall finally reported to work at Watts

---

(. . . continued) it was the 246th PER to be initiated at Watts Bar in 1995. All nuclear plants in the United States are required to have a similar type of documented corrective action process.

Bar in August 1998. After additional incidents of anonymous harassment, he stayed off work, with full pay, beginning in September 1998.

Attached to Overall's complaint is a "Chronology of Harassment" that lists 15 alleged incidents of harassment occurring from May 25 through September 9, 1998. All of the incidents were anonymous and only two of the fifteen occurred at a TVA site. There is simply no evidence that TVAN management is responsible for any of those incidents or that it failed to respond appropriately.

The purported harassment at work includes his receipt of one anonymous note,[3] a purported prank telephone call, and some imagined slights by coworkers.[4] The purported harassment away from work includes several anonymous notes at Overall's home, an anonymous note and a mock bomb found in his vehicle while parked at a nearby store, some alleged "prank" telephone calls to his home, "suspicious" individuals in his neighborhood, and several "suspicious" vehicles purportedly observing his activities.

3. TVAN's response to the alleged harassment. TVA has a firm commitment to nuclear safety and to encouraging TVA employees to raise nuclear safety concerns, expressed in many policies, procedures, practices, and programs. TVAN and the OIG have responded as vigorously as possible, given the vague nature

---

3 A second anonymous message was found written on the wall of a bathroom stall. However, when it was discovered, management promptly closed the area and limited dissemination of information about the incident. In his deposition, complainant disclaimed any information of the matter and conceded that he had not felt harassed by the message since he claimed to be unaware of it.

4 Comments by coworkers that Overall now claims to be harassing were not included in his complaint or the "Chronology of Harassment" as acts of retaliation or harassment. None of those comments were hostile and, at the worst, are merely ambiguous statements.

of some of the alleged harassment, and the fact that the incidents allegedly occurring off of TVA property were not reported directly to TVA.

When TVAN first learned of Overall's allegation of a harassing telephone call on May 25, 1998, and long before he filed his February 19, 1999, complaint in this proceeding, TVAN requested TVA's Office of Inspector General (OIG) to investigate.[5] Complainant has failed at times to apprise the OIG of the events he considered to be harassing or to provide evidence in a timely fashion. He also failed to cooperate with the OIG investigation by refusing to provide handwriting exemplars or to be interviewed.

In addition to the investigation of complainant's allegations of harassment, the Watts Bar Site Vice President met with his subordinates and informed them that the alleged harassment was inappropriate and would not be tolerated. His message was then cascaded down the chain of command to all of those working at Watts Bar. On a second occasion, each shift at the plant met in the assembly room where they were again informed that TVA and the Site Vice President would not tolerate any harassment. TVAN also allowed Overall to stay at home with full pay until he was able to return to work. Despite efforts by TVAN to return Overall to work in 1999, he was allowed to stay in nonduty pay status until he finally returned to work in February 2000.[6]

In his complaint, Overall claimed that "[t]he investigations conducted by TVA and its Office of Inspector General have been purposefully inadequate and have

---

[5] The OIG is an independent unit within TVA which operates under the authority of the Inspector General Act of 1978, as amended, 5 U.S.C. app. at 1381-99, §§ 1-12 (1994 and Supp. V 1999 app. at 385-96). While other TVA organizations can and do request OIG to investigate matters of concern to those organizations, OIG conducts those investigations without any control or review by other TVA organizations.

[6] At Overall's request not to return to Watts Bar, he was assigned to work with the Fossil Engineering Group in Chattanooga, Tennessee, much closer to his home.

not led to the discovery of who is harassing me" (compl. at 2). Contrary to that claim, the OIG investigation has expended considerable resources and followed logical investigative approaches. The OIG investigation to date has included numerous interviews, including TVA employees and individuals in Overall's neighborhood. The OIG has obtained and reviewed relevant records, has been in contact with other law enforcement agencies, including the Federal Bureau of Investigation, City of Cleveland Police Department, Lenoir City Police Department, Roane County Sheriff's Department, Chattanooga Police Department, and the Bureau of Alcohol, Tobacco and Firearms.

The evidence gathered does not point to any likely suspect who has been harassing Overall. Indeed, Overall has indicated that he has received harassing telephone calls by both a female and a male and by individuals in different cars and a motorcycle. The OIG was able to identify and interview the drivers of two of the purportedly "suspicious" vehicles. Neither driver was employed by TVA, and both were engaged in legitimate activities at the time they were observed. Among the records obtained by the OIG are telephone records which show that the allegedly harassing telephone calls were made from pay phones near Overall's home. Further, TVA security records show that the TVA employees suspected by Overall could not have made the telephone calls and written the note on the wall of the bathroom stall.

Moreover, Overall was not entirely cooperative or forthcoming with the OIG's investigation. When, as a logical step in its investigation, the OIG sought to eliminate the alleged victim as a suspect, Overall was less than cooperative. When a forensic document examiner linked Overall's handwriting to two of the alleged harassing notes, and a second examiner could not eliminate Overall as the writer of the notes, the OIG requested Overall to provide handwriting exemplars and to submit to a polygraph examination to help resolve whether he should be considered a suspect in this case. As the Court knows, Overall refused to provide any handwriting exemplars

until ordered to do so by the Court here. In addition, Overall did not advise the OIG of all of the matters relating to this case. Instead, OIG learned of some alleged incidents of harassment only through the media.[7]

While there is no likely suspect who has been harassing Overall, there are some questions as to whether he is literally the author of his alleged harassment. Both of the forensic document examiners retained by TVA for purposes of this litigation have rendered opinions that there are strong indications that Overall authored one or more of the purportedly harassing handwritten notes. They are also of the opinion that there are indications that he authored some of the other notes. In addition, examination of the harassing typewritten note shows that it bears a font design consistent with the typewriter owned by Overall. Although Overall has offered an excuse that he purchased the typewriter months after receiving the typewritten harassing note, the font design of earlier letters he had sent to his counsel, Charles Van Beke, is also similar to the alleged harassing typewritten note. Further, there is evidence that the ribbon on the typewriter was changed after the Court ordered the typewriter to be produced.[8]

---

[7] For example, on September 24, 1998, Overall's daughter Amanda went to the Roane County Sheriff's Department to have a composite drawing done of a suspicious person who allegedly drove by Overall's house in a white pickup on September 9. The composite drawing subsequently was done by the Lenoir City Police Department. In addition, a note and screws which Overall allegedly found at his residence on September 17, 1998, an incident not included in his "Chronology of Harassment," but which he now contends to be an act of harassment, were given to the Roane County Sheriff's office. Neither the Roane County Sheriff nor the Lenoir City Police Department have any jurisdiction in investigating the alleged harassment of Overall, which occurred in the City of Cleveland within Bradley County. TVA and the OIG were unaware of the composite drawing, the September 17 note, or the screws found with the note, until Overall complained in the press in December 1998 that the OIG had not done anything with respect to those matters.

[8] A one-time use ribbon such as that used by Overall's typewriter would contain a textual record of documents typed using that ribbon.

B. STATEMENT OF THE ISSUES TO BE DECIDED

It is TVA's position that Overall can neither meet his burden to establish a prima facie case nor can he carry his burden of proof to establish the existence of a hostile work environment according to the standards used by the ARB in *Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2, 92-CAA-5, 93-CAA-1, 94-CAA-2, 94-CAA-3, and 95-ERA-1, slip op. at 9 (ARB June 14, 1996), *aff'd*, 141 F.3d 625 (6th Cir. 1998), and *Smith v. Esicorp, Inc.*, No. 93-ERA-16 (Sec'y Mar. 13, 1996). Further, it is TVA's position that TVAN management took prompt and decisive action in response to Overall's reports of harassment and that such response is a complete defense to the complaint here. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). In addition, TVA's OIG conducted a reasonable investigation to determine who is responsible for the alleged harassment. Moreover, any claims of harassing acts in Overall's complaint that occurred outside of the 180-day filing period of the ERA are time-barred (42 U.S.C. § 5851(b)(1) (1994)). As Overall filed his complaint by facsimile transmission on February 19, 1999, it only extends to alleged acts occurring on or after August 23, 1998.[9]

In order to establish a prima facie case based on a theory of hostile work environment, a complainant must show:

1) the employee engaged in protected activity and suffered intentional retaliation as a result,

2) the retaliation was pervasive and regular,

3) the retaliation detrimentally affected the employee,

---

[9] ERA complaints are deemed filed as of the date of mailing. *Webb v. Carolina Power & Light Co.*, No. 93-ERA-42, slip op. at 6 n.3 (ARB Aug. 26, 1997) (citing 29 C.F.R. § 24.3(b)).

4) the retaliation would have detrimentally affected other reasonable whistleblowers in that position, and

5) the existence of *respondeat superior* liability.

Smith v. Esicorp, Inc., slip op. at 11-12 n.18; *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 753 (3d Cir. 1995); *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988).

As the evidence will show, Overall cannot establish the first and fifth essential elements of his prima facie case. As to the comments by his coworkers, Overall cannot meet the "intentional retaliation" requirement of the first element, since the comments were not retaliatory. As to the allegedly harassing notes, telephone calls, and "suspicious" vehicles, Overall cannot establish that they were as a result of his protected activity since he cannot even show who was responsible for those actions. Nor can he establish the fifth element, *respondeat superior* liability, since there is no evidence tying any of the alleged incidents directly to his superiors, to any TVAN manager, or to any TVA employee. Any decision in this case must be based on evidence, not speculation, as to the party responsible for the alleged harassment. Given the off-site nature of much of the alleged harassment and the serious issue as to whether Overall may himself be responsible,[10] there can be no assumption that TVA is responsible. As the Court knows, in order to prevail, Overall must prove each element of his claim by a preponderance of the evidence. Accordingly, TVA cannot be held responsible for the acts of employees unless Overall proves by a preponderance of the evidence that TVA managers undertook or approved the harassing acts (*Faragher v. City of Boca Raton*, 524 U.S. 775; *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)), or failed to take reasonable action to stop the harassment once informed. *See*

---

10 The issue of who is responsible for the alleged harassing acts is not only a question of whether Overall can establish the essential elements of his claim of a hostile work environment, but also raises a question as to Overall's credibility which must be resolved.

Dobreuenaski v. Associated Univs., Inc., No. 96-ERA-44, slip op. at 12-13 (ARB June 18, 1998) (respondent not responsible for coemployee harassment absent proof that respondent orchestrated and/or originated the peer response); *Boudrie v. Commonwealth Edison Co.*, No. 95-ERA-15, slip op. at 6 n.5, 9-10 (ARB Apr. 22, 1997). *See also Gunnell v. Utah Valley State College*, 152 F.3d 1253 (10th Cir. 1998) (In a Title VII retaliation case, employer can be liable for coworkers' retaliation only if its supervisory personnel orchestrated or knew about and acquiesced in the harassment.).

In addition, both TVA and OIG have responded more-than-adequately to Overall's reports of harassment. The evidence will show that TVAN and OIG have taken Overall's allegations of harassment seriously and have taken immediate, appropriate steps within their power to assure a nonhostile work environment. The Secretary of Labor has held that an employer's response is adequate if it is reasonable. *Marien v. Connecticut Yankee Atomic Power Co.*, 93-ERA-49 (Sept. 18, 1995). In cases of coworker harassment, "the employer can be liable only if its response manifests indifference or unreasonableness" (*Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 873 (6th Cir. 1997)). Moreover, Overall cannot premise his claims of a hostile work environment on matters that he did not report or which he told his management that he did not wish to pursue. *Boudrie*, No. 95-ERA-15, at 6 n.5.

Based on the evidence which will be presented at the hearing, the complaint should be dismissed.

C. RESPONDENT'S WITNESS LIST.

The name and the address, if not previously disclosed, of each witness whom TVA expects to call are identified on the attached list.

D. RESPONDENT'S EXHIBIT LIST.

The documents that TVA expects to introduce into evidence are identified on the attached list. Copies of any documents not previously marked are being provided to complainant's counsel.

E. STIPULATION OF FACTS AND DOCUMENTS.

Counsel for TVA will work with Overall's counsel in an effort to stipulate to facts and documents that are not in dispute.

F. PRELIMINARY MOTIONS AND STATEMENT OF OBJECTIONS.

TVA objects to and accordingly moves to exclude from evidence, or limit consideration of evidence to certain prescribed purposes, the following matters:

1. TVA objects to the admission of the April 1, 1998, RDO in No. 97-ERA-53 to establish any of the adjudicative facts in this case on the ground that it is a recommended decision, of no precedential value, and the ALJ's view of those facts is hearsay. TVA does not object to the decision for the purpose of establishing the procedural posture of this case or for the purpose of establishing Overall's engagement in protected activity.

2. TVA objects to the introduction of PER 246 or its disposition to establish the correctness of the technical issue. Such matters are within the sole jurisdiction of the NRC. TVA does not object to the admission of PER 246 for purpose of establishing Overall's engagement in protected activity. TVA further objects to evidence regarding PER 246 after Overall ceased having involvement with it on the ground that it is irrelevant and prejudicial.

3. TVA objects to testimony by David Grimes on the ground that his testimony is not sufficiently reliable as to be admissible under 29 C.F.R.

§§ 18.702, 18.703 (2000). *See Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993).

4. TVA objects to any purported expert testimony by David Lochbaum on the ground that his conclusions are not the proper subject of expert testimony.

5. TVA objects to any evidence about allegations made by TVA's Inspector General and the Chairman of the Board of Directors against each other on the ground that such matters are wholly unrelated to the OIG's investigation of Overall's claim of harassment.

TVA reserves the right to object to documents and witnesses listed in complainant's prehearing submission.

Respectfully submitted,

Maureen H. Dunn
General Counsel

Thomas F. Fine
Assistant General Counsel

Brent R. Marquand
Senior Litigation Attorney

Dillis D. Freeman, Jr.
Attorney

Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone No. 865-632-2061

Attorneys for Respondent

003684017

CERTIFICATE OF SERVICE

I hereby certify that respondent's prehearing submission was served on complainant by mailing a copy thereof to his counsel of record:

Lynne Bernabei, Esq.
Bernabei & Katz, PLLC
1773 T Street, NW
Washington, D.C. 20009-7139

This 9th day of March, 2001.

Brant D Maxwell
Attorney for Respondent

ENCLOSURE 3

OFFICE OF ADMINISTRATIVE LAW JUDGES
CASE NO. 1999-ERA-25
Respondent Tennessee Valley Authority's
Brief in Support of Motion for Summary Decision

BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

IN THE MATTER OF	)	
	)	
CURTIS C. OVERALL	)	
	)	
Complainant	)	
	)	
v.	)	Case No. 1999-ERA-25
	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	
	)	
Respondent	)	

RESPONDENT TENNESSEE VALLEY AUTHORITY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DECISION

Complainant Curtis C. Overall (Overall), an employee of respondent Tennessee Valley Authority (TVA), filed a February 19, 1999, complaint, alleging that respondent TVA violated Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1994) (ERA), by subjecting him to a "hostile work environment" (Feb. 19, 1999, compl. at 2). In this proceeding, Overall's second ERA case, he claims that TVA is liable to him because, he alleges, TVA violated the ERA "by (1) its fail[ing] to prevent the hostile work environment and the related harassment occurring outside the workplace, and (2) its fail[ing] to conduct an adequate investigation of these incidents of harassment" (compl. at 2). He claims that he has been the subject of retaliatory harassment both at work and away from work. This matter is now before the Court on TVA's motion for summary decision.

It is TVA's position that it is entitled to a summary decision as a matter of law because Overall cannot establish a prima facie case of a hostile working environment, i.e, he cannot prove that any TVA employee harassed him. Furthermore, even if Overall could establish a prima facie case, TVA would have no liability for discrimination since its responses to the alleged harassment were adequate. Accordingly, the Court should enter a summary decision in TVA's favor and an order dismissing the complaint.

The facts supporting respondent's motion for summary decision are contained in the pleadings, Overall's responses to respondent's discovery requests, the declarations of G. Donald Hickman and Richard T. Purcell, and the depositions of James G. Adair, Ann Pickle Harris, G. Donald Hickman, Randy W. Higginbotham, Nancy J. Holloway, C. Ron Hudson, Peter Langdon, Curtis C. Overall, Amanda Overall, Janice Overall, Joseph (Joey) Overall, George T. Prosser, Richard T. Purcell, Phillip S. Smith, Richter E. Wiggall, and Douglas F. Williams.[1] These facts are undisputed and may be summarized as follows.

STATEMENT OF FACTS

Overall left his position in TVA Nuclear (TVAN) at TVA's Watts Bar Nuclear Plant (Watts Bar) in 1995. Before he left Watts Bar, he reported problems with the ice condenser system at the plant. His TVA employment ended in 1996.

---

1 The Hickman and Purcell declarations were filed during TVA's appeal to the Administrative Review Board (ARB) and are produced here in their entirety, although only certain of the exhibits attached thereto are relied upon in support of this motion. Janice Overall and Nancy J. Holloway were each deposed on two separate occasions. The second depositions occurred on November 28, 2000, for Holloway, and February 13, 2001, for Overall. Citations to the excerpts from the second deposition of each witness will be distinguished by reference to the date of the deposition.

After his termination from TVA, he filed an ERA complaint alleging that his termination was due to his reporting of nuclear safety problems. That complaint resulted in an April 1, 1998, recommended decision requiring TVA to return Overall to work (*Overall v. TVA*, 97-ERA-53). That decision is presently on appeal to the Administrative Review Board, Case Nos. 98-111 and 98-128. The ERA requires employers to pay backpay and to reinstate employees who receive a favorable ruling, even though there has not been a final decision by the Secretary of Labor (42 U.S.C. § 5851(b)(2)(A) (1994). Accordingly, TVA scheduled Overall to return to work on June 1, 1998 (Higginbotham dep. ex. 5).

Prior to returning to work, Overall decided to participate in a nationally televised conference in Washington, D.C., in opposition to the proposal for TVA to complete the Bellefonte Nuclear Plant, located in Alabama, in order to generate tritium for the Department of Energy (C. Overall dep. at 159-162; dep. ex. 15). This conference and Overall's participation therein were announced in newspaper articles published on or about May 23, 1998, prior to the conference (C. Overall dep. ex. 15). The alleged harassment which is the subject of this complaint began shortly after the announcement in the media of Overall's participation in the press conference and before Overall was scheduled to return to work.

I. The Alleged Harassment

A. The alleged anonymous harassment

1. On May 28, 1998, Amanda Overall, Overall's daughter, answered the telephone at Overall's home and heard a whistle sound on the line (Janice Overall dep. at 22-23). Overall was not at home when the call was received (Janice Overall dep. at 22). Overall, through counsel, reported this call to TVA (C. Overall dep. at 163). Shortly after being notified, TVAN requested TVA's Office of Inspector

General (OIG) to investigate Overall's allegations of harassment (Hickman decl. ¶ 6, ex. 1). Although Overall lives more than 35 miles from Watts Bar (C. Overall dep. at 228), the OIG determined that this alleged harassing telephone call was made from a pay telephone in Cleveland, Tennessee, in the vicinity of Overall's home (Holloway dep. at 80). Overall has not come forward with any evidence concerning the identity of the person who made this telephone call (C. Overall dep. at 164-65). Nor has he come forward with any evidence linking the call to any protected activity or to any TVA manager or employee.

2. On May 28, 1998, a gray car "drove slowly past" Overall's home (Janice Overall dep. at 23-24). Overall alleges that the gray car was somehow linked to TVA and his protected activity. The sole basis for that claim is the fact that it was a car that the Overalls had not observed in their neighborhood previously, the driver looked at Overall's house and Janice Overall, Overall's wife, and the fact that there had been similar incidents in the past (C. Overall dep. at 178). Overall did not report this incident until he was interviewed by OIG agent Nancy Holloway in June 1998 (C. Overall at 179). Overall has not produced any evidence as to the identity of the person or persons operating that vehicle, nor has he linked the car to any protected activity or to any TVA manager or employee (C. Overall dep. at 178).

3. On May 29, 1998, Overall saw a car which had been parked on the street drive past his home (C. Overall dep. at 181-82). Overall's son subsequently found a hand printed note with the word "SILKWOOD" placed on his truck, which had been parked in the open in front of Overall's residence (Joseph Overall dep. at 13-14). Overall has not come forward with any evidence as to the identity of the person who wrote and/or delivered this note (C. Overall dep. at 364-66). While there may be some logical inference that the note refers to his having engaged in protected activity, Overall

has not come forward with any evidence linking the note to any TVA manager or employee.[2]

4. On or about June 1, 1998, Overall's son noticed that the gas cap and door to Overall's truck had been opened (Joseph Overall dep. at 15-16; C. Overall dep. at 190). Overall has not come forward with any evidence as to the identity of the person who allegedly tampered with his vehicle (C. Overall dep. at 191). Nor has he come forward with any evidence linking the incident to any protected activity or to any TVA manager or employee.

5. On or about June 9, 1998, Overall's wife allegedly found a hand printed note with the word "BOO!" attached to the storm door of his home (Janice Overall dep. at 34). Overall has not come forward with any evidence as to the identity of the person who wrote and/or delivered this note (C. Overall dep. at 364-66). As with the earlier note, there may be some logical inference that the note refers to his having engaged in protected activity, but Overall has not come forward with any evidence linking the note to any TVA manager or employee.[3]

6. On June 11, 1998, Overall claims to have found a hand printed note with the words "STOP IT NOW" on it placed on his vehicle while at a local store (C. Overall dep. at 198). Overall has not come forward with any evidence as to the identity of the person who wrote and/or delivered this note (C. Overall dep. at 364-66). As with the other notes, there may be some logical inference that the note refers to his

---

2 As complainant's counsel points out, "SILKWOOD" may be a reference to Karen Silkwood, an individual popularized in the media as a nuclear whistleblower (Hickman dep. at 81; Smith dep. at 104).

3 The inference that the notes may refer to Overall's protected activity is conjectural. The notes are ambiguous and do not refer to any protected activity. However, they may have been written by the same person who wrote the "SILKWOOD" note.

having engaged in protected activity, but Overall has not come forward with any evidence linking the note to any TVA manager or employee.

7. On the evening of June 13, 1998, Overall allegedly saw someone running across a neighbor's yard (C. Overall dep. at 202-03). The fuel door on Overall's vehicle was found open later that night (Joseph Overall dep. at 15-16). Overall has not come forward with any evidence as to the identity of the person or persons running across the yard or who tampered with the vehicle (C. Overall dep. at 202-03). Nor has he come forward with any evidence linking the incident to any protected activity or to any TVA manager or employee.

8. On June 16, 1998, Overall's daughter received a telephone call in which the caller was laughing and breathing on the line (A. Overall dep. at 17-19). Overall was not at home at the time of the call. Overall has not come forward with any evidence as to the identity of the person who made this telephone call nor has he come forward with any evidence linking the call to any protected activity or to any TVA manager or employee. The OIG tracked this alleged harassing telephone call to a pay telephone in Cleveland, Tennessee, in the vicinity of Overall's residence (Holloway dep. at 97).

9. On or about June 17, 1998, Overall and his daughter were driving in Overall's neighborhood when they allegedly saw a "suspicious car" (A. Overall dep. at 20-21; C. Overall dep. ex. 9). Overall considered the act to be an act of harassment because the driver of the vehicle acted in a suspicious manner, namely waving for Overall to turn ahead of the driver and "snicker[ing]" (C. Overall dep. at 254).[4] Amanda Overall noted the license plate of the vehicle. TVA's OIG subsequently located the driver and determined that he was employed by the Tennessee

---

4 Amanda Overall testified that she perceived the vehicle as being suspicious only because of the other events that had been occurring and that, absent those events, she probably would not have thought anything of it (A. Overall dep. at 21).

Highway Patrol and owned some rental property in the area. Overall has not come forward with any evidence linking the "suspicious car" to any protected activity or to any TVA manager or employee (C. Overall dep. at 257).

10. On June 26, 1998, Overall's daughter received another anonymous telephone call at home (A. Overall dep. at 22-25). Once again Overall was not at home at the time of the call (C. Overall dep. at 304). The OIG tracked this alleged harassing telephone call to a pay telephone in Cleveland, Tennessee, in the vicinity of Overall's residence (Holloway dep. at 97). Overall has not come forward with any evidence as to the identity of the person who made this telephone call (C. Overall dep. at 307). Nor has he come forward with any evidence linking the call to any protected activity or to any TVA manager or employee.

11. Shortly after Overall returned to work at Watts Bar, he alleges that he was followed on the highway by a "Ninja" motorcycle while returning home one day (C. Overall dep. at 91). He alleges that the rider tailgated him, and gave him an obscene hand gesture as the motorcycle passed him (*id.*). Overall claims that this was another act of harassment by TVA (C. Overall dep. at 92). Overall has not come forward with any evidence as to the identity of the person operating the "Ninja" motorcycle (C. Overall dep. at 91-93). Nor has he come forward with any evidence linking the motorcycle to any protected activity or to any TVA manager or employee.

12. Overall claims that on August 25, 1998, while driving from Watts Bar to his home, a vehicle followed behind him and flashed its lights, but did not pass him when he slowed down (C. Overall dep. at 318-19). Overall has not come forward with any evidence as to the identity of the person or persons operating the vehicle (C. Overall dep. at 319-20). Nor has he come forward with any evidence linking the vehicle to any protected activity or to any TVA manager or employee.

13. On August 27, 1998, while at work at Watts Bar, Overall claims that he opened a TVA interoffice mail envelope which had been delivered to his cubicle

and found a machine printed note which read "LEAVE WATTS BAR THERE IS NO ROOM FOR WHISTLEBLOWERS HERE OR ELSE" (C. Overall dep. at 321, 323). This incident was reported to Watts Bar management, site security, and the OIG (C. Overall dep. at 328-29). Overall was then escorted home by site security and a TVA employee (C. Overall dep. at 329). Overall has not come forward with any evidence as to the identify of the person or persons responsible for generating and/or causing the note to be delivered (C. Overall dep. at 324). While the note refers to protected activity, Overall has not come forward with any evidence linking the note to any TVA manager or employee.

14. On Sunday, August 30, 1998, Overall allegedly called Watts Bar to check his TVA voice mail (C. Overall dep. at 336-37). On his voice mail was a message (left on August 29) which consisted of a shrill sound (C. Overall dep. at 338). Overall reported this message to the OIG, which investigated the incident (C. Overall dep. at 279). Because TVA's telephone system uses a central telephone trunkline through which all telephone calls to TVA lines are routed, it was impossible to trace the call to Overall's work telephone (Holloway dep. at 101-03; Hudson dep. at 96-97). Overall has not come forward with any evidence as to the identity of the person who made this telephone call (C. Overall dep. at 339). Nor has he come forward with any evidence linking the call to any protected activity or to any TVA manager or employee.

