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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

ANGELICA MENDOZA,)
)
 Plaintiff,)
) No. CV-09-1300-HU
 v.)
)
 WASCO COUNTY, a political)
 subdivision of the State of)
 Oregon; RICK EIESLAND, an) OPINION & ORDER
 individual; and STEVEN)
 CONOVER, an individual,)
)
 Defendants.)
)

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HUBEL, Magistrate Judge:

Plaintiff Angelica Mendoza brings this employment-related

1 action against defendants Wasco County, Wasco County Sheriff Rick
2 Eiesland, and Wasco County Chief Deputy Sheriff Steven Conover.
3 Defendants move for partial summary judgment.

4 All parties have consented to entry of final judgment by a
5 Magistrate Judge in accordance with Federal Rule of Civil Procedure
6 73 and 28 U.S.C. § 636(c). I deny the motion.

7 BACKGROUND

8 Plaintiff began working for the District Attorney's (DA)
9 Office in Wasco County in August 2004. The DA's Office works
10 closely with the Sheriff's Department, and plaintiff's Office
11 Specialist job duties included transporting mail between the
12 offices and translating for sheriff's deputies when working with
13 Spanish-speaking individuals. Pltf's Affid. at ¶ 2. Plaintiff's
14 work at the DA's Office routinely brought her into contact with
15 sheriff's deputies, including Conover. Id.

16 At times, Sheriff's Department employees and DA Office
17 employees socialized together including going to lunch as a group
18 or for drinks after work. Pltf's Depo. at p. 36. Plaintiff denied
19 participating in any of those social activities when Conover was
20 there. Id. However, plaintiff sometimes did go out after work
21 with Sheriff's Department employees, including Eiesland, on
22 occasion. Id.

23 Plaintiff had a joking relationship with her coworkers,
24 including sheriff's deputies, that sometimes involved sexual or off
25 color jokes. Id. at p. 40. No one else but Conover made her
26 uncomfortable, however. Id. Plaintiff had a friendly relationship
27 with Eiesland. Id. at p. 37. She admits that one of the jokes she
28 participated in included her approaching Eiesland's vehicle and

1 raising her shirt in front of Eiesland.

2 Generally, plaintiff was aware that sexual harassment was not
3 permitted at Wasco County. Pltf's Depo. at p. 9. She also
4 understood that employees needed to make a report if they were
5 subjected to harassment. Id. at p. 10.

6 A. Incidents Between Plaintiff and Conover

7 When plaintiff first started working for the DA's Office,
8 Conover asked plaintiff if she was married. Pltf's Affid. at ¶ 3.
9 Plaintiff responded that she was, they continued chatting, and he
10 left. Id. He remained "very friendly" toward her every time she
11 encountered him. Id.

12 Eventually, Conover began to call her "sweetie." Id. She
13 initially thought nothing of it, but finally told one of her
14 friends in the DA's Office about it. Id. This person told
15 plaintiff that Conover was a "predator." Id.¹; Pltf's Depo. at p.
16 43 (noting verbal statements of "sweetie"), p. 81 (frequently
17 called her "sweetie").

18 When plaintiff did her mail run to the Sheriff's Department,
19 Conover began coming out of his office to greet her. Pltf's Affid.
20 at ¶ 4. He would inhale deeply and say things like "I thought that
21 was you. I could smell you coming. You smell good." Id.; see
22 also Pltf's Depo. at p. 43 (noting verbal statements like "you
23 smell good"), p. 81 (frequently said "you smell good").

24 The verbal conduct was embarrassing and humiliating to
25 plaintiff, especially because it occurred in front of others.

26
27
28 ¹ Defendants make several evidentiary objections in their
reply. I address these at the end of this opinion.

1 Pltf's Affid. at ¶ 4; Pltf's Depo. at p. 81.

2 Added to the verbal statements, Conover's conduct eventually
3 became physical when at one point, he started poking plaintiff in
4 the waist or ribs as he walked by. Pltf's Affid. at ¶ 5; Pltf's
5 Depo. at p. 80 (Conover would run his finger up and down her back
6 and poke her; touched her on a number of occasions). Although
7 infrequent, it made plaintiff uncomfortable. Pltf's Affid. at ¶ 5;
8 Pltf's Depo. at p. 80.

9 Plaintiff also described that Conover would "hang out" at
10 plaintiff's desk in the front reception area of the DA's Office,
11 leaning on her desk for long periods of time, often just watching
12 and not making conversation. Pltf's Depo. at p. 66. No time frame
13 for this conduct is suggested in the deposition excerpt. However,
14 in her affidavit, she notes that the "lurking" increased after May
15 2007, when Conover found out that plaintiff separated from her
16 husband. Pltf's Affid. at ¶ 11. She notes that at times, Conover
17 would pretend to read a newspaper, but she could tell he was
18 watching her. Id. It made it difficult for her to concentrate on
19 her work and made her uncomfortable to even answer the phone. Id.

20 A county potluck occurred in December 2006. Plaintiff was
21 cleaning up dishes in a small break room in the DA's Office when
22 Conover came up behind her and said she could go and do those at
23 his house. Pltf's Depo. at p. 15. At the same time, he put one
24 hand up by her left shoulder, and one hand on her waist and pressed
25 up against her. Id. at p. 16. The conduct lasted seconds. Id.
26 Plaintiff told a coworker, Elizabeth Osborne, about the incident
27 and also spoke with the Deputy DA Leslie Wolfe, who suggested that
28 plaintiff report the incident to Eiesland. Pltf's Affid. at ¶ 6;

1 Pltf's Depo. at p. 16 (noting report to Osborne).

2 A week or two after this incident, plaintiff reported it to
3 Eiesland. Pltf's Depo. at p. 17 (noting two weeks); Pltf's Affid.
4 at ¶ 7 (noting one week).² This was the first time plaintiff had
5 spoken to Eiesland about Conover's conduct. Pltf's Depo. at p. 18.
6 Plaintiff and Eiesland met in a back room because she did not want
7 Conover to know that she was complaining about him. Id. at p. 19.
8 She was hoping that Conover would not learn that she had come
9 forward about it. Id. She explained that she did not want to get
10 anybody in trouble. Id. at p. 20.

11 Plaintiff states that Eiesland told her that he would "handle
12 it" and would speak to Conover. Pltf's Affid. at ¶ 7. She further
13 states that Eiesland additionally said that he was glad plaintiff
14 let him know "because if some day you sue the County for sexual
15 harassment, I can say that you never let me know that something was
16 going on." Id.

17 In deposition, plaintiff testified that she hoped that by
18 talking to Eiesland, he would talk to Conover and that "it" would
19 stop. Pltf's Depo. at p. 21. She wanted Eiesland to talk to
20 Conover about appropriate workplace behavior, but not let him know
21 that plaintiff was the one making the complaint. Id.

