IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

Kayla McGuire,	:	
	:	
Plaintiff,	:	CASE NO. 18 CV 00493
	:	
v.	:	
	:	
City of Newark, *et al.*,	:	JUDGMENT ENTRY
	:	
Defendants.	:	

I. NATURE OF THE PROCEEDINGS

This matter is before the Court on defendants' motion for summary judgment, plaintiff's memorandum in opposition, defendants' reply. For the reasons set forth below, the motion is granted.

II. STANDARD OF REVIEW

Rule 56(C) of the Ohio Rules of Civil Procedure sets forth the standard this Court applies when construing a motion of summary judgment:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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.

Summary judgment is proper if, after construing the evidence most strongly in favor of the nonmoving party, reasonable minds could come to but one conclusion in favor of the moving party. Civ.R. 56; *Horton v. Hardwick Chem. Corp.*, 73 Ohio St.3d 679, 686-687 (1995). The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996).

Once the moving party satisfies its initial burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by

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affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359 (1992).

III. CONCLUSIONS OF LAW

Plaintiff's complaint alleges three claims, discrimination and retaliation based upon sex against the city, sex discrimination and retaliation against defendant Baum, and violation of R.C. 4112.02(J) against defendant Baum.

After graduating from the police officer academy, plaintiff was offered a position as a police officer with the Newark Police Department in June 2016. She was given a conditional offer of employment. Employment was contingent on successfully completing the city's police officer training (PTO training). Plaintiff was trained and evaluated by three training officers over four three-week periods and one-week mid-term and final evaluations. Plaintiff failed both the mid-term and final evaluations. Plaintiff was put on administrative leave on October 27, 2016 by the Chief of Police and terminated from employment by the city Safety Director, defendant Baum, on November 14, 2016.

Plaintiff alleges her termination was due to sex discrimination and retaliation. Plaintiff makes several allegations to support her claims. Plaintiff alleged that another officer, Smith, who was much older than her asked her out several times. (McGuire Depo. at 17-20). Plaintiff stated that another officer, Palmesano, she rode with one night made fun of her and the officer who had asked her out. *Id.* at 18-20. She also stated Palmesano called her a pork chop. *Id.* at 19. She alleged that one of her training officers, Fleming, made jokes about Officer Smith, stating Smith "sleeps with anything that doesn't have something between their

legs." *Id.* at 23. She stated Fleming called her pork chop "about once or twice a week." *Id.* at 23. Initially plaintiff stated she did not know what was meant by pork chop. *Id.* at 19. Later in her deposition she stated she believed it was a reference to a woman who was with a much older man, a reference to Officer Smith asking her out. *Id.* at 116-117. After being dispatched to a local bar, another officer, Slee, commented in reference to plaintiff, "we had to get her out of there before they got her on top of the bar and started dancing or something." *Id.* at 24.

Plaintiff further stated that Sergeant Bline stated that "we are harder on you because you are female, smaller stature." *Id.* at 27. She also stated Officer Fleming said, "we have to be harder on you because you are smaller." *Id.* at 28. Finally, plaintiff's witness, Jerad Angle, at deposition stated he heard Fleming and Bline joke that it wouldn't be long before plaintiff was having sex with Officer Smith, that she would be better off being a stripper, and that she was an idiot. (Angle Depo. at 53-60). These comments were not made in plaintiff's presence. *Id.* Angle also testified that people in the department joked about plaintiff being from a poor, rough part of the city. *Id.* at 30-31, 45.

Sex Discrimination

Sex discrimination "may be proved either by 'direct' evidence or by 'indirect' evidence and application of the burden-shifting test set forth in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792." *Egli v. Congress Lake Club,* 5th Dist. No. 2009CA00216, ¶31, 2010-Ohio-2444. "Direct evidence proves the existence of a fact without any inferences or presumptions. To establish 'direct evidence' of discrimination through a supervisor's comments made in the workplace, the remarks must be 'clear, pertinent, and directly related to decision-making personnel or processes.'" (Citation omitted). *Id.* at ¶32.

Plaintiff has presented no direct evidence that she was terminated because of her sex. Thus, she must establish a prima facie case of discrimination by indirect evidence. Then the burden of proof would shift to defendants to articulate a legitimate nondiscriminatory reason for her termination.

To establish a prima facie case of discrimination, "the plaintiff must show that: (1) she is a member of a protected class; (2) she was discharged from her employment; (3) she was qualified for the position; and (4) she was replaced by a person outside of the class." (Citation omitted). *Id.* at ¶39.

Plaintiff has not established a prima facie case of discrimination because she has not demonstrated she was qualified for the position. Successful completion of the PTO training was a condition of her employment. While plaintiff implies that her evaluation in the training was the result of discrimination or disparate treatment, she has offered no evidence that she actually passed or should have been evaluated to have passed the training. Plaintiff offers no testimony or other evidence that she in fact was proficient in the areas her evaluators found her to have failed.

The Court also notes that plaintiff does not allege that any of her trainers were biased because of sex. Officers Fleming, Arndt, and Purtee trained and evaluated plaintiff. Plaintiff was asked if Officer Arndt ever said anything that indicated he was gender biased. Plaintiff replied, "No." (McGuire depo. at 32-33). She was asked if he appeared to fairly evaluate her, and she replied, "Yes." *Id.* at 33. She similarly stated that Officer Purtee, who graded her for her mid-term and final evaluations, never said anything to suggest he was gender biased. *Id.* at 33. Plaintiff recounted that Officer Fleming joked about Officer Smith and called her pork chop. When asked how she got along with him, she stated "it was pretty decent when he

wasn't making jokes. But he would never help me. I asked for help even in the beginning of my training and he would not help me." *Id.* at 36. Her chief complaint about Officer Fleming was that he did not give her enough feedback or assistance. *Id.* at 36-37.

