IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JENNIFER KOEHLER Plaintiff VS. CITY OF MAUMELLE, ARKANSAS and MIKE WILSON, individually and in his official capacity as a lieutenant with the Maumelle Dept. of Public Safety Defendants	*	NO: 4:08CV00281 SWW

ORDER

Plaintiff Jennifer Koehler brings this employment dispute against her former employer, the City of Maumelle ("the City"), and her former supervisor, Lieutenant Mike Wilson ("Wilson"). Before the Court is Defendants' motion for summary judgment (docket entry #10) and Plaintiffs' motion for voluntary dismissal (docket entry #15). After careful consideration, and for reasons that follow, summary judgment will be entered in favor of Defendants, and this action will be dismissed with prejudice.

I.

First, the Court will address Koehler's motion to voluntarily dismiss her claims without prejudice. On March 4, 2009, Defendants filed a motion for summary judgment. On March 19, 2009, after the time for filing a response in opposition to Defendants' motion had expired, Koehler filed a motion to continue, asking the Court to reset the trial date (currently set for May 4, 2009) and to "reset all deadlines." Koehler made no reference to Defendants' motion for

summary judgment, stating only that she had been ill for several months with severe back problems, "finally having back surgery in February, 2009, with her duties restricted." Docket entry #13, at 1.

By order entered March 24, 2009, the Court denied Koehler's motion on the ground that she failed to make the showing required under Rule 56(f) for postponement of a ruling on Defendants' motion for summary judgment.

On April 1, 2009, Koehler filed a motion to voluntarily dismiss her complaint, without prejudice. In support of her motion, Koehler states that she "has had medical complications culminating in back surgery, such that it has been impossible for her to meet with counsel to prepare a response to the motion for summary judgment or prepare for trial." Docket entry #15, ¶ 2. In cases where a defendant has "already won its case," voluntary dismissal without prejudice is precluded. *See Kern v. TXO Production Corp*., 738 F.2d 968, 970 (8th Cir. 1984). For reasons that follow, the Court finds that Defendants are entitled to summary judgment, thus they have already won their case. Accordingly, Koehler's motion for voluntary dismissal must be denied.

II.

Summary judgment is appropriate when "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). As a prerequisite to summary judgment, a moving party must demonstrate "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*.,

475 U.S. 574, 586 (1986).

The non-moving party may not rest on mere allegations or denials of his pleading but must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id*. at 587 (quoting Fed. R. Civ. P. 56(e)). "[A] genuine issue of material fact exists if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, that is, a reasonable jury could return a verdict for either party." *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 401 (8th Cir. 1995).

III.

The following facts are undisputed.[1] In 1995, Koehler began working for the City of Maumelle. Initially Koehler worked as a jailer, but soon after her hire, she became an administrative assistant for the Maumelle Department of Public Safety ("DPS").

In 1999, Koehler and two coworkers, Tanya Gotcher ("Gotcher") and Debbie Bagley ("Bagley"), filed a sexual harassment lawsuit against Larry Bell ("Bell"), who served as the director of DPS.[2] The City investigated the allegations against Bell, terminated his employment, and settled the aforementioned lawsuit, paying Koehler, Gotcher, and Bagley money in exchange for release of their claims.

On October 28, 2006, Jim Hansard ("Hansard"), a DPS lieutenant, received a report from

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[1]Local Rule 56.1 provides that a party moving for summary judgment must submit a statement of the material facts as to which it contends there is no genuine issue to be tried, and the non-moving party must file a responsive statement of the material facts as to which it contends a genuine issue exists to be tried. "All material facts set forth in the statement filed by the moving party . . . shall be deemed admitted unless controverted by the statement filed by the non-moving party . . . . " Local Rule 56.1(c).

[2]At all times material to this action Gotcher and Bagley remained, and they are currently, City employees. *See* docket entry #11, Ex. #2, ¶ 5.

DPS employee Rebecca Johnson ("Johnson") that Koehler and Gotcher convinced Johnson to covertly record a meeting she had with Hansard. Johnson also told Hansard that Koehler had contaminated his food with saliva, hair, and Visine, and she served him food that had been dropped on the floor.

Maumelle Police Chief Sam Williams ordered criminal and internal investigations regarding Johnson's allegations, with Defendant Wilson in charge of the internal investigation and DPS Lieutenant Jeff Sackhoff in charge of the criminal investigation. During investigation interviews, Koehler admitted putting contact cleansing solution in Hansard's food, and she acknowledged that Hansard's son consumed some of the food intended for Hansard. Koehler denied that she encouraged Johnson to secretly record Johnson's meeting with Hansard, but she admitted that Johnson excused herself from the meeting and handed her a tape recorder.