22 Although Eiesland honored plaintiff's request, as far as she
23 knows, to keep her name out of it, she believes he spoke to
24 Sheriff's Department employees as a group and did not single out
25

26 ² Eiesland testified that plaintiff never reported this
27 incident to him. Eiesland Depo. at p. 30-31. Defendants
28 acknowledge that plaintiff's version of the facts must be
accepted as true for the purposes of summary judgment. Deft's
Mem. at p. 3 n.1.

1 Conover. Id. at p. 22. This was not what she wanted to have
2 happen. Id. However, when Eiesland told plaintiff that he had
3 spoken with everyone, she thanked him. Id. She hoped that "none
4 of this stuff" would happen again. Id. at p. 23.

5 Plaintiff states that for about a month after Eiesland spoke
6 to the Sheriff's Department employees about behavior, Conover
7 stopped calling her sweetie and making other verbal comments.
8 Pltf's Affid. at ¶ 10. He also quit touching her and poking her in
9 the sides. Id. Soon, however, Conover was again routinely calling
10 her "sweetie," telling her she smelled good, touching her
11 physically, and poking her in the waist and ribs. Id.

12 Plaintiff described another incident in which she walked into
13 the Sheriff's Department and Conover asked her how she was doing.
14 Pltf's Depo. at p. 44. Plaintiff responded she was fine. Id. As
15 Conover sat there, he turned around, tapped his leg, and said "it
16 would be better if you were sitting right here." Id. In her
17 deposition, plaintiff states that when this occurred, she just
18 chuckled and kept walking. Id. In her affidavit, she gives a few
19 more details, such as that Conover actually said "hi sweetie, how
20 are you doing," to which plaintiff responded fine and then asked
21 how he was doing. Pltf's Affid. at ¶ 15. Conover then spread his
22 legs wide open, patted the inside of his thigh, and said "I would
23 be doing better if you were sitting right here." Id. Plaintiff
24 was shocked by what he said and responded by stating "no, I am fine
25 where I'm at." Id. She chuckled nervously and left as quickly as
26 she could. Id. The deposition testimony does not pinpoint a date
27 for this incident, but plaintiff states in her affidavit that it
28 occurred in the spring of 2008. Id.

1 In deposition, Conover admitted that this incident occurred.
2 Conover Depo. at pp. 75-76. Conover denied that there was any
3 sexual overtone to that statement and stated that it was not of a
4 sexual nature. Id. He stated he was joking around and thought he
5 and plaintiff were friends. Id.

6 Plaintiff admits she never told Conover not to say "these"
7 comments to her, referring presumably, to the comments about
8 "sweetie" and "smelling good." Pltf's Depo. at p. 44. In her
9 affidavit, she explains that she did not tell Conover to stop
10 making sexual comments to her out of fear of his position as Chief
11 Deputy. Pltf's Affid. at ¶ 16. She further states that she
12 believed reporting this particular incident regarding the pat on
13 the thigh to Eiesland would not do any good because her previous
14 report had not been sufficient to stop the harassment. Id. She
15 hoped that by not responding to Conover, he would get the message
16 that his conduct was unwanted and offensive and that he would quit.
17 Id.

18 According to plaintiff, in the spring of 2008, Conover's
19 physical conduct toward her escalated. Pltf's Affid. at ¶ 13. He
20 started to rub his fingers up and down her back over her bra strap.
21 Id. This happened two or three times between an unspecified date
22 in the spring of 2008 and November 2008. Id.

23 At the time plaintiff was working in the DA's Office, there
24 was a surveillance camera recording her portion of the office.
25 Pltf's Affid. at ¶ 14. It was a feed to the Sheriff's Department
26 for security purposes. Id. In the spring of 2008, plaintiff
27 learned that Conover was watching her on the surveillance cameras.
28 Id. On one occasion, Conover actually called plaintiff at her desk

1 to tell her he liked what she was wearing. Id. Plaintiff learned
2 from other sheriff's deputies, including Detective Scattergood,
3 that Conover would make a point of standing in front of the
4 surveillance videos in order to watch plaintiff. Id. This made
5 plaintiff even more uncomfortable with Conover's actions and it
6 made it difficult for her to focus on her work, wondering if he was
7 watching her on the video camera. Id.

8 The final incident of harassment by Conover noted by plaintiff
9 occurred in November 2008. On November 12, 2008, plaintiff was
10 standing at the front desk of the Sheriff's Department talking with
11 Donna Lindsey and office manager Mary Drury. Pltf's Affid. at ¶
12 19; Pltf's Depo. at p. 45. Conover walked into the office and as
13 he passed plaintiff, he rubbed both of his hands up and down her
14 sides, from her waist up and over her bra strap and back down
15 again. Pltf's Affid. at ¶ 19; Pltf's Depo. at pp. 45-46.

16 This was embarrassing and humiliating to plaintiff. Pltf's
17 Depo. at p. 46. She states that she and Drury looked at each other
18 "kind of shocked." Id. She further states that nobody said much,
19 and that it was just uncomfortable, and silent. Id. Conover kept
20 walking, as did the other men who were with him. Id. She thought
21 everyone there saw the whole thing and that it was very
22 embarrassing. Id. In her affidavit, she states that she was so
23 embarrassed that she did not know what to do and gave a startled
24 jump.³ Pltf's Affid. at ¶ 19. Id.

25
26 ³ In response to plaintiff's report of this incident, the
27 Sheriff's Department made a copy of the surveillance video of the
28 reception desk for the date and time in question. It is
submitted as an exhibit by defendants in support of the motion.
Deft's Exh. B. I have viewed the video. There, Conover enters

1 Although plaintiff does not appear to address her report of
2 this incident in her deposition testimony or her affidavit, a May
3 6, 2009 "Notice of Charges" to Conover from Eiesland notes that in
4 November 2008, Eiesland received a complaint of possible unwanted
5 contact between Conover and plaintiff. Pltf's Exh. 9; see also
6 Pltf's Depo. at p. 75 (stating that the DA's Office initiated an
7 investigation of Conover based on her complaints).

8 Eiesland's May 6, 2009 "Notice of Charges" indicates that in
9 accordance with Wasco County policy addressing investigations of
10 command officers, he requested an investigation from outside the
11 agency. Pltf's Exh. 9.

12 Other exhibits submitted by plaintiff indicate that several
13 different entities were involved in investigating plaintiff's
14 complaints against Conover. A summary prepared by the Oregon State
15 Police states:

16 This investigation was referred to the Oregon State
17 Police by the Yamhill County District Attorney's Office
18 after receiving a request from the Wasco County District
19 Attorney's Office for review. Since the initial
20 investigative request from Yamhill County, Oregon
21 Department of Justice [h]as received this case on
22 referral from the Wasco County District Attorney.

23 The case was originally investigated by the Hood
24 River County Sheriff's Office and based on their
25 investigation[,] additional follow up was requested to be
26 completed by the Oregon State Police.