15. On September 6, 1998, Overall's wife found a hand printed note on her car, parked in the front yard at the Overall's residence, which read "DID YOU GET THE MESSAGE YET" (Janice Overall dep. at 49-50; C. Overall dep. at 340-41). Overall has not come forward with any evidence as to the identity of the person who wrote and/or delivered this note (C. Overall dep. at 342-43). As with the other notes, there may be some logical inference that the note refers to his having engaged in protected activity, but Overall has not come forward with any evidence linking the note to any TVA manager or employee.

16. The OIG agent with responsibility for the investigation made an appointment to meet Overall at his home at noon on September 9, 1998, to obtain a copy of the September 6, 1998, note (C. Overall dep. at 353). When she arrived at Overall's home, Mrs. Overall told the agent that Overall was not at home, but was calling from a local store and sounded in distress (Janice Overall dep. at 56). The OIG agent went to the store where Overall informed her that he had parked his pickup truck in the store parking lot and had gone inside (C. Overall dep. at 352-57; dep. ex. 11). Upon returning to the vehicle, he claimed that he found what he believed to be an explosive device in the bed of his vehicle (C. Overall dep. at 353-57; dep. ex. 11). It is undisputed that law enforcement authorities from the Cleveland Police Department and the Chattanooga Police Bomb Squad came to the scene to investigate the device which was determined to be a hoax (Hudson dep. at 68; dep. ex. 4).[5] Because Overall appeared to be distressed as a result of the incident, TVA placed him on "paid rest" and did not require him to return to work at Watts Bar (Higginbotham dep. at 84; C. Overall dep. at 406). The fake device was sent to the Bureau of Alcohol, Tobacco, and Firearms laboratory which was unable to identify the person(s) responsible for making or placing the device (Hudson dep. at 68; dep. ex. 4). Overall has no information or evidence as to the identity of the person or persons who manufactured the device or placed it in his vehicle. Nor has he come forward with any evidence linking the device to any protected activity or to any TVA manager or employee.

17. On September 9, 1998 (the same day Overall discovered the fake explosive device), Overall's wife and daughter observed a white truck driving along the street in front of their home in a suspicious manner (C. Overall dep. ex. 9; A. Overall dep. at 37-38; Janice Overall dep. at 57-59). Overall's daughter and son subsequently

---

5 Two bombs (not involving Overall) had been detonated in the Cleveland, Tennessee, area in the prior weeks (C. Overall dep. at 358-61; dep. ex. 11).

drove by the truck which was parked near a home in the neighborhood (A. Overall dep. at 38-40). They copied the license plate number which was provided to the local police and the OIG (A. Overall dep. at 40; Hudson dep. at 244-45).

Subsequent investigation by the OIG determined that the vehicle belonged to Peter Langdon, who was not a TVA employee (Hudson dep. at 244-45). Langdon testified that he has never been employed by TVA nor worked for TVA in any capacity (Langdon dep. at 46-48). He is currently employed by a security alarm company (Langdon dep. at 9). His only business contacts with TVA were in the early 1990s when his former employer, another security company, installed access control systems at Watts Bar (Langdon dep. at 17-18, 23-24). There is, thus, no evidence that Langdon is either an agent or employee of TVA. Langdon testified that he was in the vicinity of Overall's home on or about September 9, 1998, in the course and scope of his employment, looking for the home of a customer who lived nearby (Langdon dep. at 32-33). Overall has not come forward with any evidence that either the "suspicious vehicle" or Langdon were involved in harassing him (C. Overall dep. at 178). Nor has he come forward with any evidence linking the incident to any protected activity or to any TVA manager or employee.

Overall did not report all of the information he had about the incident with TVA or the OIG. Although the Cleveland Police Department had jurisdiction of any criminal activity with respect to the fake explosive device, Amanda Overall went to the Roane County Sheriff's Department and then to the Lenoir City Police Department in September 1998 to have a computer sketch made of the driver (A. Overall dep. at 42-43). The OIG only learned of the existence of that sketch in December 1998 through a report in the media.

18. On September 17, 1998, Overall found a hand printed note on the fence behind his home with the words "CURTIS WATCH YOUR BACKSIDE YOU ARE BEING SET-UP! BE CAREFULL Here ARE MORE SCREW Found Last

Outage Your Friend" (C. Overall dep. at 367).[6] Several broken screws were enclosed with the note which was placed on the fence behind his home (C. Overall dep. at 367). As with the other notes, there is a logical inference that the note refers to his having engaged in protected activity, but Overall has not come forward with any evidence linking the note to any TVA manager or employee. As with the composite sketch (see ¶ 17 above), Overall did not report this note to the OIG which did not learn of it until a December 1998 report in the media (Hudson dep. at 189-91).

19. On December 21, 2000, Overall's wife opened an envelope which had been delivered in the mail containing a photograph of Overall's old TVA work badge and the words "you need to go" (Janice Overall Feb. 13, 2001, dep. at 8-9; ex. 38). Overall has no information or evidence as to the identity of the person or persons who generated the letter or mailed it to Overall's home (C. Overall dep. at 35-36). There is no evidence that the note refers to his having engaged in protected activity and Overall has not come forward with any evidence linking the note to any TVA manager or employee.

20. In addition to the claimed incidents of alleged harassment (¶¶ 1-19 above), there was one additional anonymous incident which Overall concedes he did not perceive as harassment because he claims that he was not aware of it. On September 4, 1998, a TVA employee discovered an anonymous message on the inside of a bathroom stall in the building at Watts Bar in which Overall worked (Higginbotham dep. at 112-15). The message was handwritten and read "GO Home All WHISTLEBLOWers NOW" (Wiggall dep. at 152; Holloway Nov. 28, 2000, dep.

---

6 This note was not identified as a harassing event in the February 9, 1999, complaint (compl., *passim*). The note was referenced in the Chronology of Harassing Events attached to the complaint but was specifically not included as a harassing event (C. Overall dep. ex. 9). Overall now alleges that this was, in fact, a harassing event (C. Overall dep. at 100).

at 57-58, 72-74; dep. ex. 24). When the message was reported, the stall was closed with a sign indicating it was "out of order" (C. Overall dep. at 422; ex. 29) and management contacted the OIG (Holloway Nov. 28, 2000, dep. at 57-58). The message was photographed and then painted over (Higginbotham dep. at 116-17, 119-20). Overall has testified that he never saw the message and that he was not aware of the message until he was questioned about it during his deposition on August 8, 2000 (C. Overall dep. at 420). As with the earlier notes, there may be some logical inference that the message refers to Overall and his having engaged in protected activity, but Overall has not come forward with any evidence linking the note to any TVA manager or employee. Overall has no information or evidence as to the identity of the person(s) who wrote this message (C. Overall dep. at 420).

Concerning all of the claimed acts of anonymous harassment, Overall has no evidence linking the acts or actors to TVA (C. Overall dep. at 36, 164-65, 178, 191, 203-05, 324, 339, 342-43, 364-65, 420). He assumes that TVA is responsible for instigating every incident that is "adversarial" to him or his family because "there's no other valid reason" for the actions (C. Overall dep. at 164). He speculates that various TVA employees have taken part in the anonymous harassment, including TVA employees Douglas F. Williams, Philip Smith, Gary Jordan, Paul Law, Richter Wiggall, James G. Adair, Terry Woods, Paul Pace, Dennis Collins, Kenneth Rittenhour, and the entire metallurgical staff at Watts Bar (C. Overall dep. at 220-30; 346). However, he has come forward with no evidence that any of these individuals or any other TVA employees were actually involved in any of the alleged harassment.

B. Instances of alleged harassment by identified coemployees

In addition to the alleged acts of anonymous harassment, Overall also claims to have suffered thirteen incidents involving direct harassment by specific

individuals or groups after returning to work. These incidents of specific harassment are set forth below.

1. On May 21, 1998, officials with the NRC called Overall at his home (C. Overall dep. at 375). They discussed his alleged nuclear concern, similar ice condenser problems at other nuclear facilities, and Overall's previous allegations of discrimination (C. Overall dep. at 375). Overall was asleep the afternoon that the NRC officials called and considers their call, which awakened him, to be a harassing act (C. Overall dep. at 376). Overall has admitted that the persons who called him were employees of the NRC (*id.*).

2. Overall alleges that TVA's reaffirmation of its antiharassment policy, and the memorandums and discussions involved therein, were themselves acts of harassment (C. Overall dep. at 121-23). The sole basis for this claim offered by Overall is his belief that discussing harassment and TVA's opposition to it, including using the phrase "chilling effect," was a subtle attempt to remind employees of the consequences of raising safety concerns (C. Overall dep. at 123-24).

3. Overall alleges that the failure of Watts Bar upper management to personally welcome him back upon his return to work constitutes an act of harassment (C. Overall dep. at 120). Overall claims that management's failure to personally welcome him back was "not conducive to a good working environment" (*id.*). There is no allegation that Overall suffered any adverse employment action from the lack of a personal greeting by the Watts Bar Site Vice President.

4. When Overall returned to duty at Watts Bar on or about August 5, 1998 (C. Overall dep. at 346), he was assigned to the Nuclear Steam Supply System section (NSSS) of the Systems Engineering organization, working under Gary Jordan, the systems engineer with responsibility for the ice condenser system (C. Overall dep. at 115, 412; Smith dep. at 31-32). Overall alleges that not being returned to his original position constitutes an act of harassment (C. Overall dep.

at 107). The ALJ's May 12, 1998, preliminary order granting relief ordered TVA to reinstate Overall to his former position "or, if no longer available, to a substantially equivalent position" (at 2). By the time that Overall returned to work there had been a reorganization, and his original position had been eliminated (Higginbotham dep. at 29-32). Accordingly, TVA management at Watts Bar, in consultation with TVAN's Human Resources (HR) organization, reviewed Overall's original position job description and assigned him a position that most closely matched the job description (Higginbotham dep. at 29-32; Purcell dep. at 68-70; Wiggall dep. at 37).

Overall also alleges that he was not provided with work or involved in matters related to the ice condenser to his satisfaction (C. Overall dep. at 107). However, he was introduced into an established working group (Higginbotham dep. at 143). He was in this work group for barely more than one month (August 1998 to September 1998) (C. Overall dep. at 346; Higginbotham dep. at 84). When Overall questioned his work assignments, he was reminded that he was coming into an established group and that, with time, he would become more involved (Higginbotham dep. at 143). Overall was already having difficulty completing those assignments provided to him (Smith dep. at 74-75). Additionally, the facts show that Overall was provided with at least one opportunity to become more involved when he was invited to attend an industry meeting in Chattanooga, Tennessee, with representatives of other utilities operating ice condenser systems (Smith dep. at 50). Overall declined this opportunity (*id.*).

5. Shortly after Overall returned to work at Watts Bar, he went to the boilermaker shop at the facility. Upon seeing Overall enter the shop, TVA boilermaker Dennis E. Tumlin called out "hey, there's that whistle-blower" (C. Overall dep. at 129). Immediately after making this statement, Tumlin told Overall to come in and that Overall "was among friends" (C. Overall dep. at 130, 134). Overall informed his supervisor, NSSS manager Philip S. Smith, about the incident, who expressed great

concern over the statement and indicated that he would speak with Tumlin (C. Overall dep. at 130-31). However, Overall asked Smith not to do so because Tumlin was "just kidding" and Overall did not want to "get anyone into trouble" (C. Overall dep. at 136, 138). Overall has repeatedly stated that he believed that Tumlin was "just kidding" when he made the remark (C. Overall dep. at 130, 134, 136; Higginbotham dep. at 134-36).

6. Subsequent to the conversation with Smith, Richter E. Wiggall, who was then the System Engineering Manager and Smith's superior, also discussed the incident with Overall (C. Overall dep. at 134-35; Smith dep. at 32). Wiggall echoed Smith's comments about the impropriety of Tumlin's statement (C. Overall dep. at 134, 402). Wiggall then stated that they were there not "to make up problems but to find problems" and fix them "as engineers" (*id.*). Overall alleges that Wiggall's statement was a veiled reference to Overall's protected activities and was an act of harassment (*id.*).

7. On August 27, 1998, shortly after Overall received the purported harassing note through the interoffice mail (discussed above at 7-8), TVA employee Douglas F. Williams asked Overall why Williams' name appeared in the April 1, 1998 decision (C. Overall dep. at 109-10). Williams had not testified nor been named as a part of the alleged conspiracy to terminate Overall, yet his name appeared more than once in the decision (Williams dep. at 17). Overall claims that Williams' question to him on the same day that Overall received the note was an act of harassment (C. Overall dep. at 110).

Williams, however, testified that he was not aware that Overall had received the note (Williams dep. at 29-31). He further testified that upon seeing Overall alone, he considered it an opportune time to discuss the decision with Overall (*id.*).

8. In August 1998, Overall alleges that he was requested by his supervisor, Gary Jordan, to contact James Adair about a Performance Evaluation Report (PER) (PER-823) related to additional ice basket screws found during an outage (C. Overall dep. at 412; Adair dep. ex. 4). Overall alleges that Adair asked why Overall wanted the information, and did not provide it to him (C. Overall dep. at 412-13). Overall alleges that Adair told him to contact the person with responsibility for the PER if he wanted information on it (*id.*). Overall alleges that this constituted an act of harassment (C. Overall dep. at 413).

Adair has testified, however, that he was not aware that the PER was relevant to Overall's work assignments (Adair dep. at 83). Because Adair did not know why Overall needed the PER, Adair asked him in order to be sure that he was providing Overall with the information he needed (Adair dep. at 83-84). If Overall wanted information on the status, then Adair would have directed him to the person with responsibility for the PER because Adair was not aware of its status (Adair dep. at 84). If Overall wanted a copy of the PER, then he was free to obtain a copy himself from the computer system (Adair dep. at 81).

9. On or about September 2, 1998, NRC personnel were inspecting the ice condenser system at Watts Bar, and asked to speak with Overall privately (C. Overall dep. at 108). Overall alleges that following that meeting, the NRC team and Overall met with Smith to discuss the inspection (C. Overall at 108, 403). Wiggall came in later and the team repeated their comments (*id.*). Wiggall then stated that he understood Overall had spoken privately with the NRC team and asked Overall if he could "share that information with us" (*id*). Overall indicated that he could relate portions of his conversation with the NRC, but refused to discuss the full conversation, claiming that it was a private matter between Overall and NRC (C. Overall dep. at 108). Overall alleges that he felt "belittled," "threatened," and "compelled to comply," and that Wiggall's request had a "chilling effect" (C. Overall dep. at 108-09).

However, it is undisputed that Wiggall did not compel Overall to relate everything that transpired with the NRC inspectors, and there is no evidence that there were any consequences to his refusal, nor that anything further occurred.

10. On September 8, 1998, NRC inspector Kim Van Doorn called Overall after learning about the alleged harassing events (C. Overall dep. at 376-78). Van Doorn asked Overall how he was doing and they discussed the harassment (C. Overall dep. at 377-78). Overall alleges that Van Doorn's calling him for the first time to discuss the harassment was itself a harassing event (C. Overall dep. at 378). However, Overall admits that he knows Van Doorn and has spoken with him in person before the telephone call (C. Overall dep. at 378). Overall also admits that Van Doorn is an employee of the NRC (C. Overall dep. at 377-78), not TVA.

11. Overall alleges that the OIG investigation of the harassment was itself an act of harassment against him because the OIG was apparently focusing on him as a possible suspect (C. Overall dep. at 224). The OIG's activities are discussed in greater detail below (at 18-19).

12. Overall alleges that his transfer from Watts Bar to TVA's Fossil Power Group (Fossil) constitutes an act of harassment because Adair now works in Fossil. Overall alleges that he has "heard" Adair is asking about him, and that because he believes Adair has no reason to know about Overall's activities, this is an act of harassment (C. Overall dep. at 409). It is, of course, undisputed that Overall is working in a group which is managed by Adair (C. Overall dep. at 409; Adair dep. at 19-20).

II. TVA's Responses to the Alleged Harassment

A. Management's response

TVA was notified of the May 25, 1998, telephone call on May 28, 1998, by Overall's counsel when counsel requested an extension of Overall's return to duty date until June 29, 1998, because of the claimed harassment (Purcell decl. ¶ 3; dep. ex. 12). After this extension, Overall's counsel and TVA agreed to another delay in Overall's return to provide a "cooling off" period (C. Overall dep. at 313-14). On June 3, 1998, TVAN formally requested the OIG to initiate an investigation of the May 25 telephone call (Purcell decl. ¶ 4, ex. 1).

On June 10, 1998, John Scalice, Executive Vice President of TVAN, issued a memorandum to all senior TVAN managers "reinforcing TVAN's policy against intimidation and harassment" (Purcell decl. ¶ 5, ex. 2). Purcell then discussed these issues with his subordinates and directed that they pass the information and instructions on to the Watts Bar workforce (Purcell decl. ¶ 5).

On August 28, 1998, in response to further acts of harassment, Purcell again met with his subordinates to discuss the issue of harassment (Purcell decl. ¶ 6, ex. 3). Purcell restated TVA's policy of zero-tolerance for any such harassment, and the fact that such harassment was not only counterproductive to safety and performance at Watts Bar, but was strictly prohibited by Federal law (*id.*). He also notified the NRC of the actions being taken in response to the harassment of Overall (Purcell decl. ¶ 7, ex. 4).

Following the August incidents, Watts Bar management increased its efforts to deter harassment. These efforts included having stand down meetings, in which employees were brought in for training sessions concerning employees' rights to raise safety concerns and to be free of harassment (Higginbotham dep. at 138; Purcell

dep. at 139, 159). Over time, all employees at Watts Bar were cycled through these stand down meetings and received the training (Purcell dep. at 159, 179).

On September 10, 1998, Purcell issued a memorandum to all Watts Bar personnel reaffirming TVA's commitment to having employees raise safety issues without fear of retaliation or harassment (Purcell dep. ex. 20). On September 15, 1998, Purcell conducted "several site-wide meetings with employees to communicate [his] personal concerns about the incidents which Mr. Overall had reported to TVA" (Purcell decl. ¶ 8, exs. 6, 7).

B. The OIG investigation

In addition to TVA management's efforts to deter harassment, TVAN requested the OIG to conduct an independent investigation to identify the perpetrator of the harassment (Hickman decl. ¶ 6, ex. 1; Purcell decl. ¶ 4, ex. 1). As it learned of new incidents of harassment, the OIG would contact Overall and obtain any evidence in his possession (*e.g.* C. Overall dep. at 208-09, 213, 279-80, 298-300, 353). This continued until September 1998, after which time Overall's wife informed TVA that all contact with Overall should be through counsel (Holloway dep. at 130-31). The OIG also interviewed several of the persons identified by Overall as possibly being involved in the harassment (Holloway dep. at 125-126; dep. ex. 11). These interviews excluded these individuals as suspects (*id*). The OIG also publicly offered a reward of $10,000 for any information leading to the arrest and conviction of the person or persons who perpetrated the harassment against Overall (Hickman decl. ¶ 6).

For his part, Overall was not entirely cooperative or forthcoming with the OIG investigation. A standard investigative technique is to eliminate the victim of alleged harassing activities as a suspect (Hickman decl. ¶ 6). In accordance with this standard technique, the OIG requested that Overall provide handwriting samples for

comparison with the handwritten notes and submit to a polygraph examination (Hickman decl. ¶ 12, ex. 2). It is undisputed that Overall refused both requests. In addition, Overall failed to inform the OIG of some of the alleged incidents of harassment. For example, as mentioned above (at 10-11), on September 24, 1998, Overall's daughter went to the Roane County Sheriff's Department to have a composite drawing done of the suspicious person who allegedly drove by Overall's house in a white pickup on September 9 (Harris dep. at 100). She was sent to the Lenoir City Police Department where a composite drawing was done (Harris dep. at 89-90, 95-96). In addition, the September 17, 1998, note and screws left at Overall's home on September 17, 1998, were provided to the Roane County Sheriff's office (Harris dep. at 110-11; C. Overall dep. at 369). Overall resides in Cleveland, Tennessee, which is located in Bradley County (Harris dep. at 100-02), and, thus, neither the Roane County Sheriff nor the Lenoir City Police Department have any jurisdiction in investigating the alleged harassment at or around Overall's home. Overall did not inform TVA or the OIG of the composite drawing, the September 17 note, or the screws found with the note, until Overall complained in the press in December 1998 that the OIG had not done anything with respect to those matters (Harris dep. at 113-14; Holloway dep. at 73, 130-31; Hudson dep. at 191-92, 294).

Based on the foregoing, it is TVA's position that Overall cannot present evidence establishing a prima facie case of a hostile work environment. Further, TVA's responses have been adequate and that is a defense to such a claim.

ARGUMENT

I

The Legal Standard for Summary Decision

Since the Supreme Court's 1986 summary judgment trilogy, the special role of summary judgment in disposing of meritless discrimination suits has been strengthened. The trilogy, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), clarified the legal standards and ushered in a "new era" for summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

In the new era, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules [of Civil Procedure] as a whole" (*Celotex*, 477 U.S. at 327). A "moving party is 'entitled to [summary] judgment as a matter of law'" when "the nonmoving party has ***failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof***" (*id.* at 323 (emphasis added); *Street*, 886 F.2d at 1479-80). That a case may involve issues of good-faith belief, or "state of mind," or "motive" does not, any longer, provide any basis to defer summary judgment. *Celotex*, 477 U.S. at 323; *Anderson*, 477 U.S. at 245-46, 256-57; *Matsushita*, 475 U.S. at 595, 597. That a plaintiff might protest that he might ultimately cause a factfinder to "disbelieve the defendant[]" or render the defendant's testimony "discredited" is no basis for denial of summary judgment. *Anderson*, 477 U.S. at 256. Instead, the "plaintiff ***must present affirmative evidence***" to defeat a summary judgment motion, and "[t]his is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery." ***Id.*** at 257; emphasis added.

Such affirmative evidence "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Summary judgment should be granted where, on "the record taken as a whole . . . there is no 'genuine issue for trial'"; that is, where "the factual context renders . . . [a] claim implausible" and a plaintiff does not "come forward with more persuasive evidence" (*id.* at 587), dismissal is proper. If a plaintiff's "evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." *Anderson*, 477 U.S. at 249-50.

The United States Court of Appeals for the Sixth Circuit discussed *Matsushita*, *Celotex*, and *Liberty Lobby* in detail. In *Street v. J.C. Bradford & Co.*, the court drew the following principles from them:

> [The Supreme Court] ruled that not every issue of fact or conflicting inference presents a genuine issue of material fact which requires the denial of a summary judgment motion. . . . The Court went even further and held that the test for deciding a motion for summary judgment is the same as that for a directed verdict motion. There is no issue for trial, the Court stated, unless there is sufficient evidence favoring the non-moving party for a [trier of fact] to return a verdict for that party. Thus, the Court concluded, "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff" [886 F.2d at 1477; citations omitted].

The Sixth Circuit continued:

> In other words, the movant could challenge the opposing party to "put up or shut up" on a critical issue. After being afforded sufficient time for discovery, as required by FED.R.CIV.P. 56(f), if the respondent did not "put up," summary judgment was proper. . . .
>
> . . . .
>
> 2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.
>
> . . . .

8. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."

. . . .

10. The trial court has more discretion than in the "old era" in evaluating the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational trier of fact to find" for the respondent, the motion should be granted [*id.* at 1478-80; footnotes omitted].

In a case of alleged discrimination such as this, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated . . . remains *at all times* with the plaintiff." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981) (emphasis added); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). This principle becomes particularly pertinent in a summary judgment case like this one. The elements of a prima facie case of discrimination now have procedural as well as substantive significance. Indeed, the "allocation of burdens in Title VII . . . actions . . . enable[s] the district courts to identify meritless suits and dispense with them short of trial," and summary judgment is a procedural "vehicle for accomplishing this objective." *Foster v. Arcata Assocs., Inc.*, 772 F.2d 1453, 1459 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). *Accord Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985).

Courts now recognize that the principles of the *Celotex-Anderson-Matsushita* trilogy should be applied with full rigor to dismiss complaints of discrimination wherever a plaintiff does not meet the standard of proof required to avoid summary judgment. *See, e.g., Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080-81 (11th Cir. 1990) ("Summary judgments for defendants are not rare in employment discrimination cases."); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 312-16 (6th Cir. 1989); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114

(2d Cir. 1988); *Garner v. Runyon*, 769 F. Supp. 357, 359 (N.D. Ala. 1991); *Hodges v. Purolator Courier Corp.*, 670 F. Supp. 348, 353 (M.D. Ga. 1987).

II

Overall Cannot Establish a Prima Facie Case of a Hostile Work Environment.

The law is well settled that an employee may bring a claim of harassment based on a hostile work environment where the harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The Secretary of Labor has held that the hostile work environment theory set forth in *Meritor* and *Harris* applies to "whistleblower" cases alleging retaliation under the ERA. *Varnadore v. Oak Ridge Nat'l Lab*, No. 92-CAA-2, (Sec'y Jan. 26, 1996). In doing so, the Secretary held that to prove a retaliation claim based on a hostile work environment, the complainant must prove that:

> (1) the plaintiff suffered intentional discrimination because of his or her membership in the protected class;
>
> (2) the discrimination was pervasive and regular;
>
> (3) the discrimination detrimentally affected the plaintiff;
>
> (4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and,
>
> (5) the existence of respondeat superior liability [92-CAA-2, at 49 (citing *West v. Philadelphia Elec. Co.*, 45 F.3d 744 (3d Cir. 1995))].

Accord Mourfield v. Plaas, Inc., No. 1999-CAA-13, at 62 (ALJ Apr. 11, 2000) ("The elements of proof in a hostile work environment case are: the employee engaged in protected activity and suffered intentional retaliation as a result; the retaliation was

pervasive and regular; the retaliation detrimentally affected the employee; the retaliation would have detrimentally affected other reasonable whistleblowers in that position; and the existence of respondeat superior liability.").