According to an affidavit by Chief Williams, prior to November 2, 2006, he discussed Wilson's preliminary investigation report with Hansard, and Hansard stated that he intended to file criminal charges, and possibly a civil lawsuit, against Koehler. On November 2, 2006, Wilson, Sackhoff, and Koehler had a telephone conversation during which Wilson informed Koehler that Hansard intended to pursue criminal charges against her unless she resigned her position. Additionally, Wilson informed Koehler that she could not remain employed at the DPS if she was under criminal prosecution. Koehler resigned on November 6, 2006.

On May 22, 2008, Koehler filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that she was forced to resign her position with the City because of her gender and in retaliation for commencing a sexual harassment lawsuit against the City in 1999. The EEOC issued Koehler a right to sue letter on February 27, 2008, and she commenced this lawsuit on April 2, 2008, pursuant to Title VII and 42 U.S.C. § 1983, claiming that

Defendants terminated her employment because of her gender and in retaliation for bringing the 1999 lawsuit.

IV.

In support of their motion for summary judgment, Defendants assert that Koehler failed to exhaust her administrative remedies under Title VII, she presents no evidence of disparate treatment, and she is unable to establish a causal connection between protected activity and adverse employment action.

Title VII - Exhaustion of Administrative Remedies

In order to exhaust administrative remedies under Title VII, an aggrieved employee must file a charge of discrimination with the EEOC within 180 days of the alleged discriminatory act, setting forth the facts and nature of the charge. 42 U.S.C. § 2000e-5(e)(1); *Williams v. Little Rock Municipal Water Works*, 21 F.3d 218, 222 (8th Cir. 1994).

Koehler's EEOC charge attached to the complaint shows that she filed the charge on May 22, 2007--197 days after the day she resigned her job with the City. Koehler alleges that she "gave notice" to the City within 180 days of the alleged discriminatory action, but she does not claim that she filed a timely discrimination charge as required under Title VII. *See* 42 U.S.C. § 2000e-5(b)("Charges shall be in writing under oath or affirmation . . . ."). Accordingly, the Court finds that Koehler's claims under Title VII must be dismissed for failure to exhaust administrative remedies.

42 U.S.C. § 1983

In addition to her claims under Title VII, Koehler sues under 42 U.S.C. § 1983, claiming equal protection and First Amendment violations.

Equal Protection. Koehler claims that Defendants discriminated against her in violation

of the Equal Protection Clause. Specifically, she alleges that Wilson, "knowing that males were treated differently by him, used his position . . . to coerce [her] into resigning by threatening her with criminal charges . . . . " Compl., ¶ 14.

Because Koehler presents no direct evidence of discrimination, she must create an inference of unlawful discrimination under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817 (1973).[3] To establish a prima facie case of discrimination under the *McDonnell Douglas* framework, Koehler must show that Defendants favored similarly situated male employees. *See Fields v. Shelter Mut. Ins. Co*., 520 F.3d 859, 864 (8th Cir. 2008); *see also E.E.O.C. v. Kohler Co.* 335 F.3d 766, 775 -776 (8th Cir. 2003)(citing *Lynn v. Deaconess Medical Ctr.-West Campus*, 160 F.3d 484, 487 (8th Cir.1998)). "[T]he individuals used for comparison must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.'" *Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1043 (8th Cir. 2007)(citing *EEOC v. Kohler Co.*, 335 F.3d 766. 775 (8th Cir. 2003)).

> The sole allegations in the complaint regarding disparate treatment are as follows:
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> > The City of Maumelle has known of numerous male officers committing practical jokes of a similar nature, such as putting tabasco in someone's coffee, and other similar activity without taking disciplinary action against them other than possible verbal warnings.
> >
> > The City has had male officers and meal employees . . . commit much more serious offenses than the Plaintiff, who have not been threatened with criminal prosecution or termination if they did not resign. For example, Lt. Wilson has regularly falsified

[3]Although the *McDonnell Douglas* framework originated in the context of Title VII, the Eighth Circuit has applied the framework to cases arising under § 1981 and § 1983. *See Duffy v. Wolle*, 123 F.3d 1026, 1036-37 (8th Cir.1997); *Roxas v. Presentation College*, 90 F.3d 310, 315 (8th Cir.1996).