27 Pltf's Exh. 13 at p. 3.

28 Eiesland's May 6, 2009 "Notice of Charges" issued to Conover

25 the room, stands next to plaintiff at the reception desk, then
26 passes by her. Any touching by Conover of plaintiff is partially
27 obscured by other people. Contrary to plaintiff's assertion,
28 however, the room does not appear to be in shock or quiet after
Conover leaves. Rather, plaintiff remains talking with
employees, eating and laughing.

1 states that Conover was charged with violating Sheriff's Department
2 policy A05.00 and A05.01 by allegedly discriminating against
3 plaintiff by subjecting her to unwanted physical touching in the
4 workplace and thereby potentially creating a hostile work
5 environment. Pltf's Exh. 9. Afer reciting the facts of the
6 complaint by plaintiff, and that Eiesland had requested an outside
7 agency investigate the matter, Eiesland states that the
8 investigation had concluded. Id. He sustained the allegation that
9 Conover touched Mendoza inappropriately, in violation of County
10 policy. Id. Eiesland then writes that it is his determination
11 that discipline up to and including termination is warranted and
12 thus, by policy, Conover was entitled to meet with Eiesland to
13 discuss the charges and to present any mitigating or extenuating
14 circumstances. Id. He instructed Conover to meet with him on May
15 8, 2009. Id.

16 Also on May 6, 2009, plaintiff's attorney wrote a formal tort
17 claim notice to Eiesland. Exh. C to Eiesland Declr. There, in
18 addition to notifying Eiesland of her intent to file a civil
19 action, plaintiff's counsel notes that it was his understanding
20 that Conover had returned to his duties from administrative leave.
21 Id. at p. 2. I see no other evidence in the record regarding the
22 fact that Conover had been placed on administrative leave.

23 On May 8, 2009, Eiesland issued a formal letter of reprimand
24 to Conover. Pltf's Exh. 10. In pertinent part, Eiesland wrote:

25 After careful consideration it is my determination that
26 just cause exists to support the disciplinary measure of
27 placing an official Letter of Reprimand in your personnel
28 file. I am also requiring you to attend and successfully
complete a Sexual Harassment training approved by me as
soon as possible, but in any case no later than six
months from today's date. After you satisfactorily

1 complete this course, and after one year of good conduct
2 on your part, [this letter will be removed from your
3 file] or [I reserve the right to place this letter in a
4 sealed envelope and return it to your file. In that
5 case, it will be opened only with your consent, or by
6 court order, or if needed to defend Wasco County from
7 legal action, or upon a finding that you have again
8 violated policy.]

9 Id.⁴

10 Conover's conduct caused plaintiff to dread coming to work and
11 made her want to quit her job. Pltf's Depo. at p. 55; Pltf's
12 Affid. at ¶ 17. Conover's harassment was part of the reason she
13 eventually left her job with the Wasco County DA's Office. Pltf's
14 Depo. at pp. 6-7. Plaintiff now works for the City of The Dalles
15 as a department secretary. Pltf's Depo. at p. 4. She receives
16 benefits similar to those she received at Wasco County and earns a
17 higher rate of pay. Id. at p. 6.

18 B. Other Incidents Involving Conover

19 In a March 30, 2009 supplemental incident report prepared by
20 Oregon State Police officer Mitchell Meyer, Meyer reports that he
21 and Detective Kipp interviewed Deputy Birchfield who stated that
22 Conover had told him that he made a traffic stop on a vehicle
23 because the girl driving was "hot." Exh. 5 to Malmsheimer Declr.
24 at p. 3.

25 A different supplemental incident report completed by Kipp in
26 March 2009, contains a statement by Curt McConnell given during an
27 interview by Meyer and Kipp. Exh. 6 to Malmsheimer Declr. at p. 6.
28 At the time, McConnell had been a deputy sheriff in the Sheriff's

⁴ It looks as if Eiesland should have chosen one of the two options regarding the letter, but I quote it here exactly as it appears in the exhibit.

1 Department for five years. Id. McConnell stated that he had
2 observed Conover come out of his office when attractive women come
3 to the Sheriff's Department, and go to the lobby. Id. at p. 7. He
4 noted that Conover had sometimes made inappropriate jokes in front
5 of mixed company that included women. Id.

6 Also in this incident report is a statement by Wasco County
7 Sheriff's Department Detective Sergeant Terry Scattergood, a thirty
8 year Sheriff's Department employee. Id. at p. 2. Scattergood
9 stated that in the past, Conover had made it clear to him that
10 Conover wanted to get plaintiff "in the sack." Id. at p. 3.
11 Conover told Scattergood that he wanted to touch plaintiff's
12 breasts. Id. Conover also told Scattergood that women were only
13 good for one thing and that's "fucking." Id. at p. 4.

14 In his deposition, Conover explained that when he was
15 appointed Chief Deputy in 2004, there was some resentment that
16 Eiesland had appointed him and at a staff meeting, Eiesland asked
17 if anyone had anything to say about the appointment. Conover Depo.
18 at p. 22. In response, Sergeant Alan Wiebe complained about the
19 sexual nature of Conover's conversations. Id. at pp. 23-24.
20 Conover received no training, discipline, or reprimand in response
21 to the complaint, and there was no investigation. Id. at p. 24.

22 Conover also testified in deposition that he once gave Deputy
23 DA Wolfe (a woman), a packet of penis-shaped breath mints as a
24 "joke" to break the tension surrounding the sex cases they were
25 working on together. Id. at pp. 40-42.

26 Eiesland himself told sexual jokes to Conover. Eiesland Depo.
27 at p. 21.

28 / / /

1 the existence of a material issue of fact implausible, that party
2 must come forward with more persuasive evidence to support his
3 claim than would otherwise be necessary. Id.; In re Agricultural
4 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
5 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
6 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

7 DISCUSSION

8 Plaintiff brings the following claims for relief: (1) three
9 claims under Oregon Revised Statute § (O.R.S.) 659A.030, all
10 brought against Wasco County: Count One for hostile work
11 environment based on sex; Count Two for disparate treatment based
12 on sex; and Count Three for retaliation for plaintiff's reports of
13 discrimination; (2) a section 1983 claim against Conover for
14 violating plaintiff's rights to equal protection under the
15 Fourteenth Amendment; and (3) a section 1983 claim against Eiesland
16 for violating plaintiff's rights to free speech under the First
17 Amendment.

18 In the present motion, defendants move for partial summary
19 judgment as follows: (1) on the portions of plaintiff's state law
20 claims based on actions occurring more than 180 days prior to her
21 tort claim notice because they are time barred; (2) on the portion
22 of the section 1983 claim against Conover occurring more than two
23 years before the case was filed; and (3) on the sex harassment
24 hostile environment claims brought against Conover under O.R.S.
25 659A.030 and section 1983 because the alleged conduct was not
26 sufficiently severe and pervasive to constitute actionable sexual
27 harassment. While the written motion appeared to be against other
28 claims as well, at oral argument, defendants confirmed that their

1 motion is limited to the sexual harassment portion of plaintiff's
2 claims and is not directed to any claim based on a disparate
3 treatment or retaliation theory.