Overall bears the burden of proving all elements of the hostile work environment claim. *Smith v. Esicorp, Inc.*, No. 93-ERA-16, at 3 (Sec'y Mar. 13, 1996) ("The ultimate burden of persuading that the employer intentionally retaliated against the employee because of protected activity rests with the employee."); *Berkman v. United States Coast Guard Acad.*, Nos. 1997-CAA-2 and 9, at 15 (ARB Feb. 29, 2000) ("To prevail on a whistleblower complaint under the environmental acts, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action because he engaged in protected activity."). Overall must also show that the offensive conduct was related to his protected activity and not based on any personal animus or hostility towards the complainant. *Bowman v. Shawnee State Univ.*, No. 99-3255, 2000 WL 987841 (6th Cir. July 17, 2000) (various acts of harassment could not be included in the test for whether conduct was "severe or pervasive" where plaintiff failed to show that the alleged harassment occurred because of his sex or because of a discriminatory intent on the part of the harasser); *Morris v. Oldham County Fiscal Ct.*, 201 F.3d 784 (6th Cir. 2000) (plaintiff failed to show that offensive conduct was related to sex as opposed to the offender's personal animus towards plaintiff); *Williams v. Mason & Hanger Corp.*, No. 97-ERA-14, at 18-22 (ALJ Nov. 20, 1997) (hostility towards complainants was peer hostility directed towards complainants personally and not as a result of protected activity). *See Curry v. Nestle USA, Inc.*, No. 99-3877, 2000 WL 1091490, at *4 (6th Cir. July 27, 2000) (applying Title VII standards to plaintiff's State law claim,

court held that plaintiff had failed to show that the harassment and hostility directed towards her "was based upon her sex, rather than personal animosity").[7]

The law is equally well settled that an employer may be held liable for a hostile work environment in two situations: (1) vicariously because of the actions of a supervisor directed against an employee, or (2) directly for the employer's failing to take prompt and reasonable corrective actions to remedy the harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."); *Blankenship v. Parke Care Ctr., Inc.*, 123 F.3d 868, 873 (6th Cir. 1997) ("[T]he employer's liability in cases of co-worker harassment is direct, not derivative; the employer is being held directly responsible for its own acts or omissions. . . . The act of discrimination by the employer in such a case is not the harassment, but rather the inappropriate response to the charges of harassment."). The Sixth Circuit, in *Jackson v. Quanex Corp.*, 191 F.3d 647 (1999), recently stated the rules for determining when an employer would be liable for a hostile work environment as follows:

> Where . . . no tangible employment action is taken, an employer may raise an affirmative defense to liability [for harassment from a supervisor] by proving, by a preponderance of the evidence, that (1) it exercised reasonable care to prevent and correct promptly any racially harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of corrective opportunities provided by the employer. As for the acts of co-workers, a plaintiff may hold an employer directly liable if she can show that the employer knew or should have known of the conduct, and that its response manifested indifference or unreasonableness. Significantly, a court must judge the appropriateness of a response by the frequency and severity of the alleged harassment. Generally, a response is adequate if it is reasonably calculated to end the harassment [191 F.3d at 663 (citations omitted)].

---

7 Copies of unreported cases are attached hereto.

Overall cannot meet his burden of establishing a prima facie case of hostile work environment based on the alleged acts of harassment. As to the anonymous acts, Overall has no evidence showing that the acts were committed by TVA employees or supervisors, and thus there are not any grounds for holding TVA liable. Further, as to many of them, there is not even an inference that they were related to his protected activities. As to the incidents involving specific individuals or groups, the evidence is clear that these matters do not constitute harassment.

A. **Overall has no evidence as to the identity of the perpetrator(s) of the anonymous harassment and thus cannot establish any TVA liability.** As stated above, in order to establish a prima facie case of hostile work environment, a complainant must show that there is some basis for holding the employer liable for the alleged harassment. The complainant must provide some evidence that either (1) an employee with managerial authority conducted the harassment or (2) that the employer allowed others to act against the complainant. *Faragher*, 524 U.S. at 807; *Blankenship*, 123 F.3d at 873. In this case, Overall cannot meet this principle element of his prima facie case because there is no evidence to show that any agent or employee of TVA was involved in the acts of anonymous harassment allegedly perpetrated against him.

As detailed above (at 3-11), Overall has alleged a number of separate acts of anonymous harassment. Overall claims that the source for this harassment was "TVA management" (C. Overall dep. at 406). However, Overall has repeatedly admitted that he has no evidence or information as to the identity of the person or persons responsible for any of these actions, and certainly no evidence linking the harassment to TVA (C. Overall dep. at 36, 164-65, 178, 191, 203-05, 324, 339, 342-43, 364-65, 420). Overall has offered nothing more than speculation that any TVA personnel was involved. Given the undisputed lack of actual evidence linking

TVA to the acts of anonymous harassment, Overall cannot establish an essential element of his prima facie case concerning such harassment.

Hixson v. County of Alameda Sheriff's Dep't, No. C 97-0589 SI, 1999 WL 305513 (N.D. Cal. May 12, 1999), is on point. In *Hixson*, the plaintiff brought a Title VII claim alleging that he was the victim of race based harassment. This harassment included such actions as having his home and car vandalized and receiving anonymous harassing phone calls, including one that implied retaliation when and if plaintiff returned to work. *Id.* at **4-7. The court dismissed the plaintiff's claim, stating that "[t]hese anonymous incidents, while regrettable, do not find their remedy under Title VII since there is no evidence that these incidents were tangible employment actions attributable to the Department." *Id.* at *11.; *Gibson v. American Library Ass'n*, 846 F. Supp. 1330, 1341 (N.D. Ill. 1993) (anonymous "insulting voice mail messages" could not support the plaintiff's Title VII claim where the plaintiff admitted that "she [did] not know who left the messages, whether the messages were intended for her, or whether the messages were left by an ALA employee."); *Silk v. City of Chicago*, 194 F.3d 788, 806 (7th Cir. 1999) (affirming summary judgment against the plaintiff's claim of a hostile work environment brought under the Americans with Disabilities Act where the plaintiff "d[id] not allege which supervisor, or which official action, caused his not being given supervisory duties over other officers of squad cars. Without such evidence, the City cannot be held liable.").

Given the absolute lack of credible evidence linking the "harassment" to TVA, Overall cannot even show that most of the actions occurred as a result of his protected activity. *Morris v. Oldham County Fiscal Ct.*, 201 F.3d at 784; *Williams v. Mason & Hanger Corp.*, No. 97-ERA-14, at 18-22; *Curry v. Nestle USA, Inc.*, No. 99-3877, 2000 WL 1091490, at *4.

B. The specific acts of harassment by identified coemployees alleged by Overall do not rise to the level of actionable harassment. In addition to

the acts of anonymous harassment, Overall alleges that there were a number of acts of harassment committed by specific coemployees. Overall cannot establish a prima face case concerning any of these acts because they do not rise to the level of harassment and/or cannot be attributed to TVA.

1. **The May 21, 1998, telephone conversation with the NRC inspectors.** Overall alleges that on the afternoon of May 21, 1998, NRC inspectors called him at home to discuss his case (C. Overall dep. at 376). Overall claims that this was an act of harassment based solely on the fact that they made an unannounced call to his home and woke him up (*id.*). Overall has admitted that the persons were employed by NRC (*id.*) and has produced no evidence that TVA instructed or requested them to call Overall and disturb his slumber. Accordingly, TVA cannot be charged with this act of alleged harassment. *Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2 and 5, 93-CAA-1, 94-CAA-2 and 3, 95-ERA-1, at 37 (ARB June 14, 1996) (allegedly discriminatory and harassing conduct by Secretary of Energy was not actionable where the complainant failed to produce evidence that the conduct was caused by his employer). In any event, no reasonable person would consider it harassment for the NRC to contact a whistleblower and inquire as to the nature of the whistleblower's allegations.

2. **Watts Bar management's distribution of TVA's anti-harassment policy.** Overall alleges that Watts Bar management's reiteration of TVA's anti-harassment policy and the talking points issued prior to Overall's return to work were themselves acts of harassment (C. Overall dep. at 122-24). Overall's sole basis for this claim is his belief that discussing harassment and TVA's opposition to it was a subtle effort to remind employees of the consequences of raising safety concerns (C. Overall dep. at 123-24). This is nonsensical and wholly frivolous. *See Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA2 and 5, 93-CAA-1, 94-CAA-2 and 3, 95-ERA-1, at 12-13 (ARB June 14, 1996) (affirming dismissal of ERA claim based

on employer's issuance of a press release minimizing plaintiff's success on a prior ERA claim, on the grounds that nothing in the "press release could possibly be considered to have an averse impact on [plaintiff's] employment").

3. Watts Bar management's "failure" to personally welcome Overall back to work. Overall alleges that Watts Bar management's failure to personally welcome him back constitutes an act of harassment (C. Overall dep. at 120). This claim is also without legal merit. *See Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA2 and 5, 93-CAA-1, 94-CAA-2 and 3, 95-ERA-1, at 37 (ARB June 14, 1996) (the complainant could not sustain a claim for hostile work environment based on the fact he was introduced at a public stockholder meeting in a "stigmatizing manner" where no reasonable person could find that such an action could be construed as "retaliatory adverse action" against the complainant).

4. Overall's not being returned to his original position and not being provided with work. Overall claims that the fact that he was not returned to his original position constitutes an act of harassment (C. Overall dep. at 107-08). However, it is undisputed that Overall's original position was eliminated in a reorganization (Higginbotham dep. at 32, 36-40, 67). There was simply no position for Overall to return to (*id.*). TVA complied with the ALJ's decision as best as possible by placing Overall in another organization in the position that matched his original job description (Higginbotham dep. at 29-32; Purcell dep. at 68-70; Wiggall dep. at 37). Given that there is no allegation that Overall's original job did in fact exist, there are no grounds for claiming that placing Overall in a comparable position was harassment.

As to his allegations that he was not given meaningful work, Overall was entering an existing workgroup and worked at Watts Bar about one month (C. Overall dep. at 346; Higginbotham dep. at 84). As Higginbotham reminded Overall during conversations concerning his work assignments, Overall was coming

into an established group and, with time, he would become more involved (Higginbotham dep. at 143). Overall has not presented any evidence supporting his allegation that there was some nefarious reason for his not being as utilized as much as he believed he could have been. Furthermore, when efforts were made to include Overall in the group's activities, including inviting him to attend an industry meeting in Chattanooga with representatives of other utilities operating ice condenser systems and providing him with work assignments, Overall chose not to attend the meeting, and had difficulty completing his work (Smith dep. at 50, 75).

5. **The incident with Tumlin.** Overall claims that he was harassed when Tumlin, a boilermaker, greeted him with "hey, there's that whistle-blower" (C. Overall dep. at 129). Overall has testified that when he told his supervisor, Philip Smith, about the incident, Smith took the matter very seriously (C. Overall dep. at 131-32). Further, Overall rejected Smith's offer to discuss the matter with Tumlin, saying that he [Overall] did not want to get anyone in trouble (C. Overall dep. at 136, 138). Overall cannot be heard to complain of an incident where he rejected an offer to deal with the matter. *See Casiano v. AT&T Corp.*, 213 F.3d 278 (5th Cir. 2000) (dismissing hostile work environment claim where plaintiff failed to take advantage of the preventive and corrective measures offered to him); *Ward v. City of Streestboro*, 89 F.3d 837 (table), No. 95-3838, 1996 WL 346812 (6th Cir. June 24, 1996) (dismissing Title VII hostile work environment claim in part because the plaintiff failed to cooperate with the investigation of anonymous harassment by not following up on police complaints, immediately disclosing incidents, or identifying people who allegedly threatened her).

In any event, Overall himself has repeatedly stated that Tumlin was "kidding," and that Tumlin welcomed him after the remark (C. Overall dep. at 130, 134, 136; Higginbotham dep. at 135-36). There is no allegation that Tumlin or anyone else ever made a comment like that before or after this event. Given these

facts, this single remark does not rise to the level of harassment nor does it lend itself to the creation of a hostile work environment. The law is clear that "[v]erbal and physical harassment, no matter how unpleasant and ill-willed, is simply not prohibited . . . if not motivated by the plaintiff's [protected status]." *Koschoff v. Henderson*, 109 F. Supp.2d 332, 346 (E.D. Penn. 2000). In this case, the circumstances clearly show that Tumlin's comment was not intended as harassment (C. Overall dep. at 136). *See Koschoff*, 109 F. Supp.2d at 346 ("Moreover, simple teasing and offhand comments, even when they are motivated by gender, are not by themselves sufficient to constitute a hostile work environment.").

6. **The August 1998 conversation with Wiggall.** Overall alleges that following the conversation with Smith, Wiggall told him that they were there not to "make up problems" but to find them and correct the problems "as engineers." (C. Overall dep. at 134, 402). Overall claims that this was a reference to Overall's protected activities and thus was an act of harassment.

Overall's allegation is wholly misplaced in view of the full circumstances of this encounter. Overall's own notes of the incident show that Wiggall was following up on Overall's conversation with Smith concerning Tumlin's statement (C. Overall dep. at 135, 402, dep. ex. 12). By Overall's own admission, Wiggall was reiterating Smith's statements about the inappropriateness of Tumlin's comment (C. Overall dep. at 135, 402). Given this context, it is wholly unreasonable to interpret Wiggall's statement as anything but a wholly innocuous response that a reasonable person would not find to be harassing. *See Murray v. Henry J. Kaiser Co.*, No. 84-ERA-4, at 5 (ALJ June 22, 1984) (a manager's statement that he had seen "the dead arise" when a whistleblower returned to duty did not demonstrate hostility in retaliation for protected activities, where the comment was just as likely an "off-handed, innocuous comment").

7. **The August 27, 1998, conversation with Williams.** Overall claims that Williams' inquiry to him as to why Williams' name appeared in the April 1, 1998, decision was an act of harassment (C. Overall dep. at 109-10). However, Overall's sole basis for this claim is the coincidence that he received a harassing note (discussed above at 7-8) on the same day that Williams' requested to speak with Overall (C. Overall dep. at 110). Williams has fully explained his reasons for being near Overall's work area and why he chose to speak with Overall at that time (Williams dep. at 29-31).

In any event, the conversation between Williams and Overall was a personal matter. As such, it had nothing to do with Overall's protected activities and thus is not actionable. *Williams v. Mason & Hanger Corp.*, No. 97-ERA-14, at 18-22 (ALJ Nov. 20, 1997); *Koschoff*, 109 F. Supp.2d at 346 ("[M]istreatment and disrespect unmotivated by the plaintiff's gender and disrespect unmotivated by the plaintiff's gender does not cause a hostile work environment."); *Smith v. Bank One*, No. 99-3783, 2000 WL 1206536, at *3 (6th Cir. Aug. 18, 2000) (the plaintiff failed to sustain a Title VII claim of hostile work environment based on her fellow employees' comments that she might be involved in a robbery of the bank since the employees had other reasons than race to suspect plaintiff's involvement and although plaintiff was "offended and humiliated," there was no evidence of a change in "the terms and conditions of employment").

8. **The August 1998 conversation with Adair.** Overall claims that he was harassed when Adair refused to provide him with information concerning the PER, questioned him about his reasons for asking about the PER, and referred him to the TVA employee with responsibility for the PER (C. Overall dep. at 116-17; 412-14). Overall claims that this was harassment because Overall felt that being asked why he wanted to know about the PER was "very insulting, harassing, questioning [Overall's] authority" (C. Overall dep. at 413).

Even assuming that the conversation occurred exactly as Overall alleges, Overall has no evidence that the exchange was motivated by retaliatory animus. *Williams v. Mason & Hanger Corp.*, No. 97-ERA-14, at 18-22 (ALJ Nov. 20, 1997); *Koschoff*, 109 F. Supp.2d at 346. Overall himself has indicated that there is personal hostility between him and Adair (C. Overall dep. at 125). Given these circumstances, and the fact that there is absolutely no allegation that Overall suffered any tangible adverse employment action because of the exchange with Adair, this incident does not support a claim for hostile work environment.

9. **The September 2, 1998, conversation with Wiggall.** Overall alleges that Wiggall asked Overall to disclose the full content of Overall's discussions with NRC, and Overall refused (C. Overall dep. at 108-09, 402-03). Overall does not, however, allege that there were any consequences of his refusal, nor that anything further occurred.

Assuming that the conversation occurred exactly as Overall alleges, he has wholly failed to state a claim of harassment based on this incident. While he claims he felt "belittled" and that there was a "chilling effect," (C. Overall dep. at 108-09), there is no allegation whatsoever that he was disciplined or even threatened with discipline for refusing to disclose the full extent of his discussions, or that he suffered any adverse action as a result. Accordingly, there can be no claim for harassment, notwithstanding Overall's overreaction to this incident. *See Bishop v. Nat'l R.R. Passenger Corp.*, 66 F. Supp.2d 650 (E.D. Penn. 1999) (dismissing claim of one plaintiff where a reasonable woman would not have found the conduct alleged to be so offensive as to constitute harassment); *Waite v. Blair Inc.*, 937 F. Supp. 460 (W.D. Penn. 1995), (dismissing Title VII hostile work environment claim, in part, on grounds that the conduct alleged was not of a type which would have detrimentally affected a reasonable person, notwithstanding plaintiff's overreaction).

In any event, the circumstances of this incident do not lend themselves to a claim of harassment. It is perfectly reasonable for Wiggall, a senior manager at a nuclear plant, to ask a subordinate employee if there were any issues that Wiggall should be aware of.

10. The September 8, 1998, telephone conversation with NRC inspector Van Doorn. Overall alleges that Van Doorn harassed him by calling him to ask how Overall was doing (C. Overall dep. at 376-78). Overall admits that Van Doorn is an employee with NRC (C. Overall dep. at 378) and makes no allegation that TVA directed Van Doorn to make this call. In fact, Overall states that Van Doorn was acting for the NRC (*id*). Accordingly, this incident does not support a claim for harassment. *Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2 and 5, 93-CAA-1, 94-CAA-2 and 3, 95-ERA-1, at 37 (ARB June 14, 1996).

11. The September 9, 1998, incident involving Langdon. Overall claims that Langdon's driving through his neighborhood on September 9 constituted an act of harassment (C. Overall dep. ex. 9). This allegation is completely unsupported and wholly without merit. As stated before, there is no evidence that Langdon was an agent or employee of TVA in 1998 (Langdon dep. at 46-48). Given that there is no evidence that TVA was directing Langdon's activities, Overall cannot show that this incident was a harassing act attributable to TVA or that it was somehow linked to his protected activity. *Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2 and 5, 93-CAA-1, 94-CAA-2 and 3, 95-ERA-1, at 37 (ARB June 14, 1996).

12. Overall's being assigned to work in TVA Fossil. Overall claims that his transfer to TVA Fossil constitutes an act of harassment because Adair is now a supervisor in that organization (C. Overall dep. at 124-25). Overall admits, however, that he has not had any contact with Adair (C. Overall dep. at 124) and that he is not alleging that Adair was transferred to Fossil as an act of harassment (C. Overall dep. at 124-25). His sole evidence supporting this allegation are his feelings of unease

where Adair are concerned, and his statement that he has "heard" that Adair is asking about him (C. Overall dep. at 120). Overall alleges that TVA should have put him in a "nonharassing, nonfrictional" work environment rather than in Fossil (C. Overall dep. at 125).

This allegation is completely without merit. Overall admits that he has not encountered Adair (C. Overall dep. at 124), and makes no allegation that he has suffered any type of adverse action at Fossil, let alone one traceable to Adair. His sole claim is that he has heard that Adair "knew [his] whereabouts and why is he needing to know [Overall's] whereabouts when I do not report to Adair" (C. Overall dep. at 125). The facts are well established, of course, that Adair is in Overall's direct chain of supervision (C. Overall dep. at 409; Adair dep. at 19-20). Thus, Adair has a perfect right to inquire as to Overall's whereabouts or activities, given that Adair is ultimately responsible for Overall. In any event, Overall has not alleged that he has direct knowledge that Adair is inquiring about him but only that he has "heard" that Adair is asking about him. This is wholly insufficient to support a claim for harassment. *See Bishop v. Nat'l R.R. Passenger Corp.*, 66 F. Supp.2d 650, 666 (E.D. Penn. 1999) (dismissing plaintiff's hostile work environment claim which plaintiff alleged the foreman made derogatory comments to other employees which plaintiff did not hear and stared at her. The court held such conduct was not actionable, and that given plaintiff's admission of no negative effects on her, only an "overly sensitive" person would be "impacted with sufficient detriment.")

13. **The OIG's investigation of the alleged harassment.** Overall claims that the OIG's investigation of him as a possible suspect is an act of harassment (C. Overall dep. at 126). There is no basis for this allegation. Overall has not provided any evidence showing how he has been harmed by this investigation and thus he cannot meet his burden of proof. In any event, there is no basis for this allegation. The OIG was investigating claims raised by Overall and, as a standard technique,

considered Overall a suspect (Hickman decl. ¶ 6). Overall may not agree with the OIG's methods, but the fact that he would prefer some other method does not render OIG's actions harassment. *See Bell v. Chesapeake & Ohio Ry. Co.*, 929 F.2d 220, 224 (6th Cir. 1991) (while company's removal of offensive posters upon being notified of them and reprimanding individuals involved in a fight might have been less than the plaintiff wished, they were reasonable responses and thus employer was not liable); *Mullholand v. Harris Corp.*, 72 F.3d 130 (table), No. 94-3725, 1995 WL 730466, at **3 (6th Cir. Dec. 8, 1995) (actions taken by management might not be the "response[s] that Mullholand would have preferred, but Mullholand has no right to the response that she would have taken if she had been a supervisor at Harris").

C. Overall cannot show that TVA failed to adequately and properly respond to the alleged harassment. As stated above, Overall has not come forward with any evidence that any supervisor was involved with the alleged harassment. Nor is there any allegation that the harassment involved any tangible employment action against Overall. Accordingly, TVA cannot be found vicariously liable. *Varnadore v. Oak Ridge Nat'l Lab.*, ARB No. 99-121, Nos. 1992-CAA-2 and 5, 1993-CAA-1, 1994-CAA-2 and 3, 1995-CAA-1 (ARB July 14, 2000) (holding that the *Farragher/Ellerth* theory of vicarious liability is not applicable where there has been no finding of a tangible employment action nor that a supervisor was involved in the harassment.). Thus, the sole theory upon which Overall may proceed is that TVA failed to reasonably respond to the alleged incidents of harassment. Overall has the burden to prove that TVA "knew or should have known of harassment and failed to implement prompt and appropriate corrective action." *Bell v. Chesapeake & Ohio Ry. Co.*, 929 F.2d 220, 224 (6th Cir. 1991). The law is clear that "a response is adequate if it is reasonably calculated to end the harassment." *Jackson*, 191 F.3d at 663. It is undisputed that TVA was aware of some, but not all, of the alleged incidents of

harassment. It is also indisputable that TVA responded to the alleged harassment by taking prompt and reasonable corrective action; discussed in detail above (at 17-18).

After learning of the May 28 telephone call, Watts Bar management agreed that Overall should delay his return to work in order to allow a "cooling off" period (C. Overall dep. at 235-36; Purcell decl. ¶ 3). TVAN also promptly requested that the OIG investigate the telephone call (Hickman decl. ¶ 6, ex. 1; Purcell decl. ¶ 4, ex. 1). As discussed in more detail previously (at 17-18), Watts Bar management stepped up its efforts to deter the harassment as the harassment continued (Higginbotham dep. at 106, 109-110; Purcell decl. ¶¶ 6, 8, exs. 4-6).

Watts Bar management's efforts to deter the harassment are sufficient in and of themselves to meet the test for reasonable corrective measures. *Coppock v. Northrup Grumman Corp.*, No. 98-SWD-2 (ALJ July 24, 1998), is on point. In *Coppock*, the complainant alleged that because of his protected activities, he had suffered harassment from his fellow employees (including being shunned and ostracized) and that his employer had failed to take prompt corrective action. *Id.* at 2-3, 6. The court rejected this argument, holding that the employer was not liable where there was minimal evidence of the alleged harassment and where, in any event, the complainant's supervisor promptly held a meeting with the employees to address the issue of harassment. *Id.* at 31. Given that there is no evidence that any TVA employee was involved with the harassment, Watts Bar management's actions were the most that could be reasonably expected, and TVA is thus not liable. *See Williams v. Mason & Hangar Corp.*, No. 97-ERA-14 (ALJ Nov. 20, 1997) (employer could not be held liable for harassment where it took all reasonable measures, including holding meetings in which employees were encouraged to voice concerns and conducting team building workshops).

Although Watts Bar management's actions are sufficient to constitute prompt remedial actions, TVA's efforts also included requesting an OIG investigation

(discussed above at 19-20). The OIG's investigation did not find any link between the harassment and any TVA employee (Hickman decl. ¶ 6). However, OIG's investigation was impeded by Overall's refusal to provide handwriting exemplars which could be used to exclude him as a suspect. Under these facts, Overall cannot be heard to complain that the investigation was improper or incomplete. *See Ward v. City of Streestboro*, 89 F.3d 837 (table), No. 95-3838, 1996 WL 346812, at **1, 5 (6th Cir. June 24, 1996) (dismissing plaintiff's claim that employer was liable for failing to stop anonymous harassment at the workplace where the employer had taken various steps to stop the harassment and identify the perpetrators, and where the plaintiff failed to cooperate with the investigation by not pursuing police complaints, failing to immediately report incidents, and even refusing to disclose the identity of a person who she said had threatened her.).

CONCLUSION

For the foregoing reasons, TVA's motion for summary decision should be granted and an order recommending dismissal of the complaint should be entered.

Respectfully submitted,

Maureen H. Dunn
General Counsel

Thomas F. Fine
Assistant General Counsel

Brent R. Marquand
Senior Litigation Attorney

Dillis D. Freeman, Jr.
Attorney

Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone No. 865-632-2061

Attorneys for Respondent

003683249

United States Court of Appeals,
Sixth Circuit.

Thomas E. BOWMAN, Plaintiff-Appellant,
v.
SHAWNEE STATE UNIVERSITY; Jessica J. Jahnke, Defendants-Appellees.

No. 99-3255.

Argued: March 15, 2000
Decided and Filed: July 17, 2000

Former coordinator of sports studies at university brought suit against university and its dean of education alleging sexual harassment, discrimination, and retaliation. The United States District Court for the Southern District of Ohio, Sandra S. Beckwith, J., granted defendants summary judgment, and plaintiff appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) plaintiff did not suffer materially adverse employment action, and (2) there was no hostile work environment sexual harassment.

Affirmed.