Finally, plaintiff offered no evidence that Captain Riley, who recommended she be terminated, Chief Connell, or Safety Director Baum made any statements or acted in any manner that would suggest they discriminated against plaintiff based upon her sex.

Retaliation

"In order to establish a claim of retaliation, appellee had to prove: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the adverse employment action and the protected activity." *Henderhan v. Jackson Twp. Police Dep't*, 5th Dist. No. 2008-CA-00055, ¶55, 2009-Ohio-949.

Plaintiff alleges she was engaged in protected activity because she reported discrimination to her supervisors. Plaintiff stated she reported Palmesano's comment about Officer Smith to Officer Fleming. (McGuire Depo. at 21-22). She stated Palmesano did not make the comments again, but Fleming continued to joke about it. She never reported any of the comments made by Officer Fleming or Sergeant Bline. *Id.* at 29. Two days prior to being placed on administrative leave, after she had failed PTO training, she spoke with Captain Riley. She stated she asked for more training and reported that Palmesano had teased her. *Id.* at 11, 21. At the meeting in which Chief Connell placed her on administrative leave, plaintiff stated she told the Chief about Officer Slee's comment, the teasing about Officer Smith, and Sergeant Bline's comment. *Id.* at 92-93.

A plaintiff asserting a retaliation claim "must prove that she took an 'overt stand against suspected illegal discriminatory action' to establish that she engaged in a protected

activity. In other words, an employee 'may not invoke the protections of the Act by making a vague charge of discrimination.'" (Citations omitted). *Blizzard v. Marion Tech. College*, 698 F.3d 275, 288 (6th Cir.2012). It is not clear from plaintiff's testimony that she was taking an "overt stand" against illegal or discriminatory action when she reported Palmesano's comment to Fleming and Riley. In the case of the meeting with Connell, the determination to place her on administrative leave had already been made when she alleged she reported the other comments.

Even assuming plaintiff's mention of the offensive comments to Fleming, Riley, or Connell constitutes engaging in protected activity as plaintiff argues, she has offered no evidence there was a causal connection between her report and her termination. As stated above, no evidence of any improper or biased behavior was offered concerning Riley, Connell, or Baum. Further, there was no evidence offered to suggest that plaintiff was not fired because she failed the PTO program.

Hostile Work Environment

Plaintiff did not plead a claim for sexual harassment or hostile work environment in her complaint. However, the parties briefed the issue.

"In order to establish a claim of hostile-environment sexual harassment, the plaintiff must show (1) that the harassment was unwelcome, (2) that the harassment was based on sex, (3) that the harassing conduct was sufficiently severe or pervasive to affect the 'terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment,' and (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the

harassment and failed to take immediate and appropriate corrective action." *Hampel v. Food Ingredients Specialties*, 89 Ohio St.3d 169, 176-177 (2000).

"[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These 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." *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993). "'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

As discussed above, plaintiff was asked out several times by an older officer, Smith, who was not a supervisor. Another non-supervisory officer, Palmesano, teased plaintiff about this on one occasion. One training officer, Fleming, joked about Smith asking plaintiff out and called her pork chop. And Officer Slee allegedly made the comment that "we had to get her out of there before they got her on top of the bar and started dancing or something."

The comments by Palmesano and Slee were one-time incidents. The only continuing behavior plaintiff testified about involved Fleming's joking and calling her pork chop. She stated Fleming called her pork chop once or twice a week. (McGuire Depo. at 23). She stated he made jokes about Smith. "He just always made jokes and tried to have a good time. I just always let it go in one ear and out the other." *Id.* When asked how she got along with Fleming, she stated "it was pretty decent when he wasn't making jokes." *Id.* at 36.

In response to Palmesano, plaintiff called him an "ass," and he stopped making fun of the Smith situation. *Id.* at 22-23. In response to Officer Slee's comment plaintiff stated, "I just kind of rolled my eyes and went with my training officer." *Id.* at 25.

Nothing in plaintiff's testimony suggests that the comments were so severe or threatening that they affected the terms, conditions, or privileges of her employment or unreasonably interfered with her performance. Further, the comments and conduct are not "extremely serious" such that they give rise to an actionable claim. *Faragher*, supra.

Defendant Baum

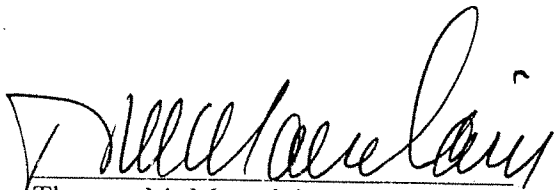
As to defendant Baum individually, plaintiff has offered no evidence that Baum engaged in any discriminatory behavior or retaliation, that he was aware of any discriminatory behavior, or that he was even aware of any of the offensive comments plaintiff alleges were made to or concerning her during her employment.

IV. CONCLUSION

For the reasons set forth above, the motion for summary judgment is GRANTED.

It is so ORDERED. There is no just cause for delay. This is a final appealable order.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.



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