4 I. Timeliness of Claims

5 A. State Law Claims

6 The notice provisions of the Oregon Tort Claims Act (OTCA)
7 apply to the state law claims in this case. Reyna v. City of
8 Portland, No. CV-02-980-JO, 2005 WL 708344, at *2 (D. Or. Mar. 28,
9 2005) ("Plaintiff's ORS Chapter 659A state law claims . . . all are
10 subject to the 180-day notice requirement of the Oregon Tort Claims
11 Act ('OTCA'), ORS 30.275(2)(b)") (citing Brinkley v. Oregon Health
12 Sci. Univ., 94 Or. App. 531, 536, 766 P.2d 1045 (1988) (state law
13 disability discrimination claim a "tort" subject to OTCA notice
14 requirement)).

15 The OTCA requires that notice of the claim be given to the
16 public body "within 180 days after the alleged loss or injury."
17 O.R.S. 30.275(2)(b). Defendants argue that to the extent
18 plaintiff's state law sexual harassment claims are based on conduct
19 occurring before November 7, 2008, 180 days before the May 6, 2009
20 tort claim notice, they are time barred.⁵

21 B. Section 1983 Claim

22 The statute of limitations for filing a section 1983 action is
23

24 ⁵ In their written materials, defendants made the same
25 argument as to the allegations supporting the retaliation claim,
26 contending that any such allegations originating before May 1,
27 2009, 180 days before the October 28, 2009 retaliation tort claim
28 notice, are time barred. In light of defendants' counsel's
representation at oral argument that the present motion is
limited to the sexual harassment allegations, I do not further
consider the retaliation argument.

1 determined by the forum state's statute of limitations for personal
2 injury actions. Wilson v. Garcia, 471 U.S. 261, 276 (1985). In
3 Oregon, the relevant statute of limitations is two years. O.R.S.
4 12.110(1); Sain v. City of Bend, 309 F.3d 1134, 1139 (9th Cir.
5 2002).

6 This case was filed on November 4, 2009. Defendants argue
7 that any alleged incidents that occurred before November 4, 2007,
8 may not serve as the basis for a section 1983 claim.

9 C. Discussion

10 Plaintiff argues that the continuing violation theory applies
11 to both the state claims and the section 1983 claim, and thus,
12 Conover's entire course of conduct is actionable. I agree with
13 plaintiff.

14 In a recent decision, Judge Papak explained that

15 [t]he Supreme Court . . . has limited the reach of the
16 continuing violations doctrine, holding that "discrete
17 discriminatory acts are not actionable if time barred,
18 even when they are related to acts alleged in timely
19 filed charges." Nat'l R.R. Passenger Corp. v. Morgan,
20 536 U.S. 101, 113, 122 S. Ct. 2061, 153 L. Ed. 2d 106
21 (2002). A discrete act is an incident of discrimination,
22 "such as termination, failure to promote, denial of
23 transfer, or refusal to hire," that constitutes a
24 separate, actionable "unlawful employment practice." Id.
25 at 114. In contrast, the continuing violation doctrine
26 applies to hostile work environment claims, which by
27 their nature consist[] of multiple related actions that
28 by themselves may not constitute discrimination. Id. at
122. . . . Oregon courts draw a similar distinction
between discrete acts of discrimination and a systematic
pattern of conduct. BoardMaster Corp. v. Jackson County,
224 Or. App. 533, 551, 198 P.3d 454 (2008); see also
Davis v. Bostick, 282 Or. 667, 674, 580 P.2d 544 (1978)
(where evidence showed that plaintiff was harmed by each
individual alleged wrongful act, she was not "entitled to
ride out the storm and lump sum her grievances.").

Arbigon v. Multnomah County, No. CV-09-311-PK, 2010 WL 2038839, at
*14 (D. Or. May 20, 2010) (finding race discrimination claim time

1 barred to certain extent because it was based on series of discrete
2 adverse employment actions); see also Picouto v. Western Star Truck
3 Plant Portland LLC, No. CV-08-807-ST, 2010 WL 3607956, at *25 (D.
4 Or. May 27, 2010) (in race, national origin, and gender
5 discrimination claim, discrete acts occurring more than one year
6 prior to the filing of an administrative agency charge of
7 discrimination, were time barred).

8 In Morgan, the Supreme Court, as noted by Judge Papak,
9 curtailed the use of the continuing violation theory in some
10 contexts. In doing so, however, the Court made an important
11 distinction between discrimination and retaliation claims on the
12 one hand, and hostile environment claims on the other. 536 U.S. at
13 115. "Hostile environment claims are different in kind from
14 discrete acts. Their very nature involves repeated conduct." Id.
15 "A hostile work environment claim is composed of a series of
16 separate acts that collectively constitute one 'unlawful employment
17 practice.'" Id. at 117. Because a hostile environment claim
18 "encompasses a single unlawful employment practice," the employee
19 "need only file a charge within [the applicable limitations period]
20 of any act that is part of the hostile work environment." Id. at
21 117, 119.

22 As Judge Stewart explained in a 2008 case, "a hostile
23 environment claim seems to be exactly the kind of claim which
24 recovery is for the cumulative effect of wrongful behavior."
25 Atwood v. Oregon Dep't of Transp., No. CV-06-1726-ST, 2008 WL
26 803020, at *13 (D. Or. Mar. 20, 2008) (internal quotation
27 omitted). As long as the facts offered show that the actions are
28 part of the same unlawful employment practice, meaning actions

1 taken because of the fact that the plaintiff was a woman, or in
2 Judge Stewart's case was disabled, the continuing violation theory
3 recognized in Morgan, applies. Id.

4 Here, the continuing violation theory, even as curtailed by
5 Morgan, applies to plaintiff's sexual harassment claims and thus,
6 all of Conover's conduct toward her should be considered for
7 liability purposes on those claims. The theory applies equally to
8 the state O.R.S. 659A.030 sex harassment claim and to the section
9 1983 claim. See Gutowsky v. County of Placer, 108 F.3d 256, 259
10 (9th Cir. 1997) (continuing violation theory applied to section
11 1983 claim); Atwood, 2008 WL 803020, at *10-13 (applying
12 continuing violation theory to state statutory claim brought under
13 the OTCA).

14 The alleged acts include ongoing sexual joking and banter,
15 Conover calling plaintiff "sweetie," telling plaintiff she "smelled
16 good" while sniffing the air, lingering near plaintiff's desk,
17 pressing up against her at the December 2006 potluck, watching her
18 at her desk on the surveillance camera, poking her in the ribs,
19 telling her he would be better if she sat "here" while tapping his
20 thigh, and rubbing his hands up her back and along her bra strap,
21 including the November 2008 incident for which he was disciplined.