West Headnotes

[1] Civil Rights ⚿167
78k167

To prevail under Title VII sexual harassment claim against employer without showing that harassment was severe or pervasive, employee must prove: 1) that employee was member of protected class; 2) that employee was subjected to unwelcomed sexual harassment in form of sexual advances or requests for sexual favors; 3) that harassment complained of was on basis of sex; 4) that employee's submission to unwelcomed advances was express or implied condition for receiving job benefits or that employee's refusal to submit to supervisor's sexual demands resulted in tangible job detriment; and 5) existence of respondeat superior liability. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[2] Civil Rights ⚿167
78k167

Plaintiff's loss of his position as coordinator of sports studies at university, for only ten days with no loss of income, did not amount to materially adverse employment action required to support Title VII sexual harassment claim. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[3] Civil Rights ⚿145
78k145

In context of Title VII, "constructive discharge" exists if working conditions would have been so difficult or unpleasant that reasonable person in employee's shoes would have felt compelled to resign. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[4] Civil Rights ⚿167
78k167

Plaintiff may establish sexual harassment claim under Title VII by proving that sex discrimination created hostile or abusive work environment without having to prove tangible employment action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[5] Civil Rights ⚿167
78k167

In order to establish hostile work environment claim under Title VII, employee must show that: 1) employee is member of protected class, 2) employee was subject to unwelcomed sexual harassment, 3) harassment was based on employee's sex, 4) harassment created hostile work environment, and 5) employer failed to take reasonable care to prevent and correct any sexually harassing behavior. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[6] Civil Rights ⚿167
78k167

Hostile work environment, as would support Title VII sexual harassment claim, occurs when workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[7] Civil Rights ⚿167
78k167

Both objective and subjective test must be met to establish hostile work environment, as would support Title VII sexual harassment claim; conduct must be severe or pervasive enough to create environment that

reasonable person would find hostile or abusive and victim must subjectively regard that environment as abusive. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[8] Civil Rights ⚿167
78k167

Court must consider totality of circumstances when determining whether, objectively, alleged sexual harassment is sufficiently severe or pervasive to constitute hostile work environment, as would support Title VII claim, and work environment as a whole must be considered rather than focus on individual acts of alleged hostility; however, isolated incidents, unless extremely serious, will not amount to discriminatory changes in terms or conditions of employment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[9] Civil Rights ⚿167
78k167

Appropriate factors for court to consider when determining whether conduct is severe or pervasive enough to constitute hostile work environment, as would support Title VII sexual harassment claim, include frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance and whether it unreasonably interferes with employee's work performance. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[10] Civil Rights ⚿167
78k167

Non-sexual conduct may be illegally sex-based and properly considered in hostile environment analysis where it can be shown that but for employee's sex, he would not have been object of harassment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[11] Civil Rights ⚿145
78k145

[11] Civil Rights ⚿167
78k167

Title VII does not prohibit all verbal or physical harassment in workplace; it is directed only at discrimination because of sex. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[12] Civil Rights ⚿167
78k167

While former coordinator of sports studies at university may have been subject to intimidation, ridicule, and mistreatment, there was no hostile work environment sexual harassment; some allegedly harassing acts by dean of education could not be considered, absent showing that coordinator was treated in discriminatory manner because of his gender, and incidents that could be considered were not severe or pervasive. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[13] Federal Civil Procedure ⚿1713.1
170Ak1713.1

Voluntary dismissal without prejudice leaves situation as if action had never been filed.

*458 Theodore R. Saker (Argued and Briefed), VI., Columbus, Ohio, for Appellant.

Donald M. Collins, Richard N. Coglianese (Argued), Kevin L. Murch (Briefed), Office of the Attorney General, Employment Law Section, Columbus, Ohio, for Appellees.

Before: MERRITT, DAUGHTREY, and MAGILL, [FN*] Circuit Judges.

FN* The Honorable Frank J. Magill, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION

MAGILL, Circuit Judge.

**1 This appeal arises out of Thomas E. Bowman's (Bowman) lawsuit against Shawnee State University (University) and Dr. Jessica J. Jahnke (Jahnke) alleging sexual harassment, discrimination, and retaliation in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*, and Ohio Revised Code (O.R.C.) § 4112, assault and battery by Jahnke, and intentional or negligent infliction of emotional distress by both Jahnke and the University. Jahnke filed a counterclaim against Bowman alleging defamation, intentional infliction of emotional distress, and abuse of process. Bowman appeals the district court's [FN1] grant of summary judgment dismissing his sexual harassment claims, and his assault and battery claim. Bowman also appeals the court's dismissal of

Jahnke's remaining counterclaims without prejudice. We affirm the judgment of the district court.

FN1. The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

I. BACKGROUND

In 1985, Bowman, a former star tailback at West Virginia University, began working for the University in its athletic complex and as a part-time instructor. In 1988, Bowman became a full-time instructor teaching a variety of health and physical education courses. Jahnke was hired in 1990 and became the University's Dean of Education shortly thereafter. In 1991, Bowman was selected to be the Coordinator of Sports Studies (Coordinator) at the University, a position under Jahnke's supervision.

Beginning in 1991, Bowman claims that Jahnke sexually harassed him on various occasions, including the following alleged incidents:

1) In late 1991, while Jahnke was in Bowman's office, she placed her hand on his shoulder and rubbed it for approximately ***459** one to two seconds. Bowman jerked away from Jahnke and said "no."

2) In June of 1992, Bowman requested time off. Jahnke approved the request with the stipulation that Bowman not miss any classes. When Bowman returned to work, he found a memorandum from Jahnke chastising him for missing classes. Jahnke wrote this memo even though Bowman had not missed a class.

3) After emphasizing the importance of teaching every class, Jahnke reprimanded Bowman for not attending a meeting scheduled at a time when he had to teach a class. However, the meeting was not required. Jahnke had simply requested that faculty members in her department attend the meeting to offer their support for her Deanship that was being considered for elimination due to restructuring at the University.

4) Jahnke forced Bowman to apologize for failing to attend a party hosted by one of Jahnke's good friends and co-workers.

5) At a 1992 Christmas party, Bowman was leaning against the stove in Jahnke's house when Jahnke grabbed his buttocks. Bowman turned around and told Jahnke that if someone were to do that to her she would fire him or her. Jahnke replied that "she controlled [Bowman's] ass and she would do whatever she wanted with it."

***2** 6) In the spring of 1994, Bowman went to Jahnke's house to repair her deck, which took approximately an hour to fix. Jahnke, excited because she would be able to use the whirlpool on the deck, told Bowman "[l]et's get it finished, you and I can try [the whirlpool] out together."

7) In the summer of 1994, Jahnke invited Bowman and his girlfriend to her house to go swimming in her pool. After a short period of time, Bowman decided to leave, at which point Jahnke commented to him that "[n]ext time, you know, you ought to come by yourself and enjoy yourself."

8) On January 9, 1995, Bowman met with Jahnke in her office. Jahnke, claiming that she was irate because Bowman lied to her about a class he was teaching at Ohio University, put her finger on Bowman's chest, placed her hands upon him, and pushed him towards the door. As he left the office, Bowman told Jahnke that "[t]his is the last time you're ever going to touch me."

9) Jahnke called Bowman at home on various occasions. Bowman found the calls to be harassing, although they were not abusive or sexual in nature.

10) Bowman also alleges various other incidents, including the following: Jahnke demanded that Bowman leave a phone number with her when he was on vacation; Jahnke required Bowman to take additional athletic training in order for him to remain in the Coordinator position; Jahnke required Bowman to investigate fellow employees and students; Jahnke demanded that Bowman take his name off his office door when she removed him from the Coordinator position; Jahnke required Bowman to work in the summer without pay; Jahnke allowed females to work outside the University, but prohibited Bowman from doing so; Jahnke threatened that she would "pull the plug" on Bowman if he did not submit to her wishes and; Jahnke reprimanded Bowman for working extra jobs on his own free time, but demanded that Bowman come to her home during working hours to perform extra duties.

The alleged sexually harassing conduct by Jahnke came to a close in 1995. Within days of the January 9, 1995, meeting in Jahnke's office, Jahnke wrote a memorandum to Bowman informing him that she was angry that he lied to her about teaching a class at Ohio University. [FN2] Janke ***460** then stripped away his responsibilities as Coordinator. Bowman's removal from the Coordinator position was only temporary, however, and did not result in a reduction of his salary. On January 19, 1995, Dr. Addington,

University Provost, informed Bowman that his removal had been rescinded and the termination letter removed from his personnel file. Shortly after the final incidents giving rise to this lawsuit occurred, Bowman, suffering from mental illness, was placed on permanent disability retirement by the State Teachers Retirement System. Jahnke also resigned her position and left the University to operate a bed and breakfast in Maine.

FN2. Part of Jahnke's concern about Bowman's outside commitments stemmed from her arrangement for Bowman to have two hours per term of "release time" in order to allow Bowman sufficient time to fulfill his responsibilities as Coordinator. The release time exempted Bowman from two hours per term of teaching in order to accommodate his duties as Coordinator.

On November 13, 1996, Bowman filed the current suit against the University and Jahnke. On July 30, 1997, the district court granted Jahnke's motion for judgment on the pleadings as to Bowman's Title VII claims against her on the basis that individual liability does not attach under Title VII unless the individual defendant otherwise qualifies as an employer. Because Bowman had only invoked the court's federal question jurisdiction, the district court dismissed Bowman's state law claims against Jahnke without prejudice.

**3 On June 19, 1998, the district court granted summary judgment to the University on Bowman's Title VII and O.R.C. § 4112 sexual harassment, sexual discrimination, and retaliation claims and held that the Eleventh Amendment barred Bowman's state law claims against the University. The court also reinstated Bowman's state law claims against Jahnke and granted summary judgment to Bowman on Jahnke's defamation and intentional infliction of emotional distress counterclaims. The court, however, denied summary judgment to Bowman on Jahnke's abuse of process counterclaim.

On September 24, 1998, the district court dismissed Bowman's sex- discrimination claims against Jahnke under O.R.C. § 4112 on the basis that, similar to Title VII, liability does not attach to individuals under O.R.C. § 4112. The court also granted judgment to Jahnke on Bowman's negligent infliction of emotional distress and assault and battery claims but refused to enter judgment for Jahnke on Bowman's claim for intentional infliction of emotion distress.

On December 16, 1998, the district court dismissed Bowman's intentional infliction of emotional distress claim, holding that Bowman could not proceed with the claim until the Ohio Court of Claims made a determination as to whether Jahnke was entitled to immunity pursuant to O.R.C. § 9.86. [FN3] On February 6, 1999, the district court granted Jahnke's motion for dismissal of her counterclaims and dismissed the counterclaims without prejudice. The court then declared the case closed. Subsequently, Bowman brought the present appeal.

FN3. Bowman appeals the court's holding that the Ohio Court of Claims must decide whether Jahnke is entitled to immunity pursuant to O.R.C. § 9.86. This claim is now moot, however, because subsequent to the filing of the parties' briefs on appeal, the Ohio Court of Claims held that Jahnke was acting outside the scope of her duties with respect to the conduct alleged by Bowman and, thus, is not entitled to immunity from liability.

II. ANALYSIS

A. Title VII claims against the University

Bowman argues that the district court erred in dismissing his Title VII sexual harassment claims. Bowman argues that the Supreme Court in *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), held that a plaintiff does not need to prove that he suffered a tangible employment action **461** even when the alleged harassment is not severe or pervasive. Bowman argues, in the alternative, that he suffered a tangible adverse employment action by the removal of his responsibilities as Coordinator. [FN4] Bowman also argues that the district court erred in holding that the alleged sexual harassment was not severe or pervasive. The district court's grant of summary judgment is reviewed *de novo. See Lucas v. Monroe County,* 203 F.3d 964, 971 (6th Cir.2000).

FN4. Bowman's claim that the Supreme Court in *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), held that no tangible employment action is required to be proved in cases where the harassment is not severe or pervasive (what used to be referred to as *quid pro quo* sexual harassment) is without merit. In *Ellerth,* the Court explained how the two terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII: When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she

> establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.
> *Id.* at 753-54, 118 S.Ct. 2257.

1. Did Jahnke's harassment culminate in a tangible employment action?

**4 [1] To prevail under a sexual harassment claim without showing that the harassment was severe or pervasive, the employee must prove the following: 1) that the employee was a member of a protected class; 2) that the employee was subjected to unwelcomed sexual harassment in the form of sexual advances or requests for sexual favors; 3) that the harassment complained of was on the basis of sex; 4) that the employee's submission to the unwelcomed advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment; and 5) the existence of *respondeat superior* liability. *See Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 186 (6th Cir.1992).

The district court rejected Bowman's claim that he suffered a tangible job detriment by the removal of his responsibilities as Coordinator. The court reasoned that there was no tangible employment action for the following reasons: 1) Bowman's removal from the position was not a demotion because the Coordinator position was not an actual position at the University but, rather, merely a title provided to a person which describes the duties he or she was performing, and was not accompanied by a reduction in salary; 2) Bowman had not offered any evidence showing that the Coordinator position was viewed as more prestigious than the full-time teaching position in which he remained; and 3) the University reinstated Bowman to his position as Coordinator.

[2] While a permanent loss of the Coordinator position may well have constituted a tangible job detriment, an issue we need not decide, it is clear that Bowman did not suffer an adverse employment action [FN5] by the very temporary loss of his position as Coordinator. In *Hollins v. Atlantic Co.*, 188 F.3d 652 (6th Cir.1999), the court noted the requirements for establishing a materially adverse employment action:

> FN5. Courts use the terms "tangible employment detriment" and "materially adverse employment action" interchangeably. *See, e.g., Bryson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir.1996).

> [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material **462** responsibilities, or other indices that might be unique to a particular situation.

Id. at 662 (citation omitted). The Sixth Circuit has consistently held that *de minimis* employment actions are not materially adverse and, thus, not actionable. *See, e.g., Jacklyn v. Schering Plough Healthcare Prod.*, 176 F.3d 921, 930 (6th Cir.1999) (holding that "neither requiring plaintiff to work at home while she was recovering from out-patient surgery, nor rejecting computer expenses that previously had been approved, were materially adverse employment actions"); *Jackson v. City of Columbus*, 194 F.3d 737 (6th Cir.1999) (holding that police chief's suspension with pay was not an adverse employment action); *Hollins*, 188 F.3d at 662 (6th Cir.1999) (holding that "[s]atisfactory ratings in an overall evaluation, although lower than a previous evaluation, will not constitute an adverse employment action where the employee receives a merit raise"); *Kocsis v. Multi-Care Management*, 97 F.3d 876, 885 (6th Cir.1996) (holding that "reassignments without salary or work changes do not ordinarily constitute adverse employment decisions in employment discrimination claims").

[3] Even if we assume that the loss of the Coordinator position constitutes a significant change in employment status, there is no tangible employment action in this case because the very temporary nature of the employment action in question makes it a non-materially adverse employment action. Similar to cases where the employment action is not significant enough to rise to the level of a materially adverse employment action, cases where the employment action, while perhaps being materially adverse if permanent, is very temporary also do not constitute materially adverse employment actions. This principle was recognized in *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178 (6th Cir.1992), where the court indicated that even if a tangible job detriment has been suffered, there may be a *de*

minimis exception for temporary actions or where further remedial action is moot and no economic loss occurred. *See id.* at 187. *See also Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir.1987) (holding that there was no adverse employment action where temporary transfer did not result in loss of salary or benefits). The removal of Bowman from the Coordinator position for only approximately ten days with no loss of income is properly characterized as a *de minimis* employment action that does not rise to the level of a materially adverse employment decision. [FN6]

> FN6. At oral argument, although not argued by Bowman, there were questions raised as to whether Bowman's claims that Jahnke coerced him into resigning his position as manager of the James A. Rhodes Athletic Center, part of the University's athletic facilities, and his resignation from his job at the University due to his permanent disability could be considered constructive discharges, and, thus, tangible employment actions. A constructive discharge exists "if working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *See Yates v. Avco Corp.*, 819 F.2d 630, 636-37 (6th Cir.1987) (citations omitted). In this case, as discussed below, Jahnke's alleged sexual harassment was not severe or pervasive and, therefore, Bowman cannot show that a reasonable employee would have felt compelled to resign.

2. Was Jahnke's harassment severe or pervasive?

**5 [4][5] A plaintiff may establish a violation of Title VII by proving that the sex discrimination created a hostile or abusive work environment without having to prove a tangible employment action. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). In order to establish a hostile work environment claim, an employee must show the following: 1) the employee is a member of a protected class, 2) the employee was subject to unwelcomed sexual harassment, 3) the harassment was based on the employee's sex, 4) the harassment created a hostile work environment, and 5) the employer *463 failed to take reasonable care to prevent and correct any sexually harassing behavior. *See Williams v. General Motors Corp.*, 187 F.3d 553, 560-61 (6th Cir.1999).

[6][7] A hostile work environment occurs "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (internal quotations and citations omitted). Both an objective and a subjective test must be met: the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive and the victim must subjectively regard that environment as abusive. *See id.* at 21-22, 114 S.Ct. 367.

[8][9] The court must consider the totality of the circumstances when determining whether, objectively, the alleged harassment is sufficiently severe or pervasive to constitute a hostile work environment. *See Williams*, 187 F.3d at 562. "[T]he issue is not whether each incident of harassment *standing alone* is sufficient to sustain the cause of action in a hostile environment case, but whether--taken together--the reported incidents make out such a case." *Id.* The work environment as a whole must be considered rather than a focus on individual acts of alleged hostility. *See id.* at 563. Isolated incidents, however, unless extremely serious, will not amount to discriminatory changes in the terms or conditions of employment. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 790 (6th Cir.2000). Appropriate factors for the court to consider when determining whether conduct is severe or pervasive enough to constitute a hostile work environment "include 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*, 510 U.S. at 23, 114 S.Ct. 367.

**6 In considering the alleged incidents of harassment, the district court found several to be nonprobative because they were not based on Bowman's sex. The court found that the 1991 shoulder rubbing incident in Bowman's office was ambiguous and of no evidentiary value absent some other evidence suggesting that it should be considered a harassing act. The court also found the January 9, 1995, confrontation in Jahnke's office and the repeated telephone calls from Jahnke to be nonprobative because Bowman had offered no evidence that those acts constituted harassment on the basis of his sex. The court then considered whether

the remaining alleged incidents, considered together, were sufficient to constitute sexual harassment that was severe or pervasive. The court found that the 1992 Christmas party incident, the 1994 whirlpool incident, and the 1994 swimming pool incident were imbued with sufficient sexual flavor to show that Bowman was subjected to uninvited harassment and that the harassment was based upon his status as a member of a protected class but found that the harassment was not severe or pervasive.

[10][11] Non-sexual conduct may be illegally sex-based and properly considered in a hostile environment analysis where it can be shown that but for the employee's sex, he would not have been the object of harassment. *See Williams,* 187 F.3d at 565. "Any unequal treatment of an employee that would not occur but for the employee's gender may, if sufficiently severe or pervasive under the *Harris* standard, constitute a hostile environment in violation of Title VII." *Id.* However, "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] ... because of ... sex.' " *Oncale v. Sundowner Offshore Serv., Inc.,* 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (emphasis in original). "The critical issue, Title VII's text ***464** indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* (citation omitted).

[12] We agree with the district court that while Bowman recites a litany of perceived slights and abuses, many of the alleged harassing acts cannot be considered in the hostile environment analysis because Bowman has not shown that the alleged harassment was based upon his status as a male. Bowman, while alleging that Jahnke tormented him personally, has not show that the non- sexual harassment had an anti-male bias. In Title VII actions, however, it is important to distinguish between harassment and discriminatory harassment in order to "ensure that Title VII does not become a general civility code." *Faragher v. City of Boca Raton,* 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (citation omitted). In *Williams,* evidence that the plaintiff was ostracized on myriad instances when others were not, combined with gender-specific epithets used, such as "slut" and "fucking women," was sufficient to create an inference that her gender was the motivating impulse for her co-workers' behavior and allowed the non-sexual harassment to be considered in the hostile environment analysis. *See Williams,* 187 F.3d at 565-66. Unlike the plaintiff in *Williams,* Bowman has not alleged that Jahnke made a single comment evincing an anti-male bias. Besides a bare and unsupported assertion that some women employees were allowed to engage in work outside the University while he was not, Bowman has not shown that the non- sexual conduct he complains of had anything to do with his gender. While he may have been subject to intimidation, ridicule, and mistreatment, he has not shown that he was treated in a discriminatory manner because of his gender.

**7 The only incidents that may arguably be considered in the hostile work environment analysis are the 1991 shoulder rubbing incident, the 1992 Christmas party incident, the 1994 whirlpool incident, the 1994 swimming pool incident, and the 1995 meeting in Jahnke's office. Although we consider more alleged incidents in the analysis than did the district court, we agree with the court's holding that the incidents that may properly be considered are not severe or pervasive and, thus, do not meet the fourth element of the hostile environment analysis. While the allegations are serious, they do not constitute conduct that is pervasive or severe. We note that like *Williams,* three of the alleged incidents in this case "were not merely crude, offensive, and humiliating, but also contained an element of physical invasion." *Williams,* 187 F.3d at 563. However, the conduct in this case is not nearly as severe or pervasive as the harassment in *Williams* or in other cases where the court found that the conduct in question was not severe or pervasive enough to constitute a hostile environment. In *Williams,* there were fifteen separate allegations of sexual harassment over a period of one year. *See id.* at 559. The allegations included derogatory and profane remarks directed at the plaintiff, sexually explicit comments directed at the plaintiff, offensive comments directed at women in general, denial of plaintiff's overtime, and the exclusion of plaintiff from certain workplace areas. *See id.* at 559. *See also Burnett v. Tyco Corp.,* 203 F.3d 980, 985 (6th Cir.2000) (holding that "under the totality of the circumstances, a single battery coupled with two merely offensive remarks over a six-month period does not create an issue of material fact as to whether the conduct alleged was sufficiently severe to create a hostile work environment"); *Morris v. Oldham County Fiscal Court,* 201 F.3d 784, 790 (6th Cir.2000) (holding that simple teasing, offhand comments, and isolated incidents including a sexual advance did not amount to discriminatory changes in the terms and conditions of a plaintiff's employment); *Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355,

1366 (10th Cir.1997) (holding that five incidents of allegedly sexually-oriented ***465** offensive comments during a sixteen-month period were not sufficiently frequent to create liability).

III. CONCLUSION

****8** [13] In sum, we affirm all of the district court's judgments dismissing Bowman's claims and the court's dismissal of Jahnke's counterclaims without prejudice. [FN7]

FN7. Bowman's other claims on appeal are also rejected and do not require a lengthy discussion. After careful review, we reject Bowman's claims that the district court erred in dismissing his sexual discrimination claims under O.R.C. § 4112, his assault and battery claim against Jahnke, and in granting Jahnke's motion to dismiss her counterclaim without prejudice. We also decline to address Bowman's claim that the district court erred in not granting summary judgment on Jahnke's abuse of process counterclaim that was dismissed without prejudice. "[A] voluntary dismissal without prejudice leaves the situation as if the action had never been filed," and, thus, it would not be proper to rule on the abuse of process counterclaim. *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246, 1247 (6th Cir.1993).

END OF DOCUMENT

(Cite as: 225 F.3d 658, 2000 WL 1091490 (6th Cir.(Ohio)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Edith CURRY, Plaintiff-Appellant,
v.
NESTLE USA, INC.; Nestle USA--Food Division, Inc., Defendants-Appellees.

No. 99-3877.

July 27, 2000.

On Appeal from the United States District Court for the Northern District of Ohio.

Before MERRITT, GUY, and COLE, Circuit Judges.

RALPH B. GUY, JR., Circuit Judge.

**1 Plaintiff, Edith Curry, appeals from the entry of summary judgment in favor of her former employer, Nestle USA--Food Division, Inc., and its parent company, Nestle USA, Inc. Plaintiff alleged sex discrimination and harassment in violation of Ohio Rev.Code Ann. § 4112.02(A) (Anderson 1998), as well as breach of contract and defamation under Ohio law. Plaintiff contends that the district court erred in granting summary judgment to defendants on her discrimination, harassment, and defamation claims because the evidence was sufficient to create a genuine issue of material fact for trial. Seeking entry of judgment in her favor on the breach of contract claim, plaintiff argues that the district court erroneously found that no enforceable contract existed. After review of the record and the arguments presented on appeal, we affirm.

I.

Plaintiff was employed with Nestle and its predecessor in Solon, Ohio, for three and a half years. She was hired in November 1993 as an accounts payable manager and was promoted to manager of accounting and then to director of accounting. When she was hired, she reported to Bob Martino, who reported to Bob Zab, who reported to Charlie Werner. When Martino resigned in April 1994, plaintiff reported to Zab until he left Nestle in June 1994. Plaintiff then reported directly to Werner, a senior vice-president and chief financial officer, until she resigned effective March 14, 1997. Plaintiff resigned to accept a position with Cole Gift for a higher salary, but left that position in late June 1997. [FN1] Plaintiff claims that she was harassed by Zab until his job was eliminated, and later by Steve Barbour, who moved to Solon from another Nestle company to become controller of frozen foods. She also relies upon other statements and incidents to suggest gender bias within the organization. Plaintiff claims she was constructively discharged by discrimination and harassment based upon her sex.

FN1. Plaintiff attended law school while employed by Nestle and has since passed the Ohio bar examination.

After plaintiff left Nestle, Sharon Maxfield, who had reported to plaintiff, discovered that VISA traveler's checks used for reward and incentive programs were missing. Of the approximately $15,000 in checks that were not accounted for, plaintiff had cashed about $850 for personal use after leaving Nestle. While plaintiff maintained that Werner had approved of her taking the money for unreimbursed expenses incurred during her employment, she never submitted an expense report or other documentation. When confronted about the cashed checks, plaintiff sent an explanation and a check to reimburse Nestle. Werner returned the check to her. Plaintiff claims that she was defamed by statements made within Nestle suggesting she had misappropriated the checks and was a "thief."

When Werner returned the check to plaintiff in June or July 1997, he considered the matter to be resolved and inquired whether plaintiff would be interested in consulting for Nestle as part of a task force project. On Thursday, October 16, 1997, Werner offered plaintiff the opportunity to participate on the task force in Glendale, California, and they agreed on the basic terms that evening. On Friday, October 17, 1997, plaintiff was "deselected" for the task force when objections to her participation were lodged by others. Plaintiff claims this was a breach of contract.

**2 In March 1998, plaintiff filed a complaint alleging (1) sex discrimination, including harassment

and disparate treatment; (2) breach of contract; and (3) defamation. After discovery was conducted, plaintiff moved for summary judgment in her favor on the breach of contract claim, and defendants moved for summary judgment in their favor on all of plaintiff's claims. [FN2] The district court denied plaintiff's motion and granted defendants' motion for the reasons set forth in its written opinion entered on June 3, 1999. This timely appeal followed.