> his time sheets without any action being taken against him; Greg Rossie, a male officer accessed the internet using City computers to view pornographic sites, with no action other than a letter of verbal reprimand.

Compl., ¶¶ 11-12.

Adding tabasco sauce to a coworker's coffee as a practical joke does not compare to Kohler's admitted misconduct, which includes covertly adding substances not intended for human consumption to food that Koehler knew would be consumed by a supervisor. Similarly, falsification of time sheets and viewing pornography on City computers, while serious infractions, do not carry the potential of physical harm or involve the type of disaffected behavior demonstrated by Koehler. A viable equal protection claim requires a threshold showing that the government gave favorable treatment to similarly-situated individuals. *See Klinger v. Department of Corrections* 31 F.3d 727, 731 (8th Cir. 1994). Here, Koehler has failed to present any evidence that she was similarly situated in all relevant respects to a male employee who received favorable treatment. Accordingly, the Court finds no genuine issues for trial with respect to Koehler's equal protection claims.

First Amendment/Retaliation. Koehler claims that Defendants violated her First Amendment rights by constructively discharging her in retaliation for her 1999 sexual harassment suit against Larry Bell. To establish a claim of unlawful retaliation for protected First Amendment activity, a public employee must prove: (1) she engaged in activity protected under the First Amendment; (2) the defendant took adverse employment action against her; and (3) her protected activity was a material factor in the adverse employment action. *See Davenport v. University of Arkansas Bd. of Trustees,* 2009 WL 223051, *1 (8th Cir. Feb. 2, 2009)(citing *Davison v. City of Minneapolis,* 490 F.3d 648, 654-55 (8th Cir.2007)).

Assuming that Koehler's 1999 sexual harassment lawsuit amounts to conduct protected under the First Amendment,[4] Defendants argue that Koehler is unable to establish a causal connection between the lawsuit and the termination of her employment in November 2006. In her unverified complaint, Koehler alleges: "Subsequent to the lawsuit filed previously . . . and continuing though calendar year 2006, Lt. Mike Wilson . . . repeatedly told the Plaintiff that it was wrong for anyone to sue the City, that she shouldn't be there since she had sued the City, and that if it was up to him, she would have been fired for filing the suit." Compl., ¶ 9.

Koehler presents no admissible evidence that Wilson made the foregoing statements. Additionally, Defendants have come forward with undisputed evidence that Wilson had no authority to terminate Koehler's employment. *See* docket entry #11. Ex. #1, ¶ 17. Given the nine year gap between Koehler's lawsuit and her resignation,[5] and the lack of admissible evidence showing that Koehler's protected activity was a material factor in alleged adverse employment action taken against her, the Court finds that Koehler's complaint allegations are insufficient to show a causal connection between protected activity and adverse employment action.

Koehler's retaliation claim fails for an additional reason, not raised by Defendants. Resignation from employment is actionable under § 1983 only if it qualifies as a constructive

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[4]"Appellant's filing of an EEOC charge and a civil rights lawsuit are activities protected by the First Amendment." *Greenwood v. Ross*, 778 F.2d 448, 458 (8th Cir. 1985)(citations omitted).

[5]Although the passage of time between events does not foreclose a claim of retaliation, the nine-year time period between Koehler's lawsuit and her resignation certainly weakens any inference of retaliation. *See Sims v. Sauer-Sundstrand Co.*, 130 F.3d 341, 343-44 (8th Cir. 1997).

discharge. *See Jones v. Fitzgerald*, 285 F.3d 705, 715 (8th Cir. 2002). "To prove constructive discharge, a plaintiff must establish the defendants deliberately made or allowed her working conditions 'to become so intolerable that the employee had no other choice but to quit.'" *Id*.(quoting *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982)).

Koehler has admitted to conduct that gave rise to the internal and criminal investigations regarding Johnson's allegations. Additionally, the undisputed evidence shows that Koehler left her employment after she learned that unless she resigned, Hansard would pursue charges against her for conduct that she undeniably committed. The circumstances that lead to Koehler's resignation were of her own making; they were not created as a result of deliberate actions on the part of Defendants aimed at making her working conditions intolerable.

V.

For the reasons stated, Plaintiff's motion for voluntary dismissal (docket entry #15) is DENIED, and Defendants' motion for summary judgment (docket entry #10) is GRANTED. Pursuant to the judgment entered together with this order, this action is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED THIS 2ND DAY OF APRIL, 2009.

/s/Susan Webber Wright

UNITED STATES DISTRICT JUDGE