22 In her deposition testimony, plaintiff expressly stated that
23 Conover's comments of calling her "sweetie" and telling her she
24 "smelled good" were "very frequent." Pltf's's Depo. at p. 81. The
25 instances of running his finger up and down her back and poking her
26 were not frequent, but still occurred on a "number of occasions"
27 and made plaintiff uncomfortable. Id. It appears to be an
28 escalation of the alleged conduct. Plaintiff's affidavit provides

1 similar testimony. Pltf's Affid. at ¶¶ 3,4, 5.

2 I agree with plaintiff that these acts as alleged, are a
3 series of closely related occurrences, similar in nature, that
4 continued over an extended period of time, and which were directed
5 at plaintiff by the same person. As the Supreme Court noted in
6 Morgan, the alleged facts establish a claim "composed of a series
7 of separate acts that collectively constitute one 'unlawful
8 employment practice.'" Id. at 117. It is the cumulative harm
9 produced by the series of ongoing, related acts committed by
10 Conover that constitutes the unlawful employment practice.

11 I deny defendants' motion on the timeliness issue.

12 II. Hostile Environment

13 Defendants' argument directed to the merits of the hostile
14 environment claims (Count One of the First Claim of Relief based on
15 O.R.S. 659A.030, and the section 1983 equal protection claim), is
16 premised on defendants prevailing on the timeliness issue. That
17 is, defendants argue that the only actionable portion of the sexual
18 harassment claim is the November 12, 2008 allegation that Conover
19 inappropriately touched plaintiff in the front reception office of
20 the Sheriff's Department. Defendants contend that that single
21 allegation is insufficient to establish a hostile work environment.

22 To survive summary judgment on a hostile work environment
23 claim, plaintiff must "establish a pattern of ongoing and
24 persistent harassment severe enough to alter the conditions of
25 employment." Nichols v. Azteca Restaurant Enters, Inc., 256 F.3d
26 864, 871 (9th Cir. 2001) (internal quotation omitted). The
27 harassment "must be both objectively and subjectively offensive,
28 one that a reasonable person would find hostile or abusive, and one

1 that the victim in fact did perceive to be so." Faragher v. City
2 of Boca Raton, 524 U.S. 775, 787 (1998). The conduct must
3 constitute discrimination because of sex. Oncale v. Sundowner
4 Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

5 When determining whether a workplace is hostile, the court
6 considers all of the circumstances, including "the frequency of the
7 discriminatory conduct; its severity; whether it is physically
8 threatening or humiliating, or a mere offensive utterance; and
9 whether it unreasonably interferes with an employee's work
10 performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23
11 (1993). "[S]imple teasing, offhand comments, and isolated
12 incidents (unless extremely serious) will not amount to
13 discriminatory changes in the terms and conditions of employment."
14 Nichols, 256 F.3d at 872 (internal quotation omitted). However,
15 "no single factor is required," Harris, 510 U.S. at 23, and "[t]he
16 required level of severity or seriousness varies inversely with the
17 pervasiveness or frequency of the conduct." Nichols, 256 F.3d at
18 872 (internal quotation omitted).

19 "A working environment is abusive if hostile conduct pollutes
20 the victim's workplace, making it more difficult for her to do her
21 job, to take pride in her work, and to desire to stay on in her
22 position." Davis v. Team Elec. Co., 520 F.3d 1080, 1095 (9th Cir.
23 2000) (internal quotation omitted). "Offensive comments do not all
24 need to be made directly to an employee for a work environment to
25 be considered hostile." Id.⁶

26 _____
27 ⁶ Although these standards have been developed in the Title
28 VII context, they apply to the O.R.S. 659A.030 and section 1983
claims. Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d

1 Given my ruling on the timeliness issue, I reject defendants'
2 argument that the only conduct relevant to the merits of the sexual
3 harassment claim is the November 2008 incident. Rather, all of
4 Conover's conduct directed toward plaintiff is properly considered
5 for liability purposes. I agree with plaintiff that the evidence
6 here is sufficient to survive a summary judgment motion as to the
7 hostile environment claim.

8 As plaintiff notes, over a period of two years, Conover
9 frequently called her "sweetie," and frequently told her she
10 "smelled good" while sniffing the air. In the context of Conover's
11 other actions, these terms took on a demeaning sexual connotation.
12 Although Conover denies that many of his comments and actions were
13 intended as sexual conduct, his actions speak for themselves and a
14 reasonable jury could conclude that much of his conduct was
15 motivated by plaintiff's gender. Notably, his gift to a female
16 lawyer in the District Attorney's Office of penis shaped breath

17
18 741, 754 (9th Cir. 2001) (noting summary judgment decisions
19 regarding section 1983 claims are "remarkably similar" to their
20 Title VII counterparts); Lowe v. City of Monrovia, 775 F.2d 998,
21 1011 (9th Cir. 1985) (holding that plaintiff had established a
22 triable issue under Title VII, and therefore also established a §
23 1983 issue); Jaurrieta v. Portland Pub. Schs., No. CV-00-1238-ST,
24 2001 WL 34041143, at *7 and n.12 (D. Or. Dec. 14, 2001)
25 (analyzing O.R.S. 659.030 hostile environment claim under Title
26 VII standards and noting that Oregon courts generally consider
27 and adopt federal case law regarding Title VII), adopted by Judge
28 Brown (D. Or. Feb. 7, 2002); Williams v. Multnomah Educ. Serv.
Dist., No. CV-97-1197-ST, 1999 WL 454633, at *4 (D. Or. Apr. 14,
1999) ("the status of the § 1983 equal protection clause claim
generally depends on the outcome of the title VII analysis.");
Logan v. West Coast Benson Hotel, 981 F. Supp. 1301, 1319 (D. Or.
1997) (in analyzing Oregon discrimination claims under Chapter
659, Oregon courts have looked to Title VII cases for guidance
because Oregon statutes are "wholly integrated and related" to
Title VII).

1 mints, while unknown to plaintiff, bears on the credibility of
2 Conover's testimony that his conduct toward plaintiff was not
3 sexual. Additionally, a jury could easily determine that
4 plaintiff's reaction to Conover's statements was influenced by
5 having heard that Conover was a "predator."

6 Other non-physical harassment included Conover watching
7 plaintiff on the security camera, the come-on when Conover tapped
8 his thigh and said he would be better if plaintiff were sitting
9 there, and lingering at plaintiff's desk while she worked. In
10 addition, Conover occasionally poked and touched her. Then there
11 are the two incidents of more offensive touching first in December
12 2006 when Conover pressed up against plaintiff from behind while
13 holding her shoulder and waist and telling her that she could wash
14 the dishes at his house, and then in November 2008 when Conover,
15 who had already allegedly occasionally been rubbing his hand along
16 her bra strap, allegedly rubbed his hands up plaintiff's back along
17 her bra strap, and back down again, this time in the front
18 reception area of the Sheriff's Department.