FN2. Plaintiff argues that the district court erred by granting summary judgment on her disparate treatment claim because defendants did not request summary judgment with respect to that claim. To the contrary, defendants' motion requested summary judgment on all of plaintiff's claims, and plaintiff's response addressed her disparate treatment claim. The district court did not act *sua sponte* in granting summary judgment to defendants.

II.

We review *de novo* the district court's decision to grant summary judgment. *See, e.g., Smith v. Ameritech,* 129 F.3d 857, 863 (6th Cir.1997). Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the non- moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v.. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A genuine issue for trial exists when there is sufficient evidence upon which the jury could reasonably find for the non-moving party. *See id.* at 252.

A. Hostile Work Environment

The Ohio courts have adopted federal Title VII standards for use in analyzing disparate treatment and hostile environment sexual harassment claims brought under Ohio Rev.Code Ann. § 4112.02(A). *See Bell v. Cuyahoga Community College,* 717 N.E.2d 1189 (Ohio App.1998); *Delaney v. Skyline Lodge, Inc.*, 642 N.E.2d 395, 399-400 (Ohio App.1994). Specifically, in order to prevail on a claim of hostile work environment sexual harassment, plaintiff must show (1) she was a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based upon sex; (4) the harassment had the purpose or effect of unreasonably interfering with her work performance or creating an intimidating, hostile, or offensive work environment; and (5) the existence of *respondeat superior* liability. *See Delaney,* 642 N.E.2d at 400 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir.1986)). The district court examined plaintiff's claims, accepted plaintiff's testimony as true and admissible, and found that plaintiff did not present sufficient evidence to create a material question of fact whether the conduct was so severe or pervasive to alter the conditions of employment. Plaintiff argues that the district court improperly evaluated the evidence by disaggregating the various incidents and by failing to examine the totality of the circumstances. *See Williams v. General Motors Corp.*, 187 F.3d 553, 562 (6th Cir.1999). Plaintiff also emphasizes that, as the district court explicitly recognized, sexual harassment need not involve overtly sexual conduct or comments for it to be based upon sex. [FN3] After *de novo* review of plaintiff's hostile environment sexual harassment claim, we find that no genuine issue of material fact exists on the third element of this claim.

FN3. Defendants contend that Ohio law diverges from federal standards by requiring that the unwelcome harassment be in the form of sexual advances or requests for sexual favors. While it is true that several recent cases from the Ohio Court of Appeals, Eighth District, Cuyahoga County, have included such language in the elements of a hostile environment sexual harassment claim, one reference was a misstatement of the elements adopted in *Delaney, see Ciliotta v. Merrill Lynch,* 699 N.E.2d 997, 999 (Ohio App.1997), and the other reference was quoted as part of the elements of a *quid pro quo* sexual harassment claim, *see Takach v. American Med. Tech., Inc.,* 715 N.E.2d 577, 582 (Ohio App.1998), *appeal dismissed* 709 N.E.2d 169 (Ohio 1999) (citing *Schmitz v. Bob Evans Farms, Inc.*, 697 N.E.2d 1037, 1042 (Ohio App.1997)). In fact, the unpublished decision cited by defendants also set forth the elements of a *quid quo pro* sexual harassment case, but then recognized that the absence of sexual advances, verbal or physical contact, or requests for sexual favors is simply a factor that must be considered in determining whether a hostile work environment was present. *See Madera v. Satellite Shelters, Inc.*, No. 73172, 1998 WL 474189, at *3-4, 6 (Ohio App. Aug. 12, 1998). We are convinced that if the Ohio Supreme Court were confronted with the issue, it would find, consistent with the

standards applied under Title VII, that the harassment need not be sexual in nature in order to establish a hostile work environment sexual harassment claim under Ohio law. *See Fenton v. HiSAN, Inc.*, 174 F.3d 827, 828 (6th Cir.1999).

**3 For sexual harassment to be actionable, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment." ' *See Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 67 (1986) (alteration in original) (quoting *Henson v. City of Dundee,* 682 F.2d 897, 904 (11th Cir.1982)). This standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The conduct in question must be judged by both an objective and a subjective standard. *See id.* at 21-22. All the circumstances are to be considered, which "may include 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." *Id.* at 23.

Plaintiff testified that she received hostile treatment from Zab, who was her supervisor, indirectly and then directly, during the first seven months of her employment. Plaintiff testified that while she was Werner's choice for the accounts payable position, Zab had wanted to give the position to his girlfriend. Plaintiff testified that she questioned various financial and business improprieties that Zab had engaged in, including, for example, operating a video rental in the office and ordering shrimp for the company which he then sold for personal profit. Zab also organized a paid golf outing for some of his male subordinates and arranged for exotic dancers to attend. When plaintiff complained and reported his conduct to Werner, Zab became hostile. Zab's tone and manner in weekly staff meetings was hostile and humiliating, but did not include comments that were either sexual in nature or gender specific. Zab forbade others from giving plaintiff information and required that she have no meetings outside his presence. Plaintiff complained about Zab's conduct and was satisfied with Nestle's response.

Plaintiff learned that Nestle paid $22,000 in college tuition for each of three male employees, which far exceeded Nestle's formal reimbursement policy. When she confronted Kent Hayes, a senior vice-president responsible for human resources, she was told that those employees had been identified as "fast trackers." Plaintiff inquired about the selection criteria, saying that she had some talented female employees and that all she was looking for was something fair and equitable. Hayes responded: "If you want fair and equitable, you're not going to find it here." Hayes later inquired through others whether plaintiff's behavior was a result of her pregnancy.

Barbour, a vice-president, was moved to Solon to be controller of frozen foods, a position previously held by a man in the same pay grade as plaintiff. At that time, plaintiff was director of accounting. Plaintiff asked Hayes whether the controller position remained at the same grade and whether Barbour would continue to receive a company car and other officer benefits. When she was told yes, plaintiff wanted to know if everyone at that pay grade (including her) would also get the same benefits. Hayes told plaintiff to mind her own business. Barbour reported directly to Werner, as did plaintiff, and was the source of much of the hostility plaintiff complained of during the remainder of her employment.

**4 Barbour wanted to bring a male employee and his fiance, Angel Alif, with him to Solon. Barbour sent Alif, an accounts payable employee, to meet with plaintiff. Alif reported that she felt plaintiff had treated her superficially and then turned down the position. Barbour was furious and went to Hayes about it. Barbour called plaintiff a "f--ing bitch" in a telephone conversation with her about the matter and on a few other occasions. Plaintiff also heard that Barbour referred to her as a "f--ing bitch" in front of other employees and went out with two male co-workers on plaintiff's last day to celebrate the "f-- ing bitch leaving." [FN4] Barbour used profanity during meetings and was hostile to plaintiff, berating her and interrupting her in front of others. She testified that he put his hand in front of her face and said "That's bullshit. That's not how we're going to do this." Plaintiff also claims Barbour tried to "set her up" to fail by making decisions that impacted her department without her input or knowledge. When someone asked if plaintiff should be in a meeting, Barbour said, "the bitch doesn't need to be here." Plaintiff contends that Barbour assigned her department certain responsibilities without forewarning her and even though they were not included in her budget. [FN5]

FN4. Defendants argue that plaintiff's testimony that others told her Barbour referred to her in this way is inadmissible hearsay. Plaintiff responds that

the evidence is not hearsay because it is not offered for the truth of the matter asserted.

FN5. Plaintiff states that when she complained about Barbour to Angela Green in human resources, Green told her that Hayes and Brett Devine, director of human resources, did not like her and that the company had problems with women.

Plaintiff also testified that Gary Johnson, director of sales, once asked her if it was "her time of the month." During her pregnancy, he also asked if she was going to stay home, like his wife, and do the right thing by her child. When she returned to work, he asked why she was not at home taking care of her child.

In May 1996, six days after plaintiff gave birth to her daughter, plaintiff attended a senior executive staff meeting because Werner had told her it was critical that she attend. James Dintaman, president of Nestle Frozen Foods, saw her in the meeting and exclaimed: "Jesus F[--ing] Christ, what are you doing here? You just had a baby." Plaintiff testified that she was humiliated by this. Dintaman testified that he was unaware plaintiff had been asked to be there and felt she should abide by the maternity leave policy. Plaintiff also complained that Dintaman had explained in detail, using profanity, about his colonoscopy during a meeting with her and Werner. Plaintiff testified that when she was commended by others during a meeting, Dintaman refused to acknowledge the statements or look at her. That same day, plaintiff met with Werner to talk about whether she should take the offer from Cole Gift. [FN6] Plaintiff confided in and complained to Werner about virtually all of the incidents of perceived harassment and discrimination. Plaintiff testified that Werner advised her to take the Cole Gift offer because she did not have a career with Nestle. Yet, plaintiff was promoted twice and was director of accounting when she resigned. [FN7]

FN6. At one point after plaintiff left Nestle, Dintaman was asked by his superior to apologize to Nestle employees for using inappropriate language during meetings. Defendants note that plaintiff was also known to use profanity and make suggestive comments in the workplace.

FN7. Plaintiff complained to Devine about Barbour, Dintaman, and Johnson, but Devine's investigation concluded that plaintiff brought it upon herself by being too assertive. Plaintiff asked what she could do "short of a sex change operation," and Devine responded that might be the easiest route in her case. Plaintiff testified that Werner told her assertive women did not have a future in Solon, Ohio, and suggested that she apply for an overseas assignment. She applied for a position in Beijing, China, but the opportunity evaporated unexpectedly after plaintiff applied.

Taking the evidence in the light most favorable to plaintiff, we agree with the district court that plaintiff did not offer evidence sufficient to show that the harassment by Zab was based upon her sex, rather than personal animosity. *See Barnett v. Department of Veterans Affairs,* 153 F.3d 338, 342- 43 (6th Cir.1998), *cert. denied,* 119 S.Ct. 875 (1999) ("personal conflict does not equate with discriminatory animus"). The statements by Hayes concerning the college reimbursements and Barbour's compensation package suggest an indifference to possible disparate treatment of men and women. Johnson's statements were gender based, but were not severe or pervasive. Dintaman's profanity and insensitivity when plaintiff attended the meeting less than a week after having a baby was understandably embarrassing but was not denigrating to women in general or suggestive of gender-based animus. Barbour's conduct included offensive language, as he referred to plaintiff several times as a "f--bitch." According to plaintiff, Barbour exhibited outward hostility toward plaintiff by interrupting her during meetings, berating her for perceived errors, and making decisions affecting her department without her input or knowledge.

**5 Viewing all of the circumstances together, we find this case is distinguishable from *Williams* and *Abieta v. TransAmerica Mailings, Inc.,* 159 F.3d 246 (6th Cir.1998). There is no evidence that the conduct unreasonably interfered with plaintiff's work performance. While a jury could conclude some of the conduct complained of in this case was based upon plaintiff's sex, all of the circumstances taken together are not sufficient to permit a rational trier of fact to conclude that a reasonable person would find the harassment was sufficiently severe or pervasive to alter the conditions of employment and create a hostile or abusive working environment. *See, e.g., Black v. Zaring Homes, Inc.,* 104 F.3d 822 (6th Cir.1997).

B. Disparate Treatment Sex Discrimination

Plaintiff asserted a disparate treatment claim as part of her sex discrimination claims in Count I, and relied

upon the burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The district court granted summary judgment to defendants finding that plaintiff could not establish a *prima facie* case of sex discrimination because, even if plaintiff could establish constructive discharge, she was not replaced by someone outside the protected class. The error in the district court's analysis, plaintiff argues, was the court's failure to recognize that the fourth prong of the *prima facie* case may be met by showing that a similarly situated person outside the class was treated differently for the same or similar conduct. *See Mitchell v. Toledo Hosp.,* 964 F.2d 577, 582 (6th Cir.1992); *Kohmescher v.. Kroger Co.,* 575 N.E.2d 439 (Ohio 1991).

We find that plaintiff has not met her burden of demonstrating a *prima facie* case of sex discrimination. Plaintiff was promoted to manager and then director of accounting before resigning to take another job offer. We need not determine whether a question of fact exists on the constructive discharge claim since plaintiff concedes that she was replaced by a female, and she has made no effort to demonstrate that she was treated differently than a similarly situated male employee. Summary judgment was properly granted on this claim.

C. Defamation

Without contesting the district court's statement of the elements of a defamation claim under Ohio law or the finding that a qualified privilege arose in this case, plaintiff contends that the district court erroneously invaded the jury's province by finding there was no question of fact on the issue of whether the statements were made with "actual malice." Plaintiff alleges that Barbour and Maxfield defamed her by stating to other Nestle employees that she had misappropriated funds and was a "thief."

"Where the circumstances of the occasion for the alleged defamatory communication are not in dispute, the determination of whether the occasion gives [rise to] the privilege is a question of law for the court." *A & B- Abell Elevator Co. v. Columbus/Central Ohio Bldg. & Constr. Trades Council,* 651 N.E.2d 1283, 1290 (Ohio 1995). The district court considered the circumstances as alleged by plaintiff and found that they were conditionally privileged communications made in good faith between employees of the defendants concerning a third employee's involvement in a matter of common interest. *See Jacobs v. Frank,* 573 N.E.2d 609, 612 (Ohio 1991). [FN8]

> FN8. In determining whether an occasion is privileged, the court is not concerned with the motivation of a particular defendant, and good faith should not be confused with the state of mind required to overcome the privilege. *A & B-Abell Elevator,* 651 N.E.2d at 1292.

**6 In Ohio, the qualified privilege can be defeated only by a clear and convincing showing that the communication was made with "actual malice." *Id.* at 610 (syllabus 2). Actual malice is defined as "acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Id.* To show "reckless disregard," a plaintiff must present sufficient evidence to permit a finding that the defendant had serious doubts as to the truth of her publication. *See A & B-Abell Elevator,* 651 N.E.2d at 1293. After an independent review of the sufficiency of the evidence concerning actual malice, we find the district court correctly concluded that plaintiff failed to meet her burden as a matter of law.

The evidence shows that shortly after plaintiff left Nestle, Maxfield was unable to account for about $15,000 in VISA travelers checks. Maxfield determined, and plaintiff has conceded, that plaintiff took $850 worth of the checks and used them after she left Nestle. Plaintiff also admits that she did not provide an expense report or other documentation to support her claim that it was for reimbursement of expenses she had incurred during her employment. Plaintiff maintained that Werner had approved of her taking the checks while he was on leave. Werner, on the other hand, denied that he would have done so and said he would have expected proper documentation. Maxfield raised the issue with Werner and then telephoned plaintiff about it. Maxfield told plaintiff that Barbour was "crucifying her," challenging Maxfield's loyalty to her, and saying she stole money from the company. Werner used Barbour's name, purportedly to protect Maxfield's relationship with plaintiff, and wrote to plaintiff about the checks. After Werner refused plaintiff's offer to return the money, he considered the matter closed. Maxfield communicated with VISA and completed worksheets in an attempt to account for the missing checks. When Maxfield learned that plaintiff had been selected for the task force, Maxfield went to Werner upset and said something like "she's a thief." Maxfield also contacted Dintaman to object to plaintiff's selection for the task force, in part, because of the lack of control over the $15,000.

On appeal, plaintiff argues that Maxfield's motives and truthfulness are at issue. Plaintiff specifically emphasizes that Maxfield had expressed concern to Werner that she would be demoted if plaintiff returned to Nestle. Plaintiff also claimed that it was possible to account for the bulk of the missing $15,000 in checks. Continuing to assert that Maxfield admitted that her statements were not true, [FN9] plaintiff also contends that malice can be inferred in this case. Actual malice cannot be inferred from evidence of personal spite or ill will by the speaker, but, rather, depends upon a showing that the statements were made with a high degree of awareness of their probable falsity. *See Jacobs,* 573 N.E.2d at 616. Plaintiff failed to make such a showing and summary judgment was proper.

> FN9. Plaintiff relies upon Maxfield's statement during her deposition that she did not have any evidence to connect the $15,000 of missing traveler's checks to plaintiff. As the district court observed, that statement was not an admission since Maxfield testified only that plaintiff had cashed $850.

D. Breach of Contract

**7 Finally, plaintiff argues that she was entitled to judgment in her favor in the amount of $90,000 on her claim for breach of contract. Werner obtained approval from Dintaman and the corporate controller to hire a consultant to participate on the task force in Glendale, California, scheduled to begin on Monday, October 20, 1997. When Werner contacted plaintiff on Thursday, October 16, 1997, plaintiff expressed interest; insisted that her services would be provided through Curry Business Systems, Inc.; and proposed compensation on an hourly basis plus *per diem* expenses. In a telephone conversation that evening, Werner and plaintiff agreed to compensation of $90,000, plus expenses, for the period from October 20, 1997, through March 22, 1998. Werner's e-mail to plaintiff on the morning of Friday, October 17, confirmed the terms and stated, in part: "I will have Jack Wyatt draw up an agreement ... for your participation in Order Entry and Purchasing teams for Nestle." When this understanding became known at Nestle, however, objections to the selection of plaintiff were lodged with Dintaman and she was "deselected" from the task force on Friday, October 17, 1997.

The district court recognized that an enforceable contract consists of mutual assent, generally through offer and acceptance, and consideration. *See Nilavar v. Osborn,* 711 N.E.2d 726, 732 (Ohio App.1998). The district court rejected defendants' contention that plaintiff's acceptance would be her attendance at the kickoff meeting on October 20, 1997. Plaintiff argues that she is entitled to judgment because the undisputed evidence demonstrates mutual assent to the essential terms of the contract. Plaintiff relies upon Dintaman's testimony that, although he did not know if there was a legal contract, he felt that they "owed" plaintiff something at the time. This testimony does not show an enforceable oral contract existed.

The district court found that no contract was formed because a formal document or agreement was intended. "In Ohio, when parties intend that their agreement shall be reduced to writing and signed, no contract exists until the written agreement is executed." *Scarborough Group v. CPT Holdings,* No. 97-3662, 1998 WL 393742, at *3 (6th Cir.1998) (unpublished) (citing *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.,* 375 N.E.2d 410, 413 (Ohio 1978)). While there was evidence that plaintiff and Werner had reached an agreement for her to provide services to Nestle through Curry Business Systems, we find that Werner's confirmation expressed the intention that the agreement be formalized in a written contract. Plaintiff offers no evidence to the contrary, and defendants' withdrawal or repudiation preceded both the execution of a formal agreement and any performance by plaintiff. As such, there was no breach of contract.

AFFIRMED.

R. GUY COLE, JR., Circuit Judge. Concurring in part and dissenting in part.

I concur in Parts I, II. A, B, and C of the majority opinion. However, because I believe there is a genuine issue of material fact as to whether a contract was formed between Curry and Nestle, I respectfully dissent from Part II.D of the majority opinion.

**8 Curry argues that the district court misapplied contract law in rejecting her breach of contract claim. Curry claims that there was never any dispute that she, Werner, and Dintaman believed that she and Nestle had a contract to work on the BEST project, and that there was no evidence that the parties did not intend the contract to be binding until it was in writing. Nestle responds that the court was correct in finding that the parties did not intend that their contract was formed until Nestle wrote up a formal agreement. In addition, Nestle argues two further

theories: first, that Werner's offer was a unilateral contract, binding upon Nestle only when Curry indicated acceptance by attending the first BEST meeting; and second, that the parties did not have a contract because Curry provided no consideration.

The majority concludes that, "[w]hile there was evidence that plaintiff and Werner had reached an agreement for her to provide services to Nestle through Curry Business Systems, we find that Werner's confirmation expressed the intention that the agreement be formalized in a written contract." This conclusion is simply not supported in the record. Curry clearly thought that a contract had been formed. JA 447. Werner testified that he, too, believed that Curry and Nestle had formed a contract. JA 95 ("I felt we had a contract."); JA 96 ("I believe I told [Curry] I felt we had a contract."). Dintaman, the president of Nestle's Frozen Food Division, also thought that the company had a contractual obligation to Curry. JA 562 ("Were we in fact obligated to provide something? Yeah, I told [Werner] I thought we were, to be very, very honest with you.").

The majority erroneously relies on *Scarborough Group v. CPT Holdings,* No. 97-3662, 1998 WL 393742 (6th Cir. June 17, 1998) (unpublished), and general contract principles, to find that the parties did not intend a contract until a written agreement was executed. To reach that conclusion, the majority relies upon the statement of the *Scarborough* court that, "In Ohio, *when the parties intend* that their agreement shall be reduced to writing and signed, no contract exists until the written agreement is executed." *Scarborough,* 1998 WL 393742, at * *3 (emphasis added). In that case, the court refused to enforce an alleged oral agreement where the complaining party admitted in an affidavit that both parties intended that their agreement would not be finalized until after it was reduced to writing and signed. *Id.* That situation is entirely different from the instant case, in which there is no firm evidence that the parties intended not to be bound until they signed a written agreement. Indeed, the statements of Werner and Dintaman indicate that the contrary is true.

The point that the district court and majority convolute is that, under Ohio contract law, a contract is binding even though it is oral (assuming it meets the basic requirements of a contract), *unless* there is clear evidence that the parties intended *not* to be bound until the agreement was reduced to writing and signed. This is made clear by *Berjian v. Ohio Bell Tel. Co.,* 375 N.E.2d 410, 413 (Ohio 1978), the only case cited by the *Scarborough* court for the proposition that parties which *intend* that their agreement will be reduced to writing are not bound until there is a written contract. *See Scarborough,* 1998 WL 393742, at * *3. In *Berjian,* the Ohio Supreme Court held that an advertising agreement between a doctor and a telephone company was binding-- despite the fact that the doctor never signed the agreement--because, as in this case, there was no evidence of the parties' intent to wait until the agreement was in written form in order to be bound by it. *Berjian,* 375 N.E.2d at 413-14.

**9 Given the fact of the instant case that Curry, Werner, and Dintaman all believed that they had reached a contractual agreement, Werner's vague statement that "Jack Wyatt will draw up an agreement," JA 259, upon which the majority relies, is simply not enough to show, as a matter of law, that the parties intended for the agreement to be non-binding until Wyatt actually drew up the agreement. Thus, the district court's grant of summary judgment to Nestle on the contract claim was in error.

For these reasons, I would reverse the district court's disposition of the breach of contract claim and remand it for trial in the district court.

END OF DOCUMENT

United States District Court, N.D. California.

Louis HIXSON, Plaintiff,
v.
COUNTY OF ALAMEDA SHERIFF'S DEPARTMENT, et al., Defendants.

No. C 97-0589 SI.

May 12, 1999.

Rosemarie Kwiatkowski, Esq., Strickland Haapala Altura Harnett Maguire & Thompson, Oakland.

Kristen J. Thorsness, Esq., County of Alameda Counsel's Office, Oakland.

John Houston Scott, Esq., Prentice & Scott, San Francisco.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

ILLSTON, District J.

*1 On May 7, 1999, the Court heard argument on motions filed by defendant County of Alameda Sheriff's Department ("Department") and defendant Sheriff Charles Plummer for summary judgment against plaintiff Louis Hixson. Having carefully considered the arguments of counsel and the papers submitted, the Court hereby GRANTS both motions for summary judgment in their entirety.

INTRODUCTION

Plaintiff Hixson is an Hispanic male. Hixson worked as a sheriff's technician for the Sheriff's Department between 1989 and 1997. During his employment, Hixson was involved in a number of altercations and disciplinary measures that he claims were motivated by racial discrimination, harassment and retaliation in violation of Title VII. On March 22, 1996, Hixson left work on stress leave as a result of what he believed was a discriminatory campaign against him because of his race, and because of his prior opposition to racial discrimination directed at him. One month later, Hixson submitted an extensive report to the Department in which he outlined most of the allegations that form the basis of the instant action. The Department initiated an investigation of Hixson's complaints while Hixson was out on stress leave. Hixson remained on stress leave during the pendency of the investigation, and resigned on March 1, 1997. The Department concluded its investigation of Hixson's complaints in July 1997, finding all but one of Hixson's allegations without merit.

In this action, Hixson claims that he was forced to resign because of intolerable and discriminatory working conditions and that he was "constructively discharged" in violation of Title VII. Hixson also claims that Sheriff Plummer, in his individual capacity, violated his due process rights under the 14th Amendment by failing to afford Hixson substantive and procedural due process prior to Hixson's constructive discharge from his permanent civil service position.

The Court concludes that Hixson's Title VII claims do not survive summary judgment because Hixson has not presented any evidence of discriminatory intent on the part of the Department, and Hixson has not presented specific and substantial evidence of pretext. The Court further concludes that Hixson's due process claims are without merit because they lack both factual and legal foundation.

BACKGROUND

Hixson began working for the Department as a sheriff's technician in May 1989. He first worked in an inmate housing unit control station at North County Jail, where he was responsible for monitoring inmates and jail personnel in the cell area, monitoring the phones and radio, and summoning aid in emergency situations. Hixson Depo., 86:19-87:8, attached to Thorsness Decl. as Exh. A. [FN1] In June 1989, Hixson was cited by the Department for leaving his observation station unmanned and with the door open. Sheriff's memorandum dated June 18, 1989, Thorsness Decl., Exh. H. In approximately February 1990, Hixson transferred to the Department of Animal Control. On April 16, 1990, Hixson was reprimanded for speeding and reckless driving while operating a county vehicle. Sheriff's Reprimand dated April 16, 1990, Thorsness Decl., Exh. J. On June 18, 1990, Hixson was reprimanded for failing to report a change in his home phone number. Sheriff's Reprimand dated June 18, 1990, Thorsness Decl., Exh. L.

FN1. For purposes of simplicity, all future cites to Hixson's deposition are located at Exhibit A of the Thorsness Declaration.

*2 In May 1992, Hixson transferred to the Santa Rita

Jail where he began working the swing shift. In November 1992, while working at the reception counter in the jail lobby, Hixson was cited for being discourteous to a member of the public. Department memorandum dated October 14, 1992, Thorsness Decl., Exh. O.