19 At a minimum, this pattern of conduct creates a jury question
20 as to whether a reasonable woman would have felt that her work
21 environment was hostile. The evidence reveals a combination of (1)
22 what could be viewed as somewhat innocuous, but ongoing, behavior
23 such as the "sweetie" and "smell good" comments and the infrequent,
24 but objectionable, poking in the ribs or back, with (2) more
25 predatory behavior of watching her on the surveillance camera,
26 lingering at her desk, and the December 2006 potluck incident.
27 When this conduct is considered along with physical touching that
28 escalated beyond the poking to rubbing hands up and down her back

1 and along her bra, the record shows both frequent and serious
2 conduct establishing a "pattern of ongoing and persistent
3 harassment severe enough to alter the conditions of employment."
4 The evidence further establishes harassment which a reasonable
5 person would have found hostile and abusive, or at least raises a
6 jury question on that issue.

7 The evidence also shows that plaintiff subjectively perceived
8 the conduct as hostile and abusive. The evidence shows that the
9 harassment made plaintiff's job more difficult. E.g., Pltf's
10 Affid. at ¶ 14 (knowing that Conover was watching her on the
11 surveillance camera made it made it difficult for her to focus on
12 her work, wondering if he was watching her on the video camera);
13 Pltf's Affid. at ¶ 11 (Conover's lingering and lurking at her desk
14 made it difficult for her to concentrate on her work and made her
15 uncomfortable to even answer the phone); Pltf's Depo. at pp. 82-83
16 (plaintiff was scared of Conover after the December 2006 potluck
17 incident, feared being alone with him, was embarrassed and
18 uncomfortable); Pltf's Affid. at ¶¶ 5, 20 (same); Pltf's Affid. at
19 ¶ 20 (Conover's treatment changed the way plaintiff thought about
20 her job from loving working with the Sheriff's Deputies to
21 questioning if she could trust law enforcement officers; feared
22 being alone in an elevator or office because of anticipating that
23 Conover would "suddenly appear" and say or do something
24 inappropriate; dreaded going to work; felt stressed and lost sleep;
25 was reduced to tears); Pltf's Depo. at p. 55 (things got to the
26 point where she wanted to quit her job).

27 Defendants point to evidence in the record which they contend
28 shows that plaintiff was not subjectively offended by Conover's

1 actions. For example, defendants note that plaintiff laughed or
2 chuckled in response to the incident when Conover patted his thigh.
3 Defendants also point to the video of the November 2008 incident
4 which shows plaintiff, and others, remaining in the Sheriff's
5 Department reception area and talking following Conover's alleged
6 rubbing of her back and bra strap. But, on a summary judgment
7 motion, the evidence is viewed in the light most favorable to the
8 non-moving party and plaintiff's affidavit and deposition testimony
9 regarding the effect of Conover's actions on her must be accepted
10 as true. Moreover, plaintiff describes her reaction to the "thigh"
11 incident as a nervous chuckle. Given the range of possible human
12 emotional responses to uncomfortable events, the jury should
13 evaluate plaintiff's response to these incidents to determine if
14 she was offended or not.

15 The same is true of plaintiff having herself occasionally
16 engaged in office-based sexual joking and her having raised her
17 shirt to Eiesland. An argument can be made that a person engaging
18 in such behavior may not be offended by actions such as those
19 perpetrated by Conover. An equally plausible argument may be made,
20 however, that being specifically targeted by a high ranking person
21 in the Sheriff's Department for repeated offensive and
22 inappropriate verbal conduct and sexualized touching is behavior of
23 a completely different kind which may in fact be offensive to a
24 person who is otherwise comfortable participating in certain other
25 activities of a sexual nature. Because differing reasonable
26 inferences may be drawn from these facts, the determination is
27 properly left to the jury. I cannot say that all jurors would
28 always find that a female plaintiff's one-time inappropriate

1 barring of her chest briefly to one employee means she welcomes all
2 manner of alleged sexual harassment from a different employee.

3 Defendants argue that because Conover was not a supervisor
4 with immediate or successively higher authority over plaintiff, he
5 cannot subject the County to vicarious liability. McGinest v. GTE
6 Serv. Corp., 360 F.3d 1103, 1119 (9th Cir. 2004) ("An employer's
7 liability for harassing conduct is evaluated differently when the
8 harasser is a supervisor as opposed to a coworker. . . . An
9 employer is vicariously liable for a hostile environment created by
10 a supervisor, although such liability is subject to an affirmative
11 defense. . . . If, however, the harasser is merely a coworker, the
12 plaintiff must prove that the employer knew or should have known of
13 the harassment but did not take adequate steps to address it.")
14 (internal quotation and citations omitted).

15 The section 1983 claim is brought against Conover directly, so
16 the issue of the County's liability relates only to plaintiff's
17 O.R.S. 659A.030 claims. Two recent decisions from this Court have
18 applied the federal standards on this issue to state law claims
19 under O.R.S. 659A.030. Dawson v. Entek Intern., 662 F. Supp. 2d
20 1277, 1288-91 (D. Or. 2009) (discussing employer's remedial
21 measures in context of O.R.S. 659A.030 claim); Delima v. Home Depot
22 U.S.A., Inc., 616 F. Supp. 2d 1055, 1090 (D. Or. 2008) (analyzing
23 whether employer took care "to prevent and promptly correct any
24 sexually harassing behavior" in context of Title VII and O.R.S.
25 659A.030 claims); see also Harris v. Pameco Corp., 170 Or. App.
26 164, 177-78, 12 P.3d 524, 533 (2000) (discussing remedial measures
27 taken by employer in context of analyzing plaintiff's O.R.S.
28 659.030 claim); Fred Meyer, Inc. v. Bureau of Labor & Industries,

1 152 Or. App. 302, 311, 954 P.2d 804, 809 (1998) (same).

2 Although the record is a bit unclear as to whether plaintiff
3 considers Conover to be equivalent to a co-worker or had some
4 supervisory authority over her, plaintiff does not appear to argue
5 in response to this motion that the County is vicariously liable
6 for Conover's conduct because he is a "supervisor." Thus, the
7 issue presented here is the liability of the County for acts
8 performed by a co-worker.

9 "An employer is liable for the hostile work environment
10 created by a co-worker unless the employer takes adequate remedial
11 measures in order to avoid liability." Nichols, 256 F.3d at 875
12 (internal quotation, ellipsis, and brackets omitted). In the Ninth
13 Circuit,

14 remedies for sexual harassment should be reasonably
15 calculated to end the harassment. . . . The
16 reasonableness of the remedy depends on its ability to:
17 (1) stop harassment by the person who engaged in
18 harassment; and (2) persuade potential harassers to
19 refrain from unlawful conduct. . . . When the employer
undertakes no remedy, or where the remedy does not end
the current harassment and deter future harassment,
liability attaches for both the past harassment and any
future harassment.