Hixson transferred to the midnight shift at the beginning of January 1993, where he was assigned to work in the jail lobby. His supervisor, Sgt. Palmer, informed him that he had to shave his beard if he wished to work in a position with public contact. Hixson explained that he had a medically documented skin condition that was aggravated by shaving. Hixson did not shave his beard and was transferred soon thereafter to a position in the housing unit with no public contact. Hixson objected to his transfer explaining to Sgt. Palmer that he was being subject to disability discrimination. Hixson successfully grieved the transfer through his union and Hixson returned to his former position at the jail lobby after several days. *See* Hixson's description of stress injury ("Hixson report"), p. 1-2, Hixson Decl., Exh. A; Hixson Depo., 233:11-235:7, Thorsness Decl., Exh. A. [FN2]

FN2. On April 4, 1996, Hixson submitted to the Sheriff's office 14- page typed single-spaced chronicle of workplace incidents since January 1993. Hixson attached this report to his declaration as Exhibit A, and incorporated the contents of the report into his declaration. Hixson Decl., ¶ 2. Many of the background facts discussed below are taken from Hixson's report, and some are vigorously disputed by defendants. However, since at the summary judgment stage the court does not make credibility determinations and must draw all inferences in the light most favorable to the nonmoving party, Hixson's version of most events is included here except as otherwise noted.

After Hixson's return to the jail lobby position, Hixson asserts that his supervisors, Sgt. Palmer and Lt. Diaz, subjected him to a hostile work environment. Sgt. Palmer would generally ignore Hixson and supervisor Lt. Diaz "would show up at my work station and make statements about how I should not be in the position I now held due to my appearance, and the unprofessional way in which I handled the disagreement." Hixson report, Hixson Decl., Exh. A. Lt. Diaz explained to Hixson that if it were up to him, Hixson "would be terminated." *Id.*

In April 1993, Hixson submitted a request for paternity leave. Lt. Diaz called Hixson into his office regarding this request and said to Hixson that he was not aware Hixson was going to be a father. Hixson responded that he was living with Gaylyn Smith, an African American who was employed by the Department in a different division. Lt. Diaz then said that he knew Smith because she had worked for him in the past, and that he did not believe that Hixson was "good enough for a person of such character, even if she's black." Hixson responded that he did not wish to continue the conversation further due to Lt. Diaz's remark. *Id.* [FN3] Hixson was granted two weeks of paternity leave after the birth of his son. Hixson Depo., 122:18-123:7, Thorsness Decl., Exh. A.

FN3. Hixson did not report Lt. Diaz' remarks to his employer until April 1996, approximately three years later. *See* Hixson report, Hixson Decl., Exh. A. Lt. Diaz denies ever having made these remarks to Hixson. *See* Declaration of Lt. C.D. Dias, ¶ 4.

In October 1993, Hixson transferred from the midnight shift to the day shift to escape the strained work environment under Lt. Diaz and Sgt. Palmer. *Id.*, p. 3. In his new shift, Hixson's supervisors were Sgt. Bordes and Sgt. Wilcox. Hixson explains that his problems under this new shift began when he complained about a co-worker's habit of smoking cigarettes inside the jail. No action was taken in response to Hixson's complaints, and the co-worker continued smoking in the jail. *Id.*

*3 Between December 1992 and November 1993, Hixson took 22.5 days of sick leave, 91% of which were in conjunction with days off. Departmental memo re Hixson's use of sick leave, Boyer Decl., Exh. C. After reviewing his attendance record, the Department concluded that Hixson's use of sick leave was "abusive." *Id.* In November 1993, Hixson was given a poor evaluation report based on his attendance record. Sgt. Bordes and Sgt. Wilcox asked Hixson to sign the evaluation, but Hixson refused to do so without having his union representative first review the evaluation. Sgt. Wilcox then "became angry and stated that how I was such a poor, poor, employee, and if he was asked, he would recommend my termination." Hixson report, p. 3, Hixson Decl., Exh. A.

On December 11, 1993, Hixson was summoned to Sgt. Bordes' office. Sgt. Bordes explained to Hixson that he had received complaints about Hixson from "three or four deputies." *Id.*, p. 4. Sgt. Bordes told Hixson that the complainants stated that Hixson was "incompetent," that he "d[id] not get along well with

others," and that Hixson should be "terminated." *Id.* Hixson responded that he was having "personality conflicts" with several deputies who were treating him "discourteously." *Id.* One of the deputies with whom he was having a personality conflict was the same co-worker about whose smoking habits Hixson had complained. *Id.* Sgt. Bordes ended the conversation with an order that Hixson get along with his co-workers. *Id.*

On December 17, 1993, Hixson was cited for a number of performance issues. *See* Wilcox memorandum dated December 17, 1993, Thorsness Decl., Exh. S. Hixson was cited for (1) having his head lowered below window-level at his work station while talking on the phone with his wife; (2) excessive use of the "silence" button without a supervisor's permission, in violation of an earlier warning; (3) having a radio/cassette player with headphones on the counter while working, in violation of an earlier warning; (4) unprofessional behavior toward a jail nurse; (5) failing to allow a deputy and a visitor prompt entry into the housing control unit; (6) being out of uniform; and (7) failing to answer phones, open doors, and respond on the radio in a timely manner. [FN4] *Id.*

> FN4. Hixson disputes some of the above incidents and claims that the citation was issued for retaliatory reasons. *See* Hixson report, pages 3-5.

In April 1994, Hixson transferred to a swing shift "to avoid further pressures from Sgts. Bordes and Wilcox." Hixson report, p. 6, Hixson Decl., Exh. A. In December 1994, Hixson interviewed for a provisional position as dispatcher. Hixson did not receive the promotion and was not told the reason why he was not chosen. Hixson Depo., 137:12-143:21. Of the six individuals selected, one was an Hispanic female and another was an African-American male. [FN5] Boyer Decl., ¶ 3. One of the white males who was promoted, Charles Bearden, had a telecommunications license from the Federal Communications Commission (FCC) and an AA degree. Hixson Depo., 141:3-142:11.

> FN5. Hixson subsequently failed the Alameda County dispatcher test in December 1995. Hixson Depo., 131:17-132:7.

***4** In September 1994, Hixson had a verbal altercation with deputy Martinez. Hixson had not met Martinez prior this exchange. Martinez began "interrogating" Hixson about his absence the previous day. During an exchange of words, Martinez told Hixson that his attendance would improve if he stopped using drugs, and that Hixson had "better be cool and ride right." Martinez then gave him the "finger" and left. Hixson report, pages 6-7, Hixson Decl., Exh. A.

Following this interaction, Hixson met with Sgt. Cahill to discuss the incident. Hixson explained that this incident as well other incidents of harassment by Sgt. Bordes, Sgt. Wilcox, Lt. Diaz, and other staff had demoralized him and caused him extreme emotional and psychological suffering. Sgt. Cahill told Hixson that she would talk to deputy Martinez and that she would get back to Hixson. When Hixson later approached Sgt. Cahill and inquired about the results of her discussion with deputy Martinez, Sgt. Cahill became irritated and told Hixson, "I handled it. Don't worry about it." *Id.*, p. 7; Hixson Depo., 269:10-270:25, Thorsness Decl., Exh. A

In January 1995, Hixson and two deputies, Ortman and Anderson, were involved in an incident in which an inmate was accidentally left in an interview room for six hours. Hixson and the two deputies were cited for this incident. Hixson grieved the disciplinary action against him, asserting that he was not negligent in leaving the inmate unattended in the interview room because of various extenuating circumstances, including a power failure due to a storm. Hixson's grievance was unsuccessful and the disciplinary action was upheld. Hixson Depo., 272:4-24, Thorsness Decl., Exh. A.

On February 19, 1995, Hixson was working in the visiting area of the Santa Rita Jail, operating a set of visiting booths on a busy Sunday afternoon. During this time, a disturbance erupted involving inmates and their visitors who were upset about the curtailment of their visitation time. Hixson claims that he shortened inmate visitation times on direct orders from Sgt. Reasoner. Following a series of inmate and public complaints about the visiting room incident, the Department began an investigation of the incident headed by Sgt. Reasoner. Elliot Depo., 57:22-25, Thorsness Decl., Exh. 4.

During the pendency of Sgt. Reasoner's investigation, several incidents occurred involving interactions between Hixson and co-workers. On February 21, 1995, a co-worker, deputy Courand, said to Hixson, "You are still working here? I thought you'd been in so much trouble you would be terminated." Hixson responded that he "had always

been a quality employee." Deputy Courand countered, "I don't agree." Hixson report, p. "7 1/2 ," Hixson Decl., Exh. A; Hixson Depo., 271:12-26, Thorsness Decl., Exh. A.

A second incident occurred on February 28, 1995, when Sgts. Reasoner and Bordes entered Hixson's work station, inquired aggressively about a staffing snafu, and proceeded to search Hixson's personal backpack. After his supervisors left, Hixson talked to two female co-workers who indicated that their units had not been searched in such a manner. Hixson report, p. 12, Hixson Decl ., Exh. A.

*5 On April 17, 1995, Sgt. Reasoner concluded his investigation of the visiting room incident, and found that Hixson had been "negligent and inefficient"in the execution of his duties. Investigative report of Sgt. Reasoner dated April 17, 1995, p. 9, Reid Decl., Exh. 3. Sgt. Reasoner's investigative report was forwarded to Sheriff Plummer, who approved the findings, noting that Hixson's version of the events was contradicted by both civilian and departmental eyewitnesses. *See* Notice of Proposed Reduction of Salary Step dated August 4, 1995, Thorsness Decl., Exh. V. Based on the visiting room incident, Sheriff Plummer recommended a demotion of one salary step for thirteen pay periods. *Id.* Hixson grieved the proposed demotion unsuccessfully, and on September 21, 1995, Hixson was demoted for thirteen pay periods. *See* Notice of reduction of salary step dated September 21, 1995, Reid Decl., Exh. 7. Hixson appealed the demotion to arbitration.

In connection with this disciplinary action, Hixson was also placed on a six- month performance improvement plan. *See* Memorandum re: Performance Improvement Plan dated January 8, 1996, Thorsness Decl., Exh. X. Under this plan, Hixson was placed under daily observation by Sgt. Gonzales, and received monthly counseling sessions both in private and in front of co-workers and the public. Hixson Depo., 187:2-9, Thorsness Decl., Exh. A. Hixson was also inspected regarding his "personal hygiene" and asked "pretty much daily" for medical documentation regarding the need for his beard. *Id.*

On February 2, 1996, Hixson received a phone call on duty from sheriff's technician Roy. Hixson answered the phone identifying himself by his first name, "Louis." After discussing inmate personnel matters, Roy told Hixson, "I understand why you answer the telephone using your first name. It is because your last name, Hixson, has been so tarnished here that you are forced to get respect." Hixson report, p. 13, Hixson Decl., Exh. A; Hixson Depo., 283:15- 284:16. Roy was eventually disciplined for making these comments to Hixson. Hixson Depo., 285:4-23.

On March 21, 1996, Hixson filed a Workers' Compensation industrial injury claim. Workers' Compensation claim, Reid Decl., Exh. 9. On the claim form, Hixson described his injury as "maintaining mental and psychological duress preventing job performance--maintaining harmful schemes and lies toward me." *Id* . On March 22, 1996, Hixson left work on stress leave. Hixson Depo., 213:2-4. [FN6] On March 25, 1996, Hixson sought medical treatment for his work-related stress at Kaiser Occupational Medical Clinic. He was seen by Dr. Harry Simms, who diagnosed him with "situational stress reaction." Patient progress record, Reid Decl., Exh. 8. Dr. Simms referred Hixson to an industrial psychologist, Dr. James Wilson. *See* First Report of Occupational Injury dated March 25, 1996, Thorsness Decl., Exh. HH. Hixson was seen by Dr. Wilson on April 4, 1996. Dr. Wilson diagnosed Hixson with "adjustment order and depressive mood" and declared Hixson unable to work until May 5, 1996. *See* Industrial Injury Report dated April 4, 1996, Thorsness Decl., Exh. II. Hixson continued under Dr. Wilson's care through January 1997. Dr. Wilson kept Hixson off work through April 1, 1997, and at no time indicated that modified work would be appropriate for Hixson. *See* twelve industrial injury reports between April 4, 1996 and January 23, 1997, Thorsness Decl., Exh. II.

> FN6. While on stress leave, Hixson received state disability benefits for a twelve month period between March 1996 and March 1997. *Id.*, 213:5-18.

*6 On April 9, 1996, a jail employee, Edgardo Vallesteros, phoned Hixson's home and spoke with Hixson's partner, Gaylyn Smith. Vallesteros asked Smith why Hixson was not at work. Vallesteros informed Smith that he had read that Hixson was off work due to stress, and then asked Smith if Hixson "was just sick of the job." Hixson report, p. 13, Hixson Decl., Exh. A. The phone call distressed both Smith and Hixson and Hixson phoned in a complaint to Lt. Roten. *Id;* Hixson Depo., 286:1-287:2.

During this time, Hixson wrote a 14 page single-spaced letter outlining the basis for his need for stress leave. *See* Hixson report, Hixson Decl., Exh. A. In

his report, Hixson outlined most of the events described herein, and additionally requested a transfer "to another department or be retrained into another position with the County outside of the Sheriff's Department." *Id.*, at cover page. [FN7] Hixson sent a copy of this report to his Workers' Compensation representative, and also sent a copy to Sheriff Charles Plummer, which Plummer received on April 22, 1996. *See* Hixson's industrial injury report (dated received at Sheriff's Department on April 22, 1996), Thorsness Decl., Exh. BB.

FN7. At no time did Hixson fill out a departmental transfer request form as required by department regulations. *See* Department Transfer Policy and Procedure, Ostlund Decl., Exh. B.

On the afternoon of April 24, 1996, while Hixson was at home, he heard a sudden loud noise outside. He went outside and noticed that his house was dented and an eight-inch long metal cylinder was on the ground next to the house. Hixson Depo., 290:3-295:15. On April 26, 1996, at approximately 11:30 at night, Hixson was at home and again heard a loud noise outside. Hixson and Smith, his partner, went outside to investigate and noticed new dents in Smith's car, which was parked in the driveway. Beside the car was scattered debris, in the form of rocks and dirt. *Id.*, 295:16-299:7. No other similar incident had ever happened to Hixson while residing at his trailer park home. *Id.*

During this time, Hixson also received two anonymous phone calls. In the first incident, the caller stated that Hixson was "a f-ing snitch," and in the second incident, the caller told Hixson, "wait until you get back." Hixson's supplemental report, Hixson Decl., Exh. B. Hixson did not recognize the caller's voice in either incident. Hixson Depo., 300:26-301:4. Hixson summarized these four incidents in a supplemental report which he mailed to Sheriff Plummer in late April or early May. *Id.*, 289:24.

On May 2, 1996, Dr. Wilson, Hixson's treating psychologist, wrote a letter to Sheriff Plummer about the incidents at Hixson's home. *See* Dr. Wilson letter dated May 2, 1996, Reid Decl., Exh. 11. Dr. Wilson advised Plummer that Hixson "has recently sought medical assistance in coping with the stress-related effects of ongoing harassment at work," and that the incidents at Hixson's home were "of concern" to Dr. Wilson. *Id.* Dr. Wilson concluded by stating, "[p]lease advise me of what you may be able to do to assist in this matter." *Id.*

*7 On May 3, 1996, Plummer wrote to Hixson and acknowledged receipt of Hixson's first report. *See* Plummer letter, Reid Decl., Exh. 10. In the letter, Plummer wrote that Hixson had outlined "serious allegations of discrimination and harassment," that Hixson's report was being forwarded to the Division of Internals Affairs (IA) for investigation, and that Hixson would be contacted shortly by IA. *Id.* Plummer forwarded the report to IA Captain Elliot for assignment to an investigator.

Hixson was seen by the Department's designated workers' compensation physician, Dr. Lawrence Petrakis, on May 16, 1996. Dr. Petrakis produced a 14 page report in which he concluded that Hixson was suffering from "adjustment disorder with mixed emotional features" arising from disciplinary actions taken against him at work. Medical report of Dr. Petrakis, p. 13, Reid Decl., Exh. 13. Dr. Petrakis noted that because Hixson believed he was the subject of harassment and discrimination at work, it was unlikely that Hixson could return to his position as a sheriff's technician at Santa Rita, but that Hixson could probably work as a sheriff's technician at another facility with psychiatric support. *Id.*

On June 10, 1996, Captain Elliot assigned the investigation of Hixson's 14 page report to deputy Clouse an investigator with Internal Affairs. Clouse Depo., 20:16-22, Reid Decl., Exh. 19. Clouse contacted the subjects involved in the report and requested written responses to the allegations contained in Hixson's report. Clouse Depo., 49:21-51:20. The IA Department chose not to contact Hixson for an interview because they believed the report to be sufficiently thorough in its detail. *Id.*, 60:23-61:4; Elliot Depo., 143:9- 19. Clouse compiled the responses and finished his report in approximately September 1996. [FN8] Administrative investigation report, Reid Decl., Exh. 20; Elliot Depo., 133:17-18. Captain Elliot then sent Clouse's report through the chain of command to each of the subject's supervisors for review and recommendations for discipline. The report was then sent back up the chain of command for review of any comments made along the line, to the division commander, and back to Captain Elliot. Captain Elliot presented the final report to Sheriff Plummer who then approved of the findings and recommendations. Issuance of the final disposition letter to Hixson was delayed until any proposed disciplinary action resulting from the investigation had been administratively reviewed. Elliot Depo., 144:4-19. The investigation resulted in the discipline

of sheriff's technician Roy for rude and discourteous behavior toward Hixson, and found Hixson's remaining allegations without merit. As soon as Roy had been administered his discipline, Hixson was mailed a final disposition letter explaining the results of the investigation on July 11, 1997. *Id;* letter to Hixson dated July 11, 1997, Thorsness Decl., Exh. DD.

> FN8. In his report Clouse summarized Hixson's complaints and the responses from the nine individuals who were the subjects of Hixson's allegations. Clouse's 17 page report reviewed the eighteen incidents Hixson complained of dating back to 1993, and determined that only deputy Roy was responsible for misconduct. Clouse concluded:
> In my opinion the 14 page letter received from Hixson was his attempt to tell "his side of the story" for the stress he alleges has developed over the years he has worked for the Sheriff's Department. In talking to various parties involved in this investigation I was given the impression that Hixson created a lot of the problems himself because of his treatment of other workers. He would alienate most everyone he worked with in some way or another.

On June 21, 1996, Hixson went to the Sheriff's office to examine his personnel files. On his way into the building, he ran into Undersheriff Watson. Hixson told Watson that he was being harassed and discriminated against and requested to speak directly with Sheriff Plummer. Hixson Depo., 321:16-322:19. Watson told Hixson that Plummer was busy and that Hixson would be contacted. *Id.* Hixson then proceeded to Sheriff's Plummer's office where he told the secretary that he wished to examine his personnel files. Hixson also made other attempts to talk directly with Sheriff Plummer by phone, but he was generally told by staff told that calls were not transferred directly to the Sheriff. *Id.*, 324:2-326:9.

***8** Hixson's appeal of his demotion was arbitrated on July 25, 1996. At the hearing, the Department decided to rescind Hixson's demotion and provide full backpay. Elliot Depo, 59:25-26, Reid Decl., Exh. 4; Hixson Depo., 278:17- 2281:20, Thorsness Decl., Exh. A.

On September 10, 1996, Hixson filed a Charge of Discrimination with the EEOC, alleging race and disability discrimination. *See* EEOC Charge of Discrimination, Hixson Decl., Exh. F. Hixson filed his original complaint in this action in *pro per* on February 19, 1997. On March 1, 1997, Hixson tendered his written resignation from the Sheriff's Department. *See* resignation letter dated March 1, 1997, Thorsness Decl., Exh. LL.

Hixson filed his Second Amended Complaint on October 3, 1997. In his complaint, Hixson brings a Title VII claim against the Department based on discrimination, harassment and retaliation. Hixson also brings a constitutional claim under 42 U.S.C. § 1983 alleging that Sheriff Plummer violated his 1st Amendment right to free speech and his 14th Amendments rights to due process and equal protection. [FN9]

> FN9. In his opposition, Hixson voluntarily dismisses his 1st Amendment claim and makes no mention of his equal protection claim.

LEGAL STANDARD

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

In a motion for summary judgment, "[if] the moving party for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact, "the burden of production then shifts so that "the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial." ' *See T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 317 (1986)).

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. *See T.W. Electric,* 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348 (1986)); *Ting v. United States,* 927 F.2d 1504, 1509 (9th Cir.1991). The evidence presented by the parties must be admissible. Fed.R.Civ.P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Falls Riverway Realty, Inc. v.*

City of Niagara Falls, 754 F.2d 49 (2d Cir.1985); *Thornhill Publ'g Co., Inc. v. GTE Corp.,* 594 F.2d 730, 738 (9th Cir.1979). Hearsay statements found in affidavits are inadmissible. *See, e.g., Fong v. American Airlines, Inc.,* 626 F.2d 759, 762-63 (9th Cir.1980).

DISCUSSION

1. Title VII discrimination/harassment/retaliation against the Department

***9** Hixson contends that he was subjected to a "continuing campaign of discriminatory, harassing, and retaliatory acts by defendants beginning in 1993 and continuing through his constructive discharge in March 1997." Hixson's opposition, 16:6-9. [FN10] The Department responds that Hixson's Title VII claims fail because he cannot show that any of the incidents in question were motivated by racial animus toward Hixson, or that the Department's legitimate reasons for its conduct toward Hixson were pretextual. [FN11]

> FN10. Hixson's complaint contains separate causes of action for racial discrimination and harassment under Title VII (first cause of action) and for retaliation under Title VII (second cause of action). Although in his opposition papers and at oral argument plaintiff focused on retaliation as the "gravamen" of his lawsuit ("that he was constructively discharged in retaliation for opposing discrimination in the workplace," opposition at 2:3-4), all three theories will be considered here.

> FN11. The Department also argues that plaintiff's claims are mostly time-barred because the Court may not consider those incidents that occurred more than 180 days prior to the filing date of Hixson's administrative charge. Hixson responds that he alleges a "continuing violation" of Title VII and therefore the Court may consider all related incidents of discrimination, harassment and retaliation irrespective of the filing date of his administrative charge. The Court need not address these statute of limitations arguments because the Court finds no Title VII violation even when all the incidents dating back to January 1993 are considered.

The Court agrees with the Department. To avoid summary judgment on his Title VII claims, Hixson must offer 1) direct evidence of discrimination, or 2) "specific and substantial evidence" that the Department's proffered reasons for its conduct were not reliable. *Godwin v. Hunt Wesson,* 150 F.3d 1217, 1219, 1221 (9th Cir.1998). Hixson has offered no appreciable evidence of discriminatory motive, and has failed to come forward with specific and substantial evidence to show that the Department's proffered motives were not its actual motives.

Hixson relies on a long list of work-related incidents between 1993 and 1996 to support his Title VII claims. A searching review of these incidents, however, does not reveal any evidence of *racial* animus directed at Hixson, but only a difficult work relationship between Hixson and his co-workers and supervisors. Whether the strain in the employment relationship was due more to Hixson or to the Department's employees is of little relevance to this Court's inquiry. Title VII is concerned solely with whether impermissible factors--in this case racial bias--animated the Department's conduct toward Hixson. The Court concludes that Hixson's Title VII claims do not survive summary judgment because Hixson has not met his burden of establishing a triable issue with respect to either discriminatory intent or pretext.

The first workplace incident occurred in January 1993. Hixson was transferred out of a jail lobby position with public contact because of his beard. He successfully grieved the transfer and resumed his previous position after several days. Hixson presents no direct or circumstantial evidence to demonstrate that the transfer, or his opposition thereto, were related to Hixson's race, and Hixson presents no evidence that the Department's basis for originally transferring Hixson was somehow pretextual.

The second incident involved Lt. Diaz' comment in April 1993 that Hixson was not good enough for his partner "even if she is black." While this is indisputably a racially motivated comment, the comment was not directed at Hixson, but at his partner. Neither Lt. Diaz' comment nor Hixson's response are actionable under a disparate treatment or retaliation theory because the comment was not followed by any adverse employment action. The comment is also not actionable under a hostile work environment claim because even if the Court were to construe the comment as directed at Hixson, this was the only such racial comment in Hixson's entire tenure with the Department. This isolated offensive utterance falls considerably short of the showing necessary to demonstrate that the Department's racial harassment "was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Ellison v. Brady,* 924 F.2d 872, 875 (9th Cir.1991).

*10 The next incident occurred in December 1993 when Hixson claims that his complaints about a co-worker's smoking habits were ignored by his supervisor, Sgt. Bordes. Hixson presents no evidence to suggest, however, that this interaction with Sgt. Bordes was in any way related to Hixson's race.

In December 1994, Hixson was passed over for a provisional promotion to the position of dispatcher. Hixson does not present any evidence that the Department's failure to promote Hixson was racially motivated. In fact, of the six individuals promoted, one was an Hispanic female and another was an African-American male. [FN12]

> FN12. In his complaint, Hixson alleges that a less qualified white male was promoted over him to the provisional dispatcher position. *See* First Amended Complaint, ¶ 12. Hixson does not appear to continue this argument in his opposition brief, and presents information regarding the qualifications of only one white male who was promoted, Charles Braden. Hixson Depo., 141:3-142:11. According to Hixson, Braden had an FCC telecommunications license to operate telecommunications equipment and an AA degree. *Id.* Hixson did not have an FCC licence, and his educational credentials were limited to a GED. *Id.*, 68:21-24. The Department's decision to promote Braden over Hixson thus appears reasonable in light of Bearden's superior training relevant to the duties of dispatcher.

Hixson further claims that the reprimand he received in January 1995 for leaving an inmate in a cell for six hours unattended was motivated by racial animus. The Department responds that the reprimand was in response to inadequate work performance, and that the reprimand was sustained despite Hixson's grievance of the matter. This incident does not present any misconduct actionable under Title VII. The two deputies who were involved with Hixson in the incident, Ortman and Anderson, were similarly reprimanded, and Hixson has presented no evidence that Ortman and Anderson were also Hispanic. *See* Hixson Depo., 272:4-14. The fact that all of the employees involved in the incident were equally disciplined without regard to their race is inconsistent with the claim that Hixson's discipline was racially motivated, or that the Department's basis for discipline was pretextual.

The visiting room incident on February 19, 1995 that led to Hixson's temporary demotion similarly lacks any evidence of racial animosity or retaliatory intent toward Hixson. Hixson was demoted for what the Department determined to be inefficiency and neglect of duty. Upon investigating the incident, the Department concluded that Hixson's version of that day's events was inconsistent with the eyewitness testimony of both civilian visitors and Department employees. *See* Elliot Depo., 59:8-11, Reid Decl., Exh. 4; Notice of Proposed Reduction of Salary Step dated August 4, 1995, Thorsness Decl., Exh. V. Under these circumstances, the Department reasonably relied on the findings of Sgt. Reasoner's investigation in its decision to discipline Hixson. Although the demotion was rescinded with full backpay during arbitration, this does not mean that the Department's original decision to demote Hixson arose from racial animus or was otherwise a pretext for discrimination or retaliation. [FN13]

> FN13. Similarly, the decision to assign the investigation to Sgt. Reasoner does not, without more, rise to the level of specific and substantial evidence of pretext. Hixson presents no evidence that the assignment of the investigation to Sgt. Reasoner was prohibited by Department policy, or that the investigation was unfair.