20 Id. at 875-76 (internal quotations, citations, and brackets
omitted).

21 Defendants note that plaintiff complained a single time to
22 Eiesland in December 2006⁷, and indicated to him she wanted the
23 matter to be handled quietly. Defendants argue that Eiesland
24

25 ⁷ As indicated above, Eiesland states that plaintiff did
26 not report the December 2006 incident to him, but instead,
27 reported the "thigh" incident. For the purposes of this motion,
28 defendants assume that plaintiff's report followed the December
2006 incident and they make their argument based on that
assumption.

1 handled the matter appropriately by holding a meeting on sexual
2 harassment for his employees. Then, defendants note that plaintiff
3 did not formally complain of the harassment or otherwise provide
4 the County with any indication of the alleged harassment until she
5 filed a tort claim in May 2009, after which the County immediately
6 responded to her allegations once it became aware of them.

7 According to plaintiff's description of her report of the
8 December 2006 potluck incident, she asked Eiesland to speak
9 directly to Conover, Eiesland said that would "handle it," and
10 would speak to Conover, but then, Eiesland did not follow through
11 with this commitment. Rather, he brought his office together and
12 told them to watch what they were saying because some people could
13 become offended. Pltf's Affid. at ¶ 8; Pltf's Depo. at pp. 22-23.

14 Plaintiff notes that Eiesland's handling of plaintiff's
15 complaint was inconsistent with plaintiff's wishes, and, was a
16 violation of the Sheriff's Department policy regarding how to
17 handle harassment allegations because that policy requires the
18 Sheriff to "speak with the alleged harasser stating the nature of
19 the complaint," and that "in all instances," the Sheriff shall
20 "contact the . . . complainant prior to implementing a course of
21 action . . . to ensure that the intended course of action is
22 understood and acceptable." Exh. 8 to Malmsheimer Declr. at pp. 2,
23 3.

24 Additionally, given that the harassment by Conover continued
25 after Eiesland addressed the Sheriff's Department generally,
26 plaintiff argues that the attempt to stop the harassment was
27 insufficient as a matter of law. As the Ninth Circuit noted in a
28 1997 case, employers "send the wrong message to potential harassers

1 when they do not discipline employees for sexual harassment" and
2 the failure to "take even the mildest form of disciplinary action
3 renders any claim for remedial action inadequate." Yamaquichi v.
4 United States Dep't of Air Force, 109 F.3d 1475, 1483 (9th Cir.
5 1997) (internal quotations omitted).

6 Finally, plaintiff points to the facts showing that the County
7 was aware of Conover's "proclivities towards inappropriate sexual
8 conduct in the workplace." Pltf's Mem. at p. 22. Plaintiff notes
9 Conover's conducting traffic stops on "hot" women, that upon
10 Conover's promotion to Chief Deputy, Wiebe complained about
11 Conover's sexual conversations, and that Conover was known to be a
12 "predator." And, plaintiff further notes that the County and
13 Eiesland contributed to the very atmosphere that permitted the
14 harassment of plaintiff to occur in the first place. Eiesland
15 admitted to engaging in sexual joking with Conover and knew that
16 sexual banter was a routine feature in the office.

17 The record creates an issue of fact as to whether the County's
18 response to plaintiff's complaint was adequate. Even without the
19 evidence of Conover's reputation or Eiesland himself engaging in
20 sexual jokes and tolerating an office with sexual banter, the fact
21 that Eiesland did not speak directly to Conover when plaintiff
22 complained to him, the fact that his failure to do so violated
23 County policy, and the fact that the harassing conduct did not
24 stop, are enough to create an issue of fact as to whether the
25 County's remedies were reasonably calculated to end the harassment
26 and stop it from occurring in the future.

27 I deny defendants' motion for summary judgment on the sexual
28 harassment claims.

1 III. Evidentiary Objections

2 In their reply memorandum, defendant raise several evidentiary
3 objections. Defendants' presentation of its objections is
4 confusing for two reasons. First, defendants raise objections to
5 assertions contained in plaintiff's concise statement of fact,
6 which are not evidence. Second, defendants repeatedly raise a
7 category or type of objection to, for example, statements contained
8 within reports, without citing to each statement and explaining the
9 objection for that particular statement. Defendants' failure to do
10 this has created an unnecessary burden for the court.

11 As to the hearsay objections, any statement by Conover is
12 admissible under Federal Rule of Evidence 801(d)(2)(A), as a
13 statement by a party-opponent. The police investigation reports
14 themselves are admissible under Rule 803(6), for records of
15 regularly conducted activity, or possibly Rule 803(8), for public
16 records and reports. Additionally, statements made by other
17 Sheriff's Department employees are likely admissible under Rule
18 801(d)(2)(D), as statements made by a party's agent or servant
19 concerning a matter within the scope of the agency or employment,
20 made during the existence of the relationship.

21 Thus, the following statements noted in this Opinion, and
22 relied on in my discussion, are not barred by the hearsay rule:

- 23 (1) Wiebe's 2004 complaint regarding Conover's promotion because
24 of the sexual nature of Conover's conversations; (2) Birchfield's
25 statement in the March 30, 2009 Oregon State Police incident report
26 that Conover told him that he made a traffic stop on a vehicle
27 because the girl driving was "hot"; (3) McConnell's statement in
28 another Oregon State Police incident report that he had observed

1 Conover come out of his office and go to the lobby when attractive
2 women came to the Sheriff's Department; and (4) Scattergood's
3 statement in the March 2009 Oregon State Police incident report
4 that Conover told Scattergood he wanted to touch plaintiff's
5 breasts, that women were only good for "fucking," and that he
6 wanted to get plaintiff "in the sack".

7 Additionally, some of the challenged statements are not
8 offered for the truth of the matter asserted, and thus, are not
9 hearsay for that reason as well. For example, Wiebe's statement
10 expressing concern over Conover's promotion is not offered for the
11 truth of the matter asserted, but to show that the County had
12 knowledge of Conover's alleged behavior. Similarly, the statement
13 by the DA Office employee to plaintiff that Conover was a predator
14 is not offered to prove the truth of the matter, but to show the
15 effect of that statement on plaintiff and how she subsequently
16 viewed much of Conover's conduct.

17 Defendants also argue that many of these statements are not
18 relevant and are inadmissible on that basis. Wiebe's statement is
19 relevant to the County's knowledge that Conover may have engaged in
20 problematic behavior. Wiebe made the statement sometime in 2004.
21 Plaintiff began working for the County in August 2004. Thus, the
22 timing of Wiebe's statement shows that the County knew of a
23 potential issue with Conover's conduct even before plaintiff
24 complained in December 2006 about the potluck incident.