On February 28, 1995, Hixson's supervisors, Sgt. Bordes and Sgt. Reasoner, berated Hixson at his work station and inspected his backpack. The Department provided the following explanation for this conduct: Sgts. Bordes and Reasoner were angry with Hixson because he committed a staffing error that caused delays and problems at the jail, and they searched Hixson's backpack because they were searching for pillows and blankets, a common practice at the jail. Clouse Depo., 93:14-24. Supp. Thorsness Decl., Exh. D. Hixson responds that he questioned two female sheriff's technicians who informed him that his was the only unit in the area to be "harassed" in this manner. Hixson report, p. 12, Hixson Decl., Exh. A. None of Hixson's evidence suggests that racial bias animated his supervisors' actions in this incident. Even if the Court were to assume that Hixson showed pretext here, Hixson has not shown that the search of his backpack constituted a "tangible employment action" that would sound in Title VII. *See Burlington Industries. Inc. v. Ellerth,* 118 S.Ct. 2257, 2268 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

*11 Between September 1995 and March 1996, Hixson was subject to monthly performance

evaluations pursuant to his Performance Improvement Plan. Hixson found the evaluations to be embarrassing at times because they were sometimes administered in front of others. While this practice may evidence a certain measure of bad judgment, Hixson has presented no evidence that this methodology was used because of racial animus, or for any reason beyond the constructive purposes underlying the Performance Improvement Plan.

After Hixson went on stress leave on March 22, 1996, his home and car were vandalized and he received two threatening phone calls at home. These anonymous incidents, while regrettable, do not find their remedy under Title VII since there is no evidence that these incidents were tangible employment actions attributable to the Department.

There is similarly no evidence that the Department's lack of contact with Hixson while he was on stress leave was tainted with discriminatory intent, and there is no basis to construe the lack of contact as an adverse employment action. From the time Hixson submitted his 14 page report in April 1996 through the time of his resignation in March 1997, the Department was conducting its internal investigation of Hixson's complaints. Hixson's complaint outlined eighteen incidents going back over three years and involving numerous Department employees. It is reasonable to assume that the investigation would have taken some time to complete, and given the extensive review procedures employed by the Department, the delay in concluding the investigation was explained by the bureaucratic manner in which the Department investigated the complaint, came to its conclusions, circulated the findings, integrated the feedback, reviewed the proposed discipline against sheriff's technician Roy, and issued its notice of final disposition. The Department explains that the status of the investigation was kept confidential until Roy had an opportunity to appeal the proposed disciplinary action against him. Consistent with this explanation, Hixson was informed of the results of the investigation as soon the discipline against Roy had been administered. Hixson has not presented any evidence to show that the Department's explanation for its delay in contacting Hixson was pretextual.

Hixson also claims that the Department's failure to transfer him to another department while he was on stress leave violated Title VII. The Court disagrees. Hixson was kept out of work on stress leave for twelve consecutive months by Dr. Wilson, his primary treating physician. Dr. Wilson diagnosed Hixson with an adjustment disorder and depression. At no point did Dr. Wilson ever indicate that Hixson's condition had improved to the point of permitting Hixson to return to work on any modified basis, and Hixson himself never completed a departmental transfer request form.

While Dr. Wilson did indicate in his letters that he believed Hixson's condition arose because of alleged discrimination and harassment at the workplace, the Department responded appropriately by examining those allegations in an internal investigation. It was certainly within the realm of the Department's options to attempt to transfer Hixson to another department with psychiatric support as noted by Dr. Petrakis, the Department's medical examiner. *See* Dr. Petrakis' medical report, p. 13, Reid Decl., Exh. 13. However, the Department's inaction under these circumstances did not rise to the level of an adverse employment action remediable under Title VII.

***12** Finally, Hixson claims that he was "constructively discharged" when he resigned in March 1997. Constructive discharge is actionable under Title VII where a reasonable person in Hixson's position "would have felt that he was forced to quit because of intolerable and *discriminatory* working conditions." *Satterwhite v. Smith,* 744 F.2d 1380, 1381 (9th Cir.1984) (emphasis added). Hixson has made no showing that his working conditions were the result of race discrimination. While Hixson's evidence suggests that he was not liked by a number of his co-workers and supervisors, Hixson has not shown that dislike for him was because of his race. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742 (1993). Accordingly, Hixson has failed to establish a triable issue of fact that his resignation on March 1, 1997 amounted to a constructive discharge in violation of Title VII.

In summary, Hixson has failed to show any evidence of discriminatory or retaliatory intent on the part of the Department, and Hixson has not come forward with specific and substantial evidence of pretext. Although Hixson claims that the disciplinary actions against him only began after he started to complain of workplace discrimination in 1993, in fact, Hixson received his first citation within a month of beginning his employment with the Department in 1989, and Hixson continued to receive citations and reprimands at regular intervals throughout his employment with the Department. In addition to his inconsistent work performance, Hixson also had an attendance problem and was found to have "abused" the Department's sick

leave policy. In light of his work performance history, Hixson has not shown that the citations, reprimands, demotion and performance plan were motivated by retaliatory or discriminatory motives as opposed to good faith employment decisions aimed at addressing perceived deficiencies in Hixson's performance at work. Moreover, while it is likely that Hixson's work environment was indeed strained, there is no evidence that the strain was due to any reasons proscribed by Title VII.

2. Due Process claims against Sheriff Plummer

A. Substantive Due Process

Hixson argues that his substantive due process rights were violated by Sheriff Plummer's arbitrary and capricious constructive discharge of Hixson and the resulting termination of his property interest as a permanent civil servant. The Department responds, *inter alia,* that Sheriff Plummer is entitled to qualified immunity because the law has not been clearly established in this Circuit that a discharged public employee can maintain a substantive due process claim based upon an arbitrary and capricious discharge from public employment. The Court agrees with Sheriff Plummer.

The defense of qualified immunity protects "government officials ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The rule of qualified immunity " 'provides ample protection to all but the plainly incompetent or those who knowingly violate the law." ' *Burns v. Reed,* 500 U.S. 478, 494-95 (1991) (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)). "Therefore, regardless of whether the constitutional violation occurred, the [official] should prevail if the right asserted by the plaintiff was not 'clearly established' or the [official] could have reasonably believed that his particular conduct was lawful." *Romero v. Kitsap Department,* 931 F.2d 624, 627 (9th Cir.1991). Furthermore, "[t]he entitlement is an immunity from suit rather than a mere defense to liability; ... it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).

***13** The Court concludes that Sheriff Plummer is entitled to qualified immunity from suit based on a substantive due process claim. During the time period of Hixson's "constructive discharge," the Ninth Circuit had not established an entitlement to substantive due process protection for public employment. *See Lum v. Jensen,* 876 F.2d 1385, 1389 (9th Cir.1989); *Portman v. County of Santa Clara,* 995 F.2d 898, 908 (9th Cir.1993).

B. Procedural Due Process

Hixson argues that Sheriff Plummer did not afford him due process prior to his "constructive discharge" from his permanent civil service position. Hixson does not cite any case law from this circuit (or any other circuit) that imposes a due process requirement on the employer prior to the resignation of a public employee who later characterizes the resignation as a "constructive discharge." While it is not impossible to imagine a factual scenario that could support such a claim, the instant facts clearly do not. Hixson had a full opportunity to grieve his disciplinary actions through the administrative process, and his complaints of harassment were duly investigated by the Department's internal affairs department. The Court has not found sufficient evidence to support Hixson's assertion that he was constructively discharged in violation of title VII, and accordingly it would be illogical to require Sheriff Plummer to have provided Hixson with fair notice and hearing prior to Hixson's unilateral decision to resign.

CONCLUSION

For the foregoing reasons, the Court GRANTS the County of Alameda Sheriff's Department's motion for summary judgment with respect to Hixson's Title VII claims in his First and Second Causes of Action. The Court also GRANTS Sheriff Plummer's motion for summary judgment with respect to Hixson's § 1983 claims in his Third and Fourth Causes of Action.

IT IS SO ORDERED.

END OF DOCUMENT

(Cite as: 89 F.3d 837, 1996 WL 346812 (6th Cir.(Ohio)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Alison WARD, Plaintiff-Appellant,
v.
CITY OF STREETSBORO; Sally Hensel, Mayor Gerald Vicha, Fire Chief, Defendants-Appellees.

No. 95-3838.

June 24, 1996.

On Appeal from the United States District Court for the Northern District of Ohio, No. 94-00643; David D. Dowd, Jr., District Judge.

N.D.Ohio

AFFIRMED.

Before: KENNEDY, JONES and CONTIE, Circuit Judges.

PER CURIAM.

****1** Plaintiff-appellant, Alison Ward, appeals the judgment for defendants- appellees, City of Streetsboro; Sally Hensel, Mayor; and Gerald Vicha, Fire Chief, in this Title VII action alleging that plaintiff was subjected to a hostile work environment, sexual harassment, and retaliation.

I.

In October 1991, plaintiff began her employment with the city of Streetsboro as a part-time fire fighter-emergency medical technician. In July 1992, she alleges that a series of harassing events began to occur. These events included being accused of having an affair with another fire fighter, receiving letters of a threatening nature, receiving a dead rat in her home mailbox, receiving numerous hang-up telephone calls at both her home and the fire station, having water placed in her fire boots, having her name whited out of the department sign-up book, having her name tag torn off her departmental mailbox, having eggs put in her fire boots, having her name blackened out on a department log sheet, having her portable radio taken without her consent and returned two days later with the words "ha, ha" written on it, having eggs placed in her fire gloves, and having her department uniform shirt, badge, and fire gloves taken. The person or persons who committed these actions is still unknown.

Fire Chief, Gerald Vicha, became aware of these harassing events about the third or fourth week of September 1992 when he was told by another fire fighter, Dave Fronek, that he received a threatening note in his mailbox. Chief Vicha learned plaintiff had also received a threatening note and of other events. The fire chief took various remedial actions; however, the perpetrator of the events was not found. Although the fire department was loaned a surveillance camera and purchased a camcorder with a telephoto lens, neither of these was used to try to catch the alleged perpetrator.

In late March 1993, Fire Chief Vicha drove plaintiff to the hospital after he learned that she was suffering from abuse of alcohol and drugs. Thereafter, he decided to place plaintiff on administrative leave because he was concerned that she would not be able to perform her duties, which would not only present a danger to herself, but also to other fire fighters and the public as well. Plaintiff was placed on administrative leave and told she could return to work if she provided a doctor's statement relating to her fitness and underwent a physical examination. Plaintiff was also asked to undertake a polygraph test in order to determine the origin of the harassing events. The fire department felt that it was necessary to clarify that the crimes or acts that she had alleged, in fact, had taken place. Various other fire fighters were also subjected to polygraph tests.

Plaintiff submitted a letter from her doctor stating she could return to work, but defendants initially would not accept it because it was not written on stationery with the doctor's letterhead. Once she submitted an official letter, she returned to work. When the investigation into these alleged events was finished, nothing had been ascertained other than that Fronek admitted that he had written the threatening letter to himself. He was ultimately fired.

**2 Plaintiff finally agreed to undertake a polygraph test, and she failed portions of this test. When the polygraph examiner asked her whether she knew who committed any of the acts, she answered "no." The polygraph examiner concluded that this response showed deception. He also concluded that her response showed deception when she answered "no" when asked whether she had committed any of the acts herself. Finally, he concluded that she was being deceptive in her response to whether she was telling the entire truth regarding the case in question and answered "yes." Fire Chief Vicha indicated that he suspected plaintiff might be doing the acts of harassment to herself.

There was also evidence that plaintiff refused to cooperate in the investigation. During the investigation, she was asked to report her complaints to the Streetsboro Police Department, but after an initial meeting with an officer, she indicated that she did not wish to continue to do so. Also, she initially refused to take the polygraph examination. Finally, she contended she was threatened by a non-officer of the Streetsboro Fire Department in December 1993, but indicated she would not reveal his identity even if ordered to do so by the court.

On March 28, 1994, plaintiff filed a complaint in the United States District Court for the Northern District of Ohio. The complaint alleged violations of § 703(a)(1) and § 704(a) of Title VII of the Civil Rights Act of 1964. The complaint alleged that defendants had unlawfully discriminated against plaintiff in her employment (1) by failing, upon receiving notice of these alleged harassing incidents, to take prompt and appropriate action to eliminate the harassment of plaintiff because of her sex, and (2) by placing plaintiff on administrative leave, requiring her to take a polygraph and other tests, and delaying her return to active duty in retaliation for her opposition to sexual harassment.

On May 22, 1995, the district court issued a judgment granting summary judgment to defendants on all claims in the case. Plaintiff filed a motion to alter or amend the judgment. On July 5, 1995, the district court issued an order denying this motion. On August 3, 1995, plaintiff filed a timely appeal.

II.

This appeal involves the issue regarding the extent of an employer's obligation under Title VII of the Civil Rights Act of 1964 upon receiving notice of a female employee that she is being harassed because of her sex.

Before the district court, defendants had argued that plaintiff did not state a prima facie case of hostile environment sexual harassment because the actions directed at plaintiff were not sexual in nature. The district court found that argument to be without merit. The district court found that the statute prohibits discrimination *because of* one's sex. The district court stated the following in this regard:

> It appears that, at the relevant time, Ward was the only female in the traditionally male role of fire fighter. It is entirely conceivable that she was subjected to all of these actions for the simple reason that she was a female and the other fire fighters wanted to put pressure on her, drive her out, or make her the butt of unpleasant jokes and incidents solely for their own enjoyment. There was no evidence that any other fire fighter was subjected to this type of harassing behavior.
> **3 Presuming for the sake of this motion that the plaintiff can establish her prima facie case of sexual harassment, the defendants would be liable on a theory of respondeat superior only if they knew or should have known of the harassment and failed to take action.
> There appears to be no dispute that the defendants were placed on notice that plaintiff was being subjected to the various incidents of which she complains. Nobody even disputes whether the various incidents occurred. Everyone agrees, however, including the plaintiff, that the person or persons responsible for the incidents were, and still are, completely unknown.

The district court presumed for the sake of the motion that plaintiff did state a prima facie case under Title VII, which makes it unlawful for an employer to discriminate against an individual because of the individual's gender. 42 U.S.C. § 2000e-2(a)(1). Plaintiff was alleging sexual discrimination under the hostile environment theory in which an employee is subject to unwelcome sexual harassment because of her gender, and that harassment has effected a term, condition or privilege of employment.

Since the presumption by the district court that the alleged events constituted harassment because of her sex is not contested by defendants on appeal, the only issue before this court is whether there is evidence which would support a finding that defendants failed to take prompt and appropriate action to eliminate the alleged harassment after being placed on notice of the conduct. When an employer is placed on notice of

harassing conduct directed at an employee because of sex, the employer is obligated to take prompt and appropriate action reasonably calculated to put a halt to this conduct. *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 183 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992).

On a motion for summary judgment, summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Once the moving party satisfies his or her burden to show an absence of evidence to support the non-moving party's case, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), the party in opposition "may not rest upon mere allegations or denials of this pleading, but ... must set forth specific facts showing there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In the present case, plaintiff contends that the district court erred in granting summary judgment to defendants because there is evidence which would support a finding that defendants did not act in compliance with their legal obligation regarding harassing conduct directed toward plaintiff. Plaintiff contends that the most important evidence is that the actions defendants took were ineffective, and that the conduct continued unabated for approximately seven to eight months. She argues that defendants conceded that they were unable to determine the perpetrators of any of the conduct, and that no individuals were disciplined for the conduct. Plaintiff argues that defendants' initial reaction when learning of the conduct was not to take it seriously and to delay in attempting to put a halt to it. Plaintiff also argues that the efforts which were taken were clearly ineffective in stopping the harassment, and that defendants were obligated to take reasonable additional steps to put a halt to the harassing conduct, rather than merely continuing to rely solely upon the current ineffective measures. Plaintiff alleges that defendants' measures which were limited to issuing a harassment policy, calling meetings of the fire department employees to tell them harassing conduct would not be tolerated, informal questioning of fire fighter employees regarding specific incidents, and daily checks for a few minutes by a fire fighter, usually only outside the fire station, in the evenings when employees were not generally there, were insufficient. Plaintiff alleges that defendants should have used surveillance cameras or camcorders as measures reasonably calculated to deter the harassing conduct, but failed to do so.

**4 We do not agree with plaintiff's argument. The evidence indicates that numerous actions were taken by defendants to stop the conduct of which plaintiff complained and to determine who the perpetrators were. These efforts included: (1) a phone tap that was placed under the direction of Ohio Bell Security; (2) meeting with the staff of the fire department to make sure that members of the department understood that harassing conduct would not be tolerated; (3) appointing an Internal Affairs officer to try and determine who was behind the alleged conduct; (4) conducting an initial police investigation in October of 1992 by Sergeant John Taiclet; (5) allowing an exception for plaintiff to take her fire gear home to avoid water and eggs in her fire gear; (6) the initiation of a full police investigation by Sergeant Stankiewicz of the Streetsboro Police Department; (7) firing an employee who admitted writing a harassing note to himself; and (8) taking certain actions during the course of the police investigation, which included professional handwriting analyses by Dr. Phillip Bouffard of the Lake County Crime Lab, conducting polygraph examinations of certain fire department employees, conducting police interviews of fire department employees, taking written witness statements of fire department employees, and taking fingerprints of fire department employees.

After reviewing these actions, the district court concluded the following:

> In general, plaintiff complains that these steps were inadequate and ineffective to stop the harassment. She asserts that a surveillance camera should have been used because it would have stopped the harassment. Apparently another fire fighter, a friend of the plaintiff, arranged for a surveillance camera to be loaned to the fire department. However, Chief Vicha testified at his deposition that, although the camera was received, it was never used because there was no place in the building to conceal it while it could be focused on the plaintiff's equipment. It was his judgment that the perpetrator(s) would not act while a camera was in full view and that installing a visible camera would only delay, not stop the harassment. He testified that the camera could not be permanently installed, so as to permanently stop the harassment, because it was borrowed equipment. A discussion was had regarding the possibility of purchasing a surveillance camera, but it was concluded that there were no funds in the budget for such purchase.

> Vicha, therefore, made the judgment call that a temporary surveillance camera would not be permanently effective and would not assist in locating the perpetrator(s).
> Although this Court accepts the fact that an employer will be held liable for failure to take prompt and adequate remedial action where there is a known perpetrator, the Court does not believe that an employer is expected to do more than this employer tried to do to ascertain the identity of the perpetrator or perpetrators. The employer cannot be a mind-reader and the employer cannot stop something whose source is unknown. Therefore, the Court finds no basis for asserting respondeat superior liability under these facts.

**5 We agree with the district court's analysis. Plaintiff has made much of defendants' alleged lack of adequate remedial action and complains that new and effective techniques and strategies were not used. However, as the district court noted, Chief Vicha made a judgment call that a temporary surveillance camera would not be permanently effective in eliminating harassment or in assisting to identify the perpetrator. We believe that this was a reasonable judgment and that the fire department was not required to install, at its own expense, a hidden camera in order to ascertain the identity of the alleged perpetrators.

In regard to the camcorder, which plaintiff also alleges should have been installed, Chief Vicha testified that he purchased it in December 1992, and that it was not used for a number of reasons. Using the camcorder to watch the parking lot entrances would have meant installing it on a vacant storefront building across the street. In discussing the issue with the police department, he decided instead to put police officers on special alert in paying attention to the parking lot. The camcorder was also needed for teaching and training purposes and installing the camcorder inside the area where plaintiff kept her gear would have made it open and obvious to the perpetrator as was the case with the surveillance camera. Finally, using the camcorder would have required constant insertion of tapes every two to four hours. Given these reservations, we do not believe that the fire department failed in its duty to take remedial action by failing to use the camcorder in order to try to catch the perpetrator of the alleged acts of sexual harassment.

Finally, there was evidence that plaintiff failed to cooperate in the investigation which the fire department initiated. After interviewing plaintiff, Chief Vicha had met with Chief Brown of the Streetsboro Police Department to discuss the matter and got a Streetsboro Police Detective, Sergeant Taiclet, involved. Chief Vicha instructed plaintiff to take any information she had about any incidents to the sergeant. Although she met with Sergeant Taiclet once, plaintiff indicated she did not want to pursue her complaint with the police even though Sergeant Taiclet remained ready to continue the investigation even on a non-criminal basis. Plaintiff also frustrated the efforts of defendants to take prompt remedial action by refusing to report the harassing incidents immediately. In one incident, she indicated that she knew a person who had threatened her, but she refused to tell the fire department who it was.

In light of these facts, we believe there is ample evidence to support the district court's ruling that prompt and adequate remedial action was taken and that defendants took more than reasonable measures to stop the harassment of which plaintiff complained. Ample efforts were taken by defendants to ascertain the identity of the perpetrator, but they did not produce a suspect, and therefore there was no one for defendants to discipline. All that defendants could do was to make a good faith effort to take prompt and adequate remedial action to produce the identity of the perpetrator and take disciplinary action. We believe the district court properly concluded that an employer could not be expected to do more than these defendants did in their numerous efforts to ascertain the identity of the perpetrator and to halt the harassing conduct. Therefore, the district court is affirmed on this issue.

III.

**6 Plaintiff also asserts that because she complained about being harassed and because she refused to submit to a polygraph test as part of the police investigation, she was retaliated against by being placed on administrative leave.

Title VII prohibits discrimination against an employee because she has opposed any practice made unlawful by Title VII. 42 U.S.C. § 2000e-3(a). In order to establish a prima facie case of retaliation, a plaintiff must demonstrate that (1) she engaged in protected activity under Title VII; (2) she suffered an adverse employment action; and (3) a causal link existed between the protected activity and the adverse employment action. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir.1994), *cert. denied,*

115 S.Ct. 733 (1995).

In the present case, the district court found that plaintiff did not establish a prima facie case based on the following reasoning:

> There is no evidence that the administrative leave was retaliatory. There is no evidence that the requirement of a polygraph test was anything more than an attempt to get to the bottom of the alleged harassment. Other fire fighters were subjected to polygraphs in addition to the plaintiff. However, plaintiff refused to cooperate with the investigation. Chief Vicha stated that, when investigations turned up no leads, he began to suspect that the plaintiff was doing all these things to herself for some unknown reason.
>
> The Court concludes that the plaintiff has failed to establish a prima facie case of retaliation. Thus defendants are entitled to summary judgment on that portion of the plaintiff's complaint.

We agree with the district court that the record in this case lacks any evidence indicating there was any retaliatory conduct against plaintiff for opposing harassing conduct based upon her sex. The alleged retaliatory administrative leave was the result of plaintiff's alcohol and drug abuse to which she admits. Chief Vicha indicated that he became aware of this on March 27, 1993, when he had to take her to the hospital. Plaintiff alleges that she only had to spend one night in the hospital for her drug and alcohol abuse. However, it is clear that the basis for the administrative leave was plaintiff's own admitted chemical dependency and the duty of the City of Streetsboro to preclude fire fighters and emergency medical technicians who are chemically dependent from being placed in potentially life-threatening and stressful situations. We agree with defendants that plaintiff's argument that she should not have been placed on administrative leave after only one visit to the hospital ignores the reasonable and common-sense conclusion that defendants not only had a duty to plaintiff and other department employees, but also to the public as well in keeping a chemically dependent fire fighter off the street.

Furthermore, there is no evidence that this administrative leave was a pretext for retaliation. Mere conclusory statements made by plaintiff that she was the victim of retaliatory conduct are insufficient in themselves to overcome a motion for summary judgment. *See Miller v. Solem,* 728 F.2d 1020, 1026 (8th Cir.), *cert. denied,* 469 U.S. 841 (1984). There is no evidence to suggest that plaintiff was required to take the polygraph examination for any other reason than to assist defendants in ascertaining the origin of the alleged harassment. There is no connection made between the polygraph examination and the administrative leave in the letters of the City Law Director to plaintiff's attorney, nor to plaintiff herself. Chief Vicha testified quite clearly that the polygraph exam had nothing to do with plaintiff's administrative leave. Plaintiff also claims that there was a delay in her returning to work because the first letter she submitted from her doctor was not accepted. We do not believe it was unreasonable for the fire department to require a letter on stationery with the doctor's letterhead, indicating that plaintiff was ready to return to work.

**7 It is evident from the record that defendants had a duty to place plaintiff on administrative leave after her own admitted abuse of alcohol and drugs given the fact that she had a stressful and hazardous job. In good conscience, defendants could not place on the streets of their city a fire fighter-emergency medical technician who was not able to perform her job responsibilities in potentially life and death circumstances. It was reasonable to require plaintiff to undergo a physical examination and to require her to supply an official letter from her treating psychiatrist that she was able to perform her duties.

Finally, there is evidence that plaintiff worked to frustrate the ability of defendants to take prompt and adequate remedial action by refusing to pursue her complaint with Sergeant Taiclet of the Streetsboro Police Department, refusing to submit to a polygraph examination, and refusing to report the harassing conduct as it occurred. Contrary to plaintiff's contention, the evidence indicates that defendants were not retaliating against plaintiff in placing her on administrative leave, but continued during that time to try to get to the bottom of this alleged sexual harassment. For all these reasons, the district court is affirmed on this issue.

To conclude, the district court is hereby AFFIRMED.

END OF DOCUMENT

(Cite as: 229 F.3d 1153, 2000 WL 1206536 (6th Cir.(Ohio)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Linda SMITH, Plaintiff-Appellant,
v.
BANK ONE, N.A., Defendant-Appellee.

No. 99-3783.

Aug. 18, 2000.

On Appeal from the United States District Court for the Southern District of Ohio.

Before ENGEL, JONES, and COLE, Circuit Judges.

PER CURIAM.

****1** Plaintiff-Appellant Linda Smith challenges the district court's grant of summary judgment in favor of Defendant-Appellee Bank One in this race discrimination suit under federal and Ohio law. For the reasons that follow, we AFFIRM.

I.

Smith, an African American, was employed by Bank One as a full-time teller at its Montgomery, Ohio branch. Smith's first supervisor at that branch, Amy Lucas, criticized Smith on several occasions for tardiness and for taking too much time to balance her teller's drawer. Lucas, who is Caucasian, rated Smith poorly in her 1995 annual performance review. Although Smith objected in writing, believing that the criticisms were personal, management approved the evaluation and Smith did not receive a raise at that time. According to Smith, after Lucas left the Montgomery branch shortly after the 1995 evaluation, she received no further complaints about her performance.