25 The other statements are also relevant to the County's
26 knowledge because the fact that there are several Sheriff's
27 Department employees offering specific statements about Conover's
28 sexualized conduct and statements creates an inference that

1 Conover's actions permeated the Sheriff's Department, putting the
2 County on notice that Conover's behavior may be problematic.
3 Finally, Conover's statements to Scattergood about plaintiff,
4 obviously made while plaintiff was employed by the County, are
5 relevant to the intent behind Conover's conduct toward plaintiff.

6 I agree with defendants that because these statements were not
7 directed at plaintiff, and there is no evidence that she was made
8 aware of them, they are not relevant to the determination of
9 plaintiff's subjective perception of harassment. But, they are
10 relevant to assessing the County's knowledge and the reasonableness
11 of its actions. Finally, they are relevant to the objective
12 assessment of Conover's behavior. Given Conover's denial that his
13 actions toward plaintiff were sexual in nature, these statements
14 are relevant to the jury's determination of whether a reasonable
15 woman would have perceived his actions as offensive because they
16 tend to show that Conover's conduct was often sexualized. As noted
17 above, this is also why the evidence that Conover gave Wolfe penis
18 shaped breath mints is relevant.

19 Defendants further challenge the basis for plaintiff's
20 statements regarding Conover's presence at plaintiff's desk in the
21 reception area of the DA's Office. First, in her deposition,
22 plaintiff describes Conover's actions, but she relates no out of
23 court statements made by either Conover or herself. Rather, she
24 describes, based on her personal knowledge, that he "hung out" at
25 her office and made her uncomfortable at times. Pltf's Depo. at p.
26 66. She further describes that she became uncomfortable when he
27 stayed for long periods of time, not conversing, but just watching
28 her. Id. This testimony presents no hearsay issue and it is

1 obviously relevant.

2 Next, in her affidavit, she describes how Conover's presence
3 at her desk became more frequent after plaintiff separated from her
4 husband. Pltf's Affid. at ¶ 11. She recites that Conover would
5 lurk around her work area and pretend he was reading a newspaper,
6 but she could tell he was watching her. Id. These statements are
7 descriptions of events based on plaintiff's personal observation of
8 them.

9 Defendants specifically object to plaintiff's statements that
10 Conover had no Sheriff's Department business purpose while
11 frequenting plaintiff's work area. Because the basis of
12 plaintiff's knowledge regarding whether Conover had a work purpose
13 for being in the area of plaintiff's desk is not clear on the
14 record, I do not rely on these particular statements of
15 plaintiff's. I also do not rely on her statements that other DA
16 Office employees would "run interference" for her when Conover
17 stayed at her desk for too long because the basis of her knowledge
18 of the motivation of those employees is also not clear in the
19 record.

20 Additionally, defendants challenge the admissibility of
21 plaintiff's statements regarding Conover watching her on the
22 surveillance camera. To the extent other employees told plaintiff
23 that she was being watched, such statements are not hearsay because
24 they are offered for the purpose of showing plaintiff's state of
25 mind, not the truth of the matter asserted. Moreover, plaintiff
26 states that Conover himself made statements that he was watching
27 her on the camera, and he called her to tell her he liked what she
28 was wearing. As with other statements by Conover, these are not

1 hearsay under Rule 801(d)(2)(A).

2 Finally, defendants argue that certain statements in
3 plaintiff's affidavit must be disregarded because they conflict
4 with her deposition testimony. Defendants offer a generalized
5 argument that plaintiff's affidavit contains "multiple self-serving
6 statements" which "contradict and exaggerate the events she
7 described in her deposition testimony." Defts' Reply Mem. at p. 4.

8 But, the only specific challenge defendants raise is to the
9 following:

10 In the spring of 2008, Chief Deputy Conover began to
11 start rubbing his fingers up and down Ms. Mendoza's back
12 over her bra strap. Mendoza Aff., ¶ 13; Mendoza Dep. at
13 80-83.

14 Pltf's Supp'l CSF at ¶ 6.

15 Defendants raise an objection to a factual assertion, which,
16 as noted above, is not evidence. I assume that defendants intended
17 to object to paragraph 13 of plaintiff's affidavit because it
18 allegedly contradicts her deposition testimony on this issue.

19 The relevant portion of the affidavit states:

20 During this time, in the Spring of 2008, Chief Deputy
21 Conover's physical conduct towards me began to escalate.
22 Chief Deputy Conover started rubbing his fingers up and
23 down my back over my bra strap. This occurred two or
24 three times before the final incident in November of
25 2008.

26 Pltf's Affid. at ¶ 13.

27 The cited deposition testimony states:

28 Q: . . . you also described two incidents of touching,
the two that I just mentioned, both the potluck and the
front desk. Were there any other incidents where Mr.
Conover touched you physically in a way that made you
feel uncomfortable?

A: No.

Q: Did he ever run his finger up and down your back or

1 anything like that?

2 A: Yes.

3 Q: Or poke you?

4 A: Yes.

5 Q: And did those instances make you feel uncomfortable?

6 A: Yes.

7 Q: And how frequently did that occur?

8 A: It wasn't frequent. I don't know.

9 Q: Can you estimate the number of times that he did?

10 A: I don't know.

11 Q: Fair enough. And would that have occurred after the
12 potluck incident?

13 A: Yes.

14 Q: So between the potluck incident and the incident at
15 the front desk -

16 A: Yes.

17 Q: - there were a number of occasions where he touched
18 you and made you uncomfortable?

19 A: Yes.

20 Pltf's Depo. at pp. 80-81.

21 An issue of fact cannot be created by an affidavit that
22 contradicts prior deposition testimony. Radobenko v. Automated
23 Equipment Corp., 520 F.2d 540, 543-44 (9th Cir. 1975). The Ninth
24 Circuit has made clear, however, that

25 The . . . Radobenko rule does not automatically dispose
26 of every case in which a contradictory affidavit is
27 introduced to explain portion of earlier deposition
28 testimony. Rather, the Radobenko court was concerned
with 'sham' testimony that flatly contradicts earlier
testimony in an attempt to 'create' an issue of fact and
avoid summary judgment. Therefore, before applying the
Radobenko sanction, the district court must make a
factual determination that the contradiction was actually
a 'sham.'

1 Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262, 266-67 (9th Cir.
2 1991). Here, not only is there no basis for finding that the
3 affidavit is a "sham," there is no material inconsistency between
4 plaintiff's affidavit and her deposition testimony. Defendants'
5 objection is unwarranted.

6 Any other objections by defendants are moot as I have not
7 relied on the evidence in resolving the motion.

8 CONCLUSION

9 Defendants' motion for partial summary judgment [27] is
10 denied.

11 IT IS SO ORDERED.

12 Dated this 8th day of November, 2010.

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15 /s/ Dennis James Hubel
16 Dennis James Hubel
17 United States Magistrate Judge
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