During the summer of 1996, Smith's son stopped by the Montgomery branch with a male friend to return Smith's car to her. The two came into the bank and waited in the lobby for thirty minutes until Smith was ready to leave work. The friend, who had never been in the branch before, was described as tall, 6'2" to 6'3", 180 to 185 lbs, and twenty-one to twenty-five years old. About two to four weeks later, on July 31, 1996, the Bank One Montgomery branch was robbed by a person wearing a mask. During the ensuing investigation, Smith described the robber as slender, 5'11" and approximately 180 lbs. She presumed the robber was less than forty years old since he leapt over the teller counter twice during the robbery. Smith was unable to determine his race, but thought he was Caucasian.

Unbeknownst to Smith at the time, however, other witnesses told the authorities that they saw the robber outside the bank without his mask. The robber was described as a black male in his early twenties, slender, approximately 5'11 and 175 lbs, and driving a large red car. The detectives asked Smith whether she knew anyone who drove a large red car and she responded that she owned a red car, but that it was not large. She also told them that her nephew, Greg Simpson, drove a large red car, but that it had a white hood and interior.

On Bank One's "Robbery Description Form," which she filled out shortly after the robbery, Smith twice quoted the robber as having said to her "Put the phone down, Linda." She also told an FBI agent and a Bank One security officer that the robber had called her by her first name, saying "get off the phone, Linda." Smith wore a name tag and her name plate was posted at her station. In her subsequent affidavits and deposition testimony. Smith stated that the robber may have been saying "Lie down," rather than "Linda." Other witnesses also reported to the authorities that the robber called Smith by her first name.

Bank employees were tense during the period following the robbery. Heather Woods, a teller who was also working on the day of the robbery, overreacted when an African American man walked toward her and Smith as they serviced the ATM machine outside. According to Smith, Woods started screaming and later admitted that she felt nervous whenever she saw a black man.

****2** Another day, Smith spoke with Woods and the branch manager, Sherry Hiltbrunner, about the robbery. Woods suggested that the robber knew Smith because Woods believed that she heard the robber use Smith's first name. Woods also identified the robber

as being African American, information which Smith was hearing for the first time. Hiltbrunner also prodded Smith about her son and his friend's visit to the bank a few weeks prior to the robbery. At that point, Smith became highly upset at Woods's and Hiltbrunner's insinuations that she and her family were involved in the robbery.

Another employee who overheard the conversation between Smith, Woods, and Hiltbrunner informed Linda Huelsman, the assistant branch manager. Huelsman reprimanded Woods for the exchange and directed her not to say anything further to Smith regarding the robbery. Woods quit her employment with Bank One the following day. Hiltbrunner, who had already left for home when Huelsman reprimanded Woods, apologized to Smith the next day, explaining that she was just trying to be a detective and had not meant to hurt Smith's feelings. Bill Butcher, a Bank One regional manager, also contacted Smith to persuade her to accept Hiltbrunner's apology. Later that month, Smith complained to Yvonne Green, an employee relations representative who does not work at the Montgomery branch, about the exchange with Woods and Hiltbrunner. Green called Smith back to assure her that this type of incident would not recur. After Smith's complaint to Green, however, Hiltbrunner asked Smith one morning how she was doing, and then informed Smith that she had a dream that the bank was robbed and Smith was shot. After this incident, Hiltbrunner had no significant communication with Smith.

Smith continued to work at the Bank One Montgomery branch until she fainted at work on September 4, 1996. She called in sick the next day, and subsequently took a leave of absence. Smith's doctor prepared a statement stating that Smith was on medical leave due to depression and phobia resulting from the bank robbery. Smith never returned to work, and the bank changed her status to voluntary termination effective May 13, 1997. The bank hired an African American woman to replace Smith.

Smith filed this action on May 9, 1997, alleging that she was discriminated against on the basis of her race in violation of Title VII, 42 U.S.C.2000(e), *et seq.*, and the Ohio Civil Rights Act, Ohio Rev.Code chapter 4112. Specifically, Smith alleges that she suffered a hostile work environment because of her race and that Bank One took an adverse employment action against her because of her race. The district court granted summary judgment in favor of Defendant Bank One on the grounds that Smith failed to establish a prima facie case for both claims. Smith now appeals.

II.

We review *de novo* a district court's grant of summary judgment. *See E.E.O.C. v. Prevo's Family Market, Inc.*, 135 F.3d 1089, 1093 (6th Cir.1998). An entry of summary judgment can be upheld only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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).

**3 Further, the Ohio Supreme Court has held that federal case law applying Title VII is generally applicable to cases involving Ohio Rev.Code Chapter 4112. *See Plumbers & Steamfitters Joint Apprenticeship Comm. v. OCRC*, 421 N.E.2d 128 (Ohio 1981). We will therefore analyze Smith's claims under federal standards.

A.

Smith's hostile environment claim arises from two incidents: (1) the expressed suspicions and questioning by the other branch employees; and (2) Hiltbrunner's tale of her disturbing dream. To establish a prima facie case of hostile work environment based on race, Smith must establish that: (1) she was a member of a protected class; (2) she was subjected to unwelcome racial harassment; (3) the harassment was based on race; (4) the harassment had the effect of unreasonably interfering with Smith's work performance by creating an intimidating, hostile, or offensive work environment; and (5) the existence of Bank One's employer liability. *See Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir.1999). To determine whether an environment is one that a reasonable person would find hostile, intimidating, or offensive, we look at factors such as 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. *See id.*

Even looking at the evidence in a light most favorable to Smith, we do not find her to have shown a hostile environment. The comments from Smith's co-workers and supervisor occurred only briefly after a

specific triggering event and did not involve any physical intimidation. Although Smith may have been offended and humiliated at the suggestion that she knew the robber, these offhand and isolated comments do not amount to discriminatory changes in the terms and conditions of employment. *See id* at 512-13. We also note that Hiltbrunner and Wood had reasons other than race to question Smith regarding her son and his friend, most notably that employees believed they had heard the robber address Smith by her first name and that the friend of Smith's son, who had recently visited the bank in Smith's red car, loosely fit the description of the robber. For these reasons, Smith has not shown that the district court erred in dismissing her hostile environment claim.

Even if the evidence supported a finding of a hostile and abusive work environment, Smith's claim still fails because she cannot establish Bank One's liability as required to meet the prima facie case. To prove a hostile environment resulting from harassment by a co-worker, Smith must show that Bank One knew or should have known of the racial harassment and failed to implement prompt and appropriate corrective action. *See id.* at 513. In contrast, employer liability for supervisor harassment is vicarious, and Bank One can raise an affirmative defense to liability or damages by establishing: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; or (2) that Smith unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *See id.*

**4 The evidence demonstrates that Bank One exercised reasonable care to prevent and correct promptly the harassing behavior. Co-worker Woods was immediately reprimanded by the assistant branch manager for her suggestion that Smith knew the robber; there was no further incidence of such conduct because Woods quit her employment with the bank the following day. Supervisor Hiltbrunner apologized to Smith the day after she recounted her dream and explained that she had not intended to hurt Smith's feelings. The regional manager called Smith to inquire about the incident and an employee relations representative assured Smith that it would not happen again. These actions indicate that Bank One took prompt and corrective action in response to Woods's statements, and exercised reasonable care to prevent any further instances of the type of offensive conduct instigated by Hiltbrunner. Thus, Smith's hostile environment claim fails because she cannot establish the prima facie case.

B.

Smith also claims that she was discriminatorily disciplined on the basis of her race because she was denied a raise after her critical performance evaluation by Lucas, while the employees who made the accusatory statements to her after the robbery did not suffer a formal job detriment. Smith's claim fails because she cannot establish that she was treated differently than a similarly situated non-minority employee as required to meet the prima facie requirement for a disparate treatment claim based on race. *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir.1992). To be deemed "similarly situated:"

> the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

See id at 583. Smith therefore is not "similarly situated" as the other Bank One employees, who obviously reported to a different supervisor since Lucas was no longer employed at the bank at the time of the robbery. Moreover, Hiltbrunner is not similarly situated to Smith, as she is a branch manager while Smith worked as a customer service representative. Because Smith and the other employees are not similarly situated, we cannot examine Bank One's conduct under a disparate treatment analysis.

The district court's judgment is therefore AFFIRMED.

END OF DOCUMENT

(Cite as: 72 F.3d 130, 1995 WL 730466 (6th Cir.(Ohio)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Marlene MULLHOLAND, Plaintiff-Appellant,
v.
HARRIS CORPORATION, Defendant-Appellee.

No. 94-3725.

Dec. 8, 1995.

On Appeal from the United States District Court for the Northern District of Ohio, No. 91-07425; Lawrence P. Zatkoff, District Judge.

N.D.Ohio.

AFFIRMED.

Before: BROWN, BOGGS, and NORRIS, Circuit Judges.

PER CURIAM:

****1** Marlene Mullholand appeals from a grant of summary judgment to Harris Corporation ("Harris") on her claims of sexual harassment (hostile workplace environment) under 42 U.S.C. § 2000e and intentional infliction of emotional distress under Ohio law. We affirm.

I

Mullholand, a white female, was employed by Harris as an assembler in its Findlay, Ohio plant. Harris also employed Robert Young, a black male, and Ken Paul. Mullholand was assigned to assist in Young's on-the-job training.

Mullholand claims Young came to her trailer and propositioned her. He reportedly asked her if she ever thought about having sex with a black man. Mullholand states that she refused and forced Young to leave. Mullholand implies that as a result of being sexually rebuffed, Young began to spread rumors that he and Mullholand had had sex together.

Mullholand represents that the following eight episodes, stemming from Young's rejection, occurred while on the job at Harris. First, Mullholand complained about Young's alleged rumor-mongering to her foreman, Robert Wright. Wright and Mullholand then confronted Young, who denied that he was spreading rumors about sleeping with Mullholand. Wright told Mullholand to let him know if the rumors continued. Mullholand then began to avoid working overtime after her normal hours on the second shift were complete, so as not to come in contact with Young, who worked on the third shift.

Second, approximately one week later, Mullholand again complained to Wright that Young was continuing to spread rumors, as well as staring and laughing at her in the halls. Joseph Wagner, Young's foreman, talked to Young as a result, and again Young denied Mullholand's accusations. Wagner asked how Mullholand was doing a number of times after that.

Third, Mullholand then began to work on the first shift and, after a change in foreman, Young allegedly began spreading rumors again. Mullholand reported this to the new foreman, Michael Wiljamaa. Wiljamaa reportedly told Mullholand that this was just gossip, "What can you do?"

Fourth, Mullholand complained to Wiljamaa that Young had pushed her against her locker and slammed its doors against her. Wiljamaa then spoke to Young, who again denied both the locker incident and spreading rumors about Mullholand. Wiljamaa told Mullholand that he could not do anything about Young's alleged behavior unless Mullholand had witnesses.

Fifth, Mullholand again complained about a new, identical locker incident. Wiljamaa again asked Mullholand whether there were any witnesses. Mullholand admitted there were not.

Sixth, Mullholand complained to Wiljamaa about Ken Paul, who Mullholand alleged was calling her a "bitch" because of the accusations she was bringing against his friend, Young. Wiljamaa instructed Paul to apologize, but apparently Paul did not, as Mullholand alleges he came to see her throughout the day, and taunted her by telling her he would not

apologize. Mullholand called Thomas Urban at Harris's Employee Relations department to complain. Urban paged Wiljamaa and told him to handle the situation. Wiljamaa then chastised Mullholand for going over his head.

**2 Seventh, Mullholand was standing at the company time clock talking with Ramona Berry and Phyllis Smith, with Brenda Smith behind them, when Young, who was seated 20 to 30 feet away, saw them and yelled, "What are you staring at?" Mullholand and one of the other women replied, "What are you staring at?" Young then slid out of his chair and told Mullholand he had been waiting for "this" for a long time. Young allegedly grabbed Mullholand by her arms with one of his own arms and used his other arm to slap her across the left side of her face with his palm. (Apparently neither Berry nor the Smiths gave depositions in the case, or at least these are not cited or included in the record on appeal.) Mullholand went to the office of Wayne Mertz, who handles plant security matters, and Mertz instructed Mullholand to write down everything that had occurred. Mertz took Mullholand to the office of Timothy Jackson, a Harris human resources officer, who discussed the "time clock incident" with her, took the names of the witnesses and told Mullholand that he would get back to her later that day.

Jackson states that he spoke to the witnesses and, although they confirmed that Young had slapped Mullholand, they also indicated that Mullholand and Young were pointing fingers at each other before Young slapped Mullholand. Young's version of events is that Mullholand first pointed a finger at his throat, which he slapped away, unintentionally hitting her face. Jackson says he saw no visible signs on Mullholand that she had been slapped.

The Monday immediately following this "time clock incident," Mullholand went to a meeting with various representatives of the company and her union. The company and the union had jointly agreed to a suspensions of Mullholand for 5 days and Young for 10 days, acting on Jackson's finding that both Young and Mullholand bore partial responsibility for the altercation.

Finally, Mullholand pressed criminal charges for assault against Young, and the court date was set on April 17. Mullholand reported to Harris plant manager John Mainser that Ken Paul had told her, "You're going to burn in hell, bitch!" and that she would "really cry on the 17th." Mainser said he would look into it, but never got back to Mullholand, although Mullholand was aware that someone at the company had questioned Paul about the alleged incident. (The result of the criminal action is not given in the record.)

After receiving a right to sue letter from the Ohio EEOC, Mullholand filed a complaint in the United States District Court for the Northern District of Ohio against a number of defendants, on a variety of legal theories. For the purposes of the current appeal, only Mullholand's claim for sexual harassment (hostile workplace environment) and a pendent Ohio state law claim for intentional infliction of emotional distress are relevant. Many of the original defendants have been dismissed from the action, and Mullholand's brief makes clear that she is appealing only the court's grant of summary judgment.

**3 The Sixth Circuit reviews a grant of summary judgment *de novo*. *Baggs v. Eagle-Picher Indus., Inc.*, 957 F.2d 268, 271 (6th Cir.), *cert. denied,* 113 S.Ct. 466 (1992). We must affirm only if we determine that the pleadings, affidavits, and other submissions 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). When evaluating an appeal, we must view the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

II. RESPONDEAT SUPERIOR LIABILITY

Mullholand's claim of sexual harassment is grounded in a claim that her employer tolerated a hostile workplace environment. The prima facie elements of such a claim when the alleged harassment stems from co-workers are: (1) that Mullholand is a member of a protected class; (2) that Mullholand was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) that the harassment was based upon sex; (4) that harassment had the effect of unreasonably interfering with Mullholand's work performance and created an intimidating, hostile, and offense working environment; (5) Mullholand can prove respondeat superior liability on the part of Harris. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619-20 (6th Cir.1986), *cert. denied,* 481 U.S. 1041 (1987). Here, we need address only the last element, respondeat superior liability, because this is the basis on which the district court granted summary judgment

against Mullholand, and we agree with the district court that Mullholand has not pled facts sufficient to satisfy this element.

It is Mullholand's burden to demonstrate respondeat superior liability. Mullholand must prove that Harris, "through its agents or supervisory personnel, knew or should have known of the sexual harassment and failed to implement prompt and appropriate corrective action." *Id.* at 621. Here, even if we assume that each of the eight incidents set forth above were sexual harassment, and that knowledge of Mullholand's allegations can be ascribed to Harris, Mullholand has failed to carry her burden. In each case, the response of Harris or its employees to Mullholand's allegations was prompt and appropriate corrective action under the circumstances.

We consider each of the eight incidents in turn. First, Wright's response to Mullholand's allegations of rumor-mongering were appropriate. Given that this was the first complaint Mullholand had made, it would hardly have been sensible to take serious action without investigation at this time. People gossip at work, and unfortunately this gossip is sometimes false. Wright's response of going with Mullholand to confront Young, and when Young denied the rumors, simply telling Mullholand that she should inform him if the rumors persisted is entirely reasonable. The second rumor-spreading incident was similar. Wagner acted reasonably in talking to Young and checking up on Mullholand. Wiljamaa's response, after Mullholand's third complaint about rumor-mongering, was to encourage Mullholand to have a thicker skin--perhaps not the response that Mullholand would have preferred, but Mullholand has no right to the response that she would have taken if she had been a supervisor at Harris. *Bell v. Chesapeake & Ohio Ry. Co.*, 929 F.2d 220, 225 (6th Cir.1991) (per curiam). In *Bell,* an African American plaintiff made much more serious allegations of racial discrimination--he claimed that it was an deficient response for his employers simply to remove Ku Klux Klan (KKK) recruiting posters he found on company bulletin boards and his locker. *Bell* held the employer's less-than-perfect response to these incidents did not give rise to respondeat superior liability. The response of Harris's agent, Wiljamaa, to the allegations of gossip in this case was not unreasonable in light of *Bell.*

**4 The fourth and fifth incidents, involving Young allegedly slamming Mullholand with locker doors, were treated more seriously by Wiljamaa. Wiljamaa spoke to Young, and in light of Young's denials, it was perhaps practical advice for Wiljamaa to tell Mullholand that no serious action could be taken unless Mullholand had witnesses. Under Title VII, victims of sexual discrimination bear the burden of proof. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1980). If this is the standard in the law, it can hardly be a violation of its legal duty for an employer to act on that same standard in its private regulation of employee conduct toward other employees.

Wiljamaa told Paul to apologize for calling Mullholand a "bitch." The record is devoid of evidence of whether Paul actually did apologize, but it is clear that Wiljamaa disciplined Paul in this fashion on the basis of Mullholand's word alone. Mullholand now finds this action insufficient. But there is no evidence that Mullholand objected at the time to the sanction the company chose to impose. The company's response was not inappropriate corrective action. If Mullholand cannot establish respondeat superior liability when Harris took no action in response to an allegation supported by Mullholand's word alone, then it is clear that Mullholand has not established respondeat superior liability when Harris took action on that same basis. Given that Wiljamaa went the "extra mile" for Mullholand, telling Paul to apologize on the basis of Mullholand's word alone, it was not unreasonable for him to have reprimanded Mullholand for going over his head to Urban in Harris's Employee Relations department. Nor did Urban act inappropriately when he referred Mullholand's complaint to Wiljamaa. Wiljamaa was Mullholand's immediate supervisor, and it was permissible for the company to allow Wiljamaa to attempt to correct the situation initially.

Harris's response to the "time clock incident" was also not inappropriate. Harris launched an investigation, because Mullholand had witnesses to the altercation. Harris's investigation, conducted by Jackson, revealed evidence from which it was not unreasonable for Harris to conclude that Mullholand was not simply a passive victim of Young, however. Therefore, Harris did not act inappropriately in disciplining both Mullholand and Young. In *Bell,* the plaintiff and a co-worker were both disciplined for fighting by their employer, when the co-worker allegedly yelled to the plaintiff in the company lunch room, "I hope the KKK kills all the niggers!" *Bell* held that this response by the plaintiff's employer was insufficient to give rise to respondeat superior liability. *Bell,* 929 F.2d at 225. Moreover, here, Mullholand's union, which has an incentive to

promote her best interests, agreed that the discipline Mullholand received was not grievable based on the facts as they appeared to the union.

The eighth incident, involving Paul again taunting Mullholand with the word "bitch," and his veiled threats against Mullholand for pressing criminal charges of assault against Young were no different than Mullholand's earlier rumor-spreading charges against Young, and name-calling charge against Paul. Harris again responded by questioning Paul, though there is no evidence in the record of the result of this investigation.

**5 Whether singly or in combination, Mullholand's accusations cannot survive summary judgment, because of failure to support respondeat superior liability, as shown by the discussion in *Bell:*

> *Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250 (6th Cir.1985), *cert. denied,* 474 U.S. 1014 ... (1986), in which we found an employer liable for racial harassment by its employees, and *Batts v. NLT Corp.*, 844 F.2d 331 (6th Cir.1988), where we came to the opposite conclusion, provide a matrix for evaluating Bell's assertion that CSX's response was inadequate. In *Erebia,* the degree of racial hostility exhibited toward the plaintiff was repeated and extreme.... Racial slurs occurred regularly over a five-year period. Plaintiff reported the situation to three different managers, who did nothing or insulted or threatened the plaintiff. In *Batts,* however, the plaintiff complained of such acts as 1) being required to change light bulbs when white employees in his job category were not required to do so; 2) not being given a more desirable work assignment until he requested it; 3) the failure of a white employee to follow his instructions after he was promoted to a supervisory position; 4) the posting, on the company's bulletin board by anonymous persons, of an article reporting an anti-discrimination suit the plaintiff had filed; and 5) finally, jokes by a supervisor at a company function about plaintiff's putative propensity to file anti-discrimination suits.

Bell, 929 F.2d at 224. Along this continuum, the eight Mullholand incidents are probably more serious than those in *Batts,* but they fall short of those in *Bell,* and so certainly fall short of those in *Erebia.*

Mullholand cites no cases from the Sixth Circuit to support her argument that Harris responded inappropriately to the eight incidents. Moreover, the cases she does cite are inapposite. In *Katz v. Dole,* 709 F.2d 251 (4th Cir.1983), Federal Aviation Administration's supervisory personnel did nothing, despite *actual knowledge* that a woman was being sexually harassed, and that other supervisors in fact took part in the harassment. The fact that the supervisory personnel took part in the harassment instantly distinguishes *Katz* from Mullholand's case, however, as does the employer's failure to take any action. *Delgado v. Lehman,* 665 F.Supp. 460 (E.D.Va.1987) is similar--a navy supervisor consistently harassed female subordinates. Also, in *Delgado,* the head of the EEO office discouraged women from making complaints. There is no allegation by Mullholand that Harris discouraged her complaints, except the relatively minor incident in which Wiljamaa became perturbed that Mullholand went over his head. *Harrison v. Reed Rubber Co.,* 603 F.Supp. 1457 (E.D.Mo.1985), also involves harassment by a supervisor, as does *Heelan v. Johns-Manville Corp.,* 451 F.Supp. 1382 (D.Colo.1978). Each case Mullholand cites is useless to her cause, because they do not address respondeat superior liability, which is the crucial issue when an allegation of sexual harassment is based on the conduct of co-workers.

**6 The district court did not improperly grant summary judgment on the issue of hostile workplace sexual harassment against Mullholand, because there was no genuine issue of material fact that Mullholand had failed to plead facts sufficient to support a prima facie showing of respondeat superior liability.

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The district court did not err in granting summary judgment against Mullholand on the Ohio state law issue of intentional infliction of emotional distress. It is clear that Harris's supervisors did not harass Mullholand. The only viable allegation Mullholand can make is that Young and Paul harassed her. Thus, Mullholand faces the same respondeat superior stumbling block here she faces to her sexual harassment claim. Ohio law holds that there can be no respondeat superior liability for acts done outside the scope of employment. *Byrd v. Faber,* 565 N.E.2d 584, 587-88 (Ohio 1991). *Byrd* held that a church could not be held liable for, among other things, fraud and intentional infliction of emotional distress, on a respondeat superior theory, for nonconsensual sexual relations between a pastor and a parishioner, because the "Seventh-Day Adventist organization in no way promotes or advocates nonconsensual sexual conduct

between pastors and parishioners." *Id.* at 588. Similarly, there is no evidence in the record that Harris promoted or advocated the alleged behavior of Young and Paul. Thus, Harris cannot be held liable for an intentional infliction of emotional distress claim by one of its employees.

Byrd's validity may have been affected by *Kerans v. Porter Paint Co.*, 575 N.E.2d 428, 493 (Ohio 1991), however, which holds that an employer "may be independently liable for failing to take corrective action against an employee who poses a threat of harm to fellow employees...." This court need not take a position on the possible conflict between *Byrd* and *Kerans,* however, because Mullholand can satisfy neither *Byrd* nor *Kerans*. The standard that *Kerans* imposes on employers is based on negligence, and can be roughly identified with the Sixth's Circuit's requirement in federal hostile workplace environment cases of a failure to take appropriate corrective action in response to harassment by co-workers, before an employer will be held liable on a respondeat superior theory. Here, Mullholand cannot show, as a threshold matter, that Harris was negligent in failing to take appropriate corrective action to remedy the eight incidents. Therefore, she cannot maintain a suit in tort for intentional infliction of emotional distress against Harris under *Kerans*. The district court did not rely on *Byrd* or *Kerans,* but this court's *de novo* standard of review permits it to take an independent look at Ohio law.

Moreover, the district court was correct in concluding that the "outrageous and extreme" level that Harris's behavior would have to rise to here, in order to constitute an intentional infliction of emotional distress under Ohio law, has not been met.

> **7 Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Amer., 453 N.E.2d 666, 671 (Ohio 1983) (quoting Restatement (Second) of Torts § 46). The conduct of the workers alleged here, while unseemly, is not so uncivilized to rise to this level. The company's actions are far less culpable, if culpable at all. [FN1] Not every successful allegation of sexual harassment rises to this level, and Mullholand cannot prove even sexual harassment on the part of Harris. *Baab v. AMR Servs. Corp.*, 811 F.Supp. 1246, 1270 (N.D.Ohio 1993). Hence, the district court did not err in granting summary judgment to Harris.

IV

The district court's grant of summary judgment in favor of Harris is AFFIRMED.

FN1. For a viable example of conduct which is sufficiently outrageous to be actionable under the Restatement, see *Pratt v. Brown Machine Co.*, 855 F.2d 1225, 1238-42 (6th Cir.1988) (intentional infliction of emotional distress under Michigan adoption of the Restatement for employer to coerce employee into silence in the face of 18 months of harassing phone calls, some threatening rape, put to the employee's wife by an upper level manager of the employer). In *Kramer v. Price,* 712 F.2d 174, 175-76 (5th Cir.1983), *vacated and reh'g granted,* 716 F.2d 284 (5th Cir.1983), *on reh'g,* 723 F.2d 1164 (5th Cir.1984) (per curiam) (en banc), a jilted lover of a newly-wed husband mailed the following postcard to the husband's wife shortly after she had delivered the couple's baby:

> Baby Problem Solved!
> --with this beautiful
> ALL METAL
> CASKET-VAULT COMBINATION
> CRYPT a CRIB....

Id. at 175. *Kramer* dealt with a criminal statute, not a tort, but it helps to illustrate the level to which uncivilized behavior that distresses another must rise to in order to constitute the intentional infliction of emotional distress tort.

END OF DOCUMENT